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"To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty . . . .'"

— Chief Justice Rehnquist[1]

"You're gonna need a bigger boat."

—Police Chief Martin Brody in *Jaws*[2]

I. INTRODUCTION

During the last decade, judges, politicians, scholars, and the general public have become troubled by problems with the death penalty in the United States.[3] Despite this growing concern, however, legislatures continue to expand their capital punishment statutes to make more defendants eligible for the death penalty.

In recent years, some judges and governing officials have acknowledged problems with the capital punishment system in the United States.[4] For example, in 1997, Judge Gerald Heaney of the United States Court of Appeals for the Eighth Circuit wrote that "this country's unprincipled death penalty selection process is inconsistent with fundamental principles of due process."[5] Similarly, a Republican governor of Illinois became so concerned about the administration of the death penalty that he imposed a moratorium on executions in 2000 and ultimately commuted the death sentences of everyone on death row in his state in 2003.[6] The governor of Maryland also imposed a temporary moratorium on executions in 2002.[7]

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1. Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). A capital sentencing scheme also "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.*

2. JAWS (Universal Studios 1975).

3. *See, e.g.*, James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1650-51 (2006); Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases*, 10 PSYCHOL. PUB. POL'Y & L. 577, 579-84 (2004); Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 21-74 (2002).

4. Kirchmeier, *supra* note 3, at 4.

5. Singleton v. Norris, 108 F.3d 872, 875 (8th Cir. 1997) (Heaney, J., concurring).

6. Ken Armstrong & Steve Mills, *Ryan: 'Until I Can Be Sure'; Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1; *see also* George H. Ryan, Governor of Ill., Commutation Address, Northwestern Center on Wrongful Convictions (Jan. 11, 2003), *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/RyanSpeech.htm.

7. Jennifer McMenamin, *Glendening Says State Still Needs Moratorium; Ex-Governor's*

Juries and courts also have slowed the march to the death house. The number of executions and the number of people sentenced to death have both dropped during the last decade.[8] Further, in the last several years, the United States Supreme Court has narrowed the category of defendants eligible for the death penalty.[9]

In recent years, some legislators also have shown concern about the use of the death penalty. In 1999, a majority of the Nebraska Legislature voted for a moratorium on executions.[10] In 2001, a moratorium bill passed in the Nevada State Senate,[11] and one almost passed in Maryland.[12] Although these legislative actions were not successful in creating death penalty moratoriums, in January 2006, the New Jersey Legislature passed a one-year moratorium on executions to allow a study of the punishment's costs and fairness.[13] A similar bill was considered in the California Assembly.[14] Also, in 2005, after New York's death penalty had been declared unconstitutional by the New York Court of Appeals and after extensive hearings on capital

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Concerns on Death Penalty Bias Persist, THE BALT. SUN, Jan. 12, 2006, at 1B.

8. Charles Lane, *Changing Attitudes About the Death Penalty*, WASH. POST, Jan. 2, 2006, at A11. In 2005:

> 60 convicted killers were executed. That is a drop of 39 percent from the recent peak of 98 in 1999 . . . . Perhaps more significant[ly], death sentences are dwindling. In 2005, there were 96 new death sentences, according to the [Death Penalty Information C]enter. This is down 70 percent from 1996, when courts sentenced 320 people to die—the largest annual number since the modern era of capital punishment began in 1976. The population of death row—3,383 as of Oct. 1, 2005—has declined by 242 since 1999.

Id.

9. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 318 (2002) (holding that it violates the Eighth and Fourteenth Amendments to execute mentally retarded defendants); Roper v. Simmons, 543 U.S. 551, 568-69 (2005) (holding that it violates the Eighth and Fourteenth Amendments to execute juvenile defendants).

10. Robynn Tysver, *Execution Suspension Approved; Senators Hand Johanns Life-and-Death Decision*, OMAHA WORLD-HERALD (Neb.), May 20, 1999, at 1. Nebraska Governor Mike Johanns, however, vetoed the bill. Robynn Tysver, *Moratorium Vetoed: Death Penalty Timeout is Poor Policy, Johanns Says*, OMAHA WORLD-HERALD (Neb.), May 26, 1999, at 1.

11. *See* Ed Vogel, *Assembly Committee Rejects Two-Year Suspension of Death Penalty*, LAS VEGAS REV. J., May 17, 2001, at 1A. The bill, however, died in the Assembly Judiciary Committee. *Id.*

12. *See Toward Greater Awareness: The American Bar Association for a Moratorium on Executions Gains Ground: A Summary of Moratorium Resolution Impacts from January 2000 through July 2001*, at 5 (Aug. 2001), *available at* http://www.abanet.org/irr/finalreport.doc.

13. *AG Says Executions Are Not Needed to Fight Crime*, STAR-LEDGER (Newark, N.J.), Mar. 17, 2006. A moratorium bill was also considered in California. *See* Carolyn Marshall, *California Assembly Sidelines a Moratorium on Executions*, N.Y. TIMES, Jan. 20, 2006, at A12. Although that bill did not make it through the California Legislature, court challenges to California's use of lethal injection have in effect established a moratorium in that state. *See* Paul Flemming, *Upcoming Execution Would Further Fray Battle*, THE NEWS-PRESS (Fort Myers, Fla.), Oct. 14, 2006, at 3B.

14. McMenamin, *supra* note 7, at 1B.

punishment, the New York State Assembly opted not to enact a new death penalty statute.[15]

Not all legislators, however, have shown concerns about evidence that the death penalty is ineffective and applied arbitrarily. Although major studies of the death penalty recommend that the lists of statutory factors that make one eligible for the death penalty need to be reduced,[16] legislatures continue to expand their death penalty statutes.

This legislative expansion is nothing new. Several years ago in *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, I noted that death penalty jurisdictions had created broad death penalty statutes that included a long list of eligibility factors.[17] These long lists of aggravating factors give prosecutors and courts broad discretion in imposing the death penalty, allowing for substantial arbitrariness in the capital punishment system.[18]

This Article examines how, during a time of growing concern about the death penalty, a number of legislatures have continued to expand their death penalty statutes, often in inadequate attempts to address other legitimate societal concerns. The ultimate impact of such an ever-expanding death penalty is that almost all murders become eligible for the death penalty, a result that is inconsistent with the Eighth Amendment.[19]

The Article begins in Part Two by giving a brief overview of the role of statutory eligibility factors in capital cases.[20] This Part also discusses several recent studies that recommend that legislatures should be eliminating eligibility factors, not adding them.[21] In Part Three, the Article lists and categorizes the large number of new eligibility and aggravating factors that legislatures have added since 1995.[22] In Part Four, the Article discusses

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15. *See* Michael Whiteman, *Death Penalty Vote Was Democratic*, TIMES UNION (Albany, N.Y.), April 18, 2005, at A7. In 1995, New York enacted a death penalty law, but a portion of it was subsequently held unconstitutional in *People v. LaValle*, 817 N.E.2d 341, 365 (N.Y. 2004).

16. *See* REPORT OF THE FORMER GOVERNOR RYAN'S COMMISSION ON CAPITAL PUNISHMENT, 65-80 (April 2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/index.html [hereinafter RYAN REPORT]; MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT REPORT, 5-12 (2004), *available at* http://www.mass.gov/Agov2/docs/5-3-04%20MassDPReportFinal.pdf [hereinafter MASS. REPORT].

17. *See* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 395-96 (1998).

18. *Id.*

19. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 877 (1983) (noting that death penalty statutes must "genuinely narrow the class of persons eligible for the death penalty . . . .").

20. *See infra* notes 26-49. Throughout this Article, unless otherwise indicated, the terms "eligibility factor" and "aggravating factor" are used to refer to factors that determine whether a defendant is eligible for the death penalty (in the sense that in order to sentence a defendant to death, a jury must find at least one of the listed factors). The factors may appear in a sentencing statute or in the jurisdiction's definition of capital murder.

21. *See infra* notes 50-84.

22. *See infra* notes 85-138.

some of the reasons for these new factors, and it considers the implications of the expanding death penalty statutes.[23] The Article also discusses the inconsistencies between the recommendations to eliminate eligibility factors and the actual practice of adding eligibility factors.[24] The Article concludes that although legislatures have slowed down their expansions of the death penalty in the last few years, many states have broader death penalty statutes than they had a decade ago.[25] These ongoing expansions raise constitutional issues and have been an ineffective response to legitimate societal concerns.

II. THE ROLE OF ELIGIBILITY FACTORS AND CURRENT TRENDS

A. The Jurisprudence of Aggravating/Eligibility Factors

In 1972 in *Furman v. Georgia*, the Supreme Court struck down capital statutes that gave broad discretion to jurors.[26] One way that state legislatures responded to the *Furman* decision was by writing new death penalty statutes that gave sentencing jurors specific aggravating and mitigating factors to consider.[27] Four years later, in *Gregg v. Georgia*,[28] a plurality held that Georgia's new statute, which contained ten aggravating circumstances for juries to consider, provided "clear and objective standards" to give guidance to the sentencing jury and therefore did not violate the Eighth and Fourteenth Amendments.[29] In other cases at the same time, the Court upheld

23. *See infra* notes 139-88.

24. *See infra* notes 189-226.

25. *See infra* notes 227-32.

26. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). In *Furman*, the Court struck down the death sentences in the three cases before it as "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 240. In effect, the decision stopped all executions in the United States under the death penalty statutes at the time. *See* FRANKLIN E. ZIMRING & GORDAN HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37 (1986). Although each Justice wrote a separate opinion in the five-to-four decision, the Justices in the majority were concerned that the death penalty statutes at issue were arbitrary because they did not give adequate guidance to jurors by defining the class of death-eligible defendants. *See Furman*, 408 U.S. at 256, 305-06, 309-10, 313, 358-60.

27. *See* WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982 174-75 (1984). Some states, however, responded with mandatory death penalty statutes that took away all discretion from sentencing juries, making the death penalty automatic upon the conviction of a specifically defined crime. *Id.* The Supreme Court found these mandatory death penalty schemes unconstitutional. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). For a further discussion of the role of mitigating factors, see Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 651-87 (2004).

28. 428 U.S. 153 (1976).

29. *Id.* at 196-98.

other "guided discretion" death penalty schemes that gave specific sentencing factors or questions to jurors.[30]

Since the Supreme Court decision in *Gregg* held that the death penalty was constitutional and upheld Georgia's sentencing scheme of aggravating factors, jurisdictions have struggled with finding an adequate list of factors that encompass all of the "worst" murders. A list of factors that make one eligible for the death penalty serves both (1) the role of giving guidance to juries and judges, and (2) the role of narrowing the group of murderers who are eligible for the death penalty.[31]

The importance of the role of aggravating factors to provide guidance to sentencers is stressed in a number of Supreme Court cases interpreting the Eighth Amendment.[32] The Court has emphasized that the application of the death penalty cannot be arbitrary and capricious, and that the death penalty must be administered "in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not."[33] Thus, the Eighth and Fourteenth Amendments require that some sort of factors be used to effectively determine the category of murderers who are eligible for the death penalty.[34]

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30. Jurek v. Texas, 428 U.S. 262, 271-77 (1976). *See* BOWERS, *supra* note 27, at 174. Although in 1976 the Supreme Court upheld capital sentencing schemes where judges made findings regarding aggravating factors, in 2002, the Court held that juries, not judges, must find the aggravating factors. *See* Proffitt v. Florida, 428 U.S. 242, 250-53 (1976); Ring v. Arizona, 536 U.S. 584, 589 (2002) (holding that Arizona's use of judges to determine aggravating factors violated the Sixth Amendment).

31. *See infra* notes 32-49 and accompanying text.

32. Some critics, however, argue that the post-*Furman* statutes and lists of aggravating circumstances have not cured the arbitrariness problems of the pre-*Furman* statutes. *See Mandatory Justice: The Death Penalty Revisited* (An Initiative of The Constitution Project) 13 (2005) (citing Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, *in* THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 81, 86 (Austin Sarat ed. 1999)), *available at* http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf [hereinafter *Mandatory Justice*] ("Empirical studies reveal that 80-90 percent of the defendants who were eligible for death before *Furman* temporarily invalidated the death penalty would still be eligible for capital punishment today.").

33. Spaziano v. Florida, 468 U.S. 447, 460 (1984); *see also* Furman v. Georgia, 408 U.S. 238, 256-57 (1972) (striking down a statute that gave capital jurors complete sentencing discretion).

34. On the other hand, the states cannot go too far in eliminating arbitrariness and must allow for consideration of mitigating factors. At the same time as *Gregg*, the same plurality struck down mandatory death penalties in *Woodson v. North Carolina*, noting that such systems have "been rejected as unduly harsh and unworkably rigid." Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (holding that a statute that mandated a death sentence for a particular offense without consideration of the individual was unconstitutional); Roberts v. Louisiana, 428 U.S. 325 (1976) (same). Further, capital sentencing schemes must allow for consideration of individual mitigating qualities of the defendant and the specific case. *Woodson*, 428 U.S. at 304; Lockett v. Ohio, 438 U.S. 586, 608-09 (1978) (holding that the Eighth and Fourteenth Amendments require individualized consideration of mitigating factors in capital cases); Skipper v. South Carolina, 476 U.S. 1, 6-7 (1986) (holding that a sentencing court must allow consideration of mitigating evidence that the defendant adjusted well to incarceration); *see also* Kirchmeier, *supra* note 27, at 651-87 (2004) (discussing the Supreme Court's jurisprudence on mitigating factors and discussing the categories of mitigation used in the United States).

The Court has stated that aggravating factors must give jurors clear standards for determining who receives the death penalty.[35] The plurality in *Godfrey v. Georgia* elaborated that a state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"[36]

Depending on a state's statutory scheme, these eligibility factors may apply at sentencing as "aggravating factors" or at the guilt phase as part of the definition of capital murder.[37] In order to sentence someone to death, a jury must find the defendant eligible for the death penalty by finding at least one such eligibility factor beyond a reasonable doubt.[38] Once an eligibility factor is found, a jury may consider other evidence in evaluating whether to actually sentence a defendant to death.[39]

Although the "clear and objective" requirement is still good law, some cases have allowed arguably vague eligibility factors.[40] In some cases, the Court has stressed only that aggravating circumstances or other eligibility factors serve a constitutionally required narrowing function.[41] For example, in *Zant v. Stephens*,[42] the Court upheld a capital sentencing scheme where "the aggravating circumstance merely performs the function of narrowing

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35. *See* Godfrey v. Georgia, 446 U.S. 420 (1980).

36. *Id.* at 428 (citations omitted).

37. The Supreme Court has held that the constitutionally required narrowing of the category of those eligible for the death penalty may be done in a jurisdiction's definition of murder and does not need to be done at the sentencing stage. *See* Lowenfield v. Phelps, 484 U.S. 231, 233 (1988).

