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COMMENT

THE DEATH PENALTY IN MONTANA: A VIOLATION OF THE CONSTITUTIONAL RIGHT TO INDIVIDUAL DIGNITY

Amanda K. Eklund*

I. INTRODUCTION

Capital punishment is a direct affront to human dignity, a basic constitutional right guaranteed to Montana citizens. The psychological effects of knowing one's death is imminent—whether it comes in a matter of weeks, days, or hours—are cruel and degrading. Further, evidence of racial disparities in the application of the death penalty demonstrates the practice directly contradicts respect for human worth. The death penalty violates the bodily integrity of its victims when it denies inmates the vital choice to determine what happens to their own bodies. The United States has been internationally criticized for its failure to recognize the indignity of the death penalty.

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II. MONTANA'S DIGNITY PROVISION

In its Declaration of Rights, the Montana State Constitution specifically provides for every Montana citizen's right to human dignity.¹ Article II, Section 4 states: "The dignity of the human being is inviolable."² Despite its strong language and prominent place in the Declaration of Rights, the Dignity Clause has only recently been relied upon by the Montana Supreme Court as a sole basis for an appellate opinion. Prior to this year, only two justices had partially based opinions on the individual right to dignity.³ In its Article II, Section 4 decisions the Court has primarily focused on the equal protection language following the dignity provision, specifically that "[n]o person shall be denied the equal protection of the law."⁴

The 1972 Constitutional Convention transcripts reveal little about the delegates' intent as to the dignity provision. The only specific references to human dignity appear in Delegate Wade Dahood's commentary supporting the proposed provision.⁵ Yet Dahood's comments deal more with discrimination, and not the general concept of human dignity: "[T]he intent of Section 4 is simply to provide that every individual in the State of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination."⁶

The only other reference to human dignity in the Convention Record appears in Delegate Proposal No. 33, which states: "The rights of individual dignity, privacy, and free expression being essential to the well-being of a free society, the state shall not infringe upon these rights without the showing of a compelling state interest."⁷ Proposal No. 33 was not adopted.

The dignity provision of the Montana Constitution was modeled largely after a similar provision in the Puerto Rico

1. MONT. CONST. art. II, § 4.

2. *Id.*

3. *See, e.g.,* *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364; *In the Matter of the Mental Health of K.G.F.*, 2001 MT 140, 306 Mont. 1, 29 P.3d 485.

4. MONT. CONST. art II, § 4. *See, e.g.,* *Kottel v. State*, 2002 MT 278, 312 Mont. 387, 60 P.3d 403; *Geil v. Missoula Irrigation Dist.*, 2002 MT 269, 312 Mont. 320, 59 P.3d 398; *Great Falls Pub. Sch. v. Johnson*, 2001 MT 95, 305 Mont. 200, 26 P.3d 734.

5. 5 MONT. CONSTITUTIONAL CONVENTION TRANSCRIPTS 1642 (1972) [hereinafter, CONVENTION RECORD].

6. *Id.*

7. 1 CONVENTION RECORD 127.

Constitution - the only other constitution in the United States or its territories that specifically provides for the unconditional protection of individual dignity.⁸ Of course, an express right to human dignity means little when it is unclear what the right might entail. Webster's Dictionary defines "dignity" as "the quality or state of being worthy, honored, or esteemed."⁹ Likewise, "indignity" is defined as "a) an act that offends against a person's dignity or self-respect; or b) humiliating treatment."¹⁰ In their recent article, Montana legal scholars Matthew Clifford and Thomas Huff analyze the dignity provision of the Montana Constitution and determine that, because there was so little discussion on the concept of dignity at the Constitutional Convention, the delegates most likely intended "human dignity" to be interpreted as it is generally understood in the Western ethical tradition.¹¹ Based on their historical and philosophical analysis of the concept of human dignity, Clifford and Huff associate the concept with "the normative ideal of individual persons as intrinsically valuable, as having inherent worth as individuals, at least in part because of their capacity for independent, autonomous, rational, and responsible action."¹² Human beings have inherent worth resulting from their abilities to have control over their own lives, and respect for that worth manifests itself in the form of political rights and fair treatment by governmental authorities.¹³

The Montana Supreme Court finally shed some light on the

8. P.R. CONST. art. II, § I. That provision reads: "The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality."

The Illinois Constitution includes two references to dignity: 1) a provision for the respect of the dignity and privacy of crime victims, ILL. CONST. art I, § 8.1; and 2) a provision entitled "Individual Dignity," which condemns hate speech in order to "promote individual dignity." *Id.*, § 20. The Illinois Appellate Court has interpreted this constitutional provision as merely a "hortatory" view toward human dignity, and not as creating a fundamental right. See *AIDA v. Time Warner Entertainment Co.*, 772 N.E.2d 953, 961 (Ill. App. Ct. 2002).

9. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 354 (9th ed. 1986).

10. *Id.* at 614.

11. Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301, 314 (2000).

12. *Id.* at 307.

