

## *Abstract*

*Is the death penalty dying? This autobiographical essay offers observations on the application of capital punishment in three very different legal jurisdictions at three different time periods when, partially by happenstance and partially by design, she was a homicide researcher, a participant and an observer of- profound changes in the jurisdiction's application of the death penalty took place.*

*The first illustrative case is Nigeria in the early 1970's when the federal government's authority and credibility had been badly damaged by a recent civil war. In Nigeria the military government created a parallel legal system to the ordinary criminal justice system. That parallel legal system could and did order especially harsh and summary penalties, including public executions. Public executions were a visible and highly symbolic way for the State to announce it had established civil rule. There was no public debate and little or no public dissent expressed or allowed.*

*The second example is New Jersey in the 1980's when capital punishment was reenacted by the legislature in 1982 after decades of its absence. The Supreme Court of New Jersey responded to the legislative reimposition of capital punishment by establishing new, highly detailed and technical due process procedures the result of which was: no executions have occurred in New Jersey as of November, 2006, and few persons have been sentenced to death or have had their death sentences upheld by the state high court.*

*The third illustrative example is the extraordinary commutation of 167 death sentences and four pardons, the emptying of the Illinois death row, by departing Governor George Ryan in January of 2003. That dramatic and unprecedented commutation did not happen in a political*

*vacuum. In addition, a set of unpredictable cases, some long in preparation and others not, revealed in a relatively compressed time period that thirteen men on death row in Illinois were innocent, or wrongfully convicted, or both.*

*And finally these illustrative cases are compared with the surprisingly successful, recent, live challenges to the entire system for implementing capital punishment in the United States: the lethal injection cases. This procedural challenge crosses federal and state jurisdictional lines and threatens to bring to a halt all executions in the United States without raising any legal challenges to the death penalty itself with regard to the manner or constitutionality of its imposition.*

Acknowledgements: The author gratefully acknowledges the continuing support of the Northwestern University School of Law and its Research Funds, and the unflagging assistance of the law school staff. Special thanks to Sarah Hager, Marcia Lehr, and Juana Haskin.

## **Not Wiser After Thirty Five Years of Contemplating the Death Penalty**

Leigh B. Bienen

Senior Lecturer, Northwestern University School of Law; Member, Illinois Capital Punishment Reform Study Committee

Introduction

This is an autobiographical essay provoked by the question - Is the death penalty dying? Four illustrative case studies from my experience as a researcher on homicide and capital punishment over the past thirty five years are an occasion to reflect upon my experience with capital punishment in very different circumstances over what seems like a long period of time. One theme is common to all these examples: that is, how inextricable the law, both decisional law and statutory law, is from the larger, surrounding politics of time and place. If the death penalty is dying in the United States, individuals will play a decisive and pivotal role, but there must be a moment, an opportunity, a confluence of forces which may be fleeting, for that to happen.

In the description of the death penalty case studies which follows, the pattern which emerges, if there is one, is a pattern of particularity and individuality. New Jersey and Illinois will never have similar legal institutions. It would be hard to imagine a New Jersey Governor acting as George Ryan did when he emptied death row in Illinois, and equally impossible to imagine the Supreme Court of Illinois taking the course chosen by the Supreme Court of New Jersey in the 1980's. Nigeria is offered as an example of a regime using capital punishment as a tool for other objectives. The lethal injection cases, popping up all over the country after 2002, are an example of the unpredictability of legal outcomes in a system with thousands of actors and adjudicators when the political climate changes every moment.

Illustrative Case No. 1 - Nigeria and the Armed Robbery Tribunal in 1972-1973

My first experience with capital punishment was in the Western State of Nigeria in 1971 when I was looking for a research project to earn six academic credits while on leave of absence after my first year of law school. The truth was I had found the first year of legal education so devoid of intellectual and personal rewards that I had no commitment to continue. I had always loved research, and so I found a project to while away the time. This research on capital punishment in Nigeria, now so distant in time and place, and its methodology so simple, continues to resonate with my present work on capital punishment thirty years later. Perhaps the commonality is the interplay between the law's overarching, studied formality, its seeming objectivity, and the deep irrationality of its application in the particular. This juxtaposition, so striking in the many manifestations of capital punishment, makes the study of the death penalty endlessly seductive. Just when understanding seems imminent, a new contradiction, a fresh irrationality presents itself.

While reading through all of the books in English on African Law in the University of Ibadan Library in 1970, I came across Paul Bohannan's African Homicide and Suicide, (1960) a series of commissioned essays from the 1950's, mostly by British colonial officers who later became anthropologists, about patterns in homicide and suicide in their colonial districts. These anthropologists were careful observers, and this was the beginning of the academic study of homicide, coming into its own with the publication of Marvin Wolfgang's Patterns in Criminal Homicide, (1958) just as quantitative sociology was transforming the discipline. One droll aspect of doing research on homicide in Nigeria in the 1970's was the repeated, solemn observation by British and American academics that the expected rates and patterns of homicide in Nigeria would resemble those of blacks in Philadelphia, because Wolfgang's study differentiated between

blacks and whites. While this suggestion was absurd, the association of the study of homicide with issues of race, as well as class and gender, is long standing and persistent. (Bienen, L.B., Weiner, N.A., Denno, D.W., Allison, P.D., Mills, D.L., 1988, p. 27).<sup>1</sup>

I designed a research project replicating the simple model suggested in African Homicide and Suicide (Bohannon, 1960). After many inquiries, and many people telling me no records existed, I found all the handwritten opinions of the Western State Supreme Court since they had started keeping written records of their opinions. These opinions were similar to records from the eighteenth or nineteenth century in Britain or America. The court first summarized the facts and the evidence presented, and then issued a brief legal ruling. There was an appellate avenue to the federal Supreme Court, but few cases were taken there. These case files, a few pages for each case, carefully written in dipped ink on slick British copying paper, included 114 homicides, a new and fresh set of data on Nigerian homicide cases from the late 1960's, which I addressed following the guidelines given by Paul Bohannon to his anthropologists in the 1950's. What I knew of criminal law was based upon one semester of a textbook and lecture course in the first year of law school.

This seemed like a worthwhile and manageable project: a straightforward account of homicides in Western Nigeria, a state which then had a population about the size of my home state, New Jersey. The law was simple enough. Homicide was a crime, defined in the same way as it was defined in New Jersey: as the unlawful killing of another without justification. The penalty was life imprisonment, or death. The source of the law, including the law supporting the imposition of the death penalty, was British common law and some statutory law, just like in New Jersey. I counted the homicides, identified patterns, such as in the kind of weapon used, the

relationship between victim and defendant, and the circumstances of the homicide, such as whether it occurred in the home or on the road, or during the commission of another felony such as robbery.<sup>2</sup>

The military government had come to power in January of 1966, and there was a second military coup in July of 1966 when Yakubu Gowon assumed power on August 1, 1966.<sup>3</sup> In 1970 the regime in power was the military government with Gowon as Chair of the Supreme Military Council. The military government had suspended certain provisions of the federal constitution regarding the rights of criminal defendants, however, the criminal courts and the rules governing trials and procedures in the Western State of Nigeria were basically unaffected by the fact of a military government with one important exception.

A legal body called The Armed Robbery Tribunal was created after the Nigerian Civil War under the authority of the military tribunal by a Decree. ("Laws of the Federation of Nigeria," 1984).<sup>4</sup> The Nigerian Civil War (1967-1970) had resulted in civilian and military deaths of between two and three million, involved the secession of the Republic of Biafra in the Southeastern region, which was primarily Ibo, the subsequent blockade and siege of the region by the Federal army with many hundreds of thousands of deaths of soldiers, civilians and children.

At the end of the war there was vast civil and economic disruption, with large numbers of weapons and arms in the hands of people who had no prospect of integration into the society or economy. Civilians in places such as Ibadan, where I was living and which was not part of the former Republic of Biafra, were fearful of going out in cars at night, and there were daily reports of armed holdups, burglaries, and murders. Whether this was a crime wave, or hysteria promoted by the press or the government, was unknown. Evidence of the destruction of the civil war was

everywhere, as was the sense of disorder and the lack of governmental control. Everyone had weapons, the government officers, the police, and the criminals.<sup>5</sup>

Meanwhile, in this time before the internet, when international telephone calls and telegrams were expensive, sporadic and unreliable, I had two sources of information about homicide in Western Nigeria: some very dated books in the library, my collection of handwritten cases from the Western State Supreme Court Library, and the Nigerian newspapers and tabloids, which sold copies by reporting murders, divorces, robberies and the thieving of politicians.<sup>6</sup> These same tabloids periodically featured gruesome reports, complete with photographs, of public executions on the Bar Beach in the national capital, Lagos, under the authority of The Armed Robbery Tribunal. Ten to twenty miscreants at a time would be executed by firing squad, their bodies then thrown to the waiting sharks in the Bay while crowds numbered in the thousands watched.

So in the heat and dust and confusion of Western Nigeria in 1971-72—there was little or no air conditioning—I pursued two parallel tracks of inquiry, a pattern I have continued to this day: the first, an academic, formal, quantitative, seemingly objective annotation of patterns in homicide, and the second, a narrative description of the unstructured chaos that I observed around me. This is not to imply that one form of inquiry is superior to the other, but rather that the two approaches complement one another; indeed each is deficient without the other. The seemingly objective approach of measuring the attributes of killers and victims and the circumstances of murder is also deeply irrational, in spite of its being couched in scientific rhetoric.

There was the formal law, the cases and statutes, the rules of evidence—impeccable and impenetrable, and not very different from what I had read in my casebook in New Jersey—and the



circus surrounding the public executions reported in the tabloids. The stories included pictures of those about to be executed, and, after execution, reports of last rites and the last words of penitence, or curses, by those being executed, as well as stern admonishments by judges and law enforcement.

The Western Nigerians were at that time justifiably proud of their completely Africanized criminal justice system. True, there were cracks in the formal system-such as the rule that the standard for insanity for the law in Western Nigeria was what would be considered acceptable to the average man on the street in an English provincial city, such as Leeds or Manchester-but the consensus on the part of both professionals and the public was that this was a functioning legal system. The trial court judges assigned counsel to indigents in every murder case, protected the due process rights of defendants, and followed the British rules of evidence even when such legal protections were no longer required under the federal constitution.

While the formal criminal law was the British common law, including a provision for the death penalty, in fact, under the ordinary criminal system in the Western State of Nigeria, the death sentence was rarely imposed and only upheld after lengthy appeals. When executions under the ordinary criminal law did take place – perhaps three or four in a decade – there was no publicity or notoriety or sensationalism surrounding them. The next of kin were informed that the convicted murderer who had languished without publicity in prison during a series of British type of appeals based upon legal precedent had been executed.

Then there was this other legal system, the one which was tying the convicted to posts, shooting them and throwing their bodies to the sharks in the Bay. That legal system took its authority from the 1970 Decree of the military government, not from a statute passed by a

legislature, or from the common law traditions of the British legal system, or from traditional African legal norms.

The Decree of 1970 had created a new quasi judicial body called the Armed Robbery Tribunal, consisting of a trial court judge, a military officer, and a police officer. This Tribunal had one function, to decide whether a defendant was guilty under the provisions of the Decree. (Development Policy Centre Nigeria, 2000).<sup>7</sup> Those eligible to be convicted were not just murderers and armed robbers, but also those ‘in the company of’ those committing an armed robbery. If a person was found guilty, the sentence was an automatic death sentence.<sup>8</sup> There were no appeals to the ordinary criminal justice system or to the federal courts from decisions of this Tribunal, although the military Governor did have the authority to grant clemency.<sup>9</sup> And the executions were public.

As this research proceeded, I decided to observe every level of adjudication in the criminal justice system.<sup>10</sup> I discovered when I went to my first murder trial – my journalistic instincts told me I should see what was actually happening in trials before writing anything – that the proceedings were conducted in a language the accused did not understand, English. The scholarly tomes in the library had not mentioned this fact, perhaps because it was so taken for granted that none of the commentators thought it remarkable, or even requiring explanation, or justification.<sup>11</sup>

When I interviewed the members of the Armed Robbery Tribunal the Judge, who was a police officer, assured me that the purpose of the public executions was to deter crime, to stop the post civil war violence by showing the criminals what happened to those who were caught. Certainly there was widespread civil mayhem. No one with a car drove at night or on unknown

roads, and there were many guns in the hands of people with grievances and no jobs or money.