38. Ring v. Arizona, 536 U.S. 584, 597 (2002).

39. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987) (explaining the capital sentencing process in that first there must be rational criteria to narrow the death penalty and second, juries must have discretion to consider mitigating evidence offered by the defendant).

40. *See, e.g.*, Arave v. Creech, 507 U.S. 463, 471 (1993) (holding that the Idaho Supreme Court's limiting instruction for the aggravating factor of "utter disregard for human life" was constitutionally adequate).

41. *See* Zant v. Stephens, 462 U.S. 862, 877 (1983) (emphasizing that the purpose behind the use of aggravating factors is to narrow the group of those eligible for the death penalty); Lowenfield, 484 U.S. at 244 (stating that a constitutionally sufficient narrowing must take place in death penalty cases). Recently, Justice Scalia explained in a majority opinion:

> Since *Furman v. Georgia*, we have required States to limit the class of murderers to which the death penalty may be applied. This narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt or penalty phase. Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it. Most States channel this function by specifying the aggravating factors (sometimes identical to the eligibility factors) that are to be weighed against mitigating considerations.

Brown v. Sanders, 126 S. Ct. 884, 889 (2006) (citations omitted).

42. 462 U.S. 862 (1983).

the category of persons convicted of murder who are eligible for the death penalty."[43] In *Zant*, the jury considered an invalid aggravating circumstance, but the Court did not order a new sentencing because the jury found two other valid aggravating circumstances that performed the narrowing function.[44] Again, the narrowing factors may apply at the trial phase as the definition of capital murder, or they may apply at the sentencing phase as aggravating factors.[45] Either way, the eligibility factors serve a constitutional purpose of narrowing the group of defendants eligible for the death penalty.[46]

The Court has considered whether some specific aggravating factors are constitutionally "clear and objective,"[47] and the Court's emphasis on the narrowing function in those cases rather than on the precision of the factors has troubled some commentators.[48] The result of the Court's emphasis on narrowing rather than on clarity has been that the role of selecting eligibility factors to distinguish "'the few cases in which [capital punishment] is imposed from the many cases in which it is not'" has been left to the legislatures.[49]

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43. *Id.* at 875.

44. The Court noted that the finding of the two statutory aggravating factors "adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." *Id.* at 879. Thus, once those eligibility factors were found, the jury could then consider other evidence in deciding whether or not to impose the death penalty. *Id.* at 879-80.

45. *See* Lowenfield, 484 U.S. at 233.

46. *See Zant*, 462 U.S. at 877; *Lowenfield*, 484 U.S. at 244; *see also* McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (noting that there must be "carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence").

47. *McCleskey*, 481 U.S. at 303. *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 975-76 (1994) (holding "circumstances of the crime" is a constitutional aggravating factor); Arave v. Creech, 507 U.S. 463, 471 (1993) (holding that the Idaho Supreme Court's limiting instruction for the aggravating factor of "utter disregard for human life" was constitutionally adequate); Walton v. Arizona, 497 U.S. 639, 653-54 (1990) (holding that Arizona's "especially heinous, cruel or depraved" aggravating factor was unconstitutionally vague on its face but that a limiting instruction applied by Arizona courts provided sufficient guidance); Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988) (holding that Oklahoma's application of its "especially heinous, atrocious, or cruel" aggravating factor was unconstitutionally vague).

48. *See, e.g.*, Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 781 (2005) ("The Court has approved statutory schemes that do no more than simply narrow the class of offenders eligible for the death penalty, allowing unguided discretion to reign at that point."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 382 (1995) (noting that concerns about sentencers using irrelevant or impermissible characteristics in capital sentencing "is not resolved merely by narrowing the range of persons among whom the sentencer can discriminate").

49. Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1975)). Recently, the Court further elaborated on the role of aggravating factors in *Brown v. Sanders*, 126 S. Ct. 884 (2006), where the Court found that relief should not be granted where at least one valid aggravating factor remained that narrowed the class of death eligible crimes. *Id.*

B. Recent Concerns and Studies Regarding Broad Death Penalty Statutes

In *Aggravating and Mitigating Factors*, I compiled a list of forty-five different eligibility factors and aggravating circumstances used throughout the country at the time.[50] The article noted that while no state used all forty-five factors, a number of states had a large number of aggravating circumstances in their statutes.[51] Further, the trend at that time was for jurisdictions to add eligibility factors to expand the coverage of the death penalty.[52]

Since that time, however, there has been a growing concern about the use of the death penalty in the United States.[53] Some have criticized the broad use of the death penalty and the risk of executing the innocent.[54] A number of judges have been critical of the capital punishment system and its arbitrariness,[55] which results in part from the long list of eligibility circumstances in many statutes. For example, in 2005, Judge Boyce Martin of the United States Court of Appeals for the Sixth Circuit wrote in a dissenting opinion that "the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair."[56]

In 2002, a death penalty commission appointed by Illinois Governor Ryan issued a report that made a number of recommendations to improve the reliability and the fairness of the death penalty.[57] In its report, the Illinois Governor's Commission on Capital Punishment recommended that if a state is going to have the death penalty, the category of murders eligible for the death penalty should be narrow because broad death penalties allow for more arbitrariness and increase the risk that innocent defendants will be

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50. Kirchmeier, *supra* note 17, at 397-431.

51. *Id.* at 399. The article stated:

> Arizona has ten, South Carolina has eleven, Nevada has twelve, Illinois has fifteen, and Pennsylvania has seventeen aggravating circumstances. In California, if a capital jury finds one or more of twenty-one statutory special circumstances, the case proceeds to the penalty phase and the jury then is instructed to consider eleven other factors in deciding whether to impose death.

Id.

52. *Id.* at 397. "In recent years, several states have expanded the coverage of their death penalty statutes, and politicians have attempted to boost their political standing by calling for further expansion." *Id.* (citations omitted).

53. *See, e.g.*, Kirchmeier, *supra* note 3, at 1-22.

54. *See, e.g.*, *A Gathering Momentum: Continuing Impacts of the American Bar Association Call for a Moratorium on Executions*, 2000 A.B.A. SEC. INDIV. RTS. & RESP. 23.

55. *See* Kirchmeier, *supra* note 3, at 25-36.

56. Moore v. Parker, 425 F.3d 250, 268 (6th Cir. 2005) (Martin, J., dissenting).

57. *See* RYAN REPORT, *supra* note 16.

sentenced to death.[58] The Commission recommended limiting the list of aggravating factors to a maximum of five factors.[59]

Similarly, in September 2003, Massachusetts Governor Mitt Romley created a Council on Capital Punishment to offer proposals for safeguards that would be essential to a fair death penalty statute.[60] The Council made ten recommendations necessary to lessen the risk of executing innocent defendants,[61] including the recommendation that death penalty jurisdictions should have only six factors to make a person eligible to be guilty of capital murder.[62]

In addition to these reports, other recent evaluations of capital punishment statutes have recommended that the number of eligibility factors in death penalty statutes be limited, including reports by The Constitution

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58. *See id.*

59. Illinois Commission Recommendation 28 states:

> There should be only five eligibility factors:
>
> 1. The murder of a peace officer or firefighter killed in the performance of his/her official duties or to prevent the performance of his/her official duties, or in retaliation for performing his/her official duties.
>
> 2. The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility.
>
> 3. The murder of two or more persons . . . .
>
> 4. The intentional murder of a person involving the infliction of torture . . . .
>
> 5. The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Illinois law of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors and investigators.

Id. at 67-68.

60. *See* MASS. REPORT, *supra* note 16.

61. *Id.* at 3.

62. *Id.* at 6-7. The Council recommended that at least one of these six elements must be present for murder in the first degree:

> (a) The defendant committed the murder as an act of political terrorism;
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> (b) The defendant committed the murder for the purpose of influencing, impeding, obstructing, hampering, delaying, harming, punishing, or otherwise interfering with a criminal investigation, grand jury proceeding, trial, or other criminal proceeding of any kind, including a possible future proceeding, or in retaliation for the victim's role in the investigation or adjudication (including the implementation of the defendant's sentence), against:
>
> > (1) a victim whom the defendant knew of or believed to have played an official role within the criminal justice system . . . or
> >
> > (2) a victim whom the defendant knew or believed to have been (i) a witness to a crime committed on a prior occasion, or (ii) an immediate family member of such a witness . . . .
>
> (c) The defendant intentionally tortured the victim, for a prolonged period of time and in a gratuitous and depraved manner, during or immediately prior to the murder;
>
> (d) The defendant committed murder in the first degree against two or more victims . . .;
>
> (e) The defendant has a previous conviction for murder in the first degree . . .;
>
> (f) At the time that the defendant engaged in the conduct . . . the defendant was subject to a sentence of imprisonment for life, without the possibility of parole, as the result of a previous conviction for murder . . . .

Id.

Project[63] and by the Committee on Capital Punishment of the Association of the Bar of the City of New York.[64] Other commentators have reached similar conclusions.[65] Broad death penalty statutes with a large number of eligibility factors give more discretion to prosecutors and juries and increase the risks of arbitrariness and unfair application of the death penalty.[66]

Despite these concerns and despite the fact that ten years ago most jurisdictions already had a large number of eligibility factors in excess of the numbers recommended by the reports, in the last decade legislatures have continued to expand their death penalty statutes. In 1995, six states added aggravating circumstances, expanded existing definitions of factors, or added to the definition of capital murder.[67] In 1996, six states added new aggravating factors, expanded aggravating factors, or added categories to the definition of capital murder.[68] In 1997, six states expanded the categories of those eligible for the death penalty.[69] In 1998, eight states expanded their

63. A bipartisan Constitution Project committee that included judges, prosecutors, and law enforcement officials recently recommended that "[t]here should be only five factors rendering a murderer eligible for capital punishment." *Mandatory Justice*, *supra* note 32, at 9.

64. *See* Sara Darehshori et al., *Empire State Injustice: Based Upon a Decade of New Information, A Preliminary Evaluation of How New York's Death Penalty System Fails to Meet Standards for Accuracy and Fairness*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 85, 111 (2006) (recommending that the list of eligibility factors in New York be cut down because "New York's list encompasses a large number of murders, and grants the prosecutor a great deal of discretion in deciding which cases to charge as a capital offense").

65. *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1 (1995) (arguing that the categories of those eligible for the death penalty should be narrowed by legislatures); Kathleen D. Weron, Comment, *Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances*, 1994 UTAH L. REV. 1107, 1168 (1994) (proposing that Utah substantially narrow its list of aggravating factors "by focusing on the character of the accused and the circumstances of the murder").

66. *See* discussion *infra* Part III.B. While this Article focuses on the number of eligibility factors being passed in various jurisdictions, another way that the statutes are broadened is when the individual aggravating factors are broad. *See* Kirchmeier, *supra* note 17, at 363-74. The broadness of individual eligibility factors, however, is beyond the scope of this Article. *See, e.g.*, Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases – The Standardless Standard*, 64 N.C. L. REV. 941 (1986).

67. *See* Tracy L. Snell, *Capital Punishment 1995*, BUREAU OF JUST. STAT. BULL. 2-4 (1996). Additionally, New York enacted a new death penalty statute in 1995. In 1995, existing death penalty statutes were expanded in Arkansas, Delaware, Illinois, Nevada, South Dakota, and Tennessee. *See id.* Also, while not expanding death penalty eligibility, four state legislatures added laws to allow victim impact evidence at sentencing: Montana, New Jersey, Oregon, and Pennsylvania. *See id.*

68. *See* Tracy L. Snell, *Capital Punishment 1996*, BUREAU OF JUST. STAT. BULL. 2-4 (1997). Florida, Indiana, Pennsylvania, South Carolina, Tennessee, and Virginia expanded their death penalty statutes in 1996. *See id.*

69. *See* Tracy L. Snell, *Capital Punishment 1997*, BUREAU OF JUST. STAT. BULL. 2-3 (1998). In 1997, Montana, Nevada, Oregon, Pennsylvania, Tennessee, and Virginia added new aggravating factors, expanded existing factors, or broadened the definition of capital murder. *See id.*

death penalty statutes.[70] In 1999, six states expanded the categories of those eligible for the death penalty.[71] In 2000, only two states expanded their death penalty statutes.[72] In 2001, four states expanded their death penalty statutes.[73] In 2002, eight states expanded their death penalty statutes by adding terrorist acts to their definitions of capital murder or lists of aggravating factors.[74] In 2003, only two states expanded their death penalty

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70. *See* Tracy L. Snell, *Capital Punishment 1998*, BUREAU OF JUST. STAT. BULL. 2-3 (1999). In 1998, the report lists Delaware, Indiana, Nebraska, Ohio, Tennessee, Virginia, and Washington as expanding the categories of those eligible for the death penalty. *See id.* However, Illinois also added two aggravating factors that year. *See* 720 ILL. COMP. STAT. ANN. 5/9-1(b)(19) (West 2005) ("[T]he murdered individual was subject to an order of protection and the murder was committed by a person against whom the same order of protection was issued under the Illinois Domestic Violence Act of 1986."); 1998 Ill. Legis. Serv. P.A. 90-668 (West) (although this factor was initially numbered subsection (18), it was later changed to subsection (19)); 1999 Ill. Legis. Serv. P.A. 91-434 (West); 720 ILL. COMP. STAT. ANN. 5/9-1(b)(18) (West 2005) ("[T]he murder was committed by reason of any person's activity as a community policing volunteer or to prevent any person from engaging in activity as a community policing volunteer."); 1998 Ill. Legis. Serv. P.A. 90-661 (West). Also, note that the change to Ohio's law was only a broadening of an existing aggravating factor for an offender who was under detention or "at large after having broken detention." *See* OHIO REV. CODE ANN. § 2929.04(A)(4) (LexisNexis 2006); 1998 Ohio Laws File 223.

Interestingly, during 1998, two state legislatures did the relatively rare act of adding statutory mitigating circumstances: Kansas (whether "a term of imprisonment is sufficient to defend and protect the people's safety from the defendant") and Kentucky (that the victim was a participant in the actions of the crime). *See* Snell, *supra*, at 2.

71. *See* Tracy L. Snell, *Capital Punishment 1999*, BUREAU OF JUST. STAT. BULL. 2 (2000). For 1999, the report lists five states that expanded existing definitions of those eligible for the death penalty: Alabama, Colorado, Nevada, New Jersey, and Wyoming. *See id.* However, Illinois also expanded its death penalty statute in 1999. *See* 720 ILL. COMP. STAT. ANN. 5/9-1(b)(20) (West 2005) ("[T]he murdered individual was known by the defendant to be a teacher or other person employed in any school and the teacher or other employee is upon the grounds of a school or grounds adjacent to a school, or is in any part of a building used for school purposes."); 1999 Ill. Legis. Serv. P.A. 91-434.