13. *Id.*

issue in May 2003 with the *Walker v. State*¹⁴ decision. The court relied heavily on the dignity provision of the state constitution in examining the defendant's motion for post-conviction relief. Walker argued that Montana State Prison's use of behavior management plans (BMPs) violated his state constitutional right against cruel and unusual punishment.¹⁵ Walker provided evidence that inmates were forced to reside in cells coated in blood, feces and vomit, and were frequently stripped naked and given only a small blanket for warmth as punishment for unacceptable behavior.¹⁶ Walker was subjected to a series of BMPs as penalty for his multiple suicide attempts.¹⁷ Walker was schizophrenic and suicidal, and the BMPs exacerbated his mental illness.¹⁸ He was denied both medication and hot meals, and the finger-food he was allowed was passed to him through the same slot as the toilet-cleaning brush.¹⁹ One inmate in Walker's cellblock described his daily prison life:

My feeling of worth, you know, was just—I didn't feel worth anything, you know, I didn't want to—I didn't want to carry on. When I finally went to the mental health block, I didn't care whether I lived or died. It's—eating like a dog, eating your food off the ground, and really, you know, you don't even feel human after a while²⁰

In his argument concerning cruel and unusual punishment, Walker cited *Madrid v. Gomez*²¹ for the standard for when prison punishment violates the inmate's constitutional rights. The *Gomez* court held that when the segregation techniques used are so severe as to cause mental illness or to worsen an existing mental condition, the prison officials are deemed to have caused "psychological torture."²²

The Montana Supreme Court held the Montana State Prison's use of BMPs and the living conditions in Walker's cellblock constituted cruel and unusual punishment by worsening his existing mental illness.²³ But the court did not

14. 2003 MT 134, 316 Mont. 103, 68 P.3d 872.

15. *Id.*; see also MONT. CONST. art. II, § 22.

16. *Walker*, ¶ 23.

17. *Id.* ¶¶ 17-18.

18. *Id.* ¶ 66.

19. *Id.* ¶ 24.

20. *Id.* ¶ 79.

21. 889 F. Supp. 1146 (N.D. Cal. 1995).

22. *Walker*, ¶ 76 (citing *Gomez*, 889 F. Supp. at 1264).

23. *Id.* ¶ 84.

end its analysis with Article II, Section 22. Instead it chose to use the dignity provision for the first time. First, the majority pointed out that Montanans enjoy broader protection against unreasonable searches and seizures based on the state constitution's explicit privacy provision.²⁴ Likewise, the Court reasoned, Montanans enjoy broader protection against cruel and unusual punishment based on the state constitution's explicit dignity provision.²⁵

An inmate does not surrender his constitutional rights when taken into custody. Justice Nelson, writing for the majority, stated: "When the rights of even the most disrespected among us are ignored, all of society is diminished."²⁶ The Court reversed the denial of Walker's post-conviction relief and remanded the case to the District Court to enter an order requiring Montana State Prison to improve its conditions and change its BMP practices.²⁷ The Montana Supreme Court also ordered Montana State Prison to report the status of the improvements to the District Court in 180 days.²⁸

The *Walker* decision demonstrates that a state may, through its constitution, provide its citizens with additional rights beyond those provided by the federal Constitution. Federal Constitutional caselaw sets forth certain rights that states cannot fail to provide, but states are free to grant rights above and beyond that federal standard. The Montana Constitution specifically grants its citizens several rights not listed in the U.S. Constitution, including a right to privacy,²⁹ a right to know,³⁰ and, as stated above, a right to individual dignity. The inclusion of these rights shows constitutional delegates were not willing to depend on courts to find these rights implied in other Constitutional provisions; they were important enough to be included in strong plain language in the Declaration of Rights.

Individual dignity, however it is defined or interpreted, essentially concerns the basic worth of human beings simply by nature of their status as human beings. As a civilized society, we value human life and the personal autonomy necessary to make choices about how we conduct our own lives. We recognize

24. *Id.* ¶ 73.

25. *Id.*

26. *Id.* ¶ 83.

27. *Id.*, ¶ 85.

28. *Walker*, ¶ 85.

29. MONT. CONST. art. II, § 10.

30. *Id.* § 9.

that denial of political rights—such as the right to free speech, the right to free exercise of religion, and the right to protection against unreasonable search and seizure—is a denial of the individual's freedom to determine the nature of his own life and to maintain his personal integrity. An affront to individual dignity, then, occurs when a human being is treated as less than human. Human dignity is nothing more and nothing less than respect for human life and independence.

III. THE DEATH PENALTY IN MONTANA

Montana statutorily recognizes capital punishment as an acceptable means of punishment for certain offenses, including deliberate homicide with aggravating circumstances, aggravated kidnapping resulting in the death of the victim, and sexual intercourse without consent if the defendant has a prior conviction for sexual intercourse without consent.³¹ Montana currently lists hanging and lethal injection as suitable methods of execution.³² As of January 1, 2004, there were five convicted inmates sitting on death row in Montana.³³ All were white males.³⁴ The State of Montana has executed only seven prisoners since 1930.³⁵

Due to the relatively few executions carried out in Montana, it is difficult to determine whether racial disparities exist in the application of the death penalty in this state. However, there is evidence of racial discrimination in Montana's criminal justice system as a whole, particularly as it affects Native Americans.³⁶ A recent study published by the Center for Native American Studies at Montana State University determined that Native Americans receive harsher sentences than whites for similar crimes.³⁷ The study indicated racial discrimination against

31. MONT. CODE ANN. § 46-18-303 (2003).

32. CENTER FOR CAPITAL PUNISHMENT STUDIES, LONDON, THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 248 (William A. Schabas ed., 1997).

33. NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.*, Winter 2004, at 29, available at <http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf> (last visited Mar. 11, 2004).

34. *Id.*

35. HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 23 (1997).

36. Alexandra Witkin-New Holy, *American Indian Religious Rights: Inside Montana Prisons*, available at http://tlc.wtp.net/american_indian_religious_rights.htm (last visited Mar. 11, 2004).

37. *Id.*

Native Americans “can and does seep into every level of the criminal justice system from the numbers of police arrests, severity of charges, sentencing, treatment by correction officers, and parole board decisions.”³⁸ Native Americans make up roughly 6% of Montana’s population, but represent 16% of the inmate population at Montana State Prison, an all male facility in Deer Lodge, and 35% of the inmate population at the Montana Women’s Prison in Billings.³⁹ The statistical evidence is clear: the number of convictions and incarcerations of Native Americans in Montana is disproportionate to the Native American population.

