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TO ESTABLISH RATIONAL CRITERIA FOR THE
IMPOSITION OF CAPITAL PUNISHMENT

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HEARINGS
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 1382

APRIL 27 AND MAY 11, 1978

Printed for the use of the Committee on the Judiciary





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U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1978

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TO ESTABLISH RATIONAL CRITERIA FOR THE IMPOSITION OF CAPITAL PUNISHMENT

THURSDAY, APRIL 27, 1978

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (acting chairman of the committee) presiding.

Staff present: Michael Hunter, legislative counsel to Senator Hatch; Russell Coombs, deputy chief counsel, Subcommittee on Criminal Laws and Procedures; and Eric Hultman, minority counsel, Subcommittee on Criminal Laws and Procedures.

Senator HATCH (acting chairman). The committee will come to order.

The Subcommittee on Criminal Laws and Procedures met a little less than a year ago to hear testimony with respect to S. 1382, a bill to establish constitutional procedures for the imposition of capital punishment.

Chairing that hearing on May 18, 1977 was Senator John L. McClellan, the primary sponsor of this measure. We sorely miss the distinguished leadership of our departed colleague who taught me so much during my early months here in the Senate.

I am honored to cosponsor this bill and to be here today to continue the work begun by Senator McClellan.

Since our last hearings, the U.S. Supreme Court has issued its decision in *Coker v. Georgia*; Deputy Assistant Attorney General Mary C. Lawton testified before us last year in behalf of the Justice Department.

Before hearing from our first witness, I offer the following material to be inserted at an appropriate place in the record of the hearings:

(1) Committee print of S. 1382 as reported from the subcommittee.

(2) Text of *Coker v. Georgia*.

(3) Library of Congress' study on countries authorizing capital punishment for treason and/or espionage.

(4) Additional statements submitted for the record.

We have asked the Justice Department to comment now on the effect of the *Coker* decision with respect to S. 1382, and we are pleased to welcome Ms. Lawton back to testify this morning.

Ms. Lawton, if you would begin your testimony we would appreciate it.

STATEMENT OF MARY C. LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Ms. LAWTON. Mr. Chairman, as requested in Chairman Eastland's letter, I am testifying on behalf of the Department of Justice to discuss the impact of the Supreme Court's decision in *Coker v. Georgia*, 433 U.S. 584, on S. 1382, a bill to establish criteria for the imposition of the death penalty in Federal cases.

For purposes of analysis, I have used the Committee Print of S. 1382 dated June 9, 1977.

The bill provides a bifurcated trial in instances in which the death penalty may be imposed. A defendant who has pleaded guilty or been found guilty of a capital offense would be entitled to a second hearing before a jury or, upon his own motion and with approval of the court and the Government, before a court alone.

At that hearing, information would be considered concerning enumerated aggravating or mitigating factors surrounding the crime and the defendant. The burden of proving aggravating factors would be on the Government which would be limited to the introduction of admissible evidence and which would be required to prove the existence of such factors beyond a reasonable doubt. The burden of establishing the existence of mitigating factors would be on the defendant, but the rules of evidence would not limit the information which could be presented, and the burden of persuasion would be preponderance of the evidence.

No presentence report would be furnished in this proceeding.

The jury or the court, if there is no jury, would be required to return special findings setting forth the existence of aggravating or mitigating factors. The death penalty would be imposed only if aggravating factors are found to exist, and then only if these factors are found sufficient to warrant the death penalty and are found to outweigh any mitigating factors that may exist. The various factors which may be considered are enumerated in the bill.

Imposition of the death penalty would be subject to appellate review, whether or not the underlying conviction is appealed.

The reviewing court would consider the trial evidence, the information adduced at the sentencing hearings, the procedures employed at the sentencing hearing, and the special findings of the court or jury. It would affirm the death penalty only if it found that it was not imposed under the influence of passion, prejudice, or any other arbitrary factor, was supported by the evidence as to the existence of aggravating and mitigating factors, and was not excessive considering both the defendant and the crime.

In these particulars, S. 1382 closely tracks the provisions of the Georgia statute held constitutional in *Gregg v. Georgia*, 428 U.S. 153 (1976). The only major differences are in the uniquely Federal nature of some of the aggravating factors enumerated, such as the special factors to be considered in relation to treason or espionage and the direct reference to offenses such as Presidential assassination.

We are satisfied that the procedures set forth in S. 1382 overcome the constitutional deficiencies noted in *Furman v. Georgia*, 408 U.S. 238 (1972), and meet the requirements emphasized by the Court in *Gregg*, namely, that attention be focused on the particu-

larized circumstances of the crime and on the defendant, that discretion be controlled by objective standards, that the sentencer be provided with all relevant evidence, and that there be appellate review of the death sentence.

The bill as reported by the subcommittee contains one significant change which may be important in satisfying the demands of due process. It specifically prohibits the furnishing of a presentence report to the court.

In *Gardner v. Florida*, 430 U.S. 349 (1977), the Supreme Court vacated a death penalty imposed under a Florida statute, which had been upheld in *Proffitt v. Florida*, 428 U.S., 242 (1976), because the sentencing court had reviewed a presentence report to which the defendant did not have complete access. The Court found this to be a denial of due process in the context of a sentencing hearing on the imposition of the death penalty.

While the *Gardner* case does not hold that the furnishing of a presentence report is in itself a denial of due process, it suggests that if a report is furnished to the court, all of it must be furnished to the defense in instances in which it may affect the imposition of the death penalty.

As introduced, S. 1382 would have permitted the withholding of portions of a presentence report for the protection of human life or for the protection of the national security. It is questionable whether this would have satisfied the standard announced in *Gardner*. Eliminating the report avoids this issue.

The primary issue you have requested us to address in this hearing is the constitutionality of S. 1382 in light of the Court's opinion in *Coker v. Georgia*.

In that case, the Court held that the Georgia death penalty statute, already found to be constitutional from a procedural standpoint, was unconstitutional insofar as it permitted the imposition of the death penalty for the rape of an adult woman, when death did not result.

Speaking for the plurality, Justice White noted that the eighth amendment bars not only cruel punishments but those that are excessive in relation to the crime committed.

Characterizing the test first enunciated in *Gregg* as, one, whether the sentence makes a measurable contribution to acceptable goals of punishment, and, two, whether the sentence is grossly out of proportion to the crime, the court concluded that the death sentence for rape, while perhaps contributing to an acceptable goal of punishment, was disproportionate to the crime (433 U.S. at 592).

In reaching this conclusion, the plurality examined the practice in other countries and the position taken by those States which had reinstated the death penalty after *Furman* and concluded that the modern approach was not to impose the death penalty for rape.

Justices Brennan and Marshall concurred separately, reiterating their views that the death penalty is unconstitutional per se. Justice Powell concurred that the death penalty was not appropriate in this case but dissented from that portion of the plurality opinion which suggested that the death penalty for rape would be excessive in all cases. Justices Burger and Rehnquist joined in dissent.

While S. 1382 would eliminate the death penalty for rape under the Federal code, it would reinstate the death penalty for a number

of Federal offenses. The majority of these offenses would permit imposition of the death penalty only when the crime results in death.¹ This appears to be consistent with the position taken by the Court in *Gregg* and with the views expressed by seven of the Justices in *Coker*.

In two instances, however, the bill would permit imposition of the death penalty for crimes not directly resulting in the death of another—treason, 18 U.S.C. 2381, and espionage, 18 U.S.C. 794. Thus, we must examine whether, under the rationale of *Coker*, the penalty may properly be imposed for those offenses.

The bill sets forth particular aggravating factors applicable to conviction of treason or espionage, and at least one of these factors would have to be present before the death penalty could be invoked.