72. *See* Tracy L. Snell, *Capital Punishment 2000*, BUREAU OF JUST. STAT. BULL. 2-3 (2001). In 2000, Colorado added an aggravating factor and Mississippi broadened its definition of capital murder. *See id.*

73. *See* Tracy L. Snell & Laura M. Maruschak, *Capital Punishment 2001*, BUREAU OF JUST. STAT. BULL. 2-3 (2002). The *Capital Punishment 2001* report lists three expansions. In 2001, Arkansas added an aggravating factor and Connecticut and Utah expanded their definitions of capital homicide. *See id*; *see also* CONN. GEN. STAT. ANN. § 53a-46a (i)(8) (West 2005) (expanding the definition to include a defendant who committed the murder "to avoid arrest for a criminal act or prevent detection of a criminal act or to hamper or prevent the victim from carrying out any act within the scope of the victim's official duties or to retaliate against the victim for the performance of the victim's official duties"); 2001 Conn. Legis. Serv. P.A. 01-151. However, during that year, New York also expanded its capital murder statute to include a terrorism factor. *See* N.Y. PENAL LAW § 125.27(a)(xiii) (McKinney 2005) ("[T]he victim was killed in furtherance of an act of terrorism . . . ."). Also, during 2001, three states passed statutes barring the execution of mentally retarded persons: Florida, Missouri, and North Carolina. *See* Snell & Maruschak, *supra*, at 2-3.

74. *See* Thomas P. Bonczar and Tracy L. Snell, *Capital Punishment 2002*, BUREAU OF JUST. STAT. BULL. 2-3 (2003). In 2002, New Jersey, Oklahoma, Tennessee, and Virginia added terrorism to its definition of capital murder or its list of aggravating factors. *See id.* Although not listed in the *Capital Punishment* report, Illinois, Ohio, and Utah also added a terrorism aggravating factor in 2002. *See* 720 ILL. COMP. STAT. ANN. 5/9-1(b)(21) (West 2005) ("[T]he murder was committed by the defendant in connection with or as a result of the offense of terrorism . . . ."); 2002 Ill. Legis.

statutes.[75] In 2004, no state expanded its death penalty statute,[76] though some expansions occurred in 2005,[77] and legislatures continued to expand

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Serv. P.A. 92-854 (West); OHIO REV. CODE ANN. § 2929.04(A)(10) (LexisNexis 2002) ("The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism."); 2002 Ohio Laws File 39; UTAH CODE ANN. § 76-5-202 (1)(l)(ii) ("[T]he homicide was committed . . . by means of any weapon of mass destruction . . . ."); 2002 Utah Laws ch. 166. The change in law in Utah was part of various "antiterrorism amendments." 2002 Utah Laws ch. 166.

One other addition was not listed in the *Capital Punishment 2003* report: South Carolina amended one of its aggravating factors to include where the victim is a "county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee . . . ." S.C. CODE ANN. § 16-3-20(C)(a)(7) (2005).

Finally, during 2002, Maryland renumbered its statute for aggravating factors. Aggravating factors used to be in MD. ANN. CODE art. 27, § 413(d) (2003), but that section was repealed effective October 1, 2002 by Maryland Acts 2002, ch. 26, § 1, and now aggravating factors are in MD. CODE ANN. [CRIM. LAW] § 2-203 (g)(1) (West 2006).

75. *See* Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment 2003*, BUREAU OF JUST. STAT. BULL 2-3 (2004). In 2003, Colorado added two aggravating factors and Texas added murder during a terroristic threat to its definition of criminal homicide. *See id.* During this year, several legislatures added procedural protections to capital defendants or eliminated mentally retarded persons from those eligible for the death penalty. *See id.*

76. *See* Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment 2004*, BUREAU OF JUST. STAT. BULL 3 (2005). During 2004, four states passed legislation involving the death penalty, but they involved defining mental retardation, execution methods, and the age at which one becomes eligible for the death penalty. *See id.*

77. There were at least ten additions to death eligibility statutes in four states in 2005, with most of those additions being done by the Arizona Legislature. *See* 2005 Ariz. Legis. Serv. ch. 166; 2005 Ariz. Legis. Serv. ch. 188; 2005 Ariz. Legis. Serv. ch. 325; ARIZ. REV. STAT. ANN § 13-703(F)(9) (2005) ("The defendant was an adult . . . and the murdered person . . . was an unborn child in the womb at any stage of its development."); ARIZ. REV. STAT. ANN § 13-703(F)(11) (2005) ("The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate."); ARIZ. REV. STAT. ANN § 13-703(F)(12) (2005) ("The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding."); ARIZ. REV. STAT. ANN. § 13-703(F)(13) (2005) ("The offense was committed in a cold, calculated manner without pretense of moral or legal justification."); ARIZ. REV. STAT. ANN § 13-703(F)(14) (2005) ("The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense."); ARIZ. REV. STAT. ANN. § 13-703(I) (2005) (expanding definition of "serious offense" for an aggravating factor to include burglary in the second degree and "terrorism").

Florida, Texas, and Utah also expanded their death penalty statutes in 2005. *See* FLA. STAT. ANN. § 921.141(5)(o) (West 2006) ("The capital felony was committed by a person designated as a sexual predator . . . or a person previously designated as a sexual predator who had the sexual predator designation removed."); 2005 Fla. Sess. Law Serv. ch. 2005-28; UTAH CODE ANN. § 76-5-202(1)(e) (2006) ("[T]he homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which the actor committed the crime of abuse or desecration of a dead human body . . . ."); 2005 Utah Laws ch. 143; TEX. PENAL CODE ANN. § 19.03(a)(9) (Vernon 2006) ("[T]he person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of

death penalty statutes in 2006.[78]

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appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court."); 2005 Tex. Gen. Laws 428; UTAH CODE ANN. § 76-5-202(1)(s) (2006) ("[T]he actor dismembers, mutilates, or disfigures the victim's body, whether before or after death, in a manner demonstrating the actor's depravity of mind."); 2005 Utah Laws ch. 143. In 2005, the Utah Legislature also divided its aggravating factor regarding prior convictions into two separate factors. UTAH CODE ANN. § 76-5-202 (1)(i) & (j) (2006); 2005 Utah Laws ch. 143.

The flurry of activity in the Arizona Legislature in 2005 may have been a result of the Arizona Legislature waiting for issues surrounding the 2002 Supreme Court decision regarding judge sentencing to be resolved. *See* Ring v. Arizona, 536 U.S. 584, 608-09 (2002) (holding that Arizona's use of judges to determine aggravating factors violated the Sixth Amendment). In June 2004, the Supreme Court finally ruled that its 2002 ruling was not retroactive and, therefore, did not apply to everyone on Arizona's death row. *See* Schiro v. Summerlin, 542 U.S. 348, 351-53 (2004).

In 2005, although not affecting death-eligibility, Oregon and Florida expanded their death penalties by amending their death penalty laws to allow for consideration of victim impact evidence. OR. REV. STAT. § 163.150(3)(a)(B) (2005); 2005 Or. Laws ch. 480; FLA. STAT. ANN. § 921.141(7) (West 2004); 2005 Fla. Sess. Law Serv. ch. 2005-64 (West). In Florida, the act providing for victim impact evidence was called the "Caroline Cody Act." 2005 Fla. Sess. Law Serv. ch. 2005-64 (West). Caroline Cody was a University of Florida medical student who was murdered in May 2000. During the sentencing hearing of Donald Fair for her murder, the court did not let Ms. Cody's father testify, thus prompting the legislative change. *See* Megan Seery, *Fair Sentenced to Life in Prison for Student Murder*, THE INDEPENDENT FLORIDA ALLIGATOR ONLINE, May 27, 2004, http://www.alligator.org/edit/news/issues/stories/040527trial.html.

78. So far in 2006, there have been several death penalty statutory expansions. In 2006, Georgia added the following aggravating factor: "The offense of murder, rape, or kidnapping was committed by a person previously convicted of rape, aggravated sodomy, aggravated child molestation, or aggravated sexual battery." 2006 Ga. Laws Act 571 (2006) (adding GA. CODE ANN. § 17-10-30(11) (2006)). Also in 2006, a bill was passed in Idaho that added the following aggravating factor:

> The murder was committed in the perpetration of, or attempt to perpetrate, an infamous crime against nature, lewd and lascivious conduct with a minor, sexual abuse of a child under sixteen (16) years of age, ritualized abuse of a child, sexual exploitation of a child, sexual battery of a minor child sixteen (16) or seventeen (17) years of age, or forcible sexual penetration by use of a foreign object, and the defendant killed, intended a killing, or acted with reckless indifference to human life.

H.B. 533, 58th Leg., 2d Reg. Sess. (Idaho 2006) (amending IDAHO CODE ANN.§ 19-2515(9)(h) (2006)). During 2006, Louisiana expanded one of its aggravating factors to include where the defendant is perpetrating or attemping to perpetrate "cruelty to juveniles, second degree cruelty to juveniles, or terrorism." 2006 La. Acts 86 § 1 (2006) (amending LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (2006)). During the same year, Oklahoma expanded an existing aggravating factor to include where one "takes the life of a human being during, or if the death of a human being results from . . . eluding an officer." 2006 Okla. Sess. Law Serv. ch. 186 (amending OKLA. STAT. ANN. tit. 21, § 701.7 (B) (West 2005)).

A bill is pending in Florida to expand an existing restraining order aggravating circumstance to apply to orders to have no contact (the current factor is limited to the circumstance where the preexisting order is not to have "violent" contact). S.B. 1472, 108th Leg., Reg. Sess. (Fla. 2006) (amending FLA. STAT. ANN. § 921.141(5)(p) to read: "The capital felony was committed by the defendant while he or she was under a court order to have no contact or to have no violent contact with the victim.").

Although New York's death penalty law has been held unconstitutional, the New York Legislature has proposed expanding its first degree murder statute, which would affect death eligibility if the New York Legislature were to reinstate the death penalty. The proposed additional eligibility factor involves a "defendant [who] intentionally causes physical injury to a minor less than fourteen years of age, pursuant [to New York assault statutes], and such minor dies as a result of such physical injury." 2005 N.Y. Assemb. B. 9786 (N.Y. 2005).

The trend in legislatures continues to be toward expanding death penalty eligibility, although in some recent years that trend has slowed down.[79] Furthermore, during this time, some legislatures passed bills that limited the application of the death penalty, mainly by preventing the execution of mentally retarded defendants.[80] The apparent decline in expansions of death penalty statutes may be due to a number of reasons, including the growth of a death penalty moratorium movement and an increasing concern about executing innocent defendants.[81] The relative slowdown in the expansion of the death penalty may be comparable to the drop in executions during the 1950s through the early 1970s.[82] During that time period there was a similar growing concern about the arbitrary use of the death penalty.[83]

Time will determine whether the drop in the number of legislatures expanding the death penalty will continue. However, it is significant that twenty years after *Gregg*, states are still expanding their death penalty statutes, especially in light of growing concerns about the use of the death penalty and in light of bipartisan studies citing overly broad statutes as one of the flaws of the American death penalty.[84] The next section looks specifically at how the categories of those eligible for the death penalty have been expanded during the last decade.

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79. The main exception to the slowed growth is 2002, when many states responded to the terrorist attacks of September 11, 2001 with new eligibility factors for terrorist acts. *See infra* Part III.A.

80. *See supra* notes 73, 75.

81. *See* Kirchmeier, *supra* note 3, at 22-74 (discussing twelve factors that led to a decline in support for the death penalty in the United States starting around the mid-1990s). Since the return of the death penalty, and especially beginning in the 1990s, there were a number of innocent defendants released from death row and a growing focus on the risk of executing innocent people. *See id.* at 39-43; *see also* Richard C. Dieter, *Innocence and the Crisis in the American Death Penalty*, (Death Penalty Information Center Report 2004), http://www.deathpenaltyinfo.org/ article.php?scid=45& did=1149.

82. *See* BOWERS, *supra* note 27, at 13.

83. *See* Kirchmeier, *supra* note 3, at 12-15, 74-78.

84. *See* Kirchmeier, *supra* note 17, at 345.

III. STATUTORY EXPANSIONS OF THE DEATH PENALTY IN VARIOUS JURISDICTIONS[85]

Below are categories of death penalty eligibility factors for homicide crimes. Although this Article focuses on expansions of such factors, some jurisdictions also have death penalty statutes for some non-murder crimes.[86] Such statutes are of questionable constitutionality because the Supreme Court has struck down the death penalty for non-murder crimes.[87]

This Article focuses on capital murder factors because murder is the crime that states use to seek the death penalty and because it is the only crime that the Supreme Court has upheld as proportional to the punishment of death.[88] However, Louisiana has prosecuted defendants for the crime of

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85. Although this Article focuses on statutory changes in state jurisdictions, 18 U.S.C. § 3592 (2006), which contains federal death penalty aggravating factors for espionage, treason, homicide, and drug offenses, has not been expanded in the last several years. The aggravating factors for the military are listed in separate rules. RULES FOR COURTS-MARTIAL 1004(c) (listing eleven categories of aggravating factors). *See* 10 U.S.C. § 918 (2005) (stating that a court-martial may impose the death penalty for premeditated murder or felony murder); *see also* Mark A. Visger, *The Impact of* Ring v. Arizona *on Military Capital Sentencing*, 2005 ARMY LAW. 71 (Department of the Army Pamphlet 27-50-388); Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 MIL. L. REV. 66 (2005).

86. *See* Corey Rayburn, *Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1139 (2004). In addition to the capital crime of child rape, the author notes that some jurisdictions have the following capital crimes: (1) treason (Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Washington and the federal government); (2) aggravated kidnapping (Colorado, Idaho, Illinois, Missouri, and Montana); (3) drug trafficking (Florida, Missouri, and the federal government); (4) aircraft hijacking (Georgia and Mississippi); (5) placing a bomb near a bus terminal (Missouri); (6) espionage (New Mexico); and (7) aggravated assault by incarcerated, persistent felons or murderers (Montana). *Id.* (citations omitted); *see also* 18 U.S.C. § 3591 (2006) (listing federal death penalty crimes, including treason).