IV. THE DEATH PENALTY AS A VIOLATION OF INDIVIDUAL DIGNITY

A. *Psychological Effects of Capital Punishment*

Forcing someone to live with the knowledge that his death is fast approaching is inhumane and demeaning psychological torture. Inmates on death row react to the knowledge of impending death in a variety of ways; some appear stronger than others, but all death row inmates suffer mental anguish and indignity.

In his essay *Psychiatric Reflections on the Death Penalty*, Psychiatrist Louis Jolyon West points out that “[e]veryone must die, but only the condemned prisoner is subjected to the terrible agony of prolonged waiting—sometimes for years, tormented by hope—to be deliberately slaughtered . . .”⁴⁰ Psychiatrists conducting studies of death row inmates have further called an individual’s knowledge of when and how he will die “possibly the most stressful of all human experiences.”⁴¹

In abolishing capital punishment in California, the California Supreme Court based much of its decision on the inherent cruelty of inflicting inmates with such extreme psychological harm.⁴² While the majority’s decision in that case

38. *Id.*

39. *Id.*

40. Louis Jolyon West, *Psychiatric Reflections on the Death Penalty*, in CAPITAL PUNISHMENT IN THE UNITED STATES 419, 421-22 (Hugo Adam Bedau & Chester M. Pierce eds., 1976).

41. Johnnie L. Gallemore, Jr. & James H. Panton, *Inmate Responses to Death Row Confinement*, in CAPITAL PUNISHMENT IN THE UNITED STATES 527 (Hugo Adam Bedau & Chester M. Pierce eds., 1976).

42. *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

was based on a violation of the Eighth Amendment's "cruel and unusual punishment" provision, and not on human dignity *per se*, the court alluded to the dehumanizing nature of capital punishment "from the pronouncement of the judgment of death through the execution itself."⁴³ The court relied heavily on the findings of experts from the psychiatric and medical communities, who testified that the imposition of a death sentence and the subsequent waiting period before execution can be so mentally destructive to the inmate as to constitute "psychological torture."⁴⁴

Federal common law has long recognized that conduct need not be physical in nature to constitute punishment. As early as 1910, the United States Supreme Court acknowledged that the Eighth Amendment's framers must have understood that cruelty could manifest itself in state-imposed punishments "other than those which inflicted bodily pain or mutilation."⁴⁵ Later, in *Trop v. Dulles*, the Supreme Court held that expatriation constituted cruel and unusual punishment in violation of the Eighth Amendment.⁴⁶ The Court held that the pain of expatriation was cruel despite the absence of physical brutality because the punishment subjected the condemned "to a fate of ever-increasing fear and distress" and represented "the total destruction of the individual's status in organized society."⁴⁷ According to the Supreme Court, banishment is too psychologically torturous for a civilized society to tolerate.

While the *Trop* Court briefly referred to a presumption of constitutionality of the death penalty in particular instances, the Court also noted that at the heart of the "cruel and unusual punishment" provision was "nothing less than the dignity of man."⁴⁸ It can thus be inferred from the Court's reasoning in *Trop* and its reliance on social science findings that if a particular punishment is so psychologically destructive as to violate the dignity of man, it must be revoked as unconstitutional under the Eighth Amendment.

There are numerous accounts of mental anguish suffered by

43. *Id.* at 892.

44. *Id.* at 894.

45. *Weems v. United States*, 217 U.S. 349, 372 (1910).

46. *Trop v. Dulles*, 356 U.S. 86 (1958).

47. *Id.* at 101.

48. *Id.* at 100.

death row inmates.⁴⁹ One particularly detailed description appears in the concurring opinion in *District Attorney for Suffolk District v. Watson*.⁵⁰ In that case, the Massachusetts Supreme Court relied heavily on psychology studies in determining the death penalty was unconstitutional.⁵¹ In his concurrence, Justice Liacos outlined the psychological trauma one death row inmate suffered in the years after his death sentence, as observed by prison officials.⁵² The inmate, Henry Arsenault, was on death row for two years, during which time he became obsessed with his impending death.⁵³ His psychosis manifested itself in uncontrollable sweating, frequent inability to sleep or eat, unbearable nightmares, uncontrollable urination, and constant fidgeting.⁵⁴ Prison officials ordered a guard to watch him twenty-four hours a day so he would not commit suicide,⁵⁵ and Arsenault suffered the indignity of being constantly observed in his humiliating condition. Only after a chaplain gave him his last rites, the executioner tested the current to the electric chair, and the other prisoners became aware of what was to take place and began to scream did the lieutenant governor reduce Arsenault's sentence to life imprisonment—less than half an hour before the scheduled execution.⁵⁶ Arsenault was so distraught that he was unable to walk, and guards had to carry him back to his cell.⁵⁷ Justice Liacos labeled Arsenault's condition of "raw terror and unabating stress" as "torture," and concluded that "this torture was not unique [to Arsenault], but merely one degrading instance in a legacy of degradation."⁵⁸

Perhaps French novelist Albert Camus best described the extent of the psychological torture a death sentence imposes on an inmate:

[F]or there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such

49. See, e.g., JOSEPH B. INGLE, *LAST RIGHTS: 13 FATAL ENCOUNTERS WITH THE STATE'S JUSTICE* (1990).

50. 411 N.E.2d 1274, 1289-90 (Mass. 1980).

51. See generally *Watson*, 411 N.E.2d 1274.

52. *Id.* at 1289-90.

53. *Id.* at 1290.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Watson*, 411 N.E.2d at 1290.

58. *Id.*

a monster is not encountered in private life.⁵⁹

Our common law has long recognized that punishment need not be physical to be torturous. The psychological brutality imposed on a prison inmate who has been sentenced to die is terrible and unjustified. A society that values human dignity cannot tolerate state-imposed psychological anguish of the severity a prisoner experiences when he knows the time and manner of his impending death.

