The Supreme Court, the Death Penalty, and Evolving Standards of Decency: A History of Interpretation

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Introduction

There has been a great deal of literature dealing with the Supreme Court and the issue of majoritarianism. The question of whether or not the highest court in the land follows the direction of public opinion, or is essentially a counter-majoritarian institution has often been dealt with only through the totality of judicial decisions measured against however one chooses to define public opinion. The purpose of this paper is to analyze the relationship between the Supreme Court and public opinion in one specific area: the Eighth Amendment's cruel and unusual punishment clause. More specifically, the focus will be limited to the cruel and unusual punishment clause only as it relates to the death penalty.

The Constitution of the United States was officially ratified on June 21st, 1788. During the debate over ratification, there were those who called themselves "Federal Republicans," who were concerned that the newly created government would become too powerful, insisting on a bill of rights to ensure that the national government would not infringe on the rights of the people.[1] Within two years, the first ten amendments to the Constitution were ratified. The subjects of these amendments did not simply spring up from the imagination or fear of the delegates. Each one addressed concerns rooted in the history of the people in the United States and Great Britain, including the Eighth Amendment.

The idea that the government should be limited in the punishment it can inflict on the people can be traced back through British history. The Magna Carta in 1215 contained a provision regarding the prohibition of excessive punishments, and the English Bill of Rights in 1689, from which the Constitutional language was derived, stipulated that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."[2] When the first Congress met to discuss the Bill of Rights, therefore, protections against cruel and unusual punishments were already grounded in English law as well as various state constitutions.[3] Nevertheless, according to the debates in Congress, some questioned the inclusion of the Eighth Amendment, fearing that the government might be prevented from inflicting corporal punishments, such as whipping, hanging, and even amputation.[4] However, the idea that it might be used to prohibit the death penalty was scarcely considered due to the fact that capital punishment was so prevalent in the colonies, as it had been throughout human history.

For the first century of its existence, the Supreme Court interpreted the Eighth Amendment in much the same was as it interpreted other Constitutional issues, as binding only on national government. Furthermore, its interpretation of the Constitution remained rigid, as Justices constantly looked back to the time of the founding whenever possible to determine the precise meaning of the Constitution. During the last part of the nineteenth century, and throughout the twentieth, the Supreme Court has been called on to settle numerous cases dealing with capital punishment. At the same time, the traditionalist argument that the Constitution means only what was considered by the founding fathers was loosing influence among Justices in deciding Eighth Amendment cases. Instead, the Court has relied on other methods for making its decisions.

The interpretation of the Eighth Amendment's cruel and unusual punishment clause is different from many other areas of Supreme Court interpretation in that for cases invoking the amendment, the Court has willingly acknowledged that it will rely, at least in part, on prevailing public opinion when making its determination of whether a particular punishment is cruel and unusual. However, many scholars have argued that the Court is in fact, a majoritarian institution based on the frequency with which its decisions correspond to prevailing public sentiment. After reviewing the literature of the majoritarian impact on the Supreme Court, the history of Supreme Court interpretation will be analyzed regarding a single issue: the death penalty and its relationship with the Eighth Amendment's ban on cruel and unusual punishment.

The Majoritarian Debate

Much of the literature on the Supreme Court's proximity to majoritarian influences tends to focus on court decisions in the aggregate. Scholars have used polling data, or national ideological trends to track whether Supreme Court decisions are generally consistent with the perceived ideology of the general population. The question of whether or not the highest court in the land is receptive to majoritarian influence is an important one due to the unique position the Supreme Court holds in America. Ever since the celebrated decision of *Marbury v. Madison*, the court has used its power of judicial review to shape, not only abstract constitutional theory, but many factors in American culture, from police procedure, to mental health facilities.[5] With a lifetime tenure and fixed salaries, these highly political decisions can be made without regard to the wishes of other branches of government, since neither Congress nor the President has the authority to overturn a Court's decision, short of a Constitutional Amendment.

Of course, the Supreme Court is not completely absolved from accountability. Presidents can affect the ideology of Court Justices through their power of appointment, and they can also request that Congress expand the size of the Court, creating greater opportunity to influence its makeup (although this latter practice has rarely been exercised). Presidents can also attempt to affect the Supreme Court by rallying the public in favor or against a particular cause. While public opinion does not compel the Court to rule a certain way, it does provide some encouragement for it to rule in a way consistent with the public consensus.[6]

Despite these pressures, W.F. Murphy, C.H. Pritchett, and L. Epstein describe what is essentially a counter-majoritarian difficulty with the Supreme Court. According to them, in a democracy, it is the people who are supposed to be the final interpreters of the Constitution. Congress' incentive to preserve Constitutional law is maintained by the threat that any attempt to violate the people's interpretation would be punished on election day.[7] In this sense, the Supreme Court acts in a way counter to the principles of democracy when it uses its authority to invalidate laws passed by the public's representatives. While the traditional interpretation of judicial review is that it protects minorities from majority tyranny, empirical data suggests that this might not always be the case.[8]

One of the implications of *Marbury v. Madison* is that the Supreme Court is more than simply a legal institution. It is also a political institution, in that the Court must "choose among controversial alternatives of public policy by appealing to at least some criteria… that cannot be found or deduced from precedent, statute, and Constitution."[9] Such discretion in decision making separates the Court from a purely judicial body that simply applies the written law to various circumstances. According to Robert Dahl (1957), Americans are neither willing to accept this fact, nor able to deny it.[10] Any analysis of the Court therefore, should include this political context.

Dahl cites two criteria for determining the precise role of the Supreme Court. One is based on the idea of "rights" or "justice." However political the Supreme Court may be, it is a popular perception that it stands as the great protector of minority rights against a tyrannical majority.[11] The second criteria is the "majority criteria," in which Court decisions may be analyzed according to the number of people for or against a given position. Regardless of the legality of a decision, the outcome of a case will invariably either (1) rule in favor of the minority against the majority, (2) rule in favor of a majority against the minority, or (3) rule in favor of one minority against some other minority.[12]

While a lack of scientific polls on many issues make it difficult, if not impossible, to determine whether a position was favored by a majority of voters, Dahl notes over eighty-six federal laws that have been declared unconstitutional by the Supreme Court. These seemingly undemocratic decisions may worry those whose have a strong faith in their Congressional representatives. Indeed, there exists the legitimate fear that "a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems."[13] It is possible, however, that this image as the guardian of justice against the unfair passions of the majority is ill-founded. Arguing precisely that, Dahl claims that the Supreme Court is, by design, a majoritarian institution.

Supreme Court Justices are appointed by the President, not elected by the people and according to Dahl's calculation, presidents can expect to appoint an average of two justices during each term in office. This system, claims Dahl, ensures that the opinion of the Court is not likely to be out of line with the dominant view of the nation as represented by the president and Congress.[14] Dahl tests this hypothesis by analyzing Supreme Court decisions where federal laws were declared unconstitutional, since the act of overturning a law passed by the representatives of the people would seem, on the surface, to contradict Dahl's majoritarian view.

Lacking scientific polls that would accurately illustrate public opinion, Dahl uses the legislative majority in Congress as a surrogate. The obvious problem with this measuring tool is that it assumes that Congressional acts and statutes are reflective of the public will. In fact, many laws passed by Congress, including those stuck down by the Court, simply do not have a national following, such as those dealing with procedural guidelines. Some laws deal with a very small part of the constituency and attract little attention. Still others focus on very specific policy problems whose implications are simply not known to much of America, thus putting their so-called support into question.

Finally, the case could be made that while the House of Representatives might come closest to mirroring public opinion, the Senate, by its design, can hardly be considered a surrogate for the national will. Due to the vast overrepresentation of small states, many have argued that the problem with the Senate is precisely that it does not represent the national majority. This concern is not wholly unjustified. While supposedly a representative body, the Congressional makeup in 1994 has seen 50 senators from the 25 smallest states represent only 16% of the total US population![15] Clearly then, using Congressional laws as a reflection of public opinion can be problematic.

According to Dahl's analysis of the Supreme Court, when it rules in favor of the minority against the majority, it acts as a counter-majoritarian institution (that is, counter to our democratic system of majority rule). Supporters of the Court cite various theoretical rationales as to how this is not the case; how a judicial body invalidating laws made by national majorities is perfectly consistent with democracy. However, these arguments are irrelevant if Dahl's analysis is correct, since the desires of the lawmaking majorities that constitute the Congress as well as the office of the presidency, are generally not obstructed by rulings of the Court. Only in a small minority of cases was the Court able to delay the application of a particular policy for more then twenty-five years.[16] But how is it that the Court, if it is separated from popular passions (which is itself, highly debatable), still seems to reflect the majority view?