The Judge looked sternly at me and said, it was all very well to be against capital punishment in America – he had been to Atlanta for training at FBI headquarters – where there was a well established tradition of respect for law and order (perhaps I demurred on the subject of the public executions, although I don't remember doing so) but the present chaos in Nigeria called for capital punishment, and public executions.

Neither the judges of the Armed Robbery Tribunal, nor the military officers who created the Tribunal, nor the general population of Nigerian millions, most of whom were law abiding, nor I, can say with authority whether the public executions deterred any armed robberies or murders, (Ilo, 2004)<sup>12</sup> beyond the possible future robberies and murders not committed by those thrown to the sharks at Bar Beach on a particular day.<sup>13</sup> The Judge, however, firmly believed that these executions were a deterrent to further civil disorder and to future armed robberies and murders.

My recollection is that the public executions usually took place on a weekend, so that more people would come. Probably they didn't take place on a Sunday. This was then a Christian part of the country. The carnival atmosphere of these occasions was striking. The crowds at the Bar Beach were market women and babies, pickpockets, boys with sticks and girls in colorful wrappers, according to the pictures and published reports – I never attended an execution – and what seemed to be a random, ordinary collection of men and women who had nothing better to do that day. People seemed to become exhilarated at the prospect of a killing, and some of the condemned commanded attention from their brief position on center stage.

Whether or not public executions deterred murder and armed robbery, at the end of the

academic year, I was completely seduced by this research. The death penalty has remained an abiding preoccupation. Every time I plan on moving away from it, some new development will bring me back. In the 1970's I collected all of my data points on 114 homicides, observed every level of adjudication, including several murder trials, interviewed every level of judge in the court system, as well as defense attorneys and prosecutors and legislators. I came to Nigeria prepared to leave law school when I returned to America. I returned as a homicide researcher. My first job after law school, on the recommendation of Marvin Wolfgang, was working as a research attorney for an NIMH study of sexual assault in Philadelphia. I spent fifteen years as a Public Defender working on homicide and capital punishment in New Jersey and conduct similar research now in Illinois, all because I was seduced by the contradictions of capital punishment in Nigeria thirty five years ago.

#### Illustrative Case No. 2 – New Jersey, 1980-1992

A few years after graduating from law school I went to work for the New Jersey Office of the Public Advocate which then included the statewide Office of the Public Defender. When I brought up my research background, working on capital punishment and homicide in Nigeria, to the lawyer who would basically be my supervisor for the next fifteen years, he crisply informed me that New Jersey had no death penalty. The last execution was more than twenty years ago.<sup>14</sup> And, he continued, it was unlikely there would be a death penalty in New Jersey in the future. The then Governor had promised to veto any capital punishment bill out of the legislature, and the votes aren't there to override his veto. Besides, he added, we don't do social science type research

at the Office of the Public Defender. This is a law office. By this time I had spent several years working on a scientific study of sexual assault in Philadelphia and was familiar with the quantitative analysis of legal issues in the context of rape and sexual assault. The statistics and the legal analysis were a rudder and a distancer in the area of rape, as well as homicide, for me, for the courts, and for the legal system.

The year was 1976, when state legislatures had received the green light from the United States Supreme Court in Gregg v. Georgia (1976) to go ahead with executions. New Jersey had reluctantly declared its system of capital punishment unconstitutional in State v. Funicello (1972).<sup>15</sup> After monitoring the passage of new criminal code, I ended up spending ten of my next fifteen years as a Public Defender constructing an empirical study of homicide in New Jersey. It was another attempt to impose objectivity, the science of quantitative analysis, on the chaos and confusion brought on with the reimplementation of capital punishment. It was the rationalist's hope that if only we could get enough information, and analyze it with sufficient scientific objectivity, we could control and understand what was happening. The application of the death penalty would be principled, under the law. That impulse would come again in Illinois and is seen in the lethal injection cases as well.

My colleague had been correct in predicting that the reenactment of capital punishment in New Jersey was not a foregone conclusion, even after Gregg v. Georgia. (Bienen et al., 1988).<sup>16</sup> When constitutional provisions prevented Governor Brendan Byrne from running again in 1982, the newly elected Republican Thomas Kean did sign the bill reinstating the death penalty. The effective date of reenactment was August 6, 1982, the date that Governor Bryne's successor signed the bill. The first capital prosecution in New Jersey occurred soon after, and the

New Jersey Supreme Court immediately began to hear a series of procedural and systemwide challenges to the reimposition. (Bienen et al., 1988, p. 70-100)

The state legislators were unequivocally in favor of the death penalty, although it was never entirely clear why the state legislators were so keen to reenact.<sup>17</sup> The ‘father of the death penalty’, Senator John Russo, was formerly a prosecutor, but it was not the county prosecutors who were pushing for the reenactment. New Jersey is one of the few states not to elect county prosecutors, or to elect judges. A majority of the 21 county prosecutors, who were appointed in New Jersey, did not favor reenactment of capital punishment according to an informal poll taken at a county prosecutor’s meeting just before the effective date of reenactment. Nonetheless they all vowed to follow the law and prosecute death eligible homicides as capital cases after reenactment.

The New Jersey legislature which was so keen to reenact never turned down a request for funds for capital defense from the Office of the Public Defender during the first decade after reenactment. The Department regularly spent more than a million dollars on a single capital case, especially in the early years of the statute when no one, including the judges, the prosecutors, and the defense attorneys, knew how to interpret or apply the new death penalty law with the two tiered trial and its statutory aggravating and mitigating factors. When New Jersey reenacted, Illinois was well on the way of filling up its death row, although the first execution in Illinois was not until 1990. The first death sentence in Illinois was upheld in 1981. (Bienen, 1996). New Jersey in 1982 was already well behind Illinois in reestablishing a capital punishment system which regularly turned out death sentences and executed defendants.

This is where I became a homicide researcher again. With the expert assistance of

colleagues from the Criminology Center at the University of Pennsylvania, the Supreme Court of New Jersey and skeptical defense attorneys and prosecutors were persuaded that the entire system of prosecuting and trying homicide cases in New Jersey should be examined in detail. The basic tenet of proportionality review was to inquire whether a particular death penalty imposed upon a particular defendant is 'just' or 'proportionate' when compared to other cases in which the death penalty has and has not been imposed.

Whether or not all death eligible cases as capital cases were prosecuted was one of the most important factual determinations of the long investigation into homicide and capital case processing which came to be known as proportionality review. (Bienen, 1996).<sup>18</sup> It was surprising to the Public Defenders in New Jersey that jurors in the first capital trials in the state overwhelmingly rejected the imposition of the death sentence, even after finding the defendant guilty of a clearly death eligible murder, in spite of the high level of support for capital punishment reported in the polls. Out of more than 130 initial capital prosecutions, only 25 were sentenced to death. (Bienen et al., 1988, p. 170, Table 2). The Public Defenders could congratulate ourselves that the legal defense was effective, but perhaps it was that jurors, when faced with an actual defendant, even one who had been proved to have committed a horrific murder, didn't want to vote to kill another human being. And these were jurors who had been death qualified and were thus more likely than the general public to be in favor of capital punishment.

When the death penalty was reenacted in New Jersey in 1982, it was not clear who wanted it, except few highly vocal state legislators. State Senator John Russo claimed he persisted for years in reintroducing legislation reenacting capital punishment when it had no chance of

becoming law to avenge his father who was a murder victim. Senator Russo was a powerful state legislator, a member of the Senate Judiciary Committee during the time when the Criminal Code was being passed.<sup>19</sup> He also repeatedly said he wanted the death penalty to be fair and for defendants to have all due process rights. Ironically, Senator Russo was acquainted with several of the personages in the Robert Marshall case, the case from his county, Ocean County, which became the principal statewide challenge to the reimposition of capital punishment in New Jersey.

The facts in the Robert Marshall case were the perfect foil for the challenge to the reimposition of capital punishment in New Jersey, (Bienen, 1996, p. 183-212)<sup>20</sup> as evidenced by the fact it was the subject of a best selling book and then a made for television movie. (Bienen, 1993).<sup>21</sup> The case exhibited a motley cast of clowns and bumblers, including the private defense attorney who took what money Robert Marshall had, didn't call his children to testify at the penalty trial, and then dumped the case on the Public Defender for what turned out to be more than 20 years of appeals. Not only was Robert Marshall the perfect hero-villain for the ensuing death penalty drama, but the attributes of his case made this the perfect case for the New Jersey Supreme Court to address the legal and ethical conundrums raised by the new death penalty.

Led by Robert N. Wilentz, the son of the Attorney General who orchestrated the drama which led to the execution of Bruno Richard Hauptmann in 1936 for the kidnapping and murder of the Lindbergh baby, the Supreme Court of New Jersey was in the 1980's the most intellectual and thoughtful state supreme court in the country. It was particularly known for developing state constitutional law doctrine, relying upon state constitutional principles at a time when the United States Supreme Court was becoming unwilling to reexamine the procedures in state capital convictions, look at state capital punishment systems or halt executions.<sup>22</sup> The Robert Marshall



case became the occasion for the New Jersey Supreme Court to examine systemwide aspects of the legal ramifications of reenactment in New Jersey, before upholding his death sentence as constitutional in 1992, ten years after reenactment.

Robert Marshall was white, a college graduate, a successful insurance executive who seemed to live an ordinary small town American life until this aberrational murder. He was clearly guilty of planning his wife's killing. The outcome of the case at trial exemplified the quixotic aspect of capital trials: Robert Marshall himself was sentenced to death; one of the assassins, probably not the trigger man, was sentenced to time served; the other assassin was acquitted at trial; the 'go between,' a clerk in a country store whose role was to allow his phone to be used and relay messages to the assassins, was sentenced to thirty years without parole. Recently, an interim Governor commuted the sentence of the co-conspirator. (Vaughan, 2006).<sup>23</sup> After twenty years of federal and state appeals Robert Marshall's death sentence was set aside on grounds of incompetence of counsel by the Third Circuit Court of Appeals in 2005. ("Marshall v. Cathel," 2005).<sup>24</sup> The Attorney General of New Jersey asked for a writ of *certiorari* to the United States Supreme Court on the last day of eligibility.<sup>25</sup>

The New Jersey Supreme Court, under the strong leadership of Hauptmann's prosecutor's serious son, addressed the legal and ethical conundrums of the 'new' death penalty. Objective statistical and legal analysis was applied to the irrationality of the crime and the bizarre outcomes at trial. This juxtaposition posed many conundrums. The reenactment of capital punishment in a number of states had been tarnished by the continuing taint of racial and economic bias in prosecution and sentencing. The poor, and mostly minorities, were sentenced to death. While that was uncontested, the reasons for it were confounded and, for some, inextricable from inequities

which plagued the criminal justice system as a whole. Robert Marshall himself was not poor, mentally retarded, or socially or culturally disadvantaged. Nor was he mentally ill, psychotic, sadistic, a mass murderer, or any other kind of madman whose fate at the hands of an executioner would raise different legal and ethical issues. Although there was widespread publicity at his trial, Robert Marshall's death sentence presented a relatively straightforward case for the court to use as an occasion to consider systemwide inequities and procedural problems with the reimposition of capital punishment. His appeal also arose at a fortuitous moment in the development of capital punishment jurisprudence in New Jersey.