The factors are: One, prior conviction of treason or espionage punishable by death or life imprisonment; two, knowingly creating a grave risk of substantial danger to national security; and, three, knowingly creating a grave risk of death to another.

In addition, the bill limits the instances in which the death penalty may be applied for espionage to those in which the information furnished involves nuclear weapons, spacecraft or satellite, early warning system or similar defense systems protecting against large-scale attack, or war plans, communications intelligence, cryptographic information or information on major weapons systems or defense strategy.

Under present law, to constitute espionage, such information must be supplied to a foreign government with intent to injure the United States or provide advantage to the foreign government.

To determine whether the imposition of the death penalty is constitutional with respect to these offenses, we must analyze whether it makes a measurable contribution to acceptable goals of punishment and whether or not it is excessive in proportion to the crime.

Among the goals of penology which may be examined in this connection are the incapacitation of the defendant from further crime, the deterrent effect of the death penalty on others who may be disposed to the crime, and the concept of retribution or the expression of moral outrage of the community (Cf. *Gregg v. Georgia*, supra.). Deference will be given to the legislative judgment on the effect of the penalty for particular offenses so long as it appears rational.

Clearly, the punishment of death, in all instances, incapacitates the defendant for the commission of further crime.

With respect to retribution, the Court in *Gregg* discussed the measure of appropriateness as whether the offense, in this case treason or espionage, is "so grievous an affront to humanity that the only adequate response may be the penalty of death" (428 U.S. at 184).

¹18 U.S.C. 34 (destruction of aircraft or vehicle where death results), 351 (assassination of a Member of Congress or kidnapping a Member where death results) 844 (explosives law violations resulting in death), 1,111 (murder in the first degree), 1,116 (murder of a foreign official), 1,201 (kidnapping resulting in death), 1,716 (mailing an injurious article which results in death), 1,751 (presidential assassination or kidnapping resulting in death), 1,992 (train wrecking resulting in death), 2,113 (bank robbery resulting in death); 49 U.S.C. 1472 (aircraft hijacking resulting in death).

Treason is, of course, the ultimate offense against the Nation, and it has been viewed as warranting the death penalty since 1790 (Cf. 1 Stat. 112, 12 Stat. 589, R.S. § 1873). Espionage has been punishable by the death penalty since 1917 (Cf. 40 Stat. 218). Limited as it would be by the aggravating factors and the particular subjects of espionage which would be subject to the penalty under S. 1382, it may be viewed as approaching the level of treason in terms of its detriment to the Nation and its people.

The deterrent effect of the death penalty on others who may be disposed to commit an offense is, of course, a subject of continuing debate and is difficult, if not impossible, to measure. Nevertheless, the Court in *Gregg* seemed willing to assume that deterrence is greater with respect to crimes which require planning and preparation, and treason and espionage certainly fall within this category (428 U.S. at 186).

On balance, it seems probable that a court would find that the punishment of death as applied to treason serves appropriate goals of penology. It is less certain whether a court would reach the same conclusion with respect to application of the death penalty to espionage but, limited as it is in S. 1382, it is our view that it too would be found to serve appropriate goals.

The second part of the test, whether the punishment is excessive with respect to the crime, is more difficult to assess. In *Coker*, the Court looked to the consensus among the States and the international community and the practice of juries in modern times, as well as to historic practice, to assess the relationship between the penalty and the offense. This is more difficult with respect to crimes as rare as treason and espionage of the magnitude covered in S. 1382.

Reference to the practice of the States is not particularly instructive in this instance. While some States may also include provisions relating to espionage or treason within their criminal codes,² the crimes have generally been considered Federal in nature, affecting as they do the entire country. Thus, the judgment of State legislatures as to whether the death penalty is appropriate would seem to carry less weight with respect to these crimes than was the case with respect to rape.

As mentioned earlier, Federal law has permitted the death penalty for treason since 1790 and for espionage since 1917. However, of the 33 Federal executions carried out from 1930 to 1970, only 2 were for espionage—the Rosenbergs—and there was none for treason although the imposition of the death penalty for treason was specifically upheld in *Kawakita v. United States*, 343 U.S. 717 (1952).

There were also six executions for the related crime of sabotage in 1942.

The Federal experience, then, is limited in practice and provides little guidance apart from the consistency with which statutory law has authorized the penalty.

² As reported in Bedeau, "Death Penalty in America," p. 43 (1967), 21 States included treason among capital crimes.

The attitude of the international community demonstrates some consistency in viewing the death penalty as appropriate for these particular crimes.

In a report on capital punishment to the United Nations, the Secretary General noted that many nations which have generally abolished capital punishment retain it for a few exceptional crimes such as those related to the security of the State ("Capital Punishment—Report of the Secretary General" par. 18, Feb. 23, 1973). More specifically the report notes, "The most common exceptional crimes punishable by death are treason and crimes relating to the security of the State." (Report par. 32.) Tables appended to the report show that the majority of member nations of the United Nations retain capital punishment—about 100 of them—and 15 other nations, while abolishing capital punishment for ordinary crimes, retain it for exceptional crimes.

A 1975 update of this report shows that the picture remains largely unchanged ("Capital Punishment" U.N. Doc. 5616, Feb. 12, 1975).

While the practice in other nations is not conclusive in interpreting the requirements of our own Constitution, it does constitute a factor which courts may well consider in determining whether the penalty of death is excessive as applied to treason or espionage.

Approaching the question as the Court did in *Coker*, the consistent view of the Congress from the earliest days of the Nation and the agreement of most nations in the world today that treason warrants the death penalty in some cases strongly argues for the conclusion that the penalty is not grossly disproportionate to the defense.

This is particularly true in light of the aggravating factors which would be proved beyond a reasonable doubt before the penalty could be imposed. In our judgment, a court, applying these same criteria, would find the death penalty for treason to be constitutional if imposed in accordance with the procedures established in S. 1382.

The result is less clear with respect to the offense of espionage. The available information with respect to the law of other nations is less clear. The imposition of the penalty for this offense was first authorized in the United States only in 1917 and then only for acts committed during time of war. The last application of the penalty, in 1952, was for conduct occurring during time of war.

These factors might be given weight by a court in determining whether the death penalty is disproportionate to espionage in time of peace. On the other hand, S. 1382 narrowly circumscribes the situations in which the death penalty would be applicable to espionage, encompassing only the most serious and harmful breaches of security. Moreover, the current world situation is one in which massively destructive acts could occur without a formal declaration of war. Further, the bill would limit the circumstances in which the death penalty could be imposed to those involving a repeat offense, a very grave risk to the Nation, or a very grave risk to life.

We are inclined to believe that a court would sustain the death penalty for espionage in cases in which those elements were proved beyond a reasonable doubt, even if an actual state of war did not exist.

In summary, it is our view that S. 1382 satisfies both the substantive and procedural requirements of the eighth amendment, as it has been interpreted to date, and is, therefore, constitutional.

Senator HATCH. Thank you. We appreciate your testimony here today.

I just have a couple of questions.

No. 1 would be this. The plurality opinion, authored by Justice White, in the *Coker* case emphasized the fact that rape, per se, does not involve the taking of human life. However, that opinion as well as the opinion of Justice Powell, concurring in part and dissenting in part, repeatedly states that it is only rape of an "adult woman" for which the death penalty is held invalid.

Since *Coker* appears to deliberately leave open the question of the validity of the death penalty for the rape of a child, is it not clear that *Coker* does not stand for the proposition that only homicide—other than treason and espionage—can be punished by death?

Ms. LAWTON. Certainly, Senator, the Court left that open, but the Court did not rule out such a penalty.

It is hard, reading *Coker* or any of the death penalty cases, to say that anything is clear. There are no majority opinions in any of those cases—they are all pluralities. You must analyze each of the Justice's views separately.

Clearly, the Court was very careful to leave that open. Thus, the issue is not resolved.

