RECLAIMING THE GAVEL: MAKING SENSE OUT OF THE DEATH PENALTY DEBATE IN STATE LEGISLATURES

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INTRODUCTION

When the United States Supreme Court held in *Furman v. Georgia*[1] that the process of death sentencing constituted cruel and unusual punishment, abolitionists were certain that the death penalty would eventually be found unconstitutional per se. Even when the Supreme Court, in 1976, declared that new state laws implementing the death penalty did not violate the eighth and fourteenth amendments,[2] we continued to believe that a systematic and well-planned legal strategy would abolish the death penalty.

But a review of Supreme Court holdings in the last three years makes it clear that the Court, rather than moving to restrict the death penalty, is sweeping away barriers to its use.[3] The Court has taken two approaches to expedite the use of the death penalty. Several decisions have restricted prisoners' rights to have their cases reviewed on habeas corpus.[4] Additionally, the

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1. 408 U.S. 238 (1972).

2. Gregg v. Georgia, 428 U.S. 153 (1976) (Georgia's proceeding called for a bifurcated process with a guilt phase and a sentencing phase).

3. For recent decisions limiting political appeals in death penalty cases, see McCleskey v. Zant, 111 S. Ct. 1454 (1991); Penry v. Lynaugh, 492 U.S. 302 (1989); Teague v. Lane, 489 U.S. 288 (1989). *See also* Burrell v. Louisiana, 111 S. Ct. 799 (1991); Mann v. Oklahoma, 488 U.S. 877 (1988); Fox, Radelet & Bonsteel, *Death Penalty Opinion in the Post-*Furman *Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499 (1990-91); Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91).

4. *See, e.g.*, Coleman v. Thompson, 111 S. Ct. 2546 (1991); McCleskey v. Zant, 111 S. Ct. 1454 (1991); Teague v. Lane, 489 U.S. 288 (1989).

Court has transferred to the political arena decisions which heretofore have been well within the judicial realm.[5] Thus, challenges to racism in the implementation of the death penalty,[6] the execution of juvenile offenders,[7] and the execution of the mentally retarded,[8] have been shunted back to the very state legislatures that created the systems being challenged.

The Supreme Court's willingness to ignore significant questions of fairness, its determination to knock down barriers to the death penalty, and its insistence that the debate be made political rather than legal, compel the abolitionist community to redirect its strategy.

Given the success the movement has had in keeping individual prisoners from execution through legal challenge,[9] it is not surprising that we have failed to develop a sophisticated legislative strategy. Until now, our voices have been mere whispers in State Houses. It is time to become a chorus!

This paper seeks to lay some groundwork for the development of a coherent legislative and political strategy for abolition. Based on the efforts of the National Coalition to Abolish the Death Penalty [hereinafter NCADP], and on my experience as the Executive Director of that organization, this Article provides an overview of death penalty-related legislation at the state level, gives a perspective on the political roots of the debate, and suggests proposals for the future.

I.
PROCESS

In 1985, the NCADP commenced a legislative monitoring project called the "National Clearinghouse on Death Penalty Legislation." The project was implemented in 1988 to track and analyze death penalty-related bills introduced at the state level and to gain insight into the way capital punishment legislation is raised. In each state, the NCADP attempts to monitor all bills relating to capital punishment.

We quickly found that gathering such information was far more complex and time-consuming than we had originally imagined. It appeared that no single source of information, even the legislature itself, could be relied upon to supply all of the relevant legislative activity. Therefore during our 1988-1989 survey, we obtained information from state legislatures and local attorneys as well as from local and statewide organizations. These state organizations

5. Gregg v. Georgia, 428 U.S. 153 (1976) (assuming validity of legislature's determination of appropriate punishments, and reviewing it only where the statute is clearly excessive).

6. *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

7. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 937 (1989).