B. Discriminatory Application of the Death Penalty

While the central concern of this article is with the facial constitutionality of the death penalty, it is important to point out the obvious injustices of the practice as it is applied to racial minorities in the United States. The discriminatory nature of the death penalty's application throughout the United States underscores the fact that it is directly contrary to the notion of human dignity.

The framers of the 1972 Montana Constitution clearly considered discrimination a violation of human dignity. Montana's corollary to the Equal Protection Clause directly follows the express right to human dignity.⁶⁰ In particular, discrimination based on race deprives a person of basic human dignity, as it defines the person solely on the basis of an immutable characteristic. Unequal treatment based on race sends a message to any member of a racial minority that his worth as a human being is less than that of his white counterpart, and he can never redeem himself because the unequal treatment is based on a factor beyond his control. Thus, racial discrimination goes to the very heart of human indignity, as it belittles and dehumanizes its victim.

The worst kind of racial discrimination is that carried out by governmental authorities because citizens look to their governments to protect them, not to treat them unfairly based on arbitrary and immutable characteristics such as race or sex. The ultimate dehumanization occurs when a government systematically discriminates against a class of its own people based on factors beyond their control. Such is the case in the

59. Albert Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 173, 199 (Justin O'Brien trans., Vintage Books 1995) (1960).

60. MONT. CONST. art. II, § 4.

American system of capital punishment.

In its 1972 *Furman v. Georgia* decision, the United States Supreme Court declared all existing death penalty statutes at the time unconstitutional as violative of the Eighth Amendment's "cruel and unusual punishment" provision.⁶¹ There was no majority opinion; each of the nine justices wrote separately, either concurring or dissenting in the outcome.⁶² While Justices Brennan and Marshall based their opinions on the *per se* unconstitutionality of capital punishment,⁶³ each of the remaining three members of the majority – Justices Douglas, Stewart and White – based their opinions on the arbitrary and discriminatory application of the death penalty.⁶⁴ Justice Douglas described the death penalty laws then in place as "pregnant with discrimination."⁶⁵ Justice Stewart determined that of those defendants potentially eligible to receive death sentences, only a "capriciously selected random handful"⁶⁶ actually received them. Justice White found that "no meaningful basis for distinguishing the few cases in which [capital punishment] is imposed from the many cases in which it is not"⁶⁷ existed in the criminal justice system. Justice Marshall made clear that he partially based his opinion on statistical findings that the death penalty was discriminatorily imposed on poor black defendants.⁶⁸

Furman v. Georgia imposed a nationwide ban on capital punishment and reduced the death sentences of nearly 600 inmates across the country to life sentences.⁶⁹ Anti-death penalty advocates across the nation considered *Furman* the pinnacle of success following years of legal battles.⁷⁰ However, the celebration would be short-lived, as state legislatures began redrafting their death penalty laws to address the issues of arbitrariness that had concerned the Supreme Court. By 1976, only four years after the Supreme Court's landmark decision, thirty-five states and the federal government had enacted new

61. 408 U.S. 238 (1972).

62. *Id.* at 240.

63. *Id.* at 257-306, 314-71.

64. *Id.* at 240-57, 306-14.

65. *Id.* at 257.

66. *Id.* at 309-10.

67. *Furman*, 408 U.S. at 313.

68. *Id.* at 364-65.

69. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 266 (2002).

70. *Id.*

capital punishment statutes intended to remedy the problems of their earlier laws.⁷¹

In the early 1980s, three social scientists—David Baldus, George Woodworth, and Charles Pulaski—began a comprehensive study (“the Baldus Study”) of the death penalty’s application in the Georgia criminal justice system.⁷² The scientists studied in detail the treatment of more than 1,000 defendants convicted of homicide over a six-year period in the state of Georgia.⁷³ By 1983, the scientists had issued their preliminary report, in which they concluded that while race of the defendant was not a conclusive factor in determining whether a defendant would receive the death penalty, race of the victim was an extremely relevant factor.⁷⁴ Cases involving white victims were much more likely to result in death sentences than cases involving black victims.⁷⁵ It was this evidence of racial disparity in death sentencing that death row inmate Warren McClesky’s attorney presented to the United States Supreme Court in 1986 in *McClesky v. Kemp*.⁷⁶

Defense counsel in *McClesky* relied heavily on the Baldus Study in an attempt to demonstrate that despite post-*Furman* remedial legislation, race was still a definitive factor in death penalty sentencing. In the majority opinion, Justice Powell acknowledged the legitimacy of the Baldus Study⁷⁷ and held that despite the lack of evidence that the defendant’s race was a factor in his sentencing, McClesky had standing to assert an equal protection claim based on the race of homicide victims because that discrimination subjected McClesky and other defendants to “an irrational exercise of governmental power.”⁷⁸ While the majority recognized the racial discrepancies in sentencing practices, it found the evidence insufficient to show the State had a “discriminatory purpose” in its imposition of

71. *Id.* at 268.

72. SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 101, 134 (1989).

73. David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

74. *Id.* at 731.

75. *Id.*

76. 481 U.S. 279 (1987).

77. *Id.* at 291 n.7.

78. *Id.* at 291-92 n.8.

capital punishment.⁷⁹

Addressing McClesky's Eighth Amendment claim of arbitrary sentencing, Powell was brief and dismissive, holding that the Baldus Study did not conclusively prove that race was a factor in capital sentencing decisions or in McClesky's individual case, and merely indicated a "risk" of discriminatory practice based on race.⁸⁰ According to Justice Powell and the majority, that risk is constitutionally acceptable, as judicial discretion is a necessary and fundamental part of our justice system.⁸¹ Thus, until social science evidence can prove beyond doubt that: 1) the race of either defendant or victim is a definitive factor in the imposition of death sentences, or 2) the government issues death sentences with a racially discriminatory purpose, the U.S. Supreme Court will most likely uphold capital punishment as constitutional. This almost insurmountable standard places a serious burden on the defendant proving discriminatory intent, and may be next to impossible in a modern society where racism, while still destructive, is often quite subtle.

