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IMPOSITION OF CAPITAL PUNISHMENT

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HEARING

BEFORE THE

SUBCOMMITTEE ON
CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

S. 1, S. 1400, and S. 1401

FEBRUARY 16, 1972, APRIL 16, JUNE 13, AND JULY 26, 1973

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IMPOSITION OF CAPITAL PUNISHMENT

[Excerpts from hearings on Reform of the Federal Criminal Laws by the subcommittee on Criminal Laws and Procedures of the U.S. Senate Committee on the Judiciary, on the recommendations of the National Commission on Reform of the Federal Criminal Laws, S. 1, S. 1400, and S. 1401.]

MONDAY, APRIL 16, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2228, New Senate Office Building, Senator John L. McClellan, presiding.

Present: Senator McClellan (presiding) and Senator Hruska.

Also present: G. Robert Blakey, chief counsel; Paul C. Summitt, deputy chief counsel; Kenneth A. Lazarus, minority counsel; Dennis C. Thelen, assistant counsel; and Mabel A. Downey, clerk.

Senator MCCLELLAN. The committee will come to order.

The Chair wishes to make a brief introductory statement for these hearings.

Today the Subcommittee on Criminal Laws and Procedures begins the first of its hearings for the 93d Congress on the subject of the codification, revision, and reform of the Federal criminal laws. With the start of these hearings, I am hopeful that we are entering the final phase of this most worthwhile and necessary project.

On January 4, 1973, I introduced for myself and Senators Ervin and Hruska, S. 1, the Criminal Justice Codification, Revision and Reform Act of 1973. This bill is the product of over 6 years of labor, which began with our appointment to the National Commission on Reform of Federal Criminal Laws in 1966. Nevertheless, as I stated on the floor of the Senate in January, S. 1 is not intended as the final draft of a new Federal penal code. There are a number of issues still to be decided, some of which will be controversial. But I do feel that we have achieved a good beginning.

On March 27, 1973, Senator Hruska and I also introduced for the Administration, S. 1400, the Criminal Code Reform Act of 1973. This bill is the product of 2 years of effort by the Criminal Code Unit created in the Department of Justice by the Attorney General in response to the direction of the President of January 16, 1971, to prepare a thorough evaluation of the report of the National Commission on Reform of Federal Criminal Laws.

The subject of today's hearings will be capital punishment in light of the Supreme Court's opinion in *Furman* v. *Georgia*, 408 U.S. 238 (1972).

The subcommittee takes up this subject at a time when our society is confronted with what can only be described as a most alarming rise in violent crimes—particularly the most violent of crimes—murder.

In the period between 1966 and 1971, the number of murders in this country rose 61 percent, while the rate of murder per 100,000 persons rose 52 percent. More importantly, the percentage of all homicides that were known or suspected to be felony murders—homicides committed in the course of another crime—rose from 21.8 percent to 27.5 percent.

Yet, concomitant with this rise in crime—indeed, in spite of it—the Supreme Court declared that the death penalty, as it is now implemented in this country, is unconstitutional. The Court found that a jury of peers—a jury representative of the various elements of our society—surely the epitome of our democratic ideal—is not constitutionally capable of determining that a crime is so heinous or so brutal as to render its perpetrator deserving of the ultimate penalty.

The effect of *Furman* v. *Georgia* has been that over 600 convicted murderers and rapists will not suffer a punishment imposed upon them by society. The effect of this decision will be the eventual release of many of these individuals to again prey upon society.

The opponents have been vociferous in their assertion that it serves no useful purpose and specifically that it does not deter crime. This argument, in my judgment, is shallow. Certainly, a penalty that is not carried out will not deter anything. The last execution in this country took place on June 2, 1967. Since that time a moratorium has been in effect, not because of society's disapproval of capital punishment, but because the Supreme Court was taking an opportunity to rule on its constitutionality. Surely, it cannot be seriously argued that the sharp rise in homicides that accompanied this moratorium was merely coincidental.

When the law is not enforced and its punishments are not imposed it loses its credibility, and when it loses its credibility, it does not deter. We are now all reaping the whirlwind.

It is sometimes said deterrence will not work with homicide since murders are committed in the heat of passion, when the individual does not consider the consequences of his actions. This is true in some cases, but not all. As I have noted, of all murders committed in 1971, 27.5 percent were either known or suspected to have taken place during the commission of a felony. Premeditation, not passion, motivated these crimes. They were not situations of uncontrollable rage.

Where reason is present the thought that one consequence of an individual's action is the forfeiture of his own life will, in most instances, serve as a deterrent.

Experience has proven this point. Recently, former Criminal Court Judge Samuel Leibowitz of New York, an eminent jurist who presided over many capital cases explained that, when he asked hardened criminals why they would not shoot their way out to

escape capture, they would inevitably reply, "I was afraid of the hot seat, Judge." [The New York Times, June 30, 1972, p. 1, col. 7.]

Indeed, even in situations involving passion, the knowledge that murder will result in the swift termination of the murderer's own life must necessarily encourage restraint and self-control.

Those who oppose capital punishment also assert that our Nation no longer approves of the taking of life for crime and, for that reason, this penalty should be abolished. Once again the facts do not bear this out. A recent Gallup Poll reveals that, of adults 18 and over, 57 percent are in favor of capital punishment for persons convicted of murder. [The Washington Post, Nov. 23, 1972, p. A27, col. 1.] These are not uncivilized people; they recognize that if society is not to degenerate into anarchy, an appropriate punishment is necessary for those who would destroy it.

Even criminals now recognize this principal. Soon after the decision in *Furman*, a bank robbery took place in New York City. During the robbery, in which many hostages were taken, one of the robbers declared: "I'll shoot everybody in the bank. The Supreme Court will let me get away with this. There's no death penalty. It's ridiculous. I can shoot everyone here, then throw my gun down and walk out and they can't put me in the electric chair. You have to have a death penalty, otherwise this can happen every day." [The Evening Star and the Washington Daily News, Aug. 23, 1972, p. 1, col. 1.]

More recently, here in Washington Metropolitan area, there was an armed holdup of a vending machine company, in which 5 bandits fought police in a gun battle in which 1 person was killed and 6 hurt, while 25 hostages were held in a small restroom. The bandits periodically would open the door and fire shots into the room. One of the gunmen snarled at one point at the huddled hostages, "I think I'll throw a hand grenade in here. What can I lose—there's no death penalty any more." [The Evening Star and Washington Daily News, March 14, 1973, p. 1, col. 4.]

This type of occurrence has not been the only consequence of *Furman*. Indeed, the decision has already had an effect that must be quite beyond the expectations of the Supreme Court. The Supreme Courts of both Delaware and North Carolina have recently decided that statutes in those States requiring a sentence of death for certain crimes, except where a judge or jury, in its discretion, decides life imprisonment more appropriate, are unconstitutional in light of *Furman*. [See *State* v. *Dickerson* (Del.), 12 CrL 2145, Nov. 1, 1972; and *State* v. *Waddell* (N.C.), 12 CrL 2361, Jan. 18, 1973.] To render the statutes constitutional, these courts have severed the discretionary life imprisonment provisions leaving the States with mandatory death sentences for specified crimes. What the Supreme Court has prevented, therefore, is not capital punishment, but judges and juries in these States from exercising their intelligence on a case by case basis in the imposition of punishment.

It is clear that the decision in *Furman* is creating havoc in legal systems throughout the country. Efforts must be made, I believe, to solve the problems that have been created. It is hoped that through

the testimony of our distinguished witnesses today the problems created by the *Furman* decision can be resolved.

Without objection, I will insert in the record following these remarks three exhibits indicating the rise in murders from 1966 to 1971 and a percentage breakdown of the types of murders committed during that period, and other related material.

Senator Hruska, do you have any comments?

Senator HRUSKA. Just a brief statement, Mr. Chairman.

I believe we are all gratified with the scheduling of today's hearing, because it is really the beginning of the 93d Congress' legislative work on these two bills that seek to create a new Federal Criminal Code. S. 1 was introduced by our distinguished chairman on January 4, and S. 1400, the Administration's bill, was introduced by this Senator on March 27.

Both of these bills provide for the imposition of the death penalty in certain cases. Although they vary slightly in terms of the offenses to which they would be applicable and procedures to be followed, both bills see capital punishment as a valid punishment in cases of certain vicious activity.

In addition to the previous bills there is also before us S. 1401, which contains only the provisions for the death penalty.

Mr. Chairman, I have a brief statement which I should like to insert in the record at this point.

[The statement above-referred to follows:]

OPENING REMARKS OF SENATOR ROMAN L. HRUSKA

Mr. Chairman, this Senator is delighted with the scheduling of today's hearings by the Subcommittee. It marks the beginning of the 93rd Congress' legislative work on S. 1, the massive "Criminal Justice Codification, Revision and Reform Act of 1973", introduced by our distinguished Chairman on January 4. and S. 1400, the Administration's "Criminal Code Reform Act of 1973" which I introduced on March 27. These two bills will serve as the primary vehicles for the recodification of our Federal Criminal law under the distinguished leadership of Senator McClellan.

Additionally, the particular focus of today's hearings will be on two subjects in which I have maintained an abiding interest over the years. This morning we will consider the issue of capital punishment. Our session later this afternoon will deal with the subject of appellate review of criminal sentences.

I shall limit my remarks at this time to capital punishment and postpone my introductory comments on the later issue until this afternoon.

Both S. 1 and S. 1400 provide for the imposition of the death penalty in certain instances. Although they vary slightly in terms of the offenses to which they would be applicable and procedures to be followed, both bills see capital punishment as a valid sanction in cases of certain vicious criminal activity.

Additionally, on March 27, Chairman McClellan and I introduced S. 1401. This bill would work the same effect with respect to the death penalty as S. 1400. It was introduced separately, however, in order to allow the Congress to act upon the death penalty as an independent issue of immediate concern which can be resolved prior to final action on the larger project of rewriting the present Federal Criminal Code. This is in accord with a suggestion of the President contained in his March 14 crime message.

Hopefully, this Subcommittee can act on a bill to cure the Constitutional defects which are inherent in present law as announced in *Furman v. Georgia*, 408 U.S. 238 (1972) and thus restore the death penalty as an available sentence in certain heinous situations. I believe such action is completely necessary and proper.

I want to welcome Deputy Attorney General Sneed and Assistant Attorney General Dixon here this morning. I look forward to working closely with both

of them on this and other issues inherent in the codification effort during the months ahead. Their wise counsel should prove invaluable to the subcommittee.

I would only make this additional suggestion regarding what the chairman has outlined so vividly and so realistically by way of justification for the death penalty being made effective once more.

So often it is said that to take a human life is debasing and degrading. It is also argued that it has a bad effect on people and the public. But that is subject to two observations. One is that the victim of that murder in the deprivation of his life is also downgraded and debased. Secondly, those upon whom this death penalty would be imposed believe themselves in the death penalty. They invoked it themselves. They, themselves, practice the deprivation of human life upon someone else and visit that penalty upon someone else.

There can be very little doubt that there will be a great deal of deterrent in it and whatever degrading or downgrading there is in the human spirit, it certainly wouldn't be from the standpoint of just retribution alone, but in the direction of deterrence.

I fully subscribe to the arguments and the reasons cited so well by the chairman that this bill, this revitalizing and reconstituting of the death penalty will have very effective deterrent capabilities.

Senator McCLELLAN. Thank you, Senator.

[Material referred to in opening statement follows:]

[Provisions from S. 1, the "Criminal Justice Codification, Revision and Reform Act of 1973," relating to the setence of death. S. 1, introduced by Senators McClellan, Ervin, and Hruska on Jan. 4, 1973; pp. 48–50]

"SUBCHAPTER E.—SENTENCE OF DEATH

"Sec.
"1–4E1. Sentence of Death.
"1–4E2. Separate Proceeding to Determine Sentence of Death.

"§ 1–4E1. SENTENCE OF DEATH

"(a) AUTHORIZATION.—If the offender is convicted of murder or of treason, a sentence of death or life imprisonment shall be imposed in accordance with the provisions of this section and section 1–4E2 (Separate Proceeding to Determine Sentence of Death).

"(b) STANDARDS FOR IMPOSITION OF SENTENCE OF DEATH.—In deciding whether a sentence of death should be imposed, the court and the jury, if any, shall be guided by the mitigating and aggravating circumstances set forth below:

"(1) The following shall be mitigating circumstances in the cases of both murder and treason:

"(i) the crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

"(ii) the offender acted under unusual pressures or influences or under the domination of another person;

"(iii) at the time of the crime, the capacity of the offender to appreciate the character of his conduct or to control his conduct was impaired as a result of mental illness, mental defect, or intoxication;

"(iv) the offender was emotionally immature at the time of the crime;

"(v) the offender was an accomplice in the crime committed by another person and his participation was relatively minor;

"(vi) the crime was committed under circumstances which the offender believed to provide a moral justification or extenuation for his conduct and which is plausible by ordinary standards of morality and intelligence; or

"(vii) the offender has no significant history of prior criminal activity.

"(2) The following shall be aggravating circumstances in the case of treason:

"(i) the offender knowingly created a great risk of death to another person or a great risk of substantial impairment of national security;

"(ii) the offender violated a legal duty concerning protection of the national security; or

"(iii) the offender committed treason for pecuniary benefit.

"(3) The following shall be aggravating circumstances in the case of murder:

"(i) 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 history of serious assaultive or terrorizing criminal activity;

"(ii) at the time the murder was committed the offender also committed another murder;

"(iii) the offender knowingly created a great risk of death to at least several persons;

"(iv) the offender committed the murder for pecuniary benefit;

"(v) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

"(vi) the victim was a public servant who was holding the offender or another person in official detention;

"(vii) the victim was a law enforcement officer; or

"(viii) the victim was the President of the United States or other high public servant.

"§ 1–4E2. SEPARATE PROCEEDING TO DETERMINE SENTENCE OF DEATH

"(a) COURT OR JURY.—The court shall conduct a separate proceeding to determine whether an offender convicted of murder or treason shall be sentenced to death or life imprisonment. The proceeding may be conducted before the jury which determined guilt, unless the person, with the approval of the court, waives a jury, or it may be conducted before a jury specially empaneled.

"(b) EVIDENCE AND ARGUMENT.—In the proceeding, any evidence may be presented as to any matter relevant to sentence. The attorney for the government and the offender or his counsel shall be permitted to present argument for or against sentence of death.

"(c) VERDICT AND SENTENCE.—The determination whether a sentence of death shall be imposed shall rest in the judgment of the court, except that when the proceeding is conducted before the court sitting with a jury, the court shall not impose a sentence of death unless it submits to the jury the issue whether the offender should be sentenced to death or life imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the court shall sentence the offender to imprisonment for life.

[Excerpts from Congressional Record, Jan 12, 1973, pp. 558–87 (daily ed.)]

Mr. MCCLELLAN. Mr. President, last week I introduced for myself and the distinguished Senators from North Carolina (Mr. ERVIN) and Nebraska (Mr. HRUSKA) S. 1, the Criminal Justice Codification, Revision, and Reform Act of 1973.

* * * * * * *

(2) CAPITAL PUNISHMENT

(a) Present Federal law.—The death penalty is an authorized sentence upon conviction under at least ten sections of present law, including murder, treason, rape, air piracy and delivery of defense information to aid a foreign gov-

ernment. [18 U.S.C. §34 (destruction of motor vehicles or motor vehicle facilities where death results); 18 U.S.C. §351 (assassination or kidnaping of Member of Congress); 18 U.S.C. § 794 (gathering or delivering defense information to aid a foreign government); 18 U.S.C. §1111 (murder in the first degree within the special maritime and territorial jurisdiction of the U.S.); 18 U.S.C. §1114 (murder of certain officers and employees of the U.S.); 18 U.S.C. §1716 (causing death of another by mailing injurious articles); 18 US.C. §1751 (Presidential and Vice Presidential murder and kidnaping); 18 U.S.C. §2031 (rape within the special maritime or territorial jurisdiction of the U.S.); 18 U.S.C. §2381 (treason); and 49 U.S.C. §1472(i) (aircraft piracy)]

As drafted, they appear to be unconstitutional under the 1972 decision in *Furman* v *Georgia*, 408 U.S. 238 (1972). In addition, there are several other statutes that authorize the death penalty, but each appears to be unconstitutional under *United States* v. *Jackson*, 390 U.S. 570 (1968), because by permitting the jury and not the court to impose the penalty, they inhibit the exercise of the right to demand a jury trial.

(b) Commission proposal.—Capial punishment would be abolished for all Federal criminal offenses under the proposed code. Section 3601 authorizes life imprisonment or the maximum sentence for a class A felony (30 years) upon conviction of treason or murder, where the court is satisfied that the defendant intended to cause the death of the victim.

A minority of the Commission, however, proposed an alternative approach—one which would retain the death penalty for at least intentional murder or treason. (Sections 3601, 3602, 3603 and 3604.) The significant features of the alternate are the adoption of: (i) a bifurcated trial and (ii) standards for imposition. Before the court imposes a death penalty upon a convicted defendant, it would be required to hold separate hearings on the question of life or death and at that hearing evidence normally inadmissable at the criminal trial where the issue was guilt could be introduced by either party (section 3602). The death sentence, moreover, could not be imposed if the defendant was less than 18 years old at the time of the commission of the crime; if the defendant's physical or mental condition calls for leniency; if in the judge's mind the evidence "does not foreclose all doubt" respecting the defendant's guilt; or if there are other substantial mitigating circumstances (section 3603). Finally, special criteria for mitigating and aggravating circumstances are listed (section 3604). A finding of their presence or absence would guide the imposition of the sentence.

(c) Alternative and arguments.—Testimony was taken by the Subcommittee on capital punishment. The arguments on capital punishment are set out fairly in the Final Report (pp. 463–64) and Volume II of the Working Papers (pp. 1347–76). I need not repeat them here. Assuming, however, the retention of the death penalty, other issues remain. Should it be limited to murder and treason? Or should it be applied to other crimes? How should it be imposed? Should it be discretionary or mandatory? Should standards be set for the exercise of discretion?

The arguments for and against the two-stage trial and standards are reviewed in *McGautha* v. *California*, 403 U.S. 83 (1971) and *Crampton* v. *Ohio*, 402 U.S. 183 (1971), which hold that neither is required by the Due Process Clause of the Constitution. In general, those in favor of these procedures argue that they are fairer, since they permit a wider range of materials, to be reviewed under appropriate standards. Others suggest that they are an unduly protracted procedure that may, in fact, result in a greater imposition of death sentences.

(d) Bill.—The bill proposes that the death penalty be retained for the most heinous crimes, murder and treason, and sections 1–4E1 and 1–4E2 adopt the two-stage trial model.

It is not my intention now to enter into a full discussion of the implications of *Furman* for the purposes of the Code, but a number of points should be made. First, *Furman* is a per curiam opinion; it merely holds that the "imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." (408 U.S. 239–40) No general opinion was written for the court. Consequently, it has little value as a precedent or as a guide to a legislature in drafting new legislation. Second, it is clear that the Supreme Court has not

held that capital punishment may not be imposed in other cases under different circumstances. The two "swing" Justices—Stewart and White—explicitly stated in *Furman* that they had not held the death penalty per se unconstitutional. Rather, they concluded that the death penalty as presently applied and administered in the United States constitutes a violation of the Eighth Amendment. Mr. Justice Stewart objected to its imposition in "so wantonly and freakishly" a manner. He then hinted that a mandatory penalty might avoid this result. See 408 U.S. at 307–08. Mr. Justice White objected to it "as it is presently administered* * *." (408 U.S. at 312–13) He felt that—

"The recurring practice of delegating the sentencing authority to the jury and the fact that a jury in *its own discretion* and without violating its trust *or any statuory* policy may refuse to impose the death penalty no matter what the circumstances of the crime (408 U.S., at 314) (Emphasis added.)"

His hint was that standards to guide discretion might pass constitutional muster.

These aspects of the concurring opinions of Justices Stewart and White were emphasized by the dissent of the Chief Justice. His comments bear quoting at some length. He observed:

"Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past * * *

"The critical factor in the concurring opinions of both Mr. Justice Stewart and Mr. Justice White is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence of capital punishment—the inference that petitioners would have the Court draw—but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion * * *.

"This novel formulation of Eighth Amendment principles—*albeit* necessary to satisfy the terms of our limited grant of certiorari—does not lie at the heart of these concurring opinions. The decisive grievance of the opinions—not translated into Eighth Amendment terms—is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice: the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern. . . It is essentially and exclusively a procedural due process argument * * *.

"Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling *by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.* If such standards can be devised or the crimes more meticulously defined, the result cannot be detrimental. (408 U.S. at 396–401) (Emphasis added.)"

Mr. President, the "Criminal Justice Codification, Revision, and Reform Act of 1973" has been drafted to meet the legitimate evils identified by the Supreme Court. The arbitrariness and unfairness to the defendant of the traditional single-stage trial can be, in my judgment, avoided by the adoption of the two-stage trial and the articulation of statutory standards for the imposition of capital punishment. Since sections 1–4E1 and 1–4E2 are carefully and rigorously drafted, they will, I believe, withstand constitutional challenge. Nevertheless, it is my intention to examine the implication of *Furman* and the question of capital punishment in further hearings on the Code.

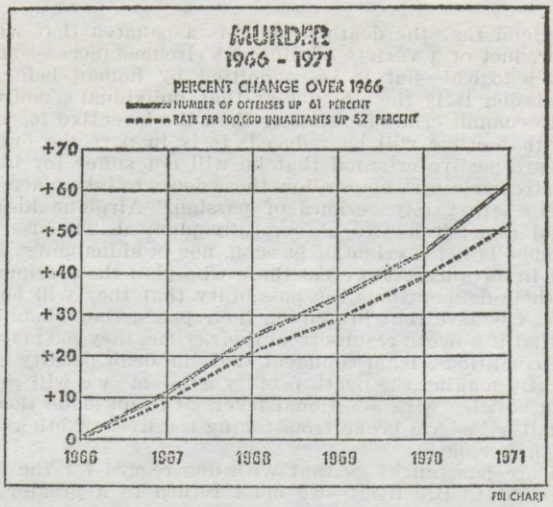

EXHIBIT NO. 2

MURDER BY CIRCUMSTANCE—1971

[Percent distribution]

Region	Total	Spouse killing spouse	Parent killing child	Other family killings	Romantic triangle and lovers quarrels	Other arguments	Known felony type	Suspected felony type
Northeastern States	100.0	9.5	4.3	4.7	5.6	40.3	25.4	10.2
North Central States	100.0	11.3	3.2	9.4	5.4	38.2	24.8	7.7
Southern States	100.0	15.3	2.4	10.4	7.6	45.5	14.0	4.8
Western States	100.0	13.3	5.7	6.5	5.4	36.9	23.9	8.3
Total	100.0	12.8	3.5	8.4	6.3	41.5	20.4	7.1

EXHIBIT NO. 3

PERCENT OF MURDERS WHICH WERE WITH FELONY CIRCUMSTANCES

Year	Known felony type	Suspected felony type
1966	14.8	7.0
1967	15.6	5.9
1968	17.4	7.5
1969	19.3	7.2
1970	20.4	8.4
1971	20.4	7.1

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[Excerpts from the *Federal System of Criminal Justice,* a Message from the President of the United States, Mar. 14, 1973.]

* * * * * * *

DEATH PENALTY

The sharp reduction in the application of the death penalty was a component of the more permissive attitude toward crime in the last decade.

I do not contend that the death penalty is a panacea that will cure crime. Crime is the product of a variety of different circumstances—sometimes social, sometimes psychological—but it is committed by human beings and at the point of commission it is the product of that individual's motivation. If the incentive not to commit crime is stronger than the incentive *to* commit it, then logic suggests that crime will be reduced. It is in part the entirely justified feeling of the prospective criminal that he will not suffer for his deed which, in the present circumstances, helps allow those deeds to take place.

Federal crimes are rarely "crimes of passion." Airplane hi-jacking is not done in a blind rage; it has to be carefully planned. The use of incendiary devices and bombs is not a crime of passion, nor is kidnapping; all these must be thought out in advance. At present those who plan these crimes do not have to include in their deliberations the possibility that they will be put to death for their deeds. I believe that in making their plans, they should have to consider the fact that if a death results from their crime, they too may die.

Under those conditions, I am confident that the deah penalty can be a valuable deterrent. By making the death penalty available we will provide Federal enforcement authorities with additional leverage to dissuade those individuals who may commit a Federal crime from taking the lives of others in the course of committing that crime.

Hard experience has taught us that with due regard for the rights of all—including the right to life itself—we must return to a greater concern with protecting those who might otherwise be the innocent victims of violent crime than with protecting those who have committed those crimes. The society which fails to recognize this as a reasonable ordering of its priorities must inevitably find itself, in time, at the mercy of criminals.

America was heading in that direction in the last decade, and I believe that we must not risk returning to it again. Accordingly, I am proposing the re-institution of the death penalty for war-related treason, sabotage, and espionage, and for all specifically enumerated crimes under Federal jurisdiction from which death results.

The Department of Justice has examined the constitutionality of the death penalty in the light of the Supreme Court's recent decision in *Furman* v. *Georgia*. It is the Department's opinion that *Furman* holds unconstitutional the imposition of the death penalty only insofar as it is applied arbitrarily and capriciously. I believe the best way to accommodate the reservations of the Court is to authorize the automatic imposition of the death penalty where it is warranted.

Under the proposal drafted by the Department of Justice, a hearing would be required after the trial for the purpose of determining the existence or nonexistence of certain rational standards which delineate aggravating factors or mitigating factors.

Among those mitigating factors which would preclude the imposition of a death sentence are the youth of the defendant, his or her mental capacity, or the fact that the crime was committed under duress. Aggravating factors include the creation of the grave risk of danger to the national security, or to the life of another person, or the killing of another person during the commission of one of a circumscribed list of serious offenses, such as treason, kidnapping, or aircraft piracy.

The hearing would be held before the judge who presided at the trial and before either the same jury or, if circumstances require, a jury specially impaneled. Imposition of the death penalty by the judge would be mandatory if the jury returns a special verdict finding the existence of one or more aggravating factors and the absence of any mitigating factor. The death sentence is *prohibited* if the jury finds the existence of one or more mitigating factors.

Current statutes containing the death penalty would be amended to eliminate the requirement for jury recommendation, thus limiting the imposition of the death penalty to cases in which the legislative guidelines for its imposition clearly require it, and eliminating arbitrary and capricious application of the death penalty which the Supreme Court has condemned in the *Furman* case.

* * * * * * *

[Excerpts from S. 1400 "Criminal Justice Codification, Revision and Reform Act of 1973; introduced by Senators Hruska and McClellan on Mar. 27, 1973.]

Provisions relating to the death sentence, pp. 153–156:

* * * * * * *

"CHAPTER 24.—DEATH SENTENCE

"Sec.
"2401. Sentence of Death.
"2402. Procedure to Determine Applicability of Sentence of Death.

"§ 2401. SENTENCE OF DEATH

"(a) IN GENERAL.—Except as otherwise provided in subsection (b), a person who has been found guilty of a Class A felony under section 1101 (Treason), 111 (Sabotage), 1121 (Espionage), or 1601 (Murder), shall be sentenced to death if:

"(1) the offense is under section 1101 (Treason), 1111 (Sabotage), or 1121 (Espionage) and:

"(A) the defendant has been convicted of another offense involving treason, sabotage, or espionage, committed before the time of the offense, for which a sentence of life imprisonment or death was imposable;

"(B) the defendant, in the commission of the offense, knowingly created a grave risk of substantial danger to the national security; or

"(C) the defendant, in the commission of the offense, knowingly created a grave risk of death to any person; or

"(2) the offense is under section 1601 (Murder) and:

"(A) the defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, an offense described in section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), 1314(a)(1) (Escape), 1621 (Kidnapping), 1625 (Aircraft Hijacking), or 1701 (Arson);

"(B) the defendant has been convicted of another federal or state offense, committed either before or at the time of the offense, for which a sentence of life imprisonment or death was imposable;

"(C) the defendant has been convicted of two or more federal or state felonies, committed on different occasions before the time of the offense, involving the infliction of serious bodily injury upon another person;

"(D) the defendant, in the commission of the offense, knowingly created a grave risk of death to another person in addition to the victim of the offense;

"(E) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

"(F) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

"(G) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or

"(H) the defendant committed the offense against:

"(i) the President or a successor to the presidency;

"(ii) a chief of state, head of government, or the political equivalent, of a foreign nation; or a foreign dignitary who is in the United States on account of the performance of his official duties; or

"(iii) a United States official, a law enforcement officer, an employee of a United States penal or correctional institution, or a federal public servant outside the United States for the purpose of performing diplomatic duties, while performing his official duties or on account of the performance of his official duties or because of his status as a public servant.

"(b) IMPOSITION PRECLUDED.—Notwithstanding the existence of one or more of the factors set forth in subsection (a) (1) or (2), the court shall not sentence the defendant to death if, at the time of the offense:

"(1) the defendant was under the age of eighteen;

"(2) the defendant's mental capacity was significantly impaired, although not so impaired as to constitute a defense to prosecution;

"(3) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution;

"(4) the defendant was an accomplice in the offense, which was committed by another person, and his participation was relatively minor; or

"(5) the defendant could not reasonably have foreseen that his conduct in the course of the murder for which he was convicted would cause, or would create a grave risk of causing, death to any person.

"§ 2402. PROCEDURE TO DETERMINE APPLICABILITY OF SENTENCE OF DEATH

"(a) SEPARATE SENTENCING HEARING.—The court shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in section 2401(a)(1) or (2) and section 2401(b), unless the government stipulates that none of the factors set forth in secion 2401(a)(1) or (2) exists or that one or more of the factors set forth in section 2401(b) exists. The hearing shall be conducted before the jury which determined the defendant's guilt; or before a jury impanelled for the purpose of the hearings if the defendant was convicted upon a plea of guilty, or if the defendant was convicted after a trial before the court sitting without a jury, or if the jury which determined the defendant's guilt has been discharged by the court for good cause; or, upon the motion of the defendant and with the approval of the court and of the government, before the court alone.

"(b) EVIDENCE AND ARGUMENT.—At the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in the presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any material in the presentence report which is withheld from the defendant and his counsel shall not be considered by the jury, or if there is no jury, by the court, for the purpose of determining the applicability of the death sentence under this chapter. Any information relevant to any of the factors set forth in section 2401(a) (1) or (2) may be presented by either the government or the defendant, if admissable under the rules governing the admission of evidence at criminal trials. Any information relevant to any of the factors set forth in section 2401(b) may be presented by either the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials. The government and the defendant shall be permitted fair opportunity to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in section 2401(a) (1) or (2) and section 2401(b). The burden of establishing the existence of any of the factors set forth in section 2401(a) (1) or (2) is on the government. The burden of establishing the existence of any of the factors set forth in section 2401(b) is on the defendant.

"(c) SPECIAL VERDICT.—The jury, or if there is no jury, the court, shall return a special verdict setting forth its findings as to the existence or nonexistence of the factors set forth in section 2401(a)(1) or (2) and section 2401(b).

"(d) SENTENCE.—If the jury, or if there is no jury, the court, finds by a preponderance of the information that one or more of the factors set forth in section 2401(a)(1) or (2) exists and that none of the factors set forth in section 2401(b) exists, the court shall sentence the defendant to death. If the jury, or if there is no jury, the court, finds that none of the factors set forth in section 2401(a)(1) or (2) exists, or that one or more of the factors set forth in section 2401(b) exists, the court shall not sentence the defendant to death but shall impose any other sentence authorized for a Class A felony under the provisions of section 2001."

[Excerpts from remarks by Senator Roman L. Hruska upon the introduction of S. 1400, from Congressional Record, March 27, 1973, pp. S 5777, S 5779, S 5782, and S 5786 (daily ed.).]

By Mr. Hruska (for himself and Mr. McClellan):

S. 1400. A bill to reform, revise, and codify the substantive criminal law of the United States; to make conforming amendments to title 18 and other titles of the United States Code; and for other purposes. Referred to the Committee on the Judiciary.

THE CRIMINAL CODE REFORM ACT OF 1973

Mr. HRUSKA. Mr. President, I take great pleasure in introducing on behalf of myself and the distinguished senior Senator from Arkansas (Mr. McClellan) S. 1400, the Criminal Code Reform Act of 1973.

* * * * * * *

PART III: SENTENCING

The reforms wrought by parts I and II of title I would have little practical significance if they were unaccompanied by a realistic approach to the myriad problems which arise once a person has been convicted of a Federal offense. Existing law in title 18 alone, provides for 18 different terms of imprisonment and 14 different fines, often with no discernible relationship between the possible term of imprisonment and the size of the fine. Part III of the bill, therefore, replaces existing anomalies with a rational system whereby offenses are classified for purposes of imprisonment and fines into eight categories.

The bill provides for imposition in appropriate cases of a "notice sanction" requiring a corporate or individual defrauder to give notice of the conviction to those innocent victims who may be entitled to file civil claims for damages —section 2004; and includes mandatory minimum prison terms for persons using dangerous weapons in the course of a crime—section 1813—traffickers in hard narcotics—section 1821—and organized crime leaders—section 1862.

To reduce the possibility of unwarranted disparities in sentencing, the bill sets forth criteria for the imposition of sentence—including, in section 2401, detailed criteria for imposition of the death penalty. Another significant change which is suggested in this area is the inclusion of a parole component in all prison sentences to insure that control will be maintained over hardened criminals after their release from confinement.

As even this limited review of the bill's more significant features makes clear, its potential for enhancing our Federal law is enormous.

This bill can be regarded as a truly momentous advance toward fulfillment of one of the most basic demands of our society, justice in the administration of the criminal law, for justice in the administration of the criminal law inevitably rests upon the justice of the criminal law.

Mr. President, when S. 1 was introduced, Senator McClellan and I both indicated that we were not prepared to provide a blanket endorsement of its provisions. That bill was viewed only as a preliminary work product. It is a starting point. A base upon which to build. Each provision will be given deep study and serious consideration. Some will be adopted, some modified, and some rejected during the processing of the bill. The senior Senator from Arkansas has authorized me to say that his attitude and approach to the instant bill will be the same as they will be with respect to S. 1. So will mine.

The bill which I introduce today is recognized as a monumental effort by the Administration, including the Department of Justice and other participating departments and agencies. Particular accolades should go to former Attorney General Mitchell, Attorney General Kleindienst, Assistant Attorney General Henry Petersen and Mr. Ronald L. Gainer who led the Code Unit in the Criminal Division of the Department.

Part III of the proposed Code replaces the existing hodgepodge of sentences and fines with a rational system whereby offenses are classified for purposes of imprisonment and fines into nine categories. (These categories are made applicable to offenses described outside Title 18 as well as those described within the Title.) For the most part, these penalty levels generally reflect the terms of imprisonment determined by the Congress to be warranted by the current counterparts of the specific offenses listed in the Code, although mandatory minimum prison terms have been included for persons using dangerous weapons in the course of a crime, traffickers in hard narcotics, and organized crime leaders, and a parole component has been included in all prison sentences to insure that "street-time" supervision will be available for all offenders and not just those found to deserve early release on parole. The fine levels, however, have been substantially increased in order that they may be felt not just by defendants without major financial resources but by those defendants, corporate and individual, who for too long have tended to view criminal fines as an insignificant potential addition to the cost of doing business. Moreover,

Part III provides for the imposition in appropriate cases of a "notice sanction" requiring a corporate or individual defrauder to give notice of the conviction to those innocent victims who may be entitled to file civil claims for damages. The death penalty provisions of the proposed Code have been carefully drafted to meet the concerns expressed by the justices of the Supreme Court; the penalty is made available only for particular crimes—treason, sabotage, espionage and murder—and then only under certain very limited circumstances.

* * * * * * *

CHAPTER 24

§ 2401. This section creates a constitutionally supportable death penalty provision. It would permit application of the death penalty only to treason sabotage, or espionage, or to murder committed either by itself or in the course of seven other federal offenses. Even in such instances, the penalty could not be imposed unless the jury, in a separate proceeding, found that one or more factors in the list of aggravating factors existed, and that none of the factors in the list of mitigating factors existed. Upon such a special finding, however, imposition of the death penalty by the judge would be mandatory.

[S. 1401, 93d Congr., 1st sess.]

A BILL To establish rational criteria for the mandatory imposition of the sentence of death, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 227 of title 18, United States Code, is amended by adding after section 3562 a new section 3562A, to read as follows:

"§ 3562A. SENTENCING FOR CAPITAL OFFENSES

"(a) A person shall be subjected to the penalty of death for any offense prohibited by the laws of the United States only if a hearing is held in accordance with this section.

"(b) When a defendant is found guilty of or pleads guilty to an offense for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in subsections (f) and (g), for the purpose of determining the sentence to be imposed. The hearing shall not be held if the government stipulates that none of the aggravating factors set forth in subsection (g) exists or that one or more of the mitigating factors set forth in subsection (f) exists. The hearing shall be conducted—

"(1) before the jury which determined the defendant's guilt;

"(2) before a jury impanelled for the purpose of the hearing if—

"(A) the defendant was convicted upon a plea of guilty;

"(B) the defendant was convicted after a trial before the court sitting without a jury; or

"(C) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

"(3) before the court alone, upon the motion of the defendant and with the approval of the court and of the government.

"(c) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence or the nonxistence of the factors set forth in subsection (f) or (g). Any information relevant to any of the mitigating factors set forth in subsection (f) may be presented by either the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating factors set forth in subsection (g) shall be governed by the rules governing the admission of evidence at criminal trials. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to

present argument as to the adequacy of the information to establish the existence of any of the factors set forth in subsection (f) or (g). The burden of establishing the existence of any of the factors set forth in subsection (g) is on the government. The burden of establishing the existence of any of the factors set forth in subsection (f) is on the defendant.

"(d) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the factors set forth in subsection (f) and as to the existence or nonexistence of each of the factors set forth in subsection (g).

"(e) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the factors set forth in subsection (g) exists and that none of the factors set forth in subsection (f) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the aggravating factors set forth in subsection (g) exists, or finds that one or more of the mitigating factors set forth in subsection (f) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

"(f) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (d) that at the time of the offense

"(1) he was under the age of eighteen;

"(2) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;

"(3) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

"(4) he was a principal, as defined in section 2(a) of this title, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

"(5) he could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

"(g) If no factor set forth in subsection (f) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (d) that—

"(1) if the defendant is convicted of an offense under section 794 or 2381 of this title—

"(A) the defendant has been convicted of another offense under one of those sections, committed before the time of the offense, for which a sentence of life imprisonment or death was imposable;

"(B) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; or

"(C) in the commission of the offense the defendant knowingly created a grave risk of death to another person; or

"(2) if the defendant is convicted of murder or of any other offense for which the death penalty is available if death results—

"(A) the defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of an offense under section 751, 794, 844(d), 844(f), 844(i), 1201, or 2381 of this title, or section 902(i) of the Act of August 23, 1958, as added by section 1 of the Act of September 5, 1961, and amended (75 Stat. 466, 49 U.S.C. 1472(i));

"(B) the defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense, for which a sentence of life imprisonment or death was imposable;

"(C) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment, committed on different occasions before the time of the offense, involving the infliction of serious bodily injury upon another person;

"(D) in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense;

"(E) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

"(F) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

"(G) the defendant committed the offense as consideration for the receipt or in expectation of the receipt, of anything of pecuniary value; or

"(H) the defendant committed the offense against

"(i) the President of the United States, the President-elect, the Vice President, or if there is no Vice President, the officer next in order of succession to the office of the President of the United States, the Vice-President-elect, or any person who is acting as President under the Constitution and laws of the United States;

"(ii) a chief of state, head of government, or the political equivalent, of a foreign nation;

"(iii) a foreign official listed in section 1116(b)(1) of this title, if he is in the United States because of his official duties; or

"(iv) a Justice of the Supreme Court, a Federal law enforcement officer, or an employee of a United States penal or correctional institution, while performing his official duties or because of his status as a public servant. For purposes of this subsection, a 'law enforcement officer' is a public servant authorized by law or by a government agency to conduct or engage in the prevention, investigation, or prosecution of an offense."

SEC. 2. Section 34 of title 18, United States Code, is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the section.

SEC. 3. Section 844(d) of title 18, United States Code, is amended by striking therefrom the words "as provided in section 34 of this title".

SEC. 4. Section 844(f) of title 18, United States Code, is amended by striking therefrom the words "as provided in section 34 of this title".

SEC. 5. Section 844(i), title 18, United States Code, is amended by striking therefrom the words "as provided in section 34 of this title".

SEC. 6. The second paragraph of section 111(b) of title 18, United States Code, is amended to read as follows:

"Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life."

SEC. 7. Section 1116(a) of title 18, United States Code, is amended by striking the word , "except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life".

SEC. 8. Section 1201 of title 18, United States Code, is amended by inserting after the words "or for life" in subsection (a) the words ", and if the death of any person results, shall be punished by death or life imprisonment".

SEC. 9. The last paragraph of section 1716 of title 18, United States Code, is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the paragraph.

SEC. 10. The fifth paragraph of section 1992 of title 18, United States Code, is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the section.

SEC. 11. Section 2031, title 18, United States Code, is amended by deleting the words "death, or".

SEC. 12. Section 2113(e) of title 18, United States Code is amended:

(a) by striking therefrom the words "kills any person, or"; and

(b) by striking therefrom the words "or punished by death if the verdict of the jury shall so direct" and inserting in lieu thereof the words "or may be punished by death if death results".

SEC. 13. Section 902(i)(1) of the Act of August 23, 1958, as amended (49 U.S.C. 1472(i)(1)), is amended to read as follows:

"(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

"(A) by imprisonment for not less than twenty years; or

"(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life."

SEC. 14. The analysis of chapter 227 of title 18, United States Code is amended by inserting after item 3562 the following new item:

"3562A. Sentencing for capital offenses.".

[From the Congressional Record, Mar. 27, 1973]

By Mr. Hruska (for himself and Mr. McClellan) :

S. 1401. A bill to establish rational criteria for the mandatory imposition of the sentence of death, and for other purposes. Referred to the Committee on the Judiciary.

RESTORING THE DEATH PENALTY

Mr. HRUSKA. Mr. President, I introduce for myself and the distinguished senior Senator from Arkansas (Mr. McClellan) S. 1401, a bill to establish rational criteria for the mandatory imposition of the sentence of death, and for other purposes.

Earlier today, I introduced S. 1400, the massive "Criminal Code Reform Act of 1973." Section 2401 of that bill provided in certain instances for the imposition of the death sentence in Federal prosecutions for treason, sabotage, espionage, and murder. Section 2402 of S. 1400 set forth the procedures to be followed in determining the applicability of the sentence of death in these instances.

The bill which I now send to the desk would work the same effect as sections 2401 and 2402 of S. 1400. It is introduced separately in order to allow the Congress to act upon the death penalty as an independent issue of immediate concern, which can be resolved prior to final action on the larger project of rewriting the present Federal Criminal Code.

Present Federal law provides that the death penalty is an authorized sentence upon conviction in at least 10 instances, including murder, treason, rape, airpiracy, and delivery of defense information to aid a foreign government. (18 U.S.C. sec. 34 (destruction of motor vehicles or motor vehicle facilities where death results) ; 18 U.S.C. sec. 351 (assassination or kidnaping of Member of Congress) ; 18 U.S.C. sec. 794 (gathering or delivering defense information to aid a foreign government) ; 18 U.S.C. sec. 1111 (murder in the first degree within the special maritime and territorial jurisdiction of the United States) ; 18 US.C. sec. 1114 (murder of certain officers and employees of the United States) ; sec. 1716 (causing death of another by mailing injurious articles) ; 18 U.S.C. sec. 1751 (Presidential and Vice Presidential murder and kidnaping) ; 18 U.S.C. sec. 2031 (rape within the special maritime or territorial jurisdiction of the United States) ; 18 U.S.C. sec. 2381 (treason) ; and 49 U.S.C. sec. 1472 (i) (aircraft piracy)).

As drafted, they appear to be unconstitutional under the 1972 decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). In addition, there are several other statutes that authorize the death penalty, but each appears to be unconstitutional under *United States* v. *Jackson*, 390 U.S. 570 (1968), because by permitting the jury and not the court to impose the penalty, they inhibit the exercise of the right to demand a jury trial.

This bill will cure the constitutional defects inherent in present law as revealed in *Furman* and thus restore the death penalty as an available sentence in certain heinous situations.

This "two-track" approach to restoring the death penalty was suggested by the President in his March 14 crime message and is supported fully by the chairman of the Subcommittee on Criminal Laws and Procedures (Mr. McClellan) and myself.

Mr. President, in the unlikely event that any Senator is unaware of it, I would like to call attention to a particularly shocking crime which was committed here in a Washington suburb just a short time ago. According to newspaper accounts, 5 men armed with handguns and a shotgun held about 25 employees of a vending machine company hostage for more than an hour. During that time, they beat, kicked, pistol-whipped and shot their victims in what appears to have been a random exercise of terror. One of the detectives who investigated it described it as the most vicious holdup he had ever seen. At the end of it all, one of the assailants was dead. Two suspects and a dozen of the innocent victims were hospitalized. It appears to have been pure chance that none of the victims was killed. As it is, one woman employee—shot in the throat—may not be able to speak for a year, and others may have been permanently disfigured.

Reports indicate that at least two of the suspects were not new to crimes of violence. In fact, they had pleaded guilty less than a week earlier to charges

that they were accessories to a murder the previous September. They were at the time of this most recent incident free on bond awaiting sentencing.

This case is not unique. It does underscore once again the desperate need for tough, realistic new efforts to curb lawlessness and violence. And, particularly, it underscores the need to restore the death penalty to our laws.

But if they run true to form, we will hear social theorists talking about the "inhumanity" of new laws to curtail the criminals, rather than about the rights of peaceful citizens to be free from the threat of imminent violence.

Mr. President, I say to the social theorists: Read the reports of this appalling episode, which took place only last week, and tell the victims if the lenient approach to crime which you advocate should be pursued to the exclusion of all else. Read the accounts of the victims who, in the midst of the mayhem, were told, and I quote: "there's no death penalty—what do I have to lose," and then tell these victims that there is no merit in the recommendation that capital punishment be restored.

The American people, in my judgment, are fed up with the kind of outrage that occurred last week in the Maryland suburbs. There can be no other way to describe it. They simply are fed up. There must be a return to the idea that when a person breaks a law, he must be held personally responsible and he must be punished for it. The American people are not of a mood to accept anything less.

The instant bill would create a constitutionally supportable death penalty, limited in applicability solely to wartime treason, sabotage or espionage, or to murder committed during the course of seven specified offenses or under other limited circumstances. However, the death penalty could only be imposed if the jury, in a separate proceeding, determined that the offense was aggravated by one or more specified circumstances and that none of the enumerated mitigating factors was present.

It is my understanding the Criminal Laws Subcommittee will shortly begin consideration of this issue. Hopefully, we will be able to enact this bill with any necessary modifications in the not too distant future.

I ask unanimous consent that the text of the bill and the transmittal letter be printed in the RECORD immediately following my remarks along with newspaper accounts of the shocking crime referred to earlier in this statement and excerpts from the President's sixth crime message to the Congress (see p. 9).

There being no objection, the bill and material were ordered to be printed in the RECORD, as follows:

"OFFICE OF THE ATTORNEY GENERAL,
"*Washington, D.C., March 14, 1973.*

"The VICE PRESIDENT,
"*U.S. Senate,*
"*Washington, D.C.*

"DEAR MR. VICE PRESIDENT: There is attached for your consideration and appropriate reference a draft bill, 'To establish rational criteria for the mandatory imposition of the sentence of death, and for other purposes.'

"In *Furman* v. *Georgia*, 408 U.S. 238, decided June 29, 1972, the United States Supreme Court held that statutes which left the imposition of the death penalty to the unfettered discretion of a judge or a jury violated the Eighth and Fourteenth Amendments of the Constitution. The decision thereby invalidated the death penalty provisions of all federal statutes under which the death penalty is now imposable.

"*Furman* was decided by a five-to four vote, each justice writing a separate opinion. Of the majority, only two justices, Brennan and Marshall, argued that the Constitution mandated an absolute prohibition of the death penalty. Justices Stewart, White, and Douglas based their concurrences in the reversals on the fact that the statutes before the Court left the imposition of the death penalty to the unchecked discretion of the judge or jury, thereby permitting and occasioning irrational, selective, and discriminatory imposition. None of the opinions of the latter three justices precludes the upholding of the constitutionality of a death penaly procedure which would remove such unchecked discretion.

"It is the Department's opinion that *Furman* holds unconstitutional the imposition of the death penalty as a discretionary, nonmandatory sentencing alternative, but nevertheless does not preclude the enactment of appropriate circumscribed legislation authorizing the imposition of the death penalty. It is the view of the Department that it is reasonable to conclude that the death penalty has deterrent value, and that it may provide a measure of protection against incorrigible, dangerous individuals.

"In his recent message on law enforcement and drug abuse prevention, President Nixon stated:

" 'I am convinced that the death penalty can be an effective deterrent against specific crimes. The death penalty is not a deterrent so long as there is doubt whether it can be applied. The law I will propose would remove this doubt.

" 'The potential criminal will know that if his intended victims die, he may also die. The hijacker, the kidnapper, the man who throws a fire bomb, the convict who attacks a prison guard, the person who assaults an officer of the law, all will know that they may pay with their own lives for any lives that they take.' "

"Under the Department's proposal, capital punishment will require a post-trial sentencing hearing for the purpose of determining the existence or nonexistence of specific aggravating factors or mitigating factors. The hearing will be held before the judge who presided at the trial and before the same jury, or under certain circumstances, before a jury specially impanelled or before the judge alone. Imposition of the death penalty by the judge will be mandatory if there is a special verdict finding the existence of one or more aggravating factors and the absence of any mitigating factor. The death sentence is prohibited if the existence of any one or more mitigating factors is found.

"Among the factors which would preclude the imposition of a death sentence are the youth of the defendant, lack of capacity to appreciate the wrongfulness of the conduct, and unusual and substantial duress. Aggravating factors include, for treason or espionage, the creation of a grave risk to the national security, and for murder, the killing of another person during the commission of the offense of kidnapping or aircraft hijacking, the assassination of the President of the United States, and the commission of murder after conviction of another offense for which a sentence of life imprisonment or death was imposable.

"I urge the prompt introduction and early enactment of this legislation.

"The Office of Management and Budget has advised that enactment of this legislation would be in accord with the Program of the President.

"Sincerely,

Attorney General."

"[From the Washington Evening Star and Daily News, Mar. 14, 1973]

"ORDEAL IN TERROR

"(By Toni House and Jackie Stone)

"John Terry Robinson had just punched out for the day on his job as a mechanic at the Canteen Corp. in Landover and was walking to his truck when a large brown car with five men wheeled into the lot.

" 'Who are they?' " a Canteen driver asked Robinson.

" 'I don't know,' he replied. 'Maybe they're here to rob the place.'

"Moments later Robinson's glib aside turned into terrifying reality as he and 24 others found themselves hostages of a group of masked men intent on robbing the company of its estimated $25,000-$30,000 daily receipts.

"For what 'seemed like days' to Robinson, he and the others were jammed in an 8-by-12 foot yellow tile and concrete men's room, where they were subjected to verbal and physical abuse as the masked men ran in and out of the bathroom, firing handguns wildly and shouting epithets.

" 'I think I'll throw a hand grenade in here," Robinson recalled one suspect in a red ski mask saying. Robinson said he was 'the crazy one . . . the big month.'

" 'There's no death penalty, what do I have to lose?' Robinson said the man shouted.

" 'None of us thought we'd get out of there alive,' recalled another hostage, Edward Foley, as he described the ordeal. 'The way they were acting, they were like maniacs * * * high on dope. I'm sure they had every intention of killing us all.'

"Foley was among the wounded hostages.

"Robinson's keys were still dangling in the lock of his white van at the company and his wedding band was safely tucked in a roll of toilet paper in the men's room that had been his prison as Robinson told of the 60-minute ordeal while awaiting treatment at the emergency room of Prince Georges General Hospital last night.

"Robinson had been pistolwhipped as had five other hostages. His light blue Canteen Corp. shirt and dark blue pants were spattered with blood.

"Here's his story:

"About 3:30 p.m. the 27-year-old Bladensburg mechanic said he was walking across the parking lot at the Ardmore-Ardwick warehouse when he was seized at gunpoint by two of the suspects. Robinson then was hustled inside the warehouse and herded into a men's room, which was rapidly filling with fellow employes being rounded up at gunpoint by the bandits and collected there.

"The hostages were ordered to lie on the floor of the bathroom and keep quiet. They followed orders, lying in a squirming sweating heap, on the yellow concrete floor.

" 'Every couple of minutes' a gunman would open the bathroom door and fire wildly into the room, apparently in an effort to keep the large number of hostages cowed. Robinson could not recall how many shots were fired. It was not clear at this time if anyone was wounded in the bathroom.

"On one occasion a bandit opened the door and ordered the hostages to place all of their valuables in the sink. Some threw their wallets and valuables into a pile, while others tried to hide theirs.

"Robinson said he concealed his wedding ring in a toilet paper roll tube, but threw his wallet and watch into the sink to satisfy the bandits.

"On another occasion the bandits opened the bathroom doors and said 'they would kill anybody they caught with keys,' Robinson said, which touched off a flurry of activity as men and women scattered and hid keys around the bathroom.

"Raymond U. Johnson, a Dunbar Express guard (an armored car employee) who had already been wounded twice, was dragged from the bathroom by gunmen who took him to a small, unopened safe and ordered him to open it.

"They returned to the room and hustled out Nancy Weaver, a coin counter, who Johnson suggested knew the combination. Johnson told police Miss Weaver said she had to have her pocketbook to open the safe, then was shot in the neck before she could get it.

"At least two women, Eleanor Miller and Wendy Post, were pistol-whipped in front of the hostages in the room. Mrs. Miller said she did not know why she was hit.

"Miss Post was struck in the mouth and the gun discharged. 'My God,' she screamed as the blow split her mouth and knocked out several of her teeth, Robinson said.

" 'You better hope you have a God,' he said a gunman replied. 'Maybe you'd be better off back with Adam and Eve.'

"Robinson's chance came when he and five others were marched outside to serve as cover for the bandits as they tried to escape from police who had cordoned off the warehouse.

"The gunmen kept firing at police as they lined up the hostages against the building wall in front of a line of parked company trucks.

"Robinson was ordered to open a truck door but said the keys were lost inside. 'I was pistol-whipped for my trouble,' he said, and while the masked men considered what to do next, he shoved past them and dashed for the police line.

"As he zig-zagged across the pavement, he said, the bandits fired at him three times. He heard one bullet ricochet off a truck and whistle past him.

"Foley said he probably was the last of the employees herded into the men's room. The next 45 minutes were a nightmare of threats and violence.

" 'They said they wanted all our billfolds, watches and valuables. Then they told the service manager, Howard Dillard, to pick up the stuff and put it in a

paper bag. When he said he didn't have one, they hit him, knocked him down, bashed his head against a wall and then pulled him back to his feet again. Dillard told them to give him a bag and that's when they shot him in the arm.

"The gunmen then forced Dillard to go with them to the money room and open the safe. Then Nancy Weaver was taken from the bathroom to the money room, where she was shot in the neck.

"When the gunmen attempted to move the sacks of money into their car, they saw the police and ordered Foley and five other employees to act as hostages and accompany them to the loading dock. The police and the gunmen began to exchange fire.

" 'John Robinson was standing in front of me, and he pushed this one guy down between two trucks. Robinson took off running and managed to get away,' Foley said.

" 'Then the guy turned around and fired twice at me. I was running toward the police lines, and I guess the second shot must have hit me. But I ran, and then crawled and ran again to the side of the building. A policeman hollered for me to 'Get down, and that's when my leg gave way.'

"Foley, the father of four lives in Lothian, Md. and fills the canteen machines at the Star-News. The gunmen's bullet still lodged in his left thigh. He said his doctor has not yet decided whether (or when) to remove the bullet.

" 'The doctor said it didn't do a lot of damage, and that maybe an operation to remove it, at least right now, would do more harm than good.'

"Asked what his thoughts were this morning, Foley replied, 'At first I was just sorry to learn that the police had only killed one of them. Those kind of people shouldn't be on the street. Two of them were out on bond on murder charges already.

" 'As long as they (the courts) keep letting people out on bond when they're charged with major crimes, this kind of thing is going to keep on happening. They should keep this kind of criminal locked up until he can go to trial.' "

"[From the Washington Post, Mar. 15, 1973]

"VICTIMS PETRIFIED IN HOUR OF TERROR

"By Ivan G. Goldman

" 'Petrified, that's the best way to describe how everyone felt,' said the guard yesterday who was shot four times by holdup men during a wild robbery attempt Tuesday at a warehouse in Prince George's County.

" 'There was no reason to shoot any of those people,' said armored car guard Raymond H. Johnson. 'Everyone was too scared even to scream. I didn't think I'd ever get out alive.'

"Johnson was one of at least three hostages shot by five would-be robbers during the Tuesday shooting at the Canteen Corp. building in the Ardmore-Ardwick Industrial Park.

"County police surrounded the building, killed one suspect and captured four others, wounding two.

"Johnson, shot in both legs, the right shoulder and neck, described a bloody scene of random mayhem as the trapped, enraged bandits shot, beat and pistol-whipped unarmed hostages. He was shot when he and another guard, William T. Marks, stumbled into the holdup while making a currency pickup.

" 'We didn't know what was going on,' Johnson said. 'We were both trapped. 'They were already inside. They pulled their guns on us. We both tried to pull our guns, and that's when I got shot the first time, in the leg.

" 'Then they told us to go into the bathroom with the others. I asked them where it was, and that's when I got beat in the face with a gun. They told us to behave ourselves or we'd get killed. Then they worked over my partner, beating him for no reason at all. Then they put us in the men's room with the others.'

"Johnson said there was no room for him to lie down with the dozen or so other hostages, confined there. He stood bleeding in a corner, and no one attempted to administer to his wounds. 'I was bleeding pretty badly,' " he said matter-of-factly.

" 'One of the gunmen stayed in there with us the whole time. That's the one I wanted to blow away. He was beating this woman. He told her to get out from behind the door. As he said it, he slapped her with the butt of his gun. I saw teeth go flying.

" 'He was the same one who shot me all four times. One guy (bandit) came in and told a guy to take his shirt off. He wanted it for the muzzle of his shotgun. He didn't take it off fast enough and they shot him and ripped it off him.

" 'Then they took me out and put me in the vault where they kept the change. They told me to open the safe, and I said I didn't know the combination. I told them who had it, and they brought her in. She wasn't fast enough or something, and they shot her in the neck. They were mad because she said the combination was in her pocketbook.'

"Johnson said it was difficult to keep track of time, but it soon became evident that the building was surrounded by police, and that the gunmen knew it. He said the gunmen had him begin loading bags of coins and currency from a pile onto a cart, and that he was shot three more times during the loading "because I wasn't fast enough.

" 'There were about 30 or 40 bags, and I loaded the better part of them. Then they told me to push the cart through the door, he said. I did, and that's when I got away. I told police there were other people in there.'

"Johnson, who has worked for Dunbar Express Co., the armored car firm, four weeks, said the one-hour ordeal 'took about a year, it seemed.'

"Johnson was in fair condition in Prince George's County Hospital and Nancy Carmen Weaver, 32, a Canteen employee, was in serious condition yesterday with a gunshot wound in the throat. Police were still piecing together details yesterday, and had not fully interviewed all witnesses.

"Assistant Police Chief John W. Rhoads said he believed about five other employees were hiding in the building during the one-hour siege. They were not taken by the holdup men, he said, but they were unable to get out of the building safely as the robbers shot it out with police.

"All four suspects were charged with armed robbery and murder. A Maryland law dictates that when death results from the commission of a felony, then the perpetrators can be held legally responsible for the death.

"Police said Baron Jerome Cathy, 22, of 3457 25th St. SE, was shot to death at the scene, an office-warehouse at 7650 Preston Dr., in the industrial park. They identified the four other suspects as Guy Thurston Marshall, 22, of 408 Aspen St. NW; Robert John Young, 27, of 5011 Jay St. NE; Samuel Edward Brown, 27, of 2930 Knox St. SE; and Robert Wesley Smith Jr., 27, of 823 N. Henry St., Alexandria.

"Smith, Young, and Brown were under police guard yesterday in Prince George's General Hospital. Hospital authorities said Smith was in fair condition with gunshot wounds in the chest and face. Brown was in fair condition with a gunshot wound to the abdomen. Young was in good condition with multiple lacerations and a jaw fracture.

"The three patients were held without bond. Marshall remained in the county jail in Upper Marlboro after County District Court Judge Howard S. Chasanow set his bond at $125,000.

"Marshall, who appeared smiling at the hearing and wearing jail denims and shower clogs, was unable to post the bond. He said nothing at the brief hearing.

"County State's Attorney Arthur A. Marshall Jr. (no relation to the suspect Marshall) said Marshall and Young had pleaded guilty Friday in County Circuit Court as accessories before the fact in the Sept. 18, 1972, murder of Dennis Johnson, 26.

"Each had been free on $10,000 bond awaiting sentencing. Law enforcement officials described the murder as a narcotics-related execution. Robert E. Hall, 25, of 1234 Prairie St. NE, was convicted of first-degree murder and conspiracy to commit murder in the slaying by a County Circuit Court jury trial yesterday.

"Rhoads said that about 50 county policemen surrounded the building minutes after the robbers entered the building. They were summoned, he said, by a silent alarm pressed by a Canteen employee.

"The robbers had driven to the building in a stolen 1971 Cadillac, Rhoads said. He said they entered through a loading dock, pulling their guns immediately and herding employees into the men's room.

"Rhoads, who directed the battle, said his men fired 'only a few shots' because they knew the gunmen held hostages.

"Rhoads said one of the gunmen fired at police Maj. Blair Montgomery as Montgomery, speaking through a bullhorn tried to persuade the men to throw down their guns and surrender. Only one man came out unarmed, Rhoads said, and he was captured without injury.

" 'In terms of criminal brutality,' Rhoads said, 'that was the worst crime scene I've ever seen. For no apparent reason people were shot and beaten unmercifully.' "

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., July 9, 1973.

To: Criminal Laws Subcommittee, Attn: Mr. Thelen
From: Education and Public Welfare Division
Subject: Public Opinion surveys on the death penalty

In response to your request regarding public opinion surveys on the death penalty, we have compiled the following charts on recent Gallup Polls and Harris Surveys. We have no records of Harris Surveys on this topic before 1969.

GALLUP POLL

Question. "Are you in favor of the death penalty for persons convicted of murder?"

	Yes (percent)	No (percent)	No opinion (percent)
Nov. 1972	57	32	11
Mar. 1972	50	41	9
1971	49	40	11
1969	51	40	9
1966	42	47	11
1965	45	43	12
1960	51	36	13
1953	68	25	7

HARRIS SURVEY

Question. "Do you believe in capital punishment (death penalty) or are you opposed to it?"

	Believe in (percent)	Opposed (percent)	Not sure (percent)
1973	59	31	10
1970	47	42	11
1969	48	38	14

We are enclosing the original releases on most of these surveys and some newspaper articles on them in case you would like more detail.

On June 15, 1973, just a few days after the most recent general Harris Survey listed above was released, another more specialized Harris Survey on the death penalty came out. This survey (enclosed) revealed that, despite the fact that 59% of the American people believe in the death penalty, only 39%, as jurors, could say, "If guilt were proven, I could always vote guilty even though the defendant would automatically receive the death penalty". This finding suggests a reluctance to make imposition of the death penalty automatic or, similarly, a reluctance to convict if upon conviction imposition of the death penalty would be automatic.

We hope this information will be helpful to you. If we can assist you further, please let us know.

JENNIFER CLAPP.

Enclosures.

UNITED NATIONS,
ECONOMIC AND SOCIAL COUNCIL,
February 23, 1973.

CAPITAL PUNISHMENT—REPORT OF THE SECRETARY-GENERAL

Introduction
I. The Current Situation.
II. The Safeguards for the Accused.
III. The Law in Practice.
IV. Conclusion.

ANNEXES

I. States Members of the United Nations and Capital Punishment.
II. Articles of the Universal Declaration of Human Rights Relevant to Capital Punishment.

INTRODUCTION

1. The General Assembly, in its resolution 3011 (XXVII) of 18 December 1972, requested the Secretary-General to prepare the report called for by the Economic and Social Council in its resolution 1656 (LII) in such a way as to up-date the reports provided in 1962 and 1967,[1] and to inform the Council of the progress made in collecting the information requested in paragraph 6 of General Assembly resolution 2857 (XXVI). The General Assembly also requested the Council to consider at its fifty-fourth session the current situation and trends with regard to capital punishment. This report is intended to meet the General Assembly's request and assist the Council in its discussion of the subject.

2. Nearly 14 years ago, on 20 November 1959, the General Assembly adopted its first resolution (1396 (XIV)) on the death penalty. As a result, the Economic and Social Council considered that question at the twenty-ninth session with particular reference to the laws and practices relating thereto and to the effect of the death senence or is aboliion on the rate of criminality, and, by resolution 747 (XXIX), requested the Secretary-General to prepare a factual review of the various aspects of the question. Subsequently, the two substantive reports mentioned above were prepared.

3. In 1963, the Council, by resolution 934 (XXXV), recommended that Governments remove capital punishment from the criminal law concerning any crime to which it was in fact not applied, nor intended to be applied; give consideration to the facilities available for the social and medical investigation of the case of the offender liable to capital punishment; and ensure the most careful legal procedures and the greatest possible safeguards for the accused.

4. In 1968, the General Assembly, through the Economic and Social Council,[2] invited Governments of Member States to provide careful legal safeguards for those accused of a crime punishable by death. Specifically, it recommended (1) that the right to appeal and to petition for pardon be provided; (2) that a death sentence be not carried out until the procedures of appeal and pardon are terminated; and (3) that special attention be given to indigent persons by providing adequate legal assistance. It also asked the Governments to consider the possibility of fixing a time-limit before the expiration of which the death sentence in each case would not be carried out.

5. In 1971, the Council, in its resolution 1574 (L), affirmed "that the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment might be imposed with a view to the *desirability of abolishing this punishment* in all countries".[3] The General Assembly made a similar affirmation in its resolution 2857 (XXVI).

Limitations of the present report

6. As mentioned earlier, the present report is intended to up-date the earlier reports and to inform the Council on the legal procedures and safeguards applied in capital cases and on the attitudes of the Member States to possible further restriction of the use of the death penalty or its total abolition.

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[1] *Capital Punishment*, published in 1962 and *Capital Punishment Developments, 1961 to 1965* published in 1967. Issued jointly as United Nations publication, Sales No. E.67.IV.15.

[2] General Assembly resolution 2393 (XXIII); Economic and Social Council resolution 1337 (XXLIV).

[3] Underscoring added.

7. However, attention must be drawn to the necessary limitation of this report. No pretention could be made, for example, of providing in a report of this kind a detailed or even general account of the precise situation in the law and practice of any given Member State. Apart from the fact that laws and practices are constantly changing, any national law review is a complex matter—even if only for the purpose of describing the use of the death penalty.

8. This report is based largely on the replies of Member States to the Secretary-General's notes. Although the ratio of answers was unusually high,[4] many replies were not complete or were ambiguous and data have, therefore, been gathered from other sources in order to complete the gaps in the information provided. Many problems were encountered in reporting on the application in actual practice of the legal provisions. Some replies provided information on statutory rules and not on their implementation; some provided the laws in detail, others did not. It was also difficult to generalize and draw comparisons beween the provisions of different legal systems.

9. Nevertheless, despite these shortcomings and the obvious need for a more scientifically designed and intensive study to provide complete data, it is significant that this is the first report of its kind providing information from such a large majority of Member States.

Outstanding issues

10. The task of this report would be facilitated if all the trends were clear and if all the moral and utilitarian issues could be either totally excluded or were already decided. In some respects it is surprising that these issues of principle are not yet settled since at least 70 years ago Enrico Ferri, a pioneer criminologist was already writing of capital punishment as a topic "worn out from the intellectual point of view".[5]

11. The Declaration of Human Rights with its emphasis on the basic right to life should also leave little doubt as to the positive trends in civilization's struggle to improve the conditions of human exisence. Even if it be argued that, in the interests of the people, the State has power over life and death, the United Nations Declaration of Human Rights should at least indicate the direction of progress.[6]

12. Whilst the imposition of the death penalty for reasons of vengeance or revenge finds few if any advocates, and the notion of a premediatated judicial killing is generally abhorred, retributive justice and necessity in the public interest are still considerations which hold considerable sway. As new forms of terror and violence evolve in society, the tendency to revert to the death penalty as the main deterrent is conspicuously increased. There are large bodies of people and a wide range of auhorities who believe that capital punishment is necessary either as a deterrent or at least as a matter of basic justice.

13. Whether or not it really deters, the way in which States still use this penalty in times of emergency shows the persistence of its appeal. For every State Member of the United Nations devoted to the abolition of capital punishment in law or fact there would appear to be three others legally committed to its sanction and use—at least as a very last resort.[7] Moreover, there are examples of some States abolishing the death sentence, but then returning to it either in law or practice, either because they see no adequate way of dealing with certain offences or because they feel the need for some final and extreme public denouncement of the particular behaviour for which the sentence is awarded.

14. The debate on the death penalty continues to revolve around the two main questions of its morality and its usefulness. The moral issue is the right of any society to put any person to death, i.e., to deny him his basic human right to live. The question of the utility of capital punishment turns essentially on its efficiency in preventing crime. Then there are a number of subsidiary questions arising from the offences for which the death penalty is used or from the conditions within which it might be applied. Whether, for example, it is a just penalty in some cases or inappropriate to the nature of the offence;

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[4] Between March 1969 and December 1972, 84 Member States replied. For substantial excerpts of these replies, see ST/SOA/118 and addenda. The reports published in 1962 and 1967 were based, respectively, on 64 and 54 official replies from Member States.

[5] Quoted by Marc Ancel, "The problem of the death penalty", Thorsten Sellin (ed.), in *Capital Punishment* (New York and London, Harper and Row, 1967).

[6] See the articles of the Declaration of Human Rights relevant to capital punishment in annex II.

[7] For a list of Member States and their position on the death penalty, see annex I.

whether it is only a last resort with every possible legal safeguard being accorded to anyone whose life is placed in jeopardy by law; whether in practice it is being applied uniformly or whether it is used discriminatorily, i.e., mainly against particular classes, ethnic groups or sections of society.

The United Nations

15. In the past the United Nations has given consideration to most of these questions. However the main focus in the 1962 and 1967 reports on this subject issued by the United Nations was on the deterrent effect of capital punishment. They concentrated more on the practical issues rather than the moral ones. The conclusion of those reports was that no significant differences in the crime rate could be found before or after the abolition of the death penalty in abolitionist countries. They also indicated that, other things being equal, no significant differences could be found in the crime rates of countries with or without the death penalty.

16. Since the issuance of these reports, the United Nations has gradually shifted from the position of a neutral observer concerned about, but not committed on the issue of capital punishment, to a position favoring the eventual abolition of the death penalty.[8]

17. From the moral standpoint, the United Nations is following the guidance of its Universal Declaration of Human Rights. From the practical or utilitarian point of view, it is acting on the evidence so far made available, and is therefore calling only for the "eventual" abolition of capital punishment.[9] Not all Member States favour early abolition of capital punishment. Some are moving towards it. Others regard it as right even if not immediately practicable for them, and there are some who feel that capital punishment is an unfortunate but, at this time, unavoidable necessity.

The concept of abolition

18. The concept of the abolition of capital punishment is rather complicated. In its fullest meaning "abolition" should indicate that a country has expunged the death penalty from its laws entirely and that in practice no executions are or can be carried out—not only during normal times but even in times of political crisis when constitutional safeguards for civil rights are suspended and usually harsh special measures are imposed for reasons of state security. Information given by Member States that even countries which are *de jure* abolitionist still usually retain the right to impose capital punishment for a few exceptional crimes, such as those related to the security of the State, especially during a war or a period of extreme political turbulence.[10]

19. On the other hand, there are countries which have retained the death penalty in law, but which in fact are abolitionist in that the sanction has not been used for a number of years and in fact a tradition or even a constitutional convention has developed that the death penalty will not be used at all. At least one country has provision for the death penalty in law but has no provisions in its administrative law which would make it possible to execute anyone even if the death sentence was to be pronounced.

Alternatives to capital punishment

20. The problem is undoubtedly complicated by the failure of States as yet to find suitable alternatives to capital punishment or to find other penal methods sufficiently drastic yet humanitarian. A consensus is emerging that taking the life of a person in the course of administering justice is an extreme measure justified only by the gravest conjunctions of crime and social crisis. Even groups or Governments which feel capital punishment to be a necessity of last resort would usually be prepared to dispense with it altogether if an appropriate substitute could be devised.

21. For various reasons life imprisonment—a "living death in prison"—is not always considered a suitable alternative to death. It is obviously less final, it demands more resources and is apparently a difficult sentence to maintain in modern society. On the other hand, the factors of mercy and the apparent rehabilitation of the criminal who may have committed the crime in a fit of passion or outrage, have reduced the full application of life sentences. Even Nazi

[8] See Council resolution 1574 (L) and General Assembly resolution 2857 (XXVI).

[9] See General Asembly resolution 2857 (XXVI).

[10] For instance, England and Wales retain capital punishment for arson in dockyards and arsenals and piracy with violence, and Peru retains capital punishment for kidnapping followed by homicide.

war criminals sentenced to life imprisonment have been released on grounds of mercy and compassion after serving a long term of imprisonment. The quality of mercy has been extended in some countries to successive reductions in the interpretation in practice of a sentence of life imprisonment so that 10 years' imprisonment or less is frequently held to mean a life sentence. The effectiveness of parole has encouraged its application to more people serving life sentences and there is an obvious difference between the questions of justice related to the offence and justice related to the offenders' suitability for release into society.

I. THE CURRENT SITUATION

22. It is difficult to provide any truly global picture of the use of capital punishment. To do justice to all the elements involved, any study of a world-wide dimension would need to include not only a presentation of the laws in all their complexity and variations from country to country but also a comprehensive expose of the diversity between nations, their ideologies, their social systems and their cultures.

23. An important consideration in any truly international appraisal is that most published studies of the death penalty have taken their data and orientation from the developed world and largely from the western world. The result has been a rather misleading picture which has frequently given an unwarranted universality to values, theories or practices prevalent in the west. In academic circles it has sometimes become unfashionable to support capital punishment: civilization is tolerance and severity in punishment a sign of backwardness and regression, and so liberal thinking and the abolition of the death penalty are expected to coincide. Therefore the writing available on the death penalty leaves the impression that there is a certain inevitability about the movement to more "civilized standards" and fewer executions. A reader could be excused for concluding that throughout the world there is in fact an irresistible and ineluctable trend towards the abolition of capital punishment or that even where death is still a last legal resort, the penal codes have fewer offences leading to capital punishment or that methods of execution are becoming more humane or that the persons liable to the extreme penalty will usually have the benefit of the best legal safeguards.

24. In fact, the world picture provides no such assurances. If one spreads consideration to include developed countries of both the east and west and the wide range of developing nations in Asia, Africa and Latin America, the picture changes appreciably. It is extremely doubtful whether there is any uniform progression towards the restriction of the use of the death penalty; progress is discernible only in the very long run and it is usually marked by many ups and downs. Periods of abolition or non-use may be succeeded by widespread executions in a revolutionary situation or by sudden return to the death penalty as a sanction where a State feels insecure.

25. Obviously, it is possible to indicate other periods of history when the death penalty was more widely used but a chronological trend would be extremely difficult to establish. There are areas of the world with certain earlier priods of their history which could be held up as models in terms of less severe penalties, less violence and more peaceful ways of life. Very simple societies usually prefer compensation to vengeance or execution and, in terms of blood-letting, economic and social progress may have marked a regression. This is not an argument to be pursued here but it is a fact which unsettles any confidence that higher levels of economic and social development must be reflected in less use of the death penalty.

26. With respect to the legal abolition of the death penalty, progress towards abolition has been slow. Only seven countries have abolished capital punishmment since the signing of the United Nations Charter. Certainly, the number of offences for which the death penalty could be imposed has been declining progressively since the nineteenth century in many parts of the world; but in terms of expunging the death penalty from the criminal codes, since the first abolition by law in 1863 there has been an average of only about six countries abolishing the death penalty every 30 years.[11]

27. In the United Nations report, *Capital Punishment*, published in 1967, it was shown that, in general, the categories of offences from which the death penalty was removed "are those, particularly homicide, to which it has tradi-

[11] See table 2 in annex I.

tionally been applied; whereas the categories for which it was newly invoked are economic and political crimes". Whilst this trend has continued, there have recently been a number of quite notable applications of the death penalty to armed robbery. Violent crimes have led to calls for a re-introduction of the death penalty for some of the homicides. Apart from economic crimes and corruption, a few newer types of crimes have begun to qualify in some countries for the death penalty. Hijacking, drug trafficking and currency dealing as well as economic crimes and corruption are some of the offences now punishable by the death sentence in certain countries. Even ordinary theft, though not usually regarded as a crime deserving the death penalty, has in come countries received the extreme sanction when in number or size the incidents of theft has seemed to grow beyond control.

28. The death penalty would still appear therefore to be regarded by a considerable number of Governments as an efficient or at least an acceptable way of getting rid of certain types of problems—whatever the experts may have to say about the lack of deterrent effect of this penalty. Moreover, it seems clear that in most cases Governments satisfy public opinion by using this sentence. Whether this popular backing for the death penalty be regarded as desirable, regressive or a sheer lack of understanding, it is nevertheless a factor. Indeed, there is evidence that even the countries totally abolishing capital punishment have sometimes acted contrary to the majority view of the population.

29. Harsher methods of execution have been introduced lately as a supplementary means of frightening potential offenders. For instance, there have been executions preceded by tortures or beating, and even beating to death has itself been a recent method of execution.

30. Whatever the factual position, public execution is still sought as a deterrent. And whether a deterrent or not, it is still regarded as an appropriate response to certain types of conduct—a fate deserved—whatever its specific effects might be.

31. As far as crime is concerned, the deterrent effect of these recent uses of the death penalty still remains to be proved, since the penalty was introduced or re-introduced not very long ago.

32. The countries retaining the death penalty in their laws are by far the majority in the world. There are only nine States Members of the United Nations which, by their own account, are totally abolitionist (see annex I). This picture is, however, an oversimplification. First, there is no clear-cut division between "abolitionist" and "retentionist" States. Those terms do not always indicate the absence or presence of executions. A number of States claiming to be "abolitionist" actually retain the death penalty for one or more "exceptional" crimes such as killing a guard or an inmate when the offender is undergoing a life sentence; the murder of the head of the State, or of a representative of the law such as a policeman; or treason; or kidnapping followed by homicide; or perhaps for crimes of military or political nature. The most common exceptional crimes punishable by death are treason and crimes related to the security of the State.

33. It is important to note that these exceptional crimes are often judged by exceptional courts with special procedures which often do not give to the accused all the guarantees he would get in an ordinary tribunal in a retentionist country. On the other hand, many of the retentionist countries use the death penalty so sparingly that, if one does not maintain the division between political and ordinary crimes, they may actually be executing fewer people than do certain "abolitionist" countries.

34. It is useful to consider the division drawn between "ordinary" and "political" crimes because today the problem has sometimes shifted from ordinary offenders to political offenders. In the past, there tended to be more tolerance of the political offender and sometimes there might even have been a bar on the sentencing to death of such offenders; currently, the tolerance is rather of the ordinary offender.[12] The moves towards abolition or restriction are usually made in favour of the ordinary offender. This shift to a more intransigent attitude towards the political offender could be due in some measure to the rise in terrorism and guerrilla warfare.

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[12] As in France from 1848 to 1960 and in Guatemala today. It is interesting to note that the re-establishment of the death penalty for political offenders in France was linked with the war in Algeria.

35. The difference between an "ordinary" crime and a "political" crime is always left to the State to decide. In some countries, a great number of offenders condemned to death for ordinary crimes are considered by most neutral observers to be political offenders. On the other hand, it is quite evident that many forms of behaviour can be labelled political crimes and that the Government by this means may find a very useful way to suppress any opposition in the State, and at the same time be considered an "abolitionist". An offender can also easily claim a political motive, when he knows that by doing so he could obtain better treatment or the sympathy of the public. It is becoming more and more common in developed countries to see prisoners and persons condemned to death being supported by anti-government movements as "martyrs". Any ordinary offence can have a political aspect and therefore any ordinary offender could be considered as a political offender. Conversely, any political offence is generally also an ordinary offence and therefore political offenders can be considered as ordinary offenders. For instance, some subversive groups consider stealing and murdering perfectly justifiable ways to bring about the downfall of the regime they oppose and consequently consider those acts (traditionally regarded as ordinary crimes) to be political acts. At the same time, strictly political offences involving aircraft hijacking could be considered as ordinary crimes in the sense that stealing, piracy and murder can be involved. Therefore, it would appear that it is not easy to justify maintaining a division between political and ordinary crimes, between death penalties for political crimes and death penalties for ordinary crimes.

Reported changes since 1965

36. The following are the changes reported by Member States since 1965, in pursuance of General Assembly resolution 2393 (XXIII) of 1968. Only the changes reported by the Governments or the national correspondents on social defence are listed, but other Member States may have changed their laws regarding the death penalty.

Abolition

In *Austria*, the death penalty was abolished in February 1968 for the exceptional crimes to which it could still be applied. Therefore, Austria is now a totally abolitionist country.

In *Finland*, where the death penalty could be applied during wartime, capital punishment was totally abolished on 1 June 1972.

In the *United Kingdom*, the Murder Act passed in 1965 was confirmed by Parliament in 1969 and thus the death penalty was abolished except for treason and, in England and Wales, for arson in dockyards and arsenals and piracy with violence. In Northern Ireland, capital punishment was abolished except for murder of any constable or person in the service of the Crown and murder done in the course of any seditious conspiracy, and also for arson in dockyards and piracy with violence.

In *Malta*, capital punishment was abolished in 1971.

In *Mexico*, the states of Nuevo Leon and Morelos abolished the death penalty, bringing to 29 the abolitionist states and territories of Mexico (out of 32).

In *Peru*, capital punishment was abolished in 1971 except for kidnapping with homicide and for treason.

Restrictions of the categories of offences leading to the death penalty

In *Australia* in 1968, the state of Tasmania abolished capital punishment for murder and the Federal Government abolished it except for murder and treason in the following territories: Australian Antarctic Territories, Australian Capital Territory, Christmas Island, Cocos Islands; Norfolk Island and the Northern Territory.

In *Bulgaria*, since the new code was introduced in 1968, there has been a reduction of one third of the cases leading to the death penalty.

Other changes

Argentina reintroduced capital punishment in March 1971.

Brazil reintroduced capital punishment in 1969 for crimes against national security with criminal loss of life.

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Canada had temporarily abolished capital punishment from 1967 to 1972, with few exceptions, as a trial period before voting on retaining or definitely abolishing the death penalty. The matter is again before Parliament and another five-year ban period will be requested by the Government.

In the *United States of America*, the Supreme Court ruled that capital punishment was unconstitutional because of the unfairness in its application. To what extent this decision limits the use of the death penalty is not clear yet. Some states have already established the death penalty on a mandatory basis. The Supreme Court's decision seems to allow the death penalty only on a mandatory basis.

II. THE SAFEGUARDS FOR THE ACCUSED

37. The irrevocable nature of any execution has always been one of the main arguments of the abolitionists. In the face of this irrevocability, the United Nations has sought to promote "the most careful legal safeguards" for those likely to be sentenced to death. Obviously, the abolition of capital punishment by law is the best legal safeguard but, failing that, the United Nations calls for the greatest care to be taken to protect the accused in danger of death before, during and after his trial. The importance of such legal safeguards for the world as a whole may be seen from the fact that 75 percent of all Member States have to be regarded as retentionist.

38. Moreover, the practice of executing certain types of offenders either without trial or with a hasty prejudicial procedure is still unfortunately too well-known. In some areas and at certain periods, the high standards of judicial practice are circumvented, suspended or disregarded. Fortunately most Member States are aware of this problem and provide safeguards for anyone in danger of capital punishment.

39. It has to be recognized, however, that getting at the truth and protecting the accused are not always compatible objectives. Perfect and unimpeachable safeguards for an accused would make it extremely difficult for there to be any investigation or any hope of evidence being obtained for trial. On the other hand, it is equally obvious that allowing free rein to investigators and prosecutors could invite a miscarriage of justice. The conflict is not new but it has modern dimensions. In earlier times, the need to establish the truth in any given hearing took unquestioned precedence. The need to protect the accused emerged relatively recently.[13] It is also evident that the concept of a safeguard implies a plurality of interests in a society and to some extent a recognition of the human limitations in any system of law enforcement. Where such a plurality of interests does not exist or is excluded by political definition, the attitude to safeguards is bound to differ.

40. In modern times the safeguards fall into different categories. Some are designed to protect the accused from the police, some to protect him from witnesses and some to safeguard him from the public and the mass media, whilst other provisions are intended to give him a measure of protection from possible errors of the judiciary. There are safeguards from political interference and forms of protection from his own ignorance or poverty.

"Protection" against errors of the judiciary

41. Among the safeguards to "protect" the accused from the errors of the judiciary, that is, from the Court's decision which could, for one reason or another, be unfair to the defendant, the most common are the appeal and the pardon.

The appeal

42. The appeal can be either on question of fact or on question of law. "Appeal", *stricto sensu*, is the retrial of the case by another and generally higher court while "cessation" is the consideration by a special court of the errors of law in a trial made by an ordinary court.[14] A "revision" is an exceptional pro-

[13] Arthur Koestler, in *Reflections on Hanging* (New York, MacMillan Co., 1957), pages 33–34, reports that in England prisoners on capital charges were not allowed counsel until 1836, that a person charged with a capital offence was not allowed to give evidence on his own behalf on the witness stand until 1898, and that, before a Court of Criminal Appeal was established in 1907, the only hope was the Royal Pardon.

[14] The following retentionist States reported provision for appeal for ordinary crimes: Australia, Bulgaria, Canada, Cyprus, Greece, Guatemala, Iran, Ireland, India, Jamaica, Kenya, Liberia, Malawi, Malta, Mauritius, Pakistan, Philippines, Poland, Sierra Leone, Singapore, Sri Lanka, Swaziland, Trinidad and Tobago, Zambia. The following States reported provision for cessation: Cameroon, Czechoslovakia, Egypt, France, Hungary, Iraq, Khmer Republic, Lebanon, Libyan Arab Republic, Madagascar, Morocco, Niger Peru, Rwanda, Spain, Syrian Arab Republic, Togo, Tunisia, Ukrainian SSR.

cedure, when the sentence is final and therefore no longer subject to appeal and new facts come to light disclosing a miscarriage of justive.[15]

43. The number of times an accused may appeal varies from country to country. For instance, two appeals are possible in Jamaica and Mexico. As a rule, federal States such as the United States of America or the USSR allow for a large number of recourses.

44. In addition, there has emerged more recently new forms of appeal based upon the question of the constitutionality of the charge, the trial or the sentence. A person might claim that the law by which he was tried or the methods used in investigation, or the form of trial, or the sentence passed were either separately or in combination violations of his fundamental human rights embodied in the constitution of the State. Presumably, this is a new acceptance. The right to constitutional protection was always there in countries with human rights clauses in their basic statutes. However, the exercise of this right and the means to lodge an appropriate appeal were not always available as they are now in some countries. The most conspicuous examples of this kind of appeal have occurred in the United States of America in recent years.

45. All sorts of provisions may either restrict the possibilities of appeal, making it subject to certain authorizations, or make it easier. Some systems make the appeal automatic in case of a sentence to death. A number of countries make it an obligation for the judge at the end of the first sentence to remind the accused of his right to appeal.[16]

The pardon

46. This prerogative of mercy is usually vested in the highest executive authority. It is the direct heir of the right of life and death that a sovereign used to have over his subjects. His subjects could always petition for his intervention. As a rule, the pardoning authority is the head of State or of the Government, in a few instances it is a political assembly. The petition for pardon is often automatic.[17] The pardoning authority generally receives the advice of a special body in charge of reviewing the cases of the persons condemned to death.

47. Another type of protection for the accused is inherent in legal systems where the burden of proof lies firmly on the prosecution. The accused may not even need to speak at all in his own defence. The prosecution must prove its case before he is called upon to reply.[18] Actually, this obligation on the prosecution prevails in most courts, whether adversary or inquisitorial, because in practice most systems require a substantial case to be established by those bringing a charge. Another protection may be traced in the requirement that before a sentence is passed in some Moslem countries the opinion of the Mufti (legal expert on Koranic law) is requested. In one country, the execution of the death sentence may be suspended for two yars and the condemned may be spared subject to good behaviour. In many countries the judge has to justify his decision at the court when he passes the sentence. Naturally, real risk occurs when procedural safeguards of this kind are disregarded, improperly administered, suspended or abrogated by special courts or tribunals in time of emergency, or when the right to appeal against procedural errors is restricted for some reason.

Protection against the police

48. A great part of the search for the truth lies in the hands of the police. Here much depends upon the amount of power invested in the police but there are situations where, in fact, a court simply confirms the police investigation. Generally speaking, the police is the only or, at least, the principal body allowed to use coercion on citizens so that the need to follow this exercise of power with a careful trial is emphasized. In some countries, a police investigation is restricted in time and a case has to be handed over to legally qualified prosecutors or to junior judges within a specified number of hours.[19] Here, the accused is protected by a time-limit against police excesses. Elsewhere, the po-

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[15] Among the retentionist States providing for revision are: Bulgaria, France, Iran, Iraq, Khmer Republic, Japan, Lebanon, Morocco, Poland, Rwanda, Togo, Ukrainian SSR.

[16] For instance, in France, the Khmer Republic, Madagascar, Tunisia.

[17] For example, such is the case in Bulgaria, Cyprus, France, Morocco, Sierra Leone, Trinidad and Tobago, Tunisia.

[18] For instance, in the United Kingdom and in the United States of America.

[19] For instance, in the USSR, the accused must be brought to the prosecutor within 48 hours.

lice powers are to some extent governed by the need for court permission to exercise them.

49. In most countries, laws exist to punish the use of physical (less often psychological) coercion as may occur in the course of a police interrogation.[20] In some countries, the confession of the defendant alone is not enough to condemn him and therefore one of the main incentives for an abuse of investigative power is suppressed.[21] Sometimes the person detained by the police has the right to ask for a medical examination every 24 hours; the same request can be made by a family member or his lawyer.[22] In other systems the person accused has the right to refuse to speak at all and may have the right to request the presence of a lawyer from the very beginning of the investigation.[23]

Protection against witnesses

50. This is a subject larger than the scope of this paper but obviously legal restrictions on persons who may give false testimony, which places a man's life in jeopardy, are desirable safeguards. Most countries have laws designed to prevent perjury or to provide for the adequate testing of a deposition by cross-examination before or at the trial. Most countries have laws specifying the relative values of different kinds of testimony given by witnesses. For instance, children or mentally retarded persons may not be allowed to bear witness and corroboration of a witness's testimony is required for some offences.[24] In some countries young people are allowed to bear witness but without taking an oath, the implication being that their testimony carries less weight than that of an adult. Generally speakiing, testimony without forms of circumstantial evidence are not enough to condemn a person in a capital case.

Protection against the public and the mass media

51. A modern State, as a matter of fundamental law and order, protects the accused from the crowd which would sometimes sooner lynch the person suspected of a heinous crime than leave him to the courts of justice. All States with police forces obviously provide for this kind of basic protection against public violence. Yet it is not unknown for this elementary protection to be withdrawn or partially withdrawn in a time of political upheaval or where the offence has political, racial or other connotations.

52. The majority of the Member States also protect the accused from slander, in particular, that which is most likely to come from the mass media and which might possibly influence a jury, the witnesses or the decision of the court. In certain countries the law is very strict about the use of epithets for the accused: "suspect", "accused", "murderer" etc. are words which often prejudge the issue and in some countries there are penalties for implying that the person is guilty of the crime before it has been proved.[25] In some countries to protect the young offenders, the trials are not public. This, of course, has both advantages and disadvantages for the accused. Where life is endangered, a non-public trial is not usual except where the offences may have been political and the usual public trial is denied.

Protection against political interference

53. The doctrine of the separation of powers has widespread appeal, and the independence of the judiciary from the executive and legislature is enshrined in many constitutions. But this way of thinking is more characteristic of the western countries than most of the socialist countries. There, the laws must not only reflect the people's will but educate them. The judges, in the USSR for instance, are elected, and there is a great participation of the citizens in the process of law, while, in most western countries, and particularly in the Romano-Germanic systems, the judges are not elected and are nominated for life to ensure their independence. In the countries following the Romano-Germanic system and in the socialist countries, there is a public prosecutor who represents the interests of society. But the actual degree of independence

[20] Cf. British Judges' Rules.

[21] In the United States of America, the courts' exclusionary rules prevent the introduction of a confession.

[22] Such is the case in France.

[23] As in the United States of America.

[24] A perjury charge, in the United States of America, for instance, must be established by more than one uncorroborated witness, and circumstantial evidence alone is not enough.

[25] As in France and the United Kingdom.

depends greatly upon local traditions and practices. Such independence is likely to be quickly affected by emergency situations and much depends upon the local political realities.

54. In some countries, the "ordinary" criminals may be represented by certain revolutionary groups as being political prisoners. Demonstrations and other forms of protest may be organized by these groups seeking to arouse public opinion and to influence the tribunals. Political intervention of this kind may not confine itself to supporting defendants, but may demand instead the condemnation of political opponents who are before the courts.

Protection against ignorance and poverty

55. In most modern societies the laws are too complex for the average citizen, with no legal training, to be able to defend himself. The right to have a defence counsel, and a lawyer in particular, is practically universally recognized, at least for the "ordinary" tribunals.

56. When the defendant is on trial for his life, most countries make it obligatory for him to be legally represented. However, this requirement does not always cover all stages of the proceedings, the investigation stage for instance. The Court is also sometimes obliged by law to remind the accused of his rights, namely, the right to appeal, the right to remain silent etc. This obligation is extremely important for a good protection of the accused, since most of the time he is not "reminded" but *learns* his rights. This is especially true of the lower-income groups ill-equipped to deal with the intricacies of the law. In the majority of Member States it is an obligation, in the case of a person liable to be senteced to death, for the Court to provide free legal assistance to the defendant, in countries where one has to pay for the services of a lawyer. In many socialist countries these services are in any case free.

57. Most countries provide for an interpreter in case the accused does not understand the language spoken in the Court.

58. The great majority of Member States report never condemning to death persons under 18 years of age.

Time-limits

59. In its resolution 2393 (XXIII), the General Assembly asked Member States to give their opinion on a supplementary safeguard, namely, the time-limit. This time-limit is the lapse of time before which no death sentence can be carried out. The resolution did not specify any period or say from when this time-limit was supposed to run, whether it should be from the time of the first finding of guilt or from the failure of the last appeal.

60. The answers to these questions tended naturally to refer to different conceptions of time-limits. An overwhelming majority of States, however, rejected the idea of a time-limit. They did not see any justification for setting an arbitrary period of time once the last recourse had been rejected. More than that, they thought a time-limit could be as inhumane as it might be protective and rather favoured a speedy execution of the condemned person once the last appeal had been dismissed. The only country which reported a delay before which no execution can take place was Sweden which, according to the Geneva Convention of 1949 relative to the Treatment of Prisoners of War, does not carry out an execution before a delay of six months following the death sentence. In Cyprus, the execution has to take place between eight and nine weeks after the sentence of the Court of Assizes.

III. THE LAW IN PRACTICE

61. The evidence is that most countries in the world do provide in their laws for the rights of the defendant. The real problem is one of implementation. Having the right laws enacted to protect a person accused of a capital offence does not invariably ensure the fair treatment of the accused. Gaps in the laws always permit the administrators of justice to make decisions or adopt practices inimical to the rights of the defendant. Or, at times the regular laws may be arbitrarily abrogated to cope with emergencies or circumstances considered too abnormal for the ordinary law to deal with.

62. A fundamental issue here is one of discretion. To what extent can discretion be vested in those charged with the conduct of government or the administration of the law? Law without discretion can be as unjust as untrammelled discretion, but if the legal safeguards enshrined in law are not

guaranteed by ancillary measures to monitor the law in action, then the likelihood of an accused in danger of death being denied his rights is greatly increased.

63. It is not enough to enact that no confession should be obtained by torture, measures to prevent any such action must be taken (such as the presence of a lawyer, or medical visits, or confessions not admitted as evidence etc.).

64. Again, the administration of justice reflects the power situation in society; it will have the same values and the same prejudices. For instance, if in a society a group of citizens are discriminated against it is doubtful that they will be treated fairly in the administration of justice, even though there may be no grounds for that discrimination in the laws.

65. One of the most powerful arguments of those who oppose the death penalty in all circumstances is that it has not proved possible in the past to make it sufficiently precise, uniform and consistent. In some countries the authorities are accused of not dispensing the death penalty with an equal hand. If prosecutions fall unequally on the poor and underprivileged, on the minority groups or on the political opposition, then the administration of the law is showing a image considerably different from that presented by the law.

66. Nevertheless, even when people have rights and are all treated equally, there is still the problem of ignorance. Many people, particularly in the lower-income groups, do not know their rights and/or are afraid to claim them when they are not respected. Not infrequently there are certain law enforcement bodies which tend to think that it is better this way because if all the rights of all the citizens were always and in every situation respected, it would paralyse the maintenance of law and order. Whatever the merits of this argument, it can have no force where an uneducated or unsophisticated person is placed on trial for his life. Here, at all stages his rights need protection and support.

67. It may not be enough to prohibit the use of violence in the interrogation of the accused, as do a very large majority of States. Administrative checks are required to inhibit any such proclivities amongst the investigators.

68. No consideration of the law in actual practice would be complete without reference to the many factors of public life which impinge upon the law and threaten its impartiality. Political action, the influence of the mass media and the effect of public opinion can never be overestimated. The public often exhibits an inordinate interest in trials for capital offences. Conversely, the influence of public opinion has sometimes mitigated harsh laws, showing a more humane image than that of the official justice.[26]

69. Another problem encountered in most countries is the financial aspect of the defence. The value of the defence counsel is too often in proportion to its cost in the countries where one has to pay for the defence.

70. Finally, the defences available to a person likely to be sentenced to death and the facilities accorded to him to protect his rights need to be widely propagated; few countries provide for this.[27]

71. These are some of the different factors that can make the application of the death penalty very questionable and sometimes very unfair. Considering that a human life is at stake, there should be no need to emphasize their importance. The injustice, the inconsistency or unfairness not of the law but of the conditions for its application has always been a major argument for the abolition of the death penalty. In fact when the United States Supreme Court banned capital punishment, it was on this ground.[28]

Information on progress of report on legal safeguards to be submitted to the General Assembly

72. A special report on "practices and statutory rules which may govern the right of a person sentenced to capital punishment to petition for pardon com-

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[26] One may recall that in eighteenth century England, when people could be condemned to death for the most insignificant theft, the people were unwilling to report the cases and the juries would consider the thief not guilty, so much so that petitions were signed by businessmen which forced the justice to abolish capital punishment for these offences and put milder ones so that the offenders would not go unpunished.

[27] This information may be propagated under an educational form as in a number of socialist countries, among which is the USSR.

[28] United States of America, Supreme Court, *Furman vs. Georgia* (29 June 1972). The Court held that because of the arbitrariness of its application, the death penalty was an "unusual" and "cruel" punishment and therefore violated the eighth and fourteenth amendments to the United States Constitution.

mutation or reprieve" was requested by the General Assembly in its resolution 2857 (XXVI). The Assembly in November 1972 asked the Secretary-General to inform the Council on the progress made in collecting that information (resolution 3011 (XXVII)). An appreciable number of Member States have replied to the queries of the Secretary-General since 1969 but due to the relative paucity of substance of most of the replies, this work will require further research. The social defence national correspondents have received questionnaires and a few replies have been received from them. More extensive requests for information will have to be sent to the Member States. The additional work will probably require one more year.

IV. CONCLUSION

73. Since the intention of the General Assembly embodied in resolution 3011 (XXVII) is to promote abolition, it would seem that there is still much more to be done. Opinion polls made in abolitionist countries as well as retentionist countries show a majority of people favouring capital punishment. It is also evident that on a world scale, Governments are inclined to favour the maintenance of this penalty.

74. The death penalty is always used when a particular problem seems to grow out of proportion and frightens public opinion or when a political opposition has to be crushed. It has been used in a number of countries to fight armed robbery or to respond to a crime wave; it is applied in some socialist countries against economic crimes; other countries have had recourse to the death penalty to fight the recent growth in drug trafficking, or to punish hijackers of aircraft after incidents which have outraged public opinion. States seeking to protect themselves against freedom-fighters and others trying to control terrorism are also likely to favour the death penalty.

75. In the industrialized world, the move appears to be more towards a reduction of condemnations and executions than towards the eradication of capital punishment from the penal code. Progress towards abolition, where it appears, is to be found in practice rather than law, that is, in the application of the law rather than in statutory exclusion. Some courts are more and more reluctant to impose the death penalty and even more hesitant about actually carrying out executions. But this must not be taken as a general rule, for even this practical shift towards clemency is not nearly as widespread as might at first appear.

76. The impression of a steadily abolitionist evolution is due to the importance given to trends in a few larger countries which happen to be in the spotlight of world politics, and which have joined in recent years the abolitionist group. Meanwhile, many countries have made no progress at all towards the abolition of the death penalty. Indeed, in some cases, they have been using it more widely and have been using harsher methods to put the condemned to death.

Tasks for the future

77. The States Members of the United Nations have decided that abolition must be the right direction for human society to take though they do not say when. All the arguments for and against will presumably continue in the intervening period. The need now is for more studies than those carried out so far —and for studies in cultures more widely diversified than those carried out to date. A tendency to use or not to use capital punishment needs to be understood not in the judgemental sense of other nations but in the context of a country's own problems so that the difficulties feared as as a result of its abolition—or the real issues involved in its abolition—are better understood. Despite the information supplied by Member States for this report, more data are required.

78. The use of the dealth penalty is not yet monitored by the United Nations in such a way as to allow the general trends to be followed. There is as yet no necessary notification of executions and the collection of comparative material requires the development of a type of questionnaire necessary not only for comparisons but for a flow of more precise data on trends and safeguards. Only at the meeting of the Consultative Group on the Prevention of Crime and the Treatment of Offenders (held at Geneva in 1968) was the death penalty fully discussed by a large United Nations group.

Annex I—States Members of the United Nations and Capital Punishment

Table 1 lists the Member States and their policies on capital punishment. Those which are "abolitionist by law" are countries whose laws do not provide the death penalty. "Abolitionist by law for ordinary crimes only" are countries whose laws provide the death penalty only for exceptional crimes and/or under exceptional circumstances. "Abolitionist by custom" are countries which, although their laws provide the death penalty for ordinary crimes, have not executed those sentenced to death, or have not sentenced anyone to death, for at least the past 40 years.[1] "Retentionist" countries are those which impose capital punishment for ordinary crimes (such as murder, rape, theft etc.). Finally, some federated nations may be divided on the issue, some States being abolitionist while others are retentionist; such is the case of Mexico.

TABLE 1.—STATES MEMBERS OF THE UNITED NATIONS AND CAPITAL PUNISHMENT

A —Abolitionist by law.
AO—Abolitionist by law for ordinary crimes only.
AC—Abolitionist by custom.
R —Retentionist.
D —Country divided on the issue (some States are abolitionist, others retentionist).

Afghanistan	AO	Equatorial Guinea [a]	R
Albania [a]	R	Ethiopia [a]	R
Algeria [a]	R	Fiji	R
Argentina	R	Finland	A
Australia	D	France	R
Austria	A	Gabon [a]	R
Bahrain	R	Gambia	R
Barbados	R	Ghana	R
Belgium	AC	Greece	R
Bhutan	R	Guatemala	R
Bolivia [a]	R	Guinea [a]	R
Botswana [a]	R	Guyana [a]	R
Brazil	AO	Haiti [a]	R
Bulgaria	R	Honduras	R
Burma	R	Hungary	R
Burundi [a]	R	Iceland	A
Byelorussian Ssr [a]	R	India	R
Cameroon	R	Indonesia	R
Canada [b]		Iran	R
Central African Republic	R	Iraq	R
Chad	R	Ireland	R
Chile	R	Israel	AO
China [a]	R	Italy	AO
Colombia	A	Ivory Coast	R
Congo [a]	R	Jamaica	R
Costa Rica	A	Japan	R
Cuba [a]	R	Jordan	R
Cyprus	R	Kenya	R
Czechoslovakia	R	Khmer Republic	R
Dahomey	R	Kuwait	R
Democratic Yemen [a]	R	Laos	R
Denmark	AO	Lebanon	R
Dominican Republic	A	Lesotho [a]	R
Ecuador	A	Liberia	R
Egypt	R	Libyan Arab Republic	R
El Salvador	R	Luxembourg	AC

See footnotes at end of table.

[1] Many new nations which have capital punishment in their laws have never executed any sentenced persons, but since most of these States have less than 20 years of existence, it is difficult to evaluate if this is really due to a conscious policy.

TABLE 1.—STATES MEMBERS OF THE UNITED NATIONS AND CAPITAL PUNISHMENT—Continued.

Madagascar	R	Senegal [a]	R
Malawi	R	Sierra Leone	R
Malaysia	R	Singapore	R
Maldives	R	Somalia	R
Mali [a]	R	South Africa	R
Malta	AO	Spain	R
Mauritania [a]	R	Sri Lanka	R
Mauritius	R	Sudan	R
Mexico	D	Swaziland	R
Mongolia [a]	R	Sweden	AO
Morocco	R	Syrian Arab Republic	R
Nepal [a]	AO	Thailand	R
Netherlands	AO	Togo	R
New Zealand	AO	Trinidad and Tobago	R
Nicaragua	AC	Tunisia	R
Niger	R	Turkey	R
Nigeria	R	Uganda	R
Norway	AO	Ukranian SSR	R
Oman [a]	R	U.S.S.R	R
Pakistan	R	United Arab Emirates [a]	R
Panama	AO	United Kingdom	AO
Paraguay [a]	R	United Rep. of Tanzania	R
Peru	AO	United States of America [b]	D
Philippines	R	Upper Volta	R
Poland	R	Uruguay	A
Portugal	AO	Venezuela	A
Qatar [a]	R	Yemen	R
Romania	R	Yugoslavia	R
Rwanda	R	Zaire [a]	R
Saudi Arabia [a]	R	Zambia	R

[a] The information concerning this Member State does not come from an official reply to the United Nations or a former United Nations publication.
[b] See paragraph 36 of the main report.

TABLE 2.—STATES MEMBERS OF THE UNITED NATIONS ABOLITIONIST BY LAW (TOTALLY OR FOR ORDINARY CRIMES ONLY)

1863	Venezuela	1928	Iceland
1867	Portugal	1930	Denmark
1870	Netherlands	1931	Nepal
1882	Costa Rica	1944	Italy
1890	Brazil	1945	Austria
1897	Ecuador	1949	Finland
1903	Panama	1954	Israel
1905	Norway	1961	New Zealand
1907	Uruguay	1969	United Kingdom
1910	Colombia	1971	Malta
1921	Sweden	1971	Peru
1924	Dominican Republic		

Also: Australia, two abolitionist states out of six. Mexico, 29 abolitionist states and territories out of 32. United States of America, 13 abolitionist states out of 50.

Annex II—Articles of the Universal Declaration of Human Rights Relevant to Capital Punishment

Article 3.—Everyone has the right to life, liberty and security of person.

Article 5.—No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.

Articles relevant to the legal safeguards for the accused

Article 7.—All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection

against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.—Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law.

Article 9.—No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.—Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.—(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence; (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

UNITED NATIONS,
SECRETARIAT,
November 17, 1972.

CAPITAL PUNISHMENT—INFORMATION FROM GOVERNMENTS COMPILED BY THE UNITED NATIONS SECRETARIAT

ADDENDUM—INFORMATION RECEIVED FROM GOVERMENTS

Bahrain

[Original: English]
[September 14, 1972]

The Bahrain Penal Code of 1955 provides for the application of capital punishment in the following cases:

1. Premeditated murder;
2. Treason;
3. Piracy;
4. Military action against the Head of the State or his Government.

However, the above law provides for the substitution of capital punishment by life imprisonment in the following cases:

(a) Where the person convicted of the capital punishment is less than 18 years old;

(b) Where the person convicted of the capital punishment is a pregnant woman.

Moreover, in all cases capital punishment cannot be executed without first obtaining the assent of the Head of the State on the said conviction.

While the Bahraini legislative authorities have not yet debated the question of the possibility of abolishing capital punishment, they would, however, give a greater thought and consideration, in the future, to the recommendation provided in paragraph 3 of the above-mentioned resolution [General Assembly resolution 2857 (XXVI)], which provides for restricting "the number of offences for which punishment may be imposed".

Honduras

[Original: Spanish]
[October 24, 1972]

La Republica de Honduras, fiel interprete de la Declaracion Universal de los Derechos Humanos, garantiza la inviolabilidad de la vida, sin que por ninguna autoridad pueda establecerse ni aplicarse la pena de muerte. El derecho de defensa es inviolable, y todo ciudadano tiene las garantias establecidas por la Carta Magna, de interponer todos los recursos estipulados por la ley. Toda persona acusada de delito tiene derecho a que no se prejuzgue su responsabilidad, considerandose como inocente mientras no se pruebe lo contrario. Ninguna persona puede ser presa o detenida sino en los lugares que determina la ley; y se prohibe absolutamente la fustigacion y toda clase de tormentos.

Malawi

[Original: English]
[November 9, 1972]
[Additional reply]

The Malawi Government has studied resolution 1574 (L), adopted by the Economic and Social Council at its fiftieth session, and clarifies its position as follows:

(a) The continued retention of the death penalty is considered by the Government of Malawi as necessary for the proper maintenance of law and order in Malawi and, in particular, for the deterrence of those who might otherwise commit the very serious crimes which still attract that punishment;

(b) The Government of Malawi has, at present, no plans for either the total abolition of the death penalty or for future restriction upon its use;

(c) There have been no changes in this respect since 1965.

Malta

[Original: English]
[November 8, 1971]
[Second additional reply]

The Bill to abolish capital punishment, to which reference was made in the Note of 16 September 1971 [from the Permanent Mission of Malta to the United Nations], has since been passed by the Parliament of Malta with significant amendments. The amendments in question withdrew the exceptions mentioned in the Note of 16 September 1971 and the Act now provides for the abolition of the death penalty and its complete erasure from the Criminal Code. The death penalty is now only retained in the Malta Armed Forces Act, 1970, and is applicable only to persons subject to military law for offences involving aid to the enemy.

UNITED NATIONS,
SECRETARIAT,
February 6, 1973.

CAPITAL PUNISHMENT—INFORMATION FROM GOVERNMENTS COMPILED BY THE UNITED NATIONS SECRETARIAT

ADDENDUM—INFORMATION RECEIVED FROM GOVERNMENTS

Czechoslovakia

[Original: English]
[December 6, 1972]

1. (a) Criminal proceedings against an offender accused of a penal act for which the Penal Code in its Special Part prescribes death penalty are of an ordinary character and are conducted, as provided by the Code of Penal Procedure, in the same manner as against offenders who committed other criminal acts. The perpetrator of a crime punishable by death penalty thus enjoys the same rights and guarantees as those accorded under the Code of Penal Procedure to any other offender.

Under section 36, paragraph 3, of the Code of Penal Procedure, the accused in penal proceedings concerning an act punishable by death penalty must have counsel already in the preparatory proceedings regardless of his property situation. If the accused does not make use of the right to choose his counsel, a counsel is appointed for him. If the accused is sentenced to death penalty, his right to submit an appeal or a petition for pardon is not limited in any way in comparison to other convicts.

All judgements imposing the death penalty shall be reviewed by the Supreme Court of the Czechoslovak Socialist Republic from the point of view of the legality of the judgement and the proceedings which had preceded it. If it finds that the law was violated in a manner which could have affected the imposition of the death penalty, it shall proceed as if a complaint against violation of the law had been filed, i.e., in its decision it shall pronounce that the law had been violated and that the judgement imposing the death penalty, or the proceedings preceding it, are cancelled and that it orders new proceedings.

The death penalty may be executed only if the judgement has been unaffected by the review carried out by the Supreme Court of the Czechoslovak Socialist Republic and the court has been advised that there has been no petition for pardon or that such petition has been rejected.

(b) Although there is no provision in the Czechoslovak legal regulations regarding the time limit within which the death penalty could be executed, there in fact exists time difference between the date on which the judgement becomes effective and the date of the execution of the death penalty. This is given by the period of time which is necessary for the review by the Supreme Court of the Czechoslovak Socialist Republic of the judgement imposing the death penalty, as stated in paragraph (a) of this information. Since the application of the existing legal guarantees always requires a certain period of time, we do not regard as necessary and purposeful to prescribe a time limit before the expiry of which the death penalty could not be executed.

2. The death penalty is expressly defined by the law as an extraordinary penalty. Possibilities for its imposition are very limited. Its imposition is possible only in respect of crimes for which the Penal Code allows the death penalty and only in cases where the degree of danger of such crime to the society is too high, where the imposition of the penalty is required for the effective protection of the society, or if there is no hope that the offender can be educationally affected by another penalty. There are 29 criminal acts for which the death penalty can be imposed. From these, 13 are military crimes for which the imposition of the death penalty comes into consideration mainly under the condition that they were committed in a state of defence emergency or in battle. In four cases they are the crimes against humanity.

The number of crimes committed in times of peace for which the death penalty can be imposed is very small. Its imposition comes quite rarely and practically only in cases of brutal murders. The Penal Code does not prescribe for any of the crimes capital punishment as the only penalty so that the court can choose between the death penalty or a long-term imprisonment.

The death penalty may in no case be imposed on a pregnant woman or a juvenile, that is a person who was not older than 18 years when he committed the crime.

Finland

[Original: English]
[January 18, 1973]
[Additional reply]

A declaration given in 1826 *de facto* abolished the execution of capital punishment in Finland. Since then, death sentences have not been executed in peace time. By an Act on the deletion of capital punishment from the penal system No. 343/72, of 5 May 1972, which came into force on 1 June 1972, the death penalty was deleted from the Finnish legislation concerning both peace and war-time and substituted by the penalty of hard labour for life.

Tunisia

[Original: French]
[November 27, 1972]

Le Code de procedure penal tunisien accorde dans les differentes phases de la procedure, des garanties aux accuses d'un crime passible de la peine capitale. C'est ainsi que lors d'une premiere comparution, le juge d'instruction doit, apres avoir constate l'identite de l'inculpe, lui faire connaitre les faits qui lui sont imputes ainsi que les textes de loi applicables a ces faits, et recevoir ses declarations (art. 69 du Code precite).

De meme, le juge d'instruction doit donner avis a l'inculpe (garantie capitale) de son droit de choisir un conseil parmi les avocats inscrits au tableau ou admis en stage. A defaut de choix, un conseil doit lui etre designe d'office. La designation est faite par le President du Tribunal (art. 69).

L'inculpe peut egalement communiquer librement avec son Conseil des apres la premiere comparution (art. 70).

En outre, tout inculpe de crime no peut etre renvoye devant le tribunal criminel que par la chambre d'accusation qui est une juridiction d'instruction de second degre. C'est en effet l'arret de renvoi de ladite juridiction qui fait de l'inculpe un "accuse" (art. 119). Devant la Cour criminelle, l'assistance de l'avocat est egalement obligatoire. Si l'accuse ne choisit pas un avocat, le President lui en designe un d'office (art. 141).

Si en principe, les jugements sont rendus a la majorite des voix, la condamnation a la peine capitale ou aux travaux forces a perpetuite est, aux termes de l'article 162, prononcee par quatre voix au moins. Il est a noter que la Cour criminelle se compose de cinq magistrats, le president compris.

Le Code precite prevoit egalement qu'aucun individu condamne a mort ne peut etre prive du droit de former un recours devant une instance judiciaire superieure ou de demander sa grace. En effet, d'apres les articles 258—261—162 et 163, tout condamne a mort peut se pourvoir en cassation dans un delai de cinq jours a dater de la decision contradictoire. Le pourvoi est forme par simple requete. Il est juge par ladite Cour toutes affaires cessantes.

