

REMOVE CONSTITUTIONAL PROHIBITION AGAINST DEATH PENALTY

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House Joint Resolution W (Substitute H-1)

Sponsor: Rep. Larry Julian

Committee: Regulatory Reform

First Analysis (3-18-04)

BRIEF SUMMARY: The joint resolution would amend the constitution to allow for the imposition of the death penalty for first degree murder in which the guilt of the defendant was proven to a “moral certainty”. The proposed constitutional amendment would require voter approval.

FISCAL IMPACT: Although figures vary, a number of studies and reports have suggested that the costs of capital punishment are substantially higher than the costs of imprisoning an offender for life without parole. Costs associated with pursuing a penalty of death for an offender are largely those associated with due process of law and include higher costs of investigation, indictment, pretrial proceedings, trial, appeals, and post-conviction petitions, as well as death-row incarceration and execution. Available studies, however, predate recent Congressional enactment of habeas corpus reforms aimed at limiting appeals in death penalty cases, and it is not yet clear to what extent the recent reforms may reduce overall costs of capital punishment.

THE APPARENT PROBLEM:

In 1846, Michigan became the first government in the English-speaking world to abolish capital punishment. (The imposition of the death penalty remained for treason, though the state has never convicted anyone of treason, as that is a crime that generally is the province of the federal government.) While the abolition of the death penalty has been in place since the state was in its infancy, support for the ban has been the subject of disagreement and controversy ever since. Throughout the balance of the 19th century, numerous attempts at reviving the death penalty were unsuccessful. (Incidentally, an attempt at the 1850 constitutional convention to place the prohibition in the constitution failed, although it has been suggested that the rejection was based, in part, on a fear that including the prohibition would have resulted in the entire document being rejected by the voters.)

In the 20th century, debate surrounding the state’s ban on capital punishment continued. There were four unsuccessful attempts in the legislature between 1900 and 1926 to undo the death penalty ban. But in both 1929 and 1931, the legislature passed legislation that would have reinstated the death penalty in Michigan for first degree murder. The 1929 measure (Senate Bill 22), which would have *required* the imposition of the death penalty for first degree murder, was vetoed by Governor Fred Green in May of 1929. The 1931 measure (Public Act 2, The Capital Punishment Act) subjected the law to a referendum

among the voters, who, in turn, rejected the proposal in an election in April 1931. That act also required the death penalty for first degree murder, but with the caveat that persons under the age of 17, at the time of conviction, be sentenced to life in prison. Both the 1929 measure and the 1931 measure provided that the punishment would be inflicted by electrocution.

Between the turn of the century and the mid-1950's at least one house of the legislature voted to reinstitute capital punishment in the state on eight separate occasions. In 1961, the state undertook a revision of the state constitution, though most likely without any planned attempt to write the abolition of the death penalty into the state constitution. However, that is precisely what the convention did when it incorporated Committee Proposal 20 into Article IV of the new constitution. On January 16, 1962, the Committee on Legislative Powers recommended to the full convention that the sentence "[n]o law shall be enacted providing for the penalty of death" be included in the constitution. In urging passage of the proposal, the committee report stated, in part, "[t]he committee believes that it is both fitting and opportune for Michigan to step forward in the tradition which we began over 115 years ago and that the adoption of this provision would be a significant contribution to the concept of civilized justice which all of us seek to serve." Committee Proposal 20 passed the full convention on April 30, 1962 by a vote of 108 (Y) to 3 (N). In the statement presented to the voters regarding the proposed section, the convention stated, "[t]his is a new section prohibiting the death penalty in Michigan. It establishes in the constitution a legislative ban which this state has had since 1846. Except for treason, which today is a matter more of federal than state significance, our state has not had the death penalty since 1846."