According to Dahl, United States' national policy is dominated by a cohesive alliance of interests, as it is in other stable democracies. Like Marx's dialectic, this alliance is formed when previous policies are no longer accepted. The resulting struggle and consolidation ends with the adoption of a new alliance, which will itself, eventually disintegrate.[17] The Supreme Court is not above this alliance but a part of it, and requires the support of other members to shape national policy. Because the Supreme Court lacks the authority to enforce its decisions, it will avoid opposing major policies of the dominant alliance.[18] However, this does not mean that the Supreme Court is simply an unwilling follower of this alliance. Dahl credits the Court for holding an essential leadership role in the nation, using its influence in much the same way as other policy makers. When making national policy, "the Court is least effective against a current lawmaking majority and… least likely to act. It is most effective when it sets the bounds of policy for officials, agencies, state governments, or even regions, a task that has come to occupy a very large part of court business."[19]

While the idea of Supreme Court decisions being consistent with the national will may sound appealing to proponents of strict democracy, Dahl's analysis of Court influence is not universally accepted. In his article, "Supreme Court and National Policy Making (1976)," Jonathan Casper credits the Supreme Court with participating in national politics far more significantly than Dahl suggests. Writing at a time when the Court was validating various "constitutionally questionable governmental activities" Dahl's study was limited, according to Casper, both in scope as well as in focus.[20]

One of the problems with Dahl's argument, according to Casper, is that he limited his cases to those invalidating a federal law only within four years of the laws enactment, successfully eliminating from consideration almost half of all cases in which a law was invalidated by the Court.[21] Casper also noted that Dahl failed to consider either statutory construction, or state and local cases, in his analysis. As Casper claims, "the more influence the Supreme Court exercises through statutory construction, the less it will appear to have under Dahl's coding rules" since anything short of declaring a law unconstitutional is excluded from consideration.[22] Finally, over a quarter of all cases in which a law was invalidated by the Court occurred after Dahl's research was published, making his research outdated. "Recent experience," according to Casper, "suggest that the Court may operate differently from the way in which Dahl suggests it has and, even more important, from the way it must."[23]

Casper does agree, at least in part, with Dahl's suggestion that a change in the political makeup of the nation's leadership ultimately affects the makeup of the Supreme Court. However, Casper's analysis of Supreme Court cases, including statutory construction and state and local cases, indicates that the Supreme Court has been far more successful in shaping policy than Dahl suggests.[24] In short, Casper's criticism of Dahl is that his study relies on evidence that is simply too narrow. His measurement of influence is diminished by ignoring more indirect forms of influence, such as providing access to the political process to ordinary citizens, bestowing legitimacy on a particular side of a debate, and other actions that the Supreme Court actively and often takes part in.[25]

Murphy, Pritchett, and Epstein are also critics of Dahl's conclusions. They contend that, contrary to Dahl's assumptions, presidents do not have a great deal of control over their Supreme Court nominees. In light of the fact that Presidents Jefferson, Eisenhower, and Nixon expressed frustration that their appointments were not voting in ways that conformed to their personal ideology, Murphy, Pritchett, and Epstein argue that there is little predictability in how justices will reflect the men who appointed them.[26]

Certainly, there is numerous anecdotal evidence to suggest that this is the case. Despite the examples offered by Murphy, Pritchett, and Epstein, however, it has not been made clear that they are representative of the average Supreme Court justice. If Dahl is correct and justices do generally reflect the ideology of the president who appointed them, it poses a sharply different view of the Supreme Court than might be commonly held. Dahl's conclusion introduced into the Court the politics and partisanship that many would prefer to see absent in judicial decision making. It further implies that Supreme Court decisions depend mostly on individual ideology. But what about factors such as the text of the Constitution, precedent, or the specific facts of the case? What role do these things play in judicial decision making? According to some scholars, not much.

The hypothesis that Supreme Court Justices vote based on their attitudes, values, or personal policy has never been tested using independent measures prior to the efforts of Jeffery A. Segal and Albert D. Cover in their article, "Ideological Values and the Votes of U.S. Supreme Court Justices."[27] Unlike previous studies, which use actual votes cast while on the Court to measure justices' ideology, Segal and Cover measured

ideology based on content analysis from newspaper editorials. Such analysis was conducted on every justice from Earl Warren to Anthony Kennedy and included editorials dating from their confirmation to their nomination to the Supreme Court.[28] As to the confidence of such a method for measuring ideology, Segal and Cover "believe that the scores [they assign] accurately measure the perceptions of the justices' values at the time of their nomination."[29]

The data that Segal and Cover collect calculates an extremely strong correlation between justices personal values and the votes they cast, but they reason that the actual score could be significantly higher since, "to the extent that we have random measurement error, we will undoubtedly find weaker correlation than would otherwise be the case."[30] Of course, "while justices may have free reign to vote their personal policy preferences, there are forces that limit this discretion" such as the influence of the Solicitor General, as well as overwhelming public opinion. "Nonetheless, the ability of the attitudinal model to explain the justices voting behavior indicates that these influences are minimal."[31]

One of the problems with Segal's and Cover's data is the inherent difficulty in relying on newspaper editorials to measure ideology. Many editorials tend to rely on second-hand rumor or the opinions of opponents to influence their characterizations of politicians, including Supreme Court nominees. At best, the reports would have relied on votes cast by the nominees when they were judges on a lower court. If this is the case, then it creates the same problem with votes cast once they are on the Supreme Court. Presumably, basing a judges ideology on the votes they cast is inaccurate due to the fact that those votes could represent their interpretation of the law, their obligation to uphold precedent, and other factors unrelated to their personal beliefs. It is likely that these votes are precisely what newspaper editorials rely on to make their own analysis. It would be no surprise then that ideology based on editorials based on votes would be consistent with votes cast once on the Supreme Court!

If Segal and Cover are correct, ideology and not legal doctrine determine cases, and therefore it would not be difficult for justices to vote consistently with the public will, even if it contradicts Constitutional principles. Of course, the reverse if is equally possible: that the ideology of the justices will be counter to the public will. The next task then, is to determine the relationship between public opinion and Supreme Court decisions.

William Mishler and Reginald Sheehan (1993) conducted time serious tests between 1956 through 1989 utilizing public opinion data, and concluded that there exists a reciprocal and positive relationship between long-term trends in public opinion and the decisions of the Supreme Court.[32] Their conclusion then, consistent with Dahl, Segal, and Cover, is that the Supreme Court is a majoritarian institution! However, Mishler and Sheehan's data is not infallible due to the tremendous difficulties in measuring public opinion, even with polling data.

For one thing, opinion polls fail to establish a causal connection. That is, they fail to determine whether the public shapes Supreme Court decisions or whether those decisions shape public opinion.[33] The second difficulty is the tendency of opinion polls to focus only on high-profile cases, which significantly skews any results since those cases will likely foster opinions much stronger then normal.[34] Thirdly, questions that pollsters ask generally relate to a much broader theoretical issues than the narrow legal questions that the Court must deal with.[35] There is also the time lag between the decision of the Court and the time the poll was conducted. Lastly, Mishler and Sheehan believes that the focus on public opinion's relationship to Supreme Court decisions assumes incorrectly that the impact of public opinion can be observed directly and immediately, when it is far more likely that public opinion influences the Court gradually (if at all) as justices adapt to changing trends in the public mood.[36] For these reasons, "the nature and extent of the relationship between public opinion and Supreme Court decisions remains very much in question."[37]

Many of these difficulties relating to public opinion polls are alleviated by studying a single issue rather then a series of Supreme Court decisions. To begin with, it is far easier to establish causation when dealing with only one issue, since public opinions tends not to jump dramatically within a short period of time allowing for the identification in major trends. Furthermore, so long as the issue is a relevant one for people, it is far more likely that people will be more familiar with the issue, especially for a subject that is highly controversial, such as the death penalty.

Despite the difficulties in utilizing series of public opinion polls, Mishler and Sheehan attempt to explore in more detail what they call the "political adjustment hypothesis." Dahl's widely accepted hypothesis, shared by Richard Funston (1975), was that Court justices never stray too far from the mood of the dominant political majority since the makeup of the Court is being continuously altered as presidents exercise the right to appoint justices that share their ideological view.[38] The political adjustment hypothesis however, states that the Court can and does respond to public opinion even without a change in Court makeup. They do this partially out of a concern that unpopular opinions will effect the legitimacy that the Court requires to be effective. Reluctant to stray too far from the public will, Court justices may "adjust their decisions at the margins" to make their opinions more compatible with public opinion.[39]

Using Stimson's (1992) index of public opinion in America as well as aggregate data of Supreme Court decisions from 1956 to 1989, Mishler and Sheehan conclude that changes in public mood generally precede changes in the liberalism of Supreme Court decisions.[40] This trend is consistent with the "Dahl-Funston hypothesis," however data reports a decline in liberal slant in the Supreme Court *prior* to the appointments of Richard Nixon, a fact which would support the political adjustment hypothesis.[41] Whichever hypothesis is more accurate, research suggests that it takes some time for public opinion to be reflected in Supreme Court decisions.

Another conclusion that Mishler and Sheehan reach from the preliminary evidence is that a broad pattern of Court decisions have a positive impact on the public

mood. This suggests that the ideological nature of Court decisions are in fact, responsive to public opinion and that Court decisions reinforce and legitimize those shifts in public mood.[42] Thus, decisions "not only are responsive to public opinion in the absence of membership change but appear even to anticipate changes in the Court's composition."[43] This conclusion however, would not hold true indefinitely. Starting in 1981, the decisions of the Court began to diverge from the public mood, despite their alignment with the ideology of President Ronald Reagan. Mishler and Sheehan interprets this trend as indicating the presence of divided government and the absence of any dominant political alliance.[44] This gives further evidence to the belief that tying Supreme Court justices to the "dominant coalition" as Dahl suggests, is not always an accurate way of measuring Supreme Court majoritarianism.

Mishler and Sheehan conclude that the Supreme Court has historically been a majoritarian institution. The time lag of approximately five years between changes in public opinion and changes in Court decisions reflect the view of the Supreme Court acting as a buffer against the "passions of the moment."[45] However, during the Reagan presidency, the Supreme Court adopted a counter-majoritarian ideological view, becoming increasingly conservative while the nation was moving towards a liberal resurgence. The obvious conclusion is simply that Presidents Reagan and Bush had ideologies that were inconsistent with the public mood. Mishler and Sheehan conclude that it is likely future presidents will increasingly diverge from the public will and thus, will lead to a Supreme Court increasingly counter-majoritarian in nature.[46] Being able to measure this possible trend will suffer from the same problems previous studies have faced when trying to uncover majoritarian influences and that is measuring public opinion.