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

9. *See* Furman v. Georgia, 408 U.S. 238 (1972); Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory death sentence for first degree murder violates the eighth amendment); *see also* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Apr. 24, 1991) (reporting that of 3845 persons sentenced to death, only 145 have been executed).

either dealt exclusively with the death penalty, or dealt with a broader human or civil rights agenda. In some states, most notably California and New Jersey, the process of identifying and receiving copies of bills has proved particularly difficult.[10]

Our first monitoring project was completed in early August of 1989 with the publication of the *1989 Survey of State Legislation*.[11] Response to the *1989 Survey* persuaded us to continue the program into the 1990[12] and 1991[13] legislative sessions. Each survey lists, by state, the status of the numerous death penalty-related bills introduced in state legislatures that year, and their disposition at the end of our monitoring project.

The NCADP monitoring project tracks *all* death penalty bills. It looks at the types of bills, their numbers, and their success rate. We seek to provide a comprehensive understanding of the mindsets of state legislators and the political pressures they face. This understanding can give us important insights as we begin to develop a national legislative strategy.

Wherever possible, our survey includes notations of both House and Senate versions of a particular bill. We also include state House and Senate Joint Resolutions and state constitutional amendment proposals. Regrettably, the surveys have excluded public death penalty initiatives. In California, these initiatives often result in the most meaningful changes in the law. For example, in 1990, "Proposition 115"[14] substantially expanded California's death penalty through public, rather than legislative, vote.

II.
FINDINGS

In recent years, the death penalty has emerged as a "hot" political issue. Few issues have so frequently dominated contemporary campaigns. Support for the death penalty has been used as a potent political weapon, conveying subtle but clear messages about race, fear, and safety.[15] It is a symbol which is being used at the state and national level, resulting in the filing of bills to expand or expedite the use of capital punishment.

10. Because of this difficulty in obtaining primary sources, this Article contains references to the materials collected in the NCADP surveys described *infra* notes 11-13 and accompanying text, rather than to individual bills. Persons interested in gathering information about the legislative activity herein described are encouraged to contact the author to obtain copies of these surveys.

11. NCADP, 1989 SURVEY OF THE STATES' LEGISLATION (1989) [hereinafter 1989 SURVEY] (unpublished report).

12. NCADP, 1990 SURVEY OF THE STATES' LEGISLATION (1990) [hereinafter 1990 SURVEY] (unpublished report).

13. NCADP, 1991 SURVEY OF THE STATES' LEGISLATION (1991) [hereinafter 1991 SURVEY] (unpublished report).

14. Proposition 115, Crime Victims Justice Reform (1990) (codified as CAL. PENAL CODE § 190.2 (Deering 1990)) (expanding death penalty law to include murders of witnesses in juvenile proceedings, accomplices who are "major participants" in felony murders, and murders committed during mayhem or rape by an instrument).

15. *See, e.g., Crime Bill Conference*, Wash. Post, Oct. 19, 1990, at A22.

The 1990 legislative sessions produced over 185 death penalty-related bills in forty-three state legislatures.[16] In fact, only two states[17] which had legislative sessions during 1990 did not have death penalty-related bills filed. Five state legislatures did not meet in 1990.[18] Similarly, 1991 legislative sessions heard 183 bills in forty-two states.[19]

Though several different types of death penalty bills have been introduced, it is not surprising that most bills have favored the expansion, expedition or reinstatement of capital punishment.[20] Very few have supported its abolition or restriction.[21]

Despite the fanfare with which these bills suggesting alterations in the state's death penalty law are often introduced, their sponsors seem more motivated by the opportunity to get publicity than by the prospect of substantively changing the state's death penalty system. Few of these bills pass. For example in 1991, only seventeen of the 183 bills tracked were passed in the legislature.[22] Only fifteen became law.[23]

A. Expansion Bills

The largest group of bills (over one third of the bills tracked in 1990) would expand a state's existing ability to seek the death sentence.[24] These bills generally add a type of crime for which the death penalty may be sought or add an aggravating circumstance which the jury may consider in its sentencing deliberations.