Racial discrimination is still pervasive in the American system of capital punishment. According to the U.S. General Accounting Office in its 1990 report "Death Penalty Sentencing," the race of murder victims is still a definitive factor in influencing the likelihood of a particular defendant receiving the death penalty.⁸²

In February of 1997, the American Bar Association recommended a moratorium be placed on capital punishment until its discriminatory application improved.⁸³ In January of 2000, Illinois Governor George Ryan issued a blanket moratorium on death sentences in Illinois.⁸⁴ He ordered the formation of the Illinois Commission on Capital Punishment, a committee made up of politicians, attorneys, and private citizens, which issued its report on April 15, 2002, after two

79. *Id.* at 297.

80. *Id.* at 308.

81. *Id.* at 309-13.

82. U.S. General Accounting Office Report, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, Report to Senate and House Committees on the Judiciary 5 (Feb. 1990), available at <http://archive.gao.gov/t2pbat11/140845.pdf> (last visited Mar. 11, 2004).

83. Ed Bond, *Lawyers Split Over a Death Penalty Ban*, L.A. TIMES, Feb. 25, 1997, at B3.

84. Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

labor-intensive years studying the Illinois justice system.⁸⁵

Governor Ryan relied on the findings of the Commission Study in his January 2003 speech at Northwestern University College of Law, wherein he addressed the fundamental cruelty of the death penalty and focused on his responsibility as Governor to ensure that justice is carried out fairly in his state.⁸⁶ The Commission's findings of unfairness, evidenced both by wrongful convictions and by racial disparities in sentencing, led Governor Ryan to call for an across-the-board commutation of all death sentences in the State of Illinois.⁸⁷ Referring to the Illinois system of capital punishment as "arbitrary and capricious," and therefore "immoral," Ryan concluded his speech with an appropriate quote from U.S. Supreme Court Justice Harry Blackmun: "I no longer shall tinker with the machinery of death."⁸⁸

Empirical evidence collected by private and public agencies demonstrates that race continues to be a factor in the imposition of death sentences. Racial discrimination is a direct deprivation of the dignity of its victims. The death penalty is an unfair and racially biased American institution, and is therefore a direct violation of the dignity provision of the Montana Constitution, which specifically grants its citizens the right to human dignity and equal protection under the law.

C. Denial of Bodily Integrity

Bodily integrity is at the very core of human dignity. The right to make choices about what happens to one's own body is established in both federal and state law. For example, in *Cruzan v. Director of Missouri Dep't of Health*,⁸⁹ the United States Supreme Court held that a patient has an unequivocal right to refuse medical treatment.⁹⁰ The Court based its holding

85. Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* (Apr. 15, 2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf (last visited Mar. 11, 2004).

86. Governor George Ryan, Address at Northwestern University College of Law (Jan. 11, 2003) available at http://www.stopcapitalpunishment.org/ryans_speech.html (last visited Mar. 11, 2004).

87. *Id.*

88. *Id.* (quoting *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting)).

89. 487 U.S. 261 (1990).

90. *Id.* at 278.

on the long-held legal tradition of respect for the autonomy of people to control and possess their own bodies. The Court cited Justice Cardozo: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body"⁹¹ The *Cruzan* court further expressed the necessity of respect for individual bodily integrity, citing an 1891 case in which the Court held that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."⁹² Citizens do not lose their fundamental right to bodily integrity when they are convicted and incarcerated.⁹³

In *United States v. Lanier*,⁹⁴ the Supreme Court found a due process right to personal bodily integrity and held that it included the right to be free from "bodily abuse without lawful justification by a state official."⁹⁵ In order for conduct by a state official to be a violation of a person's due process right, it must be "of a serious substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's conscience."⁹⁶

Likewise, the Montana Supreme Court has consistently recognized the right to personal dominion over one's own body, though most frequently in the medical context. In *In the Matter of the Mental Health of K.G.F.*,⁹⁷ a case involving effective assistance of counsel in mental commitment proceedings, the Montana Supreme Court recognized a constitutional right to bodily integrity.⁹⁸ The court pointed out that respect for an individual's bodily integrity is reflected in several state statutes, including in a patient's right to refuse medication⁹⁹ and the right to be placed in the least restrictive health care environment

91. *Id.* at 269 (quoting *Schloendorff v. Soc'y of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914)).

92. *Id.* (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

93. *See, e.g.,* *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., dissenting); *United States v. Brandon*, 158 F.3d 947, 958 (6th Cir. 1998); *Austin v. Johnson*, 328 F.3d 204, 210 n. 10 (2003).

94. 520 U.S. 259 (1997).

95. *Id.* at 262.

96. *Id.*

97. 2001 MT 140, 306 Mont. 1, 29 P.3d 485.

98. *Id.* ¶ 47.

99. *Id.*; MONT. CODE ANN. § 53-21-115(11) (2002).

suitable to a patient's needs.¹⁰⁰

In *Armstrong v. State*,¹⁰¹ the Montana Supreme Court stressed the importance of a patient's right "to make personal judgments affecting one's own health and bodily integrity without government interference."¹⁰² In both *K.G.F.* and *Armstrong*, the Court, at least in part, based its finding of the basic rights concerning bodily integrity on the Dignity Clause of the state constitution.¹⁰³

State imposed death sentences represent the ultimate denial of an individual's fundamental right to determine what happens to his body. Whether the means of execution consist of electrocution, poisoning by lethal injection, or hanging, capital punishment is a complete surrender of the inmate's body to state authority. The death row inmate no longer has even his most basic right - the right to exist.