Despite the hope of Republican delegate John Martin that the constitutional proscription would "settle once and for all the question of capital punishment" in the state, the issue has remained far from settled. A 2002 report by the Legislative Service Bureau recalls numerous efforts since the late 1970's to reinstitute the death penalty in Michigan following the U.S. Supreme Court's decision in *Gregg v. Georgia* 428 U.S. 153 (1976), which effectively lifted a moratorium on capital punishment that had been in place over the previous four years due to the Court's ruling in *Furman v. Georgia* 408 U.S. 238 (1972). Two of the more recent efforts to lift the constitutional prohibition occurred during the 83rd (1985-86) and 90th (1999-2000) legislatures. In 1985, the State Senate rejected Senate Joint Resolution H by a vote of 13 (Y) to 21 (N) on June 11, 1985. More recently, House Joint Resolution H of 1999 was reported by the Committee on Constitutional Law and Ethics and had advanced to third reading on the House floor before being re-referred to the committee, where it ultimately died with the adjournment of the 1999-2000 legislative session.

On this issue, however, Michigan remains in the minority. It is one of only 12 states that does not permit the death penalty. Reportedly, the other states have instituted the death penalty under U.S. Supreme Court guidelines. According to the recent Legislative Service Bureau report, as of August 2002, nearly 3,700 inmates were living under a state sentence of death. Proponents of the death penalty in Michigan are convinced that the majority of Michigan's voters would support joining the majority of other states in

permitting the death penalty for the most heinous crimes. In recent weeks, there has been a renewed effort to once again lift the ban, fueled in part by the recent murder of two Detroit police officers during a traffic stop that went horribly awry. A new proposed constitutional amendment has been proposed that would go before the voters at the next general election.

THE CONTENT OF THE RESOLUTION:

Article IV, Section 46, of the Michigan State Constitution states, “[n]o law shall be enacted for the penalty of death.” House Joint Resolution W would amend the constitution to add “except for first degree murder in which the guilt of the defendant is proven to a moral certainty.” The resolution would require the legislature to provide by law for the implementation of the death penalty.

The proposed constitutional amendment would be put before the voters at the next general election.

[Black’s Law Dictionary defines “moral certainty” to mean (1) “[t]hat degree of assurance which induces a man of sound mind to act, without doubt, upon the conclusions to which it leads”, (2) “[a] high degree of impression of the truth of a fact, falling short of absolute certainty, but sufficient to justify a verdict of guilty, even in a capital case.” Revised Fourth Edition, 1968.]

BACKGROUND INFORMATION:

First-degree murder. Under the Michigan Penal Code (MCL 750.316), a person who commits the following is guilty of first degree murder: (1) murder perpetrated by poison, lying in wait, or any other willful, deliberate, and premeditated killing; (2) a murder of a peace officer or corrections officer committed while the officer is lawfully engaged in the performance of his or her duties; and (3) murder committed in the perpetration of, or an attempt to perpetrate, arson, criminal sexual conduct in the first, second or third degree criminal sexual conduct, first degree child abuse, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, first or second degree home invasion, larceny, extortion, or kidnapping.

Moral certainty. The U.S. Supreme Court attempted to clarify the definition of the phrase “to a moral certainty”, which is often used in jury instructions, in *Victor v. Nebraska /Sandoval v. California* (1994). Citing an 1875 case from the Massachusetts Supreme Judicial Court, Justice O’Connor stated, “[p]roof ‘beyond a reasonable doubt’...is proof ‘to a moral certainty,’ as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion. Indeed, we have said that “[p]roof to a ‘moral certainty’ is an equivalent phrase with ‘beyond a reasonable doubt.’”

While the court did not invalidate California jury instructions that used the phrase “moral certainty”, it conceded that the phrase could be confusing to jurors, which becomes particularly problematic if jurors “understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases.” Without delving too deeply into the legal issues regarding the definition of “moral certainty”, it should be noted that some assert that the phrase is confusing and really offers no higher standard than the traditional standard of “beyond a reasonable doubt.”

Capital Punishment and the U.S. Supreme Court. Although there were no executions between 1968 and 1972, the death penalty became a major point of contention in the early 1970’s, culminating in the Supreme Court case *Furman v. Georgia* 408 U.S. 238 (1972). At issue in *Furman* was application of the death penalty. Specifically, the court was troubled by the wide latitude state law afforded judges and juries. The majority felt that this discretion led to a randomness of those being sentenced to death. It was this randomness that led three of the justices to conclude that the death penalty was unconstitutional because it was “arbitrary and capricious” and amounted to “cruel and unusual punishment” strictly forbidden by the Eighth Amendment.