Many expansion bills are introduced in response to highly publicized crimes or social problems. The "war on drugs," for example, preceded many of the recent expansion bills which would impose the death penalty in cases of drug-related murder or drug trafficking, or which seek to include drug trafficking as an aggravating circumstance when combined with homicide.[25]

Society's increasing attention to violence committed against children has led to the creation of a second category of expansion bills. These would make the murder of a child a death-eligible crime.[26] Following the January 1989 massacre of children on a school playground in Stockton, California,[27] a

16. 1990 SURVEY, *supra* note 12.
17. Delaware and Maine. *Id.*
18. Arkansas, Montana, Nevada, North Dakota, and Oregon. *Id.*
19. 1991 SURVEY, *supra* note 13.
20. 1990 SURVEY, *supra* note 12 (indexing bills filed by subject).
21. *Id.*
22. *See generally* 1991 SURVEY, *supra* note 13.
23. *Id.*
24. 1990 SURVEY, *supra* note 12.
25. *Id.* (describing such bills in Alabama, California, Florida, Georgia, Illinois, Kentucky, Louisiana, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Virginia, Washington, and Wyoming).
26. *Id.*
27. For a description of the crime and public response, see, *e.g.*, *5 Pupils Slain in School Attack*, Chicago Tri., Jan. 18, 1989, at 1; *Rifleman Kills 5 at Stockton School*, L.A. Times, Jan. 18, 1989, at 1, col. 5; *Rifleman Slays Five at School*, Wash. Post, Jan. 18, 1989, at A1.

number of state legislatures introduced bills making murders which take place on school property death-eligible. NCADP suspects that many of the current bills addressing the murder of children under age twelve are in response to the Stockton killings, as well as recent high profile child abuse cases.[28] Legislation expanding the death penalty to crimes in which the victim is under a certain age have continued to be filed in 1990 and 1991.[29]

In 1990, there were a number of bills introduced that addressed either the killing of judges and public officials or murders committed with the use of explosive devices.[30] These bills emerged just months after the mail-bomb murders of U.S. Appeals Court Judge Robert Vance and prominent NAACP attorney Robert E. Robinson.[31]

Highly publicized trials can also spark legislation. After trials in Georgia,[32] South Carolina[33] and Washington[34] in which one or more members of a jury blocked the imposition of a death sentence, bills were introduced in 1990 that would have allowed a trial court to impose a death sentence upon the recommendation of a non-unanimous jury.[35] In South Carolina, the bill necessitated the proposal of a state constitutional amendment[36] to exempt capital cases from the requirement that sentencing juries be unanimous.[37]

These bills, dubbed "reaction bills" by the NCADP, no doubt will continue to be filed in response to events that draw the attention of the press and public. Legislative monitors and activists in each state should anticipate and prepare for bills of this type. When such sensational crimes occur, it is important that responses promoting healing and prevention be proposed in order to counter the public furor and subsequent political manipulation of the tragedy.

An example of such an approach in response to a tragic crime occurred in Syracuse, New York, after the shooting death of fourteen-year-old Roger Eric Fields. The highly publicized killing could have bolstered calls for the reinstatement of the death penalty in New York, but activists with the American Friends Service Committee and People Against the Death Penalty in Syracuse proposed an alternative way for the victim's friends to express their outrage.

28. *See* 1990 SURVEY, *supra* note 12 (describing such bills introduced in California, Illinois, Kentucky, Mississippi, Texas, and Virginia); *see also USA Schools Wrestle with Kid Violence*, USA Today, Feb. 2, 1989, at 1A (noting that State Rep. Henry Cuellar (TX) introduced a bill imposing the death penalty for anyone who kills another on school property).

29. *See* 1991 SURVEY, *supra* note 13 (describing such bills introduced in Arkansas, California, Florida, Idaho, Indiana, Mississippi, New Jersey, and Tennessee).

30. *See* 1990 SURVEY, *supra* note 12 (describing such bills introduced in Alabama, Idaho and Illinois).

31. For a description of the crime and public response, see, *e.g.*, *2d Official Killed by Mail Bomb*, Chicago Tri., Dec. 19, 1989, at 1M.

32. Isaacs v. Georgia, 250 Ga. 717, 386 S.E.2d 317 (1989).

33. State v. Joyner, 289 S.C. 436, 346 S.E.2d 711 (1986).

34. State v. Yates, 111 Wash. 2d 793, 765 P.2d 291 (1988).

35. *See* 1990 SURVEY, *supra* note 12 (describing such bills introduced in Colorado, Georgia, South Carolina, and Washington).