Le condamne a mort est dispense de la consignation de l'amende a laquelle il serait condamne si sa requete etait rejetee.

Quant au droit de grace, l'article 342 dispose que lorsque la peine prononcee est la mort, la decision des qu'elle est devenue definitive est portee a la connaissance du Ministre de la justice qui la soumet au President de la Republique pour l'exercice de son droit de grace. La condamnation ne peut etre mise en execution que lorsque la grace a ete refuse.

Il convient egalement de signaler qu'en matiere d'execution, le Code penal tunisien prevoit dans son article 9 que la femme condamnee a mort, qui est reconnue enceinte ne subit sa pein qu'apres delivrance.

Enfin, s'agissant de l'abolition de la peine capitale, il ne parait pas possible, en l'etat actuel de la legislation tunisienne, de consacrer un tel principe. Toutefois, la Tunisie ne manquera pas d'etudier avec attention les propositions et suggestions qui seront faites par les National Unies a ce sujet.

Zambia

[Original: English]
[December 13, 1972]

A * * *

(i) A person condemned to death in Zambia is not deprived of the right to appeal to the Court of Appeal and whether a condemned person petitions for pardon or not, a death warrant is not signed by His Excellency the President unless the Advisory Committee on the Prerogative of Mercy has met, reviewed the case and made recommendations to His Excellency the President as to whether a person should be hanged or not.

(ii) A death sentence in Zambia is not carried out unless the procedures of appeal and a review by the Advisory Committee on the Prerogative of Mercy have been terminated.

The procedure is as follows:

(a) At the trial of a person for a capital offence, such person must be legally represented and is always legally represented.

(b) If the prisoner is sentenced to death by the High Court, he always appeals to the Court of Appeals, and the appeal is presented by a legal representative.

(c) If the Court of Appeal dismisses the appeal and confirms the death sentence, then automatically the Advisory Committee on the Prerogative of Mercy under section 55(4) of the Constitution of Zambia, reviews the whole case and advises His Excellency the President whether the death warrant should be signed or not, and whether the prisoner should be granted a pardon or reprieve.

(iii) No person may be tried on a charge of murder or manslaughter without legal representation.

B. In Zambia there are adequate legal procedures and safeguards, so that fixing a time-limit before the expiry of which the death sentence should be carried out would serve no useful purpose.

It is not intended to restrict the use of the death penalty or to abolish it, and no changes have taken place in this direction since 1965.

Senator McClellan. The next witness is Mr. Robert Dixon, Assistant Attorney General, Office of Legal Counsel.

Professor Dixon has been a consultant in the field of public law for several years. He is a former professor of law at various universities including George Washington University. He was a consul-

tant to the National Commission on Reform of Federal Criminal Laws, particularly on the question of immunity. Professor Dixon has testified here before and was very helpful during our processing of title II, the immunity title of the Organized Crime Control Act.

He later joined in filing a brief in the immunity case in which the Supreme Court sustained the constitutionality of that title.

We are very grateful for his past assistance and we welcome him here today. I am confident you will make a substantial contribution to our deliberations on these measures.

Very well, Mr. Dixon; you may proceed.

Will you identify your associates?

ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY RONALD L. GAINER, CRIMINAL DIVISION, AND JAMES KELLY, OFFICE OF LEGAL COUNSEL

Mr. DIXON. I have with me Mr. Ronald Gainer, who also appeared with Dean Sneed, again as a member of the Criminal Divison, an attorney. I also have with me Mr. James Kelley who is one of my attorneys in the Office of Legal Counsel, Department of Justice.

Senator MCCLELLAN. Very well.

Mr. DIXON. Mr. Chairman, I would propose that I condense my statement somewhat and present it in something less than its full version, and would appreciate the full version being placed in the record.

Senator MCCLELLAN. The prepared statement of Mr. Dixon may be placed in the record in full at this point. You may proceed, Mr. Dixon.

[The statement referred to follows:]

STATEMENT OF ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL OFFICE OF LEGAL COUNSEL, ACCOMPANIED BY RONALD GAINER, CRIMINAL DIVISION AND JAMES KELLEY, OFFICE OF LEGAL COUNSEL

Mr. Chairman and Members of the Subcommittee, I am pleased to have the opportunity to present the position of the Department of Justice with respect to capital punishment, as provided for by Chapter 24 in S. 1400, the Administration's proposed "Criminal Code Reform Act of 1973." The Department of Justice believes that the death penalty is an appropriate sentence for certain offenders found guilty of a narrow range of federal crimes which have a premeditated quality, are heinous in character, or involve a vitally important federal interest. In such cases, the death penalty serves recognized aims of the criminal law. It deters such conduct by others in the future; it incapacitates the offender; and, to borrow a phrase from Justice Stewart's concurring opinion in the now-famous *Furman* decision, it promotes "the stability of a society governed by law." *Furman* v. *Georgia*, 408 U.S. 238, 308 (1972). In our judgment, in the small number of cases in which the death penalty would be applicable, these societal interests would clearly outweigh rehabilitative concerns.

Federal criminal statutes presently on the books providing for the death penalty typically authorize its imposition in the discretion of the jury. Prior to last year's *Furman* decision, the Supreme Court has approved and, indeed, emphasized this near-total commitment to jury discretion with respect to the death sentence in federal cases. See *Andres* v. *United States*, 333 U.S. 740, 743 (1948); *Winston* v. *United States*, 172 U.S 303, 313 (1899). Similarly, State statutes carrying the death penalty usually authorize its discretionary imposition by the jury or judge, without standards to guide the exercise of discre-

tion. Less than two years ago, the Supreme Court sustained that procedure over Fourteenth Amendment due process and equal protection objections. *McGautha* v. *California*, 402 U.S. 183 (1971).

Last year's Supreme Court decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), however. cast considerable doubt upon the constitutionality of most federal and State death penalty statutes. In *Furman*, a 5 to 4 majority of the Court held that imposition of the death penalty in three State cases involving two rapists and one murderer constituted "cruel and unusual punishments" in violation of the Constitution. The penalties in those cases had been imposed by juries as discretionary judgments—the procedure, as I have said, which is typical under current federal and State law. Since the *Furman* decision was based on the Eighth Amendment (as applied to the States by the Fourteenth Amendment), it also applies to federal crimes.

The precise holding in *Furman* is, to say the least, difficult to state. Each of the nine Justices wrote a separate opinion, expressing a wide contrariety of view spread over 233 pages of the United States Reports. There was no opinion for the Court. The *per curiam* order of reversal rested on the votes of five Justices—Douglas, Brennan, Stewart, White and Marshall—each of whom wrote a concurring opinion in which none of their brethren joined. The four dissenting votes—cast by Chief Justice Burger and Justices Blackmun, Powell and Rehnquist—found no constitutional infirmity in the death penalty *per se*, or in the manner of its imposition in the cases before the Court. Three of the dissenting opinions, by the Chief Justice, and Justices Powell and Rehnquist, were joined by all four of the dissenting Justices.

A detailed analysis of the nine opinions in *Furman* would unduly lengthen my oral statement. I am submitting for the hearing record such an analysis. However, I believe it would be useful at this point to state very briefly what appear to be the principal thrusts of the key opinions, and the practical effect of the *Furman* decision from the standpoint of future legislative initiatives.

Only two Justices, Brennan and Marshall, concluded, on the basis of somewhat differing theories, that the death penalty is unconstitutional *per se*. Justices Stewart, White and Douglas based their concurrences on their conclusions that the statutes before the Court, in leaving the imposition of the dealth penalty to the unfettered discretion of the judge or jury, led to arbitrary and discriminatory impositions of the penalty. Each of the latter three Justices made it clear that they were not reaching the question whether mandatory death penalty statutes would be invalid. The practical effect of *Furman*, therefore, appears to be to leave to the Congress and the State legislatures some leeway to devise new statutory mechanisms for the imposition of the death penalty, provided such mechanisms restrict sentencing discretion and ensure increased rationality in patterns of death sentence imposition. This reading of *Furman* is supported by the detailed analysis of the decision I am submitting for the record and particularly by the following statement from Justice Burger's dissenting opinion—

"While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, *significant statutory changes will have to be made.* Since the two pivotal concurring opinions [Justices Stewart and White] turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, *legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentences in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.*" *Id.* at 400 (emphasis added and footnote omitted).

Under *Furman*, there are essentially three possible legislative approaches to reinstatement of the death penalty—(1) require imposition of the death penalty as an automatic consequence of conviction of the offense; (2) provide criteria for the discretionary imposition of the penalty; or (3) a combination of these approaches. Numerous variations and combinations are possible within these three approaches.

Strict mandatory death penalties, as they were administered under the old common law, might be considered valid under a technical reading of *Furman*, but it is uncertain whether they would survive constitutional attack. Chief

Justice Burger in his dissenting opinion hypothesized and condemned such an approach in these terms—

"Real change would clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition." 408 U.S. at 401.

Common-law mandatory death penalties were highly objectionable on many grounds. In addition to humanitarian considerations, the Department of Justice as the federal prosecutor would oppose a strict mandatory approach to the problem for practical reasons. Experience with "jury nullification" under the common law—where juries simply refused to convict regardless of the strength of the evidence when they considered death an unwarranted penalty in the particular case—counsels strongly against that apporach. See *McGautha* v. *California*, 402 U.S. 183, 199 (1971).

At the opposite end of the permissible legislative spectrum under *Furman* is the approach of providing criteria to guide the discretionary imposition of the death sentence. This is essentially the approach adopted by the American Law Institute in the Model Penal Code. The circumstances of aggravation and mitigation selected by the draftsmen of the Model Penal Code were not intended to be exclusive. The Code provides that the sentencing authority should "take into account the aggravating and mitigating circumstances enumerated . . . and any other facts that it deems relevant," and that the court should so instruct the jury when the issue is submitted to a jury. Model Penal Code, § 201.6 (Proposed Official Draft, 1962). A very similar provision, adapted from the Model Penal Code, was included as an alternative in the Final Report of the National Commission on Reform of Federal Criminal Laws. See Provisional Chapter 36.

A somewhat similar approach is also embodied in the capital punishment provisions of S. 1, the "Criminal Justice Codification, Revision and Reform Act of 1973," recently introduced by you, Mr. Chairman, with the cosponsorship of Senators Ervin and Hruska. See § 1–4E. Although certain of the circumstances of aggravation and mitigation set forth in S. 1 differ from those in the corresponding Model Penal Code provision, and the two proposals also differ in other particulars. They share the important feature of discretionary imposition. That is, even if several aggravating and no mitigating circumstances are found by the juddge or jury to exist, the death penalty still need not be imposed.

The Department of Justice gave very serious and thorough consideration to proposing a discretionary imposition mechanism similar to that provided for in S. 1. And the mechanism we are proposing is similar to S. 1's in many respects. However, for reasons I shall advert to later in my statement, we concluded that a mechanism combining discretionary and mandatory features would be preferable on policy grounds and would have a better chance of withstanding constitutional attack. Let me turn now to a description of our death penalty proposal.

Chapter 24 of S. 1400, entitled "Death Sentence" and appearing at pages 153–156 of the bill, provides a sentencing mechanism designed to maximize fairness and justice in the individual case and rationality in patterns of imposition of the death sentence. I will attempt to summarize briefly its principal features in a nontechnical fashion.

First, the possibility of a death sentence would only arise upon conviction of one of four offenses: treason, sabotage, espionage and murder.

Second, the bill sets forth different sets of aggravating circumstances with respect to the national security offenses, on the one hand, and murder, on the other. For example, with respect to the national security offenses, the death penalty could only be imposed if the defendant had been convicted of another grave national security offense committed before the time of the offense in question, or if one of two other specific aggravating circumstances were present. Following conviction in a murder case, the death penalty could only be imposed if, for example, the victim had been the President of the United State, or if the defendant were shown to be a hired killer, or if the murder occurred during a kidnapping or aircraft hijacking. Several other specifically described aggravating circumstances are provided for in the case of murder.

Third, the bill sets forth five circumstances under which imposition of the death penalty would be *precluded*. Thus, regardless of the existence of one or more of the specific aggravating circumstances in a particular case, the death sentence could not be imposed if, for example, the defendant was under the age of eighteen, his mental capacity was significantly impaired, he acted under unusual duress, or he was an accomplice whose participation in the offense was relatively minor.

Fourth, unlike the Model Penal Code provision, the list of aggravating and precluding circumstances is exclusive. This feature is designed to prevent irrelevant appeals to the judge or jury by either the prosecutor or the defense. Appropriate instructions from the judge would also help to prevent the jury from speculating and deciding on the basis of irrelevant factors not presented to them.

Fifth, the decision for or against the death penalty would follow automatically from the findings of the judge or jury as to the existence or non-existence of aggravating or precluding circumstances. Thus, if one or more of the aggravating circumstances, and *no* precluding circumstance, were found to exist, the judge would be required to impose the death sentence. By contrast, even if several aggravating circumstances were found to exist, if *any* precluding circumstance were also found to exist, the defendant could not be sentenced to death. This mandatory feature is, in my judgment, the most important difference between our proposal and the comparable provisions of S. 1, the Model Penal Code, and the Report of the National Commission.

Finally, the bill provides for a separate proceeding before the judge or a jury to determine the death penalty issue. The principal purpose of this feature, also contained in S. 1, is to allow the defendant to take the stand following conviction, and to introduce evidence relevant to the question of punishment, but perhaps irrelevant to the question of guilt of the offense charged.

The major premise of our proposal—consistent with seven of the nine *Furman* opinions—is the promotion of rationality and even-handedness in the imposition of the death penalty. That overall goal would be promoted principally in three ways.

First, the list of offenses to which the death penalty is presently applicable would be reduced. For example, the death penalty would no longer be applicable to such federal offenses as rape and kidnapping where death does not result.

Second, fairness and rationality would be promoted by providing standards for juries and judges to follow in imposing the death sentence. These features of the proposal are directly responsive to the suggestions for legislation made by Chief Justice Burger in the passage I quoted earlier from his dissenting opinion in *Furman*.

Third, the separate sentencing proceeding (sometimes called a bifurcated trial) ensures that the defendant will have full opportunity to present evidence relevant to the existence of aggravating or precluding factors. Under the federal practice and most State practices prior to *Furman*, guilt and sentencing in capital cases were determined by the jury in a single proceeding. This often effectively discouraged the defendant from taking the stand because evidence of a prior criminal record could then be introduced against him, and it precluded submission of evidence relevant to sentencing but irrelevant to guilt. See *McGautha* v. *California*, *supra* at 194. Provision for a separate sentencing proceeding should go far to promote fairness in the imposition of the death penalty.

As indicated earlier, the Department of Justice proposal differs from the S. 1 and essentially similar sentencing mechanisms for both policy and constitutional reasons. On the policy level, it is our view that the death penalty should in fact be imposed when one or more of the proposed aggravating circumstances is present and there is no precluding circumstance. But if the sentencing authority is left to a discretionary judgment even in those circumstances, we would be concerned that any real hope for emergence of rational patterns in sentencing in capital cases would be severely eroded. Beyond that, the imposition of the death sentence is, of course, a heavy responsibility. In our judgmnt, the Congress should shoulder a substantial portion of that responsibility by telling juries and judges, as clearly as possible, the circumstances in which the ultimate penalty is to be meted out.

We also believe that our proposal stands a somewhat greater chance of surviving constitutional attack than does S. 1's discretionary sentencing mechanism. As Justice White pointed out in his concurring opinion in *Furman*, under the discretionary provisions of present capital punishment statutes, "[L]egislative will is not frustrated if the death penalty is never imposed." 408 U.S. at 311. And Justice Stewart, in his concurring opinion, quoted Justice White's statement with the observation that it was "tellingly put." 408 U.S. at 309. Justice White's statement would be equally applicable to S. 1's discretionary sentencing mechanism. Moreover, a major theme of Justice White's concurring opinion, from the standpoint of society's interest in deterrence of crime, was that the interest "would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others." 408 U.S. at 312. Thus, the very infrequency of the imposition of the death penalty, portended by a discretionary system in the range of cases in which that penalty would be appropriate, may well present a constitutional problem.

I do not mean to suggest that S. 1's death sentence provisions are not constitutionally defensible. I want to emphasize, however, that we at the Justice Department, as prosecutors, are profoundly concerned that a Congressional enactment governing the death penalty be sustained in the courts, and we believe that the concept of S. 1400 is more likely to be sustained.

In conclusion, we believe that the death sentence provisions of S. 1400 represent sound legislative penal policy, and that they stand an excellent chance of being sustained by the Supreme Court. We urge their favorable consideration by this Subcommittee.

Mr. DIXON. I am pleased to have the opportunity to present the position of the Department of Justice with respect to capital punishment as provided for by chapter 24 in S. 1400, the Administration's proposed Criminal Code Reform Act of 1973, S. 1400, as cosponsored by you, Mr. Chairman, and Senator Hruska.

The Department of Justice believes that the death penalty is appropriate for certain offenders found guilty of a narrow range of Federal crimes which have a premeditated quality, are heinous in character, or involve a vitally important Federal interest. We feel we have here a shared purpose regarding those three interests with S. 1 which is also before the subcommittee.

We feel that an appropriately devised death penalty statute would deter harmful conduct by others in the future, would incapacitate the offender, and, to borrow a phrase from Justice Stewart's concurring opinion in the *Furman*[1] decision, it would promote "the stability of a society governed by law."

As we all know, a problem the Supreme Court found with the existing death penalty statutes centers in the area of the discretion given to the judge and the jury to impose the death penalty. Such discretion was a feature of prior Federal criminal law, and as far as that goes, existing Federal criminal law, and virtually all State legislation.

The *Furman* decision by the Supreme Court last spring casts great doubt upon the constitutionality of both Federal and State death penalty statutes because of the discretionary feature.

A detailed analysis of the nine opinions in *Furman* would unduly lengthen my statement. I am submitting for the hearing record a detailed analysis. [Analysis appears at p. 55.]

The practical effect of *Furman* appears to be to leave to the Congress and to the State legislatures some leeway to devise new statu-

[1] *Furman* v. *Georgia*, 408 U.S. 238, 308 (1972).

tory mechanisms for the imposition of the death penalty, provided such mechanisms restrict sentencing discretion and insure increased rationality in patterns of death sentence imposition.

Under *Furman*, there appear to be essentially three possible legislative approaches to reinstatement of the death penalty. One would be to require imposition of the death penalty as an automatic consequence of conviction for the offense. Second would be to provide criteria for the discretionary imposition of the penalty. Third would be to devise some combination of these two approaches.

Let us take up the first approach, a very stringent statute with very little discretion. Strict mandatory death penalties as they were administered under the old common law might be considered valid under a technical reading of *Furman*, but it is uncertain whether they would survive constitutional attack. Chief Justice Burger, in his dissenting opinion, hypothesized and questioned such an approach in these terms:

> Real change would clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the court opt for total abolition.

At the opposite end of the permissible legislative spectrum under *Furman* is the approach of providing criteria to guide the discretionary imposition of the death sentence. This approach is adopted by the American Law Institute in the Model Penal Code. It also underlies to a certain extent the final report of the National Commission on the Reform of Federal Criminal Laws, and likewise a similar approach is embodied in S. 1. The Criminal Justice Codification, Revision and Reform Act of 1973, which was introduced by you, Mr. Chairman and cosponsored by Senators Ervin and Hruska.

The Department of Justice gave serious and thorough consideration to proposing a discretionary imposition mechanism similar to that provided for in S. 1. The mechanism we are proposing is similar to S. 1 in many respects. However, for reasons I shall advert to in a moment, we did conclude that a mechanisms combining discretionary and mandatory features would be preferable on policy grounds, and would have a better chance of withstanding constitutional attack.

Let me turn now to the description of the death penalty proposal in S. 1400, chapter 24. This chapter provides a sentencing mechanism to maximize fairness and justice in the individual case, and also rationality in overall patterns of imposition of the death sentence. There are six principal features.

First, the possibility of a death sentence would only arise upon conviction of one of four offenses, treason, sabotage, espionage, and murder.

Secondly, the bill sets forth separate sets of aggravating circumstances with respect to the national security offenses on the one hand, and murder on the other. For example, with respect to the national security offenses, the death penalty could only be imposed if a defendant had been convicted of another grave national security

offense committed before the time of the offense in question, or if one of two other aggravating circumstances were present.

Following conviction in a murder case, the death penalty could only be imposed if, for example, the victim had been the President of the United States or the defendant were shown to be a hired killer or if the murder occurred during a kidnapping or aircraft hijacking. Several other precisely described aggravating circumstances are provided for in the case of murder.

Third, the bill sets forth five circumstances under which imposition of the death penalty would be precluded. Thus, regardless of the existence of one or more of the aggravating circumstances in a particular case, a death sentence could not be imposed if, for example, the defendant was under the age of 18, his mental capacity was impaired significantly, he acted under unusual duress, or he was an accomplice whose participation in the offense was relatively minor.

Fourth, unlike the Model Penal Code provision, the list of aggravating and precluding circumstances is exclusive. This feature is designed to prevent irrelevant appeals to the judge or jury by either the prosecutor or defense. Appropriate instructions from the judge would also help prevent the jury from speculating and deciding on the basis of irrelevant factors.

Fifth, the decision for or against the death penalty would follow automatically from the findings of the judge or jury as to the existence or nonexistence of aggravating or precluding circumstances. Thus where one or more of the aggravating and no precluding circumstances were found to exist, the judge would be required to impose the death sentence. By contrast, even if several aggravating circumstances were found to exist, if any precluding circumstances were also found to exist, the defendant could not be sentenced to death. This mandatory feature or qualified mandatory feature is, in my judgment, the most important difference between our proposal and the comparable provisions of S. 1, and also the Model Penal Code and the final report of the National Commission.

Sixth, and finally, the bill provides for a separate proceeding before a judge or jury to determine the death penalty issue. The principal purpose of this feature is to allow the defendant to take the stand following conviction and to produce evidence relevant to the question of punishment, but perhaps irrelevant to the question of guilt of the offense charged.

The major premise of our proposal—consistent with seven of the nine opinions in the *Furman* v. *Georgia* case—is the promotion of rationality and evenhandedness in the imposition of the death penalty. That overall goal would be promoted principally in three ways.

First, the range of offenses to which the death penalty is presently applicable would be reduced.

Second, fairness and rationality would be promoted by providing standards for juries and judges to follow in imposing the death sentence.

Third, the separate sentencing proceeding, sometimes called a bifurcated trial, insures that the defendant will have full opportunity to present evidence relevant to the existence of aggravating or precluding factors.

As indicated earlier, the Department of Justice proposal differs from the S. 1 proposal for both policy and constitutional reasons. On the policy level, it is our view that the death penalty should in fact be imposed when one or more of the proposed aggravating circumstances is present and there is no precluding circumstance. By contrast, if the sentencing authority is left to a discretionary judgment, even in those circumstances, we would be concerned that any real hope for emergence of rational patterns in sentencing in capital cases would be severely eroded.

Imposing a death sentence is, of course, a heavy responsibility. In our judgment, the Congress should shoulder a substantial portion of that responsibility by telling judges and juries as clearly as possible the circumstances in which the ultimate penalty is to be meted out.

We also believe that our proposals stand a somewhat greater chance of surviving constitutional attack than does S. 1's more discretionary sentencing mechanism. As Justice White pointed out in his concurring opinion in *Furman*, under the discretionary provisions of present statutes, and I quote Justice White, "Legislative will is not frustrated if the death penalty is never imposed." [1] Justice Stewart, in his concurring opinion, quoted Justice White's statement with the observation it was "tellingly put." [2] Justice White's statement would be equally applicable to S. 1's discretionary sentencing mechanism.

I do not mean to suggest that S. 1's death sentencing provisions are not constitutionally defensible. I merely want to emphasize, however, that we at the Department of Justice, as prosecutors, are profoundly concerned that a congressional enactment governing the death penalty be sustained in the courts, and we believe that the concept of S. 1400 is more likely to be sustained.

In conclusion, we believe that the death sentence provisions of S. 1400 represent sound legislative penal policy and that they stand an excellent chance of being sustained by the Supreme Court. We urge their favorable consideration by this subcommittee.

Thank you.

Senator McClellan. Mr. Dixon, I would like to submit to you some questions that you may answer for the record. I had no opportunity to read your statement prior to your testimony. It is very interesting, very informative, and there are some points that I would like to question you about.

I will prepare some written questions that you may answer for the record.

Mr. Dixon. Thank you, Mr. Chairman. We shall be pleased to do that. [See p. 60.]

Senator McClellan. One thought occurred to me, the Court, as I understand in the *Furman* case, held that the taking of human life by the State, by the Government in the cases before it would constitute cruel and unusual punishment, did it not?

Mr. Dixon. Yes, it did.

Senator McClellan. Is this not an unusual ruling? Have not courts heretofore sustained capital punishment?

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[1] 408 U.S. at 311.
[2] 408 U.S. at 309.

Mr. DIXON. Yes, I believe this decision was one of the more unusual decisions, perhaps, of the Supreme Court. The Court itself produced nine opinions.

Senator MCCLELLAN. There are nine separate opinions in the *Furman* case?

Mr. DIXON. Yes. There were nine opinions of the Court in *Furman* v. *Georgia*.

Senator MCCLELLAN. The death penalty has been questioned before. Has it not been sustained by the Court repeatedly over these years?

Mr. DIXON. Yes, it most certainly has. The death penalty has been in the law in America for centuries. It was in the law at the time our Constitution was framed. There is no historical foundation for the viewpoint that the Founding Fathers would have viewed the death penalty as being cruel or unusual, within the meaning of the Eighth Amendment, as far as I can ascertain. Indeed, the *McGautha* case[1] in the Supreme Court only about 2 or 3 years ago involved this very same question. There the Court had before it two murder cases, one from California and one from Ohio—first degree murder cases. The laws of Ohio and California, like the laws of the other States, and like Federal law, authorized the death penalty, and did submit it to the discretion of the jury, or to the court sitting without a jury, in the conventional fashion. Faced only 2 or 3 years ago with that issue, the Supreme Court sustained the death penalty against attacks under the due process clause and equal protection clause of the 14th Amendment. Justice Harlan's opinion was scholarly, as always is the case with Justice Harlan. He reviewed the past historical record in detail, way back in ancient English history. He reviewed the experience and legislation concerning the death penalty during our own constitutional history, and he concluded that it was not unconstitutional. So in view of that decision merely 2 years ago, the decision in *Furman* v. *Georgia* could be said to be quite unusual.

Senator MCCLELLAN. Well, the Court, 2 years later, after holding the death penalty constitutional in cases in two separate States with comparable laws, leaving the discretion of the punishment to the jury, reversed itself, is that correct?

Mr. DIXON. Yes, that is correct.

Senator MCCLELLAN. The Supreme Court 2 years ago held it would be constitutional. Two years later, by nine different opinions, they, in effect, five of the nine Justices, I believe, held it was unconstitutional, that it constituted cruel and unusual punishment.

Mr. DIXON. The only distinction that might be suggested as between the *McGautha* decision 2 years ago and *Furman* v. *Georgia* in the last term of Court is that *McGautha* was considered under the due process and the equal protection of the laws clauses: whereas *Furman* was argued on an Eighth Amendment basis as incorporated through the Fourteenth.

However, our due process concept is such a broad concept that it is hard, I think, to reconcile a due process decision 2 years ago in *McGautha* saying that capital punishment does not violate due proc-

[1] *McGautha* v. *California*, 402 U.S. 183 (1971).

ess with the decision of last spring, *Furman* v. *Georgia*, saying that it did violate the Eighth Amendment.

Senator McClellan. I am a little intrigued by this. I believe up to now the right of self-defense has been sustained through the history of this Nation as including the right to take human life if necessary to preserve your own life; is that not fundamental to our system of criminal jurisprudence?

Mr. Dixon. I believe that is fundamental to our system of criminal jurisprudence, and perhaps it is fundamental in part because it is grounded on a very basic psychological emotional structure in most men, which structure impels them to act in self-defense and indeed may even compel them to act in retribution for the death of one of their intimate family members. Therefore, an additional factor for support of the death penalty in addition to its deterrence quality—and though there are differences on deterrent effect, no one has ever found no deterrence in the death penalty—in addition to the deterrence factor, there is this deep emotional retribution factor which indeed the Supreme Court noted. As I recall, the Supreme Court in the *Furman* v. *Georgia* decision last spring—here I should speak of the Justices, because there were nine opinions—on several occasions—there is a self-defense factor—and the Supeme Court also recognized a retribution factor which is analogous to the self-defense factor. It is mentioned as being a legitimate consideration which the legislature could consider in enacting the death penalty, or which arguably a court might react to, I think, in considering the constitutional issue.

For example, Justice Stewart, in his concurring opinion, said as follows—I am reading from the *Furman* v. *Georgia* decision, 408 U.S. at page 308. Regarding the factor of retribution, which your mention of the self-defense factor put me in mind of, he said as follows:

> On that score I would only say that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve, then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

This is particularly interesting because it was the vote of Justice Stewart that was one of the needed votes to nullify the death penalty.

Senator McClellan. Do I understand, then, he recognized the right of an individual to inflict death on another human being where necessary to save and protect his own life?

Mr. Dixon. He seems to recognize implicitly that that could happen.

Senator McClellan. And that that is constitutional?

Mr. Dixon. Well, I hesitate to speak for Justice Stewart on an ultimate constitutional point. But he certainly did in the quotation I have given. He certainly did recognize that the spirit of retribution that is in the nature of man is an important ingredient in supporting the death penalty, and although Justice Stewart voted against

the death penalty on the actual facts, and the nature of the statute involved in *Furman*, he did not go so far as to say that he felt the death penalty was unconstitutional per se. Only two justices went that far—Justices Marshall and Brennan.

Senator McClellan. I am thinking about the fundamental principle of society being denied the right to invoke a penalty of death to protect society and to protect thousands, and millions of human beings, so to speak. The infliction of such punishment by the State is unconstitutional, and yet it is constitutional for an individual to inflict death in defense of his own life. It seems to me a little ridiculous.

Mr. Dixon. Under the present state of the law, all that we could say, if it were in a limited sense "constitutional" for one person to take the life of another improperly without losing his own life, because there is no death penalty—then it certainly could be said that anyone so inclined, however immoral his conduct, however heinous his conduct, would have the power to take the life of another person without fear of having his own life similarly taken as a penalty.

Senator McClellan. What occurs to me is that we have in effect said the decision is certainly moving in the direction of saying that society, that our law, cannot impose a death penalty as punishment for taking human life, but that one individual can take the life of another individual and it is constitutional for him to do that. He is absolved from any crime. He can inflict cruel and inhuman punishment, the same cruel and inhuman punishment prohibited to the State, if the interpretation is correct.

Mr. Dixon. Unless we can restore the death penalty, we will have achieved the ultimate social imbalance, that one person can kill another person without fear of suffering the same imposition on himself.

Senator McClellan. Then it seems to me the Court would have to hold that it is unconstitutional for an individual to inflict such cruel and inhuman punishment as death upon another in defense of his own life.

Mr. Dixon. That could occur. Absent a social penalty, a father faced with a killing of a member of his family, having no vent for his feelings, or retribution through the legal system, would say, well, I have had enough, I will myself kill the killer of my daughter, or my wife, or my son. If he did that, he in turn would be immune from capital punishment unless we can by legislation bring that factor back into play. That could lead, then, to a sequence of persons taking the law into their own hands in those situations where they felt that deeply about the situation, and there are few things a person would feel more deeply about than the wanton killing of a member of his family or a close friend.

Senator McClellan. In other words, instead of resolving or preventing a great injustice in society, such a holding, it seems to me, would be creating a tremendous injustice if it is followed to its logical conclusion.

Mr. Dixon. I think that——

Senator McClellan. A man who kills another in defense of himself, his wife, or his children, would be guilty of cruel and inhuman punishment and should be punished. It is ridiculous.

Mr. DIXON. I think you and I have a broad concurrence on this issue. I agree with much of what you are saying.

Senator MCCLELLAN. Senator Hruska.

Senator HRUSKA. Mr. Dixon, according to the sentencing hearing under S. 1400, the burden of proof is on the Government regarding the aggravating factors, and the Government is bound by ordinary rules of evidence regarding admissability. Why?

Mr. DIXON. That, Senator Hruska, was a policy decision which we do not feel was compelled by law, but it was a policy decision in providing the maximum protection for the accused regarding the proof of the element that is the aggravating factor, which would open up the death penalty. We chose to put that in for policy reasons, really as an added protection to the defendant. He can not receive a death penalty under S. 1400 unless at least one aggravating circumstance be shown, and we saw fit to cloak the proof of that one aggravating circumstance as the precondition to imposing the death penalty with this protection. We do not feel it to be compelled by law. It is a policy decision.

Senator HRUSKA. Under S. 1400, as well as under S. 1, suppose the jury does not bring in the death penalty verdict; what happens then?

Mr. DIXON. Well, in that event, if the jury does not bring in the death penalty verdict under the Administration bill, S. 1400, the judge would have open to him at his discretion the full panoply of alternative sentencing provisions elsewhere in the code. By contrast, if a jury did not bring in a guilty conclusion—excuse me—a death penalty conclusion under S. 1, then as I understand S. 1, life imprisonment would be automatic. Under S. 1, if the jury does not find death penalty, then the judge automatically imposes life imprisonment. Under S. 1400, the judge would have broader discretion.

Senator HRUSKA. That discretion is at the hands of the judge himself?

Mr. DIXON. At the hands of the judge, correct.

Senator HRUSKA. Must the jury's verdict as supporting a death penalty under S. 1400 be unanimous?

Mr. DIXON. It is not so specified in S. 1400; however, S. 1400 would be read in the light of the general practice prevailing in Federal courts, which is unanimous verdicts. So at the present time, it would be unanimous. Should general Federal law change, then S. 1400 would change automatically.

S. 1 by contrast, does specify that the verdict must be unanimous in order to open up the death penalty.

Senator HRUSKA. Mr. Chairman. I have some further questions here, but I believe that we could submit them for the record and ask Professor Dixon to submit written replies. They are technical in nature, and it would be just as well subserved in that fashion.

Senator MCCLELLAN. Very well. They will be submitted and we will appreciate your answers to them.

I would like to ask you one other question. We hear it said that the death penalty does not deter the commission of the crime of murder. In your judgment, does any criminal statute and the penalty it imposes for specified crimes deter?

Mr. DIXON. Yes, I believe there is an important deterrence factor in the entire criminal code, and indeed it might be hypothesized,

even though proof in these areas is disputed, it might be hypothesized that there is a greater deterrence value in the extreme penalties we associate with major felonies than the deterrence factor at the level of misdemeanors and more petty offenses. I believe that some of the evidence questioning the deterrence element in criminal law is evidence going more to the lower range of felonies and misdemeanors.

Having said that, I would also like to add this further point. Even though there may be disputes about the degree of deterrence that flows from any particular offense category and the penalty attached thereto, there is no generally accepted proof that I know of that criminal law has no deterrence. I know of no proof for the proposition that criminal law and the criminal system have no deterrent effect on antisocial behavior. So I think we should maintain our criminal system and try to improve it, and not throw up our hands.

Senator McClellan. My thought is this: If criminal laws and the penalties prescribed for given crimes, if they do not deter, why have them?

Mr. Dixon. If we can accept the proposition that criminal law does not have a deterrent effect, then I would suppose the conclusion would follow. But I would not accept the premise and the Department of Justice does not accept the premise that criminal law and the penalties associated therewith lack a deterrent effect. We think they have a deterrent effect.

Senator McClellan. Well, I do too. But the argument is made that the death penalty does not deter. I think the penalty for armed robbery is about 20 years, isn't it? Is that the highest penalty for armed robbery?

Mr. Dixon. I believe that is approximately it.

Senator McClellan. Do you think that deters some people from committing armed robbery? It does not deter all but do you think it does deter some?

Mr. Dixon. Yes, I do. Certainly we can say this much: The death penalty totally incapacitates the defendant from repeating any other offense. And you can say that a term of imprisonment totally incapacitates the prisoner from committing any further offense, as a deterrence in that sense, during the term of imprisonment. Also, I was much taken by the illustrations you gave me, Mr. Chairman, in your opening statement, regarding the *New York Bank* case, and regarding the *Maryland restaurant* case. In each instance the perpetrators of the crime in those situations were openly gloating over the fact that whatever they did to their hostages in the bank and in the Maryland establishment—they were openly gloating that whatever they did, they could not suffer the death penalty. I think to put that kind of an emotional spirit into the hands of a person who is already imbalanced and keyed up—in the course of committing a major offense like this that may last for several hours—is very, very bad social policy.

Senator McClellan. Yes, sir.

If a 20-year penalty for robbery would deter some people from committing robbery, I believe the death penalty would also deter some people from coldblooded murder, if they thought the penalty was going to be enforced.

Mr. Dixon. I agree.

Senator McCLELLAN. After all, it is the enforcement, the knowledge, the belief, the realization that the penalty may be imposed and executed. That is the real deterrent.

Mr. DIXON. I agree.

Senator McCLELLAN. The law moralizes what is right and wrong and imposes a penalty. A man may care nothing about the morals involved, the moral issue, but when you talk about taking his own life, if that doesn't make him think and use some judgment and act with discretion—there is no way, then, to deter crime.

Mr. DIXON. If that makes one person think, and that one person is deterred, we will have accomplished something important. But I think many, many persons are deterred, not just one person, by the prospect of penalties.

Senator McCLELLAN. I think many people are deterred by reason of the death penalty. If you go ask somebody that has been sentenced to the death penalty if it deterred him, he would probably say no, it didn't. Well, it didn't. But if you ask him if he had been conscious of the fact at the time he committed the crime that the death penalty was certain to be imposed, that he would lose his own life, I believe then he would tell you that it would have deterred him.

Mr. DIXON. I take further comfort from the fact—I think we can all take comfort from the fact—that the Supreme Court has not yet wholly invalidated the death penalty on constitutional grounds.

Senator McCLELLAN. Well, I hope it never does.

Mr. DIXON. We hope that these measure may restore an effective death penalty, at least in the Federal sphere.

Senator McCLELLAN. Thank you very much.

[Committee insert]

THE SUPREME COURT DECISION ON THE DEATH PENALTY

Hon. Robert G. Dixon, Jr.

A Summary of the Opinions of the Individual Justices in Furman v. Georgia

In three cases that will collectively go on the books as *Furman* v. *Georgia*, the United States Supreme Court on June 29, 1972, declared that under certain circumstances the imposition of the death penalty violates the Eighth and Fourteenth Amendments of the United States Constitution. In two of the cases the defendants were sentenced for rape; in the other case the sentence was for murder. Below is a summary of the nine separate opinions produced by this decision.

I. MAJORITY OPINIONS

Justices Marshall and Brennan felt that the imposition of the death penalty was unconstitutional under all circumstances.

A. Justice Marshall

Justice Marshall dwelt a great deal on the historical aspects of the question. He felt the legislative history of the Eighth Amendment showed that the provision was intended to prohibit cruel punishments. He went on to describe how the provision had been interpreted in the courts (emphasizing *Weems* v. *United States*, 217 U.S. 349 (1910), in which the Court "invalidated a penalty prescribed by a legislature for a particular offense") and deduced certain principles from these decisions. Citing *Trop* v. *Dulles*, 356 U.S. 86 (1958), he stated that the "most important principle" was that the Court, in assessing the constitutionality of a punishment, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Marshall discussed the faltering progress of the legislative movement to abolish the death penalty in America. He then asserted that the Eighth and

Fourteenth Amendments dictated abolition of the death penalty for two separate reasons.

First, Marshall found that the death penalty accomplished no legitimate legislative purpose that could not be accomplished equally well by a lesser penalty. Justice Marshall listed six purposes "conceivably served" by the imposition of the death penalty: retribution, deterrance, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. He found that some of these purposes (e.g., retribution) failed to justify the existence of any punishment and that the legitimate purposes of the death penalty (e.g., deterrence) were served equally well by less severe punishments.

Second, Marshall felt that abolition of the death penalty was alternately justified by the fact that it was "morally unacceptable to the people of the United States at this time in their history." He argued that the test of whether the penalty was morally unacceptable was whether American citizens would find it so "in the light of all information presently available." He stated that the average citizen would find capital punishment "shocking to his conscience" were he aware of the following facts: first, as mentioned earlier, that the death penalty accomplished no legitimate legislative purpose; second, that the penalty was imposed discriminately against "certain identifiable classes" such as racial minorities and the poor.

B. Justice Brennan

Justice Brennan felt that the legislative and judicial history of the clause demonstrated that "the Framers concern was directed specifically to the exercise of the legislative power." He asserted that in previous decisions the Court not only adopted this view but also took the position that the clause was not limited to penalties which the Framers intended to proscribe.

Brennan, like Marshall, stated that the constitutionality of the death penalty must be assessed in terms of society's evolving standards. However, he felt that the test of whether a punishment was "cruel and unusual" was whether or not it comported with human dignity.

Brennan argued that the issue of whether a punishment comported with human dignity turned on four questions: whether it was inflicted in an arbitrary manner; whether it was unacceptable to contemporary society; and whether it accomplished any legitimate purpose that was not accomplished equally well by a less severe punishment. He said that a review of past judicial interpretations of the Eighth Amendment demonstrated that no punishment adjudged cruel and unusual was fatally offensive under a single principle; indeed, it was unlikely that any legislature would enact such a statute. He felt, however, that the four principles were interrelated and that if a punishment "serious implicated" several of the principles, the Court would be justified in concluding that the punishment failed to comport with human dignity.

Brennan felt that the death penalty in view of its "enormity and finality" was so severe as to be degrading to human dignity. He argued that the infrequent infliction of the death penalty gave rise to a strong presumption of arbitrariness. Our system of giving judges and juries discretion as to the imposition of the penalty failed to guard against the likelihood that the penalty was being inflicted arbitrarily. Brennan felt that the growing debate on the death penalty, the decrease of crimes for which the penalty was inflicted, and the current rarity of infliction for any crime, indicated that the penalty had been virtually rejected by society. He also argued that capital punishment accomplished no legislative purpose that could not be equally well accomplished by some less severe penalty. He felt that the retributive value of the penalty was undemonstrated, and that the manner in which the penalty was "currently administered" kept it from being a superior deterrent.

Since the death penalty was inconsistent to some degree with all four principles, Brennan concluded that it failed to comport with human dignity and thus violated the Eighth and Fourteenth Amendments.

C. Justice Douglas

Justices Douglas, Stewart and White did not find the death penalty to be unconstitutional in all instances, rather, they focused upon the discretion granted judge and jury under current death penalty statutes.

Justice Douglas asserted that the Fourteenth Amendment prohibited "cruel and unusual" punishments prohibited in the Eighth Amendment regardless of

whether that prohibition was carried out under the privileges and immunities clause or the due process clause.

Like Marshall and Brennan, Douglas felt that the validity of the death penalty should be assessed in terms of the evolving standards of society. He felt that the legislative history of the Eighth Amendment indicated an intent on the behalf of the framers to prohibit the selective and discriminatory imposition of any penalty.

Douglas recognized the argument, put forth by Ernest van den Haag, that if a penalty was being inflicted unequally, the process by which the penalty was inflicted should be altered rather than the penalty itself. However, Douglas seemed to feel that the Court's previous decision of *McGautha* v. *California*, 402 U.S. 183 (1971), in which the Court allowed the jury "practically untrammeled discretion" in its imposition of the death penalty precluded such an approach. The Court in *McGautha* had noted that juries in the past, when confronted by statutes requiring mandatory death sentences, had exercised a sort of *de facto* discretion by acquitting defendants they did not wish to execute.

Douglas surveyed evidence that the death penalty had been inflicted in a discriminatory manner and noted that all the defendants in the instant cases were black. He did not feel ready to assert that discrimination had played a part in the imposition of any of the sentences. Rather, he emphasized that the system provided no standards to govern the imposition of the death penalty, leaving the fate of the defendants committing such offenses to the "uncontrolled discretion of judges or juries."

He felt that a function of the cruel and unusual punishment clause was to insure the even-handed application of all penalties and that equal protection was "implicit in the ban on 'cruel and unusual' punishments."

In striking down the discretionary death penalty statutes, Douglas noted that a statutory scheme employing the death penalty might be constitutional on its face, but unconstitutional in its use. He cited the example of a mandatory death penalty, only imposed upon minorities or members of the lower classes. He concluded with the statement that he did not reach the question whether or not a mandatory death sentence would be otherwise constitutional.

D. Justice Stewart

Justice Stewart emphasized the finality of the death penalty and expressed sympathy with arguments advocating prohibition of the death penalty in all circumstances. However, he found it "unnecessary to reach the ultimate question they would decide."

Stewart cited various examples of mandatory death sentences and stated that review of death sentences under such penalties would require the court to decide whether capital punishment was unconstitutional under all circumstances. More precisely, the question would be whether "a legislature could constitutionally determine that certain criminal conduct" was "so atrocious that society's interest in deterrence and retribution" outweighed "any considerations of reform or rehabilitation of the perpetrator. . . ."

On this question Stewart felt that "empirical evidence" that an "automatic death penalty" would provide "maximum deterrence" was "inconclusive." However, he did not feel that retribution was a "constitutionally impermissible ingredient in the imposition of punishment." He noted that retribution was instinctive in man and that the channelling of that instinct in the administration of criminal justice helped to prevent certain destructive manifestations of "self-help."

In the case at hand Stewart observed that none of the death sentences imposed were mandatory. The legislature, in other words, had not determined that the imposition of the death penalty was necessary to deter the respective crimes committed. The imposition of the death sentence was "cruel" because it went beyond what the state legislatures determined to be necessary; it was "unusual" because the imposition of the death sentence for either of the crimes involved was infrequent. Justice Stewart further stated that the defendants were among a "capriciously selected random handful" upon whom the sentence of death had been imposed. There were many others who, though convicted of the same crimes and "just as reprehensible" as the defendants, were, nevertheless, not sentenced to death. He concluded that the Eighth and Fourteenth Amendments cannot tolerate infliction of the death penalty under legal systems that permit this unique penalty to be "so wantonly and so freakishly imposed."

E. Justice White

Justice White emphasized that he was not taking the position that the imposition of the death penalty was unconstitutional in all circumstances; however, he felt that that position had been "ably argued." White addressed himself to the constitutionality of a statute which left the ultimate imposition of the sentence to judge and jury.

He noted that in the instant cases the legislature had authorized the imposition of the death penalty for murder or rape without mandating it, and that the penalty had been imposed so infrequently that the odds were now "very much against imposition and execution of the penalty with respect to any convicted murderer or rapist."

White reasoned that under these statutes the legislative will is not frustrated if the death penalty is never imposed. He also asserted that the death penalty was so infrequently imposed under the statutes before the Court that the punishment failed to satisfy any general need for retribution and, more important, ceased to function as a credible deterrent. He thus concluded that the penalty was "patently excessive." He also noted that there was "no meaningful basis for distinguishing the few cases" in which it was imposed from "the many cases" in which it was not.

White stated that "for present purposes" he accepted the "morality and utility" of punishing one person to influence another. At one point he stated that he did not feel the need to reject the death penalty "as a more effective deterrent than a lesser penalty." Later, however, he stated that it was "difficult to prove . . . that capital punishment, however administered, more effectively serves the ends of criminal law than does imprisonment."

He felt that the Eighth Amendment obligated the judiciary to review certain penalties whether legislative approved or not. In the present case, the claims for legislative judgment were particularly inappropriate because the legislature had delegated the ultimate imposition of the death penalty to judges and juries which, in their own discretion and without violating their trust or any statutory policy, could refuse to impose the death penalty no matter what the circumstances of the crime.

II. DISSENTING OPINIONS

Justices Burger and Blackmun, while expressing personal disapproval of the death penalty, did not feel that it was appropriate for the judiciary to overrule the legislature in the present cases.

A. Chief Justice Burger

Chief Justice Burger repudiated the argument that capital punishment had always been "cruel" and that it was "unusual" as well because of infrequent use. He stated that both the legislative history and subsequent judicial interpretation of the Eighth Amendment indicated that the provision was directed at inhuman punishment "regardless of how frequently or infrequently imposed." He felt that the adjective "unusual," whatever its function, was certainly not directed at a longstanding punishment such as the death penalty.

Surveying judicial interpretation of the Eighth Amendment, Burger noted that the Court had never held a punishment to be impermissibly cruel because of a shift in social values. More important, he observed, the Court had never held "that a mode of punishment authorized by a domestic legislature was so cruel as to be fundamentally at odds with our basic notions of decency."

The Chief Justice felt that in a democracy the presumption that the legislature embodied the prevailing standards of decency could be disproven only by showing a nationwide repudiation of the death penalty. He then cited the nationwide legislative endorsement of the penalty and noted that polls on the question fell far short of showing universal condemnation.

Burger admitted that juries imposed the death sentence infrequently. However, he felt that to characterize such imposition as "freakishly" rare was "unwarranted hyperbole." He further said that the conclusion that juries imposing the death penalty were acting arbitrarily ran against the Court's past endorsement of jury responsibility and had no empirical basis. Later in the opinion he asserted that the jury's infrequent imposition of the death penalty demonstrated that body's serious attitude towards its responsibility.

Burger felt that the argument that the death penalty accomplished no legitimate purpose was invalid; just as the approval of a punishment involving

extreme cruelty could not be justified on the basis of its efficacy, the disapproval of a particular punishment could not properly be predicated on its inefficacy. In any event, the Chief Justice disagreed with the majority's repudiation of retribution as a legitimate end of punishment, and noted that the question of the deterrent value of capital punishment was "beyond the pale of judicial inquiry."

Burger asserted that the majority erred in depriving judges and juries of discretion to impose the death penalty. The actual scope of the Court's ruling, which he presumed to be embodied in the "pivotal" opinions of Justices Stewart and White, would demand a rigid system of sentencing in capital cases which "if possible of achievement, cannot be regarded as a welcome change." The Chief Justice argued that the Eighth Amendment was directed towards punishments, not sentencing processes, and that the issue had been foreclosed, at any rate, by the Court's earlier decision of *McGautha* v. *California*, *supra*. He further asserted that legislatures would have a difficult time establishing guidelines for judges and juries in imposing of the death penalty. Such attempts had not been successful in the past, and, even if guidelines could be established, juries might well retain *de facto* discretion by returning verdicts to lesser offenses in certain cases. If the only constitutional statutory scheme remaining is one in which judges and juries are faced with a choice between imposition of the death sentence and acquittal, Burger would have preferred that the penalty be abolished altogether.

Burger, nevertheless, was somewhat pleased that the Court's decision gave the legislatures "the opportunity, and indeed the unavoidable responsibility," to re-evaluate the question of capital punishment. He felt the legislatures are far better forums than the courts for evaluation of such an issue, since the basic questions are factual rather than legal. Though the Court went "beyond the limits of judicial power," it "fortunately" left "some room for legislative judgment."

B. Justice Blackmun

Justice Blackmun felt that the death penalty should not be overturned judicially although he would vote against its retention were he a legislator. He noted that past decisions of the Court had implicitly recognized the constitutional validity of the penalty. Blackmun also observed that in recently enacted federal statutes the death penalty had been included by the "elected representatives of the people [who are] far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity, than are we who sit cloistered on this Court."

Blackmun felt that legislatures would re-enact statutes with mandatory death penalties. Such legislation, bereft of mercy, would be "regressive" in his opinion.

C. Justice Powell

Justice Powell generally endorsed Justice Burger's comments on the qualified nature of the majority repudiation of the death penalty. Powell's opinion was directed at the majority opinions advocating abolition of the death penalty in all circumstances.

Powell felt that the legislative history of the Eighth Amendment demonstrated that it was not the intent of the framers to prohibit the death penalty. Powell admitted that the Court was not barred from examining the imposition of the death penalty on a case-by-case basis, but felt it highly inappropriate to seek "total abolition of capital punishment by judicial fiat."

He noted that the Court had tacitly approved the existence of the death penalty in a long line of decisions. While acknowledging that notions of cruel and unusual punishment do evolve, Powell felt that this fact only justified a case-by-case examination of the death penalty. To abolish the death penalty altogether was to assert that "the evolutionary process" had come "suddenly to an end."

Powell argued that judicial restraint was especially required in deciding the instant cases. The issues presented a temptation to read personal opinions into the Constitution. Furthermore, the Court decision would affect numerous federal and state statutes.

He felt that legislative action, state referenda, and jury action throughout the country refuted the argument that contemporary society rejected the death penalty. Furthermore, the argument that contemporary society only tolerated the death penalty because of its infrequent and discriminatory imposition was

speculative. The fact that the death penalty fell more frequently on the impoverished was not due to an evil inherent in the penalty, but rather to long-standing social and economic problems. Powell felt that Justice Harlan's opinion in *McGautha* v. *California, supra,* had disposed of the majority's assertion that the death penalty should be abolished where arbitrarily and/or discriminatorily applied. Powell felt that there were other ways to attack discriminatory imposition of the death penalty and that, at any rate, the problem was no longer one of great magnitude.

Powell then rejected the argument that the death penalty, because it served no rational legislative purpose, was unconstitutional. He noted that there was no justification in the legislative or judicial history of the Eighth Amendment for the proposition that the Court could strike down a statutory punishment because it found the same purposes served by a lesser penalty, that decisions in this area lie within the special competence of the legislatures and hence are entitled to a presumption of validity, and that it was at least arguable that retribution was a legitimate aim of deterrence.

Powell asserted that the Court should not strike down a punishment unless the punishment was "greatly" or "grossly" disproportionate to the crime. He asserted that the death penalty was not a disproportionate punishment for the crime of rape, particularly when the effects of that crime on the victim were considered.

Powell felt that in foreclosing future discussions—legislative or judicial—of the death penalty, the Court was overreaching itself. A case-by-case approach, though tedious, would have been far more desirable.

D. Justice Rehnquist

Justice Rehnquist argued that the Court was overreaching itself in striking down legislatively enacted death penalties. Advocating judicial restraint, he asserted that overreaching by the judiciary interfered with the "right of the people to govern themselves." He felt it particularly important that the judiciary restrain itself, because there was no truly effective outside restraint on that body. He observed that it was better for the judiciary to err on the side of restraint since the result, at worst, was to leave standing a duly enacted law.

DEPARTMENT OF JUSTICE,
Washington, D.C., August 17, 1973.

Mr. G. ROBERT BLAKEY,
Chief Counsel, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. BLAKEY: This is in response to the questions you posed to me in your letter of April 17, 1973 in conjunction with the hearings held by the Subcommittee on Criminal Laws and Procedures on the death penalty provisions of S. 1400.

Following are the questions which you posed and the answers of the Department of Justice to those questions:

1. What value as a precedent does a per curiam opinion such as *Furman* have when it does not articulate its rationale?

The status of a decision as a precedent depends upon several factors, including the force and clarity its rationale, whether the Court was unanimous or divided, and whether it has stood the test of time. Judged by these standards, the recent 5-4 *per curiam* decision in *Furman* v. *Georgia,* where each majority Justice wrote a separate opinion, is certainly not of the same precedential weight as cases like *Marbury* v. *Madison* or *Gideon* v. *Wainwright.* On the other hand, the *Furman* precedent on its exact facts is, of course, binding on all American courts, like any other Supreme Court decision, unless and until it is overruled.

2. To what degree is the Congress bound to follow the views of Justices set out in concurring opinions?

The Court in *Furman* held that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Because of that holding, the Congress should not enact legislation like that which was the subject of the case. Since there is no majority among the concurring opinions of the Justices as to the rationale supporting the holding, it is necessary to analyze the indi-

vidual concurring (and dissenting) opinions to attempt to draft a statute which could withstand Supreme Court scrutiny. The Congress is not bound by any single opinion but can only use the opinions as guidelines in drafting constitutionally acceptable legislation.

3. Are Justices themselves bound by their own concurring opinions?

Although the Justices are not "bound" by their concurring opinions, it is likely that each Justice will adhere, in the main, to the view he already has expressed. These opinions present the best available indication of the treatment death penalty legislation would receive from the Supreme Court as it is presently constituted.

4. Chief Justice Burger comments in dissent [408 U.S. at 401] that either mandatory penalties or setting standards for the exercise of discretion would meet the concurring opinions of Mr. Justice White and Mr. Justice Stewart, who objected to the "wanton and freakish" application of the death penalty under present practice. Do you agree that either or some combination of both of these methods might pass constitutional muster?

We believe that carefully drawn legislation combining the best elements of the standards approach and the mandatory approach stands the best chance of passing constitutional muster.

Although the *Furman* decision can be read to permit the use of strict mandatory death penalties applied to every person who commits a certain crime, it is uncertain whether such a provision would survive constitutional attack, both because it might be concluded by a court to be cruel and unusual punishment in a case where mitigating circumstances were present, and because juries would probably be inclined to acquit in many cases if that were the only alternative to the death penalty, thus leading to the problem discussed in *Furman* of uneven application of the death penalty.

On the other hand, a system setting out standards for the discretionary imposition of the death penalty such as the system provided in S. 1 for weighing aggravating and mitigating circumstances, might pass constitutional muster if it could be drawn in a manner which would not result in unfair and uneven application.

We believe, however, that combining the standards approach and the mandatory approach in a single bill is the preferable method. There is some flexibility in the aggravating and mitigating factors to be considered by the jury under S. 1400, but once the jury has determined the presence or absence of those factors, the death sentence is either clearly required or clearly precluded. This approach should lead to even application of the death sentence while precluding its application to cases where it is inappropriate.

5. Assuming Congress were to enact mandatory penalties, how do you think the Court would treat the prosecutor's discretion not to bring a charge, the power of court or jury not to convict and the power of the President to pardon? Are not all penalties really discretionary?

To begin with, I question whether these aspects of the criminal justice system are within judicial cognizance in determining the validity of a sentencing system. It has been held, for example, that the power of a prosecutor not to bring a charge is committed to his discretion under the doctrine of separation of powers. *United States* v. *Cox*, 342 F. 2d 167 (C.A. 5), *cert. denied*, 381 U.S. 935 (1965) Surely the same concept would apply to the President's exercise of the pardoning power.

Apart from that consideration, however, so long as the various types of discretion listed are exercised in a fair and even-handed manner, we do not believe that the Court would object to their exercise in conjunction with the death penalty provisions of S. 1400. The aggravating and mitigating factors set forth in S. 1400 provide sufficient restrictions upon the imposition of the penalty that, as compared to the situation that would exist under a simple mandatory penalty provision, there would seldom be pressure to resort to such discretionary possibilities. In any event, all penalty structures necessarily contain some discretionary elements because of the danger of occasional unfairness without the availability of any discretion.

6. However they would work in practice, if we call them "mandatory" penalties, how can law enforcement officials respond to a prison riot or airplane hijacking situation, where one person has been killed and other hostages are still held? How can you talk a gunman into giving himself up and releasing hostages when the death penalty is supposedly mandatory? What incentive

would he have not to kill other people? Would it be feasible to make a mitigating factor that he did return hostages or others?

It must be kept in mind that the death penalty provisions of S. 1400 are "mandatory" only if one or more aggravating circumstances are found to exist *and* if none of the mitigating circumstances are found to exist. At the time of an offense, the non-existence of mental impairment or duress can never be so certain as to warrant the assumption that the death penalty will necessarily follow convictions for the offense.

The idea of having as a mitigating circumstance the freeing of hostages unharmed seems desirable on its face, but could cause more problems than it would solve. It might, for example, encourage the taking of hostages, since the person taking the hostages would know that so long as he complied with a request to free at least one hostage, he could kill other hostages without being made subject to the death penalty. We would, of course, have no objection to providing a mitigating circumstance such as you suggest if it did not have the drawbacks pointed out. (It should be noted that under the balancing-test approach employed by S. 1, even if it included such a mitigating factor, there might be less bargaining power available to the government in the situations postulated since at the post-trial hearing the jury could find that mitigating factor satisfied yet still elect to impose the death penalty.)

7. Why does S. 1400 [§ 2401(b)] provide for life imprisonment if only one mitigating factor is present? Should it not be a balancing process?

The Department's bill contains a narrowly drawn list of mitigating factors, any one of which we believe should absolutely preclude the application of the death sentence. For example, we do not believe that a person whose mental ability was significantly impaired should be subject to the death sentence, regardless of the seriousness of his offense. The application of the balancing test could lead to inappropriate application of a death sentence to such a person because of such factors as the nature of the evidence in a heinous murder case, a result which we believe the legislation should preclude. It should be noted, moreover, that S. 1400 does not provide for automatic life imprisonment if the death sentence is not imposed in such instances; rather, it provides that the defendant will be subject to any other sentence authorized for the offense for which he was convicted.

8. In *Williams* v. *New York*, 337 U.S. 241, 247 (1949), in affirming as consistent with Due Process a death sentence imposed by a judge on the basis of hearsay information after a jury recommendation of life imprisonment, the Supreme Court observed: "Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." S. 1400, §2402(b), however, would restrict the evidence presented by the Government in the penalty phase to that tested by the rules of evidence. Why should the interest of society in the imposition of capital punishment not have access to the fullest information possible?

S. 1400 provides for the application of stringent rules of evidence in the sentencing hearing for the death sentence only for determination of the existence of aggravating circumstances. The Department of Justice concluded that as a policy matter the death penalty should be available on in very limited situations and that it was appropriate to make the Government's proof subject to the highest evidentiary standards. The defendant would be free to introduce evidence to establish the existence of mitigating factors without regard to its admissibility under the rules of evidence in criminal trials. Admittedly, this approach tips the scales in favor of the defendant, and may promote some inequality.

9. S. 1 makes the death penalty applicable to murder and treason, while S. 1400 would extend the list to sabotage and espionage. What justification can be offered for going beyond murder and treason?

The general rationale for making the death penalty applicable also to certain forms of espionage and sabotage is that, under the limited circumstances specified in the definitions of those offenses and in section 2401(a)(1), those offenses have the potential of directly or indirectly causing the death of numerous American citizens. When committed under such described circumstances, these offenses would warrant imposition of the death penalty fully as much as the offenses of treason and murder. Indeed, under such circumstances, these offenses would often constitute an aggravated form of treason.

Today, with the possibility of a decisive nuclear conflict lasting only a matter of hours, it is conceivable that a single act of sabotage could predetermine the outcome of such a conflict. Section 1111(b)(1) of S. 1400 would make sabotage a potentially capital offense only if committed in time of war and only if the offense causes major damage to or impairment of a major weapons system or a means of defense, warning, or retaliation against large-scale attack.

10. What individual justification underwrites your inclusion in S. 1400 of each aggravating and mitigating factor? Please indicate in your response why the various factors in S. 1, but not in S. 1400, were omitted. In particular please comment on §1–4E1(b)(vii) (absence of significant history of prior criminal activity).

The Department of Justice believes that under certain circumstances the death sentence is inappropriate regardless of the other circumstances surrounding the crime.

We do not believe, for example, that a person who committed a crime otherwise punishable by death should be subject to the death sentence if he was under the age of eighteen at the time the offense was committed. Although a juvenile should be held accountable for his acts, the death sentence, we believe, is too stringent for a person whose immaturity may have contributed to the commission of the offense.

Further, we do not believe that a person who acted under a significantly impaired mental state, although not of such a severe degree as would absolve him of criminal responsibility, should be subject to the same level of punishment as a person who committed a similar act under other circumstances. Similar considerations apply to a person who acted under unusual and substantial duress.

The fourth precluding circumstance provided in S. 1400 would preclude application of the death penalty if the defendant was an accomplice in a crime commited by another but his participation was relatively minor. Not all persons legally chargeable as principals in an offense necessarily warrant the same penalty. For example, a person who participated in a kidnapping by permitting his dwelling to be used as a temporary place for confining the victim, and who did nothing else to warrant his participation being considered anything other than minor, should not as a matter of policy be subject to the same penalty as the primary perpetrator who actually kidnapped and ultimately killed the victim.

Finally, the fifth precluding circumstance, that the defendant could not foresee that his conduct would cause, or create a grave risk of causing, death to another person, is included primarily to preclude use of the death sentence for a nonviolent crime which accidentally causes the death of another in a situation where this risk is not foreseeable. This mitigating circumstance might in certain situations overlap the fourth precluding circumstance.

Under the Department's proposal, at least one aggravating circumstance must be present in order for the death sentence to apply. For the crimes of treason, sabotage, and espionage the crime must not only be committed under the special circumstances set forth for Class A felony treatment in the grading subsection of the offense but must also either be the defendant's second offense of that nature or have created a grave risk of substantial danger to the national security or a grave risk of death to another person. Thus, the proposal would narrowly limit the death sentence for national security offenses to the most serious possible offenses, those involving grave risk to the national security or of death to another person, or those which are part of a pattern of commission of the most serious types of national security offenses.

The aggravating circumstances provided in the Department's proposal for the offense of murder were formulated to cover those murders which were especially heinous in character, posed an undue danger to other persons, were committed by a hired killer, were part of a pattern of dangerous felonious behavior, or substantially threatened governmental functions or foreign relations of the United States because of the position of the victim of the offense.

The aggravating and mitigating circumstances listed in section 1–4E1 of S. 1 are in some instances more loosely drawn than those in S. 1400. This is a result of the fact that S. 1 provides for a balancing of the factors considered rather than providing a mandatory result if certain findings are made. Thus, S. 1400 necessarily avoids listing certain aggravating and mitigating circum-

stances listed in S. 1 because the result of listing them might be to require the death sentence when it should not be required or to preclude it when it should be imposed. For example, S. 1 provides as a mitigating circumstance that the defendant is "emotionally immature". Although this might be an appropriate consideration when a balancing test is used, it should not in itself preclude applicability of the death sentence as it would if incorporated in the S. 1400 approach. For the same reason, where certain mitigating circumstances are included in both S. 1 and S. 1400, the language of the provisions of S. 1 is sometimes broader than the language of the comparable provisions in S. 1400. For example, the third mitigating circumstance listed in S. 1 is the impairment of the defendant's capacity to appreciate the character of his conduct or to control his conduct; by contrast S. 1400 would require that the defendant's mental capacity be "significantly" impaired. The broader provision of S. 1 again may be appropriate to a balancing test, but when the existence of a given circumstance would completely preclude application of the death sentence, the language should be more narrowly drawn.

With respect to the seventh mitigating circumstance provided by S. 1, that "the offender has no significant history of prior criminal activity". This may be an appropriate consideration when a balancing test is used. However, we believe that it should not preclude application of the death sentence in certain cases altogether, as would occur if it were made a precluding circumstance under S. 1400. It should be noted, however, that the aggravating circumstances listed in S. 1400 are drawn to require consideration of past criminal records in certain situations. (See section 2401(a)(1)(A), (2)(B), and (2)(C)).

11. S. 1400, §2402(a), provides for the penalty hearing to be held unless the Government stipulates that aggravating factors are absent or mitigating factors are present. No time (*e.g.*, when the indictment is returned) is set for the stipulation. No factual basis is required for it. And it is not subject to judicial review. In the absence of such safeguards, do you see the potentiality for abuse of the stipulations as a plea bargain technique in capital cases?

In many Class A felony cases the nonexistence of an aggravating circumstance or the existence of a mitigating circumstance will be so obvious that it would serve no purpose to go through the special sentencing hearing provided for in S. 1400. In such cases, a provision should exist to permit appropriate stipulations. Since such stipulations will entail fairly specific matters of fact, a lawyer, as an officer of the court, is unlikely to file a stipulation containing a false representation—an act that would be a felony both under S. 1400 (section 1343) and under existing law. In any event, the courts may be expected to scrutinize the application of the death penalty very carefully for any abuse, and prosecutors may be expected to recognize the necessity for evenhanded application of the death sentence in order for any death sentence provision to be found constitutionally acceptable.

12. Do you think it might be advisable to permit an appellate court to review the substantiality of the evidence and the applicability of the aggravating factors in capital cases? Would there not be a tendency for an appellate [court to] review the conviction for technical points anyway if it thought the death penalty was improperly imposed?

The conviction of the defendant in such a case would be subject to appeal in the same manner as any other criminal case. If the defendant believed that there was an unsupported finding of an aggravating circumstance resulting in the imposition of the death sentence, the finding would be subject to appellate review. We see no need for a specific provision permitting or requiring appellate court review in these cases.

13. Do you think it would be a good idea to process S. 1401 along with S. 1 and make the provisions of S. 1401 effective immediately, even though S. 1 would have a delayed effective date?

We recommend that S. 1401 be enacted at an early date and go into effect as soon as possible. The provisions of S. 1401 were specifically drawn to amend existing law rather than the proposed criminal code so that the bill could be acted upon before passage of the entire code. The provisions relating to the death sentence can then be incorporated into the criminal code as it passes the Senate.

Sincerely,

ROBERT G. DIXON, Jr.,
Assistant Attorney General
(Office of Legal Counsel).

Senator McCLELLAN. Our next witness is District Attorney Arlen Specter.

Mr. Specter, we welcome you today. You have been before this committee before. I believe you were one of our important witnesses when we considered the Omnibus Crime Control Act, were you not?

STATEMENT OF ARLEN SPECTER, DISTRICT ATTORNEY, PHILADELPHIA, PA.

Mr. SPECTER. Yes, sir, Senator McClellan. I had the pleasure to be in July of 1966, shortly, after the *Miranda* [1] decision came down, in terms of this committee's consideration of the Omnibus Crime Control Act, which was passed in 1968.

Senator McCLELLAN. We appreciate your appearance here and are grateful to you for coming back today to testify on the issues and problems the committee is now considering.

You have a prepared statement, I believe?

Mr. SPECTER. Yes, I do, Senator McClellan.

Senator McCLELLAN. You may proceed.

Mr. SPECTER. If it pleases the committee, I would prefer to submit the prepared statement and perhaps highlight it and supplement it on other points which I think may be of interest to the committee.

Senator McCLELLAN. Very well. The statement will be received and printed in full in the record at this point. You may proceed to highlight it.

[The statement referred to follows:]

STATEMENT OF DISTRICT ATTORNEY ARLEN SPECTER

Today I would like to discuss with the members of this Subcommittee the most serious and complex problem which confronts me as a law enforcement officer. It is a problem which has stirred controversy in every State in this nation. It is a problem so difficult, and so fundamentally tied to a disconcerting interweaving of religious, moral, social and legal principles, that it has provoked virtually every citizen to take his stand—either for or against.

The problem to which I refer is the question of the reinstitution of the death penalty.

When the United States Supreme Court struck down capital punishment as unconstitutional, if freakishly or wantonly applied, in the now famous case of *Furman v. Georgia*, 408 U.S. 238 (June 29, 1972), the decision brought audible sighs of relief in some quarters and frustration underscored by a very real sense of naked helplessness in others.

Because more than a decade in the District Attorney's Office of the nation's fourth largest city has convinced me that the death penalty is a meaningful deterrent to violent crime, my Office moved immediately to propose legislation which meets the requirements articulated by the U.S. Supreme Court in the *Furman* case. By July 5th, less than one week after the Court had acted, our proposal was on its way to every member of the Pennsylvania General Assembly.

We noted to the Legislature that the Supreme Court ban was neither irrevocable nor unanimous, and we reminded our Senators and Representatives of Chief Justice Burger's clear invitation to State governments to act to fill the void left by the *Furman* decision.

Said the Chief Justice:

". . . legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment."

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Our bill was introduced in the State Senate and a similar version was introduced in the State House. Although the bill easily passed the House by a vote of 157 to 38 on September 27th, the Senate did not act before the 1972 session ended and so the bill was reintroduced in the current session on January 22nd.

The road to final passage, however, will not be easy. Governor Milton Shapp is opposed to this legislation and has vowed that there will be no executions of convicted and sentenced criminals—however heinous and depraved their crimes—while he is Governor of Pennsylvania. However, the Governor may be on the verge of modifying his position—he has recently appointed a special commission to study the question of capital punishment prior to any formal recommendation from his office to the Legislature.

I have accepted the Governor's personal invitation to join in this study, but I have also stated publicly that I will not be a party to any attempt to delay consideration of this important question by the full General Assembly. But the battle will not be and is not being waged solely in the Commonwealth of Pennsylvania. Government officials from 11 States have requested copies of our proposal for possible introduction in their Legislatures. Florida has already reenacted capital punishment and California voters have by referendum approved the death penalty by a margin of more than two to one.

The strong public reaction in California which the referendum approval reflects has been mirrored in the reaction of Pennsylvanians whom I have spoken to and corresponded with in the nine months since the Supreme Court acted.

Furthermore, as you know, United States Attorney General Richard Kleindeinst has announced the Nixon Administration's interest in making the death penalty mandatory for persons convicted of certain classes of treason, sabotage, espionage, and murder. These Administration proposals are now before you as a part of S. 1400.

I believe that the bill which we have proposed for Pennsylvania would meet the requirements set down by the Supreme Court by imposing a mandatory death sentence on any person convicted of murder in the first degree involving:

1. The murder of a peace officer or fireman in the line of duty.
2. A contract murder committed for pecuniary gain.
3. An assassination.
4. A murder committed by a defendant previously convicted of first degree murder.
5. A murder committed by a defendant serving a life sentence.
6. A murder committed during any arson, rape, robbery, or burglary where the defendant had previously been convicted of any arson, rape, robbery or burglary.
7. A murder during a kidnapping.
8. A murder resulting from the hijacking of a plane, train, bus, ship or other commercial vehicle.

Under our proposal, after any death sentence has been imposed there must be an automatic review of the sentence by the State Board of Pardons. The Board would have the authority, by a majority vote, to reduce the sentence to life imprisonment after consideration of specific aggravating and mitigating circumstances.

Aggravating circumstances would include:

a. The defendant was previously convicted of another murder or a felony involving the use or threat of violence to the person.

b. At the time the murder was committed the defendant also committed another murder.

c. The defendant knowingly created a great risk of death to many persons.

d. The murder 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 robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

e. The murder was committed for pecuniary gain.

f. The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

As you can see, we have not included subsections (vi), (vii), or (viii) of Section 1–4E1(b)(3) in our list of aggravating circumstances, but rather we have made provision for these instances in our enumeration of the types of first degree murder for which the death penalty shall be mandatory, as listed above at (1), (3) and (5).

Mitigating circumstances under our proposal would include:

a. The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.

b. The defendant acted under unusual pressures or influences or under the domination of another person.

c. At the time of the offense, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

d. The youth of the defendant at the time of the offense.

e. The defendant was an accomplice in the offense committed by another person and his participation was relatively minor.

f. The defendant has no significant history of prior criminal activity.

Included in S.1, but omitted in our proposal is Section 1–4E1(b)(1)(vi), which provides as an additional mitigating circumstance: "the crime was committed under circumstances which the offender believed to provide a moral justification or extenuation for this conduct and which is plausible by ordinary standards of morality and intelligence. . ." Our experience has indicated no substantial reason to include the provision among possible mitigating circumstances.

These provisions, I feel will give our bill the uniform application across the State which the *Furman decision demands. We will not have the problem of a court in Philadelphia imposing the death sentence in a case where a Pittsburgh court would not, and with the Pardons Board review we preserve the flexibility which we need.*

Thus, with the exceptions noted above, our proposal is substantially similar to Section 1—4E1 (p. 48–50) of Senate Bill 1. Our bill, of course, makes no reference to treason and does enumerate the specific types of homocide for which the death penalty would be applicable. In addition, it provides for a critically important post-adjudication review by our State Board of Pardons.

In order to meet the standards articulated in *Furman*, in our opinion, it is necessary to preclude wanton or freakish application of the penalty by mandatory imposition. Yet it is equally important that the uniform application so achieved retain sufficient flexibility. We provide for a uniform application of this "flexibility" by lodging power to consider both aggravating and mitigating circumstance within one body—the Pardons Board. I would respectfully suggest to this Subcommittee that consideration be given to amending Sections 1–4E1 and 2 to provide for such flexible yet uniform review so that the demands of *Furman* may be met.

I would add that it had been and continues to be the position of the Philadelphia District Attorney's Office that the death penalty has not been wantonly or freakishly applied in Pennsylvania. My Office raised this argument before the U.S. Supreme Court in 1972 in *U.S. ex rel. Phelan v. Brierley*, in *Pennsylvania v. Brown*, and as recently as February 12, 1973 in *Pennsylvania v. Lopinson*. Statistics from our briefs in these cases, detailing the characteristics of incidence of imposition of the death penalty in Pennsylvania since 1960, appear in an appendix to my statement today. To date our petitions have been in vain and the opportunity for oral argument which we have sought has been denied. The petition in the *Brown* case was denied March 26, 1973.

Why do I feel so strongly that the death penalty should be reinstituted? As I stated at the outset, my conviction is a product of over a decade in the prosecutor's office in the nation's fourth largest city. Too many times hardened criminals have openly admitted to me or to members of my staff that they don't carry weapons because of their fear of the death penalty.

Let me cite an illustration. In 1957, three young men named James Cater, George Rivers and Robert Williams decided to rob a North Philadelphia pharmacy. All three were of marginal intelligence levels with IQs in the 75 to 80 range. Yet Cater and Rivers refused to go through with the holdup when they discovered that Williams planned to take a gun.

Williams, 20, lied to Cater, 20, and Rivers, 18, and assured them that he would leave the gun behind since they objected—he even pretended to return the weapon to a nearby drawer. But when Cater and Rivers turned to leave the room, Williams slipped the gun out of the drawer and concealed it on his person.

During the ensuing robbery which netted the trio $34, Williams panicked and pulled the gun, killing storekeeper Jacob Viner.

The reason I tell you this story is this. If two young men with marginal IQs have enough fear of the death penalty to refuse to participate in a holdup if a

gun is going to be taken by an accomplice, then I think it becomes plainly apparent that the death penalty *is* an effective deterrent to murder.

Perhaps another illustration would be helpful. An incident involving the Governor of Maryland, Marvin Mandel, recently came to my attention which graphically and dramatically underscores the deterrent value of capital punishment. Asked if he personally favored a restoration of the death penalty in Maryland, the Governor quickly replied, "Yes, I do, and I'll tell you why . . ."

The Governor then described an incident that occurred last July at the Maryland Penitentiary in Baltimore when he arrived during a riot by inmates.

"One of the guards was being held on the fourth floor right out over the ledge and one of the prisoners (a spokesman) was down on the first floor talking to me, and we were trying to talk him into releasing the prison guard," Mandel said.

"He said to me, 'Look, I'd just as soon push him out. I'm here under life sentence and all they can do is give me another life sentence, so what difference does it make?'

"And I said to him, 'You may be wrong about that.' He said, 'The Supreme Court said I can't get the death penalty.' And I said, 'Yeah, but if it's mandated by the state you could.' And he turned around to another prisoner and said, 'Is he right?' and the other prisoner said, 'He may be right.' He turned around and stopped talking."

The hostage guard was then freed.

Other illustrations are equally as compelling. A case of particular significance to Pennsylvania is the murder of State Trooper Robert Lapp in Lancaster on October 16, 1972, by Alfred Ravnel. Ravnel had been sentenced to death for one of three murders which he had committed in New Jersey, but his sentence was later commuted.

Also of significance are two incidents at the State Correctional Institution at Dallas, Pennsylvania which have occurred subsequent to the *Furman* decision.

In the first incident inmate David Scoggins, under a death sentence on a first degree murder conviction, is alleged to have stabbed fellow inmate Alexander Edinger to death.

In the second incident inmate Fred Butler and Ronald Jordon, both under life sentences for first degree murder, are alleged to have stabbed fellow inmate Thomas Wilson to death.

I feel it is appropriate, in view of such incidents, to consider the question of the safety of both inmates and correctional officers subsequent to *Furman*.

Yet another example is the holdup attempt in a Brooklyn, New York, branch office of the Chase Manhattan Bank on August 22nd shortly after the *Furman* decision, during which two holdup men threatened to kill the nine hostages who had been taken because—by the direct admission of one of the holdup men—the death penalty no longer confronted him.

Still another example of the effect that even the possibility of imposition of the death penalty can have is illustrated by the experience of one of the finest prosecutors in the nation, my First Assistant District Attorney, Richard Sprague, in the trial of the Yablonski cases.

Sprague has repeatedly voiced his opinion that it was the possible imposition of the death penalty that motivated the first three defendants convicted in connection with the Yablonski murders to cooperate and offer information leading to evidence of the involvement of others in the case.

He has also noted to me that his success in attempting to secure such cooperation since the *Furman* decision has been sharply curtailed.

The statistics which have been marshalled by both proponents and foes of capital punishment in their efforts to either support or refute the effectiveness of the death penalty as a deterrent to violent crime go both ways and are, therefore, in my judgment inconclusive.

For example, a study of this question by Randolph Childs which appeared in the Pennsylvania Bar Association Quarterly in 1960 compared the murder and non-negligent manslaughter rates per 100,000 population in Pennsylvania (a death penalty State) and Michigan (a State which long ago abolished the death penalty) for an eight-year period and concluded that the Commonwealth's lower rate of 2.97 when contrasted with Michigan's substantially higher rate of 4.23 demonstrated the deterrent value of capital punishment.

Other studies have reached conflicting conclusions and the most thoughtful analyses seem to conclude that mere statistical evaluation of this question is not too helpful.

The prestigious Royal Commission on Capital Punishment, for example, which began its study of this problem in 1949 and issued its report fully

twenty years ago, concluded that there was evidence that ". . . the death penalty is likely to have a stronger effect as a deterrent to normal human beings than other forms of punishment . . . ," but at the same time the Commission conceded that reliance solely on statistical evidence was not at all "convincing."

And in this country, commenting in 1960 on 1959 statistics comparing the incidence of murder in the nine States which had abolished capital punishment with the 41 which had retained it, the F.B.I. openly acknowledged the deterrent value of the death penalty in its *Uniform Crime Reports for the United States*, and labeled as "completely inconclusive" simple statistical comparisons of murder rates.

More recently, my Office has noted an increase in the number of jury trials and a reduction in the number of guilty pleas in cases in which the death penalty might previously have been a factor. Several of my senior staff members feel, based on their reviews of selected cases, that this change can be attributed to abolition of the death penalty. Their conclusions are, of course, subjective, but I bring them to your attention so that you may evaluate them in the context of your particular inquiry.

Suffice it to say that, in my opinion, it is imperative that the death penalty be returned to law enforcement as a deterrent tool.

Please do not mistakenly think that I seek this reinstitution because I hold the life of any individual in anything less than the highest regard. I support this legislation because I do hold human life in the highest regard and because I want every tool at my disposal, and at the disposal of my fellow prosecutors, to protect the lives of decent, law-abiding citizens.

I firmly believe that the death penalty is a deterrent to violent crime. I hope you will agree with me and vote for the passage of this proposal.

Thank you.

APPENDIX

PENNSYLVANIA DEATH PENALTY SURVEY—1960 TO PRESENT

Defendant characteristics	1st degree convictions		Death penalties (trial court)		
	Number of cases	Percent of total cases	Number of cases	Percent of total cases	Percent of 1st convictions
Age:					
Under 15	4	0.9	0	0	0
16 to 24	194	45.1	16	47.1	8.2
25 to 34	93	21.7	8	23.5	8.6
35 to 44	38	8.8	4	11.8	10.5
45 to 54	19	4.4	1	2.9	5.3
Over 55	4	0.9	0	0	0
N/A	76	17.7	5	14.7	6.6
Total	428	[1]100.0	34	100.0	
Race:					
Black	249	58.2	19	59.9	7.6
White	164	38.1	14	41.2	8.5
Spanish-American	6	1.4	1	2.9	16.7
N/A	9	2.1	0	0	0
Total	428	[1] 100.0	34	100.0	
Sex:					
Male	413	96.3	32	94.1	7.7
Female	15	3.5	2	5.9	13.3
Total	428	[1] 100.0	34	100.0	
Counsel:					
Court	298	69.6	26	76.4	9.1
Private	121	28.0	8	23.5	6.6
Pub. def	6	1.4	0	0.0	0
N/A	3	.7	0	0.0	0
Total	428	[1] 100.0	34	[1] 100.0	
Adjud.					
Jury	306	71.5	24	70.6	7.8
G.P	119	27.8	10	29.4	8.4
N/A	3	.7	0	0.0	0
Total	428	100.0	34	100.0	

[1]Percentages in these columns do not add up to exactly 100 percent due to rounding of component percentages.

Mr. SPECTER. Mr. Chairman, I would prefer to start with the issue of deterrence, which is a subject that the committee has already considered this morning, and to express my judgment on this issue, and that is that I believe the death penalty is an effective deterrent against murder. I say that based upon more than 7 years as district attorney of Philadelphia, and dealing with a great many cases in that capacity. We have the frequent occurrence in the criminal courts of Philadelphia where professional burglars have expressed themselves on the point of not carrying a weapon on a burglary because of their concern there may be a scuffle, there may be a dispute, during which the weapon may be used and death may result, and they may face the possiblity of capital punishment.

The same situation holds true to young hoodlums who carry weapons on armed robberies. I would like to take just a minute to describe one of the celebrated cases which I have set forth in the prepared text. In 1957, three young men named Williams, Caters, and Rivers, ages 20, 20, and 18, respectively, set out to commit a robbery in the city of Philadelphia. This was a case reported in the Pennsylvania Supreme Court appellate reports.

Williams was the ringleader and had a weapon. He chose two younger accomplices, one of whom was Rivers, age 18. He chose him because he had no police record and could therefore open up the drugstore door without leaving fingerprints which would be detectable. Caters and Rivers objected to going on the robbery when they saw that Williams had a gun. We found this out later through their confessions and our investigation of the case. I think it highly significant that they did object, because Caters and Rivers had a marginal intelligence level in the 75 to 80 range, but even in that range, they would be apprehensive in a robbery where a gun was involved as a weapon.

Williams, when confronted, said OK, I will leave the gun here, and he put it in a drawer and he slammed it shut, and they all proceeded to leave the room. Unknown to Caters and Rivers, Williams slipped the gun out of the drawer and concealed it on his person. They went to a north Philadelphia drug store, where they came upon a scene involving a man name Jacob Viner, who was the storekeeper. Williams drew his revolver and shot and killed Jacob Viner. The death penalty was carried out as to Williams. Caters and Rivers were sentenced to death and ultimately had the sentence commuted, but the principle was that these two young hoodlums, with marginal IQs, thought twice about going along on a robbery if a weapon was to be involved.

There is another specific case cited by Governor Mandel in January of this year in which he relates a visit that he made to the Maryland prison where there was a riot in process. At that time, there was a prison guard held hostage and pushed out on to the ledge of the wall and a lifer was threatening to push the prison guard off unless the State of Maryland, through its Governor, complied with the demands. The lifer said "Well, what have I got to lose? I have already got one life sentence. There is nothing further to be done to me." Governor Mandel shot back, "Well, you could get the death penalty if it is mandated by law." The man asked some-

body if he was right. The other prisoner said he may be right. The lifer then let the prison guard proceed to safety. Governor Mandel cites that as his reason for being in favor of the death penalty.

Since the U.S. Supreme Court decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), in Pennsylvania, we have had two murders at the State correctional institution at Dallas, according to the accounts, by lifers there. The lifer who has nothing to lose, being under one life sentence, has no reason not to kill others. On these occasions, it was two other inmates. And equally there is nothing to stop or protect a prison guard from being murdered by someone who is already serving a life sentence.

I personally believe the statistics on capital punishment are largely inconclusive. Statistics can be cited on both sides of the fence, and I think it boils down essentially to a question of judgment. As I said to you, based upon what I have seen as district attorney of Philadelphia, I firmly believe the death penalty is an effective deterrent.

I think that there is a substantial issue involved in our society in allowing the principles of representative democracy to hold sway, absent some compelling constitutional issue which I do not believe is present on the death penalty case, providing the legislation is sufficiently carefully drawn. I believe that the people of Pennsylvania favor the death penalty. We introduced a bill into the general assembly in Harrisburg last July and it passed by a vote of 158 to 37. It was bottled up in committee in our State Senate. But I think that the sentiment in Pennsylvania is strongly in favor of such legislation and I think it can be constitutionally drawn. I would like to come to that in a minute.

I think the other States which passed a death penalty strongly support that and the California referendum is an illustration that the people in our society do expect law enforcement officials to have at their disposal every legitimate weapon which can be used in the war against crime, especially violent crime like homicide.

I would like now to turn to another issue, if I may, and that is a very basic question which the Supreme Court decided in *Furman*, that the death penalty imposed by the State of Georgia was wantonly or freakishly imposed. There was no uniform or rational imposition of the death penalty as the Supreme Court viewed the facts of *Furman* v. *Georgia*. The decision of the Supreme Court of the United States was badly split, as is their custom from time to time. Only two of the Justices, Marshall and Brennan, decided that capital punishment was cruel and unusual punishment and definitely in violation of the Eighth Amendment prohibiting against cruel and unusual punishment. Four of the Justices said that the death penalty was constitutional and three of the Justices in the center said it could be constitutionally applied if a mandatory or rational or nonfreakish or nonwanton basis existed. Justice Douglas said it could be constitutionally applied, but that it would take a phenomenal act to satisfy his standards of constitutionality. I think as to Justices White and Stewart, being in the middle, that a realistic approach would be to try to tailor a death penalty law which would fit their standards as to constitutionality. So that Justices White and Stew-

art, in combination with the other four, would constitute a majority of six.

With respect to the issue of whether the death penalty is wantonly or freakishly applied, my office, the Philadelphia district attorney's office, has sought on two occasions to have the U.S. Supreme Court review the application of the death penalty in Pennsylvania because we believe that an analysis of the death penalty in Pennsylvania will show that it is not freakishly or wantonly applied. It is not discriminatorily applied against the underprivileged, nor unconstitutionally applied against the blacks, which was the central conclusion in the *Furman* case.

I would refer this committee to a statement made by Chief Justice Burger, which I think is really stated for the benefit of State legislative bodies rather than for the U.S. Congress, where he pointed out, and I cite this on page 2 of my statement, "* * * Legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough reevaluation of the entire subject of capital punishment." I would suggest just as respectfully that it would be very useful for this committee to make such an evaluation of capital punishment as you are doing now, and even to move into the area as to whether capital punishment as applied by the Federal Government, which, of course, is your fundamental responsibility but perhaps even as to State governments, is applied in a wanton or freakish way. We have an unfortunate situation—I think it is unfortunate—that when a case arises from a State like Georgia and the *Furman* decision is handed down, and it arose from Texas as well in a joint decision, that all of the States are bound by that adjudication, even though the underlying facts in the other States may not really support it. My office joined, immediately after the *Furman* decision, with the State of Texas and with the State of Georgia in urging reargument by the U.S. Supreme Court on the basic issue, speaking for Pennsylvania, that Pennsylvania's laws were differently applied. That petition for reargument was denied.

Then, as we have had a number of our death cases move up through the appellate courts and have had our death sentences changed to life imprisonment under the authority of *Furman*, we have then petitioned the Supreme Court of the United States for certiorari on the ground that the factors in Pennsylvania were not discriminatory under their rational in *Furman* v. *Georgia*.

My office has made an exhaustive study of the cases involving 428 first degree murder convictions in Pennsylvania from 1960 until October 3, 1972. We have taken these cases and have analyzed them with respect to how frequently the death penalty is imposed; in what number of cases blacks are sentenced to the death penalty as contrasted with whites; in what percentage of cases the death penalty is imposed in cases involving court appointed counsels opposed to private counsel; and in what percentage of cases the death penalty is imposed for guilty pleas as opposed to trials by jury. We came to the conclusion, which we feel is factually supported statistically under these cases, that under Pennsylvania law the death penalty is not wantonly or freakishly applied nor does it discriminate against the underprivileged or impercunious or against the black.

I attached as an appendix to my statement some of these basic statistical materials. For example, taking the 420 cases where murder in the first degree resulted in Pennsylvania in that 12-year span, in 34 of those cases capital punishment was applied. That is slightly under 8 percent of the cases, 7.9 percent. Among the 249 blacks, 19 received the death penalty, 4.6 percent, contrasted with 14 whites who received the death penalty out of 164 tried for 8.5 percent. So that in Pennsylvania the death penalty was imposed in a slightly higher rate on white defendants than on black defendants.

With respect to the issue of court appointed as opposed to private counsel, our statistics showed that blacks had private counsel in a higher percentage of cases than did white defendants. In court-appointed counsel cases, out of 298 some 26 received the death penalty for a percentage of 9.1 percent; whereas in private counsel cases, out of 121 cases, 8 received the death penalty, for 6.6 percent, which is really in the same ballpark on that kind of a statistical computation.

With respect to jury trials, 306 defendants were tried by a jury and 24 received the death penalty, for 7.8 percentage, while 119 entered guilty pleas and 10 received the death penalty, for 8.4 percent. So that the range is still very close, we would submit. Taking these statistics as a whole, it is our conclusion and our submission in analyzing these 428 cases that the death penalty was imposed in some 34 instances determined by the nature of the murder itself and the prior criminal record of the defendant, and we would submit to this committee that those are two very good reasons for the imposition of the death penalty and two reasons which would withstand constitutional scrutiny.

I would submit to this committee that the U.S. Supreme Court, when the death penalty issue reaches that Court again, if it does, would place great reliance on factual findings, obviously supported by evidence that this committee would reach. I would cite in support of that the decision which the U.S. Supreme Court gave in *Frazier* v. *Cupp*,[1] a murder case in Oregon. I argued that case on behalf of the National District Attorneys Association and made the argument on behalf of the States that the State prosecutor should have no more rigid standard in terms of what is an unconstitutional confession than do the Federal prosecutors. The 14th Amendment due process clause, picking up the Fifth Amendment privilege against self incrimination and the Sixth Amendment right for counsel, should impose no more rigid standards on the State prosecutor. In 1968 Congress enacted the Omnibus Crime Act which said a confession should be admitted into evidence if it were constitutional, not limited to precise warnings. The U.S. Congress came to that conclusion after making an exhaustive legislative inquiry and finding that the restrictions of *Miranda*[2] unduly limited law enforcement agencies.

It is a curious situation in the law today that the Omnibus Crime Control Act does establish a different standard for admissability of statements or confessions than that which is the law of Pennsylvania, for example, or any other State which is bound by the *Miranda* decision. But the different standards on confessions under the 1968

[1] *Frazier* v. *Cupp*, 394 U.S. (1969).
[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Omnibus Crime Control Act have not yet been decided by the Supreme Court of the United States as to whether they are constitutional or are unconstitutional. But when the case of *Frazier* v. *Cupp* was argued and we made the oral presentation that the Supreme Court should overrule *Miranda* based upon the Federal standard enacted by Congress, which was presumptively constitutional based upon their substantial factual findings, the U.S. Supreme Court declined to meet that issue, but instead permitted the confession to be used in *Frazier* v. *Cupp*. It is hard to draw conclusions along this line. But I think the Court sought to avoid a head-on confrontation with the Omnibus Crime Control Act of 1968. So if this committee were to make the same kind of legislative finding as this committee did in 1968—and, as Senator McClellan has previously noted, I had the privilege and opportunity to testify before this committee at that time and presented certain statistical data there as to how the *Miranda* decision had reduced the opportunity of State law enforcement agencies to obtain confessions—I think an analogous inquiry made by this committee would be very persuasive and give prosecutors and law enforcement agencies a forum to come and present their arguments, because we have not had the opportunity to present arguments to the U.S. Supreme Court, even though my office has sought to do so in a number of cases since the *Furman* decision.

If I may, I would like to present one other idea for your consideration. That is the concern which I have over the provision of both section 1–4(E)(1), as well as the provisions of Senate bill 1400, in terms of possible constitutional objections that may be rendered. Starting with provisions of 1–4(E)(1), I am concerned that the Supreme Court of the United States might well conclude that allowing the ultimate judgment on the imposition of death or life imprisonment to reside with either the court or a jury based upon a set of aggravating and mitigating circumstances leaves too much discretion in the hands of the fact finder. This might leave the Court on the pivotal opinions of Justices White and Stewart to say that there is still latitude for irrational or discriminatory or freakish or wanton imposition of the death penalty, that even under those standards a jury in Georgia might come to a different conclusion than a jury in Pennsylvania.

I am similarly concerned by a number of the provisions in S. 1400, and if I could focus just for a minute on the provision of section 2401, which relates to sentence of death, and specifically to subparagraphs (b)(2) and (b)(3), where there are a series of circumstances where the imposition of the death sentence would be precluded. One would be in subparagraph (b)(2) where the defendant's mental capacity was significantly impaired, although not so impaired as to constitute a defense to prosecution, or subparagraph (b)(3) where a defendant was under unusual and substantial duress. My concern arises from the possibility of an argument that submitting such discretionary considerations to a jury might lead different juries on identical offenses to come to different conclusions. I would submit to this committee that a much safer basis for imposition of a death penalty would be to establish it on a mandatory basis for a specific type of offense, no ifs, ands, and buts, in terms of the impo-

sition in that specific case. As, for example, an assassination of a Federal official, or a hijacking of a plane where death results. I would then provide that the requisite flexibility comes into play by a similar procedure which my act has imposed, that is to have every case where the death penalty is imposed reviewed automatically by the Board of Pardons of Pennsylvania, by the State Board, or on the Federal level, by the Federal Board of Pardons, and then permit that board to review the case under the standards which you may set forth under mitigating and aggravating circumstances, and in our drafting legislation we made virtually identical provisions. In that way there would be one single body which would be considering the issue of reduction from death to life imprisonment, and in that way there would be the best possible guarantee that there would not be a different set of values imposed, say by a jury in Pennsylvania as opposed to a jury in Georgia, but if one body, the Federal Board of Pardons, were to consider the case and the second case, then I think there would be the strongest possible factors in favor of uniformity.

We have taken that approach in our Pennsylvania legislation in asking for the death penalty in eight categories of particularly outrageous and heinous murders, such as an assassination of a public official, such as a contract killing, or a murder committed by someone serving life imprisonment, or a murder occurring in the case of robbery or rape where he had previously been convicted of robbery or rape.

Senator McClellan. As I understand it then, the Pennsylvania legislation for the first offense would not impose the death penalty for a murder in connection with the crime of rape, but would permit a life sentence the first time and give the defendant another chance?

Mr. Specter. I am saying I don't like the concept of the second chance, but like even less not having the death penalty at all. My judgment is, Senator, that if we are to retain the death penalty, we will have to apply it in two categories of cases. One category where we have a recidivsit, someone who has previously been convicted, and the second category where it is a rational, calculated act. We do have another provision, and that is in the case of the killing of a police officer where I think special circumstances work because of the unique risks which a police officer faces.

So when you say to me, Senator, would I not like to have it available for a person who murders in the course of a rape on the first instance, I would answer yes, I would like to have it available, but our legislation does not provide that, because I think we have to be more restrictive in the application if we seek to have it imposed and get the State law back into effect on it.

But I think that as it would apply to Pennsylvania, or as it would apply nationally by analogy, in order to have a constitutional death penalty for our State I want to be sure that a jury in Philadelphia will not be imposing a death penalty in a case or a jury in Pittsburgh will not be imposing life imprisonment to give the U.S. Supreme Court grounds to say that different juries under different circumstances will treat different offenses in different ways. That is why our proposed legislation in Pennsylvania will vest the authority

to reduce from death to life imprisonment in the pardon board, and that is why I would make the same suggestion for this committee, because I think that flexibility is necessary if we are to have the chance of getting the legislation passed. I would like too see it handled by one body under the most uniform standards possible.

Senator McClellan. One other question. How do you describe the standards or define the standards that would require the imposition of the death penalty in a mass murder?

Mr. Specter. Excuse me, sir, what kind of a murder?

Senator McClellan. Mass murder. Under the criteria that you have prescribed in your legislation in Pennsylvania, what would happen in a case like the assassination of the Yablonskis? That is a mass murder. They go in there and deliberately kill three or four people.

Mr. Specter. Under our statute that would call for the mandatory imposition of the death penalty because it is a contract murder committed for pecuniary gain.

Senator McClellan. That is not necessarily for pecuniary gain. They were not in there to rob.

Mr. Specter. They were paid to commit the murder, though.

Senator McClellan. They probably were paid, that is a factor in it. We have other cases where there is no factor of pay, where people just go in and commit mass murder, a man murders his children, murders his family. There are various instances. We had here in Washington recently a case where the Black Muslims went in a home and murdered women and children. There was someone—Speck—who murdered a number of nurses a few years ago. In cases like that is there no way to reach them? Have we got to apologize for whatever we do to try to bring those people to justice? Do not they forfeit their right to live?

Mr. Specter. Senator McClellan, I think with respect to the Muslim killing that would fall under the category of assassination. I think with respect to the Speck murder in Illinois, some 8 or 10 years ago, that I would prefer to see legislation enacted which would call for the death penalty as to a defendant like Speck. But I would submit to this committee that our first step that we can have upheld on constitutional grounds. That is why, even though I would prefer to do it differently if I had my preferences, I would prefer to see a very limited act passed on the most outrageous kinds of killings where there is either a calculation or recidivist factor.

Senator McClellan. What you are saying is we are confronted with a condition where you can't necessarily advocate what you actually believe is the exercise of true justice, but must compromise to accommodate those who would release the criminal. We are going in that direction. We have been going in that direction for years. That is very, very discouraging to me. We have to try to accommodate these extreme views that make it difficult to have law enforcement.

Mr. Specter. I would phrase it differently, Senator McClellan. I would say that I would prefer to enact a more restricted bill and have it pass constitutional muster and appear before this distinguished committee again 7 years from now and advocate the broadening of the bill rather than enacting a bill which is broad enough

to draw the adverse reactions of the U.S. Supreme Court again. I think the next time around, if we have a bill which is too broadly drawn and not sufficiently restrictive and careful, will make it very hard to go back on the third occasion. I think we have to be very careful. I think we have to take a short step. I think the whole history of Supreme Court decisions has been made in helping the rights of defendants in very short steps and I think that from the prosecutor's point of view we have not come back with the same kind of an overall tactical approach. That is why I would prefer to see a more limited death penalty bill enacted now which would definitely pass constitutional muster.

Senator McClellan. Well, you may be approaching it from a standpoint of what may be termed practical necessity if we are to get any relief at all.

Mr. Specter. Yes, sir.

Senator McClellan. That is your position, if I understand it. We might get this much relief, but even though I believe it is right, we couldn't get relief beyond that?

Mr. Specter. I think that is true, Senator McClellan, and I think we are going to have to approach this bill to be sure that it is mandatory and is not susceptible to being wantonly or freakishly applied or discriminatorily applied, and we will have to buttress it on certain classes of offenses where we can make our strongest arguments for deterrence, and if we deal with emotional crimes, which you might think call for the death penalty and I might agree, then we will not have the strongest basis for that argument in terms of the current impact and it will run the risk of being upset by the court again.

Senator McClellan. I don't think the Yablonski murder was an emotional crime.

Mr. Specter. I don't either, and I will cover that in my bill pending before the Pennsylvania General Assembly.

Senator McClellan. I don't think robbing somebody and killing them is an emotional crime. It is a deliberate, premeditated crime of the highest order. They mean to get that money and if it is necessary to kill, they kill. I don't see how we can justify these things. They rob a bank and kill several people and yet are entitled to live.

I don't know the answer, but I am greatly disturbed. I am greatly disturbed, and I think many other people in this country are disturbed. Those who have been moving toward protection, greater protection for the criminal have not demonstrated to me that this is protecting society. I think in many instances where they have moved in that direction they have moved at the expense of the safety of the lives of human beings, and we are paying a heavier penalty in human life by reason of the weakening of the law-enforcement processes than we would if we enforced it occasionally and imposed a death peanalty in carrying it out. It is very distressing to me to see what is happening in this country with respect to law enforcement.

Mr. Specter. Senator McClellan, I would respond to that by citing the experience of the McClellan committee with the *Miranda* decision. You responded to that with a very careful, limited approach to the issue of confessions and statements, and you left latitude for

the courts to consider the factor of *Miranda*, but you concluded it would not be conclusive absent one of those warnings or waivers.

Senator McClellan. I have always thought that a jury that was competent to pass upon the guilt or innocence of a defendant was certainly competent to judge whether a confession was voluntary or coerced. I always felt that way. If it is not competent to judge whether a confession or statement was free of coercion or intimidation, I don't see how it would be competent to pass upon the guilt or innocence of a person. That is the position I took with respect to *Miranda*. I still believe I was right. You are probably correct. I wasn't trying to argue with you. You are probably correct that if we get any relief at all it is going to be the very minimum.

Thank you very much.

Any questions?

Mr. Blakey. I have one or two, Mr. Specter, if I might. Would you make available to the committee the larger study that you have and not just statistical?

Mr. Specter. Certainly.

Mrr Blakey. Secondly, when the Supreme Court denied certiorari did you read that as a rejection of your argument?

Mr. Specter. Yes.

Mr. Blakey. On the merits or rather just that the Court would prefer to hear it at a later time?

Mr. Specter. My reaction is that they don't care to hear it at all. I appreciate the rule of law that when certiorari is denied it has no meaning at all as to the underlying merits. That is the standard legal doctrine, but if the U.S. Supreme Court was going to consider what is happening in Pennsylvania, one would think they would have considered it on a petition for reargument. When *Furman* was decided the Court reversed two of our capital cases, so we had standing to petition for reargument. So we lost that and they say they will not hear it on reargument. We had cases coming up from the Court of Appeals for the Third Circuit in which we raised the argument again. Why would they be likely to consider it the next time around if they did not on two previous cases?

Mr. Blakey. What if the Court thought it would be wise as a policy matter to consider some of the statutes rather than to get into the business of considering them further?

Mr. Specter. If they do that, it will be a new statute.

Mr. Blakey. It seems to me the thrust of the evidence that you presented was their previous decision was overreaching, that it may have been correct in certain places and certain times but certainly not correct in all places and all times. I wonder if the new statute that would be enacted by the Congress or the States, if it were substantially different from the old statute, whether the evidence under the old statute would really be relevant? The new statute would have a presumption of constitutionality, and since there would be no evidence of experience under the new statute, no evidence of either discrimination or nondiscrimination, the Court would then have a pure case? It would have to face the constitutionality of the death penalty per se and have to face the question squarely. I wonder how helpful it would be for the committee to study evidence of discrimi-

nation under statutes substantially different than the one which it is considering?

Mr. SPECTER. Well, I think it would be very helpful for two reasons. One is that if we assume new legislation is to be passed, say, here by the Congress or the Pennsylvania General Assembly, the case then comes back to the U.S. Supreme Court and inevitably you argue about the last case, you seek to change the conclusion in the last case, and if in Pennsylvania we can show that even under prior practice there was a nondiscriminatory use of the death penalty——

Mr. BLAKEY. It would help your case if you could show the absence of it, but if the defendant could show the presence of discrimination under the old statute, unless he can project that onto the new statute, it would be irrelevant.

Mr. SPECTER. Correct.

Mr. BLAKEY. And it would come to the Court with the presumption of regularity and constitutionality.

Mr. SPECTER. It is true that evidence would work to help the State, the absence of evidence would not hurt the State because we would have a new law, but the presence of this evidence would be helpful to us, I think.

Mr. BLAKEY. Is it sine qua non of the committee going forward that it has extensive factual studies such as yours on a 10-, 50-, or 15-State basis? It certainly wouldn't be?

Mr. SPECTER. I would not represent it would be sine qua non. I wouldn't represent it to be that indispensable, nor do I believe the committee would have had to make those exhaustive studies when it passed the omnibus crime bill of 1968, but I can tell you the arguments to the Supreme Court in order to point to this committee what I felt was very persuasive, The U.S. Supreme Court has very limited factual bases for its conclusions. It does not engage in the extensive proceedings which this committee does. I think the U.S. Supreme Court would be loathe to tangle squarely with the conclusion by Congress on the facts.

Senator MCCLELLAN. Thank you very much.

REFORM OF FEDERAL CRIMINAL LAWS

THURSDAY, JULY 26, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 11:30 o'clock a.m., in room 2228, Dirksen Senate Office Building, Senator Roman Hruska presiding.

Present: Senators Hruska (presiding) and Kennedy.

Also present: G. Robert Blakey, chief counsel; Paul C. Summitt, deputy chief counsel; Kenneth A. Lazarus, minority counsel; Dennis C. Thelen, assistant counsel; and Mabel A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

We will resume hearings on S. 1 and S. 1400. We have a very fine list of witnesses this morning. It will be headed by the former Governor of Ohio, Michael V. DiSalle, who will testify on the subject of the death penalty.

Governor, through the years you have always extended your courtesy when we visited your State. We are very happy to have you here this morning.

You have submitted a statement and it will be printed in the record in its totality. You may proceed to testify as you wish.

I will be able to stay here until 1 o'clock.

You may proceed.

[The prepared statement of Mr. DiSalle follows:]

STATEMENT BY HON. MICHAEL V. DI SALLE, ATTORNEY AT LAW, WASHINGTON, D.C.

DEATH PENALTY

Mr. Chairman and Distinguished Members of the Committee:

Permit me first to express my appreciation for the opportunity to appear before you on the important subject of the death penalty. The President, in his message of March 14, 1973, has recommended the use of the death penalty in connection with certain crimes. This recommendation comes at a time when he also claims that crime has been substantially reduced since 1969. It might be well to note that this is also a period in which the death penalty has not been used in the United States. In view of this paradox, it might be well to examine the history of capital punishment, its use and disuse, it results, its deterrent value and its value as a tool in the protection of a civilized society.

During my term as governor of Ohio, the Executive Mansion at Columbus was staffed by convicted killers, all of whom were under life sentence. My wife and I, our children and grandchildren, lived under the same roof with these men twenty-four hours a day. Our association was not that of keeper and prisoner but that of fellow human beings. I shared their joys and sorrows, their strengths and weaknesses, their hopes and fears.

During the same period I acted on appeals for executive clemency from eleven men and one woman who had been sentenced to death. I also passed upon the cases of some one hundred fifty lifers eligible for parole after having served the Ohio legal minimum of twenty years. Whenever I extended mercy to a prisoner, elements of the press and my political enemies, knowing I had long been opposed to capital punishment would accuse me of encouraging crime by coddling criminals. Their conclusions were generally that the Governor is a sentimentalist whose heart is bigger than, though not as soft as, his brain, who weeps for the poor murderer but is coldbloodedly unconcerned about the murderer's victim.

I hope to convince this committee that the time to show concern for the victims of crime is long before the shot is fired or the blow struck—by seeking a sensible way of eliminating the *causes* of crime rather than by trying as we now do, futilely and after the fact, to eradicate crime by punishing the perpetrator. Punishment is too often a matter of emotion rather than cold logic. Under a system of justice not free of inequities, the question of who should be put to death in the name of the law and who should live is often decided by men influenced more by public climate and public clamor than by abstract justice. He who is to die is too frequently a man who has committed a crime at the wrong time in the wrong place under the wrong circumstances. A different combination of the same factors could well produce a more temperate verdict.

It would be well for us to examine the emotions which push a peaceable, kind, and just individual to the front rank of a lynch mob, clamoring for the life of a person he has never known, on the basis of facts which he has heard only at second or third hand. Must a man die to atone for a crime, the evidence of which has been viewed only through the blood-red spectacles of outrage and anger?

No one who has never watched the hands of a clock marking the last minutes of a condemned man's existence, knowing that he alone has the temporary Godlike power to stop the clock, can realize the agony of deciding an appeal for executive clemency.

During my term as governor, I came to dread the days leading to an execution. In those four years, six men died in the electric chair. Despite my opposition to the death penalty as a futile barbaric relic, my oath of office required me to execute the laws of the state, some of which call for capital punishment. True, my power of clemency was limited only by the exclusion of treason and impeachment cases, but for the six who died I could find no extenuating circumstances, no unequal justice, no questionable legal procedure, no reasonable doubt, to justify my reversing the sentence of the courts.

Even when I was convinced of the man's guilt, doubt haunted my unconscious long after the warden had notified me that the prisoner was dead. I remembered the narrow escapes of many innocent people and wondered how many innocents had actually died at the hands of the state. The death penalty is so horribly final. Once it has been carried out, mistakes cannot be corrected, and what human does not make mistakes? I though of Clarence McKinney, convicted of first-degree murder in my own state in the 1920's on the basis of circumstantial evidence, mistaken identity, and, apparently, his previous police record. While he was in prison awaiting an appeal, another man confessed to the crime. What if McKinney had been executed?

And Ed Larkman in New York, condemned to death in 1925. Larkman's sentence was commuted by Governor Alfred E. Smith in 1927, and he was pardoned by Governor Lehmann in 1929—after the real culprit confessed.

And Tommy Bambrick, whose case is discussed today in muted tones. Bambrick was already in the death house at Sing Sing when new evidence came to light which convinced Warden Thomas Mott Osborne that another man had committed the murder for which Bambrick had been convicted. Last-minute efforts to reach the governor were unsuccessful, however, and Bambrick went to his death still protesting his innocence.

This possibility of an irrevocable error was so vivid to me that on several occasions I made last-minute visits to the grim, antiquated Ohio State Penitentiary, not far from downtown Columbus, across the street from a casket factory, for a final interview with the condemned man. With death only a few hours away, it seemed to me that I might expect a moment of truth.

The tragic impossibility of correcting an error is, however, only one of the reasons for my opposition to capital punishment. First of all, I believe that

taking a human life, even to pay for a life already taken, is immoral. I am not speaking of morality in an abstract, theological sense—some professional theologians have sought to debate with me on that basis—but in a personal sense, according to my own conscience. Society, echoing the Ten Commandments, says: Thou shalt not kill. Then society illogically continues: Killing is wrong, and in order to prove it is wrong, we will kill you if you kill.

I believe human life is a divine gift and deliberately to destroy it is as much a crime for the state as for the individual. Israel, the land where the "eye for an eye * * * life for a life" idea of punishment originated more than two thousand years ago, has now abolished capital punishment except for crimes against the state—which means, in effect, collaboration with the Nazis in their program to exterminate the Jews.

Second, I believe the death penalty serves no purpose. Its champions argue that it is a deterrent to murder and the police lobby and its spokesmen agree, but statistics and history show that it had no deterrent effect. The shots fired by a misfit named Lee Harvey Oswald in Dallas on November 22, 1963, demonstrated the fallacy of this favorite argument of the champions of the death penalty.

Three Presidents of the United States had been assassinated before John Fitzgerald Kennedy was struck down in Dallas. All of their assassins died. Booth, who shot Lincoln, was killed while trying to escape his pursuers; his accomplices were hanged. Garfield's assassin, a disappointed office seeker, was executed. So was the anarchist who shot McKinley. Did this deter the men who took pot shots at Theodore Roosevelt, Franklin Roosevelt (the man who tried to kill F.D.R. in Miami in 1933 but killed Mayor Cermak of Chicago instead was electrocuted the following month), or Harry S. Truman (one of those would-be assassins was killed by guards? It did not deter Oswald.

The murder of Oswald by Jack Ruby produced intense indignation for a number of reasons. That Oswald was thereby denied a trial is of course basically opposed to our whole system. So is the persistence of a lynch attitude in a democracy that prides itself on its system of calm, considered justice. Further, Oswald's premature death prevented us all from ever learning more about his motives and of any possible accomplices. But I think the most interesting reason for the outraged reaction to Ruby's exhibitionistic act of retaliation is an implicit rejection of the whole idea of capital punishment.

If we believe that the murder of President Kennedy should be avenged and that the killing of Oswald could serve this purpose, then we ought to find some satisfaction in Ruby's one-man vigilante action. But if we say that Ruby as an individual should not seek revenge, should we as a people seek it collectively?

The Dallas jurors brought in a curiously contradictory verdict. By condemning Ruby to death they decided that avenging the killing of the President by another killing was wrong. Then they went on to say that this wrong should be corrected by another killing. Three wrongs make a right.

Ruby's trial was conducted in an emotion-charged atmosphere of exhibitionism, questionable civic pride, and political ambition. The prosecutor went into the Dallas courtroom like a heavyweight champion entering the ring to preserve his unblemished record. A record of one-hundred-percent convictions in capital cases does not necessarily mean that a prosecutor is achieving the prime objective of his office, the administration of justice. A prosecuting attorney has the responsibility of determining the guilt or innocence of a person charged with a crime. Even if he determines that the defendant is guilty, he has the further responsibility of determining what would best serve the ultimate cause of justice. Should he close the door to any mitigating information regarding the defendant, he is not filling his essential role in our system of jurisprudence.