The Supreme Court of New Jersey did not uphold the statute as constitutional until five years after reenactment, and after reversing 27 consecutive death sentences. This along with the court's controversial stand in other cases caused the Chief Justice Wilentz serious problems at his seven year confirmation hearing.<sup>26</sup> Several state legislators expressed their unhappiness with the fact that four years had passed since reenactment and no one had been executed under the new statute. (Bienen, 1996, p. 209, n. 283).<sup>27</sup> Nonetheless he was confirmed, and the court continued to develop extraordinary constitutional doctrine regarding capital punishment. The Supreme Court of New Jersey finessed the fact that the United States Supreme Court had in 1984 declared that proportionality review was not required by the federal constitution and had rejected a systemwide challenge to a state capital punishment system in 1987. The Supreme Court of New Jersey simply said that law did not apply in New Jersey. The Supreme Court of New Jersey also simply ignored a legislative provision restricting proportionality review in New Jersey to a limited comparison of death only cases. (Bienen, 1996, p. 211, n. 295).<sup>28</sup>

Instead the Supreme Court of New Jersey took over the study of all homicides in New

Jersey since the reimposition of capital punishment, which was started at the Office of the Public Defender, hiring as a Special Master Professor David Baldus from the University of Iowa, the expert whose statistical study had not been persuasive to the United States Supreme Court. He had been the academic principally in charge of the Georgia studies brought before the United States Supreme Court over decades of litigation, culminating in 1987. In New Jersey Professor Baldus and others devised a new methodology for comparing the characteristics of the offense and offender to determine whether the imposition of the death sentence in a particular case was proportionate, or just. (Bienen et.al., 1998, p. 183-207, n. 193).<sup>29</sup> The defining of this procedure and its application to individual cases took years and resulted in an elaborate jurisprudence, culminating with the upholding of Robert Marshall's death sentence as proportionate. ("State v. Robert O. Marshall, II," 1992).

No other state Supreme Court before or since has been willing to hold an entire criminal justice system up to the light. Then, the times changed, and the court's personnel changed. Chief Justice Wilentz died, and Justice Handler, who had been one of the most thoughtful of the contributors to the inquiry, retired, and other Justices of the Supreme Court of New Jersey retired or were replaced. (Bienen, 1996, p. 209, n. 284).<sup>30</sup> After ten years of research on homicide and the death penalty in New Jersey, after, as Justice Handler of the Supreme Court of New Jersey noted, thousands of hours and thousands of pages of New Jersey Supreme Court opinions, the grinding of many computers and miles of green bar printout – that's where the technology was then – what was accomplished by proportionality review in New Jersey? Robert Marshall himself will not be executed for other reasons.

In the Robert Marshall case, after all of the statistics, after all of the systemwide analysis,

after all of the technicalities of proportionality review, the most difficult fact for the court to reconcile was that there was another case from another county in New Jersey which was almost a twin of the Marshall case on its facts. (Bienen, 1996, p. 196, n. 234). In another case a relatively well off, white man – I don't use the term 'middle class' because there were suggestions of an organized crime association – hired two assassins to kill his wife. In some respects the circumstances of this case were 'worse' than those of Marshall. The wife was tortured before being killed by the two thugs hired to kill her.

As in Marshall there was no question of the guilt of the defendant, and it was a killing for hire. And yet the County Prosecutor in that case chose not to prosecute the case as a capital case, in spite of the fact there was strong factual basis for more than one statutory aggravating factor: the cold blooded hiring of two assassins to kill, and the torture of the victim. How could the principle of proportionality be maintained in the face of such a contradiction? More than the statistics, more than the regression analysis, more than the philosophical principles, this simple intuitive comparison, between two cases, one where death was imposed and a similar case where it wasn't because of a prosecutor's choice, proved to be intractable.

Yet, at the end of all of these extraordinary legal proceedings, the Supreme Court of New Jersey was still stuck with the death penalty. The Court had been successful in postponing executions, at least for some time. Now the New Jersey legislature has taken an unprecedented step in imposing a moratorium on executions and creating a Study Commission whose mission it is to come up with findings for keeping the death penalty. Probably the legislature could not have taken this stance if the Supreme Court of New Jersey had not engaged in fifteen years of extensive dialogue about the reimposition of capital punishment in New Jersey. The methodology

developed for the Marshall case has been and will continue to be applied to others sentenced to death whose sentences automatically come to the New Jersey Supreme Court for review, as long as there is a death penalty in New Jersey.

There was little entertainment value in proportionality review, although, as with every aspect of the death penalty, there were many ironies. As a homicide researcher it was enormously satisfying to be able to collect the data on all homicides in New Jersey since the reimposition of capital punishment in 1982, to participate in the creation of a workable model for analyzing cases by category of offense and offender, and then to watch the contradictions rise to the surface in this relatively straightforward and scientific process. Though proportionality review did not result in the Court declaring the system unconstitutional, it did result in a substantial body of jurisprudence.

As of January, 2006 there is a legislatively imposed moratorium on executions in New Jersey, and that same bill passed January of 2006 created a Study Commission to submit its findings to the New Jersey legislature before November 15, 2006. (“An Act Creating a Study Commission on the Death Penalty and Imposing a Moratorium on Executions,” 2006).<sup>31</sup> The Study Commission has published a cost study detailing the entire cost of the reimposition of capital punishment and the cost of individual cases. The bill asks the legislature to repeal the death penalty unless there can be shown a reason to continue it. It is the only legislatively imposed moratorium, and the findings announced in the statute are extraordinary.<sup>32</sup>

To understand what happened in New Jersey, it is very important to know that the 21 county prosecutors are not elected, and that the last execution was in 1963. The legal institutions are not dug in with regard to a commitment to the death penalty. This is probably the most

significant difference between Illinois and New Jersey. In Illinois the Supreme Court could hardly wait to affirm the first death penalty. They never recognized that the old statute was unconstitutional. In Nigeria the constitutionality of capital punishment was not even discussed. New Jersey is a unique political and legal culture, one without much interest or commitment to the reimposition of capital punishment. That cultural context was critical, as was the long standing tradition of judicial independence and the respect for the Supreme Court of New Jersey.

As always, there were unpredictable elements in New Jersey as well. The former Governor of New Jersey, who opposed the bill creating the Study Commission and the moratorium on executions, resigned for reasons unrelated to the death penalty. The interim Governor, having nothing to lose politically, was willing to sign the legislation establishing moratorium and the bill creating the Study Commission. The present Governor, John Corzine, supports the moratorium and the bill. The former Attorney General of the State, Zulima Farber, who resigned for reasons unrelated to capital punishment, was not in favor of capital punishment, and it remains to be seen whether her successor will take the same position.<sup>33</sup>

In New Jersey the death penalty does seem to be dying, but the death penalty had not for decades been strongly entrenched in the political or legal culture. It is as if the entire state is still recovering from the Hauptmann execution. For a critical decade the state Supreme Court was willing to distinguish its death penalty rulings from the trend at the United States Supreme Court and rule on the basis of state constitutional law. The leadership and tenacity shown by Chief Justice Wilentz in this area could not have been predicted and will not be replicated. It was important that the executions never started after reenactment, and few death sentences have been imposed or upheld by the state supreme court. (“National Association for the Advancement of

Colored People Legal Defense and Education Fund,” 2006).<sup>34</sup>

### The Change in the Political Climate in the 1990's

In the 1990's the legal arguments in capital cases were becoming increasingly technical and incomprehensible to the public, replacing the dramas of revenge in some of the first death penalty cases after Furman, cases such as those involving Ted Bundy or Gary Gilmore. Perhaps the most telling analysis of the changes in the 1990's will be made by a demographic study of criminal defendants and the changes in the prison population during this decade. Nuances of federal appellate procedure were cast as rule interpretations and refined to tell death row inmates that they had no more avenues of appeal, even if they brought a new claim of innocence. The composition of the United States Supreme Court had changed, and the court had become impatient with protracted appeals in death cases. Lawyers who made careless mistakes, such as filing papers a day late, were responsible for sending their clients to the execution chamber. The technicalities of the questioning of jurors, who was qualified to vote for or against death based upon what they said in *voir dire*, was weighed down by an increasingly arcane body of precedent. Each state had different rules, and cases in the federal system were being bounced back to the states. Somewhere along the way the moral high ground was lost by those who had championed capital punishment as the return to a more principled criminal justice system based upon the harsh punishment of murderers.

At the same time stories of death row inmates who were drugged, mentally incompetent, who didn't realize they weren't coming back from the execution chamber to eat their dessert, and

inmates who were abused and brutalized as children became common currency, offset by the increasingly vocal victims' rights advocates. The discourse was all about pain and suffering on both sides. The reports were of local prosecutors running for reelection based on the number of murderers they sent to the gallows, of drunken and incompetent defense attorneys who were assigned cases after contributing to a judge's reelection campaign, of courts and counties who wouldn't pay more than a few hundred dollars to defense attorneys, as well as allegations of false confessions, torture at the police station, rigged or mistaken identifications by eye witnesses, lost evidence, forged evidence, suppressed exonerating evidence, and on and on. (Medwed, 2006).

While the new death penalty was bringing forward tales of less than a clean cut or wholesome death penalty, the innocence movement was gaining momentum. Dozens of inmates on death row were proved to be entirely innocent of the crime for which they had been sentenced to death. In state after state defense attorneys, who were learning to coordinate and collaborate on what came to be seen as common patterns, were able to show that some people on death row were there because their false confessions were coerced, or because evidence of their guilt had been manufactured and evidence of their innocence suppressed or ignored. Or, just too many sloppy mistakes had been ignored, and no one cared. In trial courts across the country there were reports of things going on which didn't comport with what many observers thought was fair or just. And the issues of race, of race and economic status, of race and ethnicity never went away. Meanwhile, courts and administrators of the death penalty seemed to be increasingly impatient with rational argument and objective evidence and what they called legal technicalities. It was time to move on with the executions.

As those on death row came out from the shadows, and the stories of their wrongful



convictions were told, they were seen to be human, often pathetic bumbling with a record, who were in the wrong place when the police arrived. When dozens of claims of innocence became credible, prosecutors were backed into a corner. To admit prior mistakes was disloyal to their colleagues and institutions. People on death row were found innocent and released, but the number of people sentenced to death continued to grow. With the exception of Texas, no state was executing enough people to bring the numbers down. In the meantime our commercial entertainments became increasingly violent: showing widespread carnage, murder and the dead stacked up like jacks or poker chips. The demographic of young men most likely to kill or be killed was especially addicted to ritualized violence on small and large screens. While the impact of this may be difficult to measure, arguments about the inhumanity of capital punishment seemed dated, or irrelevant, as the public became increasingly inured to public representations of violence and killing, and as the number of people sentenced to death continued to increase.

### Illustrative Case No. 3 - Illinois, 1998-2003

When I left New Jersey in 1995 to come to Illinois I was convinced I would never again do research on homicide or the death penalty. After all, nothing was happening in Illinois in 1995. There was a very large death row population. The Public Defender did not have the advantage of a strong statewide administrative structure or a budget similar to that which allowed the New Jersey Office of the Public Defender to spend millions of dollars on the defense of a single capital case. The Illinois Supreme Court had declared that it did not and would not conduct proportionality review. The court regularly affirmed death sentences. The then Governor was in

favor of capital punishment, and executions had begun. Public support for the death penalty was high, although not significantly higher than the national levels.

The Illinois Supreme Court had repeatedly affirmed death sentences. (Bienen, 1996, p. 166, Table 1). There was a brief moment first in 1979 and then again in 1984 when the constitutionality of capital punishment was a live issue before the state Supreme Court and federal courts in Illinois. ( "People ex rel. Carey v. Cousins," 1979; "People v. Lewis," 1984; "People v. Silagy," 1984).<sup>35</sup> Since that time the Supreme Court of Illinois indicated in numerous opinions that it was uninterested in system wide challenges to the capital punishment system. There had never been the institutional will or the leadership within the Illinois criminal justice system for an enterprise such as the analysis of criminal justice system undertaken by the Supreme Court of New Jersey with the participation and cooperation of numerous other courts and state agencies, including the Office of the Public Defender, the county prosecutors and the Attorney General.

The Illinois prosecutors, the State's Attorneys, are individually elected and answer to no higher legal authority than the voters in their individual jurisdiction. And there are 102 of them. They are elected as county officials, and there is no limitation on the number of terms they may serve. These are 102 very autonomous local officials, each with the independent and unreviewable authority to select a case for capital prosecution, or not.<sup>36</sup> Given the breadth of the Illinois statutory aggravating factors, when I arrived in 1995 and began reading the daily newspapers, it seemed as if a capital case was always on deck, on trial, being investigated, or one of the more than 160 inmates on death row was coming up for execution. The culture of capital prosecutions was and is well entrenched in Illinois.

