

# "SHALL SURELY BE PUT TO DEATH." Capital Punishment in New Hampshire, 1623-1985

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*The following is a reprint of an article originally published in the Bar Journal in Vol. 27, No. 3, Spring 1986.*

"While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards.... [T]he words of the Amendment are not precise, and ... their scope is not static. The Amendment must draw it's meaning from the evolving standards of decency that mark the progress of a maturing society."

*Trop v. Dulles*<sup>1</sup>

## INTRODUCTION

The development of New Hampshire's capital punishment statutes reflects the process noted by the Trop court that the scope of the state's power to punish is defined by the "evolving standards of decency that mark the progress of a maturing society."<sup>2</sup> The uniform direction of that process in New Hampshire over the past 350 years has resulted in ever increasing restrictions on the state's prerogative to inflict the penalty of death. If the evolution of capital punishment in New Hampshire continues the same course, there may come a time when a sentence of death becomes cruel and unusual punishment because it falls outside New Hampshire's 'limits of civilized standards.'

The revisions of the state's capital punishment statutes mirror the social and political changes marking New Hampshire's transition from British colony to fledgling republic to modern state. As New Hampshire distanced itself from the theocratic government of Massachusetts in the early eighteenth century the province eliminated capital punishment for crimes involving family relationships, religion, and superstition. Early in the nineteenth century, after the Declaration of Independence had established the principle that life itself is an unalienable right, the New Hampshire Legislature prohibited the state from exacting a life for crimes against property. Over the past two centuries, as the

bounds of the relationship between the individual and the state have been further defined, the legislature has enacted increasingly stringent procedural safeguards to protect defendants from the arbitrary exercise of the state's power to impose a penalty of death.

The introduction in the 1970s of federal standards regarding the use of the death penalty abruptly restructured the process driving the development of New Hampshire's capital punishment statutes. The federal standards resulted from United States Supreme Court decisions in cases involving Eighth Amendment challenges to death penalty statutes in states other than New Hampshire. The thrust of the Court's decisions was that the death penalty is not cruel and unusual punishment per se as long as there are particular procedural safeguards to guide its application.<sup>3</sup> In response to the Court's decisions the legislature rewrote New Hampshire's capital punishment statutes. New Hampshire's current death penalty statutes are a blend of the concepts evolved over New Hampshire's long history and the requirements imposed by the Federal Constitution.<sup>4</sup>

Merely conforming to the United States Supreme Court's interpretation of the United States Constitution does not insure that the present capital punishment statutes fall within New Hampshire's "limits of civilized standards." The New Hampshire Constitution guarantees individuals strong protections against intrusions by the state.<sup>5</sup>

The New Hampshire Supreme Court has found that in certain circumstances the New Hampshire Constitution offers greater protections for the individual than does the Federal Constitution.<sup>6</sup> The court has never decided whether capital punishment violates the New Hampshire Constitution.<sup>7</sup> However, the evolution of the statutes concerning capital punishment in New Hampshire coupled with the strong protections guaranteed the individual under the State Constitution may someday terminate New Hampshire's power to punish with the penalty of death.

## CAPITAL CRIMES LEGISLATION, 1623-1985

Until their union with the Massachusetts Bay colony, the first four New Hampshire towns were, to various degrees, autonomous settlements. Although the four were subject to the laws of England,

and Hampton was governed to some extent by Massachusetts, each town also had its own laws and its own means to enforce them. There is no indication that Portsmouth, Dover, or Hampton either passed any capital laws or meted out any capital sentences before joining Massachusetts Bay in 1641. Exeter passed a town ordinance in 1640 making treason a capital offense.<sup>8</sup> However, the Exeter court imposed no death sentences before the law was voided when the town joined Massachusetts in 1643. The first comprehensive body of statutory law made applicable to the four New Hampshire towns was the Body of Liberties promulgated by the Massachusetts General Court in 1641. The Liberties enumerated 12 capital offenses and more could be added by statute. In addition, the General Court could hear cases and impose capital punishment for offenses involving violations of the laws of God not covered by the Liberties.<sup>9</sup>

There appear to have been two categories of capital crimes under the Liberties. The first category provided that the offender “shall be put to death” for crimes including idolatry, witchcraft, blasphemy, willful murder, impassioned murder, murder by poisoning, false witness causing another’s death, public rebellion, and treason.<sup>10</sup> The sentence for category two crimes was that the offender “shall surely be put to death!” Category two offenses included bestiality, sodomy, adultery, and kidnapping.<sup>11</sup> The statutes were straightforward statements with no mention of leniency or mitigating circumstances. However, the refusal of grand juries to indict for certain crimes ameliorated the harshness of the statutory language.<sup>12</sup>

One of the purposes for settling Exeter and the Massachusetts Bay Colony was to establish societies based upon religious principles. The laws of each colony evidenced the theocratic nature of their governments. Both the Exeter treason law of 1640 and the Liberties used biblical passages to support the right of the state to punish certain behavior.<sup>13</sup> In addition, the Massachusetts General Court declared the religious crimes of idolatry, blasphemy and witchcraft to be capital offenses.<sup>14</sup>

The 1658 version of the Liberties included two more peculiarly Puritan capital crimes. In one, the courts could impose capital punishment on children over 16 who cursed or hit their parents.<sup>15</sup> The law did not allow the death penalty if the parents had been “un-Christianly negligent” in the child’s education or if the parents had been so harsh in their discipline that the child had reacted in self defense.<sup>16</sup> The second law allowed parents to bring their stubborn or rebellious son to court on the capital charge of failing to mind his parents and living a life of sundry and notorious crimes.<sup>17</sup> The General Court also addressed some other social problems in its 1658 revision of the Liberties. New provisions made forced rape punishable either by death or “some other grievous punishment” and added carnal knowledge of a female child under ten years of age and a third conviction for burglary to the list of capital crimes.<sup>18</sup>

The Liberties served as the foundation for the first New Hampshire code of laws after the colony broke away from Massachusetts in 1679. The New Hampshire Assembly made a few changes in the capital crimes laws at the time of separation and instituted considerable changes over the next 40 years. The reforms evidence a very different

outlook concerning the nature of society and indicate that the state was assuming responsibility for maintaining the peace rather than for imposing religious norms. The Assembly deleted the references to biblical passages supporting the state’s power to punish certain actions and either eliminated the strictly “Puritan” capital crimes or reduced them to noncapital offenses. The capital offenses added by the Assembly generally addressed crimes against the person and against property rather than crimes against religious principles.

The New Hampshire Assembly’s first code deleted adultery from the list of capital offenses and moved kidnapping from category two to category one.<sup>19</sup> Juries were to consider mitigating circumstances at trials for murder, sodomy, and cursing or hitting one’s parents.<sup>20</sup> Allowances for mitigating factors became statutory considerations in sentencing for convictions of public rebellion, sodomy, kidnapping, being a rebellious son, rape, arson and burglary.<sup>21</sup>

All laws passed by New Hampshire’s provincial government required approval by the Privy Council in London.<sup>22</sup> The Council imposed a few of its own changes on the 1679 code. Being a rebellious son was included in the New Hampshire, but not the English, copy of the law.<sup>23</sup> That omission probably meant the law was not valid. The Assembly did not include it in later New Hampshire codes. In addition, the Privy Council set aside the code’s provisions concerning idolatry, blasphemy, treason and public rebellion.<sup>24</sup> The first two might not have been consistent with English law. The Council set aside the second two because they were already provided for under English law.<sup>25</sup>

In 1682 the Assembly passed a law making second, rather than third, offense burglary a capital crime.<sup>26</sup> In 1701, the Assembly made polygamy a capital crime and reduced false witness (perjury) to a noncapital offense.<sup>27</sup> Concealing the death of a bastard child became a capital offense in 1714.<sup>28</sup> The law presumed that a mother who concealed the death of a bastard child was guilty of murder.<sup>29</sup> Raising a defense that the child was born dead required at least one corroborating witness.<sup>30</sup> Also in 1714 the Assembly reinstated treason as a capital offense.<sup>31</sup>

A new capital crimes statute enacted in 1718 eliminated the language that certain offenders shall surely be put to death.<sup>32</sup> The same law also reduced blasphemy to a noncapital offense and dropped cursing or hitting one’s parents from the criminal code.<sup>33</sup> In addition, the 1718 law changed the penalties for more secular crimes by dropping kidnapping, impassioned murder, and murder by poison from the criminal code and increasing the penalty for burglary by permitting capital punishment upon conviction of a first offense.<sup>34</sup> The Assembly reduced the crimes of being a stubborn child and public rebellion to noncapital offenses in 1718 and 1721 respectively.<sup>35</sup> The law prohibiting idolatry was never reenacted after having been set aside by the Privy Council in 1679. The statute concerning witchcraft was dropped without record, perhaps in response to the 1690s witch hysteria. By 1721 the Assembly had limited capital crimes to willful murder, burglary, arson, rape, sodomy, bestiality, polygamy, concealing the death of a bastard child, and treason. New Hampshire’s capital crimes statutes of the eighteenth century indicated that the province had become more interested in using the criminal code to resolve existing social problems than to

further the goals of a theocratic state.