The Dallas verdict was no surprise. Ruby's unsavory background, his associations, his career as a strip-tease impresario, all helped make him a likely candidate to pay with his life for a crime for which he may not have been emotionally or mentally responsible. I do not know what motivated him, but I would prefer to keep him alive as long as possible in order to achieve the broader service to society which will be accomplished only by establishing the complete truth.

To those who argue that political assassination cannot be considered in the same class with common-law murder in discussing capital punishment as a deterrent, I offer statistics. At present, fourteen American states and two

dependencies have abolished the death penalty as punishment for first-degree murder: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New Mexico, New York, North Dakota, Oregon, Rhode Island, Vermont, West Virginia, Wisconsin, Puerto Rico, and the Virgin Islands. States retaining capital punishment have failed to give greater pause to the prospective murderer than those that have abolished it: according to F.B.I. statistics, there is no appreciable difference in the homicide rate. Most European countries that have abolished capital punishment have a much lower murder rate than American states which still hang, electrocute, or gas their homicidal criminals.

As for the increased mortality rate among police officers—the police lobby is most vociferous in its claim that abolition of capital punishment will make the policeman's lot much more dangerous—F.B.I. figures again contradict the claim. A thirty-five-year record compiled by the Department of Justice does indicate a slight difference. In the capital punishment states a law enforcement officer's chance of being shot down in the performance of his duty is 1.3 per 100,000. In the abolitionist states the rate is 1.2.

More eloquent than statistics are the graphic examples from my own state of Ohio. During the reign of terror of the infamous Licavoli gang in Toledo, the gang killers could have driven just five miles to the Michigan line in order to do away with their victims in a state which does not execute for murder. They didn't bother. They were so confident of their own position that they did not even consider the fact that Ohio killed its killers in certain cases.

Even more striking is the case of Charles Justice. Justice, a broom maker who was sentenced in 1902 to twenty years in the Ohio State Penitentiary after a cutting scrape—a third offense—was a trustee assigned to the housekeeping duties of the death house. He found the electric chair—an angular, ungainly contraption of polished golden oak—far from efficient. While obviously not designed for comfort, the chair was too big for the small, nervous type of prisoner, who would squirm in his seat and cause the electrodes to make imperfect contact. As a result, the powerful current would arc between the electrodes and the doomed man's body, causing flesh burns and an unpleasant odor which discommoded the witnesses and officiating representatives of the state. Justice corrected this deficiency by designing iron clamps—which are still in use—to immobilize the limbs of the condemned man during his death reflexes and thus make for a neater execution.

For his exemplary service to the state, Charles Justice was granted extra time off and was paroled in April, 1910. He was well aware of the fate reserved for murderers, a more efficient operation, thanks to him. This awareness, vivid though it must have been, was not the deterrent it is supposed to be. In November of the same year, Justice returned to the penitentiary as Number 40,103. The charge: murder in the first degree. On October 27, 1911, underterred Charles Justice died in the electric chair he had helped make more lethal, immobilized by the clamps he had invented. As a contemporary cynic remarked, it was poetic justice for Justice.

Let me sum up briefly the remaining reasons for my opposition to capital punishment, which I will develop in detail as I describe specific cases. The men who occupied death row in the Ohio State Penitentiary during my administration had one thing in common: they were penniless. They had other common denominators—low mental capacity, little or no education, few friends, broken homes—but the fact that they had no money was a prime factor in their being condemned to death. I have never seen a person of means go to the chair. It is the well-heeled gangster, the professional killer who can afford the best legal talent to defend him, who gets off with a lesser sentence. It is the poor, the illiterate, the underprivileged, the member of the minority group—the man who because he is without means is defended by a court-appointed attorney—who becomes society's blood sacrifice.

The court-appointed defender, diligent though he may be, is always handicapped. Sometimes he is inept—there is no criterion of experience in criminal law to guide a court appointment—and always he lacks the staff and funds available to the prosecution. Without funds and personnel to investigate the background of jurors and witnesses, to check alibis and examine the evidence before trial, the court-appointed attorney and his client have two strikes against them before they even enter a plea. When, if they run up against a politically ambitious prosecutor, an emotional jury, and a biased, politically conscious judge, they are truly in a bad way.

No, the death penalty solves nothing. It treats symptoms, ignoring the disease, the primary causes of crime. It eliminates the possibility of rehabilitation, thus denying a second chance to a potentially useful citizen. Capital punishment becomes merely a communal expression of vengeance—a debasing passion in any society that calls itself civilized.

I know of few governors who are not sorely troubled by the question of capital punishment. I have discussed the subject with many of them and have found that most of them agree in opposing the death penalty. Some tolerate the practice because it accords with the climate of their own bailiwicks, but I have found none who is passionately in favor of it.

The world's first recorded homicide was not punished by death. When Cain killed his brother Abel and lied about it, the Lord did not see fit to take Cain's life in return. Instead, He marked Cain as a fratricide and exiled him for life.

In the half-dozen millenia since the murder of Abel, the Lord's idea of punishment by exile has had some advocates. The French used to send their felons to New Caledonia and Devil's Island, the the Russians still consider exile to Siberia a fate worse than death. But capital punishment has been by far the most popular form of retribution not only for murder but also for misdemeanors corresponding to no more than double parking today. In 1780 there were three hundred crimes punishable by death in England, including consorting with gypsies and defacing Westminster Bridge. Where the supreme penalty is retained today, it is generally reserved for such crimes as murder, treason, armed robbery, and rape, particularly—in some of our states—what amounts to integrated rape.

Some of the most ingenious and revolting forms of killing criminals orginated in the Orient, where the act of retribution seems to have developed into something of a spectator sport. The Mosaic ratio of an eye for an eye became more accurately an eye for an eyelash, a life for an eye. For relatively minor offenses, the Chinese used to boil unfortunate transgressors in oil, dissect them gradually by a process known as the One Hundred Slices, or bury them alive. In Thailand, the iniquitous were thrown to the crocodiles.

In India during the rule of the Great Moguls (the era which also produced the Taj Mahal), impalement was in great favor. The executioner carefully sharpened a bamboo stake stout enough to support the weight of a man, yet thin enough so that its upward course through the body would not kill before the tip had reached the heart.

The prisoner was lifted, his naked buttocks parted so that the point of the stake could enter the anus, and his body brought down firmly. He would scream as the bamboo lance pierced his bowels. Then the executioners would step back, satisfied that they had prepared a spectacle as well as an object lesson for the assembled onlookers.

The howling victim stood on tiptoe in an effort to halt the excruciating upward progress of the stake. As he writhed in pain he appeared to be doing a grotesque toe dance—but there was blood streaming down his legs. His strength ebbed and his heels came down. Then his knees buckled and the stake pierced his heart. Justice had been satisfied. The thief had paid the penalty for stealing a cup of rice and a handful of buffalo-milk curds from the kitchen of the palace of Emperor Shah Jahan.

The Malayan sultans had a variation on the Mogul impalement which delighted the amateurs of suffering. Impalement, after all, was over in a matter of minutes or, at most, hours. In Malaya there was a species of bamboo which, in the steamy tropical climate, grew several inches a day. By seating the condemned man on a newly sprouted bamboo shoot and immobilizing him, the sultan could have his sentence carried out and prolong the pleasure of his friends for several days as the avenging plant grew inexorably and agonizingly into the victim's vitals to destroy him.

As civilization moved westward, Oriental ingenuity in exterminating undesirables came with it. The Greeks clung to the cup of hemlock, a quiet, unobtrusive way of wiping out the nonconformist. The Romans, on the other hand, combined the death penalty with the circus. They threw the miserable creatures to the lions. They staged historic crucifixions in lands where the pre-Roman method of capital punishment was lapidation—stoning to death—and no questions asked about who was to throw the first stone.

During the Middle Ages there was considerable burning at the stake, breaking on the wheel, flaying alive, and drawing and quartering. There were two versions of this last form of capital punishment. The first was to attach four spirited steeds to the arms and legs of the victim and drive the horses off in four directions. The other is well described in the sentence pronounced on eight men convicted on high treason in England in 1780:

That you be hanged by the neck, but not till you be dead. For you must be cut down alive. Then your bowels must be taken out and burned before your face. Then your head must be severed from your body divided into four quarters, and these must be at the disposal of the supreme authority of the state.

Spain, which pioneered several of the more artistic forms of extermination, still hopefully uses one of them after nearly five hundred years of nondeterrence. Garroting is still the capital punishment of choice in Franco's Spain. As recently as August 17, 1963, two men charged with terrorist bombings were led out into the cold light of a Madrid dawn and fitted with iron collars. The collars were tightened until eyes bulged and faces purpled. The screws at the back were tightened still more, closing the windpipe, crushing the thyroid cartilage. The points of the screws emerged from the inside of the iron collars to pierce the vertebrae and sever the spinal cord. The faces were dark with the lividity of death by strangulation.

Capital punishment by decapitation has been widely used over the years and over the world. As a rule it has been done by hand—with an axe in the Tower of London, with a scimitar in the Near East, with a cleaver in the Far East. Beheading entered the preliminary stages of automation early in the sixteenth century in the Mediterranean countries, but the head-chopping machine did not reach perfection until the French Revolution. The year 1792 saw the adoption of the guillotine, a blanting one-hundred-thirty-pound knife that drops ten feet between guide rails to shear off the prone victim's head while the neck is held firmly in a stock-like clamp. The head falls into a container and the body is rolled into a waiting basket.

The device was named for Dr. Joseph Guillotin, though he did not invent it and protested indignantly against the use of his name in connection with it. The first guillotine was designed by Dr. Antoine Louis and was called a louisette by contemporaries. Dr. Guillotin was a professor of anatomy who carried on a campaign for a humane method of capital punishment. He did believe the guillotine knife fell with such speed that the victim would feel nothing except a brief sensation of cold at the back of his neck.

Some eyewitness accounts cast doubt on the good doctor's belief. The late Albert Camus quotes the chaplain of La Sante prison, in Paris, where executions now take place:

"When he was executed * * * his head fell into the trough in front of the guillotine, and the body was immediately put in the basket. But contrary to custom, the basket was closed before the head could be put in. The assistant carrying the head had to wait a moment until the basket was opened again. And during that brief space of time, we were able to see the two eyes of the condemned man fixed on us in a gaze of supplication, as if to ask our forgiveness. Instinctively we traced the sign of the cross in order to bless the head, and then the eyelids blinked, the look in the eyes became gentle again, and then the gaze, which had remained expressive was gone."

Regardless of whether the priest's account was subjective or even hallucinatory, Camus calls decapitation "a crude surgery practiced in conditions that deprive it of any edifying character whatsoever." If it is to have a deterrent effect, why is it performed in secret, behind the walls of La Sante prison? Why not expose all potential murderers to the horrid details of what awaits them—the blood spurting from the sliced carotid arteries, the grimance of the severed head, the frantic reflex twitching of the headless body. But there have been no public executions in France since 1939.

England abolished public executions in 1868. At that time only a dozen crimes were cause for capital punishment, as against two hundred in 1810 (and four today), but the spectacle was still eagerly awaited by the public. And the crimes, though fewer, still varied as widely as before—from picking pockets to begging in the streets (by soldiers and sailors without passes) and stealing sixpence (by an apprentice from his master).

As early as 1748 the Lord Chief Justice hesitated about requiring the death penalty for one William York, convicted of murder. The hanging judge

demurred, arguring that "this boy's punishment may be a means of deterring other children from the life offense and, as sparing this boy on account of age will have a quite contrary tendency, in justice to the public the law ought to take its course." The law took its course. Willliam York was hanged. He was ten years old.

Child killings were not unusual during the heyday of England's public executions. There are records of eight-year-olds taking giant strides to climb the thirteen steps to the scaffold—for such capital crimes as the theft of a loaf of bread or a shilling. On one occasion an undernourished twelve-year old criminal dropped through the trap and just dangled there, wide-eyed with fright, because she was not heavy enough either for the drop to break her neck or for the noose to tighten and strangle her. The executioner had to climb down from the scaffold and hang from her legs to carry out the sentence.

Such divertissements attracted huge crowds to the hangings, and the huge crowds attracted the pickpockets in droves—even when pickpockets were being hanged for picking pockets. In fact, the idea that capital punishment was a deterrent to crime became such a joke by mid-nineteenth century that when a Royal Commission reported that of the 167 persons executed in 1866, 164 had previously witnessed an execution, legislative machinery was set in motion that did away with public hangings two years later. But not with capital punishment. And when another Royal Commission on Capital Punishment was created in Britain in 1949, it was expressly forbidden to consider abolition.

It was not until the Winter Solstice of 1964 that the House of Commons, by a vote of 355 to 170, passed on its second reading a bill to abolish the death penalty in Britain. The billl was introduced as a "private member's motion," freeing each M.P. to vote according to the dictates of his conscience rather than along party lines.

Apparently it is extremely difficult for the retentionists to give up the idea that capital punishment is a deterrent. During my term as governor, whenever a particularly atrocious murder made the front pages of the newspapers, the volume of my mail would be appreciably increased by nasty, vilifying letters demanding to know how I could justify my opposition to the death penalty in view of the brutal crime that had just been committed. I answered all these letters, patiently pointing out that despite my personal disagreement with the principle of taking a life for a life, the death penalty was still in effect in Ohio, and yet it had failed to save the victim of this latest bloody crime.

In all this mail, only one letter gave an example of how capital punishment had succeeded as a deterrent: a man wrote that he had led the life of a good, law-abiding citizen since he was eight years old, when his father had taken him by the hand and walked him to the courthouse square to watch a hanging.

The history of those countries that have done away with capital punishment is a strong argument for its abolition. In Denmark, the death penalty disappeared by disuse in 1802; it was formally abolished in 1830. Finland has had no execution since 1828. Norway has not practiced capital punishment since 1875, although it was not legally abolished there until 1905. The Netherlands wiped the death penalty off the books in 1870 after it had gone unused for twenty years. Capital punishment disappeared from Belgium in 1863 ("We have learned that the best means to teach respect for human life," declared the Belgian Minister of Justice in 1930, "is to refuse to take life in the name of the law."), Portugal in 1867, Switzerland in 1874 (local option was accorded cantons in 1879, but revoked again in 1942), Sweden in 1921, Ireland in 1944. Turkey in 1950. Italy abolished the death sentence in 1890, Mussolini restored it in 1931, and it disappeared again with the disappearance of Mussolini and the monarchy in 1944. The Nazis probably made greater use of the death sentence than any regime in history—for political and economic reasons, for no reason, to wipe out an ethnic minority group, to eliminate the aged and infirm, or out of sheer sadism; but West Germany abolished capital punishment in 1949. In none of these countries do we find an increase in the murder rate since the killing of homicidal criminals was abandoned.

As the list of abolitionist countries grows, I think more and more people will share my doubt that a society which depends for the good behavior of its members solely upon the fear of punishment can possibly be a decent, honest society, or that in the long run it can provide a sound basis for a lasting civilization.

The history of capital punishment in the United States is a reflection of developments in the Western world, with two exceptions. Technologically, we Americans are far advanced; our executions are the most modern that science can provide in the way of swift, sure, and—it is hoped—painless death. But in our moral and sociological attitudes toward the death penalty we are far behind.

Even before the Bill of Rights in 1791 prohibited "cruel and unusual punishments," the more barbaric forms of execution were never widely used in America. A few fugitive slaves were burned at the stake in colonial days.

In 1692 a man named Giles Cory was "pressed to death" in Salem, Massachusetts, for refusing to admit to the crime of witchcraft. However, all the rest of the convicted Salem witches were spared the stake. They were decently hanged.

The criminal codes of the American colonies, while less severe than that of the mother country, still listed more capital offenses than do the states today. The 1636 code of the Massachusetts Bay Colony prescribed the death penalty for idolatry, witchcraft, blasphemy, murder, assault in anger, sodomy, buggery, statutory rape, forcible rape, death penalty (optional), man stealing, perjury (in the capital case), and rebellion. Virginia listed seventy capital crimes for Negro slaves, five for whites. North Carolina had an equally harsh code, perhaps because there was no penitentiary to house malefactors in the early days, and it was more convenient to do away with them. North Carolina followed the example of most of the colonies in not permitting the benefit of clergy for those sentenced to death for all capital crimes, except highway robbery and bigamy, in which cases the culprit was entitled to religious solace before mounting the scaffold to be hanged.

In 1880 the New York state legislature decreed that its gallows should be torn down and that an "electric chair" should be constructed as a far superior and humane means of dispatching an antisocial wretch. Thirteen years later, after his lawyer had vainly sought to have the sentence set aside on the grounds that it was "unusual" under the Eighth Amendment, one William Kemmler became the first convict to be legally electrocuted.

Contemporary reports do not bear out the blurb for the newfangled killing machine. Apparently it was faulty in construction and clumsy in operation, but a sensational novelty had been launched. Kemmler died in agony, but science and American technical proficiency triumphed. Electrocution is today the treatment of choice in most American states that still kill their criminals.

Pathologists differ as to just how electrocution kills. Some believe the heart muscles are paralyzed. Most are convinced that death is caused by paralysis of the respiratory centers—in effect, by asphyxiation. Almost all agree that unconsciousness is practically instantaneous. The high-voltage current raises the temperature of the body and the brain so high that all awareness and feeling are extinguished within a fraction of a second. The straining and twitching of the body in what looks to the spectators like a desperate death struggle are purely muscular reflexes, not unlike the jerking of the detached legs of Galvini's frog when an electric current was applied.

While the electric chair gained popularity, Utah retained hanging as the preferred treatment but was the first state to offer an alternate method. The condemned man has the option of facing a firing squad—a soldier's death and a quick one. It is usual in execution by shooting to load one of the five rifles with a blank, so that each marksman can sleep soundly in the belief that he had drawn the blank. No allowance, however, is made for bad marksmanship. In 1951, Eliseo Mares, condemned to death, chose the firing squad. They strapped him to a straight-backed chair just twenty-five feet from the riflemen and pinned a heart-shaped target to his chest. "Fire!" ordered the commmander of the firing squad. The condemned man's body jerked as the four bullets tore through him. For some reason—the unconscious reluctance of the executioners to kill a man?—not one of the slugs struck the heart-shaped target. Eliseo Mares bled to death.

The next innovation in the art and science of snuffing out human life painlessly in legal retaliation for wrongs done to society was contributed by the state of Nevada. In 1921 the Nevada legislature voted to execute capital criminals by introducing poisonous gas into their cells while they were asleep. There would be no warning; the condemned man would be spared the torture

of apprehension. Governor Emmet Boyle, like so many other governors an outspoken enemy of capital punishment, signed the bill in the belief that all courts would find it violated the constitutional guarantee against "cruel and unusual punishments." For several years no candidate for the death penalty appeared available to test the constitutionality of the new law. In 1924, when a convicted murderer named Gee Jon was sentenced to death, the Nevada Supreme Court found that lethal gas was neither cruel or unusual, but the plan to poison the sleeping Gee Jon quietly in his cell ran into technical difficulties. The danger of the legal gas's seeping into other cells and wiping out half the prison population was deemed too great to risk, and a special gas chamber had to be constructed before Gee Jon could become the historic first to be executed by breathing hydrogen cyanide.

Nine states have since joined Nevada in the march of progress: Arizona, California, Colorado, Maryland, Mississippi, Missouri, New Mexico, Oregon (until the death penalty was abolished in 1964), and Wyoming.

Gas has now passed hanging as runner-up in the race for the favorite American death penalty, ten states to seven. In first place, of course, is still the electric chair, with twenty states. Only thirteen states have abolished capital punishment although in some states it is practically inoperative.

The abolitionist movement in the United States can be said to have started in 1788, when Dr. Benjamin Rush, physician and signer of the Declaration of Independence, wrote an essay called "Inquiry into the Justice and Policy of Punishing Murder by Death." His followers included Benjamin Franklin and U.S. Attorney General William Bradford, and their influence secured the abolition of the death penalty in Pennsylvania (1794) "for all crimes except first-degree murder." Thomas Jefferson was also an abolitionist.

In the 1840s an important convert to the cause was Horace Greeley, founder-editor of the New York Tribuine. In 1846 Michigan, then a territory, abolished the death penalty for all crimes except treason, and has remained true to the principle since attaining statehood. Rhode Island followed in 1852, Wisconsin in 1853, and Maine in 1876 (Maine revoked the action in 1883 but returned to her original decision in 1887). Minnesota saw the light in 1911, North Dakota in 1915, Alaska and Hawaii in 1957, Oregon in 1964, Iowa, New York, Vermont, and West Virginia in 1965.

The police lobby succeeded in having police killers excepted from the Vermont and New York abolition bills. Governor Rockefeller pointed out the "moral inconsistency" involved but signed the New York bill anyway, as a long step in the right direction. A number of states have experimented with abolition but reinstated the gallows or the electric chair after some particularly horrendous local crime, a local political situation, or pressure from the ever-vigilant police lobby. Delaware is a typical example.

The Delaware legislature outlawed the death penalty in 1958. In 1960, on the second anniversary of abolition, Delaware Attorney General Januar D. Bove, Jr., during a panel discussion of capital punishment at the Overseas Press Club in New York, said:

We in Delaware are proud that our state has * * * taken this forward step in the field of criminology. We do have need for many other laws to aid law enforcement and probation and parole officers in their work. * * * There is no evidence whatsoever that attacks on police or prison guards or threats to public safety have increased. * * *

In 1961 a succession of four murders aroused emotions again. An eighty-nine year-old woman was beaten and stabbed to death in rural southern Delaware (a young Negro confessed), a prominent matron was felled by a shotgun blast in her kitchen (assailant unknown), and an elderly couple was killed with a shotgun by a young Negro on their farm. The relatives of the victims and the police lobby went into action. One of the loudest voices in favor of restoring the death penalty was that of Detective Sgt. William J. Mulrine III of the Wilmington police department, who insisted that capital punishment was a deterrent, a necessary protection for law officers, and a just punishment for murderers.

On December 18, 1961, by a margin of one vote, the Delaware legislature restored the death penalty over the veto of Governor Elbert N. Carvel.

On December 28, just ten days later, Detective Sgt. William J. Mulrine III shot and killed his wife with a revolver.

Sgt. Mulrine, however, escaped the "just punishment" he had so strongly recommended. On the third day of his trial he pleaded guilty to manslaughter, received a five-year sentence which was later reduced to four, and became eligible for parole after serving two years.

Has abolition caused an upsurge of homicide and rape in the states that have discarded the death penalty? Comparisons cannot be made on a broad basis, because urban areas have a murder rate which is normally higher than that of rural areas, and states with the lowest standards of living and literacy have the highest average murder rates. However, comparing contiguous states with similar living standards, we find no appreciable difference between the retentionisht and abolitionist states, except for a few percentage points in favor of those without the death penalty. Michigan, without a hangman for more than a hundred years, had fewer homicides per one hundred thousand population from 1920 to 1958 then did neighboring Ohio and Indiana, which have kept the electric chair. In New England, Maine and Rhode Island, with no death penalty, compare favorably with Connecticut and Massachusetts which still have the electric chair and New Hampshire with its hangman. The same holds for Minnesota, Wisconsin, and North Dakota, as compared with their Middle Western neighbors.

A British Royal Commission studying capital punishment in the years 1949 to 1953 visited America to study the effects of abolition and concluded "that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase of the homicide rate or that its re-introduction has led to a fall."

The Massachusetts legislature has periodically rejected attempts to abolish the death penalty, but the question always pops up again. A Massachusetts commission studying the question found that capital punishment does more social harm than good. "Capital punishment is not a better protection against murder than a sentence of life imprisonment. Its deterrent effect is slight and is offset by its encouragement to unstable individuals to commit murder. * * * It is the swiftness and certainly of punishment and not its severity that deters. There is no reason to believe that trials would be shorter and conviction more swift and certain if life imprisonment rather than death were the maximum penalty."

It was, and is a matter of principle, but my approach to the problems of crime and punishment is not based on theory alone. I visited every industrial school, reformatory, honor camp, juvenile center, and mental hospital in Ohio —and I was appalled. I saw our aged citizens lying in bed in mental institutions, scarcely more than vegetables, long forgotten by the outside. I saw the emotionally disturbed, the psychotic, the retarded children in our industrial schools, without the attention and care that would help them to lead useful lives. I saw the products of these industrial schools graduate to reformatories, the penitentiary, and finally death row. I saw the dependent child trying to become a mature adult on the meager allowance provided by society. I saw the shiny new psychiatric hospital for children—with no personnel to staff it.

It is the correction of these problems that we will find an answer to the problem of crime and punishment. Our present system of correction is obviously wrong, because it does not correct. Our crime rate continues to rise, despite the threat and fact of prison, or the threat and fact of electric chair and gas chamber. For thousands of years we have thought only of punishment in connection with crime. Should we not, after thousands of years of failure, substitute, for the principle of punishment, the goals of crime prevention and rehabilitation of criminals?

Some criminologists believe that the state's responsibility begins after a man has committed his first offense. I believe the state has a responsibility *before* the fact—a responsibility to remove those sociological factors which breed crime. Few will challenge the statement that poverty ranks high among these factors, or that it is closely related to other factors. Inadequate education, for instance, is both the cause and result of poverty—a vicious circle, self-perpetuating. For years the number of registered unemployed job-seekers in Ohio who never finished high school had reached as high as sixty-one percent of the total; thirty percent did not go beyond the eighth grade. Juvenile delinquency feeds on poverty.

Most institutions throughout the country are overcrowded, understaffed, and underequipped. It is obviously impossible to care for offenders properly under

these circumstances. Some of them have physical problems. Many are emotionally disturbed. Some are retarded. If we do not have the facilities to provide the special attention required by each case, we render no service beyond removing a problem child from a noxious environment for a very brief period. The length of this period is more often determined by the need for space and the number of cases waiting to be admitted to the school than by the child's needs. If we return him to his old environment without having better prepared him physically, mentally, and psychologically to meet the problems which caused his original difficulty, we have not only wasted the taxpayers' money but increased our chances of meeting the boy again at the reformatory, the next step on the road to the penitentiary.

A contribution to the prevention of juvenile delinquency would be to improve the psychological and counseling service in our system of education and to expand facilities for the diagnosis and treatment of the emotionally disturbed child. When this approach fails, the state must be ready with staff and facilities to care for the child at the institution of commitment—a regional school, by preference, where he could be treated as an individual and where the length of confinement would be decided not by the demand for space but by his own needs. In some cases this period may run as long as three years. When the youngster is returned to society, efforts should be made to avoid sending him back to the environment which contributed to his original delinquency. This, too, would require trained staff to appraise the child and the situation, and to seek placement in a foster home.

If the need to expand state services to disturbed and deprived children is ignored, our correctional institutions will continue to be merely stopping places on the road to major crime. The juvenile delinquent goes through his apprenticeship at the industrial school and the reformatory, and he gives up the kid stuff—petty larceny, purse snatching, car stealing. He has learned nothing except how to take advantage of loopholes and cheat on the authorities without getting caught. He has lost whatever friends he had outside, and he is released with a police record that will be of no help when he tries to get a job. He is on parole and he is on relief. He gets little enough money—perhaps sixty percent of subsistence. To get money to buy a new suit he needs to look for a job, he teams up with a fellow alumnus of the reform school to rob a liquor store—and gets caught. He is sent to the penitentiary for five or six or seven years.

The Ohio penitentiary was a monument to archaic architecture and penal thinking, but is no worse than most other state penitentiaries. Built during the last century to house 2,200 convicts, it was jammed with 4,400. Our freshman convict would share a cell with three other men. Who they were depended upon the warden's judgment of his character after studying the record. If he was a rebel, a fighter, and a sworn enemy of society, he would share a cell with three tame, resigned prisoners. The warden cannot risk two firebrands in the same cell. The overcrowded prison is always a powder keg.

There is no staff to classify the prisoners and no space to group them according to age, background, or potential. The young first-offender is bunked with the hardened repeater, the high school graduate with the illiterate, the sex deviate, the emotionally unstable, the mentally ill, and the retarded.

Our freshman convict will find very little in the way of educational programs inside the walls. He will get no organized training in skills that will help him earn a living if he is ever released. Whatever vocational training he gets is incidental to this assignment to one of the prison workshops or the hospital. If he is eager to rejoin society when he has served his sentence, he may take a correspondence course or teach himself some trade or dexterity. Or he may become merely "prison smart" and learn the most painless way to make time pass, deteriorating steadily until he is returned to society less fit for it than when he was convicted. He may well develop into one of those inmates described as "serving life on the installment plan."

If his friends and family are in a different part of the state, his only contact with the outside world may well be an underpaid, poorly educated, perhaps venal guard. Some guards no doubt need the extra quarters or dollars they receive for running errands—some illicit—for the prisoner. And if the prisoner happens to be a plutocrat of organized crime whose well-paid battery of legal talent has kept him from the chair, the underpaid guard can do quite well by keeping the big shot in luxuries. I doubt that the state will ever be

able to introduce a wage scale that will compete with the bribes of professional criminals, but at least we can try to pay enough to attract men with sufficient moral stamina to realize their responsibility toward their charges—that they must represent decently the society that has incarcerated these men.

We need more chaplains. Three men of God are hardly enough to illuminate life's spiritual values for more than four thousand prisoners who for the most part have been cynically living by the most materialistic standards. Three are perhaps enough to help men to die on the electrical altar of a vengeful society, but many more are needed to bring the sound of a friendly human voice to men who have for months heard only the voices of fellow convicts.

We need more psychiatrists and psychologists, too, to sort out the sick from the misguided, the mentally incompetent from the educable dropout, the pathological offender from the immature but salvageable. Some men should never be released from custody. They are beyond education, training, and psychotherapy. Just as some patients are chronic invalids and must always receive medical care, so some criminals will never be able to live unsupervised. We gave life sentences to pathological offenders such as pyromaniacs, embezzlers, and forgers, who find it impossible to resist the crime which originally sent them to prison. If their quirk of mind could be discovered at its first outbreak, the state would be saved great expense by committing them to a light-security institution where they would be kept indefinitely and released only upon satisfactory psychiatric evaluation.

In fact, the whole concept of an arbitrary sentence of so many years for such-and-such a crime is outmoded. Some states have already adopted the indeterminate sentence, with a minimum term, and the ultimate date of release determined, on the basis of prospects of future conduct, by a board of experts. This conclusion could be reached only after extensive study of the offender's aptitude and degree of education, mental and physical condition, and personality—of his liabilities as well as his favorable potential. Experts must make the evaluation.

If the prisoner is physically ill or undernourished, his condition must be corrected to the best of our ability. If he is mentally ill, he must receive treatment. If he is mentally retarded, he must be given the best training we can provide. If he is going to be our ward for life, he must be treated as a human being and a creature of God, not as a wild animal. (And I say "wild" advisedly, for I have seen pets and farm animals better treated than criminals and the mentally ill.) If he has the intelligence to be trained, he should be given a skill to help him find a way of life. If he can be educated, he should not be released as an illiterate or semiliterate. Above all, he must be made to feel that we care what happens to him and that life can be better than he has found it so far.

Before he is paroled, he and his plan must be thoroughly investigated by competent experts. Some states have made progress in reducing the average case load of the parole officer. But more progress is needed. We must employ more and better-trained probation officers to obviate repetition of errors. To do this, we will have to abandon more false economies. We cannot attract enough good men unless we pay them enough.

During my administration I asked that the Ohio Bureau of Probation and Parole be transferred from the Department of Mental Hygiene and Corrections to the Commission of Pardon and Parole, where it properly belongs. Parole after all is not a part of our prison system but a matter of adjustment to the nonprison world after release. I see in the Pardon and Parole Commission, and in similar bodies in other states, a possible solution to the problem of removing the power of executive clemency from politics.

I repeat, however, that we can more easily prevent the making of a criminal than we can correct the already committed violator. We have the responsibility of helping to eradicate poverty by affording opportunity to those capable of escaping from the rut. It is easy for orators to say that this is a responsibility of the home and church, but experience demonstrates that the vast majority of our offenders have no home and do not go to church. We reach our children in our schools. There we must seek out the causes of emotional problems, slow learning, and truancy, and strike the most telling blow against incipient criminality.

But if we fail, as we must for years to come, what of those unfortunates who reach the brink of darkness—the capital crime? I have already made my

plea. They should not be put to death, because it is not our privilege to play God; because death is no deterrent; because death makes an error horribly irrevocable; because vengeance is no substitute for justice; because man is not merely an entity that is three fourths water and the rest mineral and organic products worth somewhat less than three dollars.

I believe that in every man there is some spark of the infinite, some fragment, however deeply submerged, of the universal good. If we can salvage the spark, we must fan it carefully until it flames into usefulness. I admit that this is not always possible. I have said many times that there are pathological incorrigibles who must be permanently separated from society. But they must not be separated by killing them in cold blood.

Dr. Karl Menninger, the distinguished psychiatrist, has said:

To a physician discussing the wiser treatment of our fellow men, it seems hardly necessary to add that under no circumstances should we kill them. It was never considered right for doctors to kill their patients, no matter how helpless their condition. Similarly, capital punishment is in my opinion morally wrong. Punishing and even killing criminals may yield a grim kind of gratification; let us all admit that there are times when we are so shocked at the depredations of an offender that we persuade ourselves that this is a man the Creator didn't intend to create, and that we had better help correct the mistake. But playing God in this way has no conceivable moral or scientific justification.

It is with the deep feeling that society will continue to improve and that we will find better solutions to our problems that I make a plea to this committee that we not retrogress to a practice that has failed. I represent no clients, I receive no compensation in appearing here today. I do so because I believe that a civilized society can best serve by setting a better example for its constituent citizens.

STATEMENT OF HON. MICHAEL V. DiSALLE, ATTORNEY AT LAW, WASHINGTON, D.C.

Mr. DiSalle. Thank you very much, Senator. I want to thank the committee for this opportunity of appearing before it.

I felt it necessary. I am not here representing a client. I am not receiving a fee. I am doing it because I am earnestly and sincerely concerned about the possible restoration of the death penalty at any level or for any crime. The President, in his message of March 14, 1973, has recommended the use of the death penalty in connection with certain crimes. This recommendation comes at a time when he also claims that crime has been substantially reduced since 1969. It might be well to note that this is also a period in which the death penalty has not been used in the United States. In view of this paradox, it might be well to examine the history of capital punishment, its use and disuse, its results, its deterrent value and its value as a tool in the protection of a civilized society.

During my term as governor of Ohio, the executive mansion at Columbus was staffed by convicted killers, all of whom were under life sentence. My wife and I, our children and grandchildren, lived under the same roof with these men 24 hours a day. Our association was not that of keeper and prisoner but that of fellow human beings. I shared their joys and sorrows, their strengths and weaknesses, their hopes and fears.

During the same period I acted on appeals for executive clemency from eleven men and one woman who had been sentenced to death. I also passed upon the cases of some 150 lifers eligible for parole after having served the Ohio legal minimum of 20 years. Whenever I extended mercy to a prisoner, elements of the press and my political

enemies, knowing I had long been opposed to capital punishment would accuse me of encouraging crime by coddling criminals. Their conclusions were generally that the Governor is a sentimentalist whose heart is bigger than, thought not as soft as, his brain, who weeps for the poor murderer but is coldbloodedly unconcerned about the murderer's victim.

I hope to convince this committee that the time to show concern for the victims of crime is long before the shot is fired or the blow struck—by seeking a sensible way of eliminating the causes of crime rather than by trying as we now do, futilely and after the fact, to eradicate crime by punishing the perpetrator. Punishment is too often a matter of emotion rather than of cold logic. Under a system of justice not free of inequities, the question of who should be put to death in the name of the law and who should live is often decided by men influenced more by public climate and public clamor than by abstract justice. He who is to die is too frequently a man who has committed a crime at the wrong time in the wrong place under the wrong circumstances. A different combination of the same factors could well produce a more temperate verdict.

It would be well for us to examine the emotions which push a peaceable, kind and just individual to the front rank of a lynch mob, clamoring for the life of a person he has never known, on the basis of facts which he has heard only at second or third hand. Must a man die to atone for a crime, the evidence of which has been viewed only through the blood-red spectacles of outrage and anger?

No one who has never watched the hands of a clock marking the last minutes of a condemned man's existence, knowing that he alone has the temporary Godlike power to stop the clock, can realize the agony of deciding an appeal for executive clemency.

During my term as governor, I came to dread the days leading to an execution. In those 4 years, six men died in the electric chair. Despite my opposition to the death penalty as a futile, barbaric relic, my oath of office required me to execute the laws of the State, some of which call for capital punishment. True, my powers of clemency was limited only by the exclusion of treason and impeachment cases, but for the six who died I could find no extenuating circumstances, no unequal justice, no questionable legal procedure, no reasonable doubt, to justify my reversing the sentence of the courts.

Even when I was convinced of the man's guilt, doubt haunted my unconscious long after the warden had notified me that the prisoner was dead. I remembered the narrow escapes of many innocent people and wondered how many innocents had actually died at the hands of the State. The death penalty is so horribly final. Once it has been carried out mistakes cannot be corrected, and what human does not make mistakes? I thought of Clarence McKinney, convicted of first-degree murder in my own State in the 1920's, on the basis of circumstantial evidence, mistaken identity, and, apparently, his previous police record. While he was in prison awaiting an appeal, another man confessed to the crime. What if McKinney had been executed?

And Ed Larkman in New York, condemned to death in 1925. Larkman's sentence was commuted by Governor Alfred E. Smith in 1927, and he was pardoned by Governor Lehmann in 1929—after the real culprit confessed.

And Tommy Bambrick, whose case is discussed today in muted tones. Bambrick was already in the death house at Sing Sing when new evidence came to light which convinced Warden Thomas Mott Osborne that another man had committed the murder for which Bambrick had been convicted. Last-minute efforts to reach the Governor were unsuccessful, however, and Bambrick went to his death still protesting his innocence.

This possibility of an irrevocable error was so vivid to me that on several occasions I made last-minute visits to the grim, antiquated Ohio State Penitentiary, not far from downtown Columbus, across the street from a casket factory, for a final interview with the condemned man. With death only a few hours away, it seemed to me that I might expect a moment of truth.

The tragic impossibility of correcting an error is, however, only one of the reasons for my opposition to capital punishment. First of all, I believe that taking a human life, even to pay for a life already taken, is immoral. I am not speaking of morality in an abstract, theological sense—some professional theologians have sought to debate with me on that basis—but in a personal sense, according to my own conscience. Society, echoing the Ten Commandments, says: Thou shalt not kill. Then society illogically continues: Killing is wrong, and in order to prove it is wrong, we will kill you if you kill.

I believe human life is a divine gift and deliberately to destroy it is as much of a crime for the State as for the individual. Israel, the land where the "eye for an eye, life for a life" idea of punishment originated more than 3,000 years ago, has now abolished capital punishment except for crimes against the State, which means, in effect, collaboration with the Nazis in their program to exterminate the Jews.

Second, I believe the death penalty serves no purpose. Its champions argue that it is a deterrent to murder and the police lobby and its spokesmen agree, but statistics and history show that it has no deterrent effect. The shots fired by a misfit named Lee Harvey Oswald in Dallas on November 22, 1963, demonstrated the fallacy of this favorite argument of the champions of the death penalty.

Three Presidents of the United States had been assassinated before John Fitzgerald Kennedy was struck down in Dallas. All of their assassins died. Booth, who shot Lincoln, was killed while trying to escape his pursuers; his accomplices were hanged. Garfield's assassin, a disappointed office seeker, was executed, so was the anarchist who shot McKinley. Did this deter the men who took pot shots at Theodore Roosevelt, Franklin Roosevelt, or Harry S. Truman, even there one of those would-be assassins was killed by guards? It did not deter Oswald.

The murder of Oswald by Jack Ruby produced an intense indignation for a number of reasons. That Oswald was thereby denied a trial is of course basically opposed to our whole system. So is the persistence of a lynch attitude in a democracy that prides itself on its system of calm, considered justice. Further, Oswald's premature death prevented us all from ever learning more about his motives and of any possible accomplices. But I think the most interesting reason for the outraged reaction to Ruby's exhibitionistic act of re-

taliation is an implicit rejection of the whole idea of capital punishment.

If we believe that the murder of President Kennedy should be avenged and that the killing of Oswald could serve this purpose, then we ought to find some satisfaction in Ruby's one-man vigilante action. But if we say that Ruby as an individual should not seek revenge, should we as a people seek it collectively?

The Dallas jurors brought in a curiously contraditory verdict. By condemning Ruby to death they decided that avenging the killing of the President by another killing was wrong. Then they went on to say that this wrong should be corrected by another killing. In effect, three wrongs make a right.

Ruby's trial was conducted in an emotion-charged atmosphere of exhibitionism, questionable civic pride, and political ambition. The prosecutor went into the Dallas courtroom like a heavyweight champion entering the ring to preserve his unblemished record. A record of 100 percent convictions in capital cases does not necessarily mean that a prosecutor is achieving the prime objective of his office, the administration of justice. A prosecuting attorney has the responsibility of determining the guilt or innocence of a person charged with a crime. Even if he determines that the defendant is guilty, he has the further responsibility of determining what would best serve the ultimate cause of justice. Should he close the door to any mitigating information regarding the defendant, he is not filling his essential role in our system of jurisprudence.

The Dallas verdict was no surprise. Ruby's unsavory background, his associations, his career as a striptease impresario, all helped make him a likely candidate to pay with his life for a crime for which he may not have been emotionally or mentally responsible. I do not know what motivated him, but I would prefer to keep him alive as long as possible in order to achieve the broader service to society which will be accomplished only by establishing the complete truth.

To those who argue that political assassination cannot be considered in the same class with common law murder in discussing capital punishment as a deterrent, I offer statistics. At present, 14 American States and two dependencies have abolished the death penalty as punishment for first-degree murder. States retaining capital punishment have failed to give greater pause to the prospective murderer than those that have abolished it. According to FBI statistics, there is no appreciable difference in the homicide rate. Most European countries that have abolished capital punishment have a much lower murder rate than American States which still hang, electrocute, or gas their homicidal criminals.

As for the increased mortality rate among police officers—the police lobby is most vociferous in its claim that abolition of capital punishment will make the policeman's lot much more dangerous—FBI figures again contradict the claim. A 35 year record compiled by the Department of Justice does indicate a slight difference, and that in favor of the abolitionist States.

More eloquent than statistics are the graphic examples from my own State of Ohio. During the reign of terror of the infamous Lica-

voli gang in Toledo, the gang killers could have driven just 5 miles to the Michigan line in order to do away with their victims in a State which does not execute for murder. They did not bother. They were so confident of their own position that they did not even consider the fact that Ohio killed its killers, in certain cases.

Even more striking is the case of Charles Justice. And this I would summarize for the Committee. Justice was serving a term for burglary at the Ohio State Penitentiary. He was put in charge of the operation of the then new electric chair. The electric chair was not functioning very well. It burned its victims. It created an odor. It was really discomforting to the official witnesses and those who presided at executions.

So, Justice designed a new clamp which kept the burning down to a minimum. He had it patented, and as a result of his service to the State, his sentence was commuted as it might have been. A few years later, Justice returned to the State Penitentiary, found guilty of murder, and was executed in the electric chair which he had helped to perfect.

Now, no one knew more about the electric chair than Charles Justice, but it certainly did not serve to deter him from committing another crime.

One of the principal reasons for my opposition to capital punishment was the fact that all of those whose cases I reviewed during my time had certain common denominators, low mental capacity, little or no education, few friends, broken homes, but the fact that they had no money was a prime factor in their being condemned to death. I have never seen a person of means go to the chair. It is the well-heeled gangster, the professional killer who can afford the best legal talent to defend him, who gets off with a lesser sentence. It is the poor, illiterate, the underprivileged, the member of the minority group, the man who because he is without means is defended by a court-appointed attorney, who becomes society's blood sacrifice.

The court-appointed defender, diligent though he may be, is always handicapped. Sometimes he is inept—there is no criterion of experience in criminal law to guide a court appointment—and always he lacks the staff and funds available to the prosecution. Without funds and personnel to investigate the background of jurors and witnesses, to check alibis and examine the evidence before trial, the court-appointed attorney and his client have two strikes against them before they even enter a plea. When, if they run up against a politically ambitious prosecutor, an emotional jury, and a biased, politically conscious judge, they are truly in a bad way.

I am going to skip over the various types of punishment which have been used during the history of civilization and their failures. I might just call your attention to a sentence pronounced on eight men convicted of high treason in England in 1870. There the judge said;

> That you be hanged by the neck, but not till you be dead. For you must be cut down alive. Then your bowels must be taken out and burned before your face. Then your head must be severed from your body divided into four quarters, and these must be at the disposal of the supreme authority of the state.

In Ohio, the Judge also intones the fact that in sentencing a man to death, that he also be sentenced to pay the cost of the execution.

Apparently it is extremely difficult for the retentionists to give up the idea that capital punishment is a deterrent. During my term as Governor, whenever a particularly atrocious murder made the front pages of the newspapers, the volume of my mail would be appreciably increased by nasty, vilifying letters demanding to know how I could justify my opposition to the death penalty in view of the brutal crime that had just been committed. I answered all these letters, patiently pointing out that despite my personal disagreement with the principle of taking a life for a life, the death penalty was still in effect in Ohio, and yet it had failed to save the victim of the latest bloody crime.

In all this mail, only one letter gave an example of how capital punishment had succeeded as a deterrent: a man wrote that he had led the life of a good, law-abiding citizen since he was 8 years old, when his father had taken him by the hand and walked him to the courthouse square to watch a hanging.

The history of those countries that have done away with capital punishment is a strong argument for its abolition. In Denmark, the death penalty disappeared by disuse in 1802; it was formally abolished in 1830. Finland has had no execution since 1828. Norway has not practiced capital punishment since 1875, although it was not legally abolished there until 1905. The Netherlands wiped the death penalty off the books in 1870 after it had gone unused for 20 years. Capital punishment disappeared from Belgium in 1863, and the Belgian Minister of Justice in 1930 said, "We have learned that the best means to teach respect for human life is to refuse to take life in the name of the law."

Portugal in 1867, Switzerland in 1874, Sweden in 1921, Ireland in 1944, Turkey in 1950. Italy abolished the death sentence in 1890, Mussolini restored it in 1931, and it disappeared again with the disappearance of Mussolini in 1944. The Nazis probably made greater use of the death sentence than any regime in history, for political and economic reasons, for no reason, to wipe out an ethnic minority group, to eliminate the aged and infirm, or out of sheer sadism; but West Germany abolished capital punishment in 1949. In none of these countries do we find an increase in the murder rate since the killing of homicidal criminals was abandoned.

As the list of abolitionist countries grows, I think more and more people will share my doubt that a society which depends for the good behavior of its members solely upon the fear of punishment can possibly be a decent, honest society, or that in the long run it can provide a sound basis for a lasting civilization.

The history of capital punishment in the United States is a reflection of developments in the Western World, with two exceptions. Technologically, we Americans are far advanced; our executions are the most modern that science can provide in the way of swift, sure, and it is hoped, painless death. But in our moral and sociological attitudes toward the death penalty we are far behind.

Even before the Bill of Rights in 1791 prohibited "cruel and unusual punishments," the more barbaric forms of execution were never

widely used in America. A few fugitive slaves were burned at the stake in colonial days.

In 1692 a man named Giles Cory was pressed to death in Salen, Massachusetts, for refusing to admit to the crime of witchcraft. However, all the rest of the convicted Salem witches were spared the stake. They were decently hanged.

I am not going to take the committee's time analyzing the various types of punishments that we have used in the United States. We now use the electric chair in most States, we use gas, we use hanging, and in Utah you have your choice between being hanged or being shot by a firing squad.

Senator HRUSKA. Would the witness suspend for just a moment?

Senator KENNEDY. Well, I will ask him to continue.

Senator HRUSKA. Senator Kennedy will take over. You are in much better hands.

Mr. DISALLE. Thank you.

Governor Boggs is here, and we talked a little bit before about the experience in Delaware. In Delaware the legislature outlawed the death penalty in 1958. In 1960, on the second anniversary of abolition, Delaware Attorney General Januar D. Bove, Jr., during a panel discussion of capital punishment at the Overseas Press Club in New York said:

> We in Delaware are proud that our state has taken this forward step in the field of criminology. We do have need for many other laws to aid law enforcement and probation and parole officers in their work. There is no evidence whatsoever that attacks on police or prison guards or threats to public safety have increased.

In 1961 a succession of four murders aroused emotions again. An 89 year old woman was beaten and stabbed to death in rural southern Delaware, a prominent matron was felled by a shotgun blast in her kitchen, and an elderly couple was killed with a shotgun by a young Negro on their farm. The relatives of the victims and the police lobby went into action. One of the loudest voices in favor of restoring the death penalty was that of Detective Sergeant William J. Mulrine III of the Wilmington Police Department, who insisted that capital punishment was a deterrent, a necessary protection for law officers, and a just punishment for murderers.

On December 18, 1961, by a margin of one vote, the Delaware Legislature restored the death penalty over the veto of Governor Elbert N. Carvel.

On December 28, just 10 days later, Detective Sergeant William J. Mulrine III shot and killed his wife with a revolver.

Sergeant Mulrine, however, escaped the just punishment he had so strongly recommended. On the third day of his trial he pleaded guilty to manslaughter, received a 5-year sentence which was later reduced to 4, and became eligible for parole after serving 2 years.

Has abolition caused an upsurge of homicide and rape in the States that have discarded the death penalty? Comparisons cannot be made on a broad basis, because urban areas have a murder rate which is normally higher than that of rural areas, and States with the lowest standards of living and literacy have the highest average murder rates. However, comparing contiguous States with similar

living standards, we find no appreciable difference between the retentionist and abolitionist States, except for a few percentage points in favor of those without the death penalty. Michigan, without a hangman for more than 100 years, had fewer homicides per 100,000 population from 1920 to 1958, than did neighboring Ohio and Indiana, which have kept the electric chair. In New England, Maine, and Rhode Island, with no death penalty, compare favorably with Connecticut and Massachusetts which still have the electric chair and New Hampshire with its hangman. The same holds for Minnesota, Wisconsin, and North Dakota, as compared with their Middle Western neighbors.

A British Royal Commission studying capital punishment in the years 1949 to 1953 visited America to study the effects of abolition and concluded:

> There is no clear evidence in any of the figures we have examined that the abolition of capital punishment has lead to an increase of the homicide rate or that its re-introduction has led to a fall.

The Massachusetts Legislature has periodically rejected attempts to abolish the death penalty, but the question always pops up again. A Massachusetts commission studying the question found that:

> Capital punishment does more social harm than good. Capital punishment is not a better protection against murder than a sentence of life imprisonment. Its deterrent effect is slight and is offset by its encouragement to unstable individuals to commit murder. It is the swiftness and certainty of punishment and not its severity that deters. There is no reason to believe that trials would be shorter and conviction were swift and certain if life imprisonment rather than death were the maximum penalty.

It was, and is a matter of principle, but my approach to the problems of crime and punishment is not based on theory alone. I visited every industrial school, reformatory, honor camp, juvenile center, and mental hospital in Ohio—and I was appalled. I saw our aged citizens lying in bed in mental institutions, scarcely more than vegetables, long forgotten by the outside. I saw the emotionally disturbed, the psychotic, the retarded children in our industrial schools, without the attention and care that would help them to lead useful lices. I saw the products of these industrial schools graduate to reformatories, the penitentiary, and finally death row. I saw the dependent child trying to become a mature adult on the meager allowance provided by society. I saw the shiny new psychiatric hospital for children, with no personnel to staff it.

It is in the correction of these problems that we will find an answer to the problem of crime and punishment. Our present system of correction is obviously wrong, because it does not correct. Our crime rate continues to rise, despite the threat and fact of prison, or the threat and fact of electric chair and gas chamber. For thousands of years we have thought only of punishment in connection with crime. Should we not, after thousands of years of failure, substitute, for the principle of punishment, the goals of crime prevention and rehabilitation of criminals?

Some criminologists believe that the State's responsibility begins after a man has committed his first offense. I believe the State has a responsibility before the fact, a responsibility to remove those socio-

logical factors which breed crime. Few will challenge the statement that poverty ranks high among these factors, or that it is closely related to other factors. Inadequate education, for instance, is both the cause and result of poverty, a vicious circle, self-perpetuating. For years the number of registered unemployed jobseekers in Ohio who never finished high school had reached as high as 61 percent of the total, 30 percent did not go beyond the eighth grade. Juvenile delinquency feeds on poverty.

Most institutions throughout the country are overcrowded, understaffed, and underequipped. It is obviously impossible to care for offenders properly under these circumstances. Some of them have physical problems. Many are emotionally disturbed. Some are retarded. If we do not have the facilities to provide the special attention required by each case, we render no service beyond removing the problem child from a noxious environment for a very brief period. The length of this period is more often determined by the need for space and the number of cases waiting to be admitted to the school than by the child's needs. If we return him to his old environment without having better prepared him physically, mentally, and psychologically to meet the problems which caused his original difficulty, we have not only wasted the taxpayers' money but increased our chances of meeting the boy again at the reformatory, the next step on the road to the penitentiary.

A contribution to the prevention of juvenile delinquency would be to improve the psychological and counseling service in our system of education and to expand facilities for the diagnosis and treatment of the emotionally disturbed child. When this approach fails, the State must be ready with staff and facilities to care for the child at the institution of commitment, a regional school by preference, where he could be treated as an individual and where the length of confinement would be decided not by the demand for space but by his own needs. When the youngster is returned to society, efforts should be made to avoid sending him back to the environment which contributed to his original delinquency. This, too, would require trained staff to appraise the child and the situation, and to seek placement in a foster home.

If the need to expand State services to disturbed and deprived children is ignored, our correctional institutions will continue to be merely stopping places on the road to major crime. The juvenile deliquent goes through his apprenticeship at the industrial school and the reformatory, and he gives up the kid stuff, petty larceny, purse snatching, car stealing. He has learned nothing except how to take advantage of loopholes and cheat on the authorities without getting caught. He has lost whatever friends he had outside, and he is released with a police record that will be of no help when he tries to get a job. He is on parole and he is on relief. He gets a little enough money—perhaps 60 percent of subsistence. To get money to buy a new suit he needs to look for a job, he teams up with a fellow alumnus of the reform school to rob a liquor store, and gets caught. He is sent to the penitentiary for 5 or 6 or 7 years.

The Ohio penitentiary was a monument to archaic architecture and penal thinking, but is no worse than most other State peniten-

tiaries. Built during the last century to house 2,200 convicts, it was jammed with 4,400. Our freshman convict would share a cell with three other men. Who they were depended upon the warden's judgment of his character after studying the record. If he was a rebel, a fighter, and a sworn enemy of society, he would share a cell with three tame, resigned prisoners. The warden cannot risk two firebrands in the same cell. The overcrowded prison is always a powder keg.

There is no staff to classify the prisoners and no space to group them according to age, background, or potential. The young first-offender is bunked with the hardened repeater, the high school graduate with the illiterate, the sex deviate, the emotionally unstable, the mentally ill, and the retarded.

Our freshman convict will find very little in the way of educational programs inside the walls. He will get no organized training in skills that will help him earn a living if he is ever released. Whatever vocational training he gets is incidental to this assignment to one of the prison workshops or hospital. If he is eager to rejoin society when he has served his sentence, he may take a correspondence course or teach himself some trade or dexterity. Or he may become merely prison smart and learn the most painless way to make time pass, deteriorating steadily until he is returned to society less fit for it than he was when he was convicted. He may well develop into one of those inmates described as serving life on the installment plan.

If his friends and family are in a different part of the State, his only contact with the outside world may well be an underpaid, poorly educated, perhaps venal guard. Some guards no doubt need the extra quarters or dollars they receive for running errands, some illicit, for the prisoner. And if the prisoner happens to be a plutocrat of organized crime whose well-paid battery of legal talent has kept him from the chair, the underpaid guard can do quite well by keeping the big shot in luxuries. I doubt that the State will ever be able to introduce a wage scale that will compete with the bribes of professional criminals, but at least we can try to pay enough to attract men with sufficient moral stamina to realize their responsibility toward their charges, that they must represent decently the society that has incarcerated these men.

We need more chaplains. Three men of God are hardly enough to illuminate life's spiritual values for more than 4,000 prisoners who for the most part have been cynically living by the most materialistic standards. Three are perhaps enough to help men to die on the electrical altar of a vengeful society, but many more are needed to bring the sound of a friendly human voice to men who have for months heard only the voices of fellow convicts.

We need more psychiatrists and psychologists, too, to sort out the sick from the misguided, the mentally incompetent from the educable dropout, the pathological offender from the immature but salvageable. Some men should never be released from custody. They are beyond education, training, and psychotherapy. Just as some patients are chronic invalids and must always receive medical care, so some criminals will never be able to live unsupervised. We give life

sentences to pathological offenders such as pyromaniacs, embezzlers, and forgers, who find it impossible to resist the crime which originally sent them to prison. If their quirk of mind could be discovered at its first outbreak, the State would be saved great expense by committing them to a light-security institution where they would be kept indefinitely and released only upon satisfactory psychiatric evaluation.

In fact, the whole concept of an arbitrary sentence of so many years for such-and-such a crime is outmoded. Some States have already adopted the indeterminate sentence, with a minimum term, and the ultimate date of release determined, on the basis of prospects of future conduct, by a board of experts. This conclusion could be reached only after extensive study of the offender's aptitude and degree of education, mental and physical condition, and personality, of his liabilities as well as his favorable potenial. Experts must make this evaluation.

If the prisoner is physically ill or undernourished, his condition must be corrected to the best of our ability. If he is mentally ill, he must receive treatment. If he is mentally retarded, he must be given the best training we can provide. If he is going to be our ward for life, he must be treated as a human being and a creature of God, not as a wild animal. And I say "wild" advisedly, for I have seen pets and farm animals better treated than criminals and the mentally ill. If he has the intelligence to be trained, he should be given a skill to help him find a way of life. If he can be educated, he should not be released as an illiterate or semiliterate. Above all, he must be made to feel that we care what happens to him and that life can be better than he has found it so far.

Before he is paroled, he and his plan must be thoroughly investigated by competent experts. Some States have made progress in reducing the average case load of the parole officer. But more progress is needed. We must employ more and better trained probation officers to obviate repetition of errors. To do this, we will have to abandon more false economies. We cannot attract enough good men unless we pay them enough.

During my administration I asked that the Ohio Bureau of Probation and Parole be transferred from the Department of Mental Hygiene and Corrections to the Commission of Pardon and Parole, where it properly belongs. Parole after all is not a part of our prison system but a matter of adjustment to the non—prison world after release. I see in the Pardon and Parole Commission, and in similar bodies in other States, a possible solution to the problem of removing the power of executive clemency from politics.

I repeat, however, that we can more easily prevent the making of a criminal than we can correct the already committed violator. We have the responsibility of helping to eradicate poverty by affording opportunity to those capable of escaping from the rut. It is easy for orators to say that this is a responsibility of the home and church, but experience demonstrates that the vast majority of our offenders have no home and do not go to church. We reach our children in our schools. There we must seek out the causes of emotional problems, slow learning, and truancy, and strike the most telling blow against incipient criminality.

But if we fail, as we must for years to come, what of those unfortunates who reach the brink of darkness, the capital crime? I have already made my plea. They should not be put to death, because it is not our privilege to play God: because death is no deterrent; because death makes an error horribly irrevocable; because vengeance is no substitute for justice; because man is not merely an entity that is three-fourths water and the rest mineral and organic products worth somewhat less than $30.

I believe that in every man there is some spark of the infinite, some fragment, however deeply submerged, of the universal good. If we can salvage the spark, we must fan it carefully until it flames into usefulness. I admit that this is not always possible. I have said many times that there are pathological incorrigibles who must be permanently separated from society. But they must not be separated by killing them in cold blood.

Dr. Karl Menninger, the distinguished psychiatrist, has said:

> To a physician discussing the wiser treatment of our fellow men, it seems hardly necessary to add that under no circumstances should we kill them. It was never considered right for doctors to kill their patients, no matter how helpless their condition. Similarly, capital punishment is in my opinion morally wrong. Punishing and even killing criminals may yield a grim kind of gratification; let us all admit that there are times when we are so shocked at the depredations of an offender that we persuade ourselves that this is a man the Creator didn't intend to create, and that we had better help correct the mistake. But playing God in this way has no conceivable moral or scientific justification.

In closing, I want to join Dr. Menninger in this statement and by saying it is with the deep feeling on my part that society will continue to improve and that we will find better solutions to our problems that I make a plea to this committee that we not retrogress to a practice that has failed. I represent no clients, I receive no compensation in appearing here today. I do so because I believe, sincerely believe that a civilized society can best serve by setting a better example for its constituent citizens.

Senator HRUSKA. Well, Governor DiSalle, you have joined a number of notable witnesses who have expressed the same point of view that you have so eloquently. We are grateful for your appearance.

Senator Kennedy, have you questions or comments?

Senator KENNEDY. I would just like to join in welcoming Govenor DiSalle to this committee, and to commend him for his statement and his comments.

Governor DiSalle brings us a very special perspective. As a distinguished Governor of one of our very major States, one can see from the testimony that this has been a subject that he has cared deeply about for many years and to which he has given an extraordinary amount of thought and concern.

I think his is really a masterful statement in tracing the history to western and perhaps even eastern civilizations. It serves as a reminder about how far we have come, but it also forcefully reminds us how much further we must go. I find that is difficult to have any other reaction but of complete and wholehearted support and commendation for his views.

I would like to ask Governor DiSalle, who has spent a lifetime in public affairs and public activities, how he accounts for, or if he agrees with, the various studies and polls that there have shown a swingback favoring the death penalty.

I think we have seen this in any number of polls that have been taken recently, and I think we have seen probably some corresponding reflection of this in the Congress and Senate by people who have introduced various death penalty bills.

Does he believe that to be the trend? If so, why? How does he think that such a tend can be reversed?

Mr. DiSalle. Senator, I believe there is a trend because people are being misled. During the days of rioting on campuses, people became disturbed, upset, and they felt there was a certain permissiveness existing. People in high places have taken advantage of this climate to try to use the death penalty and restoration of the death penalty as an excuse for not doing the job that has to be done, and people want an easy way of doing it. They look for it.

I talk to so many people who say, for example, in the District of Columbia, there are law violations and—the kind of law violations we find are not the kind of violations we punish by executing people, but people do not relate these two things, and as I pointed out in my statement, I think if we are going to develop a greater respect for law, we also have to develop a feeling on the part of people that the State itself is not corrupt, that the Government itself is not corrupt, that the people in politics are not corrupt, that we have the kind of leadership available and will set the kind of example that is necessary, and certainly in this particular case, with the President of the United States asking for resoration of the death penalty for certain crimes, the people of this country no doubt are influenced by this sort of thing.

I have known Governors—and I do not blame them at all—they are political. They have to run for reelection. It is tough at a time like this to stand and try to stem the tide when to them it really does not mean any big thing.

I just think we need more and more people who have the respect of the citizens of this country to go out and speak the truth as to what little effect the death penalty has on the total system of justice.

Senator Kennedy. Your point is that with the apparent growth of crime, people have the mistaken concept that if the death penalty is passed, there will be a reduction of crime.

Mr. DiSalle. That is right, and that has never been the history of any country in the world or any period in history. There has never been a reduction. In fact, the classic case is an example in England when they were hanging pickpockets for pickpocketing, and the day of the hanging, which was public, was the biggest day the pickpockets used to have in England because people were looking up and they were easy victims to pickpockets, who watched their colleagues being executed while at the same time he was plying his trade.

Senator Kennedy. It also seems to me to be pretty much of a fraud on the American people—at least I have seen in a number of instances public officials tripping over each other trying to support death penalty legislation, and yet we find that once it is passed it is rarely, rarely

utilized. It seems on the one hand people go out and attempt to lead the public into thinking that if they pass the death penalty all will be solved, and then once it passes, it seems that the public is really kind of reluctant to actually see that it is used.

Do you find that this is rather confusing?

Mr. DiSalle. Yes, it is confusing. In very much publicized crimes at the time the prosecuting attorney is running for reelection he is more likely to ask for the death penalty than he is if he is not running for reelection. Most prosecuting attorneys feel that if the law is there, and the death penalty is part of it, he has to ask for it. Otherwise people consider him soft on crime, and I had some figures here that I just received recently about the number of people who are really executed in the United States over a period of years, and it is relatively few. It is really a lottery. When you are executed you have to have committed a crime that really aroused a lot of sentiment and emotion, and a prosecuting attorney who really needed it at the time. And the kind of people—you know, when you consider these cases, and the question of clemency, here is a man with an IQ of 69 or 70, on a chart where 70, the dividing line between idiocy and a moron, and here he was convicted of a crime that had a good deal of publicity in a small county in Ohio and the jurors had written to me afterwards just begging that that sentence be reduced because their conscience bothered them.

Other situations like that. A woman in Cincinatti who I was convinced later was innocent of the crime of which she was found guilty, the principal witness for the prosecution had committed perjury. The principal witness for the defense had committed perjury, and the jury was taken out to the wrong site. They never saw the actual site. The facts were totally outside of the scope of the jury at the time they made their decision. And yet the prosecuting attorney told me after he discovered the fact that the site was wrong, this makes our case even stronger, even though in an interview the principal witness for the prosecution had said he was at work the night the crime was committed, later told a State highway patrolman in an affidavit that he was in the apartment of a black prostitute that night. The prosecutor knew this but this was not brought before the jury, and the prosecutor told me it would not have made any difference.

Now, it is hard for me to believe that testimony of a man who had said he had gone back to work would be given less credence than a married man who was out philandering that particular night, and the circumstances under which he was philandering, that the jury would give the same weight to that kind of testimony. And yet the prosecutor knew this and he proceeded with the prosecution that lead to the death penalty for this woman.

Senator Kennedy. Just finally, I am troubled by the classifications that are worked out in different forms of legislation. Innocent people in a hijacking, for instance. You can imagine a circumstance where in a hijacked plane if one person gets killed, the fellows says, well I am going to go to the electric chair anyway, and therefore we might as

well take down all the rest on the plane. I mean I think we can imagine a circumstance like that.

Mr. DiSalle. This is my feeling with the police killers. A man figures he is going to go to the chair anyway. He figures, I might as well shoot my way out, and he kills other people in the process.

Senator Kennedy. Precisely. I am trying to put a higher value on an individual's life.

We have had introduced here just the death penalty for those who kill members of Congress or the Senate. I thought that was interesting, because therefore you are putting a higher value of life on a Member of Congress or Senate than an ordinary citizen, and so we are making judgments in these ways as well, which I wonder if you find distressing.

Mr. DiSalle. I find it terribly inconsistent because after all, a life is a life, and I do not think there are different degrees of safety involved.

Senator Kennedy. I want to thank Governor DiSalle. I think that final statement, Mr. Chairman, would indicate that Governor DiSalle comes here as a private citizen, representing no special interest, which gives great credibility to him and to his views. I want to thank you very much for your appearing before the committee.

Mr. DiSalle. I would like also to point out, Senator, that today this is not a very popular political position, and although I am not a candidate or intend to be a candidate, I am speaking, I think, on behalf of a lot of people who would like to say the same thing but who are politically involved and feel their political life is a lot more important.

Senator Kennedy. Well, I am politically involved, but you speak for me in your statement.

Senator Hruska. I should like to join Senator Kennedy in his statement in regard to the motivation of the witness here today, and as further evidence of that, Senator, I would like to place in the record at this point a biographical sketch of our witness which is replete with his many civic contributions and other activities that are in keeping with that.

[The information referred to follows:]

Biographical Sketch

DiSalle, Michael Vincent, lawyer, former governor of Ohio. Born New York City, January 6, 1908; son of Anthony and Assunta (D'Arcangelo) DiSalle; student Central Catholic High School, Toledo; J. D., Georgetown University, 1931; LL.D., Notre Dame University, 1949, Miami University, 1959, Bowling Green State University, University of Toledo, Kent State University, University of Akron, 1960; D.H.L., Ohio University, 1963; M.T. (Honorary), University of Bridgeport, 1951; married Myrtle Eugene England, December 19, 1929; children: Antoinette, Barbara, Constance, Diana, Michael E. Admitted to Ohio Bar, 1932, and began practice in Toledo; senior member of DiSalle, Green and Haddad; Assistant District Counsel for Home Owners Loan Corporation, 1933–1935; member Ohio House of Representatives, 1973; Assistant City Law Director, City of Toledo, 1939–1941; Member Toledo City Council, 1941–1947; Vice-Mayor of Toledo, 1944–1948; Mayor (City Manager), 1948–1950; Director of Price Stabilization, Washington, D.C., 1950–1952; appointed Director of Economic Stabilization, 1952; governor of Ohio, 1959–1963; practice law, Columbus, Ohio 1963–1966, Partner Chapman, DiSalle & Friedman, Washington, D.C. 1966. Distinguished Professor, University of Massachusetts, 1963. Origina-

tor, First Chairman Toledo Labor-Management Citizens Committee (Toledo Plan), 1945 (plan has been adopted by other cities for mediation labor disputes); organizer and first President Ohio Association of Municipalties, 1949; Chairman, Advisory Board U.S. Conference of Mayors, 1949; Delegate International Union Cities, Geneva, 1949; served in Ohio State Guard, World War II. Named outstanding man of year by Junior Chamber of Commerce 1944; outstanding alumnus Georgetown Student Bar Association, 1962; recipient award Interfaith Movement, 1962; Member American Bar Association, Ohio; Columbus, Toledo Bar Associations, Bar Association, D.C., Delta Theta Phi. 1961—appointed by President John F. Kennedy, Member of the Advisory Commission on Governmental Relations; 1963–1967—Member Board of Directors, Cincinnati Federal Home Loan Bank Board; 1967—appointed by President Lyndon B. Johnson, Member of Arbitrators of the International Centre for Settlement of Investment Disputes. Author, "Power of Life and Death"—Random House and "Second Choice"—Hawthorne. Many articles on Death Penalty, Price and Wage Controls. Democrat. Roman Catholic. Home: Washington residence—Watergate East, Apartment 1014N, 2510 Virginia Avenue, N.W., Washington, D.C. 20037; Office: 1709 New York Avenue, N.W., Suite 303, Washington, D.C. 20006.

REFORM OF THE FEDERAL CRIMINAL LAWS

WEDNESDAY, JUNE 13, 1973

* * * * * * *

Senator HRUSKA. . . . Our next witness will be Professor Levinson of the Law Center of the University of Florida. We welcome you here, Professor.

Mr. LEVINSON. Thank you.

Senator HRUSKA. Your statement will be placed into the record in toto, and you may proceed in your own fashion, to read or to highlight the testimony that you give.

[The statement of L. Harold Levinson follows:]

STATEMENT BY L. HAROLD LEVINSON, PROFESSOR OF LAW, UNIVERSITY OF FLORIDA, GAINESVILLE, FLA.

1. Introduction
2. Summary Statement of Position
3. Appropriateness of Capital Punishment if the System is Suitable
4. Analysis of *Furman* v. *Georgia*
5. Florida's Legislative Response to *Furman*
6. Critique of Capital Punishment Proposals in S.1 and S.1401
7. Recommendation—Fundamental Revision of Proposals

APPENDIXES

Appendix A: Reprint from *Journal of Criminal Law and Criminology*, Vol. 64, pages 2–10 (March 1973), Ehrhardt, Hubbart, Levinson, Smiley and Wills, "The Future of Capital Punishment in Florida: Analysis and Recommendations"

Appendix B: Analytical listing of memorandum decisions rendered by United States Supreme Court on June 29, 1972, on basis of *Furman* v. *Georgia*, decided same day, vacating death sentences imposed by numerous state courts. (Analysis was prepared by N.A.A.C.P. Legal Defense and Educational Fund, Inc., and was included in their brief, as amicus curiae, filed in the Supreme Court of Florida, April 1973, in the consolidated cases of *State* v. *Dixon*, *State* v. *Setser*, *State* v. *Hunter* and *State* v. *Shepphard*.)

Appendix C: Florida Capital Punishment statute, enacted December 8, 1972 ,Laws of Florida, ch. 72–724)

Appendix D: Reprint from *Journal of Criminal Law and Criminology*, Vol. 64, pages 10–21 (March 1973), Ehrardt and Levinson, "Florida's Legislative Response to Furman: An Exercise in Futility?"

STATEMENT ON CAPITAL PUNISHMENT

1. INTRODUCTION

It is a privilege to appear in response to your invitation to discuss the capital punishment proposals in S.1 and S.1401.

My statement reflects my own personal views, and should not be attributed to any other person, nor to any institution.

21-885—73——8

2. SUMMARY STATEMENT OF POSITION

May I briefly summarize my position.

First, I believe capital punishment does have an appropriate place in our system of criminal justice, provided the system can be made to satisfy certain standards of reliability, equality and fairness.

Second, I find support for my position in the United States Supreme Court decision in *Furman v. Georgia*.

Third, the Florida Capital Punishment statute which was enacted in December 1972 is, in my opinion, an unsatisfactory response to the *Furman* decision.

Fourth, the capital punishment proposals being considered by this subcommittee, S.1 and S.1401, are also unsatisfactory responses to the *Furman* decision.

Finally, I recommend fundamental revision of the proposals.

3. APPROPRIATENESS OF CAPITAL PUNISHMENT IF THE SYSTEM IS SUITABLE

The philosophical debate for and against capital punishment has raged for thousands of years. This subcommittee has received a summary of the contending arguments in the Report of the National Commission to Reform the Federal Criminal Law (page 310) and in the accompanying Working Papers (pages 1347 to 1376).

More recently, during the latter part of 1972, I heard debates on both sides of the question, as witnesses appeared before the Florida Governor's Committee to Study Capital Punishment. Each of the four law schools in Florida designated at least one faculty member to serve as legal advisor to the Committee, and I was designated by the University of Florida. We held hearings throughout the State of Florida, from Pensacola to Miami. At each hearing, part of the time was allocated to testimony from invited experts, many of them of national stature, while the remainder of the time was available to citizens, who were encouraged to walk in and express their opinions. We held a special hearing at Raiford State Prison, where we interviewed a number of inmates who had been on Florida's death row until rendition of the *Furman* decision.

Having heard the debates and read a sampling of the vast literature, I am left in almost the same state of uncertainty as before. Neither side of the philosophical controversy has convinced me. I have the hunch that the possibility of capital punishment is a more effective deterrent than other types of deterrents, for some potential criminals, as regards some potential criminal acts they may be tempted to perpetrate, on some occasions. Further, my hunch tells me that the possibility of capital punishment tends to strengthen the confidence of citizens in general, and law enforcement officers in particular, in our system of justice; and that the possibility of capital punishment will therefore reduce the extent to which citizens and law enforcement officers are tempted to resort to self-help in response to criminal conduct.

If these hunches are sound, capital punishment offers some significant benefits to society. But these benefits are purchased at a cost, and we cannot expect to receive the benefits unless we pay the cost. If it turns out that the cost is higher than we are prepared to pay, we must do without the benefits which capital punishment would produce.

What are the costs? Partly, of course, the costs are reflected in dollars and cents. The financial costs of conducting the special proceedings in capital cases are extremely high, even under prevailing notions of procedure. Could these funds be better spent by employing more police officers to patrol the streets and prevent future crimes—or by improving social conditions in slum areas which are the breeding grounds of crime?

But apart from financial costs, we risk incurring other costs, such as the cost of offending our own deeply held values. If our system of capital punishment is carried out in such a manner as to cause serious affront to our notions of decency and fair play, this affront must be considered as a cost, perhaps a prohibitive cost, tending to persuade us that capital punishment is not worth buying at such a price.

The question then becomes, not whether I favor capital punishment, but whether I can anticipate that the benefits of capital punishment can be purchased for society without excessive cost. Again, I can only resort to a hunch, which tells me that we can indeed purchase the benefits at an acceptable cost.

We can, but we have not yet developed a plan for doing so. Development of such a plan is the challenge I find in the Supreme Court's decision in *Furman* v. *Georgia*.

4. ANALYSIS OF *FURMAN* V. *GEORGIA*

The *Furman* decision is both challenging and inspirational. It is challenging because it leaves open the theoretical possibility that some type of capital punishment system may be found constitutional. In terms of my previous discussion. I interpret *Furman* as challenging us to develop an acceptable cost at which to purchase the benefits of capital punishment, if we want those benefits. And *Furman* is also inspirational because, in my view, it contains implications not only for capital punishment but also for the entire system of criminal justice. Since capital punishment is the penalty of unique and ultimate severity, let us by all means use it as the first place for refining our system; but let us not stop there—let us refine the entire system, in non-capital as well as capital cases.

Shortly after the *Furman* decision was rendered, Governor Askew appointed the Governor's Committee to Study Capital Punishment. Five law professors, including myself, served as the legal advisors to the Committee. We prepared a memorandum analyzing the *Furman* decision, and recommending a course of action. Our memorandum was subsequently published in the *Journal of Criminal Law and Criminology*, and a reprint of that publication is attached as Appendix A to these remarks. May I briefly summarize.

We noted that *Furman* was decided by a vote of five to four. This circumstance had led some other commentators to speculate that the four Justices who dissented in *Furman* would continue to vote in favor of capital punishment in all future cases, and that capital punishment could therefore be reinstated if at least one of the five Justices of the *Furman* majority could be convinced in a future case to vote in favor of some capital punishment statute distinguishable from those at issue in *Furman*. We pointed out, in response, that some or all of the four Justices who dissented in *Furman* are likely to respect the precedent established in *Furman*. Thus, it is unlikely that the vote of five to four will be repeated in future Supreme Court litigation involving capital punishment.

Next, our memorandum developed the view that the requirements of the *Furman* decision would probably not be satisfied, either by a statute providing mandatory capital punishment, or by a statute providing detailed guidelines for jury determination of mercy. An acceptable system would necessarily include provisions designed to eliminate, as far as humanly possible, the risk of arbitrary, freakish or discriminatory decisions in capital cases, not only in the jury function, but at all stages of the process where substantial discretion existed, including executive clemency, jury discretion to convict of lesser offenses, and plea bargaining to lesser offenses.

We interpreted *Furman* and other recent Supreme Court decision as strong indications that the Court was ready to require fundamental changes in our entire system of criminal justice and corrections, whether or not the reinstatement of capital punishment was attempted.

We recommended that a comprehensive study of our entire system of criminal justice and corrections be commissioned and undertaken, and that, pending completion of the comprehensive study, no attempt be made to reinstate capital punishment in Florida.

Today, my interpretation of the *Furman* decision is essentially the same as it was a few months ago, when I participated in writing that memorandum. One additional aspect of the *Furman* decision has been brought to my attention since then, tending to strengthen the view that the Supreme Court is unlikely to approve any capital punishment statute, unless in context of fundamental changes in the system.

On the same day that *Furman* was decided, the Supreme Court issued dozens of memorandum decisions, on the basis of *Furman*, vacating death sentences imposed by numerous state courts. Attached to this statement, as Appendix B, is an analytical listing of these memorandum cases. The listing was prepared by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and was included in their brief, as amicus curiae, filed in the Supreme Court of Florida in April, 1973, in the case testing the validity of the new Florida Capital Punishment statute. This listing points out that the United States Supreme Court rendered memorandum decisions on the same day as *Furman*, vacating

death sentences which had been imposed under each of seven types of statutes: (1) the defendant was sentenced to death by a jury which had a choice between death and prison confinement; (2) the death penalty was mandatory unless the jury recommended mercy; (3) the sentence was life, unless the jury recommended death; (4) the defendant was sentenced to death by a judge following a plea of guilty; (5) the defendant waived jury trial, and was tried and sentenced to death by a judge; (6) the jury could make a binding recommendation of death, but a recommendation of mercy could be overriden by a judge; and (7) the jury could make a binding recommendation of mercy, but a recommendation of death could be overriden by a judge. All of these sentencing systems were invalidated on the same day *Furman* was decided.

The analysis of these memorandum decisions reinforces the view that *Furman* requires more than simply a reform of the sentencing process. To repeat a phrase from the memorandum we prepared for the Governor's Committee, an acceptable system would necessarily include provisions designed to eliminate, as far as humanly possible, the risk of arbitrary, freakish or discriminatory decisions at all stages of the process where substantial discretion exists. And, once such a system has been designed, we will be in a position to see how much risk remains because of our inability to eliminate it, and we will then have to decide whether we dare maintain that element of risk as an essential cost of a system of capital punishment, or whether, on the other hand, the risk is so high as to make capital punishment an unacceptable feature of our system.

5. FLORIDA'S LEGISLATIVE RESPONSE TO *FURMAN*

During recent years, Florida has provided national leadership in a number of areas. We pioneered in adopting the American Bar Association Standards of Criminal Justice. We enacted a Government in the Sunshine Law.

We also led the nation by becoming the first state to enact a capital punishment statute after the *Furman* decision. Unfortunately, I must urge you not to follow Florida's leadership in that matter. In my opinion, the new Florida capital punishment statute is an unsatisfactory response to the *Furman* decision.

The full text of the statute is attached as Appendix C to this statement. Another attachment, Appendix D, reproduces a critique co-authored by Professor Charles Ehrhardt and myself, which was recently published in the *Journal of Criminal Law and Criminology*, as a companion piece to the memorandum in which the five law professors analyzed the *Furman* decision.

A test case is now pending in the Supreme Court of Florida, in which the constitutionality of the new statute is squarely at issue. The Court heard oral argument on April 24, and a decision may be rendered at any time. As soon as I receive a copy of the decision, I will send it to this subcommittee, as a supplement to the present statement.

In brief, the new statute provides a bifurcated trial in capital cases. The sentencing proceeding is heard by the same judge and jury who determined the question of guilt. The jury's function is advisory only, and their recommendation does not bind the judge. The statutory list of aggravating and mitigating circumstances must be considered in the sentencing proceeding, and if the judge imposes the death penalty, he must support his decision by findings concerning these circumstances, including a finding that sufficient aggravating circumstances exist, and that sufficient mitigating circumstances do not exist to outweigh the aggravating circumstances. A death sentence is automatically reviewed by the Supreme Court of Florida.

If the death penalty is not imposed on a defendant found guilty of a capital felony, he must, under the new law, serve at least 25 years of imprisonment before becoming eligible for parole.

In our law review article, Professor Ehrhardt and I criticize the new statute on a number of grounds.

First, the statutory list of aggravating and mitigating circumstances includes some vague language, and the process by which mitigating circumstances are weighed against aggravating circumstances seems to leave excessive discretion.

Second, the transfer of ultimate life-or-death authority from the jury to the judge does not help make the statute constitutional. Thus, no constitutional gain arises from adopting this policy which has been rejected by the vast majority of jurisdictions.

Third, the scope of appellate review by the Supreme Court of Florida is unclear. Thus, the uncertainties in the statutory procedures for the trial court are compounded by uncertainties in the scope of appellate review.

Fourth, the statute makes no attempt to reduce the scope of discretion anywhere in the system except at the sentencing function. Thus, the statute fails to respond adequately to the *Furman* decision, insofar as we interpret that case as requiring the elimination, as far as humanly possible, of the risk of arbitrary, freakish or discriminatory decisions at all stages of the process where substantial discretion exists.

Fifth, the 25-year no-parole provision puts pressure on the pardon and commutation power of the executive, and emphasizes the need, as yet unfulfilled, for executive development of guidelines for the exercise of clemency. This provision also raises serious penological questions, in view of the undisputed testimony heard by the Governor's Committee from responsible Florida corrections officials, to the effect that by the time an inmate has been imprisoned for as long as twenty years, he is likely to be either a vegetable or a maniac, and in any event hardly fit for release.

Our article describes the hasty drafting of the bill after the Governor's Committee had reached the basic policy decision in favor of capital punishment. The bill was amended on the floor of each house, and then went through drastic changes in a late night session of a conference committee. It was approved next day by a legislature anxious to end its special session.

6. CRITIQUE OF CAPITAL PUNISHMENT PROPOSALS IN S. 1 AND S. 1401

Two bills have been submitted for comment: S.1 (introduced January 4, 1973) and S. 1401 (introduced March 27, 1973).

S.1 provides that the court and jury (if any) shall be guided by aggravating and mitigating circumstances listed therein, and that the court shall not impose a sentence of death unless the jury returns a unanimous verdict that the sentence should be death. The list of aggravating and mitigating circumstances is for guidance only, and no findings are required. The presence or absence of any of these circumstances does not compel decision one way or the other, but merely provides guidance. This system vests as much discretion in the court and jury as was condemned in *Furman*, and is clearly invalid under that decision.

S.1401 provides a tighter system. The bill contains lists of aggravating and mitigating circumstances. A special verdict must be rendered, setting forth findings as to the existence or nonexistence of each of the aggravating and mitigating circumstances. The burden of establishing aggravating circumstances is on the government, while the burden of establishing mitigating circumstances is on the defendant. Disclosure, rebuttal and argument are assured. If the special verdict finds, by a preponderance of the information, that one or more aggravating circumstance exists, and that no mitigating circumstances exist, the court shall sentence the defendant to death. If no aggravating circumstances are found to exist, or if one or more mitigating circumstances exist, the sentence shall not be death.

The wording of the aggravating and mitigating circumstances is sharper than in the Florida statute. Thus, one of the mitigating circumstances in S.1401 is that the defendant was "under the age of eighteen." The Florida equivalent is merely "the age of the defendant." As another example, one of the aggravating circumstances in S.1401 is that, "in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense." The Florida equivalent is: "The defendant knowingly created a great risk of death to many persons."

The bill makes no provision for appellate review of the sentence. The scope of appellate review may therefore be uncertain.

In general, S. 1401 goes far in providing statutory standards, so as to reduce the scope of discretion in sentencing. I personally question some of the policy choices which went into drafting the aggravating and mitigating circumstances. For example, I have difficulty understanding why aggravating circumstances include the fact that the victim was President or Vice-President of the United States, or a Justice of the Supreme Court, or a federal law enforcement officer, or an employee of a United States penal or correctional institution; if any distinction is made by reason of the status of the victim,

why not also include district court judges, who are much more likely to be exposed to violence than are Supreme Court Justices? But these policy choices are minor aspects of the bill.

My major difficulty with S.1401 is that it deals only with sentencing. My position, stated previously, is that *Furman* calls for much more than a tightening of sentencing. It calls for an overhaul of the entire system, so as to eliminate, as far as humanly possible, the risk of arbitrary, freakish and discriminatory decisions at all stages of the process where substantial discretion exists. And, once we have done this, it calls for a sober consideration of the costs which society would have to pay, in order to get the benefits of capital punishment—and these costs include the residual amount of the risk of arbitrariness, etc., which would remain in the system after we eliminate as much risk as humanly possible.

S.1401 does not deal with plea bargaining, with jury discretion to convict of lesser offenses, with executive clemency, with the exercise of prosecutor's discretion, with the grand jury, with the availability and sufficiency of defense counsel beyond the existing levels of service. Until these and other items are frankly treated in a legislative proposal, how can we begin to determine whether capital punishment can be bought at an acceptable cost?

7. RECOMMENDATION—FUNDAMENTAL REVISION OF PROPOSALS

My recommendation is simply that you return to the drawing board, with a larger view of what a capital punishment statute should try to accomplish.

I have only the greatest respect for the distinguished committee and staff members who drafted these products. The massive proposals to reform the federal criminal code have been under consideration for many years, and in most respects I am sure these proposals reflect the mature judgment of the experts. But the *Furman* decision intervened at a relatively late stage of the federal criminal code project, and I must conclude that the draftsmen have not devoted a full measure of time to considering the impact of *Furman*.

During these remarks, I have devoted primary attention to the costs which must be faced in adopting a system of capital punishment. But we should also reconsider the potential benefits to be derived from this type of punishment. I started by expressing certain hunches which persuade me that capital punishment does have some special benefits to offer, so long as the cost is not prohibitive. I hope that research continues into this question, so that our hunches become increasingly educated as the state of the art improves. We will then approach, as closely as possible, a rational determination of the relative social utility of capital punishment compared to other alternatives.

Appendix A

[Printed from The Journal of Criminal Law and Criminology]

THE AFTERMATH OF *FURMAN*: THE FLORIDA EXPERIENCE

The Supreme Court's decision abolishing the death penalty, at least as it existed in most jurisdictions, hardly represents the final resolution of the controversy over capital punishment. Given substantial public sentiment which apparently favors capital punishment in some form—voiced, for example, in the results of the recent referendum in California—various legislative bodies will face the question of whether capital punishment can and should be legislatively reinstated. In December 1972 the State of Florida became the first jurisdiction to pass judgment on this question. The legislature enacted a bill allowing imposition of the death penalty in certain circumstances.

The two articles which follow highlight the competing policy and legal considerations which face legislatures after *Furman*, and illustrate one state's response to those considerations. The first article is a slight revised version of a memorandum to the Florida Governor's Committee to Study Capital Punishment, submitted by the Committee's Legal Advisory Staff. It sketches the various possible legislative responses to *Furman* and recommends one. The second indicates other recommendations made to the legislators and comments on the ultimate legislative determination.

I. THE FUTURE OF CAPITAL PUISHMENT IN FLORIDA: ANALYSIS AND RECOMMENDATIONS*

Charles W. Ehrhardt,** Phillip A. Hubbart,† L. Harold Levinson,††
William McKinley Smiley, Jr.‡ and Thomas A. Wills‡‡

The purpose of this memorandum is to advise the Florida Governor's Committee to Study Capital Punishment regarding the constitutional effects of the decision rendered by the Supreme Court of the United States on June 29, 1972, in *Furman v. Georgia*.[1]

The five-man majority in *Furman* agreed on a one-paragraph decision reversing the judgments of the courts of Georgia and Texas and holding that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[2] In addition to the per curiam opinion, the *Furman* decison includes nine separate opinions in which each Justice of the majority and minority expresses his own views.

Following *Furman*, the Florida supreme court ruled in *Donaldson v. Sack*[3] that capital punishment no longer exists in Florida, since *Furman* invalidates Florida's capital punishment laws along with those of Georgia and Texas. Consequently, capital punishment cannot constitutionally be imposed unless Florida statutes are amended, and then only if the amended statutes satisfy the standards required by *Furman*. Whether any capital punishment statute could satisfy these standards is, of course, a crucial question for this Committee.

Our comments inevitably involve prediction of the manner in which the Supreme Court is likely to decide future cases. In making these predictions, we assume that the nine Justices currently on the Court will continue in office and that each Justice will decide future cases consistently with the views he expressed in *Furman*.

SOME OR ALL OF THE FOUR JUSTICES WHO DISSENTED IN *FURMAN* ARE LIKELY TO CHANGE THEIR VOTES IN FUTURE CASES OUT OF RESPECT FOR THE PRECEDENT ESTABLISHED IN *FURMAN*

Dissenting opinions in *Furman* were written by Chief Justice Burger and by Justices Blackmun, Powell and Rehnquist. The underlying theme of all four dissents is that legislatures, not the courts, should decide whether capital punishment is an acceptable penalty. Not a single Justice stated that he personally favored capital punishment. To the contrary, Justice Blackman wrote: "Were I a legislator, I would vote against the death penalty. . . ."[4] And the Chief Justice, in an opinion joined by all four dissenters, stated: "If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall [who held capital punishment unconstitutional] or, at the

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* The original text of this memorandum was prepared at the request of the Honorable E. Harris Drew, Chairman of the Florida Governor's Committee to Study Capital Punishment, for submission to a meeting of the Committee at Tallahassee on October 20, 1972.

The writers were appointed by Governor Reubin Askew, after consultation with the deans of the four law schools in Florida, to serve as legal advisors to the Committee.

This memorandum reflects the personal views of the authors, and should not be attributed to any of the institutions with which they are affiliated.

Although the version which appears here does not deviate significantly from that which was submitted to the Committee, it was necessary to alter that text slightly so as to make this article and the one following more understandable and useful to the non-Florida reader. An unedited copy of the memorandum is included in FINAL REPORT OF THE [FLA.] GOVERNOR'S COMMITTEE TO STUDY CAPITAL PUNISHMENT (Nov. 21, 1972).

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[1] *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[2] 408 U.S. at 239–40.

[3] 265 So. 2d 499 (Fla. 1972). The law as it existed before this decision is summarized in Erhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility* 64 J. CRIM. L. & C. 10 (1973).

[4] 408 U.S. at 406 (Blackmun, J., dissenting).

very least, restrict the use of capital punishment to a small category of the most heinous crimes." [5] Instead, the four dissenters based their votes upon their view that the Supreme Court should not interfere with legislative judgments about the acceptability of capital punishment.

The *Furman* majority, however, considered the question of the wisdom of the legislative judgment as appropriate for judicial determination. They reached the question, decided it, and thereby established a new precedent. While the full scope of *Furman*, as precedent, is uncertain in view of the five separate opinions written by the five Justices who constituted the majority, one aspect of the decision is perfectly clear. The five-man majority, in their one paragraph opinion, invalidated the judgments of the Georgia and Texas courts which had applied their states' respective capital punishment statutes. In so doing, the Supreme Court necessarily decided that it could and would exercise its authority on this topic, despite the contrary arguments of the four dissenters.

Out of respect for this precedent, it is likely that some or all of the four Justices who dissented in *Furman* will consider themselves bound in future cases to consider the question they refused to reach in *Furman*. A substantial tradition argues in favor of this approach. The most notable advocate of this position in recent years was the late Justice Harlan, who frequently dissented from "landmark" decisions of the Supreme Court but usually changed his vote when similar issues came to the Court again so as to conform to the precedent established by the majority.[6]

Thus, it is unlikely that the vote of five to four will be repeated in future Supreme Court litigation involving capital punishment. Now that the Court's role in this matter has been established by the *Furman* precedent, some or all of the four dissenters in *Furman* are likely to consider the question on its merits, and some or all of these Justices are likely to vote for abolition of capital punishment, or at least to restrict its use to a small category of the most heinous crimes.

AN AMENDMENT TO FLORIDA STATUTES REMOVING JURY DISCRETION TO RECOMMEND MERCY FOR CERTAIN CAPITAL OFFENSES IS UNLIKELY TO WITHSTAND CONSTITUTIONAL CHALLENGE

Some legal authorities in Florida, notably the Attorney General, assert that capital punishment may be constitutionally reinstated under the *Furman* decison if the punishment is made "mandatory" upon conviction for certain heinous crimes by removing all jury discretion to recommend mercy.[7]

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[5] 408 U.S. at 375 (Burger, C. J., dissenting).

[6] As examples of the late Justice Harlan's respect for precedent, *see* Aguillar v. Texas, 378 U.S. 108, 116 (1964) (Harlan, J., concurring); Griffin v. California, 380 U.S. 609, 615–17 (1965) (Harlan, J., concurring); Orozco v. Texas, 394 U.S. 324, 327–28 (1969) (Harlan, J., concurring).

The tendency of the Burger Court to adhere to the precedents established by the Warren Court is noted in: Kurland, *1970 Term: Notes on the Emergency of the Burger Court*, in SUPREME COURT REVIEW 265 (1971); Kalven, *Foreword, The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 5 (1971). On the general topic of precedent in the Supreme Court, *see* Boudin, *The Problem of Stare Decisis in our Constitutional Theory*, 8 N.Y.U.L.Q. 589 (1931); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 VALPARAISO L. REV. 101 (1969).

[7] In his official legal memorandum on the *Furman* decision dated July 7, 1972, the Attorney General of Florida argues strongly that a system of mandatory death penalties for certain types of homicide may be constitutionally reinstituted. Specifically, the Attorney General suggests that death be mandatorily imposed as a punishment for the murder of a law enforcement officer, the murder of any penal institution officer, any murder pursuant to a contract for profit, any murder committed or perpetrated during the commission of any felony directed against another person, any murder by an assassin or person taking the life of any state or federal official, any murder committed by a parolee or probationer previously convicted of first degree murder, and any murder of a person in connection with a hijacking of an airplane, bus, train, ship or any other commercial vehicle.

It has been argued at some hearings of this Committee, that classifying certain murders as punishable by death and others punishable by life imprisonment may violate the equal protection clause of the fourteenth amendment to the United States Constitution and article I, section 2 of the Florida Constitution (1968). This objection is unsound. A legitimate governmental purpose is evident in the proposed legislative scheme, namely, to punish more severely those heinous type murders which more than other murders, threaten the peace and safety of the community. Statutory classifications of this nature are not condemned by the equal protection clause so long as some legitimate governmental purpose is served by the classification. Watts v United States, 394 U.S. 705, 707 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). However, it is our ultimate conclusion that a system of mandatory death penalties cannot be sustained under the *Furman* decision.

This position is based primarily on the two crucial concurring opinions of Justices Stewart and White in *Furman*. These opinions state that quite different questions would be presented by a statute which mandatorily applied the death penalty to certain types of crimes, and that no view is expressed regarding the constitutionality of such a statute.[8]

It is argued with some persuasiveness that a system which eliminated the arbitrary application of capital punishment would in all likelihood be viewed as constitutional by Justices Stewart and White. Therefore, the argument concludes that capital punishment can be constitutionally reinstated for certain heinous offenses so long as jury discretion to recommend mercy is eliminated, and that Justices Stewart and White, together with the dissenting Justices in *Furman* (Burger, C. J., and Blackmun, Powell, and Rehnquist, JJ.) would vote to uphold the constitutionality of such a system. This legal analysis, while appearing on the surface, is unsound and must be rejected.

First, the position assumes that the four dissenting Justices in *Furman* would uphold the constitutionality of a system of mandatory death penalties. This assumption is extremely doubtful, based on statements by the four dissenters in *Furman*. Chief Justice Burger, joined by all the dissenters, makes the following statements in his opinion:

"Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for abolition." [9]

Justice Blackmun, in his separate dissenting opinion, states that if legislatures responded to the *Furman* decision by enacting mandatory capital punishment without the possibility of imposing lesser punishments, such legislation would be "regressive and of an antique mold, for it [would] eliminate the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago." [10] Moreover, as we have previously indicated, some or all of the dissenting Justices in *Furman* may change their votes out of respect for the *Furman* precedent and rule unconstitutional any legislation reinstating capital punishment.

The concurring opinions of Justices Brennan and Marshall make it clear that any statutory scheme to reinstate capital punishment would be unconstitutional under their interpretation of the eighth amendment.[11] The views of these Justices along with the four dissenters would therefore seem to invalidate any legislative effort to reinstitute capital punishment on a mandatory basis.

Second, the argument in favor of reinstating capital punishment through a system of mandatory death penalties assumes that eliminating jury discretion to recommend mercy will substantially eliminate the risk of arbitrary application of capital punishment, so as to satisfy the constitutional objections of Justices Stewart and White in *Furman*. This is extremely doubtful. Other areas of unfettered discretion contribute substantially to the arbitrary application of capital punishment in Florida, to wit: executive clemency by the Governor and pardon board, jury discretion to convict of lesser included offenses, and "plea bargaining" to lesser included offenses. Since these areas of discretion would remain intact under a system which eliminated jury discretion to recommend mercy, it is highly unlikely that such a system would reduce the risk of arbitrariness sufficiently to satisfy the basic constitutional objections of Justices Stewart and White. Furthermore, any effort to eliminate these critical areas of discretion would fortify the position of the four dissenting Justices in *Furman* who observed that such a system would be so regressive as to be unconstitutional, making total abolition the only alternative.

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[8] 408 U.S. at 306 (Stewart, J., concurring); 408 U.S. at 310–11 (White, J., concurring).

[9] 408 U.S. at 401 (Burger, C. J., dissenting).

[10] 408 U.S. at 413 (Blackmun, J., dissenting).

[11] "When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual,' and the states may no longer inflict it as a punishment for crimes. 408 U.S. at 305 (Brennan, J., concurring); "There is but one conclusion that can be drawn from all of this—i.e., the death penalty is an excessive and unnecessary punishment which violates the Eighth Amendment." 408 U.S. at 358–59 (Marshall, J., concurring).

In short, it is our considered opinion that any effort to reinstitute capital punishment on a mandatory basis for certain heinous offenses by eliminating jury discretion to recommend mercy is unlikely to be upheld under the *Furman* decision.

AN AMENDMENT TO FLORIDA STATUTES PROVIDING DETAILED GUIDELINES FOR JURY DETERMINATION OF MERCY IS UNLIKELY TO WITHSTAND CONSTITUTIONAL CHALLENGE

In his dissenting opinion, Chief Justice Burger speculates on the impact of the Court's decision in *Furman*, and suggests that legislatures "may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed." [12]

A tenable argument can be made that a statute providing detailed guidelines controlling the imposition of capital punishment would be held valid by a majority of the Court, including some Justices who concurred in *Furman* as well as some or all of those who dissented.

Advocates of this approach would point out that three members of the majority in *Furman*, Justices Douglas,[13] White and Stewart, do not hold capital punishment unconstitutional per se, but carefully limit their concurring opinions to systems where the decision between life and death for the defendant rests in the complete discretion of the jury.

Vesting complete discretion in the jury without any guidelines for the imposition of the penalty causes Justice White to conclude that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." [14] He is also concerned that the judgment which state legislatures have made regarding the death penalty is lost when the jury is delegated the sentencing authority and can, without violating any trust or statutory policy, refuse to impose the penalty no matter what the circumstances of the crime.

Similarly, Justice Stewart, who finds the death penalty to be impermissible where it is "wantonly and freakisly imposed," [15] implies that the death penalty is not unconstitutional per se when he recognizes that retribution is a constitutionally permissible ingredient in the imposition of punishment. The capricious selection by the jury of those upon whom the sentence of death will be imposed is Stewart's chief objection to the present sentencing procedures. Thus, it is arguable that the Court would uphold capital punishment if imposed in a manner which eliminates capriciousness and uncontrolled discretion in the sentencing process.

Both the Model Penal Code and the Report of the National Commission on Reform of Federal Criminal Laws recommend sentencing procedures which attempt to define when the death penalty may be imposed. Each proposal sets forth certain aggravating and mitigating circumstances which serve as guidelines for imposing the death penalty.[16] In order to stand any chance of satisfying constitutional requirements, statutory guidelines must evidently be made obligatory rather than merely advisory, otherwise the sentence can still be imposed in a completely capricious and arbitrary manner.[17] The model Penal

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[12] 408 U.S. at 400 (Burger, C. J., dissenting).

[13] Justice Douglas finds the discretionary statutes to be unconstitutional in their application as the death penalty was arbitrarily and selectively applied in a manner inconsistent "with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." 408 U.S. at 257 (Douglas, J., concurring).

[14] 408 U.S. at 313 (White, J., concurring).

[15] 408 U.S. at 310 (Stewart, J., concurring).

[16] MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962); REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, pt. 1, §§ 3601–04 (1971). In addition to providing guidelines, a legislature following this approach should specifically negate constitutionally impermissible criteria, *e.g.*, race. *See* McGautha v. California, 402 U.S. 183, 207 (1971).

[17] *See, e.g., In re* Anderson, 69 Cal. App. 2d 613, 447 P.2d 177, 73 Cal. Rptr. 21 (1968) (Tobriner, J., dissenting). In Donaldson v. Sack, 265 So. 2d 499, 504 (Fla. 1972), the Florida Supreme Court did not rule on the constitutionality of ch. 72–72, [1972] Fla. Sess. Laws 122, *amending* FLA. STAT. § 921.141 (1971), providing for bifurcated trials in capital cases and listing certain aggravating and mitigating circumstances, since it was not effective until October 1, 1972. However, the new statute apparently contains constitutional infirmities in that it does not require a finding of the presence of an aggravating circumstance prior to the imposition of the death penalty, but rather allows the jury that same discretion in determining when the death penalty should be imposed which was condemned in *Furman*. The Florida statute also lacks the additional requirements discussed in notes 19 and 20 and accompanying text *infra*.

Code meets this argument by requiring, for the imposition of the death penalty, a finding of the presence of one of the enumerated aggravating circumstances and a further finding that there are no mitigating circumstances sufficient to call for leniency.[18]

Thus, it can be argued that the requirements of *Furman* would be satisfied by a statute incorporating the Model Penal Code approach, requiring specific findings regarding aggravating or mitigating circumstances. The sentence would be determined at a penalty trial, separate from the trial for determination of guilt. The penalty trial would, under one view of the matter, be conducted by a judge without a jury.[19] The specific findings made at the penalty trial, as well as the sentence imposed on the basis of these findings, would be subject to complete appellate review.[20]

While a statute along these lines would undoubtedly reduce the scope of the jury's discretion, in our opinion the statute would be unlikely to withstand constitutional challenge.

We base this opinion on the same reasons that led us to conclude, in the preceding section, that a statute imposing mandatory death penalties would be unlikely to withstand constitutional challenge. First, a statute imposing guidelines for jury determination of mercy, coupled with a requirement of specific findings and appellate review, might be rejected by some or all of the Justices who dissented in *Furman*, as a "regressive" attempt to divest the jury of its flexibility and discretion. Second, such a statute would still leave vast areas of discretion, including executive clemency, jury discretion to convict of lesser included offenses, and "plea bargaining" to lesser included offenses. Thus, a substantial and unacceptable risk of arbitrariness would remain.

NO STATUTE IMPOSING CAPITAL PUNISHMENT CAN BE EXPECTED TO WITHSTAND CONSTITUTIONAL CHALLENGE UNLESS ENACTED IN CONTEXT OF FUNDAMENTAL CHANGES IN OUR SYSTEM OF CRIMINAL JUSTICE—AND EVEN IF FUNDAMENTAL CHANGES ARE MADE IN OUR SYSTEM, IT IS UNLIKELY THAT A CONSTITUTIONAL CAPITAL PUNISHMENT STATUTE CAN BE ENACTED

We read *Furman* as requiring extremely reliable guarantees in capital cases, because of the unique severity and finality of capital punishment. The Court leaves open at least the theoretical possibility of a valid capital punishment statute, but gives no clear blueprint of an improved system which could administer capital punishment with an acceptable degree of reliability.

Our discussion in the previous two sections of this memorandum indicates that, in our view, the Court's requirements would probably not be satisfied, either by a statute providing mandatory capital punishment, or by a statute providing detailed guidelines for jury determination of mercy.

An acceptable system would necessarily include provisions designed to eliminate, as far as humanly possible, the risk of arbitrary, freakish or discriminatory decision in capital cases, not only in the jury function, but at all stages of the process where substantial discretion now exists. Amongst other stages where discretion is currently exercised, we direct special attention to the clemency power, exercised pursuant to the Florida Constitution [21] by the Governor and three members of the cabinet. Any attempt to make changes in this function would evidently require amendment of the Florida Constitution.

In order to design a system of capital punishment which would have a theoretical chance of withstanding constitutional challenge, the legislative draftsman would need inputs from experienced prosecutors, defense counsel, trial judges, Florida supreme court justices, and officials of the executive department familiar with the exercise of the clemency power. The assistance of these persons would be necessary in order to identify the stages of the process at which substantial discretion currently exists, to discuss the types of abuse

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[18] MODEL PENAL CODE, *supra* note 16, at § 210.6(2).

[19] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft, 1968), referring to the judge's role in sentencing, states: "clearly the most telling argument against jury sentencing is that a proper sentencing decision calls on an expertise which a jury cannot possibly be expected to bring with it to the trial, nor develop for the one occasion on which it will be used." *Id.* at 47.

[20] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS 367 (1971) recommends amendment of 28 U.S.C. § 1291 (1970) by providing that the jurisdiction of the courts of appeal "shall in criminal cases include the power to review the sentence and to modify or set it aside for further proceedings."

[21] FLA. CONST. art. IV, § 8.

most likely to occur, and to suggest methods by which the risk of abuse could be reduced to the stringent requirements of *Furman*.

This Committee has not received evidence on these matters, except for a few passing references made by some witnesses. We consider it would be premature, on the basis of the present state of the Committee's record, for us to offer any recommendations on these matters. We merely note that no statute imposing capital punishment is likely to have been a theoretical chance of withstanding constitutional challenge unless enacted in the context of fundamental changes in our system of criminal justice.

We have described, as "theoretical," the possibility of drafting a capital punishment statute which would satisfy the *Furman* requirements. This description is based upon a number of considerations which suggest that, while *Furman* on its face appears to leave the door open to the enactment of valid capital punishment statutes, the decision strongly implies that capital punishment in the United States is a thing of the past.

First, some or all of the four Justices who dissented in *Furman* may change their votes in future cases, out of respect for the precedent established by the *Furman* majority. We have discussed this matter in a previous section.

Second, the guarantees needed in order to satisfy the *Furman* requirements may be so expensive and time consuming that no legislature would be willing to provide them.

Third, Justices Douglas, Stewart and White may have been motivated to write their separate concurring opinions by the desire to condemn arbitrary, freakish or discriminatory exercises of discretion throughout our system of criminal justice. These three Justices may, in future cases, be prepared to vote against capital punishment, regardless of the system under which it may be administered; they refrained from taking such a position in *Furman*, perhaps in order to focus attention upon the arbitrary, freakish or discriminatory aspects of existing systems of imposing punishment, in noncapital as well as capital cases.

Fourth, it seems unlikely that the United States Supreme Court would permit reinstatement of capital punishment in any form in the United States, with the possible exception of the military, after having taken the drastic measure of ordering the release of over 600 convicts from death rows throughout the country.

FURMAN AND OTHER RECENT DECISIONS SERVE NOTICE THAT THE UNITED STATES SUPREME COURT IS READY TO REQUIRE FUNDAMENTAL CHANGES IN OUR ENTIRE SYSTEM OF CRIMINAL JUSTICE AND CORRECTIONS, WHETHER OR NOT WE ATTEMPT TO REINSTATE CAPITAL PUNISHMENT

We have pointed out, in the previous section, that *Furman* requires extremely reliable guarantees in capital cases, because of the unique severity and finality of capital punishment. We have also noted that some of the concurring opinions in *Furman* may be read as condemning the risks of arbitrary, freakish and discriminatory decision-making throughout our system of criminal justice and corrections.

Thus, while capital cases demand the most rigorous guarantees—perhaps so rigorous as to be impossible of attainment—non-capital cases also require guarantees, not quite so rigorous as in capital cases, but in many respects more rigorous than are currently available.

We read *Furman* and some other recent decisions of the United States Supreme Court as strong indications that the Court is ready to require fundamental changes in our entire system of criminal justice and corrections, whether or not we attempt to reinstate capital punishment.

The opinions by Justices Douglas, Stewart and White have already been mentioned, as condemning the risks of arbitrary, freakish and discriminatory decisions, wherever they may exist in our system. Some of the other opinions in *Furman* support their view.

For example, Justice Brennan develops a four-point cumulative test for measuring punishments against the eighth amendment.[22] (1) if the punishment is unduly severe; (2) if there is a strong probability that it will be inflicted arbitrarily; (3) if it is substantially rejected by contemporary society; and (4) if there is no reason to believe that it serves any penal purpose more

[22] 408 U.S. at 271–81 (Brennan, J., concurring).

effectively than some less severe punishment. Justice Marshall follows a similar approach.[23] Justice White implies that a penalty, in order to satisfy constitutional standards, must demonstrably serve "discernible social or public purposes." [24]

The dissenting Justices express hesitancy about reaching such questions. Thus, Chief Justice Burger observes that the eighth amendment "is not addressed to social utility and does not command that enlightened principles of penology always be followed."[25] He points out that, "If it were proper to put the states to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment." [26]

However, to the extent that the *Furman* majority has indeed opened up this avenue, some or all of the dissenters may respect *Furman* as a precedent for the proposition that the Court should examine the social utility of punishments in general.[27] And, as the Chief Justice puts it, "If anywhere in the whole spectrum of criminal justice fresh ideas deserve sober analysis, the sentencing and correctional area ranks high on the list." [28]

Our view that *Furman* calls for legislative reconsideration of the entire system of criminal justice and corrections is reinforced by a number of other cases decided by the Supreme Court during the months preceding *Furman* [29] and by the numerous off-the-bench statements made by Chief Justice Burger advocating drastic reform in many of these areas.[30] The Burger Court is likely to move further in these areas than in the trial procedure area which was a major concern of the Warren Court.

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[23] *Id.* at 330–32 (Marshall, J., concurring).
[24] *ID.* at 312 (White, J., concurring).
[25] *Id.* at 394 (Burger, C. J., dissenting).
[26] *Id.* at 396.
[27] *See* note 6 and accompanying text *supra.*
[28] 408 U.S. at 402 (Burger, C. J., dissenting).
[29] Morrissey v. Brewer, 408 U.S. 471 (1972) (proceedings for parole revocation must provide certain minimum due process guarantees) ; Jackson v. Indiana, 406 U.S. 715 (1972) (Indiana system of pretrial committment of mentally incompetent defendants held unconstitutional) ; McNeal v. Director, Patuxent Institution, 407 U.S. 245 (1972) (inmate confined indefinitely as defective delinquent held entitled to procedural safeguards commensurate with long-term imprisonment) ; Murel v. Criminal Court, 407 U.S. 355 (1972) (review of delinquency law refused only because statute was undergoing substantial revision) ; Humphrey v. Cady, 405 U.S. 504 (1972) (Wisconsin Sex Crimes Act held seriously questionable under equal protection guarantee) ; Cruz v. Beto, 405 U.S. 319 (1972) (prisoners have right to participate in religion of choice) ; United States v. Tucker, 404 U.S. 443 (1972) (prior invalid convictions must not be considered in imposing sentence for subsequent crimes) ; Santobello v. New York, 404 U.S. 257 (1971) (plea bargain, once made, must be fulfilled at time of sentencing) ; Wilwording v. Swenson, 404 U.S. 249 (1971) (habeas corpus relief available to prisoners seeking review of living conditions and discipline without need to exhaust state remedies).
[30] For many years we neglected the entire spectrum of criminal justice. Slowly, but with increasing pace we have corrected procedural inequities. . . . In time we must take stock of what we have done and see whether all of it is wise and useful and constructive.

Meanwhile we must soon turn increased attention and resources to the disposition of the guilty once the fact finding process is over. Without effective correctional systems an increasing proportion of our population will become chronic criminals with no other way of life except the revolving door of crime, prison and more crime.

Address by Chief Justice Burger, American Bar Association Convention, Dallas, Texas, Aug. 11, 1969, as quoted in 39 GEO. WASH. L. REV. 185 (1970).

In 1971, the Chief Justice called criminal correction the "most neglected" part of the criminal justice system and defined six urgent needs in relation to it.

The Chief Justice first called attention to the inadequate physical plant of our prisons itself, pointing out that rising crime has created severe overcrowding and that prisons "are poorly located and inaccessible to the families of the inmates, too far away from facilities for work release programs, and located in areas that do not provide adequate housing for personnel of the institutions." The Chief Justice then emphasized the need to recruit prison staffs of the highest caliber and training and the need to classify and separate clearly different types of offenders and prevent prisons from criminalizing their occupants. Chief Justice Burger also pointed out the failure of our prisons to provide their youthful occupants with exercise programs to "burn off the surplus energies of youth" and with work and educational programs which will motivate inmates to improve themselves. Society has "a moral obligation to try to change an offender—to make him a reasonably successful human being." Finally, the Chief Justice stressed the need that every individual has to communicate with others. Every inmate should be given an opportunity to communicate with those who run the institutions and should be given a chance to regulate part of his life.

Edwards, *Foreword—Penitentiaries Produce No Penitents,* 63 J. CRIM. L.C. & P.S. 154, 159–60 (1972), quoting from an address by Chief Justice Burger, 1971 National Conference on Corrections, summarized in 10 BNA CRIM. L. REP. 2238 (Dec. 29, 1971).

COMPREHENSIVE STUDY OF ENTIRE SYSTEM OF CRIMINAL JUSTICE AND CORRECTIONS IS A VITAL COUNTERPART TO THE WORK OF THIS COMMITTEE

A comprehensive study of our entire system of criminal justice and corrections is vital for a number of reasons.

First, as indicated above, *Furman* and other recent decisions of the United States Supreme Court indicate that the Court will require fundamental reforms.

Second, this Committee's deliberations about capital punishment necessarily lead to discussion of alternative sanctions, in the event that capital punishment is deemed to be either inappropriate or constitutionally impermissible. For example, concern has repeatedly been raised at Committee meetings, as to whether any other sanction can provide a comparable deterrent effect, tending to prevent the robber from killing his victim and to prevent the prisoner from killing his guard or fellow-inmate. If a suitable non-capital sanction could be found, the relative utility of capital punishment would be reduced.

Third, this Committee's deliberations about capital punishment necessarily lead to discussion of the corrections system. Special concern has been expressed at Committee meetings, about the need for a reliable system of classifying inmates, so that society is protected against the release of that relatively small percentage of inmates who remain dangerous despite the best efforts of rehabilitation programs. If dangerous inmates could be reliably classified and kept in custody, again the relative utility of capital punishment would be reduced. And, of course, the entire system of rehabilitation programs has caused serious concern.