87. The Supreme Court has found that the use of the death penalty for crimes other than murder violates the Eighth Amendment. *See* Coker v. Georgia, 433 U.S. 584, 600 (1977) (holding that the death penalty is a grossly disproportionate and excessive punishment for the crime of rape of an adult woman); Enmund v. Florida, 458 U.S. 782, 797 (1982) (stating that death penalty is disproportionate punishment for crime of armed robbery). *See generally* Carol Schultz Vento, *Application of Death Penalty to Nonhomicide Cases*, 62 A.L.R. 5th 121 (1998). Although in *Coker* the Court stressed the extremely serious nature of the crime of rape, it distinguished it from murder. *Coker*, 433 U.S. at 597; *see also* Buford v. State, 403 So. 2d 943 (Fla. 1981). Despite the holding in *Coker* that the death penalty is an unconstitutional punishment for rape, legislators in recent years have passed laws that make the death penalty a possible sentence for some crimes of child rape. *See* Lianne Hart, *More Calls for Death Penalty in Child Rapes*, L.A. TIMES, Oct. 10, 2006, at A15; *see also infra* notes 89-91.

88. *See* Gregg v. Georgia, 428 U.S. 153, 173-88 (1976) (holding that the punishment of death for the crime of murder does not violate the Eighth and Fourteenth Amendments).

capital child rape,[89] and in recent years, a few states have added rape[90] or child rape[91] as death-eligible crimes.

The categories of death penalty eligibility factors for murder crimes fall into four categories.[92] First, there are factors that determine death-eligibility

89. Louisiana adopted a child rape statute in 1995, and since then defendants have been prosecuted under the statute. Rayburn, *supra* note 86, at 1136-37. *See* LA. REV. STAT. ANN. § 14:42(D)(2) (2005). The Louisiana Supreme Court upheld the statute in *State v. Wilson*, 685 So. 2d 1063, 1073 (La. 1996). *But see* Buford v. State, 403 So. 2d 943, 951 (Fla. 1981) (holding that Florida's capital child rape statute violated the Eighth Amendment); Robertson v. State, 888 P.2d 1023, 1024 n.2 (Okla. Crim. App. 1995) (noting in dicta that the constitutionality of a death sentence under the state's "antiquated" capital rape statute was questionable). Currently, Patrick Kennedy, who was convicted in 2003, is the only inmate in the country facing the death penalty for the rape of a child that did not result in murder. *See* Hart, *supra* note 87, at A15.

90. *See* MONT. CODE ANN. §§ 45-5-503(3)(b)-(c)(i) (2005) (adding to death eligibility section the crime of "sexual intercourse without consent": "(c) . . . the offender was previously convicted of an offense under this section or of an offense under the laws of another state or of the United States that if committed in this state would be an offense under this section and if the offender inflicted serious bodily injury upon a person in the course of committing each offense . . . ."); MONT. CODE ANN. § 46-18-303(4) (2006) (same); OKLA. STAT. ANN. tit. 21, § 1115 (2005) (imposing death penalty for rape in the first degree).

91. In 2006, South Carolina passed a law that allows the death penalty for repeat offenders of criminal sexual conduct with a minor. S.B. 1138, 2005 Leg., 116th Sess. (S.C. 2005), *available at* http//www.scstatehouse.net/cgi-bin/web_bh10.exe/. In June 2006, Oklahoma passed a law requiring a sentence of death or life without parole for a defendant convicted of rape or forcible sodomy of a person under fourteen years of age where the defendant had a previous conviction of sexual abuse where the victim was under fourteen years of age. S.B. 113, 50th Leg., 2d Spec. Sess. (Okla. 2006), *available at* http://www.oksenate.gov/publications/legislative_summary/2006_legislative summary. pdf. Prior to this recent change, Oklahoma's statute already provided for the death penalty for first-degree rape, which includes in its definition as rape of someone under fourteen or rape of an adult in certain circumstances. OKLA. STAT. ANN. tit. 21, §§ 1114-15 (2005). Although Georgia's death penalty for adult rape was found unconstitutional in *Coker*, its death penalty statute still provides the death penalty for rape, and in 1999 the Georgia Legislature added the death penalty for one who has "carnal knowledge of . . . [a] female who is less than ten years of age." GA. CODE ANN. § 16-6-1 (2006). *See* H.B. 249, 145th Gen. Assem., Reg. Sess. (Ga. 1999), *available at* http://www.legis. state.ga.us/legis/1999_00/leg/fulltext/hb249.htm. Other states are considering the addition of death penalty laws for child rape. *See* Hart, *supra* note 87, at A15.

The Uniform Code of Military Justice also provided for the death penalty for the crime of rape, though the portion regarding adult rape was stuck down. *See* 10 U.S.C.A. § 920 (2005); United States v. Clark, 18 M.J. 775, 776 (1984) (striking down punishment of death for crime of adult rape). A recent amendment to the statute will remove the language providing the death penalty for child rape. *See* Pub. L. No. 109-163, div. A, title V, §§ 552(a)(1),(f) (Jan. 6, 2006), 119 Stat. 3257, 3263 (effective Oct. 1, 2007).

92. Not all states have a list of sentencing "aggravating factors" that determine eligibility for the death penalty, but this Article includes new factors that serve the function of aggravating factors, i.e., they serve the function of determining who is eligible for the death penalty. For example, some states may list factors in the definition of capital murder. *See, e.g.*, VA. CODE ANN. § 18.2-31 (2005) (defining categories of capital murder); *cf.* VA. CODE ANN. § 19.2-264.2 (2005) (listing two factors, of which one must be found before imposing the death penalty). The Supreme Court has held that the constitutionally required narrowing of the category of those eligible for the death penalty may be done in a jurisdiction's definition of murder and does not need to be done at the sentencing stage.

based upon specific facts surrounding the murder.[93] Second, some factors focus on the defendant's motivation in committing the murder.[94] Third, some factors focus on the defendant's status at the time of the murder.[95] Fourth, some factors focus on the status of the victim.[96] The new eligibility and aggravating factors that have been added in various jurisdictions since 1995[97] are listed below under one of these four general categories.[98]

A. Factors Added That Relate to Facts Surrounding the Murder

Abduction /Kidnapping[99]
Automobile Shooting[100]
Burglary[101]
Child Abuse or Neglect[102]

See Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988).

93. *See infra* notes 99-112 and accompanying text.

94. *See infra* notes 113-17 and accompanying text.

95. *See infra* notes 118-24 and accompanying text.

96. *See infra* notes 125-38 and accompanying text.

97. For eligibility factors that existed prior to the most recent decade see Kirchmeier, *supra* note 17, at 400-30.

98. The statutory expansions listed below cover the years of 1995 to October 2006. The listings include expansions noted in editions of U.S. Department of Justice publications through the most recent 2005 issue, which covers through 2004, as well as additions noted from surveys of state statutes for changes in 2005 through late 2006. *See* Bonczar & Snell, *supra* note 76.

99. VA. CODE ANN. § 18.2-31(1) (2006) (adding "intent to defile the victim" to "[t]he willful, deliberate, and premeditated killing of any person in the commission of abduction . . . when such abduction was committed with the intent to extort money or a pecuniary benefit or *with the intent to defile the victim* of such abduction") (emphasis added).

100. ARK. CODE ANN. § 5-10-101(a)(10) (2006) (adding to definition of capital offenses: "The person [p]urposely discharges a firearm from a vehicle at a person or at a vehicle, conveyance, or a residential or commercial occupiable structure that he or she knows or has good reason to believe to be occupied by a person; and . . . [t]hereby causes the death of another person under circumstances manifesting extreme indifference to the value of human life."); 720 ILL. COMP. STAT. ANN. 5/9-1(b)(15) (West 2006) ("[T]he murder was committed as a result of the intentional discharge of a firearm by the defendant from a motor vehicle and the victim was not present within the motor vehicle.").

101. Arizona expanded its definition of "serious offense" for an aggravating factor to include burglary in the second degree and "terrorism." *See* ARIZ. REV. STAT. ANN. § 13-703(I) (2005). Some scholars are critical of capital aggravating factors based upon a list of felonies that may accompany the murder because such aggravating factors are broad by themselves, thus allowing more arbitrariness. *See, e.g.*, Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1403 (2005) (criticizing reform efforts of the Model Penal Code that retain the Code's capital aggravating factor for murders committed during a felony). Zimring notes that "[t]his single provision is probably responsible – in the states that use this style of statute – for more death sentences and executions than all the other aggravating factors combined." *Id.*

102. LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (2006) (adding "cruelty to juveniles" and "second degree cruelty to juveniles" to existing aggravating factors); TENN. CODE ANN. § 39-13-202(a)(2) (2006) (expanding definition of first degree murder to include killings in the course of or attempt of each of aggravated child neglect and aggravated child abuse); UTAH CODE ANN. § 76-5-202(1)(d) (2004) (revising its definition of aggravated homicide to include where "the homicide was

Desecration or Mutilation of Victim's Body[103]
Felony Possession of a Weapon[104]
Multiple Killings in One Course of Conduct[105]
Multiple Killings in Series[106]
Murder Done on School Property[107]

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committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit . . . child abuse"); WYO. STAT. ANN. § 6-2-102(h)(xii) (2004) (amending aggravating factor to include among capital felonies murder in the commission of abuse of a child under sixteen years of age: "The defendant killed another human being purposely and with premeditated malice and while engaged in, or as an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary, kidnapping *or abuse of a child under the age of sixteen (16) years*.") (emphasis added).

103. TENN. CODE ANN. § 39-13-204(i)(13) (2006) ("The defendant knowingly mutilated the body of the victim after death."); UTAH CODE ANN. § 76-5-202(1)(e) (2006) ("[T]he homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which the actor committed the crime of abuse or desecration of a dead human body . . . ."); 2005 Utah Laws ch. 143; UTAH CODE ANN. § 76-5-202(1)(s) (2006) ("[T]he actor dismembers, mutilates, or disfigures the victim's body, whether before or after death, in a manner demonstrating the actor's depravity of mind."); 2005 Utah Laws ch. 143.

This aggravating factor, like some other aggravating factors, may apply to situations where the defendant is mentally ill, which should be a mitigating factor instead of an aggravating factor. *See, e.g.*, Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1128-29 (2005); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1165-66 (1997).

104. COLO. REV. STAT. ANN. § 18-1.3-1201(5)(o) (West 2004) ("The defendant's possession of the weapon used to commit the class 1 felony constituted a felony offense under the laws of this state or the United States."). Note that Colorado's aggravating factors were listed in COLO. REV. STAT. ANN. § 16-11-802 until 2002, and they are now listed at COLO. REV. STAT. ANN. § 18-1.3-1201(5).

105. ALA. CODE § 13A-5-49(9) (2004) ("The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.").

106. ALA. CODE § 13A-5-49(10) (2004) ("The capital offense was one of a series of intentional killings committed by the defendant."); COLO. REV. STAT. ANN. § 18-1.3-1201(5)(p) (West 2004) ("The defendant intentionally killed more than one person in more than one criminal episode."); TENN. CODE ANN. § 39-13-204(i)(12) (2004) (revising multiple murder provision to: "The defendant committed 'mass murder,' which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight-month period."); VA. CODE ANN. § 18.2-31(8) (2004) ("The willful, deliberate, and premeditated killing of more than one person within a three-year period.").

107. NEV. REV. STAT. ANN. § 200.033(14) (2004) ("The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person."). *Cf.* 720 ILL. COMP. STAT. ANN. 5/9-1(b)(20) (West 2005) ("[T]he murdered individual was known by the defendant to be a teacher or other person employed in any school and the teacher or other employee is upon the grounds of a school or grounds adjacent to a school, or is in any part of a building used for school purposes."); 1999 Ill. Legis. Serv. P.A. 91-434.

Murder Done While Lying in Wait or With Explosives or With Incendiary Device[108]
Rape or Sexual Assault[109]
Remote Stun Gun Used By Defendant[110]
Robbery[111]
Sexual Abuse or Exploitation of a Child[112]

B. Factors Added that Relate to the Motivation for the Murder

Avoid Arrest, Prevent Prosecution, or Retaliate for Prosecution[113]
Based on Victim's Race, Religion, etc.[114]

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108. COLO. REV. STAT. ANN. § 18-1.3-1201(5)(f) (West 2004) ("The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device or a chemical, biological, or radiological weapon.").

109. NEV. REV. STAT. § 200.033 (13) (2004) ("The person, alone or with others, subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder."). During the last decade, the Montana Legislature also made some changes to the terminology in its list of aggravating factors. *See* MONT. CODE ANN. § 46-18-303 (2005); *see also* VA. CODE ANN. § 18.2-31(5) (2004) (adding "object sexual penetration" to "[t]he willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration").

110. ARIZ. REV. STAT. ANN § 13-703(F)(14) (2005) ("The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense.").

111. VA. CODE ANN. § 18.2-31(4) (2006) (broadening statute by removing "deadly weapon" requirement from "[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery"); *see* LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (2006) (adding "second degree robbery" to existing aggravating factor that already included "simple robbery").

112. IDAHO CODE ANN.§ 19-2515(9)(h) (2006) ("[M]urder was committed in the perpetration of, or attempt to perpetrate, an infamous crime against nature, lewd and lascivious conduct with a minor, sexual abuse of a child under sixteen (16) years of age, ritualized abuse of a child, sexual exploitation of a child, sexual battery of a minor child sixteen (16) or seventeen (17) years of age, or forcible sexual penetration by use of a foreign object, and the defendant killed, intended a killing, or acted with reckless indifference to human life.").

113. ARIZ. REV. STAT. ANN. § 13-703(F)(12) (2005) ("The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding."); CONN. GEN. STAT. ANN. § 53a-46a(i)(8) (West 2005) ("[T]the defendant committed the [murder] . . . to avoid arrest for a criminal act or prevent detection of a criminal act or to hamper or prevent the victim from carrying out any act within the scope of the victim's official duties or to retaliate against the victim for the performance of the victim's official duties."); *see* OKLA. STAT. ANN. tit. 21, § 701.7(B) (West 2005) (expanding an existing factor to include where one "takes the life of a human being during, or if the death of a human being results from . . . eluding an officer").

114. COLO. REV. STAT. ANN. § 18-1.3-1201(5)(n) (West 2004) ("The defendant committed the class 1 felony against the victim because of the victim's race, color, ancestry, religion, or national origin."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(v) (2006) ("The murder was committed for the purpose of interfering with the victim's free exercise or enjoyment of any right, privilege or immunity protected by the First Amendment to the United States Constitution, or because the victim has exercised or enjoyed said rights, or because of the victim's race, religion, color, disability, national origin or ancestry."); NEV. REV. STAT. § 200.033(11) (2004) ("The murder was committed

Cold and Calculated/Premeditated[115]
Murder Done at the Direction of Another[116]
Terrorism[117]

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upon a person because of the actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of that person.").

115. ARIZ. REV. STAT. ANN. § 13-703(F)(13) (2005) ("The offense was committed in a cold, calculated manner without pretense of moral or legal justification."). This aggravating factor, while rare, is similar to other pre-existing aggravating factors. *See* FLA. STAT. ANN. § 921.141(5)(i) (West 2006) ("The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."); NEV. REV. STAT. § 200.033(9) (2006) ("The murder was committed upon one or more persons at random and without apparent motive.").