With the exception of law concerning treason, the capital crimes statutes of 1721 remained in effect until after the American Revolution. One prudent change occurred in 1777 when the revolutionary legislature redefined treason to mean acts against the State of New Hampshire rather than against the government of Great Britain.<sup>36</sup> In 1781 the legislature expanded the scope of the treason statute to include statements as well as acts against the New Hampshire government.<sup>37</sup>

The New Hampshire Legislature revised the criminal code in 1791 and continued willful murder, burglary, arson at night, rape, sodomy, bestiality, and treason as capital offenses.<sup>38</sup> The legislature responded to the ingenuity of some individuals in making ends meet during the difficult economic times following the Revolution by adding counterfeiting and mugging to the list of capital crimes.<sup>39</sup> In addition, the 1791 code reduced the penalty for polygamy, eliminated the presumption of murder for concealing the death of a bastard child, and permitted juries to acquit on a charge of murder while still finding a mother guilty of concealing the death of her bastard child.<sup>40</sup> By 1859, murder and concealment could no longer be charged in the same indictment.<sup>41</sup>

At the time the legislature passed the 1791 capital crimes law, the movement to abolish capital punishment was well established in parts of the United States. Cesare Beccaria's 1764 *Essay on Crimes and Punishment* had helped initiate the debate.<sup>42</sup> In his *Essay*, Beccaria systematically applied the principles of the Enlightenment to criminal law and concluded that the state lacked legitimate power to take the life of a citizen. Beccaria's writing influenced such notables as Dr. Benjamin Rush, Benjamin Franklin, and Thomas Jefferson to join in opposing capital punishment.<sup>43</sup> The leaders of the anti-gallows movement advanced a number of arguments against the use of the death penalty including the fallibility of the criminal justice system, the failure of capital punishment to deter crime more effectively than imprisonment, and the desirability of rehabilitating rather than exterminating criminals.<sup>45</sup>

In addition to the anti-gallows crusade, the penitentiary movement was in full swing by the end of the eighteenth century.<sup>46</sup> The goal of the penitentiary movement was to reform criminals through long periods of confinement to hard labor. The legislative record for the early 1800s makes it apparent that both the anti-gallows and the penitentiary movements had supporters in the state. In 1811 the legislature appointed John Mason, John Goddard, and Daniel Webster to revise the state's criminal laws and to create rules for the new state prison then under construction.<sup>47</sup> The next year the legislature abolished capital punishment for all crimes except murder and treason.<sup>48</sup> In place of the death penalty, the legislature mandated long periods of confinement at hard labor in the state prison.<sup>49</sup> The 1812 law also permitted judges to sentence certain offenders to solitary confinement for up to six months.<sup>50</sup>

The debate over the death penalty did not end with the wholesale changes of 1812 and the issue received wide public attention in New Hampshire during the 1830s and 1840s. In 1834 Governor William Badger asked the legislature to replace capital punishment for murder and treason with terms of imprisonment. subnumbe<sup>51</sup> He based his argument on part I, article 18 of the New Hampshire Constitution which

notes that the "true design of all being to reform, not to exterminate mankind."<sup>52</sup> Governor Badger repeated his plea in 1835 and observed that the "question as to the expediency of capital punishment has for the past year excited the attention of very many enlightened individuals and legislatures of several of the states."<sup>53</sup> The New Hampshire Legislature was unmoved, however, and the House shortly thereafter killed a bill to abolish capital punishment.<sup>54</sup>

Reverend Arthur Caverno's 1835 sermon calling for the abolition of capital punishment in New Hampshire indicates the extent of the debate over the subject at that time.<sup>55</sup> In his sermon, Caverno refuted the argument that capital punishment had a deterrent effect on crime and pointed to Denmark as an example where the murder rate dropped after the country had abolished the death penalty. Caverno adopted Beccaria's conclusion that the state does not have a legitimate right to take a life and also argued that imperfections in the judicial system resulted in the occasional execution of innocent individuals. In addition to it being morally wrong for Christians to condemn others to death, Caverno felt that the use of capital punishment promoted the very evils it was intended to prevent. As proof he offered statistics showing that between 1820-1834 the ratio of prison inmates to population for New Hampshire averaged less than one-half the ratio for four other New England states even though New Hampshire had the least harsh capital punishment statutes.<sup>56</sup>

The opponents of capital punishment secured the passage of two pieces of reform legislation in 1837. In that year the New Hampshire Legislature reduced treason to a non-capital offense and divided the

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crime of murder into two degrees.<sup>57</sup> “All murder ... committed by poison, starving, torture or other deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, may be murder in the first degree; all other murder shall be of the second degree.”<sup>58</sup> The law restricted the use of capital punishment to convictions of murder in the first degree and limited the punishment for second degree murder to confinement to hard labor for life with up to three years in solitary confinement.<sup>59</sup>

The anti-gallows movement was in full swing on a national scale during the second quarter of the nineteenth century. By the 1840s the opponents of capital punishment were publishing a magazine to report on the progress of their cause throughout the nation.<sup>60</sup> Organizers founded anti-gallows groups in a number of states and in 1845 a national anti-gallows society met in Philadelphia and elected the Vice-President of the United States George M. Dallas as its president.<sup>61</sup> The anti-gallows movement was effective in prodding several states to abolish the death penalty temporarily and in convincing a few states to abolish it permanently.<sup>62</sup>

The 1840s were also a busy time for the New Hampshire anti-gallows movement and opponents of the death penalty introduced a number of bills and petitions calling for an end to capital punishment. In 1842 Governor Henry Hubbard proposed that the legislature abolish capital punishment and replace it with penalties that were in proportion to the offense but which would not destroy all hope within the offender.<sup>63</sup> Later that year the House rejected by a vote of 109 to 104 an amendment to a bill which would have abolished capital punishment in New Hampshire.<sup>64</sup> In 1844, Governor John H. Steele called for abolition of the death penalty and a number of citizens petitioned the legislature to heed the governor’s advice.<sup>65</sup> The legislature put the issue before the voters as a referendum question on the 1844 presidential ballot and the abolitionists were defeated 21,544 votes to 11,241.<sup>66</sup> Following the referendum a special committee of the House found it inexpedient to legislate on capital punishment at that time.<sup>67</sup> Despite the defeat, the anti-gallows movement remained active and introduced petitions and legislation concerning capital punishment in 1848, 1849 and 1850.<sup>68</sup> The abolitionists’ single success during this time was an 1849 law requiring the state to wait one year rather than four days before carrying out a sentence of death.<sup>69</sup>

Between 1837 and 1971, there was but one change in New Hampshire’s capital crimes statute. In 1937, perhaps in response to the Lindbergh kidnapping, the legislature added the killing of a kidnap victim to the circumstances that permitted a finding of first degree murder.<sup>70</sup> During that period the anti-gallows movement had to measure its success by the implementation of additional procedural safeguards for defendants in capital cases rather than by further limitations on the use of the death penalty.

The New Hampshire Legislature revamped the state’s capital crimes laws several times in the 1970s. However, the rationale for the changes resulted from requirements imposed by the United States Supreme Court rather than from the efforts of opponents of capital punishment. In 1971, shortly before the decision in *Furman v. Georgia*, the legislature reworked the murder statute and removed the distinction between first and second degree murder.<sup>71</sup> Three years

later the legislature reversed itself and enacted an even more specific statute dividing the offense into capital, first degree, and second degree murder.<sup>72</sup> In 1977 the legislature amended section 111 of the statute to provide that a person convicted of capital murder may (rather than shall) be put to death.<sup>73</sup> The amendment was made necessary by two 1976 United States Supreme Court decisions banning mandatory death sentences upon conviction of any crime.<sup>74</sup> The current capital murder statute, enacted in 1974 and amended in 1977, provides that:

I. A person is guilty of capital murder if he knowingly causes the death of:

(a) A law enforcement officer acting in the line of duty;

(b) Another before, after, while engaged in the commission of, or while attempting to commit kidnapping as that offense is defined in RSA 633:1;

(c) Another by criminally soliciting a person to cause said death or after having been criminally solicited by another for his personal pecuniary gain.

II. As used in this section, a “law enforcement officer” is a sheriff or deputy sheriff of any county, a state police officer, a constable or police officer of any city or town, an official or employee of any prison, jail or corrections institution, or a conservation officer.