The State's Attorney of Cook County is the most visible State's Attorney in Illinois, and

one of the most powerful and autonomous political figures in the state. Prosecutions by the Cook County State's Attorney, like those by equivalent offices in Los Angeles and New York, regularly are national news. The State's Attorney of Cook County, and the other Illinois State's Attorneys have always been visible and vocal advocates for the death penalty in the state, both in theory and practice. Cook County regularly accounts for about three quarters of the state's murders and the largest number, and the most visible, if not the largest proportion of capital prosecutions. (Illinois State Police, 2003).<sup>37</sup> The State's Attorneys in Illinois have often been legendary political figures. There has long been a well marked path from the State's Attorney's office, especially the Cook County State's Attorney's office, to the state legislature, to the judiciary, to the Illinois Supreme Court, and to other state and occasionally national political offices.<sup>38</sup> The elected state judiciary, and the state supreme court, have traditionally included many former State's Attorneys.

In 1995 the Republican Governor of Illinois, James Edgar, didn't seem to be particularly eager to carry out executions. The first execution after reenactment in 1990, when James Thompson was Governor, was of Charles Walker, who decided not to pursue further appeals. (Warden, 2005, p. 398). The next execution in May of 1994 was of John Wayne Gacy, the notorious murderer of young boys and men. Governor James Edgar included in his campaign for Governor in the fall of 1994 extensive publicity of his opponents opposition to the death penalty. (Warden, 2005, p. 399). After his election Governor Edgar signed five death warrants. One of those cases was based upon a problematic confession, and this case attracted some attention from columnists after Northwestern University students investigated the case and launched a campaign on the defendant's behalf. In 1996 Governor Edgar did commute one death sentence, that of

Guinevere Garcia, fourteen hours before she was to be executed. (Warden, 2005, p. 401, n. 85).

In 1995 I and many others could not have anticipated what happened in the next few years. The institutional system supporting capital punishment didn't change; the State's Attorneys remained enthusiastic prosecutors of capital cases. The Illinois Supreme Court did not abandon its bizarre electoral system for state Supreme Court judges which divided representation, ensuring factionalism and precluding establishing, at least in recent decades, a court known for intellectual leadership and political independence. The Public Defender in Illinois did not become institutionally stronger, richer, or more capable of addressing issues on a statewide basis. Factors outside of the institutionalized criminal justice system were critical.

In 1998 the innocence movement was gaining momentum. An extraordinary conference at Northwestern University School of Law, organized by Professor Lawrence Marshall and others, brought together some 1500 advocates, representatives of the national and international press, and, most importantly, and 29 men and women who were the living embodiment of the fact that the innocent could be wrongfully convicted of capital murder. (Sarat, 2005, chap. 1).<sup>39</sup> When these men and women told their individual stories of how they ended up on death row, the world began to watch and listen.

The sympathy of the public for the innocents did not happen overnight or because of one event, and it did not happen without an enormous amount of expert effort and coordination between old and new advocates for capital defendants. Many of those who ended up on death row for crimes they did not commit had committed other crimes, or had problems with addictions, and few were articulate enough or in a position to tell their stories effectively to a skeptical American public. A group of articulate and highly skilled advocates, writers, and journalists brought these

cases and the discussion of capital punishment to a national level. This is where individuals and the advocacy movement as a whole, as well as the journalists and the larger legal community made an enormous difference. The mention of the conviction of the innocent formerly could elicit the response, that this was just one of the unintended costs of the criminal justice system, analogous to highway deaths. And one case could always be dismissed as an aberration, or the result of the particularity of its circumstances.

In 1998 after the Northwestern University School of Law National Conference on Wrongful Convictions and the Death Penalty there was a step level change in public perceptions and public discussion. The political climate changed, and support for a statewide moratorium gained momentum. (Roper Center for Public Opinion, 2003).<sup>40</sup> I use those vague and impalpable terms because the change was like a change in the seasons, if you had been working on the death penalty for decades you could sense it in the air. No one was more surprised in 1998 than the old hands who had been seeing the same fifty people at death penalty conferences since Gregg. In 1998 it felt like the coming together of elements which had been waiting to happen for some time. This change in the political weather was not immediate, nor was it the work of one person or group, or one case or series of events, although there were people without whom it would not have happened. But, once the political atmosphere changed, there was no going back to the old assumptions.

For several years the national Innocence Project, under the direction of Professor Barry Scheck at Cardozo Law School and others, had been pursuing evidence of the actual innocence of capital defendants by reexamining identification evidence with newly sensitive DNA tests. The DNA analysis offered a whole new avenue for the uncovering of wrongful convictions. The seminar on capital punishment taught in the Medill School of Journalism at Northwestern

University by Professor David Protess had for more than a decade been working with undergraduates and law students in researching the factual basis for questionable capital convictions. The founding of the Center on Wrongful Convictions at the Northwestern University School of Law was another milestone. These activities came together in an extraordinary way after 1998. (Warden, 2005, p. 399-410).<sup>41</sup>

Another critical factor in Illinois was the expertise and experience of the columnists and crime reporters for the Chicago Tribune and several other prominent Chicago papers and legal journals. For years, staff reporters and editors at the Chicago Tribune had collected data on capital cases, and on homicides in Cook County, and had written extensively about individual capital trials and appeals, and, the questionable tactics and practices of all participants in the Illinois capital case processing system. No newspaper in New Jersey played a similar role. Then, the perfect storm occurred: the case of Anthony Porter. The legal community and the public were forced to acknowledge that something was drastically wrong with a system which could sentence Anthony Porter to death for a crime he didn't commit.

The highly dramatic unraveling of the Anthony Porter death sentence was told in real time by several people simultaneously, his attorneys, newspaper columnists and reporters, who quickly realized something extraordinary was happening, and by the newly galvanized coalition of lawyers and advocates against capital punishment.<sup>42</sup> These were the unpredictable and mutually reinforcing elements of the Anthony Porter case: his actual innocence, that he came within hours of being executed, the fact that his case and the circumstances of his conviction matched system-wide defects in the national criminal justice system (the evidence against him included uncorroborated eye witness testimony and what turned out to be a false confession shortly after

his arrest); he was an African American man with a prior record, possibly mentally retarded, with no job or social support system at the time of his conviction; he was arrested because he was near the crime scene at the time of the murder; and there was no physical evidence connecting him to the murder.

I was teaching a seminar on homicide and capital punishment at Northwestern University School of Law before the Anthony Porter case began to unravel, and the seminar read the Illinois Supreme Court opinion unanimously affirming Anthony Porter's conviction. ("People v. Porter," 1986, p. 1329 -30).<sup>43</sup> It contained several quotes, allegedly his statements, presumably from the police reports. At the time I recall saying to the students that the quotations sounded 'canned', the kind of obviously incriminating, aggressive, hostile statements which I had seen attributed to defendants time and time again in police reports in New Jersey. It wasn't that defendants didn't sometimes incriminate themselves, or confess, or make hostile and insensitive comments, but they didn't all use the same language, the same phraseology, the same syntax and diction, especially those defendants who barely spoke English, or were incoherent, inarticulate, or struck dumb by their arrest. Indeed there is now a phalanx of experts trained to compare questionable statements by defendants with their ordinary speech patterns.

When I mentioned my suspicions to one of Anthony Porter's attorneys at the time, he replied, correctly, that the Illinois Supreme Court had unanimously affirmed the conviction twice, and the conviction was the result of a jury verdict. At that point no one had ever suggested Anthony Porter had not committed the murder. This same attorney uncovered evidence suggesting Anthony Porter might be retarded, an issue which had never been raised at trial, and it was the possibility of this being a valid legal issue which postponed Anthony Porter's execution.

When all of this was revealed, the facts and circumstances of the Anthony Porter's conviction and appeals raised questions about the entire capital punishment system in Illinois at a time when people were prepared to listen.

In Illinois there were other totally unpredictable circumstances in the Anthony Porter case: that the Northwestern University team videotaped the recantation of the eye witness who lied at trial, and then videotaped the incriminating statements of the actual killer (these statements were later retracted). Not only was this persuasive, but the drama of the revelations was bolstered by the luck that both the recanting witness and the 'actual' killer were alive and found by students and investigators. The unraveling of the foundation of Anthony Porter's death sentence took place in daily installments in the media, masterfully and expertly chronicled by the Chicago Tribune's prize winning reporters, columnists and editors and others. (Warden, 2005, p. 403-404).<sup>44</sup>

Of course the real wild card, the card that trumped all others, was the character and circumstances of George Ryan himself. Most importantly, his political career was not associated with any of the Illinois State's Attorney's Offices, and thus he was not politically beholden to the entrenched pro-death penalty legal establishment. (Sarat, 2005, p. 1-33).<sup>45</sup> Like the majority of the public George Ryan was a naïf when it came to the politics and realities of capital punishment and the criminal justice system generally.

George Ryan repeatedly announced that he had voted for the reinstatement of capital punishment in 1977 when he was a legislator. He could sincerely express shock and outrage, thus taking the moral high ground, when it developed that in Illinois more people on death row had been exonerated than executed since reenactment. And he was leaving office and leaving political life. He had nothing to lose by taking an unpopular position, and much to gain. There were other



unreproducible circumstances of George Ryan's personal life and political position. George Ryan neither looked nor acted like a 'liberal'. George Ryan was not a Catholic, and thus the support of a the Catholic Church, the Pope, and anti-death penalty advocates such as Sister Helen Prejean counted doubly on the credit side, as did his lifelong membership and allegiance to the Republican Party. And, equally important, after the appointment of the Governor's Commission there was time for public support to build, with the help of a well organized group of lawyers, judges and other anti-death penalty advocates who had been working for a national and state moratorium on executions for years.

The tale of the massive, unprecedented Ryan commutations, the emptying of Illinois' death row, has been told often and elsewhere. As a highly interested observer at the scene, my strongest impression was of the fortuitousness of the political circumstances: the luck and the hard work of the students and faculty at the Northwestern University School of Law and Medill School of Journalism and many others in uncovering the actual innocence of so many people on death row; the 1998 National Conference on Wrongful Convictions and the Death Penalty at Northwestern University; the appointment of a credible and expert, bipartisan Governor's Commission which published a scholarly, factual analysis of the Illinois capital punishment system; (Turow, 2003)<sup>46</sup> the new public seriousness after 9/11; the guidance of Governor Ryan's professional staff, especially his close adviser, former Assistant United States Attorney Matthew Bettenhausen, in shaping that Commission and Report; the twists and turns of the Rolando Cruz case as a precursor and warm up for the Anthony Porter case; the consistent, steady involvement of Professor Lawrence Marshall, Rob Warden, the Center on Wrongful Convictions, the Innocence Project, and many other long time advocates; the careful cultivation and then the

snowballing participation of the national, international, and local legal community; and the role of the media and especially the expert and experienced editors, feature writers, such as Eric Zorn, and reporters of the Chicago Tribune. So many pieces had to fall into place, to reflect off of one another, and reverberate and magnify one another, for that unique historic moment in the history of capital punishment in America to happen. And lest we forget, the commutations almost didn't happen. ("Halt the Anguish, Gov. Ryan," 2002).<sup>47</sup> A ground swell of opposition to any commutations built in the fall of 2002 and came close to preventing them. George Ryan always said that he did not make up his mind until just before the commutations were announced.

While there has been some backlash, some retrenching since the commutations, support for the moratorium remains high in Illinois. Politicians running for office in 2004 discovered that the popular political position was the contradiction: to be in favor of the moratorium and to simultaneously express support for capital punishment itself. After the commutations and after George Ryan left the Governor's office the Illinois Legislature created the Capital Punishment Reform Study Committee in 2003, and that Committee, of which I am a member, is collecting information and preparing a Report, to be filed in 2009. ("Capital Punishment Reform Study Committee Act," 2003)<sup>48</sup> In the meantime the statewide moratorium on executions imposed by Governor Ryan remains in effect. The number of death sentences imposed has been falling from before the commutations and the moratorium. And the exoneration of the innocent continues. (Center on Wrongful Convictions, 2006). The Illinois Supreme Court has held that the State could not seek the death penalty again for a person whose sentence of death was pending on appeal at the time of Ryan commutations, removing from death row several people whose status was unclear. ("People v. Morris," 2006).