Ensuring effective punishment of criminals who commit the severest of crimes is clearly a compelling state interest.¹⁰⁴ However, execution is not a narrowly-tailored means of promoting that interest. Life imprisonment without possibility of parole is an obvious alternative to execution. It is a very serious punishment for serious crimes, but unlike the death penalty, it allows the prisoner to retain his individual dignity and some choice over what happens to his body. The state is not justified in denying the prisoner his fundamental right of bodily integrity through execution, as it is not a narrowly-tailored means to ensure effective punishment of criminals.

D. Dehumanization of Others

When a death row inmate is executed, the State takes his personal autonomy. His government no longer values him as human being; he has no inherent worth. This is the very definition of indignity. Yet it is not only the executed prisoner

100. MONT. CODE ANN. § 53-21-120 (2002).

101. 1999 MT 261, 296 Mont. 361, 989 P.2d 364.

102. *Id.* ¶ 72.

103. *K.G.F.*, ¶ 45; *Armstrong*, ¶ 72.

104. Upon finding a right to be fundamental, the Court will assess whether denial of that right is constitutional using strict scrutiny analysis. See *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). Under strict scrutiny analysis, a fundamental right (here, the right to bodily integrity) may only be breached upon finding 1) the existence of a compelling state interest; and 2) that the means of furthering that interest are narrowly tailored to promoting the stated interest. *Id.*

who is dehumanized. The execution process is inhumane and brutal to all involved, from the judge or jury imposing the sentence to the prison guard who carries it out.

As early as the late 1700s, juries felt the enormous guilt associated with imposing the death penalty on a criminal defendant.¹⁰⁵ In a time when death sentences were mandatory for capital crimes, juries felt the intense conflict between their responsibility as a part of the justice system and their unwillingness to be the impetus for killing a fellow human being. Law professor James Wilson is quoted as instructing his Philadelphia classes during this time, “the criminal will probably be dismissed without prosecution, by those whom he has injured. If prosecuted and tried, the jury will probably find, or think they find, some decent ground on which they may be justified or, at least, excused in giving a verdict of acquittal.”¹⁰⁶

Applicable caselaw prohibits methods of execution that go beyond “the mere extinguishment of life” or that cause “torture or a lingering death.”¹⁰⁷ The modern prison system has taken elaborate steps to ensure that executions are as sterile and humane as possible, both to the condemned prisoner and to those involved in the process. Hanging, nearly the exclusive method of execution until the middle of the twentieth century,¹⁰⁸ often resulted in botched executions which had to be repeated.¹⁰⁹ It is now nearly obsolete in the United States, replaced by more efficient and reliable methods, specifically the electric chair and, more recently, lethal injection.¹¹⁰ Yet death by electrocution and poison, contrary to public knowledge, is not always instantaneous or sterile. Despite electric burns to his skin and involuntary muscle convulsions caused by the 1900 volts of the electric chair, it took three separate attempts to kill John Evans, an Alabama death row inmate.¹¹¹ As Raymond Landry was undergoing lethal injection in Texas, the needle came loose from his vein and sprayed the poisonous chemicals at the

105. BANNER, *supra* note 69, at 101.

106. *Id.*

107. *In re Kemmler*, 136 U.S. 436, 447 (1890); *Glass v. Louisiana*, 471 U.S. 1080, 1084 (1985).

108. BANNER, *supra* note 69, at 169.

109. BANNER, *supra* note 69, at 46.

110. Montana, however, still recognizes hanging as a suitable execution method. CENTER FOR CAPITAL PUNISHMENT STUDIES, LONDON, THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 248 (William A. Schabas ed., 1997).

111. INGLE, *supra* note 49, at 102-03.

spectators.¹¹² At the electrocution of Pedro Medina in Florida in 1997, “[b]lue and orange flames up to a foot long shot from the right side of Mr. Medina’s head and flickered for 6 to 10 seconds, filling the execution chamber with smoke.”¹¹³

The American Medical Association prohibits doctors from taking part in executions, other than administering sedatives before the killing and performing the autopsy afterward.¹¹⁴ While this policy is clearly necessary to comply with every doctor’s vow to “first do no harm,” it leaves the business of lethal injection to non-medically trained prison officials, who often spend a painfully long time attempting to find a suitable vein in which to inject the poison.¹¹⁵ Such graphic depictions of mistakes in executions demonstrate that despite technological advancements, current methods of execution continue, at least in some cases, to go beyond “the mere extinguishment of life.”¹¹⁶

Psychiatry Professor Louis Jolyon West emphasizes the inhumanity inflicted upon prison guards forced to carry out executions in the course of their employment. He writes, “[t]he killing of a helpless captive is a brutally degrading experience. If only those who have personally participated in an execution could vote on the death penalty, I suspect it would be abolished permanently.”¹¹⁷

Prison officials often break down the execution process into small tasks assigned to separate employees, in order to minimize the sense of responsibility each person has for the death of the inmate.¹¹⁸ Several states now use a machine to inject the poison into the condemned’s bloodstream.¹¹⁹ The machine was designed to operate only upon simultaneous

112. BANNER, *supra* note 69, at 297.

113. Deborah W. Denno, *Execution and the Forgotten Eighth Amendment*, in *AMERICAN’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 547, 573 (James R. Acker, et al. eds. 1998) (quoting Deborah W. Denno, *Getting to Death: Are Executions Constitutional?* 82 IOWA L. REV. 319, 361 (1997)).

114. BANNER, *supra* note 69, at 297.

115. BANNER, *supra* note 69, at 297.

116. *In re Kemmler*, 136 U.S. 436, 447 (1890); *Glass v. Louisiana*, 471 U.S. 1080, 1084 (1985).