Justice Potter Stewart held that “these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.” He asserted that the inconsistent application of the death penalty, along with infrequent executions (compared to the actual number of death row inmates), failed to show that capital punishment was an effective deterrent. In concurring opinions, Justices Brennan and Marshall believed that capital punishment, in and of itself, was cruel and unusual. Justice Brennan also felt that capital punishment was “degrading to human dignity, arbitrarily severe, and unnecessary.” Justice Douglas also believed that the poor and “socially disadvantaged” were more likely to be sentenced to death.

While the *Furman* decision commuted the executions of nearly 600 death row inmates, it should be noted that the court did not strike down a state’s authority to seek and impose the death penalty. However, it required that before a state could continue its policy of capital punishment, state statutes must be consistent in their application, by creating standards for jury discretion and sentencing guidelines.

Capital punishment had tremendous popular support both before and after the *Furman* decision (as the dissenters pointed out). Four years later the issue of capital punishment was again taken up by the Supreme Court in *Gregg v. Georgia* 428 U.S. 153 (1976) and four other companion cases. The *Gregg* decision effectively reversed the court’s decision in *Furman* and allowed the states to continue their policy of capital punishment.

In a 7-2 majority, the court concluded that capital punishment did not violate the 8th Amendment to the Constitution. Combining the decisions of *Gregg* and the companion cases, the court found that for a state’s death penalty statute to withstand constitutional scrutiny, it must focus on two main areas. The sentencing process must take into consideration the circumstances surrounding the offense. The sentencing process must also take into consideration the any relevant characteristics about the defendant. In doing

this, the jury or judge must weigh certain aggravating and mitigating factors that decide whether the defendant should receive a death sentence or a lesser punishment. The court also held that there should be separate hearings to determine the guilt and punishment of the defendant. Finally, each defendant should be entitled to a substantive and timely appellate review process.

Capital Punishment and the States. According to the Death Penalty Information Center, 12 states and the District of Columbia do not impose the death penalty. In addition to Michigan these states include, Alaska, Hawaii, Iowa, Maine, Massachusetts, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Of the 38 remaining states that allow for the death penalty, the center reports that as of March 10, 2004, six states have not had an execution since 1976. These states include Connecticut, Kansas, New Hampshire, New Jersey, New York, and South Dakota. Recently, departing Illinois Governor George Ryan commuted the death sentences of all 167 inmates on death row in 2003 after numerous problems with the Illinois death penalty system were revealed.

During its current legislative session, a committee of the Minnesota House of Representatives heard testimony on a bill (House File 1602) that would remove a ban on the death penalty in the state that has been in place since 1911. According to the Minneapolis *Star-Tribune*, a substitute version of the bill, which would be subject to voter approval, would impose the death penalty for first degree murder in which there is a murder of more than one persons, the murder of a public safety officer, the murder occurs in the course of forcible rape, or the murder occurs in a situation that is “especially heinous, atrocious, or cruel, manifesting exceptional depravity.”

Arguments at Michigan’s Constitutional Convention. Support for prohibiting the death penalty at the constitutional convention that led to Michigan’s current constitution was largely the product of an article on the death penalty that appeared in the October 1958 issue of the *Journal of the American Judicature Society*, and was described in the official record of the convention on January 16, 1962, as follows. (1) The evidence clearly shows that execution does not act as a deterrent to capital crimes. (2) The serious offenses are committed, except in rare instances, by those suffering mental disturbances; are impulsive in nature; and are not the acts of the “criminal class”. (3) Conviction of the innocent does occur and death makes a miscarriage of justice irrevocable. Human judgment cannot be infallible. (4) When the death sentence is removed as a possible punishment, more convictions are possible with less delays. (5) Unequal application of the law takes place because those executed are often the poor, ignorant, and the unfortunate without resources. (6) The state sets a bad example when it takes a life. Imitative crimes and murder are stimulated by executions. (7) Legally taking a life is useless and demoralizing to the public officials who, dedicated to rehabilitating individuals, must callously put a man to death. The effect upon fellow prisoners can be imagined. (8) A trial where a life may be at stake is highly sensationalized, adversely affects the administration of justice, and is bad for the community. (9) Society is amply protected by a sentence of life imprisonment.