Is the death penalty dying in Illinois? That question is too broad. The death penalty in Illinois doesn't exist as an abstraction. The Ryan commutations were a spectacular event, without precedent in the history of capital punishment in America. In Illinois, however, the very strong forces which have always supported the death penalty are still in place: the elected State's Attorneys; the elected judges; continued public support for capital punishment; and, perhaps most important of all, the institutional pull, the sheer inertia of the capital punishment system still being in place, still proceeding with capital prosecutions and still imposing death sentences.

There is less of that pull with the present moratorium on executions continuing, but the momentum of capital prosecutions and convictions, the preparation, the going forward with the trials, the training of the lawyers and judges, the publicity accompanying a capital trial and conviction, all continue to make the legal system, and the public, invested in keeping capital punishment. In Illinois the commitment to the prosecution of capital cases is deeply ingrained in the legal system. Capital prosecutions have been going without interruption since reenactment in 1974, continuing a long tradition from well before Furman. The impetus may have slowed, but the death penalty is a long way from dying in Illinois. The situation in Illinois is very different from that in New Jersey where there is a good chance for the repeal of the death penalty under pending legislation. In Illinois the political impetus is in the direction of keeping capital punishment, although the enactment of the reforms of 2003 and the appointment of the Study Committee signals to the contrary.

Is the Death Penalty Dying? -- The Unexpected Momentum of the Lethal Injection Cases

This brings us to the present moment when the liveliest challenge to capital punishment as

a system is, ironically, in the cases challenging the constitutionality of lethal injection. While the legal events in New Jersey and Illinois were challenging the operation of the death penalty as a system and as applied to individual cases, an entirely different legal challenge to capital punishment was being developed: the argument that the method of execution used by most jurisdictions, lethal injection, was itself the infliction of cruel and unusual punishment, and hence unconstitutional. There is a long history of challenges to methods of execution; classic challenges based upon the Eighth Amendment jurisprudence going back centuries. What is new in the lethal injection cases, what makes them ‘the ringer’ in this long series of legal challenges, is the presentation to courts of scientific and medical evidence documenting exactly what happens during a lethal injection.

The character of the evidence brought forward in these cases is unprecedented. This is what makes the lethal injection cases new. In addition, these are legal challenges to the entire system of capital punishment which are not based upon race, or economic status, or the abuse of prosecutorial discretion, or any characteristic of the defendant, the victim, or the circumstances of the offense. This challenge is not all about the lawyers and judges not doing what they are supposed to do. This challenge has been gaining momentum just as all the reenacting states have either chosen lethal injection initially, or switched to it as the preferred or only method of execution.

Evidence of the mutilation of the body in the cut down procedures, the bleeding, the continued consciousness, all are being brought to the attention of the courts and the public. Procedures which are supposed to have been ‘medical’ and humane, controlled, highly civilized, are shown to be the opposite. The people in the white coats are not doctors. The drugs are not just

sedatives, but also paralytics. The evidence brought forward is ‘objective,’ couched in medical terminology, difficult to dispute. It is not a question of how one judge interprets a statute or constitutional phrase. It is something anyone who has been in a hospital can understand. The success of this legal tactic, as seen in cases postponing or halting executions in a number of states, is one of the surprises of the past decade and may have systemwide effects. (Weinstein, 2006, June 28).<sup>49</sup>

Lethal injection, which the states adopted quickly when evidence of malfunction and mishaps came to light with the electric chair, seemed to be benign until academics and advocates began to pull back the curtain hiding the process. (Denno, 2002).<sup>50</sup> There was the bizarre development of the equipment itself, the Rube Goldberg contraption invented by a self promoting crank. (“Dr. Death and His Wonderful Machine,” 1990)<sup>51</sup> Then, the embarrassing fact that all state and national medical societies have come out against medical doctors, and others governed by medical ethics provisions, participating in executions, although a recent poll of doctors showed that close to half of the doctors asked had no personal objection to participating in executions.

The fact is that many doctors, nurses and other medically trained personnel are involved in executions. They do participate and observe executions, in spite of the ethical problems. (Denno 2002, Table 17). There is no sanction imposed upon doctors and medical personnel who participate in executions. Only half of all doctors are members of these societies. It is the state licensing agency which can take away a doctor’s license, not the professional medical society. Knowledge of doctors’ involvement in the execution process is new, however. Their continued participation may be more problematic. The irony is that all of the trappings of a medical procedure which are supposed to make the death penalty more humane and civilized actually do

the opposite. Through the Freedom of Information Act challenges the information is now coming out about what actually goes on in execution chambers.

The state legislatures flocked to lethal injection in 1977 because it was politically palatable. The legislatures specified lethal injection and left it to the various state Departments of Corrections to figure out how to do it.<sup>52</sup> The procedures for lethal injection have not changed for 30 years. How it would work included what drugs would be used – the lethal cocktail, as it came to be called – and how and in what combination and sequence the drugs would be administered. Someone else, usually someone without much education who was afraid of losing a job with the State, was left to figure out the details such as dosages and the implements for the dirty work of killing someone, and the results weren't pretty. (Denno, 2002, p. 146-260)<sup>53</sup>

At the time of reenactment state legislators feared that doctors would not or could not participate in executions. The writers of the regulations engaged in elaborate distancing rituals to ensure that doctors were not the ones who actually pulled the trigger, so to speak. (Denno, 2002, p. 207-260).<sup>54</sup> Many states specify that doctors, usually the state or county coroner, will certify death. A new breed of civil employee, the execution technician, was created.<sup>55</sup> I was not aware until coming to Illinois of research by psychologists at Stanford and elsewhere which undertook an inquiry into the effects of execution upon those doing or observing the executions. (Osofsky, M.J., Bandura, A., Zimbardo, P.G., 2005).<sup>56</sup> Once again, the truth is more bizarre than the imagined situation, as details began to come to light about the protocols, the cavalier attitudes expressed by some legislators and judges, the training of personnel or its absence, and the ghoulish specifics of the procedures themselves.

Lethal injection procedures were adopted by corrections officials who received little or no

guidance from the state legislators, turned out to be slap dash and designed to mimic a medical act, the giving of a medically appropriate injection. The rest was window dressing: the use of the hospital gurney or stretcher, the white sheets, the curtain behind which the witnesses sat, the white coats of the technicians, and the giving of a sedative to the person to be executed. With the exception of the giving of the sedative, the rest of the procedures were all an elaborate stage show to reassure those observing or taking part that what was going on was controlled and humane and medically appropriate.

Evidence of botched lethal injections started to accumulate immediately. And the medical, legal and academic community challenged the procedure itself.<sup>57</sup> Meanwhile everyone associated with its establishment could blame another institution for the conundrum: what was supposed to be a kind of ‘euthanasia’ was turning out to be tortuous. The legislators could blame the public for demanding capital punishment. The prosecutors and the defense attorneys could blame the corrections officials and the legislature, and say they were just following the law. The corrections officials and prison administrators, who had to figure out how exactly to put the new procedure into effect, could blame the lawyers, the judges, and the legislatures. And everyone could blame the convicted murderers about to be executed. After all, if they hadn’t committed those terrible crimes they wouldn’t be causing more trouble by making everyone else worry about whether a method of execution was humane.

The moral disengagement and ambivalence described in the scientific idiom by the academic psychologists became the subject of narratives in photographic essays, first person accounts from death row inmates and their advocates, newspaper stories and books, some of which became best sellers, television shows and highly successful commercial films.<sup>58</sup> Lethal

injection had appealed to state legislators as putting murderers to sleep --painlessly, mercifully, cleanly, on a stainless steel table, surrounded by people in white coats who looked like doctors but weren't doctors. Some commented that this peaceful a death was too good for people who had themselves tortured and made their victims suffer. The truth was often to the contrary.

The procedure, with minor variations among the 37 states specifying lethal injection, is a three stage process: the first drug is a sedative, the second drug has no other function but to paralyze the inmate; the third drug stops the heart. The only reason for including the paralytic drug is to sanitize the process and mask the infliction of pain, to paralyze the person being executed so that there is no twitching, screaming, vomiting, or perceptible expression of pain. The only reason for including the second paralytic drug is because doctors did not know how long it would take for the other drugs to act. The veterinarians now use quicker and better drugs to euthanize animals. The veterinarians won't use the paralytic agent in the killing of animals. The pain experienced, if the sedative is inadequate or has not yet reached the brain, is the pain of having a heart attack.

In 2001 only nine states mentioned the amount of drugs they were using. Only with the Freedom of Information Act requests did information come out on how the procedures were actually being implemented. This information, available for the first time now is what makes these cases powerful. In 1978 the Texas Court was not even required to say what drugs were being used. The constitutional theory of the challenge to the method of execution is not new; it is 'cruel and unusual punishment,' the same as the challenges to hanging and the electric chair under the principles of the Eighth Amendment. It is the detailed information about what actually happens in the execution chamber, the level of incompetence and indifference, which has caught



the attention of the courts, the advocates, and the public.

A factual inquiry in Missouri in 2006 has brought to light that the physician preparing the injections – in violation of the state and national ethics provisions – unilaterally halved the dose of the sedative because of difficulty in dissolving the powder in the liquid because the supplier used a different package. This same doctor testified that he not seen any written protocols for executions, and the only way in which they might have been written down is if someone observed what he was doing during an execution and wrote that down. This same doctor admitted he was ‘still improvising’ his technique for executing people, and that he himself was dyslexic and thus it was not unusual for him to make mistakes with numbers. These mistakes, he alleged, were not critical to the work he does as a surgeon. The head of the Missouri Department of Corrections, to whom the doctor reported, had no background in corrections and no background in medicine. He told the dyslexic doctor he was completely reliant on the doctor to advise him whether changes in the procedures needed to be made. (“Taylor v. Crawford,” 2006, p. 7-10).<sup>59</sup>

Once again raids and inroads are being staked out as to who will take the moral high ground as the lawsuits began to multiply. Recently and surprisingly the United States Supreme Court halted a Florida lethal injection in the last hours in May, 2006, on a procedural question, whether the inmate could use Section 1983 to challenge lethal injection. This gives a broader legal theory for inmates to make substantive challenges to lethal injection procedures in the future. The Florida inmate was executed after another procedural ruling at the state level, however, no attorney today can bring a death penalty case without challenging lethal injection itself on constitutional grounds. It would be ineffective assistance to neglect to bring that constitutional challenge now.

At some point the United States Supreme Court will have to take a case addressing lethal injection challenges substantively, not just procedurally. And that is why these cases are ‘the ringer’. Just as the United States Supreme Court appeared to have put to rest the last of the systemwide challenges to capital punishment in the United States, the lethal injection cases have gained a surprising amount of traction. The issue will reach the United States Supreme Court and have implications for all capital punishment systems currently in place in the 37 states. A federal judge in California has ordered a hearing to take place in September of 2006 to review the constitutionality of California’s procedures. The prospect of new, protracted proceedings on behalf of the more than 650 men and women on death row in California is a startling new development.

One of the interesting aspects of these lawsuits is that they halt an execution on medical grounds, yet they are nonetheless challenges to the legal system imposing the death penalty as a whole. There are no allegations about due process violations to defendants during arrest, incarceration or trial, or of discrimination based upon race of the victim or defendant, or socio-economic status of the defendant or victim, or allegations about the inequities generally in the ‘criminal justice system.’ These are civil suits, mostly heard in the federal civil courts at the district level, by judges who are not typically criminal judges. They can and are also brought in state courts. This may be an important factor in the character of the decisions. Perhaps these judges, like former Governor George Ryan, are not inured to the brutalities of the criminal justice system. Although the cases may be brought under habeas corpus, they are also being brought as declaratory judgment cases, or simply as civil rights complaints under state or federal law.