116. VA. CODE ANN. § 18.2-31(10) (2004) ("The willful, deliberate, and premeditated killing of any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise . . . .").

117. 720 ILL. COMP. STAT. ANN. 5/9-1(b)(21) (West 2005 & Supp. 2006) ("[T]he murder was committed by the defendant in connection with or as a result of the offense of terrorism . . . ."); 2002 Ill. Legis. Serv. P.A. 92-854; NEV. REV. STAT. § 200.033(15) (2004) ("The murder was committed with the intent to commit, cause, aid, further or conceal an act of terrorism."); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (2006) (adding "terrorism" to existing aggravating factor); N.J. STAT. ANN. § 2C:11-3(c)(4)(l) (West 2004) ("The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism . . . ."); N.Y. PENAL LAW § 125.27(a)(xiii) (McKinney 2005) ("[T]he victim was killed in furtherance of an act of terrorism . . . ."); OHIO REV. CODE ANN. § 2929.04(A)(10) (LexisNexis 2003) ("The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism."); 2002 Ohio Laws File 139; OKLA. STAT. ANN. tit. 21, § 1268.2(C) (West 2005) (adding terrorism to first degree murder definition: "A person who kills another person or who causes the death of another person in the commission of an act of terrorism shall be guilty of murder in the first degree."); TENN. CODE ANN. § 39-13-204(i)(15) (2004) ("The murder was committed in the course of an act of terrorism."); TENN. CODE ANN. § 39-13-202(a)(2) (2004) (adding to its definition of felony murder the "killing of another committed in the perpetration of . . . act of terrorism"); TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2004 & Supp. 2005) (modifying the definition of capital murder to include a "person [who] intentionally commits the murder in the course of committing or attempting to commit . . . terroristic threat . . . ."); UTAH CODE ANN. § 76-5-202(1)(n)(ii) (2003) ("[T]he homicide was committed . . . by means of any weapon of mass destruction . . . ."); 2002 Utah Laws ch. 166; VA. CODE ANN. § 18.2-31(13) (2004) (adding the following offenses to its definition of capital murder: "The willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism . . . ."). Arizona expanded its definition of "serious offense" for an aggravating factor to include burglary in the second degree and "terrorism." *See* ARIZ. REV. STAT. ANN. § 13-703(I)(13) (2005); *cf.* COLO. REV. STAT. ANN. § 18-1.3-1201(5)(f) (West 2004) (adding language that would make one eligible for the death penalty if the person used "a chemical, biological, or radiological weapon").

While not included in the expansions of the death penalty counted in the previous section, in March 2001, Kentucky did change the language of one its aggravating factors from where the offender "created a grave risk of death to more than one (1) person in a public place by means of a destructive device, etc." to replace "destructive device" with "weapon of mass destruction." KY. REV. STAT. ANN. § 532.025(2)(a)(3) (LexisNexis 2006). The change was part of a larger bill regarding terroristic threats. *See* 2001 Ky. Acts ch. 113.

C. *Factors Added that Relate to the Murder Defendant's Status*

Gang Member[118]
Prior Felony Possession of a Weapon[119]
Prior Felony and in Prison or on Probation[120]
Prior Conviction for Sexual Assault Crime[121]
Prior History of Serious Assaultive Criminal Activity[122]
Sexual Predator[123]
Under Order of Protection for Domestic Violence[124]

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118. ARIZ. REV. STAT. ANN. § 13-703(F)(11) (2005) ("The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate."); FLA. STAT. ANN. § 921.141(5)(n) (West 2004) ("The capital felony was committed by a criminal street gang member . . . ."). Missouri has a similar provision. *See* MO. ANN. STAT. § 565.032(2)(17) (West 2005) ("The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity . . . .").

119. COLO. REV. STAT. ANN. § 18-1.3-1201(5)(o) (West 2004) ("The defendant's possession of the weapon used to commit the class 1 felony constituted a felony offense under the laws of this state or the United States.").

120. FLA. STAT. ANN. § 921.141(5)(a) (West 2004) ("The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.").

121. GA. CODE ANN. § 17-10-30(11) (2006) ("The offense of murder, rape, or kidnapping was committed by a person previously convicted of rape, aggravated sodomy, aggravated child molestation, or aggravated sexual battery.").

122. NEB. REV. STAT. § 29-2523(1)(a) (2004) (revising statute to include bold language: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial [prior] history of serious assaultive or terrorizing criminal activity.").

123. FLA. STAT. ANN. § 921.141(5)(o) (West 2006) ("The capital felony was committed by a person designated as a sexual predator . . . or a person previously designated as a sexual predator who had the sexual predator designation removed."); 2005 Fla. Sess. Law Serv. ch. 2005-28.

124. 720 ILL. COMP. STAT. ANN. 5/9-1(b)(19) (West 2005) ("[T]he murdered individual was subject to an order of protection and the murder was committed by a person against whom the same order of protection was issued under the Illinois Domestic Violence Act of 1986."); 1998 Ill. Legis. Serv. P.A. 90-668 (West). Although this factor was initially numbered subsection (18), it was later changed to subsection (19). *See* 1999 Ill. Legis. Serv. P.A. 91-434 (West); *see also* N.J. STAT. ANN. § 2C:11-3(c)(4)(g) (West 2004) ("[M]urder was committed [during] . . . the crime of contempt in violation of [an order of protection for domestic violence]."); 42 PA. CONS. STAT. ANN. § 9711(d)(18) (West 1998) ("At the time of the killing the defendant was subject to a court order restricting in any way the defendant's behavior toward the victim pursuant to 23 Pa.C.S. Ch. 61 (relating to protection from abuse) or any other order of a court of common pleas or of the minor judiciary designed in whole or in part to protect the victim from the defendant."); WASH. REV. CODE ANN. § 10.95.020(13) (West 2005) ("At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order.").

D. Factors Added that Relate to the Murder Victim's Status[125]

Victim was a Child[126]
Victim was a Community Policing Volunteer[127]
Victim was a Correctional Officer or Corrections Employee[128]
Victim was Elderly or Disabled[129]

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125. Although these eligibility factors are listed as focusing on the victim's status, many of these factors also have a motive element. For example, the eligibility factor that the victim was a witness often requires the state to prove that the purpose of the murder was based on the fact that the victim was a witness. *See, e.g.*, State v. Martinez, 130 P.3d 731, 735 (N.M. 2006) (holding that for murder-of-a-witness aggravating factor, the state must prove the defendant killed the victim because the victim was a witness). Other statutory factors based upon a victim's employment also often have a motive element too. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/9-1(b)(18) (West 2005) ("[T]he murder was committed by reason of any person's activity as a community policing volunteer or to prevent any person from engaging in activity as a community policing volunteer.").

126. ARK. CODE ANN. § 5-4-604(10) (2003) ("The capital murder was committed against a person whom the defendant knew or reasonably should have known was especially vulnerable to the attack because: . . . (B) The person was twelve (12) years of age or younger."); CONN. GEN. STAT. ANN. § 53a-54b(8) (West 2005) ("murder of a person under sixteen years of age"); NEV. REV. STAT. § 200.033(10) (2004) ("The murder was committed upon a person less than 14 years of age."); OR. REV. STAT. ANN. § 163.095(1)(f) (West 2003) (adding "[t]he victim of the intentional homicide was a person under the age of 14 years" to definition of aggravated murder); VA. CODE ANN. § 18.2-31(12) (2004) ("The willful, deliberate and premeditated killing of a person under the age of fourteen by a person age twenty-one or older."); *see also* S.D. CODIFIED LAWS § 23A-27A-1(6) (2004) ("The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age."). The South Dakota statute added the language creating the presumption when the victim is less than thirteen years of age in 1995. *See* 1995 S.D. Sess. Laws ch. 132.

127. 720 ILL. COMP. STAT. ANN. 5/9-1(b)(18) (West 2005) ("[T]he murder was committed by reason of any person's activity as a community policing volunteer or to prevent any person from engaging in activity as a community policing volunteer."); 1998 Ill. Legis. Serv. P.A. 90-661 (West); NEV. REV. STAT. § 200.033(7)(a) (2004) (expanding definition of "peace officer" to include "[a]n employee of the Department of Corrections who does not exercise general control over offenders imprisoned within the institutions and facilities of the Department, but whose normal duties require him to come into contact with those offenders when carrying out the duties prescribed by the Director of the Department"). Also, South Carolina amended an existing aggravating factor that already provided for where the victim was a "corrections officer" to specifically include where the victims are "county or municipal corrections officer[s], a county or municipal detention facility employee or former county or municipal detention facility employee . . . ." S.C. CODE ANN. § 16-3-20(C)(a)(7) (2005); 2002 S.C. Acts 224.

129. FLA. STAT. ANN. § 921.141(5)(d) (West 2004) ("The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit . . . abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement . . . ."); FLA. STAT. ANN. § 921.141(5)(m) (West 2004) ("The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim."); TENN. CODE ANN. § 39-13-204(i)(14) (2004) ("The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at

Victim was an Environmental Officer[130]
Victim was a Family Member[131]
Victim was a Firefighter, Rescue Worker, Etc.[132]
Victim was a Judge[133]
Victim was a Law Enforcement Officer[134]
Victim was Pregnant[135]

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the time of the murder the defendant knew or reasonably should have known of such handicap or disability.").

130. CONN. GEN. STAT. ANN. § 53a-54b(1) (West 2005) (adding to the definition of capital crime within the victim category: "[A] conservation officer or special conservation officer appointed by the Commissioner of Environmental Protection under the provisions of section 26-5 . . . ."); MISS. CODE ANN. § 97-3-19(2)(a) (2004) (adding "conservation officer" to the definition of victims the killing of which would create death eligibility).

131. WASH. REV. CODE ANN. § 10.95.020(14) (West 2005) ("At the time the person committed the murder, the person and the victim were 'family or household members' . . . and the person had previously engaged in a pattern or practice of [certain] crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted."). *See supra* note 124 for expansions where defendant was under an order of protection for domestic violence.

132. TENN. CODE ANN. § 39-13-204(i)(9) (2004) (amending statute to include "[murders] committed against any . . . *emergency medical or rescue worker, emergency medical technician, paramedic or firefighter*, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known . . . .") (emphasis added).

133. TEX. PENAL CODE ANN. § 19.03(a)(9) (Vernon 2006) ("[T]he person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.").

134. NEB. REV. STAT. § 29-2523(1)(i) (2004) ("The victim was a law enforcement officer engaged in the lawful performance of his or her official duties as a law enforcement officer and the offender knew or reasonably should have known that the victim was a law enforcement officer."); VA. CODE ANN. § 18.2-31(6) (2004) ("The willful, deliberate, and premeditated killing of a law-enforcement officer . . . or any law-enforcement officer of another state or the United States having the power to arrest for a felony under the laws of such state or the United States, when such killing is for the purpose of interfering with the performance of his official duties.").

135. COLO. REV. STAT. ANN. § 18-1.3-1201(5)(q) (West 2004) ("The victim was a pregnant woman, and the defendant intentionally killed the victim, knowing she was pregnant."); IND. CODE ANN. § 35-50-2-9(b)(16) (West 2005) ("The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability . . . ."); 42 PA. CONS. STAT. ANN. § 9711(d)(17) (West 2004) ("At the time of the killing, the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy."); VA. CODE ANN. § 18.2-31(11) (2004) ("The willful, deliberate and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth."). *Cf.* ARIZ. REV. STAT. ANN § 13-703(F)(9) (2005) ("The defendant was an adult . . . and the murdered person . . . was an unborn child in the womb at any stage of its development.").

In at least one state, a similar expansion of death eligibility occurred through a court's statutory construction of an aggravating factor when "two or more persons" are murdered by the defendant. The South Carolina Supreme Court interpreted "person" to include a viable fetus, thus broadening the existing statutory aggravating factor. *See* State v. Ard, 505 S.E.2d 328, 331 (S.C. 1998), *overruled in part on other grounds by* State v. Shafer, 531 S.E.2d 524 (S.C. 2000), itself *overruled by* Shafer v. South Carolina, 532 U.S. 36 (2001); *see also* James Clark, State v. Ard: *Statutory Aggravating Circumstances and the Emergence of Fetal Personhood in South Carolina*, 50 S.C. L. REV. 887 (1999).

Victim was a Teacher or School Employee[136]
Victim was an Unborn Child[137]
Victim was a Witness[138]

IV. ANALYSIS OF RECENT DEATH PENALTY STATUTORY EXPANSIONS

During the last decade, more than twenty different state legislatures expanded their death penalties by adding factors that make one eligible for the death penalty.[139] Tennessee, Virginia,[140] Colorado, and Arizona have made more death penalty eligibility expansions during the last decade than other states, although several states made changes in more than one year.[141] These additions have resulted in most states far exceeding the maximum of five or six aggravating factors recommended in recent reports.[142] For

136. 720 ILL. COMP. STAT. ANN. 5/9-1(b)(20) (West 2005) ("[T]he murdered individual was known by the defendant to be a teacher or other person employed in any school and the teacher or other employee is upon the grounds of a school or grounds adjacent to a school, or is in any part of a building used for school purposes."); 1999 Ill. Legis. Serv. P.A. 91-434 (West). *Cf.* NEV. REV. STAT. § 200.033(14) (2004) ("The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person.").

137. ARIZ. REV. STAT. ANN § 13-703(F)(9) (2005) ("The defendant was an adult . . . and the murdered person . . . was an unborn child in the womb at any stage of its development.").

138. DEL. CODE ANN. tit. 11, § 4209(e)(1)(g) (2004) ("The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime, or in retaliation for the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime."); S.C. CODE ANN. § 16-3-20(C)(a)(11) (2004) ("The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.").

139. *See supra* notes 67-77 and accompanying text.

140. Note that Virginia lists only two sentencing aggravating factors—vileness and future dangerousness—in its sentencing statute. VA. CODE ANN. § 19.2-264.2 (2006). Thus, one may reasonably argue that Virginia has a narrow list of eligibility factors. However, the two sentencing aggravating factors are quite broad. *See, e.g.*, Kirchmeier, *supra* note 17, at 364-74 (discussing arbitrariness and broad application of heinousness and future danger type aggravating factors). Because the two sentencing aggravating factors encompass such a large number of murders, a significant part of the narrowing of defendants eligible for the death penalty occurs in the state's definition of capital murder. Virginia's definition of capital murder, however, now has thirteen eligibility factors and the state continues to expand the list. *See* VA. CODE ANN. § 18.2-31 (2006).

141. *See* discussion *supra* Part II.