36. S.C. CONST. art. V § 18.

37. 1990 SURVEY, *supra* note 12.

These groups organized a "March to End Violence" as a tribute to the victim.[38] Even if the filing of reaction bills cannot be prevented, activists should mount aggressive campaigns to keep them from being adopted. Changing effective state statutes in response to individual tragedies may be good politics, but it is rarely good government. However, it should be noted, as will be discussed below, that few of these reaction bills become law.[39]

The 1990 and 1991 state legislative sessions illustrated a disturbing trend toward the introduction of bills that would impose the death penalty for crimes other than murder,[40] or for crimes that only indirectly result in death.[41] This trend is not limited to state legislation. Each year since 1989, the Department of Justice has called for a federal drug trafficking death penalty even when no murder has occurred.[42] Most of the state legislation seeking to allow the death penalty for non-homicides involved drug trafficking offenses.[43]

In *Coker v. Georgia*,[44] the Supreme Court ruled that the imposition of the death penalty for crimes from which no death results violates the cruel and unusual punishment provision of the eighth amendment. No subsequent Supreme Court decision has challenged this precedent.

The Department of Justice defends a federal drug trafficking death penalty law by relying on *Tison v. Arizona*.[45] In that case, the Court allowed the imposition of the death penalty on two co-defendants who participated in a prison escape that resulted in four murders, even though the two co-defendants had not committed the murders. The Court cited as justification the co-defendants' "reckless disregard for human life" through their participation in a felony which resulted in murder.[46] But unlike the decision in *Tison*, current legislative proposals would impose the death penalty when no murder has occurred. Presumably, the *Coker* precedent would force courts to strike down these proposals if they became law. However, the current composition of the Supreme Court casts doubt upon the viability of this reading. Even if they are struck down, these bills represent an alarming willingness to extend the death penalty far beyond its previous boundaries. For example, a bill filed in 1990 in North Carolina would define the distribution of a controlled substance which causes or substantially contributes to a death as first degree murder made pun-

38. *See* A March to End Violence: In Loving Memory of Roger Eric Fields, News Release by People Against the Death Penalty (on file with author); *see also Young & Old Plead: Stop Terror Against Kids*, Herald Am., Apr. 7, 1990, at A1, col. 1.

39. *See* 1990 SURVEY, *supra* note 12 (indexing bills passed).

40. *Id.*

41. *Id.*

42. S. 1225, 101st Cong., 1st Sess., 135 CONG. REG. 6613 (1989). President Bush's 1991 crime package authorized death for a number of federal offenses that do not involve murder. *See* ACLU, Press Release April 12, 1991 (copy on file with the author).

43. *See* 1990 SURVEY, *supra* note 12 (indexing bills filed by subject).

44. 433 U.S. 584 (1977) (striking down a Georgia statute providing for the death penalty as punishment for rape).

45. 481 U.S. 137 (1988).

46. *Id.* at 152-54.

ishable by death. This bill specifies that any death resulting not only from the medical effects of the drug but also from the actions of a person impaired by use of the drug, would be included.[47] Two additional bills introduced that year which attempted to impose the death penalty for non-homicides singled out the sale of drugs to minors. According to the proposal in Louisiana, the sale itself would be considered a death-eligible crime,[48] while in Georgia, the bill required that a minor die as a result of the ingestion of the drugs in order for the offense to warrant death.[49]

B. Expedited Appeals Bills

Several bills in 1990 and 1991 responded to requests from both Chief Justice Rehnquist and members of Congress to consolidate or otherwise expedite the appeals process for those sentenced to death. Many of these bills restrict or eliminate proportionality review by the state courts.[50] Proportionality reviews focus on whether a particular death sentence is proportionate to other criminal sentences imposed in that state. Such reviews allegedly ensure that executions are not imposed in a discriminatory manner.