While the Supreme Court has the luxury of issuing their decisions along with the legal rationale, the public does not have such a method of explaining its beliefs in great detail in any way that would make it easy to quantify. However, since this paper has limited the scope of judicial decision making to one issue, the death penalty, discovering a national consensus is a far less daunting a task, but still not without difficulty. While the attempt will be made to utilize general national trends and political events to speculate what the prevailing mood of the nation is, the primary tool for analyzing public opinion shall be polling data when available.

Measuring Public Opinion

There are many ways to measure popular opinion regarding the death penalty. In the landmark case of *Furman v. Georgia*, in which the Court ruled the death penalty to be unconstitutional as it was then applied, Justice Brennan states that "the objective indicator of society's view of an unusually severe punishment is what society does with it."[47] Throughout the several written opinions in that case, three sources of public opinion were most prominent in the decision. Those sources were; State legislation, the behavior of the juries, and general support for the death penalty as demonstrated in social surveys and polls.[48]

State legislative action can be a useful tool for measuring the support for a particular penal method. However, it rests on an assumption that is itself, controversial, which is that the State legislatures are truly representative of the public will. Demonstrating a particular trend throughout the States does not necessarily prove a national consensus. Rather, it could be that voters do not consider capital punishment important enough in determining who to vote for. Even assuming that a majority of people in a state support a certain piece of legislation, it still would not demonstrate a national majority. This because, just like the winner-take-all method of presidential elections, a majority of states with a majority of citizens does not always translate into a national majority.[49]

Relying on the behavior of juries can be a useful tool in determining public opinion, as they may be more representative than public officials. Certainly, the frequency with which a particular punishment is invoked by juries selected randomly is one way of measuring support for such a punishment. However, that factor alone is insufficient in determining public approval, as there are other explanations for why a punishment is rarely invoked other then a lack of support for it. It could be, for example, that eligible crimes have simply gone down, and therefore do not warrant a capital sentence. Furthermore, as Justice Powell suggests in his dissent in *Furman v. Georgia*, demonstrating the infrequency with which juries sentence a defendant to death may only reflect particular care in applying such a harsh punishment and not an outright rejection of it.[50]

Perhaps one of the most obvious measurements of public opinion is the use of polling data. This is especially the case with the Eighth Amendment since the legal definition of cruel and unusual punishment depends, in large measure, on contemporary standards.[51] Of course, using polling data to measure public approval or disapproval of issues faced by the Supreme Court can be problematic. As Chief Justice Rehnquist notes regarding opinion polls in his *Atkins v. Virginia* dissent, "everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analysis use to interpret the data can skew the results."[52] While the decisions of the court are based on many factors, including precedent, legal justification, and the specific circumstances involved in a given case, public opinion data often reflect only the respondent's moral leanings. Simply put, the questions asked in public opinion polls are not the same questions that are put before the court.

Another failure of public opinion polls is that scientific polling is a relatively recent phenomenon, and cannot be used to accurately chart trends in opinion prior to the latter half of the twentieth century. Finally, it is worth noting that many Americans are simply ignorant about the facts behind many questions. According to A. Sarat and N. Vidmar, who conducted a series of interviews in 1976 in Massachusetts, respondents "were reasonably well informed on the use of the death penalty, but ill informed on its effects."[53] This conclusion is supported by Phoebe C. Ellesworth and Samuel R. Gross in a 1983 article, which revealed widespread ignorance on the effects of the death penalty, or its perception outside of the United States.[54]

Despite these deficiencies in polling data, the cruel and unusual punishment clause of the Eighth Amendment lends itself to seeking out public opinion on the issue. Unlike most constitutional interpretations, in which the court sometimes expresses its unwillingness to consider public opinion, the Supreme Court has explicitly stated in *Trop v. Dulles* that the "evolving standards of decency" is a paramount consideration in determining the constitutionality of the death penalty. As Justice Marshall states,

> a general abhorrence on the part of the public would, in effect, equate a modern punishment with those barred since the adoption of the Eighth Amendment. There are no prior cases in this Court striking down a penalty on this ground, but the very nation of changing values requires that we recognize its existence.[55]

Another reason polling data can be useful regarding capital punishment is that it is such a salient issue.[56] Thus, people are far more likely to have formed an opinion rather then simply having to come up with on in response to a poll question. Furthermore, and perhaps most remarkable, opinion polls regarding the death penalty shows relatively little difference in result across competing polls which use different phraseology.

In their article analyzing Americans perceptions of the death penalty, Ellesworth and Gross note that none of the differences in question format for the half-dozen polls they analyzed produced a noticeable difference in results. For example, the General Social Survey asks people "Do you favor or oppose the death penalty for persons convicted of murder?" while the Harris poll asks "Do you believe in capitol punishment or are you opposed?"[57] Despite the difference in these questions and others, the results have been remarkably consistent. In fact, Ellesworth and Gross observe that "the distribution of responses remains roughly unchanged even when aggravated categories of death-worthy crimes are mentioned." However, even though public opinion about the death penalty remains relatively consistent across questions, the responses change when the questions include such mitigating factors such as age of the accused, or whether the sentence of death should be mandatory.[58] Regarding overall support for capital punishment, "most Americans know whether they 'favor' or 'oppose' the death penalty, and say so in response to any question that can reasonably be interpreted as addressing that issue."[59]

One final indicator of support for capital punishment is the overall political trends in the country. While imperfect and susceptible to subjective judgment calls on which trends are significant in shaping people's ideology, this broad variable should not be ignored in measuring national support for an issue as salient to many people as the death penalty. Although it is not the object of this study to attempt to quantify and measure national trends that might contribute to support for the death penalty, to completely ignore such national factors as depression, the red scare, or world war would be to seriously neglect an important element in understanding the perception of capitol punishment in society. While speculation based on these national trends is by no means as scientifically quantifiable as polling data, they will be utilized in this paper in an effort to put the debate in its historical context.

In choosing which cases to focus on in determining whether or not the Supreme Court follows public opinion, I opted to select only lead cases where the Court was asked to establish new categorical rules for States and the Federal Government to follow and avoided those cases that merely solidified procedural guidelines but made only minor adjustments to the interpretation of the Eighth Amendment, or those cases that, while significant, were simply not salient enough to be able to accurately measure public opinion.

The Supreme Court in the Nineteenth Century

Prior to the passage of the fourteenth amendment, and the subsequent nationalization of the Eighth Amendment, the Supreme Court interpreted the Bill of Rights as protecting individuals only from the national government.[60] Throughout the nineteenth century, the death penalty was challenged politically by various liberal organizations which comprised only a small minority of the population.[61] While the Eighth Amendment would be brought to the Supreme Court several times throughout the century, these cases dealt mostly with the "excessive bail" clause of the amendment.[62] It would not be until 1878 that the Eighth Amendment would be used to challenge the legality of a death penalty statute in the Supreme Court.

The case began in Utah, when a man named Wilkerson was convicted of premeditated murder and sentenced to death by a firing squad.[63] Wilkerson claimed that the method of execution was cruel and unusual and thus in violation of the Eighth Amendment. The Court reviewed ample precedent, from military laws to a comparative analysis of other countries, to demonstrate that death by shooting was a legitimate method of execution. In trying to determine what constitutes cruel and unusual punishment, Justice Clifford noted that

> difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to say that punishments of torture… and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."[64]

The case left open the question of what punishments were "unnecessary cruelty" and what punishments were in the legitimate interests of public safety.

Because reliable polling data is unavailable during this time period, it is difficult to gauge public opinion regarding the use of firing squad for executions. However, it is possible to speculate about the probable general attitude given the historical record of the death penalty in America. The nineteenth century produced a great number of reforms with regards to capitol punishment. In 1834, Pennsylvania became the first state to ban public executions, moving them behind closed doors. By 1845, every state in New England and the Mid-Atlantic region had completely eliminated public executions.[65] During this same decade, the movement to abolish the death penalty was growing in

popularity leading to the Michigan legislature becoming the first government in the world to eliminate the death penalty entirely in 1846.[66]

By the time of the *Wilkerson* case, however, much of the opposition to the death penalty had lost its force. The Civil War and Reconstruction had put anti-death penalty advocates on the defensive, perhaps because people had become somewhat desensitized by the massive casualties of the Civil War over a decade before.[67] In any event, many states formally institutionalized the death penalty by permitting it only by the state government and no longer by local town and counties.[68] As mentioned in the court decision, firing squads were long accepted as an appropriate manner of execution by the military during the Civil War with little objection. The military standard, combined with the relatively low support for death penalty abolitionist movements at this time, seems to indicate that the ruling in *Wilkerson* affirming the constitutionality of capitol punishment by a firing squad was perfectly consistent with the national consensus as it existed. Even if there was no consensus favoring the death penalty, there is no evidence to suggest that there was a consensus opposing it.

The next important death penalty case to come before the Supreme Court after *Wilkerson v. Utah* was *In Re Kemmler* in 1890. In 1889, William Kemmler was convicted of murder in the first degree and was sentenced to become the first person in American history to be executed by electrocution. Kemmler claimed that the manner of death violated the federal and state constitutions, which both prohibited cruel and unusual punishment, despite the fact that the New York legislature chose electrocution for the explicit purpose of finding a method of death which was "the most humane and practical method known to modern science."[69] In upholding electrocution as a valid means of execution, Justice Fuller reaffirmed Justice Clifford's evaluation in *Wilkerson* that punishments which involve torture or lingering death are indeed cruel and unusual. He also went further than *Wilkerson* in explicitly stating that the death penalty was not meant to be included within the meaning of the constitution.[70]

In both *Wilkerson v. Utah* and *In Re Kemmler*, the Court utilized a historical style of interpretation, determining whether a punishment was cruel and unusual based on the standards of 1789. So long as the court maintained this interpretative style, the death penalty, as well as many other forms of punishment, would have forever remained outside constitutional scrutiny. While there is no evidence that there existed widespread opposition to the death penalty, the language of the Supreme Court indicates that even if such resistance existed, it would not be enough to overturn a death penalty statute so long as that statute was consistent with the standards of the late 18th century.