Senator HATCH. Thank you.

Consider, for a moment, the practical legislative judgment that must be made if the committee concludes that it is impossible to predict with complete certitude whether the Supreme Court would uphold the constitutionality of the death penalty for treason or espionage.

Since the States rarely, if ever, prosecute treason or espionage, that constitutional issue will not be resolved unless Congress enacts such a law, and the Court thereafter considers the law's constitutionality.

I think that would be correct.

Ms. LAWTON. Yes, Senator, I agree.

Senator HATCH. If congress enacts the death penalty for treason and espionage, and the Supreme Court were to invalidate it, the convicted person would merely receive a reduced sentence—not a new trial or a complete release. Is that not correct?

Ms. LAWTON. Yes. That has been correct under all of these decisions.

Senator HATCH. So that there is no way anybody could be hurt under this particular statute, assuming that it would be tested before the Supreme Court?

Ms. LAWTON. That is correct.

Senator HATCH. It seems, then, that if the Supreme Court's view of the constitutional issue were considered uncertain, that would be no reason to refrain from enacting such a law.

I would say, instead, Congress should make its own decision on both the constitutional question and the question of whether authorizing the death penalty for treason and espionage is sound policy.

Ms. LAWTON. Yes.

The Congress, of course, should be guided, to the extent it can be, by the rationale followed by the Court, but, in doing so, we have concluded that the bill is constitutional.

Senator HATCH. In any event, I have to admit that I share your view that it is possible to predict, with reasonable confidence, that the Court would sustain the constitutionality of the provisions of this particular bill.

I think you made out a good case for that, and I agree with you.

I think that is all we have today.

We are very grateful that you would take time to come up here and give this testimony. I think it is very lucid testimony and helps us to understand the workings of the Court and the possible future ramifications of this particular bill.

Therefore, these hearings of the Committee on the Judiciary will now recess until Thursday, May 11, 1978.

[Whereupon, at 9:55 a.m., the hearing was recessed until Thursday, May 11, 1978.]

TO ESTABLISH RATIONAL CRITERIA FOR THE IMPOSITION OF CAPITAL PUNISHMENT

THURSDAY, MAY 11, 1978

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:10 a.m., in room 6226, Dirksen Senate Office Building, Hon. James Abourezk (acting chairman of the committee) presiding.

Staff present: Irene Emsellem, chief counsel and staff director and Robert Nichols, counsel, Subcommittee on Administrative Practice and Procedure; and Russell M. Coombs, Deputy Chief Counsel, subcommittee on Criminal Laws and Procedures.

Senator ABOUREZK (action chairman). The hearing will come to order.

On January 17, 1977, Gary Mark Gilmore was killed by a firing squad in Utah, and thereby became the first person to be legally executed anywhere in the Nation for nearly 10 years.

Gilmore's execution was made possible when the Supreme Court in *Gregg v. Georgia* ruled that the punishment of death does not invariably violate the Constitution.

After the *Gregg* decision, several States adopted death penalty statutes patterned after the one upheld in that case—a so-called "guided discretion" statute.

The Senate Judiciary Committee is now considering another of these statutes, modeled after the Georgia law, S. 1382.

I asked for this hearing today, because I believe that the focus of earlier hearings on this bill was far too narrow. The only issue discussed was whether the procedures contained in S. 1382 were constitutional.

No testimony was received on the more fundamental question of whether the Federal Government should have a death penalty law in the first place.

Thus, important relevant evidence was excluded from the record.

The Congress last held hearings on the merits of capital punishment 5 years ago in 1973.

Since then, a great amount of social research on the death penalty has added important knowledge on this subject. Innovative studies have been published on the deterrent effect of capital punishment, on the variables of the race of the criminal and the race of the victim, and on the effect of the jury selection process, among other topics.

Many of these subjects will be addressed by today's witnesses.

Besides excluding some important evidence, the limited scope of earlier testimony had another effect. It diverted attention from the fact that S. 1382 is not just a procedural bill; it is a bill to reinstate capital punishment for Federal crimes.

This means that the Judiciary Committee now has the solemn duty to decide whether or not capital punishment is good public policy. Only if we can answer yes to that question should we then proceed to examine the best way to impose the death sentence.

Capital punishment is no longer just an issue for the Courts; it is an issue before the Congress.

Before calling the first witness, I want to note that the record will remain open for 15 days after today to receive any additional written statements from interested parties.

Our first witness this morning is Hans Zeisel, professor emeritus of law and sociology at Chicago University.

STATEMENT OF HANS ZEISEL, PROFESSOR EMERITUS OF LAW AND SOCIOLOGY, UNIVERSITY OF CHICAGO, SCHOOL OF LAW, CHICAGO, ILL.

Mr. ZEISEL. Thank you.

Three times over the course of the years I have had an opportunity to study the problem of the death penalty from various aspects.

If I may, I will just state in two words my overall conclusion and then I will elaborate.

I have come to the conclusion that capital punishment is ineffective as a deterrent and may even be a counterdeterrent. That means as a net balance, it might create more homicides than it is alleged to deter.

It fulfills only one purpose; namely, it stills the desire for revenge. Or, as the proponents of capital punishment like to call it more civilly, retribution.

It upsets and distorts the normal course of the law enforcement process and is, for this and other reasons, impossible of equitable administration.

If I now may go into some details, first I will talk about the problem of deterrence and please interrupt me at any time.

Senator ABOUREZK. May I interrupt you now to ask you this.

Would you explain further what you mean by saying that the death penalty is perhaps responsible for creating more homicides than it prevents?

Mr. ZEISEL. The simple introduction to this problem is to point to the one execution that took place, Mr. Gilmore in Utah, who committed a completely senseless murder under circumstances which made him almost certain to be caught.

And I think by his subsequent behavior and the testimony of the court psychiatrist in Utah, it was a clear case of suicide by courtesy of the Utah firing squad.

I might say that there is a long psychiatric history which I have referred to in footnote 58 of the paper you have before you, which makes this indeed plausible.

Furthermore, and perhaps most important, the best of the econometric studies of the effects of the death penalty have shown

negative relationships between executions and the frequency of homicide.

So there is this triple evidence, each of which is by no means complete. But since it all points in the same direction, I would say that there are such cases.

Senator ABOUREZK. There is another facet of that particular issue which I want to ask you about.

At the time Caryl Chessman was executed, I am given to understand that there were a great number of killings and crimes of passion associated with publicity surrounding that particular execution. This leads me to ask: Do you believe that a State-sponsored execution incites the passion of people who might be led to commit a murder themselves?

Mr. ZEISEL. I don't have any specific knowledge of this sort.

Knowing what I do about the ineffectiveness of the death penalty, I just think it is a bad idea that the Government itself engages in killing in cold blood.

If it were to serve a real purpose and would really alleviate a problem, I might have second thoughts about it; but as matters stand, there is really no reason to advocate this.

Senator ABOUREZK. Do you think that it might serve the purpose of calming the blood anger of people who are not related to a murder victim but who might demand revenge? You hear that argument often from those who favor capital punishment.

Mr. ZEISEL. You hear it now in this tragic fashion of the parents of the victims of Sam in New York, who say they would give 10 years of their lives if they saw him burn.

It is to this type of feeling, essentially, to which the death penalty has to make a contribution—but nothing else.

It seems to me that this is more comparable to medieval desires to execute an animal who killed somebody because clearly such people are far beyond the human understanding and don't deserve to be judged on moral grounds but on medical grounds.

Senator ABOUREZK. Please continue.

Mr. ZEISEL. Let me first say that I think the whole problem of the death penalty rearose because of the sharp increase in violent crimes in the sixties.

It was the popular response to this increase in crime which put the death penalty on the map, partly of course because of the wrecking of the democratic system.