For example, United States District Court Judge Jeremy Fogel in the Morales case in San

Jose, California sent a questionnaire to both counsel, asking counsel what would comprise a constitutionally acceptable procedure for lethal injection. (Weinstein, 2006, Oct. 6). The judge wants to know how the drugs will act and what the qualifications are of the ‘execution team.’ This is highly unusual, and not the dismissive treatment which capital defendants may typically receive in the lower federal courts when everyone in the system has seen too many cases. In the Morales case the lawyers have objected that it is not their responsibility to come up with constitutional methods for killing their clients. New litigants are bringing these cases, new arguments are being made and being heard afresh. The faces in court are not only the public defenders and members of the anti-death penalty establishment from prior capital punishment battles. As an example of the reach of these cases, the most recent execution in Virginia was an electrocution. In Tennessee an inmate chose electrocution. These inmates chose electrocution over lethal injection because they thought it was more humane. (Death Penalty Information Center, 2006).

The lethal injection cases are straightforward and very democratic: a challenge to the system for implementing the death penalty itself, assuming the death penalty has been correctly applied to a person whose guilt is not in question. It isn’t necessary to frame the legal arguments in subtle terms to meet the refinements of the most recent interpretation of the habeas corpus jurisprudence. The arguments are politicized along different lines and different alliances are being drawn. Having new advocates making the case adds another dimension of unpredictability. And since the other methods of execution have been problematic – hanging because it is too crude, and arguably ‘cruel’ (“Rupe v. Wood,” 1994)<sup>60</sup>, the electric chair as demonstrably cruel – the system must figure out another way to execute, or find a way to make this method not cruel.

Perhaps it is because the arguments are more factual than legal, that certain groups, such as the American Society of Anesthesiologists, who say they are neither for nor against the death penalty itself, has advised its 40,000 members to ‘steer clear’ of participating in executions, saying the legal system has painted itself into a corner with lethal injection, and it is not the responsibility of the professional anesthesiologists to resolve the legal issues. On the contrary, the Society advises, professional anesthesiologists should not be involved in lethal injections in any manner. This is not a medically appropriate sedation.<sup>61</sup>

The federal judges, the lawyers, the journalists and the advocates have put the information out about the circumstances of botched executions. (“Capital punishment: Cruel and unusual,” 1993). The fiction that this is analogous to putting the family pet to sleep is no longer tenable. Veterinarians and advocates for animals have gone on record as saying that the procedures used in lethal injections would not be sufficiently humane to use in the killing of animals. It will be awkward for state legislators to argue that executions should continue in the face of this evidence.

A federal judge can hold a hearing under section 1983 for further fact finding. This is one of the few unobstructed powers of the federal judiciary. United States District Court Judge Fernando J. Gaitan, Jr. in an evidentiary hearing on lethal injection wrote the following as a factual finding:

“... There is no dispute that if an inmate is not sufficiently anesthetized when the potassium chloride [the drug which stops the electrical activity of the heart] is administered, it will cause excruciating pain, as it is administered through the inmate’s veins. The inmate, however, would be unable to show he was experiencing discomfort due to the paralyzing effects of the pancuronium

bromide [the paralytic agent].”

(“Taylor v. Crawford,” 2006, p.6).<sup>62</sup>

The inquiry in California is pending, and may prove to be the mechanism for Governor Schwarzenegger to declare a statewide moratorium on executions, or to find that there is no constitutionally acceptable method for carrying out the death penalty.<sup>63</sup> As the legal challenges to lethal injection in other state and federal courts proceed, each ruling halting an execution, each factual finding of pain and suffering, is reinforcing similar allegations in other cases. It is just a question of time before a case reaches the United States Supreme Court. That case when it comes may result in an unpredictable or surprising alignment among the new judges of this United States Supreme Court.

#### Conclusion and Summary

Is the death penalty dying? The illustrative cases put forward here do not answer that question. With the exception of the clear national trend in the lethal injection cases, no predictions are offered in this essay. If these reflections upon three very different case studies have a common theme, it is the unexpected nature of the events which resulted in a very dramatic change in the jurisdiction’s application of the death penalty. Decades from now these end results may appear to have been foreordained and inevitable, but to this observer close to the ground individual decision makers and the particularities of circumstances created a wobbling, momentary coherence, unpredicted and not likely to be repeated.

In Nigeria the government established an extra legal system for imposing the death penalty, the Armed Robbery Tribunal, and used the very public application of the death penalty to intimidate the public and convince the polity of its legal authority. In New Jersey in the 1980’s

and early 1990's the Supreme Court of New Jersey, which had a long tradition of independence, fashioned a constitutionally required system for proportionality review and other court imposed procedural due process guarantees under the leadership of a powerful Chief Justice who is no longer there.

In Illinois the way was paved for Governor Ryan's blanket commutation by more than two years of serious work by the Governor's Commission on Capital Punishment (2002), by the concerted efforts of the national and local legal community supporting a moratorium on executions, and by a set of unpredictable cases, some long in preparation, others not, which unfolded in a relatively compressed time period and revealed that thirteen men on death row in Illinois were either innocent, wrongly convicted, or both.

Of course, Nigeria in the 1970's is *sui generis*, in time, distance, and in the difference of its legal system. There has been a moratorium movement in Nigeria, but executions, including the executions of political prisoners and executions under traditional *Sharia* law, continue. The Armed Robbery Tribunal is still in effect. There are so many other illegal and unconstitutional state and private killings in that country that capital punishment as an issue of legal principle receives attention only from a few activists and from international human rights groups.

In New Jersey, capital punishment may literally be dying. The support for the death penalty within the legal community seems minimal. There is a legislatively imposed moratorium on executions, and the legislative initiative to abolish the death penalty is pending. Importantly executions in New Jersey never started again after reenactment in 1982. A legal culture supporting and institutionalizing capital punishment has not been firmly entrenched for decades. The former Attorney General, the present Governor, some Justices of the Supreme Court of New

Jersey, as well as many legal organizations, have gone on record as being against the death penalty, and also as saying that capital punishment is a waste of government resources.

Illinois is very different from New Jersey, yet both jurisdictions at present have a moratorium on executions. Illinois continues to have a strong institutional commitment to capital punishment within the offices of the State's Attorneys, the elected judiciary, and the private bar. That the dramatic commutation of more than 160 death sentences occurred in Illinois is testament to the coming together of an extraordinary set of people, institutions and circumstances, unlikely to be replicated elsewhere. The Illinois commutations have had national reverberations, however, and the innocence movement continues to be strong in Illinois with the presence of the Center on Wrongful Convictions and the other advocacy institutions involved in national and Illinois exonerations.

Finally some observations on the serendipity of the crop of cases challenging the application of lethal injection as a method for imposing the death penalty. This challenge crosses state and federal jurisdictional lines and threatens to halt all executions in the United States without raising any legal challenge to the death penalty itself with regard to the manner and constitutionality of its imposition in the state or federal system. Lethal injection may well be the next vehicle for overturning a large number of death sentences. I don't think there is the national will at the present time to devote large amounts of energy or invention to 'improving' the method of execution in the face of unrelenting stories of execution botches and administrative bungling.

There is one caveat, however. That is, if this country finds itself in an international war, with substantial loss of life at home, then that would transform the political climate regarding domestic capital punishment. It might mean that in states such as Texas, executions would

continue or escalate with no one paying any attention. Alternatively, it might be that the amount of time, effort and resources spent on capital cases would suddenly seem to be an extravagant waste. There could be a general lack of interest in continuing our present capital punishment system.

Throwing out the death penalty because of the cruelty of the method has the great advantage of not being a ‘victory’ for either the defense or the prosecution. It allows those committed to capital trials and prosecutions not to be blamed, to say that only the last step is unconstitutional. It allows defense attorneys and the general public to argue against executions without appearing unsympathetic to victims or sentimental about defendants on death row. Perhaps this can be the excuse, the face saving, for the country to realize how tired we all are of capital punishment. The federal constitutional principle of an evolving standard of decency incorporates the idea of ‘progress’ in a civilized society.

As Americans, we like to think there are certain things we don’t do, or at least certain things we don’t officially sanction. We like to think of ourselves as a country of laws and strong, independent legal institutions. When the State kills, or is poised to kill, the public, those within legal institutions, and those who watch and monitor those systems pay attention and, it is hoped, hold accountable the institutions and their administrators – courts, judges, lawyers, police officers, and prison officials – who are responsible for action taken in the name of the rule of law. The rule of law requires judges to ask the hard questions, and it asks lawyers to put the information before judges so that they may ask and answer those questions on the basis of facts. Our entertainment driven culture is addicted to dramas about murder, and will always address issues of guilt, innocence and punishment on multiple levels. At the end of the day, however, the



legal institutions, the courts, must take the responsibility for finding the facts and deciding upon constitutionality of the official criminal justice system and its methods.

## References

Africa Watch. (1991, October). *Nigeria-On the eve of 'change'-Transition to what?*. New York:

Human Rights Watch.

American Society of Anesthesiologists. (2006). *Message from the President*. Retrieved

November, 2006 from <http://www.asahq.org>.

Amnesty International. (2005). *Appeal for the abolition of the death penalty in Africa*. Retrieved

November, 2006 from <http://www.amnesty.org/>.

Amnesty International. (2006). *Nigeria*. Retrieved November, 2006 from

<http://www.amnesty.org/>.

An Act Creating a Study Commission on the Death Penalty and Imposing a Moratorium on

Executions and Amending P.L. 1983, ch. 245. NJ P.L. Ch. 321 (2005).

An Act to Make Comprehensive Provisions for Matters Relating to Armed Robbery. Robbery and

Firearms (Special Provisions) Act, Cap. 398 p. 14140. (1984).

Bailey, B. (2006, February 26). Lethal injection facing scrutiny, attention likely to amend but not

end death penalty. *San Jose Mercury News*, p. 1A.

Bandura, A. (1999). Moral disengagement in the perpetration of inhumanities. *Personality and*

*Social Psychology Review*, 3, 193-209.

Bienen, L. (1974). Criminal homicide in Western Nigeria, 1966-1972. *The Journal of African Law*, 18, 57- 78.

Bienen, L. (1976). The determination of criminal insanity in Western Nigeria. *The Journal of Modern African Studies*, 14, 219-245.

Bienen, L.B., Weiner, N.A., Denno, D.W., Allison, P.D., Mills, D.L. (1988). The reimposition of capital punishment in New Jersey: The role of prosecutorial discretion. *Rutgers Law Review* 41, 27-372.

Bienen, L.B., Weiner, N.A., Allison, P.D., Mills, D.L. (1990). The reimposition of capital punishment in New Jersey: Felony murder cases. *Albany Law Review*, 54, 709-817.

Bienen, L.B. (1993). A good murder. *Fordham Urban Law Journal*, 20, 585-607.

Bienen, L.B. (1996). The proportionality review of capital cases by state high courts after *Gregg*: Only 'the appearance of justice?'. *Journal of Criminal Law & Criminology*, 87, 130-314.

Bienen, L.B. (1998). The Quality of Justice in Capital Cases: Illinois as a Case Study. *Law & Contemporary Problems*, 61, 193-217.

Bienen, L.B. (1998). Technician. *TriQuarterly* 104, 192-271.

Bienen, L.B., Rottinghaus, B. (2002). Learning from the past, living in the present: Understanding homicide in Chicago, 1870-1930; Newspapers and the political and intellectual climate of the times. *Journal of Criminal Law & Criminology*, 92, 437-554.

Bohannon, P. (1960). *African homicide and suicide*. Princeton: Princeton University Press.

Capital punishment: cruel and unusual. (1993, January 23). *The Economist*, 86.

Capital Punishment Reform Study Committee Act. Ill. P.A. 93-605. (2003).

Center on Wrongful Convictions. (2006). *Illinois exonerations*. Retrieved November, 2006, from <http://www.law.northwestern.edu/wrongfulconvictions/>.

Consultation With and Supervision Over County Prosecutors; Uniform Enforcement of Criminal Laws, NJ Stat. Ann. Sec. 52: 17B-103 (2006).

Criminal Code Act. (1990, January 31). In Law Revision Committee (Eds.), *The Laws of the Federation of Nigeria*. Portsmouth: Grosvenor Press Ltd.