A South Carolina bill requires that the state supreme court issue a decision within ninety days on the direct appeal of a capital case.[51] A Florida bill would eliminate the office of the Capital Collateral Representative.[52] This is a thinly veiled effort to expedite capital appeals by eliminating the state-funded office which provides appellate representation to death-sentenced prisoners.[53]

C. Reinstatement Bills

Fourteen states do not have constitutional death penalty statutes. In eleven of these states, bills to reinstate the death penalty were introduced in 1991.[54] Some of the bills were comprehensive, providing procedures for death sentencing, appeals, and execution. Other bills would restore executions only for a limited list of crimes. One example of a limited restoration measure was a Hawaii bill proposing to reinstate the death penalty for the kidnapping and murder of minors.[55] Another example is a Kansas bill proposing to reinstate

47. 1990 SURVEY, *supra* note 12 (the bill died in judiciary committee).

48. *Id.* (the bill died in judiciary committee).

49. *Id.*

50. *See* 1990 SURVEY, *supra* note 12 (describing such bills introduced in Maryland, New Jersey, North Carolina and Ohio); *see also* 1991 SURVEY, *supra* note 13 (describing such bills introduced in Alabama, California, Nevada, New Jersey, Oregon, and South Carolina in 1991).

51. 1990 SURVEY, *supra* note 12 (the proposal died in judiciary committee).

52. *Id.* (The Capital Collateral Representative office is an appellate defense office established by the Florida legislature in 1985.)

53. *Id.*

54. *See* 1991 SURVEY, *supra* note 13 (describing such bills introduced in Alaska, Hawaii, Iowa, Kansas, Maine, Massachusetts, New York, Rhode Island, Vermont, West Virginia, and Wisconsin).

55. 1990 SURVEY, *supra* note 12 (the bill died in committee).

the death penalty for acts of terrorism.[56]

Despite persistent attempts to bring back the death penalty, reinstatement bills have repeatedly failed to pass. None of the thirteen reinstatement bills filed in 1990 passed, and all bills from the 1991 legislative sessions have also failed to pass (with the exception of one pending provision in Massachusetts, which is expected to be addressed in the next few months).

The history of reinstatement bills in New York provides a textbook illustration of the value of "checks and balances" among the branches of government. In 1991, for the thirteenth year in a row, the New York State Assembly passed a reinstatement bill.[57] The Governor, for the thirteenth year in a row, vetoed it.[58] The annual battle to override the Governor's veto has intensified over the years; both the Senate and the Assembly have come within a few votes of success. However, the prospects for a future override appear slim after the Assembly elections in 1990. Two candidates who oppose the death penalty were elected to the Assembly, defeating incumbents who supported it.[59] Their election was widely attributed to the incumbents' changing their positions during the primary campaigns to support the death penalty. Their defeat marks an important step toward de-bunking the myth that support for executions is a necessary component of a winning campaign. In 1991, moreover, the usual wrangling over the issue was far less intense; the Assembly did not even call for an override vote.

D. Bills to Restrict or Repeal the Death Penalty

Bills to restrict or repeal the death penalty were filed far less frequently than expansion bills. In addition, the trend is going in the wrong direction with fewer restriction bills filed in 1990 than in 1989.[60] In 1990, only five states had bills filed to completely repeal the death penalty.[61] Twelve states considered legislation which would prohibit the imposition of death sentences on the mentally retarded.[62] Of these bills, the ones in Kentucky[63] and Tennessee[64] passed in 1990, and the one in New Mexico[65] passed in 1991, raising the

56. 1991 SURVEY, *supra* note 13.

57. 1991 SURVEY, *supra* note 13.

58. Governor Cuomo has vetoed the death penalty since 1982. Prior to that, it was vetoed each year by then-Governor Hugh Carey.

59. *House, Death Penalty Backers Loose Ground in Assembly*, Gannett News Service, Nov. 7, 1990 (Susan John and Vivian Cook defeated Gary Proud and Edward Abramson).

60. *Compare* 1990 SURVEY, *supra* note 12 (31 bills filed) *with* 1989 SURVEY, *supra* note 11 (43 bills filed).

61. *See* 1990 SURVEY, *supra* note 12 (describing such bills introduced in California, Georgia, Nebraska, New Jersey, and Utah).