One is running again and again into legislators who say: My people demand the death penalty, and it is only democratic that I would follow this demand.

It is perhaps instructive to note what happened.

Back in 1967, there was still a minority of people in the United States for the death penalty. Now close to 70 percent are for the death penalty.

I might just add two interesting points. One is that, as on so many issues, there is a strong cleavage by race. The white population is 70 percent in favor of capital punishment. The black population is only 24 percent.

It is not an unimportant point, because it is one of the things that makes it so difficult to administer the death penalty and sets it apart from all other penalties.

There are people who think that prison is good or it is bad, but there is no basic difference within the American population on the merits or the necessity of prison, whereas there is a basic cleavage on capital punishment.

At the point of juror selection, this difference in public opinion begins to distort the process in a serious way.

Senator ABOUREZK. Would you elaborate on that—on the point of jury selection?

Mr. ZEISEL. Let me perhaps begin by saying at what point I became interested in this issue.

Back in the early fifties, New York City had something called a blue ribbon jury. These were specially selected and hand-picked jurors who were to serve, as the statute said, in cases where the death penalty was at issue and in so-called notorious cases.

The idea was that these were specially selected jurors, not necessarily open to the general prejudice which might arise in cases with much publicity.

One of the men convicted by such a blue ribbon jury appealed and the Supreme Court denied the unconstitutionality of the blue ribbon jury, with the argument that there is really no way of saying that such a jury would arrive at a different verdict from another and, therefore, there was no ground to deny it.

I learned at that point, by looking at the mode of selection, that one of the requirements of being a blue ribbon jury was that one had no scruples against the death penalty.

That is to say, preselecting the jurors for capital crimes because in capital crimes at that point the death qualification was necessary.

Any juror or prospective juror who would say he had scruples against the death penalty would be excused for cause anyway.

There were opinions expressed among the academicians and practitioners that jurors who are for the death penalty might indeed decide the issue of guilt differently from the jurors who are not.

Mind you that was the time long before the *Witherspoon* decision.

I then conducted a study in the criminal court of Chicago and Brooklyn, with the permission of the presiding justices, and what we did there was the following:

We asked the jurors who had served on ordinary cases, not necessarily capital cases, whether they had voted on the case. And if they said yes, we asked them how was the first ballot in this case? If it was unanimous, we weren't very much interested; but if it was split, as indeed it was in two-thirds of the cases, we asked them on which side they voted—for conviction or for acquittal. And they would tell us.

Then sometime later during the interview after asking all kinds of other questions so they would not notice the significance of the connection we were after we would ask them whether they had any scruples against the death penalty—the standard question at that time to qualify a juror for a capital crime.

Then we did something very simple. We tried to find out whether the jurors who were for the death penalty had a higher propensity

to vote with the prosecution in case the guilt issue was not so clear that we would get a unanimous verdict.

We found that on any level of likelihood of guilt—whether the first ballot was 11 to 1 or 10 to 2 or 9 to 3—all the way to 1 to 11—that the jurors who were for capital punishment were more likely to vote with the prosecution.

This quite clearly indicated that if you remove the jurors who have scruples against the death penalty, you impair the jury, which is to be fair and impartial, in the direction of prosecution proneness and you reduce the chances of the defendant from being acquitted or convicted of a lesser-included offense.

I published a paper on this, and the crucial result is on pages 29 and 30. I will probaby leave this with you, Senator.

Senator ABOUREZK. Yes; we would like to have it.

[Material appears on p. 144.]

Mr. ZEISEL. I should perhaps add this.

The present state of affairs is that after the *Witherspoon* decision of the Supreme Court, simply having scruples against the death penalty does not any longer provide a cause for excusing a juror for cause.

The situation now is such that only if a juror says that he will under no circumstances impose the death penalty, no matter what the facts of the case are, these jurors under the present law are excused for cause.

It is quite clear that the exclusion of these jurors impairs the chances of the defendant from being acquitted or convicted of a lesser included offense, quite aside from the fact that the same juries now have to decide on the death penalties under the newly enacted laws.

Senator ABOUREZK. That is an interesting point of view—extremely interesting.

Has that point of view ever been argued before the Supreme Court in a death penalty case?

Mr. ZEISEL. Yes.

Senator ABOUREZK. Asking for an outlawing of the death penalty, based on the tilting and the imbalance which results from that kind of jury selection?

Mr. ZEISEL. The last time the court acted on it was in the *Witherspoon* case. There it did not reach the question of whether a death-qualified jury really impairs the constitutional requirement. It merely said that it is unconstitutional to excuse jurors for cause who merely say they had scruples.

The issue which I have now posed to you—the post-*Witherspoon* issue—has not yet reached the Supreme Court. It was not brought before it.

And that, sooner or later, I am sure, will come before the court.

I might add a footnote here so as not to have my testimony impeached. The *Witherspoon* decision has a footnote which says: Under study by Professor Zeisel. It said that this is quite unsatisfactory.

Just for the record, I would point out that this study never was before the Supreme Court in the *Witherspoon* case. What there was a half-page memorandum which one of the lawyers put into one of

the briefs, because he had heard of my study and hoped to achieve something with it.

So, in any event, this footnote should not be considered a disparagement of this evidence.

The issue of bias of the death-qualified jurors on the issue of guilt is one of the few legal social science issues which has been investigated, at least six times by completely different investigators with completely different methods.

It has always led to the same finding, with extreme clarity.

Since social science evidence is hardly ever 100 percent conclusive and people who say, therefore, it is really irrelevant and like to cite such last doubts that one may have, which is about on the level of the reasonable doubt before one convicts a defendant, they point this out.

But if six or seven investigators all come to the same conclusion, then there cannot be any reasonable doubt left that this is a true issue and that this is a true finding.

I might add, since you were interested, Senator, how the law in fact operates is as follows:

Although the *Witherspoon* says only such jurors may be excused from jury duty for cause that would under no circumstances give the death penalty, what happens in capital trials is that the jurors are asked first, before they are asked this ultimate question, do you have any scruples against the death penalty. And some of them raise their hands. Then the judge, or whoever does the questioning, would ask: Is anyone so much against the death penalty that he wouldn't give it under any circumstances? And then one or two raise their hands. And they are excused.

But at that point, the prosecutor knows his enemies. And on the peremptory challenges, he throws the rest of them out.

So much about the jury selection problem.

Is it alright if I now go back to the deterrence issue?

Senator ABOUREZK. May I ask a question on deterrence?

I guess it doesn't matter how we elicit your testimony—whether you volunteer it or whether I do it by questions.

But if I miss anything, I hope you will fill it in.

Some people dismiss the value of studies on the deterrent effect of the death penalty by saying that the statistics which are used are not reliable.

For example, it is said that those who are, in fact, deterred by the death threat do not commit murder and are thus not included in the statistics.

What is your reaction to that?

Mr. ZEISEL. I take it, Senator, that you are paraphrasing somebody else's view, because it really has no merit whatsoever. It is the standard objection to any statistics, which sits deep in people who don't want to be examined as to the correctness of their views, that any statistics are really faulty and the whole joke about statistics and lies and so forth.

The actual research on the effectiveness of the death penalty is infinitely more sophisticated than such a statement would allow to infer.

Indeed, the paradigm of investigating the effectiveness of the death penalty rests on an idea of a controlled experiment, which would look as follows:

You divide the population into two parts by some device. For instance, by saying that every person who was born on an even day and commits a murder is subject to the death penalty and every person who was born on an odd day and commits a murder is only subject to the maximum penalty of life.

If you could make such an experiment, which of course one can't, you could then observe whether indeed the persons who do not face the death penalty would commit more murders than the others who would only be threatened by the life sentence.

Although this is an impossible experiment, it is indeed the foundation of all research. All the research done tries to approximate and simulate this experimental situation.