117. Louis Jolyon West, *Psychiatric Reflections on the Death Penalty*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 422 (Hugo Adam Bedau & Chester M. Pierce eds., 1976).

118. BANNER, *supra* note 69, at 299.

119. BANNER, *supra* note 69, at 299.

depression of two separate buttons, ensuring that one person never holds full responsibility for the death of the inmate.¹²⁰

In his concurring opinion in *Furman v. Georgia*,¹²¹ Justice Marshall noted: “American citizens know almost nothing about capital punishment,”¹²² and that if the American public were better informed about the execution process, “the great mass of citizens would conclude . . . that the death penalty is immoral and therefore unconstitutional.”¹²³ He refused to believe that “at this stage in our history, the American people would ever knowingly support purposeless vengeance.”¹²⁴

Attempts to sterilize the execution process and lessen the burden on officials carrying out the sentences demonstrate the government’s acknowledgement that capital punishment is dehumanizing not only to the condemned prisoner, but also to everyone involved in the process, whether they be jurors, judges, prison officials, or spectators.

V. THE INTERNATIONAL APPROACH TO CAPITAL PUNISHMENT

As of 1995, nearly every European nation had discontinued practice of the death penalty.¹²⁵ Capital punishment has also been abolished in non-European countries with cultures similar to that of the United States: Australia, New Zealand, and Canada.¹²⁶ The United States has been the target of international criticism for its refusal to follow its sister nations in abolishing the death penalty.¹²⁷

A. *The South African Approach*

Until the 1990s, South Africa was one of the strongest supporters of the death penalty in the world, with roughly 100 executions per year.¹²⁸ The number of annual executions peaked

120. BANNER, *supra* note 69, at 299.

121. 408 U.S. 238 (1972).

122. *Id.* at 362.

123. *Id.* at 363.

124. *Id.*

125. BANNER, *supra* note 69, at 300.

126. AMNESTY INTERNATIONAL, THE DEATH PENALTY: LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES, available at <http://www.web.amnesty.org/pages/deathpenalty-countries-eng> (last updated Mar. 4, 2004).

127. BANNER, *supra* note 69, at 301.

128. Michelle M. Sharoni, *A Journey of Two Countries: A Comparative Study of the Death Penalty in Israel and South Africa*, 24 HASTINGS INT’L & COMP. L. REV. 257, 269 (2001).

in 1987 at 164, an average of nearly one execution every two days.¹²⁹

In 1988, Amnesty International published a study on the death penalty in Apartheid South Africa.¹³⁰ The results clearly demonstrated the racism inherent in the South African criminal justice system. Over a one-year period, 47% of black defendants convicted of killing whites received death sentences, whereas only 2.5% of blacks convicted of killing blacks received death sentences.¹³¹ During the same period, no whites convicted of killing blacks received death sentences.¹³²

With the fall of Apartheid in South Africa came a new criminal justice system, a new constitution and a Constitutional Court.¹³³ In 1993, South Africa adopted an Interim Constitution,¹³⁴ dedicated to the fair treatment and protection of the basic rights of all people of South Africa. The Interim Constitution was ratified in 1996, and is now the effective Constitution of South Africa.¹³⁵ It includes a strong Bill of Rights, including an explicit right to individual dignity, which reads: “[E]very person shall have the right to respect for and protection of his or her dignity.”¹³⁶

The very first opinion issued by the new Constitutional Court of South Africa concerned the constitutionality of the death penalty.¹³⁷ The Constitutional Court effectively abolished the death penalty in South Africa in *State v. Makwanyane*.¹³⁸ In a unanimous decision, the Court determined that, based on the new constitution’s enumerated rights to equal protection of the law,¹³⁹ life,¹⁴⁰ dignity,¹⁴¹ and protection against “cruel, inhuman

129. *Id.*

130. *Id.* at 268.

131. *Id.*

132. *Id.* (quoting *South Africa: The Death Penalty*, AMNESTY INT’L NEWSLETTER, Feb. 1989, at 6).

133. *Id.* at 271-72.

134. Dana L. Bogie, *Life or Death? The Death Penalty in the Untied States and the New Republic of South Africa*, 3 TULSA J. COMP. & INT’L L. 229, 234 (1996).

135. See S. AFRICA CONST., EXPLANATORY MEMORANDUM, available at <http://www.saweb.co.za/election/constit/saconst.html> (last visited Mar. 11, 2004).

136. S. AFRICA CONST. ch. 2, § 10.

137. Sharoni, *supra* note 128, at 274.

138. 1995 (6) BCLR 665 (SA), available at 1995 SACLX LEXIS 218.

139. S. AFRICA CONST. ch. 2, § 8.

140. *Id.* ch. 2, § 9.

141. *Id.* ch. 2, § 10.

or degrading treatment or punishment,”¹⁴² the death penalty was not a constitutional punishment.¹⁴³

The Court began by analyzing the death penalty as it was then applied in South Africa. The Court determined that chance was involved “at every stage from arraignment to appeal,” and that death sentences could be “affected by factors such as the way the case had been investigated or presented, how effectively the defence had been conducted, the personality of the trial judge and his attitude towards punishment. . . . [P]overty, race and chance played a role in determining who should live or die.”¹⁴⁴ Based on evidence of arbitrary application of the death penalty, the Court held that the death penalty, as applied, violated the fundamental right to equal protection of the law.¹⁴⁵

The Court next addressed the *per se* constitutionality of the death penalty, holding it violative of the constitutional right to dignity, as the punishment “strips the convicted person of all dignity and treats him or her as an object to be eliminated by the State.”¹⁴⁶ Quoting from *Furman v. Georgia*, the Court held that the death penalty is an affront to the notion of human dignity as it “involves, by its very nature, a denial of the executed person’s humanity.”¹⁴⁷ The Court concluded that if “the essential content of the right not to be subjected to cruel, inhuman or degrading punishment . . . is found to be respect for life and dignity, . . . the death sentence for murder, if viewed subjectively from the point of view of the convicted prisoner, clearly negates the essential content of the right.”¹⁴⁸ The Court ordered that the State could not execute any criminal already convicted or any citizen in the future.¹⁴⁹

B. The Western European Approach

With the exception of Belgium, which is *de facto* abolitionist (no one has been executed in Belgium since 1918),¹⁵⁰ and Russia,

142. *Id.* ch. 2, § 11.