62. *See id.* (describing such bills introduced in Florida, Georgia, Indiana, Kentucky, Nebraska, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Washington).

63. 1990 SURVEY, *supra* note 12 (codified as KY. REV. STAT. ANN. § 532.140 (Michie/Bobbs-Merrill 1990).

64. *Id.* (codified as TENN. CODE ANN. § 39-13-203 (1990)).

65. 1991 SURVEY, *supra* note 13 (codified as N.M. STAT. ANN. § 31-30A-2.1 (Michie 1991)).

total number of states which now bar the execution of the mentally retarded to five.[66] Seven states reviewed legislation to raise the minimum age for execution.[67] Most of the bills filed would establish eighteen as the minimum age for the imposition of the death penalty.[68] Minimum age bills in Georgia, Mississippi, Oklahoma, South Carolina, and Virginia were defeated; one is pending in Pennsylvania. Missouri passed a bill raising the minimum age for death sentencing from fourteen to sixteen.[69]

Several states addressed the method of execution to be used. Bills implementing lethal injection were filed in Louisiana, Mississippi, Ohio, and Washington.[70] Ohio's bill was vetoed by then-Governor Richard Celeste.[71] Louisiana's bill passed in 1991.[72] While most abolitionist organizations do not take a position on the method of execution used in a given state, these bills often provide an opportunity to raise arguments against the death penalty, and should therefore be monitored by death-penalty abolitionists.

E. Sentencing Bills

Though the NCADP's legislative monitoring project did not request bills which related to non-death penalty sentencing changes, several of the bills we received suggest a trend toward stiffer sentencing for first degree or felony murder.[73] This should not be surprising. Lawmakers' "quick-fix" approaches to crime almost always focus on punishment rather than prevention, and the sentiment for stiffer sentences has gone well beyond calls for the death penalty.

In 1990, legislators in Florida, Indiana, and Mississippi[74] proposed bills which would establish a sentence of life without the possibility of parole as a third option for juries. The jury in a case involving a crime punishable by death would have the option of sentencing the defendant to an unspecified life term, to life without the possibility of parole, or to death. Two other states, Colorado and Utah, introduced bills replacing the maximum sentence of unspecified life with life without the possibility of parole. The Colorado bill has

66. The other two are Georgia, which passed such a prohibition in 1987 (GA. CODE ANN. § 17-7-131 (1990)), and Maryland, which passed a bill in 1988 (MD. ANN. CODE § 412 (1990)). Two 1990 legislative efforts in Georgia attempted to repeal or alter the prohibition on the execution of the mentally retarded. Both failed. 1990 SURVEY, *supra* note 12.

67. *Id.* (describing such bills introduced in Georgia, Michigan, Mississippi, Missouri, Oklahoma, Pennsylvania, South Carolina, and Virginia).

68. *See generally id.*

69. *Id.* (codified as MO. REV. STAT. § 565.020 (1990)).

70. *Id.* (At the time these bills were introduced, Louisiana and Ohio used the electric chair, Mississippi used the gas chamber, and Washington used either lethal injection or hanging.).

71. United Press Int'l, July 9, 1989.

72. 1991 SURVEY, *supra* note 13.

73. *See* 1990 SURVEY, *supra* note 12 (describing such bills introduced in Kansas, Mississippi and New Jersey).

74. *Id.* (Indiana's bill was initially written to repeal the death penalty, replacing it with life without parole. It was later amended to add life without parole as a third option and passed as amended in the House, but died in the Senate Judiciary Committee.)

passed,[75] but Utah's bill failed.[76]

The NCADP does not take a position on alternative sentences such as life without the possibility of parole or minimum-time-served sentences (sometimes referred to as life sentences, with specific prohibitions on eligibility for parole for a determined period of time, usually twenty-five to forty years). We believe, however, that jury awareness of the existence of such sentences, which are often mandatory in capital cases where death is not imposed, could reduce the number of death sentences.

Public opinion polling across the country suggests that people choose specific alternative sentencing arrangements over the death penalty when given the choice.[77] These poll results confirm that the public is more concerned about safety than about the death penalty. Research demonstrates that the public does not understand the meaning of a life sentence, and if given accurate information about parole eligibility, may be less likely to impose death.[78] Given this data, attempts should be made to educate the public about these alternative sentences where they exist.