III. A person convicted of a capital murder may be punished by death.

IV. As used in this section and RSA 630:1a, 1-b, 3, 3, and 4, the meaning of “another” does not include a foetus.

V. In no event shall any person under the age of seventeen years be culpable of a capital murder.<sup>75</sup>

In 1983 the legislature killed a bill that would have once again merged all classes of murder into a single offense.<sup>76</sup> Legislation introduced in 1985 would have expanded the current statute as well as have changed the method of execution from hanging to lethal injection.<sup>77</sup> The proposed legislation provided that a person already convicted of first degree murder is guilty of capital murder if “he purposely, knowingly, or recklessly causes the death of another.”<sup>78</sup> The bill also sought to expand the definition of law enforcement officer to include parole and probation officer.<sup>79</sup> The House voted to send the bill to interim study where the Committee on the Judiciary excised all but the provisions concerning lethal injection before voting to recommend that the bill ought to pass.<sup>80</sup> The bill was introduced in the 1986 legislative session as HB 106, N.H. (1986).

A by-product of the deliberations of the committee was HB 115, N.H. (1986) which sought to replace capital punishment with sentences of life imprisonment with no chance of parole. The House defeated HB 115 (1986). HB 106 (1986) passed both houses of the legislature.

## PROCEDURAL DUE PROCESS AND THE DEATH PENALTY IN NEW HAMPSHIRE

Parallel to the reduction in the number of New Hampshire’s capital crimes laws has been an increase in the procedural protections available to individuals accused of capital offenses. Before 1977

the requirements of the State Constitution and the concerns of New Hampshire citizens shaped and expanded the procedural rights specific to capital punishment. In recent years the legislature has adopted due process procedures for capital cases with the goal of conforming New Hampshire law to the requirements imposed by decisions of the United States Supreme Court.

During New Hampshire's union with Massachusetts, all capital cases had to be tried to the Court of Assistants in Boston with a special jury impaneled to hear each case.<sup>81</sup> Defendants could challenge jurors and have them removed for good cause.<sup>82</sup> The 1641 Body of Liberties provided that "no man shall be put to death without the testimony of two or three witnesses or the equivalent thereunto."<sup>83</sup> In 1646 the General Court decided that an accused's failure to surrender after public announcement of his or her indictment for a capital offense was sufficient testimony in itself to reduce by one the number of required witnesses for the state.<sup>84</sup> By 1647, a defendant in a capital case had the right to have all witnesses present in court no matter where they lived.<sup>85</sup> The Liberties provided that a defendant convicted of a capital crime by a divided Court of Assistants could bring an appeal to the General Court.<sup>86</sup> Executions could not be carried out until four days after sentencing.<sup>87</sup> In 1849 the legislature raised the time interval required between sentencing and execution to one year.<sup>88</sup>

New Hampshire's 1679 code of laws added a couple of procedural protections for defendants in capital cases. Defendants could preemptorily challenge "six or eight" jurors in addition to challenges for cause.<sup>89</sup> Also, defendants could appeal any conviction to the President and Council or to the General Assembly.<sup>90</sup> In addition, the Crown's 1682 instructions to Lieutenant-Governor Cranfeld called for automatic Privy Council review of all death sentences except for cases involving willful murder.<sup>91</sup> In 1776 the New Hampshire Assembly ended this "absurd practice" of taking appeals to the Privy Council.<sup>92</sup>

The post-revolution state legislature built upon the procedural protections already available to defendants in capital cases. The protections incorporated into the New Hampshire Constitution of 1784 and amendments of 1791 mandated much of the new legislation. Part I, article fifteen of the constitution outlines procedures for arraignment, witnesses, and counsel. Part I, article sixteen requires trial by jury in capital cases, part I, article eighteen requires a sentence to be proportionate to the offense, and part I, article thirty-three prohibits cruel and unusual punishments.

The criminal code passed in 1791 reflected the new constitutional requirements by greatly expanding the procedural protections available to defendants in capital cases. The law required the state to supply the defendant in a capital case with a copy of the grand jury's indictment before arraignment.<sup>93</sup> In addition, the court had to provide counsel, not exceeding two, who were to have access to the prisoner at all reasonable hours.<sup>94</sup> Defendants had the right to proceed *pro se* if they wished and to make proof through any competent witness.<sup>95</sup> The law mandated that defendant, in capital cases be given the same power to compel witnesses for the defense as the state had to compel witnesses for the prosecution.<sup>96</sup>

The 1791 code also gave the jury responsibility to decide whether

a prisoner who refused to plead stood mute by the "Providence of God" or by the defendant's own design.<sup>97</sup> In the first instance, the court remanded the defendant to prison until the mute condition subsided.<sup>98</sup> If the jury found that the prisoner "fraudulently, willfully, and obstinately" stood mute, the court proceeded with the trial as if the defendant had pleaded not guilty, except that the prisoner forfeited the right to challenge jurors.<sup>99</sup> By 1867 the legislature had dropped the jury question relating to the cause of a defendant's refusal to plead.<sup>100</sup> However, failure to plead still operates to deny the defendant the right to preemptorily challenge jurors.<sup>101</sup>

The 1791 code also required the state to supply the defendant in a capital case with the names and addresses of all witnesses and jurors at least 48 hours before trial.<sup>102</sup> By 1878 the legislature had reduced the time to the present standard of twenty four hours before trial.<sup>103</sup> A 1939 law empowered judges to admit testimony of non-listed witnesses as long as sufficient notice was given to the defendant and justice would be served by allowing the testimony.<sup>104</sup> The 1791 code raised the number of preemptory challenges permitted a defendant from "six or eight" to twenty.<sup>105</sup> The legislature permitted the state no preemptory challenges in capital cases until it granted two in 1860 and raised the number to ten in 1877.<sup>106</sup>

The trial of a capital case required two judges until 1915.<sup>107</sup> By 1867, however, a single judge could arraign a defendant in a capital case and impose a noncapital sentence if the defendant pled guilty.<sup>108</sup>

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The 1791 code also continued New Hampshire's only statute of limitations for a capital crime by requiring an indictment for treason to issue within two years after the offense was committed.<sup>109</sup>

The State Constitution provided the impetus for the 1791 revisions of the procedural protections guaranteed defendants in capital cases. Subsequent revisions, however, seemed to result from the lobbying efforts of opponents of capital punishment. For example, in 1849 at the end of two decades of political activity by the New Hampshire anti-gallows movement, the legislature increased the time interval between sentencing and execution from four days to one year in order to insure that a person sentenced to death had a chance to exhaust appeals.<sup>110</sup>

Other revisions that can be linked to the efforts of the anti-gallows movement track the evolution of the procedures permitting the jury discretion to determine when the state would impose a sentence of death. Although discredited by the United States Supreme Court in the 1970s, it appears that jury discretion in capital sentencing was originally intended to provide additional protection for defendants by making it more difficult for the state to impose capital punishment upon conviction for murder. In 1837, when the New Hampshire legislature divided the crime of murder into first and second degrees, it gave the jury responsibility for determining the degree upon which the conviction was based.<sup>111</sup> Only first degree murder could carry a sentence of death.<sup>112</sup>

Before passage of the law, judges determined whether to sentence a convicted murderer to imprisonment or to death. After passage of the law, a jury could, for the first time in New Hampshire, find a defendant guilty of murder while insuring that a death sentence would not be imposed. Judges alone, however, could still determine the degree of murder, and impose a sentence of death, if a defendant pled guilty.<sup>113</sup> The legislature passed the 1837 law in the midst of the longest period of sustained legislative opposition to the death penalty in New Hampshire history.

The opponents of capital punishment renewed pressure on the legislature in the late 1870s and again at the turn of the century. The second wave of activity resulted in legislation making it even more difficult for the state to impose a sentence of death after obtaining a conviction for murder. In 1899 the House Committee on the Judiciary reported a bill to abolish capital punishment inexpedient to legislate.<sup>114</sup> Four years later the same committee recommended that a similar bill ought to pass.<sup>115</sup> However, the bill was amended on the floor to allow the death penalty for first degree murder in cases where the jury returned a verdict containing the words "with capital punishment."<sup>116</sup> The bill, as amended, became law and twelve years elapsed before a New Hampshire jury returned a verdict calling for capital punishment.