"Evolving Standards of Decency"

The year 1910 marks the first time the Supreme Court struck down a punishment enacted by a state legislature. In *Weems v. United States*, an officer in the Philippine Islands was convicted of forging an official document, but the court found that the punishment of fifteen years of hard labor was in violation of the Eighth Amendment's cruel and unusual punishment clause. Thus, the court set a new precedent by declaring

for the first time that the cruel and unusual punishment clause of the Eighth Amendment could prohibit more than just acts which were unacceptable when the Constitution was first adopted. Noting that "time works changes," the court decided that interpretation of the eighth amendment "cannot be only of what has been but of what may be."[71]

The decision in *Weems* to "modernize" the interpretation of the eighth amendment is consistent with the general atmosphere of progressive legal and Constitutional reform that marked the early 20th century. The time period in which the case was decided was in the middle of the "progressive era" in the country. Between 1907 and 1917, six states abolished the death penalty completely, while an additional three limited its usage to only first degree murder of a law enforcement official and treason.[72] The Court's decision in *Weems* could be seen as a reflection of this progressive period. The Chief Justice of the Court, Justice McKenna, who delivered the opinion, was appointed by President McKinley. Meanwhile, three additional Justices (Wendell, Rufus, and Henry) were appointed by President Theodore Roosevelt. This period of reform, however, was not to last.

The Communist Revolution in Russia in 1917 and a world war began a red scare in the United States throughout the 1920's, as class conflict mounted with the rise of socialist parties within the United States.[73] By 1920, five of the six states that had abolished the death penalty had reinstated it. Some even introduced a new form of execution, the cyanide gas chamber, which emerged in Nevada in 1924. These political events, as well as the writings of criminologists championing the use of the death penalty contributed to the imposition of more executions during the 1930's, the era of prohibition and the Great Depression, then in any other decade in U.S. history, an average of 167 per year.[74] A 1937 Gallup poll, one of the first to pose the question of death penalty support, recorded that 60% of respondents favored the death penalty for someone convicted of murder.[75]

It would be over two decades later, in 1958, that a landmark case set the stage for capital punishment to be directly challenged as being cruel and unusual. Although it was not a death penalty case, *Trop v. Dulles* affirmed the idea that cruel and unusual punishment depends, in large measure, on what the public finds acceptable. In striking down a law that allowed Trop, a native-born American, to be stripped of his citizenship for the crime of wartime desertion, the court emphasized the flexibility in the wording of the Eighth Amendment. Chief Justice Warren wrote that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[76] In the decision, the plurality also noted the climate of international opinion in making their determination.

During the time of the *Trop* case, support for the death penalty was already on the decline, at only of 47%.[77] This may have been influenced by the post World War II movement to abolish capitol punishment throughout much of Western Europe.[78] In 1948, the newly formed United Nations adopted the Universal Declaration on Human Rights, which categorically affirmed a "right to life." Subsequent international agreements throughout the 1950's and 1960's, including the International Covenant on

Civil and Political Rights, make clear the commitment of much of the Western World to eliminate the death penalty as a legitimate form of punishment. The precedent set in *Trop* regarding the elasticity of the cruel and unusual punishment was maintained in two other non-death penalty cases, *Robinson v. California* (1962) and *Powell v. Texas* (1968).[79]

The Road to *Furman*

The first cases to go before the Supreme Court dealing with the death penalty after the 1958 *Trop* decision was a decade later, in 1968. During this time, overall support for the death penalty had been rising from a record low of 42% in 1962, to 56% in 1967.[80] The *United States v. Jackson* invalidated a federal kidnapping statute that required that the punishment of death only be imposed if the jury recommends it.[81] Other cases were heard by the Supreme Court dealing with the cruel and unusual punishment clause during this time but the landmark case that finally put the practice of capitol punishment on a collision course with the eighth amendment was the 1972 case of *Furman v. Georgia*.[82]

By 1972, the country was almost evenly divided in its support for the death penalty, with supporters only slightly outnumbering opponents.[83] The grassroots effort to abolish capitol punishment coincided with the growing opposition to the war in Vietnam, which centered around ending violence by the government. Throughout the decade of the 1960's, few prosecutors asked for the death penalty and between 1967 and 1972, not a single person was executed in the United States.[84] However, despite the low numbers of executions, polls showed a slight increase in support in the early 1970's from the late 1960's. This increase in favorable attitudes could be traced to the increase in reported crime, the increasing politicization of crime and, as Sarat and Vidmar suggest, "a fading from public consciousness of the reality of executions."[85] It was in this environment that the Supreme Court heard a series of cases that challenged the constitutionality of the death penalty.

Furman v. Georgia

On June 29th, 1972, in a vote of 5 to 4, and with 9 separate opinions, the Supreme Court of the United States held that the death penalty, as it was administered, constituted cruel and unusual punishment under the Eighth Amendment, and therefore invalidated the practice in the states by the Fourteenth Amendment. The decision effectively invalidated 40 death penalty statutes, and commuted the execution of 629 death row inmates around the country. While there was some important disagreements as to precisely why the death penalty was unconstitutional, it was agreed by the majority that part of the decision rests on the perceived desire of the American people.

Among the various rationales for the decision, Justices Brennan and Marshall were the only two who declared that the death penalty itself was unconstitutional. The remaining opinions concluded that capital punishment per se was not inconsistent with the Eighth Amendment, but merely the arbitrary fashion with which it was imposed.

Justice Brennan wrote that death, while an admittedly "traditional punishment," was also arbitrarily administered, and serves no penal purpose that could not be otherwise served. Also noting the "unusual severity" and permanency of death, he concluded that "in comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity."[86] Brennan goes on to state that "when there is a strong probability that an unusually sever and degrading punishment is being inflicted arbitrarily, we may well expect that society will disapprove of its infliction" and that the death penalty is "almost totally rejected by contemporary society."[87]

Justice Marshall makes a similar appeal to popular opinion by stating that "even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States."[88] The remaining justices in the majority opinion cited the selective application of the death penalty on the poor and on African-Americans, stating, as Justice Stewart does, that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[89]

By what basis did Justices Brennan and Marshall conclude that public opinion was against the death penalty, given that public opinion polls demonstrate that opponents of the death penalty have never been in the majority? Justice Brennan bases his claim on the fact that the imposition of the death penalty has been increasingly rare and therefore has proven "especially more troublesome to the national conscience."[90] He interprets the public approval of capital punishment in the polls and through referendum as reflecting approval for the *authorization* of the death penalty, not approval for its imposition. "Indeed," he adds, "the great likelihood is that the punishment is tolerated only because of its disuse."[91]

Justice Marshall similarly concluded that the public was against capital punishment, arguing that for public opinion to be utilized in judging the constitutionality of the death penalty, two conditions must be met. First, attitudes about the death penalty must represent "informed" judgments about the application and effects of capital punishment. Second, those opinions should not be contrived out of a desire for retribution, precisely the rationale that the Eighth Amendment was designed to restrict.

According to a study conducted by Austin Sarat and Neil Vidmar, Marshall relies on three assumptions in making his judgment in the *Furman* case. The first assumption is that the public is ill-informed about the death penalty. Secondly, if the public were informed, it would reject the death penalty as a method of punishment, and finally, when retribution is the rationale for support, additional information will have no effect on opinion.[92] According to Sarat and Vidmar, all of these assumptions are supported by substantial empirical evidence.[93] While the purpose of this paper is to measure the majoritarian impact of the Supreme Court in interpreting the Eighth Amendment with regards to the death penalty and not to evaluate the basis for why such an opinion exists, Marshall's assumptions have some important implications.

Justice Marshall's basic contention is that if the public knew what he and others knew about capital punishment, they would oppose the practice. This rationale certainly supports Segal and Cover's conclusion that Justices vote primarily based on their own ideology and would seen to go against Dahl's theory. If the Court was simply a part of a dominant coalition, there is no reason to believe that they would interpret death penalty data any differently than Congress (who presumably has access to the same information). Furthermore, Marshall's contention would leave Justices free to vote their conscious in the name of public consideration by simply claiming that everyone would reach the same conclusion if they knew what the Justices knew. This argument would also allow Justices to conform to both the majoritarian and counter-majoritarian philosophies. This is because scholars could claim that although the Court's decisions do not conform to majority beliefs, it is still majoritarian since the majority's beliefs are based on faulty or limited information without which the majority would agree with the Court.

Regardless of Marshall's hypothesis, the polls did not support the contention that a national consensus had formed against the death penalty. According to three major polls conducted in 1972, while support for the death penalty ranged from 50% (Gallup poll taken in March) to 57% (Gallup poll taken in November), opposition never surpassed 42% and was as low as 32% in one Gallup poll, with the remaining respondents undecided.[94] These numbers hardly indicate a national trend. They indicate that the public did not view the death penalty *as it existed and was administered* to be unconstitutional. Based on the available data, it would seem that the Supreme Court's decision in *Furman* was not consistent with national opinion at that time.