142. The following survey of states reveals the large number of death eligibility factors used in individual states, either through sentencing factors or in the definition of capital murder. *See* ALA. CODE § 13A-5-49(9) (2006) (listing ten aggravating circumstances); ARK. CODE ANN. § 5-10-101(a)(10) (2006) (listing ten categories for capital murder); ARK. CODE ANN. § 5-4-604 (2006) (listing ten aggravating circumstances); ARIZ. REV. STAT. ANN § 13-703(F) (2005) (listing fourteen

example, the recent Tennessee additions give the state a total of fifteen different factors that may make one eligible for the death penalty.[143] The

aggravating circumstances); CAL. PENAL CODE § 190.2 (West 2006) (listing twenty-two special circumstances that make one eligible for the death penalty or life imprisonment without parole); CAL. PENAL CODE § 190.3 (West 2006) (listing eleven factors to consider in determining whether to sentence to death or life imprisonment without parole); COLO. REV. STAT. ANN. § 18-1.3-1201(5) (West 2006) (listing seventeen aggravating circumstances); CONN. GEN. STAT. ANN. § 53a-54b (West 2006) (listing eight factors in capital felony definition); DEL. CODE ANN. tit. 11, § 4209(e) (2006) (listing twenty-two factors in first degree murder statute); FLA. STAT. ANN. § 921.141(5) (West 2006) (listing fifteen aggravating circumstances); GA. CODE ANN. § 17-10-30 (listing eleven aggravating circumstances); IDAHO CODE ANN § 19-2515 (2006) (listing eleven aggravating circumstances); 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West 2006) (listing twenty-one factors in first degree murder statute); IND. CODE ANN. § 35-50-2-9(b) (West 2006) (listing sixteen aggravating circumstances); KAN. STAT. ANN. § 21-4625 (2006) (listing eight aggravating circumstances); KY. REV. STAT. ANN. § 532.025 (West 2006) (listing eight aggravating circumstances); LA. CODE CRIM. PROC. ANN. art. 905.4(A) (2006) (listing twelve aggravating circumstances); MD. CODE ANN., CRIM. LAW § 2-303(g)(1) (West 2006) (listing ten aggravating circumstances); MISS. CODE ANN. § 97-3-19(2) (2006) (defining capital murder with eight factors); MISS. CODE ANN. § 99-19-101(5) (2006) (listing eight aggravating circumstances); MO. ANN. STAT. § 565.032 (West 2006) (listing seventeen factors in definition of first degree murder); MONT. CODE ANN. § 46-18-303 (2006) (listing eleven aggravating circumstances although they are numbered under four categories); NEB. REV. STAT. § 29-2523 (2006) (listing nine aggravating circumstances); NEV. REV. STAT. § 200.033 (2006) (listing fifteen aggravating circumstances); N.H. REV. STAT. ANN. § 630:5(VII) (2006) (listing ten aggravating circumstances); N.J. STAT. ANN. § 2C:11-3(c)(4) (West 2006) (listing twelve aggravating circumstances); N.M. STAT. ANN. § 31-20A-5 (West 2006) (listing seven aggravating circumstances); N.Y. PENAL LAW § 125.27(1)(a) (McKinney 2006) (listing thirteen factors in definition of first degree murder); N.C. GEN. STAT. § 15A-2000(e) (2006) (listing eleven aggravating circumstances); OHIO REV. CODE ANN. § 2929.04(A) (West 2006) (listing ten aggravating circumstances); OKLA. STAT. ANN. tit. 21, § 701.7 (West 2005) (listing five factors in definition of first degree murder); OKLA. STAT. ANN. tit. 21, § 1268.2(C) (adding terrorism as a sixth factor making one eligible for first degree murder); OKLA. STAT. ANN. tit. 21, § 701.12(C) (West 2005) (listing eight aggravating circumstances); OR. REV. STAT. ANN. § 163.095 (West 2006) (defining aggravated murder with twelve factors under two categories); 42 PA. CONS. STAT. ANN. § 9711(d) (West 2006) (listing eighteen aggravating circumstances); S.C. CODE ANN. § 16-3-20(C)(a) (2006) (listing eleven aggravating circumstances); S.D. CODIFIED LAWS § 23A-27A-1 (2006) (listing ten aggravating circumstances); TENN. CODE ANN. § 39-13-204(i) (2006) (listing fifteen aggravating circumstances); TEX. PENAL CODE ANN. § 19.03(a) (Vernon 2006) (listing nine factors for definition of capital murder); UTAH CODE ANN. § 76-5-202(1) (2006) (listing nineteen factors for the definition of aggravated murder); VA. CODE ANN. § 19.2-264.2 (2006) (listing only two aggravating sentencing factors, although they are broad factors and include future dangerousness); VA.CODE ANN. § 18.2-31 (2006) (listing thirteen factors for definition of capital murder); WASH. REV. CODE ANN. § 10.95.020 (West 2006) (listing fourteen factors for definition of first degree murder); WYO. STAT. ANN. § 6-2-102(h) (2006) (listing twelve aggravating circumstances); *see also* 10 U.S.C.A. § 918 (2006) (listing four aggravating circumstances); RULES FOR COURTS-MARTIAL 1004(c) (listing eleven categories of aggravating factors).

The actual procedures in the states may differ. For example, although California's "special circumstances" perform the narrowing function more like traditional aggravating circumstances, they apply at the guilt phase to define the defendants who are eligible for death. *See* Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 2-3 n.5 (2005); People v. Bacigalupo, 862 P.2d 808, 813 (Cal. 1993). In California, the term "aggravating circumstances" are factors used by the jury to select the penalty. *See* Pierce & Radelet, *supra*, at 2-3 n.5; Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1291-92 n.39 (1997).

143. TENN. CODE ANN. § 39-13-204(i) (2006).

recent additions in Colorado give the state a total of seventeen aggravating factors.[144] Additionally, if one were to count the subsections of the eligibility factors in most states, the numbers would be even higher.[145]

The following subsections address two important aspects of legislatures' treatment of eligibility factors in the last decade. The first addresses some reasons why states added certain eligibility factors, including some new factors that did not exist in any state until the last decade.[146] The second considers the implications of the trend of expanding death penalty laws.[147]

A. The Creation of New Eligibility Factors Were Passed in Response to Specific Events or Specific Political Concerns

There is generally little media coverage when state legislatures add new death penalty eligibility factors. However, it is easy to understand why the factor of terrorism was added in several states since 2001. In recent years, terrorism has been added as an aggravating factor or a death eligibility factor in ten death penalty states: Arizona, Nevada, New Jersey, New York, Ohio, Oklahoma, Tennessee, Utah, Texas, and Virginia.[148] The triggering event

144. COLO. REV. STAT. ANN. § 18-1.3-1201(5) (West 2006).

145. In many of these states, the actual number of eligibility factors could be larger if one counted all of the subsections separately. *See, e.g.*, Pierce & Radelet, *supra* note 142, at 3-4 (noting that the total number of eligibility factors in California is actually thirty-six when one counts various subsections, and that death eligibility has even been further broadened in the expansion of the state's definition of first degree murder).

146. *See infra* Part IV.A.

147. *See infra* Part IV.B.

148. *See* NEV. REV. STAT. § 200.033(15) (2004) ("The murder was committed with the intent to commit, cause, aid, further or conceal an act of terrorism."); N.J. STAT. ANN. § 2C:11-3(c)(4)(l) (West 2005) ("The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism . . . ."); N.Y. PENAL LAW § 125.27(1)(a)(xiii) (McKinney 2005) ("[T]he victim was killed in furtherance of an act of terrorism . . . ."); OHIO REV. CODE ANN. § 2929.04(A)(10) (West 2006) ("The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism."); 2002 Ohio Laws File 139; OKLA. STAT. ANN. tit. 21, § 1268.2(C) (West 2005) (adding terrorism to first degree murder definition: "A person who kills another person or who causes the death of another person in the commission of an act of terrorism shall be guilty of murder in the first degree."); TENN. CODE ANN. § 39-13-204(i)(15) (2004) ("The murder was committed in the course of an act of terrorism."); TENN. CODE ANN. § 39-13-202(a)(2) (2004) (adding to its definition of felony murder the "killing of another committed in the perpetration of . . . act[s] of terrorism"); TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2004) (modifying the definition of capital murder to include situations where "the person intentionally commits the murder in the course of committing or attempting to commit . . . [a] terroristic threat . . . ."); UTAH CODE ANN. § 76-5-202(1)(i)(ii) (2006) ("[T]he homicide was committed . . . by means of any weapon of mass destruction . . . ."); 2002 Utah Laws ch. 166; VA. CODE ANN. § 18.2-31(13) (2004) (adding the following offenses to its definition of capital murder: "The willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of

for the addition of this factor is the terrorist attacks that occurred on September 11, 2001.

In New York, within one week after September 11, the New York Legislature made "terrorism" a factor that makes one eligible for the death penalty.[149] Of course, those who committed the terrorist acts on September 11, had they survived, would already have been eligible for the New York death penalty under other factors,[150] but the swift legislative response was apparently made to ensure such a result.[151]

The timing indicates that the other state legislatures that added terrorism factors were influenced by September 11 as well. Nevada, New Jersey, Ohio, Oklahoma, Tennessee, Utah, and Virginia added a terrorism factor in 2002.[152] Texas added it in 2003;[153] Arizona added it in 2005;[154] and Louisiana added it in 2006.[155] The New Jersey and Virginia Legislatures

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terrorism . . . .").

149. Ken Armstong, *Laws Could Get Tougher on Criminals*, CHI. TRIB., Sept. 21, 2001, at 14N. Only one New York state senator voted against the death penalty expansion, and the bill passed in the state assembly by a vote of 131-5. *See* John Caher, *State Legislature Approves Tough Anti-Terrorism Laws*, N.Y.L.J., Sept. 18, 2001, at 1. Although prior to 2001, terrorism had not been an eligibility factor in New York's death penalty law, it was a factor that could be considered after a defendant was found eligible for the death penalty. *See* N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2006); 2001 N.Y. Sess. Law ch. 300.

Since New York's death penalty was found to be unconstitutional, one of the current Democratic candidates for governor, Eliot Spitzer, has used terrorism and the death penalty in his campaign, claiming a hope to bring back the death penalty for terrorists in New York. *See* John Caher, *Death Penalty Opponents Urge Spitzer Not to Support Statute's Reinstatement*, N.Y.L.J., Nov. 21, 2005, at 1.

150. *See* N.Y. PENAL LAW § 125.27(1)(a) (McKinney 2006). One relevant factor in New York's statute would be causing the death of additional persons. N.Y. PENAL LAW § 125.27(1)(a)(viii). The federal death penalty could have also applied. *See* 18 U.S.C.S. § 111 (LexisNexis 2006).

151. Three psychology professors theorized that one result of the September 11 attacks could be that people would respond with more draconian criminal sentences. The same reasoning would support a basis for legislators acting so quickly to expand their death penalty statutes. *See* TOM PYSZCZYNSKI, SHELDON SOLOMON, & JEFF GREENBERG, IN THE WAKE OF 9/11: THE PSYCHOLOGY OF TERROR 106 (2003). A further discussion of the possible psychological implications are beyond the scope of this Article, but for further insight on human reactions to reminders of death see generally ERNEST BECKER, ESCAPE FROM EVIL 110 (1975) ("The logic of killing others in order to affirm our own life unlocks much that puzzles us in history.").

152. *See supra* note 148. The Tennessee Legislature passed the bill that included the terrorism aggravating factor on the first Independence Day after the 9/11 attacks - July 4, 2002. *See* 2002 Tenn. Pub. Acts ch. 849. The change in law in Utah was part of various "antiterrorism amendments." *See* 2002 Utah Laws ch. 166.

153. TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2004) (modifying the definition of capital murder to include circumstances where "the person intentionally commits the murder in the course of committing or attempting to commit . . . terroristic threat . . . .").

154. Arizona expanded its definition of "serious offense" for an aggravating factor to include burglary in the second degree and "terrorism." *See* ARIZ. REV. STAT. § 13-703(I)(13) (2005).

155. Louisiana expanded an existing aggravating factor to include when the offender was perpetrating or attempting to perpetrate "terrorism." 2006 La. Acts 86 § 1 (2006) (amending LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (2006)).

were likely influenced by their proximity to the attacks in New York and Washington, D.C. on September 11.

The Oklahoma Legislature was likely influenced because that state had experienced its own terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995.[156] However, it is interesting that the September 11 attacks apparently provided the impetus for the 2002 legislative change, not the attack on local soil approximately seven years earlier.

Thus, because of the timing of the legislation, the September 11 attacks must have been on the mind of the legislatures in all of these states when they expanded their death penalties to include terrorism.[157] Further, an eleventh state—Colorado—added language to an aggravating factor that does not use the word "terrorism" but still might have been influenced by concerns of terrorism.[158] The Colorado Legislature included language that would make one eligible for the death penalty if the person used "a chemical, biological, or radiological weapon."[159]

Another new aggravating factor that until the last decade had not existed is that of school shootings.[160] This factor was added to Nevada's statute and it states:

> The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person.[161]

Nevada added this aggravating factor in 1999, perhaps in response to the shootings at Columbine High School on April 20, 1999, in Colorado.[162]

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156. *McVeigh Diary Had Bomb Plans*, PITTSBURGH POST-GAZETTE, Apr. 27, 1995, at A1.

157. It is interesting, though, that Arizona did not add "terrorism" until 2005. *See* ARIZ. REV. STAT. § 13-703(I)(13) (2005) (expanding definition of "serious offense" aggravating factor to include "terrorism"). Perhaps the Arizona Legislature waited so long to add "terrorism" because it was waiting to resolve issues from the Supreme Court's 2002 decision in *Ring v. Arizona*, 536 U.S. 584, 608-09 (2002) (holding that Arizona's use of judges to determine aggravating factors violated the Sixth Amendment).

158. COLO. REV. STAT. ANN. § 18-1.3-1201(5)(f) (West 2004).

159. *Id.*

160. The school shooting aggravating factor was not among the aggravating factors in any state in 1997. *See* Kirchmeier, *supra* note 17, at 400-31.