The next legislative attempts to abolish capital punishment coincided with New Hampshire's renewed use of the death penalty. Once again, opponents of the death penalty failed to secure passage of legislation to end capital punishment and had to settle for apparent reform rather than abolition of the penalty. In 1915, with a man on death row, the House passed a bill to abolish capital punishment.<sup>117</sup> The bill died in the Senate.<sup>118</sup> Two years later, with another man on death row, the House defeated two bills calling for an end to capital

punishment.<sup>119</sup> The legislature did pass one bill pertaining to capital punishment during this period. That law eliminated the power of judges to impose capital sentences on defendants who pled guilty to murder.<sup>120</sup> If a defendant pled guilty to first degree murder, a judge could either impose a sentence of life imprisonment or submit the question of punishment to a jury, with the jury having the option of imposing a sentence of death.<sup>121</sup> The apparent intent of the law was to make it easier, and thus more likely, for prosecutors to obtain convictions for first degree murder by trading off the state's option to seek the death penalty in return for the defendant pleading guilty. Opponents of capital punishment probably supported the bill because the result of the law would likely be a reduction in the use of the death penalty in New Hampshire. However, the law imposed a Hobson's choice on defendants by giving prosecutors a weapon to pressure defendants to plead guilty to first degree murder in return for a promise to oppose the impanelling of a jury. In deciding whether to strike a bargain, defendants had to weigh the odds of receiving a sentence of death against the chance that the state would not meet its burden of proof at trial. The fact that the state could force defendants to make this choice did not go unrecognized in subsequent trials for first degree murder.<sup>122</sup>

In 1837 New Hampshire gave juries unbridled discretion to decide whether a particular defendant on trial for first degree murder received the death penalty.<sup>123</sup> In *Furman v. Georgia*, the United States Supreme Court held that similar laws in other states had led to the arbitrary application of the death penalty in violation of the Eighth Amendment.<sup>124</sup>

In 1976 the Court held in *Gregg v. Georgia* that the use of the death penalty was not unconstitutional as long as the guilt and penalty phases of the trial were split and that, during the penalty phase, the sentencing body considered both aggravating and mitigating circumstances concerning the crime and the defendant.<sup>125</sup> In addition, the court noted that it looked very favorably upon the mandatory review procedures contained in the law that was being challenged.<sup>126</sup> In 1977 the New Hampshire Legislature responded to *Gregg* by enacting the current procedures regarding sentencing for capital murder.<sup>127</sup> Responsibility for imposing a capital sentence still rests with the jury but the law now incorporates procedures to guide their decision. Currently the law provides that at the conclusion of a capital murder trial the jury decides the issue of guilt without consideration of punishment.<sup>128</sup> If they return a verdict of guilty, a presentence hearing is conducted before the same jury.<sup>129</sup> The only issue at the hearing is the penalty to be imposed and the jury hears evidence of aggravating and mitigating circumstances relevant to the sentence.<sup>130</sup> The prosecution and defense may introduce evidence pertaining to:

(a) Aggravating Circumstances:

- (1) The murder was committed by a person under sentence of imprisonment.
- (2) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

- (3) At the time the murder was committed the defendant also committed another murder.
  - (4) The defendant knowingly created a great risk of death to many persons.
  - (5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
  - (6) The murder was committed for pecuniary gain.
  - (7) The murder was exceptionally heinous, atrocious or cruel.
- (b) Mitigating Circumstances:
- (1) The defendant has no significant history of prior criminal activity.
  - (2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
  - (3) The defendant acted under extreme duress or under the substantial domination of another person.
  - (4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired.
  - (5) The youth of the defendant at the time of the crime.<sup>131</sup>

The jury hears both evidence and arguments concerning the circumstances bearing on the penalty.<sup>132</sup> If the jury unanimously finds at least one statutory aggravating circumstance, they “may fix the sentence of death.”<sup>133</sup> The judge must impose the sentence determined by the jury.<sup>134</sup> A deadlocked jury requires the judge to impose a sentence of life imprisonment without eligibility of parole at any time.<sup>135</sup> Errors committed in the sentencing portion of the trial require a rehearing only on the penalty issue and not on the issue of guilt.<sup>136</sup>

The legislature paid attention to both the requirements and the recommendations of the Court in *Gregg* and provided for an automatic, and rapid, review of both the guilt and the penalty phases of the trial.<sup>137</sup> Within 60 days of the certification of the record by the trial court, the New Hampshire Supreme Court is charged with determining:

- (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and,
- (b) Whether the evidence supports the jury’s finding of an aggravating circumstance, as authorized by law, and
- (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.<sup>138</sup>

The Court is limited in its remedies regarding the penalty phase of the trial and can either affirm the sentence of death or remand the case for resentencing by the trial judge.<sup>139</sup>

## CIVIL EFFECT, FORM, AND PLACE \ OF THE PENALTY OF DEATH

New Hampshire’s 1837 murder statute provided that a person sentenced to life imprisonment suffered a civil death.<sup>140</sup> Civil death dissolved the bonds of matrimony, annulled contract, and had property descend as if the person had died a natural death. By 1867, a sentence of death caused a civil death for the defendant at the moment sentence was passed.<sup>141</sup> The legislature repealed the law pertaining to civil death in 1973.<sup>142</sup> The form of execution was first specified in the 1776 statute on treason. An individual convicted of treason was to be “hung by the neck until dead, any law or custom to the contrary notwithstanding.”<sup>143</sup>

In 1791 the criminal code mandated hanging for all executions by the state.<sup>144</sup> Attempts to change the method of execution from hanging to lethal gas (1937), electrocution (1939), and shooting (1985) were not successful.<sup>145</sup> In 1985 the House sent to interim study a bill that would have changed the form of execution to lethal injection.<sup>146</sup>

The Committee on the Judiciary voted eight to seven to report that the lethal injection provisions of the bill ought to pass.<sup>147</sup> The House considered the proposal in 1986.<sup>148</sup> Although the bill calls for lethal injection as the primary means of execution, it permits hanging if the commissioner of corrections finds that lethal injection is impractical in a particular case or if the courts declare lethal injection unconstitutional. The efforts to change the form of execution to lethal injection



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indicate that some individuals consider hanging an unsuitable form of execution in today's society. Both the 1984 and 1985 reports from the House Committee on the Judiciary noted that the committee felt lethal injection would be "more humane" than hanging.<sup>150</sup>

The place for New Hampshire executions has changed over time. Portsmouth, as the seat of the colonial government, was the location of the first four executions.<sup>151</sup> The first executions took place in 1739 when Sheriff Parker hung two young Hampton women, Sarah Simpson and Penelope Kenney, for the murder of a child. In 1755 Parker hung Eliphaz Dow of Hampton Falls for murder.<sup>153</sup> The last Portsmouth execution occurred in 1768 when Parker hung Ruth Blay, a South Hampton school teacher, for concealing the death of an illegitimate child.<sup>154</sup> The law at that time presumed that a mother who concealed the death of her illegitimate child and who could not produce any witnesses that the child was born dead was guilty of murder.<sup>155</sup>

In 1770 the provincial assembly divided New Hampshire into five counties "for the more easy administration of justice."<sup>156</sup> The law gave the counties responsibility for administering courts and prisons.<sup>157</sup> The state legislature adopted, revised, and later expanded, the colonial county system.<sup>158</sup> Under the new arrangement, counties became responsible for carrying out capital sentences and eight executions were spread about the state over the next 100 years. In 1796 Thomas Powers (or Palmer), a black man, was hung in Haverhill for a "hideous crime" (perhaps murder) committed in Lebanon.<sup>159</sup> The other seven were executed for murder. Hangings were generally carried out at some convenient place in the town and, much to the consternation of county sheriffs and others: the public treated hangings as festive public holidays with each execution drawing crowds from near and far.<sup>160</sup> County sheriffs made most of the decisions concerning the location and witnesses for the executions of Elisha Thomas in Dover in 1788, Josiah Burnham in Haverhill in 1806, Daniel Farmer in Amherst in 1822, and Abraham Prescott in Hopkinton in 1836.<sup>161</sup> In 1837, however, the legislature specified that executions were to take place within the walls, or within the enclosed yard, of county prisons.<sup>162</sup> The county sheriff was to be present unless prevented by sickness or unavoidable casualty.<sup>163</sup> Two deputies were also to be present and the sheriff could invite additional deputies, constables, prison officers, military guards, and other assistants.<sup>164</sup> The sheriff was to request the presence of the attorney general, clerk of the county court, and up to twelve reputable citizens, including a doctor and the relatives, counsel, and minister of the convict.<sup>165</sup> The law prohibited attendance by any other persons.<sup>166</sup> The restrictions on attendance were ineffective, however, and the executions of Andrew Howard in Dover in 1843, Enos Dudley in Haverhill in 1849, and Samuel Mills in Haverhill in 1868 were enormously popular public events.<sup>167</sup> By 1869 the law mandated that executions be carried out only within the walls of the state prison in Concord.<sup>168</sup> The added security gained by carrying out executions in this less public environment permitted the legislature to drop the part of the statute concerning the sheriff's invitations to additional deputies, constables, prison officer, military guards, and other assistants.