If you care to look at figure 1 which appears below, you will see a diagram which outlines the research problem.

Would Be Murderers
under

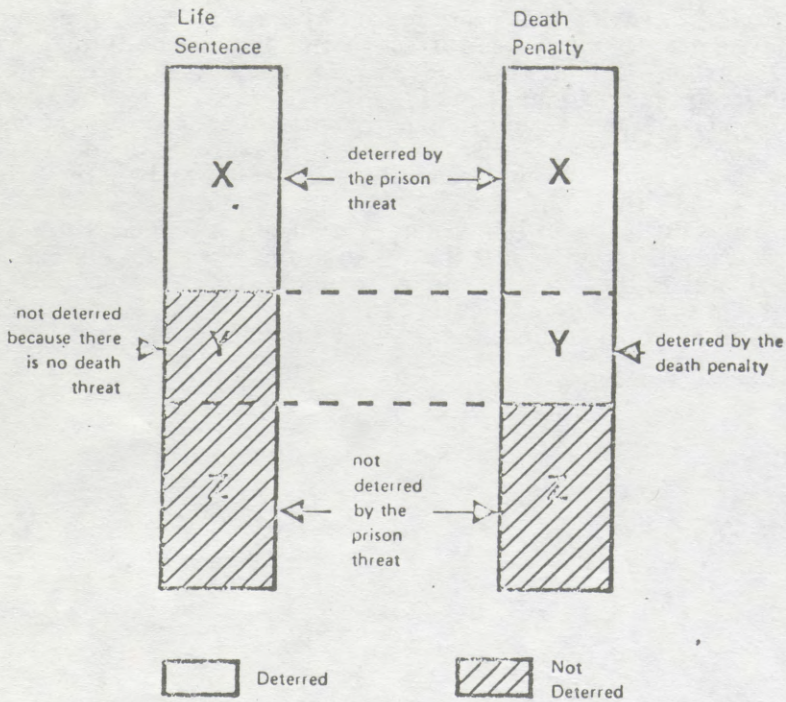


FIG. 1. Experimental paradigm showing a deterrent effect of the death penalty over the life sentence.

If you assume there would be murderers in the population—I think we are all happy to know that the vast majority of people do not belong in this category. That means that we wouldn't commit murder, even if there were no criminal sanction against it.

But among these would-be murderers for purposes of finding out whether there is a deterrent effect of the death penalty vis-a-vis the life sentence, you have to divide the population into three groups.

Those who are deterred by the prison threat: They don't commit murder, and they are the ones who are not even in the statistics.

Then at the other end, you have the people who commit murder under any circumstances; namely, those who are not even deterred by the death penalty. Of course, they could be both in the non-death-penalty and in the death-penalty group.

The crucial question is that if there is no death penalty, would there be a group of people who do commit murder because there is no death penalty, but would not have done it if there were a death penalty?

That means: Are there people who say, I will commit the murder if all I risk is a life sentence, but who would not commit the murder if there is a death penalty?

That is the narrow and precise aim of all the efforts to find out whether there is a deterrent effect.

The first efforts to find out whether there is such a deterrent effect went along these lines.

We have two adjacent States like Illinois and Michigan. Michigan doesn't have the death penalty and Illinois does. They both have a major city of somewhat equal structure.

If there were a deterrent effect of the death penalty, one should really expect more murders in Michigan than in Illinois.

Indeed, one can do that for all the non-death-penalty States in the United States, and Prof. Thorston Sellin has done this.

I refer now to table 1 which is a reproduction from my paper which appeared in the "Supreme Court Review." It shows, indeed, that if you compare the adjacent States with capital punishment with the States in which there is none, there is not the slightest difference between the two States.

TABLE 1—HOMICIDE DEATH RATES IN CONTIGUOUS STATES WITH* AND WITHOUT CAPITAL PUNISHMENT, 1940-55
(Average annual rate per 100,000 population)

Midwest					
Group 1		Group 2		Group 3	
Michigan	3.5	Minnesota	1.4	North Dakota	1.0
Indiana*	3.5	Wisconsin	1.2	South Dakota*	1.5
Ohio*	3.5	Iowa*	1.4	Nebraska*	1.8
New England					
Group 4			Group 5		
Maine	1.5	Rhode Island	1.3		
New Hampshire*	0.9	Massachusetts*	1.2		
Vermont*	1.0	Connecticut*	1.7		

The argument that was raised against such allegedly simple-minded, but indeed quite correct, approach to the problem is: But aren't these States very different?

And there may be other factors which cause the nondifference in the homicide rates.

So investigators took these States—say, Michigan, Indiana, and Ohio—I took only this example, but the study was done for others—in order to see how they compare on the homicide rates and the probability of apprehension and the probability of conviction, what is the unemployment rate, and what is the proportion of young people.

It turns out, if one carefully looks into these adjacent States, that they are indeed very comparable in all important respects.

Therefore, this is indeed very sound evidence. Let me say at this point, modestly, that there is no visible deterrent effect of the death penalty on this level.

The second effort—and I am talking about types of efforts; these were multiplied in many ways in different countries—that was made, stemmed from this consideration:

If a State abolished capital punishment or reintroduces it or introduces it, one should really be able to compare the homicide rate before abolition and after abolition.

Again, if you think of this experimental set of comparing populations with the death penalty and without the death penalty and then see whether the death penalty indeed deters by producing a smaller homicide rate——

Again, Professor Sellin did this for all the States, and we have variegated histories. Whenever there was a group neighborly feeling, a State would abolish capital punishment. And then where there was a bad rape murder, they would reintroduce it.

Legislators, as the Senator I am sure knows, State legislators especially, are sometimes quick to act on such matters.

So these comparisons were made.

Again, nowhere was there found a deterrent effect for capital punishment.

These studies were made very carefully, not only by looking at the State that abolished capital punishment but at the neighboring States.

I have a second chart here (which is on page 323 of my published article) which shows three adjacent States and their homicide rates (see fig. 2 below). One of them has abolished capital punishment midway. But you can see at a distance perhaps, better than close by, that you could not in any way pick out the State which has abolished the capital punishment rate.

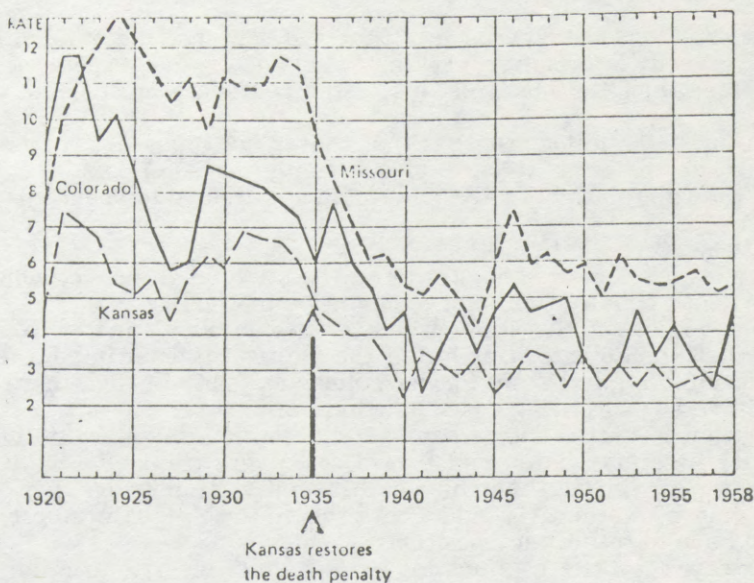


Fig. 7. Homicides per 100,000 population in Missouri, Colorado, and Kansas, 1920-58.

Indeed, this is what is powerfully shown by later charts which I am going to present in a minute. The development of the homicide rate, up or down, is influenced by many factors. A few of them we know, but most of them we are utterly ignorant of, as we are about all the causes of crimes.