This Committee has not been charged with responsibility for a comprehensive review of the entire system of criminal justice and corrections, nor could such an undertaking have been accomplished within the time allotted.

However, the need for such a project becomes apparent from this Committee's deliberations about its assigned topic. The question whether to reinstate capital punishment cannot adequately be answered without serious consideration of the alternatives.

As a counterpart of the work of this Committee, a comprehensive study would be highly appropriate, covering our entire system of criminal justice and corrections.

Substantial research projects have been conducted in Florida and elsewhere, on various aspects of criminal justice and corrections, but we are not aware of any readily available source of the comprehensive information we deem an essential basis for legislative proposals. However, the availability of various research materials will reduce the amount of time which would otherwise be needed to complete the project we suggest. We estimate that our suggested project could be completed within between six and twelve months, if funded so as to employ at least one full-time project director, together with consultants and supporting secretarial and research personnel. Completion of the project within that period would enable legislative proposals, including budgetary recommendations, to be submitted to the Florida Legislature no later than its regular 1974 session.

RECOMMENDATION—NO ATTEMPT TO REINSTATE CAPITAL PUNISHMENT PENDING COMPLETION OF COMPREHENSIVE STUDY

We were asked to advise the Committee regarding the constitutional effects of *Furman* v. *Georgia*. Having commented on the assigned topic, we feel obliged to follow through by submitting a recommendation to the Committee, based upon our overall evaluations of the various matters discussed.

We recommend that a comprehensive study of our entire system of criminal justice and corrections be commissioned and undertaken, as discussed in the preceding section, and that, pending completion of the comprehensive study, no attempt be made to reinstate capital punishment in Florida.

This recommendation is based upon our view that: (1) no constitutional basis can justify any attempt to reinstate capital punishment without an accompanying fundamental change in our system of criminal justice, which can be attempted only after the comprehensive study; (2) no satisfactory policy choice regarding capital punishment can be made without adequate study of alternative types of sanction, which again can be adequately consid-

ered only after the comprehensive study; and (3) our entire system of criminal justice and corrections needs reform, whether or not capital punishment is reinstated.

Immediate enactment of a statute imposing capital punishment would offer few benefits to society. The existence of the statute might serve as a deterrent to would-be perpetrators of capital offenses, if they were aware of the statute, if they believed it would survive constitutional challenge, and if they were deterred by the possibility of being themselves subjected to its penalty. However, most people who would be aware of a new statute would also be aware that the United States Supreme Court decided in 1972 that capital punishment was unconstitutional and released over 600 inmates from death row. Nothing short of another decision by that Court is likely to convince the general public that capital punishment has been effectively reinstated. Unless and until such a decision is rendered, the deterrent effect of any capital punishment statute is likely to be minimal.

We have expressed serious doubts whether any capital punishment statute could possibly withstand constitutional challenge, even if drafted after the most careful study and consideration. The risk of unconstitutionality would be greatly increased if the statute were drafted hastily, without benefit of the comprehensive study. The high risk of having the statute declared unconstitutional would produce a corresponding risk of demoralization of law enforcement officers, together with general confusion in the administration of criminal justice.

Furthermore, if a statute reinstating capital punishment were enacted hastily, without benefit of the comprehensive study, the statute might reflect premature decisions on momentous policy choices, and our progress toward sound reform might be delayed.

APPENDIX B

Analytical listing of memorandum decisions rendered by United States Supreme Court on June 29, 1972, on basis of *Furman* v. *Georgia*, decided same day, vacating death sentences imposed by numerous state courts.

Analysis was prepared by N.A.A.C.P. Legal Defense and Educational Fund, Inc., and was included in their brief, as amicus curiae, filed in the Supreme Court of Florida, April 1973, in the consolidated cases of State v. Dixon, State v. Setser, State v. Hunter, and State v. Sheppard.

Listing and Breakdown Of The Cases In Which Supreme Court Of The United States Vacated Death Sentences on June 29, 1972, On The Authority Of *Furman* v. *Georgia*, 408 U.S. 238 (1972).

I. In each of the following cases, the defendant was sentenced to death by a jury which had a choice between death and prison confinement.

Lokos v. Alabama, 408 U.S. 935 (1972).
McCants v. Alabama, 408 U.S. 933 (1972).
Hubbard v. Alabama, 408 U.S. 934, 936 (1972).
Swain v. Alabama, 408 U.S. 936 (1972).
Jackson v. Alabama, 408 U.S. 938 (1972).
Sims v. Eyman, 408 U.S. 934 (1972).
Hnderson v. Kentucky, 408 U.S. 938 (1972).
Duisen v. Missouri, 408 U.S. 935 (1972).
Terry v. Missouri, 408 U.S. 940 (1972).
Walker v. Nevada, 408 U.S. 935 (1972).
Koonce v. Oklahoma, 408 U.S. 934 (1972).
Tilford v. Page, 408 U.S. 939 (1972).
Scolcri v. Pennsylvania, 408 U.S. 934 (1972).
Herron v. Tennessee, 408 U.S. 937 (1972).
Curry v. Texas, 408 U.S. 939 (1972).
David v. Texas, 408 U.S. 937 (1972).
Huffman v. Beto, 408 U.S. 936 (1972).
Jackson v. Beto, 408 U.S. 937 (1972).
McKenzie v. Texas, 408 U.S. 938 (1972).
Matthews v. Texas, 408 U.S. 940 (1972).
Morales v. Texas, 408 U.S. 938 (1972).
Stanley v. Texas, 408 U.S. 939 (1972).

Tea v. Texas, 408 U.S. 937 (1972).
Thames v. Texas, 408, U.S. 937 (1972).
Wright v. Beto, 408 U.S. 934 (1972).
Sellers v. Beto, 408 U.S. 937 (1972).
Smith v. Texas, 408 U.S. 934 (1972).
Williams v. Slayton, 408 U.S. 935 (1972).
Brown v. Virginia, 408 U.S. 940 (1972).

II. In each of the following cases, the death penalty was mandatory unless the jury recommended mercy:

Davis v. Connecticut, 408 U.S. 935 (1972).
Anderson (Alvin E.) v. Florida, 408 U.S. 938 (1972).
Pitts v. Wainwright, 408 U.S. 941 (1972).
Boykin v. Florida, 408 U.S. 940 (1972).
Brown v. Florida, 408 U.S. 938 (1972).
Hawkins v. Wainwright, 408 U.S. 941 (1972).
Jonhson v. Florida, 408 U.S. 939 (1972).
Paramore v. Florida, 408 U.S. 935 (1972).
Thomas v. Florida, 408 U.S. 935 (1972).
Williams v. Wainwright, 408 U.S. 941 (1972).
Arkwright v. Georgia, 408 U.S. 936 (1972).
Miller v. Georgia, 408 U.S. 938 (1972).
Walker v. Georgia, 408 U.S. 936 (1972).
Williams v. Georgia, 408 U.S. 936 (1972).
Cummings v. Georgia, 408 U.S. 935 (1972).
Lee v. Georgia, 408 U.S. 936 (1972).
Manor v. Georgia, 408 U.S. 935 (1972).
Park v. Georgia, 408 U.S. 935 (1972).
Sullivan v. Georgia, 408 U.S. 935 (1972).
Thacker v. Georgia, 408 U.S. 936 (1972).
Williams v. Smith, 408 U.S. 938 (1972).
Douglas and Jackson v. Louisiana, 408 U.S. 937 (1972).
Jonhson and Singleton v. Louisiana, 408 U.S. 932 (1972).
Marks v. Louisiana, 408 U.S. 933 (1972).
Strong v. Louisiana, 408 U.S. 937 (1972).
Williams v. Louisiana, 408 U.S. 934 (1972).
McAllister v. Louisiana, 408 U.S. 934 (1972).
Poland v. Louisiana, 408 U.S. 936 (1972).
Sinclair v. Louisiana, 408 U.S. 939 (1972).
Square v. Louisiana, 408 U.S. 938 (1972).
Kerringan v. Scafiti, 408 U.S. 932 (1972).
Limone and Cassesso v. Massachusetts, D08 U.S. 936 (1972).
Linmore v. Massachusetts, 408 U.S. 936 (1972).
Stewart v. Massachusetts, 408 U.S. 845 (1972).
Capler v. Mississippi, 408 U.S. 937 (1972).
Irving v. Mississippi, 408 U.S. 935 (1972).
Yates v. Cook, 408 U.S. 934 (1972).
Chance v. North Carolina, 408 U.S. 940 (1972).
Doss v. North Carolina, 408 U.S. 939 (1972).
Hamby and Chandler v. North Carolina, 408 U.S. 937 (1972).
Miller v. North Carolina, 408 U.S. 937 (1972).
Westbrook v. North Carolina, 408 U.S. 939 (1972).
Bryson v. Ohio, 408 U.S. 938 (1972).
Carter v. Ohio, 408 U.S. 936 (1972).
Duling v. Ohio, 408 U.S. 936 (1972).
Eaton v. Ohio, 408 U.S. 935 (1972).
Elliott v. Ohio, 408 U.S. 939 (1972).
Eubanks v. Ohio, 408 U.S. 935 (1972).
Kassow v. Ohio, 408 U.S. 939 (1972).
Keaton v. Ohio, 408 U.S. 936 (1972).
Laskey v. Ohio, 408 U.S. 936 (1972).
Moorehead v. Ohio, 408 U.S. 938 (1972).
Young v. Ohio, 408 U.S. 940 (1972).
Atkinson v. South Carolina, 408 U.S. 936 (1972).
Fuller v. South Carolina, 408 U.S. 937 (1972).

III. In each of the following cases, the sentence was life, unless the jury recommended death:

Canaday v. Washington, 408 U.S. 940 (1972).

Cerny v. Washington, 408 U.S. 939 (1972).
Music v. Washington, 408 U.S. 940 (1972).
Smith and Riggins v. Washington, 408 U.S. 934 (1972).
Tyler v. Washington, 408 U.S. 937 (1972).

IV. In each of the following cases, the defendant was sentenced to death by a judge following a plea of guilty:

Alford v. Eyman, 408 U.S. 939 (1972).
Janovic v. Eyman, 408 U.S. 934 (1972).
Krutchen v. Eyman, 408 U.S. 934 (1972).
Alvarez v. Nebraska, 408 U.S. 937 (1972).
Menthen v. Oklahoma, 408 U.S. 940 (1972).
Phelan v. Brierly, 408 U.S. 939 (1972).
Fesmire v. Oklahoma, 408 U.S. 935 (1972).
Morford v. Hocker, 408 U.S. 934 (1972).

V. In each of the following cases, the defendant waived jury trial, and was tried and sentenced by a judge:

Delgado v. Connecticut, 408 U.S. (1972).
Cunningham v. Warden, 408 U.S. 938 (1972).
Gilmore v. Maryland, 408 U.S. 940 (1972).
Johnson v. Maryland, 408 U.S. 937 (1972).
Mefford v. Warden, 408 U.S. 935 (1972).
Miller v. Maryland, 408 U.S. 934 (1972).
Pope v. Nebraska, 408 U.S. 933 (1972).
Staten v. Ohio, 408 U.S. 938 (1972).
White v. Ohio, 408 U.S. 939 (1972).
Braickhouse v. Slayton, 408 U.S. 938 (1972).
Figg v. Slayton, 408 U.S. 937 (1972).

VI. In each of the following cases, the jury could make a binding recommendation of death, but a recommendation of mercy could be overridden by a judge:

Seeney v. Delaware, 408 U.S. 939 (1972).
Steigler v. Delaware, 408 U.S. 939 (1972).
Kelbach and Lance v. Utah, 408 U.S. 935 (1972).

VII. In each of the following cases, the jury could make a binding recommendation of mercy, but a recommendation of death could be overridden by a judge:

Hurst v. Illinois, 408 U.S. 935 (1972).
Moore v. Illinois, 408 U.S. 786 (1972).
Arlington v. Maryland, 408 U.S. 938 (1972).
Bartholomey v. Maryland, 408 U.S. (1972).
Strong v. Maryland, 408 U.S. 939 (1972).
Tull v. Warden, 408 U.S. 939 (1972).

APPENDIX C

1972 SPECIAL SESSION

CRIMES—PUNISHMENT—CAPITAL AND LIFE FELONIES

CHAPTER 72–724

House Bill No. 1–A

AN ACT relating to capital punishment; amending § 775.081(1), Florida Statutes, providing for a life felony; amending § 775.082, Florida Statutes, as amended by chapter 72–118, Laws of Florida, to provide punishment for capital and life felonies; amending § 782.04, Florida Statutes, to specify the crimes constituting murder and the penalties; amending § 779.07, Florida Statutes, to make intentional injury to property a life felony; amending § 790.16, Florida Statutes, providing for new penalties for throwing or discharging bobms or discharging machine guns in public places; repealing subsections (3) and (4) of § 790.16, Florida Statutes, relating to recommendation of mercy and judicial discretion in sentencing; amending § 790.161, Florida Statutes; providing new penalties for throwing, placing, or discharging any destructive device depending on degree of harm inflicted; amending § 794.01, Florida Statutes, providing new penalties for crimes of rape; amending § 805.02, Florida Statutes, providing that kidnapping for ransom shall be a life felony; amending § 921.141, Florida Statutes, as amended by chapter 72–72, Laws of Florida, providing a separate proceeding to determine sentence in capital cases; providing a severability clause; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 775.081, Florida Statutes, is amended to read:

775.081 Classifications of felonies and misdemeanors

(1) Felonies are classified, for the purpose of sentence and for any other purpose specifically provided by statute, into the following categories:

(a) Capital felony;

(b) Life felony;

(c) Felony of the first degree;

(d) Felony of the second degree; and

(e) Felony of the third degree.

A capital felony and a life felony must be so designated by statute. Other felonies are of the particular degree designated by statute. Any crime declared by statute to be a felony without specification of degree is of the third degree, except that this provision shall not affect felonies punishable by life imprisonment for the first offense.

Comment: Provides a new category of felony to serve as an additional deterrent to those crimes, while not classified capital, are especially serious in nature.

Section 2. Section 775.082, Florida Statutes, as amended by chapter 72-118, Laws of Florida, is amended to read:

775.082 Penalties for felonies and misdemeanors

(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

(4) A person who has been convicted of any other designated felony may be punished as follows:

(a) For a life felony, by a term of imprisonment in the state prison for life, or for a term of years not less than thirty;

(b) For a felony of the first degree, by a term of imprisonment in the state prison not exceeding thirty (30) years or, when specifically provided by statute, by imprisonment in the state prison for a term of years not exceeding life imprisonment;

(c) For a felony of the second degree, by a term of imprisonment in the state prison not exceeding fifteen (15) years.

(d) For a felony of the third degree, by a term of imprisonment in the state prison not exceeding five (5) years.

(5) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment in the county jail not exceeding one (1) year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment in the county jail not exceeding sixty (60) days.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law, except as provided in subsection (1).

Comment: Subsection (1) provides two alternate sentences for capital crimes which will be mandatory according to the findings of fact made in a separate sentencing proceeding. A distinction between life imprisonment under subsection (1) and that contemplated under subsection (4) (a), relating to life felonies should be noted. In the former case, there is a minimum period to be served on a life sentence before eligibility for parole. In the latter, there is no such minimum but only a minimum term of years

which must be imposed if life imprisonment is not the sentence. There is no minimum sentence for felonies of the first degree. Thus, each category contemplates a descending degree of severity according to the classification of the crime.

Section 3. Section 782.04, Florida Statutes, is amended to read:

782.04 Murder

(1) (a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, except as provided in subsection (1), It shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life, or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082, section 775.083, or section 775.084.

Section 4. Section 779.07, Florida Statutes, is amended to read:

779.07 Intentional Injury to or Interference with property

Whoever intentionally destroys, impairs, injures, interferes or tampers with real or personal property and such act hinders, delays or interferes with the preparation of the United States or of any country with which the United States shall then maintain friendly relations, or of any of the States for defense or for war, or with the prosecution of war by the United States, is guilty of a life felony, punishable as provided in § 775.082.

Section 5. Section 790.16, Florida Statutes, is amended to read:

790.16 Throwing bombs; discharging machine guns; penalty

(1) It is unlawful for any person to throw any bomb or to shoot or discharge any machine guns upon, across or along any road, street or highway in the state, or upon or across any public park in the state, or in, upon or across any public place where people are accustomed to assemble in the state. The casting of such bomb or the discharge of such machine gun in, upon or across such public street, or in, upon or across such public park, or in, upon or across such public place, whether indoors or outdoors, including all theatres and athletic stadiums, with intent to do bodily harm to any person or with intent to do damage to property not resulting in the death of another person, shall be a felony of the first degree, punishable as provided in section 775.082. A sentence not exceeding life imprisonment is specifically authorized where great bodily harm to another or serious disruption of governmental operations results.

(2) This section shall not apply to the use of such bombs or machine guns by any United States or state militia, or by any law enforcement officer while in the discharge of their lawful duty in suppressing riots and disorderly conduct, and in preserving and protecting the public peace or in the preservation of public property, or where said use shall be authorized by law.

Comment: This provision provides rational alternatives in sentencing compatible with existing law, depending on the degree of harm done. It is intended that where a homicide results that such offense be prosecuted under section 782.04, F.S. Deletion of subsections (3) and (4) is required to remove jury discretion to recommend mercy and judicial discretion to lower the sentence. These provisions are unnecessary as the most serious toffense under this section is now classified as a felony of the first degree, with specific authorization of a term of imprisonment not exceeding life imprisonment in certain cases.

Section 6. Section 790.161, Florida Statutes, is amended to read:

590.161 Throwing, placing or discharging any destructive device or attempt so to do, felony; penalties

It is unlawful for any person to throw, place, discharge or attempt to discharge any destructive device, as defined herein, with intent to do bodily harm to any person or with intent to do damage to property, and any person convicted thereof shall be guilty of a felony and punished in the following manner:

(1) When such action, or attempt at such action, results in the death of another person, the person so convicted shall be guilty of a life felony, punishable as provided in section 775.082.

(2) When such action, or attempt at such action, results not in the death of any person, but does result in personal injury to a person or in damage to property, the person so convicted shall be guilty of a felony of the first degree, punishable as provided in sections 775.082, 775.083 or 775.084. A sentence not exceeding life imprisonment is specifically authorized where great bodily harm to another or serious disruption of governmental operations results.

Section 7. Section 794.01, Florida Statutes, is amended to read:

794.01 Rape and forcible carnal knowledge; penalty

(1) Whoever of the age of seventeen years or older unlawfully ravishes or carnally knows a child under the age of eleven, is guilty of a capital felony, punishable as provided in § 775.082.

(2) Whoever ravishes or carnally knows a person of the age of eleven years or more, by force and against his or her will, or unlawfully and carnally knows and abuses a child under the age of eleven years, shall be guilty of a life felony, punishable as provided in § 775.082.

(3) It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only.

Section 8. Section 805.02, Florida Statutes, is amended to read:

805.02 Kidnaping for ransom

Whoever, without lawful authority: forcibly or secretly confines, imprisons, inveigles or kidnaps any person, with intent to hold such person for a ransom to be paid for the release of such person, or any person, or any person who aids, abets or in any manner assists such person in the continuing, imprisoning, inveigling or kidnaping of such person, shall be guilty of kidnapping a person, which constitutes a life felony, punishable as provided in section 775.082.

Comment: This section reduces kidnapping for ransom to a life felony, in accordance with the express general policy of taking a life only when a life is taken.

Section 9. Section 921.141, Florida Statutes, as amended by chapter 72–72, Laws of Florida, is amended to read:

(Substantial rewording of section. See section 921.141, F.S., as amended by chapter 72–72, Laws of Florida, for present test.)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for that purpose unless waived by the defendant. In the preceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; and further provided that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh aggravating circumstances, found to exist and and

(c) Based on these considerations whether the defendant should be sentenced to life or death.

(3) Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

(4) If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(5) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

(6) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment;

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) The defendant knowingly created a great risk of death to many persons;

(d) 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 any robbery, rape, arson, burglary, kidnaping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive-device or bomb;

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) The capital felony was committed for pecuniary gain;

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially helinous, atrocious or cruel.

(7) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The victim was a participant in the defendant's conduct or consented to the act;

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) The age of the defendant at the time of the crime.

Section 10. It is declared to be the legislative intent that if any section, subsection, paragraph, sentence, clause, provision or word of this act is held to be invalid, the remainder of the act shall not be affected.

Section 11. This act shall take effect upon becoming a law.

Approved by the Governor Dec. 8, 1972.

Filed in Office Secretary of State Dec. 8, 1972.

CRIMES—AIRCRAFT PIRACY

CHAPTER 72-725

House Bill No. 43-A

AN ACT relating to aircraft piracy; providing for the crime of aircraft piracy; providing penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1.

Whoever without lawful authority seizes or exercises control, by force or violence and with wrongful intent, of any aircraft containing a non-consenting person or persons within this state is guilty of the crime of aircraft piracy, a felony of the first degree, punishable as provided in § 775.082, § 775.083, or § 775.084, Florida Statutes.

Section 2. This act shall take effect upon becoming a law.

Approved by the Governor Dec. 8, 1972.

Filed in Office Secretary of State Dec. 8, 1972.

APPENDIX

II. FLORIDA'S LEGISLATIVE RESPONSE TO FURMAN: AN EXERCISE IN FUTILITY?*

Charles W. Ehrhardt** and L. Harold Levinson †

Furman v. Georgia,[1] decided by a five to four vote of the United States Supreme Court in June 1972, held that the imposition and carrying out of the death penalty under the statutes of Georgia and Texas constituted cruel and unusual punishment, in violation of the eighth and fourteenth Amendments. Less than six months later, Florida became the first state to enact a post-*Furman* capital punishment statute.[2]

This article traces the background of the new Florida statute, including summaries of pre-existing Florida law on capital punishment, judicial responses to *Furman*, and the legislative history of the new statute. The article concludes with a commentary on various aspects of the new statute.

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* The authors served as members of the five-man legal staff of the Governor's Committee to Study Capital Punishment, and participated in the proceedings of the committee from August until November, 1972, as well as in preparation of the memorandum submitted by the legal advisory staff, an edited version of which appears as a companion piece to this article.

The views expressed in this article are those of the authors and should not be attributed to the committee or to the institutions with which the authors are associated.

Preparation of this article was greatly facilitated by the cooperation of Robert Mounts, Assistant General Counsel, Office of the Governor, and Martha Bass, Director of Senate Legislative Services. The authors gratefully acknowledge their assistance.

The title of this article is adapted from a statement by retired Florida supreme court Chief Justice E. Harris Drew, Chairman of the Governor's Committee to Study Capital Punishment, reported in the Miami (Fla.) Herald, Dec. 3, 1972, at 1-B, that Florida's post *Furman* capital punishment statute was "an exercise in futility."

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

[2] Ch. 72-724, [1972] Fla. Sess. Laws— (Spec. Sess. 1972), enacted by the Florida Legislature on December 1, signed by the Governor on December 8, 1972, thereupon becoming law.

FLORIDA LAW AT TIME OF *Furman v. Georgia*

At the time *Furman* was decided, Florida statutes [3] provided that a defendant found guilty of a capital felony must be sentenced to death unless the verdict included a recommendation of mercy by the jury, in which event the sentence must be life imprisonment.

A statutory amendment was enacted in March 1972,[4] to become effective on October 1, 1972, providing, for the first time in Florida law, a bifurcated trial. The statute provided that a defendant convicted of a capital felony was to receive a separate sentencing "trial" on the question whether the penalty would be death or life imprisonment. The resulting jury decision was binding on the court. The statute contained lists of aggravating and mitigating circumstances, but only as guidelines for the matters to be considered during the sentencing proceeding. This bifurcated trial provision was never used, since the *Furman* decision intervened between the enactment and the effective date of the statute, and the Florida Supreme Court interpreted *Furman* as eliminating all capital felonies in Florida.[5]

Another statutory amendment, also enacted in March 1972,[6] to become effective on October 1, 1972, provided that if the death penalty were held unconstitutional, persons previously sentenced to death must be re-sentenced to life imprisonment, by the trial court, with no eligibility for parole. This re-sentencing provision was rendered ineffective when the Florida supreme court resentenced all death row inmates prior to October 1, 1972.[7]

Under pre-*Furman* Florida law, an appeal could be taken to the Florida supreme court, as a matter of right, in all cases where the death penalty was imposed.[8] The supreme court could review the conviction of guilt, but not the severity of the sentence.[9] If the trial court did not impose the death sentence, appeal was taken to the district court of appeals, the intermediate appellate court which has general appellate jurisdiction in all matters except those in which the Florida Constitution confers jurisdiction elsewhere.[10]

Pre-*Furman* Florida law classified felonies as being either capital, or first, second or third degree.[11] The capital felonies were: premeditated murder,[12] certain felony-murders,[13] bombing or machine-gunning in public places,[14] homicide caused by a destructive device,[15] rape of a female of the age of ten years or more,[16] "carnal knowledge and abuse" of a female child under the age of ten years,[17] and kidnapping for ransom.[18]

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[3] FLA. STATS. §§ 775.082(1), 921.141 (1971).

[4] Ch. 72–72, [1972] Fla. Sess. Laws 122, *amending* FLA. STATES. §§ 921.141 (1971).

[5] *See* note 21 *infra* and accompanying text.

[6] Ch. 72–118, [1972] Fla. Sess. Laws 258, *amending* FLA. STATS. §§ 775.082 (1971).

[7] *See* notes 25 & 26 *infra* and accompanying text.

[8] FLA. CONST. art. V, § 4(2) (1968), *renumbered* art. V, § 3(b)(1) (March 1972). See note 10 *infra* regarding the additional provision in the 1972 amendment of the constitution, authorizing the legislature to expand the supreme court's jurisdiction to include appeals from sentences of life imprisonment.

[9] FLA. STATS. § 924.06 (1971) provides that a defendant may appeal from "a sentence, the ground that it is illegal." The only provision for discreitionary reduction of sentences by an appellate court is in Fla. Stats. § 924.41(3) (1971) authorizing the circuit court to lower sentences imposed by the municipal court. (The circuit court is the court of general trial jurisdiction, which sits also as an appellate court to review judgments of municipal courts. The municipal courts will be phased out of existence by 1977, pursuant to § 20(d)(4) of Article V, the Judiciary Article of the Florida Constitution, as amended in March 1972.)

[10] FLA. CONST. art. V, § 5(3) (1968), *renumbered* art. V, § 4(b) (March 1972) but substantially unchanged. The 1972 amendment of Article V contained a new provision, § 3(b)(2), authorizing the legislature to expand the supreme court's jurisdiction to include appeals from sentences of life imprisonment. If this provision were implemented by legislation, the district courts of appeal would automatically lose this jurisdiction.

[11] FLA. STATS. § 775.081(1) (1971).

[12] Fla. Stats. § 782.04(1) (1971).

[13] *Id.* The felony murders were those "committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping."

[14] FLA. STATS. § 790.16(1) (1971).

[15] FLA. STATS. § 790.161(1) (1971).

[16] FLA. STATS. § 794.01 (1971).

[17] *Id.*

[18] FLA. STATS. § 805.02 (1971).

At the time of the *Furman* decision, a stay order was in effect, issued in 1967 by a federal court in Florida,[19] preventing the execution of any death sentence in Florida pending the outcome of the Supreme Court litigation testing the constitutionality of capital punishment. In addition, Governor Reubin Askew issued an Executive Order in February 1972,[20] staying the execution of any death sentence in Florida until July 1, 1973, so as to provide time for the outcome of pending litigation, and for legislative consideration of the entire question of capital punishment. The Executive Order recited that the Governor had unsuccessfully requested the 1972 Florida Legislature to declare a legislative moratorium on further executions, and to authorize appointment of a commission to examine the whole area of capital punishment, capital offenses and capital offenders in Florida.

JUDICIAL RESPONSES TO *Furman*

In *Donaldson v. Sack*,[21] decided on July 17, 1972, the Florida Supreme Court held that *Furman* eliminated capital punishment—and capital felonies—from Florida law, until new legislation might revive them. The court further held that persons thereafter convicted of offenses designated on the statute books as "capital" should be punished by life imprisonment, and that various incidents of capital felonies, such as the twelve-man trial jury,[22] were no longer required.

Two weeks later, in *Newman v. Wainwright*,[23] the United States Court of Appeals for the Fifth Circuit emphasized that *Furman* invalidated the capital punishment statutes of Florida. The court noted that in Florida, as in Georgia and Texas, whose statutes were before the Supreme Court in *Furman*, "the death penalty has been inequitably, arbitrarily and infrequently imposed." [24]

In *Anderson v. State* [25] and *In re Baker*,[26] decided on September 8 and 26, 1972, respectively, the Florida supreme court resentenced former death row inmates. The court thus avoided the impact of the pre-*Furman* enactment, effective October 1, 1972, which provided for life imprisonment without eligibility for parole in the event the death penalty were held unconstitutional.[27]

Anderson involved 40 persons whose appeals were still pending in the Florida supreme court. The court held that it retained jurisdiction, and could therefore itself carry out the resentencing, without going through the "ministerial formality" of remanding to the trial court. *Baker* involved 60 persons who did not have appeals pending. The court decided to treat this class on the same basis as the *Anderson* class, as a matter of equal protection. All the *Anderson and Baker* inmates were resentenced to life imprisonment and, since parole was not precluded, the possibility of parole remained open. Those inmates who were under sentence of death for rape committed before 1972 were given leave to file a motion with the trial court for mitigation of sentence from life to a term of years, in accordance with pre-1972 law.

THE LEGISLATIVE RESPONSE TO *Furman*

Committee Action [28]

A few days after the Supreme Court handed down its decision in *Furman*, some members of the Florida legislature requested the Governor to convene a

[19] Adderly v. Wainwright, 272 F. Supp. 530 (M.D. Fla. 1967), 46 F.R.D. 97 (M.D. Fla. 1968), *dismissed as moot*—F. Supp—.(MD. Fla. 1972).

[20] Exec. Order [Fla.] No. 72–8 (February 21, 1972).

[21] 265 So. 2d 499 (Fla. 1972).

[22] FLA. CONST. art. 1, § 22 provides that "the qualifications and the number of jurors, not fewer than six, shall be fixed by law." FLA. STATS. § 913.10 (1971) provides for a twelve-member jury in capital cases, and a six-member jury in all other criminal cases.

[23] 464 F.2d 615 (5th Cir. 1972).

[24] *Id.* at 616.

[25] 267 So. 2d 8 (Fla. 1972).

[26] 267 So. 2d 331 (Fla. 1972).

[27] *See* note 6 and accompanying text *supra*.

[28] In addition to the committee action described in this section, the Attorney General of Florida also suggested legislation requiring imposition of a mandatory, death sentence for persons convicted of certain classes of premeditated murder. Fla. S. 1-A, Spec. Sess. § 3 (1972); Fla. H.R. 8-A, Spec. Sess. §3, (1972). *See* FINAL REPORT OF THE [FLA.] HOUSE SELECT COMMITTEE ON THE DEATH PENALTY 4–5 (1972). The Attorney General's proposals, in memorandum form were widely publicized. *See, e.g.*, St. Petersburg (Fla.) Times, Nov. 26, 1972, at 4-D. Legislative proposals reflecting the Attorney General's views are discussed in note 53 *infra*.

The president of The Florida Bar appointed a five-man committee, which submitted a memorandum to the Governor's Committee to Study Capital Punishment, note 32 and

special legislative session for the purpose of considering the reinstatement of capital punishment. The Governor declined to call a special session at that time, but promised to call one promptly after the general election in November 1972.[29] Meanwhile, the Speaker of the Florida House of Representatives established the House Select Committee on the Death Penalty.[30] The committee held hearings and received testimony from representatives of various interested groups and from the public at large. After deciding that the death penalty should be reinstated, the committee drafted tentative legislation [31] calling for mandatory death sentences upon conviction of premeditated murder and a small number of other crimes. The Select Committee's legislation permitted the jury to convict of lesser included offenses.

On July 28, 1972, Governor Askew issued an Executive Order [32] creating the Governor's Committee to Study Capital Punishment. The order required the Committee to undertake a detailed study and make recommendations to the Governor as to whether the death penalty should be retained, what alternative forms of punishment were available if the death penalty were not reinstated for some or all of the existing capital crimes, and what changes were required in the procedures relating to the execution of the death penalty, executive clemency, treatment of death row inmates, and other related procedural matters.

After its organizational meeting on August 17, 1972, the committee held a series of public meetings throughout the state to collect information relative to the question of whether capital punishment should be reinstated and, if so, in what form. Expert witnesses from across the nation and members of the public so desiring testified at each meeting. A secondary purpose of the hearings was to serve as a mechanism for public education on the issues surrounding the question of capital punishment.

After three months of deliberations and contrary to the recommendations of the committee's legal advisory staff,[33] the committee recommended to the Governor legislation which provided for a bifurcated trial in capital cases. Sentencing was to be by a panel of three judges after they heard evidence at a separate sentencing hearing, and after they had considered the presence of certain enumerated mitigating and aggravating circumstances.[34] Additionally, the committee passed a resolution calling for the creation of a special citizen's commission to study and make recommendations concerning the improvement of the entire system of criminal justice in Florida.[35]

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accompanying text *infra*, one week before the special legislative session convened. The Bar committee, speaking for itself and not necessarily for the president or members of the Bar, argued that the statute enacted in March 1972, ch. 72–72, [1972] Fla. Sess. Laws 122, *amending* FLA. STATS. § 921.141 (1971), providing for a bifurcated trial and enumerating aggravating and mitigating circumstances, was compatible with *Furman*. The committee recommended that "Florida . . . proceed under the present law and secure a new ruling from the U.S. Supreme Court." REPORT OF THE DEATH PENALTY COMMITTEE OF THE FLORIDA BAR (1972).

The President of the Senate appointed a Senate Council on Criminal Justice which proposed a bill that was never filed or introduced. The Senate Council's bill would have deleted the existing statutory language relating to jury recommendation of mercy, thus making the death penalty mandatory upon conviction of one of the enumerated capital crimes. Interview with Martha Bass, Director of Senate Legislative Services, in Tallahassee, Florida, Dec. 8, 1972.

[29] Governor Askew discussed the matter, in retrospect, in a news conference on November 20, 1972.

> Had I not indicated last summer a special session in the fall, the chances would have been better than even that the legislature, in the middle of a campaign, might have called themselves back into session. . . . This is better.

St. Petersburg (Fla.) Times, Nov. 21, 1972, at 1-B.

[30] *See* FINAL REPORT OF THE [FLA.] HOUSE SELECT COMMITTEE ON THE DEATH PENALTY 1 (1972).

[31] The Select Committee's proposal is embodied in the original version of Fla. H.R. 1-A, Spec. Sess. (1972) (submitted by Representative Gautier and others). See notes 39–50 and accompanying text *infra* for a discussion of this bill and the degree to which the Governor's bill modified it.

[32] Exec. Order [Fla.] No. 72–37 (July 28, 1972). The blue-ribbon committee's seventeen members included a retired Chief Justice of the Florida supreme court, two ex-Governors, a past president of The Florida Bar, members of the Florida House and Senate, and representatives from many segments of the criminal justice system, as well as a number of informed citizens. The Governor also appointed both an advisory committee and a legal advisory staff.

[33] *See* Ehrhardt, *et al., The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. CRIM. L. & C. 2, 9–10 (1973).

[34] FINAL REPORT OF THE [Fla.] GOVERNOR'S COMMITTEE TO STUDY CAPITAL PUNISHMENT 147–62 (1972). See notes 42–49 and accompanying text *infra* for a discussion of the proposed legislation.

[35] *Id.* at 163–64. A similar study was recommended by the committee's legal advisory staff. Ehrhardt, *supra* note 33, at 8–9.

Legislative Skirmishes

The Florida Legislature convened in special session on November 28, 1972, to consider whether capital punishment should be legislatively reinstated.[36] Governor Askew adopted the recommendations of the Governor's Committee to Study Capital Punishment[37] and, in his opening address to a joint session of the legislature, proposed the bifurcated trial for capital cases. His proposal required that all sentencing findings be in accordance with strict statutory guidelines and based upon the record of a separate sentencing proceeding. He strongly urged the legislators to reject any proposal which provided for mandatory imposition of the death penalty without opportunity for mercy. Because he felt that a jury would merely exercise its discretion at an earlier stage by convicting on a lesser charge, he reasoned that the same discretion which *Furman* deemed impermissible would be present under any mandatory system. Moreover, he pointed out that Chief Justice Burger, with three other dissenters in *Furman*, condemned the mandatory imposition of the death penalty as archaic.[38]

Following the Governor's address to the joint session, the House Select Committee on the Death Penalty recommended to the House of Representatives the passage of a series of four bills[39] which directly contradicted the Governor's bill by providing for mandatory death sentences for certain crimes. Under the proposal there was to be no determination by the trial jury other than the guilt of the defendant. Once a guilty verdict was returned, a sentence of death was mandated regardless of any mitigating circumstances or feelings of leniency by the judge or jury.[40] The Select Committee's bill did, however, narrow the list of capital crimes by reclassifying certain felonies, previously capital, as felonies of the first degree, for which the maximum punishment was life imprisonment.[41]

On the floor of the House, the bill recommended by the Governor's Committee was offered as an amendment to the Select Committee's bill.[42] The proposed amendment entirely changed the philosophy of the bill then under consideration. Rather than being crime-oriented, as was the Select Committee's bill, the Governor's bill was sentencing-oriented, expressing the general policy of taking a life only when a life is taken.[43] The Governor's bill created a new classification of crime, the life felony,[44] redefined capital felonies, and provided a procedure under which the decision would be made as to whether death or life imprisonment would be imposed in capital cases.

Apart from certain novel provisions concerning felony-murder,[45] the focal point of the Governor's bill was the provision for a bifurcated trial in capital cases. Following a conviction for a capital crime, the bill provided for a separate sentencing proceeding to be conducted by the original trial judge and two other judges from outside the judicial circuit in which the trial was held, to

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[36] FLA. H.R. JOUR., Spec. Sess. 1 (1972).

[37] The Governor stated, however, that he continued to have "mixed feelings as to the necessity, the rightness and even the legality of capital punishment in any form." *Id.* at 6.

Representative Johnson, a member of the Governor's Committee, subsequently introduced the bill recommended by the Governor's Committee as an amendment to a bill proposed by the House Select Committee. Fla. H.R. 14–A, Spec. Sess. (1972). A modified version of this bill was subsequently passed by the House. See notes 50–52 and accompanying text *infra*.

[38] Fla. H.R. JOUR., Spec. Sess. 6 (1972).

[39] Fla. H.R. 1-A, H.R. 2-A, H.R. 3-A, H.R. 4-A, Spec. Sess. (1972)) (Select Committee bill).

[40] Fla. H.R. 1-A Spec. Sess § 1 (1972) (Select Committee bill).

[41] The crimes of throwing bombs when death of a person results, *id.* § 2, kidnapping for ransom, *id.* § 7, and felony-murders not listed below were reduced from capital felonies to felonies of the first degree. Capital crimes under the bill were premeditated murder, *id.* § 2; murder committed by any person engaged in the perpetration of any arson, rape, robbery, burglary, or kidnapping, *id.;* carnal knowledge of a person under the age of thirteen, *id.* § 6; the intentional interference with or injury to property of the United States used for defense or war, *id.* § 3; and the throwing of bombs or discharging of machine guns when death results, *id.* § 5.

[42] Fla. H.R. JOUR., Spec. Sess. 17–20 (1972); Fla. H.R. 14-A, Spec. Sess. (1972).

[43] Fla. H.R. 14-A, Spec. Sess. § 9 (1972) (drafters' comment). FLA. STATS. § 779..07 (1971), listing treason as a capital offense, was not amended by the Governor's bill. The Select Committee's bill listed certain forms of rape as capital felonies, *see* Fla. H.R. 1-A, Spec. Sess. § 6 (1972), as well as treason, *see id.*, § 3.

[44] The life felony classification is retained in § 3, ch. 72–724, [1972] Fla. Sess. Laws____ (Spec. Sess. 1972). The drafters' comment expresses the reason for the new classification:

> Provides a new cateogry of felony to serve as an additional deterrent to those crimes [which], while not classified capital, are especially serious in nature.

Id. The minimum statutory punishment for an offender convicted of a life felony is thirty years, although parole before that time is not precluded. *Id.* § 4.

be selected by the Chief Justice of the Supreme Court of Florida. Upon findings of fact[46] by a majority of the three-judge court that one of several enumerated aggravating circumstances was present, the death penalty was mandatory.[47] However, if the court found none of these aggravating circumstances to be present, or if the court found a substantial mitigating circumstance to be present,[48] a sentence of life imprisonment was mandated.[49] This novel sentencing procedure represented an attempt to reduce discretion in the sentencing process, yet retain an element of mercy.

A divided House approved the Governor's bill 70-47 as an amendment to the bill recommended by the Select Committee,[50] thereby defeating the Select Committee,[50] thereby defeating the Select Committee's bill. Thereafter, the Governor's bill was altered in several minor respects[51] by amendments from the floor. The bill, as amended, passed the House unanimously.[52]

The Florida Senate, by a vote of 36 to 1,[53] adopted the philosophy of the Governor's bill, as amended by the House, but substantially altered the bill's sentencing procedure.[54] While the Senate version retained the sentencing options of the House-amended Governor's bill—death or life imprisonment—the Senate replaced the bill's three-judge sentencing court with the judge and jury which presided at the convicted offender's trial.[55]

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[45] The bill provided that "the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being shall . . . constitute a capital felony. . . ." Fla. H.R. 14-A, Spec. Sess. § 1 (1972). However, the principle of felony-murder was retained only as a rebuttable presumption of premeditation when a killing occurred during the furtherance of certain serious felonies. *Id.* The Select Committee's bill was much broader in scope. It defined as a capital felony a felony-murder if a person was killed by one "engaged" in the perpetration of certain named felonies. *See* Fla. H.R. 1-A, Spec. Sess. § 1 (1972) (Select Committee bill).

[46] The bill authorized the court to receive any evidence it deemed probative and which related to one or more of the enumerated aggravating or mitigating circumstances, without regard to the traditional exclusionary evidentiary rules, as long as the convicted offender was permitted a fair opportunity to rebut any hearsay statements. Fla. H.R. 14-A, Spec. Sess. § 5 (1972). The bill did not purport to allow evidence excludable on constitutional grounds. *Id.* (drafters' comment).

[47] Fla. H.R. 14-A, Spec. Sess. § 5 (1972).

[48] The bill did not provide for a one-on-one correlation between aggravating and mitigating circumstances. If the court found "that an aggravating circumstance exists as enumerated" and "that no substantial mitigating circumstance exists as enumerated . . . which would warrant leniency" the death penalty was mandatory. *Id.* Too, in contrast with ch. 72–72, [1972] Fla. Sess. Laws 122, *amending* FLA. STATS. § 921.141 (1971), the list of aggravating and mitigating circumstances enumerated were not merely guidelines for the court. The court was restricted to the enumerated circumstances in its decision. *See* Fla. H.R. 14-A, Spec. Sess. § 5 (1972); *cf.* § 9, ch. 72–724, [1972] Fla. Sess. Laws ___ (Spec. Sess. 1972).

[49] Fla. H.R. 14-A, Spec. Sess. § 5 (1972).

[50] Fla. H.R. JOUR., Spec. Sess. 20 (1972).

[51] First, carnal knowledge of a person under ten years old by a person seventeen years or older was made a capital felony. Forcible rape of a person ten years or older was classified as a life felony. *Id.* at 22. Additionally, if any person was killed as a result of air piracy within the boundaries of Florida, the offense was deemed capital. *Id.* at 23. The felony-murder section of the Governor's bill was amended to include any killing which resulted "from the unlawful distribution of heroin or cocaine by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user." *Id.*

[52] *Id.* at 23.

[53] Fla. S. JOUR., Spec. Sess. 26 (1972). The Attorney General's bill, see note 28 *supra*, was never actively considered by either the House or Senate although it had been prefiled in each chamber The bill provided for the mandatory imposition of the death penalty upon conviction of capital crimes. Although the bill reduced felony-murder from murder in the first degree to a life felony, the bill made any unlawful and knowing killing a capital felony when committed under the following circumstances:

1) When committed in the perpetration of certain named felonies; or
2) When committed pursuant to a contract for hire; or
3) When the victim was an elected officer and "assassinated"; or
4) When the victim was a law enforcement officer; or
5) When the perpetrator was a probationer or parolee who had previously been convicted of a life felony or murder in the first or second degree.

The offences of treason, throwing bombs, discharging destructive devices resulting in death, rape, and kidnapping for ransom were all reclassified as life felonies, with a ten year minimum before parole could be granted.

[54] The most significant other amendment provided that carnal knowledge of a female ten years old or younger by a person seventeen years old or older, with force, was a capital felony. Rape of a female over the age of ten and carnal knowledge of a female under the age of eleven years were reclassified as life felonies. FLA. S. JOUR., Spec. Sess. 23 (1972). The Senate also amended the bill so that if a killing occurred during an "aircraft piracy" a rebuttable presumption of premeditated design arose, making conviction of the crime a capital felony. *See id.* at 25.

[55] FLA. S. JOUR., Spec. Sess. 23–24 (1972). The final version of the Senate bill provided that if the defendant had waived trial by jury or had pleaded guilty, the sentencing proceeding was to be conducted before a jury empaneled for that purpose. *See id.* at 24.

Under the Senate bill the jury was to retire after hearing evidence on the existence of aggravating and mitigating circumstances whether or not enumerated in the bill [56] and by majority vote render an advisory opinion to the trial judge (1) on the presence or absence of those factors and (2) whether the death sentence should be imposed. A jury finding that no aggravating circumstances existed or that they were outweighed by mitigating circumstances was conclusive. Thus, if the jury did not recommend the death penalty, the trial judge was required to impose a life sentence. But if the jury's recommendation was for the death penalty, the trial judge was required to reconsider the evidence and make specific written findings of fact as to whether any aggravating circumstances existed and if so whether they were outweighted by any mitigating circumstances. A sentence of death was mandatory unless the court found that insufficient aggravating circumstances existed or, if found to be present, were outweighed by mitigating circumstances; [57] in such a case the court was required to sentence the offender to life in prison, with restricted parole opportunities.[58]

THE NEW FLORIDA CAPITAL PUNISHMENT STATUTE

Because neither the House nor the Senate would retreat from its stance on the procedure and composition of the sentencing proceeding contained in the bill passed by each, a conference committee [59] was necessary to resolve the differences. The statute finally approved [60] is a hybrid: in return for the House's approval of a judge and jury sentencing procedure, the Senate abandoned its insistence that the jury have a determinative role in sentencing in capital cases. While the statute retains the Senate's philosophy that the jury should participate in the sentencing process, the jury now has the authority only to give an advisory sentence which can then be rejected by the trial judge if his findings regarding mitigating and aggravating circumstances justify such action.[61]

Under the new statute, a separate sentencing proceeding for convicted capital offenders is to be conducted "as soon as practicable" by the trial judge before the trial jury. If trial by jury was waived by the defendant or if the defendant pleaded guilty, the sentencing proceeding is to be conducted before a jury empaneled for that purpose, unless also waived by the defendant.[62] Any evidence which has probative value and is relevant to a determination of the sentence to be imposed may be received [63] regardless of its admissibility under the exclusionary rules of evidence, provided only that the defendant is accorded a fair opportunity to rebut any hearsay statements. The introduction of any evidence secured in violation of the defendant's constitutional rights is specifically barred. Both the prosecutor and the defendant or his counsel are permitted to present argument for or against the sentence of death.[64]

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[56] While the Governor's bill limited the aggravating and mitigating circumstances to those listed in the bill—and limited the scope of evidence at the sentencing hearing to those circumstances—the Senate amendments made it clear that the court, in its discretion, could consider any other factors deemed relevant. *See* FLA. S. JOUR., Spec. Sess. 25 (1972). The final statute, however, adopted the limitations of the Governor's bill. *See* notes 65–68 *infra* and accompanying text.

[57] See note 56 *supra*.

[58] FLA. S. JOUR., Spec. Sess. 22 (1972).

[59] FLA. H.R. JOUR., Spec. Sess. 42 (1972). For an interesting account of the conference committee's actions see Dyckman, *Our Legislature in Action: The Unwisdom of it All*, St. Petersburg (Fla.) Times, Dec. 3, 1972, at 12-B.
All, St. Petersburg (Fla.) Times, Dec. 3, 1972, at 12-B.

[60] The approved bill was signed by the Governor, without public ceremony, on December 8, 1972. St. Petersburg (Fla.) Times, Dec. 9, 1972, at 12-B.

[61] Ch. 72–724, § 9 [1972] Fla. Sess. Laws ___ (Spec. Sess. 1972) (*amending* FLA. STATS. § 921.141 (1971)) [hereinafter cited as Florida Capital Punishment Act].

[62] *Id.*

[63] *Id.* The Governor's bill limited evidence to those matters relating to any of the bill's enumerated aggravating or mitigating circumstances. *See* Fla. H.R. 14-A, Spec. Sess. § 5 (1972). The Senate bill and the final statute are virtually identical with regard to the type of evidence admissible; both provide for any relevant and probative evidence as long as the evidence *includes* matters relating to the enumerated aggravating or mitigating circumstances. *Compare* FLA. S. JOUR., Spec. Sess. 23 (1972) *with* Florida Capital Punishment Act §9.

[64] Florida Capital Punishment Act § 9.

After hearing the evidence, the jury, by majority vote, is to render an advisory sentence of either life imprisonment or death to the trial judge.[65] If the jury finds that sufficient aggravating circumstances[66] exist to recommend the death sentence, then it must determine whether sufficient mitigating circumstances[67] exist to outweigh the aggravating circumstances justifying a recommendation of life imprisonment.

After receiving the advisory sentence from the jury, the trial court is required to make it own determination as to the presence or absence of aggravating or mitigating circumstances.[68] If the court determines that sufficient aggravating circumstances exist to impose the death penalty and that either no mitigating circumstances exist or those that do exist are insufficient to outweigh the aggravating circumstances, the court must specifically so find in writing and impose the death penalty. Both the judgment of conviction and sentence of death are then subject to automatic review by the Supreme Court of Florida.[69] If, on the other hand, the court determines that mitigating circumstances outweigh the aggravating circumstances or that no aggravating cir-

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[65] *Id.* at § 9(2):
(2) After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:
(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and
(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh aggravating circumstances found to exist, and
(c) Based on these considerations whether the defendant should be sentenced to life or death.
Subsection (3) makes clear that the jury's recommendation is to be by majority vote. *See* note 68 *infra*.

[66] *Id.* at § 9(6):
(6) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:
(a) The capital felony was committed by a person under sentence of imprisonment;
(b) The defendant was previously convicted of another capital felony involving the use or threat of violence to the person;
(c) The defendant knowingly created a great risk of death to many persons;
(d) 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 any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
(f) The capital felony was committed for pecuniary gain;
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
(h) The capital felony was especially heinous, atrocious or cruel.

[67] *Id.* at § 9(7):
(7) Mitigating circumstances.—Mitigating Circumstances shall be the following:
(a) The defendant has no significant history of prior criminal activity;
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(c) The victim was a participant in the defendant's conduct or consented to the act;
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;
(e) The defendant acted under extreme duress or under the substantial domination of another person;
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(g) The age of the defendant at the time of the crime.

[68] *Id.* at § 9(3):
(3) Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.
In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

[69] *Id.* at § 9(5).

cumstances exist, the court must sentence the convicted offender to life imprisonment with restricted parole opportunities.[70]

In addition to premeditated murder, capital felonies include the unlawful killing of a person by an individual engaged in the perpetration of any arson, rape, robbery, burglary, kidnapping, aircraft piracy, the unlawful throwing, placing, or discharging of a destructive device or bomb, or any killing of a human being resulting from the unlawful distribution of heroin by a person over the age of seventeen when such drug is proved to be the proximate cause of the death of the user. The new statute rejects the innovative approach of the House-amended Governor's bill with regard to felony-murder.[71]

The new statute retains the provision of the Senate bill that rape or carnal knowledge of a person under the age of eleven by a person over the age of seventeen years is a capital felony, but rejects the Senate bill's provision that force is required; forcible rape of a person eleven years or older is reduced to a life felony.[72] The crimes of kidnapping,[73] throwing bombs or discharging machine guns in public,[74] and intentional interference with the United States or with any state in the preparation for war or for defense [75] are all reduced from capital felonies to life felonies.

THE NEW STATUTE—CRITIQUE AND ANALYSIS

Procedural Aspects of the New Bifurcated Trial—Constitutional Problems

Florida law in effect when *Furman* was decided [76] gave the jury complete life-or-death discretion, expressed in the jury decision whether or not to recommend mercy as part of the verdict, at the end of a single-stage trial. The statutory amendment, enacted in March 1972, to take effect on October 1, 1972,[77] provided a bifurcated trial, conducted by the same judge and jury who adjudicated guilt, culminating in a jury decision, binding on the court. The statute contained a list of aggravating and mitigating circumstances, but only as guidelines.

The new law [78] provides a bifurcated trial, by the same judge and jury. The jury's function is advisory only, and their recommendation does not bind the judge. The statutory list of aggravating and mitigating circumstances must be considered in the sentencing proceeding and if the judge imposes the death penalty he must support his decision by findings concerning these circumstances.

The statutory lists of aggravating and mitigating circumstances [79] are intended to narrow the scope of discretion in making the life-or-death decision. However, the lists include some vague language, which may not sufficiently accomplish the narrowing purpose.

The italicized language in the following excerpt from the list of aggravating circumstances seems especially vague: "The capital felony was *especially heinous, atrocious or cruel.*" Amongst the mitigating circumstances: "The defendant has no *significant* history of prior criminal activity"; "the defendant was

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[70] *Id.* § 1. The bill requires that a person who has been convicted of a capital felony and who has received a sentence of life imprisonment serve no less than twenty-five calendar years before becoming eligible for parole. *Id.* § 2 (*amending* FLA. STATS. § 775.082 (1971) *as amended* by ch. 72-118, [1972] Fla. Sess. Laws 258). If the death penalty provisions of the statute are held to be unconstitutional, the statute provides that the sentence for conviction of a capital felony will be life imprisonment, subject to the same parole restriction above. *Id.* (*amending* FLA. STATS. § 794.01 (1971)).

[71] *See* note 45 *supra.*

[72] Florida Capital Punishment Act § 7 (*amending* FLA. STATS. § 794.01 (1971). However, FLA. STATS. § 794.01(2) (1971), as *amended by* the new capital punishment statute, also provides that, "Whoever . . . unlawfully and carnally knows and abuses a child under the age of eleven years, shall be guilty of a *life* felony." Subsection (1) of amended § 794.01 states flatly that a person seventeen years or older who commits the same crime as in subsection (2) is guilty of a *capital* felony. While the legislative intent was probably to apply the language of subsection (2) only to offenders under the age of seventeen, the statute is not so limited on its face.

[73] Florida Capital Punishment Act § 8 (*amending* FLA. STATS. § 805.02 (1971)).

[74] *Id.* § 5 (*amending* FLA. STATS. § 790.16 (1971)). The statute also provides that a sentence not exceeding life imprisonment is authorized where great bodily harm to another or serious disruption of governmental operations results. *Id.*

[75] *Id.* § 4 (*amending* FLA. STATS. § 779.07 (1971)).

[76] Note 3 *supra.*

[77] Note 4 *supra.*

[78] Notes 59–75 and accompanying text *supra.*

[79] Notes 66 & 67 *supra.*

an accomplice in the capital felony committed by another person and his participation was *relatively minor*"; "the defendant acted under *extreme duress* or under the *substantial domination* of another person"; "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was *substantially impaired*"; "the *age of the defendant* at the time of the crime." Furthermore, the statute requires the jury to render an advisory sentence, as to "whether *sufficient* aggravating circumstances exist as enumerated . . . and whether *sufficient* mitigating circumstances exist as enumerated . . . , which *outweigh* aggravating circumstances found to exist. . . ." [80] The judge must thereafter perform a similar weighing process.[81]

The statute does not specify whether the existence of aggravating or mitigating circumstances must be proven beyond a reasonable doubt, or in some other manner. Nor does the statute clarify whether the trial judge, in performing his weighing process, should give any weight to the recommendation of the jury; even though the jury recommendation has no binding force, it may still have some degree of persuasion.

A considerable amount of discretion thus remains in the sentencing process —first, the discretion which inevitably exists in making a factual determination, even under the most tightly drawn statute; second, the additional discretion which is created by the vague language by which the statute describes the enumerated aggravating and mitigating circumstances; third, the further discretion which is created by vagueness in the statute as regards burden of proof and weight which the judge should give to the jury recommendation.

A system of sentencing based upon enumerated aggravating and mitigating circumstances, with written findings by the court to support the death sentence, may arguably be compatible with *Furman*, provided the court is granted no more discretion than is necessary in order to carry out such a system.[82] The new Florida statute, as indicated above, grants the court unnecessarily broad discretion, which could be significantly reduced by careful redrafting. The existence of this unnecessary amount of discretion raises serious questions under *Furman*.

Williams v. New York,[83] decided by the United States Supreme Court in 1949, sustained the validity of a New York statute which authorized the trial judge to impose the death sentence even though the jury had recommended involved only the determination of guilt, not the sentence.

While *Williams* indicates that the constitutionality of a capital punishment statute is not impaired by transferring ultimate sentencing authority from the jury to the judge, a post-*Furman* decision by the Delaware supreme court [84] indicates that such a transfer does nothing to enhance the validity of the system when tested against *Furman*. The Delaware court held that state's *Williams*-type statute unconstitutional, since it "delegates to jury and judge uncontrolled discretion in the imposition of the death penalty that now stands condemned by the United States Supreme Court in *Furman*. . . ." [85]

If the United States Supreme Court takes a similar view, Florida has made no progress toward constitutionality by transferring ultimate life-or-death authority from the jury to the judge. And, by making this change, Florida has adopted a policy which has been rejected by the vast majority of jurisdictions. A 1953 law review article [86] noted that only New York,[87] Delaware [88] and

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[80] Florida Capital Punishment Act § 9(5). See note 65 *supra*.
[81] *Id.* § 9(3). See note 68 *supra*.
[82] *See, e.g.*, Ehrhardt, *supra* note 33.
[83] 337 U.S. 241 (1949).
[84] State v. Dickerson, ___A.2d___ (Del. 1972).
[85] *Id.* at ___.
[86] Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953). A similar analysis can be found in MODEL PENAL CODE, App. D, 125 (Tent. Draft No. 9, 1959). The major policy considerations against permitting the judge to overrule the jury are summarized in the commentary to ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 47 (Approved Draft, 1968).
[87] The New York statute was subsequently amended so as to repeal this feature; *see* note 91 and accompanying text *infra*. The history of New York law on this point is traced in People v. Fitzpatrick, 61 Misc. 2d 1043, 308 N.Y.S.2d 18, *motion denied* 34 App. Div. 2d 730, 311 N.Y.S.2d 577, *appeal dismissed*, 27 N.Y.2d 742, 314 N.Y.S.2d 992, 263 N.E. 2d 390 (1970).
[88] The Delaware statute is DEL. CODE ANN. § 3901 (1953) which however was recently held unconstitutional; *see* notes 84–86 and accompanying text *supra*.

Utah [89] authorized the trial court to impose a death sentence after the jury had recommended mercy, while South Dakota [90] permitted the court to grant mercy after a jury recommendation of death but not vice versa. Since then, New York has amended its statute so as to remove this authority from the judge, who can now pronounce the death penalty only upon the unanimous recommendation of the jury.[91] Utah appears to be the only other jurisdiction, besides Florida under the new statute, authorizing the judge to impose a death sentence after the jury has recommended mercy.

[89] The Utah statute is UTAH CODE ANN. § 76–30–4 (1953).

Appellate Review Following Imposition of the Death Penalty

Pre-*Furman* Florida law permitted an appeal from the trial court to the Florida supreme court, as a matter of right, in all cases where the death penalty was imposed.[92] The supreme court reviewed the determination of guilt, but could not reduce the sentence as being excessive, so long as the sentence was permissible under the statute. The new laws provides automatic review by the supreme court, promptly after the trial, and the supreme court now reviews the sentence as well as the determination of guilt.[93]

By providing for review of the sentence, the new law evidently requires the supreme court to review the trial court's findings of the existence of aggravating and mitigating circumstances, and the process by which the trial court determined that the mitigating circumstances, if any, were not sufficient to outweigh the aggravating circumstances.

The statute contains no guidelines for the exercise of the supreme court's appellate function. We may wonder, for example, whether the supreme court will sustain the trial court upon a finding of "substantial evidence", even though the supreme court might have reached the opposite result in a hearing de novo.[94] Further, we may ask whether the supreme court should be influenced by the circumstance, where it exists, of a disagreement between the trial judge and jury.[95]

The uncertainties in the statutory procedures for the trial court are, therefore, compounded by uncertainties in the scope of appellate review by the Florida supreme court. The statute vests a significant amount of discretion in that court, to the extent that it possesses almost as much discretion as if the statute simply authorized the supreme court to grant mercy in its discretion. The extent of the supreme court's discretion under the new statute raises additional questions under *Furman*, and may subject the supreme court to an unwelcome new responsibility.

Lack of Change in Procedure at Other Stages of the System.

The memorandum submitted in October 1972 by the legal advisory staff of the Governor's Committee suggested that, in order to stand even a theoretical chance of satisfying constitutional standards, a system of capital punishment "would necessarily include provisions designed to eliminate, as far as humanly possible, the risk of arbitrary, freakish or discriminatory decision in capital cases, not only in the jury function, but at all stages of the process where substantial discretion now exists." [96] As examples of areas of substantial discre-

[90] The South Dakota statute is S.D. COMPILED LAWS ANN. § 22–16–13 (1967).

[91] N.Y. PENAL LAW §§ 125.30, 125.35 (McKinney, 1967). *See also* note 87 supra.

[92] *See* notes 8–10 and accompanying text *supra.*

[93] The difference between "automatic review by the Supreme Court" in the new statute and the "appeal as a matter of right to the Supreme Court" in the old statute is by no means clear, especially as the Florida Constitution confers jurisdiction upon the supreme court in language identical to the old statute. This question could only arise in the highly unlikely event that a person who had been sentenced to death made no attempt to appeal to the supreme court. The court would then have to decide whether to entertain "automatic review" without an active appellant. Under both old and new statutes, if the sentence is not death, appeal is taken from the trial court to the district court of appeals. *See* note 10 *supra.*

[94] In Nelson v. State, *ex rel.* Quigg, 156 Fla. 189, 191, 23 So.2d 136, 136–37 (1945), *cert. denied*, 327 U.S. 390 (1946), the court noted the "almost universal rule, that the findings of fact made by an administrative board, bureau or commission, in compliance with law, will not be disturbed on appeal if such findings are sustained by substantial evidence. . . This rule finds its counterpart in, if indeed it is not the twin brother of, the rule which requires an appellate court to give great weight to the findings of fact made by a jury or a chancellor and to sustain such findings unless there is no substantial evidence to support them."

[95] The concept is well settled in administrative law, *e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), and may be appropriate for consideration in the appellate review of sentencing.

[96] Ehrhardt, *supra* note 33, at 6.

tion, the memorandum mentioned executive clemency, jury discretion to convict of a lesser offense, and plea bargaining to lesser included offenses.[97] These examples were not intended to be an exhaustive listing; additional discretionary functions readily come to mind, including the prosecutor's decision whether or not to prosecute and, if so, what offense to charge and what penalty to suggest; the grand jury function; and the availability and sufficiency of defense counsel beyond the bare minimum required to meet constitutional or statutory requirements.

Amongst these discretionary functions, executive clemency occupies a unique position, since it is exercised by the Governor and members of the cabinet on the basis of authority specifically provided in the Florida Constitution.[98] It cannot therefore be controlled by statute. It could, and arguably should, be controlled by quasi-legislative acts of the executive, announcing procedures and standards so as to accomplish a voluntary self-limitation of the future exercise of clemency in individual cases.[99] The other areas of discretion seem amenable to statutory control.

The new Florida capital punishment statute makes no attempt at limiting discretion at any stage of the process except sentencing. The statute thereby fails to respond adequately to the requirements of *Furman*, as we interpret them.

Parole Restrictions

The new Florida statute contains a provision, without equivalent in prior law, requiring at least twenty-five years of imprisonment to be served before eligibility for parole, by defendants whose lives have been spared after conviction of a capital felony.[100] This provision inevitably puts pressure on the pardon and commutation power of the executive, which is not restricted—and indeed could not be restricted [101]—by the statute. Prisoners confined under the twenty-five year no-parole sentence will obviously seek executive clemency as a means of reducing the length of time to be served. The prospect of this pressure on the executive clemency function emphasizes the need previously noted,[102] for executive development of guidelines for the exercise of clemency.

Moreover, the twenty-five year no-parole sentence raises serious penological questions. Corrections officials testified to the Governor's Committee that lifetime imprisonment, without any possibility of parole, would seriously prejudice prison administration, since inmates would be unmanageable.[103] The officials also testified that, by the time an inmate has been imprisoned for twenty years, he is likely to be either a vegetable or a maniac, and in any event hardly fit for release.[104] The twenty-five year no-parole sentence therefore is likely to result either in the release of inmates after that length of time, in a deteriorated condition with a strong potential of danger to society, or in the imprisonment of inmates for their entire lives, since after twenty-five years they will be found unfit for release.

The Life Felony Classification

The new statute creates the life felony, a new classification relating to offenses less serious than capital felonies but more serious than felonies of the first degree.[105] The life felony carries imprisonment for life, or for a term of years not less than thirty; parole is not precluded. Some felonies which were previously capital are reduced to life felonies.[106]

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[97] *Id.*

[98] FLA. CONST. art. IV, § 8 (1968).

[99] *See generally* K. Davis, DISCRETIONARY JUSTICE 126–41, 221–22 (1969).

[100] Florida Capital Punishment Act § 2 (*amending* FLA. STATS. § 775.082 *as amended by* ch. 72–118, [1972] Fla. Sess. Laws 258).

[101] *See* note 98 and accompanying text *supra.*

[102] *See* note 99 and accompanying text *supra.*

[103] Statement by Louie L. Wainwright, Director, Florida Division of Corrections, to the Governor's Committee to Study Capital Punishment, August 17, 1972, in Tallahassee, Florida. Mr. Wainwright's views were supported by testimony of Armond R. Cross, Chairman, Florida Parole and Probation Commission, *id.*

[104] These observations were made in response to questions at the meeting of the committee cited in note 103 *supra*, attended by one of the authors of this article, and are not recorded in these terms in the report of the committee. Newspaper reports of the legislative debate on the twenty-five year no-parole provision are to the same effect. *See, e.g.*, St. Petersburg (Fla.) Times, Dec. 2, 1972, at 1-A.

[105] Florida Capital Punishment Act §§ 1 (*amending* FLA. STATS. § 775.081 (1971)) and 2 (*amending* FLA. STATS. § 775.082, *as amended by* ch. 72–118, [1972] Fla. Sess. Laws 25).

[106] Notes 70–75 and accompanying text *supra.*

It is questionable whether this additional classification of offenses is needed. The felony of the first degree carries a maximum term of thirty years or, when specifically provided by statute, life imprisonment.[107] Prisoners seldom serve the full term of their sentences, since they are generally released on parole after serving only a portion of it[108]—and, as pointed out above, corrections officials oppose imprisonment for terms as long as twenty years. In view of current practices with regard to parole, the distinction between the penalties for life felony and felony of the first degree seems minimal.

Committee Support for The New Statute

The report issued by the Governor's Committee to Study Capital Punishment deals almost exclusively with the single question whether capital punishment should be reinstated. The committee's report did not address itself to the other matters in the Executive Order which created the committee, since no significant amount of information had been received on anything other than the question of reinstating capital punishment. The House Select Committee on the Death Penalty prepared a brief report, which focused primarily on the sentencing procedure which should be adopted when capital punishment was reinstated. The Senate Council on Criminal Justice filed no report at all, other than the draft of legislation it recommended.

Thus the new Florida capital punishment statute is supported by committee reports only in one respect—on the question whether to reinstate capital punishment. No part of the committee reports provides significant information on the other matters dealt with in the statute such as sentencing procedure, appellate review, minimum sentence without parole. The lack of committee work products on these crucial questions become especially unfortunate when the Senate-House conference committee met during the final night of the legislative session to draft a compromise bill. Many of the deficiencies in the statute might well have been remedied at that time if the conference committee had the benefit of adequate reports containing information about experience in other jurisdictions, surveys of professional and scholarly literature, testimony from experts, and alternative solutions.

CONCLUSION

Although seriously defective, the statute enacted during the legislature's whirl-wind four day special session appears to have placated the proponents of reinstatement of capital punishment. Doubts about the constitutionality of the statute were frequently expressed seldom as criticism of the new statute or its authors.[109] The *Tampa Tribune* observed editorially:

> Justices of the Supreme Court in their readiness to bend the Constitution to fit their own sentiments may find the new Florida law as invalid as the old. But, if so, some of the responsibility for the callous killings of innocent citizens will rest with the Court, not with Governor Askew and the Legislature. They have fashioned a fair method for punishing the guilty and deterring the potential killer.[110]

Thus, constitutional problems were brushed aside by Florida lawmakers and other leaders of opinion. The capital punishment statute seems to have been an expedient response to election-time politics rather than a sound response to the constitutional and penological needs of the state.[111] The need remains as great after enactment of this statute as before for comprehensive study and reform of our entire system of criminal justice and corrections.

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[107] FLA. STATS. § 775.082(2)(a) (1971).

[108] Cross, *supra* note 103, notes that "The average length of time served on [life] sentence before parole release is granted is 9.55 years."

[109] *See, e.g.*, Miami (Fla.) Herald, Dec. 3, 1972, at 1-B; St. Petersburg (Fla.) Times, Dec. 4, 1972, at 1-B. The only editorial criticism in a major Florida newspaper the authors could locate was in the St. Petersburg (Fla.) Times, Dec. 2, 1972, at 16-A:

> Askew should, but no doubt won't, veto the compromise death penalty bill which fails to fully conform to the standards he proposed. . . . It is up to Askew, or the U.S. Supreme Court, to correct the Legislature's hastily written mistake.

[110] Tampa (Fla.) Tribune, Dec. 2, 1972, at 14-A.

[111] This discussion raises problems of legislative ethics, a subject beyond the scope of the present article.

STATEMENT OF L. HAROLD LEVINSON, LAW CENTER, UNIVERSITY OF FLORIDA

Mr. LEVINSON. It is a privilege to appear before this subcommittee, and comment on the capital punishment provisions of S. 1 and S. 1401.

The statement reflects my own personal views, and should not be attributed to any other person, nor to any institution.

In summary, my position is as follows. First, I believe capital punishment does have an appropriate place in our system of criminal justice, but only if the system can be made to satisfy certain standards of reliability, equality and fairness.

Second, I find support for my position in the United States Supreme Court decision in the *Furman* case.

Third, the statute that Florida enacted in December, 1972 enacting capital punishment is, in my opinion, an unsatisfactory response to the Supreme Court decision.

Fourth, I regret to say that I believe that the proposals being considered by this subcommittee, S. 1 and S. 1401, are also unsatisfactory responses to the *Furman* decision.

My recommendation must be back to the drawing board for a drastic revision of these proposals.

During the latter part of 1972, I had the privilege of hearing significant debate on the capital punishment question as I rode around the State of Florida with the Governor's Committee To Study Capital Punishment.

We held hearings all over the State from Pensacola in the northwest, to Miami in the south, and in the State penitentiary. We talked to many defendants who had been on death row until the *Furman* case. We talked to a lot of people who had not committed capital crimes. We asked them, why did you not kill the victim, after you raped or robbed the victim; were you afraid of capital punishment?

At the public hearings throughout the State, we invited people to come off the street and talk to us, and a relatively small number did, although the publicity was substantial. And I got the feeling that capital punishment may not be quite such a popular, intense issue as some people would have us believe.

Having heard the debate and having read at least a sample of the endless literature, I still have no proof one way or the other, but I do have hunches on the subject. I do have a hunch that the possibility of capital punishment is a more effective deterrent than other types of deterrents for some potential criminals as regards some potential criminal acts that they may intend to perpetrate on some occasions.

Further, my hunch tells me that the possibility of capital punishment tends to strengthen the confidence of citizens in general, and law enforcement officers in particular, in our system of justice. And the capital punishment possibility will tend to reduce the extent to which citizens and law enforcement officers are tempted to resort to self-help in response to criminal conduct.

If these hunches are sound, capital punishment offers some significant benefits to society. These benefits are purchased at a cost, and we cannot expect to receive the benefits unless we are prepared to pay the cost.

If it turns out that the costs are higher than we are prepared to pay, we must do without the benefits which capital punishment will produce.

What are the costs? Partly, of course, they are financial costs reflected in dollars and cents. This relates to our allocation of priorities, either spending money on that or spending money on something else.

Apart from financial costs, we risk incurring other costs, such as the cost of offending our own deeply held values. If our system of capital punishment is carried out in such a manner as to cause serious affront to our notions of decency and fair play, this affront must be considered as a cost, perhaps a prohibitive cost, tending to persuade us that capital punishment is not worth buying at such a price.

And so the question then becomes, not whether I favor capital punishment, which I do, but whether I can anticipate that the benefits of capital punishment can be purchased for society without excessive cost, either financial or otherwise.

Again, I can only resort to a hunch, which tells me that we can indeed purchase the benefits at an acceptable cost. We can, but I don't believe we have yet developed a plan for doing so. Development of such a plan is the challenge, and in a way the inspiration that I find in the Supreme Court's decision in the *Furman* case.

Shortly after the *Furman* decision was rendered, Governor Askew appointed the Governor's Committee to Study Capital Punishment. Five law professors, including myself, had the privilege of serving as legal advisors to the committee.

We prepared a memorandum analysing the *Furman* decision, and recommending a course of action. Our memorandum was subsequently published in the Journal of Criminal Law and Criminology, and a reprint of that publication is attached as an appendix of these remarks.

Let me briefly summarize. The points developed in the article represent a consensus of the five authors.

We noted that *Furman* was decided by a Supreme Court vote of 5 to 4.

Mr. BLAKEY. Professor, it was a per curiam opinion, was it not?

Mr. LEVINSON. Yes.

Mr. BLAKEY. What value as precedent have per curiam opinions such as *Furman* when the Court does not articulate its rationale?

Mr. LEVINSON. It did articulate a rationale, to the effect that the imposition of the death sentence in this case was a cruel and unusual punishment.

Mr. BLAKEY. Did it tell us why it was proven an unusual punishment?

Mr. LEVINSON. No.

Mr. BLAKEY. The only way that we could gather it was is to read the concurring opinions.

Mr. LEVINSON. And the dissenting opinions.

Mr. BLAKEY. To what degree is Congress bound to follow the views of Justices set out in concurring opinions as opposed to majority opinions?

Mr. LEVINSON. A Congressman and a Senator should attempt in good faith to legislate in accordance with how he predicts the Supreme Court would pass on the statute that he is now considering.

Mr. BLAKEY. That would depend on the analysis of the individual opinions.

Mr. LEVINSON. Surely.

Mr. BLAKEY. That would depend on the assumption that those opinions would be similar.

Mr. LEVINSON. Yes.

Mr. BLAKEY. In what way are the Justices themselves, the present ones and the succeeding ones, bound by concurring opinions?

Mr. LEVINSON. The Supreme Court is never bound by its precedents anyway.

Mr. BLAKEY. It is in a sense. It doesn't lightly set aside constitutional decisions.

Mr. LEVINSON. The precedents are only persuasive in the Supreme Court. It has on very dramatic occasions discarded a precedent and struck out in another direction.

Mr. BLAKEY. Would you suggest that a majority opinion signed by five or more justices would be of the same weight or greater weight, or less weight then a concurring opinion signed only by the judge himself?

Mr. LEVINSON. As the decision of the Court becomes increasingly clear, it leaves a smaller area of uncertainty as to how to comply with its spirit in the future. I see your point that the nine separate opinions which are reflected in the 5-to-4 vote in the *Furman* case may leave a lot of uncertainty as to what the Court would do if a similar question came before them again.

Mr. BLAKEY. To a somewhat differently composed Court?

Mr. LEVINSON. Yes; I cannot predict when a vacancy will arise, or who will fill it.

Mr. BLAKEY. We are really left in a pretty unpredictable state.

Mr. LEVINSON. I don't think prediction in this situation is much more difficult than it would be in any other situation.

Mr. BLAKEY. If we had a 9 to 0 opinion signed by the Chief Justice, and concurred in by all the others?

Mr. LEVINSON. You still don't know who will be on the Court at a future date, or how they will think or how the pendulum may swing.

Mr. BLAKEY. Thank you.

Mr. LEVINSON. I do agree with the implication that obviously it is more difficult to anticipate the sequel to an opinion of this sort than if the Court spoke with a single voice.

Senator HRUSKA. Professor Levinson, I trust you are aware that you are being examined and you are engaging in colloquy with a brother in the teaching of the law.

Mr. LEVINSON. I do, it's a great privilege to do so.

Senator HRUSKA. It's a delight to hear this exchange. I know it will increase the quality of our product.

Mr. LEVINSON. Thank you.

In that memorandum, we did address ourselves to the 5-to-4 vote in the *Furman* decision. And we pointed out that in the past many times a Justice who dissented when the principle was first articulated by the Court later on respected that precedent, and voted in favor of following the precedent in subsequent terms of court.

Our memorandum suggests, therefore, that if the same statutes came before the Court anew, the vote would not be 5 to 4, but it might be 9 to 0; because the four Justices that had dissented in the *Furman* case might say, "We lost. The Court has decided and following the late Justices Harlan and Holmes, we will now go along with the precedent, rather than leave the law in a state of uncertainty."

Mr. BLAKEY. Of course, if a different statute was presented to them, they might very well not only vote to sustain the statute, but one or more of those who concurred might be moved to sustain.

Mr. LEVINSON. That is correct. On the other hand, if a different statute comes up, maybe one or more of the five men of the majority would switch his vote. Maybe one or more of the four men in the minority would switch in the other direction.

I think too many analysts have assumed that the dissenters will always vote for capital punishment. I think that assumption is completely false.

Mr. BLAKEY. Or the five majority would all vote to knock down a statute.

Mr. LEVINSON. Equally, it follows, absolutely. I do enjoy the colloquy with my coleague as long as he will tolerate me, but I guess we have to move along.

The memorandum the four other colleagues and myself wrote in Florida developed the view that the *Furman* decision's requirements would not be satisfied either by a statute providing mandatory capital punishment or by a statute providing detailed guidelines for jury determination of mercy. In our view, an acceptable system of capital punishment would necessarily include provisions designed to eliminate, as far as humanly possible, the risk of arbitrary, freakish, or discriminatory decisions in capital cases; not only in the sentencing function, but in all stages of the process where substantial discretion exists.

Mr. BLAKEY. That is clearly an extrapolation of a synthesis of the concurring opinions. The focus of the issue, correct me if I'm wrong, was on the administration of the death sentence as between judge and jury. An arguement was not made in the Court that raised either the discretion to indict or the discretion through nullification to convict, or the discretion of the bargaining power.

Mr. LEVINSON. We find implications going through many of the opinions to the effect that the Court was concerned, collectively, with such things as arbitrary, discriminatory, and freakish application of the death penalty——

Mr. BLAKEY. There was no argument made by any of the people in opposition that raised any of the pretrial or posttrial or nullification aspects of discretion, was there?

Mr. LEVINSON. I'm not sure what arguments have been made. I frankly have not studied the briefs that carefully, nor did I attend the argument.

I do find language in several of the opinions of some of the Justices that indicate that the Justices were aware that merely tightening up the sentencing process may not in itself solve the problem.

For example, the opinion by Justice Brennan suggests that capital punishment in any form would be unconstitutional. One of the bases for his opinion was that you cannot eliminate a large risk of arbitrariness from the system. Therefore, that risk is unacceptable because of the unique severity of the penalty.

So when you say we are extrapolating, we are in a sense drawing an implication from the collective decisions of the Justices.

Mr. BLAKEY. To what degree would that decision be equally valid?

Mr. LEVINSON. I think the implication is that in every type of criminal procedure, whether it is capital or not, the Court has issued a challenge to legislators and to other people involved in the administration of justice to come up with a more reliable, evenhanded, and if you will, credible system than we have had in the past.

If I may just complete this thought, please. Obviously, the Court realizes that to reform the entire system overnight may be asking a little too much. As I view this decision, and other decisions rendered during the same term of the Court, together with the Chief Justice's off-the-bench statements on many occasions.

The thrust is a suggestion that we use capital punishment as a proving ground to refine procedures, because of the unique severity, finality and trauma of capital punishment.

The Court is telling us, if you think it's worthwhile having capital punishment, work on it, and learn some lessons from refining the capital punishment statutes that may enlighten your manner of administering less severe penalties.

Mr. BLAKEY. Your argument applies equally to life sentences or to any sentence if you extrapolate beyond the four corners of the opinion.

Mr. LEVINSON. Yes, I believe the *Furman* opinion suggests that there are priorities in reforming the criminal justice system, and if you want to reinstate the most severe penalty, that should have a pretty high priority in your reforming of the system; so as to purge the capital punishment process as far as humanly possible of the risk of arbitrariness, discrimination, etc.

If you succeed in doing that, with this enlightenment you can go down the line to less severe penalties; because I think the Chief Justice said in his opinion that if we're going to talk about social utility in the applications of capital punishment, why stop with capital punishment? Why don't we go all the way down the line to parking tickets?

I agree with him; why not? I think the top priority should be with the most severe penalty, and from that, work down. I suppose I am arguing social utility.

We do regard *Furman* as holding this implication, not only for capital cases, but for noncapital cases too. But because of the special

nature of capital cases, we believe that *Furman* suggests that is the place to start if the legislature thinks it's that important to have capital punishment in the first place. If they don't, we should start refining the system wherever else the most severe penalty exists, and work down from there.

We were faced in Florida with a tight deadline. A special legislative session had been called to meet in November 1972, and our recommendation put together in October, 1972 recognized that we could not within the available time attempt to formulate what we would regard as an acceptable system of administering capital punishment, going throughout the system from arrest to plea bargaining to indictment to everything else.

We recommended further study. We recommended that the Florida legislative committees and the Governor's committee should attempt, in a 1-year time frame, to work out as well as they could an appropriate system for administering capital punishment. Of course, the legislature and the Governor's committee did not accept this advice, and the statute was enacted by the legislature in November, and signed by the Governor in December.

After writing that memo, I received a very significant analysis by the NAACP Legal Defense Fund of the memorandum decision's that were rendered by the Supreme Court on the same day as *Furman*. And there are dozens of them set forth in that analysis, which is attached as an appendix to my prepared remaks.

They're listed here only by case name and citation.

These cases come from a large number of jurisdictions around the country, and one would have to read the lower court decision and the relevant statutes to work out what these memoranda cases were saying at the same time that *Furman* was decided.

These memorandum cases state that imposition of capital punishment, in each case, is cruel and unusual punishment on the basis of *Stewart* v. *Massachusetts*. *Stewart* v. *Massachusetts* says capital punishment in this case is cruel and unusual because of *Furman*. So all these cases were companions to *Furman*, all decided on the same day by the same court.

These companion cases point out that a wide range of sentencing possibilities were stricken down at the same time as the *Furman* case was decided, not only the statutes of Georgia and Texas that were involved in the *Furman* decision.

These remarks, therefore, reinforce the view that it's not sentencing that's the problem with *Furman*. It is the entire system, the entire happening from arrest all the way to Executive clemency.

In my view the new Florida statute is unsatisfactory, partly because it deals only with sentencing. We feel there is something more to deal with than sentencing. The full text of the statute is attached as an appendix to these remarks, and so is a Law Review article written by two of the five professors that wrote the first memo.

The Florida capital punishment statute is now being tested in the Supreme Court of Florida. It was argued on April 24, and if the court follows its normal time schedule, they should be rendering a decision any day now.

Mr. Chairman, if I may, I will send you a copy of the Florida Supreme Court decision as soon as it's available as a supplement to these remarks. Obviously, I have no way of predicting what the Supreme Court will do.

In brief, the new Florida statute provides a bifurcated trial. The sentencing proceeding is heard by the same judge and jury who determined the question of guilt.

The jury function is advisory only, and the recommendation does not bind the judge either way. There's a statutory list of aggravating and mitigating circumstances that must be considered in the sentencing proceeding. And if the judge imposes the death penalty, he must support this decision by findings, concerning the circumstances —including the finding that aggravating circumstances exist, and that sufficient mitigating circumstances do not exist to outweigh the aggravating circumstances. If a death sentence is rendered, it is automatically reviewed by the Supreme Court of Florida.

If the death penalty is not imposed on the defendant found guilty of a capital felony, the new law requires that he serve at least 25 years of imprisonment, before becoming eligible for parole.

The Law Review article, by Professor Ehrhardt and myself, criticizes the new statute on a number of grounds.

First, the statutory list of aggravating and mitigating circumstances includes some vague language, and the process by which mitigating circumstances are weighed against aggravating circumstances seems to leave excessive discretion.

Second, the transfer of ultimate life-or-death authority from the jury to the judge does not help make the statute constitutional. And so for no apparent constitutional reason, Florida has adopted a policy which has been rejected on policy grounds by a great majority of the States.

Third, the scope of appellate review by the Florida Supreme Court is unclear. Thus, the uncertainties in the statutory procedures for the trial court are compounded by uncertainties in the scope of appellate review. So in my opinion, the statute pretty well gives the power of clemency to the Florida Supreme Court.

Fourth, the statute makes no attempt to reduce the scope of discretion anywhere in the system except at the sentencing function. That is my major criticism of the Florida statute, as it is of the pending Federal legislation.

Finally, the 25-year no-parole provision puts undue pressure on the pardon and commutation power of the executive, and also raises great penological questions.

May I comment briefly on the capital punishment provisions of S. 1 and S. 1401. S. 1 provides that the court and the jury shall be guided by aggravating and mitigating circumstances listed in the statute, and that the court shall not impose a sentence of death unless the jury returns a unanimous verdict that the sentence should be death.

The list of aggravating and mitigating circumstances is for guidance only, and no findings are required. The presence or absence of any of these circumstances does not compel decision one way or the other, but merely provides guidance.

This system, in my view, vests as much discretion in the court and jury as was condemned in *Furman*, and is clearly invalid under the *Furman* decision.

S. 1401——

Senator HRUSKA. Professor, when was this Florida statute enacted?

Mr. LEVINSON. The legislature acted November 1972. The Governor signed it December 8, 1972.

Prosecution has already been initiated in a number of cases. One trial court found it unconstitutional. Another trial court found it was constitutional. A third trial court rendered a certified question before trial and a test case is pending in the Florida Supreme Court.

Senator HRUSKA. The State supreme court?

Mr. LEVINSON. Yes, the State of Florida has moved very quickly in enacting the statute, and in attempting to enforce it, and in litigating it.

Mr. BLAKEY. Your analysis would indicate that S. 1 is unconstitutional. That rejects, I take it, Chief Justice Burger's comment in the dissent, that either mandatory penalties or setting standards for the exercise of discretion would need the concurring opinion of Mr. Justice White, and Mr. Justice Stewart.

Mr. LEVINSON. I don't think it would satisfy either one of those.

Mr. BLAKEY. Putting aside for the moment the construction as to whether it is their guidance only, let us assume that they were binding standards, and there was explicit language in this statute that directed him not to consider anything else but, and further required findings to the effect that they did find aggravating circumstances.

They did not find mitigating, or if they found mitigating, the aggravating outweighed them.

These were the clear, authoritative standards, and no other standards could be used for the judgment. Would that meet the test?

Mr. LEVINSON. That would be preferable. Of course, to some extent, S. 1401 satisfies some of these requirements that you suggested. As to whether I reject Chief Justice Burger's dissenting opinion, I'd rather follow the majority opinion than the dissenting, if I had my choice.

Mr. BLAKEY. To a degree, there is a difference between S. 1401 and S. 1, in that there is a discretion, a degree of discretion left in S. 1401, although the standards are set to be exercised. Whereas in S. 1401, if certain things are found, the penalty follows as day follows night.

There may be some judgments of wisdom as to what ones should be done. I'm simply raising it with you. If it is just at least a permissable reading of the Supreme Court's decision, at least Chief Justice Burger's and Justices White's and Stewart's, to argue that S. 1 is constitutional with the additions that you suggest of a clear statement that the standards are binding; and finally, should be found in support.

Mr. LEVINSON. You refer to S. 1401 as well as S. 1.

Mr. BLAKEY. S. 1400 is identical to S. 1401.

Mr. LEVINSON. S. 1 provides standards for guidance only. S. 1401 has binding standards.

Mr. BLAKEY. Let me set up a different alternative. Let us assume that S. 1 sets up standards for the exercise of discretion permitting balancing between aggravating and mitigating circumstances, as the Florida statute does. On the other hand, S. 1401 requires a finding of the absence of mitigating, and the presence of aggravating, and then requires an imposition of the death penalty.

Assuming that they are the two models, do you think that the one that permitted the weighing under binding standards would be fundamentally inconsistent with White's and Stewart's concurring opinion?

Mr. LEVINSON. I think that it would cause greater problems; as long as weighing is used, you have the problem of how do the judge and jury weigh, how much weight has to go on each side of the scale.

Mr. BLAKEY. This is the real question; whether it has to be absolutely mandatory, or that there's some room for guiding or discretion.

Mr. LEVINSON. Sure.

I think the more room you have for discretionary weighing, the more problems you will have. I'm not prepared to say that by removing the weighing, you satisfy *Furman*. You might satisfy one corner of *Furman*.

Mr. BLAKEY. By having it present, you wouldn't necessarily violate *Furman*. If standards are set for discretion, it could, in fact, produce a fair, equal administration of capital punishment; it would meet the test of *Furman*.

Mr. LEVINSON. It's difficult to tell in any given case whether it will be equal or not. In the first case that comes through the court, the first one with no history behind it, you can't say this has been applied unequally in the past.

Mr. BLAKEY. There wouldn't be a presumption in favor of passage now?

Mr. LEVINSON. Unless the statutory language on its face indicates significant risk of unequal application.

Mr. BLAKEY. Has the test been in the past significant risk of abuse? You can argue unconstitutional on its face or unconstitutional administering. If we change the nature of the statute in such a way that it is susceptible to a fair administration, wouldn't the presumption of constitutionality carry until such time as contradictory evidence was developed?

Mr. LEVINSON. If that was their intent, they would have to wait until *x* number of people were executed under the new statute in order to have evidence whether it was administered fairly or not.

Mr. BLAKEY. They don't want to get the facts before they get their judgment?

Mr. LEVINSON. They don't want that kind of factual basis before they make their judgment, as to whether it's likely to create an unreasonable risk of unequal application. Maybe the imposition of capital punishment has been placed in a separate category by the *Furman* decision, in regard to what constitutes denial of equal protection. There is something unique about capital punishment.

In my view, it is not enough to see how many people are prosecuted or tried, because the impact of Executive clemency may be a

crucial thing, too. So you have to find some means of testing this system before people have been executed under it.

S. 1401 provides a tighter system of aggravating and mitigating circumstances that must be considered by the trier of fact. A separate verdict must be given as to the findings of the existence or nonexistence of the facts. The burden is clearly stated in the statute.

One of the weaknesses in the Florida statute is, by-the-way, it did not mention where the burden lay. Here, in S. 1401, we do have it. The burden of establishing aggravating circumstances is on the Government and the burden of establishing mitigating circumstances is on the defendant. Disclosure, rebuttal, and argument are assured.

If the special verdict finds, by a preponderance of the information, that one or more aggravating circumstances exist, and that no mitigating circumstances exist, the court shall sentence the defendant to death. If no aggravating circumstances are found to exist, or if one or more mitigating circumstances exist, the sentence shall not be death.

This is tighter than S. 1 or the Florida statute. The wording of the mitigating and aggravating circumstances in S. 1401 is considerably tighter than the wording of the corresponding provision in the Florida statute.

In brief, I certainly prefer S. 1401 to any of the other things we have been talking about today. I think S. 1401 stands a better chance of getting past the Supreme Court than S. 1 or the Florida statute.

Some of the policy choices under S. 1401 are to be questioned. But my main difficulty with 1401 is that it deals only with sentencing. My position stated previously is that *Furman* calls for much more than the tightening of sentencing. It calls, in my view, for an overhaul of the entire system so as to eliminate, as far as humanly possible, the risk of arbitrary, freakish, or discriminatory decision at all stages of the process where substantial discretion exists.

Once we have done this, it calls for a sober consideration of the cost which society would have to pay in order to get the benefits of capital punishment. And these costs include the residual amount of the risk of arbitrariness, etc, which would remain in the system after we eliminate as much risk as humanly possible.

S. 1401 does not deal with plea bargaining, with jury discretion to convict of lesser offense, with Executive clemency, with the exercise of prosecutor's discretion, with the grand jury, with the availability and sufficiency of defense counsel beyond the existing levels of service, and you could think of other aspects that are not dealt with here.

However, until these and other items are frankly treated in a legislative proposal, I don't think we can determine whether capital punishment can be bought at an acceptable cost.

Therefore, with great respect to the draftsmen and to the staff members of the Committee, I recommend that you return to the drawing board with a larger view of what a capital punishment statute is trying to accomplish.

During these remarks that I am now concluding, I have devoted primary attention to the cost which must be faced in adopting a system of capital punishment. However, we should not only consider

cost, but potential benefits to be derived from this type of punishment.

I started by expressing certain hunches which persuade me that capital punishment does have some special benefits to offer, so long as the cost is not prohibitive. I hope that research continues into this question, so that our hunches become increasingly educated as the state of the art improves.

We will then approach, as closely as possible, a rational determination of the relative social utility of capital punishment compared to all other alternatives.

Mr. BLAKEY. Professor, you mentioned the Supreme Court might not be willing to run the risk of losing lives of criminal defendants while they take on a test program. At the same time, would the Court be willing to take the risk of a loss of life of police officers and innocent citizens by striking down a system that is fair on its face, but has not yet been tested to show that it is discriminatory?

Mr. LEVINSON. Obviously, if you think that a court decision does create the risk of victims being killed. The Supreme Court has shown itself to be willing to do it. They did it a year ago. As the statute before the Court approaches more closely what I may regard as aceptable, I assume the Court would have more and more reluctance to strike it down.

And you might get a statute past the Court that would not satisfy, from a scholarly point of view, some of the standards that I have suggested this morning. The Court would be prepared to settle for it if they thought that was the best they could get, and if they thought it was needed to deal with criminality in the United States.

I hope that this committee is not limited by what they think will scrape by the Supreme Court. I hope that this Committee will formulate a statute that is even more sophisticated and better designed than the Supreme Court insists on.

Mr. BLAKEY. Thank you. From the staff's point of view, I really want to extend our appreciation to you for a very thoughtful and very scholarly and, frankly, very objective analysis. Since you have struggled with the problem and did not find the answer makes it very helpful to us and the staff to have to struggle with it.

Thank you.

Mr. LEVINSON. Thank you, sir.

Senator HRUSKA. Professor, you have testified that the bill, S. 1401, makes no provision for appellate review of the sentence. I don't know if you are familiar or not with the legislative proposal that there be appellate review of sentences which are for 1 year or more of imprisonment or in excess of that by way of sanction.

If that bill were enacted, of course, we would have a general appellate review of sentence, which would apply to this situation here. However, if an exception were to be considered to this S. 1401 making provision for appellate review for sentence, could you give us any guidance as to what might be its composition?

Mr. LEVINSON. Yes, Senator. I think that is one of the problems with the Florida statute, that I mentioned before. The Florida statute does provide for appellate review, but gives no standards.

Senator HRUSKA. Mandatory?

Mr. LEVINSON. It gives no standards as to what the reviewing court should do, so the Florida Supreme Court has a pardoning power, but by no means does the statute attempt to control the matter in which the Florida Supreme Court——

Mr. BLAKEY. Wouldn't the usual common law rules pertain; substantiality of evidence and the need for discretion?

Mr. LEVINSON. That is not clear. We have very little history in Florida of review of sentence. Only the petty courts have sentences subject to review. I am afraid that significant confusion and uncertainly would rest in the Florida system, because of the Florida statute.

With the benefit of that experience, I would suggest that in providing appellate review of death sentences, some guidelines should be set out in the statute to guide the appellate court. Precisely what these would be, I frankly do not have a formulation.

I presume that findings of fact would be reviewed on some basis, preponderance of the evidence, if that's any basis. As to the appropriateness of the sentence, if the statute provided for weighing aggravating and mitigating circumstances, the appellate court would have to be told how to review the weighing process. I realize S. 1401 does not provide for a weighing process, at the present time.

Of course, the bill may be amended somewhere along the way.

I suppose the appellate court should be given statutory guidelines as to what standards of review to apply to questions of fact, and to what extent errors committed during the course of the trial might have some bearing on the sentencing decision, since you have the same trier of fact involved in both determining guilt and determining sentence.

I suppose you have a double reason to consider the rule of prejudicial versus nonprejudicial error in the course of the trial. I know I have not really given you a firm answer to your question. I did not come here with one.

Senator HRUSKA. Because of the unique nature, of course, of the death penalty, would you consider that it might be advisable to devise an appellate procedure that would apply to this particular point, as opposed to relying on a general statute, such as that proposed in the appellate review of sentences bill?

Mr. LEVINSON. That would be very helpful.

Senator HRUSKA. You think that would be desirable?

Mr. LEVINSON. Yes; this means the regular appellate courts——

Senator HRUSKA. Yes; but the standards, the provisions, the guidelines, whatever it is; it would be well to devise what special and exclusive reference to the death penalty, when it is imposed.

Mr. LEVINSON. Yes; I think that would strengthen the statute in the Supreme Court, as well, since we have a special trial procedure. I think you should have a special appellate procedure to dovetail with it; so as to provide a sequence.

Senator HRUSKA. Of course, beyond that, there is still pardon and clemency.

Mr. LEVINSON. Yes, sir.

Senator HRUSKA. The Supreme Court found it was totally helpless in the *Rosenburg* case, for example, because the statement was

flatly made, we have no power to intervene insofar as the penalty that is proscribed by the district court is concerned.

That left it only to the President.

Mr. LEVINSON. In Florida, I recommended that the Governor issue an executive order setting forth the guidelines that he would propose to subject himself to in exercising the power. I would recommend that the President of the United States consider doing this same thing.

Senator HRUSKA. Was that included in the bill?

Mr. LEVINSON. No, sir. It was not.

Senator HRUSKA. You recommended it, but it was not included.

Mr. LEVINSON. It would not be a legislative matter. I recommended it to the Governor's committee—that recommendation was transmitted to the Governor. It would be up to the Governor to issue an executive order, if he felt so disposed. But he has not done so.

Mr. BLAKEY. If the Attorney General issued comparable regulations of the exercise of prosecuting discretion, that might too insulate the beginning of the criminal process.

Mr. LEVINSON. It would be helpful, surely. Any time you can take an area of potential discretion and lay out some general guidelines in advance of a specific incident, you are ahead, within the view that I take of the *Furman* case.

Mr. BLAKEY. I suppose Congress could mandate the Attorney General to issue those regulations. Could they require the President to put out regulations of his power?

Mr. LEVINSON. I don't think so. I think that would take action by the President using his inherent power. I think a recommendation by this committee would be well considered.

Senator HRUSKA. Isn't the power of pardon and clemency, which resides in the President, an express grant in the Constitution?

Mr. LEVINSON. Certainly. But the President, as a means of implementing that constitutional power, could set forth general guidelines indicating how in the future he will do it.

Senator HRUSKA. Each President would probably do that for himself, but I doubt it very much, or it could be doubted very much that one President could formulate guidelines that would be binding on another President, if the power itself comes directly from the Constitution.

Mr. LEVINSON. Certainly, each succeeding President could revoke the Executive order of his predecessor just as the Congress could revoke statutes of its predecessor. But that does not stop us from enacting statutes.

Mr. BLAKEY. We would be creating a situation that would survive the Supreme Court's concern.

Mr. LEVINSON. I think so.

Senator HRUSKA. Vacation days are here. If you have nothing else to do, professor, if you want to devise some appellate review of sentences in the context of S. 1401 or S. 1, we would be happy to receive the fruits of your labor.

Mr. LEVINSON. Thank you, Senator. I will be in touch with your staff.

Senator HRUSKA. Thank you very much.

In regard to the cost to which you refer, you say that in addition to financial costs, the penalty of capital punishment also involves other costs, such as the cost of offending our deeply held values. I wonder if we should consider the offense to deeply held values at this point in the sequence of events, and not take into consideration the offense to our deeply held values, which created the necessity of determining whether or not the death penalty should be visited on a certain person. I know you have that in mind.

When a little time was elapsed, such as sometime after those eight nurses were killed by that maniac in Chicago, they faded into the background, and often in the public mind all the sympathy is given to the man that is facing the death penalty, which is being considered.

Mr. LEVINSON. No question.

Senator HRUSKA. I join Mr. Blakey in his expression of appreciation for the work that you have and your colleagues have done particularly on that paper, and in your legislative effort. And in the Senate here, we still think with deep reverence of a long time member of your bar, Senator Holland, a one time partner of Chesterfield Smith, and of course, serving currently on our Judiciary Committee is your senior Senator, Mr. Gurney. And we think highly of him, too. He has done some work in this area, also.

Thank you for coming.

Mr. LEVINSON. Thank you, Senator.

Senator HRUSKA. Our final witness for the day is Edward Kiernan, president of the International Conference of Police Associations. He is accompanied by Mr. Robert D. Gordon, executive director.

Your statement will be placed in the record too, and you may proceed in your own fashion.

[The statement of Edward J. Kiernan follows:]

TESTIMONY OF EDWARD J. KIERNAN, PRESIDENT, INTERNATIONAL CONFERENCE OF POLICE ASSOCIATIONS

Mr. Chairman and Members of the Committee:

I want to thank you for the opportunity to testify on the legislation being considered by you which is probably one of the most important pieces of legislation to be considered during this session.

My name is Edward J. Kiernan and I am the President of the International Conference of Police Associations, representing more than 150,000 police officers from every section of our country. I formerly served as the President of the Patrolmen's Benevolent Association of the City of New York and recently retired after thirty years of service as a patrolmen. I feel that I can qualify as a spokesman for our police officers from both a personal as well as an observer's point of view.

On April 19, 1972, Mr. Robert D. Gordon, Executive Director of ICPA testified before the House Judiciary Subcommittee #3 opposing the enactment of several bills that would have abolished the death penalty under all laws of the United States, authorizing the imposition of life imprisonment in lieu thereof.

The problem of capital punishment has absorbed the people of this country for many years. Through various stages, imposition of the death penalty has been gradually abolished and this process has been accompanied by a great deal of speculation concerning its true deterrent ability. No definitive analysis has been possible, for in recent years the rate of serious crime has been soaring at an incredible pace.

How many murders would not have occurred if the threat of execution were present? How many potential murderers were deterred from that final act

under the old system? None of us can really known the answers; we can only shudder at the mounting totals and seek solutions with growing desperation.

Over the last several years present statistics have shown a frightening increase in crimes against the person, crimes that either involved the taking of a life or that occurred in circumstances which might easily have resulted in the taking of a life. In that period of time, the same statistics show us the horrible off shoot of such a breakdown in the morals of our society. In 1966, 57 police officers were killed in the performance of their duties; in 1967, there were 76; 1968, 64; 1969, 86; 1970, 100; 1971, 126; 1972, 112; and already in 1973, January to May, there have been 56, 10 more than the comparable period of last year. As you can see, the number of police officers killed in the performance of their duty has doubled in the last eight years. Just last week I attended the funerals of two policemen in the City of New York who gave their lives and during that same period of time, there were seven other attempts to murder policemen in the City of New York. Multiply this by the number of Police Departments we have in this country and you come up with a figure that is almost astronomical.

In Philadelphia recently, two wardens were killed in cold blood by prisoners who had been sent to jail as a result of previous killings of law enforcement people. It is a fact of life that our present laws only protect the killers while the police officer is forced to try to do his job knowing that society is playing russian roulette with his life. How long are you going to gamble with the families of police officers as the chips in this no limit game? How long do you think you can last in the jungle that is being created without having the policeman to pull your chestnuts out of the fire? The primary duty of the policeman is enforcement of laws enacted by you as legislators. In that role, the police walk constantly among criminals some of whom are chronic repeaters and some of whom are the toughest, most hardened miscreants in our society. Police officers are trainted to weight the motives of such men, and soon come to understand some of the character, some of the drives and above all some of the fears which are prevelent among this criminal element. They know, from the synthesis of their total experience, that lurking behind even the toughest fascade is often a deep seated fear of that terrifying punishment and they know that sometimes the specter of that fear will stay a trigger finger at the critical moment.

In a recent bank holdup in New York City, the perpetrators held several hostages inside a bank and threatened to kill them if their demands were not met. When they were questioned about their threatened assasinations, they retored, "What do we have to worry about? Even if we kill them, we can't get the Chair". Recollect if you will, the murders of our political leaders, John and Robert Kennedy, the attempted assasination of presidential candidate Governor Wallace, the ambushing of policemen under the guise of political or racial injustices, the hijacking of airplanes loaded with innocent passengers and the resulting death of crew or law officers attempting to prevent the crime. Think of the correctional officers who have been killed in the riots inside our penetentaries; killed by murderers who were sentenced to jail rather than the gas chamber.

We are not talking here about the so called crimes of passion, the family fights or drunken brawls, or the actions of the mentally unbalanced. In the past, attempts to mandate the death penalty were opposed by the so called bleeding hearts because of their reluctance to take a life. Their obvious lack of concern for the police officer who gave his life was excused by the theory that this is a part of the job of being a policeman. What they fail to take into consideration is their responsibility to do everything possible to make the job of being a policeman as safe as they possible can. They worry about families of the killer, but shed no tears for the families of the dead officer. In a survey consulted by UMCA in the City of New York in February 1972, relative to capital punishment more than 2 to 1 in favor of capital punishment.

There is much that needs to be done if we, as a people, are to be freed at last from the age old scourge of crime. From the past, we may draw upon the values that once were transmitted to each new generation of Americans as a matter of counsel; the doctrine which decreed responsibility for one's self and respect for ones fellow man. With it, went a profound respect for the ideals of law and order and justice—propositions which are much maligned today.

We must not jeopardize our future by ignoring the harsh realities of today's world in a vain attempt to put off our responsibilities to the next generation. The structure of this nation was built upon a solid foundation of individual responsibility, common effort and adherence to law. Unless that foundation is bettered now, the goals of tomorrow will be shaped on a bed of ashes. We urge this committee to weigh the human factor most bravely and recommend positive consideration of legislation that will restore society's ultimate sanction. We have tried the easy way out and it obviously has not worked. Please, before it is too late, try our way.

Thank you

STATEMENT OF EDWARD J. KIERNAN, PRESIDENT, INTERNATIONAL CONFERENCE OF POLICE ASSOCIATIONS; ACCOMPANIED BY ROBERT D. GORDON, EXECUTIVE DIRECTOR

Mr. KIERNAN. Senator, Mr. Blakey, needless to say, I'm pleased to be allowed to testify on behalf of our police officers. Unlike the two previous speakers, I'm neither an attorney nor a teacher. I am speaking on behalf of the men who are on the firing line, whose lives are going to be lost if we do not soon do something about this serious matter.

I listened with a great deal of interest to your remarks relative to the fact that we do have a responsibility to the policemen that are being killed. If we are going to worry about the values and the cost involved in this kind of legislation which would mandate the death penalty, I think we have a serious responsibility to take into consideration, not just the families of the criminal and those that were left behind, but I think we have a much more serious responsibility to think of the families of the men that are out there enforcing these laws, who have laid down their lives voluntarily.

As you say, my prepared testimony will be recorded. Both Mr. Gordon and myself have testified in the past before this committee on different bills relating also to the death penalty provisions. Our position today is no different than it has been in the past.

I think as I referred to on page 1, the problem of capital punishment has absorbed the people of this country for many years. We have gone through basically a trial-and-error process whereby we have eroded the original feelings of the people in this country in favor of capital punishment, eroded that concept down to the point now, where it has almost been completely negated.

I think we're safe to say that if we took the opinion of the nine Justices on the Supreme Court, that if it were not for the lack of consistency in the application of the death penalty throughout the country, we could have very possibly have had a 6 to 3 vote in favor of continuing the death penalty.

I am not prepared to cite case history, or previous decisions to bolster my opinion. But as a layman and a law officer, I do think we are on fairly safe ground to anticipate the possibility of the continuation of the existing nine members of that Court.

If some form of consistency were established relative to the death penalty, then we could look forward hopefully to a 6–3, at least, decision in favor of reinstating the death penalty throughout the country.

I enjoyed very much, as a layman, listening to the colloquy going on between Mr. Blakey and Mr. Levinson. It is interesting for us to sit back as lay people and listen to this reparte back and forth.

We could appreciate the need and the value of such investigation and research, but you have to recognize our frustrations as a man on the street who is required to enforce the law, that these deliberations and this research has to take so long. I am not facetious when I say in my statement that we have tried your way; the way of the courts, and the way of the legislators. And obviously, it has not worked because if you look at my statements in my testimony, the number of policemen that have died over the last 8 years has doubled.

And in that testimony, I do not refer to the number of assaults that were committed on police officers, that are almost impossible to compile, to put down statistically, where the intent of the assailant was the death of the police officer.

Mr. BLAKEY. There was a study done by the FBI last year that does summarize it.

Mr. KIERNAN. I have that. I think that only referred to attacks on Federal people. Not to be facetious again, they are a small part of the picture.

And I think if we were ever successful—we in the International Conference are trying our hardest to get this kind of survey done—if we were ever successful in compiling the figures of assaults on police officers with the intent to kill, as compared with the assaults where death of the police officer was a reality, would not only shock us as police officers, because we do know; it would really shock the citizens of this country.

Historically, in the past—and being a police officer in New York City for 30 years—we have accepted that mode of existence as being commonplace, and the concept has always been that well, it only happens in New York, or Chicago, or Detroit.

I do not think we can any longer sit back complacently and take that viewpoint. I think if you look today, you will find out that in a small town in New York, Chateaugay, 80,000 people, police officers are being killed. Go to the small towns in the South and the West, and we find the same thing.

So it is no longer safe to say that it only happens in the big cities, it does not happen here. It's now a matter of national concern.

I think that actions such as are contemplated in these measures will go a long way towards making the job of being a police officer, big city or small city, a much safer and much more effective arm of our Government. I think when you sit down and analyze——

Senator HRUSKA. Mr. Kiernan, you have given statistics on page 2 of your statement about the number of police officers that were killed in the performance of their duties, and made the observation that the officers killed in the performance of their duty has doubled in the last 8 years.

Tell me if you can as to the incidents of ambushes in which police officers are killed. In a recent discussion with a man very prominent in your profession, he seemed to think that there has been an increase in ambushes, and killings in revenge for the part that a police officer took in the arrest of somebody or testimony and so on.

Have you any observations on that point? It would seem to me that it would bear a good deal on the deterrence of the death penalty, because if the man that does the ambushing knows that he does not have to pay that extreme penalty, it's easier for him to pull that trigger. If he thought well, maybe, and his chances would be substantial, that he would suffer a life sentence——

Mr. KIERNAN. I think I referred to that on page 3, not exactly what you're saying, but I referred on page 3 that the police officers are trained to understand the mode of such men. They understand their character. We know from experience with these people that even the toughest criminal would hesitate if he knew the ultimate penalty that he was going to suffer was the death penalty.

I think going back, as you requested, to the incidence of ambushes throughout the country; I think we have gone away from the concept that a police officer is only an enforcer of laws relating to burglary and larceny and assault. I think a police officer today has come into the position of being a representative of the government. He is now involved in the actions that center around racial polarity, housing conditions, educational availability, job availability, and so forth.

The police officer today, being the obvious symbol of government, and in many cases, the only symbol of government available to people, has to assume the mantle of being the whole effective government. He has to assume the blame of the lack of responsibility of the government to the minorities and the lack of the responsibility of government to educational advantages.

As a result of this, he must suffer the ire and the vengeance of these people who are obviously involved in these situations. So that a policeman today is no longer just a man on the street directing traffic and enforcing the law. He is now the symbol of government as far as these people are concerned.

As a result, he has to bear the brunt of that whole structure.

If you go back to my statement on page 2, Senator—I'm also speaking here, not only as a representative of the association or the members themselves, but also correctional guards that man our institutions across the country. I do not have to go very far back to point out a situation that took place in the city of Philadelphia just recently, where two men had previously taken the lives of other law enforcement people, and had the mandatory death sentence been imposed at that time, would not have been in the position to go out and willfully murder two wardens in a Philadelphia prison.

You know, the people on the other side of this argument, and I can respect their feelings, have a horrible fear of taking a life. And as you said before, Senator, I can understand that they feel this way because the timespan between the time the crime was committed taking the life of one of our people and the trial gives society a chance to sit back and rationalize why they did these things.

And I have to say to you, sir, and say to the members of your committee, that there is no rationale for taking the life of a law officer or a prison guard, or people who are serving as the arm of the government. When they use this rationale, probably with all good intentions, to give an excuse for not taking the life of that per-

petrator, they fail to take into consideration their responsibility to use the same rationale, as you said, at the time of the incident in the life of that law enforcement officer or that prison guard.

I think that the responsibility lays upon your shoulders, and I think it is a heavy responsibility. You now have to take a position that you're no longer going to sit idly by and let lives of law officers go down the drain.

In plain English, we've come to a time where if we don't change the society back to where it was before, to where we teach our children respect for law and order, and do away with this permissive attitude that has developed over the years, and once again, get back to the point where we say that if you take a life, you're going to give a life in exchange, I say we are only going to cause more wanton murders of law officers.

I know that is a harsh philosophy, but when you are dealing with issues like this, you have to take a harsh attitude. All I can hope is that this committee in its judgment can exert enough pressure, if you will, on the members of the Congress to go along with this theory.

And if we are wrong, and if we find out over a period of years that we were wrong in our conjecture that the imposition of the death penalty does not result in lowering the killing of police officer, then go back, if you will, the other way. But you have tried the reverse, and it has not worked. Give us the same shot, and try our way, and see if it does work. That's all we can ask.

Senator HRUSKA. When you say in your statement that the structure of this Nation was built upon a solid foundation on individual responsibility, and common effort and adherence to law, that's pretty sound gospel in my book.

Mr. KIERNAN. We as policemen on the street know that with that attitude redeveloped in this country once again, you are going to have respect for law and order, sir.

Senator HRUSKA. Mr. Gordon, have you any statement?

Mr. GORDON. No, sir.

Senator HRUSKA. I know you have testified in Congress before, and have always made good account of yourself.

Thank you both for coming.

We adjourn now until 10 tomorrow in this same room.

[Whereupon at 12:25 p.m. the subcommittee was adjourned until 10 a.m. Thursday, June 14th, 1973.]

IMPOSITION OF CAPITAL PUNISHMENT

[Testimony given on February 16, 1972, in hearings before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, U.S. Senate, on Reform of the Federal Criminal Laws—recommendations of the National Commission on the Reform of the Federal Criminal Laws]

* * * * * * *

Senator McCLELLAN. The next witness is Mr. Douglas Lyons. Come around please, sir.

STATEMENT OF DOUGLAS B. LYONS, EXECUTIVE DIRECTOR, CITIZENS AGAINST LEGALIZED MURDER, INC., NEW YORK, N.Y.; ACCOMPANIED BY FRED KOENIGSBERG

Senator McCLELLAN. Very well, Mr. Lyons, did you have a statement?

Mr. LYONS. Yes; I do have a statement.

Senator McCLELLAN. A written statement?

Mr. LYONS. Yes; I do.

Senator McCLELLAN. You may identify yourself for the record and proceed to read your statement, if you like.

Mr. LYONS. Thank you. I am Douglas Lyons, and I am executive director of Citizens Against Legalized Murder, Inc.

Senator McCLELLAN. I note that your statement is quite long. Do you want to read it?

Mr. LYONS. I am going to read an abbreviated version of the statement, Senator McClellan, but I do request that the entire statement be entered in the record.