Since 1869 New Hampshire has sentenced 16 men to die and executed 12, all for murder.<sup>169</sup> The state hung the first six in the old state

prison on Beacon Street in Concord between the years 1869 and 1879. The rapid pace of executions rekindled the efforts of the anti-gallows movement and in 1879 the House formed a special committee to consider the several citizen petitions calling for the abolition of capital punishment in New Hampshire.<sup>170</sup> Despite considerable legislative maneuvering, however, the bills to abolish capital punishment introduced in 1879 were indefinitely postponed.<sup>171</sup> Although this resurgence of the anti-gallows movement produced no substantial revision of the laws, the rate of executions did slow considerably.<sup>172</sup> The next execution occurred in 1885 and was the first of six to take place in the present state prison.<sup>173</sup> The most recent execution in New Hampshire was the 1939 hanging of Howard Long.<sup>174</sup> New Hampshire juries have sentenced three men to die since 1939. However, one committed suicide and the other two had their sentences commuted.<sup>175</sup>

The legislature repealed the statutes pertaining to the civil effect, form and place of executions in 1973 in response to *Furman v. Georgia*.<sup>176</sup> The result was that for a year there was a death penalty but no means to carry it out. In 1974, however, the legislature reinstated hanging at the state prison as the form and place of capital punishment.<sup>177</sup> The statute concerning civil effect was not reenacted. The 1974 law added the county attorney to the pre-1973 list of invited witnesses and gave the Governor and Council responsibility for determining the time and manner for performing the execution and for providing facilities for the event.<sup>178</sup> Although the law mandating the governor's consent to an execution is new to New Hampshire, similar laws have been in force in other states beginning in 1837.<sup>179</sup> In the 1800s anti-gallows reformers had pressed for legislation requiring governors to sign death warrants because the procedure added one more layer of protection for the defendant by making the implementation of a death sentence less automatic. In addition, some governors have barred executions by refusing to sign any warrants.<sup>180</sup> Laws requiring governors to sign death warrants did not always prove effective in stopping executions during the 1800s and seem to impose almost no restraints on modern governors.<sup>181</sup>

## THE IMPACT OF *FURMAN* AND ITS PROGENY ON STATE'S CAPITAL PUNISHMENT LAW

Constitutional challenges to the death penalty in the 1960s and 1970s resulted in the creation of federal standards concerning the use of capital punishment by the states. In New Hampshire, two men sentenced to die in 1959 were still in prison when public sentiment and a backlog of constitutional challenges forced a nation-wide moratorium on executions beginning in 1967.<sup>182</sup> The moratorium lasted until 1977.

In 1972 the United States Supreme Court restructured the debate over capital punishment with its decision in *Furman v. Georgia*.<sup>183</sup> Prior to *Furman* the Court had generally assumed that capital punishment was in accord with the Eighth Amendment's prohibition against cruel and unusual punishments. In 1958 the Court had noted in *Trop V. Dulles* that "[f]ines, imprisonment and even execution may be imposed" without violating the Eighth Amendment's prohibition against cruel and unusual punishments.<sup>184</sup> In the extremely fragmented *Fur-*

man decision, however, the Court appeared less certain that the death penalty continued to fall within *Trop's* "limits of civilized standards."<sup>185</sup> *Furman* did not speak directly to the constitutionality of the death penalty. Rather, the Court held that the arbitrary manner in which states applied capital punishment was unconstitutional.<sup>186</sup> Four years later the Court held in *Gregg v. Georgia* that the death penalty was not cruel and unusual punishment where a state's capital punishment statutes contained procedural safeguards to insure that courts did not impose death sentences arbitrarily.<sup>187</sup> The requirements resulting from *Gregg* are twofold. First, there must be a bifurcated trial consisting of a guilt phase and a penalty phase.<sup>188</sup> In the penalty phase of the trial, the sentencing body (either judge or, as in New Hampshire, the jury) must take into account both aggravating and mitigating factors concerning the crime and the defendant's background.<sup>189</sup> Second, it was strongly suggested, but not mandated, that states institute a review procedure to insure that the death penalty is not imposed because of racial or other illegal discrimination.<sup>190</sup> Subsequent decisions eliminated mandatory death sentences and death sentences for conviction of rape.<sup>191</sup>

The debate over capital punishment was also in full swing in New Hampshire during the 1960s and 1970s. The anti-gallows movement had returned to the New Hampshire Legislature in 1963 with the introduction of two bills to abolish capital punishment.<sup>192</sup> Both were defeated.<sup>193</sup> After being rebuffed again in 1965, opponents of the death penalty switched tactics and in 1967 tried to limit capital punishment to cases involving the murder of on-duty prison officials and police officers.<sup>194</sup> The House killed the compromise bill passed by the Senate in 1967 and killed similar House bills in 1967, 1969 and 1971.<sup>195</sup>

Opponents of the death penalty in New Hampshire also pressed their case at the 1974 Constitutional Convention. Resolution 132 called for a constitutional amendment to abolish capital punishment. The committee studying the resolution reported that a majority felt the death penalty should be abolished and that the constitution was the proper vehicle for the change.<sup>196</sup> The victory for the abolitionists was short-lived, however, and the delegates defeated the resolution on the floor by a vote of 202 to 109.<sup>197</sup>

The debate concerning capital punishment in New Hampshire also occurred outside the government. In 1967 a New Hampshire Bar Association poll reported that the state's lawyers had voted 172 to 148 in favor of abolishing capital punishment.<sup>198</sup> Written comments revealed a variety of sentiments on both sides of the issue. A recent "Law Poll" reported in the American Bar Association Journal suggests that the results of the New Hampshire poll might be different if taken today. In the ABA poll, lawyers in the northeastern United States favored implementing capital sentences already imposed by the courts by a margin of 65 percent to 31 percent.<sup>199</sup> However, the poll did not report the lawyers' opinions regarding the continued application of the penalty. Since New Hampshire currently does not have any inmates on death row; the issue addressed by the ABA poll is only marginally relevant to the present status of capital punishment in the state.

One of the major flaws in the capital laws under review in *Furman* was the unbridled discretion given the sentencing body to impose

or withhold a sentence of death.<sup>200</sup> New Hampshire's capital murder statute in effect at that time allowed the jury the type of discretion outlawed by *Furman*. The *Furman* decision nullified the capital punishment statutes of New Hampshire and most other states and it was five years before New Hampshire law fully complied with the new federal requirements.<sup>201</sup> In 1973 the legislature repealed the statutes concerning the implementation of the state's death penalty for one year.<sup>202</sup> The 1973 legislature also considered two bills to revise the murder statute they had passed in 1971.<sup>203</sup> The House voted one bill inexpedient to legislate at the request of the sponsor because the matter was being considered by the attorney general's office.<sup>204</sup> The House sent the other bill to interim study.<sup>205</sup> In 1974, after considerable debate over whether the state should even have a death penalty, the legislature enacted the present capital murder statute.<sup>206</sup> In 1977 the legislature added the current sentencing and review procedures in order to conform New Hampshire law to the requirements of *Gregg v. Georgia*.<sup>207</sup> The 1977 legislature also paid heed to the 1976 United States Supreme Court decisions prohibiting mandatory death sentences and passed a law providing that a defendant convicted of capital murder may, rather than shall, be put to death.<sup>208</sup>

Since 1974, any efforts to revise New Hampshire's death penalty have had to take the new federal requirements into consideration. If it had passed, a 1983 attempt to merge all degrees of murder might have pushed New Hampshire's capital statutes outside the bounds of the Constitution by opening the door to a more arbitrary application of the death penalty.<sup>209</sup> The 1985 attempt to expand the definition of law enforcement officer and to change the method of execution to lethal injection appeared more in line with federal mandates.<sup>210</sup>

*Furman* and its progeny have fundamentally changed the perspective of the legislation pertaining to capital punishment in New Hampshire. Prior to *Furman*, the legislature determined the bounds of capital punishment within the context of the political and social

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climate of the state. Now, the legislature's chief concern seems to be to develop a statute that comports with federal requirements.

## CAPITAL PUNISHMENT UNDER THE NEW HAMPSHIRE CONSTITUTION

When matched to the standards laid down in *Gregg v. Georgia*, New Hampshire's capital murder statute does not appear to violate the Eighth Amendment's prohibition against cruel and unusual punishments.<sup>211</sup> However, the statute may be open to a challenge grounded on similar provisions of the New Hampshire Constitution.<sup>212</sup> The New Hampshire Supreme Court has offered little guidance for defining the State Constitution's prohibition against cruel and unusual punishments.<sup>213</sup> Generally, the court has analyzed punishment issues in terms of whether a sentence is proportionate to the crime.<sup>214</sup> However, requiring a penalty to be proportionate to the offense is considered in a separate part of the constitution.<sup>215</sup> The provision prohibiting cruel and unusual punishments perhaps has a larger meaning than simply requiring a proportionate sentence.

There appears to be room to urge the court to take a more expansive view of the provisions pertaining to cruel and unusual punishment than it has in the past. In *State v. Farrow*, the New Hampshire Supreme Court noted that one of the criteria for testing any sentence under the provisions of the Eighth Amendment to the United States Constitution is that "[i]t must be acceptable according to contemporary standards and comport with basic notions of human dignity."<sup>216</sup> A similar requirement for the State Constitution's prohibition against cruel and unusual punishments would bring the analysis within the bounds of *Trop v. Dulles* and allow the court to assess New Hampshire's capital murder law within the context of contemporary New Hampshire society.<sup>217</sup>

A different result could obtain if a challenge was brought under the New Hampshire Constitution rather than the Federal Constitution because, in several instances, the New Hampshire Supreme Court has found the State Constitution to be more protective of individual rights than the United States Constitution.<sup>218</sup> In *State v. Ball* the New Hampshire Supreme Court noted that:

While the role of the Federal Constitution is to provide the minimum level of national protection of fundamental rights, our court has stated that it has the power to interpret the New Hampshire Constitution as more protective of individual rights than the parallel provisions of the United States Constitution.<sup>219</sup>

Whether the New Hampshire Constitution prohibits capital punishment because *Trop*'s standards of decency have evolved further in New Hampshire than they had nationally in 1976 remains an unanswered question. No one has ever challenged a sentence of death as violating the New Hampshire Constitution's prohibition against cruel and unusual punishments.<sup>220</sup> If the issue does reach the court, however, the justices should be urged to consider the relationship between the changes in the values and norms of New Hampshire society and the evolution of the state's capital punishment statutes.