Political expediency plays a role in the demise of some of these sentencing bills. In 1989, Governor Martinez of Florida vetoed a bill which would have provided life without parole as a third option for capital juries.[79] The veto statement made it clear that the Governor based his objection to the provision on the belief it would reduce the number of death sentences imposed.[80] It remains unclear whether such sentiments played a role in the demise of this year's sentencing bill in Florida.

In New York, the Republican Senate has vowed not to hear Governor Cuomo's life-without-parole bill. The Senate sponsor of the death penalty provision, Vincent Graber, revealed the reason in a February 1990 interview: "This being an election year, I don't think the Senate is in the mood to go with mandatory life, no parole. The death penalty would become less of a campaign issue and I don't think they want to do that."[81]

This review represents only a sampling of the sentencing bills introduced in the recent past. The passage of tougher alternative sentencing provisions may well reduce death sentencing rates. Despite the abolition movement's justifiable unwillingness to support specific sentencing alternatives, the growing number of life-without-parole or minimum-time-served bills and their po-

75. Imposition of Sentence Act, ch. 118, 1990 Colo. Sess. Laws 92.7 (codified as amended at COLO. REV. STAT. § 16-11-103 (1990)).

76. 1990 SURVEY, *supra* note 12.

77. *See* NCADP, PUBLIC OPINION AND THE DEATH PENALTY: WHAT THE POLLS REALLY SAY (1990) (on file with author).

78. Wood, *The Meaning of Life for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1625 (1989).

79. H. 356, 11th Leg., 1st Sess. (1989).

80. *See* Letter from Governor Robert Martinez to Jim Smith (July 3, 1989) (on file with author).

81. Cortland Standard, Feb. 5, 1990, at 11, col. 5 (on file with author).

tential to prevent the passage of death penalty bills or to reduce the imposition of death sentences should be acknowledged.

III.
WHAT CAN WE LEARN FROM THE SURVEY?

The death penalty is a hot topic in state legislatures. Whether or not a state presently has a death penalty statute, the legislature will likely confront the issue. Yet despite the high incidence of legislative activity regarding death penalty provisions, significant changes in the law are unlikely. These bills generally do not pass. In fact, the sponsors of many death penalty-related bills let them die once they are introduced. While calls for an expanded death penalty may seem politically expedient, the nuts and bolts of the lawmaking process often discourage enactment.

It is easy to pick out the political pressures encouraging legislators to introduce death penalty bills. There is little pressure against these bills because most states lack an organized abolitionist lobby. Politicians find it easier to call for the death penalty in response to an assault weapon murder, than to seek bans on assault weapons, which would draw fire from the National Rifle Association.[82] Supporting the death penalty for child abusers makes a better sound bite than supporting programs to prevent child abuse. Politicians also know that death penalty measures can be introduced, debated, and even passed without special financial appropriations, and to date, policymakers have not been held accountable for the complete lack of effectiveness of these measures.

Another conclusion drawn from the surveys is that legislators mistakenly think an active death penalty law needs no "care and feeding." One such legislator, during last year's debate in the New York State Assembly, expressed his frustration at twelve years of wrangling with the death penalty. He threatened to change his vote from anti- to pro-death penalty, and thus provide the final vote needed to override the Governor's veto and bring back the death penalty, just to "end the years of debate."[83] These legislators should note that reviving the death penalty sets off an endless process of "fine-tuning." There is always one more crime to bring under the statute, one more procedure to streamline, one more "advance" to be made. All this "tinkering" ties up the legislative process. In addition, where these adjustment bills pass, they add to the ever-increasing complexity that now accompanies every death penalty trial, every appeal and every execution. Passing a death penalty reinstatement bill will not end the debate; on the contrary, it will initiate an endless process of refinement.

82. *See, e.g.*, 1990 SURVEY, *supra* note 12 (describing a bill introduced in Kentucky, which would impose the death penalty for murders committed with fire arms, and one in Massachusetts, which would establish the death penalty for murders committed with assault weapons).