Before moving on to explore future reinterpretation of the Eighth Amendment and capital punishment, it should be questioned whether the decision was truly based on public opinion and legal considerations, or whether the judgment was simply a reflection of the President who appointed them, or as Dahl claimed, the dominant coalition. According to the research of Ellswoth and Gross, Republicans are more likely to support the use of the death penalty than Democrats, although they acknowledge that party labels are relatively weak predictors.[95] The record on *Furman v. Georgia* seems consistent with this conclusion. Of those Justices who voted with the majority to invalidate death penalty statutes, three of them were appointed by Democratic presidents (Justice Douglas by President Roosevelt; Justice White by President Kennedy; and Justice Marshall by President Johnson), while two were appointed by Republican presidents (Justice Brennan and Justice Stewart by President Eisenhower). However, all of the justices who voted with the minority were appointed by a Republican president (Chief Justice Berger, as well as Justices Blackmun, Powell, and Rehnquist were all appointed by President Nixon).

Other variables could be influential in decision making, such as religion, or state of origin of a Justice, but in the case of *Furman v. Georgia*, it would not seem to have been public opinion. The decision did leave open the possibility for states to rewrite their death penalty legislation to avoid those problems cited by many justices as being the reason for their unconstitutionality. Advocates of the death penalty immediately began

writing statutes that eliminated some of the arbitrariness in capital sentencing. Florida became the first state after the *Furman* decision to rewrite its statute, a mere five months after the decision. Soon, 34 other states proceeded to pass new legislation allowing for the death penalty.[96] Some states tried to remove the discretion of the jury by simply mandating the death penalty for particular crimes. However, this tactic was ruled unconstitutional in *Woodson v. North Carolina*.[97] The case that would reinstate the death as a constitutionally permissible punishment occurred in 1976, only four years after the *Furman* decision.

Gregg v. Georgia

By the time *Gregg v. Georgia* reached the Supreme Court, polls showed that the public was overwhelmingly supportive of the death penalty, with 67% of the country in favor, according to a 1976 Harris poll.[98] On the 200th anniversary of the signing of the Declaration of Independence, crime rates were the highest in years, with almost three time more violent crimes in 1976 than in 1960.[99]

The case of *Gregg v. Georgia* was the first test the death penalty faced after several states (including Georgia, Texas, and Florida) rewrote their laws to try and make them compatible with the guidelines laid out in *Furman*.[100] In a 7 to 2 opinion, the court first confronted the issue left unresolved in the *Furman* decision: is the death penalty inherently cruel and unusual under the Eighth Amendment? The court ruled that it is not, once again looking to public sentiment. Claiming that national developments regarding the death penalty have changed considerably since 1972, Justice Stewart wrote that "it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction." He made this claim on two grounds. First, the court cited the legislative response to the *Furman* decision. Noting that 35 state legislatures as well as the United States Congress had enacted new death penalty statutes since 1972 that addressed the concerns outlined in that case, the court concluded that "capital punishment itself has not been rejected by the elected representatives of the people."[101]

The Court's second argument concerns juries, which were cited as "a significant and reliable objective index of contemporary values because it is so directly involved."[102] Despite the relative infrequency of death penalty sentences handed down by juries, the fact that it was issued as many times as it was represents the fact that juries still considered it a valid means of punishment "for a small number of extreme cases." The Court then took note of the fact that all of the prior concerns about the imposition of the death penalty had been sufficiently addressed in the new Georgia law. These reforms included bifurcated trials, in which a separate jury would determine the penalty for a crime than the jury that determined guilt.

Of the justices who voted to invalidate the death penalty in *Furman*, Justices Brennan and Marshall maintained their original positions that the death penalty is inherently unconstitutional. Meanwhile, Justice Stewart and Justice White, who had voted to invalidate capital punishment in *Furman*, voted with the majority in the *Gregg*

case, convinced that the necessary changes had been made to make the death penalty constitutional. All of the justices who had dissented in the *Furman* case, including Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist voted with the majority in *Gregg*. The lone justice who was new to the court since *Furman* was Justice Stevens, who had been appointed by President Ford in 1975 and who voted with the majority to uphold the death penalty statutes. On January 17, 1977, for the first time in ten years, someone was legally executed in the United States.[103] In that same year, the Court's attention would again be brought to Georgia to decide the status of the death penalty under the Eighth Amendment.

Coker v. Georgia

In 1974, Erlich Coker escaped from prison, where he was serving time for murder, rape, kidnapping, and assault. Upon his escape, he entered the Carver family's home through an unlocked kitchen door, tied up Mr. Carver in the bathroom, and proceeded to rape Mrs. Carver before taking her with him in the couple's car. Coker was later apprehended and Mrs. Carver was returned home with no further harm. After legal procedures in accordance with the decision in *Gregg v. Georgia*, Coker was sentenced to death by electrocution.

By 1977, *Coker v. Georgia* reached the Supreme Court, which was asked to consider whether the imposition of the death penalty for rape was cruel and unusual punishment within the meaning of the Eighth Amendment.[104] According to the decision in the case, it was. The sentence of death for rape was, in the Court's view, "grossly disproportionate and excessive punishment… and is therefore forbidden by the Eighth Amendment." The Court added that "in light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system."[105]

In looking for legislative behavior that would signify a national consensus, the Court noted that at no time within the past 50 years has a majority of states authorized the death penalty for the crime of rape. While 18 states, the District of Columbia, and the Federal Government authorized death for rape in 1925, by 1971, that number dropped to 16 states plus the Federal Government. Immediately after the *Furman* case, 35 states immediately rewrote their death penalty statutes to make them consistent with the Supreme Court decision.[106] However, none of the states that had previously lacked statutory laws proscribing death for rape chose to include rape among capital felonies. Of the 16 states that did authorize the death penalty for rape before the *Furman* decision, only three retained the provision in their revised statutes, including Georgia. The other two states (North Carolina and Louisiana) were forced to revise their death penalty statutes after the Court ruled that the mandatory sentencing guidelines were unconstitutional.[107] In their revised laws, rape was removed from the list of crimes punishable by death.

Legal representatives of Georgia, in trying to prove the acceptability of capital punishment for rape, suggested that the lack of death penalty statutes for rape might be misleading. According to their argument, 11 of the 16 states that authorized death for rape, in attempting to comply with the *Furman* ruling, simply removed rape from a capital offense in lieu of mandating it for every instance. Chief Justice Burger concurs with this explanation, noting in his dissent that at the turn of the century, "more than one-third of American jurisdictions have consistently provided the death penalty for rape." Given the "swift changes in positions of some Members of this Court in the short span of five years," Burger asks,

> can it rationally be considered a relevant indicator of what our society deems 'cruel and unusual' to look solely to what legislatures have refrained from doing under conditions of great uncertainty arising from our less than lucid holdings on the Eighth Amendment? Far more representative of societal mores of the 20th century is the accepted practice in a substantial number of jurisdictions preceding the Furman decision.[108]

The Court responded with the fact that, regardless of the history of the death penalty for rape, the vast majority of states simply did not authorize the execution of rapists, neither before, or after the Court ruled against mandatory sentencing for rape cases. Thus, "the current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."[109]

Along with legislative evidence of the unacceptability of sentencing a convicted rapist to death, the Court also took note of international opinion, as the plurality opinion had in *Trop v. Dulles*. It noted that, according to a United Nations Department of Economic and Social Affairs, of 60 nations surveyed in 1965, only three retained the death penalty for rape alone.

Finally, as cited in *Gregg*, the Court looked to the behavior of juries in making its determination on whether the "evolving standard of decency" accepted the death penalty for rapists.[110] However, "the jury's judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed."[111] Because, at the time of the *Coker* case, this was true only in Georgia, the record was limited to that state.[112] While the Court took pains to note the differences between rape and murder (the most obvious being that the former does not involve the taking another life), its primary argument was a majoritarian one. It would continue to utilize this rationale 12 years later, in another landmark case that invalidated the death penalty for a particular class of convicts.

Ford v. Wainwright

Throughout the 1980's, the death penalty had a favorable rating of between 70%-75%.[113] In 1986, the court was again called to clarify the role of the Eighth Amendment with regards to the death penalty, specifically, whether or not death was a

permissible punishment for the mentally insane. The last time the Court considered such a possibility was in *Solesbee v. Balkcom* in 1950, in which the court denied a due process right to a judicial determination of a convicted person's sanity.[114] By 1986, however, the Supreme Court's "interpretations of the Due Process and the Eighth Amendment have evolved substantially."[115]

The case was *Ford v. Wainwright*, and it involved a murderer whose conviction was upheld by the Governor of Florida despite a requisite panel of three psychiatrists affirming his insanity. In the decision, the Court took into account "objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects."[116] Again, the court invoked contemporary standards as a justification for its decision. As Justice Marshall wrote in his opinion,

> the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this nation.[117]

In enunciating why the Florida system is unconstitutional, the court outlined several deficiencies in the states' procedure, including its failure to include the prisoner in the process, the lack of opportunity to challenge the opinion of the state appointed psychiatrists, and the exclusive discretion given to the Governor. But what evidence did the court offer to support its claim that executing the mentally insane is inconsistent with the public opinion? In *Furman v. Georgia*, the majority on the Court concluded that the public was against the death penalty because of the infrequency with which it was imposed by juries. The case of *Gregg v. Georgia* also relies, in part, on the recurrence of death penalty sentences, but *Gregg* also uses statutory laws throughout the country as a surrogate for the public will. In *Ford*, similarly, national legislation is used as confirmation that there is a national consensus against executing the insane.

Thompson v. Oklahoma

The next major death penalty issue to go before the Supreme Court was in 1988, and it centered on the issue of executing juveniles. The case was *Thompson v. Oklahoma* and it involved a brutal murder committed by four people.[118] Each of them was tried separately and each was sentenced to be executed. Although their guilt had been legally proven, one of the defendants was only 15 years old. Based on its previous decisions, the Court needed only to seek out what the contemporary standards of decency were in order to determine its decision. Once again, in determining the standard of whether or not the execution of juveniles was acceptable, the Court turned to state legislatures and the actions of the sentencing juries.