Over the long term, the state has faced increasing restrictions

on its power to inflict the penalty of death. The momentum that has driven the process over the past 350 years might, at some point, become powerful enough to move the court to abolish the death penalty for all crimes.

## CONCLUSION

The evolution of New Hampshire law pertaining to capital punishment reflects the evolution of New Hampshire society. From the earliest codification of provincial laws into the nineteenth century, the death penalty was available in New Hampshire to punish a variety of crimes. As the colony moved towards a more secular-based government in the late seventeenth and early eighteenth centuries, the rationale for capital punishment changed away from the religious justifications given for the early laws. Gone were the biblical passages supporting the state's prerogative to punish. Gone too were capital sanctions against idolatry and witchcraft. In their place were laws based upon the state's responsibility to maintain the peace rather than a religious norm. Over time, society reconsidered the standards by which to measure the value of a human life and the goals to be achieved for the state by the use of capital punishment. The assertion in the Declaration of Independence that life is an unalienable right caused some individuals to rethink the legitimacy of the state's prerogative to exact a life for any criminal behavior. In 1812 the legislature decided that the value of a human life outweighed all crimes against property and in a t crimes against the person. Twenty-five years later the legislature barred the state from taking a life for any crime except first degree murder.

In addition to the reduction in the number of capital offenses, the state's power to take a life has been radically circumscribed, first by the evolution of state laws that shifted the power to inflict capital punishment from the courts to the jury, and then by the imposition of federal procedures to insure that the jury's decision was based on reason rather than emotion. The result is a capital murder statute that is confined to a limited class of murders and burdened by considerable procedural safeguards.

The debate over capital punishment has long been established in New Hampshire. For nearly 200 years opponents and proponents of the death penalty have considered the issue of deterrence, the possibility of mistake, the moral issues of reform and retribution, and the legitimacy of the state's power to exact a life. The opponents of capital punishment appear to have had considerable influence on the evolution of the laws concerning capital punishment in New Hampshire. Many of the changes in the laws have coincided with periods of lobbying activity by the anti-gallows movements. An additional factor, however, which now nearly controls the debate, is the creation of federal standards regarding the use of the death penalty. The imposition of federal requirements has created a sharp break in the development of New Hampshire's capital punishment statutes by turning the focus away from the evolution of the death penalty within the state to a concern that the new statutes comply with federal law.

Although the current capital murder statutes appear to meet federal standards regarding the prohibition of cruel and unusual punishments, there is still an open question as to whether the statute

comports with similar provisions contained in the State Constitution. The New Hampshire Supreme Court has never ruled directly on the issue of capital punishment. Neither has the court developed any precedent concerning the meaning of the State Constitution's prohibition against cruel and unusual punishments.

The court has held that the State Constitution sometimes offers protections for individuals that exceed similar protections offered by the Federal Constitution. In addition, it would not be unreasonable to urge the court to adopt an interpretation of the State Constitution's prohibition against cruel and unusual punishments which looks to contemporary standards of decency and basic notions of human dignity. Under such an interpretation, the court should consider the historical relationship between the changes in New Hampshire society and the increased restrictions on the state's use of the death penalty. A continuation of the process that has driven the evolution of the state's capital punishment statutes for the past 350 years may yet preclude the state from imposing a sentence of death.

## ENDNOTES

1. 356 U.S.86, 100-101 (1958)
2. 356 U.S. at 101
3. See *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 974 (1976).
4. New Hampshire's capital punishment laws are codified at N.H. Rev. Stat. Ann. Sections 630:1, 6305 (SUPP. 1985).
5. See, e.g., *State v. Robert H.* 118 N.H. 713, 393 A.2d 1387 (1978) ("family and rights of

parents over family are natural, essential, and inherent rights within the meaning of [the N.H. CONST., pt. 1, art.2]" *Opinion of the Justices*, 123 N.H. 554, 465 A.2d484 (1983) ("right of mentally ill persons to refuse medical treatment is a liberty interest which is protected by our State Constitution").

6. See, e.g., *State v. Ball*, 124 N.H. 226, 471 A.2d 347 (1983).
7. In *State v. Farrow*, 118 N.H. 296, 386 A.2d 808, (1978), the N.H. Supreme Court in dicta analyzed New Hampshire's death penalty in terms of meeting the requirements of the Federal Constitution.
8. 1 *Laws of New Hampshire* 740 (A. Batchellor ed. 1904).
9. *Id.* at 752.
10. *Id.* at 762-763. There is no indication why the Mass. Gen. Court made the distinction in the penalties.
11. *Id.*
12. See E. L. Page, *Judicial Beginnings in New Hampshire: 1640-1700*, 106 (1959).
13. 1 *Laws of New Hampshire* 740, 762-763.
14. *Id.* at 762-763.
15. *The Colonial Laws of Massachusetts* 15 (1887).
16. *Id.*
17. *Id.*
18. *Id.* at 12, 15.
19. 1 *Laws of New Hampshire* 14.
20. *Id.* at 13, 14.
21. *Id.* at 12-16.
22. *Id.* at 9.
23. *Id.* at 14.
24. *Id.* at 12.
25. *Id.*
26. *Id.* at 60.
27. *Id.* at 676, 679.