Death Penalty Information Center. (2006). Statistics Retrieved November, 2006 from <http://www.deathpenaltyinfo.org/>.

Denno, D.W. (1994). Is electrocution an unconstitutional method of execution? The engineering of death over the century. *William & Mary Law Review* 35, 551-692.

Denno, D.W. (1997). Getting to death: Are executions constitutional?. *Iowa Law Review*, 82, 319-464.

Denno, D.W. (2002). When legislatures delegate death: The troubling paradox behind state uses of electrocution and lethal injection and what it says about us. *Ohio State Law Journal*, 63, 63-260.

Development Policy Centre Nigeria. (2000). *Laws of the federation of Nigeria: A subject analysis*. 262-263. Ibadan, Nigeria: Dina, O., Ajibade, A., Atinmo, M., Mabawaonku, I.

Dr. Death and his wonderful machine. (1990, October 18). *New York Times*, p. A24.

Forsberg, M.E. (2005, November). Money for nothing?—The financial cost of New Jersey's death penalty. *New Jersey Policy Perspective*. Retrieved November 2006 from <http://www.njpp.org>.

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

Halt the anguish, Gov. Ryan. (2002, October 20). *The Chicago Tribune*, p. 8.

Hoffman, J. (1996, June 30). His court, his legacy. *New York Times*, sec. 13NJ, p. 1.

Illinois State Police. (2003). *Uniform crime reporting program, crime in Illinois*. Retrieved November, 2006 from [www.isp.state.il.us/crime/cii2003.cfm](http://www.isp.state.il.us/crime/cii2003.cfm).

Ilo, U. (2004, May 10). The Rope: Country report on death penalty application in Nigeria. In *Report presented at the first African conference on death penalty application in Commonwealth Africa*. Entebbe, Uganda.

Internet Movie Database. (1995). *Dead man walking*. Retrieved September 9, 2006, from <http://www.imdb.com/title/tt0112818/>.

Laws of the Federation of Nigeria. Section 402(2)(a)(b) Criminal Code Act, cap. 77. (1984).

*Marshall v. Cathel*, 428 F. 3d 452 (3<sup>rd</sup> Cir. 2005).

McGinniss, J. (1991). *Blind Faith*. New York: Random House.

Medwed, D.S. (2006). *Anatomy of a wrongful conviction: Theoretical implications and practical*

solutions. *Villanova Law Review*, 51, 337-377.

National Association for the Advancement of Colored People Legal Defense and Education Fund.

(2006). *Death Row USA* (Spring, 2006).

NJ Constitution, Article V, section 1, paragraph 5.

Osofsky, M.J., Bandura, A., Zimbardo, P.G. (2005). The role of moral disengagement in the execution process. *Law and Human Behavior*, 29, 371- 393.

*People ex rel. Carey v. Cousins*, 397 N.E. 2d 809 (Ill. 1979).

*People v. Lewis*, 473 N.E. 2d 901 (Ill. 1984).

*People v. Morris*, 848 N.E. 2d 1000 (Ill. 2006).

*People v. Porter*, 489 N.E. 2d 1329 (Ill. 1986).

*People v. Porter*, 647 N.E. 2d 972 (Ill. 1995).

*People v. Silagy*, 461 N.E. 2d 415 (Ill. 1984).

*Pulley v. Harris*, 465 U.S. 37 (1984).

Roper Center for Public Opinion. (2003). Survey. Retrieved November, 2006 from [web site](#).

Rosen, B.S. (1984, Nov. 5). A bold court forges ahead. *National Law Journal*, 1.

*Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994).

Sarat, A. (2005). *Mercy on trial - What it means to stop an execution*. Princeton: Princeton University Press.

Schwaneberg, R. (2006, August 19). Marshall gets life in prison. *The Star-Ledger* (Newark, N.J.), p. 1.

*State v. Ramseur*, 524 A. 2d 188 (NJ 1987).

*State v. Funicello*, 286 A. 2d 55 (NJ 1972).

*State v. Marshall*, 586 A. 2d 85 (NJ 1991).

*State v. Marshall II*, 613 A. 2d 1059 (NJ 1992)



Sullivan, J.F. (1978, July 28). Penal code revision easing curbs on sex passed in New Jersey. *New York Times*, p. 1.

*Taylor v. Crawford, et al.*, No. 05-4173-CV-C-FJG (W.D. Mo., June 26, 2006.)

Turow, S. (2003). *Ultimate punishment*. New York: Farrar Straus & Giroux.

United Nations High Commissioner for Refugees (2006). Retrieved November, 2006 from [web site](#).

Vaughan, B. (2006, February 2). New Jersey seeks appeal of Marshall ruling. *The Press of Atlantic City*, p. A1.

Waldron, M. (1978, March 4). Byrne pocket vetoes death penalty bill. *New York Times*, p. 45.

Warden, R. (2005). Illinois death penalty reform: How it happened, what it promises. *Journal of Criminal Law & Criminology*, 95, 381-426.

Weinstein, H. (2006, June 28). Federal judge orders Missouri to stop all executions. *Los Angeles Times*, p. A16.

Weinstein, H. (2006, July 2). Anesthesiologists advised to avoid executions. *Los Angeles Times*, p. A32.

Weinstein, H. (2006, October 6). Judge considering constitutionality of lethal injection posing tough questions, *Los Angeles Times*, p. B3.

Wolfgang, M.E. (1958). *Patterns in criminal homicide*. Philadelphia: University of Pennsylvania.  
*-(2002). The Report of the Governor's Commission on Capital Punishment.*

---

<sup>1</sup> The cited work and the following summarizes some of the early studies of race and the death penalty after Wolfgang's work, "**The Impact of Race in Pre-Furman Studies: 1900-1959;**" "**The Impact of Race in Pre-Furman cases: 1960-1970,**" pp. 103 – 118 in Bienen, L.B., Weiner, N.A., Denno, D.W., Allison, P.D., Mills, D.L., 1988. Race had been linked with different rates of homicide, and the imposition of the death penalty prior to Wolfgang's work, but that study at that time brought issues of race to the forefront. And see the 'race of victim' studies cited in (Bienen, 1996, pp. 149-50, n. 66).

<sup>2</sup> .This research resulted in two publications, and also got me my first job out of law school, as a research attorney for a large, quantitative study of sexual assault in Philadelphia. The African papers were: (Bienen, 1974) and (Bienen, 1976).

<sup>3</sup> .There was another military coup in July of 1975, deposing Gowon, and the subsequent military government handed over power to a civilian government in October of 1979.

<sup>4</sup> .The law was enacted in 1970 and still in effect: The Robbery and Firearms Decree of 1970. It was amended at various times, in 1971, 1972, and 1977 and then replaced with a very similar provision in 1984: ("An Act to Make Comprehensive Provisions for Matters Relating to Armed Robbery," 1984).

<sup>5</sup> .The Western State of Nigeria in 1972 had a similar legal structure to New Jersey: a largely autonomous state legal system, with its own court structure, layered within a larger federal system. In 1972 issues concerning the conflicting authority of the civil and religious courts was not an issue, at least not in the homicide cases I was studying, and not in the Western State of Nigeria. Nor was it an issue for The Armed Robbery Tribunal.

<sup>6</sup> My recollection is that there was little radio, and no television except a small, tedious state run network. The dominant role of the newspapers in reporting all political and international news, and especially crimes, was similar to the role played by newspapers in Chicago in the early 20<sup>th</sup> century. See (Bienen, L.B., Rottinghaus, B., 2002, pp. 456-460).

<sup>7</sup> The language of the Decree incorporated in the statutory law reads: "... If ... [any offender]..(b) wounds or uses any personal violence to any person, the offender shall be liable upon conviction under this Act to be sentenced to death. The sentence of death imposed may be executed by

---

hanging or causing such offender to face firing squad as directed by the Governor. ... The Governor of each State is empowered to set up a tribunal for the trial of offences under this Act. The Act provides for a conviction to be subject to be confirmed or disallowed by the Governor of a State. No civil proceedings shall be or be instituted in any court for or on account of or in respect of any act, matter or thing done or purporting to be done under this Act by the Governor of a State or by any member or officer of a tribunal constituted under this Act....” (“An Act to Make Comprehensive Provisions for Matters Relating to Armed Robbery,” 1984).

<sup>8</sup> The 1984 version of the statute does not require that the person ‘in the company of’ the armed robber who wounds be sentenced to death. The 1990 version of the same statute states that any offender ‘in company with’ any person ... shall upon conviction be sentenced to death. (“Criminal Code Act,” 1990, January 31).

<sup>9</sup> The 1990 statute does not mention public executions; the 1984 statute specifies hanging or firing squad. See n. 8, *infra*.

<sup>10</sup> This essay does not address the complex and very interesting questions involving traditional Muslim law, *Sharia*, and the death penalty. In 1999 the *Sharia* courts were empowered across northern Nigeria under new penal legislation to impose the death penalty for sexually related offenses (*Zina*). The *Sharia* does provide for executions, including public executions, and death sentences have been handed down by *Sharia*, at least four recently. See (Amnesty International, 2006, *Nigeria*); (United Nations High Commissioner for Refugees, 2006).

<sup>11</sup> If an answer was required of the accused — ‘where were you on Saturday night when the victim was stabbed?’ – then an interpreter would be brought in and that question was asked and answered in a language the accused understood. Then the trial would go back to being a conversation among the lawyers and judges.

<sup>12</sup> The most comprehensive report on the death penalty in Nigeria concluded that it did not deter additional armed robberies: “The introduction of [the] death penalty for armed robbery in Nigeria, which was targeted at reducing the increasing cases of armed robbery in the country did not result in any remarkable reduction in armed robbery cases.” (Ilo, 2004). This same Report lists 487 persons on death row, including 11 women, as of July 2003. *Id.* at 71. A government report in July 2005 recommended that the death penalty be applied to juveniles and that state governors should execute people on death row to relieve congestion in the prisons. See (Amnesty International, 2005, *Appeal for the abolition of the death penalty in Africa.*)

<sup>13</sup> “Sentences by tribunals are generally severe, particularly for armed robbery and treason, which carry a mandatory death sentence with no right to appeal. Some of the death sentences are carried out in public, even though public execution has been outlawed in Nigeria. In July 1991, Amnesty International reported that a total of 15 armed robbery convicts were publicly executed in three states and were witnessed by hundreds of spectators.” (Africa Watch, 1991, October).

<sup>14</sup> Ralph Hudson, a 43 year old white male whose crime was committed in Atlantic County, was executed on January 22, 1963. N.J. Dept. of Corrections. There have been no executions in New

---

Jersey since 1963.

<sup>15</sup> The then Chief Justice Weintraub's concurring opinion was particularly noteworthy: "... My point is the doctrines of the Federal Supreme Court have led to an impossible situation. .... I believe the case method should be replaced by a rule-making process in which the Federal Supreme Court can meet regularly with representatives of State Supreme courts, to become aware of their problems, to benefit from their experience, and to adopt rules of prospective application...." (*State v. Funicello*, 1972, Weintraub, C.J., concurring).

<sup>16</sup> The then Governor of New Jersey, Brendan Byrne had kept his promise to veto any legislation reenacting the death penalty in 1978 and was reelected in 1978. As a judge he had declared the pre-*Furman* New Jersey capital punishment statute unconstitutional. He was prevented from being reelected by a limited term limits provision in the New Jersey Constitution. ("New Jersey Constitution"). See also, (Waldron, 1978, March. 4). For a history of capital punishment in New Jersey and the reenactment in 1982, see (Bienen, L.B., Weiner, N.A., Denno, D.W., Allison, P.D., Mills, D.L., 1988, pp. 66-70).

<sup>17</sup> By 1982 the majority of states had reenacted the death penalty, and the executions had begun again with the death by firing squad of Gary Gilmore in 1977, under the authority of a Utah statute which provided for death by firing squad at the election of the defendant.

<sup>18</sup> Particularly note, Table 1 'Date of Reenactment, Date of First Capital Affirmance, Date of First Execution, and Time Period Between, by State,' at 166.