Senator McCLELLAN. Very well, your entire statement will be received and printed in the record, and now if you wish to abbreviate it or summarize it, we will be glad to have you do so.

[Complete statement of Mr. Lyons follows:]

STATEMENT OF DOUGLAS B. LYONS, EXECUTIVE DIRECTOR, CITIZENS AGAINST LEGALIZED MURDER, INC.

I will limit my remarks today to one recommendation made by the Commission's Report: the abolition of the death penalty.[1]

DEATH PENALTY ABANDONED

The real question facing the Judiciary Committee and the Congress is not whether to abolish the death penalty, but when. For as the Commission found in its Working Papers, " . . . while de jure abolition has ebbed and flowed, a de facto abolition has practically become a reality in the United States." [2] Executions in this country have declined dramatically in the last generation. In 1935 there were a record hundred and ninety-nine (199) executions. In 1966 there was one, and in 1967 there were two executions. The last execution in the United States was on June 2, 1967—almost five years ago.

See references on p. 164.

Since 1930 (when the U.S. Department of Justice started keeping accurate statistics), the Federal government has carried out only thirty-three (33) executions—an average of less than one per year. The last Federal executive was in 1963—nearly a decade ago.[3] Outside the District of Columbia, there are no Federal prisoners now awaiting execution. As a practical matter, it seems to me the Federal government no longer executes people. But courts and state legislatures point to the retention of the death penalty by the Federal government as an example of the widespread acceptance of capital punishment. They thus justify and support the existence of capital punishment in their own states.

The death penalty is enforced only on an incredibly selective basis. Since 1965 there have been approximately 78,000 homicides in this country. During the same period roughly 600 men were sentenced to death for murder. Yet there have been only three executions since 1965.[4] In other words, in the last six years, we have executed only one two hundred and fiftieth of one percent of all murderers.

677 men and 7 women are now on death row in our nation. Yet, as we have seen, it is inconceivable that more than an arbitrarily handful of these prisoners will ever be put to death.

The selectivity with which the death penalty is enforced is best exemplified by the case of Eddie Slovik. During World War II, 40,000 American soldiers deserted. Theoretically they all could have been executed. In fact, however, only Slovik faced the firing squad—the only American soldier executed for desertion since the Civil War.[5]

The Supreme Court of the United States is now considering whether the death penalty, as selectively enforced, is "cruel and unusual punishment," prohibited by the Eighth Amendment. But the Congress need not await the Court's decision to decide for itself that human life is sacred, and that the Federal government should not be in the business of killing people.

DETERRENCE

The major argument used to support capital punishment is that it is a deterrent to serious crimes, especially to murder. But the death penalty is not a deterrent to murder.[6] The President's Commission on Law Enforcement and Administration of Justice examined the death penalty with particular reference to its alleged value as a deterrent. The Commission concluded:

"It is impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes. The most complete study on the subject, based on a comparison of homicide rates in capital and non-capital jurisdictions concluded that *there is no discernible correlation between the availability of the death penalty and the homicide rate.* This study also revealed that there was no significant difference between the two kinds of States in the safety of policemen. Another study of 27 States indicated that the availability of the death sentence had no effect on the rate of assaults and murders of prison guards." [7] (Emphasis added.)

In fact, virtually every study which has been conducted on the question of deterrence has concluded that capital punishment is not a deterrent to murder.[8]

If the death penalty *were* a deterrent to murder, it would follow that those states which have and use the death penalty would have lower murder rates than the states which have abolished it. But just the opposite is true. In 1970 the death penalty states had an average of 7.7 homicides per 100,000 population, while the abolition states had an average murder rate of only 4.6. Furthermore, in 1970 the states which had the three highest murder rates were all states which have and use the death penalty: Georgia, South Carolina, and Florida. On the other hand, the states with the three lowest murder rates in 1970 were all abolition states: Maine, Vermont, and North Dakota. If the death penalty were a deterrent to murder, the situation would be reversed. That is, the abolition states would have the highest murder rates, and the states which have capital punishment would have the lowest murder rates. This is not the case.[9]

Discussing the problem of murder, J. Edgar Hoover, a supporter of the death penalty, pointed out that:

" * * * police are powerless to prevent a large number of these crimes, which is made readily apparent from the circumstances or motives which surround criminal homicide. The significant fact emerges that most murders are

See references on p. 165.

committed by relatives of the victim or persons acquainted with the victim. It follows, therefore, that *criminal homicide is, to a major extent, a national social problem beyond police prevention.*" [10] (Emphasis added)

I agree.

Far from deterring murder, the continued existence of the death penalty is a serious danger to society. Capital punishment may in fact encourage murder. Three of the last four men executed in this country wanted to be executed, and they committed their crimes so that they would be executed.[11]

The question is often asked: What about the victims? Our history is clear—capital punishment has done nothing for the victims. We are told that capital punishment will prevent the murderer from killing again. But we know that murderers have the lowest recidivism rate of any criminal group.[12]

Capital punishment serves no legitimate social end. The criminal law should do more for the victim than seek revenge. To protect society, we must not rely upon the ineffective weapon of capital punishment.

We must, I believe, seek new means to rid our society of the plague of murder. I suggest a national campaign to seek out and study the factors which lead to and cause murder. Such a study might begin with an examination of the murderers now on death row, and of the thousands of murderers who are imprisoned under lesser sentences. Another aspect of the homicide problem which might be studied is the glaring fact that each year over half of all homicides are carried out with guns.[13]

The facts are clear. Capital punishment does not stop murder. If we wish to deal with the problem of murder we must seek out its causes.

WORLDWIDE ABOLITION OF CAPITAL PUNISHMENT [14]

By abolishing the death penalty, the Federal government will not only demonstrate that it rejects the notion that grave social problems can be solved only through the use of force: this country will take the civilizing step of joining the long list of nations throughout the world which have already abolished the death penalty.

Only France and Spain among the Western European nations outside the Soviet bloc still prescribe death for murder and other peacetime crimes. In the Western Hemisphere, this country stands virtually alone in keeping the death penalty. Capital punishment for murder, rape, and kidnaping has been almost completely abandoned in the Anglo-American world—except for the United States.

EXECUTING THE INNOCENT

In 1966 Queen Elizabeth issued a royal pardon to Timothy John Evans. Unfortunately, Evans had been hanged in 1950—for a murder he did not commit. The Evans case, in which England discovered that it had hanged an innocent man led to the abolition of the death penalty in Great Britain.[15]

I hope that the United States will do away with this form of legalized murder before we discover that we too have executed an innocent man and are forced to issue a posthumous pardon—the ultimate absurdity in a society which calls itself civilized.

CONCLUSION

The comments of the Archbishop of Canterbury after the abolition of capital punishment in England in 1969 are equally applicable to this nation. He said: "Abolition of capital punishment, once and for all, will help create a more civilized society in which to continue the search for the causes of crime . . . I am certain it will redound in very many ways to the advantage and honor of the nation." [16]

The abolition of the death penalty by the Federal government will demonstrate to the entire world that we believe, in act as well as word, that killing is wrong.

I speak for millions of Americans Mr. Chairman in urging you to adopt the Commission Report's recommendation that the Federal death penalty be abolished.

REFERENCES

1. See Chapter 36, "Final Report of the National Commission on Reform of Federal Criminal Laws".
2. National Commission on Reform of Federal Criminal Laws, "Working Papers", pp. 1350–1351.

See references on p. 165.

3. 15 of these executions were for murder; 6 were for kidnapping. (Under the Federal kidnapping statute, the death penalty provision of which was ruled unconstitutional by the U.S. Supreme Court in *United States* v. *Jackson*, 390 U.S. 750 (1968), kidnapping is a capital crime only if the victim is not released unharmed. In 5 of the 6 cases, the victims were killed by the kidnappers.); 6 were executed for sabotage. (All in the District of Columbia in 1942); 2 for rape on a Federal reservation; 2 for bank robbery with murder; and 2 for conspiracy to commit espionage.
   Source: U.S. Department of Justice, Bureau of Prisons, National Prisoner Statistics Bulletin No. 45, "Capital Punishment 1930–1968" (August, 1969) (hereinafter NPS) p. 29.
4. NPS, p. 7.
5. See Huie, "The Execution of Private Slovik".
6. See the attached memorandum on deterrence, and the excerpts from "The Case Against Capital Punishment", also attached.
7. "The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice" (1967) p. 143.
8. See T. Sellin in "To Abolish the Death Penalty, Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, 90th Cong., 2nd Sess. (1968) (hereinafter Hearings) p. 80.
9. Source: "Crime in the United States, Uniform Crime Reports—1970", U.S. Department of Justice, F.B.I. (1971) (hereinafter UCR) pp. 72–81. See the attached list of all states in descending order of homicide rate.
10. UCR, p. 9.
11. See the attached synopsis of these cases. Also see L. West in HEARINGS, p. 126.
12. See the attached excerpts from "The Case Against Capital Punishment" on recidivism.
13. UCR, p. 9.
14. See the attached memorandum on world-wide abolition.
15. See Kennedy, "Ten Rillington Place".
16. N.Y. Times, December 19, 1969, p. 9.

APPENDIXES

STATES IN DESCENDING ORDER OF MURDER RATE

State	Murder rate per 100,000 population, 1970	Total executions for murder, 1930–70	State	Murder rate per 100,000 population, 1970	Total executions for murder, 1930–70
Georgia	15.3	299	West Virginia[1]	6.2	39
South Carolina	14.6	120	Oklahoma	5.9	54
Florida	12.7	133	New Jersey	5.7	74
Alaska[1]	12.2	0	Wyoming	5.7	7
Alabama	11.7	106	Pennsylvania	5.3	152
Louisiana	11.7	116	Indiana	4.8	41
Texas	11.6	210	Kansas	4.8	15
Mississippi	11.5	130	Idaho	4.6	3
Kentucky	11.1	88	Oregon[1]	4.6	19
North Carolina	11.1	207	South Dakota	3.8	1
Missouri	10.7	52	Hawaii[1]	3.6	0
Arkansas	10.1	99	Connecticut	3.5	21
Illinois	9.6	90	Massachusetts	3.5	27
Arizona	9.5	38	Washington	3.5	46
New Mexico[1]	9.4	8	Utah	3.4	13
Maryland	9.2	44	Montana	3.2	6
Michigan[1]	8.9	0	Rhode Island[1]	3.2	0
Nevada	8.8	29	Nebraska	3.0	4
Tennessee	8.8	66	Minnesota[1]	2.0	0
Virginia	8.4	71	New Hampshire	2.0	1
New York[1]	7.9	327	Wisconsin[1]	2.0	0
California	6.9	280	Iowa[1]	1.9	18
Delaware	6.9	8	Maine[1]	1.5	0
Ohio	6.6	172	Vermont[1]	1.3	4
Colorado	6.2	8	North Dakota[1]	0.5	0

[1] Abolition State.

(Source: Crime in the United States, Uniform Crime Reports—1970, United States Department of Justice, pp. 72–81; U.S. Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, Capital Punishment, 1930–68.)

Source: Citizens Against Legalized Murder, Inc. Newsletter, Vol. V, No. 2, November 1971, C.A.L.M., Inc., P.O. Box 24 New York, N.Y. 10024.

THE LAST FOUR MEN EXECUTED IN THE UNITED STATES

[Source: Citizens Against Legalized Murder, Inc. Newsletter]

ANDREW PIXLEY

Convicted of the rape-slaying of two sisters, aged eight and twelve. He laughed when sentenced to death, testified that he did not want an appeal, and wrote to the State Supreme Court, asking that his appeal be withdrawn, when his lawyers filed one against his wishes. Executed, December 10, 1965, Wyoming.

JAMES DONALD FRENCH

Convicted of strangling his cellmate while serving a life sentence for an earlier murder. When the lawyer in his first murder case had French's first death sentence reduced to life imprisonment, French tried to have him disbarred. He told the psychiatrist that he committed the second murder because he wanted to be put to death. He wrote the Governor and State Supreme Court, asking that his execution not be delayed or prevented in any way. Executed, August 10, 1966, Oklahoma. (Note: French was the only man executed in the United States in 1966!)

AARON MITCHELL

Convicted of killing a policeman during a burglary attempt.

The day before his execution, Mitchell slashed his wrists with a razor blade he had hidden, but his wounds were dressed, and he was pronounced sane enough to be executed.

The next morning, April 12, 1967, at 10 a.m., just half an hour before a State Senate Committee opened hearings on a bill to abolish capital punishment, Mitchell was dragged into the gas chamber, screaming, "I am Jesus Christ!" Executed, April 12, 1967, California.

LUIS JOSE MONGE

Convicted of killing his wife and three of their seven children. While on death row, Monge contemplated suicide, but the prison's Catholic chaplain told him that the Church forbade suicide. However, explained the obliging chaplain, it was acceptable, in the eyes of the Church, for Monge to allow the state to commit suicide for him. Monge agreed. Executed, June 2, 1967—the last man executed in the United States.

THE CASE AGAINST CAPITAL PUNISHMENT

[The Washington Research Project]

Chapter III.A.

MURDERERS ON PAROLE

RESTRAINT AND REFORM

One of the recognized purposes of criminal punishment is the restraint of the individual offender. Retentionists often argue that only the death penalty can sufficiently protect the public against further crimes by convicted murderers. The evidence is overwhelming that they are wrong. Murderers are the least likely of all classes of offenders to return to crime when they are paroled or released. They make the best prisoners. In some cases, the worst murderers can be transformed into decent and even exceptional human beings. In situations in which this is not the case, the prisoners can be indefinitely incarcerated.

A. MURDERERS ON PAROLE

Numerous studies have examined the risk presented by paroled murderers, and the findings have always been the same—their rate of parole violation is by far the lowest of all classes of offenders. Paroled murderers almost never commit another murder, and few of them commit any serious crimes—in sharp contrast to persons released after serving sentences for other crimes, who show a shockingly high rate of recidivism. For example, between 1930 and

1961 in New York, 63 first degree murderers were released on parole. Sixty-one of them had been sentenced to death, but had had their sentences commuted. By the end of 1962, only one had committed another crime (burglary). In the same study, the rate of violation for all parolees was 41 per cent—22.8 per cent technical violations, and 18.2 per cent criminal arrests.

In California, 342 first degree murderers were paroled between 1945 and 1954. About ten per cent of them violated parole, but only 2.6 per cent committed new felonies—the lowest rate for any class of parolees. According to the same study, comparable rates of felony recidivism for parolees convicted of some other crimes were; auto theft—31.2 per cent; forgery—30.2 per cent; burglary—25.6 per cent; robbery—20.8 per cent.

Similar studies in other states have produced the same results. In Massachusetts the rate of parole violations for released murderers was only one-sixth the overall violation rate. A legislative report in Ohio concluded that "the 169 first-degree life-sentence prisoners paroled since 1945 have compiled the highest parole success rate of any offense group." When studies in nine different states were grouped, it was found that of 1293 first degree murder parolees, only 71 violated their paroles. Only nine of them were convicted of a second felony, and only one of a second murder.

It might be argued that statistics from death penalty states are slanted because the worst murderers are executed. However, the figures from abolition states are similar. Of 370 released life prisoners in Wisconsin, only 18 committed parole violations. In Michigan, of 164 paroled first degree murderers between 1930 and 1959, only four violated parole and only one committed another felony.

There seem to be two primary reasons for the excellent parole record and low recidivism rate established by murderers. First, they are on the average somewhat older than other offenders when they commit their crimes and, because they serve much longer sentences, they are much older when released. Second, and more important, murderers are not usually professional or habitual criminals, but rather people driven to kill by exceptional situations of stress.

REFERENCES

1. Stanton, "Murderers on Parole," 15 Crime and Delinquency 149 (1969).
2. California Assembly, Interim Committee Reports, Vol. 20, No. 3, "Problems of the Death Penalty and its Administration in California" (1957), at 12.
3. Massachusetts Department of Correction, *An Analysis of Convicted Murderers in Massachusetts: 1943–1966* (1968).
4. Ohio Legislative Service Commission, "Capital Punishment" (1961).
5. HART HEARINGS at 110.
6. Wisconsin Legislative Reference Bureau, Bulletin #210, (March 1962).
7. HART HEARINGS at 110.
8. Stanton, *supra* note 1, at 153–154.

Chapter II

DETERRENCE

The argument most often urged in support of capital punishment is that it deters capital crimes more effectively than do penalties of imprisonment. Three main kinds of argument are heard on the question of deterrence—statistical argument from comparative crime rates, arguments from individual incidents and personal experience, and arguments based on assumptions as to the responses of potential murderers. None of them withstand careful examination.

A. Statistical Evidence

Crime statistics show no higher homicide rates in states with capital punishment than in those without. In response to the possibility that figures of this kind may reflect divergent social and cultural factors other than capital punishment, more sophisticated studies have compared homicide rates in contiguous states, where history, geography, and social economic conditions are similar. No matter how these figures are arranged and compared, they have consistently led social scientists to the same conclusion: "You cannot tell from . . . the homicide rates alone, in contiguous states, which are abolition and which are retention states; this indicates that capital crimes are dependent upon factors other than the mode of punishment."

In the best known of these studies, Professor Thorsten Sellin compared homicide rates between 1920 and 1963 in abolition states with the rates in neighboring and similar retention states. He found that on the basis of the rates alone it was "impossible to identify the abolition state" within each group. A similar study comparing homicide rates in states recently abolishing the death penalty and neighboring retention states during the 1960's reached the same results.

Michigan became the first state to abolish capital punishment in 1846, and it has never restored the death penalty. Comparisons between Michigan and the bordering retention states of Ohio and Indiana—states with comparable demographic characteristics—have shown no significant differences in homicide rates.

Students of capital punishment have also studied the effect of abolition and reintroduction of the death penalty upon the homicide rate in a single state. If the death penalty has a significant deterrent effect, abolition should produce a rise in homicides apart from the general trend, and reintroduction should produce a decline. After examining statistics from 11 states, Professor Sellin concluded that "there is no evidence that the abolition [of capital punishment] generally causes an increase in criminal homicides, or that its reintroduction is followed by a decline. The explanation of changes in homicide rates must be sought elsewhere." In Delaware, the most recent state to abolish and then restore capital punishment, the homicide rate was actually lower during the period of abolition than before or after.

Other criminologists have examined the short term deterrent effects of capital punishment. One study compared the number of homicides during short periods before and after several well-publicized executions during the Twenties and Thirties in Philadelphia. It was found that there were significantly more homicides in the period after the executions than before—the opposite of what the deterrence theory would suggest. Another short term study in Philadelphia tested the hypothesis that the pronouncing of the death sentence, with its attendant publicity, would deter homicides. It found no significant difference in homicide rates for equal periods before and after sentence of death was pronounced in four widely publicized trials during the 1940's.

In Chicago, three capital cases received extensive press coverage during 1962, and two of them resulted in executions in that year. There had been only one execution in the city in the previous 16 years. The publicity surrounding the cases did not affect the homicide rate in the city, which fluctuated according to typical seasonal patterns, independently of the executions.

Some retentionists argue that, whether or not the death penalty deters murder in general, it does discourage, the killing of policemen. Empirical studies fail to support this theory. The rate of police homicides during the period 1919–1954 was not significantly different for 182 cities in retentionist states (1.3 per 100,000 population) than in 82 comparable cities in states which did not have capital punishment (1.2 per 100,000). During the years 1961–63, 140 police officers were killed by criminals or suspects, all but nine of them in retention states. In abolition states, 1.31 officers per 10,000 officers were killed, and 1.32 in the retention states bordering on them. A survey of state police departments revealed that 71 officers had been killed in 18 retention states, while six abolition states reported a total of only six killed. Detailed analysis of the data failed to show any added protection for state police in the death penalty states.

In contrast to the studies we have received, we have found no published study that gives any support to the theory that the use of the death penalty reduces the number of murders. Retentionists frequently argue that there is no way of knowing how many people are deterred by the death penalty since these people do *not* commit murders and hence are not identified. But those deterred by capital punishment should appear—statistically—in the capital crime rates of abolition jurisdictions. According to all the evidence, they simply are not there.

Admittedly, these studies do not *conclusively* prove that the death penalty has no special deterrent effect, because the available crime rates do not distinguish between capital and noncapital homicides, and because of imperfections in the nature of the control population groups with which homicide rates are compared. But in no area of public policy are social science or statistical studies conclusive of the relevant facts. Social and political decisions must always be made on limited and imperfect information; sound public policy is made on the basis of the weight of the evidence available. In this area, there can be no

doubt but that the weight of the evidence is against the claim of deterrent effect. While retentionists ask for *conclusive* proof that the death penalty does not deter, abolitionists in turn need only ask for *any substantial evidence* that it does; none can be provided.

B. Personal Experience

Faced by the strong statistical case against the deterrent theory, retentionists, particularly law enforcement officials, sometimes argue from personal experience, often relating anecdotes of criminals who have told police that they modified their criminal activity to avoid the death penalty. For example, the Los Angeles Police Department reported to a California Senate Committee considering the abolition of the death penalty that during the course of one year, 13 robbery suspects had told police that they used unloaded or simulated guns "rather than take a chance on killing someone and getting the gas chamber." And in 1959, newspapers reported that an escaped convict had released hostages at the state line because he feared the death penalty for kidnapping in the neighboring state. In other instances, law enforcement officials have argued that the death penalty has a unique deterrent value, based on their general experience with criminals.

But for every individual account tending to show deterrence, there are many that indicate the contrary. Clinton Duffy, former Warden of San Quentin Prison and a correctional officer for over 30 years, asked thousands of prisoners convicted of homicide or armed robbery whether they had thought of the death penalty before their act. Not one had. Robbers who used unloaded or toy pistols told him they had done so not out of fear of execution, but because they did not want to hurt anyone and only wanted money. When he asked why they told police officers that fear of the death penalty motivated them, they typically responded that it seemed like a good thing to say at the time.

Anecdotes illustrating the death penalty's lack of deterrent effect abound in abolitionist literature. Charles Justice, an inmate in the Ohio State Penitentiary assigned to housekeeping duties in the death house, suggested and designed improvements in the prison electric chair. He was released on parole, and within a few months returned to the penitentiary convicted of murder in the first degree. He died in the electric chair he had helped design. Similarly, an inmate at San Quentin helped install the lethal gas chamber there. After his release, he killed three people, and was sentenced to death. Finally, a policeman in Delaware who had forcefully argued for restoration of capital punishment in that State on the grounds of its deterrent value killed his wife just ten days after the penalty was restored in 1961.

Moreover, if reports of individual cases are to be considered, it should be noted that there are numerous reports of psychotic individuals who are apparently driven to kill by the existence of the death penalty itself. Many murderers kill themselves after their crime; a few apparently wish to die at the hands of the state. Dr. Louis West, Professor of Psychiatry at the University of Oklahoma, described several cases:

"Recently an Oklahoma truck driver had parked to have lunch in a Texas roadside cafe. A total stranger—a farmer from nearby—walked through the door and blew him in half with a shotgun. When the police finally disarmed the man and asked why he had done it, he replied, 'I was just tired of living.'"

"In 1964 Howard Otis Lowery, a life-term convict in an Oklahoma prison, formally requested a judge to send him to the electric chair after a District Court jury found him sane following a prison escape and a spree of violence. He said that if he could not get the death penalty from the jury he would get it from another, and complained that officials had failed to live up to an agreement to give him death in the electric chair when he pleaded guilty to a previous murder charge in 1961.

"Another murderer, James French, asked for the death penalty after he wantonly killed a motorist who gave him a ride while hitch-hiking through Oklahoma in 1958. However he was 'betrayed' by his Court-appointed attorney who pleaded him guilty and got him a life sentence instead of the requested execution. Three years later French strangled his cell-mate for no obvious reason; a deliberate, premeditated slaying. He has been convicted three times for that crime, declared legally sane and sentenced to death each time. This sentence he deliberately invites in well-organized, literate epistles to the Courts and in provocative challenges to the jurors. During a psychiatric exam-

ination in 1965 French admitted to me that he had seriously attempted suicide several times in the past but 'chickened out' at the last minute, and that a basic motive in his murdering another prisoner was to force the State to deliver the electrocution to which he feels entitled and which he deeply desires.

"Many other examples may be found in which the promise of the death penalty consciously or unconsciously invites violence. Sellin reviewed a number of them. Werthan's analysis of Robert Irwin, who attempted suicide by murder, is a classic. Some who seek execution even borrow somebody else's murder! A few months ago Joseph Shay in Miami admitted that he had falsely confessed to an unsolved murder 'because I wanted to die.' "

In short, reports of individual incidents can be collected to support each thesis concerning the death penalty—that it deters, that it has no deterrent effect, and that it actually encourages capital crime. Similarly, men with long experience in dealing with criminals have found support for each of these theses in the totality of that experience. Arguments and claims of this sort tend to neutralize each other, and because of their unsystematic character they give litle help in settling the basic factual question whether or not the death penalty is an effective deterrent.

C. The Psychology of Deterrence

Retentionists often discount statistical evidence, and argue that the deterrent effect of the death penalty is obvious as a matter of common-sense psychology—men fear deaths above all else, hence the threat of death must deter. The argument has appeal at first glance; the ordinary citizen knows he is less likely to exceed the speed limit where the penalty is loss of license than where it is a ten-dollar fine. By the same common sense reasoning, should not some potential murderers be deterred by a possible death penalty?

On closer examination, however, the analogy is unsound. A large percentage of homicides are within families, or result from emotional entanglements, and occur in circumstances suggesting that the killers have been driven beyond their breaking point by hatred or frustration. Another large group of homicides occur between acquaintances as a result of arguments, most of them on the public street—again circumstances which do not suggest deliberation or a weighing of consequences. Alcohol was found to be associated with nearly two-thirds of criminal homicides in one study.

In American law, killings occurring during the commission of a felony are treated as first degree murder, punishable with death in capital punishment jurisdictions, regardless of whether that killing is unpremeditated or even if it is accidental. Many robberies and associated killings which lead to the imposition of the death penalty are committed by addicts who need money to feed their habit and are unlikely to be in a calm, deliberative state. A killing associated with rape is frequently unplanned. This is also true of accidental killings during the commission of other felonies.

Some homicides are simply the senseless murder of strangers. In some cases, such killers are found insane, but under the narrow prevailing definition of legal insanity, many are not. Whether or not they are legally insane, these aimless killers must be sufficiently deranged from normal patterns of thought that the notion of their weighing potential penalties is absurd.

All the kinds of homicide described above may amount to first degree murder as our law defines it, and hence may be punished by death in capital jurisdictions. What studies and statistics exist suggest that killings of this kind make up the bulk of our criminal homicides. But in none of them does it seem plausible that the murderer has made any meaningful "decision to kill" at all, much less one which turned on his consideration of the likelihood of being executed after capture, trial and sentence.

Turning from these typical cases to consider the "rational killer"—and we do not know how many of them exist—several considerations make it unlikely that the death penalty would play a large part in his thought. First, since the penalties for murder, whether death or a long prison sentence, are both so severe as to destroy the future of anyone subjected to them, the creme would not be committed by a rational man unless he thought there was little likelihood that he would be caught. For this reason, the difference in deterrent

effect between the possibility of execution and a maximum of life imprisonment must be small to the vanishing point.

Worldwide Abolition of the Death Penalty

Source: Citizens Against Legalized Murder, Inc. Newsletter, Volume V, No. 2, November 1971, C.A.L.M., Inc., P.O. Box 24, N.Y., N.Y. 10024.

WORLDWIDE ABOLITION

This table lists abolitionist jurisdictions outside the U.S. by year of *de jure* abolition, except for Lichtenstein, Luxembourg, Nicaragua, and Surinam, for which the last execution year is given to mark the beginning of *de facto* abolition. Nine of the listed jurisdictions retain execution as the penalty for certain extraordinary civil offenses (the 4 Australian jurisdictions, Canada, Israel, Nepal, New Zealand, and United Kingdom); 8 permit the death penalty in wartime or under military law (Brazil, Denmark, Finland, Italy, Netherlands, Norway, Sweden, and Switzerland); and two executed Nazi collaborators after World War II (Netherlands and Norway).

Argentina	1922
Australia (Federal)	1945
New South Wales	1955
Queensland	1922
Tasmania	1968
Austria	1968
Belgium	[1] 1863
Bolivia	1961
Brazil	1946
Canada	[2] 1967
Colombia	1910
Costa Rica	1880
Denmark	1930
Dominican Republic	1924
Ecuador	1897
Finland	1949
Germany, West	1949
Greenland	1954
Honduras	1957
Iceland	1940
India, Travencore	1944
Israel	1954
Italy	1944
Lichtenstein	[3] 1798
Luxembourg	[3 4] 1821
Mexico (Federal)	1931
29 of 32 States	1931–70
Monaco	1962
Mozambique	1867
Nepal	1950
Netherlands	1886
Antilles	1957
New Zealand	1961
Nicaragua	[3] 1892
Norway	1905
Panama	1915
Portugal	1867
San Marino	1848
Surinam	[3] 1927
Sweden	1921
Switzerland	1942
United Kingdom:	
Great Britain	1965
Northern Ireland	1966
Uruguay	1907
Vatican City State	1969
Venezuela	1863

[1] Excludes 1 soldier executed in 1918.
[2] Statute abolishing capital punishment for murder expires after a 5-year period (beginning 1967) if not renewed.
[3] *De facto* only: date is last execution.
[4] Excludes one.

ABOLITION STATES

(This table lists abolition States, with date of *de jure* abolition)

Alaska	1957
Hawaii	1957
Iowa	1965
Maine	1887
Michigan	[1] 1847
Minnesota	1911
New Mexico	[2] 1969
New York	[3] 1965
North Dakota	[4] 1915
Oregon	1964
Puerto Rico	1929
Rhode Island	[5] 1852
Vermont	[2] 1965
Virgin Islands	1957
West Virginia	1965
Wisconsin	1853

[1] Death penalty retained for treason until 1963.
[2] Death penalty retained for murder of police officer or prison guard, or for commission of second unrelated murder.
[3] Death penalty retained for murder of police officer and for any homicide by life term prisoner.
[4] Death penalty retained for treason and for murder by life term prisoner incarcerated for murder.
[5] Death penalty retained for murder by life term prisoner.

Mr. LYONS. This is my associate, Fred Koenigsberg.

Senator MCCLELLAN. Very well. You may proceed.

Mr. LYONS. I am honored to be here today, Senator, and I will address myself only to one recommendation made by the Commission's report, dealing with the abolition of the death penalty.

Death penalty abandoned: The real question facing the Judiciary Committee and the Congress is not whether to abolish the death penalty, but when. For as the Commission found in its working papers, "* * * while de jure abolition has ebbed and flowed, a de facto abolition has practically become a reality in the United States."

Executions in this country have declined dramatically in the last generation. In 1935 there were a record 199 executions. In 1966 there was one, and in 1967 there were two executions. The last execution in the United States was on June 2, 1967—almost 5 years ago.

Since 1930, the Federal Government has carried out only 33 executions—an average of less than one per year. The last Federal execution was in 1963—nearly a decade ago. Outside the District of Columbia, there are no Federal prisoners now awaiting execution. As a practical matter, it seems to me the Federal Government no longer executes people. But courts and State legislatures point to the retention of the death penalty by the Federal Government as an example of the widespread acceptance of capital punishment. They thus justify and support the existence of capital punishment in their own States.

The death penalty is enforced only on an incredibly selective basis. Since 1965 there have been approximately 78,000 homicides in this country. During the same period roughly 600 men were sentenced to death for murder. Yet there have been only three executions since 1965. In other words, in the last 6 years, we have executed only one two-hundred-and-fiftieth of 1 percent of all murderers.

Seven women and 677 men are now on death row in our Nation. Yet, as we have seen, it is inconceivable that more than an arbitrarily chosen handful of these prisoners will ever be put to death.

The selectivity with which the death penalty is enforced is best exemplified by the case of Eddie Slovik. During World War II, 40,000 American soldiers deserted. Theoretically, they all could have been executed. In fact, however, only Slovik faced the firing squad —the only American soldier executed for desertion since the Civil War.

The Supreme Court of the United States is now considering whether the death penalty, as selectively enforced, is "cruel and unusual punishment," prohibited by the eighth amendment. But the Congress need not await the Court's decision to decide for itself that human life is sacred, and that the Federal Government should not be in the business of killing people.

Deterrence: The major argument used to support capital punishment is that it is a deterrent to serious crimes, especially to murder. But the death penalty is not a deterrent to murder. The President's Commission on Law Enforcement and Administration of Justice examined the death penalty with particular reference to its alleged value as a deterrent. The Commission concluded:

It is impossible to say with certainly whether capital punishment significantly reduces the incidence of heinous crimes. The most complete study on

the subject, based on a comparison of homicide rates in capital and non-capital jurisdictions concluded that there is no discernible correlation between the availability of the death penalty and the homicide rate. This study also revealed that there was no significant difference between the two kinds of States in the safety of policemen. Another study of 27 States indicated that the availability of the death sentence had no effect on the rate of assaults and murders of prison guards.

In fact, virtually every study which has been conducted on the question of deterrence has concluded that capital punishment is not a deterrent to murder.

If the death penalty were a deterrent to murder, it would follow that those States which have and use the death penalty would have lower murder rates than the States which have abolished it. But just the opposite is true. In 1970 the death penalty States had an average of 7.7 homicides per 100,000 population, while the abolition States had an average murder rate of only 4.6. Furthermore, in 1970 the States which had the three highest murder rates were all States which have and use the death penalty. Georgia, South Carolina, and Florida. On the other hand, the States with the three lowest murder rates in 1970 were all abolition States: Maine, Vermont, and North Dakota. If the death penalty were a deterrent to murder, the situation would be reversed. That is, the abolition States would have the highest murder rates, and the States which have capital punishment would have the lowest murder rates. This is not the case.

Discussing the problem of murder, J. Edgar Hoover, a supporter of the death penalty, pointed out that:

* * * police are powerless to prevent a large number of these crimes, which is made readily apparent from the circumstances or motives which surround criminal homicide. The significant fact emerges that most murders are committed by relatives of the victim or persons acquainted with the victim. It follows, therefore, that criminal homicide is, to a major extent, a national social problem beyond police prevention.

I agree.

Far from deterring murder, the continued existence of the death penalty is a serious danger to society. Capital punishment may in fact encourage murder. Three of the last four men executed in this country wanted to be executed, and they committed their crimes so that they would be executed.

The Federal Government's solution to the deplorable increase of the police murders in this country is to award $50,000 to the widows of the policemen. I think this gesture is willfully inadequate and does not solve the problem.

Mr. BLAKEY. Would abolishing capital punishment, solve it?

Mr. LYONS. It might lead us to seek answers to the reasons why people commit murders. I do not think that giving a widow $50,000 will——

Mr. MCCLELLAN. You do not think now that the present law of capital punishment is a deterrent, do you?

Mr. LYONS. Not at all, Mr. Chairman.

Senator MCCLELLAN. I would agree. I would not say, "Not at all". I agree that it is not, in many respects, the deterrent that it should be, but the reason is because it is not enforced.

Mr. LYONS. There are about 13,000 homicides in this country every year, Mr. Chairman. I cannot imagine that many executions.

Senator McClellan. I know, but they do not expect to be executed. We do not enforce the laws.

Mr. Lyons. Exactly.

Senator McClellan. That is the point that I am making. The trouble with the present approach is that we do not enforce the law. The criminal is not deterred.

Mr. Lyons. In 1935, we had a record number of executions, 199, and I do not think that we are going to exceed that record in these days.

Senator McClellan. We have not been, but the trouble is just that we have abandoned using capital punishment as a deterrent and, therefore, it is no longer a deterrent. Murders are increasing just like all other crimes because we are not enforcing the law, I think.

Mr. Lyons. I think murderers simply do not believe that they are ever going to get caught.

Senator McClellan. That is exactly right, and the second is that they do not believe that they will be executed if they are. So it is not a deterrent because it is not enforced.

Mr. Lyons. Well, I think most murderers, as Mr. Hoover pointed out, know the victim and it is a family squabble of some sort.

Senator McClellan. Whether they know them or not, if they murder, they murder.

Mr. Lyons. The typical murderer has no time to consider whether he is going to get caught or punished.

Senator McClellan. I remember that there was an amendment offered to the bill S. 3650, offered on the floor of the Senate to end capital punishment and we debated it, and I remember one of my colleagues gave the illustration that someone had talked to people in death row somewhere, possibly out in California, and asked them the question: "Was the fact that capital punishment was prescribed, was it a deterrent to him in committing the crime, and they said, no."[1] And I agree. That is the point I am trying to make, but had he asked the question, if I had asked you or anyone else present in this room at this moment who is contemplating murder, if you knew, if you committed the crime, you would be electrocuted for it, would you do it, it comes down to that, I think. The fact is today, why it is not effective is because it is not enforced.

Mr. Lyons. I have a different point of view on that matter, Senator.

Mr. Blakey. Mr. Lyons, could I ask you one question?

Senator McClellan. Let him finish. He wanted to answer.

Mr. Lyons. I think there are many reasons that those of us who have grudges of one variety or another do not commit murder: I think there are many reasons why we do not kill.

Senator McClellan. That is true but the fellow who will kill, there is one reason why he should not, and if he is going to be executed if he does, I think that's pretty good persuasion.

Mr. Lyons. The end result of that to follow that logic is that we have 13,000 executions every year.

Senator McClellan. Not necessarily because all of those were not first degree murders. We have different degrees of crime.

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[1] 116 Cong. Rec. S. 17506 (daily ed. Oct. 8, 1970).

Mr. LYONS. That is true.

Mr. BLAKEY. Let me ask you this, Mr. Lyons, as you suggest that most murders are the result of poverty and passion——

Mr. LYONS. Right.

Mr. BLAKEY. But you suggest that the death penalty be abolished in all cases. Would not your evidence really establish that it ought to be abolished in crimes of passion, but that it could be applied in other murders that are not a question of poverty or passion?

Mr. LYONS. The way that I analyze the types of murders, the first category is the people who know each other, the husband-wife, father-daughter, love triangle, any of those combinations; it seems to me that the death penalty never enters into that situation. None of the participants ever takes the time to consider what might happen if he kills his victim.

The second typical situation is, in a gas station or a liquor store holdup which turns into a murder. Men come into the station with guns and——

Mr. BLAKEY. Well, those are the easy cases.

Mr. LYONS. Those are most of them. That covers most of them.

Mr. BLAKEY. That is all right, but you want to abolish it in all cases.

Mr. LYONS. That is correct.

Mr. BLAKEY. What about the case of the organized crime hit man who is a professional killer, who does this for a living, cold, calculated, 7 days a week type business? Do you think that he ought to be—that kind of an assassin—subjected to the death penalty?

Mr. LYONS. I think that he should be caught. In the definition, a professional killer, obviously, thinks that he is never going to get caught, and usually he is not.

Mr. BLAKEY. If he does get caught?

Mr. LYONS. No; I do not think that he should.

Mr. BLAKEY. Let us take another slightly different illustration. What appropriate response can society make to an Adolf Eichmann, who is responsible for the murder of millions of Jews, simply because they are Jews, and not simply their death, but their cremation? Is life imprisonment an appropriate punishment for that kind of offense? For that kind of offender?

Mr. LYONS. I am not sure that there is any punishment that man could devise that would be appropriate for an Adolf Eichmann. I certainly think that the idea that we have avenged the 6 million by hanging Eichmann, that idea strikes me as preposterous, but the case is now closed.

Mr. BLAKEY. Would you suggest that the people in Israel who imposed the death penalty on Eichmann were preposterous?

Mr. LYONS. I do not think that, it was the people. I think the hanging was preposterous, not the people. Had the decision been up to me, I would have kept Eichmann as a reminder that this happened. I did not live through World War II. It is difficult for me sometimes to imagine what that period was like, and what the slaughter of the 6 million was like. It is to some extent ancient history for many people in this country. After all, half of the people in this country were born after the war, and it is now ancient history. If he

had been kept alive, I think, as a living memorial, if you like, lest we forget——

Mr. BLAKEY. I have no further questions. Mr. Chairman.

Senator MCCLELLAN. Thank you very much.

Mr. LYONS. The continued existence of capital punishment lulls us into the mistaken belief that we are "doing something" about murder.

Senator MCCLELLAN. What are we doing about it?

Mr. LYONS. We are not doing anything about it. That is the problem, Mr. Chairman.

Senator MCCLELLAN. That is what I am talking about. What do you recommend we do about it?

Mr. LYONS. I think that we should study; I think we should have a national campaign to determine why people commit murder.

Seantor MCCLELLAN. What are you going to determine by a campaign, what kind of campaign?

Mr. LYONS. I think the first thing we should do is to study the people we know who have already committed murders, the people on death row and the thousands of murderers in prison.

Senator MCCLELLAN. That has been studied for years.

Mr. LYONS. I disagree with you, Mr. Chairman. I think we have been telling ourselves that we are taking care of the problem, and we are executing them and that is going to solve the problem, but as you pointed out it does not solve the problem at all. And we have been killing people for eons, and it simply has not worked or helped us at all.

Senator MCCLELLAN. I think it has worked. I think many a murder has been prevented by reason of the fact that the man contemplating the murder contemplates his future punishment if he commits it. But, the fact that today that law enforcement is so lenient, people are committing crimes on the theory that, first, they are not going to get caught and, second, if they do get caught, there are so many technicalities that he can get out of it, and if he cannot get out of it and gets convicted, then he can probably get probation or something else. There are so many reasons today to persuade or to induce someone to take the risk, whereas if they knew they would be caught and punished, that would be a deterrent.

Mr. LYONS. I agree.

Senator MCCLELLAN. But because they know today that they will probably not be apprehended, convicted, or punished, they are willing to take the risk.

Mr. LYONS. Again, I go back to 1935, when we had a record number of executions, 199 executions out of thousands of murders and any statistician will tell you that those are pretty good odds, and I cannot imagine——

Senator MCCLELLAN. Well, we abandon the odds and the murder rate goes up, and up and up.

Mr. LYONS. The murder rate has been going up in the States that have the death penalty and the ones that do not——

Senator MCCLELLAN. Well, if they have it, why don't they enforce it?

Mr. LYONS. California has over 100 people on death row.

Senator MCCLELLAN. They are not enforcing it.

Mr. LYONS. They are trying.

Senator MCCLELLAN. They are not enforcing it and these people are waiting and they are hoping that they will be able to escape the death penalty. All of them are, and they are not being executed, and they keep waiting and they give reprieves and everything else.

Mr. LYONS. The State is trying to have them executed.

Senator MCCLELLAN. Sir?

Mr. LYONS. The State of California has the death penalty——

Senator MCCLELLAN. I know, but they are not executing it.

Mr. LYONS. Well, they have been estopped——

Senator MCCLELLAN. The jury may find them guilty, and the court may assess it, but then they find ways to avoid it, and it is not being enforced. That is what I am talking about.

Mr. LYONS. That is correct. They have been stayed by the courts.

Senator MCCLELLAN. Yes. I am not blaming the Federal Government necessarily or anybody else, but I am pointing out my theory of it, that one reason it is not a deterrent today, not as much as it should be, is that the law is not enforced.

Mr. LYONS. And I am suggesting that——

Senator MCCLELLAN. And you are suggesting that no enforcement will get better results.

Mr. LYONS. I understand a different concept when I say enforce. When I say enforce, I mean apprehend, not necessarily——

Senator MCCLELLAN Well, what good does that do if you cannot convict them?

Mr. LYONS. Well apprehend and convict them.

Senator MCCLELLAN. Well, it still does not do you a full measure of good to apprehend them, and convict and not punish them.

Mr. LYONS. I do not think there is any special good served by electrocuting people.

Senator MCCLELLAN. Well, that is an honest opinion and I defer from your standpoint, and it is a matter on which honest people disagree. But, I do think there is another side to it.

Mr. LYONS. I agree that, you know, this is something that we can disagree about. But it is worth noting, I think, that all of the studies that have ever been done on the death penalty and deterrence have concluded that the death penalty simply is not a deterrent.

Senator MCCLELLAN. I assure you, I get no comfort out of thinking of a death penalty, but I get no comfort either out of seeing people maliciously raped, murdered, and shot down like dogs, and no punishment being inflicted or imposed on those who do it. I do believe that people can go so far in their degradation today that they forfeit their right to life in a human society.

Mr. LYONS. I have a basic disagreement with you, obviously, on that point.

But, there is another point that I want to make. Two or three years ago, cabdrivers in New York State tried to have the State legislature restore the death penalty for the murder of cabdrivers. At the time, cabdrivers were being assaulted, murdered, and robbed at an alarming rate. The effort to restore the death penalty did not succeed. That is, the death penalty was not restored, but the cabdrivers took other steps. They installed bulletproof partitions——

Senator McCLELLAN. Well, what we are arguing about here is going to be decided by the Supreme Court pretty soon and it may hold the death penalty unconstitutional.

Mr. LYONS. I certainly hope so.

Senator McCLELLAN. I hope they do not. They have given enough encouragement to the criminals today in some of their decisions, and I think that that would be a further encouragement. But I hope that they would not do that, and what you hope and what I hope may or may not happen—but then if it does hold it is constitutional, then there is the right of the Congress, of course, to change it.

Mr. LYONS. Exactly.

Senator McCLELLAN. And then if the Congress with respect to the States, the Congress, I assume, could—I mean the country could, by due process prescribed by the Constitution—could pass a constitutional amendment prohibiting it anywhere in the United States as being cruel and inhumane punishment. Possibly that power is reposed: I am sure it is reposed in the people by constitutional amendment if they want to do it, should the Supreme Court hold it to be constitutional. So, there is a remedy somewhere for these things. And, as you point out, as I point out, there is honest differences of opinion. I do not ascribe to you the idea that you want lawlessness in the country because you may disagree with me. It is just a matter of differences of opinion on how you can best provide a deterrent to crime and how you can best prevent crime and deal with this crime menace that threatens the internal security of the Nation today.

Mr. LYONS. I agree. It is a question of finding other means.

To go back to the situation of the cabdrivers: they put in bullet-proof partitions, and they put in locked boxes which the cabdrivers did not have access to, and so——

Senator McCLELLAN. I do not know, but I do not think it is incumbent upon every citizen to try to do everything in the world he can to keep from being killed. There is some responsibility on the man who is going to kill him to be a law-abiding citizen.

Mr. LYONS. And there is some responsibility on the part of the State to protect the citizens.

Senator McCLELLAN. But they cannot do it by turning them loose.

Mr. LYONS. Mr. Chairman, I do not think they can do it by giving the widows $50,000.

Senator McCLELLAN. I did not say that, but it may be that the widow deserves it. A man that goes out, a policeman goes out and risks his life day after day to protect you and me, and some thug comes along and shoots him down in cold blood, murder, and we pay them very little to begin with—I think there is a moral obligation on the part of us to help that widow to some extent.

Mr. LYONS. I agree, but I do not think that is enough.

Senator McCLELLAN. What?

Mr. LYONS. I do not think helping the widow out is enough. I think we have to make sure that there are no more policemen murdered, and we are not doing anything about it.

Senator McCLELLAN. How are you going to do it?

Mr. LYONS. We have been executing killers for years, and it has not stopped it.

Senator McCLELLAN. How are you going to stop it?

Mr. LYONS. I suggest we find out why people kill policemen.

Senator McCLELLAN. Do you know anybody smart enough to find that out?

Mr. LYONS. I know that we have not even tried, Senator.

Senator McCLELLAN. They kill them because they want to kill them and they want to be free to commit crime, and the policeman interferes with them and they shoot them down. That is what they want, they want to be free to commit crime and they do not want to be apprehended and incarcerated.

Mr. LYONS. And if they knew they would be caught and perhaps incarcerated——

Senator McCLELLAN. And if they knew they would be electrocuted for it, some of them would not do it. That is my judgment.

Mr. LYONS. Well, I disagree.

Senator McCLELLAN. All right.

Mr. LYONS. The cab drivers in New York found that after they installed these boxes and partitions there were no more taxicab drivers killed in New York City in 1971. And the conclusion I draw from that is that factors other than the death penalty, availability of capital punishment, will help cut down on the murder rate.

Senator McCLELLAN. Have you finished your statement?

Mr. LYONS. No, I have not.

Senator McCLELLAN. All right, proceed.

Mr. LYONS. By abolishing the death penalty, the Federal Government will not only demonstrate that it rejects the notion that grave social problems can be solved only through the use of lethal force; this country will take the civilizing step of joining the long list of nations throughout the world which have already abolished the death penalty.

Only France, Spain, and Greece among the Western European nations outside the Soviet bloc still prescribe death for murder and other peacetime crimes. In the Western Hemisphere, this country stands virtually alone in keeping the death penalty. Capital punishment for murder, rape, and kidnaping has been almost completely abandoned in the Anglo-American world—except for the United States.

Executing the innocent: In 1966 Queen Elizabeth issued a royal pardon to Timothy John Evans. Unfortunately, Evans had been hanged in 1950—for a murder he did not commit. The *Evans* case, in which England discovered that it had hanged an innocent man led to the abolition of the death penalty in Great Britain.

I hope that the United States will do away with this form of legalized murder before we discover that we too have executed an innocent man and are forced to issue a posthumous pardon—the ultimate absurdity in a society which calls itself civilized.

Conclusion: The comments of the Archbishop of Canterbury after the abolition of capital punishment in England in 1969 are equally applicable to this Nation. He said:

> Abolition of capital punishment, once and for all, will help create a more civilized society in which to continue the search for the causes of crime * * * I am certain it will redound in very many ways to the advantage and honor of the nation.

The abolition of the death penalty by the Federal Government will demonstrate to the entire world that we believe, in act as well as word, that killing is wrong.

I speak for millions of Americans, Mr. Chairman, in urging you to adopt the Commission report's recommendation that the Federal death penalty be abolished. Thank you.

Senator McCLELLAN. Thank you very much.

All right. The next witness is Mr. Howard B. Gill. All right, Mr. Gill, will you identify yourself for the record, please, sir.

STATEMENT OF HOWARD B. GILL, DIRECTOR, INSTITUTE FOR CORRECTIONAL ADMINISTRATION, AMERICAN UNIVERSITY, WASHINGTON, D.C.

Mr. GILL. Yes, sir.

Senator McCLELLAN. You have a prepared statement?

Mr. GILL. Yes, I have.

Senator McCLELLAN. Very well. Do you want to insert your statement in the record and highlight it, or do you wish to read it?

Mr. GILL. I think I will just have it inserted in the record and I will highlight it.

Senator McCLELLAN. Very well.

[The prepared statement of Mr. Gill follows:]

STATEMENT OF HOWARD B. GILL, DIRECTOR OF THE INSTITUTE OF CORRECTIONAL ADMINISTRATION, WASHINGTON, D.C.

It has been a privilege to examine certain portions of the Hearings before your Subcommittee on Criminal Laws and Procedures on February 10, 1972 and the Final Report of the National Commission on Reform of the Federal Criminal Laws; and it is an honor to be asked to comment on certain portions of that Report.

I have the highest regard for Professor Louis B. Schwartz, Staff Director of the National Commission, whom I met 25 years ago and for several members of the Advisory Committee whom I know. Since the invitation to appear before your Committee was received only on February 1, I must confine my comments to very limited portions of the Report particularly those dealing with Imprisonment, Pre-sentence Reports, Parole, and Capital Punishment.

I have been particularly interested in the statement made by Senators Hruska and Hart on February 10, 1971 (page 93) that "in the hearings on the bill S. 1760, there were no witnesses who appeared to oppose the abolition of the death penalty". Also Professor Schwartz' statement that "the Code is not addressed to procedural question in general" and Senator McClellan's reply, "If I have that power, it is invoked." (page 111).

Since I am opposed to the abolition of capital punishment *provided certain procedures are adopted* surrounding its application to persons convicted of a capital offense, what I have to say today regarding capital punishment may appear irrelevant. However, I ask your indulgence and patience in the hope that my comments may offer some suggestion for a middle ground between the extremes of abolition and retention while meeting the arguments of both sides.

CORRECTIONS

Although the Commission proposes to change the title of Title 18 from "Crimes and Criminal Procedures" to "Crime and Corrections" (page 155), there is nothing in the Final Report which deals with corrections in correctional institutions. Chapter 32 (pages 437–447, # 3201–3205) entitled "Imprisonment" considers only matters of sentencing and disposition by the courts and might just as well have been included under Chapter 30 entitled "General Sentencing Provisions". Since a person deprived of freedom is still subject to judicial concern, this seems like a serious omission.

The rights of prisoners awaiting trial, or under serious disciplinary action affecting the length or conditions of incarceration, or under confinement in general, such as the right to be treated or not be treated, the right of privacy, the right to communicate, the right to observe one's religion, etc.; the distinction between prisoners' rights and privileges; the definition of different types of prisons as well as prisoners; the minimum requirements of institutions which may be considered "correctional"; the distinction between administrative and judicial actions in prison management; what constitutes cruel and unusual punishment, etc.—all such subjects have been before the courts for consideration and adjudication.

A Commission in South Carolina studying these matters reports that it has considered hundreds of court decisions bearing on these topics.[1] The "Hand Off Doctrine" no longer governs the judiciary. The courts are exercising more and more jurisdiction over persons who have been deprived of their freedom by judicial action. A revision of Title 18 cannot well ignore these matters, all of which have been of judicial concern in recent years especially in Federal Courts.

In this connection, it may be of interest to note that no member of the Commission, or of the Advisory Committee, or of the Staff, or among the Consultants, had had experience in the operation of a correctional institution. Under the leadership of Chief Justice Warren Burger, corrections and correctional institutions have become of prime concern in the United States and findings regarding them should be included in Title 18 of the United States Code. The Subcommittee is justified in seeking further study of Court findings regarding the administration of correctional institutions. For if the Congress does not act, the Courts will legislate.

PRESENTENCE COMMITMENT FOR STUDY

The proposal of the Commission for Presentence Commitment for Study is a most constructive suggestion which will be welcomed by all who wish to see the sentencing procedure based upon an adequate understanding of each case. I have only one suggestion. Since the tendency in so many diagnostic studies of this sort is to wander far afield in the so-called "complete study of the defendant", I propose that after the word "health in the 11th line of #3004 there be inserted the words, *"and especially the significant problem or problems involved in the offense under consideration"*. Too often in the desire to understand or "rehabilitate" the offender, the real causes and problems involved in his criminality are overlooked. (#3004, Presentence Commitment for Study, page 427).

PAROLE

In Chapter 23, Parole (pages 452–457), I find nothing relative to the composition or qualifications of members of parole boards. Since such boards operate under semi-judicial procedures affecting the length and conditions of sentence, frequently their operation and findings are of equal, if not greater significance, than those of the original court of jurisdiction. After conviction, nothing is of greater importance to the convicted person than the quality and composition of the membership of the Parole Board.

Another important consideration concerns the rights of due process at hearings involving the granting or the revocation of parole. Since such hearings may result in many years of imprisonment, they take on the nature of a semi-judicial determination of evidence, counsel, and other matters which entitle the offender at least to some of the rights of due process.

Consideration by the Subcommittee of both the composition and qualification of members of parole boards and the rights of due process at parole board hearings would be most helpful.

CAPITAL PUNISHMENT [2]

On pages 463–464, the Commission has presented arguments pro and con capital punishment. I shall comment only briefly on one or two of these points.

First, I want to emphasize the distinction presented by the Commission between *individual deterrence and social or general deterrence.* There is no conclusive proof that individual deterrence does or does not apply to the threat of capital punishment among convicted or potential convicts. However, is has taken our culture 300 years to create in the general public the consen-

See footnotes on p 210.

sus that killing another person is one of the most heinous offenses and therefore deserving the most severe penalty. To reduce murder to the level of robbery cannot help but dilute that "conscience of the community (which) creates inhibitions against such conduct". Thus the *moral "sanctity of life"* argument advanced in favor of abolition of the death penalty may be just as valid in supporting of retaining it.

The argument that capital punishment falls *"unequally on rich and poor, black and white"* and "must operate almost by chance" is applicable to the entire system of criminal justice; it is not peculiar to capital punishment. Similarly with the argument that *"law enforcement is generally impeded and the system of criminal justice loses credibility"* by reason of the retention of capital punishment. Such arguments should be addressed to the whole system of criminal justice. They are not peculiar to a particular sanction.

SELF-DEFENSE AND STATE RESPONSIBILITY

One argument against the abolition of capital punishment which is not included in the Commission's summary is that having restricted by law or implication the necessity for citizens to arm in self-defense against the criminal, the State has assumed the responsibility for the defense of its citizens, and that such responsibility may extend to killing the offender. Certainly such killing of the offender at the time of the offense is considered justified. The execution of the offender at some later date is merely an extension of the right of self-defense exercised by the State. In spite of the time element, the State may not refuse this responsibility. Again, the so-called "moral" argument against capital punishment must succumb to the well recognized right of self-defense whether exercised by an individual or by the State acting in his place.

DEATH OR LIFE IMPRISONMENT AUTHORIZED FOR CERTAIN OFFENSES

There are some 30 or more offenses in the United States for which the death penalty can be invoked. Most of these are acts leading to death or forcible rape. To reduce these to acts affecting only certain officials such as the President or Vice President of the United States, policemen or prison officers, etc. is discriminatory. There is also no evidence to support thet claim that such laws add any protection to such persons. In reality, such laws avoid the real issues involved. (#3601, Comment, page 465).

AGGRAVATING AND MITIGATING CIRCUMSTANCES [3]

The proposal for establishing both aggravating and mitigating circumstances as a basis for determining whether capital punishment or some lesses penalty should be applied, is eminently sound. This would help to avoid some of the objections to a general imposition of capital punishment in all convictions for murder, rape, and related crimes. (#3604, Criteria for Determination, pages 467–468).

CAPITAL PUNISHMENT AS POSITIVE MOTIVATION FOR REFORM

I should like to add another suggestion for your consideration. It has been stated by the advocates of abolition that there is no positive value to a sentence of capital punishment; that it treats only the symptom, but ignores the disease. I propose that the death penalty be retained as a positive force in the reform of persons convicted of capital offenses.

I propose (1) that all persons convicted of a capital offense be sentenced conditionally to capital punishment (2) with a finding by the jury of either aggravating or mitigating circumstances; (3) that such convicted persons be remanded to a diagnostic center for thorough observation and diagnosis; (4) that on findings as to the probable problem or problems underlying the offense, the convict be given the opportunity for treatment toward change; (5) that as long as constructive change is demonstrated, the execution of the sentence shall be held in abeyance; (6) if in the opinion of those in charge of such treatment, such change is sufficient to warrant release under supervision (either work-release or parole), recommendations to this effect shall be made to the committing court, and if approved, the convicted person shall be released under such conditions as are appropriate; and finally, (7) if no adequate change is noted, their recommendations for execution of the sentence shall be made to the court, and appropriate action follows.[4]

See footnotes on p. 211.

This process may require one, two, five, ten, fifteen, twenty years of treatment depending upon all the factors involved—the nature of the offense and of the offender, the reaction of the public, and the skill of the treatment. Fortunately, the art and science of human relations has advanced sufficiently to enable professionally trained persons to measure and evaluate the results of such treatment.

Life imprisonment for crime too frequently results in the reduction of the convicted to the state of a vegetable. No one has yet devised a program for treating the life prisoner. However, treatment for any crime is based on creating motivation for change. *Motivation for change is always based on anxiety for need satisfaction.* The most powerful motivation for change is anxiety for survival. Even some so-called incurable psychopaths (such as Carl Chessman) have changed under the anxiety for survival. To abolish capital punishment is to remove the most powerful motivation for change in the case of persons convicted of a capital offense.

Such a proposal will meet all the valid objections of those who now favor the abolition of the death penalty and it will satisfy most of the arguments in favor of its retention. It will in addition provide a positive force for the treatment of persons convicted of a capital offense. By providing for observation, diagnosis, and treatment for change in the case of persons convicted of a capital offense, any innocent persons will be saved, deprived minority persons will be helped, both individual and social deterrence will be strengthened, society's responsibility for self-defense of its citizens will be maintained, and social outrage will be satisfied. Incidentally, such a proposal will provide a civilized answer to the fate of the 600 or more persons now awaiting execution in the United States as well as a humane and just method of dealing with persons convicted of capital offenses in the future.

SUMMARY

(1) The absence of any findings regarding numerous judicial questions now before Federal courts relative to the administration of correctional institutions is a serious lack in the Report of the Commission, (Chapter 32, pages 437–447) and the Subcommittee is justified in seeking further advice on these questions.

(2) The proposal for Pre-sentence Commitment for Study is widely recognized as sound, professional procedure.

(3) Consideration of the qualifications and composition of members of Boards of Parole, and the rights of due process in hearings before Boards of Parole is recommended.

(4) Social Deterrence (the "conscience of the community") would be seriously diluted by the abolition of capital punishment; and the moral "sanctity of life" upheld by the retention of capital punishment.

(5) The unequal application of capital punishment and the impediment of the criminal justice system are characteristics of the entire system, and are not peculiar to capital punishment.

(6) Since the power of self-defense has been largely assumed by the State, the State may not refuse the responsibility to implement it, but is morally justified, regardless of the time eletment, in applying the extremet sanction, if necessary, to defend its citizens.

(7) The limitation of capital punishment to offenses against selected individuals is both discriminatory and ineffectual.

(8) The recognition of aggravating and mitigating circumstances in capital offenses, as suggested by the Commission, is well founded, and should answer many of the objections to capital punishment.

(9) Capital punishment may be used as a positive force in the reform of persons convicted of capital offenses as outlined in the seven steps proposed. Such a program will meet most of the objections of the abolitionists and most of the arguments of those who favor the retention of capital punishment. These proposals offer a civilized means of reforming the great majority of persons convicted of a capital offense.

HOWARD B. GILL.

FOOTNOTES

1. Court Decisions Research Project, Hubert M. Clements, Director, South Carolina Department of Corrections, P.O. Box 766, Columbia, S.C., 29202.
2. Sellin, Thorsten, Ph.D., "*Capital Punishment*", Federal Probation, Administration Office of U.S. Courts, Washington, D.C., June 1961.

McCafferty, James A., "*Major Trends in the Use of Capital Punishment*", Federal Probation, Administrative Office of U.S. Courts, Washington, D.C., June 1961.

"*Capital Punishment 1930–1968*", NPS Bulletin, No. 45, Department of Justice, Bureau of Prisons, Washington, D.C. August 1969.

"*Should we Abolish Capital Punishment in California?*", The Commonwealth, Vol. XXXIX, No. 45, Part Two, San Francisco, 19, Cal., Nov. 11, 1963.

Mattick, Hans W., "*The Unexamined Death*", An Analysis of Capital Punishment, 2nd Ed., John Howard Association, 608 South Dearborn St., Chicago, Ill., 60605, 1966.

"*Capital Punishment*", The Prison Journal, Vol. XXXVIII, No. 2, Pennsylvania Prison Society, 311 S. Juniper St., Philadelphia 7, Penn., October 1958.

Ibid., "*A Bibliography on Capital Punishment and Related Topics—1948–1958*"; pp. 41–45.

"The Death Penalty," Crime and Delinquency, vol. 15, No. 1, National Council on Crime and Delinquency, 44 East 23d St., New York City, N.Y., January 1969.

3. Murdy, Ralph G., "*A Moderate View of Capital Punishment*", Federal Probation, Administrative Office of U.S. Courts, Washington, D.C., June 1961.

4. Gaddis, Thomas E. and Long, James O., "*Killer: A Journal of Murder*",

Senator McCLELLAN. Identify yourself for the committee, please.

Mr. GILL. Yes, sir, I am director of the Institute of Correctional Administration, Washington, D.C., and senior fellow of the Institute for Studies in Justice and Social Behavior, Washington College of Law of the American University.

Senator McCLELLAN. Very well. Your statement will be printed in full in the record and now you may proceed to highlight it.

Mr. GILL. I feel something like a white blackbird in this hearing, as I note in the hearings on bill S.1760, there were no witnesses who appeared to oppose the abolition of the death penalty. Now, I happen to oppose the abolition of capital punishment, provided that certain procedures are adopted.

Senator McCLELLAN. Provided what?

Mr. GILL. Certain procedures concerning it are adopted.

I would like to call attention to that portion of my statement dealing with corrections first. That is, in chapter 32, pages 437 to 447, paragraphs 3201 and 3205, entitled, "Imprisonment." It appears that this section considers only matters of sentencing and disposition by the courts. It might just as well have been included under chapter 30 entitled "General Sentencing Provisions" since all persons deprived of freedom are still subject to judicial concern.

I think this is a serious omission. There have been, as you know, in the past few years a great deal of interest in the Federal district courts with regard to the rights of prisoners awaiting trial, under serious disciplinary action, or just in general. There have been some questions as to the right of privacy, right to communicate, right to observe one's religion etc. In Arkansas, as you remember, the Federal district judge condemned the entire system; but when he was asked, "All right, what is a correctional system?" he had no reply.

By the way, there is a commission in South Carolina which is studying these matters, and its report has considered hundreds of court decisions bearing on these topics. In other words, the "hands-off doctrine" no longer applies, and the court are taking action with regard to corrections.

Now, it seems to me, Mr. Chairman, that the subcommittee is justified in seeking further study of court findings regarding the administration of correctional institutions. If the Congress does not act, the courts will continue to legislate.

I am very impressed with S. 2939 which has just been called to my attention. It seems to me that this is one of the most advanced proposals that we have had presented to us in years. It will help to give guidelines, at least, to the Federal courts in this matters of corrections which as Chief Justice Burger has pointed out is of very vital concern at this time.

I will just skip over one or two other points. I am very much impressed with the proposal for the presentence commitment for study. I would like to see such studies applied to the significant problems under consideration affecting criminality. So often, this sort of diagnostic study wanders far afield when they attempt to make a complete study of the offender and they get far away from criminality.

Senator McClellan. If I may, we have a rollcall vote. That means that I will have to go over there and vote, and I do not know whether there will be one or two. You never know, but would you be satisfied now to put your statement in the record and the other gentlemen here? Would he be satisfied to do that? I am trying to determine—I may not get back here, and I am trying to be as accommodating as I can.

Mr. Gill I am glad to wait.

Senator McClellan. Professor Carlson?

Mr. Carlson. Mr. Chairman, I am at your pleasure on this.

Senator McClellan. Well, will you do this—I may have to keep you here and I do not know what I will have to do once I get over there—would you mind placing your statement in the record and that questions possibly would be submitted to you in writing as a follow-up for explanation. Would you be willing to do that?

Mr. Carlson. Yes, indeed.

Senator McClellan. Thank you very much. I will let your statement be placed in the record, and I appreciate that cooperation with us. We set these things and never know.

Off the record.

[Off the record discussion.]

Senator McClellan. Thank you very much. Very fine.

Mr. Gill. I would like to speak to just one other subject, and that is the section on pages 463–464, in which the Commission presented some arguments pro and con capital punishment. There always seems to be two extremes, either those of abolitionists who want to abolish capital punishment for everyone or those in favor of capital punishment for everyone. I would like to propose that capital punishment is not effective when applied to merely certain offenses or to certain people. It never has been effectual and I think it is, moreover, discriminatory. I am much impressed with the proposal that there be aggravating and mitigating circumstances presented as guidelines in the imposition of capital punishment.

Now, I would like to speak for just a moment or two on capital punishment as a positive motivation for reform. To save the time of the committee, I will read a paragraph or two in this statement.

Senator McCLELLAN. Now, just a moment. I am sorry——

Mr. GILL. Would you rather I did not?

Senator McCLELLAN. It is not that I would rather you do not, but I am going to miss the vote. I will give you all the time I can, but I did not want you to get started because I will have to stop you.

Mr. GILL. You stop me when you wish. Do you want to stop now?

Senator McCLELLAN. Go ahead.

Mr. GILL. All right. I propose: (1) that all persons convicted of a capital offense be sentenced conditionally to capital punishment, (2), with a finding by the jury of either aggravating or mitigating circumstances; (3), that such convicted persons be remanded to a diagnostic center for thorough observation and diagnosis; (4), that on findings as to the probable problem or problems underlying the offense, the convict be given the opportunity for treatment toward change; (5), that as long as constructive change is demonstrated, the execution of the sentence shall be held in abeyance; (6), if in the opinion of those in charge of treatment, such change is sufficient to warrant release under supervision, either work-release or parole, recommendations to this effect shall be made to the committing court and if approved, the convicted person shall be released under such conditions as are appropriate; and, finally, (7), if no adequate change is noted, then recommendation for execution of the sentence shall be made through the court and appropriate action follow.

Senator McCLELLAN. Thank you very much.

Mr. GILL. That is my constructive proposal.

Senator McCLELLAN. Thank you very kindly and would you be willing, of course, if we need to ask you some questions, for us to submit them to you by letter? I am awfully sorry, gentlemen.

[Staff reference paper follows:]

FEDERAL STATUTES IMPOSING THE DEATH PENALTY

Offense	Title	Section
A. United States Code:		
Causing death of another by willful damaging, destroying, etc., of aircraft or motor vehicles, or their facilities	18	34
Assassination of a Congressman or Congressman-elect	18	351
Gathering or delivering national defense information to aid a foreign government	18	794
Causing death through explosives	18	844(d), (f), (i)
Murder in the first degree within the special maritime and territorial jurisidiction of the United States	18	1111
Killing certain Federal officers and employees	18	1114
Causing death of another by mailing injurious articles	18	1716
Presidential, Vice-Presidential, etc., assassination, kidnapping	18	1751
Rape within special maritime or territorial jurisdiction of the United States	18	2031
Treason	18	238
Aircraft piracy	49	1472(i)[1]
Uniform Code of Military Justice—Title 10, U.S.C.:		
Desertion in time of war	885	85(c)
Assaulting or willfully disobeying a superior commissioned officer in time of war	890	90
Mutiny or sedition	894	94
Misbehavior before the enemy	899	99
Subordinate compelling surrender	900	100
Improper use of countersign in time of war	901	101
Forcing a safeguard	902	102
Aiding the enemy	904	104
Spying in time of war	906	106
Willfully hazarding a vessel	910	110
Misbehavior of sentinel in time of war	913	113
Murder	918	118(1)(4)
Rape and carnal knowledge	920	120(a)
B. District of Columbia Code:		
Murder in the first degree	22	2401

FEDERAL STATUTES CARRYING THE DEATH PENALTY IN WHICH EXECUTION IS, OR APPARENTLY WOULD BE BARRED BY THE DECISION IN UNITED STATES v. JACKSON, 390 U.S. 570 (1968)

Offense	Title	Section
A. United States Code:		
Kidnapping	18	1201
Causing death by wrecking a train	18	1992
Causing death while engaged in a bank robbery	18	2113(e)
Violations of the Atomic Energy Act	42	2272, 2274, 2275, 2276
B. District of Columbia Code:		
Rape	22	2801

APPENDIX

THE LIBRARY OF CONGRESS LEGISLATIVE REFERENCE SERVICE

CAPITAL PUNISHMENT: PRO AND CON ARGUMENTS

By Joyce Vialet, Education and Public Welfare Division

WASHINGTON, D.C. *August 3, 1966.*

SECTION 1—AGAINST CAPITAL PUNISHMENT

I. THE STATE SHOULD NOT KILL

The central argument against capital punishment may be summarized as follows: In the absence of a clearly demonstrable benefit to society, it is morally wrong and pragmatically unsound for the State to be invested with the right to take the life of its citizens.

Abolitionists argue, first, that it is morally wrong to kill, and no less so for the State than for the private individual. Michael V. DiSalle, the former Governor of Ohio, writes:

> First of all, I believe that taking a human life, even to pay for a life already taken, is immoral * * *. Society, echoing the Ten Commandments, says: Thou shalt not kill. Then society illogically continues: Killing is wrong, and in order to prove it is wrong, we will kill you if you kill.[1]

While the moral argument, based as it is on the belief in the sanctity of human life, leads some abolitionists to argue that capital punishment is wrong regardless of whether or not it benefits society, this absolute stand is unusual. The following statement by Herbert L. Packer, Professor of Law at Stanford University, is representative of the more prevalent view:

> The case is not that the sanctity of human life is an absolute but rather that it is a highly cherished value that should give way only upon a persuasive showing that some other, more important end will thereby be served * * *. Unless it can be shown that capital punishment serves prime social purposes that cannot otherwise be served, the claims of its proponents are unconvincing.[2]

Abolitionists argue, secondly, that this belief in the sanctity of the individual human life is the central value of our society and should be supported by the actions of the State. They contend that, if the institution of capital punishment does not actually undermine this value, and many believe that it does, it clearly does nothing to reinforce it. Governor Edmund G. Brown of California writes:

> I oppose capital punishment, too, because it brutalizes man; because a society that takes human life cannot invest its citizens with respect for human life.[3]

A *New York Herald Tribune* editorial entitled "The State Should Not Kill" puts it more strongly:

> Whenever the state takes life it cheapens life. Capital punishment panders to man's basic instincts, cloaking retribution in the mantle of the law, coloring vengeance with respectibility, setting a public example for private violence.[4]

Third, abolitionist argue that the State should be granted legal power to take the lives of its citizens only if this is clearly necessary for self-defense

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[1] Michael V. DiSalle, *The Power of Life or Death* (1965), p. 6.
[2] Herbert L. Packer *et. al.*, "Mr. Barzun and Capital Punishment," *The American Scholar* (Summer 1962), p. 440.
[3] Edmund G. Brown, *Statement on Capital Punishment* (1963), p. 2.
[4] "The State Should Not Kill," *New York Hearld Tribune* (March 27, 1960), in *Capital Punishment*, ed. Grant S. McClellan (1961) pp. 83–84.

which, in the case of capital punishment, means the protection of its law-abiding citizens. In the United States, this argument takes the traditional form of the need to protect the rights of the individual against the State, and is summarized as follows by Michael V. DiSalle:

"Those of us who are interested in the freedom of the individual realize that government exists only with those powers that have been delegated to it by the people, and the more restrictions we place upon government and the exercise of the powers that have been delegated to it, the more certain we are that we will have a democratic type of society where the freedom of the individual prevails. It should certainly not be the purpose of people within a society to delegate to government any more authority than that necessary to perform its functions; I feel that the delegation of the right to take away life can only be justified when a certain purpose is to be served; that purpose might be the preservation of society itself against a threat from the outside or a threat from within." [5]

In general, abolitionists in the United States are more willing to grant that the death penalty would be justified by its clear necessity for the protection of "society itself against a threat from the outside of a threat from within," than are, for instance European abolitionists. The latter tend to be more concerned than American abolitionists with the danger that capital punishment will be used illegitimately by the State. A representative European view on this issue is expressed as follows by the late Albert Camus:

* * * for 30 years crimes of state have vastly exceeded crimes of individuals. I shall not even mention wars—general or local. . . . I am referring here to the number of individuals killed directly by the State, a number that has grown to astronomic proportions and infinitely exceeds that of "private" murders. There are fewer and fewer men condemned by common law, and more and more men executed for political reasons. * * * It is not so much against the individual killer that our society must protect itself then, as against the State. Perhaps this equation will be reversed in another thirty years. But for the present, a legitimate defense must be made against the State, before all else. Justice and the most realistic sense of our time require that the law protect the individual against a State given over to the follies of sectarianism and pride.[6]

In summary, then, most American abolitionists argue that the death penalty should stand or fall on proof that it is necessary to protect society. Furthermore, because of the moral and practical evils they see as inherent in the institution of the death penalty, abolitionists argue that the burden of proof rests with its supporters.

It is generally agreed by both sides in the capital punishment controversy that there are two ways in which the death penalty might afford society unique protection. First, it might be a more effective deterrent against major crime than life imprisonment. The deterrent issue is defined as follows by Hugo Adam Bedau:

The only question [regarding deterrence] which must be settled is this: is long term imprisonment (on the assumptions that it is less savage and more easily administered by the judicial system than capital punishment) as good a deterrent for the major crimes currently punished by death? This formulation leaves open, as it should, the question of how close either penalty is to a completely effective deterrent; and it does not raise the further question, as it shouldn't, whether death might be a better deterrent for certain crimes (e.g., against property) that no one would think of punishing in this way. To put it another way, the real dispute over deterrence is this: how many capital crimes, if any, have been (or might be) prevented by the threat of execution, which would not have been (or would not be) prevented by the threat of imprisonment? [7]

Second, the death penalty might be the only way of protecting society against the incorrigibly dangerous. The debate with regard to this second function centers around the issue of whether or not the death penalty is in fact necessary, whether this protection is not provided equally well by measures short of execution.

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[5] American Bar Association, Section of Criminal Law, *1959 Proceedings* (1960), pp. 5–6.

[6] Albert Camus, "Reflections on the Guillotine", *Evergreen Review* (No. 3, 1957), p. 48.

[7] *The Death Penalty in America*, ed. Hugo Adam Bedau (1964), p. 261.

Abolitionists argue that the death penalty has failed as a deterrent and is unnecessary as a protective measure. They argue that it should be abolished because there is no demonstrable proof that it affords society the unique protection which alone would justify its retention.

II. DETERRENCE

Hugo Adam Bedau defines the doctrine of deterrence and comments on its importance in the capital punishment controversy as follows:

* * * by far the most common way to employ a punishment as a preventative of crime is to adopt a sufficiently severe penalty so as to compel general obedience out of fear of the consequences of disobedience—the classic doctrine of deterrence. Even though deterrence cannot override every other concern in formulating a rational penal philosophy, there is no doubt that the death penalty's efficacy as a deterrent is the major factual issue in dispute between abolitionists and retentionists.[8]

Abolitionists argue that the death penalty's efficacy as a deterrent is, at the very least, called into serious question both by the available statistics and by the evidence of modern psychology.

A. The Statistics

In a study of the death penalty which he prepared at the request of the American Law Institute, Thorsten Sellin notes:

Any one who carefully examines the * * * data is bound to arrive at the conclusion that the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent.[9]

Sellin analyzes the four ways in which the deterrent value of the death penalty would be evident if it, in fact, existed: It seems reasonable to assume that if the death penalty exercises a deterrent or preventive effect on prospective murderers, the following propositions would be true:

(a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects—character of population, social and economic condition, etc.—in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these states.

(b) Murders should increase when the death penalty is abolished and should decline when it is restored.

(c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crime occurred and its consequences are most strongly brought home to the population.

(d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than in those without it.[10]

In general, the various statistical studies which have been made in an attempt to test the deterrent value of capital punishment concern themselves with one or more of these four propositions.

It will be noted that the majority of the studies in this field have been conducted by Sellin. Professor Emeritus of Sociology at the University of Pennsylvania and President of the International Society of Criminology, Thorsten Sellin has been described as the "foremost statistician in the field of criminal law in the world."[11] He was the principal consultant to Great Britain's Royal Commission on Capital Punishment as well as to the majority of other official government commissions studying this subject. Bedau notes:

* * * [Sellin's] evidence has managed over the past decade to convince a wide variety of legislative committees throughout the English-speaking world, and not in every case where the members of these committees initially receptive to his conclusions.[12]

Contiguous Jurisdictions.—Sellin's studies of the homicide rates in contiguous jurisdictions with and without the death penalty are, in Bedau's words, "the cornerstone of the case against the deterrent superiority of the death pen-

[8] Bedau (ed.), *op. cit.*, p. 260.
[9] Thorsten Sellin, *The Death Penalty* (1959) p. 63.
[10] Sellin, *op. cit.*, p. 21.
[11] California Legislature, Senate Committee on Judiciary, *Hearing Report and Testimony. . .*(1960), p. 65.
[12] Bedau (ed.), *op. cit.*, p. 265.

alty over imprisonment." [13] Table 1 below shows the results of four of these studies, described by Mr. Sellin as follows:

The only fair comparison is one that takes into account regional differences and therefore compares the homicide rates of an abolitionist state with that of its neighbor states. The diagrams shown *** [see below] are based on such comparisons. They show the annual size of the homicide death rate per 100,000 population for the period 1920–1958 and the general trend of the rate for each set of states compared.[14]

Sellin's conclusion on the basis of these studies follows:

The striking thing about these diagrams is that within each set of states the rates are so nearly the same annually and the trends so closely alike that if the lines were not identified with each specific state, no one would dare to guess which lines represented the abolition states. * * *

It is proper to conclude that states which are similar in the character of their population, their urban and industrial development, and their mores have similar homicide rates, whether or not they have the death penalty. In other words, the presence of the death penalty for murder in a state appears to have no more influence on its homicide rates than the absence of the penalty in a comparable state has on the rates of that state. And, if our basic assumption is correct, what holds true for the homicide rates would hold true for the capital murder rates, were they obtainable.

When it once becomes generally understood that the amount and the trends of murder depend on demographic, social, economic, and political conditions, one would realize that the explanation for rises or falls in the statistics of this crime must be sought through a study of these conditions, and that through such a study alone could any possible remedy be found. To hope that this remedy could be found in the application of the death penalty or in its introduction is to grasp at a straw.[15]

TABLE 1.—CONTIGUOUS JURISDICTIONS: HOMICIDE DEATH RATES FOR SELECTED STATES [16]

DIAGRAM I

Homicide Death Rates, per 100,000 Population, in Maine, New Hampshire, and Vermont: 1920–1958

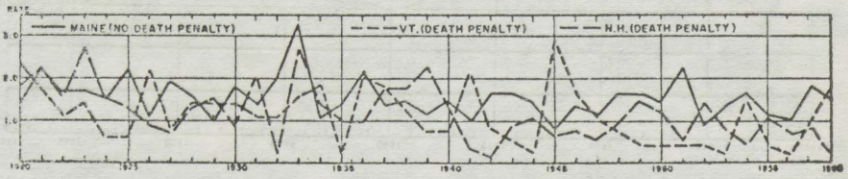
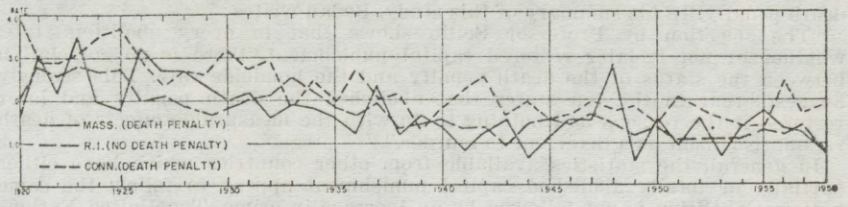


DIAGRAM II

Homicide Death Rates, per 100,000 Population, in Massachusetts, Connecticut, and Rhode Island: 1920–1958



[13] Bedau (ed.), *op. cit.*, p. 263.
[14] Thorsten Sellin, "Capital Punishment," *Federal Probation* (Sept. 1961), p. 6. See also Sellin, *The Death Penalty*, pp. 23–34.
[15] Sellin, "Capital Punishment, p. 6.
[16] *Ibid.*, pp. 7–8.

DIAGRAM III

Homicide Death Rates, per 100,000 Population, in Minnesota, Iowa, and Wisconsin: 1920–1955

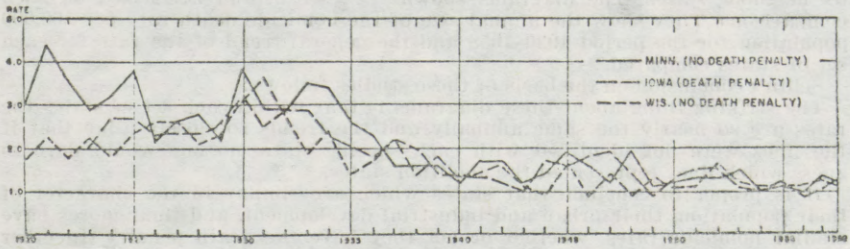
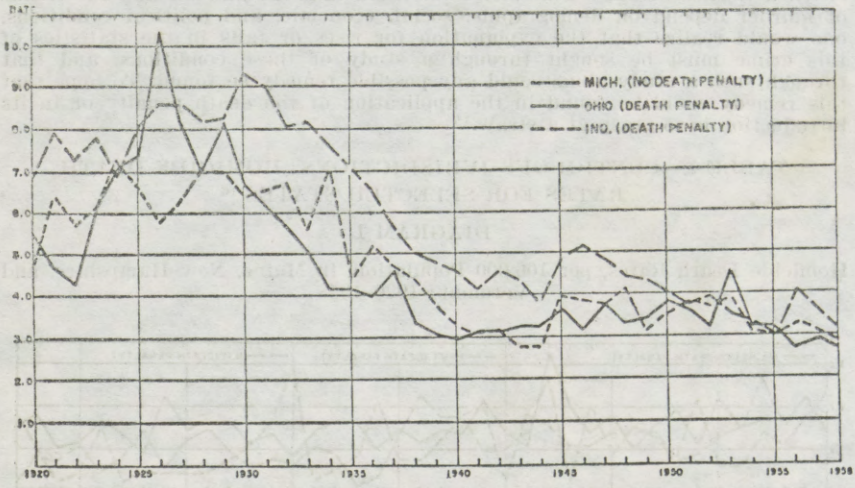


DIAGRAM IV

Homicide Death Rates, per 100,000 Population, in Michigan, Indiana, and Ohio: 1920–1958



Abolition and the Criminality Curve in the Same Jurisdiction.—Several studies have been made on the second assumption stated above by Sellin; namely, that, if capital punishment is a deterrent to murder, the homicide rate in a given jurisdiction should increase with the abolition of the death penalty and decrease with its restoration. Sellin has conducted such a study on the basis of the statistics available from states in this country which have abolished the death penalty. In his summary of this study, Bedau writes:

"The selection by Professor Sellin shows that in every abolition state, whether or not it later restored capital punishment, there is no correlation between the status of the death penalty and the homicide rate. This strongly suggests that in the ten states that abolished the death penalty and later restored it the reasons had nothing to do with the measurable effects of death vs. imprisonment as a deterrent to murder." [17]

In general, the statistics available from other countries which have either partially or totally abolished capital punishment appear to follow the same pattern: abolition is not followed by an increase in crime. The United Nations report, *Capital Punishment*, contains the following observation on the effects of partial abolition:

"All the information available appears to confirm that such a removal has, in fact, never been followed by a notable rise in the incidence of the crime no

[17] Bedau (ed.), *op. cit.*, pp. 333–334.

longer punishable with death. This observation, moreover, confirms the nineteenth century experience with respect to such offenses as theft and even robbery, forgery and counterfeiting currency, which have progressively ceased to be punishable with death; indeed, these crimes, so far from increasing, actually decreased after partial abolition." [18]

With regard to total abolition, the U.N. report concludes that, "The same general observation can usually be made regarding the total abolition of the death penalty." [19]

The Effect of Executions on a Community.—Studies have been made on the effect of a series of executions on the capital crime rate in the community where the executions occurred. The reasoning behind these studies is described by Sellin as follows:

"If the death penalty is a deterrent, its greatest effect should be shown through executions which are well publicized. Furthermore, the effect should be most noticeable in the community where the offense occurred, where the trial aroused wide publicity and the offender lived and had relatives, friends and acquaintances." [20]

Such a study was conducted in Philadelphia by Robert H. Dann.[21] He compared the number of homicides occurring 60 days before and 60 days after five different executions. A total of 91 homicides occurred in the periods following them. Nineteen of the 204 homicides resulted in a sentence of first degree murder. Of these, nine occurred in the "before" period and ten occurred in the "after" period. A similar study conducted by Leonard D. Savitz in Philadelphia a number of years later yielded similar results. Savitz concluded:

"There emerges, therefore, no pattern that would indicate deterrence. * * * It can be said in summary, that the author is aware that the short period of time under analysis and the extremely small number of murders dealt with prevent conclusive findings, but we must conclude from the data at hand that there was no significant decrease or increase in the murder rate following the imposition of the death penalty on four separate occasions." [22]

Police Safety.—The two extensive studies of the comparative safety of the police in jurisdictions with and without capital punishment do not indicate that the death penalty affords the police greater protection. Sellin conducted a major study of the comparative safety of metropolitan police described by him as follows for the American Bar Association Section of Criminal Law:

A few years ago, I sent a questionnaire to the chiefs of police in all cities with more than 10,000 population in the six states that at that time did not have the death penalty for murder, and in the states that bordered on them—seventeen in all. I asked them to give us year by year, beginning in 1920, the number of police killed by a criminal with a lethal weapon. We got a pretty good response—47 per cent—at least from all but the big metropolitan cities; a few of these responded but not enough to really make any comparison easy. We broke the information down in groups of cities by size; there were five or six population groups, so that the large city would not distort the information gained from smaller cities. We computed rates and found to our surprise that there was no difference in the information gathered between the states that had the death penalty and those that did not have it. There were as many police killed in the states with the death penalty, considering the size of the cities involved, as in the states without the death penalty. The argument of the police on the basis of that study falls by the wayside.[23]

This study indicated that the rate of police killings was in fact higher in death penalty states than in abolition states: 1.3 per 100,000 in the former, compared to 1.2 per 100,000 in the latter.[24]

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[18] United Nations, Department of Economic and Social Affairs, *Capital Punishment* (1962), p. 54.

[19] *Ibid.*, p. 55. See also Sellin, *The Death Penalty*, pp. 34–50.

[20] Sellin, *The Death Penalty*, p. 50.

[21] Robert Dann, *The Deterrent Effect of Capital Punishment* (1935); see James A. McCafferty, "Major Trends in the Use of Capital Punishment," *Federal Probation* (Sept. 1961), p. 20.

[22] Leonard D. Savitz, "The Deterrent Effect of Capital Punishment in Philadelphia" (1958), in Bedau (ed.), *op. cit.*, pp. 321–322. See also William F. Graves, "The Deterrent Effect of Capital Punishment in California" (1956), in Bedau (ed.), *op. cit.*, pp. 322–332.

[23] American Bar Association, Section of Criminal Law, *op. cit.*, p. 23.

[24] Sellin, *The Death Penalty*, p. 55.

A companion study of the comparative safety of state police was conducted by Donald R. Campion, S. J. Father Campion summarized his findings as follows:

"* * * we conclude that the data available to us after a survey of half the state police forces of the United States do not lend empirical support to the claim that the existence of the death penalty in the statutes of a state provides a greater protection to the police than exists in states where that penalty has been abolished." [25]

B. The Psychology of Deterrence

In the opinion of many abolitionists, the deterrent value of capital punishment has been seriously called into question by the evidence of modern psychology and penology. As the U.N. report on capital punishment notes, the majority of specialists in these fields are themselves abolitionists:

"* * * it will be noted that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists." [26]

This is substantiated by Bedau in his discussion of what Americans think about the death penalty:

"* * * psychiatrists, penologists and possibly social scientists and social workers generally, as well as higher governmental officials, tend to oppose the death penalty in this country at this time." [27]

In his anthology, *The Death Penalty in America*, Bedau summarizes what in his opinion are the two major abolitionist arguments; one of these arguments is a comprehensive statement of the abolitionist objections to the psychological validity of the death penalty as a special deterrent to murder.[28] According to this argument, murders are either premeditated, or they are not. In the case of unpremeditated murders, no punishment will be effective as a deterrent. Mr. Bedau's comment here reflects the conviction held by many that this category comprises a considerable percentage of those who commit violent crimes:

"When one considers that most of the undeterrables are likely to be suffering from one or another form of mental illness, and that considerable evidence exists to show that murderers and condemned men generally include a large proportion who are sick, it seems pointless to threaten such offenders with death." [29]

The argument continues that premeditated murders are committed by people who either do or do not expect to be caught. About the latter category, those who expect to be apprehended, Bedau comments:

In the latter case, there is nothing whatever gained (so far as controlling his behavior is concerned) by threatening to kill him as his punishment; for he is likely to try to kill himself (just as he is likely to surrender to the police right after his crime). Such cases are by no means rare.[30]

Abolitionists argue that, for this type of murderer the death penalty is, in fact, more apt to be an inducement than a deterrent. Sellin has noted the existence of:

"* * * good evidence that the availability of instruments used to inflict the punishment of death has induced people of unbalanced mind to seek that punishment as a devious means of suicide." [31]

In a section entitled "Capital Punishment as Cause for Murder" in the study he made for the American Law Institute, Sellin itemizes cases of people attempting to commit suicide by execution.[32]

It is equally difficult to see, the argument continues, what value as a deterrent the death penalty has for those who plan their murder on the assumption that they will get away with it. Bedau comments:

"Gangland killings, kidnappings for ransom, and a large proportion of all serious crimes are committed by those who think they will never be caught.

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[25] Donald R. Campion, "Does the Death Penalty Protect State Police?" (1955), in Bedau (ed.), *op. cit.*, pp. 314–315.
[26] United Nations, *op. cit.*, p. 62.
[27] Bedau (ed.), *op. cit.*, p. 236.
[28] *Ibid.*, pp. 270–272. See p. 16 below for a discussion of the second argument.
[29] Bedau (ed.), *op. cit.*, p. 271.
[30] *Ibid.*
[31] Sellin, "Capital Punishment," p. 4.
[32] Sellin, *The Death Penalty*, pp. 65–69.

The obvious, and probably the only, way to deter such persons is by increasing the effectiveness of law enforcement and criminal prosecution in the courts." [33]

This category of murderers, including as it does the gangland killer, is of considerable importance. It would seem that the deterrent theory should be applicable here, if anywhere: the gangster, murdering as a means to an end, would seem to be capable of rationally considering other possible ends of his action—for instance, his own death. However, the facts seem to justify the conviction of those engaged in organized crime that they have virtually no reason to fear the death penalty. Sellin testified as folows before the New Jersey Commission to Study Capital Punishment:

"Defenders of the death penalty would probably feel that if anybody deserved this punishment, it will be the hired killer in organized crime. It's a well-established fact that such murderers enjoy almost complete immunity, that the instances in which even a conviction has been secured are extremely rare, and that deterrence plays no role in this connection." [34]

This leaves one final category: "those who are sane and cautious enough to weigh the risk of punishment against the anticipated gain from crime, and who would decide that the risk is too great if the threatened punishment is death, but not great enough to deter them if it is only imprisonment.[35] Bedau quotes the following passage from the Ceylon *Report on Capital Punishment* as the answer to question, "How many such persons are there in the total population?":

"It would be most exceptional for a man to be insufficiently sane and normal to be deterred by the risk of a sentence of protracted imprisonment but yet sufficiently sane and normal to be deterred by the risk of his own execution, when both risks are at a level of contingency which he is doing his utmost to avoid." [36]

C. The Administration of the Death Penalty

Those opposed to the death penalty argue that the very way in which it is necessarily administered undercuts whatever deterrent effect it might have for those capable of exercising some degree of rationality. Bedau considers this to be one of the two major abolitionist arguments, and discusses it in some detail:

"Since the time of Beccaria, Bentham, Rush and Livington, most penologists have agreed that for any punishment to have optimum efficacy as a deterrent, the penalty must be imposed consistently, immediately and inexorably that is, on all offenders, promptly after their crime, and in such a way that the general public expects exactly this. But in practice, not one of these conditions is satisfied by the way capital punishment is administered. Only a small proportion of first degree murderers are sentenced to death and even fewer are executed. The delay in convicting and executing those who do get a death sentence is increasing and notorious. So, almost anyone who contemplates some horrible crime can see some chance in getting away with it, or at least in not having to pay the supreme penalty. If, in practice, the death penalty is no more effective a deterrent for murder, rape and kidnapping than imprisonment is, this may be the reason. One must either admit it, and keep capital punishment on other grounds, in the knowledge that it cannot be made a better deterrent than it is; or else abandon the jury system, the right of appeal, and deprive the accused of most of his basic constitutional rights in all capital cases, in the hopes of improving the deterrent efficacy of the death penalty; or else get rid of the death penalty itself in the confidence that imprisonment is on the evidence as good a deterrent and considerably simpler to administer." [37]

III. THE DEATH PENALTY AS A PROTECTIVE MEASURE

Most abolitionists agree that the institution of the death penalty would be justified by its necessity as a protective measure against the incorrigibly dangerous. The debate here differs from the debate about deterrence in that there is clearly no question about the effectiveness of capital punishment as a pro-

[33] Bedau (ed.), *op. cit.*, p. 271.
[34] New Jersey Commission to Study Capital Punishment, *Report* (1964), p. 13. See also Sellin, "Capital Punishment," p. 5.
[35] Bedau (ed.), *op. cit.*, p. 272.
[36] Quoted by Bedau (ed.), *op. cit.*, p. 272.
[37] Bedau (ed.), *op. cit.*, p. 270.

tective measure. The argument turns on the issue of whether or not the death penalty is, in fact, necessary. In so far as there actually is a danger to society from those found guilty of capital crimes, is it possible to provide protection by some means short of their death? Abolitionists argue that this danger is considerably exaggerated by retentionists and, more importantly, that life imprisonment is a complete adequate protective measure. Sellin comments:

"In the last analysis, the argument that the life sentence does not offer an adequate safeguard against further homicidal criminality by a murderer who is not executed appears untenable. Basically, those who advance it probably feel that the life sentence, in practice, is not an adequate *punishment* for murder." [38]

The abolitionist arguments on the issue of incapacitation are summed up as follows by the late Lewis E. Laws, the warden for many years of Sing Sing Prison:

"Murderers make the best prisoners. They are least troublesome to any warden, and often they accomplish a great deal behind bars. I know of none released during my wardenship at Sing Sing who reverted to crime. Furthermore, it is not true—at least in New York State—that a murderer whose death sentence is commuted to life imprisonment can easily obtain his freedom. The average period of incarceration among those who receive the second commutation is about twenty years. Granted that other states are too lenient, that would be an argument for a better administration of justice, not for putting people to death." [39]

A. "Murderers Make the Best Prisoners"

It is generally agreed that murderers do, in fact, make the best prisoners and that the percentage of violent crime committed by them in prison is negligible. A survey conducted in 1950 by the International Penal and Penitentiary Commission comparing the behavior of prisoners serving sentences for murder with the behavior of those serving sentences for other offenses clearly indicated this to be the case in countries abroad. Sellin discusses the results of this survey and continues:

"The same views as those* * *expressed by prison administrations in many European countries are held by American wardens and superintendents of correctional institutions. Lifers are generally considered to be among the best behaved prisoners. It would be unnatural were they not at times involved in disciplinary violations, and examples are known when some lifer has committed an assult in prison and even a homicide, but those appear to be very rare exceptions. Generally speaking, such murderous offenses are committed by prisoners serving sentences for other crimes than murder." [40]

B. The Danger from Released Murderers

Statistics indicate that the behavior of first degree murderers released on parole is, in the words of Sellin, "very good, much better than that of other prisoners who have been paroled, especially property offenders." [41] This is equally true of those who have been pardoned. Bedau comments:

"The general position of American penologists on the matter of pardoning (or paroling) murderers was stated succinctly a decade ago by the retired Director of the Federal Bureau of Prisons, Sanford Bates, when he informed the Royal Commission on Capital Punishment: "Cases of murder committed by persons pardoned from the death penalty are rare if not almost unknown." This is almost as true of all murderers, whether sentenced to death and commuted by the governor or sentenced to life imprisonment by the jury, and whether kept in prison or released * * * " [42]

Abolitionists are generally agreed that the misguided release of those who remain a danger to society indicates a need for the reform of a state's parole practices, rather than for retention or reinstatement of capital punishment. In the words of Robert G. Caldwell, a lawyer and noted criminologist:

"For example, it is clear that the possibility of releasing dangerous prisoners into the community could be reduced by improving the rehabilitative facilities

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[38] Sellin, *The Death Penalty*, pp. 78–79.
[39] Lewis E. Lawes, "Capital Punishment," *Encyclopedia of Criminology*, ed. Vernon C. Brannum and Samuel B. Kutash (1949), p. 44.
[40] Sellin, *The Death Penalty*, p. 72. See also Bedau (ed.) *op. cit.*, pp. 400–401.
[41] American Bar Association, Section of Criminal Law, *op. cit.*, p. 24.
[42] Bedau (ed.), *op. cit.*, p. 397; see pp. 397–399 for state statistics.

of our correctional institutions and by strengthening our pardon and parole procedures. An execution, it is true, absolutely eliminates this possibility; but since it is to be prescribed as punishment for a crime, one can hardly maintain that in a given case it should be used not so much because a certain offense has been committed but because we are too lenient and inefficient in the operation of our correctional systems." [43]

Moreover, abolitionists argue that the low rate of recidivism among paroled murderers indicates that in general dangerous prisoners are not being released, and that the danger of such releases is greatly exaggerated.

Finally, the abolitionist position on the alleged lack of a satisfactory alternative penalty is summed up as follows by Donald E. J. MacNamara, Dean of the New York Institute of Criminology:

"The record in abolition jurisdictions, some without the death penalty for more than one hundred years, both in the United States and abroad, in which imprisonment for indeterminate or stated terms has been substituted for the penalty of death, is a clear demonstration that alternative penalties are of equal or greater protective value to society than is capital punishment." [44]

IV. RETRIBUTION VS. VENGEANCE

Abolitionists do not accept the argument that capital punishment is defensible on the grounds of retribution, apart from any benefit it may afford society either as a superior deterrent or as a necessary protective measure. According to many proponents of capital punishment, some criminals are simply unfit to live: they have committed acts so heinous that the only appropriate punishment is death. This function of the death penalty is commonly referred to on the retentionist side as retribution and on the abolitionist side as vengeance.

Abolitionists argue that the motivation behind this use of the death penalty is of the same order as the irrationality which provoked the criminal to the act for which he is being executed. Arthur Koestler comments:

"Yet though easy to dismiss in reasoned argument on both moral and logical ground, the desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation or revulsion—whether the reasoning mind approves or not. This psychological fact is largely ignored in abolitionist propaganda—yet it has to be accepted as a fact. The admission that even confirmed abolitionists are not proof against occasional vindictive impulses does not mean that such impulses should be legally sanctioned by society, any more than we sanction some other unpalatable instincts of our biological inheritance. Deep inside every civilized being there lurks a tiny Stone Age man, dangling a club to rob and rape, and screaming an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the land." [45]

The purpose of the criminal law is to provide protection against man's irrationality and violence, not to furnish a means of expressing it. Abolitionists contend that the death penalty is a violation of this purpose. In the words of Theodore McKeldin, former Governor of Maryland:

"The function of the criminal law is to protect the law-abiding, not to sate society's lust for revenge. Only as a protector of the lives and property of honest men does it deserve the respect and support of honest men. Hence anything that tends to associate it with the idea of vengeance impairs its dignity and subtracts from the respect that intelligent people accord it. The argument that the death penalty is needed to allay public excitement is an argument against capital punishment, not in its favor." [46]

In summary, then, of the central argument against capital punishment, those who oppose the penalty believe that it does not deter would-be murderers more effectively than life imprisonment, and that life imprisonment is a fully adequate safeguard against those who have committed murder. In the words of Thorsten Sellin:

"The belief that the death penalty is a unique instrument for the protection of society against murder and superior to life imprisonment in this respect is not supported by any credible evidence now available to us." [47]

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[43] Robert G. Caldwell, "Why Is the Death Penalty Retained?", *The Annals* (Nov. 1952), pp. 48–49. For statistics and a discussion of the actual length of life sentences in various states, see Sellin, *The Death Penalty*, pp. 72–76.

[44] Donald E. J. MacNamara, "The Case Against Capital Punishment," *Social Action* (April 1961), p. 12.

[45] Arthur Koestler, *Reflections on Hanging* (1957), p. 100.

[46] Maryland Committee on Capital Punishment, *Report* (1962), p. 25.

[47] Sellin, "Capital Punishment," p. 9.

In the absence of "credible evidence" that the death penalty is necessary to protect society, abolitionists argue that its only purpose is to satisfy man's desire for vengeance. The acceptance of vengeance as a legitimate goal of the criminal law of a civilized state is, according to abolitionists, morally wrong and pragmatically dangerous.

V. THE DEATH PENALTY AND CRIMINAL JUSTICE

A number of the arguments against capital punishment relate to its alleged incompatibility with equitable and efficient criminal justice. The following statement by Herbert L. Packer of Stanford Law School is representative of the opinion of many, particularly in the legal profession, who oppose capital punishment:

"The case for abolition rests most securely, I think, on pragmatic considerations. Very simply, capital punishment is more trouble than it is worth. Criteria for its even-handed application are totally lacking; its effect on the administration of justice is malign and pervasive; it brings the law into disrepute." [48]

A. The Possibility of Error

A major argument in this area is the danger than an innocent man will be executed. The Marquis de Lafayette once said, "I shall ask for the abolition of the penalty of death until I have the infallibility of human judgment demonstrated to me." [49] The argument remains the same today. Sellin writes:

"Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed, perhaps after many years in prison, by the discovery of the real criminal." [50]

In *The Death Penalty in America*, Bedau abstracts "seventy-four cases occurring in the United States since 1893, in which a wrongful conviction of criminal homicide has been alleged and, in most cases, proved beyond doubt." [51] These cases resulted in the following penalties: [52]

Death sentence executed	8
Death sentence not executed	23
Life sentence	30
Less than life sentence	10
Conviction averted	3
Total	74

Bedau comments that while there is some doubt whether the right men executed were innocent, "no doubt, however, attaches to the fact that nearly two dozen men have been sentenced to death for crimes they demonstrably did not commit." [53] He also points out that 11 of the 30 life sentences occurred in abolition states.

Had the death penalty not been abolished in these states, it is likely that at least some of these eleven men would have received a death sentence and been executed.[54]

Several governors who have had to make the final decisions on executions have been particularly emphatic about the reality and seriousness of the danger of executing the innocent. Both Governor Edmund Brown of California [55] and Michael V. DiSalle, former Governor of Ohio,[56] recount incidents which illustrate this danger. Bedau points out that, reputedly, the States of Maine, Rhode Island, and Wisconsin abolished the death penalty during this century because of the hanging of innocent men.[57]

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[48] Packer, *op. cit.*, p. 441.
[49] Quoted by Otto Pollak, "The Errors of Justice," *The Annals* (Nov. 1952), p. 115.
[50] Sellin, *The Death Penalty*, p. 63.
[51] Bedau (ed.), *op. cit.*, p. 436; see pp. 434–452.
[52] *Ibid.*, p. 438.
[53] *Ibid.*, p. 440.
[54] *Ibid.*, p. 438.
[55] Brown, *op. cit.*, p. 6.
[56] DiSalle, *op. cit.*, p. 6.
[57] Bedau (ed.), *op. cit.*, p. 407.

B. Inequality of Application

Opponents of the death penalty are universal in their denunciation of the injustice with which this penalty is enforced. Mr. Bedau speaks for abolitionists in general in his comment that, "The whole pattern of treatment of capital convictions by the higher courts seems devoid of rhyme or reason." [58]

Abolitionists charge that racial prejudice, particularly against Negroes, is a major factor in the unequal application of the death penalty. They cite particularly statistics on execution for rape. The Federal Bureau of Prisons, in its 1965 national prisoner statistics bulletin on executions, indicates that during the period 1930–1964, nine-tenths of all executions for rape have been of non-white males.[59] On this subject, Bedau notes:

"* * * as *National Prisoner Statistics* shows, of the nineteen jurisdictions that have executed men for rape since 1930, a third of them have executed only Negroes. In these six states, the very existence of rape as a crime with an optional death penalty is, in the light of the way it has been used, strong evidence of an original intent to discriminate against non-whites. This was probably the purpose behind the decision in Tennessee in 1915 to abolish capital punishment for murder and treason, but to retain it for rape." [60]

According to abolitionists, a second factor in the inequitable use of the death penalty is reflected in the fact that with few exceptions, it is the "poor and friendless" who are executed. Because of the very nature of our law courts, the difference between life and death is frequently determined by the ability of the accused to provide himself with skilled legal counsel. Former Governor DiSalle writes:

"I have never seen a person of means go to the chair. It is the well-heeled gangster, the professional killer who can afford the best legal talent to defend him, who gets off with a lesser sentence. It is the poor, the illiterate, the underprivileged, the member of the minority group—the man who because he is without means is defended by a court-appointed attorney—who becomes society's blood sacrifice.

"The court-appointed defender, diligent though he may be, is always handicapped. Sometimes he is inept—there is no criterion of experience in criminal law to guide a court appointment—and always he lacks the staff and funds available to the prosecution. Without funds and personnel to investigate the background of jurors and witnesses, to check alibis and examine the evidence before trial, the court-appointed attorney and his client have two strikes against them before they even enter a plea." [61]

Abolitionists argue that the inequalities involved in the actual use of the death penalty undermine the justification of it on the basis of the protection it may offer society. They maintain the facts indicate that, far from serving a rational, legitimate purpose, the death penalty is an instrument of class and racial prejudice and a test of expensive legal ingenuity.

Abolitionists argue further that the way in which the death penalty is actually used completely invalidates any possible defense of it on the grounds of society's right to retribution. They state for instance, that it is difficult to defend the position that Negro rapists merit death while white rapists, for the most part, do not. Sellin comments:

"* * * If I were an adherent of the view of retributive justice, I might—if my emotions did not deprive me of my reason—wish to find out if retributive justice is efficiently and properly administered. * * * If only about 4 percent of those who actually commit murders in the first degree [are executed], a figure based on what we conservatively estimate to be the number of capital murders committed annually in the United States and the accurate knowledge we have of the number of executions, it is obvious that, whatever the elements may be that produce the attrition, retribution is but rarely achieved and in no equitable manner. Therefore, just as the death penalty has proved to fail as a special means of social protection, so it has failed as an instrument of retributive justice." [62]

C. The Administration of Criminal Justice

Abolitionists contend that the existence of the death penalty has a bad effect on the administration of criminal justice. This point of view is summed up as

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[58] Bedau (ed.), *op. cit.*, p. 410.
[59] U.S. Bureau of Prisons, *Executions 1930–1964* (April 1965), p. 10.
[60] Bedau (ed.), *op. cit.*, p. 413.
[61] DiSalle, *op. cit.*, pp. 10–11.
[62] Sellin, "Capital Punishment," *op. cit.*, p. 10.

follows in the report of the Florida Special Commission for the Study of the Abolition of Death Penalty in Capital Cases:

"When the life of an accused person is at stake, it is more difficult and takes longer to impanel juries because prospective jurors dislike such cases and are frequently disqualified because they do not believe in the death penalty. Trials become longer and more expensive and emotions are especially likely to confuse the issues. Indeed, the guilty person is more likely to escape punishment altogether because of the reluctance of the jury to convict and thereby make the death penalty a possibility. Appeals are more likely to result in reversals, and this brings on new and equally expensive trials. More are of the opinion that there would be many convictions for what are now capital crimes if life imprisonment replaced execution." [63]

The issue of the disproportionate amount of time involved in capital cases was the subject of a study conducted in 1961 by the American Bar Foundation, the research branch of the American Bar Association. The Foundation concluded that that the long delays in capital trials and in the carrying out of death sentences weakened public confidence in the law.[64] The study was prompted by the Caryl Chessman case, which began in June 1948 and ended with his execution on May 2, 1960. Abolitionists argue that, while this case is an extreme, it is not an anomaly. In 1957, two prisoners were executed in California after seven years of appeals and trials.

As the report of the Florida Special Commission indicates, another major objection in this area is that the emotion aroused by the spectacle of a man fighting for his life is not compatible with the just and rational administration of the law. Governor Edmund G. Brown of California has referred to the capital trial as "our modern equivalent of the Roman Circus." [65] The effect of this emotion on the trial itself is seen by many eminent lawyers to be deplorable. Mr. Justice Frankfurter, in his appearance as a witness before the British Royal Commission, said:

"When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the bar, the public, the judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life." [66]

The retentionist response to this category of arguments is that they indicate the need for legal reform, not the abolition of capital punishment.[67] Those opposed to the death penalty reply that recommending legal reform is no answer unless retentionists are, to quote Herbert L. Packer, "prepared to propose the solution that has so far eluded all students of the subject." [68] In fact, many abolitionists argue that the death penalty is a major factor operating against the reform of our criminal law. The late Professor Sam Bass Warner of Harvard Law School said that "the existence of the death penalty for first degree murder is one of the principal reasons, if not the main reason, why it is extremely difficult to get judges and legislators to remove procedural barnacles from our law." [69] Dr. Sheldon Glueck, a professor at Harvard Law School and an eminent sociologist, comments that the death penalty "bedevils the administration of criminal justic all the way down the line and is the stumbling block in the path of general reform." [70]

D. Technicalities of the Law

In the majority of jurisdictions which retain capital punishment, a person convicted of murder can only be sentenced to death if he is found to be legally sane and guilty of murder in the first degree. A number of eminent lawyers have argued that many of the abuses surrounding the death penalty stem directly from the inadequacy of the legal definition of sanity and the vague-

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[63] Florida Special Commission for the Study of the Abolition of Death Penalty in Capital Cases, *Report* (1965), p. 26.

[64] *New York Times*, Jan. 29, 1961, p. 60.

[65] Brown, *op. cit.*, p. 5.

[66] Quoted by Richard C. Donnelly, "Capital Punishment," in *Congressional Record*. Aug. 24, 1960, p. A6285.

[67] See below, pages 61–65.

[68] *Packer*, op. cit., p. 441.

[69] Quoted by Herbert B. Ehrmann, "The Death Penalty and the Administration of Justice" (1952), in Bedau (ed.), *op. cit.*, p. 433.

[70] Quoted by James A. McCafferty, "Major Trends in the Use of Capital Punishment," *Federal Probation* (September 1961), p. 21.

ness of what Herbert Ehrmann refers to as the "metaphysical" distinction between first and second degree murder.[71]

Mr. Justice Cardozo commented as follows on the distinction between first and second degree murder:

"I think the distinction is much too vague to be continued in our law. * * * The statute is framed along the lines of a defective and unreal psychology. * * * The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after dilligent study of what has been written in the books. Upon the basis of this fine distinction with its mystifying psychology, scores of men have gone to their deaths." [72]

Professor Packer of Stanford Law School points out that the arbitrariness with which the death penalty is used is directly related to the lack of guidance afforded by the law in this area:

"All students of the subject agree that the grading of murder into degrees, characteristic of most American penal codes, is hopelessly inept. Tacit recognition that this is so underlies the fact that in most jurisdictions the grading of murder has been reinforced by conferring discretion on the jury to decide whether persons convicted of first degree murder shall be executed or imprisoned. The result is that in practice the selection of those to be executed is the result of arbitrary, whimsical and uninformed choice. At this most crucial point in the administration of even-handed justice, law abdicates completely. The choice of life or death reflects mainly the strains and tensions of our society, most notably in the Southern states, but throughout the country as well." [73]

The stand taken by abolitionists on the issue of legal sanity in capital trials centers around their objection to the M'Naghten Rule, the test of sanity in most jurisdictions. This rule is based on a decision handed down in 1843 and states, in essence, that a person is legally sane if, at the time of the commission of his crime, he was capable of distinguishing between right and wrong. The abolitionist view of the effect of this ruling on criminal justice is summed up as follows in the report of the Florida Special Commission:

"Many feel that the death penalty makes the issue of insanity as a defense to a charge of capital crime a thorn in the side of the administration of criminal justice. Insanity of the accused is often in issue, but the law's test of ability to distinguish between right and wrong is hard to apply because modern medicine does not even recognize this type of "insanity" as a clinical entity. As a result, the expert medical witnesses often testify that the accused is suffering from mental disease, but then the judge tells the jury, in effect, that this is not the 'insanity' recognized by the criminal law." [74]

A prominent San Francisco psychiatrist, Dr. Bernard L. Diamond, testified before the California Legislative Subcommittee on Capital Punishment that "Only a driveling idiot has no conception of right and wrong." He went on to describe the consequences of the M'Naghten rule as follows:

"The result is that a given psychiatrist will answer, as to the knowledge of right and wrong, on the part of an accused person, in accordance with his own prejudices, or (worse yet) with the wishes of the side that hired him. The conclusion is, therefore, unescapable that the right and wrong test satisfies the requirements of neither psychology or medicine, nor, indeed, of the law itself." [75]

In summary, then, many, particularly in the legal profession, argue that our present laws on who shall and shall not be sentenced to death are inadequate. Furthermore, it is argued that these laws, particularly with regards to the issue of legal sanity, are essentially inaccessible to reform within the framework of the law as it now stands. In the opinion of many, it is no accident that the law relating to capital punishment has not been reformed along the line of a more realistic view of psychology. This would mean opening the doors to a deterministic view of individual responsibility which is essentially incom-

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[71] Ehrmann, *op. cit.*, p. 429. For a discussion of the distinction between first and second degree murder and its historical development, see Bedau (ed.), *op. cit.*, pp. 23–27.

[72] Quoted by Ehrmann, *op. cit.*, p. 429.

[73] Packer, *op. cit.*, p. 441.