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28. 2 *Laws of New Hampshire* 127 (A. Batchellor, ed. 1913). The remnants of this law are codified at N.H. Rev. Stat. Ann. Section 601 :6(a) (1974).
29. *Id.*
30. *Id.*
31. *Id.* at 141.
32. *Id.* at 314.
33. *Id.*
34. *Id.*
35. *Id.* at 266, 355.
36. 4 *Laws of New Hampshire* 71 (H. Metcalf, ed. 1916).
37. *Id.* at 384.
38. 5 *Laws of New Hampshire* 596, 597. (H. Metcalf, ed. 1916).
39. *Id.* at 598, 706.
40. *Id.* at 596, 597.
41. 1859 N.H. Laws 2221.
42. See D.B. Davis, *The Movement to Abolish Capital Punishment In America*, 1787.1861. 63 *American Historical Review* 23 (1957); *The Death Penalty In America* (H. Bedau, ed. 1967); W. Bams, *For Capital Punishment: Crime and the Morality of the Death Penalty* (1979); W. Espy. *A Brief History of Capital Punishment In the United States, 1608-1983* (Available through Amnesty International); J. Gorecki, *Capital Punishment: Criminal Law and Social Evolution*, (1983).
43. See D.B. Davis. *supra* at 25.
44. J. Gorecki, *supra* at 84.
45. *Id.*
46. In his 1792 treatise *Considerations of the Injustice and Impolicy of Punishing Murder by Death*, Dr. Rush advocated replacing capital punishment with long prison terms. See Davis, *supra* at 26. Pt. 1, art. 18 of the N.H. CONST. stating that "[t]he true design of all punishments being to reform, not exterminate mankind" reflects the wide acceptance in New Hampshire of the main tenet of the penitentiary movement.
47. 8 *Laws of New Hampshire* 60 (Secretary of State, ed. 1920).
48. *Id.* at 129.
49. 8 *Laws of N.H.* 129.
50. *Id.*
51. N.H.Sen. Jour.. June 6,1834,16.
52. *Id.*
53. N.H. Sen. Jour., June 4,1835.12.
54. N.H. House Jour., June 24,1835, 137.
55. A. Caverno, *A Sermon Delivered at Great-Falls New Hampshire*, August 9,1835 On the Subject Of Abolishing Capital Punishment (1836). (Available at the New Hampshire Historical Society.) At the time, Caverno was pastor of Great Falls, N.H. Baptist Church.
56. Caverno noted that the average ratio of prisoners to the general population of New Hampshire for the years 1820-1834 was 1:16, 208. Massachusetts, which from 1812-1821 had put eight people to death for crimes that no longer were capital offenses in New Hampshire, had an average prisoner to general population ratio of 1:7 016. Maine had a ratio of 1:8, 683; Vermont 1:8. 770; and Connecticut 1:5 222.
57. 1837 N.H. Laws 273. In 1794, Pennsylvania was the first state to divide murder into degrees and to limit capital punishment to first degree murder. Most other states followed Pennsylvania's lead over the next half century. Davis, *supra* at 26. Treason became punishable by life imprisonment with up to three years in solitary confinement.
58. 1837 N.H. Laws 273:l.
59. *Id.* at 273:2.
60. See D.B. Davis, *The Movement to Abolish Capital Punishment*, 42. The Prisoner's Friend began as a weekly in 1845 (called The Hangman until 1846) and became a monthly magazine in 1848.
61. *Id.*
62. In 1847 Michigan became the first English speaking jurisdiction to abolish capital punishment for murder. Rhode Island followed in 1852 and Wisconsin in 1853. Maine abolished the death penalty in 1876, restored it in 1883, executed three people in 1885, and abolished the penalty for good in 1887. Kansas effectively abolished capital punishment in 1872 and formally did so in 1907. The penalty was reinstated in Kansas in 1935 but was not reenacted after the *Furman* decision. Alaska and Hawaii abolished their death penalties when they became states. Presently there are 12 U.S. jurisdictions without capital punishment. The others are: District of Columbia, Iowa, Massachusetts, North Dakota and West Virginia. The United States is alone among Western European, Scandinavian and North American countries in its retention of capital punishment for offenses other than treason or war crimes. Sources: Davis, *Movement to Abolish Capital Punishment*, 44-45; Espy, *supra* at G27; NAACP *Legal Defense and Educational Fund*, "Bulletin," Dec. 20, 1984: Amnesty International. *The Death Penalty: Cruel and Unusual Punishment*, pamphlet, 1985.
63. N.H. Sen. Jour., June 2. 1842, 25.
64. N.H. House Jour., Dec. 16,1842, 284-287.
65. N.H. Sen. Jour. June 6, 1844, 19. See also N.H. House Jour., Nov. 22, 1844.28; Nov.27, 1844.50: Dec. 13,1844, 176.
66. 1844 N.H. Laws 108; N.H. House Jour., Nov.27.1844,55. At the time, William Coming was awaiting execution in Grafton County for the murder of his wife. Coming's conviction was based on circumstantial evidence and may have been influenced by his confession of adultery. Six days before Comings' scheduled execution the legislature, under much pressure, voted Governor Steele the power to commute the sentence. Steele complied and Comings was imprisoned until 1853 when he was pardoned by the Governor and Council. D.8. Davis. *Murder in New Hampshire*, 28 *New England Quarterly* 147 (1955).
67. N.H. House Jour., Dec. 27,1844, 359.
68. N.H. House Jour., Nov. 27, 1848, 34; June 13, 1849,71; June 14, 1849,84; June 18, 1849, 107; June 19,1849,122; June 27,1850,244.
69. 1849 N.H. Laws 855.
70. 1937 N.H. Laws 20.
71. 408 U.S. 238 (1972); 1971 N.H. Laws 518. Also in 1971, the House and Senate could not agree on procedures to be followed in order to determine certain facts before a sentence of death could be imposed. The Senate version would have reinstated the distinction between first and second degree murder and would have restricted the use of capital punishment to murder in the first degree. H.B. 489, N.H. House Jour., June 23, 1971, 1688: N.H. Sen. Jour., June 16, 1971, 1244. Another bill concerning capital punishment. H.B. 366 (1971 ), was found inexpedient to legislate because it covered the same subject matter as H.B. 489. N.H. House Jour. Apr. 29. 1971, 880.
72. 1974 N.H. Laws 34:l.
73. 1977 N.H. Laws 440:l.
74. *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976).
75. N.H. Rev. Stat. Ann. Section 630 (Supp. 1983).
76. H.B.660, N.H. House Jour., Apr. 20, 1983, 499.
77. H.B. 623, N.H. House Jour., Apr.9, 1985, 2056.
78. H.B. 623, N.H. (1985).
79. H.B.623:2, N.H. (1985).
80. N.H. House Jour., Apr. 9, 1985, 2056. Report of the House Comm. on the Judiciary, N.H., Sept. 17, 1985.
81. *Page*, *Judicial Beginnings in N.H.* 102; *Colonial Laws of Mass.*, 86.
82. 1 *Laws of N.H.* 755.
83. *Id.* at 757.
84. *Colonial Laws of Mass.* 16.
85. *Id.* at 158,159.
86. 1 *Laws of N.H.*756.
87. *Id.* at 757.
88. 1849 N.H. Laws 855.
89. 1 *Laws of N.H.* 25.
90. *Id.* at 24, 25.
91. *Id.* at 52.
92. 4 *Laws of N.H.* 10.
93. 5 *Laws of N.H.*599.
94. *Id.*
95. *Id.*
96. *Id.* 97. *Id.*
98. *Id.* at 599, 600.

99. *Id.* at 600.
  100. See N.H. Gen. Stat. Section 268:3 (1867).
  101. N.H. Rev. Stat. Ann. Section 606:3 (1974).
  102. 5 Laws of N.H. 599.
  103. N.H. Gen. Laws Section 261 :1 (1878); See N.H. Rev. Stat. Ann "Section 604:I (1974).
  104. 1939 N.H. Laws 178:I.
  105. 5 Laws of N.H. 600.
  106. 160 N.H. Laws 2350:I; 1877 N.H. Laws 6:I.
  107. 1915 N.H. Laws 65:2.
  108. N.H. Gen. Stat. Section 243:2 (1867).
  109. 4 Laws of N.H. 74:5 Laws of N.H. 601.
  110. 1849 N.H. Laws 855.
  111. 1837 N.H. Laws 273: 1.
  112. *Id.* at 273:2.
  113. See *Id.* at 273:I.
  114. N.H. House Jour., Jan. 26, 1899, 385.
  115. N.H. House Jour., Mar. 12, 1903, 445.
  116. 1903 N.H. Laws 114. The law mandated a sentence of life imprisonment for first degree murder in the absence of a jury returning a verdict with capital punishment.
  117. N.H. House Jour., Feb. 23, 1915, 404.
  118. N.H. Sen. Jour., Mar. 11, 1915.
  119. N.H. House Jour. Feb. 28, 1917, 403; Mar. 20, 1917, 559.
  120. 1915 N.H. Laws 65.
  121. *Id.* at 65:2.
  122. The *Manchester* (N.H.) *Union Leader*, Nov. 16, 1959, 21 reported that Russell Nelson and Frederick Martineau had taken the gamble and placed their fate in the hands of a jury rather than plead guilty and accept a sentence of life imprisonment. The jury returned a verdict of guilty "with capital punishment" and the judge sentenced the two to hang on January 10, 1961. Their death sentences eventually were vacated and the two men were paroled in 1973.
  123. 1837 N.H. Laws 273.
  124. 408 U.S. 238 (1972).
  125. 428 U.S. at 195.
  126. 428 U.S. at 206.
  127. 1977 N.H. Laws 440:2. Codified at N.H. Rev. Stat. Ann. Section 630:5.
  128. N.H. Rev. Stat Ann. Section 630:5(I) (Supp. 1985).
  129. *Id.* at Section 630:5(II).
  130. *Id.*
  131. *Id.*
  132. *Id.* at Section 630:5(III).
  133. *Id.* at Section 630:5(IV).
  134. *Id.*
  135. *Id.* at Section 630:5(V).
  136. *Id.*
  137. *Id.* at Section 630:5(VI).
  138. *Id.* at Sections 630:5(VI), (VII).
  139. *Id.* at Section 630:5(VI11).
  140. 1837 N.H. Laws 273:4.
  141. N.H. Gen. Stat. Section 244:7 (1867).
  142. 1973 N.H. Laws 370:36.
  143. 4 Laws of N.H. 74. Edward Gove had received a much more brutal sentence upon his conviction for high treason in 1683. The sentence read: "You Edward Gove shall be drawn on a sledge to the place of execution and there shall be hanged by the neck and then yet living be cut down and cast on the ground and your bowels shall be taken out of your belly and your privy members be cut off, and your body be divided in four parts, and your head and quarters shall be placed where our Sovereign Lord the King pleaseth to appoint. And the Lord have mercy on your soul." Gove's conviction had to be reviewed by the Privy Council in London.
- Since the case was a political hot potato, N.H. Gov. Cranfield sent Gove to London where he spent a couple of years confined to the tower of London. He was pardoned in 1685. Gove returned to N.H. and sued Gov. Cranfield for the return of his property. Page, *supra* at 169-170.
144. 5 Laws of N.H. 601.
  145. H.B. 36, N.H. House Jour., Feb. 4, 1937, 173; H.B. 8, N.H. House Jour., Jan. 26, 1939, 154; H.B. 660, N.H. House Jour., Apr. 20, 1983, 449-500.
  146. H.B. 623, N.H. (1985). H.B. 623 resulted from an interim study report of H.B. 601 (1983) which initially concerned only prison assaults and the confiscation of certain property of prisoners. The bill was amended in committee to include provisions on lethal injection and to create a fourth category of capital murder.
  147. House Comm, on the Judiciary, Report on H.B. 623, N.H. (Sept. 17, 1985). Seven members did not vote.
  148. H.B. 106, N.H. (1986).
  149. *Id.*
  150. House Comm. on the Judiciary, Report on H.B. 601, N.H. (1983) (July 17, 1984); Report on H.B. 623, N.H. (Sept. 17, 1985).
  151. H.T. Odell, *Portsmouth, New Hampshire: The Role of the Provincial Capital in the Development of the Colony. 1700-1775, 782-783* (Ph.D. diss., Boston Univ., 1860).
  152. *Id.* at 782.
  153. *Id.* at 782-783.
  154. *Id.* at 783. A stay of execution from Gov. Wentworth arrived shortly after Sheriff Parker had carried out Blay's sentence.
  155. 2 Laws of N.H. 127.
  156. 3 Laws of N.H. 524.
  157. *Id.* at 526, 528.
  158. 4 Laws of N.H. 34.
  159. W.F. Whitcher, *History of the Town of Haverhill, New Hampshire* 361 (1919).
  160. See, e.g., C.C. Lord, *Life and timer in Hopkinton*. New Hampshire, 131-132 (1890). G. Wadleigh, *Notable Events in the History of Dover*. New Hampshire 175-176 (1913) The crowds could be particularly unruly when a last minute stay of execution meant that all their travel and other arrangements had been in vain.
  161. *Wadleigh, supra* at 175; Whitcher, *supra* at 362; D.F. Secomb, *History of the Town of Amherst. (N.H.)* 350 (1883, 1972); Lord, *supra* at 131.
  162. 1837 N.H. Laws 273:5.
  163. *Id.*
  164. *Id.*
  165. *Id.*
  166. *Id.*
  167. *Wadleigh. supra* at 250.251; *Whitcher, supra* at 366.
  168. N.H. Gen. Stat. Section 244:5 (1867).
  169. The twelve who were executed were:

Josiah Pike	Nov. 9.1869;
Franklin B. Evans	Feb. 17.1874;
Elwin W. Major	Jan. 5, 1877;
Joseph LaPage	Mar. 15, 1878;
John Q. Pinkham	Mar. 14, 1879;
Joseph Buzzell	July 10, 1879;
Thomas Sarnon	Apr. 17, 1885;
James Parner	May 1, 1890;
Frank C. Almy	May 16, 1893;
Oscar Comery	Feb. 18, 1916;
Frederick L. Small	Jan. 15, 1918;
Howard Long	July 14, 1939;
- Two died in prison. Isaac Sawtelle, who died Dec. 26, 1891, was scheduled to be executed on Jan. 5, 1892. Ralph E. Jennings was to be executed Mar. 20. 1950 but committed suicide in 1949. Two men, Russell Nelson and Frederick J. Martineau, were scheduled to be hung June 10, 1961, but had their death sentences vacated and were paroled in 1973.

170. N.H. House Jour., June 24, 1879, 364.
171. *Id.*, July 17, 1879, 526.
172. From six in eleven years (1869-1879) to three over the next fourteen years (1879-1893).
173. 1885 N.H. Laws 91 provided that the Sheriff of Belknap County was to construct gallows at the new prison to be "held by the warden for the use, without charge, of the respective sheriffs of the several counties."
174. Eight months before Long's indictment the House had killed a bill that would have abolished capital punishment in New Hampshire. N.H. House Jour. Feb. 11, 1937, 197; N.H. Atty. Gen. Report 217 (1936-1938).
175. Ralph Jennings committed suicide before he could be executed in 1950. Russell Nelson and Frederick Martineau had their 1959 death sentences vacated and were paroled in 1973.
176. 408 U.S. 238 (1972); 1973 N.H. Laws 370:36.
177. 1974 N.H. Laws 34:10.
178. *Id.*
179. In 1837 the Maine legislature was the first to place the burden of approving each execution on the governor. Opponents of capital punishment had supported the law on the theory that, under the prevailing ethical climate, no governor would use his power to kill a condemned criminal. Davis, *The Movement to Abolish Capital Punishment*, 33 n.36.
180. In 1849, Maine Governor Dana said he interpreted the law to mean that the legislature did not want the state's capital punishment statutes enforced. *Id.*
181. A case in point is Florida Governor Robert Graham who has signed more than 100 death warrants since taking office in 1979. New Hampshire Governor John Sununu is also a supporter of the death penalty and apparently would sign any necessary warrants. See *Concord* (N.H.) *Monitor*, Jan. 11, 1985, 3.
182. See note 175 regarding Nelson and Martineau. Between Jan. 17, 1977 and Oct. 16, 1985 49 people were put to death in the United States for crimes of murder. The executions were carried out in thirteen different states.
183. 408 U.S.238 (1972).
184. 356 U.S. 86,100 (1957).
185. *Id.*; *Furman v. Georgia*, 408 U.S. 238.
186. *Furman v. Georgia*, 408 U.S. 238.
187. 428 U.S. 153 (1976).
188. 428 U.S. at 195.
189. *Proffitt v. Florida*, 428 U.S. 242 (1976), held that the Constitution permits vesting the final capital sentencing decision in the judge rather than the jury.
190. 428 U.S. at 206, Neither Gregg nor any subsequent cases have held that the review process is constitutionally mandated. W.S. White. *Life in the Balance: Procedural Safeguards in Capital Cases* 19 n.34 (1984).
191. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death sentence upon conviction of first degree murder unconstitutional); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (mandatory death sentence upon conviction of limited categories of first degree murder unconstitutional); *Coker v. Georgia*, 433 U.S. 584 (1977) (death sentence upon conviction of rape unconstitutional).
192. H.B. 171, N.H. (1963); H.B.293, N.H. (1963).
193. N.H. House Jour., May 21, 1963, 708 (H.B. 171 indefinitely postponed); N.H. House Jour., May 21, 1963, 709 (H.B.293 inexpedient to legislate).
194. H.B. 317, N.H. House Jour., May 11, 1965, 585 (indefinitely postponed); S.B. 139, N.H. Sen. Jour., May 4, 1967, 490. Several pages of debate are recorded in the Senate Journal concerning capital punishment. References were made to the mistaken rape conviction of Henry C. Duke in 1958 and to the 1768 execution of Ruth Blay.
195. S.B. 139, N.H. House Jour., May 24, 1967, 1182; H.B. 483, N.H. House Jour., July 1, 1967, 2153; H.B. 547, N.H. House Jour., Mar. 25, 1969, 1081; H.B. 763, N.H. House Jour., May 11, 1971, 1015.
196. Journal of the Constitutional Convention, June 12, 1974, 169-170.
197. *Id.*
198. 9 N.H. Bar Journal 171 (1967).
199. ABA Journal 44 (April 1985).
200. *Furman v. Georgia*, 408 U.S.238.
201. White, *supra* at 2.
202. Repealed by 1973 N.H. Laws 370:36; reinstated by 1974 N.H. Laws 34:10.
203. H.B. 267, N.H. (1973); H.B.971, N.H. (1973).
204. H.B. 267, N.H. House Jour., Feb.20, 1973, 327.
205. H.B. 971, N.H. House Jour., June 1, 1973, 1584.
206. 1974 N.H. Laws 34:I. The debate in the N.H. Senate over S.B.27 covers more than 65 pages of the Senate Journal and offers considerable insight into the variety of opinions regarding capital punishment in New Hampshire.
207. 428 U.S. 153; 1977 N.H. Laws 440:2.
208. *Woodson v. North Carolina*.428 U.S. 280; *Roberts v. Louisiana*, 428 U.S. 325; 1977 N.H. Laws 440:I.
209. H.B. 660, N.H. (1983) was voted inexpedient to legislate. N.H. House Jour., Apr. 20, 1983, 499.
210. H.B. 623, N.H. 119851 was sent to interim study. N.H. House Jour., Apr.9, 1985, 2056. The U.S. Supreme Court has ruled that the Food and Drug Administration was not required to take enforcement action regarding allegations that the use of lethal drug injection for executions violated the Food, Drug, and Cosmetic Act. The Court held that such enforcement decisions were entirely within the discretion of the FDA and thus not reviewable. *Heckler v. Chaney*, 53 U.S.L.W. 4385 (U.S. March 20, 1985).
211. 428 U.S. 153.
212. N.H. CONST. pt. I. art. 33, prohibits cruel and unusual punishments.
213. *State v. Wentworth*, 118 N.H. 832, 395 A.2d 858. (1978). recognized that sentences which are "grossly disproportionate" to the crime might amount to cruel and unusual punishment.
214. See, e.g., *State v. Dean*, 115 N.H. 520, 345 A.2d40.S (1975).
215. N.H. CONST., pt. I, art. 18.
216. 118 N.H. 296, 302, 386 A.2d 808, 812 (1978) (citing *Gregg v. Georgia*, 428 U.S. at 182). In *Farrow*, the court held that the New Hampshire statute mandating life imprisonment without parole did not constitute cruel and unusual punishment. The court's analysis, however, was grounded on the Eighth Amendment to the U.S. Constitution rather than on Article 33 of the New Hampshire Constitution.
217. 356 U.S. 86.
218. See Opinion of the Justices, 123 N.H. 554, 465 A.2d 484 (1983); *State v. Robert H.*, 118 N.H. 713, 393 A.2d 1387 (1978).
219. 124 N.H. 226, 471 A.2d 347 (1983).
220. N.H. CONST., pt. I, art.33.



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