83. Legislative Gazette, Mar. 13, 1989 (on file with author).

IV.
BUILDING A LEGISLATIVE STRATEGY

No one would suggest that we should focus all of our energy on legislative and political opposition to the death penalty. There are many fronts on which we need to fight if we are to succeed. However, a coordinated legislative and political strategy has become an increasingly important requirement of our work.

The ease with which politicians have recently been able to advocate the death penalty and use it for political gain suggests a critical need for death penalty opponents to make themselves heard. A legislative strategy must take two directions. First, it must work to support measures which restrict or repeal the death penalty. Second, it must raise the political costs for advocating the death penalty and oppose bills which would expand its use. The strategy should include working with the wide variety of organizations which share the NCADP's goals.

Until now, the NCADP has avoided taking positions on other crime-related issues such as gun control, sentencing options or victims' rights measures. However, building alliances for effective legislative work may require that the movement take positions on some of these issues.

The legislative work could include many approaches. It might raise issues which in the past have been considered only in the judicial arena. For example, additional mitigating circumstances or prohibitions could be sought. These might include addressing the effect of child abuse on future violent behavior and the incidence of post-traumatic stress disorder. Trial judges could be required to fully inform sentencing juries about the true meaning of the non-death option. There also are more traditional legislative approaches. We could fight against participation of medical personnel in any part of an execution, including pronouncement of death. Bills addressing racism in the application of the death penalty,[84] such as the Fairness in Death Sentencing Act now before Congress,[85] should be supported and introduced at the state level. Abolitionists should participate in budget battles, highlighting the large amounts of state resources used in implementing the death penalty. Perhaps county councils could be persuaded to require that public defenders and prosecutors keep records of capital prosecution and defense expenses. These types of campaigns, in addition to all-out repeal efforts, will give abolitionists a chance to debate the full range of death penalty issues at the local level and thus win more grass roots support.

During election campaigns, appropriate groups must strongly support candidates who oppose the death penalty, as well as loudly challenge those

84. *See, e.g.*, S. 1970, 101st Cong., 1st Sess. tit. 1, 135 CONG. REC. S16,697-701 (daily ed. Nov. 21, 1989); S. 1696, 101st Cong., 1st Sess., 135 CONG. REC. S12,152-202 (daily ed. Sept. 28, 1989); H.R. 4442, 100th Cong., 2d Sess., 134 CONG. REC. E1174-201 (daily ed. Apr. 21, 1988).

85. S. 1249, 102d Cong., 1st Sess., 137 CONG. REC. S7381 (daily ed. June 6, 1991).

who do not. This strategy seems to have worked in New York in 1990.[86] Such political action should continue after elections to provide ongoing support to those officials who oppose capital punishment.

CONCLUSION

All of this will, of course, require some structural changes within a movement now geared exclusively toward public educational and legal strategies. But such changes will help us increase the effectiveness of the movement as a whole. While we may not immediately make dramatic breakthroughs, even a modicum of activity should prevent the reckless legislative efforts we are now witnessing in state capitals. These bills are being filed in part because there is no organized opposition to them. A Mississippi legislator proposed the death penalty for rape[87] and no one objected. Lawmakers in other states have suggested that proportionality review be eliminated.[88] Thus far no one has taken responsive action. Power concedes nothing without struggle.[89] As long as it is tolerated, the political rhetoric will not fade. Neither the legislative nor judicial branches will change without forceful action from abolitionists. Opponents of the death penalty must present powerful arguments and concern for rational solutions to violence. Given the grandstanding that characterizes the current death penalty debate, such a strategy is not just good abolition work, it is also good government.

86. United Press Int'l, Sept. 11, 1990 (two death penalty advocates were defeated at the polls by two death penalty opponents).

87. 1990 SURVEY, *supra* note 12.

88. *See supra* note 50 and accompanying text.

89. *See* Letter from Frederick Douglass to Gerrit Smith (Mar. 30, 1849) (stating "[p]ower concedes nothing without a demand"), *reprinted in* G. SELDES, THE GREAT QUOTATIONS 214 (1990).