<sup>19</sup> When the New Jersey state legislature was enacting the Criminal Code which included the possibility of reenacting capital punishment, with the specter of the first execution in decades, the provision in the Code which attracted the most vocal opposition was the decriminalization of certain forms of consenting sexual conduct. See (Sullivan, J.F., 1978, July 28).

<sup>20</sup> For detailed description of the litigation surrounding the Robert Marshall case, see; Statistics and Law; the Supreme Court of New Jersey's Implementation of Proportionality Review." Bienen, 1998, pp.183-212.

<sup>21</sup> See also (McGinniss, J. 1991).

<sup>22</sup> "It might be the best Supreme Court in the Country—state or federal," said Harvard law professor Laurence H. Tribe, as quoted in (Rosen, B.S., 1984, Nov. 5). See also (Hoffman, J., 1996, June 30).

<sup>23</sup> "Robert Marshall was sentenced to death, and his co-conspirator, Robert Cumber, who let a man use his phone to set up the killing, got a 30-year life sentence. Cumber, now 68 and nearly blind, was released recently after former Gov. Richard J. Codey granted him clemency in the final days of his stay in office."

<sup>24</sup> In the spring of 2005 Robert Marshall's death sentence was overturned by the Third Circuit

---

Court of Appeals on grounds of the incompetence of his private trial counsel. The Ocean County prosecutor announced that they were not going to prosecute him again for capital murder in the spring of 2006. The Attorney General of New Jersey did appeal the third circuit ruling by filing a writ of certiorari on the last day of eligibility. (Vaughan, B., 2006, February 2).

<sup>25</sup> “At the end of an emotional 40-minute hearing in Toms River, Superior Court Judge Wendel Daniels gave Marshall the toughest sentence he could: life imprisonment with no parole for 30 years. The 66-year-old Marshall, who faced execution by lethal injection until the federal courts overturned that sentence, could be eligible for parole in December 2014 - 30 years from his arrest for arranging the murder of his wife, Maria, in 1984....” (Schwaneberg, R., 2006, August 19). The Ocean County Prosecutor recommended that sentence. *Id.* The Ocean County Prosecutor tried the case in Atlantic County because of the publicity surrounding the crime.

<sup>26</sup> “... In the summer of 1986 Robert N. Wilentz was very nearly fired. By then he had been Chief Justice for seven years, the point at which the [New Jersey] Senate considers whether to give a judge a lifetime appointment...” (Hoffman, J., 1996, June 30, p. 6-7). The New Jersey Supreme Court held the death penalty statute constitutional in *State v. Ramseur* (1987), soon after Chief Justice Wilentz’s confirmation. The first capital conviction was not affirmed, however, until the first Robert Marshall case, (“*State v. Marshall*,” 1991). Marshall II affirmed the death sentence of Robert Marshall after proportionality review. (“*State v. Marshall II*,” 1992).

<sup>27</sup> This was typical. Legislators often expected executions to start soon after reenactment.

<sup>28</sup> See also discussion of *Pulley v. Harris*, 1984, p. 189.

<sup>29</sup> This article provides a history the proportionality review project in New Jersey prior to the appointment of Professor Baldus and the Order appointing Professor David Baldus as Special Master. See also Appendix E Order of July 29, 1988, at 371-2. For the history of proportionality review after the appointment of the Special Master, see (Bienen, 1996, p. 159-212).

<sup>30</sup> The Wilentz era ended in 1996, when the Chief Justice resigned for reasons of illness, dying a few months later in July of 1996. Deborah T. Poritz, the former Attorney General and Governor’s Counsel, was immediately appointed and confirmed as the new Chief Justice.

<sup>31</sup> In January of 2006 the interim Governor of New Jersey signed into law a bill requiring an immediate moratorium on executions and creating a Study Commission to study the economics, ethics, effects and possible alternatives to the death penalty and report back to the legislature by November 15, 2006. A new study of the cost of capital prosecutions by the New Jersey Policy Perspective, said capital trials cost an average of \$162,960, compared with 46,560 for non-capital trials. See (Forsberg, M.E., 2005, November).

<sup>32</sup> See, e.g. “... *The Legislature finds and declares that* .. [b]The experience of this State with the death penalty has been characterized by significant expenditures of money and time; [c] the financial costs of attempting to implement the death penalty statutes may not be justifiable in light of the other needs of this State; [d] There is a lack of any meaningful procedure to ensure uniform

---

application of the death penalty in each county throughout the State; [e] There is public concern that racial and socio-economic factors influence the decisions to seek or impose the death penalty; [f] There has been increasing public awareness of cases of individuals wrongfully convicted of murder, in New Jersey and elsewhere in the nation; [g] The Legislature is troubled that the possibility of mistake in the death penalty process may undermine public confidence in our criminal justice system; [h] the execution of an innocent person by the State of New Jersey would be a grave and irreversible injustice; ...” (“An Act Creating a Study Commission on the Death Penalty and Imposing a Moratorium on Executions and Amending P.L. 1983,” 1984). [Emphasis supplied.]

<sup>33</sup> The Attorney General of New Jersey has supervisory authority over the 21 county prosecutors in New Jersey. See (“Consultation With and Supervision Over County Prosecutors; Uniform Enforcement of Criminal Laws,” 2006): “The Attorney General shall consult with and advise the several county prosecutors in matters relating to the duties of their office and shall maintain a general supervision over said country prosecutors with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State.” Illinois does not provide that the Attorney General of Illinois shall have supervisory authority over the independently elected State’s Attorneys.

<sup>34</sup> As of the spring of 2006 only 13 people are on death row in New Jersey, more than 20 years after reenactment, and there have been no executions in New Jersey since 1963. There have been 1016 executions in the country as a whole since *Gregg*. (*Death Row USA, Spring 2006*.)

<sup>35</sup> See also discussion in Bienen (1996, p. 235, notes 401-03) and Bienen, L.B. (1998, 197-209). And see (Warden, R., 2005, p. 389 -391).

<sup>36</sup> Only recently has the Illinois State’s Attorney’s Association issued a set of Guidelines for the prosecution of capital cases, and those have not been published or made public. The New Jersey county prosecutors published their guidelines in 1989. See (Bienen, L.B., Weiner, N.A., Allison, P.D., Mills, D.L., 1990, p. 791-3, Appendix B: Prosecutor’s Guidelines for Designation of Homicide Cases for Capital Prosecution.)

<sup>37</sup> In 2003 there were a total of 896 murders reported by the Illinois State Police, and 696 were from Cook County. The collar counties around Cook, account for a sizable fraction, *e.g.* Kane County and Lake County, in 2003, 21 and 15 respectively. Other counties, such as Dupage (6 murders in 2003) have a strong, pro death penalty culture.

<sup>38</sup> The present mayor of Chicago, Richard M. Daley, was the State’s Attorney in Cook County from 1980-1989, and was elected Mayor in 1989. He was a member of the Illinois State Senate from 1972-1980.

<sup>39</sup> See also (Warden, R., 2005, p. 391-410); and in numerous articles and newspaper accounts.

<sup>40</sup> See *e.g.* a 2003 Roper poll showing that 60% of those asked supported a moratorium on executions to allow government to reduce the chances that an innocent person would be put to

---

death. Survey 1/15/2003 to 1/16/2003, telephone interview with 1010 national adults. The same survey showed 64% in favor of the death penalty for individuals convicted of serious crimes such as murder. Q. 029 and Q 021.

<sup>41</sup> See also (Sarat, A., 2005, p. 1-33).

<sup>42</sup> The nearly perfect storm was the Rolando Cruz case that brought Professor Lawrence Marshall into the vortex, but the Rolando Cruz case had too many ambiguities, too much baggage, and too many recent memories about the brutal murder of a child for that case to capture the public imagination the way the Anthony Porter case did. The defendant himself, Rolando Cruz, was not sufficiently credible to prevent another jury from finding him guilty. At his third trial the judge directed a verdict of acquittal. See (Warden, R., 2005. p. 400-401 and n. 80-84).

<sup>43</sup> See also ("*People v. Porter*," 1995).

<sup>44</sup> See Tribune features in this article.

<sup>45</sup> See also (Warden, R. 2005, p. 405-409). As a state legislator George Ryan had voted for the death penalty to be reinstated and then voted for it to be expanded. *Id.* at 388.

<sup>46</sup> And see (2002). *The Report of the Governor's Commission on Capital Punishment*.

<sup>47</sup> The highly publicized hearings before the Prisoner Review Board in October of 2002, consisting of testimony about the underlying crimes by victim's families, alienated many, including the Chicago Tribune which in an editorial called for Governor Ryan not to commute all death sentences.

<sup>48</sup> The act was filed without signature of the Governor and after an amendatory veto was overridden. The Illinois Study Committee Act does not contain the sweeping declarations of the New Jersey law.

<sup>49</sup> Discussing *Taylor v. Crawford*, (June 26, 2006), Fernando J. Gaitan, Jr., J.

<sup>50</sup> See also (Denno, D.W., 1997); and (Denno, D.W., 1994).

<sup>51</sup> See also discussion in Denno, D.W. (2002, n. 345 and surrounding text).

<sup>52</sup> New Jersey, for example, specified lethal injection as the method of execution shortly after reenactment in 1982, years before the first death sentence was upheld.

<sup>53</sup> Provides a state by state survey of the methods and drugs used, for tables described when individual states adopted lethal injection, and for protocols specifying procedures and participants.

<sup>54</sup> See statutory language in the compilation of each state provision, *e.g.* Arkansas, Ohio,

---

Oregon, or Arizona. The Arizona regulations declare that the procedure is ‘not painful.’ *Id.* at 207.

<sup>55</sup> While observing this process in New Jersey I wrote a fictional account of the hiring and training of such a person, and his socialization into the task of killing. See (Bienen, L.B., 1998, p. 104).

<sup>56</sup> See also (Bandura, 1999).

<sup>57</sup> “ ... The high percentage of botches in Texas appeared to be partly attributable to the dearth of written procedures provided to the executioners concerning how to perform an execution. Originally, these ‘procedures’ listed little more than the chemicals to be used (in incorrect order or application) and a vague account of the content of the syringes. Moreover, there was no information specifying the nature and extent of the qualifications that executioners should have in order to perform an execution.... [Internal footnote omitted.]” (Denno, D.W., 2002, p. 111).

<sup>58</sup> Tim Robbins’ film “Dead Man Walking” based upon the 1993 book by Helen Prejean grossed more than \$39 million in the U.S. alone, and was nominated for and won numerous awards. See (Internet Movie Database, 1995).

<sup>59</sup> U.S. District Judge Jeremy Fogel in San Jose California has scheduled a two day hearing in September of 2006 to review California’s lethal injection protocol, which prompted the State in February to call off the scheduled execution of Michael Morales in California. (Weinstein, H., 2006, June 28).

<sup>60</sup> The challenge via habeas corpus was based upon the fact that the defendant would be decapitated by the hanging because he weighed 409 pounds. The case became moot when Washington changed its method of execution to lethal injection.

<sup>61</sup> Dr. Orin F. Guidry, President of the American Society of Anesthesiologists has strongly urged members of his 40,000 member organization to ‘steer clear’ of any participation in executions. “Lethal injection was not anesthesiology’s idea,... American society decided to have capital punishment as part of our legal system and to carry it out with lethal injection .... The legal system has painted itself into this corner, and it is not our obligation to get it out.” (American Society of Anesthesiologists, 2006). The President of the Association said he was prompted to issue that message when the federal judge in Missouri ordering the halt to lethal injections said that a board certified anesthesiologist needs to be responsible for the mixing of drugs in the lethal injection process. (Weinstein, H., 2006, July 2).

<sup>62</sup> And see (Weinstein, H., 2006, June 28).

<sup>63</sup> “A federal judge in San Jose has effectively halted the practice [of lethal injection] in California, after state officials said they could not satisfy his orders to have medical personnel take part in executing rapist-killer Michael Morales last week. Despite a widespread assumption that it is painless, courts around the country are weighing similar challenges from prisoners who



---

contend that the most common method of lethal injection can still lead to physical suffering...”  
(Baily, B. 2006, February 26) and subsequent articles in this same paper on the Morales case.