[74] Florida Special Commission, *op. cit.*, p. 26.

[75] Quoted by Eugene B. Block, *And May God Have Mercy* (1962), p. 80.

patible with the assumptions underlying our system of law. Arthur Koestler writes in his book, *Reflections on Hanging:*

"The reason why the law relating to capital punishment cannot be reformed is basically simple. It could only be reformed at the price of undermining the concept of criminal responsibility by such deterministic notions as 'irresistible impulse' or 'diminished responsibility'—that is, *by making determinism statutory*, as it were. This necessity does not arise in the case of other offenses, because the sentence is elastic. * * * To sum up. The deficiencies of the capital law are irremediable because the death-penalty is based on a philosophical concept of criminal responsibility which does not admit the compromises with the determinist view practiced in other courts. Regarding all other offences, the administration of the law is elastic; the death-penalty, by its nature, excludes gradings of culpability. This rigidity and finality, which is the very essence of the capital law, is at the same time the reason of its attractiveness and symbolic value for the anti-progressive forces in society." [76]

Furthermore, abolitionists argue that it is essentially impossible to determine the degree to which an individual is responsible for his behavior with sufficient certainty to base a life and death decision on it. Koestler comments on this point:

"Yet even by revolutionizing the basic concepts of Common Law for the sole purpose of making capital law a little less barbaric, its self-contradictions would remain. Since the frontiers between "responsible" and "irresponsible" are fluid, problematical and bedevilled by metaphysical problems, and drawing of the line by legal definition would be arbitrary. And since it is impossible to define when a man acted freely and ought to die, or when he acted under compulsion and ought to live, the only solution is to bring capital law into line with the remaining body of the Common Law by eliminating the unique, fixed, all-or-nothing penalty which admits of no gradations." [77]

Abolitionists tend to see the difficulty of determining individual responsibility as relevant only to the death penalty, not to lesser sentences, or to penology in general. Many retentionists regard abolition of capital punishment as a triumph for the view that criminal behavior is an illness which should be cured, not punished—a step in the transition, prophesied by Jacques Barzun, from law to social work.[78] Abolitionists argue that precisely the opposite is true, that it is the existence of the death penalty which has forced criminal justice to become embroiled in the issue of psychological determinism. Packer writes:

"But what * * * has been primarily responsible for the extremist position that criminals should all be regarded as sick rather than bad? Demonstrably, it has been capital punishment. This is the spur and this is the rallying point for the attack upon law. The polemic battle that has enlisted so much psychiatric talent has been waged almost entirely with reference to capital punishment. It is in the murder trial that the issue of the extent to which the mental condition of the defendant should excuse or mitigate has been most often and most acrimoniously litigated. As Chief Justice Weintraub of N.J. said: 'For all practical purposes the furor * * * is confined to the disposition of offenders convicted of murder. It is the death penalty that sparks the quarrel.' " [79]

V. THE RELIGIOUS ARGUMENT

Many Protestant churches have taken an official stand against capital punishment. While the Roman Catholic Church has not taken a stand on either side, according to the recent U.N. study it has in recent years been moving more towards the view that the death penalty should be abolished.[80] Most Jewish organizations are officially opposed to the death penalty.

The religious argument against the death penalty generally centers around the belief that even sinful men are the objects of God's redemptive love, and that vengeance belongs to God, not man. In the words of Bishop John Wesley Lord of the Washington, D.C. Conference of the Methodist Church:

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[76] Arthur Koestler, *Reflections on Hanging* (1957), pp. 102–104.
[77] *Ibid.*, p. 102.
[78] Jacques Barzun, "In Favor of Capital Punishment" (1962), in Bedau (ed.), *op. cit.*, p. 157. See page 57 below.
[79] Packer, *op. cit.*, p. 442.
[80] United Nations, *op. cit.*, p. 64.

"A Christian view of punishment must look beyond correction to redemption. It is our Christian faith that redemption by the grace of God is open to every repentant sinner, and that it is the duty of every Christian to bring to others by every available means the challenge and opportunity of a new and better life. We believe that under these circumstances only God has the right to terminate life." [81]

Simiarly, the following resolution was adopted in 1958 at the General Convention of the Episcopal Church;

"Inasmuch as the individual life is of infinite worth in the sight of Almighty God; and

"Whereas the taking of human life falls within the providence of Almighty God and not within the right of man; Therefore be it Resolved, That the General Convention goes on record as opposed to capital punishment." [82]

The Bible is used by both sides in the capital punishment controversy. Abolitionists cite Romans, XII, 17, in which Paul says:

"Recompense to no man evil for evil * * * avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord."

In the Old Testament, they point, first, to the fact that Cain was not put to death (Genesis IV, 15), and to the adjuration in Leviticus, XIX, 18:

"Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbor as thyself: I am the Lord."

More generally, those opposed to capital punishment for religious reasons argue that the whole Christian concept of love and redemption as presented in the New Testament runs counter to use of the death penalty in a system of justice. In support of this, they refer specifically to the Sermon on the Mount (e.g., Matthew V, 44) and to Luke VI, 35.

In addition to the Old and New Testaments, abolitionists quote St. Augustine in opposition to capital punishment. The following passage is from a plea that some Donatsits, a heretic African sect, who had confessed to the heinous murder of Christians, be spared the death penalty:

"We do not wish to have the sufferings of the servants of God avenged by the infliction of precisely similar injuries in the way of retaliation. Not, of course, that we object to the removal from these wicked men of the liberty to perpetrate further crimes, but our desire is rather that justice be satisfied without the taking of their lives or the maiming of their bodies in any particular; and that, by such coercive measures as may be in accordance with the laws, they be drawn away from their insane frenzy to the quietness of men in their sound judgment, or compelled to give up mischievous violence and betake themselves to some useful labour." [83]

VI. PUBLIC OPINION

The four most recent Gallup Poll surveys indicate a steady decrease of public support for the death penalty. In each case, the question asked was, "Are you in favor of the death penalty for persons convicted of murder?" The results of the four polls are shown below: [84]

[In percent]

	1966	1965	1960	1953
Yes	42	45	51	68
No	47	43	36	25
No opinion	11	12	13	7

The waning public support for the death penalty is reflected on the state level by the fact that in 1965 alone four states abolished it.[85] On the federal level, 1965 saw the Justice Department's break with its previous official posi-

[81] Maryland Committee, *op. cit.*, p. 24.
[82] Quoted by Florida Special Commission, *op. cit.*, p. 24.
[83] Quoted by Koestler, *op. cit.*, p. 100.
[84] *Washington Post*, July 2, 1966, p. A3.
[85] Iowa and West Virginia abolished it completely; New York and Vermont abolished it except for special crimes (e.g., killing a policeman acting in the line of duty).

tion of neutrality on the issue. Deputy Attorney General Ramsey S. Clark wrote in a letter to the House District Committee:

"We favor the abolition of the death penalty. * * * This nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime." [86]

A number of sociologists have commented on the extent to which the retention or abolition of capital punishment depends on the public attitude toward it,[87] and have predicted that the current trend of increasing opposition will culminate in the abolition of the death penalty in this country, at least in practice if not in law. After itemizing various factors that have contributed to the decline of public support, Sellin concludes that:

"* * * is not difficult to explain the rapid downward trend in the number of executions annually from a high of 199 in 1935 to 57 in 1960. And this trend is likely to continue, barring unforeseen social crises, until executions will become a much greater rarity than today and will ultimately be abandoned." [88]

There were seven executions in 1965, an all-time low in the history of this country.

Section 2—In Favor of Capital Punishment

I. THE STATE SHOULD PROTECT THE LAW-ABIDING CITIZEN

The central argument in defense of capital punishment is that the first responsibility of the State, and thus of the criminal law, is the protection of the law-abiding. As long as there is substantial reason to believe that capital punishment serves this function, it should be retained. This argument is expressed as follows in the majority report of the New Jersey Commission to Study Capital Punishment:

"This Commission has an obligation to the people of the State of New Jersey. Our citizens deserve the maximum degree of protection from injury both to their persons and to their property. In case of doubt as to which method will create the most likely optimum of protection, this Commission is bound to retain the type of punishment which throughout history has proved to be the most severe. * * * It seems clear that those who seek the abolition of capital punishment are concerned with the saving of the lives of those convicted of the crimes in question. * * * Yet most, if not all of those seeking abolition would, the Commission is certain, retain the death penalty if they were satisfied that it would save innocent lives. One abolitionist witness thought that the saving of a single life would not be enough. The Commission, however, in its obligation to the people of this State, is not justified in gambling the life of a single citizen." [89]

Retentionists argue that if this goal of providing the law-abiding citizen optimum protection conflicts with the welfare of the criminal, then it is the criminal who must be sacrificed.

Retentionists assert that the death penalty affords the law-abiding unique protection in two ways. It is, they argue, superior to life imprisonment as a deterrent to would-be murderers, and it is necessary as a protective measure against the incorrigibly dangerous. Furthermore, those in favor of capital punishment contend that because of the responsibility of the State to protect its citizens, the burden of proof rests with the abolitionists. Those opposed to capital punishment must, according to retentionists, prove conclusively that the death penalty is ineffective as a deterrent and unnecessary as a protective measure before abolition can be seriously considered.

II. DETERRENCE

A. The Evidence of Experience

The case for retaining the death penalty has the support of a majority of the law enforcement profession. Ralph G. Murdy, Managing Director of the Baltimore Criminal Justice Commission, writes:

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[86] *New York Times*, July 24, 1965, p. 1.
[87] Bedau (ed.), *op. cit.*, pp. 231–232.
[88] Sellin, "Capital Punishment," p. 11.
[89] New Jersey Commission to Study Capital Punishment, *Report* (1964), pp. 7–8.

"There is no question that a large majority of law-enforcement officers throughout the country favor capital punishment. The June 1960 issue of the official publication of the International Association of Chiefs of Police was entirely devoted to capital punishment without any expression from a police administrator encountered who favored its abolition. Occasionally an endorsement will be seen from a police administrator in a noncapital punishment state. However, only a few are active in presenting a case against capital punishment." [90]

Sheriff Peter Pitchess of Los Angeles County testified as follows before the California Senate Committee on the Judiciary:

"But I can tell you that the overwhelming majority of people in law enforcement—the ones who are dealing with these criminals, the ones who are seeing them not as statistics but real live human beings, and who are studying their human behavior—are overwhelmingly convinced that capital punishment is a deterrent." [91]

J. Edgar Hoover, Director of the Federal Bureau of Investigation since 1925, is unqualifiedly opposed to the abolition of capital punishment. The 1959 issue of *The Uniform Crime Reports for the United States* contains the following statement by Mr. Hoover:

"The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty. . . . For the law enforcement officer the time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessary ingredient." [92]

The importance of the support of the death penalty by members of the law enforcement profession is evidenced by the weight placed on it in the following passage from the New Jersey Commission majority report:

"The Commission is convinced that capital punishment does deter some potential murderers from committing capital crimes. More particularly, it is believed that the deterrence is most significant in the area of felony murder and in the area of a truly premeditated crime. While the statistical information presently available does not indicate a significant difference in the homicide rates between abolition states and capital punishment states, even when adjoining, this statistical information was admittedly not restricted to capital crimes, did not include the incidence of felony murders, the relationship of aggravated assaults to homicides, or the relationship of Police woundings. Those presenting only raw homicide figures admitted that these were as yet the best available, and for the purpose of further analysis they would like to have available the additional information set forth above. On the other hand, those most intimately concerned with law enforcement gave evidence and their conclusions that capital punishment is a deterrent in some cases." [93]

The conclusion that capital punishment has a deterrent value "in the area of felony murder and in the area of a truly premeditated crime" is emphasized and backed with evidence in the majority of the defenses of capital punishment. The following is the introductory paragraph of a report from the Los Angeles Police Department presented as evidence at hearings before the California Senate Committee on Judiciary:

"The following defendants in conversations with reporting officers stated that they either: (1) used toy guns; or (2) empty guns or (3) simulated guns in robberies rather than take a chance on killing someone and getting the gas chamber." [94]

The report then discusses 13 defendants who had been involved in a total of 28 felonies, with 28 potential victims.

In his statement before the American Bar Association Section of Criminal Law in 1959, Richard E. Gerstein, as State's Attorney of the Eleventh Judicial Circuit of Florida, cited the following instances from testimony given by law enforcement officers concerning the deterrent value of the death penalty:

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[90] Ralph G. Murdy, "A Moderate View of Capital Punishment," *Federal Probation* (Sept. 1961), p. 13.
[91] California Legislature, Senate Committee on Judiciary, *Hearing Report and Testimony* (1960), p. 150.
[92] Federal Bureau of Investigation, *The Uniform Crime Reports of the United States* (1959), p. 14.
[93] New Jersey Commission, *op. cit.*, pp. 8–9.
[94] Quoted by California Senate Committee, *op. cit.*, p. 17.

"(1) Criminals who have committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captor though by killing, escape seemed probable. When asked why they refrained from the homicide, quick responses indicated a willingness to serve a life sentence but not to risk the death penalty.

"(2) Criminals about to commit certain offenses refrained from carrying deadly weapons. Upon apprehension, answers to questions concerning absence of such weapons indicated a desire to avoid more serious punishment by carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty.

"(3) Victims have been removed from a capital punishment state to a non-capital punishment state to allow the murderer opportunity for homicide without threat to his own life. This in itself demonstrates that the death penalty is considered by some would-be killers. Statistics cannot tell us how many lives have thus been saved." [95]

In several cases, the indication of the clear awareness and consideration on the part of the criminal of the capital laws of different states have led abolition states to reinstitute the death penalty. Thorsten Sellin testified before the British Royal Commission as follows:

"South Dakota reintroduced the death penalty because a couple of Illinois convicts, who had finished serving their terms, tramped across the state and killed a couple of filling-station attendants, if I remember correctly—they were robbery murders." [96]

The Attorney General of Kansas testified before the British Royal Commission that:

"One of the contributing factors leading to the re-enactment [in the state of Kansas] of the death penalty for first degree murder was the fact that shortly prior thereto numerous deliberate murders were committed in Kansas by persons who had previously committed murders in states surrounding Kansas, where their punishment, if captured, could have been the death penalty. Such murders in Kansas were admittedly made solely for the purpose of securing a sentence to life imprisonment in Kansas if captured." [97]

More recently, a letter was intercepted by the Delaware State Police in which a murderer wrote that he had known before he killed that the most he could get was 15 years. The murder occurred after Delaware had repealed capital punishment in 1958 and was a major factor in the reinstitution of the death penalty in that state in 1961.[98]

B. The Psychology of Deterrence

The majority report of the New Jersey Commission noted:

"No punishment would be a deterrent for a crime of passion; or a crime committed by one who is insane. These are not the persons who generally receive the death penalty." [99]

The fact that many murders appear to be either crimes of passion or acts of insanity is interpreted by retentionists not as an indication of the death penalty's uselessness as a deterrent, but of its success in deterring people from *premeditated* murder. The following is from the Canadian Parliamentary Committee's *Report on Capital Punishment:*

"One measure of its [the death penalty's] deterrent effect was afforded by an analysis of murders which indicated that a considerable proportion, probably in excess of half, are committed under the compulsion of overwhelming passion or anger where no deterrent could have been effective. This would seem to demonstrate that the death penalty, coupled with the excellent standards of law enforcement prevailing in Canada, has been successful in deterring the commission of deliberate, premeditated murders and reducing their incidence to minimum proportions. The deterrent effect may also be indicated by the widespread association of the crime of murder with the death penalty which is undoubtedly one reason why murder is regarded as such a grave and abhorrent crime." [1]

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[95] American Bar Association, Section of Criminal Law, *1959 Proceedings* (1960), p. 15.
[96] Quoted by Hugo Adam Bedau (ed.), *The Death Penalty in America* (1964), p. 336.
[97] *Ibid.*
[98] Maryland Committee on Capital Punishment, Report (1962), pp. 30–31.
[99] New Jersey Commission, *op. cit.*, p. 9.
[1] Quoted by Bedau (ed.), *op. cit.*, p. 268.

The minority report of the Massachusetts Special Commission contains a related observation:

"* * * we believe that the death penalty threat is effective in preventing large numbers of wrongdoers from ever allowing themselves to reach that stage of criminality where they become victims of uncontrollable impulses and subjects of murder commissions. It is in this early grey zone of murder premeditation that the death penalty threat is most apt to be operative and effective." [2]

As indicated in the passage from the Canada report quoted above, retentionists also believe that the death penalty is effective as a deterrent in the broadest sense, by reinforcing the public abhorrence of murder. It is argued that the death penalty reinforces the public's belief in the sanctity of human life by associating this abstract moral concept with the strong instinctive fear of one's own death. Richard Gerstein comments on this point as follows:

"Furthermore, as the Royal Commission [of Great Britain] opined, the death penalty helps to educate the conscience of the whole community, and it arouses among many people a quasi-religious sense of awe. In the mind of the public there remains a strong association between murder and the penalty of death. Certainly one of the factors which restrains some people from murder is fear of punishment and surely, since people fear death more than anything else, the death penalty is the most effective deterrent." [3]

C. The Statistics [4]

Those in favor of capital punishment assert that the question of the superior deterrent value of the death penalty to life imprisonment most probably cannot be—and certainly has not been—definitively answered by statistical studies. This argument is supported by the following passage from the Florida Special Commission's report on capital punishment:

"Superficial consideration might lead one to conclude that this question [whether the death penalty is superior to imprisonment in deterring those persons who would otherwise commit serious crimes] might be answered by scientific and statistical studies, but such is not the case. There is no reliable method for determining who has contemplated committing a capital crime but refrained due to the fear of the death penalty as distinguished from other forms of criminal punishment. * * * It is probably impossible to subject deterrence to scientific study in any direct way. The facts cannot be ascertained so that they can be subjected to scientific analysis and interpretation." [5]

First, as the Florida report indicates, there is the obvious point that those who are deterred do not show up as statistics. Secondly, both abolitionists and retentionists agree that the available statistics are inadequate. Hugo Adam Bedau, an abolitionist, writes in *The Death Penalty in America:*

"In a word, there is no exact information anywhere as to the volume of capital crimes in the United States. Difficult as it is to specify the capital laws for the nation as a whole, it is impossible with the present sort of criminal statistics to specify the exact amount of capital crimes for even one jurisdiction in even one year for even one crime. Then years ago, George B. Vold complained, 'There are no general statistics available as to the number of offenses committed per year for which death is the required penalty.' Nothing has changed in the interim." [6]

The major difficulty is that the only murder figure available for use in attempting to gauge the effect of capital punishment on the murder rate is the "murder and non-negligent manslaughter" figure reported by the Federal Bureau of Investigation in its annual publication, *Uniform Crime Reports for the United States.* As Mr. Bedau points out:

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[2] Massachusetts Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases, *Report and Recommendations* (1958); the minority report is reprinted in *Capital Punishment,* ed. Grant S. McClellan (1961), p. 82.

[3] American Bar Association, Section of Criminal Law, *op. cit.,* p. 17.

[4] The statistical studies of the deterrent effect of the death penalty are discussed in detail in Section 1, pp. 5–12 above. The following comment from the State of Florida's Report of the Special Commission for the Study of Abolition of Death Penalty in Capital Cases is relevant here:

"One caution is appropriate at this point: it is those opposed to the death penalty who have been active in research and who are responsible for the statistical studies discussed herein" (p. 19).

[5] Florida Special Commission for the Study of the Abolition of Death Penalty in Capital Cases, *Report* (1965), pp. 13–14.

[6] Bedau (ed.), *op. cit.,* pp. 56–57.

"Since some states have no death penalty for murder, the national totals of 'murder and non-negligent manslaughter' will exceed the number of homicides punishable by death. What is even more important, the F.B.I. does not distinguish between total murders (or first degree murders), which alone carry the death penalty, and all lesser forms of non-negligent criminal homicide, in particular second degree murder and voluntary manslaughter, crimes usually punished by imprisonment. Instead, all voluntary or non-negligent criminal homicides are lumped together in *Uniform Crime Reports* under the title, "murder and non-negligent manslaughter." * * * What one wants to know, of course, is what fraction of the totals entered in this fashion are murders; and what fraction of this fraction are capitally punishable homicides, i.e., murders where a normal adult (not a child, juvenile, or lunatic) is the criminal and where a capital indictment might issue (excluding, therefore, those cases where the murderer commits suicide). It is impossible to supply this information at present." [7]

Mr. Bedau comments as follows on the validity of this "murder and non-negligent manslaughter" figure for the purpose of capital punishment statistics:

"One of the first criminologists to discuss the statistical relationship between general homicides and capitally punishable homicides was the late Professor Edwin H. Sutherland. In 1925, he pointed out that although (a) the *number* of homicides far exceeded the number of first degree murders (and, by inference, the number of capitally punishable homicides), (b) the *ratio* of the two was sufficiently constant to use the former as a guide to the latter. . . . there is no doubt that [(a)] . . . is true. But what about (b)? It is extremely difficult to determine what evidence it is based on. Sutherland himself offered none, but advanced it as a plausible assumption. In the intervening generation, no criminologist has done any better." [8]

Mr. Bedau subsequently analyzes in some detail one specific difficulty involved in relying on inferences from homicide rates to capitally punishable murder rates:

"We have already seen * * * how skechy the known connection is between the two rates. To whatever degree the former is an unreliable guide to the latter—which we have no way of directly measuring at all—to that degree all the studies * * * [relying on it] are unreliable at the crucial point: is the death penalty an effective deterrent for those kinds of homicides punishable by death? Here is one kind of difficulty that arises when one expects homicide statistics to provide a conclusive answer to this question. Data reported [in an article by Thorsten Sellin] * * * show that the ten-year average of annual homicide rates in Ohio fell during the 1920's from 7.9 per 100,000 of population to 3.8 in the 1950's. Yet if the death penalty had been abolished in Ohio at the beginning of this period and if (let us suppose) abolition had been followed by a dozen or so more murders each year thereafter, the general homicide rate would have decreased almost exactly as in fact it has, and at no time would the rate for any given year be more than a tenth of one percent greater than it has been. Thus, while we could truthfully say that the abolition of the death penalty in Ohio had been followed by a decrease in the general homicide rate, it would also have been true that abolition resulted in an *increase* in the total number of murders, and this despite the constancy of the ratio of total homicides to murders (except in the first year after abolition). For all we know, this is exactly what has happened in all the abolition states, which without exception show a steadily declining general homicide rate over the past several decades. The number of crimes at stake here is so small that they would never be noticed by anyone who relies on the ordinary vital and criminal statistics of homicide." [9]

The report of the Florida Special Commission contains the following comment on the inadequacy of statistical comparisons based on the F.B.I. murder and non-negligent manslaughter figure:

"Perhaps it is fortunate that the judgment of most persons who have studied them is that they do not prove much; that while they do not prove that the death penalty is a superior deterrent, they do not *prove* that it is not * * * J. Edgar Hoover, Director of the Federal Bureau of Investigation, favors reten-

[7] Bedau (ed.), *op. cit.*, p. 61.
[8] *Ibid.*, pp. 68–69.
[9] Bedau (ed.), *op. cit.* pp. 256–266.

tion of the death penalty, but he has charged that statistical comparisons [based on inferences from homicide rates to first degree murder rates] are completely inconclusive." [10]

D. The Need to Protect the Police

The defense of the death penalty on the grounds that it is necessary for police protection is a special case of the argument that its deterrent value is superior to that of the penalty of life imprisonment. It might be noted that two of the thirteen states which have generally abolished capital punishment have retained it for the offense of killing a policeman acting in the line of duty.

Members of the law enforcement profession are generally convinced that the death penalty protects the police. The minority report of the Massachusetts Special Commission comments:

"We have been impressed by the urgent demands of large numbers of law-enforcement officers that the death penalty be retained. These men have not made the speculative study of the problem with which they are confronted that would enable them to present their conclusions in compelling statistical form. Their point of view is not, however, for this reason to be taken lightly, especially in view of their insistence that their own lives are endangered by their efforts to protect the lives and property of their fellow men. * * *" [11]

III. THE DEATH PENALTY AS A NECESSARY PROTECTIVE MEASURE

Those in favor of the death penalty argue that the second way in which it affords society unique protection is by guaranteeing that certain criminals who have committed particularly heinous crimes will not have the opportunity to do so again. Jacques Barzun, Provost of Columbia University, defends the death penalty on these grounds as follows:

"The uncontrollable brute whom I want put out of the way is not to be punished for his misdeeds, nor used as an example or a warning; he is to be killed for the protection of others, like the wolf that escaped not long ago in a Connecticut suburb. No anger, vindictiveness or moral conceit need preside over the removal of such dangers. But a man's inability to control his violent impulses or to imagine the fatal consequences of his acts should be a presumptive reason for his elimination from society." [12]

Retentionists do not accept the abolitionist position that life imprisonment is in all cases a sufficient safeguard. They argue that some criminals are incorrigibly anti-social and will remain potentially dangerous to society for the remainder of their lives. These men constitute a danger to prison officials and to the other inmates, and there is always the chance that they may escape.

Furthermore, retentionists argue that, because the life sentence rarely means that an offender is in reality imprisoned for life, there is a serious possibility that dangerous men will be released on parole. Mr. Barzun points out that it is impossible to be certain that a murderer has, in fact, been "cured":

"The 'scientific' means of cure are more than uncertain. The apparatus of detention only increases the killer's anti-social animus. . . . Some of these are indeed "cured"—so long as they stay under a rule. The stress of the social free-for-all throws them back on their violent modes of self-expression. At that point I agree that society has failed—twice: it has twice failed the victims, whatever may be its guilt toward the killer." [13]

The defense of the death penalty on the grounds that it is a necessary protective measure is directly related to the argument that there is no satisfactory alternative sentence for those criminals who clearly constitute a continuing danger to society. The obvious possible alternative is the life sentence without the possibility of parole. However, a number of penologists believe that this is a highly unsatisfactory solution. They argue that such a sentence removes all inducement to improve and thus greatly increases the difficulty and danger involved in handling the men so sentenced. The Maryland report noted the reaction of Ralph G. Murdy, the Managing Director of the Baltimore Criminal Justice Commission, to such a suggestion as follows:

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[10] Florida Special Commission, *op. cit.*, p. 17.
[11] Massachusetts Special Commission, in McClellan (ed.), *op. cit.*, p. 79.
[12] Jacques Barzun, "In Favor of Capital Punishment" (1962), in Bedau (ed.), *op. cit.*, pp. 155–156.
[13] Barzun, in Bedau (ed.), *op. cit.*, p. 159.

"* * * Mr. Murdy observed that many penal experts believe the no-parole sentence for life-terms creates a hard core of incorrigibles in prisons who fear no authority because they can never be set free. They are robbed of the incentive to behave, he said." [14]

Thorsten Sellin comments on the absolute life sentence as follows:

"Recent legislation in some states and proposed in others, depriving a person sentenced to life for murder of that hope [of future release], may prove to be most inadvisable." [15]

The former Director of the Maryland Department of Parole and Probation, Mr. Wallace Reidt, indicated to the Maryland Commission that the possibility of the no-parole life sentence replacing the death penalty was a major reason for his opposition to the repeal of capital punishment in that state:

" If capital punishment is abolished, there will be considerable pressure to prevent parole in life terms and there will be removed what I believe is a great deterrent in the handling of prisoners in institutions.

"Most persons connected with institutions feel that unless there is some fear of punishment or hope of reward that a good many life-termers would cause a great deal of trouble in the institutions and make the work of prison officials much more dangerous than it is now." [16]

A. The Second-Time Murderer

Several states which have generally abolished capital punishment have retained it for a person found guilty of murder who then murders again. The argument that the death penalty should be retained for those who murder a second time is a limited version of both the argument that the death penalty is necessary as a protective measure, and the argument that it is more effective than life imprisonment as a deterrent. Sidney Hook, Professor of Philosophy at New York University, comments:

"* * * in a sub-cass of murders, i.e., those who murder several times, there may be a special group of sane murderers who, knowing that they will not be executed, will not hesitate to kill again and again. For *them* the argument from deterrence is obviously valid. Those who say that there must be no exceptions to the abolition of capital punishment cannot rule out the existence of such cases on *a priori* grounds. If they admit that there is a reasonable probability that such murderers will murder again or attempt to murder again, a probability which usually grows with the number of repeated murders, and still insist they would *never* approve of capital punishment, I would conclude that they are indifferent to the lives of the human beings doomed, on their position, to be victims." [17]

Of the thirteen states which have generally abolished capital punishment, four of them retain it for some type of second-time murder, as follows,

New York: Killing a peace officer acting in the line of duty; and murder committed by a prisoner acting under sentence of life imprisonment.

North Dakota: Murder in the first degree committed by a prisoner already serving a sentence for murder in the first degree.

Rhode Island: Murder committed by a prisoner under sentence of life imprisonment.

Vermont: Second conviction of murder, at discretion of jury, provided the two cases are not related; and first-degree murder of a police officer or prison guard who is on duty.

IV. RETRIBUTION AND THE SANCTITY OF HUMAN LIFE

Capital punishment is defended by some on the grounds that it satisfies a legitimate communal need for retribution aroused by particularly heinous crimes. Society's desire that a man pay with his life for a violent crime represents both society's moral condemnation of such acts, and the closing of the ranks against those who violate society's laws. Thus, Lord Justice Denning testified before the British Royal Commission on Capital Punishment that:

"The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent of reformative or pre-

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[14] Maryland Committee, *op. cit.*, p. 20.
[15] Thorsten Sellin, *The Death Penalty* (1959), p. 72.
[16] Maryland Committee, *op. cit.*, p. 23.
[17] Sidney Hook, "The Death Sentence" (1961), in Bedau (ed.), *op. cit.*, p. 153.

ventive and nothing else. * * * The ultimate justification on any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime; and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty." [18]

Closely related to the defense of the death penalty on the grounds that it satisfies the legitimate public demand for retribution is the argument that capital punishment is, in fact, a public and official testimony to the belief in the sanctity of human life. This argument was stated as follows by Roy A. Gustafson, District Attorney of Ventura County, before the California Senate Committee on the Judiciary:

"Capital punishment * * * is based upon our concept of the high value placed upon life. We consider life to be the most precious possession and, therefore, when the crime is the most heinous and most grave of all crimes, then we make the man forfeit the thing that is most precious to him, namely, life." [19]

In answer to the abolitionist assertion that capital punishment is, in fact, a violation of the santity of human life, retentionists argue as follows—

There is too much loose talk about the sacredness of human life. A life is sacred only when it makes itself sacred; when it respects the lives and rights of others. * * * A cold-blooded murderer, having cunning intelligence without moral restraint, is infinitely more dangerous than any other animal on earth.[20]

J. Edgar Hoover characterizes as "maudlin" the view that "the most wanton slayer [is] 'a child of God' who should not be executed," and continues, commenting on a crime committed recently in California:

"Was not this small, blonde six-year-old girl a child of God? She was choked, beaten, and raped by a sex fiend whose pregnant wife reportedly helped him lure the innocent child into his car and who sat and watched the assault on the screaming youngster. And when he completed his inhuman deed, the wife, herself bringing a life into the world, allegedly killed the child with several savage blows with a tire iron. The husband has been sentenced to death. Words and words and words may be written, but no pleas in favor of the death penalty can be more horribly eloquent than the sight of the battered, sexually assaulted body of this child, truly a 'child of God.'" [21]

V. THE ABOLITION MOVEMENT AND MODERN LIBERALISM

There is a strong feeling among those in favor of capital punishment that the abolition movement of today is in many respects a corrollary of the permissive, deterministic view of individual behavior which characterizes much modern psychology and is reflected in the thinking of many liberal intellectuals. With regard to penology, this view is characterized—so the retentionist argument goes—by a belief that society is responsible, and thus to blame, for the ills of its misfits, and by a preference for the black sheep over the white. Retentionists point to such passages as the following to illustrate their case:

By the establishment of a motive, an understanding of the crime, at least in the legal sense, is achieved, and no more official effort is extended from or charged to the authorities to go beyond and find a deeper insight into the true motivation of the mind of the man who kills.

"Acceptance in legal procedures of the motive at large is based on the presumption that, unless it is proved otherwise through the intricacies and formalities of the court trial, the individual [murderer] is like any other person, who could exercise at pleasure any function he chose. There is no recognition of the fact that if he had been in possession of such perfect powers of reasoning and such ideal forces of will, he could have prevented the occurrence of the fatal act. In reality, he is in his predicament for the very reason that he was incapable of behaving like a complete man, the master of himself. However, people in general refuse to look upon him as an invalid, and find considerable gratification in obtaining for society a maximum security and protection by imposing a maximum retribution." [22]

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[18] Quoted by Richard C. Donnelly, "Capital Punishment," in *Congressional Record*, Aug. 24, 1960, p. A6284.

[19] California Legislature, Senate Committee on Judiciary, *op. cit.*, p. 103.

[20] Evelle J. Younger, "A Sharp Medicine Reconsidered" (1956), in McClellan (ed.), *op. cit.*, p. 16.

[21] J. Edgar Hoover, "Statements in Favor of the Death Penalty" (1961), in Bedau (ed.), *op. cit.*, p. 133.

[22] Ralph S. Banay, "Study in Murder," *The Annals* (Nov. 1952), p. 33.

The distance between this approach and that of many retentionists may be seen by contrasting the above passage with the following statement by Jacques Barzun, Provost of Columbia University:

"I happen to think that if a person of adult body has not been endowed with adequate controls against irrationally taking the life of another, that person must be judicially, painlessly, regretfully killed before that mindless body's horrible automation repeats." [23]

Barzun sums up the general viewpoint discussed above as follows:

"Social science tends steadily to mark a preference for the troubled, the abnormal, the problem case. Whether it is poverty, mental disorder, delinquency or crime, the "patient material" monopolizes the interest of increasing groups of people among the most generous and learned. Psychiatry and moral liberalism go together; the application of law as we have known it is thus coming to be regarded as an historic prelude to social work, which may replace it entirely. Modern literature makes the most of this same outlook, caring only for the disturbed spirit, scorning as bourgeois those who pay their way and do *not* stab their friends. All the while the determinism of natural science reinforces the assumption that society causes its own evils. A French jurist, for example, says that in order to understand crime, we must first brush aside all ideas of Responsibility. He means the criminal's and takes for granted that of society. The murderer kills because reared in a broken home or, conversely, because at an early age he witnessed his parents making love. Out of such cases, which make pathetic reading in the literature of modern criminology, is born the abolitionist's state of mind: we dare not kill those we are beginning to understand so well." [24]

Generally speaking, retentionists argue that, regardless of the developments of the day in the field of psychology, law and order cannot exist unless people are held individually responsible for their actions and thus subject to the control of punishment if they fail to obey the law. Those in favor of capital punishment argue that it reflects, both pragmatically and symbolically, this fundamental tenet of our society, and that its abolition could well be seen as an endorsement of the kind of liberalism described by Mr. Barzun—a view which, if incorporated into our laws, would lead to social anarchy. Richard Gerstein commented on this point as follows before the American Bar Association:

"Society must also consider what effect the abolition of capital punishment could have upon the philosophy of the youth of our country. Many of them might very well look upon the criminal code, including that part of it forbidding murder, as a mere convention of society which advanced thinking and progressive social theories permit them to set aside as a matter of no consequence. This theory leads to the belief that each is a law unto himself; that each may choose the laws which he will obey, and that he may violate the rest. This type of thinking would eventually lead us into virtual anarchy." [25]

More specifically, retentionists argue that the concern of abolitionists for the criminal has led them to place far too much emphasis on rehabilitation, as opposed to deterrence and protection, as the purpose of punishment. Richard Gerstein comments that, "we must not forget that reformation is an enjoyable by-product, not the sole goal of punishment." [26] The minority report of the Massachusetts Special Commission notes:

"* * * it might be well here to point out that it is the opinion of the minority that the majority report lays too great stress on the welfare of the individual criminal subject to a sentence of execution. It is not our intent to deprive the criminal of every consideration which may be afforded to him by the executive powers of the state subsequent to his sentencing to execution. However, the urge that this one could be rehabilitated or that one could be given psychiatric treatment and therefore they all are salvable does not solve the problem of suppressing potential murderers. If one becomes convinced that the drastic measure of execution is the effective deterrent, then it must logically follow that the innocent lives saved thereby are of far greater import than the criminal life sacrificed. This method of thinking must of necessity divorce itself from any thought of the rehabilitation of the properly condemned criminal." [27]

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[23] Barzun, in Bedau (ed.), *op. cit.*, p. 159.
[24] *Ibid.*, pp. 157–158.
[25] American Bar Association, Section on Criminal Law, *op. cit.*, p. 18.
[26] *Ibid.*
[27] Massachusetts Special Commission, in McClellan (ed.), *op. cit.*, p. 78.

The New Jersey Commission majority report comments in a similar vein:

"The great increase of crime in this State has coincided with a greater tendency to emphasize the rehabilitation factor in criminology as against the punishment or retributive and deterrent aspects of criminology. The Commission cannot conclude that easing the lot of the murderer will cause less crime or fewer criminal homicides." [28]

The supporters of capital punishment contend that this misplaced emphasis on rehabilitation as well as the general willingness to "brush aside all ideas of Responsibility" is a corollary of the fact that many abolitionists argue from theory rather than from a direct experience with the realities of crime and law enforcement. J. Edgar Hoover comments:

"As a representative of law enforcement, it is my belief that a great many of the most vociferous cries for abolition of capital punishment emanate from those areas of our society which have been insulated against the horrors man can and does perpetrate against his fellow beings." [29]

Direct experience with law enforcement has led most members of this profession to support the death penalty. Sheriff Pitchess of Los Angeles County testified as follows before the California Senate Committee investigating capital punishment:

"* * * When I was in law school, I remember that I prepared a paper supporting the abolition of capital punishment. I changed my mind. I went directly from law school into the F.B.I. I can't tell you whether it was within a year or two years, but it wasn't long after I had been in the active field of investigating that I changed my mind, and I have become progressively more convinced. I wish I could be as positive and as certain as the proponents of abolition—I wish I could be. I am as certain as I can be, after searching my own conscience, that it is a deterrent, but my change—and I am not ashamed to admit that I did change my mind—was based on my direct contact with the criminals, who convinced me that it was a deterrent to them." [30]

VI. THE DEATH PENALTY AND CRIMINAL JUSTICE

With regard to the complex of arguments relating to capital punishment and criminal justice (see pp. 23–33), retentionists contend, first, that the institution of capital punishment should stand or fall on the issue of whether or not it provides maximum security for the law-abiding, and not on the fact that certain abuses exist in its use, or that it is time-consuming and expensive to adminster. Secondly, they argue that many of the abuses alleged by abolitionists either do not actually exist or are remediable through a reform of the courts. Supporters of the death penalty point out that its efficacy as a deterrent is itself undermined by the inequalities and inefficiencies in the administration of criminal justice; what is indicated here is not the need to abolish the death penalty, but the need to reform criminal procedure.

A. The Possibility of Error

A major issue in this area is the alleged danger of executing the innocent. First, there are those who argue that this is not, in fact, a real possibility, given the precautions taken by the courts in capital cases. Judge Learned Hand commented:

"Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." [31]

There have been no *known* cases of the execution of an innocent man in this country.[32]

The position of those retentionists who admit that the possibility of error does exist is summed up by the Florida report as follows:

"Proponents of capital punishment who admit that the possibility of convicting an innocent man is present maintain that such a possibility is extremely remote today due to the painstaking care that the courts take and the many avenues for correcting trial error. The task of conducting capital punishment trials is carried out with every possible precaution in favor of an accused thereby making the chance of a miscarriage of justice infinitely small." [33]

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[28] New Jersey Commission, *op. cit.*, p. 7.
[29] Hoover, in Bedau (ed.), *op. cit.*, p. 130.
[30] California Legislature, Senate Committee on Judiciary, *op. cit.*, pp. 150–151.
[31] Quoted by Florida Special Commisson, *op. cit.*, p. 29.
[32] Bedau (ed.), *op. cit.*, p. 440; see pp. 23–24 above.
[33] Florida Special Commission, *op. cit.*, p. 29.

Those who support the death penalty argue that, insofar as there is a risk that an innocent man will be executed, it is justified by the protection afforded to society by the death penalty. This argument is stated as follows by the minority report of the Massachusetts Special Commission:

"We do not feel, however, that the mere possibility of error, which can never be completely ruled out, can be urged as a reason why the right of the state to inflict the death penalty can be questioned in principle. * * * All that can be expected of [human authorities] is that they take every reasonable precaution against the danger of error. When this is done by those who are charged with the application of the law, the likelihood that errors will be made descends to an irreducible minimum. If errors are then made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angels but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty aims to provide effective remedies." [34]

B. The Alleged Inequality of Application

Abolitionists allege that there is a discrimination in the use of the death penalty, based primarily on race, wealth, and legal counsel. The retentionist answer to this allegation is well stated as follows by Hugo Adam Bedau, himself an abolitionist:

"Out of the contentions of abolitionists in this country, popularized by the late Warden Lawes, is that 'only the poor, the friendless and the foreign-born' are sentenced to death and executed. As a description of the class of persons executed, this is probably fairly accurate (though, with the virtual curtailment of immigration, the place of the foreign-born has been taken by native non-whites). But if it is meant to imply deliberate discrimination by trial courts, appellate courts and boards of pardons, it remains unproved. The vast majority of all prisoners throughout our country's history have been the poor, the friendless and the foreign-born (or non-white). It has yet to be shown that murderers or prisoners under death sentence differ significantly in these respects from other criminals." [35]

On the specific issue of the high percentage of Negroes sentenced to death, it has been noted—

Much previous research in criminal homicide which includes murder in the first degree, has demonstrated the fact that a disproportionate contribution to the homicide rate is made by Negroes. It is no surprise, therefore, that as many as thirty-six per cent of persons placed on death row are Negro. Consistent with independent research and the *Uniform Crime Reports*. Negroes comprise between three and four times more of the criminal homicide cases (either as offenders or as victims) than they do of the general population." [36]

C. The Need for Reform

As indicated above, retentionists view the existence of abuses in the administration of the death penalty not as an argument for abolishing the death penalty, but for reforming the courts and the criminal procedure. Mr. Barzun's comment on the danger of executing the innocent is generally relevant here:

"* * * what is at fault in our present system is not the sentence [of death] but the fallible procedure. * * * What the miscarriages point to is the need for reforming the jury system, the rules of evidence, the customs of prosecution, the machinery of appeal." [37]

Retentionists contend that if the death penalty is a less effective deterrent than it might be, a major reason is the rarity of its use. A number of abolitionists concur. Thorsten Sellin comments:

"We arrive then at the conclusion that if the death penalty is to have any restraining effect there must be an adequate threat of execution, but no one has ventured to calculate how great the risk of possible execution must be in order to constitute an adequate threat." [38]

Bedau develops this argument at some length:

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[34] Massachusetts Special Commission, in McClellan (ed.), *op. cit.*, p. 81.

[35] Bedau (ed.), *op. cit.*, pp. 411–412. For statistics which substantiate Bedau's argument, see California Legislature, Senate Committee on Judiciary, *op. cit.*, pp. 106–108.

[36] Marvin E. Wolfgang, Arlene Kelly, and Hans C. Nolde, "Executions and Commutations in Pennsylvania" (1962), in Bedau (ed.), *op. cit.*, p. 473.

[37] Barzun, in Bedau (ed.), *op. cit.*, p. 163.

[38] Sellin, *The Death Penalty*, pp. 20–21.

"Since the time of Beccaria, Bentham, Rush and Livingston, most penologists have agreed that for any punishment to have optimum efficacy as a deterrent, the penalty must be imposed consistently, immediately and inexorably; that is, on all offenders, promptly after their crime, and in such a way that the general public expects exactly this. But in practice, not one of these conditions is satisfied by the way capital punishment is administered. Only a small proportion of first degree murderers are sentenced to death and even fewer are executed. The delay in convicting and executing those who do get a death sentence is increasing and notorious. So, almost anyone who contemplates some horrible crime can see some chance of getting away with it, or at least in not having to pay the supreme penalty. If, in practice, the death penalty is no more effective a deterrent for murder, rape and kidnapping than imprisonment is, this may be the reason." [39]

Those in favor of retaining the death penalty do not accept the abolitionist argument that it is impossible to effect the reforms necessary to make capital punishment a more credible threat to the man contemplating a horrible crime. The Massachusetts Special Commission minority report comments:

"It does not seem logical to say that the death penalty should be abolished because statistics prove that it is not a deterrent. It seems more consistent to urge that every effort be made to minimize the influence on the effectiveness of the death penalty of factors extrinsic to itself, and thus to realize to the maximum its intrinsic value. * * * If we admit that the state has, in principle, the right to inflict it, we should admit likewise a corresponding obligation on the part of the state to make it effective and we should not urge failure to do this as proof that the death penalty itself is not necessary." [40]

VII. THE RELIGIOUS ARGUMENT

The defense of capital punishment on religious grounds rests primarily on two points. First, it is argued that the death penalty is a testimony to the sacredness of life, and—in the case of the Hebrew-Christian tradition—that the Bible clearly differentiates between murder and the death penalty as a just punishment for the taking of God-given life. This argument is supported by the following passages, as well as others, from the Old Testament:

"Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made the man (Genesis, 9:6)."

"He that smiteth a man, so that he die, shall be surely put to death. * * * But if a man come presumptuously upon his neighbor to slay him with guile; thou shalt take him from mine altar, that he may die (Exodus, 21: 12, 14).

"Whoso killeth any person, the murderer shall be put to death by the mouth of witnesses. * * * Moreover ye shall take no satisfaction for the life of a murderer, which is guilty of death; but he shall be surely put to death * * * and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it (Numbers, 35: 30, 31, 33)."

Turning to the New Testament, it is argued that the law of love preached by Jesus implies the need for the existence of a strong civil law, and that it is a misreading of the New Testament to see it as advocating leniency for criminal behavior. This argument is summed up as follows by Rev. Jacob J. Vellenga who, since 1958, has served as Associate Executive of the United Presbyterian Church in the United States:

"The law of love, also called the law of liberty, was not presented to do away with the natural laws of society, but to inaugurate a new concept of law written on the heart where the mainsprings of action was born. The Church is ever to strive for superior law and order, not to advocate a lower order that makes wrongdoing less culpable . . . wherever and whenever God's love and mercy are rejected, as in crime, natural law and order must prevail, not as extraneous to redemption but as part of the whole scope of God's dealing with man." [41]

He continues:

"The law of capital punishment must stand as a silent but powerful witness to the sacredness of God-given life. Words are not enough to show that life is sacred. Active justice must be administered when the sacredness of life is violated." [42]

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[39] Bedau (ed.), *op. cit.*, p. 270.
[40] Massachusetts Special Commission, in McClellan (ed.), *op. cit.*, p. 77.
[41] Jacob J. Vellenga, "Christianity and the Death Penalty" (1959), in Bedau (ed.), *op. cit.*, pp. 127–128.
[42] *Ibid.*, p. 129.

In addition to the Old and New Testaments, St. Thomas Aquinas is also quoted in support of capital punishment: "It is lawful to kill an evil-doer insofar as it is directed to the welfare of the whole community." [43]

VIII. PUBLIC OPINION

Thirty-seven states, the District of Columbia, and the Federal Government have the death penalty. Of the thirteen states which have abolished it, only eight have done so completely. Five retain it on a limited basis, for such crimes as killing a policeman acting in the line of duty and the killing of a prison guard by an inmate who is serving a life term for murder. Jacques Barzun's assertion that his views in favor of the death penalty "are now close to unpopular" has been answered by Jerome Nathanson, a leading abolitionist, as follows:

"When I read this I wondered if he and I live in the same United States. How close is close? * * * A few years ago a special Massachusetts commission recommended abolition of the death penalty, whereupon the legislature promptly voted against its own commission. A few years ago Delaware abolished capital punishment. Subsequently, as has happened elsewhere, an especially outrageous crime led to a demand for its restoration. The legislature responded favorably to the demand, the Governor vetoed the measure, and it was passed again over his veto. The Governor of California is a supporter of abolition, but there is hardly the ghost of a chance, after the furor over the Chessman case, that it will be realized during his administration, even if he is elected to another term in office. * * * One could go on and on * * * After working a number of years in behalf of abolition, I have the contrary impression that the preponderance of popular sentiment is on [Mr. Barzun's] side." [44]

The reason for such public support—and its importance as an argument in favor of the retention of the death penalty—is commented on by Mr. Ralph G. Murdy, Managing Director of the Baltimore Criminal Justice Commission, as follows:

"Traditionally, our people have believed capital punishment necessary to control attacks on body and life. A majority today still holds that belief despite evidence of growing hesitation and question. To fly in the face of such conviction by completely doing away with the death penalty would only serve to further weaken the faith of our citizens in the administration of justice." [45]

The abolitionist argument that such popular feelings are based on emotion and prejudice rather on a knowledge of the facts is answered by the retentionists as follows—

Abolitionists say the public is not enlightened. That argument is always used to rationalize a minority point of view; but it is no more valid in this case than in any other case where two points of view exist and the question is resolved in accordance with the democratic process.[46]

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THE HARRIS SURVEY—MAJORITY OF AMERICANS NOW FAVOR CAPITAL PUNISHMENT

(By Louis Harris)

Despite recent rulings of the U.S. Supreme Court virtually outlawing the death penalty, a majority of the country believes in capital punishment, 59–31 percent. This marks a sharp increase in sentiment supporting the death penalty, up from a much closer 47–42 percent in 1970.

The key to current thinking on capital punishment can be found in the belief that it has a deterrent effect on people who might otherwise take the life of another person. For example, by 57–29 percent, a majority of the public agrees with the statement that "the death penalty is more effective than a life sentence without parole in keeping people from committing murder."

When asked if it could be proven that a long sentence was an effective a deterrent as the death penalty, most Americans say, by 48–35 percent, that they would then oppose capital punishment. This result indicates that in supporting death as punishment for murder the American people are not endorsing the old Biblical command of "an eye for an eye and a tooth for a tooth." In fact, when asked directly about that expression from the Bible, the public rejected that idea by a 49–40 percent margin. Still another "hard line" approach, the statement that "someone who has committed a terrible crime such as murder is an animal and deserves to be executed," met with 51–41 percent rejection.

Recently, the Harris Survey asked a nationwide cross section of 1,537 households this question, repeated from previous years:

"Do you believe in capital punishment (death penalty) or are you opposed to it?"

BELIEF IN CAPITAL PUNISHMENT

[In percent]

	1973	1970	1969
Believe in	59	47	48
Opposed	31	42	38
Not sure	10	11	14

There has been a clear intensification of support for the principle of capital punishment. The main reason for this shift emerged from another series of questions:

"Do you feel that the death penalty is more effective (a better deterrent) or not more effective than (READ LIST) in keeping other people from committing such crimes as murder?"

RELATIVE EFFECTIVENESS OF DEATH SENTENCE

[In percent]

	More effective	Not more effective	Not sure
Compared with:			
Life sentence with possible parole	56	32	12
Life sentence without parole	57	29	14

It is evident that the public believes that imprisonment of a person convicted of murder for life simply is not as effective a deterrent as the death penalty. Whether there is a chance to achieve parole or whether the convicted criminal serves out his full term for life appears to make little difference in people's assessment of the relative effectiveness of the sentences.

Some might take these results to mean that in its continuing concern over unchecked crime, a majority of the public has become vindictive in the extreme. Further probing, however, did not bear this out.

The cross section was also asked:

"Now I'd like to read you some statements other people have made about why they support capital punishment. For each one would you tell me if it represents your own view completely, fairly well, only slightly, or not at all?"

STATEMENTS ABOUT CAPITAL PUNISHMENT

[In percent]

	Reflects own view	Does not	Not sure
Capital punishment is more effective than other penalties in keeping people from committing crimes	61	33	6
A government which cannot execute criminals is going to become weak and lose the respect of the people	49	42	9
The Bible is right when it preaches "an eye for an eye and a tooth for a tooth"	40	49	11
Someone who has committed a terrible crime such as murder is an animal and deserves to be executed	41	51	3

The public sees the use of capital punishment as a tactical weapon rather than a matter of high principle, under which the taking of a life automatically should mean the death penalty. The proof of this finding was evident when people were asked this question:

"Suppose it could be proved to your satisfaction that the death penalty was not more effective than long prison sentences in keeping other people from

committing crimes such as murder, would you be in favor of the death penalty or would you be opposed to it?"

[in percent]

	Favor	Oppose	Not sure
Nationwide	35	48	17
By age:			
Under 30	32	56	12
30 to 49	34	48	18
50 and over	39	43	18
By education:			
8th grade or less	36	40	24
High school	37	45	18
College	32	59	9
By sex:			
Men	40	44	17
Women	31	53	16

Most ready to abandon the death penalty are young people, those with some college education, and women. Older persons, those with less education, and men are more reluctant to see life imprisonment substituted for capital punishment.

Of course, all of the results reported in this Harris Survey deal with the public's point of view about capital punishment and its effectiveness in deterring crime. How people would behave if they were jurors in murder trials is quite another story and will be reported in Thursday's Harris Survey.

THE GALLUP POLL—PRESIDENT NIXON LIKELY TO BE BACKED ON DEATH PENALTY

Princeton, N.J., March.—President Nixon's proposal that the death penalty be restored for certain federal crimes will likely meet with approval from the majority of the American people.

A Gallup survey taken in November showed support for capital punishment for murder to be at the highest point in two decades, despite the U.S. Supreme Court's ruling which, in effect, struck down the death penalty. A majority of 57 percent of persons interviewed voted in favor of the death penalty, while 32 percent were opposed and 11 percent undecided.

In a radio speech Saturday, President Nixon announced that he had asked Atty. Gen. Richard G. Kleindienst to draft a capital punishment law that would revive the death penalty for assassination, treason, kidnapping, skyjacking and the murder of law enforcement officials and prison guards.

Further evidence of the public's current "hard line" mood is seen from recent Gallup findings which show 67 percent of Americans in support of Gov. Nelson Rockefeller's proposal that all sellers of hard drugs be given life imprisonment without the possibility of a parole.

SUPPORT FOR DEATH PENALTY AT HIGHEST POINT IN TWO DECADES

THE GALLUP POLL—DESPITE SUPREME COURT RULING

(By George Gallup)

Princeton, N.J., Nov. 22.—Despite the U.S. Supreme Court's ruling striking down the death penalty, public support for capital punishment is currently at its highest point in nearly two decades.

In the latest survey, completed last week, a majority of 57 per cent of adults 18 and older said they favor the death penalty for persons convicted of murder. This percentage represents a sharp increase in support since March of this year when the figure was 50 per cent in favor.

The previous high was recorded in 1953 when 68 per cent of all adults interviewed voted in favor of capital punishment.

The following table shows the latest results and trend since 1953, when the current question wording was first used:

TREND SINCE 1953
[In percent]

	Yes	No	No opinion
November, 1972	57	32	11
March, 1972	50	41	9
1971	49	40	11
1969	51	40	9
1966	42	47	11
1965	45	43	12
1960	51	36	13
1953	68	25	7

FEAR FOR PERSONAL SAFETY KEY FACTOR

The increase in support for the death penalty since March may be due in considerable measure to widespread fear concerning personal and family safety —the "hidden issue" in this year's presidential election, according to Gallup Poll analysts.

Survey evidence indicates that the proportion of voters who say they are afraid to go out alone at night in their own neighborhoods has shown a dramatic increase in recent years. It is especially high in cities over 1 million in population but even in smaller cities it has reached a high level.

Voters throughout the nation feel that crime has increased during the last year in their communities and favor stricter law enforcement, as well as tougher sentences for lawbreakers.

EVIDENCE OF 'HARD LINE' MOOD

Indicative of the public's current "hard line" mood regarding crime was the recent vote in California on the death penalty.

California voters, by a vote of 67.5 per cent to 32.5 per cent (unofficial), approved the restoration of capital punishment for the crimes of train-wrecking, perjury resulting in execution of an innocent person, treason against the State and deadly assault against a prison guard by a life-term convict.

Six in ten whites favor the death penalty, but a majority of blacks (53 per cent) oppose it. Young adults (18 to 30) are less inclined to favor capital punishment for persons convicted of murder than are older persons, although the weight of opinion among young adults is 5-to-4 on the side of support.

Although women are less in favor of capital punishment than are men, they nevertheless lean heavily in support of it in the latest survey. In the March survey, by contrast, women were divided in their views on the death penalty.

In the March survey, public support for the death penalty was higher in the largest cities where worry over crime is most pronounced. Today, little difference is found on the basis of size of city or community, with as high a proportion of persons living in small towns or rural areas in favor of the death penalty as big city residents.

Following are the latest results by key population groups:

FAVOR DEATH PENALTY FOR MURDER?
[In percent]

	Yes	No	No opinion
National	57	32	11
Men	64	26	10
Women	50	37	13
Whites	60	29	11
Non-whites	29	53	18
College	58	36	6
High school	60	28	12
Grade school	50	34	16
Under 30 years	50	39	11
30 to 49 years	60	30	10
50 and over	60	27	13
Community size:			
1,000,000 and over	58	31	11
500,000 to 999,999	54	35	11
50,000 to 499,999	53	38	9
2,500 to 49,999	57	35	8
Under 2,500, rural	58	32	10

The latest survey results are based on in-person interviews with 1207 adults, 18 and older, interviewed in more than 250 scientifically selected localities between November 10 and 13. This question was asked:

Are you in favor of the death penalty for persons convicted of murder?

[From The Washington Post, Nov. 23, 1972]

THE GALLUP POLL—DEATH PENALTY GETS SURGE IN APPROVAL

(By George Gallup)

Princeton, N.J.—Despite the U.S. Supreme Court's ruling striking down the death penalty, public support for capital punishment is currently at its highest point in nearly two decades.

In the latest survey, completed last week, a majority of 57 per cent of adults 18 and older said they favor the death penalty for persons convicted of murder. This percentage represents a sharp increase in support since March of this year when the figure was 50 per cent in favor.

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Although women are less in favor of capital punishment than are men, they nevertheless lean heavily in support of it in the latest survey. In the March survey, by contrast, women were divided in their views on the death penalty.

The latest survey results are based on in-person interviews with 1,207 adults, 18 or older, interviewed in more than 250 scientifically selected localities between November 10 to 13. This question was asked.

Are you in favor of the death penalty for persons convicted of murder?

[In percent]

	Yes	No	No opinion
National	57	32	11
Men	64	26	10
Women	50	37	13
Whites	60	29	11
Non-whites	29	53	18
College	58	36	6
High school	60	28	12
Grade school	50	34	16
Under 30 yrs	50	39	11
30 to 49 yrs	60	30	10
50 and over	60	27	13
1,000,000 and over	58	31	11
500,000 to 999,999	54	35	11
50,000 to 499,999	53	38	9
2,500 to 49,999	57	35	8
Under 2,500, Rural	58	32	10

[From The Evening Star and Daily News, Washington, D.C., Nov. 13, 1972]

Death Penalty Staging a Comeback

(By Fred Barnes, Star-News Staff Writer)

The death penalty, virtually banned by the Supreme Court, earlier this year, is staging a comeback.

Since the high court's 5-to-4 ruling in June, which outlawed the death penalty as it is imposed almost everywhere in the nation, a strong effort has been made in many states to restore capital punishment.

In recent weeks, the campaign has begun to make headway. For example:

By a 2–1 margin, California voters on Tuesday voted in referendum to reinstate the death penalty in state prosecutions. The vote overturned a ruling of the California Supreme Court which flatly banned capital punishment, However, the change so far would be effective in few cases.

On Nov. 2, the Delaware Supreme Court declared that the state law prescribing death as the punishment for murder is constitutional. The court held the Delaware law is permissible under the U.S. Supreme Court decision because it makes the death penalty mandatory.

The Supreme Court's June ruling did not say in so many words that death penalties would be valid if they were mandatory. However, the justices whose votes were crucial in the split decision indicated they might be prepared to vote to uphold capital punishment where it was not left to the discretion of juries or judges, but rather was imposed in all capital cases alike.

Florida Gov. Reuben Askew, reluctantly acceding to the demands of politicians in the state, has called a special session of the Florida Legislature to deal with capital punishment. The session begins Nov. 28 and the legislators are expected to pass overwhelmingly a bill making the death penalty mandatory for a variety of crimes.

Officials in perhaps half a dozen other states have announced plans to push for legalizing the death penalty in the next regular session of their legislatures. Utah Atty. Gen. Vernon Romney, for instance, said Friday that he will propose "a carefully framed statute" that might meet U.S. Supreme Court tests.

A special 11-member committee of the National Association of Attorneys General is drafting model state legislation that will be allowable under the high court's ruling. The proposed capital punishment statute may be unveiled when the association meets next month in San Diego.

14 Already Had Banned

The Supreme court's decision affected 34 states. In 14—Alaska, Michigan, Hawaii, New York, New Mexico, West Virginia, Iowa, Oregon, Rhode Island, Vermont, Wisconsin, Minnesota, Maine and North Dakota—the legislatures earlier had banned the death penalty.

In New Jersey and California, the state supreme courts had ruled that capital punishment was unconstitutional.

The campaign to restore the death penalty in California has been directed from the Governor's mansion, and carried out by an army of volunteers under Atty. Gen. Evelle Younger.

Gov. Ronald Reagan was angered by the 6-to-1 ruling of the state high court in February that said capital punishment is "incompatible with the dignity of man and the judicial process."

To get a referendum on the ballot on the issue of the death penalty, 500,000 signatures were needed. Petitions were handed out at police stations and courthouses, among other places. Nancy Reagan, the governor's wife, volunteered to obtain signatures.

"With an operation like that, they didn't have any trouble getting enough signatures," commended Douglas Lyons, executive director of Citizens Against Legalized Murder Inc., an anti-death penalty group.

ISSUE PASSES EASILY

More than 1 million signatures were obtained, the issue went on the ballot and easily passed.

The referendum sought to restore all the death penalty statutes that were struck down by the California Supreme Court. But only four of them can be used—the ones which make death a mandatory punishment.

These are for somewhat infrequent crimes—killing a prison guard, train wrecking, treason against California and perjury that leads to the execution of an innocent person—and thus there will be little immediate impact.

Other restored laws which allow judges and juries to impose capital punishment at their discretion can't be put into effect because they apparently would violate the highest court's ruling. A state referendum can't overturn a federal court decision.

The referendum also barred the state Supreme Court from declaring capital punishment void again. And it said that the state legislature is "free to enact" new legislation making the death penalty mandatory and thus outside the Supreme Court ban.

LEGAL ATTACK EXPECTED

A legal attack on the referendum is expected, however. Opponents have charged that it was illegal since voters couldn't simply endorse or reject the laws with a mandatory death sentence. Californians had to vote on all death penalty laws, even the ones that the high court has outlawed.

In Delaware, there were two laws prescribing the death penalty for murder. One simply said a convicted killer gets death, and the other said it was up to juries and judges to decide on a sentence for murderers.

Did the U.S. Supreme Court's decision throw out both of those laws? Only the one that made the death sentence discretionary, answered the Delaware Supreme Court.

The first mandatory death penalty case to reach the Supreme Court will probably come from Florida, according to Ass't. Atty. Gen. George Georgieff.

Florida will be the first state to impose the required death penalty, he said, and thus become the first state to have the penalty challenged.

"Necessarily we'll be the first ones to go to Washington," he said.

Though Gov. Askew opposes capital punishment, Georgieff said he was "importuned" into calling the special legislative session by a collection of state politicians and Atty. Gen. Robert L. Shevin.

Georgieff said that the legislation expected to come out of the special session will require death for premeditated murder, felony murder, air piracy, killing a policeman and assassinating a public official.

The campaign to restore capital punishment should pick up markedly next year when state legislatures convene. Strong efforts are expected to come in Utah, Indiana, Pennsylvania, Oklahoma, New York and several Southern states, among others.

Indiana Atty. Gen. Theodore L. Sendak has formed a 50-member committee to study how to get the death penalty back on the books in his state.

Sendak's pro-capital punishment stance is credited with aiding his re-election last Tuesday. He was the leading vote-getter in the state.

Sendak is one of the members of the National Association of Attorneys General's special committee on capital punishment. Attorney Generals Andrew Miller of Virginia and Francis Burch of Maryland are also on the committee.

The group met last month in Oklahoma City, and there was some disagreement among the members. Many expressed doubts that the high court would go along with a mandatory death penalty.

The ruling in June didn't say that a required death sentence was legal. It simply left that matter open as it struck down the discretionary use of the penalty.

Georgieff was among those pessimistic about getting court approval. "I think for the most part we've seen the end of capital punishment," he said.

Before the issue reaches the Supreme Court, there are not likely to be any executions. No one has been put to death in the U.S. since 1967.

[From the FBI Law Enforcement Bulletin, February 1973]

Capital Punishment

(By Daniel F. McMahon)

The issue of capital punishment has been one of the most continuous and fiercely debated in our history. Since 1846, several States, some 15 in number, have completely abolished capital punishment, and of these, 11 have reinstated the death penalty. Of these 11, 3 have reabolished capital punishment. At the moment, there are only 10 States of the 50 that have totally abolished the death penalty. As evidence of the strong support for capital punishment, the House of Representatives, on October 2, 1972, by a majority of 354 to 2, voted the death penalty for aircraft hijackers.

In 1965, New York State abolished the death penalty, with certain exceptions. On June 29 of this year, the U.S. Supreme Court, by a five to four decision, held unconstitutional the laws of Georgia and Texas, which authorized the death penalty. Two of the three cases before the Supreme Court were rape cases, not involving homicide. The decision has been widely misconstrued to hold that capital punishment was abolished for all purposes. This is not a fact, as a reading of the decision will clearly show. Each of the nine Justices had a written opinion, and only two of the nine clearly support complete abolition. In any event, this is an unfortunate decision, because it has left confusion and uncertainty in its wake. There was no legal precedent for this decision, even though the issue had been before the Supreme Court on previous occasions. Aso, it is noted that the framers of our Constitution explicitly authorized capital punishment. The fifth amendment of the U.S. Constitution makes this abundantly clear.[1]

Since the abolition of the death penalty in our State, we have had a continuous increase in the homicide rate. As a matter of fact, over the past 2 years, we have had one record after another broken with the number of murders. New York City had 1,466 murders in 1971, an increase of 31 percent over the previous year. During the first 5 months of 1972, New York City had a record of 614 homicides and, unprecedented number of 57 homicides for the first week in July of this year. It is noteworthy that this 1-week record came immediately following the announcement of the U.S. Supreme Court decision.

The greatest significance of these homicide figures for 1972 is the fact that during the same period of time the total of serious crime in the city was decreasing by 21 percent. The trend of soaring homicides is similar throughout the entire State of New York. The total recorded in the State for 1971 was 1,817, in contrast with 1,439 the previous year, representing a 26 percent increase. The circumstance of soaring homicide rates, with the aggregate of other serious crime leveling or dropping, is also true outside New York City.

It is interesting to note England abolished capital punishment in 1965. Their experience has shown a marked increase in homicides, even through their homicide rate is substantially below ours in this country. Nevertheless, responsible groups are banning together, urging the reestablishment of capital punishment.

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[1] The pertinent portion reads as follows: "No person shall be held to answer for a *capital*, or otherwise infamous crime, unless. . . ." (Emphasis added.)

I recognize very well that the statistics that I have set forth do not *prove*, with absolute certitude, that capital punishment is a deterrent to murder. Likewise, I would dispute the claim of the abolitionist that statistics *prove* their position. This word seems to be very loosely used in this debate. But, I do submit the statistics above stated do serve as a basis for a sound, commonsense conclusion that the nonexistence of the death penalty has direct relationship with homicides, which are now reaching epidemic proportions. Nowhere was this dramatized more than the Brooklyn Chase Manhattan holdup this past August. The holdup man, while holding eight hostages in the bank for many many hours, told a reporter that if the cops stormed the bank, "I could kill. I will shoot everyone in the bank. The Supreme Court will let me get away with this. There's no death penalty. It is ridiculous. I can shoot everyone here, then throw my gun down, and you can't put me in the electric chair."

This is positive proof that the penalty, or lack thereof, was very much on the mind of one armed criminal, a potential killer. It is unreasonable to contend that the death penalty does not enter the minds of some other killers. Such being the case commonsense dictates that at least some will be deterred. To suggest otherwise is to contend that individuals do not fear death. *I strongly urge, if one potential murderer is deterred annually and one innocent life spared, it justifies capital punishment.* This is particularly so for homicides involving premeditation.

On March 17, 1971, J Edgar Hoover testified before the congressional subcommittee that 19 of the killers of police officers during the 1960's had previously been convicted of murder. In 1971, when we had no executions, there were an estimated total of 17,630 murders in our country, as compared with approximately 9,000 in 1960—a 96 percent increase.

One of the unfairest arguments used by abolitionsists is: In recent years the executions have dropped to zero, proving the disfavor of the penalty. This is not true. The very same abolitionists are the ones who have started massive legal attacks on capital punishment across our country, dating back 5 or 6 years. This has caused the sentencing authorities to pause, and appropriately so, pending the final word from our highest authority, the Supreme Court. It does not follow that capital punishment is in disfavor—as the polls and referendums have clearly shown. Unfortunately, the Supreme Court has not given a final word, rather a very indecisive decision.

Those in State government in the executive branch and in the legislature, in the area of criminal justice, have been motivated by an overriding concern for rehabilitation of the criminal. I acknowledge their sincerity and high purpose. I fully support efforts to rehabilitate the criminal, but not at a cost of sacrificing the rights of society. A proper balance can be and must be struck. But the authorities have achieved little in accomplishing their purpose, and, worst of all, they have created an imbalance which has neglected the average citizen. Our citizens in cities and suburbs live in greater fear than at any time in modern history. It can only end when the legislature returns to the fundamental and basic principle: We must have swift and certain punishment for wrongdoing. We must show greater concern for our citizens and the victims of crime than for the criminal. The first and imperative step is to reestablish capital punishment.

FRATERNAL ORDER OF POLICE,
Philadelphia, Pa., July 31, 1973.

Senator JOHN L. MCCLELLAN,
Chairman Subcommittee on Criminal Laws and Procedures
New Senate Office Building, Washington, D.C.

HONORABLE SIR: On July 30, 1973 I visited your Sub-Committee office and left a statement that I hope you can put into the record of the hearings on the Death Penalty Bill. I would appreciate it if you would do this when the Committee book goes to print.

With me was John Carroll, National Trustee from the State of Pennsylvania of the Fraternal Order of Police. This article is to be attributed to both of us.

I hope this will not be of any inconvenience to you.

Respectfully yours,

LOUIS R. DAMIANI,
Vice-President.

[From The Peace Officer, Philadelphia Lodge No. 5, July 1973]

FOP Supports Capital Punishment

On behalf of the 11,000 active members of the Fraternal Order of Police in Phila. I wish to express their deep concern over Legislation to revive the death penalty.

At a time in our national state history when crime is increasing alarmingly and when the number of police officers in the state of Penna. is reaching new heights, we have prominent figures and powerful groups advocating the abolition of Capital Punishment—almost an invitation for murderous thugs to kill more police officers whose duty it is to protect (even at the expense of their own lives) the very citizens who advocate leniency for their murderers. Where is the reciprocal regard for the life of a police officer in the minds and hearts of these paragons of Christian charity? Perhaps they have arrived at a governmental philosophy which considers the lives of police officers expendable, but not so the lives of the vicious criminals who murder them. Rather must we protect the latter, since to punish them too severely would be "projecting society's crime into the criminal."

Would it not be more sensible and accurate to state that "society" is to blame for the murder of its police officers unless it insists upon the retention of the death penalty as a protection for its own protectors, ergo, society itself?

Unmistakably, without militant police protection the whole of society would 'overnight become a criminal jungle.'

It is also put forth by those who would weaken our laws and, our ability to protect the innocent, that many murderers on death row claim they did not think of the death penalty when they committed their crimes. This is undoubtedly true. That is precisely the point, if they had thought to it, they would have not committed their crimes. Here we have the spectacle of a minute minority of convicted murderers convincing intelligent people that capital punishment is wrong because of their own failure to realize the consequences of their murderous conduct.

Are we then to base our laws on this reasoning? What of the countless others who were deterred from murder through the fear of the penalty? The implication is clear; even those murderers who didn't think of the death penalty would have been deterred had they given it consideration.

Our laws are made for reasonable creatures, not to satisfy an abnormal handful. It is hardly the part of wisdom to be guided by the counsel and advice of an infinitesimally small band of bestial criminals. Further, the cunning individual and conspiratorial group who plot murder always imagine themselves too clever to get caught, or if caught, convicted.

If capital punishment does not deter crime than why does every criminal sentenced to death seek commutation to life imprisonment? Common sense alone, without the benefit of knowledge, wisdom, and experience, convinces that we are influenced to the greatest degree by that which we love, respect or fear to the greatest degree; and that we cling most tenaciously to our most valued possessions. Life is indisputably our greatest possession.

On the other hand the proponents of "rehabilitation" for all murderers quote those portions of the Bible which they believe support their lavender-and-old-lace world where evil is neither recognized nor allowed. But the Bible clearly reveals that enforcement of moral justice is nothing new to our age. Misguided do-gooders frequently quote the 5th Commandment "Thou Shalt Not Kill," to prove that capital punishment is wrong. This commandment in the 20th chapter of Exodus has also been interpreted to mean: "Thou Shalt Do No Murder." Then the 21st chapter says "He That Smiteth A Man, So That He Die, Shall Be Surely Put To Death." We can no more change the application to our society of this basic moral law in the Old Testament than we can change the meaning of Leviticus "Thou Shalt Love Thy Neighbor As Thyself" which Jesus quoted in the New Testament. To "love thy neighbor" is to protect him; capital punishment acts as at least one wall to afford "God's children" protection.

Those in State Government in the executive branch and in the Legislative, in the area of criminal justice, have been motivated by an overriding concern for rehabilitation of the criminal. I acknowledge their sincerity and high purpose. I fully support efforts to rehabilitate the criminal, but not at a cost of sacrificing the rights of society. A proper balance can be and must be struck.

But the authorities have achieved little in accomplishing their purpose, and worst of all, they have created an imbalance which has neglected the average citizen.

Our citizens in cities and suburbs live in greater fear than at any time in modern history. It can only end when the Legislature returns to the fundamental and basic principle. We must have swift and certain punishment for wrong-doing.

We must show greater concern for our citizens and the victims of crime than for the criminal. I strongly urge, if one potential murderer is deterred annually and one innocent life spared, it justifies capital punishment.

The question that must be answered by this committee is, if it is legal and moral to take the life of a would be attacker before he kills you, why is it immoral for civil authority to take the assailant's life after he has successfully carried out his dastardly business?

In conclusion let me state some cold hard facts about our position on capital punishment. In the last ten years, over 700 policemen met death at the hands of felons. Of those responsible, 75% had prior criminal records, 54% of these for violent crime. One fourth of the murderers were on parole or probation when they killed the police officer and twenty, or 3%, had been previously convicted of a murder. Had capital punishment been the law of the land it could not be contested that these repeat killers, once executed, would have been deterred from killing again.

How long are you going to gamble with the families of police officers as the chips in this no limit game? How long do you think you can last in the jungle that is being created without having the policeman to pull your chestnuts out of the fire? The primary duty of the policeman is enforcement of laws enacted by you as legislators. In that role, the police walk constantly among criminals some of whom are chronic repeaters and some of whom are the toughest, most hardened miscreants in our society. Police officers are trained to weigh the motives of such men, and soon come to understand some of the character, some of the drives and above all some of the fears which are prevalent among this criminal element. They know, from the synthesis of their total experience that lurking behind even the toughest facade is often a deep seated fear of that terrifying punishment and they know that sometimes the specter of the fear will stay a trigger finger at the critical moment.

The deciding factor should be the consideration of justice—the primary, if not the sole, business of government. All the erudition, wisdom, experience and knowledge of history reveals that the death penalty is morally and legally just.

We must not jeopardize our future by ignoring the harsh realties of today's world in a vain attempt to put off our responsibilities to the next generation. The structure of this nation was built upon a solid foundation of individual responsibility, common effort responsibility, common effort and adherence to law. Unless that foundation is bettered now, the goals of tomorrow will be shaped on a bed of ashes. We urge this committee to weigh the human factor most bravely and recommend positive consideration of legislation that will restore society's ultimate sanction. We have tried the easy way out and it obviously has not worked. Please, before it is too late, try our way. Thank you.

Presentation given by Mrs. Marie Ann Mackley, Co-President Philadelphia Police Wives and interested citizens for action before the Governor's commission studying capital punishment:

Commission Members: I am here today as a citizen of the Commonwealth of Pennsylvania and a Representative of Philadelphia Police Wives and Interested Citizens For Action. Our demand is that when you return to Harrisburg with your report to the Governor you inform him of the desire of our Organization to restore the death penalty. We demand this because our loved ones also deserve the right to life, liberty and the pursuit of happiness. These are guaranteed by the United States Constitution. Capital punishment should be applied to all premeditated first degree murders—for to deliberately and willfully deny any man of his most precious possession, his life, is a crime against God and Society. Police Wives are especially concerned with the safety of their husbands for their is no other occupation in the entire country that is so dangerous as that of being a Police Officer. When our husbands put on their uniforms and leave for work, they become instant targets for all the sick and hostile minds of society. We have a legal right to our husbands and our children possess a right to have their fathers. Those who would take it upon themselves to murder Law Enforcement Officers deserve a fate no less than death. We do not seek venge-

ance—but justice and will settle for nothing less. The Governor should not be permitted to govern the Commonwealth by his own personal philosophy but should heed the will of the people—and the people want the return of the death penalty. The victims of these horrible murders cannot speak for themselves because death is final but someone must be their voices—we owe them that much. Do we not care how much they suffered at the hands of their killers before drawing their final agonizing breath? And have we no compassion for the families of these dead souls?—children growing up without fathers, never knowing the warmth, love, joy and companionship that a father passes on to his children. Or, are we only concerned with the rights of the criminal and his repeated cry of his consitutional rights being denied. Let us not forget that with every right there is a responsibility and criminals are criminals by choice not chance.

Capital punishment is not cruel. The convicted man has ample opportunity to make his peace with his Maker—the victim had no such opportunity. I cannot quote you statistics relating to the pros and cons of capital punishment being a deterrent. I can only state this fact: If a man is executed for killing one human being, there is absolutely no chance this same man will ever kill again—that Gentlemen would be a statistic. All of us are sick and tired of having Law Enforcement Officers murdered and knowing their killers will never receive the ultimate punishment—more than likely in a matter of time they will return to society and in many cases will even kill again. You know, they're not killing Governors, Representatives, Doctors, Lawyers, Bankers or even Supreme Court Justices—they're killing our husbands, sons, brothers, sons and friends. The time has now come for all of us to stand up and be heard. The state has the moral and legal right to protect its citizens against those who would deny us of our right to life. It also has the authority to punish and this authority should be used. For a lawful society can only survive if its leaders have the courage and ability to protect the innocent and punish the guilty. In 1971 our Organization travelled to Harrisburg and asked the Governor to bring back the electric chair—he refused. We also asked him to put the question of capital punishment on a referendum—he again refused. In 1972, within a very short period of time, petitions with over 15,000 signatures in favor of restoring the death penalty were presented to our Mayor. And now in 1973 we are here before this Commission with the same request: BRING BACK CAPITAL PUNISHMENT. Rest assured we will continue the fight until the very end. Most of our members are mothers and grandmothers. Some will say we are blood thirsty—that is not true. We are not violent people, rather we are very passive. Law, order and justice is what we are seeking. Perhaps we have been passive too long—we're now fighting for the lives of our loved ones because if we don't nobody else will. Are any of the members of the Commission familiar with the names of: George Jacobs, William Lackman, Ross Brackett, Frank VonColln, Harry Davis, Frederick Cione, Jospeh Kelley, John McEntee, Doug Alexander, or Louis Vasgarr? These are a few of our men who were murdered during the past few years. True, their loved ones and friends have suffered a great loss but the biggest loser is you and me, because when these men, were murdered, Society lost dedicated public servants. For whenever any Law Enforcement Officer is murdered society dies a little.

(Excerpts from Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 92d Congress, 2d Sess. (1972))

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STATEMENT OF FRANK G. CARRINGTON, EXECUTIVE DIRECTOR, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

Mr. Chairman: My name is Frank Carrington. I reside at 1341 Chestnut Street, Wilmette, Illinois. I am an attorney, and hold a Master of Laws degree in criminal law from Northwestern University. I have been in law enforcement work for the past 10 years, serving as a United States Treasury Agent and as a Police Legal Advisor with the Chicago and Denver Police Departments. I am currently the Executive Director of Americans for Effective Law Enforcement, Inc., 228 North LaSalle Street, Chicago, Illinois.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit organization, the purpose of which is to give a voice to the law-abid-

ing citizen in our criminal justice system. AELE has been described as a conservative counterforce to the American Civil Liberties Union (ACLU) in the area of the criminal law.[1] AELE believes that the right of the law-abiding citizen to be reasonably free from criminal harm should not be subordinated to the increasingly contrived "rights" which are being accorded to the violent and lawless elements in this country. To this end, AELE seeks to represent, here, and in the criminal courts, nationwide, the views of the law enforcement community and the interest of the actual and potential victims of crime in America. A summary of the aims, activities and accomplishments of AELE, together with a listing of its Board of Directors and Advisory Board, is contained in the brochure attached hereto as Exhibit #1.

AELE'S POSITION ON THE ISSUE OF CAPITAL PUNISHMENT

AELE does not believe that capital punishment should be abolished in federal or state criminal justice systems. Our reasons for this position are set forth below however at this juncture we wish to state, as emphatically as possible, our view that *if* capital punishment should be abolished, it should be by legislative action rather than by judicial fiat. We refer, of course, to the recent decision of the California Supreme Court which banned the death penalty in that state as "cruel or unusual punishment." [2] In our opinion the California court in so holding substituted sociological abstractions for the law, and, based upon the *personal* feelings of the six majority justices, negated the very clear will of the California Legislature and of the citizens of that state. (According to Tom Wicker, an anti-capital punishment columnist, mail to the California Supreme Court chambers is running 2-to-1 in favor of capital punishment. See: *The New York Times*, March 7, 1972, p. 37m, col. 1).

The issue of abolishment or retention of the death penalty is properly one to be determined by the democratic process. For example, in December of 1970, in a state constitutional election, the voters of Illinois rejected a proposition abolishing the death penalty, casting 1,218.791 votes *against* abolishment to 676,302 *for* abolishment, a margin of almost 2-to-1.[3]

Be that as it may. This is, in fact, a legislative hearing; and we are here to express our opposition to the abolishment of the death penalty by legislative action for the following reasons:

CONSIDERATION SHOULD BE GIVEN TO THE VICTIMS OF CRIME

AELE is, frankly, a victim-oriented organization. We believe that many of those who advocate the abolition of the death penalty evidence a highly unrealistic and lofty disregard for: (a) the plight of the actual victims of countless murderers and (b) the safety of the *potential* victims of those who will kill in future.

Insofar as the actual victims are concerned, consider these questions: Who can name just one of the eight nurses murdered by Richard Franklin Speck? Likewise, if one of Charles Manson's victims had not been a famous movie actress, who would be able to recall the names of any of those who were murdered by Manson and his foul clan?

Yet the names Richard Speck and Charles Manson are, in truth, "household words" in the United States and, while their victims are lying in their graves, active efforts, evidenced by these proceedings, are under way to save Manson, Speck and others from the consequences of their acts.

We submit that past and future victims of crime *are* deserving of our consideration, especially in view of the fact that, beyond any question, our racial minorities and ghetto-dwellers are the principal victims of violent crimes, including those crimes for which the death penalty is provided.[4] We concur

[1] See: "A Counterweight to ACLU Thrives" by Fred P. Graham, *New York Times*, Feb. 22, 1971 page 30m.

[2] *California v. Anderson*, —— Cal. ——, Criminal No. 13617, Supreme Court of California (February 18, 1972).

[3] Illinois Secretary of State, Constitution of the State of Illinois and the United States, 13, 15 (1971).

[4] See, e.g., Crime Control Digest, March 25, 1970, page 7, in which is described a study by Stanford Criminologist Herbert L. Packer which concluded that ghetto residents are 100 times as likely to become victims of violent crime as their more affluent suburban counterparts. See also: "Black Crime Preys on Black Victims" an Associated Press study appearing in the *Denver Post*, August 23, 1970, page 35; and "Black Law and Order" in the *National Observer*, May 10, 1971, page 1.

with Illinois State Senator Raymond Ewing, a black, who refused to vote for a moratorium on the death penalty in Illinois because:

I realize that most of those who would face the death penalty are poor and black and friendless. *I also realize that most of their victims are poor and black and friendless and dead.*[5] (emphasis supplied)

Our concern for the victims of murderers leads inevitably to the abolitionist response that the execution of the death penalty upon killer "A" will not bring his victim "B" back to life. This is, of course, true; but the question goes deeper than that. The fact that "A" is executed will not, concededly, bring "B" back to life; however, such arguments ignore the fact that although "B" is beyond resurrecting, the fact that "A" has been executed for the crime: (1) may well deter "C", "D", and "E" from following "A" 's example of killing and (2) *will* make absolutely certain that "A" will never kill again.

This brings us to the main bases for our contention that capital punishment should not be abolished: the deterrence of capital crimes and the incapacity of a killer, once executed, to kill again.

CAPITAL PUNISHMENT AS A DETERRENT

We believe that if the threat of capital punishment were to be a real, rather than an imagined, threat, potential murderers in many cases would, in fact, be deterred from killing. Evidence to support this contention is to be found in a study conducted in 1970 and 1971 by the Los Angeles Police Department in an effort to measure the deterrent effect of the death penalty.[6] The study involved a compilatiom of statements taken from persons who had been arrested for crimes of violence. Those interviewed had either been unarmed during the commission of their crimes or had been armed but did not use their weapons. Of 99 persons who gave a statement as to why they went unarmed or did not use their weapons the results were classified as follows:

Los Angeles Police Department Study of the Deterrent Effect of the Death Penalty, February, 1971

1. Deterred by fear of death penalty from carrying weapon or operative weapon, 50 (50.5%).
2. Unaffected by death penalty because it was no longer being enforced, 7 (7.07%).
3. Undeterred by death penalty, would kill whether it was enforced or not, 10 (10.1%).
4. Unaffected by death penalty because they would not carry weapon in any event, primarily out of fear of being injured themselves or of injuring someone else, 32 (32.3%).

Thus we see a 5-to-1 ratio of deterrence over non deterrence as reported by individuals who were in the best position to make such a judgement: the perpetrators themselves.

The conclusions drawn from this study by the Los Angeles Police are as follows:

1. The adoption of an effective enforced death penalty system is a deterrent in the prevention of homicides. II. Though the death penalty has not been removed from the statutes in California, many suspects believe in reality that no death penalty exists as it is not being enforced. III. Some suspects, while realizing that the California death penalty exists in name only, disclose that the certainty of an executed death penalty sentence would deter them from being armed while committing crimes.

The report also notes that:

If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement. In 1970 in the City of Los Angeles, 394 innocent people were victims of an unlawful execution without the right of due process of law. (emphasis supplied)

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[5] *Chicago Tribune*, "Ban Death Penalty, State House Visit Urges" April 15, 1971 section 1, page 1, col. 5.

[6] Los Angeles Police Department, Detective Bureau, Administrative Analysis Section, A Study by the Los Angeles Police Department on Capital Punishment II (February, 1971).

This study was cited by the State of California in the Supreme Court of the United States in *Aikens v. California*, October Term 1971, No. 68–5027.

Additionally, Justice Marshall McComb of the California Supreme Court (who was the sole dissenter in the *Anderson* case in which the California Supreme Court held the death penalty to be "cruel or unusual) had, in an earlier case,[7] cited, as evidence of the deterrent effect of the death penalty, another series of examples of violent criminals who did *not* kill because of the threat of death involved for capital crimes.

We are submitting verbatim these examples from Justice McComb's opinion as a part of our statement because we believe that they indicate very clearly the true deterrent nature of capital punishment. We urge this Subcommittee to consider them with care. These are cases in which lives were *actually saved* because a would-be killer, *by his own admission*, was deterred, by the threat of the death penalty, from murdering others in the course of violent crimes.

These cases cited by Justice McComb are as follows:

(i) Maragret Elizabeth Daly, of San Pedro, was arrested August 28, 1961, for assaulting Pete Gibbons with a knife. She stated to investigating officers: 'Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*'

(ii) Robert D. Thomas, alias Robert Hall, an ex-convict from Kentucky; Melvin Eugene Young, alias Gene Wilson, a petty criminal from Iowa and Illinois; and Shirley R. Coffee, alias Elizabeth Salquist, of California, were arrested April 25, 1961, for robbery. They had used toy pistols to force their victims into rear rooms, where the victims were bound. When questioned by the investigating officers as to the reason for using toy guns instead of genuine guns, all three agreed that real guns were too dangerous, *as if someone were killed in the commission of the robberies, they could all receive the death penalty.*

(iii) Louis Joseph Turck, alias Luigi Furchiano, alias Joseph Farino, alias Glenn Hooper, alias Joe Moreno, an ex-convict with a felony record dating from 1941, was arrested May 20, 1961 for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery here. He told investigating officers that he was aware of the California death penalty although he had been in this state for only one month, and said, when asked why he had only simulated a gun, *'I know that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber.*

(iv) Roman Jesse Velarde was arrested September 26, 1960, while attempting to rob a supermarket. At that time, armed with a loaded .38 caliber revolver, he was holding several employees of the market as hostages. He subsequently escaped from jail and was apprehended at the Mexican border. While being returned to Los Angeles for prosecution, he made the following statement to the transporting officers: 'I think I might have escaped at the market if I had shot one or more of them. *I probably would have done it if it wasn't for the gas chamber.* I'll only do 7 or 10 years for this. I don't want to die no matter what happens, you want to live another day.'

(v) Orelius Mathew Stewart, an ex-convict, with a long felony record, was arrested March 3, 1960, for attempted bank robbery. He was subsequently convicted and sentenced to the state prison. While discussing the matter with his probation officer he stated: "The officer who arrested me was by himself, and if I had wanted, I could have blasted him. *I thought about it at the time, but I changed my mind when I thought of the gas chamber.*'

(vi) Paul Anthony Brusseau, with a criminal record in six other states, was arrested February 6, 1960, for robbery. He readily admitted five holdups of candy stores in Los Angeles. In this series of robberies he had only simulated a gun. When questioned by investigators as to the reason for his simulating a gun rather than using a real one, he replied that *he did not want to get the gas chamber.*

(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officer: 'I want to ask you one question, do you think they will repeal the capital punishment law? *If they do, we can kill all you cops and judges without worrying about it.*'

(viii) Jack Colevris, a habitual criminal with a record dating back to 1945, committed an armed robbery at a supermarket on April 25, 1960, about a week

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[7] *People v. Love*, 56 Cal. 2d. 720, 336, P. 2d. 33, (1961) (McComb, Jr., dissenting).

after escaping from San Quentin Prison. Shortly thereafter he was stopped by a motorcycle officer. Colevris, who had twice been sentenced to the state prison for armed robbery, knew that, if brought to trial, he would again be sent to prison for a long term. The loaded revolver was on the seat of the automobile beside him and he could easily have shot and killed the arresting officer. By his own statements to the interrogating officers, however, *he was deterred from this action because he preferred a possible life sentence to death in the gas chamber.*

(ix) Edward Joseph Lapienski, who had a criminal record dating back to 1948, was arrested in December 1959 for a holdup committed with a toy automatic type pistol. When questioned by investigators as to why he had threatened his victim with death and had not provided himself with the means of carrying out the threat, he stated. *'I know that if I had a real gun and killed someone, I would get the gas chamber.'*

(x) George Hewlitt Dixon, an ex-convict with a long felony record in the East, was arrested for robbery in kidnaping committed on November 27, 1959 Using a screw-driver in his jacket pocket to simulate a gun, he had held up and kidnaped the attendant of a service station, later releasing him unharmed. When questioned about his using a scredriver to simulate a gun, this man, a hardened criminal with many felony arrests and at least two known escapes from custody, indicated his fear and respect for the California death penalty and stated, *'I did not want to get the gas.'*

(xi) Eugene Freeland Fitzgerald, alias Edward Finley, an ex-convict with a felony record dating back to 1951, was arrested February 2, 1960, for the robbery of a chain of candy stores. He used a toy gun in committing the robberies, and when questioned by the investigating officers as to his reasons for doing so, he stated: *'If I had a real gun and killed someone, I would get the gas. I would rather have it this way.'*

(xii) Quentin Lawson, an ex-convict on parole, was arrested January 24 1959, for committing two robberies, in which he had simulated a gun in his coat pocket. When questioned on his reason for simulating a gun and not using a real one, he replied that *he did not want to kill someone and get the death penalty.*

(xiii) Theodore Roosevelt Cronell, with many aliases, an ex-convict from Michigan with a criminal record of 26 years, was arrested December 31, 1958, while attempting to hold up the box office of a theater. He had simulated a gun in his coat pocket, and when asked by investigating officers why an ex-convict with everything to lose would not use a real gun, he replied. *'If I used a real gun and shot someone, I could lose my life.'*

(xiv) Robert Ellis Blood, Daniel B. Gridley, and Richard R. Hurst were arrested December 3, 1958, for attempted robbery. They were equipped with a roll of cord and a toy pistol. When questioned, all of them stated that they used the toy pistol because *they did not want to kill anyone, as they were aware that the penalty for killing a person in a robbery was death in the gas chamber.* (Emphasis in the original.)

On a related point, we often hear the arguments of those who would abolish capital punishment that the ever increasing numbers of murders in the United States indicate that capital punishment, which is still in effect in most states, is not a deterrent to crime. This argument might have some validity if capital punishment had for the past few years constituted a genuine threat; however, it is common knowledge that because of judicial, legislative, and other legal maneuverings against the death penalty there have been no executions in this country since 1967 and very few executions before then. As a result the threat of capital punishment is not taken seriously by many killers. We submit that it is highly likely if in certain carefully delineated classes of crimes (premeditated murder, felony-murder, killing of law enforcement officers and prison guards, murder for hire, and multiple murder) the death penalty for the convicted perpetrator would be swift and sure, homicides would in fact decline in number.

THE "SECOND MURDERS"—KILLINGS BY PERSONS WHO HAVE KILLED BEFORE BUT WHO, NOT HAVING BEEN EXECUTED, HAD THE OPPORTUNITY TO KILL AGAIN

The brief of the State of California in its petition for rehearing in the *Anderson* case cites, at pages 17 and 18, cases in which persons who had been once convicted of murder had killed again, either in prison, after escaping, or after being paroled. Summaries of seven such cases follow:

People v. *Purvis*, 52 Cal. 2d 871, 346 P. 2d 22 (1959)

In 1950 defendant was convicted of second degree murder of his wife and sentenced to prison. In 1954 he was paroled. In 1957 he murdered a woman and was convicted with the death penalty imposed. The California Supreme Court affirmed judgment but ordered a retrial on issue of penalty.

People v. *Gilbert*, 63 Cal. 2d 690, 408 P. 2d 365 (1965)

Gilbert was convicted in 1947 of second degree murder for killing a fellow prisoner at San Quentin. He was released on parole in 1959 and convicted of burglary in 1960. He escaped in 1965 and committed a series of armed bank robberies. In 1964 he killed a police officer while committing a bank robbery. Gilbert was convicted of first degree robbery, and kidnapping and received the death penalty.

People v. *Robles*, 2 Cal. 3d 205, 466 P. 2d 710 (1970)

Robles was serving life sentence for first degree murder. He had a prior conviction for assault with intent to commit murder. While in prison, he murdered an inmate by striking him on the head and then cutting his throat from ear to ear. Robles was convicted of first degree murder and received the death penalty. The California Supreme Court reversed the penalty.

People v. *St. Martin*, 1 Cal. 3d 524, 463 P. 2d 390 (1970)

Defendant was serving a life sentence for second degree murder and robbery in the first degree. While a guard was trying to restrain him, defendant plunged a knife three times into an inmate's chest killing him. Defendant was convicted and given the death penalty. The California Supreme Court reversed the judgment.

People v. *Peete*, 28 Cal. 2d 306 (1946)

Defendant was convicted of murder in 1921 and after 18 years was released from prison. In 1944 defendant murdered another person and this time received the death penalty.

People v. *Hall*, 199 Cal. 451 (1926)

Hall escaped from prison while serving a life sentence for murder. Subsequently he committed another murder and was convicted and received the death penalty. The California Supreme Court reversed judgment.

People v. *Morse*, 70 Cal. 2d 711.

Morse, serving a sentence of life imprisonment for two murders garrotted a fellow prisoner who owed him some cigarettes. Sentenced to death for this murder, Morse had the judgment reversed by the California Supreme Court.

Cases such as these, and other similar cases, nationwide, clearly indicate that misguided leniency towards one who has been proven to be a murderer can result in the loss of the lives of the victims of "second killings." Abolitionists often couch their opposition to the death penalty in terms of "reverence for human life;" however, this reverence appears to be directed solely towards the lives of the killers. It ignores the fact that the lives of the innocent "second victims" have also been taken—lives that could have been saved if one had already demonstrated a potential for killing had not been given a "second chance" to kill again.

EASY PAROLE LAWS

In California a "life sentence" actually means that the individual convicted is eligible for parole in seven years.[8] Other states provide for parole eligibility after relatively short periods of confinement. Parole laws such as these indicate our preoccupation with the criminal and our total amnesia with regard to such rights to life as the victims might have had. Who can guarantee that, after a given period of years, Sirhan Sirhan, Richard Speck, Charles Manson and his followers or James Earl Ray might not be paroled by a high-minded parole board who saw before them an apparently repentant and rehabilitated individual? We believe that there are certain individuals who are, quite simply not fit to return to society again (for example the person or persons who

[8] California Penal Code, Section 3046.

planted operable bombs of extreme explosive power aboard two airliners last week, in an attempt to extort two million dollars from Transworld Airlines). Yet overly lenient parole laws, coupled with our tendency to deny any thought to the victims of crime, could act to return the most hideous of murderers to the community—perhaps to kill again.

SPECIAL CASES—LAW ENFORCEMENT OFFICERS AND PRISON GUARDS

We have, in the foregoing section, spoken of our overall concern for the actual and potential victims of homicides. We turn now to two special cases: law enforcement officers and prison guards.

1. Law Enforcement Officers

In our society we have placed the responsibility for the prevention of crime and the apprehension of criminals squarly upon our law enforcement officers. As a part of their duty to protect the public, they must seek out confrontations with the criminal element which others are privileged to avoid. The average citizen who sees an armed robbery, a street mugging, or an attempted rape in progress has, as a general rule, no duty to intervene. No so the policeman. On duty or off he must attempt to apprehend the perpetrator. Between 1966 and 1970, 261 law enforcement officers were killed answering disturbance calls, responding to crimes in progress and making arrests (except traffic arrests.) [9]

It is precisely because we require the policeman to engage in face-to-face confrontations with criminals on a day-to-day basis that they should be considered as special cases when we consider the punishment to be accorded to their killers. *AELE takes the unequivocal position that the punishment for the murder of a law enforcement officer engaged in his duties should be death.*

Consider the tragic statistics of law enforcement officers killed during the five-year period 1967 to 1971:

1967	76
1968	64
1969	86
1970	100
1971	125

We believe that if a *non-commutable* death sentence were the *only* penalty upon conviction of the murderer of a law enforcement officer, these statistics would rapidly decline.

The other side of the coin is also true. As we have had mentioned, "life imprisonment" in California now means that the convict is eligible for parole in seven years. In a recent case in Illinois the murderer of a policeman received a "tough" sentence of 100 to 200 years; the killer will, however, be eligible for parole in eleven years and three months. We believe that parole laws such as these make the already dangerous job of a law enforcement officer infinitely more hazardous. When an armed robber, rapist or fleeing killer is cornered by a police officer he may well consider that killing the officer in order to escape apprehension may well be the best option open to him in view of the current lack of enforcement of the death penalty and our overly lenient parole laws.

A policeman, in his day-to-day confrontation with criminals, deserves the fullest protection that the law can give him; and that protection is assuredly *not* present in a state, such as California, where the would-be cop-killer knows that, if apprehended, seven years in prison may be the total penalty that he must face.

2. Prison Guards and Corrections Officers

Just as policemen are required to confront the criminals on the streets, prison guards confront them daily in our correctional institutions. Prison guards go unarmed among their charges and are vulnerable at any time to an attack. In the notorious "Soledad Brothers" case a guard was thrown to his death from a third floor tier, and, in the Attica riots and the escape attempt of Geroge Jackson from San Quentin prison, unarmed guards were murdered by inmates.

Prison guards, like law enforcement officers, deserve the maximum protection of the law. We favor the death penalty for the killing of any prison guard or corrections officers while he is on duty.

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[9] FBI Uniform Crime Reports 1970.

CONCLUSION

AELE's presentation herein may be considered a hard line approach to the issue of capital punishment. If this is, indeed, true, the hard line approach is based upon our preoccupation with the rights of the actual and potential victims of murderers (most of whom will be members of minority races and ghetto dwellers) rather than with those of the murderers themselves. Additionally, we have a special regard for the safety of law enforcement and correctional officers.

We believe that if capital punishment was once again to be made a *real* threat and that swift and sure execution followed upon conviction of the classes of murders we have discussed herein, the deterrent effect would be tremendous. The execution of a human being by the state is never a pleasant thing; however, we believe that such executions would, in fact, deter potential murderers and prevent "second killings" by those who have already been proven to be killers, that the saving of these innocent lives far outweighs any concern that we should have for convicted killers, and that capital punishment should clearly be retained and made a reality once more.

Respectfully submitted,

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ON DETERRENCE AND THE DEATH PENALTY

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(This article is a revision of one which appeared originally in *Ethics.*)

I

If rehabilitation and the protection of society from unrehabilitated offenders were the only purposes of legal punishment the death penalty could be abolished: it cannot attain the first end, and is not needed for the second. No case for the death penalty can be made unless "doing justice," or "deterring others," are among our penal aims.[1] Each of these purposes can justify capital punishment by itself; opponents, therefore, must show that neither actually does, while proponents can rest their case on either.

Although the argument from justice is intellectually more interesting, and, in my view, decisive enough, utilitarian arguments have more appeal: the claim that capital punishment is useless because it does not deter others, is most persuasive. I shall, therefore, focus on this claim. Lest the argument be thought to be unduly narrow, I shall show, nonetheless, that some claims of injustice rest on premises which the claimants reject when arguments for capital punishment are derived therefrom; while other claims of injustice have no independent standing: their weight depends on the weight given to deterrence.

II

Capital punishment is regarded as unjust because it may lead to the execution of innocents, or because the guilty poor (or disadvantaged) are more likely to be executed than the guilty rich.

[1] Social solidarity of "community feeling" (here to be ignored) might be dealt with as a form of deterrence.

Regardless of merit, these claims are relevant only if "doing justice" is one purpose of punishment. Unless one regards it as good, or, at least, better, that the guilty be punished rather than the innocent, and that the equally guilty be punished equally,[2] unless, that is, one wants penalties to be just, one cannot object to them because they are not. However, if one does include justice among the purposes of punishment, it becomes possible to justify any one punishment—even death—on grounds of justice. Yet, those who object to the death penalty because of its alleged injustice, usually deny not only the merits, or the sufficiency, of specific arguments based on justice, but the propriety of justice as an argument: the exclude "doing justice" as a purpose of legal punishment. If justice is not a purpose of penalties, injustice cannot be an objection to the death penalty, or to any other; if it is, justice cannot be ruled out as an argument for any penalty.

Consider the claim of injustice on its merits now. A convicted man may be found to have been innocent; if he was executed, the penalty cannot be reversed. Except for fines, penalties never can be reversed. Time spent in prison cannot be returned. However a prison sentence may be remitted once the prisoner serving it is found innocent; and he can be compensated for the time served (although compensation ordinarily cannot repair the harm). Thus, though (nearly) all penalties are irreversible, the death penalty, unlike others, is irrevocable as well.

Despite all precautions, errors will occur in judicial proceedings: the innocent may be found guilty;[3] or the guilty rich may more easily escape conviction, or receive lesser penalties than the guilty poor. However, these injustices do not reside in the penalties inflicted but in their maldistribution. It is not the penalty—whether death or prison—which is unjust when inflicted on the innocent, but its imposition on the innocent. Inequity between poor and rich also involves distribution, not the penalty distributed.[4] Thus injustice is not an objection to the death penalty but to the distributive process—the trial. Trials are more likely to be fair when life is at stake—the death penalty is probably less often unjustly inflicted than others. It requires special consideration not because it is more, or more often, unjust than other penalties, but because it is always irrevocable.

Can any amount of deterrence justify the possibility of irrevocable injustice? Surely injustice is unjustifiable in each actual individual case; it must be objected to whenever it occurs. But we are concerned here with the process that may produce injustice, and with the penalty that would make it irrevocable—not with the actual individual cases produced, but with the general rules which may produce them. To consider objections to a general rule (the provision of any penalties by law) we must compare the likely net result of alternative rules and select the rule (or penalty) likely to produce the least injustice. For however one defines justice, to support it cannot mean less than to favor the least injustice. If the death of innocents because of judicial error is unjust, so is the death of innocents by murder. If some murders could be avoided by a penalty conceivably more deterrent than others—such as the death penalty—then the question becomes: which penalty will minimize the number of innocents killed (by crime and by punishment)? It follows that the irrevocable injustice, sometimes inflicted by the death penalty would not significantly militate against it, if capital punishment deters enough murders to reduce the total number of innocents killed so that fewer are lost than would be lost without it.

In general, the possibility of injustice argues against penalization of any kind only if the expected usefulness of penalization is less important than the probable harm (particularly to innocents) and the probable inequities. The possibility of injustice argues against the death penalty only inasmuch as the added usefulness (deterrence) expected from irrevocability is though less important than the added harm. (Were my argument specifically concerned with justice, I could compare the injustice inflicted by the courts with the injustice—outside the courts—avoided by the judicial process. *I.e.*, "important" here may be used to include everything to which importance is attached.)

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[2] Certainly a major meaning of *suum cuique tribue.*

[3] I am not concerned here with the converse injustice, *which I regard as no less grave.*

[4] Such inequity, though likely, has not been demonstrated. Note that, since there are more poor than rich, there are likely to be more guilty poor; and, if poverty contributes to crime, the proportion of the poor who are criminals also should be higher than that of the rich.

We must briefly examine now the general use and effectiveness of deterrence to decide whether the death penalty could add enough deterrence to be warranted.

III

Does any punishment "deter others" at all? Doubts have been thrown on this effect because it is thought to depend on the incorrect rationalistic psychology of some of its 18th and 19th century proponents. Actually deterrence does not depend on rational calculation, on rationality or even on capacity for it; nor do arguments for it depend on rationalistic psychology. Deterrence depends on the likelihood and on the regularity—not on the rationality—of human responses to danger; and further on the possibility of reinforcing internal controls by vicarious external experiences.

Responsiveness to danger is generally found in human behavior; the danger can, but need not, come from the law or from society; nor need it be explicitly verbalized. Unless intent on suicide, people do not jump from high mountain cliffs, however tempted to fly through the air; and they take precautions against falling. The mere risk of injury often restrains us from doing what is otherwise attractive; we refrain even when we have no direct experience, and usually without explicit computation of probabilities, let alone conscious weighing of expected pleasure against possible pain. One abstains from dangerous acts because of vague, inchoate, habitual and, above all, preconscious fears. Risks and rewards are more often felt than calculated; one abstains without accounting to oneself, because "it isn't done," or because one literally does not conceive of the action one refrains from. Animals as well refrain from painful or injurious experiences presumably without calculation; and the threat of punishment can be used to regulate their conduct.

Unlike natural dangers, legal threats are constructed deliberately by legislators to restrain actions which may impair the social order. Thus legislation transforms social into individual dangers. Most people further transform external into internal danger: they acquire a sense of moral obligation, a conscience, which threatens them, should they do what is wrong. Arising originally from the external authority of rulers and rules, conscience is internalized and becomes independent of external forces. However, conscience is constantly reinforced in those whom it controls by the coercive imposition of external authority on recalcitrants and on those who have not acquired it. Most people refrain from offenses because they feel an obligation to behave lawfully. But this obligation would scarcely be felt if those who do not feel or follow it were not to suffer punishment.

Although the legislators may calculate their threats and the responses to be produced, the effectiveness of the threats neither requires nor depends on calculations by those responding. The predictor (or producer) of effects must calculate; those whose responses are predicted (or produced) need not. Hence, although legislation (and legislators) should be rational, subjects, to be deterred as intended, need not be: they need only be responsive.

Punishments deter those who have not violated the law for the same reasons —and in the same degrees (apart from internalization: moral obligation) as do natural dangers. Often natural dangers—all dangers not deliberately created by legislation (*e.g.*, injury of the criminal inflicted by the crime victim) are insufficient. Thus, the fear of injury (natural danger) does not suffice to control city traffic; it must be reinforced by the legal punishment meted out to those who violate the rules. These punishments keep most people observing the regulations. However, where (in the absence of natural danger) the threatened punishment is so light that the advantage of violating rules tends to exceed the disadvantage of being punished (divided by the risk), the rule is violated (*i.e.*, parking fines are too light). In this case the feeling of obligation tends to vanish as well. Elsewhere punishment deters.

To be sure, not everybody responds to threatened punishment. Non-responsive persons may be a) self-destructive or b) incapable of responding to threats, or even of grasping them. Increases in the size, or certainty, of penalties would not affect these two groups. A third group c) might respond to more certain or more severe penalties.[5] If the punishment threatened for bur-

[5] I neglect those motivated by civil disobedience or, generally, moral or political passion. Deterring them depends less on penalties than on the moral support they receive, though penalties play a role. I also neglect those who may belong to all three groups listed, some successively, some even simultaneously, such as drug addicts. Finally, I must altogether omit the far from negligible role problems of apprehension and conviction play in deterrence—beyond saying that by reducing the government's ability to apprehend and convict, courts are able to reduce the risks of offenders.

glary, robbery, or rape were a $5 fine in North Carolina, and 5 years in prison in South Carolina, I have no doubt that the North Carolina treasury would become quite opulent until vigilante justice would provide the deterrence not provided by law. Whether to increase penalties (or improve enforcement), depends on the importance of the rule to society, the size and likely reaction of the group that did not respond before, and the acceptance of the added punishment and enforcement required to deter it. Observation would have to locate the points—likely to differ in different times and places—at which diminishing, zero, and negative returns set in. There is no reason to believe that all present and future offenders belong to the *a priori* non-responsive groups, or that all penalties have reached the point of diminishing, let alone zero returns.

IV

Even though its effectiveness seems obvious, punishment as a deterrent has fallen into disrepute. Some ideas which help explain this progressive heedlessness were uttered by Lester Pearson, then Prime Minister of Canada, when, in opposing the death penalty, he proposed that instead "the state seek to eradicate the causes of crime—slums, ghettos and personality disorders." [6]

"Slums, ghettos and personality disorders" have not been shown, singly or collectively, to be "the causes" of crime.

(1) The crime rate in the slums is indeed higher than elsewhere; but so is the death rate in hospitals. Slums are no more "causes" of crime, than hospitals are of death; they are locations of crime, as hospitals are of death. Slums and hospitals attract people selectively; neither is the "cause" of the condition (disease in hospitals, poverty in slums) that leads to the selective attraction.

As for poverty which draws people into slums, and, sometimes, into crime, any relative disadvantage may lead to ambition, frustration, resentment and, if insufficiently restrained to crime. Not all relative disadvantages can be eliminated; indeed very few can be, and their elimination increases the resentment generated by the remaining ones; not even relative poverty can be removed altogether. (Absolute poverty—whatever that may be—hardly affects crime.) However, though contributory relative disadvantages are not a necessary or sufficient cause of crime: most poor people do not commit crimes, and some rich people do. Hence, "eradication of poverty" would, at most, remove one (doubtful) cause of crime.

In the United States, the decline of poverty has not been associated with a reduction of crime. Poverty measured in dollars of constant purchasing power, according to present government standards and statistics, was the condition of ½ of all our families in 1920; of 1/5th in 1962; and of less than 1/6 in 1966. In 1967, 5.3 million families out of 49.8 million were poor—1/9 of all families in the United States. If crime has been reduced in a similar manner, it is a well kept secret.

Those who regard poverty as a cause of crime often draw a wrong inference from a true proposition: the rich will not commit certain crimes—Rockefeller never riots; nor does he steal. (He mugs, but only on T.V.) Yet while wealth may be the cause of not committing (certain) crimes, it does not follow that poverty (absence of wealth) is the cause of committing them. Water extinguishes or prevents fire; but its absence is not the cause of fire. Thus, if poverty could be abolished, if everybody had all "necessities" (I don't pretend to know what this would mean), crime would remain, for, in the words of Aristoteles "the greatest crimes are committed not for the sake of basic necessities but for the sake of superfluities." Superfluities cannot be provided by the government; they would be what the government does not provide.

(2) Negro ghettos have a high, Chinese ghettos have a low crime rate. Ethnic separation, voluntary or forced, obviously has little to do with crime; I can think of no reason why it should.[7]

(3) I cannot see how the state could "eradicate" personality disorders even if all causes and cures were known and available. (They are not.) Further, the known incidence of personality disorders within the prison population does not exceed the known incidence outside—though our knowledge of both is tenuous. Nor are personality disorders necessary, or sufficient causes for criminal offen-

[6] *N.Y. Times*, Nov. 24, 1967, at 22. The actual psychological and other factors which bear on the disrepute—as distinguished from the rationalizations—cannot be examined here.

[7] Mixed areas, incidentally, have higher crime rates than segregated ones. *See, e.g.*, ROSS & VAN DEN HAAG, THE FABRIC OF SOCIETY, 102-4 (1957). Because slums are bad (morally) and crime is, many people seem to reason that "slums spawn crime"—which confuses some sort of moral with a causal relation.

ses, unless these be identified by means of (moral, no clinical) definition with personality disorders. In this case, Mr. Pearson would have proposed to "eradicate" crime by eradicating crime—certainly a sound, but not a helpful idea.

Mr. Pearson's views are part as well of the mental furniture of the former U.S. Attorney General, Ramsey Clark, who told a congressional committee that ". . . only the elimination of the causes of crime can make a significant and lasting difference in the incidence of crime." Uncharitably interpreted, Mr. Clark revealed that only the elimination of causes eliminates effects—a sleazy cliche and wrong to boot. Given the benefit of the doubt, Mr. Clark probably meant that the causes of crime are social; and that therefore crime can be reduced "only" by non-penal (social) measures.

This view suggests a fireman who declines fire-fighting apparatus by pointing out that "in the long run only the elimination of the causes" of fire "can make a significant and lasting difference in the incidence" of fire, and that fire-fighting equipment does not eliminate "the causes"—except that such a fireman would probably not rise to fire chief. Actually, whether fires are checked, depends on equipment and on the efforts of the firemen using it no less than on the presence of "the causes": inflammable materials. So with crimes. Laws, courts and police actions are no less important in restraining them, than "the causes" are in impelling them. If firemen (or attorneys general) pass the buck and refuse to use the means available, we may all be burned while waiting for "the long run" and "the elimination of the causes."

Whether any activity—be it lawful or unlawful—takes place depends on whether the desire for it, or for whatever is to be secured by it, is stronger than the desire to avoid the costs involved. Accordingly people work, attend college, commit crimes, go to the movies—or refrain from any of these activities. Attendance at a theatre may be high because the show is entertaining and because the price of admission is low. Obviously the attendance depends on both—on the combination of expected gratification and cost. The wish, motive or impulse for doing anything—the experienced, or expected, gratification—is the cause of doing it; the wish to avoid the cost is the cause of not doing it. One is no more and no less "cause" than the other (Common speech supports this use of "cause" no less than logic: "Why did you go to Jamaica?" "*Because* it is such a beautiful place." "Why didn't you go to Jamaica?" "*Because* it is too expensive."—"Why do you buy this?" "*Because* it is so cheap." "Why don't you buy that?" "*Because* it is too expensive.") Penalties (costs) are causes of lawfulness, or (if too low or uncertain) of unlawfulness, of crime. People do commit crimes because, given their conditions, the desire for the satisfaction sought prevails. They refrain if the desire to avoid the cost prevails. Given the desire, low cost (penalty) causes the action, and high cost restraint. Given the cost, desire becomes the causal variable. Neither is intrinsically more causal than the other. The crime rate increases if the cost is reduced or the desire raised. It can be decreased by raising the cost or by reducing the desire.