ARGUMENTS:

For:

In and of itself, this joint resolution does not remove the ban on the death penalty in Michigan. Rather, it puts the issue before the voters, where it belongs. Supporters of the resolution believe polls showing that a majority of Michigan residents want the option of the death penalty for the most egregious murders. In any case, after 40 years of living under the state's current constitution, the voters should finally be given the opportunity to voice its opinion on this vital issue. It also should be noted that, if the resolution is approved by the voters, it would still be up to the legislature to implement the death penalty. In doing so, legislators would look to U.S. Supreme Court requirements and, undoubtedly, would look to the experience of other states in determining how capital punishment could be applied fairly and cost-effectively.

For:

Proponents of the resolution offer the following reasons for supporting the reinstatement of the death penalty in Michigan:

-- Some crimes are so terrible that people who commit these crimes must be executed if justice is to be done. This position is a version of the view that justice, or an important component of justice, is fundamentally retributive. That is, criminals should pay a penalty that is proportionate to the moral gravity of the offense they have committed, regardless of whether or not such a penalty serves as an effective deterrent. In the case of first degree murder, the death of the murderer is the appropriate punishment for the crime committed. This is sometimes referred to as the "lex talionis" (the law of retaliation) and has deep roots. Some supporters of the death penalty, for example, cite Leviticus 24:20, "breach for breach, eye for eye, tooth for tooth; as he hath caused a blemish in a man, so shall it be done to him again." Contrary to the critics of the death penalty, the use of capital punishment is a demonstration of the respect for life, not an impermissible taking of life.

-- The death penalty might deter some people (even if not all people) from committing first degree murder. In a recent study, researchers from the University of Colorado at Denver found "a significant relationship between the execution and pardon rates and the rate of homicide. Each additional execution decreases homicides by 5 to 6, while three additional pardons generate one to 1.5 homicides." These findings were somewhat substantiated in a later report by researchers at Emory University concluded that the execution of each offender seems to save, on average, the lives of 18 potential victims (with a margin of error of +/-10). Even if this cannot be proved, it is certain that a murderer who is legally executed will not murder again. Moreover, the death penalty provides one last deterrent to prevent prisoners already serving life in prison from committing a murder (either against another prisoner or employee of the Department of Corrections) while already incarcerated.

-- Some people argue that the law, and punishments inflicted for breaches of the law, ought to reflect the sentiments of the public. That is to say, the punishment should reflect

the degree of revulsion people feel toward the crime committed. Sentencing represents a denunciation by the community of an unlawful act. In this sense, the death penalty is the appropriate sentence, the highest possible sentence, for those murderous acts most offensive and shocking to the community.

-- The death penalty might save the state (which is to say, the taxpayers) money, since incarceration for life at maximum security levels is expensive. The costs of housing an inmate increase as the inmate ages and becomes more susceptible to illness requiring expensive medical treatments also paid for at the expense of taxpayers. For example, according to one source using 1994 federal Justice Department figures, the costs for life without parole in death penalty-equivalent cases could be as much as \$3 million while the costs for the death penalty could be as low as \$2 million. Even if a person resided on death row for eight years, the cost would be about \$2.5 million.

-- The vast majority of states do have some form of death penalty. This is not, as some critics charge, a radical proposal.

Against:

Opponents of the death penalty offer a number of reasons for their opposition to the resolution.

-- Michigan already has the appropriate punishment for the most terrible of crimes, namely, life imprisonment without parole. As virtually everyone is aware, life in prison is neither easy nor comfortable, even apart from the fact that incarcerated people are shut away from their families and other loved ones.