Throughout the American legal system, there are numerous distinctions between children and adults, from contracts, and criminal procedure, to rights such as voting and holding office. While there is no national consensus on what constitutes "a child," the

court did identify the age of 16 as an age in which there exists "complete or near unanimity among all 50 states and the District of Columbia" that people whose age is below it were considered minors for legal or political purposes.[119] Most relevant to the case in the view of the Court however, was that the age of 16 is the maximum age in every state in which a person fell under the jurisdiction of juvenile courts. Despite these substantial legal differences between children and adults, 19 states which authorized the death penalty offered no minimum age in the statutes. However, in the remaining 18 states that had death penalty statutes, the minimum age at which a person could be executed is 16.[120]

The second source of evidence that was used to verify the public rejection of executing minors was the behavior of juries. According to an article that the Supreme Court cited in its opinion, of all of the executions performed in the 20th century, only 18 to 20 had been of individuals below the age of 16, and all of them were performed in the first half of the century.[121] The interim between that time and now, however, "leads to the unambiguous conclusion that the imposition of the death penalty on a 15 year old offender is now generally abhorrent to the conscience of the community."[122] In reaching this conclusion, the court noted that between 1982 and 1986, approximately 82,094 people were arrested for homicide, of which 1,393 were sentenced to death. Of that, only five of those people, including the petitioner in this case, were under 16 years old.[123] This suggested to the court that "these five young offenders have received sentences that are 'cruel and unusual in the same way that being struck by lightening is cruel and unusual.'"[124] As Justice O'Connor noted in her concurring opinion however, the plurality did not indicate how many juries have been asked to impose death or how many times the prosecution had exercised his or her discretion to refrain from seeking death.

The year after the Court ruled in *Thompson*, in 1989, it clarified the Eighth Amendment again by ruling that the execution of a 17-year-old person did not violate the Constitution. In *Stanford v. Kentucky*, again relying on public opinion, the Court found that there is no national consensus against executing 16 or 17 year old convicted murderers.[125] The inconsistency of public opinion polls, interest groups, and professional association studies demonstrated a lack of accord and therefore the minimum age of a person to be sentenced to death shall be left for the States to determine. However, since the *Stanford* case, none of the 40 death penalty jurisdictions have passed legislation lowering the age to 16, even though it was their right to do so.

Penry v. Lynaugh

The next major constitutional question that went before the Supreme Court with regards to the Eighth Amendment was whether or not a person who was mentally retarded could be put to death. While the Court had already established in *Ford v. Wainwright* that the mentally insane could not be executed, and further added that children were equally exempt from execution in *Thompson v. Oklahoma*, *Penry v. Lynaugh* tested the validity of executing an adult with the mental capacities of a child. The case was brought before the Court in 1989 and involved the brutal rape and murder by a 22-year-old mentally retarded man named Penry, who confessed to the crime.

According to the testimony of his psychiatrist, Penry had the mental abilities of a six to seven year old child and the social maturity of a nine to ten year old child.

During the trial, the jury was asked to consider three issues in the case. The first issue was whether or not the murder had been committed "deliberately." The second issue was whether the defendant was likely to commit future violent crimes, and thirdly, whether the killing was an unreasonable response to any provocation by the victim. The jury was told that if it answered all three issues in the affirmative, which it subsequently did, the sentence would automatically be death. During the proceedings, the jury was not instructed that it could consider mitigating circumstances (such as Penry's mental retardation) in imposing the sentence.

The Supreme Court ultimately decided that the wording of the issues the jury was asked to decide contained ambiguous language and that "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence."[126] Thus, the court remanded Penry's death sentence. The next issue that the high court had to deal with was whether or not the Eighth Amendment prohibited Penry's execution. In arguing that it did not, Penry's contention was that "there is an emerging national consensus against executing the mentally retarded."[127] With this, the court emphatically disagreed.

Once again, the court reasoned that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[128] Unlike *Ford v. Wainwright*, in which the court found that no state permitted the execution of the insane, only one state in the country banned the execution of mentally retarded people with another state legislation pending.

The court also looked to common law to determine whether or not executing the mentally retarded was consistent with that tradition. While the court noted that "in its emphasis on a permanent, congenital mental deficiency, the old common law notion of 'idiocy' bears some similarity to the modern definition of mental retardation," and such persons were prohibited from being punished by death, the Court decided that this was not relevant to this case. Penry was found competent to stand trial and the jury rejected his insanity defense.[129]

Penry offered no legislative evidence or jury behavior to support his supposition, but he did offer public opinion data from various states such as Texas, Florida, and Georgia. Such polls demonstrated that support for the death penalty decreased dramatically when the defendant is mentally retarded.[130] Further, Penry cited the American Association on Mental Retardation (AAMR), the country's largest organization of professionals who work with the mentally retarded, who opposed the execution of people who suffered from mental retardation. Regardless of the value of those polls, the court simply did not rely on polling data as a measurement for national opinion. While the court conceded that polls might one day be reflected in legislation, "there is insufficient evidence of a national consensus against executing mentally retarded people

convicted of capitol offenses for" the Court "to conclude that it is categorically prohibited by the Eighth Amendment."[131] Penry's death sentence was upheld. It would be 13 years before the Court would take another opportunity to consider mental retardation and the death penalty.

Atkins v. Virginia

In 2002 the Supreme Court heard the case, *Atkins v. Virginia*, in which the Court ruled that the Eighth Amendment prohibits the execution of the mentally retarded.[132] The case began when Daryl Atkins was convicted and sentenced to death for the crimes of abduction, armed robbery, and murder. While Atkins was determined by a psychiatrist to be mentally retarded, the Supreme Court of Virginia refused to commute his sentence. The US Supreme Court heard the case and overturned Atkins' sentence, claiming that in the 13 years between *Atkins* and *Penry*, there had been "a dramatic shift in the state legislative landscape."[133]

According to the majority opinion in *Atkins*, state legislatures had begun to address the issue of executing the mentally retarded since the *Penry* case. The Court cited numerous states that had prohibited the execution of the mentally retarded but what is even more important to the number of states, the Court argues, is the

> consistency of the direction of change. Given the well known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons…provides powerful evidence that today our society views mental retarded offenders as categorically less culpable than the average criminal.[134]

Furthermore, the execution of mentally retarded persons is uncommon even when it would be perfectly legal to make such a sentence. This is true even in states where executions occur with some regularity. Because the practice had become so exceptional throughout the States, the majority in the Court concluded that the national consensus was against it. If there was serious disagreement regarding the case of imposing a capital sentence on people who are mentally retarded, the Court contended that it was only in determining which offenders actually fall into the category of mentally retarded. The Court also considered the issues of retribution and deterrence, as well as the diminished mental capacity of the accused, all of which the Court used to find executing the mentally retarded unconstitutional.

In his dissent, Chief Justice Rehnquist noted that while it is true that 18 States had passed laws prohibiting the execution of the mentally retarded, the 19 other States that allowed for the death penalty had no such prohibitions, and the decision was simply left to the discretion of the judge or jury. He went on to criticize the majority's use of polling data that might not be in accordance with "generally accepted scientific principles or are capable of supporting valid empirical inferences about the issues before" the Court. Affirming his belief that legislative acts and jury behavior ought to be the sole measuring

rods of public opinion, Rehnquist found it difficult to sustain the position that there existed a national consensus with regards to executing mentally retarded people.[135]

While the argument of Chief Justice Rehnquist to ignore polling data when considering public opinion was valid, public opinion polls do effectively demonstrate the public's opposition to executing the mentally retarded, even if that support has not yet manifested itself in an outright legislative ban on the practice. In 2002, while 72% of Americans favored the death penalty for those convicted of murder, 82% opposed it if the defendant is mentally retarded.[136]

Results and Discussion

The purpose of this paper was to consider the majoritarian impact on the Supreme Court when deciding death penalty cases. Dahl's theory about the Supreme Court being part of a dominant coalition is a compelling rationale, but it assumes that such a coalition is itself majoritarian. Furthermore, Dahl's theory is difficult to test in the presence of a divided government, in which no single ideological coalition dominates. Based on Supreme Court decisions, a few conclusions can be reached about the relationship between public opinion and the Eighth Amendment's cruel and unusual punishment clause with regards to the death penalty.

First, the Supreme Court consciously tries to utilize public opinion to determine cruel and unusual punishment clause and the death penalty. In determining where the public lies on a death penalty related issue, the Court utilize State legislative action and jury behavior as a surrogate for national opinion. However, while both of these variables yield significant insight about the death penalty in America, they can also be misleading and has the potential to overemphasize or under-emphasize the support for the death penalty. State legislative acts, for example, need not necessarily reflect a national majority, even if they represent a majority of States. The determination of jurors is largely dependent on what the prosecution requests, how the defendant pleads, and other variables rather then the extent of support juries have for capital punishment.

Second, the methods that the Supreme Court utilizes to gauge public opinion are not always consistent with scientific polling data. Certainly, public opinion polls are not always the definitive reflection of actual public opinion, especially since they often indicate a general preference without measuring the degree of conviction they feel towards that preference. However, they do have the advantage of reaching a cross-section of the population as well as being able to single out issue preferences rather than have to interpret preferences based on the actions of the peoples state representatives.

To the extent that polling data is a better surrogate for public opinion than legislative action or jury behavior, the Supreme Court does not follow actual public opinion even when it claims to. In *Furman v. Georgia*, Justice Marshall offered the somewhat elitist argument that Justices should focus on what public opinion would be assuming an informed citizenry, rather than what it is under current conditions. The general pattern that emerges from the sample of cases in this paper, however, is an

uneasy struggle to discover what the public believes about a particular aspect of the death penalty.