The cost of crime is more easily and swiftly changed than the conditions producing the inclination to it. Further, the costs are very largely within the power of the government to change, whereas the conditions producing propensity to crime are often only indirectly affected by government action, and some are altogether beyond the control of the government. Our unilateral emphasis on the conditions and our undue neglect of costs may contribute to an unnecessarily high crime rate.

V

The foregoing suggests the question posed by the death penalty: is the deterrence added (return) sufficiently above zero to warrant irrevocability (or other, less clear, disadvantages)? The question is not only whether the penalty deters, but whether it deters more than alternatives and whether the difference exceeds the cost of irrevocability. (I shall assume that the alternative is actual life imprisonment so as to exclude the complication produced by the release of the unrehabilitated.)

In some fairly infrequent but important circumstances the death penalty is the only possible deterrent. Thus, in case of acute *coups d'etat*, or of acute substantial attempts to overthrow the government, prospective rebels would altogether discount the threat of any prison sentence. They would not be deterred because they believed the swift victory of the revolution will invalidate

a prison sentence and turn it into an advantage. Execution would be the only deterrent because, unlike prison sentences, it cannot be revoked by victorious rebels. The same reasoning applies to deterring spies or traitors in wartime. Finally, men who, by virtue of past acts, are already serving, or are threatened, by a life sentence, could be deterred from further offenses only by the threat of the death penalty.[8]

What about criminals who do not fall into any of these (often ignored) classes? Prof. Thorsten Sellin has made a careful study of the available statistics: he concluded that they do not yield evidence for the deterring effect of the death penalty.[9] Somewhat surprisingly, Prof. Sellin seems to think that this lack of evidence for deterrence is evidence for the lack of deterrence. It is not. It means that deterrance has not been demonstrated statistically—not that non-deterrence has been.

It is entirely possible, indeed likely (as Prof. Sellin appears willing to concede), that the statistics used, though the best available, are nonetheless too slender a reed to rest conclusions on. They indicate that the homicide rate does not vary greatly between similar areas with or without the death penalty, and in the same area before and after abolition. However, the similar areas are not similar enough; the periods are not long enough; many social differences and changes, other than the abolition of the death penalty, may account for the variation (or lack of) in homicide rates with and without, before and after abolition; some of these social differences and changes are likely to have affected homicide rates. I am unaware of any statistical analysis which adjusts for such changes and differences. And logically, it is quite consistent with the postulated deterrent effect of capital punishment that there be less homicide after abolition: the retention there might have been still less.

Homicide rates do not depend exclusively on penalties any more than do other crime rates. A number of conditions which influence the propensity to crime, demographic, economic or generally social, changes or differences—even such matters as changes of the divorce laws or of the cotton price—may influence the homicide rate. Therefore variation or constancy cannot be attributed to variations or constancy of the penalties, unless we know that no other factor influencing the homicide rate has changed. Usually we don't. To believe the death penalty deterrent does not require one to believe that the death penalty, or any other, is the only, or the decisive causal variable; this would be as absurd as the converse mistake that "social causes" are the only, or always the decisive factor. To favor capital punishment, the efficacy of neither variable need be denied. It is enough to affirm that the severity of the penalty may influence some potential criminals, and that the added severity of the death penalty adds to deterrence, or may do so. It is quite possible that such a deterrent effect may be offset (or intensified) by non-penal factors which affect propensity; its presence of absence therefore may be hard, and perhaps impossible to demonstrate.

Contrary to what Prof. Sellin *et al.* seem to presume. I doubt that offenders are aware of the absence or presence of the death penalty state by state or period by period. Such unawareness argues against the assumption of a calculating murderer. However, unawareness does not argue against the death penalty if by deterrence we mean a preconscious, general response to a severe, but not necessarily specifically and explicitly apprehended, or calculated threat. A constant homicide rate, despite abolition, may occur because of unawareness and not because of lack of deterrence: people remain deterred for a lengthy interval by the severity of the penalty in the past, or by the severity of penalties used in similar circumstances nearby.

I do not argue for a version of deterrence which would require me to believe that an individual shuns murder while in North Dakota, because of the death penalty, and merrily goes to it in South Dakota since it has been abolished there; or that he will start the murderous career from which he had

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[8] Cautious revolutionaries, uncertain of final victory, might be impressed by prison sentences—but not in the acute stage, when faith in victory is high. And one can increase even the severity of a life sentence in prison. Finally, harsh punishment of rebels can intensify rebellious impulses. These points, though they qualify it, hardly impair the force of the argument.

[9] Prof. Sellin considered mainly homicide statistics. His work may be found in his CAPITAL PUNISHMENT (1967), or, most conveniently, in BEDAU, THE DEATH PENALTY IN AMERICA (1964), which also offers other material, mainly against the death penalty.

hitherto refrained, after abolition. I hold that the generalized threat of the death penalty may be a deterrent, and the more so, the more generally applied. Deterrence will not cease in the particular areas of abolition or at the particular times of abolition. Rather, general deterrence will be somewhat weakened, through local (partial) abolition. Even such weakening will be hard to detect owing to changes in many offsetting, or reinforcing, factors.

For all of these reasons, I doubt that the presence or absence of a deterrent effect of the death penalty is likely to be demonstrable by statistical means. The statistics presented by Prof. Sellin *et al.* show only that there is no statistical proof for the deterrent effect of the death penalty. But they do not show that there is no deterrent effect. Not to demonstrate presence of the effect is not the same as to demonstrate its absence; certainly not when there are plausible explanations for the non-demonstrability of the effect.

It is on our uncertainty that the case for deterrence must rest.[10]

VI

If we do not know whether the death penalty will deter others, we are confronted with two uncertainties. If we impose the death penalty, and achieve no deterrent effect thereby, the life of a convicted murderer has been expended in vain (from a deterrent viewpoint). There is a net loss. If we impose the death sentence and thereby deter some future murderers, we spared the lives of some future victims (the prospective murders gain too; they are spared punishment because they were deterred). In this case, the death penalty has led to a net gain, unless the life of a convicted murderer is valued more highly than that of the unknown victim, or victims (and the non-imprisonment of the deterred non-murderer).

The calculation can be turned around, of course. The absence of the death penalty may harm no one and therefore produce a gain—the life of the convicted murderer. Or it may kill future victims of murderers who could have been deterred, and thus produce a loss—their life.

To be sure, we must risk something certain—the death (or life) of the convicted man, for something uncertain—the death (or life) of the victims of murderers who may be deterred. This is in the nature of uncertainty—when we invest, or gamble, we risk the money we have for an uncertain gain. Many human actions, most commitments—including marriage and crime—share this characteristic with the deterrent purpose of any penalization, and with its rehabilitative purpose (and even with the protective).

More proof is demanded for the deterrent effect of the death penalty than is demanded for the deterrent effect of other penalties. This is not justified by the absence of other utilitarian purposes such as protection and rehabilitation; they involve no less uncertainty than deterrence.[11]

Irrevocability may support a demand for some reason to expect more deterrence than revocable penalties might produce, but not a demand for more proof of deterrence, as has been pointed out above. The reason for expecting more deterrence lies in the greater severity, the terrifying effect inherent in finality. Since it seems more important to spare victims than to spare murderers, the burden of proving that the greater severity inherent in irrevocability adds nothing to deterrence lies on those who oppose capital punishment. Proponents of the death penalty need show only that there is no more uncertainty about it than about greater severity in general.

The demand that the death penalty be proved more deterrent than alternatives can not be satisfied any more than the demand that six years in prison be proved to be more deterrent than three. But the uncertainty which confronts us favors the death penalty as long as by imposing it we might save future victims of murder. This effect is as plausible as the general idea that

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[10] In view of the strong emotions aroused (itself an indication of effectiveness to me: might murderers not be as upset over the death penalty as those who wish to spare them?) and because I believe penalties must reflect community feeling to be effective, I oppose mandatory death sentences and favor optional recommendations by juries after their finding of guilt. The opposite course risks the non-conviction of guilty defendents by juries who do not want to see them executed.

[11] Rehabilitation or protection are of minor importance in our actual penal system (though not in our theory). We confine many people who do not need rehabilitation and against whom we do not need protection (*e.g.*, the exasperated husband who killed his wife); we release many unrehabilitated offenders against whom protection is needed. Certainly rehabilitation and protection are not, and deterrence is, the main actual function of legal punishment, if we disregard non-utilitarian purposes.

penalties have deterrent effects which increase with their severity. Though we have no proof of the positive deterrence of the penalty, we also have no proof of zero, or negative effectiveness. I believe we have the right to risk additional future victims of murder for the sake of sparing convicted murderers; on the contrary, our moral obligation is to risk the possible ineffectiveness of executions. However rationalized, the opposite view appears to be motivated by the simple fact that executions are more subjected to social control than murder. However, this applies to all penalties and does not argue for the abolition of any.

[From The Reference Shelf, Vol. 32, No. 6]

CAPTIAL PUNISHMENT

(Edited by Grant S. McClellan, *ed.*)

CAPITAL PUNISHMENT

* * * * * * *

CAPITAL PUNISHMENT? YES [1]

Despite the vast literature, the endless discussions on the topic, the firm opinions (on both sides of the question) expressed by judges, legislators, social workers, criminologists and other experts, and perhaps most important of all by the man in the street, the last word has certainly not been said regarding retention or abolition of capital punishment.

This is good. For when a judicial sentence of death for murder or treason is carried out, the law has imposed its utmost penalty. We do well to keep constantly under anxious review the question whether, *in any circumstances at all*, it it permissible for the law to go so far as to take life itself away from the prisoner. That question lies at the root of the matter.

Few contend that the death penalty should be imposed for all murders—whatever the definition of murder may be. Many countries have abolished it entirely. That is to say that society in those countries is more shocked by the death penalty than impressed with the need for it.

But it is important to bear in mind that in the same country—or in different parts of the same country—circumstances can change; so that, while and where these variations exist, greater severity on the one hand or greater leniency on the other may be called for. Conditions also change from age to age. Our ancestors imposed the death penalty for quite small thefts. One result was that juries—frequently with the connivance of the judge—would in meritorious cases bring in perverse verdicts of acquittal. The same could happen today if the severity of the law gets quite out of touch with popular sentiment in general and with the views of juries in particular.

In Britain a popular feeling of uneasiness about our law of murder recently led to the appointment of a Royal Commission on Capital Punishment. It heard evidence in the United States as well as in London. It had information from many European countries and visited Norway, Sweden, Denmark, The Netherlands, and Belgium to supplement what it had been told. Its terms of reference excluded consideration of total abolition. But, nevertheless, the Commission found that question inextricably relevant. Debates followed in both houses of Parliament. The result was amendment of the law of murder and a narrowing of the class of murders to which the death penalty applied, but not total abolition. This is not a perfect solution. But, though many would disagree, it can fairly be said that it is what society in Britain wants for the time being.

But put borderline cases out of your mind for a moment. Think of the very worst case of murder committed by a sane man that you can imagine. Ask yourself: shall he die for his crime? Abolitionists say No for reasons of the heart that must command respect. But if you have an open mind, consider the overwhelming grounds for retaining the death penalty in those worst cases of all. Leave to the judges and legislators and other experts the agonizing task of formulating the occasions when capital punishment shall or shall not be

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[1] From article by John B. S. Edwards, lawyer practicing in London. *Rotarian.* 94:10–11. My. '59. Reprinted by permission.

imposed, when a reprieve shall be granted, and so on. Difficult as that task is, evidence from every death-penalty state suggests that it is carried out scrupulously and with all possible bias of mercy to the prisoner. The chance of a miscarriage of justice is infinitely small. At trial, and afterward, infinite pains are taken. The judicial process must do its best. It is wrong for the system to falter because of the chimera of error.

And why should you not have an open mind? Every country holds in honor, and how rightly, its soldiers and other servicemen. They are trained to take the lives of other human beings. Not one of them enjoys that prospect: all will face it if need be. It is honorable because it is done for a higher purpose: the protection of the lives and institutions and freedoms of the citizens they serve. Lives may have to be taken to preserve other lives.

So it is with the death sentence for murder. This is what is meant by the "unique deterrent." The known existence of the gallows, or electric chair, or guillotine, or gas chamber gives pause to the hand of the potential murderer to an extent that nothing else can. From this his potential victim is the beneficiary. Too little indeed is heard of the potential victims in the resounding arguments on capital punishment. Of course, they never reach statistics—which can only be compiled by counting corpses. In those cases the deterrent has failed. But who can number over a given period the lives in being solely because a would-be murderer felt the mortal fear of capital punishment at the critical moment or sooner? Whatever the number, I believe the end justifies the means.

It is true that in England at any rate rather more than half of death sentences are commuted to life imprisonment for one reason or another. But these odds against being hanged are probably realized only vaguely, if at all, by would-be murderers. Few of them would take pains to consult the Homicide Act to see whether what they contemplate is "capital murder" or not. Consider, then, some possibilities:

1. The man who contemplates robbery does not take a weapon with him, lest the temptation to use it in a tight corner should prove irresistible.
2. In an emergency he shoots to wound rather than to kill.
3. He is deterred from killing to accomplish his purpose, to avoid detection by silencing the victim of the crime, or to resist arrest.
4. A man, before killing his wife, moves her from a death-penalty state to a state where he knows he cannot be executed.

Examples such as these, and many more, have been fully authenticated. Truly the statistics show that most murders are not committed by the professional criminal classes. But does that not in itself suggest that the deterrent is most effective where it is most needed? Pathetic (rather than brutal) cases of murder by persons of hitherto good character are just those cases that are most eligible for clemency. Motive and mode of killing are carefully considered. Still, it is possible to exaggerate the importance of the moral quality of a crime, where the public interest calls for an example to be made. A further advantage of this deterrence is that in Britain the police may go about without guns.

Then there is a secondary effect. This linking of murder and the death penalty in the popular imagination builds up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder. Murder becomes "the crime of crimes," stigmatized by the gravest of all punishments.

It is at this point that deterrence merges with an element of "retribution." Of course, the old idea of "an eye for an eye and a tooth for a tooth" is archaic and cannot be supported in modern penology: vengeance is an anachronism. But still it must be recognized that in most communities there is a strong and widespread demand for retribution in the sense of reprobation—often mixed in the popular mind with a feeling of atonement and expiation. It is society's emphatic denunciation of the crime. It is just and right.

Suppose now that abolition takes place. What sentence do you substitute? Life imprisonment perhaps. You then have a chance to reform the character of the murderer. The truth is that many convicted murderers need little reforming. The chance of a second murder after release is very small—though there have been instances. A further truth is that, in practice, you can do nothing helpful for a man by actually keeping him in prison for longer than approximately ten years (whatever his sentence was). After that period has elapsed, provided there is no risk to the community, it is better to let him free; further detention is merely cruelty to him. It will be remembered that Joan of

Are preferred to face the brief agony of death at the stake to the thought of lifelong incarceration.

The difficulty is that once it gets around that the likely punishment is only ten years or so of imprisonment, would-be murderers under extreme temptation—and this applies most strongly to those with hitherto clean criminal records—may seriously weigh up the penalty of detection and find the scales tipped toward taking the risk. The unsatisfactoriness of alternative sentences underlines the unique quality of the death-penalty deterrent.

As for the alleged brutalization of those who have the unpleasant duty of being concerned with the executions, I do not believe it. Neither did the Royal Commission, which accepted evidence that, on the contrary, the grimness of the circumstances frequently brings out the best in those people.

So, if you really believe in abolition, you will hold to your belief despite the arguments. But you cannot base yourself upon the sanctity of life. If that is your criterion, look at the arguments very closely—and I believe you must conclude that the death penalty in principle is permissible after all.

CAPITAL PUNISHMENT? NO [2]

Out of the many arguments which surround the question of capital punishment there is one fact that is beyond argument. Once an execution has taken place, society is deprived of the ability to rectify any mistake that may have been made. No one would suggest that mistakes are impossible. It must therefore be agreed that the scope of this drastic and irrevocable punishment should be no wider than is necessary for the protection of society. But society is entitled to protection in two ways: protection against being murdered and protection against being wrongly executed. One has to be balanced against the other. While the abolition of the death penalty affords a complete protection against the latter, does the retention of it afford an increased protection against the former? Clearly retention does not afford a complete protection against the chance of being murdered. Nothing can.

Does the death penalty, then, give increased protection against being murdered? The principal argument for the continuation of the death penalty is its supposed unique quality as a deterrent. The first thing to be observed in this connection is that capital punishment has obviously failed as a deterrent each time a murder is committed. In the discussing of this question, statistics are often put forward as supporting the argument in one direction or the other, but no figures are available to show the number of people who have been deterred from committing murder by the thought of being executed if caught. The British Royal Commission on Capital Punishment 1949–1954 investigated in particular the murder figures taken in the United States of America among those states which have at one time or another tried abolition. The Commission found that there is no clear evidence of any influence of the death penalty on the homicide rates of those states. They report the figures suggest that both in death-penalty states and in abolition states the rates are conditioned by other factors than the death penalty.

It is true that both the judges and the police, whose evidence was heard by the Commission, were almost unanimous in saying that the death penalty is a uniquely effective deterrent to professional criminals. Again, of course, no figures are available; but one thing that figures do show is that murder is not a crime of the so-called criminal classes. Of all the murders in Britain during the first fifty years of this century, less than 20 per cent of the convicted murderers had previous convictions. If one accepts the theory of the judges and police as being correct, the weight of their argument is much reduced by this fact. If the Commission was right in its general conclusion that there is no clear evidence that the abolition of capital punishment has led to an increase in the homicide rate or that its reintroduction has led to a fall, can it really be said that the death penalty is a uniquely effective deterrent?

It is commonly said that punishment has three principal purposes: retribution, deterrence, and reformation. It is probably true to say that the first of these principles, though heinous crimes undoubtedly provoke a public demand for retribution, is today of less importance than the other two; and this is particularly so if the prime consideration is taken to be the protection of the

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[2] From article by John Drinkwater, lawyer practicing in London. *Rotarian*. 94:12–13. May '59. Reprinted by permission.

public. No one would nowadays demand that a person who breaks another's leg should have his own leg broken, even if the act was willful and malicious. Is it any more logical to demand the death of a person who murders another? Clearly not, because in Britain, at any rate, eleven out of every twelve murderers known to the police are not hanged. This must inevitably be the case where there is a uniform penalty for all convicted murderers, for the circumstances in which murders are committed vary infinitely and in some cases may call more for pity than for censure. If, then, the element of retribution is reduced almost to insignificance, nothing remains of the principles of punishment as applied to the death penalty. The act of carrying out the penalty precludes the possibility of reformation.

Even if the idea of retribution has receded into the background in the light of modern thought, there are still those who consider that as murder is the crime of crimes, so the worst cases must be marked by the gravest punishment that can be inflicted. This raises the question: who is to decide which cases merit the punishment of death? In some countries it is the function of the judge; in others the burden is placed on the jury; in yet others there are degrees of murder, one category carrying the death penalty, the others not. The difficulties and disadvantages inherent in all three solutions are so grave that it is submitted they outweight their merits. In human affairs mathematical precision in reaching a conclusion is impossible. Emotions and human weakness play their part. The result is always that the fate of the wrongdoer is decided by a different yardstick in every case. Where the punishment is irrevocable and precludes the possibility of rectifying a mistake, such a state of affairs is undesirable in the highest degree.

The argument is frequently advanced by supporters of capital punishment that there is no satisfactory alternate to it. Of the countries in Europe outside the Iron Curtain only Britain, France, and Spain still retain capital punishment. The remaining Western European countries have apparently found a satisfactory alternative in detaining those who would otherwise have been executed for varying periods during which the element of reformation is given an opportunity of working. The evidence from these countries is that released murderers who commit further crimes are rare, and those who become useful citizens are common. This again is the finding of the Royal Commission. Any convicted murderers unsafe ever to release are likely to be mentally abnormal. They therefore present no greater problem than the incurably insane, and facilities for dealing with them already exist.

Capital punishment, like a drug, has some very unpleasant side effects upon people other than those who suffer it. It brings out psychological qualities of a sort no state would wish to foster in its citizens. Executions arouse in the public a morbid interest which is carefully catered to by the less restrained sections of the press. This is particularly so if the person to be executed happens to be a woman. Public hangings in England were always extremely popular and invariably drew large crowds. This may account for the fact that they were not abolished until 1868. Even today an execution generates a craving that draws a crowd to the prison gates where a notorious murderer is being executed. It is perhaps not without significance that the Royal Commission reported that in England there are five applications a week for the post of hangman.

Again, executions have a distressing effect on those who carry them out. Indeed it may even be a brutalizing effect. Those German citizens who ultimately came to carry out the atrocities in Belsen and elsewhere can surely only have become capable of these acts by gradual indifference to human suffering. It is preferable that anything which may have psychological effects of that nature should be suppressed.

Then too there is the strain imposed upon those whose duty it is to keep the condemned person under surveillance until the execution takes place. This is matter which it is easy to dramatize, but clearly such a duty cannot fail to be unpleasant and trying for the prison officials who have to do it. The Royal Commission found that some prison officials, particularly prison chaplains, who become specially intimate with prisoners, do occasinally find the strain of looking after them and attending their executions so painful as to affect their health.

Similarly a certain strain among the prisoners in a prison where an execution takes place is an inevitable incident of capital punishment. In an atmos-

phere already charged with resentment, such an added emotional strain could lead to outbreaks of violence and rioting. It is not suggested that these undesirable concomitants of capital punishment are by themselves a sufficient argument for its abolition, but their disappearance would be one of the advantages of abolition.

The case against capital punishment suffers from the fact that it is generally stated in overemotional terms, sometimes even in near hysterical terms. It is unfortunate that this highly controversial subject on which honest and sincere men and women hold widely different views has attracted not a few cranks whose opinions, expressed in the most lurid terms to attract the sensationally inclined reader, have tended to obscure rather than clarify the issues. Yet it is a matter literally of life and death, and one for which ultimately each one of us, as a voter or potential voter living in a free democracy, has a personal responsibility. Everyone must decide the question for himself. It is submitted that the case against capital punishment is overwhelming because the case in favor of it is nonexistent.

DEATH IS NOT THE ANSWER [3]

Shortly after he has elected governor of Ohio, Michael DiSalle went before a committee of his legislature and did his best to persuade the lawmakers to abolish capital punishment.

A MINORITY REPORT [4]

It is the opinion of those who subscribe to this minority report of the [Massachusetts] Commission appointed for the study of capital punishment and related questions that it would be inopportune at the present time to abolish the death penalty for first-degree murder. This conclusion assumes and is derived from the following fundamental postulates:

1. There is a supreme and all-perfect being, God, who has created man and upon whom man depends for his continued existence.

2. By his possession of a spiritual soul, which is the source and explanation of his characteristically human activity, man is elevated above the material universe with which his body is related.

3. Man is capable of self-determined activity, through which he rises above the factors which may exercise a compulsive influence upon him. The normal man is thus capable of charting his own course over the period of his earthly existence.

4. In the relationship between man and God there arises the moral law, which is the expression of man's obligation to follow those courses of action which are in conformity with the essential requirements and tendencies of his nature and to avoid those courses of action which lack this conformity.

5. As created by God, man is destined to live in society with his fellow men. Man's natural social condition implies the existence, as divinely ordained, of a social entity, of which the organized expression is the state.

6. The purpose of the state is to provide for the temporal welfare of its individual members. The very nature of the state implies, therefore, divine authorization to take whatever steps are necessary to assure its own existence and to guard against the dangers which threaten it, consistently with the more fundamental principles of the natural law.

7. Only God, who created human life, has the right to take it away. Since, however, the authority of the state derives ultimately from God, and is exercised in God's name, it is not inconsistent to hold that the state may claim the right, in the name of God, to take away human life in circumstances in which this would appear clearly to be in accord with God's own will.

8. It is beyond the authority of the state to take the life directly of any innocent human being. The right of each man to his life is anterior to the

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[3] From "Capital Punishment Is Not the Answer," by Ernest Havemann, freelance writer. *Reader's Digest*. 76:114–19. My. '60. Copyright 1960 by The Reader's Digest Association, Inc. Reprinted by permission.

[4] From the Minority Report of the "Report and Recommendations." Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases. Commonwealth of Massachusetts. House Report No. 2575:64–74. Boston. D. 30, '58. The Minority Report was written by John R. Sennott, Jr., member of the Massachusetts House of Representatives, and the Right Reverend Thomas J. Riley, St. Peter's, Cambridge. (Several bills to abolish capital punishment were introduced in the legislature, but none were enacted.)

existence of the state. When, however, a man, through his own fault, has endangered the right of the state to carry on its divinely appointed functions, there may be reason to assume that he has forfeited his God-given right to live, and that the taking of his life may be justified as an indispensable means of protecting society from serious harm.

Right of the State

Human history bears witness to the persistent conviction that the state has a natural right to inflict the death pnalty. It would be wrong to hold that capital punishment is in essential violation of the law of God, and that the taking of life by the state represents essentially a tampering with rights which God reserves exclusively to Himself. Nor would it be right to assert that an individual member of human society has an absolute right to his life that is beyond all attack on the part of the state.

On the other hand, it is clear that the taking of human life by the state can be justified only when no other means will be effective in safeguarding its essential interests from criminally immoral attack. Only a malefactor can be put to death by the state, and only when the taking of his life will be a necessary means for the strengthening of human society against attack upon its fundamental structure.

No one can deny that there have been grave abuses connected with the exercise by the state of its right to inflict the death penalty. History records the regrettable facts that men have been put to death by state governments for trivial reasons in brutal and abhorrent ways and in satisfaction of the basest of human passions. We should not, however, allow the abuses connected with the exercise of the right of capital punishment to obscure our understanding of the considerations which justify it in principle. We should not argue that because the death penalty has often been imposed for minor crimes, there can never be a crime of major proportions for which it would be a necessary measure for the protection of society. We should not identify the death penalty itself with the gruesome methods which have been employed in particular situations or by individual executioners. We should not infer from the fact that motives of hatred or vengeance are often associated with the inflicting of capital punishment that such motives constitute the only reasons for which the death penalty could be demanded or justified.

The subscribers to this minority report hold, therefore, that the supreme authority of the state has the right to inflict the death penalty when it can be shown to be a necessary means for protecting society against criminal attack which endangers its very foundations. It is our opinion that the death penalty for first-degree murder, as it exists at present in this Commonwealth, is justified in principle on these grounds.

We are led to this conclusion by the following considerations. It is recognized that the death penalty is primarily punishment and inflicted as such. However, it is not essentially for this reason that it is imposed. It is chiefly for its deterrent influence that the state adopts such a drastic measure. We would hold first of all, then, that the state may take the life of a human being only in punishment for a crime of serious proportions. The primary aim of the state in so doing is to discourage by the most drastic means possible, the deprivation of human life, the wanton taking of the life of innocent human beings. The state is considering at this level of action not the individual life of the criminal but the protection of all its other members, the human beings who are the potential victims of other future murderers. In this area of its thinking the state is not concerned with problems of vengeance and hatred on the one hand, nor of rehabilitation, treatment or parole, on the other. Its main and all-important objective is what measure will best serve as a deterrent to would-be assassins and as a protection to all its members. The death penalty cannot be inflicted merely to rid society of undesirable members. Nor can it be inflicted merely because an objectively criminal act has been committed, without reference to the subjective guilt of the criminal. Execution of a person by the state must represent essentially a punishment which fits a crime. It is, thus, primarily an exercise of vindictive justice by which steps are taken to restore the order of society which has been willfully violated.

Secondly, the inflicting of capital punishment can be justified only if it serves as a deterrent in relation to future possible crimes of the same order, and only if less drastic measures towards the same end will not be sufficiently effective.

It is at this particular point that differences of opinion arise among those who admit in principle the right of the state to inflict the death penalty. It is in relation to this point, therefore, that the conclusions of this minority report require to be established and defended. Does the death penalty serve as a deterrent? Will life imprisonment, or any other penal measure afford sufficient protection to society against the crime of first-degree murder for which the death penalty is now decreed? These are the important questions which we shall attempt to answer and upon which will depend the validity of the report which we submit.

Deterrent Value

Does the death penalty for first-degree murder really serve as a deterrent to potential murderers? All human beings fear the loss of their lives, even those who may be suffering from major mental disturbances. The instinct of self-preservation is so fundamental that the threat of death, apprehended as such, must have a powerful determining influence on the voluntary direction of human activity. No one will knowingly drink poison or cast himself over a precipice unless he is so deranged that he cannot evaluate the consequences of what he is doing, or unless he studiously chooses the alternative of death to continued existence in what he judges to be an intolerable situation. The claim that the death penalty in itself, decreed for the committing of a major crime, will not exercise a deterring influence on the great majority of potential criminals, contradicts one of the fundamental facts of human psychology.

What of statistics that seem to show that the incidence of crime does not vary consistently with the presence or absence of the death penalty? These statistics have obvious reference to the particular circumstances in which the death penalty is inflicted. In point of fact, the death penalty, in states in which it exists, is incurred by only a small percentage of those who commit murder. It is impossible, of course, for the penalty to be implemented quickly and with unerring accuracy. Legal procedures, extending over long periods of time, are required to establish the moral responsibility of one who has been charged with murder. The welfare of society as a whole demands that every possible precaution be taken against the execution of one whom the law would require to be spared.

This necessary delay in the carrying out of the death penalty of its very nature reduces the effectiveness of the penalty as a deterrent measure. And because legal procedures are so complicated and so difficult of organization, the possibility is created that even those who are guilty of the crimes for which they are charged may not be proved guilty by the courts. Some lawyers who have testified before the commission have remarked the effect of the slowness with which trials for murder are conducted. The claim has been made, moreover, that those who have unlimited wealth at their disposal will almost certainly escape the death penalty, while those who are poor and unfortunate are more likely to be its victims.

All these factors are represented in the statistics which seem to indicate that the death penalty is not a deterrent to potential murderers. It seems quite possible, therefore, that the reason why the death penalty is not effective is the difficulty of applying it to concrete cases and the correspondingly increased possibility that the murderer may escape the penalty which the law decrees. This point should, it would seem, be kept in mind as we attempt to evaluate the statistics to which the advocates of abolition attach such great significanc. It does not seem logical to say that the death penalty should be abolished because statistics prove that it is not a deterrent. It seems more consistent to urge that every effort be made to minimize the influence on the effectiveness of the death penalty of factors extrinsic to itself, and thus to realize to the maximum its intrinsic value. The death penalty strikes deeply at the possession of the bodily life which is for everyone the root and foundation of every other earthly possession and satisfaction. If we admit that the state has, in principle, the right to inflict it, we should admit likewise a corresponding obligation on the part of the state to make it effective and we should not urge failure to do this as proof that the death penalty itself is not necessary.

Other Measures

Will life imprisonment, or some other penal measure, afford sufficient protection to society against the crime of first-degree murder for which the death penalty is now decreed? Many advocates of abolition who have agreed with what has already been said will answer this question affirmatively. We have

reached, they will say, a point in the development of human society at which it is no longer necessary to resort to the drastic measure of capital punishment as a means of safeguarding society from the dangers created by potential criminals. The criminal, they say, should be punished in some less severe way which will leave open the possibility of his rehabilitation and his eventual restoration to full membership in society. In any event, he should be allowed to run the course of his natural life, atoning in his enforced isolation for the wrong which he has done and no longer presenting a danger to society of further criminal activity.

In answer to this kind of argument we may point to the obvious fact that crime of all description is increasing both in numerical occurrence and in the efficiency of the methods by which it is perpetuated. Respect for the moral law is diminishing. Those who seek illegitimate gain hesitate less and less to sacrifice human life when it suits their purpose to do so.

In this regard it might be well here to point out that it is the opinion of the minority that the majority report lays too great stress on the welfare of the individual criminal subject to a sentence of execution. It is not our intent to deprive the criminal of every consideration which may be afforded to him by the executive powers of the state subsequent to his sentencing to execution. However, the urge that this one could be rehabilitated or that one could be given psychiatric treatment and therefore they all are salvable does not solve the problem of suppressing potential murderers. If one becomes convinced that the drastic measure of execution is the effective deterrent, then it must logically follow that the innocent lives saved thereby are of far greater import than the criminal life sacrificed. This method of thinking must of necessity divorce itself from any thought of the rehabilitation of the properly condemned criminal. This commission, including the members of this minority report, has unanimously agreed on a change in the definition of legal sanity so that the psychiatric considerations mentioned above will be adequately presented for the protecotion of deserving accused.

It must be continually borne in mind that it is not the mere elimination of the murderer from society by life imprisonment or isolation in a mental hospital that prevents future murders (few murderers kill a second time in any event) but the ever-present threat of execution on the law books of the Commonwealth that will deter the potential killer from committing his nefarious deed. The most drastic crime, the taking of life needs the most drastic form of punishment, the taking of life (and this is not a life for a life in vengeance) for its effective control and suppression.

The movement to abolish capital punishment should, it would seem, be integrated with more comprehensive efforts to strike at the roots of the criminal tendencies which threaten the future of our democratic institutions. We who subscribe to this minority report look forward, as do so many whose testimony we have heard, to the day when it may be possible to dispense with the death penalty. It is our conviction, however, that as a society we have not yet reached the stage of moral development at which it would be prudent to remove a safeguard judged to be necessary by so many who are charged with the heavy responsibility of protecting human life against criminal attack.

Murder and the Police

We have been impressed by the urgent demands of large numbers of law-enforcement officers that the death penalty be retained. These men have not made the speculative study of the problem with which they are confronted that would enable them to present their conclusions in compelling statiscal form. Their point of view is not, however, for this reason to be taken lightly, especially in view of their insistence that their own lives are endangered by their efforts to protect the lives and property of their fellow men.

Again, here we are faced with the objection of statistical evidence which seems to indicate that murders of law-enforcement officers do not vary consistently with the presence or absence of the death penalty. We suggest that here, too, there may be hidden factors which may alter the significance of the data presented. A law-enforcement officer is a human being. His strongest natural tendency is to protect and preserve his own life. If he has become honestly convinced in his past experience that the death penalty is a ncessary deterrent measure, his reaction to its abolition might well be to relax his efforts to enforce the law when the full discharge of his duty might place his own life in jeopardy.

We are not suggesting that any purely subjective impressions of law-enforcement officers should be accepted as sufficient reason for retaining the death penalty. What we do say is that the convictions of law-enforcement officers on the necessity of the death penalty earnestly expressed by so many of their authorized representatives, should not be dismissed as groundless because of the lack of confirmatory statistical evidence. Without doubt many of those who acted as spokesmen for the associates used language which betrayed a high degree of emotional reaction. Possibly, too, many of them may have found it difficult to dissociate in their thinking on the subject those motives which are morally sound from other motives which would be questionable on moral grounds as indicative of hatred or revenge.

Beyond all these questionable elements in the presentation of their argument, however, there lies a groundwork of objective truth towards which their convictions are directed. We feel that society owes to them every possible measure of protection, and that it would be imprudent at the present time to disregard their warning that abolition of the death penalty would hamper them in their efforts to maintain public order.

We have likewise been deeply impressed by the honesty and sincerity of those who have appeared before this commission to urge abolition of the death penalty. Many of them are expert in their respective fields, and their conclusions have obviously followed upon careful and scientifically controlled study. We are conscious moreover, that in presenting a minority report, we are in disagreement with a larger number of our colleagues on this commission, whose conviction have been conscientiously formed and for whom we have developed sentiments of the highest respect. We have all worked together in a spirit of harmony and cooperation, and we regret our inability to subscribe to a report which could be presented without disagreement on essential points.

We recognize that there can be honest differences of opinion in the matters which we have been asked to consider. Our dissenting report is not presented as an expression of disagreement on questions of principle. Nor does it represent a point of view which could not be modified at some future time under the influence of an improved condition of society.

Other Considerations

At the same time, however, we would challenge the objection that our own advocacy of the death is inconsistent with either the principles of the natural law or the findings of modern psychology. We have already stated the reasons why we feel that the state has, in principle, the right to inflict the death penalty. Another objection, less radical in its origin but no less universal in its conclusion, is that capital punishment is wrong because the death penalty is irrevocable, and it is thus possible that a miscarriage of justice may send an innocent man to his death.

It would be impossible to deny the premises from which the conclusion is derived. The conclusion itself, however, does not seem valid. In the first place, the danger of convicting a person for a crime which he did not commit, while not absolutely negligible is, in existing circumstances, extremely remote. There is far greater danger, as we have previously suggested, that a person who is really guilty of murder, may escape the punishment which the law decrees for him, so carefully and painstakingly do the courts sift the evidence which would lead to his conviction. While suggesting, as we already have, that the procedures of the courts might be expedited to the extent consistent with conservative legal and judicial requirements, we would not want any changes introduced which would increase the danger of error in a matter in which errors are so costly and so irreparable.

We do not feel, however, that the mere possibility of error, which can never be completely ruled out, can be urged as a reason why the right of the state to inflict the death penalty can be questioned in principle. It is not possible for human authorities to make judgments which are infallible in matters which require lengthy deliberation and logical analysis. All that can be expected of them is that they take every reasonable precaution against the danger of error. When this is done by those who are charged with the application of the law, the likelihood that errors will be made descends to an irreducible minimum If errors are then made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angels but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty aims to provide effective remedies.

We have likewise met the objection of many authorities in psychology and psychiatry that all murderers are psychopathic personalities, and that few, if any, murders are committed by persons who could be held legally or morally responsible for their acts. We recognize the value of the psychological studies which have revealed the influence of subconscious motivation on all forms of human activity. We have noted disagreement among psychiatrists themselves, however, as to the extent to which this motivation is effective. We would certainly agree that some murderers are victims of strong impulses which reduce, if they do not remove completely, the power of self-determination which is fundamental to any degree of moral or legal responsibility.

However, such a concession does not minimize or destroy the great power of deterrency of the death penalty even in many such people. Eliminating first those who would be adjudged insane under the uncontrollable impulse rule included in the change to the legal sanity definition, we believe that the death penalty threat is effective in preventing large numbers of wrongdoers from ever allowing themselves to reach that stage of criminality where they become victims of uncontrollable impulses and subjects of murder commissions. It is in this early gray zone of murder premeditation that the death penalty threat is most apt to be operative and effective.

We maintain that premeditated murder, for which full responsibility should be imputed, is not just a speculative possibility, but an imminent danger actually to be feared. There is such a thing today as organized crime. It is a big business in this country. Those who are engaged in it are highly intelligent and completely unscrupulous. They do not hesitate to plan and commit murders in cold blood when the need arises. Those whose assistance they seek in the actual perpetration of crime are fully aware of the implications and requirements of the cooperation which they are asked to afford.

It is wrong, we hold, to evaluate the moral or legal responsibility of criminals in terms simply of their psychological condition at the moment at which they actually commit a crime. When any wrong deed is committed, its agent has built up within himself, while he is still free to conform to the requirements of the law, an attitude of intellectual contempt for what the law demands, and of voluntary determination to break it. It is during this period of calm and deliberate reflection that moral responsibility is incurred. A criminal should not be allowed to plead insanity as a ground for release from the charges made against him simply because at the moment at which he actually perpetrated a crime he was under the influence of an impulse which he could not resist. This point of view prescinds entirely from the crucial question: why was the criminal under the influence of an irresistible impulse? If his personality is habitually psychopathic, he may well have been lacking in the moral responsibility for which he could legally be punished. If however, his inability to resist was due to his having voluntarily prepared for the situation in which he executed his criminal intention, he is not less but more guilty for this very reason.

We submit this report in the hope that it may contribute to a better understanding of the problems which we have been deliberating during the lifetime of the commission to which we have been appointed. . . .

We feel quite certain that we have not approached the problem of first-degree murder in a spirit of vindictiveness or hatred. We have tried to be objective and to rise above the emotional prejudice which so easily injects itself into any discussion of controversial matters. We have tried, too, to make this report on the basis of the evidence which has been presented to us, and not to present it as the elaboration of previously determined points of view. We are grateful for the privilege of serving on this commission and we trust that we may have rendered a faithful account of our efforts to fulfill the task which has been entrusted to us.

STATE OF NEW JERSEY,
COMMISSION TO STUDY CAPITAL PUNISHMENT,
October 26, 1964.

HIS EXCELLENCY GOVERNOR RICHARD J. HUGHES AND THE HONORABLE MEMBERS OF THE SENATE AND GENERAL ASSEMBLY: The Commission is pleased to transmit its Report, pursuant to the mandate of Joint Resolution No. 7, adopted May 5, 1964, reflecting its study of capital punishment in the State of New Jersey. It

includes both a majority and a minority statement, each giving conclusions and recommendations. The bibliography, included with the Report, used by the Commission in its deliberations, is believed to be the most complete modern compilation on the subject.

WILLIAM F. TOMPKINS,
Chairman.
HAROLD A. PRICE,
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REPORT OF THE COMMISSION APPOINTED TO STUDY CAPITAL PUNISHMENT PURSUANT TO JOINT RESOLUTION NO. 7, P.L. 1964

Senate Joint Resolution No. 3, was introduced January 20, 1964 which would establish a commission to study capital punishment in the State of New Jersey, to be made up of nine members, three to be appointed by the President of the Senate, three by the Speaker of the General Assembly, and three by the Governor. This joint resolution was signed as Joint Resolution No. 7 by the Governor of the State of New Jersey on May 5, 1964. The Commission organized on June 1st of this year.

Work was immediately commenced on the gathering of facts and materials concerning capital punishment. The Commission received a large number of articles and reports from the American League to Abolish Capital Punishment. It also had the benefit of the hearings held before a Committee of the Assembly in 1957 and 1958. Moreover, it requested its staff, composed of Counsel to the Commission and a Research Assistant, to gather the most significant literature on the subject and on the issues contained within the subject so that as much as possible would be available to the Commission prior to the first public hearing. A bibliography, which is included in the Appendix to this Report, was prepared containing some 31 pages of references to the applicable literature. The literature was either read by members of the Commission or was briefed for the Commission. Throughout the period of the Commission's existence it received and reviewed reports which were prepared by its Counsel and literally thousands of pages of printed matter. Because many arguments and issues have been repetitively covered previously, the Commission decided that they need not be restated.

Public hearings were held on July 10, 1964 and July 24, 1964. Invitations to speak were extended to leading authorities throughout the country, including State Attorneys General, Wardens of well-known Institutions, the Director of the F.B.I., Police Officials, Criminologists, Religious Leaders, Sociologists, Judges, Prosecutors and a number of other persons generally interested in the retention or abolition of capital punishment. Newspaper articles advised the public of these hearings in advance and at the hearings themselves all persons present were advised that they would have the opportunity to speak and give their views. A total of 20 persons testified orally. In addition statements were submitted formally and informally, including letters, on both sides of the issue, from well over 100 persons. There have been printed the transcripts of the hearings, a number of statements and other relevant matter.

Specifically concerning New Jersey, there was a substantial amount of literature available, including reports going back to the mid-19th Century by other Commissions appointed to study the subject, a leading analysis on the make-up of those convicted of homicides in New Jersey, "Frankel 1000 Murderers", various analyses prepared by the New Jersey Parole Board, an article by Wolf analyzing Jury sentencing in capital cases, 1937 to 1961, an article by Hugo Bedau on the Abolition Program in New Jersey, contained in his 1964 anthology on "The Death Penalty in America" and an article by Mr. Bedau, over 150 pages in length, covering "Death Sentences in New Jersey, 1907–1960".

This New Jersey source of information was used in conjunction with the other literature on the subject of capital punishment throughout the United

States and elsewhere in the world. The Commission had the benefit of the study of the Royal Commission appointed by Parliament, the Commission of the Canadian Parliament, and studies by committees and commissions of the States of Maryland, Pennsylvania, Ohio, Massachusetts and California. The Commission attempted to go beyond a mere analysis of statistical information concerning homicide rates and attempted to analyze capital punishment on many levels, including the religious, moral, penal, deterrent, protective, psychiatric, medical and sociological aspects of punishments for murder. Specifically as well, the Commission sought to make a judgment on the frequently claimed discrimination concerning the death penalty based upon legal counsel, race, wealth and intelligence level.

The Commission is convinced that it has fairly reviewed and diligently analyzed positions taken on each issue included within the larger subject of capital punishment. The issues themselves have been stated on many occasions as fully as possible. Each member of the Commission has considered the problem with care and has searched his conscience before coming to any conclusion.

CONCLUSION

At the present time New Jersey and the remainder of the Nation are suffering a greater incidence of crime than at any time for which records have been kept. All areas of crime are up substantially from the 1940's and the 1950's. While the rate of criminal homicides has not risen to the same extent as certain crimes involving property, it none-the-less has not only numerically risen sharply, but is at its highest rate per 100,000 since the gang wars of the 1930's. The rate of aggravated assaults, very frequently with a deadly weapon, has risen far more sharply. The Commission can only conclude that the high number of aggravated assaults in any year creates a reservoir of potential criminal homicides, the only saving grace being better communication and better medical care.

The great increase of crime in this State has coincided with a greater tendency to emphasize the rehabilitation factor in criminology as against the punishment or retributive and deterrent aspects of criminology. The Commission cannot conclude that easing the lot of the murderer will cause less crime or fewer criminal homicides.

This Commission has an obligation to the people of the State of New Jersey. Our citizens deserve the maximum degree of protection from injury both to their persons and to their property. In case of doubt as to which method will create the most likely optimum of protection, this Commission is bound to retain the type of punishment which throughout history has proved to be the most severe.

As with any issue which touches the conscience and which involves both justice and mercy, as well as very significant religious aspects, there have been sharp conflicts in the opinions expressed both in the hearings before the Commission and in the literature examined by it. It seems clear that those who seek the abolition of capital punishment are concerned with the saving of the lives of those convicted of the crimes in question. Secondarily, they are concerned with the possible brutalizing effect of executions upon the populace as a whole. Yet most, if not all of those seeking abolition, would, the Commission is certain, retain the death penalty if they were satisfied that it would save innocent lives. One abolitionist witness thought that the saving of a single life would not be enough. The Commission, however, in its obligation to the people of this State, is not justified in gambling the life of a single citizen.

The Commission is convinced that capital punishment does deter some potential murderers from committing capital crimes. More particularly, it is believed that the deterrence is most significant in the area of felony murder and in the area of a truly premeditated crime. While the statistical information presently available does not indicate a significant difference in the homicide rates between abolition states and capital punishment states, even when adjoining, this statistical information was admittedly not restricted to capital crimes, did not include the incidence of felony murders, the relationship of aggravated assaults to homicides, or the relationship of Police woundings. Those presenting only raw homicide figures admitted that these were as yet the best available, and for the purpose of further analysis they would like to have available the additional information set forth above. On the other hand, those most inti-

mately concerned with law enforcement gave evidence and their conclusions that capital punishment is a deterrent in some cases.

No punishment would be a deterrent for a crime of passion, or a crime committed by one who is insane. Those are not the persons who generally receive the death penalty. An examination of the crimes by the 14 persons presently awaiting execution in New Jersey, included at page 108A of the second hearing, makes it abundantly clear that this is so.

At this stage of our knowledge of the human mind and of its inter-action with our society, no one has yet been able to assign a definite reason for crime in each case, for rate of crime, for the proper punishment of crime, and for the deterrent effect of any particular type of punishment. In fact, it appears at the hearings that the very concept of punishment of crime was a matter for serious study.

It has at times been suggested that there is discrimination in the execution of persons based upon wealth, legal counsel, race and intellectual attainment. From all the information studied by the Commission so far as it affects the State of New Jersey, and from similar information found for a number of States which have made studies, the Commission believes that the intellectual attainment of persons sentenced to death and executed is a rough cross-section of that of the Prison population at large. This is not surprising since a large number of murderers have previously committed other criminal offenses. Mr. Bedau found in his recent article on death sentences in New Jersey, 1907–1960, that 78% of those sentenced to death whose record could be checked were found to have at least one prior conviction. There is presently awaiting execution in New Jersey a person previously convicted of another criminal homicide. Since the persons convicted of murder are similar in other ways to the prison population, it is not surprising that there are few wealthy men executed. There are also few wealthy men who commit murder in the course of a felony.

Insofar as legal counsel is concerned, it is true that nine out of the fourteen men presently awaiting execution in New Jersey were represented by assigned counsel. However, it is the decided opinion of the Commission that assigned counsel in capital cases in New Jersey are of the highest level that the Bar of this State has to offer. The Courts select assigned counsel in those cases with extreme care to assure the best defense and will select only the most competent counsel available.

The claim has also been made that there is discrimination in the execution of Negros. The most recent study on the question by Mr. Bedau, however, finds that race does not emerge as a statistically significant factor in the final disposition of death sentence in New Jersey.

It appears that witnesses for both retention and abolition were dissatisfied with the present penalty provision involving life imprisonment. The parole statutes of New Jersey permit a person sentenced to life imprisonment, including one whose death sentence is commuted, to be eligible for parole as early as 14 years, 8 months after sentence. The choice of penalties before a Jury in first degree murder cases therefore is that of death or imprisonment for as little as 14 years. The possibility of early parole for a murderer, the Commission believes, is rather well known by the public. It is the Commission's concept that the death penalty should be, and normally is, meted out only for the most heinous and aggravated type of murder, but there is a possibility of excessive use of the death penalty as long as a Jury is not given an adequate alternative for a somewhat less shocking crime. It is only by increasing the absolute meaning of life imprisonment that an adequate alternative could be presented. We therefore recommend that the Legislature give consideration to amending the laws concerning life imprisonment to provide that life imprisonment means imprisonment without the possibility of parole. If this requirement be considered unacceptable by the Legislature, we suggest as an alternative that the life imprisonment penalty be increased so that no one sentenced to life imprisonment will be eligible for parole for a period of at least 30 years, against which minimum time no credits of any kind would be permitted.

The recommendation on life imprisonment will in the first instance make more efficient the administration of justice in first degree murder cases. Moreover, we feel it also may provide a safe testing ground where the deterrent effect of the death penalty will not be lost while a true life sentence could become the standard penalty given by a Jury. If present society is as adamant

against the death penalty as those seeking abolition claim, this certainly would be the case.

The Commission recommends the retention of capital punishment. It also recommends that, after the absolute life sentence provision is in effect for a period of time sufficient to create a body of facts and information, there be a thorough review of the subject of capital punishment to determine whether new conclusions are appropriate.

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MINORITY REPORT

We cannot agree with our colleagues on the Commission to Study Capital Punishment that capital punishment should be retained in its present form and that life imprisonment should be made absolute without the possibility of parole.

After listening to the many witnesses who testified at the public hearings and reading much of the material which is available for study in relation to capital punishment, it is our conviction that a strengthened life imprisonment should be substituted for the sanction of capital punishment. Life imprisonment should mean that a minimum of thirty years is to be served before possibility of parole and that no convicted murderer should be paroled even then unless thorough psychiatric examinations prove that he is capable of returning to society.

It is our belief that there are two ways, at least, to approach the problem of capital punishment:

1. We may assume that minimal morality requires society to demonstrate some social need before it affirmatively takes the life of an individual by a premediated, planned, official act.

2. We may assume that the death penalty is completely unrelated to morality, but should be imposed only if demonstrable benefit exceeds the detriment, if any be shown.

In relating to the first suggested analysis, it appears to us that of the various methods the criminal law utilizes to achieve control through punishment, the difference between the death penalty and life imprisonment can only be in deterrence. Certainly neither aims at reformation. Nor should incapacitation be considered. The state, in the case of life imprisonment, has the power to incarcerate the convict for his entire life. The percentage of crime in prisons or by escapees is negligible. The fact that the power to imprison for life may be negated by parole does not justify consideration. A man should not be put to death today because some official board may make a mistake eighteen or thirty years in the future. The experience with paroled murderers compares very favorably with experience with other parolees in terms of recidivism.

Furthermore, the men who need to be deterred most are the organized criminals. But Professor Sellin testified: "Defenders of the death penalty would probably feel that if anybody deserved this punishment, it will be the hired killer in organized crime. It's a well-established fact that such murderes enjoy almost complete immunity, that the instances in which even a conviction has been secured are extremely rare, and that deterrence plays no role in this connection. . . .

"As a matter of fact, the nature and frequency of murder has no connection with the death penalty but is dependent on social, political and economic conditions and the character of populations."

So, unless there is an appreciable demonstration that the death penalty is a more effective deterrent penalty than life, death is unwarranted under the first analysis. Retribution, of course, cannot be considered as a legitimate goal of criminal law unless satisfying such an impulse is necessary to prevent self-help—i.e., lynching. Sellin, in his testimony at the hearings, adequately demonstrates there is no such need in the United States. Furthermore, the imposition

of death is more than retribution—few murderers have ever killed with such calculated coldness or with such forewarning to the victim with concommitant suffering through anticipation as occurs when the state executes a convicted murderer.

On the issue of deterrence, the difficulties of comparative statistics are well known. Nonetheless, the conclusion of the Royal Crown Commission in Great Britain, after years of study, that the incidence of murder in a particular jurisdiction depends upon something other than the death penalty is difficult to rebut. If the burden is placed upon persons desiring to impose the additional sanction—and it seems to us that only people not sentenced to death can contend that life imprisonment is worse—they fail on the empirical data.

Such a failure is consistent with common sense. It is the rare, perhaps nonexistent, case where the potential killer would find the difference between the two significant if, before he acted, he seriously weighed the difference assuming his capture. Both are sufficiently severe to control, if either will, in such cases.

Actually, most killings are perpetrated under circumstances of pressure which preclude such rational evaluations. It could be argued that conditioning operates subconsciously to deter the would-be murderer. However, society's revulsion at the act is sufficiently demonstrated by life imprisonment. Contrary to what some exponents of capital punishment seem to believe, we are considering sereve sanctions rather than giving the killer an accolade.

The major religious faiths oppose capital punishment and agree that a life term is more in accord with our Judeo-Christian tradition. Thus, Rabbi Freedman testified: "It seems to me that the general tenor of the Judeo-Christian temperament and its religious traditions is one which inherently considers the value of mercy, pity, peace and love, infinitely superior, infinitely more meaningful and more lasting in terms of mankind's development."

If we consider the second analysis, that the death penalty is completely unrelated to morality but should be imposed only if demonstrable benefit exceeds the detriment, it appears to us that we should reach the same conclusions that are found under the first analysis.

Even if we were to assume either that: (1) deterrence were proved; or (2) that the question of deterrence could not be definitively answered and the burden were upon people desiring the abolition of capital punishment—i.e., a change of the legal status quo, death would still be undesirable if disadvantages outweigh supposed advantages. A number of disadvantages seem apparent:

(1) The use of "jury discretion" in determining who receives the death penalty means that we have no identifiable standards for choosing which murderers will be put to death. The choice of the few who ultimately are executed depends upon such possible vagaries as the ability of the lawyer, the trial tactics (i.e., whether he is after an acquittal or is trying only to avoid the death penalty), the predilections of the jury members, the race and wealth of the defendant, the way the mass media have treated the crime, and many others. Such an irrational method of choice regarding the infliction of death has little to commend it.

(2) As indicated above, the issue of punishment may well overshadow the question of guilt at the trial. The focusing of emotions in capital cases makes it difficult to obtain a climate of calm deliberation and dignity essential to judicial determination and makes error a likelihood.

(3) The death penalty necessarily leads to reversals, abuse of appeal and post-conviction process and disrespect for the law and the Courts. Appellate Courts, by the nature of the sanction, must resolve doubtful questions in favor of the condemned man; they must allow continuing resort to legal process as long, at least, as arguments advanced are not frivolous; they must use a disproportionate amount of valuable and an expensive time in deciding such issues. In this respect, the courts represent accurately society's ambivalence to the penalty. The result is the anomaly of a Chessman or a Smith, the current problem in New Jersey.

(4) Although less obvious, the English experience demonstrated that the death penalty made the populace callous. The same effect is avoided in degree, at least, by limiting its imposition and the secretiveness of its application. However, there is no reason to believe that the execution does not have serious emotional effects upon people associated with it.

(5) The death penalty is not a proven deterrent. Thus, Table XVI on page 293 of Sutherland's, "Principles of Criminology," clearly show "that the states which have abolished the death penalty generally have slightly lower homicide rates than the adjoining states which have retained the death penalty."

Also, as Austin MacCormack pointed out: "How could anybody expect deterrence with as few executions as we have today? For the last three years in the United States we have executed 56 [1960], 42 [1961], 47 [1962]". In 1963 it was 21.

(6) We believe a strengthened "life term" in place of the death penalty will provide equity for all segments of our society. Whereas the professional killer has least to fear from the death penalty, the poor and the illiterate have most to fear. In the pamphlet titled "37 Questions on Capital Punishment" we may read: "Since 1907 there have been over 7000 homicides in Jew Jersey of which 40% resulted in some sort of conviction. In 1960 there were 164 murders and non-negligent manslaughters in the State; and in 1961, there were 1953. However from 1956 through 1962 there were but two executions, and since 1907, only 243 persons have been sentenced to death. Thus only one murderer is sentenced to death for every 30 murders. 160 were finally executed since the electric chair was installed, [in 1907 and most of them were ignorant and uneducated, of average or inferior mentality, emotionally unstable, poor and unskilled. Many were immigrants and 33% were Negroes. No woman has been executed since 1867, although two have been sentenced to death in recent decades . . ."

(7) We have asked what does society gain by the death of another human being? His destruction places his potential talents beyond society's use. This seems wasteful. Regarding the danger of such a criminal taking another life since he may be paroled after twenty-five or thirty years, there is the wise judgment of Professor Sellin: "Prisoners serving life sentences for murder do not constitute a special threat to the safety of other prisoners, or to the prison staff. They are, as a rule, among the best-behaved prisoners and if paroled, they are least likely to violate parole by the commission of a new crime. In the few cases where such a violation occurs, the crime is usually not a very serious one. A repeated homicide is almost unheard of. It does occasionally occur, and publicity about it may sometimes fool the reader. In the last several decades, for instance, only one case occurred in Pennsylvania, where a man convicted and sentenced to death for murder received a commutation for life, was later paroled and again convicted of murder in the first degree. However, in neither case did he actually murder anybody. He participated unarmed in a robbery during which a person was killed, and this brought him his first conviction. After parole, under similar circumstances, he again took part in a robbery. Prisoners on parole who commit murder, and there are some, have usually been serving sentences for burglary, robbery, or other offenses."

If all, or a substantial number of the above disadvantages are accurate, any supposed advantage is outweighed.

It is noted that the death penalty has undergone an evolution throughout history in a continuous narrowing of its use. From the imposition of the death penalty upon a group of persons, many of whom were in no way connected with the act of murder, the death penalty where in use has been generally limited to those associated with the act of taking another's life. A further step in the evolution was demonstrated by the limitation of the use of the sanction of capital punishment only in certain very heinous murders. A great many countries in Western Europe and a number of states within this country have abolished its use even in those limited areas.

The following appears from a summary of History of the Death Penalty in New Jersey, prepared by the Commission Counsel:

"From 1796 until 1907 the death penalty in New Jersey consisted of hanging. (Paterson's Laws, Act of March 18, 1796). In 1906, to take effect in 1907, electrocution was substituted (L. 1906, Ch. 79, now N.J.S. 2A:165). The first execution took place under the new law on December 11, 1907. Since then some 243 execution sentences received have resulted in 160 electrocutions, 65 commutations, 4 deaths pending execution, and 14 in prison awaiting results of appeals (Ashby report. June 2, 1964). 66% thus were executed.

"All death sentences and executions during the period from 1907 have resulted from murder convictions. Murder, however, is only one of four capital crimes in New Jersey. The others are treason (N.J.S. 2A:148-1); since 1902

assault on high executive officials of a government (N.J.S. 2A:148-6); since 1933, Kidnapping for ransom (N.J.S. 2A:118-1).

"Murder has, since 1796, consisted of two kinds of killing: (a) willful, deliberate and premeditated killing and (b) felony murder, which is any killing committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery and sodomy (N.J.S. 2A:113-2). Both types of murder in 1839 were declared to be murder in the first degree and punishable by death. (P.L. 1839, p. 147). The felony of kidnapping was not added to the felony category in felony murders until 1952. No one has been sentenced to death for felony murder in arson or kidnapping; well over 90% of the felony murders where death was the sentence resulted from burglary or robbery. Of the 14 presently under sentence of death, 12 or possibly 13 were guilty of murder while committing a felony. Of some 232 murderers in the recent New Jersey study by Bedau sentenced in the first instance to death, 105 had committed felony murder, 93 non-felony murder, and 34 were unknown. Thus those at present under sentence of death are much more heavily weighted toward felony murder, generally considered an aggravated offense.

"Until 1916 New Jersey was a mandatory death penalty state, but in that year, over the veto of the Governor, the legislature modified the penalty for first degree murder to be death unless the jury at the rendering of the verdict should recommend imprisonment at hard labor for life. (L. 1916, Ch. 270, p. 576). In 1919 because of certain technical difficulties the law was modified and clarified as well as adding that in the event of the jury recommending life, that penalty and no greater would be imposed. (L. 1919, Ch. 134, p. 303) (N.J.S. 2A:113-4). Kidnapping for ransom also bears a discretionary death penalty. (N.J.S. 2A:167-1). Treason maintains its mandatory death penalty, (N.J.S. 2A:148-1)."

Perhaps this evolution is best demonstrated by a listing of the seven major trends which are leading to a *de facto* abolition of the death penalty:

"Hartung in 'Trends in the Use of Capital Punishment,' Annals (1952), p. 8, lists some seven major trends:

1. There has been a trend to abolish it completely.

2. There has been a tendency to reduce the number of capital offenses. In England in 1780 there were 350 capital crimes. Today in the United States there are 7.

3. There has been a tendency to make the death penalty permissive rather than mandatory. In 1918, 12 states had mandatory death penalties, in 1952 there was only 1.

4. There has been a trend to reduce the number of executions. In the early 1930's they averaged about 170 a year. In 1962 there were 47.

5. There is a tendency toward selective enforcement, biased against Negroes, the poor and less educated men. As Lawes wrote in 'Twenty Thousand Years in Sing Sing' (1932), p. 302 of the 150 he escorted to the death chamber the prisoners were all alike in one respect, 'All were poor, and most of them friendless.'

6. There has been a trend away from capital punishing in the presence of the public; public executions existed in several American states until the 1930's.

7. There has been a trend toward relatively swift and painless methods of execution. Those who seek abolition spare no erudition when describing past barbaric customers of inflicting pain and destroying the body. Some of these can be found in a leading abolition book, 'Reflections on Hanging' by Koestler (1957)."

It is our conclusion that the State of New Jersey, through its legislative representatives, should take the following actions:

1. The abolition of capital punishment by the removal of that sanction from the statutes listed in the previous summary History of the Death Penalty in New Jersey;

2. That there be a substitution in those statutes of a strengthened life imprisonment sanction for an absolute term of not less than thirty years; and

3. If the legislative representatives have not been able to take the recommended action within the next succeeding legislative year, that a referendum concerning the abolition of capital punishment be submitted to the people of New Jersey.

MONSIGNOR SALVATORE J. ADAMO.
MALCOLM D. TALBOTT.

ACKNOWLEDGMENTS

The Commission wishes to express its profound gratitude to its counsel, Theodore L. Abeles, for his tireless and unstinting efforts. Mr. Abeles devoted countless hours to preparing memoranda for the Commission, directing the research and analyzing a vast amount of data. His devotion to the work of the Commission could not be equalled.

We would also like to thank: David J. Goldberg, formerly Associate Counsel and now Counsel to the Governor, Secretary to the Commission, for his complete cooperation and excellent assistance to the Commission throughout its existence; Edward Lippincott of Rutgers Law School, Research Assistant, for his assembly and review of literally hundreds of books, magazines, pamphlets and other literature on the subject; and all those persons who testified, bringing with them the wealth of their experience, in order to aid the Commission in its deliberations.

JOINT RESOLUTION No. 7, P.L. 1964

A JOINT RESOLUTION creating a commission to study capital punishment to weigh the question of its place in present-day society and to inquire into possible substitutions therefor.

Whereas, Eight States of the United States have seen fit to abolish the death penalty with no seemingly harmful effects on the public peace; and

Whereas, The moral teachings of Christianity and Judaism preclude the taking of life for any reason; and

Whereas, Many penologists, criminologists, psychiatrists and other experts in the field of human relations advocate the abolition of the death penalty; and

Whereas, Juries in capital cases have been increasingly reluctant to assess the death penalty; and

Whereas, There has been an increasing interest in the subject of capital punishment by the general public; now, therefore,

BE IT RESOLVED *by the Senate and General Assembly of the State of New Jersey:*

1. There is hereby created a commission to be known as the Commission to Study Capital Punishment consisting of 9 members, 3 to be appointed by the President of the Senate, no more than 2 of whom shall be of the same political party, 3 to be appointed by the Speaker of the General Assembly, no more than 2 of whom shall be of the same political party, and 3 to be appointed from the citizenry of the State at large by the Governor, no more than 2 of whom shall be of the same political party. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments were made.

2. The commission shall organize as soon as may be after the appointment of its members and shall select a chairman and a vice-chairman from among its members and a secretary who need not be a member of the commission.

3. It shall be the duty of the commission to study the subject of capital punishment to evaluate the conditions under which it has been applied in New Jersey and to its purported deleterious moral and social effect. It shall be the further duty of the commission to inquire into the effect which abolition of the death penalty may have on law enforcement and to evaluate the experience in those States and countries which do not have the death penalty. In conducting its studies, the commission shall be guided by the imperative need of respect for the law, and the constant need for revision of the law toward the end that it shall be compatible with modern moral, social and scientific concepts.

4. The commission may conduct public and private hearings as it may deem desirable, and it may call upon any of the State departments for such assistance as may be required from such departments.

5. The commission shall make its report to the *[present or the next]* Legislature and to the Governor **within 90 days after enactment of this joint resolution**, and its report may include recommendations for specific changes in the statutory law relating to the subject of capital punishment.

6. This joint resolution shall take effect immediately.

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Capital Punishment

(James A. McCafferty)

A Prosecutor Looks at Capital Punishment

(Richard E. Gerstein)

At the outset I would like to make my personal position clear. As a Prosecuting Attorney in this state in which the law provides for capital punishment I have always believed that I could best objectively do my job if I did not become known as an avid advocate of capital punishment. Conversely, I could not fulfill my duty under the law if I was opposed to capital punishment. Therefore, I have refrained from taking any personal position on this question. During the course of this presentation I will endeavor to convey a composite of the arguments in favor of the retention of capital punishment, since almost without exception, prosecutors, both in the State of Florida and throughout the Nation, with whom I have discussed this issue, have been strongly in favor of the retention of capital punishment.

The most convincing and most widely used argument in favor of capital punishment is that it acts as a deterrent. Deterrence is usually defined as the preventive effect which actual or threatened punishment of offenders has upon potential offenders. This principle has influenced our penal codes since ancient times when torturous deaths and mutilations were exacted with the thought of making an example of the malefactor. The deterrence concept governed the Romans in their use of crucifixion as a means of execution, and it led the English to employ the ingenious device of drawing and quartering to warn the

potential criminal of the consequences of his proposed action. In Colonial America the use of the pillory and stocks served to remind those with criminal ideas that the course of lawlessness had its disadvantages. In short, it may be said that the deterrence concept has been evident through the ages in Western thought concerning crime and punishment.

As do many members of our profession, I take the position that deterrence is necessary for the maintenance of the legal system and the preservation of society. As clearly stated by Sir John Salmond:

"Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil doer an example and a warning to all who are like-minded with him."[1]

There can be no argument with the fact that capital punishment is totally effective as a deterrent in so far as convicted criminals are concerned. The murderer who has been permanently deterred by execution no longer poses a threat to society.

Therefore, the basic question to be resolved is whether or not the death penalty acts as a deterrent upon potential offenders. It is the contention of virtually all prosecutors that the death penalty does have this desired effect, although it must be admitted at the outset that most of the statistical evidence available does not support this position, for, according to statistics, in jurisdictions where the penalty has been abolished the number of murders has not increased and may even have decreased. For example, Maine, which abolished capital punishment in 1870, has the lowest murder rate of any State in the Union, and Wisconsin and Minnesota, which abandoned the death penaty in 1854 and 1911, respectively, have far lower homicide rates than most of the other states.[2] However, it should be emphasized that criminologists and sociologists agree that statistics are an unsatisfactory indication of the deterrent effect of the death penalty because murder is a complex sociological problem, as well as a crime, and contributing factors, such as race, heredity, regional lines, standards of housing and education, are intangibles, the value of which is difficult to assess. Furthermore, it is obvious that statistics cannot tell us how many potential criminals have refrained from taking another's life through fear of the death penalty. As Judge Hyman Barshay of New York stated:

"The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down.[3]

The contention that statistics are not necessarily the controlling factor in resolving the issue at hand was apparently shared by the Royal Commission on Capital Punishment which was set up on May 4, 1949. Under the chairmanship of Sir Ernest Gowers, their terms of reference were to consider and report, among other things, on "whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified." This inquiry extended over a long period and a most comprehensive report was submitted, with which I cannot deal in detail but which I commend to your perusal. Their terms of reference precluded the committee from considering whether the abolition of capital punishment would be desirable, but they did consider its deterrent effect, as the Report stated in part as follows:

"We recognize that it is impossible to arrive confidently at firm conclusions about the deterrent effect of the death penalty, or indeed of any form of punishment. The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment may be stated as follows: Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than other forms of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so."[4]

The evidence to which the Royal Commission refers is the testimony of law enforcement officials concerning their experiences in the apprehension and prosecution of criminals. This evidence clearly illustrates the inadequacy of

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[1] *Journal of Criminal Law, Criminology and Police Science,* 46:347, "The Deterrence Concept in Criminology and Law," John C. Ball.
[2] *Kentucky Law Journal,* 47:397, "Capital Punishment Reconsidered," W.O. Reichert.
[3] *Senior Scholastic,* 71:6 "Capital Punishment: Pro and Con."
[4] Great Britain, *Royal Commission on Capital Punishment. Report.* London: H.M. Stationary Office, 1953.

the claim that capital punishment is not a deterrent, as is seen by the following:

(1) Criminals who have committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captor though by killing, escape seemed probable. When asked why they refrained from the homicide, quick responses indicated a willingness to serve a life sentence, but not risk the death penalty.

(2) Criminals about to commit certain offenses refrained from carrying deadly weapons. Upon apprehension, answers to questions concerning absence of such weapons indicated a desire to avoid more serious punishment by carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty.

(3) Victims have been removed from a capital punishment State to a non-capital punishment State to allow the murderer opportunity for homicide without threat to his own life. This in itself demonstrates that the death penalty is considered by some would-be killers. Statistics cannot tell us how many lives have thus been saved.

Frank S. Hogan, District Attorney for the County of New York, wrote to me recently and with the letter he enclosed a memorandum representing the thinking of eight of ten of his associates, all of whom have had considerable experience in the prosecution of murder cases. Their collective opinion as to the deterrent value of capital punishment is clearly set forth in the following excerpt from that memorandum:

"We are satisfied from our experience that the deterrent effect is both real and substantial * * * for example, from time to time accomplices in felony murders state with apparent truthfulness that in the planning of the felony they strongly urged the killer not to resort to violence. From the context of these utterances, it is apparent that they were led to these warnings to the killer by fear of the death penalty which they realized might follow the taking of life. Moreover, victims of hold-ups have occasionally reported that one of the robbers expressed a desire to kill them and was dissuaded from so doing by a confederate. Once again, we think it not unreasonable to suggest that fear of the death penalty played a role in some of these intercessions.

"On a number of occasions, defendants being questioned in connection with homicide, have shown a striking terror of the death penalty. While these persons have in fact perpetrated homicides, we think that their terror of the death penalty must be symptomatic of the attitude of many others of their type, as a result of which many lives have been spared."

In further support of this argument, it is interesting to note that eight States which previously abolished the death penalty have found it necessary to re-adopt it for its deterrent value. In Washington, for example, the death penalty was repealed in 1913 and re-enacted in 1919. According to John R. Cranson, warden of the Washington State Penitentiary, "Record available * * * indicate that there was an increase in the number of capital crimes * * * during that period." This increase, plus a scandalous trial in 1917, convinced Washingtonians that abolition of the death penalty was a mistake. The trial involved a man accused of a brutal murder. He boasted throughout his trial that the State could do nothing to him but board him up for the rest of his life.

For what purpose was capital punishment restored in these states, who urged it and why, if not to serve notice on people who might be tempted to murder that on conviction their lives would be forfeited?

It is argued that the professional criminal does not take the death penalty seriously due to the lack of consistency with which it is applied. For example, out of an estimated 23,370 cases of murder, non-negligent manslaughter, and rape in the year 1949, there were only 119 executions carried out in the entire United States. In 1953 there were sixty-two persons executed in this country. In that same year there were over 7,000 cases of murder and non-negligent manslaughter. At that rate the criminal's chances of escaping execution are better than 100 to 1.[5]

While this factor must of necessity affect the deterrent value of capital punishment, it is the contention of prosecutors that the potential killer will

[5] *Journal of Criminal Law, Criminology and Police Science*, 44:695, "Capital Punishment Reconsidered," Evelle J. Younger.

refrain from taking a life if there is the slightest possibility that the death penalty may be invoked against him.

It is clear that for normal human beings no other punishment deters so effectively from committing murder as the punishment of death. The threat of death is the one to which resort has always been made, when there is an absolute determination to produce some result.

The Commissioner of Police of London, England, in his evidence before the Royal Commission on Capital Punishment, told of a gang of armed robbers who continued operations after one of their members was sentenced to death and his sentence commuted to penal servitude for life, but the same gang disbanded and disappeared when, on a later occasion, two others were convicted of murder and hanged.[6]

Surely it is a common sense argument, based on what is known of human nature, that the death penalty has a deterrent effect particularly for certain kinds of murderers. Furthermore, as the Royal Commission opined the death penalty helps to educate the conscience of the whole community, and it arouses among many people a quasi-religious sense of awe. In the mind of the public there remains a strong association between murder and the penalty of death. Certainly one of the factors which restrains some people from murder is fear of punishment and surely, since people fear death more than anything else, the death penalty is the most effective deterrent.

Another factor in support of the retention of capital punishment is that the public is in favor of it. A poll on this issue by the American Institute of Public Opinion in 1955 showed these results: In favor of the death penalty, 68 per cent; opposed, 25 per cent; no opinion, 7 per cent. The reason for this may be seen in the following excerpts from the report of the Royal Commission on Capital Punishment:

Moreover, we think it must be recognized that there is a strong and widespread demand for retribution in the sense of reprobation—not always unmixed in the proper mind with that of atonement and expiation. As Lord Justice Denning put it: "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. . . . The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime; and from this point of view there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.[4]

That this opinion is shared by those of us who are called upon to prosecute for heinous crimes may be seen in the experience of J. Frank Adams, State Attorney for the Fourteenth Judicial Circuit of Florida. In his recent letter to me, he described the following three cases which he prosecuted:

1. The defendant had raped and murdered his victim and afterwards attempted to have intercourse with her body;

2. The defendant unnaturally assaulted two young boys and then abandoned them in St Andrews Bay;

3. The defendant raped the mother, killed her husband and one small child and left two other children for dead. In each of these cases, the defendant received the death penalty, and in speaking in justification of these sentences, State Attorney Adams said: "I feel that in all three of these cases imprisonment would not have been much punishment to these defendants nor would it have satisfied the public." In concluding his letter, he made the following statement in support of capital punishment:

In my career as a prosecuting attorney, I have had occasions to talk to many defendants, some of them hardened criminals, and they all fear the chair and to many of them being in the penitentiary merely furnished security. Therefore, I believe it would be a terribe mistake to abolish capital punishment or to weaken it in any way in the State of Florida.

Much of the opposition to the retention of capital punishment is based on the ideas of the fallibility of a single jury in a murder trial, of the possibly inflamed atmosphere in which a trial might take place, and of the personal disposition of a single Judge in directing the jury in such a trial. However, under appeals acts, a person convicted of murder may appeal his conviction, and in the serene and impartial atmosphere surrounding an appellate court he may

[6] See footnote 4, p. 276.
[4] See footnote 4, p. 276.

have the conviction set aside and a judgment and verdict of acquittal entered, or may be granted a new trial; or he may have the capital charge reduced to a lesser crime, if the jury, on the evidence, could have found him guilty of such an offense. We must not forget the importance of the American citizen and the role he plays as a jurist. It's not a duty he takes lightly, nor do the attorneys and judges. No man on trial for murder is given a superficial trial. I therefore feel that there is little chance for an innocent man to be sentenced to death.

The prosecutors' final argument for the retention of capital punishment is the State's right of self-defense. Just as the individual has the right to defend his life against the attacks of an unjust aggressor, so the State has the right to defend itself against external enemies (by waging war) and internal enemies (by capital punishment), who by their crimes undermine the very foundations of the social order. "The slaying of an evildoer is lawful," says St. Thomas Aquinas, "inasmuch as it is directed to the welfare of the whole community."

A man who has committed murder deliberately has proved himself unfit for society, and regardless of all the duties which belong to it. The safety of society is most effectually guarded by cutting him off from the power of doing further mischief. If his life be not taken away, the only other means left are confinement for life or exile for life. Neither of these is a perfect security against the commission of other crimes. It is true that the latter punishments leave open the chance of reform to the offender, but we must not forget that reformation is an enjoyable by-product, not the sole goal of punishment. Suppose a criminal has proved unable to be reformed in spite of many honest attempts. Logic demands refraining from further punishment, as its alleged end cannot be attained. But the law demands his punishment and an especially severe one, life imprisonment, and this fact proves that not reformation but protection is the desired aim of punishment.[7]

Society must also consider what effect the abolition of capital punishment could have upon the philosophy of the youth of our country. Many of them might very well look upon the criminal code, including that part of it forbidding murder, as a mere convention of society which advanced thinking and progressive social theories permit them to set aside as a matter of no consequence. This theory leads to the belief that each is a law unto himself; that each may choose the laws which he will obey, and that he may violate the rest. This type of thinking would eventually lead us into virtual anarchy.

The moralist argues that the State has no right to take away a human life, for in doing so, the State is "playing God." This argument was eloquently answered by Richard H. Rovere in his review of Arthur Koestler's book *Reflections on Hanging*, as he wrote:

Man must play God, for he has acquired certain Godlike powers, among them a considerable degree of mastery over life and death, and he cannot avoid their exercise. Science has put into our hands—and politics has required us to grasp firmly—instruments that force a human judgment on whether or not the entire race is to be executed; even in benign employment, these instruments can affect the very image of man many millenia hence, and for that matter, the duration of all life. In a less awesome—but an awesome enough—way, modern medicine has been usurping prerogatives once held to be God's alone. It has learned to cheat death not merely by the prolongation of life but by calling men back to life after several hours on the other shore. The judge who orders an execution is no more guilty of playing God than the doctor who, having decided that a human being has been summoned to eternity too soon, restores him to the world of time and suffering and sin.[8]

CONCLUSION

Any case for the retention of the death penalty does not rest upon sentiment or hysteria. It is based quite simply on the fact that, human nature being what it is, potential criminals are most effectively deterred from crime by what they fear most. The penalty of death is obviously the most dreaded punishment; obviously it is more dreaded than life imprisonment, else why does every murderer sentenced to death thankfully accept a life sentence if and when he is reprieved? And even the strongest opponents of capital punishment

[7] *Chitty's Law Journal*, 8:146, "Capital Punishment," Kurt Soelling.
[8] *New Yorker*, September 14, 1957, Review of *Reflections on Hanging*, Richard H. Rovere.

admit that it is necessary to provide the death penalty for murders committed by men under life sentences. This in itself is a complete admission that life imprisonment does not produce sufficient horror in the mind of the killer to deter him.

There is no question that there are some murders committed upon sudden passion, so strong that the existence of no penalty would be sufficient to stay the hand of the murderer. But this is not an argument against capital punishment, as the abolitionists would have us believe. Indeed, it may be that men so dangerous that they kill when they lose their tempers should be executed for the safety of other people. Moreover, we must remember that all murders are not committed under sudden impulse; and, because of those cases in which men do turn over in their minds the dreadful thought of murder, it is necessary that the most powerful and effective deterrent should be retained. As Daniel Webster said:

* * * When the guilty, therefore, are not punished, the law has so far failed of its purpose; the safety of the innocent is so far endangered.[9]

In Favor of Capital Punishment

(Jacques Barzun)

A passing remark of mine in the *Mid-Century* magazine has brought me a number of letters and a sheaf of pamphlets against capital punishment. The letters, sad and reproachful, offer me the choice of pleading ignorance or being proved insensitive. I am asked whether I know that there exists a worldwide movement for the abolition of capital punishment which has everywhere enlisted able men of every profession, including the law, I am told that the death penalty is not only inhuman but also unscientific, for rapists and murderers are really sick people who should be cured, not killed. I am invited to use my imagination and acknowledge the unbearable horror of every form of execution.

I am indeed aware that the movement of abolition is wide-spread and articulate, especially in England. It is headed there by my old friend and publisher, Mr. Victor Gollancz, and it numbers such well-known writers as Arthur Koestler, C. H. Rolph, James Avery Joyce and Sir John Barry. Abroad as at home the profession of psychiatry tends to support the cure principle, and many liberal newspapers, such as the *Observer*, are committed to abolition. In the United States there are at least twenty-five state leagues working to the same end, plus a national league and several church councils, notably the Quaker and the Episcopal.

The assemblage of so much talent and enlightened goodwill behind a single proposal must give pause to anyone who supports the other side, and in the attempt to make clear my views, which are now close to unpopular, I start out by granting that my conclusion is arguable; that is, I am still open to conviction, *provided* some fallacies and frivolities in the abolitionist argument are first disposed of and the difficulties not ignored but overcome. I should be glad to see this happen, not only because there is pleasure in the spectable of an airtight case, but also because I am not more sanguinary than my neighbor and I should welcome the discovery of safeguards—for society *and* the criminal—other than killing. But I say it again, these safeguards must really meet, not evade or postpone, the difficulties I am about to describe. Let me add before I begin that I shall probably not answer any more letters on this arousing subject. If this printed exposition does not do justice to my cause, it is not likely that I can do better in the hurry of private correspondence.

I readily concede at the outset that present ways of dealing out capital punishment are as revolting as Mr. Koestler says in his harrowing volume, *Hanged by the Neck*. Like many of our prisons, our modes of execution should change. But this objection to barbarity does not mean that capital punishment —or rather, judicial homicide—should not go on. The illicit jump we find here, on the threshold of the inquiry, is characteristic of the abolitionist and must be disallowed at every point. Let us bear in mind the possibility of devising a painless, sudden and dignified death, and see whether its administration is justifiable.

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[9] *The Congressional Digest*, August–September 1927.

The four main arguments advanced against the death penalty are: *1.* punishment for crime is a primitive idea rooted in revenge; *2.* capital punishment does not deter; *3.* judicial error being possible, taking life is an appalling risk; *4.* a civilized state, to deserve its name, must uphold, not violate, the sanctity of human life.

I entirely agree with the first pair of propositions, which is why, a moment ago, I replaced the term capital punishment with "judicial homicide." The uncontrollable brute whom I want put out of the way is not to be punished for his misdeeds, nor used as an example or a warning; he is to be killed for the protection of others, like the wolf that escaped not long ago in a Connecticut suburb. No anger, vindictiveness or moral conceit need preside over the removal of such dangers. But a man's inability to control his violent impulses or to imagine the fatal consequences of his acts should be a presumptive reason for his elimination from society. This generality covers drunken driving and teen-age racing on public highways, as well as incurable obsessive violence; it might be extended (as I shall suggest later) to other acts that destroy, precisely, the moral basis of civilization.

But why kill? I am ready to believe the statistics tending to show that the prospect of his own death does not stop the murderer. For one thing he is often a blind egotist, who cannot conceive the possibility of his own death. For another, detection would have to be infallible to deter the more imaginative who, although afraid, think they can escape discovery. Lastly, as Shaw long ago pointed out, hanging the wrong man will deter as effectively as hanging the right one. So, once again, why kill? If I agree that moral progress means an increasing respect for human life, how can I oppose abolition?

I do so because on this subject of human life, which is to me the heart of the controversy, I find the abolitionist inconsistent, narrow or blind. The propaganda for abolition speaks in hushed tones of the sanctity of human life, as if the mere statement of it as an absolute should silence all opponents who have any moral sense. But most of the abolitionists belong to nations that spend half their annual income on weapons of war and that honor research to perfect means of killing. These good people vote without a qualm for the political parties that quite sensibly arm their country to the teeth. The West today does not seem to be the time or place to invoke the absolute sanctity of human life. As for the clergymen in the movement, we may be sure from the experience of two previous world wars that they will bless our arms and pray for victory when called upon, the sixth commandment notwithstanding.

"Oh, but we mean the sanctity of life *within* the nation!" Very well: is the movement then campaigning also against the principle of self-defense? Absolute sanctity means letting the cutthroat have his sweet will of you, even if you have a poker handy to bash him with, for you might kill. And again, do we hear any protest against the police firing at criminals on the street—mere bank robbers usually—and doing this, often enough, with an excited marksmanship that misses the artist and hits the bystander? The absolute sanctity of human life is, for the abolitionist, a slogan rather than a considered proposition.

Yet, it deserves examination, for upon our acceptance or rejection of it depend such other highly civilized possibilities as euthanasia and seemly suicide. The inquiring mind also wants to know, why the sanctity of *human* life alone? My tastes do not run to household pets, but I find something less than admirable in the uses to which we put animals—in zoos, laboratories and space machines—without the excuse of the ancient law, "Eat or be eaten."

It should moreover be borne in mind that this argument about sanctity applies—or would apply—to about ten persons a year in Great Britain and to between fifty and seventy-five in the United States. These are the average numbers of those executed in recent years. The count by itself should not, of course, affect our judgment of the principle: one life spared or forfeited is an important, morally, as a hundred thousand. But it should inspire a comparative judgment: there are hundreds and indeed thousands whom, in our concern with the horrors of execution, we forget: on the one hand, the victims of violence; on the other, the prisoners in our jails.

The victims are easy to forget. Social science tends steadily to mark a preference for the troubled, the abnormal, the problem case. Whether it is poverty, mental disorder, delinquency or crime, the "patient material" monopolizes the interest of increasing groups of people among the most generous and learned.

Psychiatry and moral liberalism go together; the application of law as we have known it is thus coming to be regarded as an historic prelude to social work, which may replace it entirely. Modern literature makes the most of this same outlook, caring only for the disturbed spirit, scorning as bourgeois those who pay their way and do *not* stab their friends. All the while the determinism of natural science reinforces the assumption that society causes its own evils. A French jurist, for example, says that in order to understand crime we must first brush aside all ideas of Responsibility. He means the criminal's and takes for granted that of society. The murderer kills because reared in a broken home or, conversely, because at an early age he witnessed his parents making love. Out of such cases, which make pathetic reading in the literature of modern criminology, is born the abolitionist's state of mind: we dare not kill those we are beginning to understand so well.

If, moreover, we turn to the accounts of the crimes committed by these unfortunates, who are the victims? Only dull ordinary people going about their business. We are sorry, of course, but they do not interest science on its march. Balancing, for example, the sixty to seventy criminals executed annually in the United States, there were the seventy to eighty housewives whom George Cvek robbed, raped and usually killed during the months of a career devoted to proving his virility. It is too bad. Cvek alone seems instructive, even though one of the law officers who helped track him down quietly remarks: "As to the extent that his villanies disturbed family relationships, or how many women are still haunted by the specter of an experience they have never disclosed to another living soul, these questions can only lead themselves to sterile conjecture."

The remote results are beyond our ken, but it is not idle to speculate about those whose death by violence fills the daily two inches at the back of respectable newspapers—the old man sunning himself on a park bench and beaten to death by four hoodlums, the small children abused and strangled, the middle-aged ladies on a hike assaulted and killed, the family terrorized by a released or escaped lunatic, the half-dozen working people massacred by the sudden maniac, the boatload of persons dispatched by the skipper, the mindless assaults upon schoolteachers and shopkeepers by the increasing horde of dedicated killers in our great cities. Where does the sanctity of life begin?

It is all very well to say that many of these killers are themselves "children," that is, minors. Doubtless a nine-year-old mind is housed in that 150 pounds of unguided muscle. Grant, for argument's sake, that the misdeed is "the fault of society," trot out the broken home and the slum environment. The question then is, What shall we do, not in the Utopian city of tomorrow, but here and now? The "scientific" means of cure are more than uncertain. The apparatus of detention only increases the killer's antisocial animus. Reformatories and mental hospitals are full and have an understandable bias toward discharging their inmates. Some of these are indeed "cured"—so long as they stay under a rule. The stress of the social free-for-all throws them back on their violent modes of self-expression. At that point I agree that society has failed—twice: it has twice failed the victims, whatever may be its guilt toward the killer.

As in all great questions, the moralist must choose, and choosing has a price. I happen to think that if a person of adult body has not been endowed with adequate controls against irrationally taking the life of another, that person must be judicially, painlessly, regretfully killed before that mindless body's horrible automation repeats.

I say "irrationally" taking life, because it is often possible to feel great sympathy with a murderer. Certain *crimes passionnels* can be forgiven without being condoned. Blackmailers invite direct retribution. Long provocation can be an excuse, as in that engaging case of some years ago, in which a respectable carpenter of seventy found he could no longer stand the incessant nagging of his wife. While she excoriated him from her throne in the kitchen—a daily exercise for fifty years—the husband went to his bench and came back with a hammer in each hand to settle the score. The testimony to his character, coupled with the sincerity implied by the two hammers, was enough to have him sent into quiet and brief seclusion.

But what are we to say of the type of motive disclosed in a journal published by the inmates of one of our Federal penitentiaries? The author is a bank robber who confesses that money is not his object:

"My mania for power, socially, sexually, and otherwise can feel no degree of satisfaction until I feel sure I have struck the ultimate of submission and terror in the minds and bodies of my victims. * * * It's very difficult to explain all the queer fascinating sensations pounding and surging through me while I'm holding a gun on a victim, watching his body tremble, and sweat. * * * This is the moment when all the rationalized hypocrisies of civilization are suddenly swept away and two men stand there facing each other morally and ethically naked, and right and wrong are the absolute commands of the man behind the gun."

This confused echo of modern literature and modern science defines the choice before us. Anything deserving the name of cure for such a man presupposes not only a laborious individual psychoanalysis, with the means to conduct and to sustain it, socially and economically, but also a re-education of the mind, so as to throw into correct perspective the garbled idea of Freud and Nietzsche, Gide and Dostoevski, which this power-seeker and his fellows have derived from the culture and temper of our times. Ideas are tenancious and give continuity to emotion. Failing a second birth of heart and mind, we must ask: How soon will this sufferer sacrifice a bank clerk in the interests of making civilization less hypocritical? And we must certainly question the wisdom of affording him more than one chance. The abolitionists' advocacy of an unconditional "let live" is in truth part of the same cultural tendency that animates the killer. The Western peoples' revulsion from power in domestic and foreign policy has made of the state a sort of counterpart of the bank robber: both having power and neither knowing how to use it. Both waste lives because hyponotized by irrelevant ideas and crippled by contradictory emotions. If psychiatry were sure of its ground in diagnosing the individual case, a philosopher might consider whether such dangerous obsessions should not be guarded against by judicial homicide *before* the shooting starts.

I raise the question not indeed to recommend the prophylactic execution of potential murderers, but to introduce the last two perplexities that the abolitionists dwarf or obscure by their concentration on changing an isolated penalty. One of these is the scale by which to judge the offenses society wants to repress. I can for example imagine a truly democratic state in which it would be deemed a form of treason punishable by death to create a disturbance in any court or deliberative assembly. The aim would be to recognize the sanctity of orderly discourse in arriving at justice, assessing criticism and defining policy. Under such a law, a natural selection would operate to remove permanently from the scene persons who, let us say, neglect argument in favor of banging on the desk with their shoe. Similarly, a bullying minority in a diet, parliament or skupshtina would be prosecuted for treason to the most sacred institutions when fists or flying inkwells replace rhetoric. That the mere suggestion of such a law sounds ludicrous shows how remote we are from civilized institutions, and hence how gradual should be our departure from the severity of judicial homicide.

I say gradual and I do not mean standing still. For there is one form of barbarity in our law that I want to see mitigated before any other. I mean imprisonment. The enemies of capital punishment—and liberals generally—seem to be satisfied with any legal outcome so long as they themselves avoid the vicarious guilt of shedding blood. They speak of the sanctity of life, but have no concern with its quality. They give no impression of ever having read what it is certain they have read, from Wilde's *De Profundis* to the latest account of prison life by a convicted homosexual. Despite the infamy of concentration camps, despite Mr. Charles Burney's remarkable work, *Solitary Confinement*, despite riots in prisons, despite the round of escape, recapture and return in chains, the abolitionsts' imagination tells them nothing about the reality of being caged. They read without a qualm, indeed they read with rejoicing, the hideous irony of "Killer Gets Life"; they sigh with relief instead of horror. They do not see and suffer the cell, the drill, the clothes, the stench, the food; they do not feel the sexual racking of young and old bodies, the hateful promiscuity, the insane monotony, the mass degradation, the impotent hatred. They do not remember from Silvio Pellico that only a strong political faith, with a hope of final victory, can steel a man to endure long detention. They forget that Joan of Arc, when offered "life" preferred burning at the stake. Quite of another mind, the abolitionsists point with pride to the "model prisoners" that murderers often turn out to be. As if a model prisoner were

not, first, a contradiction in terms, and second, an exemplar of what a free society should not want.

I said a moment ago that the happy advocates of the life sentence appear not to have understood what we know they have read. No more do they appear to read what they themselves write. In the preface to his useful volume of cases, *Hanged in Error*, Mr. Leslie Hale, M.P., refers to the tardy recognition of a minor miscarriage of justice—one year in jail: "The prisoner emerged to find that his wife had died and that his children and his aged parents had been removed to the workhouse. By the time a small payment had been assessed as 'compensation' the victim was incurably insane." So far we are as indignant with the law as Mr. Hale. But what comes next? He cites the famous Evans case, in which it is very probable that the wrong man was hanged, and he exclaims: "While such mistakes are possible, should society impose an irrevocable sentence?" Does Mr. Hale really ask us to believe that the sentence passed on the first man, whose wife died and who went insane, was in any sense *revocable?* Would not any man rather be Evans dead than that other wretch "emerging" with his small compensation and his reasons for living gone?"

Nothing is revocable here below, imprisonment least of all. The agony of a trial itself is punishment, and acquittal wipes out nothing. Read the heart-rending diary of William Wallace, accused quite implausibly of having murdered his wife and "saved" by the Court of Criminal Appeals—but saved for what? Brutish ostracism by everyone and a few years of solitary despair. The cases of Adolf Beck, of Oscar Slater, of the unhappy Brooklyn bank teller who vaguely resembled a forger and spent eight years in Sing Sing only to "emerge" a broken, friendless, useless, "compensated" man—all these, if the dignity of the individual has any meaning, had better have been dead before the prison door ever opened for them. This is what counsel always says to the jury in the court of a murder trial and counsel is right: far better hang this man than "give him life." For my part, I would choose death without hesitation. If that option is abolished, a demand will one day be heard to claim it as a privilege in the name of human dignity. I shall believe in the abolitionist's present views only after he has emerged from twelve months in a convict cell.

The detached observer may want to interrupt here and say that the argument has now passed from reasoning to emotional preference. Whereas the objection to capital punishment *feels* that death is the greatest of evils, I *feel* that imprisonment is worse than death. A moment's thought will show that feeling is the appropriate arbiter. All reasoning about what is right, civilized and moral rests upon sentiment, like mathematics. Only, in trying to persuade others, it is important to single out the fundamental feeling, the prime intuition, and from it to reason justly. In my view, to profess respect for human life and be willing to see it spent in a penitentiary is to entertain liberal feelings frivolously. To oppose the death penalty because, unlike a prison term, it is irrevocable is to argue fallaciously.

In the propaganda for abolishing the death sentence the recital of numerous miscarriages of justice commits the same error and implies the same callousness: what is at fault in our present system is not the sentence but the fallible procedure. Capital cases being one in a thousand or more, who can be cheerful at the thought of all the "revocable" errors? What the miscarriages point to is the need for reforming the jury system, the rules of evidence, the customs of prosecution, the machinery of appeal. The failure to see that this is the great task reflects the sentimentality I spoke of earlier, that which responds chiefly to the excitement of the unusual. A writer on Death and the Supreme Court is at pains to point out that when that tribunal reviews a capital case, the judges are particularly anxious and careful. What a left-handed compliment to the highest judicial conscience of the country! Fortunately, some of the champions of the misjudged see the issue more clearly. Many of those who are thought wrongly convicted now languish in jail because the jury was uncertain or because a doubting governor commuted the death sentence. Thus Dr. Samuel H. Sheppard, Jr., convicted of his wife's murder in the second degree, is serving a sentence that is supposed to run for the term of his natural life. The story of his numerous trials, as told by Mr. Paul Holmes, suggests that police incompetence, newspaper demagogy, public envy of affluence and the mischances of legal procedure fashioned the result. But Dr. Sheppard's vindicator is under no illusion as to the conditions that

this "lucky" evader of the electric chair will face if he is granted parole after ten years: "It will carry with it no right to resume his life as a physician. His privilege to practice medicine was blotted out with his conviction. He must all his life bear the stigma of a parolee, subject to unceremonious return to confinement for life for the slightest misstep. More than this, he must live out his life as a convicted murderer." [1]

What does the moral conscience of today think it is doing? If such a man is a dangerous repeater of violent acts, what right has the state to let him loose after ten years? What is, in fact, the meaning of a "life sentence" that peters out long before life? Paroling looks suspiciously like an expression of social remorse of the pain of incarceration, coupled with a wish to avoid "unfavorable publicity" by freeing a suspect. The man is let out when the fuss has died down; which would mean that he was not under lock and key for our protection at all. He *was* being punished, just a little—for so prison seems in the abolitionist's distorted view, and in the jury's and the prosecutor's, whose "second-degree" murder suggests killing someone "just a little." [2]

If, on the other hand, execution and life imprisonment are judged too severe and the accused is expected to be harmless hereafter—punishment being ruled out as illiberal—what has society gained by wrecking his life and damaging that of his family?

What we accept, and what the abolitionist will clamp upon us all the more firmly if he succeeds, is an incoherence which is not remedied by the belief that second-degree murder merits a kind of second-degree death; that a doubt as to the identity of a killer is resolved by commuting real death into intolerable life; and that our ignorance whether a maniac will strike again can be hedged against by measuring "good behavior" within the gates and then releasing the subject upon the public in the true spirit of experimentation.

These are some of the thoughts I find I cannot escape when I read and reflect upon this grave subject. If, as I think, they are relevant to any discussion of change and reform, resting as they do on the direct and concrete perception of what happens, then the simple meliorists who expect to breathe a purer air by abolishing the death penalty are deceiving themselves and us. The issue is for the public to judge; but I for one shall not sleep easier for knowing that in England and America and the West generally a hundred more human beings are kept alive in degrading conditions to face a hopeless future; while others—possibly less conscious, certainly less controlled—benefit from a premature freedom dangerous alike to themselves and society. In short, I derive no comfort from the illusion that in giving up one manifest protection of the law-abiding, we who might well be in any of these three roles—victim, prisoner, licensed killer—have struck a blow for the sanctity of human life.

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U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., June 1, 1960.

To all law enforcement officials:

The question of capital punishment has sent a storm of controversy thundering across our Nation—millions of spoken and written words seek to examine the question so that decisions may be reached which befit our civilization.

The struggle for answers concerning the taking of men's lives is one to which every American should lend his voice, for the problem in a democracy such as ours is not one for a handful of men to solve alone.

As a representative of law enforcement, it is my belief that a great many of the most vociferous cries for abolition of capital punishment emanate from those areas of our society which have been insulated against the horrors man can and does perpetrate against his fellow beings. Certainly, penetrative and

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[1] Editor's note: See Sheppard v. Maxwell, 346 F.2d 707 which reversed defendant Sheppard's conviction. Released from prison, Dr. Sheppard later succumbed following a brief illness.

[2] The British Homicide Act of 1957, Section 2, implies the same reasoning in its definition of "diminished responsibility" for certain forms of mental abnormality. The whole question of irrationality and crime is in utter confusion, on both sides of the Atlantic.

searching thought must be given before considering any blanket cessation of capital punishment in a time when unspeakable crimes are being committed. The savagely mutilated bodies and mentally ravaged victims of murderers, rapists and other criminal beasts beg consideration when the evidence is weighed on both sides of the scales of Justice.

At the same time, nothing is so precious in our country as the life of a human being, whether he is a criminal or not, and on the other side of the scales must be placed all of the legal safeguards which our society demands.

Experience has clearly demonstrated, however, that the time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessary ingredient. Law-abiding citizens have a right to expect that the efforts of law enforcement officers in detecting and apprehending criminals will be followed by realistic punishment.

It is my opinon that when no shadow of a doubt remains relative to the guilt of a defendant, the public interest demands capital punishment be invoked where the law so provides.

Who, in all good conscience, can say that Julius and Ethel Rosenberg, the spies who delivered the secret of the atomic bomb into the hands of the Soviets, should have been spared when their treachery caused the shadow of annihilation to fall upon all of the world's peoples? What place would there have been in civilization for these two who went to their deaths unrepentant, unwilling to the last to help their own country and their own fellow men? What would have been the chances of rehabilitating Jack Gillbert Graham, who placed a bomb in his own mothers's luggage and blasted her and 43 other innocent victims into oblivion as they rode an airliner across a peaceful sky?

A judge once said, "The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down."

Despicable crimes must be dealt with realistically. To abolish the death penalty would absolve other Rosenbergs and Grahams from fear of the consequences for committing atrocious crimes. Where the death penalty is provided, a criminal's punishment may be meted out commensurate with his deeds. While a Power transcending man is the final Judge, this same Power gave man reason so that he might protect himself. Capital punishment is an instrument with which he may guard the righteous against the predators among men.

We must never allow misguided compassion to erase our concern for the hundreds of unfortunate, innocent victims of bestial criminals.

Very truly yours,

JOHN EDGAR HOOVER,
Director.

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U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., June 1, 1961.

To all law enforcement officials:

The capital punishment question, in which law enforcement officers have a basic interest, has been confused recently by self-styled agitators "against the evil of capital punishment." A brochure released not long ago, pleading for "rehabilitation" of murderers while passing lightly over the plight of the killers' innocent victims and families, charges that law enforcement officers "become so insensitized by their dealings with vicious criminals that they go to the extreme of feeling that the death penalty is absolutely necessary."

To add to the burden of conscience borne by peace officers, prosecutors, and jurists and to brand law enforcement officers as callous, unfeeling men "insensitized" to the sanctity of human life are gross acts of injustice to these servants to the public. This ridiculous allegation is mutely refuted by the compassion which wells up in quiet tears flowing down the cheeks of hardened, veteran officers who too often see the ravaged bodies of victims of child molesters.

There can be no doubt of the sincerity of many of those who deplore capital punishment. A realistic approach to the problem, however, demands that they weigh the right of innocent persons to live their lives free from fear of bestial

killers against statistical arguments which boast of how few murderers kill again after "rehabilitation" and release. No one, unless he can probe the mind of every potential killer, can say with any authority whatsoever that capital punishment is not a deterrent. As one police officer has asked, how can these "authorities" possibly know how many people are not on death row because of the deterrent effect of executions?

Maudlin viewers of the death penalty call the most wanton slayer a "child of God" who should not be executed regardless of how heinous his crime may be because "God created man in his own image, in the image of God created he him." (Genesis 1:27) Was not this small, blonde 6-year-old girl a child of God? She was choked, beaten, and raped by a sex fiend whose pregnant wife reportedly helped him lure the innocent child into his car and who sat and watched the assault on the screaming youngster. And when he completed his inhuman deed, the wife, herself bringing a life into the world, allegedly killed the child with several savage blows with a tire iron. The husband has been sentenced to death. Words and words and words may be written, but no plea in favor of the death penalty can be more horribly eloquent than the sight of the battered, sexually assaulted body of this child, truly a "child of God."

The proponents of "rehabilitation" for all murderers quote those portions of the Bible which they believe support their lavender-and-old-lace world where evil is neither recognized nor allowed. But the Bible clearly reveals that enforcement of moral justice is nothing new to our age. In fact, in referring to man as the "image of God," the Old Testament, so freely quoted by opponents of the death penalty, also states, "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." (Genesis 9:6) There are many passages in the Old Testament which refer to capital punishment being necessary to enforce the laws of society. Since the Old Testament was written about and to a nation while the New Testament was written to individuals and to a nonpolitical body known as the Church, there is a difference in emphasis and approach. Certainly, however, the moral laws of the Old Testament remain with us today.

Misguided do-gooders frequently quote the Sixth Commandment, "Thou shalt not kill," to prove that capital punishment is wrong. This Commandment in the 20th chapter, verse 13, of Exodus has also been interpreted to mean: "Thou shalt do no murder." Then the 21st chapter, verse 12, says, "He that smiteth a man, so that he die, shall be surely put to death." We can no more change the application to our society of this basic moral law in the Old Testament than we can change the meaning of Leviticus 19:18: "thou shalt love they neighbor as thyself," which Jesus quoted in the New Testament.

To "love thy neighbor" is to protect him; capital punishment acts as at least one wall to afford "God's children" protection.

Very truly yours,

JOHN EDGAR HOOVER,
Director.

[From Federal Probation, September 1961]

CAPITAL PUNISHMENT

(By THORSTEN SELLIN, PH. D. *Professor of Sociology, University of Pennsylvania*)

Last year 57 men were executed in the United States. Five states—Arkansas, California, Georgia, New York, and Texas—accounted for 37 of the executions. Two of them were for kidnapping—one in California (the Chessman case) and one in Oklahoma. There was 1 execution in Georgia for robbery, 1 in California for aggravated assault by a life prisoner, and 8 for rape—3 in Texas and 1 in each of the states of Florida, Georgia, Mississippi, South Carolina, and Tennessee. The remaining 45 executions were for murder in the first degree.[1]

Although there have been during the 31-year period 1930 to 1960 11 executions for burglary, 23 for armed robbery, and 434 for rape, all in the Southern states, as well as 5 executions in California for aggravated assault by a life prisoner, 8 for espionage, and 18 for kidnaping, it is the 3,186 executions for

[1] All data concerning executions have come from *National Prisoner Statistics*, No. 26, March 1961: *Executions 1960*. Washington, D.C.: Bureau of Prisons, U.S. Department of Justice.

murder that have evoked most discussion. The literature on the death penalty in the United States can be said to deal almost exclusively with this crime. Because of the dearth of data concerning the use of capital punishment for other crimes than murder, I shall therefore focus this article on the murder problem.

It is evident from the figures given above that the death penalty is the rarest of all punishments. To an objective observer of the social scene, it is therefore amazing to note the emotional fervor that animates any discussion about it. Numerically insignificant as it is in practice, attitudes toward it are rooted deep in the sentiments of people and arouse powerful emotions whenever its justification is questioned. So long as the status quo is undisturbed nothing happens, but the moment it is attacked, either by abolitionists who want to eliminate the death penalty from the law or by retentionists who want to maintain or reinstate it, the debate begins. The antagonists bombard each other with "facts." Beliefs and opinions, often based on spurious or anecdotal evidence, are offerred in support of the one or the other viewpoint, the Bible is liberally quoted by both sides, and each side mocks at the views of the other. In the heat engendered by the debate, epithets are flung. The abolitionists are called "maudlin" or "misguided do-gooders," and the retentionists backward, out-of-tune with the times, and at the worst, "sadists." It is only fair to say that in abusive name-calling the abolitionists lag far behind their opponents.

PURPOSE OF THE DEATH PENALTY

Although it is sometimes said that the death penalty serves a eugenic purpose, this argument is absurd since so few are executed and since their sterilization would just as effectively prevent them from having offspring. It has also been claimed that it is an economical way of disposing of criminals who, otherwise, would have to be supported at public expense—perhaps for the rest of their lives. Those who employ this cynical argument may be ignorant of the sometimes mountainous costs of the administration of justice in capital cases and they certainly have no knowledge of the realities of prison administration. It is no doubt true that some prisoners, including some lifers, do not make adequate returns to the state—measured in dollars and cents—for some of them are mentally or physically incapable of doing so. But most lifers work in prison. They perform domestic services, they work in prison shops, they do clerical work. If they were paid a wage commensurate with their services, they would be able to pay the costs of their maintenance, but since they are paid little or nothing, it is easy to forget that they are a source of financial profit to the institution in one way or another. Any prison warden will testify to the fact that it is from the group of lifers that he draws a considerable number of trusted inmate employees.

In the last analysis there are only two purposes of the death penalty that are worthy of attention, for the fate of this punishment hangs on them alone. One of these purposes might be called "the protection of the community." Those who embrace this aim say that the death penalty is needed as a threat or warning to deter potential murders, and that murderers are too dangerous, once they have committed the crime, to be kept alive, since they may kill fellow prisoners or prison personnel and may escape or be ultimately released on parole or pardon, in which case they would again become a menace to the community. Hence, it would be too risky to substitute life imprisonment, so called, for the death penalty.

The other purpose is of a different kind. Those who support it simply feel that someone who murders another, perhaps under certain circumstances, for certain motives, or by certain means, has forfeited his life. In such cases they see the death penalty as the only just punishment, its aim being retribution.

It would be difficult to classify retentionists into those who support the one and those who support the other purpose mentioned. Although these purposes are distinct, from a conceptual point of view, it is by no means certain that they are mutually exclusive in people's minds. I suspect—and the reading of many debates on capital punishment gives support to that suspicion—that many find it possible somehow to cherish both of them.

Are the purpose of social protection and retribution achieved by capital punishment and achieved better than by the use of some other sanction? For

someone who is interested in the death penalty as a social institution and curious about its survival in the criminal law, it is natural to wonder how one might be able to find an answer to this question.

DOES THE DEATH PENALTY GIVE MAXIMUM SOCIAL PROTECTION?

I stated above that there are two separate problems that confront us in the study of this matter. First, does the existence of the death penalty instill such fear in men's hearts that the thought of it keeps them from committing murder? Second, if a murderer is not executed for his crime, does he remain a constant danger to the prison community, if he is given a prison sentence, and to the larger community, if he is granted a later release?

The problem of general deterrence

In an article published in the June 1961, issue of the *FBI Law Enforcement Bulletin*,[2] Mr. J. Edgar Hoover writes: "No one, unless he can probe the mind of every potential killer, can say with any authority whatsoever that capital punishment is not a deterrent. As one police officer has asked, how can these 'authorities' possibly know how many people are not on death row because of the deterrent effect of execution." This statement contains a tacit assumption that the death penalty is a deterrent, but no one can state with any authority whatsoever that capital punishment *is* a deterrent. So we have reached an impasse. If no one can say either Yes or No on this point, it means either that the question is unanswerable or that no one has tried to find an answer.

Now, I am not unaware of the fact that police officers, prison wardens, or judges now and then claim to know cases where a given individual refused, for instance, to carry a firearm when participating in a burglary or robbery or refused to participate at all if any member of the group was so armed, and that this is assumed to prove that fear of the death penalty dictated this conduct. It is not impossible that some of these instances may be true. But the stories as printed have never clearly indicated whether it was the fear of capital punishment rather than the fear of taking or participating in taking a human life—regardless of the consequences—that motivated the refusal. Furthermore, the information seems in many cases to have been secured or given under circumstances that would make it suspect. Even if it were accepted as fact, there is just as good evidence that the availability of instruments used to inflict the punishment of death has induced people of unbalanced mind to seek that punishment as a devious means of suicide. When we place these contradictory "facts" in a balance it would be rash for any one to claim with assurance that the one outweighs the other.

Even if we recognize that the fear of punishment may have some deterrent effect and helps to prevent the commission of some crimes, there is good reason to think that it does not or cannot be operative in preventing murders. Life is generally regarded as man's most valued and even sacred possession, and the protection of life by the avoidance of doing deliberate harm to others or to ourselves is taught to us from childhood in many ways and by many means. When in spite of this general social aversion to murder, killings occur, it means that the perpetrators have either not been properly taught to respect human life or that they find themselves in a situation where hatred, desire, anger, greed, necessity, or the mores of a group to which the offender belongs acquire such dominance that all else is ignored or forgotten, including the possible punishment. The person who carefully plans his crime so as to avoid detection has no fear of consequences since he is certain he will never suffer any. Discounting war and revolution, all but very few people, even most murderers, consider the taking of life as a terrible moral wrong. It is this feeling that ultimately is the great deterrent.

If we were to take the ultracynical view that people obey the law only because they want to avoid the consequences of disobedience and not because they live according to a moral code which also finds its expression in legal prohibitions, we would have to assume that potential offenders fear the consequences somewhat in proportion to the risk of suffering them. But, statistics tell us that the risk of being executed for murder is small. It is extremely small for gangsters, who, according to the supporters of the death penalty, are

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[2] Reproduced in *The Philadelphia Inquirer*, June 18, 1961.

among those who should be made to fear it most. According to the last annual report of the Chicago Crime Commission there were 947 gang murders in Chicago since 1919. I suppose it is not an overestimate to assume that at least two persons, the actual killer and the one who ordered the killing, participated in those murders. In that case, there were a minimum of 1,900 murderers involved. Of these 17 were convicted but several of them were later freed by the Supreme Court on appeal.[3] There is nothing new in this story, for it has its counterpart in all cities where organized crime is found.

If the risk of execution is regarded as the important element in deterring persons from committing murder we are therefore leaning on a mighty weak reed. That risk is so much smaller than the risk of the potential murderer being killed by his intended victim, by the police, or by some bystander during or after the crime.

During the period 1934–1954 (in Chicago), for instance, policemen killed 69 and private citizens 261 criminals or suspects involved in homicide, or a total of 331. During the same period there were 45 persons executed for murder in the Cook County Jail. In other words, there were nearly 8 times as many homicidal offenders killed unofficially, so to speak, as were those electrocuted. There were 5,132 murders and nonnegligent manslaughters known to the police during those years. In connection with 6.45 percent of these homicides, a criminal or suspect met his death at the hands of police or citizens, while 0.88 percent were put to death in the electric chair.[4]

Judging from the number of murders and nonnegligent manslaughters known to the police and published in *Uniform Crime Reports* for the year 1959, and taking into account a slight increase in 1960, there were a minimum of 8,400 murders and nonnegligent manslaughters last year (1960) in the states that still have the death penalty, and of these offenses the number punishable by death would probably be at least 1,260, or 15 percent of the total. This is a most conservative estimate. It would be equally conservative to say that at least 1,300 persons were guilty of these murders and that 1,250 of these will never be executed.

If fear of being executed for murder played the great deterrent role claimed by retentionists, it would be reasonable to assume that when this fear is not experienced, as in states that have abolished capital punishment, or is suddenly removed, when a state abolishes this penalty, the result would in the first case mean that murder rates would be higher than in states that have retained the punishment, and in the second case, that these rates would show an increase, which could be stopped or even reduced by the simple device of reinstating the penalty. When statistics appear to give support to such assumptions, retentionists are quick to seize upon them to illustrate the soundness of their views, but when the statistics fail them they are wont to claim that statistics demonstrate nothing.

The only way of testing the correctness of the above assumptions, however, is by the use of statistics. We have to admit that the data available for use are far from perfect for the purpose of counting the exact number of capital murders that occur during any given period of time in any jurisdiction, small or large. There are no reliable statistics of *capital* murders. Such murders are of two types. The first includes premeditated malicious killings and especially those committed by certain methods, such as arson or ambush. The second includes killings that occur in connection with the commission of crimes, such as burglary, robbery, rape, kidnaping, etc. Although no count of capital murders has so far been made by any official agency on a statewide basis, it would probably be possible to get a rather accurate count of the so-called felony murders, i.e., the second class mentioned above, but the premeditated murders defy any accurate enumeration, since their qualification depends so greatly on the state of mind of the offender, who is often undetected or unknown. Therefore we have to use other kinds of statistics in an attempt to arrive at conclusions.

For many years we have had statewide statistics of deaths due to willful homicides. They are based on an analysis of death certificates submitted to the

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[3] Virgil W. Peterson, *A Report on Chicago Crime for 1960*. Chicago: Chicago Crime Commission, 1960, p. 56.