161. NEV. REV. STAT. § 200.033 (14) (2004).

162. *See* Mark Obmascik, *High School Massacre Columbine Bloodbath Leaves Up to 25 Dead*, DENVER POST, Apr. 21, 1999, at A-01. The Nevada aggravating factor addition went into effect approximately five months after the Columbine shootings. *See* NEV. REV. STAT. § 200.033(14)

Similarly, Illinois added a school-related aggravating factor, but only for teacher and school employee victims, not student victims.[163]

Like society's awareness of terrorism and school violence issues, society has become more conscious of the problem of domestic violence.[164] This awareness has also been reflected in the creation of new eligibility factors. Ten years ago, domestic violence was not a capital aggravating factor in any state,[165] but during the last decade several states have added death eligibility factors that encompass domestic violence concerns. Specifically, Illinois, New Jersey, Pennsylvania, and Washington added an eligibility factor when the defendant was under an order of protection for domestic violence.[166] Similarly, Washington added an aggravating factor for when the victim was a family member,[167] and Nebraska added an aggravating circumstance of prior history of "serious assaultive . . . criminal activity."[168]

Like domestic violence, issues such as child abductions and child abuse have been getting more media attention in recent years.[169] This trend is reflected in the creation of new aggravating factors for murder crimes involving child abuse or neglect,[170] and where the defendant is a "sexual

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(2004); 1999 Nevada Stat. ch. 13.

163. 720 ILL. COMP. STAT. ANN. 5/9-1(b)(20) (West 2005) ("[T]he murdered individual was known by the defendant to be a teacher or other person employed in any school and the teacher or other employee is upon the grounds of a school or grounds adjacent to a school, or is in any part of a building used for school purposes."); 1999 Ill. Legis. Serv. P.A. 91-434 (West).

164. *See, e.g.*, Kirsten J. Barnes, *Program Targets Domestic Violence,* MONTGOMERY ADVERTISER (Ala.), Oct. 20, 2005, at C1.

165. *See* Kirchmeier, *supra* note 17, at 400-31.

166. *See supra* note 124.

167. WASH. REV. CODE ANN. § 10.95.020(14) (West 2005) ("At the time the person committed the murder, the person and the victim were 'family or household members' . . . and the person had previously engaged in a pattern or practice of [certain] crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted.").

168. NEB. REV. STAT. § 29-2523(1)(a) (2004) (revising statute to include bold language: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity.").

169. *See, e.g.*, Peter Applebome, *Our Towns; How We Took the Child Out of Childhood*, N.Y. TIMES, Jan. 8, 2006, at 121 (citing Professor Steven Mintz regarding an "explosion in parental anxiety over child abductions, sexual abuse and crime, a panic almost entirely due to saturation news media coverage"); Cheryl Wetzstein, *Child-Abuse Rates Remain Unchanged,* WASH. TIMES, April 19, 2005, at A07 (noting report that "media and medical groups have been raising awareness about child abuse for years"); *see also* Andrew Vachss, *The Child Abuse Backlash: A Time of Testing, in* 2 JUSTICE FOR CHILDREN 3 (1989), *available at* http://www.vachss.com/av_dispatches/disp_8900_a.html ("Child abuse, once largely ignored by the general public, has been the subject of more media attention than perhaps any other issue in recent American history.").

170. LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (2006) (adding "cruelty to juveniles" and "second degree cruelty to juveniles" to existing aggravating factors); TENN. CODE ANN. § 39-13-202(a)(2) (2004) (expanding definition of first degree murder to include aggravated child neglect); TENN. CODE ANN. § 39-13-202(i)(2) (2004) (adding to definition of first degree murder: "A killing of another committed in the perpetration of or attempt to perpetrate any . . . *aggravated child abuse.*") (emphasis added); UTAH CODE ANN. § 76-5-202(1)(d) (2004) (revising its definition of

predator."[171] Further, a few states have expanded their death penalty in a constitutionally questionable way to apply to the crime of child rape where no murder occurred.[172] The expansion of the death penalty in several states to address offenses against children reveals a growing societal and political concern for the protection of children, even if these legislative changes may not in practice provide any additional protection to children.[173]

In addition to terrorism, school shootings, domestic violence, and child abuse, there are a few other new eligibility factors that were not used a decade ago. One new aggravating factor indicates a new concern with the use of stun guns.[174] Three other new eligibility factors include one for prior felony possession of a weapon,[175] one where the victim was an environmental officer,[176] and one factor dealing with murders committed to

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aggravated homicide to include when "the homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit . . . child abuse"); WYO. STAT. ANN. § 6-2-102(h)(xii) (2004) (amending aggravating factor to include among capital felonies murder in the commission of abuse of a child under sixteen years of age: "The defendant killed another human being purposely and with premeditated malice and while engaged in, or as an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary, kidnapping *or abuse of a child under the age of sixteen (16) years.*") (emphasis added); *see* IDAHO CODE ANN. § 19-2515(9)(h) (2006) ("[M]urder was committed in the perpetration of, or attempt to perpetrate, an infamous crime against nature, lewd and lascivious conduct with a minor, sexual abuse of a child under sixteen (16) years of age, ritualized abuse of a child, sexual exploitation of a child, sexual battery of a minor child sixteen (16) or seventeen (17) years of age, or forcible sexual penetration by use of a foreign object, and the defendant killed, intended a killing, or acted with reckless indifference to human life.").

171. *See supra* note 123. Prior to the recent decade, however, there were aggravating factors in some states for when the victim was a child. *See* Kirchmeier, *supra* note 17, at 420-21 n.378. Several states added a similar factor during the last decade. *See supra* note 126.

172. *See supra* notes 86-91 and accompanying text.

173. One critic of the statutory expansion to apply the death penalty to non-murder child rape crimes noted the political nature of them, saying that a bill to execute child sex offenders is "like 'political crack cocaine. It attracts publicity and people's attention at a very visceral level' but in the end . . . does little good." *See* Lianne Hart, *supra* note 87, at A15; *see also* Rayburn, *supra*, note 86, at 1164 (concluding that "the best available evidence shows that these statutes are counterproductive to their stated aims").

174. ARIZ. REV. STAT. ANN § 13-703(F)(14) (2005) ("The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense.").

175. *See supra* note 119. Several other jurisdictions, however, already had aggravating factors for prior offenses, but those aggravating factors are generally for more serious crimes than weapon possession. *See* Kirchmeier, *supra* note 17, at 415 n.374.

176. *See supra* note 130. Prior to the last decade, several states had aggravating factors for situations where the victim was a government employee, but those aggravating factors generally focus on people involved in the legal field or firefighters. *See* Kirchmeier, *supra* note 17, at 422 n.382.

affect a community police volunteer.[177] These last three factors, however, are similar to other eligibility factors that previously existed.[178]

Although the other eligibility factors that were added in some states during the last decade were previously used in other states, a few deserve special mention. Take for example, the aggravating factor for elderly victims added in Florida. Because Florida has a large elderly population,[179] it is not surprising that the state legislature considered that constituency when adding aggravating factors for elderly abuse or when the victim was elderly.[180] In addition to Florida, Tennessee added an aggravating factor for when the victim was elderly.[181] Previously, several other states already had a similar aggravating factor.[182]

These eligibility factor additions during the last decade were attempts by legislatures to address political issues through capital punishment laws. Concerns about children, the elderly, school violence, domestic violence, terrorism, and other issues have resulted in the expansion of the death penalty in a large number of states.[183]

One last example illustrates how one specific incident may result in politicians making an unnecessary expansion of the death penalty. As in the case of the legislative responses to the September 11 attacks, sometimes a specific murder may prompt an expansion of the law so that the death penalty would apply to that crime in the future. In 2002, a young pregnant woman was murdered in a Colorado town.[184] In response, in 2003, the Colorado Legislature added a seventeenth aggravating factor: "The victim was a pregnant woman, and the defendant intentionally killed the victim, knowing she was pregnant."[185] The Colorado Legislature also passed a declaration regarding the murder and the importance of the new factor.[186]

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177. *See supra* note 127.

178. For example, the community policing and environmental officer factors are similar to several other law enforcement aggravating factors. *See, e.g.*, FLA. STAT. ANN. § 921.141(5)(j) (West 2006) ("The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.").

179. As of 2000, Florida had the highest percentage of people over sixty-five years old in the United States (17.6%), so it is not surprising that the state has two aggravating factors regarding the elderly. *See* Christine L. Hines, *Which U.S. States Are the 'Oldest'?*, POPULATION REFERENCE BUREAU, *available at* http://www.prb.org/Template.cfm?Section=PRB&template=/ContentManagement/ContentDisplay.cfm&ContentID=8429. The actual percentage of elderly living in Florida is probably higher when elderly people from other states reside in Florida during the winter months.

180. *See supra* note 129.

181. *See supra* note 129; *see also* Hines, *supra* note 179.

182. Several other jurisdictions have an aggravating factor for when the victim is over a certain age. *See* Kirchmeier, *supra* note 17, at 421 n.379. For example, Arizona added an aggravating factor based on the elderly age of the victim in 1993. *See* 1993 Ariz. Sess. Laws ch. 153 § 1.

183. *See supra* notes 148-82 and accompanying text.

184. COLO. REV. STAT. ANN. § 18-1.3-1201(5)(q) (West 2006).

185. *Id.*

186. *Id.* The declaration, which implies that the legislature's concern about the unborn child in

However, the case was already death eligible without the new aggravating factor. The reason the actual murderer did not get the death penalty was because a plea deal was reached, not because of a lack of aggravating factors that would make the gruesome murder death eligible.[187] So, as in the case of other eligibility factor expansions, this expansion of the death penalty served more as a political function rather than a fix of an actual criminal justice problem. As one recent report noted, the developments of new death eligibility factors stem from "political imperatives" rather than from reasoned penological goals.[188]

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this criminal case might arise from concerns about abortion issues, reads as follows:

> SECTION 1. Legislative declaration. (1) The general assembly hereby finds that:
> (a) In the summer of 2002, a young woman was brutally murdered in a town in Colorado;
> (b) Autopsy results indicate that the young woman was between sixteen and seventeen weeks pregnant at the time of her murder;
> (c) Autopsy results further indicate that the young woman's child was a healthy boy who, presumably, would have been alive at birth;
> (d) Under current Colorado law, the young woman's murderer can be charged with her murder, but this person cannot be held directly accountable for the termination of her pregnancy;
> (e) Justice requires a change to Colorado's law in order to hold persons who assault or murder pregnant women directly and fully accountable for the harm they cause both to the women and to their unborn children.
> SECTION 8. Effective date - applicability. This act shall take effect July 1, 2003, and shall apply to offenses committed on or after said date.

COLO. REV. STAT. ANN. § 18-1.3-1201(5)(q) (West 2005).

187. The case the Colorado Legislature refers to seems to be Michael Baldwin's murder of his fifteen-year old girlfriend, Amanda Lynn Hanson, who was pregnant. Abortion Violence Website, http://www.abortionviolence.com/CO.HTM (citing Pam Zubeck & Anslee Willett, *Slain Fetus Fuels Calls for Law*, COLO. SPRINGS GAZETTE, Aug. 21, 2002; Bill Hethcock, *Girl's Killer Pleads Guilty*, COLO. SPRINGS GAZETTE, Nov. 27, 2002). During the course of the killing, Baldwin jammed sticks into her body and beat her with a rock such that a sheriff called the killing "the most vicious" one he'd seen in thirty years. *Id.* Thus, among the available aggravating factors that already existed, it seems that the case could have been eligible as being done "in an especially heinous, cruel, or depraved manner." COLO. REV. STAT. ANN. § 18-1.3-1201(5)(j) (West 2005). The Colorado Legislature's response seemed to be a result of dismay at the resolution of the case rather than based upon the genuine need for another aggravating factor.

188. *Mandatory Justice*, *supra* note 32, at 14. This report noted: "Rather than stemming only from sound penological policy, such as a broad and traditional sense of the public good, political imperatives appear to be reflected in the new generation of aggravators." *Id.*

B. *The Legislative Expansion of the Death Penalty During the Last Decade Created Broader Death Penalties and Did Not Service Criminal Justice Goals*

Because legislatures generally add death eligibility factors to address political concerns rather than considering the criminal justice goals of death penalty statutes as a whole, the ongoing death penalty expansions can lead to overbroad statutes, resulting in a "deregulation" of the death penalty.[189] Certainly, all murders are horrible, so it is natural for legislators to instinctively be drawn toward expanding their death penalty statutes. The Colorado crime where the man viciously killed his pregnant girlfriend rightfully creates outrage among moral human beings.[190] However, all unjustified murders are horrible, and if legislatures continue to add eligibility factors, the death penalty will apply to all—or almost all—murders.[191] Such broad statutes do not serve the constitutional requirement of narrowing the group of defendants eligible for the death penalty and result in arbitrariness similar to that in the statutes found unconstitutional in *Furman v. Georgia*.[192]

Although expansion of death penalty eligibility factors has been the rule during the last decade, there was at least one legislative attempt to evaluate and to drastically decrease the number of aggravating factors.[193] In 2005, a bill was proposed in South Dakota to reduce the number of factors in the state's list of aggravating factors from ten factors to only three.[194] However, the bill has not passed.[195] The three remaining aggravating factors would have been where the victim was a judicial officer or prosecutor, where the "offense was outrageously or wantonly vile, horrible or inhuman," and where the victim was a law enforcement officer, corrections employee or firefighter.[196]

Although states often add death eligibility factors, they rarely remove them from their statutes.[197] However, as part of a compromise bill that included expanding death eligibility in other ways, in 2001, Connecticut removed from its definition of capital murder the offense of selling a narcotic resulting in death.[198] Although one state senator reasoned that the

189. *See* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 333-34 (1984) (stating that the legislative response to the public's concern with certain violent behavior has "as much infected as enriched" the death penalty laws).

190. *See supra* note 187 and accompanying text.

191. *See* MASS. REPORT, *supra* note 16, at 10.

192. *See supra* Part II.A.

193. H.B. 1238, 2005 Leg., 80th Sess. (S.D. 2005).

194. *See id.*

195. *See id.*

196. *Id.*

197. *See* MASS. REPORT, *supra* note 16, at 10.

198. *See* Tracy L. Snell & Laura M. Maruschak, *Capital Punishment 2001*, BUREAU OF JUST.

elimination of the aggravating factor might be a sign that support for capital punishment was dropping, some legislators supported the elimination of the aggravating factor as part of a package that expanded the death penalty in other ways because no one had ever been charged under the provision they eliminated.[199]

Similarly, the Utah Legislature took the rare action of deleting an aggravating factor, but the practical effect was not to reduce the number of defendants eligible for the death penalty.[200] In 2001, Utah deleted the following aggravating factor: "[T]he actor was under a sentence of life imprisonment or a sentence of death at the time of the commission of the homicide."[201] At the same time, however, the Utah Legislature amended another aggravating factor to make a defendant qualify for the death penalty where the defendant had previously been convicted of any one of twenty different crimes.[202] Most likely, the Utah Legislature realized that the change to the latter factor would cover most instances that would be covered under the deleted factor. As such, the deletion of the aggravating factor was not in effect a deletion.