We are increasingly sure that the death penalty has nothing to do with it.

I might insert one thought here. I was asked it by some reporter who came around when I spoke about the comparison of the death penalty with the life sentence.

The first answer you always get is: But aren't they put out on the street shortly after they have been incarcerated, and don't they have the right to be before the parole board after a few years?

Of course, the answer is yes. But the people who are candidates for the electric chair—

Coming from Illinois, I recall Mr. Harrison and Mr. Speck and now Mr. Sam Berkowitz in New York.

These people never see the light of day. The one exception was Mr. Leopold after 35 years.

So when one talks about the deterrent effect of the death penalty, one should be very precise, knowing that one talks about the difference between life imprisonment or a very, very long life sentence and the death penalty.

It makes it psychologically more understandable for the common man and woman that the death penalty is not the deterrent which people believe it is.

The commonsense approach is that if a sentence deters at all—and everybody knows even parking tickets deter and speeding tickets deter—then the most terrible of the sentences must deter the most.

Of course, the fallacy there is that that is not the issue. The issue is whether the most terrible of the sentences deter significantly more than the next most terrible—namely, to have to spend life in prison.

So these were the first efforts.

Now let me come to the efforts on the study of the effectiveness of the death penalty thorough econometric methods.

We all know of the study which gained publicity in the *Gregg* case when the Solicitor General of the United States printed a not-yet-appeared study by my former colleague, Isaac Ehrlich, here at the University of Chicago. He isn't there any more.

This purported to show that every execution saves eight lives.

That's a serious claim, and I want to be very frank. If I were in the least convinced that the death penalty would save lives—I don't know whether I would draw the line at eight or more—I would have to rethink my position.

Anyway, the brief was put in, I think quite clearly, in order to show, as lawyers put it, that there are still two sides of the issue and that the Supreme Court would then be able to say, as indeed they did, that if the professors can't get along we the judges can substitute our opinions for them, as indeed they did.

Normally, if a professor makes a study, maybe another professor will read it. But if a study was done in order to influence the course of the law on such an issue—that means if it becomes, in a real sense, a life and death issue—it has excited quite a number of other academicians.

Something happened in the social sciences which has never happened before but which is an everyday occurrence in the natural science.

When somebody says he has conducted an experiment and he has found something which has not been suspected, it is of course immediately repeated. And only if it holds up under repetition, will the academic community agree that this is indeed a finding.

This same thing has happened here.

I do not want to mention the many papers in which this was done. I just want to say that the first effort to replicate and analyze this study was made by a study team which was headed up by the then-president of the American Economic Association, Prof. Lawrence Klein.

Senator ABOUREZK. This is an extremely interesting discussion, but I have two other witnesses today.

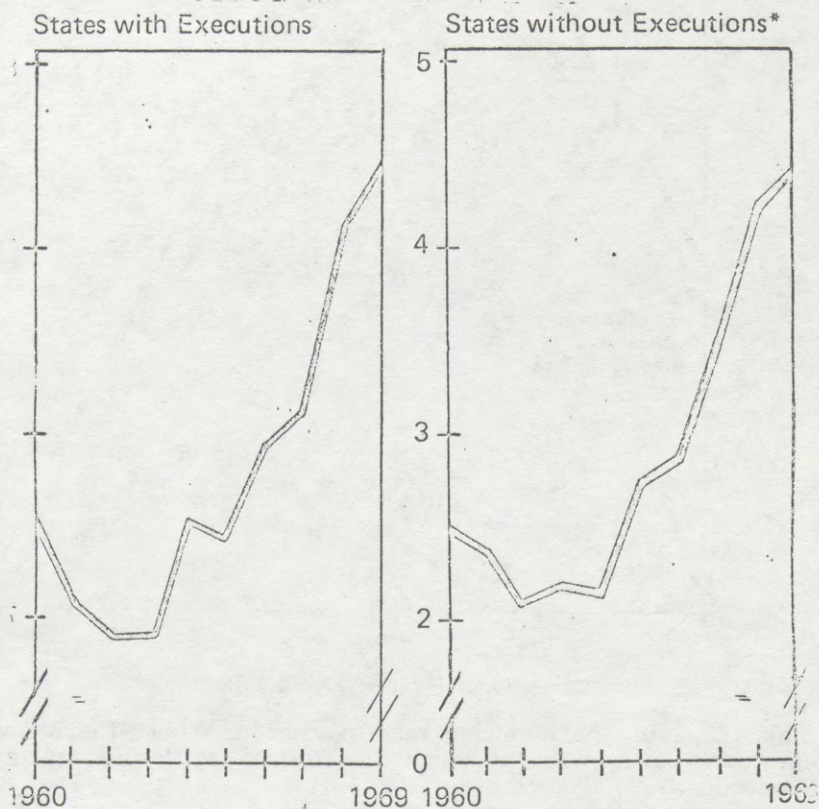
Mr. ZEISEL. Then let me just say that all efforts to duplicate Professor Ehrlich's findings failed. There was even an effort made to see whether the phenomenon can be duplicated on Canadian data. Canada too has abolished the death penalty. And they failed.

Let me just show you two more graphs, which in a way very powerfully show how completely independent this problem is from the death penalty.

Figure 3 is a reproduction of a chart which is in my published paper which shows the increase during the sixties of the homicide rate in States with and without capital punishment.

I challenge you at a distance to say which were the States with and without capital punishment.

As you see, the rate went up in precisely the same proportion.



* Abolition states and 6 states with no executions since 1948

FIGURE 3.—Homicide rates.

As my last point on deterrence, I would like to leave this with you.

I had an opportunity some months ago in the habeas corpus proceedings in Florida to testify on the nondeterrent effect of the death penalty. At that point I was cross-examined by the attorney general of Florida who is now running for Governor, very much on the death penalty ticket, if I may say this.

He confronted me on cross-examination—not as nicely, but in principle—with this graph, figure 4.

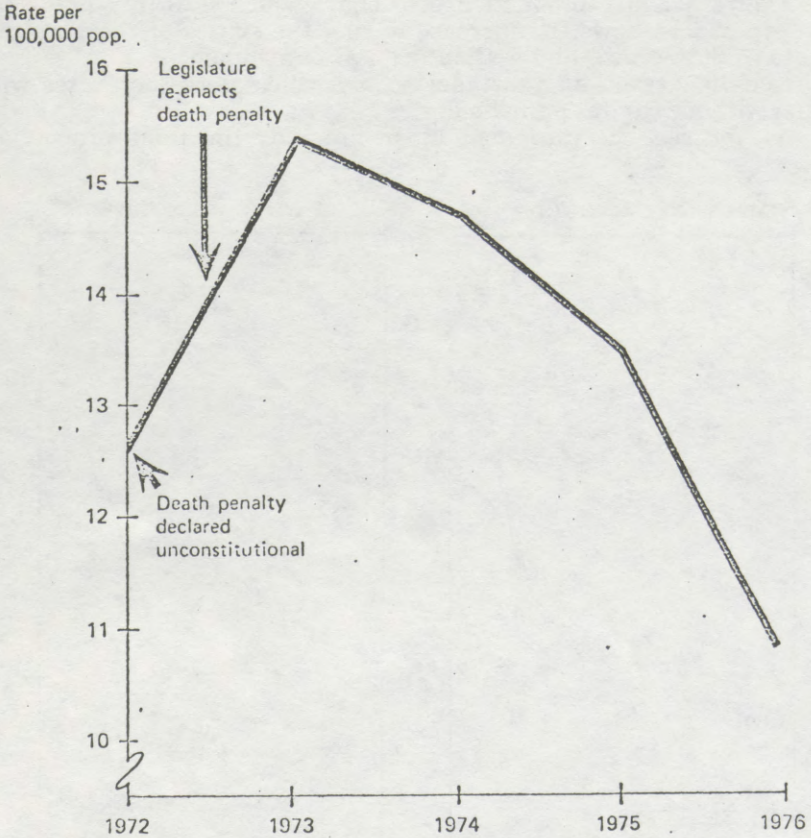


FIGURE 4—Homicide rate in Florida 1972-76

This is, again, the homicide rate in Florida. Where the arrow comes down is the point at which the Florida Legislature enacted the new death penalty statute.