[4] Thorsten Sellin, *The Death Penalty*. A Report for the Model Penal Code Project of The American Law Institute. Philadelphia: The American Law Institute, 1959, p. 62.

Bureau of Vital Statistics of the Federal Government from all the states of the Union. These certificates do not contain any information that would make it possible to segregate capital murders from other kinds of willful killings. They do make it possible to compute rates of deaths due to willful homicide and it is these death rates which are generally assumed to be usable as an index to capital murders, on the assumption that the *proportion* of capital murders, hidden among these homicides, remains constant from year to year. An increase or a decrease in the total homicide death rate in a state, from one year to another, is then assumed to reflect a proportionate increase or decrease in the number of capital murders in that state. Experts in various countries who have made a study of this problem have concluded that this assumption is valid. Until it has been disproved we have to accept that judgment.

Abolitionists are frequently guilty of making assertions that the states that have retained the death penalty have much higher homicide crime rates than the states that have abolished it. They arrive at that conclusion by simply comparing the rates of the two classes of states. This is a reprehensible practice. The conclusion is accurate but the inference is false. Except for Delaware and Rhode Island, the abolition states on our continent all border on Canada, and all the northern states have fairly low rates of homicide compared with the South, where no state has dropped capital punishment. The only fair comparison is one that takes into account regional differences and therefore compares the homicide rates of an abolitionist state with that of its neighbor states.

The diagrams shown on pages 7 and 8 are based on such comparisons. They show both the annual size of the homicide death rate per 100,000 population for the period 1920–1958 and the general trend of the rate for each set of states compared. Diagram I compares the abolitionist state of Maine with the states of New Hampshire and Vermont. Diagram II shows rates for Rhode Island (an abolition state), Massachusetts, and Connecticut. Diagram III contains two abolition states, Minnesota and Wisconsin, compared with Iowa. Diagram IV compares Michigan, which has no death penalty for murder, with Ohio and Indiana.[5]

The striking thing about these diagrams is that within each set of states the rates are so nearly the same annually and the trends so closely alike that if the lines were not identified with each specific state, no one would dare to guess which lines represented the abolition states. Generally speaking, all the states involved showed a decline in homicide deaths during the 39 years examined. The decline was slight in New England and much more pronounced in the middle west, but then the New England rates were also generally much lower to begin with.

It is proper to conclude that states which are similar in the character of their population, their urban and industrial development, and their mores have similar homicide rates, whether or not they have the death penalty. In other words, the presence of the death penalty for murder in a state appears to have no more influence on its homicide rates than the absence of the penalty in a comparable state has on the rates of that state. And, if our basic assumption is correct, what holds true for the homicide rates would hold true for the capital murder rates, were they obtainable.

When it once becomes generally understood that the amount and the trends of murder depend on demographic, social, economic, and political conditions, one would realize that the explanation for rises or falls in the statistics of this crime must be sought through a study of these conditions, and that through such study alone could any possible remedy be found. To hope that this remedy could be found in the application of the death penalty or in its introduction is to grasp at a straw.

We have had some experience in this country with such vain efforts.[6] Several states have temporarily abolished the death penalty and have then reintroduced it. In some of them abolition was followed by a rise in homicides, in others by a fall. And when the death penalty was reintroduced the rates usually rose. For the reasons already stated, the law of murder had apparently nothing to do with these variations.

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[5] These diagrams are reproduced from *Capital Punishment*. Staff Research Report No. 46. Columbus : Ohio Legislative Service Commission, January 1961, pp. 40–42. They were copied from Sellin, *op. cit.*, and brought up to date.

[6] Cf. Sellin, *op. cit.*, pp. 34–38 ; *Capital Punishment, op. cit.*, pp. 43–45 ; General Assembly of Pennsylvania, *Report of the Joint Legislative Committee on Capital Punishment*. Harrisburg : The Committee, June 1961, pp. 24–26.

But if we do not execute murderers, they will remain a menace to all within the walls of prisons, it is said, and if they are ever released the community will again be threatened by them. We should, therefore, attempt to discover how capital murderers who have been imprisoned for life—which is the usual punishment when the death penalty is not applied—behave while in prison and after release.

The experience of prison administrators is, broadly speaking, that lifers are among the best behaved prisoners in an institution. They obviously may become disciplinary problems at some time or other, as do other prisoners, but their conduct record is on the whole very good. There have been instances where such prisoners have committed a homicide in an attempt to escape or as a result of conflicts with other inmates or the prison staff, but almost all killings committed inside prisons are done by prisoners serving sentences for other crimes than homicide. Are such events more common in abolition states than in death-penalty states? No one knows, since no study has been made of this matter.

The paroled lifer has had an enviable record of good behavior so far as we can gather from available information. I have given elsewhere[7] some data which demonstrate this fact. Within the last few months the Ohio Legislative

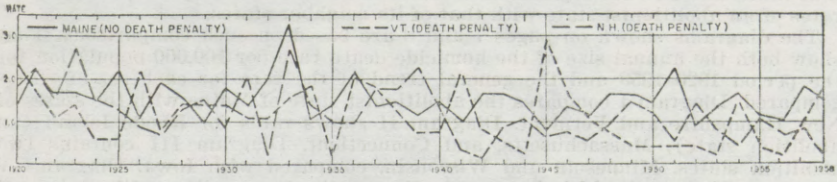

DIAGRAM I.—*Homicide Death Rates, per 100,000 Population, in Maine, New Hampshire, and Vermont: 1920–58*

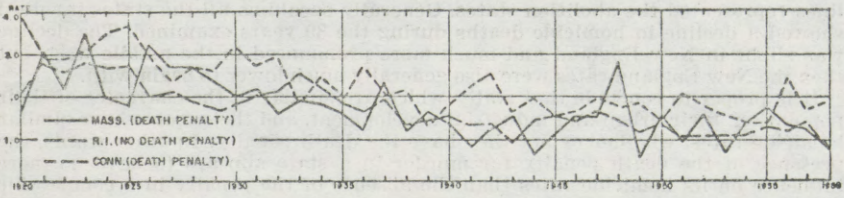

DIAGRAM II.—*Homicide Death Rates, per 100,000 Population, in Massachusetts, Connecticut, and Rhode Island: 1920–58*

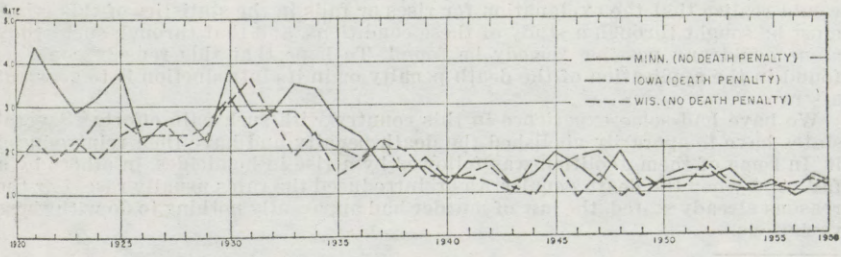

DIAGRAM III.—*Homicide Death Rates, per 100,000 Population, in Minnesota, Iowa, and Wisconsin: 1920–55*

[7] Sellin, *op. cit.*, pp. 76–78.

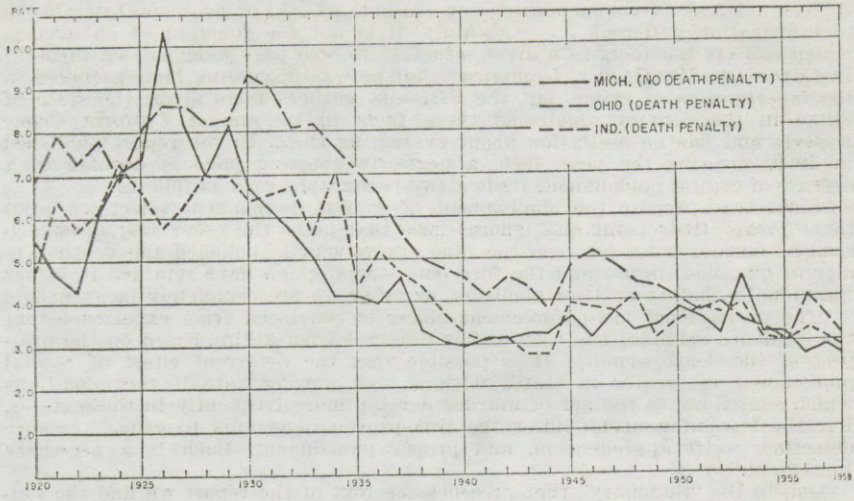

DIAGRAM IV.—*Homicide Death Rates, per 100,000 Population, in Michigan, Indiana, and Ohio: 1920–58*

Service Commission has furnished additional information on this point. In a staff research report, published in January, we learn that since Ohio's present parole law became effective in 1945, there have been 169 first degree murderers paroled in that State, as of October 1, 1960. These 169 parolees "have compiled the highest parole success ratio of any offense group among the more than 6,000 paroled convicts now administered by the Ohio Bureau of Probation and Parole. Only two of the 169 have been returned to penal institutions for the commission of new felonies. One of these was returned after committing armed robbery while on parole, and the other for assult with intent to commit a felony. Eight more paroled first degree murderers have been returned to penal institutions for technical violations of parole rules and regulations or because of general failure to adjust satisfactorily to life outside the penitentiary." [8] The report suggests that the explanation may be found in the facts that a large proportion of first degree murderers are highly reformable, that those paroled—in Ohio at least—were 30 years old on the average when they were committed to serve life sentences, but 53 years old on the average when they were paroled, and finally that those who were not good parole risks serve their life sentences in full. In 1957, for instance, when one prisoner was executed in Ohio, 11 prisoners, who were serving definite life sentences died.[9]

Police safety

Among those who wish the death penalty retained there are, of course, people from all walks of life, but certain occupational groups or professions appear to contain a particularly high or at least vocal proportion of them. This is particularly true of the police who rather consistently—except in the states that have abolished capital punishment—individually or through their professional organizations or unions make known their views, that if the fear of the death penalty is removed by the abolition of this punishment, the policeman's vocation would become more hazardous. It is assumed that persons engaging in crime would, then, be more likely to kill police officers who are pursuing, questioning, or arresting them. This belief, as well as the belief that the death penalty acts generally as a unique deterrent, has even led the Federal Bureau of Investigation to express its support of capital punishment, in spite of its avowed policy of neutrality. Last year, Mr. J. Edgar Hoover stated that policy in clear terms. "The F.B.I. . . . is strictly a fact-gathering agency.

[8] *Capital Punishment, op. cit.*, pp. 81–82.
[9] Communicated by Mr. James McCafferty, Criminologist, Bureau of Prisons, Washington, D.C.

It does not make recommendations or evaluations . . . or pass opinion relative to information gathered. . . . Certainly, it is not the function of an agency, which collects the facts in a given situation to also pass judgment on them." [10] In fairness to Mr. Hoover, I must say that he was discussing facts gathered in the *investigation* of crime, but the FBI also gathers facts about the state of crime in the country, published these facts in its annual *Uniform Crime Reports* and has no hesitation about evaluating them. In the report published in 1960, covering the year 1959, a perfectly amazing page is devoted to a defense of capital punishment. Its last two paragraphs read as follows:

"Some who propose the abolishment of capital punishment select statistics that "prove" their point and ignore those that point the other way. Comparisons of murder rates between the nine states which abolished the death penalty or qualified its use and the forty-one states which have retained it, either individually, before or after abolition, or by group are completely inconclusive.

"The professional law-enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty. It is possible that the deterrent effect of capital punishment is greater in states with a high murder rate if the conditions which contribute to the act of murder develop more frequently in those states. For the law-enforcement officer the time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessary ingredient." [11]

And, in the "Summary" that precedes the text of the report we find the sentence, "Proponents of abolition of capital punishment cannot find support for their cause in study of state murder rates, since results are inconclusive." [12]

Having read these statements, one would assume that the report contained some facts about capital punishment that might explain and justify the statements even though the "fact-gathering agency" is not supposed to "make recommendations or evaluations." Not so. The statements are gratuitously introduced into an official governmental report that offers nothing to support them. They are mentioned here only to show the length to which police authorities are willing to go in defense of the death penalty, even though they have never been willing to make any scientific attempt to test the validity of their opinions.

The only more extensive inquiry to discover if policemen are better protected in states that have capital punishment was made in 1955 by the author for the Joint Committee of the Senate and the House of Commons on Capital Punishment of the Canadian Parliament.[13] In a recent report it is summarized as follows:

"It was based on a questionnaire sent to all police departments in cities with more than 10,000 inhabitants, according to the 1950 census, in the six states that had no death penalty in 1955 and the eleven states that bordered on them. Information was requested on the number of policemen killed by lethal weapons in the hands of criminals or suspects each year begining with 1919 and ending with 1954. Full reports were returned by 266 cities, representing 55 percent of the cities in the abolition states and 41 percent of those in the capital punishment states.

"Several interesting facts appeared from an analysis of the responses to the questionnaire. First, when comparing groups of cities in the two types of states, according to the size of the cities, it was found that there was no difference in the rates of policemen killed in the cities of the capital punishment states and in those of the abolition states. Second, it was found that in both types of states in the northeast part of the country, the killing of policemen was less frequent than in the middle west. Third, it was found that the decade of 1920–30 had been most hazardous to the police of both types of states and that the number of police killed had declined regularly, whether the state had or did not have the death penalty. . . . It is, therefore, impossible to conclude

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[10] J. Edgar Hoover, "The Federal Bureau of Investigation: The Protection of Civil Liberties," *American Bar Association Journal*, Vol. 46, August 1960, pp. 836–837.

[11] *Uniform Crime Reports for the United States . . . 1959*. Washington, D.C.: Federal Bureau of Investigation, September 16, 1960, p. 14.

[12] *Ibid.*, p. 3.

[13] Thorsten Sellin, "The Death Penalty and Police Safety," Second Session—Twenty-Second Parliament 1955: *Appendix "F" of the Minutes of Proceedings and Evidence No. 20 of The Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries*. Ottawa: Queen's Printer, 1955, pp. 718–728.

that the existence of this punishment in law or practice affords any special protection to the police that would not be afforded by the threat of life imprisonment." [14]

This conclusion can be extended. The belief that the death penalty is a unique instrument for the protection of society against murder and superior to life imprisonment in this respect is not supported by any credible evidence now available to us.

IS RETRIBUTION EFFECTIVE?

There is no denying that many persons feel that a person who takes another's life under circumstances that qualify the crime as murder in the first degree should, in all justice, forfeit his life. Some of them are quite willing to agree that so far as the protection of society is concerned life imprisonment would be just as effective, but they feel that the grievious wrong done to the family of the victim, the robbing of the victim of his chance to enjoy perhaps a long life of usefulness, and the display of recklessness and of perhaps a wicked or depraved character on the part of the murderer, fully merit his execution.

This view of justice must be reckoned with. Its nature is such that if logic prevailed those who hold it would maintain it even if it were proved that the use of the death penalty had socially undesirable by-products. Opponents of the view are equally strong in their feelings that to take a life deliberately by the state is just as reprehensible as murder and is morally wrong.

I do not propose to enter into any debate on this issue. Its resolution lies entirely within the sphere of moral philosophy. It is in such debates that capital punishment is discussed, not from point of view of its effectiveness in protecting society but from the point of view of its inherent rightness or wrongness. However, if I were an adherent of the view of retributive justice, I might—if my emotions did not deprive me of my reason—wish to find out if retributive justice is efficiently and properly administered.

One might begin with some basic assumptions. The first is that every person who commits first degree murder should lose his life. Since this poses a dilemma, not all such murderers being discovered, at least every person convicted of this kind of murder should be executed. A second assumption is only a logical consequence of the first, namely, that since all such persons should be executed, there could be no discrimination. All murderers would be equally dealt with.

The gap between what should happen, if these assumptions are correct, and the realities of the administration of capital justice is enormous. It begins to develop in the courtroom, where the skilled defense lawyer may stave off a first-degree murder conviction and where juries may inequitably determine a verdict or a sentence, depending on their attitudes toward a defendant or the feelings of the community rather than the strict nature of the crime. It is well known that the number of women murderers sentenced to death is disproportionately low compared with the proportion of male murderers so sentenced. In Ohio, during 1955–1958, 31 percent of the males and 8 percent of the females charged with murder in the first degree were found guilty of that crime.[15] And it has been observed that in many states, racial attitudes hinder the equal application of justice.

But if a sentence of death is finally imposed there is still the matter of commutation by boards of pardons or governors. Whether or not a death sentence will actually be executed depends, in the last resort, on these authorities. At times the policy of commutation depends on the particular attitude toward the death penalty held by them. One governor, opposed to this punishment, may commute every sentence; another who holds the opposite view may commute few of them. Bias or adventitious circumstances may also exert an influence. In Ohio, of the persons under death sentence in the prisons during 1950–1959, not counting 7 cases yet to be disposed of by November 1960, 78 percent of the Negroes and but 51 percent of the whites were put to death. This discrepancy may in part reflect economic as well as racial inequalities, for commutations were received in 44.4 percent of the cases where the defendant was able to afford private counsel, but only in 31 percent of the cases where he was served

[14] General Assembly of Pennsylvania, *Report, op. cit.*, pp. 28–29.
[15] *Capital Punishment, op. cit.*, p. 61.

by a court appointed one.[16] A Pennsylvania study of 439 persons sentenced to death and placed on death row between 1914 and 1958 showed that Negro felony-murders received commutation in one of the cases while white felony-murderers did so in over 17 percent of the cases.[17]

There is no need to multiply these or similar data. If only about 4 percent of those who actually commit murders in the first degree, a figure based on what we conservatively estimate to be the number of capital murders committed annually in the United States and the accurate knowledge we have of the number of executions, it is obvious that, whatever the elements may be that produce the attrition, retribution is but rarely achieved and in no equitable manner. Therefore, just as the death penalty has proved to fail as a special means of social protection, so it has failed as an instrument of retributive justice. It is vain to hope for an improvement, because the spirit of the times is unfavorable to it. To prove that this is so, we need only to take a glance at history and especially at the history of abolition.

THE ABOLITION MOVEMENT

Speaking of the abolition movement there are two aspects of it that are interesting. First of all, of course, is the extent to which the death penalty, at least in peace times, has disappeared from the criminal law of nations and states. In Western Europe, only France, the United Kingdom, Spain, and Eire have retained it, and most countries of Central and South America, including Brazil, Argentina, and most of Mexico, have abolished it. In the United States, four states abolished it during the last century (Michigan, Wisconsin, Maine, and Rhode Island). During the present century five states have done so without restoring it again, namely, Minnesota, North Dakota, Delaware, Alaska, and Hawaii, the last three joining the others within the last half decade. It does not exist in Puerto Rico nor in the Virgin Islands.

This is, however, but a part of the story. The last century and a half has seen changes which explain the decline of the death penalty in states that have kept it in the law. We have seen a general trend toward the reduction of the number of offenses punishable by death, despite occasional minor reversals. We have gradually eliminated public executions, for while desiring to make the penalty as frightening as possible—that is, as a deterrent—we have also become more and more averse to such unesthetic and revolting spectacles. Moved by sentiment, we have sought for more and more quick and painless methods of killing murderers, as witness the spread first of the electric chair, and now of the gas chamber, in replacement of the traditional gallows. Finally, we have removed the mandatory death sentence and left in the hands of the jury or the judge, the choice of an alternative—life imprisonment.

The combined result of these policies has caused capital punishment to become an anachronism in many states. If we add the changing attitudes toward punishment in general as reflected in the establishment of juvenile courts, the introduction of parole and probation, and the rise of a correctional philosophy which stresses rehabilitation, it is not difficult to explain the rapid downward trend in the number of executions annually from a high of 199 in 1935 to 57 in 1960. And this trend is likely to continue, barring unforeseen social crises, until executions will become a much greater rarity than today and will ultimately be abandoned.

A MODERATE VIEW OF CAPITAL PUNISHMENT

(By Ralph G. Murday, *Managing Director, Baltimore Criminal Justice Commission*)

On March 7, 1961 two committees of the General Assembly of Maryland held a joint hearing on proposed legislation to abolish the death penalty in Maryland. Distinguished out-of-state authorities appeared on behalf of the proposed legislation while only one voice was heard in opposition to the specific bills

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[16] *Ibid.*, pp. 62–63.

[17] As yet unpublished study on a "Comparison of the Executed and the Commuted Among Admissions to Death Row," by Marvin E. Wolfgang, Arlene Kelly, and Hans C. Nolde.

repealing capital punishment. Events on that occasion and on subsequent days have served to clarify certain aspects in my mind relating to a moderate position on the capital punishment issue.

My opposition to the particular repeal bills was based on a conviction that the bills had no possible chance of enactment and I wanted to present an alternative for consideration by the legislators. Since two specific bills had already been introduced, one had to speak in favor of or in opposition to compiete abolition. I was in favor of partial repeal and was accordingly heard as one opposed to the bills. Actually such an absolute choice was most appropriate for the two sides in this question tend to see the question as admitting no middle ground. In fact, the moderate must first argue with the abolitionists to present a case for selected retention and then argue with those in favor of capital punishment to present a case for further restricting it. He must use arguments from both sides but finds that while the abolitionists have a good supply of ammunition, the retentionists are starting to look about desperately.

THREE EXCEPTIONS

Of course there is no one moderate stand on capital punishment. Moderation differs in degree and must be defined in each case. My own position favors abolishing the death sentence with three exceptions. The exceptions would permit imposition of a death sentence in criminal homicide cases involving: (1) the killing of a prison employee or officer by an inmate; (2) the killing of a police officer while performing his official duties; and (3) the killing of a kidnaping victim.

Certainly the moderate outlook in this debate is not a popular or particularly satisfying one and is difficult to present and defend. It is simpler to be completely for or against a principle than to stand somewhere in between and advocate a compromise. Yet in this case it seems to offer a solution to a highly emotional issue which has raged for a century without subsiding. States have abolished, reinstated and in some cases reabolished capital punishment. Maryland has seen similar bills introduced on several occasions in the last few years and will probably continue to ponder this penalty, for no action was taken to change its lawn when the legislative session ended on April 1, 1961. Other states are undergoing the same soul searching. Delaware, which abolished capital punishment in 1958, is now considering its return.

REEVALUATION OF DETERRENT ASPECTS

Abolitionists have helped to create an atmosphere of question which is beneficial. If capital punishment is not the certain deterrent it was believed to be in the past, then we need to reevaluate it use. I question the strategy of the abolitionists in wanting to do away with capital punishment completely rather than accepting a restriction of its application for the present.

This criticism would have to be qualified, of course, in the case of those who advocate complete abolition because of religious convictions. While I personally feel the state has the right to take a life under certain circumstances, but should further restrict the exercise of that right, I certainly respect a religious conviction which is contrary to mine. As a practical matter though, while advocating complete abolition and educating the public at the same time, they may have to accept either a compromise or the status quo for some time.

Based on the experience of criminologists who have compared states having capital punishment with those not having it, it seems certain we would not see a crime wave if capital punishment were further restricted by law. In fact, it is largely restricted in practice now, although not as much as it would be if it were limited to the three areas previously noted or under another moderate proposal mentioned later. Since capital punishment cannot be shown an ineffective deterrent to those particular homicides, it should be retained as a permissive penalty.

A sufficiency of statistics to help prove the effectiveness of the death penalty as a deterrent to police and prison guard killings is not available. Conversely, Professor Thorsten Sellin offers from his studies some statistical evidence showing little change in regard to police killings in cities with and without the death penalty. Unfortunately, however, most of the larger cities failed to submit data to him and no positive conclusions could be reached. In both situ-

ations—prison and police work—it appears in the absence of more evidence to the contrary that doubt must be resolved in favor of these public servants who are required to assume particular risks to life. Furthermore, if statistical evidence could be produced to allow positive conclusions, it would have little chance of effecting any immediate change in attitudes on the part of both the public and these employees.

The third area in which capital punishment can act as a deterrent is the killing of a kidnap victim. This was the reasoning behind the 1934 amendment to the Lindbergh Law which provides the death penalty only if the victim is not returned unharmed and the jury directs the death sentence. It is an unusually thoughtful device to protect the victim of a kidnaper, providing an inducement to return victims instead of killing them to prevent giving evidence.

ANOTHER MODERATE VIEW

In April 1961, an advisory committee of the American Law Institute offered as part of its proposed Model Penal Code, Section 201.6 dealing with the death sentence. A review of those provisions discloses some interesting and parallel recommendations to the moderate view expressed earlier.

In essence, the death sentence could be imposed only for murder, by those 18 years of age and over whose crime was accompanied by at least one aggravating circumstance, with no sufficiently substantial mitigating circumstances present to call for leniency.

The aggravating circumstances specified are:

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons

(e) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, or the attempt to commit, or flight after committing or attempting to commit robbery, rape by force or intimidation, arson, burglary, or kidnaping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for hire or pecuniary gain.

(h) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

Mitigating circumstances listed are:

(a) The defendant has no history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

The foregoing is a decidedly moderate view of capital punishment and one to be carefully studied. In effect it attempts to limit the death sentence to extraordinary murders by the most pitiless offenders. Its guides for aggravating circumstances would encompass murder of a prison guard, police officer, and kidnap victim as well as other special situations often recommended in selected codes. In addition, it offers the defense every conceivable mitigating circumstance including youth, intoxication, and mental defectiveness. Literally applied, these criteria would at the very least redically reduce capital punish-

ment without completely repealing the exercise of the state's right to take a life while a loose construction of its mitigating circumstances could seemingly abolish capital punishment for all practical purposes.

PUBLIC STILL WANTS THE DEATH PENALTY

Traditionally, our people have believed capital punishment necessary to control attacks on body and life. A majority today still holds that belief despite evidence of growing hesitation and question. To fly in the face of such conviction by completely doing away with the death penalty would only serve to further weaken the faith of our citizens in the administration of justice. No small segment of the population would be ready to seize upon the abolition of the death sentence as proof that the streets have been abandoned to the plunderers and pillagers. A large body of the citizenry is already convinced that recent court decisions have given license to criminal behavior. Public opinion, then, is an additional reason to warrant these three exceptions to the abolition of capital punishment.

To what can I point as proof of the proposition that most people still believe in capital punishment? To begin with, experience in talking before groups and particularly in conversation with officials in the field of criminal justice convinces me that public opinion holds for its continuation. Even Arthur Koestler, an eloquent opponent of capital punishment, admits public opinion is the "strongest passive support of the hang-hards."

On the day of the hearing in Maryland it was obvious from the tenor of questions from the floor that persons antagonistic to the proponents were present, although no one openly opposed it in addition to myself. From communications received later, some of which were anonymous, it was equally obvious that the feelings of many opposed to the bills were like the underpart of an iceberg—silent, massive, and constant.

Prior to the hearing the State's Attorney's Association of Maryland had already gone on record in opposition to the bills as did the Maryland Law Enforcement Officers Association some weeks later. There is no question that a large majority of law-enforcement officer throughout the country favor capital punishment. The June 1960 issue of the offiicial publication of the International Association of Chiefs of Police was entirely devoted to capital punishment without any expression from a police administrator encountered who favored its abolition. Occasionally an endorsement will be seen from a police administrator in a noncapital punishment state. However, only a few are active in presenting a case against capital punishment.

WHY THE PUBLIC FAVORS CAPITAL PUNISHMENT

Why are people in favor of capital punishment? Koestler says their main reasons are ignorance, traditional prejudice, and repressed cruelty. Whatever the reasons, there must also be a certain sincerity, misguided although it might seem to some.

Public opinion has been molded in favor of capital punishment in at least several ways. These are not proposed as arguments for capital punishment, but as an attempt to explain the convictions held by many; to explain the result through the cause. Men are still rational creatures despite all the qualifications placed upon reason.

First, there is a reaction to the determinist psychology often espoused by abolitionists and certainly associated with their cause historically. Koestler puts his finger on this issue of free will as the heart of the matter. Again, a most accurate observation. Our whole system of living has traditionally been built upon mores which reward good conduct and punish misconduct. Even though psychology has brought us to accept some emotions and mental states as mitigating circumstances, society still clings to responsibility, as diminished as it may be in these cases.

The issue of free will is not a positive argument for retaining capital punishment. Possibly as many abolitionists accept free will and responsibility as those who do not. However, since many advocates of abolition in the past have also questioned the existence of moral responsibility, the public often associates the two. Society cannot function in its present state without assigning

responsibility, so society rejects the determinists and by association, often rejects their pleas for the abolition of capital punishment.

Another reason the general public is still in favor of capital punishment is that voices in the country whose opinions in their fields have been respected and revered have expressed themselves against abolishing the death penalty. Even though their arguments can be atacked, these witnesses help to mold public opinion.

Slightly over 2 years ago a rabbi wrote against abolition in one of our local papers as follows: "Society cannot live in peace and security if such a super goodheartedness is pursued. Moreover, that wonderful sentiment contradicts the Old Testament which prescribes death to murderers."

To retort that Jewish rabbinic and ethical tradition have interpreted this Old Testament sanction so as to make its application virtually impossible goes somewhat wide of the intended mark. Argue with the rabbi and his supporters, if you will, but do not make out they are not there nor underestimate their effect.

In June 1960 J. Edgar Hoover Stated: "As a representative of law enforcement, it is my belief that a great many of the most vociferous cries for abolition of capital punishment emanate from those areas of our society which have been insulated against the horrors man can and does perpetrate against his fellow beings. Certainly, penetrative and searching thought must be given before considering any blanket cessation of capital punishment in a time when unspeakable crimes are being committed. The savagely mutilated bodies and mentally ravaged victims of murderers, rapists and other criminal beasts beg consideration when the evidence is weighed on both sides of the scales of Justice."

Mr. Hoover was answered in March 1961 by the National Council of the Protestant Episcopal Church which said his unsupported assertion is devastating against a more enlightened penology. The Council then reaffirmed its opposition to capital punishment. Who is right? Neither side can demonstrate an absolute answer, so the immediate future of abolition bills should not be decided by either argument. This serious difference of opinion should only be resolved at this time by compromise.

I have not quoted these leaders who favor retention of capital punishment because of what they have said, but to show the effect of what they have said. Theirs are not ironclad arguments for capital punishment but they illustrate how public opinion is molded in some measure. While equally eminent voices are certainly to be found in the ranks of the abolitionists, they have failed so far to convince the public at large of the merit of their cause. Certainly continued missionary work will have an eventual effect on opinion but it cannot be done by one pamphlet or one campaign.

CONCLUSION

If capital punishment is restricted to the three categories discussed, the potential deterrent of each may be enhanced to an even stronger position than is evident now. Knowing clearly that these three areas alone will permit the death penalty should be more impressive. With capital punishment allowed in so many crimes today, but used so selectively, its possible deterrent power in other areas of crime is dissipated.

To the abolitionists, these categories offer a sharp reduction in the already declining use of the death penalty. To those opposed to abolition they offer an opportunity to pass from frustration to certainty for there can be little doubt that whatever the penalties available, the use of capital punishment is lessening.

Recently I witnessed an execution by lethal gas and later attempted to express some measure of empathy for the staff in performing a difficult task with dignity. Another person commented that it did not seem dignified to him in any manner for society to take a life under such circumstances. While he had misunderstood my use of the word, his remark was more important in any event, for it must have flashed through everyone's mind—official as well as citizen—was there no alternative? While witnessing an execution is an emotional experience carrying little weight in logic, it is an occasion which impresses upon all the heavy burden of choosing life or death.

Major Trends in the Use of Capital Punishment*

(By James A. McCafferty, *Criminologist, U.S. Bureau of Prisons, Washington, D.C.*)

Interest in capital punishment has reached its peak in this century preceding the execution of highly controversial persons. Some of the cases illustrate the marked ambivalence we have had as a Nation toward the imposition of the death sentence. A few of the cases, such as Sacco-Vanzetti, Hauptmann, Anna Marie Hahn, the Rosenbergs, Barbara Graham, and Chessman, brought to the surface the deep turmoil Americans feel toward the death sentence.

Definite strong feelings for the retention or repeal of the death sentence have resulted in a tremendous growth of literature on the subject of capital punishment.[1] The literature presents literally dozens of views which support the death sentence or show opposition to the penalty. Generally, the arguments both pro and con as to the efficacy of the supreme penalty fall into the following eight major areas: (1) deterrence; (2) protection; (3) retribution; (4) religion; (5) morality; (6) social solidarity; (7) eugenics; and (8) economics.

In addition to the viewpoints expressed in the various categories above, those who feel the death penalty is not needed give the following three general reasons for its discontinuance: (1) the spread of humanitarianism throughout the world with its special emphasis on the dignity of man and protection of human life; (2) the complexity of our modern industrial-urban life with its vast impersonality; and (3) the great strides made in understanding man as the highest form of life on this planet.[2] In this last point, a study of all aspects of human life is made with a scientific emphasis similar to that which made possible the discoveries of Galileo and Newton in the field of physics or those of Pasteur and Harvey in the field of medicine.

MAJOR TRENDS

It is not the intent of this article to analyze the arguments for or against capital punishment nor to discuss methods of execution and related matters. Instead, it is proposed to present what appear to be the seven major trends in the use of capital punishment in the United States.[3]

1. Interest in repeal or mitigation of the death sentence

This country has just completed a decade—the 1950's—when religious leaders, scholars, legislators and the "man on the street" gave serious study to the matter of capital punishment. In some respects there appeared to be a resurgence of the "abolition" spirit which passed over the country in the period prior to World War I, resulting in eight states repealing the death penalty. It is to be noted, however, that all but two of these eight states subsequently restored capital punishment.

In the last decade, at least half of the state legislatures in the United States studied one or more bills which would have removed or modified the death penalty. A few states where such bills have been contested were California, Connecticut, Delaware, Florida, Illinois, Indiana, Maryland, Massachusetts, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, and Virginia. Of these, only one state, Delaware, actually passed legislation which removed the penalty and substituted life imprisonment. On April 2, 1958, the

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*This statement reflects testimony given as a witness before state legislative committees studying matters relating to capital punishment. It does not represent an official view of the U.S. Department of Justice or the Federal Bureau of Prisons.

[1] Examples of recent publications: *The Annals*, "Murder and the Penalty of Death," American Academy of Political and Social Sciences, November 1952; *Capital Punishment*, Staff Research Report, Ohio Legislative Service Commission, January 1961; *Capital Punishment*, National Council, Episcopal Church, 1961; *The Death Penalty*, Thorsten Sellin, American Law Institute, 1959; *What the Churches Say on Capital Punishment*, Connecticut Friends Committee on Social Order, 1961; *Hearings Before Subcommittee No. 2 of the Committee on the Judiciary on H.R. 870, House of Representatives*, May 27, 1960, Serial No. 21; *The Police Chief*, papers and comments of chiefs of police and others on the subject of capital punishment, International Association of Chiefs of Police, June 1960; "A Survey of the Debate on Capital Punishment in Canada, England, and the United States, 1948–1958," Hugo Adam Bedau, *The Prison Journal*, October 1958.

[2] Robert Caldwell, "Why is the Death Penalty Retained?" *The Annals*, American Academy of Political and Social Science, November 1952, p. 45.

[3] See Edwin Sutherland and Donald Cressey, *Principles of Criminology*, New York; J. B. Lippincott Company, 1951, pp. 263–265 and Frank Hartung, "Trends in the Use of Capital Punishment," *The Annals, op. cit.*, pp. 8–19.

then Governor J. Caleb Boggs signed into law this historic piece of legislation.[4]

Currently, there are nine states which do not generally recognize capital punishment. Delaware, as indicated, abolished the death sentence in 1958. Alaska and Hawaii abolished capital punishment as territories and when granted statehood were added to the list of states which do not recognize the death penalty. The other states which dropped the penalty were Michigan in 1946, Rhode Island in 1952, Wisconsin in 1953, Minnesota in 1911, North Dakota in 1915, and Maine in 1876. Maine restored the death penalty in 1883 and finally abolished it in 1887.[5]

In studying the use of capital punishment in this country, there is evidence that though some states are technically classified in the column of jurisdictions having capital punishment, in practice they use the penalty most sparingly. For example, in the 31-year period 1930 through 1960 New Hampshire has had 1 execution; Idaho had 3; Vermont and Nebraska 4 each; Montana and Wyoming 6 each; New Mexico 8; and Utah 13. South Dakota for the period 1939 to 1960 has had one execution and Kansas for the years 1935 to 1959 has had 10 executions.[6]

In summary, 9 of our 52 jurisdictions (50 states, District of Columbia, and the Federal Government) do not recognize capital punishment. Another 10 states use it sparingly.

2. REDUCTION OF OFFENSES

A trend is reflected in the reduction in the number of offenses which call for the death penalty. Our laws, for the most part, are derived from our country's English heritage. We are mindful that in 18th-century England there were some 350 capital offenses such as letter stealing, coining, forgery, sheep stealing, sacrilege, petty theft, felling a tree, pick pocketing, or associating with gypsies. Eventually public pressure brought about a mitigation of the penalties and reduced the number of crimes punishable by death.[7]

Though our colonies were under English rule, there is no evidence that the King's subjects in the New World were under such a stringent code. According to Hartung, the Great Law of the Colony of Pennsylvania, adopted in 1682, permitted the death sentence only for first-degree murder. The day after William Penn's death, May 30, 1718, the English penal code was reinstated. This code provided the death penalty for 14 offenses. In September 1791 the death penalty was abolished for witchcraft and by 1794 Pennsylvania had dropped the penalty for all offenses except first degree murder. Other colonies had between 10 to 18 capital offenses, but generally followed Pennsylvania in removing the severe penalty from the statute books.[8]

In a study made by the author in 1952 (see table 1), 31 separate capital offenses were found in the United States. Since 1930, only 7 of these offenses have resulted in an execution. Capital crimes in the 41 states, District of Columbia, and the federal jurisdiction range from 1 for murder in the State of New Hampshire to 14 separate offenses in the State of Georgia.[9]

Table 1 gives the number of jurisdictions with capital punishment laws, those which have used the law, and the number of persons executed under the particular crimes punishable by the law.

Since 1930, when the national collection of statistics on executions began, all 43 of the jurisdictions had one or more executions for murder. These ranged from 1 execution in New Hampshire to 292 in Georgia. Though kidnaping is a capital offense in 36 jurisdictions, only 7 of them have executed prisoners for

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[4] James V. Bennett, "Delaware's Historic Move," *American Bar Association Journal*, November 1958, p. 1053.

[5] Death penalty illegal except that Michigan and North Dakota prescribe it for treason. North Dakota also permits the death penalty for first degree murder committed by a prisoner serving a life sentence for first degree murder. Rhode Island makes the death penalty mandatory for murder committed by a prisoner serving a life sentence.

[6] Bureau of Prisons, *National Prisoner Statistics*, Executions 1960, Number 26, March 1961, table 3.

[7] Edwin Sutherland and Donald Cressey, *op. cit.*, p. 262; Leon Radzinowicz, *A History of Criminal Law and Its Administration from 1750*, Volume 1, 1948. London: MacMillan, p. 4.

[8] Frank Hartung, *The Annals, op. cit.*, pp. 9–10.

[9] James A. McCafferty, *Capital Punishment in the United States, 1930–1952*. Thesis completed as a partial requirement for Master of Arts at Ohio State University.

this offense. Executions for rape have occurred in all but one of the 19 jurisdictions. Executions for armed robbery have been carried out in all of the seven jurisdictions where such executions are possible. Burglary is a capital

TABLE 1.—CAPITAL OFFENSES FOR WHICH PRISONERS WERE EXECUTED IN THE UNITED STATES, 1930 TO 1960 [1]

Capital offense	Number of jurisdictions		Prisoners executed 1930–60 [3]
	With law	Using law	
Murder	[2] 43	43	[2] 3,217
Kidnaping	[2] 36	7	18
Treason	[2] 25		
Rape	[2] 19	18	[2] 430
Dueling	18		
Train wrecking	15		
Lynching	10		
Perjury during capital trial	10		
Dynamiting	7		
Armed robbery	7	7	23
Arson	6		
Train robbery	5		
Burglary	4	2	11
Killing a woman by abortion	4		
Aggravated assault by a life prisoner	2	1	5
Other capital offenses [4]	16	1	[5] 8

[1] Based on the author's study, Capital Punishment in the United States, 1930–1952 (unpublished M.A. thesis).

[2] Delaware is excluded as a jurisdiction. Prisoners executed during the period 1930 to 1946 (the year of the last execution in Delaware) are as follows: for murder 8 and for rape 4.

[3] Bureau of Prisons Bulletin No. 26, National Prisoner Statistics, Executions 1960, March 1961.

[4] Jurisdiction and offense for which capital punishment may be imposed: Federal, espionage; Connecticut, attempt to kill President of the United States or any accredited foreign ambassador; New Jersey, inciting assaults or assaulting President, Vice President, or any official in the line of succession to the presidency of the United States or the Governor of New Jersey or the heir apparent to the throne of any foreign country; Virginia, causing death by obstructing or injuring canal, railroad, etc., or by shooting at or throwing stones at a train, car etc.; Georgia, burning railroad bridge, insurrection, castration, foeticide; Kentucky, homicide while committing criminal syndicalism or sedition; Tennessee, assaulting with a deadly weapon while disguised; Arkansas, aiding in a suicide, killing by colliding with steamboat, etc. killing unnecessarily a person who resists when that person is committing a felony, and killing a prisoner by exceeding the bounds of moderation while executing a sentence; Oklahoma, killing while participating in a riot and; Colorado, causing death by violation of anarchy and sedition laws.

[5] All executed for espionage by the Federal Government.

crime in four states and has been used in two of them. Only one state, California, has used the death sentence for prisoners who committed aggravated assault while serving a life sentence. Finally, the Federal Government, which has had the only espionage law, has executed 8 prisoners for this offense.

In summary, among the 43 jurisdictions there are 31 capital offenses. Of this group, only 7 have resulted in execution. All of them have executed a prisoner for murder, 18 for rape, 7 for kidnaping, 7 for armed robbery, 2 for burglary, 1 for assault by a life prisoner, and 1 for espionage.

3. PERMISSIVE USE

A third trend is the permissive use of capital punishment. The death sentence is now exclusively permissive in all 43 jurisdictions except the District of Columbia.[10] The District of Columbia represents the last jurisdiction to provide a mandatory death sentence for first degree murder. This mandatory provision has brought about some very obvious inequities with respect to justice. The Judicial Conference of the District of Columbia Circuit has taken cognizance of this and on May 22, 1959, the Conference voted 89 to 8 to approve a motion dropping the provision which requires a mandatory death sentence for persons convicted of first degree murder.[11] A few days later, June 1, 1959, Senator Kenneth B. Keating introduced a bill (S. 2083) relating to the District of Columbia which provided that:

"The punishment of murder in the first degree shall be death by electrocution unless the jury recommends life imprisonment. A jury finding a person

[10] With the exception that in New York State when murder is "From a deliberate and premeditated design to effect the death of the person killed, or of another . . ." and the jury finds the person(s) guilty of such premeditation the death sentence is mandatory. See *McKinney's Consolidated Laws of New York Penal Law*, Article 94, Sections 1044, 1045, and 1045-a.

[11] Editorials: *Washington Evening Star*, May 23, 1959 and *Washington Post-Times Herald*, May 28, 1959, Washington, D.C.

guilty of murder in the first degree may, as part of its verdict, recommend that the defendant be imprisoned for life. Upon the recommendation, the court may sentence the defendant to imprisonment for life. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years."

Hearings were held on S. 2083; however, it died on the Senate Calendar. In the 87th Congress, 1st Session, Senator Kenneth B. Keating introduced S. 1380 which is generally similar to S. 2083. Also, Congressman Thomas G. Abernathy introduced on March 2, 1961, H.R. 5143 which proposes to amend the District of Columbia Code and provides that:

"The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall inform the court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment.

"Notwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.

"Whoever is guilty of murder in the second degree shall be imprisoned for life or not less than twenty years."*

In discussion of S.2083, the press noted that many lawyers believed the elimination of the mandatory death penalty for the District of Columbia would relieve a burden on the prosecutors which arises from the reluctance of juries to sentence men to death. A study of the disposition of first degree murder cases showed that in the period July 1, 1947 through June 30, 1958, a total of 276 persons were indicted for first degree murder under the District of Columbia Code. Of this group, 43.9 percent were either acquitted or obtained a directed verdict in court. The disposition of the remaining 155 was as follows: 127 were convicted of a lesser offense and sentenced to imprisonment and 28 were sentenced to death. Of the 28 sentenced to death, 7 had their sentences commuted, 7 had their cases reversed on appeal, 3 were transferred to St. Elizabeths Hospital, 1 was awaiting the outcome of his appeal, and only 10 were executed. This means that only 1 person was executed for about every 28 persons indicted for first degree murder![12]

Long dropped by most of the states as unworkable and self-defeating, the mandatory provision in the District of Columbia Code may give way to permitting the jury or court to set the penalty.

4. EXECUTIONS FOR MURDER DROPPING

The trend of executions for murder is definitely downward. In the 1930–1939 decade the average annual number of executions for murder in the United States stood at 151. For the 1940–1949 decade, the average dropped to 106 per year. For the 1950–1959 decade, the average was 60 per year. For the year 1960, there were only 45 executions for murder (see Table 3).[13] No single reason can be attributed to this drop.

With the drop in executions, the question is raised, has there been a decrease in homicides in the United States? During the 18-year period, 1940 to 1957, for which data are available, the number of homicides in the United States as estimated by the Federal Bureau of Investigation ranged from a low of 6,517 in 1943 to a high of 8,442 in 1946. Since this high in 1946, the number averaged slightly over 7,000 a year for the period under study. With the substantial increase in our general population it would appear that we should

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* EDITOR'S NOTE: On July 6, 1961, H.R. 5143 was reported by the Committee on the District of Columbia with amendments. It was referred to the House Calendar and ordered to be printed. It was passed by the House of Representatives on July 10, 1961. See Report No. 677, amending Section 801 of the Act Establishing a Code of Law for the District of Columbia.

[12] Miriam Ottenberg, "Abolition of Mandatory Dealth Penalty in the District Splits Lawyers Studying Question for Judicial Group," *Evening Star*, May 17, 1959, Washington, D.C.

[13] Executions 1960, Table 1. U.S. Bureau of Prisons, *National Prisoner Statistics.*

have had a corresponding increase in the number of homicides, especiallly since, according to available evidence, we have had a sizable increase in other serious offenses. Yet, the number of homicides did not keep pace with the population growth. Thus, in 1940 the population in the United States stood at 132 million and by 1957 had increased to over 170 million, a rise of 29 percent. A comparison of homicide figures for the same period shows an 8.2 percent decrease—from 7,540 in 1940 to 6,920 in 1957.[14]

5. SELECTIVE USE

A fifth trend is what is sometimes referred to as the "selective enforcement" of the death sentence. Here the remarks are limited to two related phenomena.

(1) For each year since the close of 1953, the Bureau of Prisons has collected the data on the number of prisoners under sentence of death at the close of each year. Though some prisoners received under the death sentence are executed in the same year and would not appear in the yearend count of prisoners under sentence of death, the actual execution figures when compared with the number of prisoners under sentence of death indicate that more than half appear to evade society's supreme penalty.

TABLE 2.—PRISONERS IN THE UNITED STATES REPORTED UNDER SENTENCE OF DEATH AT CLOSE OF YEAR AND NUMBER EXECUTED IN FOLLOWING YEAR, 1953–60

Year	Number reported under sentence of death December 31	Number executed during following year
1953	131	81
1954	147	76
1955	125	65
1956	146	65
1957	151	49
1958	147	49
1959	190	57
1960	210	(1)

[1] This figure will not be available until the calendar year 1961 is complete and all executions data are received. Source: National Prisons Statistics bulletins on executions published by U.S. Bureau of Prisons, Washington, D.C.

In 1960 the Bureau of Prisons collected for the first time disposition information on all prisoners reported under sentence of death at the beginning of the year together with the disposition of those received under sentence of death during the calendar year. Of the 190 reported under sentence of death at the beginning of the year, 48 were executed in 1960, 21 had their sentence commuted to life, 11 had their sentence reversed or vacated and 3 were transferred to mental hospitals. At the close of 1960 there were 107 of the original 190 still under the sentence of death.

For those 113 received with death sentences from court during 1960, only 9 were executed and only 1 had his sentence commuted to life. The 103 who remained, when added to the 107 received in prior years, resulted in a total of 210 prisoners under sentence of death on December 31, 1960. This was 20 more than at the beginning of the year (see Table 3).

(2) Selective enforcement occurs with respect to how long a prisoner awaits the sentence to death. In 1959 the elapsed time between first sentence to death and execution ranged from 65 days in a Nebraska murder case to 9 years, 1 month, 21 days for a murder case in Pennsylvania. In 1960 the elapsed period extended from 1 month, 6 days for a prisoner executed for murder in Washington to 11 years, 10 months for a California execution for kidnaping.[15]

Appeals, new trials, and judicial and executive orders granting stays of execution accounted for the wide range in elapsed periods between sentence to death and execution. There has been much concern about the delay in carrying

[14] Federal Bureau of Investigation, *Uniform Crime Reports*, estimated number of murders and nonnegligent manslaughters published annually; and Bureau of Census, *Statistical Abstract*, 1960, table 2.

[15] U.S. Bureau of Prisons *National Prisoner Statistics* Bulletins Nos. 23 and 26, "Executions 1959 and 1960," respectively.

out the imposition of the death sentence. Though no studies have been made on the relationship between long litigation and the final outcome of the capital cases, there is reason to believe that the longer the delay the greater the possibility that the death sentence will not be exercised.

6. LIMITING SOCIETY'S PARTICIPATION

There is a growing effort to remove the public from the death chamber and also those appointed to carry out the execution. In this country executions were at one time attended by literally thousands of persons. However, the carnival atmosphere engendered by such gatherings soon led the legislatures to have them carried out in a secret and private place with as few witnesses as possible.

Not only were the executions removed to a private place, but those who now attend are carefully screened. Some states, however, still permit the relative of the condemned man or relative of the person whom he murdered to be present. Others provide that the sheriff, judge, and prosecuting attorney may attend. In a few states the sheriff or his deputy is required to carry out the execution.

7. ELIMINATION OF PAINFUL DEATH

In recent years there has been an effort to reduce the possibility of a painful death for the condemned. Also, it is to be noted, there has been a great effort to provide anonymity for the persons charged with the responsibility of carrying out the execution. In 1930, of the 42 jurisdictions which had the appliances for carrying out the sentence of death, hanging was used in 17 states and by the Federal Government; electrocution was used in 21 states and in the District of Columbia; shooting or hanging was used in Utah where the prisoner has his choice; and lethal gas was used in only one state, Nevada. Today, only 6 states use hanging, 24 use electrocution, 11 lethal gas, and Utah continues to permit the prisoner his choice of shooting or hanging. The Federal Government uses the facilities in the state where the conviction is held.[16]

Lethal gas, because it must be administered in a special chamber, somehow removes the person to be executed from those charged with this awesome responsibility. It is true that the prisoner must be placed in a chair and strapped in, but once the door of the lethal chamber is closed, the mechanical operation of execution commences without interruption. According to those who have witnessed all three forms of execution—hanging, electrocution, and lethal gas—the latter is said to be more merciful and causes no apparent damage to the body.

TABLE 3.—MOVEMENT OF PRISONERS UNDER SENTENCE OF DEATH IN THE UNITED STATES BY OFFENSE, 1960

Offense	Reported under sentence of death on Jan. 1, 1960	Received from court during 1960	Executed		Other disposition not resulting in execution [1]			Reported under sentence of death Dec. 31, 1960		
			Present Jan. 1, 1960	Received in 1960	Commutation to life	Transfered to mental hospital	Sentence reversed or vacated	Total	Received 1960	Received Prior years
Total	190	113	48	9	22	3	11	210	103	107
Murder	155	94	39	6	[1] 19	3	10	172	87	85
Rape	30	16	3	3	3		1	34	13	21
Robbery	1		1							
Kidnapping	2	2	2					2	2	
Assault by life prisoner	1	1	1					1	1	
Burglary	1							1		1

[1] One prisoner received in 1960. All others were under sentence of death on January 1, 1960.

Source: U.S. Bureau of Prisons, National Prisoner Statistics, Executions 1960: No. 26. March 1961.

[16] For method of execution in 1930, see *Prisoners in State and Federal Prisons and Reformatories, 1929–1930*, p. 48; for 1960 see *National Prisoner Statistics* Bulletin No. 26, table 3.

SUMMARY OF TRENDS

Summing up, there are seven major trends in the use of capital punishment:

1. There is a decided trend toward repealing the death sentence by disuse or by dropping it and substituting life imprisonment or a term of years.
2. Though we have 31 capital offenses in this country, since 1930 only 7 of the offenses have resulted in an execution.
3. Our laws have provided for the permissive rather than mandatory application of the death sentence in all jurisdictions having the penalty except the District of Columbia. There is evidence that the District's mandatory death provision for first degree murder may be changed to permit the jury and/or the court the responsibility for determining the sentence.
4. The trend in executions for murder continues downward. During the decade of the 1950's the average has been 60 per year as compared with 151 per year in the 1930 decade.
5. There is evidence that about half of those persons sentenced to death are actually executed. Also, the periods of time between sentence to death and execution vary considerably. The average number of homicides each year is about 7,000, which means, in effect, that there is 1 execution carried out for each 115 homicides.
6. The general public has been removed from the death chamber.
7. The form of the lethal appliance is being changed to make the death penalty quicker and painless for the condemned person. Needless to say, it reduces the "dehumanizing" influences for those responsible for carrying out the task.

SOME FURTHER CONSIDERATIONS

This discussion should not be drawn to a close without mentioning two major considerations.

Deterrent effects

The first of these is the extent to which the life-and-death struggle surrounding a capital case affects society. It appears there may be a form of psychic contagion with respect to capital trials as well as homicide itself. One exemple which may be coincidental is that on the very day, May 23, 1958, when 19-year-old Charles Starkweather was sentenced to die in the Nebraska electric chair for 1 of the 11 killings for which he was charged, only 90 miles away a 17-year-old Albion, Nebraska, high school student shot and killed two people—his girl friend and a rival suitor—and then turned the gun on himself.[17]

Dr. William Graves, who studied the homicide rate in Alameda, Los Angeles, and San Francisco counties over a 10-year period, 1946–1955, discovered that on the Thursday and Friday, when the executions were performed on a Friday at San Quentin, more homicides occurred in the above-noted counties than on the Thursdays and Fridays in those weeks when no executions were carried out.[18]

A similar study was carried out by Robert H. Dann which compared the number of homicides occurring 60 days before and 60 days after the execution of persons convicted and sentenced in the city of Philadelphia. In studying the number of homicides occurring before and after five separate executions, he found there were 91 homicides in the "before" execution period and 113 in the "after" period. Of the 204 homicides, 19 resulted in sentences for murder in the first degree. Nine occurred in the 60-day period preceding the five executions referred to above and 10 in the corresponding period following an execution.[19]

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[17] *The Lincoln Star*, May 24, p. 1, Lincoln, Nebraska; and *Daily News*, Friday, May 23, 1958, p. 4, Washington, D.C.

[18] William F. Graves, M.D., "A Doctor Looks at Capital Punishment," delivered at the 86th American Congress of Corrections, Los Angeles, California, August 28, 1956.

[19] Thorsten Sellin, *The Death Penalty, op. cit.*, pp. 50–52.

These two studies point up the need for continued investigation of the relationship, if any, of homicide and executions.

Long drawn-out trials

Further study needs to be made as to the effect on law-enforcement agencies and the judiciary, as well as on society in general, of long drawn-out trials and appeals which invitably follow the death sentence. For example, in 1957 two prisoners were executed in California for murder after contesting their capital conviction for well over 7 years.[20] This same state was estimated to have spent in excess of a half-million dollars to bring to a conclusion the 12-year contest of a recent case.

In April 1958, two New Jersey prisoners condemned to death for the hold-up slaying of a special policeman received life imprisonment after a 6½-year fight to escape execution.[21] On the other hand, in 1957 a Pennsylvania man charged with murder and sentenced to death in five separate trials over a 10-year period walked out of the court to freedom when the State was unable to sustain its case.[22]

This matter of capital punishment, so bitterly contested in our modern day civilization, diverts society's attention from the overriding problems of crime control and crime prevention to only a minute fraction of the crime problem. Considering that each night some 200,000 men and women climb into their bunks in the various state and Federal prisons and reformatories looking forward to tomorrow and what it offers, we are spending proportionately less time on them than on the some 210 prisoners who know tomorrow may mean another day closer to death or a reprieve.[23]

Our efforts are somewhat out of focus. To put it another way, Dr. Sheldon Glueck, Harvard criminologist who has spent many years studying the American crime problem, has said:

"The presence of the death penalty as the keystone of our penal system bedevils the administration of criminal justice all the way down the line and is the stumbling block in the path of general reform and of the treatment of crime and criminals." [24]

Capital punishment is a serious matter—one which calls for patient, thoughtful, and systematic study and decisions reached judiciously and with painstaking care. The facts are available.

History does not provide convicing evidence that any one type of method for protecting society from criminals has been more or less effective than any other. Crime appears to have been prevalent in all periods of history, and in varying degrees, in all societies, even the earliest, as recounted in *Genesis.* Comparison of criminality levels among periods of history, however, as a measure of the effectiveness of prevailing punishment methods, is not possible. Even if reliable criminal statistics were available, which they are not, unmeasurable variables would make most conclusions from such comparisons highly questionable. One of the most obvious of these variables lies in historical differences in the definitions of certain acts as crimes. Many acts which are crimes today were not crimes as recently as a century ago, with the converse also true. Even the killing of human beings has been and still is variously defined as a crime. The concept of justifiable homicide, for example, still exists in criminal law, and men's ideas of what justifies homicide have varied widely at different times and in different places.

—From *Capital Punishment*, Staff Research Report No. 46, Ohio Legislative Service Commission, January 1961.

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[20] U.S. Bureau of Prisons, *National Prisoner Statistics* Bulletin No. 17.
[21] *Newark Evening News*, Thursday, April 17, 1958, p. 1, Newark, N.J.
[22] Jack Alexander, "How a Three Time Murder Convict Has Escaped the Chair," *Saturday Evening Post*, March 2, 1957.
[23] U.S. Bureau of Prisons, *National Prisoner Statistics* Bulletins Nos. 24 and 26.
[24] Letter from Dr. Glueck to Mrs. Herbert B. Ehrmann, Brookline, Massachusetts, dated January 23, 1937.

[NBC News, Air Date: Friday, July 28, 1972, 9:30 p.m. e.s.t.]

"THOU SHALT NOT KILL"

(Produced and written by Peter Jeffries)

REEL I

[Video] "NBC News Presents."
[Audio] FX. Prison sounds.
[Video] Title: (zoom in) "Thou Shalt Not Kill."
[Audio] FX. Footsteps.
[Video] Frame: "NBC News Correspondent Carl Stern."
[Audio] FX. Prison sounds.
[Video] 'Copter shot moving over ridge.
[Audio] FX. 'Copter, establish then under.

STERN [voice over]. On June 29, 1972, the Supreme Court of the United States ruled that 600 men and women on Death Row may not be executed. This program is about two of them. Some parents may prefer that their children *not* watch it.

FX. 'Copter noise up then under.

[Video] 'Copter shot moving in to prison. Super "Utah State Prison." Super out. Continue 'Copter shot right into prison block.

[Audio] LANCE [voice over]. We had a lot of thoughts of just grabbing the Thompson submachine guns, just stick 'em out of the window, some people come out of the show house or something like that and just cut loose.

KELBACH [voice over]. I'd still like to take a doggonned tank down State Street and just cut loose with a 50-caliber on top and just let it go.

[Video] Lance and Kelbach on camera being interviewed.

[Audio] *Question [on camera]. Why?*

KELBACH [on camera]. I don't know . . .

It just seems like something that would be different, something that would be fun. You could see people scattering all over, windows breaking, people just falling down, blood running all over. It would be exciting.

[Video] CU Lance.

[Audio] STERN [voice over]. Myron Lance, age 31, is the one with the shaved head . . .

[Video] CU Kelbach.

[Audio] STERN. And this is his partner, Walter Kelbach, age 34.

[Video] Super "Carl Stern, NBC News, Law Correspondent" super out.

[Audio] STERN [on camera]. In five days, just before Christmas 1966, they killed six people in Salt Lake City . . . not with tanks and submachine guns . . . but with a knife and a pistol.

They were captured, tried, convicted and sentenced to death.

[Video] Exteriors Supreme Court.

[Audio] STERN. On June 29th the Supreme Court struck down the death penalty for Lance and Kelbach and 598 other persons awaiting execution in 32 states.

[Video] Interior of Supreme Court pull back to expose.

[Audio] STERN. The Court ruled that the death penalty is so infrequently and randomly imposed that it has become "cruel and unusual punishment" prohibited by the Constitution.

What it means, apparently, is that the states where capital punishment was permitted either will have to eliminate executions entirely or devise new laws for special categories of heinous crimes in which the death penalty will always and automatically be imposed.

[Video] Stern on camera.

[Audio] STERN [on camera]. That possibility is being examined by the Federal Government at the instruction of President Nixon. It will also preoccupy many of the state legislators in the next year.

Lance and Kelbach committed not one murder but six . . . at different times . . . deliberately and with no regret. Although they cannot now be executed, no case could be better suited for study by the lawmakers than theirs, and that is why we are presenting it tonight.

What you are about to see is an interview with Lance and Kelbach filmed by television station KUTV in Salt Lake City. NBC News obtained the film, added some of its own and edited all of it into a one-hour program.

We are showing it now because the issue of capital punishment has never been so urgently and widely debated.

The interview is also a "first" in broadcast journalism. Nothing quite like it has been seen before a mass audience. Only television can tell this kind of story because it brings you, the audience, face to face with two murderers.

In December 1966 Lance and Kelbach were out of Utah State Prison on parole. Both had served terms for petty thievery.

On Saturday, December 17, Lance went to Kelbach's room at the Holiday Motel in Salt Lake City. Kelbach had a large supply of pills—Nembutal and Methadrine.

They took these with beer—lots of both. The pair also had a starter pistol and a very sharp knife.

[Video] Several shots of Stephen Shea's body and gas station.

[Audio] STERN. The night would end in the murder of 18-year-old Stephen Shea, a gas station attendant. He had taken the job ten days earlier to earn extra money for Christmas.

[Video] Two-shot of Lance and Kelbach.

[Audio] STERN. Two years later on Death Row Lance and Kelbach talked about the killing.

KELBACH. We were riding around up in Kearns and we went past this place where I had bought a new home in '63 and sold it, and we noticed this one filling station on the corner with this lone attendant, and we pulled in there and there was this—and while we were in there we went to the rest room, and then I drove around to the front of the pumps and had him put in some oil and fill 'er up with gasoline and we both went in the station.

While we are in the station, and that, and I was supposed to get ready to pay the man, a truck pulled in and, uh, Lance went out and waited on them and took care of them. And when he come back in he took the starter pistol that we had picked up during our ride.

So we went in and we put the starter pistol into the guy's ribs, and then he opened up the cash register and Lance took all the money out, put it in his pocket. He had the starter pistol, was watchin' the guy. I was watchin' out front to make sure if any cops were coming by, and uh, which is—they ain't usually one around when you need 'em anyway.

And so we turned around . . . we decided, well, we'd better take him with us. So we took him into the car with us and just drove out. We left the station open.

Question. Where did you put him in the car? The back seat?

KELBACH. The back seat. Well, no, it was a station wagon. He had this Mercury station wagon, so he put him in the seat behind the driver and we were both in front and he sat kitty-corner on the seat and watched him and that with the gun.

We had the guy take off all his clothes so that he would hesitate in jumping out of the car. Not because for any other reason, just to hesitate. We were gonna take him out onto the desert and leave him. We had no intentions of killing him or anything else, just delaying gettin' caught.

So when on the way out we gets—makes the turnoff going out towards Windover there where we were gonna go out to the desert, we were drinking beer and we took some more pills and then we even offered the kid a beer and cigarettes if he wanted it. We were humane.

And we got out to Tippy's Point. All of a sudden one of us just says, "Well, let's flip a coin and see who does it, so we don't get caught." So we flipped a coin and it came up that I lost, and I always take tails and he takes heads.

LANCE. I know before we flipped the coin we been more or less half joking that we would make up our minds later whether we's gonna kill him or let him go. All we's really doing was just trying to scare the guy, and pretty soon it ended up to where we really meant it.

Question. Didn't you have these discussions in front of the service station attendant while you were driving out?

LANCE. Yeah. That's while we's driving.

KELBACH. We flipped the coin right in front of him, too.

Question. What were you saying at that point? Do you remember?

LANCE. Heads, you do it; tails, I do it—somethin' like that. He said somethin' about "Do what?"—You know. And Kelbach says "Well bump you off, of course," something similar to that.

Question. So you lost the flip.

KELBACH. Yeah, I lost, so I did it. Simple . . . easy . . . 'cause all's it is is just when you put it in. I don't know if you ever cut foam rubber or cut your skin with a razor blade. Once you get through the little skin and the little layer there that's there as a protective shield there's nuttin' but just a bunch of blood and intestines—they're soft . . . it's just like you take your veins and that . . . it's just like boiled spaghetti. It's just soft, easy, and with a good sharp knife it does nothing in that. In fact, if in the height of excitment if you were using one on somebody the person probably wouldn't even know it until they happen to look at it right off the bat. Smooth, efficient. It leaves no ballistics. And if you take care of it right, it won't leave anything that the police can use.

Question. Well, you didn't actually know who won the toss out there. You just wanted to demonstrate some of the knowledge you'd gained in the prison hospital on anatomy?

KELBACH. Well, not particularly. I just utilized it, you know, It just came naturally, after. It's just one of those things that comes naturally.

So we got up to Tippy Point and made him get out of the car—lie on the ground—and that's when I inserted into his spine, both of his lungs, his heart and his intestinal tract.

He was laying on his back, but then after the first three wounds he rolled over onto his side where I just reached around and got him and then I turned the knife around and made another incision so that it looked like a two-sided knife and that. Because these little technicalities . . . I did it half out of just a reaction to make sure I had it in the right spot and plus the fact just to make sure.

Question. This kid say anything when you were stabbing him?

KELBACH. He says, "Oh my God, I got a wife." That was his dying words. It was in a phrase like "Oh my God, I got a wife!"—something similar to that. And uh—

LANCE. At the time we thought it was kind of funny, really, because, well, everything we was really doing at the time we thought was funny. Every action or move you'd make, it seemed really funny to us. And I think one of us even commented on "Did you see the way he squirmed? Wasn't that funny?"

And, oh, I don't know, everything we done all through this whole time seemed funny or exciting or different. I'll grant you it was different.

[End reel I.]

REEL II

[Video] Stern on camera.

[Audio] STERN [on camera]. The police discovered Stephen Shea's body on Sunday morning, December 18th. That night they patrolled the city in squad cars and jeeps, keeping a careful watch on all gas stations.

[Video] Newsfilm of Holtz Body.

[Audio] STERN. Yet, 18-year-old-Michael Holtz, another gas station attendant, became the second victim.

The killers knew where to get information on how the hunt was going.

KELBACH. So I went across to the Holiday Inn and that—which is where I usually went when I was doing something wrong because the police and everything had their coffee there. It's just like a terminal for 'em and you can hear anything you wanta know—how they're doing on any case—and they were discussing different parts of what they were doing, how they had their road blocks set up and so on and so forth. And you can pretty well see if you got any heat on you or not.

Question. You still taking pills all this time?

KELBACH. Yes, all this time we're taking——

LANCE. We're taking pills approximately every two and a half, maybe three hours. Sometimes——

KELBACH. Four or six. Whenever you think of it. And then just like candy.

LANCE. And there's always a case of beer, if not two cases of beer, in the back seat. A six-pack between us. When we come back from Salt Lake we emptied the back of the car and filled two standard size garbage cans completely full of beer cans.

KELBACH. So, don't know exactly what we did when we come back, but we were back and went riding around in Salt Lake.

LANCE. We went to the East Side to find a place to pull a job, and we pull

in one service station, like he said, and was looking it over and really had intentions of holding the place up but there's this jeep that kept—we'd pull up and a few minutes later we'd see a jeep go by so we'd pull away 'cause the jeep'd slow down like it was gonna pull in. Well, we'd take off and it'd take off. We tried that I guess about four different times at that one service station and, uh, finally just give up the idea on that particular station.

KELBACH. So, we went down and we knew this one place that was close to Lance's where there was only one attendant.

LANCE. And about six blocks away.

KELBACH. So we pulled in there and used the same operation: Lance went in, I opened up the back door of the car, stayed out in the car with the car running, keeping eye, and Lance went in, got the money and the attendant with his starter pistol, brought him out and we used the same procedure.

We started off. We made him get undressed so that he'd be less apt to run off, and on the way out we gave him a beer which he accepted and he drank a beer and smoked a cigarette. And then we told him not to be nervous and stuff like that, and we were heading out towards Coleville 'cause of that lake. We could always plant the body—the body in the lake there.

Well, we got part way there and we got tired so we pulled up on this overpass—I don't know the name of it anymore. We got out of the car . . . he got out of the car and Lance made him lie down.

LANCE. Yeah, and uh, he was laying half on his back but yet more of his side—and he just looked at yuh. He never said a word.

Question. Did he talk to you in the car at all going up?

LANCE. No. The only time he ever said anything was when someone asked him a question. He would answer. Other than that he—he never said a word.

And—and I knelt down by him then, slidin' all over in the snow. I damned near—I damned near stabbed him once accidentally, slidin' down, trying to grab a way to keep from going down into the barpit, and I finally climbed back up by him.

And so I got him in the—in the—right here next to the heart. I guess it went through from what I heard.

KELBACH. I was leaning against the back of the car with my arm up like this, you know, above the window of the station wagon, a beer in this hand, see, and I just tell Lance—well, he'd be standing there and he had seen where I did it so he was approximate to location. Then all's I did is just point out to him different spots. I'd tell him, "Well, a little bit over and down," and that's what he did.

He already had markings in the same similar area as the one out at Tippy Point. There wasn't, oh, I'd say, in all told, with all—both bodies—there wasn't ten inches all told in variation between all of 'em, and so he wasn't gonna go anywhere, anyway.

So—I kinda helped him along—instructed him a little bit.

And that's when this truck that looks like one of these Wycoff mail trucks, and exactly the same big-van type and everything, come up on top and its headlights shone right down on us and there was no mistakin' to the fact he seen what was happen'.

So we quick jumped in the car and we took off because we figured it was a mail truck and that he would radio ahead to the police, and so we took off and threw the stuff—the guy's clothes—out the window of the car and we came on back into Salt Lake.

I don't know how the driver of that truck ever missed reportin' that. Beats the heck outta me. He had a clear view.

[Video] Stern on camera.

[Audio] STERN [on camera]. After they left, the truck driver drove up to the site, stepped out of the cab—his footprint was found in the snow—examined the corpse, and then drove off. To this day the police do not know who he was . . . just somebody who saw a murder and didn't want to get involved.

[End reel II.]

REEL III

[Video] Stern on camera.

[Audio] STERN [on camera]. No murder is a pretty story, but the story of Lance and Kelbach seems more sordid than most.

If there are extremes in murder, then the murders by Lance and Kelbach are extreme. That is why we're presenting their story. It is cases like theirs—

cold-blooded, multiple murders without remorse—that will confront the lawmakers. They will have to decide whether to let capital punishment be abandoned or whether certain murders are so extreme that the death penalty should be automatically and uniformly imposed.

[Video] CU Stern.

[Audio] STERN. Their second victim was discovered and reported Monday morning. Police had no clues. Ferris Andrus, the Chief Deputy Sheriff, believed he had no hope of catching the murderers until they killed again and he hoped, this time, they would leave a clue.

By Wednesday Lance and Kelbach had obtained a ten-shot, 38-caliber pistol.

[Video] Shots of cab and Strong's body.

[Audio] STERN. That night . . . three days before Christmas Eve . . . a 30-year-old cab driver, Grant Creed Strong, became the third man they killed.

KELBACH. This was the night when we started out on a cab driver.

Question. Did you check a couple places before you got to the cabs?

LANCE. Uh, yeah. In fact, uh, that's where we checked, uh—what is it?—uh . . .

Question. At Seven-Eleven, wasn't it?

LANCE. Yeah, we checked the Seven-Eleven. We checked another one in—uh—it was further in Grange.

KELBACH. Yeah, and we checked it, Day and Night, right by the police station.

LANCE. Gee, yeah. Right across from the Metropolitan Hall of Justice. We pulled in there and the gun would only hold, I think it was ten—ten rounds and it seemed like all the time there was 13 people in there, so we—if there was any trouble started (no thanks) there was nothing really we could do except—we couldn't see any sense in leaving any witnesses now that we's already in trouble, so we's just gonna get rid of them if we had, you know, instead of taking a chance of getting busted.

So considering there was more people in it all the time than what I had rounds in the gun, well, we decided to let that Day-Night market alone.

We's driving and a couple cabs passed us and, I don't know, one of us says, "Well, why not hit a cab?" I said, "They've usually got pretty good money."

And Kelbach says, "No," uh, he says, "they ain't got much money."

I said, "Well, there's a couple guys out in state prison for cab robbing that did get pretty good money, see."

And he says, "All right."

So he pulls up and lets me off on the corner of, I don't remember exactly where—somewhere right in the center of Salt Lake—and he says, "Well, don't get in the cab 'til I come around the block so I can tell which cab you get in, see."

So the first time he comes around the block I can't get in the cab because there's a police paddy wagon sittin' there, see, and I really could have, I guess, but I just thought they were watching me when they really wasn't.

And—so he makes another trip around and I hadn't even seen him passed. You know, I didn't know he'd even passed me, and I thought he was still behind me waitin' to see if I got in. And before I got in I took a coupla more pills and drove off and in the meantime Kelbach was comin' around and he'd missed me.

Question. What did you think when you missed him?

KELBACH. Well, I figured, "Well, I know where he's headed," because our rendezvous was the same parking lot out there by the airport, and then—so I knew where he was headed.

But contrary to this the cab had gone to the cab company and I didn't know this and so I'm going down, just going along at a moderate rate of speed because I figure—well I can't see nobody ahead of me, I can't see nuttin' behind me and there's a cab comes out ahead of me and I thought "was that him?" No, that wasn't him—he turned off in another direction—so I just kept a-goin' at a steady pace.

LANCE. In the meantime, when this cab pulls into the cab company I got all shook up, you know. I was all excited and I says, "Hey, what—hey what are you pulling in here for?" I'm paranoid, I guess you might say. I'm—I'm scared. And, uh, he said, "Well, I've gotta check in on something. I got to sign a receipt for something."

In the meantime, what he was really doing was he's turning his money in.

He was expectin' a—a robbery of some kind and he had set up a signal that if he was to click the microphone five or six times that was—that meant that a robbery was in possession and to get out there and give him a hand. But I didn't know this at the time. I found out later.

And I glanced up and I seen—I knew it was my Mercury because it had my sticker in the back. I never had plates on it. And I thought, "Well, how the hell'd he get up in front of me?" He's supposed—Is mad 'cause he's supposed to have followed me.

KELBACH. And I'm mad. I dont even know where he is. And I didn't know where he was until I pulled in the parking lot and he pulled in behind me and his cab driver tried to block my—I had left plenty of room in case of an emergency in the front of the car, but this cab driver pulled right up in back of me and I couldn't maneuver very good then, see?

LANCE. So I could see that he was gonna be blocked in to where he couldn't get out and there was all kinds of cars up there parked, watching the planes come in and landing, so I'd pulled the gun on him just before we'd pulled in and told him it was a holdup, you know.

And he finally moves his car window and starts going in the other direction and turned around, trying to knock the gun out of my hand. And that's even making me more excited and scared!

In the meantime, he's reaching for the microphone. But I don't—I don't know what he's reaching for, so I—it could've been a gun for all I know—so then I just pulled the trigger and blood flew everywhere. Oh boy! I never seen so much blood.

KELBACH. And all of a sudden he pops out of the car and tries to get in on the lefthand side and the doors are locked, of all the damn[illegible] things so he runs around the car and he opens up the righthand side of the front door there and he no more than gets in, he ain't even got the door closed—

LANCE. I ain't all the way in.

KELBACH. And I let gravel fly all over the parked cars, 'cause I'm gettin' out of there. And I mean I sprayed, 'cause that gravel just sprayed up on all them cars. I betcha all them people were mad.

Question. You intended to kill him, didn't you, when he got in the cab?

LANCE. Yeah, definitely. After the first person was killed, we intended to kill anybody that we held up because there was no sense killin' one and letting fifteen go when the one that's dead ain't gonna hurt you but the fifteen you let go can probably getcha in trouble.

KELBACH. We decided we were gonna go have a beer then. And from our big caper, it was a whole nine dollars.

Question. Didja get—what'd you get—nine bucks?

LANCE. Nine dollars.

KELBACH. Yeah, it was a big caper, see.

[End reel III.]

REEL IV

[Video] Stern on camera. Super "Carl Stern, NBC News Law Correspondent" super out.

[Audio] STERN [on camera]. Lance and Kelbach left the dead cab driver near the airport and drove back to Lolly's Tavern, a bar in Salt Lake City's run-down West Side district.

[Video] Shots of Lolly's Tavern and victims.

[Audio] STERN. Firing wildly and indiscriminately, they would wound several people and kill their last three victims—James Sizemore, 47, a Navy veteran . . . Fred William Lillie, 20 years old—too young legally to be served alcohol in a bar in Utah . . . and Mrs. Beverly Mace, 34 years old.

KELBACH. We goes into Lolly's. There was a couple left, so there was just enough in that to take care of the cartridges in his gun, and so, what the heck, we're out of our mind anyway, walking around in there just like a zombie. If you seen a Frankenstein movie, how he walks in a trance and how he walks—don't even know what he's doin'—that—that can apply to us because there's no feeling; you don't feel nothin', you don't sense nuttin'—it's just like a walking zomble. Always you are—is—within yourself, self-sonsciousness—anybody says anything to you, you take offense right away. So we had —uh—these big schooners of beer. I decided to play the pinball machine.

LANCE. But before that—to give you an idea of the way I felt, even though I knew where I was and the time of the year and all this, was—was I had

the feelin' inside me—you know, I felt: I'll play Al Capone, or something like this, you know, and I'll get 'em all, you know.

And I had this honest feeling that, even though I knew better, that I was in this specific roaring '20 era, see? And, in fact, I was even usin' slang that they'd used back in them days, see, and "ordered da beer," and all this bull—

He—he went back to play the pinball machine.

They just got through broadcasting over a radio that was playing that the cab driver had been shot and there was talk all about what they'd do under the same circumstances, if something like that happened.

And, I'm sittin' there, I'm thinking: I wonder what they would do, you know. And me and Kelbach had discussed it for a few minutes, so then we decided then, really, to hold the place up.

And I—uh—one of the guys says—uh—"Wish I had a big .45 and they'd come in here, I could fix them," you know. And I reached under the bar and I said, "Would a .38, P–38 do?" The other guy says, "Yeah, that'd work, but I'd still rather have a .45," you know.

So I stepped back then and at the same time he let the balls go and I said, "Well, here's a P–38, try this one." And everybody sort of half turned to see what was goin' on down there, so I shot and got one of 'em behind the ear—the first guy that was shot in the bar—and he fell down between the—well, he fell forward first and slid off, I guess, in between the stools.

I really couldn't tell you where the people were laying. And when the first shot went off, Kelbach stepped out from around the front of the machine and stepped back where he could guard this one door, see. And he was—he was holdin' a pistol that he had, a starter pistol pointed at the floor because if you held it up you could look down the cylinder and see that it was a blank—that it wasn't—it wasn't even loaded.

KELBACH. Wasn't even any cartridges in it.

LANCE. Well, it'd never been fired for about three weeks beforehand. And after that first shot was fired it looked like—did you ever step in a chicken coop and slam the door and see chickens fly everywhere? That's what it was.

Question. Did you tell 'em it was a holdup before you shot?

LANCE. Yeah. In fact, I said, "Here's a P–38, this is a holdup," or something like that, something similar.

KELBACH. Bartender give him the money and everything.

LANCE. He just picked the whole cash register up and set it on the bar.

I said, "Well, open the cash register up," and he—the cash register come open and I put the money in my pockets, see.

And—and I'm nervous. I don't know if anyone else has got a gun, you know, and so I just started shootin', you know, and the bullets are flying everywhere. One woman got it either through the arm or the wrist and then through the throat—uh—I missed several others.

One guy turned around because Kelbach had said something down at the other end or something, and when he turned around he was right in front of me and I just pulled the trigger and it went through his shoulder and come out over here—other—it deflected off his shoulder bone, and they said later that if it hadn't 've deflected it would have come out in this vicinity here and saved his life. And he fainted—well he passed out really.

In the meantime, I'd shot at Charles Haney. I shot down his way. You know those beer spigots you draw your draft beer with? It was sittin' right directly in front of—in line with him and when I fired, I fired like this, and I seen the bullet glance off from—you know, seen the glass drop.

So then I raised the gun—instead of steppin' to one side, I raised the gun and was trying to shoot like this, instead of pointin'—I wasn't even aiming the gun—and fired everywhere.

Question. Did someone try and get out the back door when you were in Lolly's?

LANCE. Yeah, Fred Lillie started to go out the back door first and then changed his mind and went the other way 'cause he thought I was pretty busy. And I happened to glance—to see his head bobbing up and runnin' around behind the thing, so I just stepped around the corner and when he stuck his head around I just shot him and he dropped on the floor.

Question. What would have happened if he had of gone out?

KELBACH. He'd a got knifed. If, he'd a come through he'd a got knifed.

That's was all there was to it. I had it nice and handy and there was no question of it, my intent was, at the time, leave no witnesses 'cause dead people tell no tales.

And you can bet your bottom dollar that if we knew when we were gettin' ready to leave that there would'a been somebody left, we'd a ran around and checked. We had more faith in his shootin'.

LANCE. [Laugh] Thanks.

I went back to the cash register then and finished taking the money out and this one bartender had already fell to the floor once after I'd shot at him before Lillie had took off and he said he got powder burns on the side of the face and he was playing dead down there, and I reached across the bar and fired four or five shots into the floor and then I—after I finished picking up the money—the gun was empty now, it was all sprung open and everything else, and I semi-loaded—you know, singally loaded it a couple times and just shot around, you know. People—I probably missed 'em, I don't know. You couldn't even see 'em half the time.

And—uh—meantime, Kelbach just be standing back there grinning and laughing, you know. And I guess people'd start going towards him and he'd make a motion. He couldn't do nothing'. All he was was a big bluff. Ha ha ha.

KELBACH. So he just about had everything all cleaned up there and so I said, "Well I might as well go out and get the car started. We might as well get ready and go."

So I just walked towards him while he was firing down the line, and then I just walked towards him, bullets just going by, and I told him I was going to go out and start the car and get it warmed up and I walked out the front door.

. LANCE. What gets me is, one of the first shots that went down that way, he was still halfway leanin' against this pool table—uh—this pinball machine, and there's a bullet went right past him, here, just missed him and plowed into the wall. And he didn't realize that later. He'd felt somethin' go by but he never realized what it was until the police later brought the mentioned up and wondered how it got down there.

KELBACH. They still owe me a nickel from the pinball machine.

Question. What would have happened down at Lolly's Tavern if one of the bartenders hada come up with a gun and things woulda been about even around there?

LANCE. I'd just started pullin' the trigger 'cause he'll—hesitate for a second and I won't. If anything had moved I was shootin' at it except for him. If someone—an innocent bystander—had of just opened up the door and said "hey!" I'da shot—I'da shot at the sound, if nothin' else.

KELBACH. And I'da doggone sure thrown the knife at 'em!

LANCE. I'm walking around kicking people to see if they'll move, see. They could be squirming all over for all I know—it was just a blur, and ears are ringing. Oh, 12 shots, I guess, been fired as fast as you can pull a trigger, except for the last two, which I loaded.

My ears were—sounded like someone was still shootin' in there, is what it sounded like.

And so I'd walk back around and I went to the door and opened the door up and threw the door—just pulled the door shut like this—and at that time one of the—the bartender Lloyd Graven had got up, fiddled around and found his .38 and he'd shot at me and he'd hit the door and glanced off, and I didn't even know he'd even shot at me; I thought it was still an echo and I went out and got in the car.

KELBACH. And we goes down to Holiday Inn. We were gonna eat there but it's midnight, so it's closed. So we goes all the way back up town to this Chinese place that stays open downtown.

LANCE. I think it's Oriental.

KELBACH. Oriental Cafe—and we goes in there to eat and there is a drunk in there who's lost his coat and he's causing a big disturbance over coats and two policemen come in, see.

LANCE. And I'm sittin' down there waving at the cops, see.

KELBACH. They didn't say nothin'.

LANCE. They'd wave back and they's—their mind was all fixed I guess on this—this drunk who's raising Cain, and he waved to us.

Finally, after we ate, we got up and walked out.

We start the car up, passed the police car and—uh—I guess we passed three or four cops after that that was shining flashlights in the cars. Never stop, just drive up next to the car and shine it in and go on.

And—uh—uh—then we——

KELBACH. We went to the Jade Cafe where we got a large coke for his sister Mary—his other sister who was home tending the kids.

Well, we got there and she was sick, so they had to call the police ambulance. Well, we decided that was the time for us to kind of, you know, motivate outa there, so——

LANCE. I said, "Well, we'll meet you at the hospital." We didn't wanna be there when the police came, see.

So we went out and got in the car, and we had no intentions whatsoever of going up to that hospital. So we started—uh——

KELBACH. That's when we went up and we were gonna go up towards Park City, so we gets up—part way up there and we made a wrong turn off one of the roads going up towards the highway there, and—uh—so then we sat around for a couple minutes deciding, well should we or shouldn't we? Oh, yeah, we'll go on up there. What the heck, if the police stopped us at a roadblock, they ain't gonna know who anyway because dead people tell no tales, you know—no witnesses, and that, so—uh—we goes on up and I'm going around the curve—I'm driving and I think I'm really going to town and I'm really driving fast—I must be doing five, ten, fifteen miles an hour, see.

LANCE. He's weavin' down the street like a snake.

KELBACH. I am outa my mind. I don't even know where I'm at.

And so we're getting up there and pulls up and we see a bunch of lights and —red lights.

"Oh there must have been an accident up there," and we stopped. Must have been an accident up there, so we said, "Oh well, we might as well go on."

So we goes on up and pulls—and so they got these little markers in the road here for the—uh—to pull in, you know, for the thing. So we pulls on in on the—way on the righthand side like we were gonna stop, maybe we could help em' you know. We're good citizens.

And or they flagged us out in between here and I had a heck of a time gettin' that car out there.

LANCE. Just before he gets there, though, I said, "Well, it's—it's a road block of some kind." And I'm still on a paranoid kick, see, so I pull out the gun. I says, "Well you run the roadblock and I'll get 'em," you see. There's about 30 or 40 or 50 or a hundred of 'em up there, see, and I don't know it at this time.

They get a little closer and I see how many there are and I just stuck the gun back in and I says, "Maybe they are just investigating an accident," you know. I'm hopin' they are, see.

KELBACH. So we get's up and into this roadblock and they come and look at us, you know—flash a light at us.

LANCE. One officer come up and he's got a big double-barreled shotgun, you see, and he's tappin' the barrel of it on the hood in front of me, and my hands went up. Boy, I seen that big shotgun.

And Kelbach's just looking at him, you know, like "Who do you think you are?" See.

He found out when he reached over and tapped it on the windshield. And he seen that—well, his hair stood straight in the air and he just broke out in sweat.

KELBACH. Those big barrels look mighty big when you're on the wrong end of 'em.

LANCE. So he—he steps out of the car and they shake me down—take my shoes off, and I'm standing there. And they shake me down—they find the .38, the P–38, and oh, they were mad 'cause it was loaded, cocked and everything else, ready to go. And I had it in my pants in such a way where the only thing the policeman could do was to grab it by the stock. That way, any fingerprints was on it would be taken off and his put on, see.

After they found my gun they shook Kelbach down and they were mad then 'cause they found one on him.

So, I never touched the ground—all the way from the squad car, for about 250 yards to where we had this other car and, uh, it was quite deal there.
[End reel IV.]

REEL V

[Video] Stern on camera.
[Audio] STERN on camera]. Lance and Kelbach have described how they killed six people.

But who are Lance and Kelbach? What are their backgrounds, motives, their feelings about killing and suffering? Are these matters relevant in determining whether they should be executed and, if so, how is a legislator to reduce these things to a simple formula in a statute book . . . a formula that would call for an automatic tilting of the scales to require the death penalty, as the Supreme Court now suggests is needed, if capital punishment is to be preserved?

Question. When did you first start to carry a knife, Wally—and how old were you?

KELBACH. Oh, I've always carried a knife. I usta carry a knife when I was 7 or 8. I usta have a switchblade that I carried plus my fishing knifes and that, when I went fishin' off the piers and stuff like that.

Question. Did you ever use it when you were young? You know, threaten somebody with it?

KELBACH. No. The only thing I ever killed that young and that what I was doing was I was cuttin' off the heads and that of fish and stuff like that. Nice perch, you know, from fishing. And that, or maybe taking little firecrackers and tying 'em around snakes' necks and then lighting 'em and watchin' 'em blow up or something like that, or takin' frogs and dissectin' 'em a little bit or——

Question. How about you with guns?

LANCE. Oh, I have always had guns at one time or another. I guess since about 15, 16.

Question. When you have that gun in your hand that built up your ego and you kinda—like—ah——

LANCE. You'd be surprised how much it does, too. Uh, I don't know, you got a gun and you know that that—well, the average person just ain't gonna run up to you and try to pick a fight with you if you got a gun pointin' at him, ya know. And if he does, shoot him—he ain't gonna do nothin' after you shoot him.

KELBACH. Just like most men'll tell you they-ve been around a lota weapons, and actually they're more scared of a knife than they are a gun. 'Course I ain't never been around a gun that much.

LANCE. The only thing good about a knife is you can outrun a knife.

Question. A knife—a knife makes it bleed more.

KELBACH. Nuttin' wrong with that. But, uh, I never been around guns much 'cept for in service where I was taught how to use one. I was taught that if you're gonna take it out to use it, otherwise just don't take it out.

LANCE. I hope they pass that gun law. It'll make it harder for the citizens to protect themselves. That way we could get guns easier—ha ha.

Question. There's a theory.

KELBACH. That's right. That is exactly what——

LANCE. Well, you stop and think about it now. You take the guns away from the citizens, it'll make it a little harder for us to get 'em but it'll make it a damned sight harder on the citizens because they want to go about it, gettin' it, legally. We'll just go steal it.

KELBACH. Well heck, you always got National Guard armories and stuff like that got weapons in 'em.

Question. Were things quiet around your house when you were young?

LANCE. No, uh, my mother and her various number of husbands was always fightin', quarreling—uh—my mother's been in trouble; at the time of her death she was on probation for grand larceny.

Question. Was there anything ever discussed around the table at mealtime other than crime and violence, from Grandpappy on down?

LANCE. Not really. That was more or less like you hear people sittin' around tellin' old folk tales. Well, these were no folk tales. They were actualy happenings in the family.

I've got one—uh—one aunt that's been in prison for arson. I got no—my dad, he was in prison for blowin' up a thrashing machine. Got several relatives that's been in trouble off and on, but even had one relation that was hung for—uh—for horse stealin'. Also had one that come out here to prison for—uh—some train robbery.

Question—How do you feel about each other?

LANCE. In what respect? ha ha.

Question. Any respect, any way at all.

KELBACH. Well, go ahead, commit yourself. [Laughs.]

LANCE. Yeah. I don't know. I trust him and he trusts me. I know that, uh, he won't do anything that would jeopardize me without first talking with me. I'd say I gotta lot o' respect for him. I couldn't say that I loved him, you know, ha ha. He's too sadistical in a lota ways for that.

Question. How about you?

KELBACH. Well, I respect him and I trust him and that's more than I do 99 percent of the other people I know, and that. That's why he is closer to me than others. I know that nobody's gonna come at my back while he's there, and vice-versa. He knows that I ain't gonna let nobody get at his while I'm there, and that. And this is the way we have our mutual understanding and this is the way we work.

Question. How do you feel about the people you killed—any particular way, one way or the other?

LANCE. Oh, the only real regret I've got is the woman. I guess it's mainly because I think of all her children probably. Other than that I haven't real feeling towards any of the others—has no value. Actually, the —lot of ways life has no value to me at all. You're born to die. There's no way you can 'escape' that. All I did was help it.

Question. How about you, Wally?

KELBACH. I got no feelins' whatsoever. I got—I could be perfectly honest with ya, I'd have no feelings if somebody keeled over right here. I got wouldn't make no difference to me, really. I got no feelings about anything I've done.

Question. Why do you think that is?

KELBACH. I don't know. No one's ever said why—ever told me why and——

Question. Have you ever thought about it?

KELBACH. Ooh—I thought about why some people get so emotional all the time over somethin' and that, but—try and figure it out, that—might be immaturity or somethin' on their part that they get emotional because no matter where you go people're gonna die and if they're gonna go they're just gonna go. I jest let it go. No sense in worrying about it because, uh, you see, people that worry about that worry about bills and where do you end up, in a mental institution. No sense gettin' there.

Question. You get a thrill out of seeing them die, don't you?

KELBACH. I don't—I kinda laugh sometimes.

Question. Don't you get a special thrill or a charge out of seeing somebody die with a knife, or a knife you—Wally, you used a knife most of your life and you had an application to work in the surgery at the Veterans Hospital when you were in the county jail, and I was just wondering if you just didn't like to be around blood and somebody gettin' cut up.

KELBACH. Sure, I like to see what it does, and that. I mean, I can't say that I'm not sadistic 'cause I am. I don't mind people gettin' hurt because I just like to watch it. Don't ask me why or how or what because I can't answer that, but I don't mind a bit.

That's just like I told you, if somebody was to keel over here, if somebody knifed one of these guards here—I'd just stand there and laugh.

Question. You'd like it better, though if one of 'em were cut with a knife instead of one just dropping over with a heart attack, then?

KELBACH. Right. I'd just as soon see that. I'd just as soon see 'em suffer a little bit on the way—while they're dyin'. I'd like to see 'em crawl up the last inch to the quarter and just about get to the telephone for aid and then not make it.

LANCE. Ha ha ha. Okay—ha ha ha.

[Video] Super "Dr. R. J. Howell, Psychologist" super out.

[Audio] Dr. R. J. HOWELL, Psychologist. Walter Kalbach was seen under the direction of Dr. Paul Bramwell who was here at the prison at that time and my direction by a doctoral student in November of 1966.

After he was returned to the State Prison, following his conviction of first-degree murder in May of 1967, I saw him again and I found his condition at this time to be much the same as it was in November of '66—that I could not find that he had any emotional or mental illness that would relate to the question of insanity in a court of law.

We did find him to be of average intelligence, to be a man who had had a life-long history and feelings of inadequacy, inferiority, unimportance, discouragement and failure, and I would speculate that these killings that he and his partner engaged in, at least on his part, related to his attempts to gain importance in his own eyes.

[Video] Super "Dr. I. Reed Payne, Psychologist" super out.

[Audio] Dr. I. REED PAYNE, Psychologist. Mr. Lance was, in my opinion, neither psychotic—and I don't believe he was crazy in any sense of the word.

He's an anti-social individual, a man who has developed a don't-care attitude. He cares very little for himself or for others. Kind of a hopeless, helpless, feeling was what I got from the interaction.

[Video] Stern on camera.

[Audio] STERN [on camera]. One wonders why Lance and Kelbach allowed themselves to be filmed. Their confession was so damaging it would have destroyed any hope of a successful appeal. And remember, the interview was filmed before the Supreme Court's decision spared them from execution.

The truth may lie in a fact that was *not* brought out in the interview. When police searched their rooms after their capture, they found hundreds of clippings from newspapers describing the murders. To Lance and Kelbach, these clippings were glory . . . and what greater glory than the greatest clipping of all—the long, long interview for television?

But that is not *our* purpose.

Lance and Kelbach no longer face the prospect of execution by a Utah firing squad. Like the other 600 Death Row inmates around the country they will be re-sentenced to a maximum of life in prison.

But what of future Lances and Kelbachs? If Utah would prefer to execute them, can it write a law that would meet Supreme Court requirements—a law imposing the death penalty automatically and yet meeting fundamental precepts of justice? Should the test be multiple killing, or a lack of remorse, or the sheer malice with which the killing is done?

Some states undoubtedly will attempt to draft such laws. They will be reviewed by the Supreme Court and it is quite possible that as the Court's membership changes, some accommodations will still be worked out to preserve the death penalty in extreme cases.

If that happens, will it deter anyone? That has always been one of the basic questions. In the case of Lance and Kelbach it is impossible to judge whether facing even absolutely certain execution would have deterred them. Almost everything in the interview suggests the answer is "No." Even when they thought they were going to die they showed no apparent remorse.

[Video] Lance and Kelbach with big sound. Lance laughs.

[Audio] LANCE. [Laughs.]

[Video] Stern on camera.

[Audio] STERN [on camera]. We asked Captain Ferris Andrus, the man who captured them and who probably knows them best, how they could be so cheerful.

He answered: "It's a defense . . . they laugh to keep from crying."

For an instant that defense did crack during the long interview . . . and that may hold the only promise. It occurred when Lance was talking about people who might be foolish enough to imitate him and his partner . . .

[Video] Lance on camera.

[Audio] LANCE. [on camera]. We're serious. We may laugh and joke, at places here and there, but that's mainly for our own benefit because they can no more than shoot us. But think of the people out there that could end up in our shoes and it ain't very funny.

[Video] Freeze frame go to black.

[End reel V.]

Title: "Thou Shalt not Kill."
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Dann Armstrong
Robert C. Smith
Michael Gallivan
Consultant, Captain Ferris Andrus
Interviewer, Art Kent

Excerpts from Hearings, *Capital Punishment*, House of Representatives, Sub-Committee No. 3, Committee on the Judiciary, May 10, 1972

TESTIMONY OF GLEN D. KING, DIRECTOR, INFORMATION SERVICE DIVISION, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

Mr. KING. I would like to express the regrets of Mr. Tamm. He would have liked to appear before the committee, but he had an unavoidable conflict that could not be rescheduled.

So if I may speak for Mr. Tamm and the president of the association, Chief George Murphy, Oneida, N.Y., and on behalf of them and the 8,500 members of the International Association of Chiefs of Police, I do express our appreciation for your invitation to testify.

Rather than specifically addressing the bills being considered by this subcommittee, I would like to voice a belief regarding the general nature of capital punishment and its influence on the commission of capital crimes.

The IACP, as the world's leading association of police executives, has traditionally been greatly concerned about deterrents to crime and has viewed capital punishment as one of great impact.

Although the number of incidents in which capital punishment has been exercised has been extremely limited, its total impact as a deterrent to crime has far exceeded its numerical size.

The seriousness of your task and the very great difficulty it poses for you is emphasized by the fact that persons of differing opinions can look at the same basic facts and come to entirely contrary conclusions.

I am sure that most persons who appear before this subcommittee urging legislation to abolish capital punishment do so because of a concern for human life. It is precisely for this reason that I urge the subcommittee to decide in favor of recommending a retention of this form of crime prevention.

The logic which urges an abolition of the death penalty in the interest of human life is more apparent than real. For I am convinced that ultimately abolition of capital punishment would result in a much greater loss of human life than would its retention.

It is admittedly tragic whenever the State in the most awesome exercise of its authority decides that capital punishment must be invoked, tragic because any loss of human life is a tragedy. But I sub-

mit to you that even in the tragedy of human death there are degrees, and that it is much more tragic for the innocent to lose his life than for the State to take the life of a criminal convicted of a capital offense.

My statement implies a belief that there is a direct relationship between the legal existence of capital punishment and the incidents of criminal homicide. Although statistics are generally unreliable in this area, I am convinced that such a relationship does exist. I am convinced that many potential murderers are deterred simply by their knowledge that capital punishment exists, and may be their fate if they commit the crime they contemplate.

I think it significant that during recent years we have seen a consistent reduction in the number of incidents of capital punishment, and at the same time a very great increase in the number of criminal homicides.

As an example, in 1950, 82 convicted felons were executed, a very great percentage of whom were guilty of the crime of homicide. During the same year, 7,020 criminal homicides were reported.

A decade later, the number of executions dropped to 56, and the number of criminal homicides rose to 9,140.

Throughout the 1960's, we experienced a steady increase in the number of criminal homicides, with 14,590 recorded in 1969. During the same decade, we saw a practical end to the utilization of the death penalty. Since 1967, no executions have occurred in the United States, and there were only two that year. In 1966, there was only one instance in which this form of punishment was applied.

I realize that a very great number of factors are involved in this extremely complex question, and I do not suggest for a moment that the de facto end of the death penalty as a form of punishment is solely responsible for the burgeoning homicide rate in the United States. But I suggest it is equally unrealistic to assume that there is no relationship between the two.

The danger of resorting solely to statistics in attempting to determine the best course of action to follow in something as complex as the issue of the death penalty is illustrated by some of the statistics cited to support its abolition.

Opponents of capital punishment point to the criminal homicide rates in States which have legally banned the death penalty, and claim support for their beliefs in the fact that the statistics in these States are lower than in some in which capital punishment continues to be legally permissible.

The questionable nature of such statistics becomes immediately apparent when we realize that capital punishment as a practical matter has ceased to exist in all States. When 4 years pass without a single State exacting the death penalty, then statistics comparing States with capital punishment and those without become ridiculous.

We have in effect become a Nation in which capital punishment does not exist, and I am convinced that part of the results of this has been a very great increase in capital offenses.

It is equally as invalid to rely on emotional appeals, because there is an inherent element of emotion both in appeals to continue and to discontinue capital punishment.

Lurid descriptions of the death scene have painted a horrible picture of the execution. Of equal impact are descriptions of the savage atroci-

ties visited upon innocent victims by those who commit murders and rapes. A description of the execution scene which revolts and repels is no more valid a basis upon which to make a decision than is the gore of the criminal homicide scene.

Our courts, with every justification, have refused to admit into evidence in the trial of an accused pictures and oral descriptions which repel human sensibilities and are revolting to human decency. The courts realize that reliance upon such methods cause conclusions to be reached on the basis of emotion rather than on the basis of logic.

Such an application can with equal validity be made to execution.

At one time in the history of man, 168 violations were capital offenses. It is to the credit of our forebears that they realized that the death penalty could not properly be applied in minor cases, but must be reserved to those cases of greatest magnitude.

I am convinced that an equal exercise of good judgment calls upon us to decide that conditions can exist in which this act of the utmost gravity is not only justified but is demanded, and that violations can be committed which are so reprehensible that no other form of punishment is suitable.

If we are to apply those methods which serve as the greatest deterrent, we are going to have to continue to suit the punishment to the offense.

The Nation's police officers are particularly concerned with this issue, not merely because they are called upon for direct involvement in the incidents which may result in the application of the death penalty, but because they themselves are so often the victims of offenses for which the death penalty may be assessed. We have in recent years seen a very great increase in the number of criminal assaults committed on the police officer, and in the number of injuries and fatalities resulting from those assaults.

Several of the five States which have partially abolished the death penalty have retained it for the killing of a police officer or a prison or jail guard who is in the performance of his duties. The States of New Mexico, New York, and Vermont have specifically cited such offenses as being justification for the exercise of the death penalty while prohibiting it in other criminal homicides.

Whether these States are correct in their partial abolition of the death penalty, they are unquestionably correct in their implication that the death of a police officer inflicted while that officer is acting in the line of duty is somewhat different and apart from other criminal homicides.

The policeman willingly subjects himself to a greater element of danger than most persons ever experience while protecting the citizens he serves. He is not, however, willing to be the victim of the criminal who uses violence as the method of obtaining that which he seeks. Nor is he willing to be the victim of felonious assault merely because his assailant knows that he can maim and kill without being subjected to meaningful and appropriate punishment.

Gentlemen, I am of the belief that capital punishment must be assessed only after every legal safeguard has been provided, and that it can be properly applied only with a full understanding of the very great gravity of its exercise.

But I am convinced, and I urge you to conclude, that capital punishment under carefully prescribed conditions and for highly selective offenses is a deterrent to certain kinds of crimes, and that the value of human life is not lessened but is rather protected by retention of the death penalty as a form of punishment.

That is the end of the statement.

I thank you.

Mr. KASTENMEIER. Thank you, Mr. King, for that statement. It is one on which a number of this committee place some reliance.

We are, of course, sorry that your executive director could not be here this morning. He is well known to the Congress, as is the International Association of Chiefs of Police.

For the record, I might ask something about your association. Is it national, or is it international in character?

Mr. KING. It is international in character. We have now slightly more than 8,500 members, representing 64 nations.

Mr. KASTENMEIER. Would a majority of your membership be U.S. citizens?

Mr. KING. A very great majority is. Only somewhat less than a thousands are foreign to the United States.

Mr. KASTENMEIER. Do you meet during the year, like the bar association, and take positions on matters of public policy? For example, matters of policy in respect of crimes and the like?

Mr. KING. The association does meet, and we have an annual conference, and it does consider matters at the conference.

The association as such, or the membership of the association, has not adopted a formal policy on the death penalty.

Mr. KASTENMEIER. One of the difficulties or dilemmas the committee has—as do a number of witnesses, some of whom would share your position, more or less—is that statistical evidence is really lacking or not very conclusive as to what causes what.

Does the abolition of the death penalty lead to more crime? Does in fact the death penalty deter?

We are not certain.

One of the arguments made very forcefully for the bill which provides for suspension of the death penalty pending some review of the matter is that we need a time to see if we can determine from studies whether the death penalty does have the claimed relationship, and I wonder how you react to that.

Would you or your association, in your view—you can speak either for yourself or your association—feel that if studies on which you place some reliance came to the conclusion that the death penalty was not in fact a deterrent or an aid in fighting serious crime, change your mind with respect to whether or not it ought to be abolished?

Mr. KING. Addressing several points that you made, I think the first one is that——

Mr. KASTENMEIER. I apologize for the complexity of the question.

Mr. KING. Not at all.

I am not sure I will be able to answer all of it. I think I agree very simply that there is not reliable statistical data. I think it does not exist. I think perhaps in something as complex as this, the controls that would need to be established to conduct meaningful research are not possible.

I think, very simply, at the end, or at the beginning, we are going to have to have some largely subjective evaluations of this.

I think it is easy to establish certain impacts of law enforcement. You can assign greater numbers of officers to an area to determine whether the presence of uniforms has an impact on the number of offenses that occur there.

You are not justified, perhaps, in doing this when you are dealing with human lives. I think when you are dealing with property and dealing with life, it is entirely different, and I suspect that what we actually are doing when we conclude that we will establish a moratorium on the death penalty is transferring that greater danger to the citizen who is the victim of the assault and substituting it for the greater danger to the criminal.

I think the studies can be made equally as well and equally as validly with the death penalty continuing to exist, as it has continued to exist in the past years, and I think the greater danger to the society and the dangers to the society would mandate that it be continued while the studies were made.

Secondly, could the opinions be changed if it were proven that the death penalty does not have a deterrent effect? Certainly, because I think there are other factors at work, here. I think there are other persuasions here, but I think none of them are compelling.

I think the only compelling one is the preventive nature of capital punishment, and if it can be shown not to be, or can be shown to be a preventive to other capital offenses.

Mr. KASTENMEIER. One of the difficulties with present statistics is that so many different things can be shown.

For example, our State of Wisconsin does not have the death penalty, and we probably have a low rate of homicides, and probably even lower with respect to homicides on police officers and other law-enforcement personnel. Yet in a State, as you point out in your own statement on page 5, such as New York, that has specifically cited such offenses as being justification for the exercise of the death penalty, we find, nonetheless, homicides of law-enforcement personnel has risen dramatically and scandalously and alarmingly.

So one would almost think that there is no deterring some people from committing homicides. For example, with respect to the murder of law-enforcement personnel.

Mr. KING. I also tried to make the point immediately following page 5 that this is an extremely complex thing, and that I did not intend to imply that this was the only factor at work here.

There are many factors at work, and I do suggest to you again that there is a practical end, so far as its exercise is concerned, of the death penalty.

I also suspect that if you will look at the crime rate of your State in other offenses, you will find there is a difference also in rate there.

Mr. KASTENMEIER. I think that is true.

Thank you very much.

I yield to the gentleman from Pennyslvania.

Mr. BIESTER. I, too, want to thank the witness for testifying.

Mr. Railsback was on the telephone with me just a moment ago, and he expressed his regret that he could not be here to hear you, because

your testimony and the point of view of the organization you represent is a point of view which Mr. Railsback has urged me to have a chance to hear in the course of our hearings, and he asked me specifically to apologize to you for his not being here.

Mr. KING. Thank you, sir.

Mr. BIESTER. I wonder if in your membership you have members who work in nations which have abolished the death penalty some time ago.

Mr. KING. I am sure there will be. I did not study the membership to see what percentage there would be, or whether they actually exist, but logic would persuade me that certainly they do exist.

Mr. BIESTER. What do you make of the British experience, and the finding that the homicide rate has remained stable? In fact, if you want to look at the findings, it has actually gone down since they abolished capital punishment several years back.

Mr. KING. I think we have to look at it very simply, and the totality of the conditions that exist in England, and if we could impose those here, then perhaps the same results might accrue here.

I think, very simply, that we do have to take into account all of the circumstances that exist in determining whether something will work or will not work.

I think if you will take a look at the number of criminal homicides that occur in England, the number of criminal homicides that occur in the United States, you will find that the social conditions that exist that would influence this are markedly different.

Mr. BIESTER. Then, should we not focus on those social conditions, rather than on this?

Mr. KING. I think so, yes. I think it is not either/or, I think it can be both.

Mr. BIESTER. You mentioned two potential tragedies: One, of course, is the tragedy of the victim, which by the time we get to trial in this country—since trials seem not to occur until some time after the event occurs—is somewhat lost in the shuffle; the other is the potential tragedy to the convicted murderer. As I think you have expressed it, if there is a comparative in tragedies—and I am not sure there is—but if there is a comparative in tragedies, certainly the tragedy of the death of the victim is the more intense tragedy.

What about the tragedy of the man who is convicted, executed, and then discovered innocent? Is that not the most intense tragedy?

Mr. KING. I think it would certainly not be excelled by any, and I think the legal system of the United States has to be applied with the greatest caution, and I think it is applied with the greatest caution. I think it moves sometimes with such deliberation that it seems not to be moving at all.

But I think that when something as serious as this does occur, when a capital crime is being heard, I think there is awareness on the part of the judiciary and on the public that serves as jurors of the gravity of this, and I think they approach it from that point of view.

I don't have figures on it. I suspect figures on this area also would be unreliable, on the number of persons who were innocent of an offense, who were convicted of it, and were ultimately executed for it. I don't have those figures.

I would again suspect the figures that I saw, because I think someone else's deathbed confession or the denial of the person who has been convicted cannot be accepted completely as evidence that he did not commit the crime.

Mr. BIESTER. Of course. There are two different kinds of expressions, I suppose, as to what innocence means and what we are talking about. There is actual innocence, and there is judicial innocence.

Mr. KING. Yes.

Mr. BIESTER. Because of the persistence of counsel in cases in which there is a life imprisonment imposed, we may 8 to 10 years later have a court ruling that the earlier conviction was violative of due process rights. In capital cases, of course, where the execution has been carried out, there is not then an assiduous search for error.

So in one sense, actual innocence may be difficult to discover. Like you, I have some reservations about other people's death-bed confessions, although there have certainly been proved instances in which this has happened.

But what about judicial innocence, the lack of due process which may have occurred?

Mr. KING. Does not law apply to the conditions that exist at the time the law is enacted, or at the time that it is applied?

The Constitution of the United States, which probably has the greatest permanency of any law that we have, has been amended many times, and it is not now the Constitution that was written originally, and it should not be, because the conditions that existed at that time don't exist now.

The conditions that do exist because of changing social customs, of mores, of legalities, the fact that something is not now legal and proper does not mean it was not legal and proper at the time it was applied. I think you have to look at it in the context of the times in which it occurs.

There are undoubtedly going to be changes made in the law in the future that will move it in a different direction, that will give it different thrusts, and this is entirely proper.

We are not able to, and I think we are doomed to failure if we try to predict what the law is going to be 20 years from now, and let our actions at this present time be determined by that. I think it very simply cannot work.

Mr. BIESTER. We have heard testimony here, which is quite persuasive, to the effect that there has been racial discrimination in the imposition of the death penalty in many parts of the country under many different kinds of circumstances, and especially with respect to the crime of rape, particularly in the South.

I trust you would agree that, to the extent that such discrimination occurs, we should eliminate it from our system.

Mr. KING. I certainly agree with that, yes.

Mr. BIESTER. Are you aware of the fact that among the people awaiting execution are perhaps maybe 150 to 200 blacks who have been convicted of rape in the South? Would you hold out any distinction with respect to the execution of those sentences?

Mr. KING. I think, very simply, before you make decisions in this area, you have to admit other factors also, because I think that while certainly the possibility that these are of a racial nature exists, certainly the possibility that they are not of a racial nature also exists, and I think we ought to take a look at some of the victims here, also, and see what percentage of the victims were black, and see if, like in homicides, this is going to be true.

Mr. BIESTER. I am particularly concerned with the rape cases.

Mr. KING. Having glanced very rapidly at this, I thought the figure was 77 rapes, with 66 of those blacks. I am not sure.

Mr. BIESTER. It has been a couple of weeks since we had that testimony.

Mr. KING. I am not at all sure.

Mr. BIESTER. But even if it were 66, do you think that those executions should be carried out?

Mr. KING. In the absence of indication that the sentence itself was not a proper sentence, I think it should be carried out, yes.

I think this is a factor to be considered, and I think it is an important factor. I think it is not the only factor to be considered, and I think, very simply, that the conclusion that because a greater number of those, whether for rape or for homicide, or for whatever reason the sentence has been imposed, I think the conclusion that this sentence resulted because of the race of the person involved, and would not have resulted had the race been different, I think requires substantiation.

Mr. BIESTER. But if it were substantiated?

Mr. KING. I would not ever recommend that any sentence of any magnitude be carried out against a person who was convicted for anything other than a provable commission of the offense.

Mr. BIESTER. One last question—perhaps not last, but at least the last area I would like to get into.

We talk about continuing capital punishment, but I am wondering if we were to begin setting up a society at the present time, and we had to make the decisions on establishing the Constitution and the general laws of that society, whether in fact we would include among the punishments the death penalty.

Do you think that we would be justified, beginning from scratch, to impose the death penalty based on such subjective feelings, or do you think that we would be constrained to impose that penalty on the basis of some factual data, some genuine evidence which indicates that it would be a deterrent?

Mr. KING. I think before I could answer it, I would have to see the criteria on which you selected your population. If you could establish a population that would conform to the customs and conventions of society, which are its laws, and who would not commit assaults upon and murders of its fellow man, then, certainly, you would want to establish that as a society that did not have a death penalty.

I think, very simply, that the question implies that there is not a relationship between the death penalty and the commission of capital offenses, and this is, I think, incorrect. I think there is that.

I say again that I think the ability to prove or disprove that point at the present time does not exist.

Mr. BIESTER. That is my question. If it cannot be proved, and it cannot be disproved, if we are unable to satisfy ourselves intellectually that it does make a difference, then do we have a right to impose it?

Mr. KING. I think, very simply, we not only have a right, but we have an absolute responsibility to evaluate this, and to apply the best judgment that we have to it. And if our best judgment persuades us that there is a deterrence to it, then we proceed as if the deterrence actually exists, that we perhaps arrive at the conclusion subjectively, but after having adopted subjectively, we apply it with the greatest objectivity we can bring to bear.

Mr. BIESTER. I just want to finish by thanking the witness very much. The body of citizens he represents here is a group about whom many of us on the subcommittee have been especially concerned.

I think all of the members of the subcommittee have been concerned with respect to the question of deterrence. I think your observation that those you represent do face special hazards that are not faced every day by the average citizen creates a higher degree of interest in this whole subject, and I think that should be something to which all here would agree.

I am not sure that means we should go ahead and go further down the line with you, but I think that there is a special circumstance in the special set of hazards faced by those in police work.

Thank you.

Mr. KASTENMEIER. Mr. King, the committee thanks you for your appearance and your testimony this morning.

Mr. KING. Thank you, Congressman Kastenmeier, Congressman Biester.