-- Mistakes are sometimes made, and there are known cases of innocent people having been executed. The execution of even one innocent person is fundamentally wrong and a terrible injustice. And unlike life imprisonment, death by execution is irreversible. Critics say that the conviction of the innocent often occurs as a result of police misconduct or based on testimony of a single, mistaken eyewitness, a jailhouse informant, or on uncorroborated testimony of an accomplice. Perhaps what is most troubling about this is that there is no constitutional right to have newly discovered evidence heard in court. One professor at the Michigan State University School of Criminal Justice testified that there have been cases in which DNA testing has exonerated people, but they have not been freed because prosecutors fight against judicial consideration of the case. He further stated, "the U.S. Constitution only requires that the person have a fair trial according to specified procedures- if the judge or jury reaches the wrong conclusion about guilt at the trial, there is no constitutional guarantee that it can be corrected, even if new evidence is discovered."

-- Capital punishment has never been shown convincingly, much less conclusively, to deter people from committing terrible crimes. Most murders are committed with little forethought often in fits of rage or without sound mind, and it is almost axiomatic that people committing crimes do not expect to be caught, much less punished. And in those cases where a murder is planned ahead of time, it is unlikely that the perpetrator expects to be caught either, and therefore is unlikely to be deterred by the thought that, if caught, he or she could be executed. Furthermore, to serve as an effective deterrent to crime, any

punishment must be swift, sure, and even handed. Capital punishment fails in all three categories.

-- Where the death penalty is allowed, critics say, it is carried out disproportionately on the poor, the uneducated, and minorities. The 1972 U.S. Supreme Court case that originally ruled against the constitutionality of the states' death penalty laws was based on the arbitrariness of their application, and many people are convinced that when the death penalty is an option, a form of particularly virulent discrimination against the poor, the uneducated, and minorities is inevitable. Some people further fear that the current racial and economic divisions in our society will only be exacerbated if the death penalty is reinstated. Moreover, it is believed our current public defender system is woefully incapable of supporting a criminal justice system with the death penalty.

-- Opponents of the death penalty believe that the costs for executing one criminal are monumental. A capital case requires a tremendous amount of financial resources. The appellate process is much more exhaustive than a non-capital murder case. Added to the court costs, are the costs necessary to incarcerate the criminal during the entire appellate process. A study conducted by the *Miami Herald* concluded that it cost the State of Florida over \$3 million to execute a criminal. That was significantly greater than the \$516,000 projected costs to incarcerate a criminal for 40 years. Another study reported that in Texas, a person incarcerated for 40 years (serving a sentence of life without parole) would cost roughly \$750,000, compared to \$2.3 million to execute a criminal.

-- Many people argue, on religious and philosophical grounds, that killing is morally wrong, whether done by individuals or by the state. In fact, some people argue that killing by the state is especially pernicious, since state executions perpetrate and legitimize violence instead of ameliorating it. What is more, state-sanctioned executions involve all of the state's citizens, regardless of their sincerely held religious and moral beliefs. Further, some religious organizations believe that public policy should strive toward the public good by valuing the sanctity of all human life, from conception to *natural* death.

POSITIONS:

A number of individuals, including members of families of murder victims, testified in support of the resolution. (3-9-04, 3-16-04)

The Macomb County Sheriffs office supports the resolution. (3-16-04)

The Fraternal Order of Police indicated that it supports the resolution. (3-16-04)

A number of individuals, including members of families of murder victims, testified in opposition to the resolution. (3-9-04, 3-16-04)

The Michigan Committee Against Capital Punishment opposes the resolution, (3-16-04)

The Michigan Catholic Conference opposes the resolution. (3-9-04)

The American Civil Liberties Union of Michigan indicated that it opposes the resolution. (3-9-04)

Michigan Citizens United for Rehabilitation of Errants indicated that it opposes the resolution. (3-16-04)

Amnesty International indicated that it opposes the resolution. (3-16-04)

The American Friends Service Committee indicated that it opposes the resolution. (3-16-04)

The Innocence Project indicated that it opposes the resolution. (3-16-04)

The Detroit Coalition Against Police Brutality indicated that it opposes the resolution. (3-16-04)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.