Then he said: Do you aim to say, Professor, that this enormous decline, the first decline in many, many years of the death penalty, has nothing to do with our having enacted the death penalty? I gave him a preliminary answer, and I have now a more definite answer.

Figure 5 shows the development of the homicide rate in the States that did not have a capital punishment statute—exactly for the same time period and exactly to the same scale.

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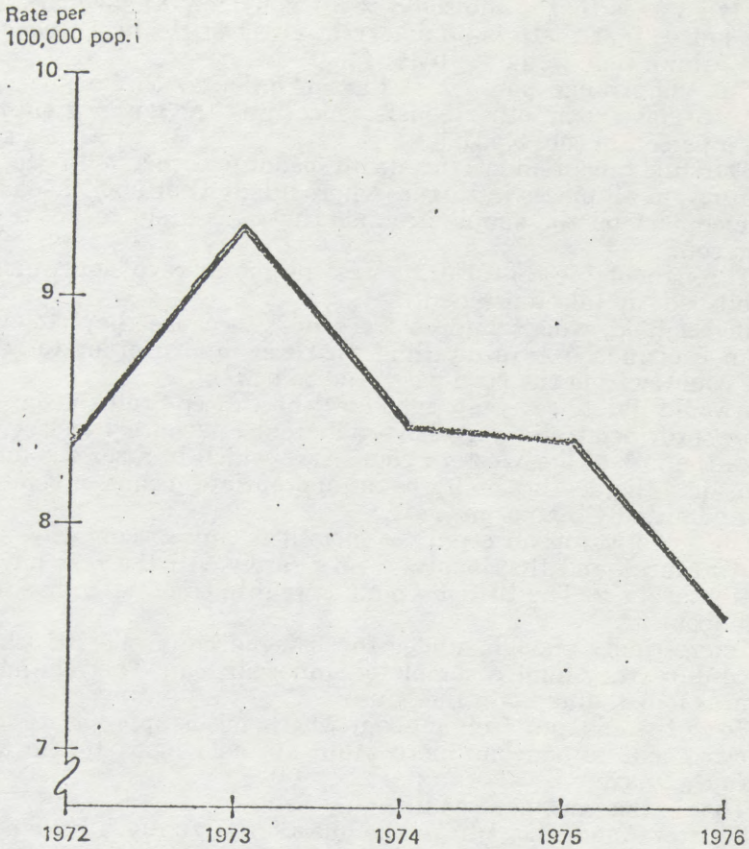


FIGURE 5—Homicide rate in States without death penalty 1972-76.

Senator ABOUREZK. Does figure 5 represent the experience of a nearby State?

Mr. ZEISEL. No. These were all the States that didn't have the death penalty.

Senator ABOUREZK. It is a composite of all the abolitionist States then?

Mr. ZEISEL. Yes.

After having all that said, Senator, I think I should like to make just one brief remark.

Historically speaking, the question of deterrence has never had any clear connection with the abolition of the death penalty.

I should warn you that it is really a method of rhetoric. Nobody really dares talk about revenge, which is the real issue.

Even the Supreme Court talks about retribution and the moral feeling of the community only in parentheses.

My guess is that if one could really convince the lawmakers and the judges that there is no deterrent effect of the death penalty, I don't think they would really be for it.

But the strange paradox is that in order to be convinced, you have to have some other beliefs concerning the government's killing a person in cold blood.

The first abolition of the death penalty occurred in the 12th century, of all places in Russia, where a lady Czar abolished capital punishment on the simple grounds that it is a sin to kill a christian soul.

Throughout the centuries, it was the moral revulsion which has abolished capital punishment.

In England, when children were hung because they stole more than 5 pounds from a dwelling. In Germany, in order to remove the country from the Nazi past. And so it went.

I would like to say that right now the United States is one of its more provincial and regressive adherents. We are the last country—the last of the Western countries—which in a serious manner considers the death penalty as an appropriate means of combating our admittedly high crime rate.

Only two European countries have it in any serious way—Spain and France—and they apply it very rarely. All the rest have forgotten about it. The British Commonwealth, essentially, has forgotten about it.

Interestingly enough, under the safeguards of the British trial procedure, they hung a completely innocent man. The real murderer was four flights up in the house.

So in the end, our feeling about whether it is appropriate for the Government to add one more killing in cold blood to the all too many we have——

That is the issue as I see it.

Senator ABOUREZK. I have one question. Actually, I have a lot of questions that we don't have time to pursue because of the other witnesses.

Your statement is that it has been throughout history moral revulsion which has abolished the death penalty, rather than statistics and so on.

We are now witnessing a new drive to reestablish the death penalty in the United States. What does that say for the moral character of the country at this point in history?

Mr. ZEISEL. We are the only country which has 50 million handguns distributed among civilian hands. We are the country which probably watches more homicides every day on television as a matter of course.

We have a very fierce tradition. I only read yesterday of an 1810 Tennessee statute that if you stole a horse you were whipped and if you stole a second horse, you would be hung.

That is not western justice. That was the Tennessee statute. So it was not an eye for an eye. It was a life for a horse. And that is only very recent history.

Well, you know this country better than I do. I am only an immigrant.

Senator ABOUREZK. You are only a poor immigrant. [Laughter.]

I have heard that before. Are you also a country lawyer, Professor? [Laughter.]

I am very grateful for your appearance and your testimony. I think it has been an excellent contribution to this hearing record. I will look forward to reading through the materials you have left.

I want you to know we are very grateful for it.

Mr. ZEISEL. Thank you very much.

Senator ABOUREZK. Our next witness is Prof. Hugo Adam Bedau, chairman of the Department of Philosophy, Tufts University, Medford, Mass.

I would like to welcome you to this hearing. We appreciate you coming.

STATEMENT OF PROF. HUGO ADAM BEDAU, CHAIRMAN, DEPARTMENT OF PHILOSOPHY, TUFTS UNIVERSITY, MEDFORD, MASS.

Mr. BEDAU. Thank you very much. It is a pleasure to be here.

I have a statement which I believe you have before you. I am sure we won't have time for me to present it all, but I hope it can all be incorporated into the record.

Senator ABOUREZK. Your statement will be included in full in the record as though you had read it.

[Material to be supplied follows:]

Testimony

of

HUGO ADAM BEDAU

Austin Fletcher Professor of Philosophy

Tufts University

Medford, Massachusetts

on

S. 1382

A Bill to Establish Rational Criteria for

the Imposition of the Sentence of Death,

and for Other Purposes,

Subcommittee on Administrative Practice and Procedure

Senate Judiciary Committee

May 11, 1978

Senate Office Building, Rm 6226

10:00 a.m.

Although the question of the death penalty under federal law raises many important legal, moral, and empirical questions, my remarks here are confined to examining only three of these questions. One is, What role should retribution play in our thinking about capital punishment? The second is, How strong is the evidence that the death penalty is administered with racially discriminatory impact? I shall also consider the question, How effective an alternative to the death penalty is long term imprisonment?

I. Retribution

Some critics of the death penalty denounce it on the very ground on which others defend it: its retributive character. Some think that since the death penalty is retributive, and retribution is an entirely illegitimate purpose for punishment, therefore the death penalty cannot be justified. Others believe that retribution is the chief function of punishment, and that a refusal to punish murderers and other heinous criminals with death is a failure to provide adequate retribution. This controversy is worth resolving, if for no other reason, because both the Solicitor General¹ and the Supreme Court² have appealed to retribution in their recent arguments against the unconstitutionality of capital punishment.