The relationship between the Supreme Court and public opinion is complex. While many scholars have analyzed Supreme Court decision making regarding a range of issues over time and compared them to overall trends in public opinion, this paper has attempted to demonstrate the usefulness in focusing on a single issue or area. Such a focus, it is hoped, will lead to a clearer understanding of how the Supreme Court uses public opinion in its decisions. Future research is needed to determine whether other issues yield similar conclusions but one thing that is clear is that interpretation of the Eight Amendment and the death penalty will continue to undergo changes, as public opinion continually shifts over time.

Appendix 1: Public Opinion Polls Regarding Capital Punishment

Date	Organization	Question Number	Number	% Favor	% Oppose	% Don't know
Dec-36	GALLUP	1	1500	61	39	7
Dec-37	GALLUP	2	1500	60	33	11
Nov-53	GALLUP	3	1498	64	25	13
Apr-56	GALLUP	3	2000	53	34	18
Sep-57	GALLUP	3	1528	47	34	11
Mar-60	GALLUP	3	1535	53	36	12
Jan-65	GALLUP	3	2435	45	43	11
May-66	GALLUP	3	1523	42	47	8
Jun-67	GALLUP	3	1518	56	36	9
Jan-69	GALLUP	3	1503	51	40	11
Nov-71	GALLUP	3	1558	49	40	9
Mar-72	GALLUP	3	1513	50	42	8
Apr-72	NORC	4	1613	53	39	11
Nov-72	GALLUP	3	1462	57	32	10
Apr-73	HARRIS	5	1537	59	31	5
Apr-73	NORC	4	1504	60	35	5
Apr-74	NORC	4	1484	63	32	6
Apr-75	NORC	4	1490	60	33	5
Apr-76	NORC	4	1499	66	30	7
Apr-76	GALLUP	3	1540	66	26	8
Dec-76	HARRIS	5	1459	67	25	6
Apr-77	NORC	4	1530	67	26	11
Mar-78	GALLUP	3	1560	62	27	6
Apr-78	NORC	4	1532	66	28	9
Nov-78	NBC/AP	4	1600	66	25	8
Jul-79	NBC/AP	4	1599	65	27	6
Apr-80	NORC	4	1468	67	27	9
Nov-80	LAT	6	1829	62	29	11
Jan-81	GALLUP	7	1030	65	24	9
Feb-81	GALLUP	3	1609	66	25	8
May-81	ABC/Wash.	3	1533	73	20	6
Apr-82	NORC	4	1506	74	21	9
Jun-82	NBC/AP	4	1597	71	20	5
Dec-82	ABC	3	2464	76	19	5
Jan-83	HARRIS	5	1254	68	27	5
Apr-83	NORC	4	1599	73	22	6
Apr-84	NORC	4	1473	70	24	8
Jan-85	GALLUP	3	1523	72	20	5
Apr-85	NORC	4	1534	76	19	8
Nov-85	GALLUP	4	1008	75	17	5
Apr-86	NORC	4	1470	71	24	6

Apr-87	NORC	4	1466	70	24	7
Apr-88	NORC	4	1481	71	22	5
Sep-88	GALLUP	4	1001	79	16	5
Oct-88	GALLUP	4	1001	79	16	8
Oct-88	CBS/NYT	4	1518	78	14	9
Jan-89	CBS/NYT	4	1533	71	20	9
Apr-89	NORC	4	1537	74	20	6
Jun-89	YANKCS	8	504	75	17	8
Apr-90	NORC	4	1372	75	19	6
Apr-90	CBS/NYT	4	1515	72	20	8
Jul-90	NBC/WSJ	9	1555	71	20	9
Aug-90	CBS/NYT	4	1422	76	15	9
Apr-91	NORC	4	1517	72	22	6
May-91	NBC/WSJ	9	1508	71	18	11
Jun-91	GALLUP	3	990	76	18	6
Apr-92	ABC/Wash.	4	1003	75	19	6
May-92	NBC/WSJ	9	1118	69	24	7
Sep-94	GALLUP	9		80	16	4
May-95	GALLUP	9		77	13	10
Aug-96	ABC/Wash.	4		77	19	4
Aug-98	ABC/Wash.	4		69	27	4
Feb-99	GALLUP	9		71	22	7
Jan-00	ABC/Wash.	4		64	27	9
Feb-00	GALLUP	9		66	28	6
Jun-00	ABC/Wash.	4		63	27	10
Jun-00	GALLUP	9		66	26	8
Sep-00	GALLUP	9		67	28	5
Feb-01	GALLUP	9		67	25	8
Apr-01	ABC/Wash.	4		63	28	9
May-01	GALLUP	9		65	27	8
Jul-01	HARRIS	5	1022	67	26	7
Oct-01	GALLUP	9		68	26	6
May-02	GALLUP	9		72	25	3
May-03	ABC/Wash.	4	1021	65	26	9
Oct-02	GALLUP	9	1005	70	25	5
May-03	GALLUP	3	1005	74	24	2

Questions

1 Do you believe in the death penalty for murder?

2 Do you favor or oppose capitol punishment for murder?

3 Are you in favor of the death penalty for persons convicted of murder?

4 Do you favor or oppose the death penalty for persons convicted of murder?

5	Do you believe in capitol punishment/death penalty or are you opposed to it?
6	Do you approve or disapprove of the death penalty?
7	Are you in favor of or opposed to the death penalty for persons convicted of murder?
8	Do you, in general, favor or oppose the death penalty for individuals convicted of serious crimes, such as murder?
9	Do you favor or oppose the death penalty?

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Wilkerson v. Utah, 99 U.S. 130 (1878)

Wyatt v. Stickney, 325 U.S. 582 (1971)

[1] These opponents of the Constitution who opposed a strong national government are often called “Anti-Federalists,” a term originally designated by their Federalist opponents. O’Connor. Karen, and Larry J. Sabato. 1997. *American Government: Continuity and Change*. Boston: Allyn & Bacon, Pg. 61

[2] Fellman, David. “Cruel and Unusual Punishments.” *The Journal of Politics*, Vol. 19, No. 1. (Feb., 1957), pg. 34-45.

[3] Five of the original states contained bills of rights in their state constitution which included prohibitions on excessive bail, as well as cruel and unusual punishments, as did Article II of the Northwest Ordinance of 1787, which stipulated that “all fines shall be moderate; and no cruel or unusual punishments shall be inflicted.”

[4] 1 Annals of Congress 754 (1789)

[5] Miranda v. Arizona, 384 U.S. 436 (1966), and Wyatt v. Stickney, 325 U.S. 582 (1971) respectively

[6] Murphy, W.F., C.H. Pritchett, and L. Epstein. 2002. "Courts in Constitutional Democracies." In *Courts, Judges, and Politics*, pg. 46

[7] see Murphy, Pritchett, and Epstein, note 6, pg. 49

[8] see Murphy, Pritchett, and Epstein, note 6, pg. 49

[9] Dahl, Robert A. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *The Journal of Public Law* 6:279-95., pg. 281

[10] see Dahl, note 9, pg. 279

[11] see Dahl, note 9, pg. 282

[12] see Dahl, note 9, pg. 279.

[13] see Dahl, note 9, pg. 283

[14] see Dahl, note 9, pg. 284

[15] Geoghegan, Thomas. 1994. "The Infernal Senate." *The New Republic*, Nov. 21:17-23

[16] see Dahl, note 9, pg. 291

[17] see Dahl, note 9, pg. 293

[18] see Dahl, note 9, pg. 293.

[19] see Dahl, note 9, pg. 294

[20] Casper, Jonathan D. 1957. "The Supreme Court and National Policy Making." *The American Political Science Review* 70:50-63, pg. 52

[21] see Casper, note 20, pg. 56

[22] see Casper, note 20, pg. 56

[23] see Casper, note 20, pg. 54

[24] see Casper, note 20, pg. 60

[25] see Casper, note 20, pg. 63

[26] see Murphy, Pritchett, and Epstein, note 6, pg. 50

[27] Segal, Jeffery A., and Albert Cover. 1989. "Ideological Values and Votes of U.S. Supreme Court Justices." *The American Political Science Review*. 83:557-65.

[28] see Segal and Cover, note 27, pg. 559

[29] see Segal and Cover, note 27, pg. 559

[30] see Segal and Cover, note 27, pg. 561-62

[31] see Segal and Cover, note 27, pg. 563

[32] Mishler, William, and Reginald S. Sheehan. 1993. "The Supreme Court as a Counter-Majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions." *The American Political Science Review* 87:87-101, pg. 87

[33] see Mishler and Sheehan, note 32, pg. 88

[34] see Mishler and Sheehan, note 32, pg. 88

[35] see Mishler and Sheehan, note 32, pg. 88

[36] see Mishler and Sheehan, note 32, pg. 88

[37] see Mishler and Sheehan, note 32, pg. 88

[38] see Dahl, note 12, pg. 285 and also Funston, Richard. 1975. "The Supreme Court and Critical Elections." *The American Political Science Review*, Vol. 69, No. 3. (Sep., 1975), pp. 795-811.

The American Political Science Review, Vol. 69, No. 3. (Sep., 1975), pp. 795-811.