Accordingly, during the last decade, legislatures have not cut back on their eligibility factors. Even if it were wise to remove eligibility factors to serve penological goals, it would be politically risky for legislatures to remove factors.[203] It is difficult to predict future crimes, and because all murders are horrible, if a factor was removed that would cover a later crime, legislators perceive they might be at risk at the ballot box. Thus, legislators would have to be politically courageous to vote to narrow death penalty statutes.[204]

STAT. BULL. 2 (2002); CONN. GEN. STAT. ANN. § 53a-54b (West 2001) (noting deletion of aggravating factor of "the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroine or methadone"). The deletion of the aggravating factor was part of a compromise that included the addition of "a provision that would make it easier to impose a death sentence on people who kill police officers or other law enforcement officials." Lisa Chedekel, *Senate Ok's Changes in Death Penalty*, HARTFORD COURANT, June 6, 2001, at A3. The decision to expand the death penalty was "largely a backlash against the state Supreme Court's decision last year to reverse an inmate's death sentence in the 1991 shooting of Trooper Russell Bagshaw." *Id. See* State v. Johnson, 751 A.2d 298, 345 (Conn. 2000) (upholding conviction but reversing death sentence because evidence did not support a finding of the aggravating factor that the killing was done in an "especially cruel, heinous and depraved manner").

199. *See* Chedekel, *supra* note 198, at A3

200. *See* H.R. 258, 2001 Leg., Gen. Sess. (Utah 2001) (codified at UTAH CODE ANN. § 76-5-202 (2005)).

201. *Id.*

202. *See id.*

203. *See supra* note 198.

204. Recent research has revealed that legislators are uniform about the beliefs of their

Although it is politically understandable that legislators continue to add eligibility factors and to avoid deleting such factors, if one is concerned about the penological goals and constitutionality of death penalty statutes, the continued expansion of the death penalty is problematic for a number of reasons. First, as death penalty statutes become broader, "expanding the population of death rows will not do a single thing to accomplish the objective . . . [of] ensur[ing] that the very worst members of our society . . . are put to death."[205] Second, because capital cases are more complicated and more expensive than other cases, the creation of more death-eligible crimes wastes money and court resources.[206] Third, the expansion of the death penalty statutes raises constitutional issues if they become so broad that practically every murder qualifies for the death penalty.[207] Fourth, this broadness, by making such a large number of cases death-eligible, gives prosecutors and jurors wide discretion in selecting which of these cases actually receive the death penalty.[208] This broad discretion, which gives jurors and prosecutors more potential capital cases from which to select, approaches the concerns about arbitrariness discussed by the Supreme Court in *Furman v. Georgia*, where the Court invalidated statutes that gave too much discretion to jurors and prosecutors.[209] Finally, broad death penalty

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constituents regarding the death penalty, believing that there is greater support for the death penalty among voters than actually exists. *See* James R.P. Ogloff & Sonia R. Chopra, *Stuck in the Dark Ages: Supreme Court Decision Making and Legal Developments*, 10 PSYCHOL. PUB. POL'Y & L. 379, 384-85 (2004). For example, "[w]hile 73% of [New York] legislators believed that their constituents would prefer the punishment for first-degree murder to be the death penalty [over other options] . . . 73% of citizens statewide preferred [life imprisonment without parole] plus restitution to the death penalty." *Id.* at 385.

205. Kozinski & Gallagher, *supra* note 65, at 29. One scholar has argued that, with respect to the goal of executing a narrow class of the worst offenders, a system of proportionality review would be a substantial improvement over the current procedures that focus on aggravating factors. *See* Evan J. Mandery, *The Principles of Proportionality Review*, 39 CRIM. L. BULL. 157, 193 (2003) (conclusion).

206. *See, e.g.*, Michael Booth, *Abolishing Death Penalty Makes Fiscal Sense, Says Research Group*, N.J.L.J., Nov. 28, 2005 (quoting New Jersey Policy Perspective research director who states that "it would make more sense to do away with capital punishment rather than continue spending $52,000 per inmate per year"); Dieter, *supra* note 81.

207. *See* Zant v. Stephens, 462 U.S. 862, 872 (1983) (emphasizing that the purpose behind the use of aggravating factors is to narrow the group of those eligible for the death penalty); Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) (stating that a constitutionally sufficient narrowing must take place in death penalty cases); *see also* Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (plurality opinion) (holding that North Carolina's mandatory death penalty statute is unconstitutional); Roberts v. Louisiana, 428 U.S. 325, 333-36 (1976) (plurality opinion) (holding that Louisiana's mandatory death sentence statute is unconstitutional). *Woodson* and *Roberts* addressed mandatory death penalty statutes. A current statute that included every murder but still allowed consideration of mitigating circumstances probably would not be unconstitutional under those cases. *See supra* Part II.A.

208. One scholar has argued that because of the arbitrariness in the current system, a solution would be less jury secrecy to allow "review of jurors' reasons for imposing death." Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B. C. L. REV. 771, 824 (2005).

209. Furman v. Georgia, 408 U.S. 238, 240 (1972). Several of the Justices in *Furman* were

statutes—by increasing the number of people given the death penalty—increase the risk of executing the innocent.[210]

The costs to the system come at a time when there is no reliable evidence that these expansions add any benefits to society. Even if one assumes there may be some general deterrent effect resulting from using the death penalty instead of life imprisonment, additional eligibility factors would not increase that deterrent effect.[211]

A recent bipartisan report from The Constitution Project noted similar concerns with broad death penalty statutes.[212] The report noted that many of the recent eligibility factor additions do not consider sound penological goals or focus on the moral culpability of defendants.[213] Instead, the factors consider penologically less relevant aspects such as categories of offenders, (i.e. imprisoned convicts), or "the most high-profile risk of the day," such as gang killings.[214] Legislatures create these eligibility factors "without any evidence that injury rates were higher than for other crimes of violence or that these crimes were more widespread than other serious offenses."[215] Another problem with certain new eligibility factors, like gang factors and

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concerned with the racial disparity that resulted from capital statutes that permitted too much discretion. *See id.* at 255 (Douglas, J., concurring); *see also* MASS. REPORT, *supra* note 16, at 10-11. The broad discretion from "[e]xpansive statutes also lead[s] to geographic disparity as prosecutors in one county [in a state] may more aggressively seek the death penalty than prosecutors in other counties [within the same state]." *See* Sara Darehshori et al., *supra* note 64, at 110; Gene Warner, *Counties Differ Widely in Invoking Death Penalty*, BUFFALO NEWS, July 9, 2001, at A1 (discussing studies that reveal geographic disparities in the application of New York's death penalty).

210. *See* Liebman & Marshall, *supra* note 3, at 1661.

> There are two ways in which narrowed aggravating factors, a substantial degree of aggravation net of (full) mitigation, and other less-is-better techniques can address concerns about executing the innocent. First, assuming there is a static error rate, a reduction in the absolute number of death sentences imposed will yield a proportional reduction in the incidence of errors. Second, evidence reveals that reducing the numerousness of capital prosecutions and verdicts tends to decrease the rate of error as well.

Id.

211. Although there have been claims that the death penalty may act as a deterrent, those claims lack support. *See e.g.*, Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?* (2005), *available at* http://preprints.stat.ucla.edu/396/JELS.pap.pdf; Jeffrey Fagan, *Deterrence and the Death Penalty: A Critical Review of New Evidence*, Jan. 21, 2005, *available at* http://www.deathpenaltyinfo.org/FaganTestimony.pdf.

An extensive study of the claims about deterrence value of the death penalty is beyond the scope of this Article. However, even if there were any deterrence value to executions, it is unlikely that the addition of aggravating factors would add any such value, especially factors like "terrorism" when many terrorists commit suicide in carrying out their plots.

212. *See Mandatory Justice*, *supra* note 32, at 14.

213. *Id.*

214. *Id.*

215. *Id.*

ones related to felonies, is that the factors are often associated with inner-city poor,[216] further highlighting one of the criticisms of the death penalty as a punishment that is the "privilege of the poor."[217] Other new eligibility factors, such as those where the victims are elderly or where the victim has a government job, appear to create a class of politically powerful classes of people whose lives are more valuable than people in other classes.[218]

As noted earlier, the Massachusetts Governor's Council on Capital Punishment Report[219] and the Illinois Report of the Governor's Commission on Capital Punishment,[220] both recommend that states significantly limit the number of eligibility factors in their death penalty statutes down to five or six factors. The Massachusetts Report noted that the eligibility factors are the one place in the capital punishment system that is not discretionary, and that long lists of factors give individual prosecutors and others extraordinary discretion.[221] This discretion leads to problems like racial disparity in the use of the death penalty.[222] Similarly, the authors of the Illinois Report also noted that a long list of aggravating factors and broad individual aggravating factors give too much discretion to prosecutors in selecting cases for capital prosecution.[223]

The slower expansion of the death penalty in the last few years may be a reflection of some of these concerns.[224] It may also be a result of growing general criticisms of the death penalty and, due to recent discoveries of innocent people on death row, the fear that an innocent person will be executed.[225] Another reason for the slower expansion may be that the statutes now already cover most murders and, three decades after *Furman* and *Gregg*, the state legislatures are running out of ideas for new eligibility factors they can add. This last reason is illustrated by the fact that once the new idea of adding a terrorism eligibility factor developed, eleven states added factors to address terrorism.[226]

If the only reason for the slowdown in the expansion is that legislators are running out of eligibility factor ideas, then during the next decade there

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216. *Id.*

217. Clinton Duffy, a former warden of San Quentin, concluded from his observations: "The death penalty is the privilege of the poor." IAN GRAY & MOIRA STANLEY, A PUNISHMENT IN SEARCH OF A CRIME: AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY 119 (1989).

218. *See Mandatory Justice*, *supra* note 32, at 15.

219. MASS. REPORT, *supra* note 16, at 6-7 (Recommendation 1).

220. RYAN REPORT, *supra* note 16, at 24 (Recommendation 28).

221. MASS. REPORT, *supra* note 16, at 10-11.

222. *Id.* at 11.

223. RYAN REPORT, *supra* note 16, at 66-72.

224. This slowdown would have been clearer without the increase in terrorism concerns and the addition of the terrorism aggravating factor in several states.

225. *See, e.g.*, Kirchmeier, *supra* note 3, at 39-43.

226. *See supra* note 117 (listing ten states with eligibility factors for "terrorism"); *see also supra* note 108 (referring to Colorado's factor for use of "a chemical, biological, or radiological weapon").

will be fewer additions. If the reason for the slowdown is mainly over concerns about overbroad death penalty statutes, then during the next decade state legislatures may finally get around to seriously considering the criminal justice purposes of their statutes. If the legislators decide to consider the criminal justice goals of trying to achieve a more efficient and less arbitrary death penalty, they will begin to delete some of the aggravating factors in their statutes, rather than adding new ones.

V. CONCLUSION

During the third decade of the modern death penalty in the United States, the legislative expansion of the death penalty has slowed down, but statutes have continued to expand so that there are now more than fifty different eligibility factors used throughout the country in various combinations.[227] The decrease in the rate of expansion may be due partly to growing concerns about the death penalty, but it is also possible that part of the explanation lies in the fact that after thirty years of the current death penalty system, it is difficult for legislators to think up new aggravating factors or new constituencies to address.

Unfortunately, during the last decade, states have failed to reassess their current lists of eligibility factors and instead have added aggravating factors piecemeal to reflect the latest political concerns.[228] Despite the fact that new studies have indicated that death penalty statutes are overbroad, legislators have not acted to eliminate factors that make one death-eligible, and an overwhelming majority of death penalty states have ten or more eligibility factors.[229] Now that lawmakers are beginning to realize they do not need to expand the death penalty statutes, they should look to limiting their statutes, using the recommendations of the Massachusetts Governor's Council and the Illinois Governor's Commission to limit eligibility factors to a total of five or six at most. Otherwise, the courts need to address the constitutional issues surrounding these overbroad statutes that do not achieve the narrowing required by the Eighth and Fourteenth Amendments.

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227. *See supra* Part III.A (discussing new aggravating factors that did not exist until recently); Kirchmeier, *supra* note 17, at 397-431.

228. For an interesting psychological discussion of the support for the death penalty, see Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. DAVIS L. REV. 155, 247 (1999) ("The legislative momentum at present is clearly retentionist and even expansionist with little sign of interest in critical self-examination of society's propensity for institutionalized violence.").

229. *See supra* note 142 and accompanying text.

The problem may lack a political solution. Legislators believe that they can gain votes or appear to be doing something about crime or terrorism by expanding lists of death penalty eligibility factors.[230] One of the clearest examples of this belief was the New York Legislature's act of adding "terrorism" to the list of death-eligible crimes within a week of September 11, 2001.[231] Of course, Americans try to think of responses to all horrendous criminal and terrorist acts, but the desire to do something in response does not necessarily lead to an effective response.

Yet, legislators continue to expand the death penalty statutes, and they have created a system providing a large pool of death candidates and allowing for increased arbitrary discretion by prosecutors and jurors. Every new murder may lead to a legislative response to expand the list of eligibility factors. As the list of factors expands and the legislators cast a wider net to catch more defendants, we approach a system where every homicide is eligible for the death penalty, leading to an arbitrary and mandatory death penalty.[232] Either the legislators or the courts must assess the wisdom and constitutionality of a system that attempts to make every case death-eligible and no longer tries to define the very worst murders.

These legislative changes during the last decade catalog the fears of Americans in the early twenty-first century. As the media focuses on concerns about terrorism, child abductions, child abuse, school violence, and domestic violence, legislators struggle with ways to address these issues. One response has been to expand death penalty statutes. Although the legislative responses are often sincere reactions to the overwhelming nature of terrorism and horrendous crimes, the crimes are often covered by existing factors and the legislative expansions only make the death penalty statutes more broad and arbitrary.

Future generations will look back on these expansions for a record of the concerns of people in the United States during the early twenty-first century. These expansions reflect American's fears of certain types of violence. However, future generations will likely determine that beyond creating a record of political concerns, the casting of a wider net of death eligibility only added to the arbitrariness of the death penalty and did little to address the underlying societal problems.

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230. Like the argument that the death penalty is expanded for political reasons rather than reasoned penological goals, some commentators have noted a similar motivation in the growth in the number of people imprisoned in the United States. *See, e.g.*, JOSEPH HALLINAN, GOING UP THE RIVER: TRAVELS IN A PRISON NATION, xiii-xv (Random House 2003).

231. The New York Anti-terrorism Act of 2001, N.Y. PENAL LAW § 70.02 (Consol. 2006), *available at* http://www.security.state.ny.us/legislation_files/antiterror%20act%20of%202001.pdf#search=%22new%22york%20anti-terrorism%20law%20september%2017%202001%22.

232. *See* Kirchmeier, *supra* note 17, at 388-91, 431-36.