143. *Makwanyane*, 1995 (6) BCLR 665 (SA), available at 1995 SACLX LEXIS 218.

144. *Makwanyane*, 1995 SACLX LEXIS 218, at *13.

145. *Id.* at **13, 364. The right to equal protection is guaranteed under Section 8 of the Bill of Rights.

146. *Makwanyane*, 1995 SACLX LEXIS 218, at *64.

147. *Id.* at *63 (quoting *Furman v. Georgia*, 408 U.S. 238, 290 (Brennan, J., concurring)).

148. *Id.* at **163-64.

149. *Id.* at *179.

150. ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 12 (2d. ed.

which imposed a moratorium on executions in 1996,¹⁵¹ no Western European country practices capital punishment.¹⁵² The abolitionist status of Western Europe is most likely due to the strong European commitment to protection of human rights. In 1995, eighteen European countries ratified the Sixth Protocol to the European Convention on Human Rights, which specifically condemned the practice of the death penalty.¹⁵³

European nations make a direct connection between abolishing the death penalty and maintaining human rights. In response to a United Nations survey, officials in Switzerland stated that capital punishment was abolished because the death penalty is "a flagrant violation of the right to life and dignity."¹⁵⁴ Germany, which eliminated the death penalty in 1949 - during a period of post-war reconstruction and particular sensitivity to human rights - has been a strong supporter of international abolition.¹⁵⁵ The German Constitution contains specific provisions granting a right to individual dignity¹⁵⁶ and prohibiting capital punishment.¹⁵⁷ Germany's dignity provision appears in the very first section of the statement of Basic Rights, and reads, "Human dignity is inviolable. To respect and protect it is the duty of all state authority."¹⁵⁸

Germany has been particularly vocal in its support for the worldwide abolition of the death penalty. At the United Nations annual meeting on democratic rights in 1999, Germany targeted the United States as offending the U.N. campaign for human rights, declaring the cruelty of "the execution of minors, of the mentally ill, enforcement before completion of ongoing pro-

1996).

151. Russia imposed a moratorium upon joining the Council of Europe in 1996. *Russian Parliament Backs Death Penalty*, BBC NEWS, Feb. 15, 2002, available at <http://news.bbc.co.uk/2/hi/europe/1823556.stm> (last visited Mar. 11, 2004). The Russian parliament recently approved a resolution against abolition of the death penalty, but the resolution is presently without effect, as a 1999 constitutional court ruled that no executions could be carried out until all death penalty cases were tried by juries. As of 1999, very few Russian regions conducted jury trials, though they are becoming more common. *Id.*

152. HOOD, *supra* note 150, at 12.

153. HOOD, *supra* note 150, at 11.

154. HOOD, *supra* note 150, at 14.

155. William A. Schabas, *War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, 741 (1997).

156. GG CONST. art. 1, § 1.

157. *Id.* art. 102.

158. *Id.* art. 1.

cedures, and extradition to countries where the death penalty is in force.”¹⁵⁹

The United States Supreme Court has at times considered evidence from “other nations that share our Anglo-American heritage.”¹⁶⁰ In a recent death penalty case, the Court relied in part on a brief by the European Union as *Amicus Curiae*¹⁶¹ in determining the unconstitutionality of death sentences imposed upon the mentally retarded.¹⁶² The Court’s decision demonstrates a concession that, at least in some circumstances, the death penalty is inhumane.

Western Europe views the institution of capital punishment as a violation of human rights. The United States stands alone among Western democratic nations as the sole nation unwilling to recognize the connection between the death penalty and the deprivation of human rights and individual dignity.

VI. CONCLUSION

The state constitution specifically grants Montana citizens a right to individual dignity. This guarantee is not qualified; it is an unconditional provision requiring the state to value and respect human life and refrain from unfair treatment of its citizens.

The death penalty is clearly an affront to the notion of human dignity. The psychological pain inflicted on a death row inmate in the period of months or years before his execution constitutes humiliating treatment and brutal torture which should not be tolerated in a civilized society. Empirical evidence of racial disparities in the imposition of death sentences demonstrates that the death penalty is applied in an arbitrary, and thus unconstitutional manner, and therefore violates the individual’s right to equal protection under the law and human dignity. The death penalty represents the ultimate violation of the inmate’s bodily integrity, denying him the right to make choices about his own body. Democratic societies across the world recognize the death penalty as a violation of human rights and have condemned the practice of capital punishment in the

159. Toni M. Fine, *Moratorium 2000: An International Dialogue Toward a Ban on Capital Punishment*, 30 COLUM. HUM. RTS. L. REV. 421, 436 (1999).

160. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

161. The European Union filed an *amicus* brief in *McCarver v. North Carolina*, 531 U.S. 1205 (2001), relied upon in a later case, *Atkins v. Virginia*, 536 U.S. 304 (2002).

162. *Atkins*, 536 U.S. at 316 n.21.

United States.

The Montana Constitution provides more rights to Montana citizens than the U.S. Constitution, and the Montana Supreme Court is not bound by the reasoning of the United States Supreme Court when interpreting the state constitution. The time has come to abolish the death penalty in Montana and renew the dedication to individual dignity and human rights that was so important to the framers of the 1972 Montana Constitution.