[39] see Mishler and Sheehan, note 32, pg. 89

[40] see Mishler and Sheehan, note 32, pg. 90

[41] see Mishler and Sheehan, note 32, pg. 88

[42] see Mishler and Sheehan, note 32, pg. 91

[43] see Mishler and Sheehan, note 32, pg. 93

[44] see Mishler and Sheehan, note 32, pg. 95

[45] see Mishler and Sheehan, note 32, pg. 97

[46] see Mishler and Sheehan, note 32, pg. 97

[47] Furman v. Georgia 408 U.S. 238 (1972)

[48] Sarat, A. and N. Vidmar 1976 “Public Opinion, the Death Penalty, and the Eighth

Amendment: Testing the Marshall Hypothesis.” *Wisconsin Law Review*., pg. 174

[49] In the election of 2000, for example, George W. Bush received a majority of votes in the majority of states, but because Al Gore received a majority in many of the larger states, Gore won the popular vote.

[50] Furman v. Georgia (1972)

[51] Furman v. Georgia (1972)

[52] Atkins v. Virginia (2002)

[53] Ellsworth, P.C. and S.R. Gross 1994 “Hardening of the Attitudes: Americans’ Views on

the Death Penalty.” *Journal of Social Issues*. 19-51, pg. 33

[54] see Ellsworth and Gross, note 52, pg. 33

[55] Trop v. Dulles, 356 U.S. 86 (1958)

[56] see Ellsworth and Gross, note 52, pg. 23, A 1986 national poll concluded that 65% of the adult population claimed that the death penalty was an issue they feel “very strongly about.”

[57] see Appendix

[58] Markowitz, Michael W., and William E. Harver. 2003. “Public Sentiment on the Death Penalty: Do Race, Gender, Age, and State of Mind Matter? *National Social*

Science Journal. Vo. 21 no.1

[59] see Ellsworth and Gross, note 52, pg. 24

[60] see Barron v. Baltimore 32 U.S. 243 (1833), where the Court affirmed its belief that the Bill of Rights does not impose upon the State government

[61] Bohn, Robert M. 1999. *Deathquest: an introduction to the theory and practice of capital punishment in the United States*. Cincinnati : Anderson Pub. Co.

[62] One of the first cases heard by the Supreme Court dealing with the eighth amendment occurred in 1833, when Tobias Watkins argued that he was charged a fine that was excessive and violated the eighth amendment. The Supreme Court ruled that the eighth amendment is addressed only to the federal courts and that the Supreme Court "has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent on the record, reverse the sentence." The court further ruled that even had the court possessed the appropriate jurisdiction, there was no current method of determining if a fine is indeed excessive.

In 1866, a man by the name of Pervear was indicted in Massachusetts for selling alcohol in his home without a permit. Pervear, having been fined fifty dollars and sentenced to three months of hard labor, took his case to the Supreme Court, claiming that his sentence was cruel and unusual punishment coupled with an "excessive" fine and was in violation of the eighth amendment. The Court disagreed and found nothing in the penalty that would be protected by the Constitution.

[63] Wilkerson v. Utah, 99 U.S. 130 (1878), it should be noted that although Utah did not become a state until 1896, it was declared a US territory in 1850, which made the legislature bound to the rules and amendments of the federal Constitution

[64] Wilkerson v. Utah, 99 U.S. 130 (1878)

[65] Masur, Louis P. 1989. *Rites of Execution: Capitol Punishment and the Transformation of American Culture, 1776-1865*. New York: Oxford University Press, pg. 93-94

[66] see Ibid., pg. 117

[67] see Ibid., pg. 160

[68] McFeely, William. 2001. "When the State Kills." *The History News Network*.

<http://hnn.us/articles/printfriendly/147.html> Vermont was the first state to do this in 1864, during the Civil War

[69] In Re Kemmler, 136 U.S. 436 (1890), citing a commission made by the New York legislature upon request from the Governor to find “a less barbarous manner” of execution then hanging

[70] In Re Kemmler, 136 U.S. 436 (1890)

[71] Weems v. United States, 217 U.S. 349 (1910)

[72] Bedau, Adam. 1997. *The death penalty in America: Current controversies*. New York:

Oxford University Press.

[73] see Bohn, note 61

[74] see Bohn, note 61

[75] see Appendix

[76] Trop v. Dulles, 356 U.S. 86 (1958)

[77] see Appendix

[78] In the wake of WWII, the newly created United Nations issues various documents that discouraged (although did not explicitly ban) the death penalty, including the Universal Declaration of Human Rights.

[79] Robinson v. California, 370 U.S. 660 (1962) and Powell v. Texas, 392 U.S. 514 (1968)

[80] see Ellsworth and Gross, note 52

[81] United States v. Jackson, 390 U.S. 570 (1968)

The statute encouraged defendants to waive a jury trial in order to ensure that the death penalty would not be imposed. In the same year, in *Witherspoon v. Illinois*, the Court ruled that a potential juror with “reservations” about the death penalty could not be dismissed from sitting on a death penalty case, but only those whose attitudes, prosecutors could demonstrate, would prevent him/her from making an impartial decision.

[82] Furman v. Georgia, 408 U.S. 238, actually a collection of cases that challenged the arbitrariness of the death penalty and included Furman v. Georgia, Jackson v. Georgia, and Branch v. Texas

[83] see Appendix

[84] see McFeely

[85] Sarat, A. and N. Vidmar, note 48, pg. 175

[86] Furman v. Georgia 408 U.S. 238 (1972)

[87] Furman v. Georgia 408 U.S. 238 (1972)

[88] Furman v. Georgia 408 U.S. 238 (1972)

[89] Justice Douglas wrote that the death penalty must be considered unusual "if it discriminates against him by reason of his race, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices" while in the final majority opinion, Justice White noted the seemingly useless function of the death penalty by stating the "a penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."

[90] Furman v. Georgia 408 U.S. 238 (1972)

[91] Furman v. Georgia 408 U.S. 238 (1972)

[92] see Sarat, A. and N. Vidmar, note 48

[93] Sarat, A. and N. Vidmar cite various public opinion polls that demonstrate the public's misconceptions about capital punishment and how people who are informed tend to offer vastly different responses, note 58

[94] see Appendix; Gallup poll in March of 1972 showed 50% in favor of the death penalty and 42% against, while support jumped to 57% by November with opposition at 32%. NORC recorded 53% in favor in April of 1972, with 39% opposed.

[95] see Ellsworth and Gross, note 52, pg. 21

[96] see The Death Penalty Information Center (DPIC) <http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#ReinstatingtheDeathPenalty >

[97] Woodson v. North Carolina 428 U.S. 280 (1976)

[98] Both Gallup and NORC polls showed support for the death penalty at 66%, while those opposed were 26% and 30% respectively

[99] U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics <http://149.101.22.40/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm>

[100] Gregg v. Georgia 428 U.S. 153 (1976) and Woodson v. North Carolina 428 U.S. 280 (1976) are actually two of five “Death Penalty Cases” that the court in 1976 along with Jurek v. Texas, Roberts v. Louisiana, and Proffitt v. Florida.

[101] Gregg v. Georgia 428 U.S. 153 (1976)

[102] Gregg v. Georgia 428 U.S. 153 (1976)

[103] That first execution was of Gary Gilmore by firing squad in Utah. In the same year, Oklahoma became the first state to adopt lethal injection as a method of execution.

[104] Coker v. Georgia 433 U.S. 584, 97 S. Ct. 2861

[105] Coker v. Georgia 433 U.S. 584, 97 S. Ct. 2861

[106] see Woodson v. North Carolina 428 U.S. 280 (1976)

[107] see Woodson v. North Carolina 428 U.S. 280 (1976) and Roberts v. Louisiana

428 U.S. 325 (1976)

[108] Coker v. Georgia 433 U.S. 584, 97 S. Ct. 2861

[109] Coker v. Georgia 433 U.S. 584, 97 S. Ct. 2861

[110] Gregg v. Georgia 428 U.S. 153 (1976)

[111] Coker v. Georgia 433 U.S. 584, 97 S. Ct. 2861

[112] The only other state that authorized the death penalty for rape was Florida, but it was limited only to the rape of a child by an adult.

[113] see Ellsworth and Gross, note 62

[114] Solesbee v. Balkcom, 339 U.S. 9, 16 (1950)

[115] see Ellsworth and Gross, note 52

[116] Ford v. Wainwright 477 U.S. 399 (1986)

[117] Ford v. Wainwright 477 U.S. 399 (1986)

[118] Thompson v. Oklahoma, 487 U.S. 815 (1988)

[119] The Court noted that no state allowed for an individual below the age of 16 to vote, serve on juries, or purchase pornographic material.

[120] Thompson v. Oklahoma, footnote 30

[121] see V. Streib, Death Penalty for Juveniles 190-208 (1987)

[122] Thompson v. Oklahoma, 487 US 815 (1988)

[123] In Thompson v. Oklahoma, the Supreme Court cites reports issued by the United States Department of Justice

[124] Thompson v. Oklahoma, 487 US 815 (1988)

[125] Stanford v. Kentucky 492 U.S. 361 (1989)

[126] Penry v. Lynaugh 492 U.S. 302 (1989)

[127] Penry v. Lynaugh 492 U.S. 302 (1989)

[128] Penry v. Lynaugh 492 U.S. 302 (1989)

[129] Penry v. Lynaugh 492 U.S. 302 (1989)

[130] According to the data provided by Penry, Texas shows 86% approval for death penalty, while 73% of those polled opposed its application to the mentally retarded. Florida shows 71% favor the death penalty, while only 12% favor it for mentally retarded people; in Georgia, 66% oppose death penalty for mentally retarded persons.

[131] Penry v. Lynaugh 492 U.S. 302 (1989)

[132] Atkins v. Virginia 536 U.S. 304 (2002)

[133] Atkins v. Virginia 536 U.S. 304 (2002)

[134] Atkins v. Virginia 536 U.S. 304 (2002)

[135] Atkins v. Virginia 536 U.S. 304 (2002)

[136] see Gallup News Service, May 20, 2002