My own view--and I think it is the dominant one today among philosophers and other students of the theory of punishment--is that justified punishments have some retributive features, but the death penalty is not the only way to obtain them.³

There seem to be several retributive features of punishment, all of which are built around the idea that a proper punishment "pays back" to the offender something like what he inflicted on the victim: (1) crime must be punished because it is unfair to the law abiding and to the innocent victim not to do so

(the principle of fairness); (2) punishment must be an infliction of hardship, suffering, or deprivation on the offender (the principle of deprivation); (3) the severity of punishments must be proportional to the gravity of the offense (the principle of proportionality); and (4) only a severe penalty for a grave crime can adequately express society's abhorrence at the offence (the principle of denunciation).

Opponents and defenders of the death penalty need not dispute any of these principles. Obviously, both sides agree on principle (1); only those who reject punishment altogether would disagree. Likewise with principles (2) and (4). Long term imprisonment (with or without eventual release) is certainly a deprivation and a severe one. So a defense of the death penalty on retributive grounds very quickly reduces to the view that principle (3), the principle of proportionality, requires capital punishment. Let us look at this claim more closely.

Traditionally, the principle of proportionality has been understood in terms of the doctrine of retaliation in kind, lex talionis. However, on this interpretation, as it has often been pointed out, (a) no crime other than criminal homicide can be justifiably punished by death on retributive grounds, and (b) all inexcusable and unjustifiable homicides will require the death penalty. Furthermore, reflection will show that (c) current legal methods of inflicting the death penalty are bound to be inadequately retributive in some cases. All these conclusions should be as troublesome for defenders of the death penalty as they are for its opponents.

(a) The punishment of crimes other than murder. First, not even the biblical world limited the death penalty to the punishment of murder. Many other non-homicidal crimes also carried this penalty (e.g., kidnapping, witchcraft, cursing one's parents).⁴ In our recent history, persons have been

executed for aggravated assault, rape, kidnapping, armed robbery, sabotage, and espionage.⁵ It is not possible to defend any of these executions (not to mention some of the more bizarre capital statutes, like the one in Georgia prior to 1966 that provided an optional death penalty for desecration of a grave) on grounds of just retribution. This entails that either such executions are not justified or that they are justified on some ground other than retribution. In actual practice, few if any defenders of the death penalty have ever been willing to rest their case entirely on the moral principle of just retribution as formulated in terms of "a life for a life." (The philosopher Immanuel Kant seems to have been the conspicuous exception.) Most defenders of the death penalty have implied by their willingness to use executions to defend limb and property, as well as life, that they did not place much value on the lives of criminals when compared to the value of both lives and things belonging to innocent citizens.

(b) The punishment of criminal homicide. Our society for several centuries has endeavored to apply the death penalty only to some, not to all, criminal homicides. (Even Kant took a surprisingly casual attitude toward a mother's killing of her illegitimate child. "A child born into the world outside marriage is outside the law..., and consequently it is also outside the protection of the law.")⁶ In this country, the development nearly two hundred years ago of the distinction between first- and second-degree murder was an attempt to narrow the class of criminal homicides deserving of the death penalty.⁷ Yet those dead owing to manslaughter, or to any kind of unintentional, accidental, unpremeditated, unavoidable, unmalicious killing are just as dead as the victims of the most ghastly murder.

Both the law in practice and moral reflection show how difficult it is to identify all and only the criminal homicides that are appropriately punished

by death (assuming that any are). Individual judges and juries differ in the conclusions they reach. The history of capital punishment for homicides reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die.

Benjamin Cardozo, a Justice of the United States Supreme Court fifty years ago, said of the distinction between degrees of murder that it was

...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 diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death.⁸

Similar scepticism has been registered on the reliability and rationality of death penalty statutes which give the trial court the discretion to sentence to prison or to death.

As Justice John Marshall Harlan of the Supreme Court observed a decade ago,

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history.... To identify before the fact those characteristics of criminal homicide and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.⁹

The abstract principle that the punishment of death best fits the crime of murder turns out to be extremely difficult to interpret and apply.

If we look at the matter from the standpoint of the actual practice of criminal justice, we can only conclude that "a life for a life" plays little or no role whatever. Plea bargaining, even where murder is concerned, is widespread. Studies of criminal justice reveal that what the courts (trial or appellate) decide on a given day is first-degree murder suitably punished

by death in a given jurisdiction could just as well be decided in a neighboring jurisdiction on another day either as second-degree murder or as first-degree murder but without the death penalty.¹⁰ The factors that influence prosecutors in determining the charge under which they will prosecute go far beyond the simple principle of "a life for a life." Nor can it be objected that these facts show that our society does not care about justice. To put it succinctly, either justice in punishment does not consist of retribution, because there are other principles of justice; or there are other moral considerations besides justice which must be honored; or retributive justice is not adequately expressed in the idea of "a life for a life."

(c) The death penalty as insufficiently retributive. Given the reality of horrible and vicious crimes, one must consider whether there is not a quality of unthinking arbitrariness in advocating capital punishment for murder as the retributively just punishment. Why is death in the electric chair or the gas chamber or before a firing squad or on a gallows the exact requirement of retributive justice? When one thinks of the savage, brutal, wanton character of so many murders, how can retributive justice be served by anything less than equally savage methods of execution for the murderer? From a retributive point of view, the oft-heard complaint, "Death is too good for him!" has a certain truth. Yet few defenders of the death penalty are willing to embrace this consequence of their own doctrine.

The reason they do not and should not is that, if they did, they would be stooping to the methods and thus to the squalor of the murderer. Where criminals set the limits of just methods of punishment, as they will do if we attempt to give exact and literal implementation to lex talionis, society will find itself descending to the cruelties and savagery that criminals employ. But society would be deliberately authorizing such acts, in the cool light of

reason, and not (as is often true of vicious criminals) impulsively or in hatred and anger or with an insane or unbalanced mind. Moral restraints, in short, prohibit us from trying to make executions perfectly retributive. Once we grant the role of these restraints, the principle of "a life for a life" itself has been qualified and no longer suffices to justify the execution of murderers.

Other considerations take us in a different direction. Few murders, outside television and movie scripts, involve anything like an execution. An execution, after all, begins with a solemn pronouncement of death sentence from a judge, followed by long detention in maximum security awaiting the date of execution, various appeals, perhaps a final sanity hearing, and then "the last mile" to the execution chamber itself. As the French writer Albert Camus has remarked,

For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.¹¹

Most popular discussions of the death penalty and retribution are spoiled by a failure to understand the role of the principle of proportionality. This happens whenever it is asserted that murderers deserve death, as though this were a self-evident truth. It is not. If murderers deserve to die, then it is because a general principle of proportionality in punishment leads to this conclusion. Lex talionis is such a general principle. But, as we have seen, it has objectionable consequences if taken literally and applied uniformly throughout the construction of a penalty schedule. The only rational response, therefore, is to swallow these undesirable consequences out of respect for consistency, or to reject lex talionis and find some other way to interpret the principle of proportionality, even if it turns out that one can no longer insist that murderers deserve to die.

(d) Retribution without execution. This leads us to reflections regarding principle (4), the principle of denunciation. The most famous recent expression of this view we owe to an English judge, Lord Justice Denning, when he said

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.¹²

The difficulty, however, is that actual executions do not always have this sobering and admonitory effect. Instead, other effects triumph, as the recent novel about executions in Florida, James McLendon's Deathwork (1977), vividly illustrates. Disgust, fear, horror, terror, nausea, revulsion, stupefaction, shame, self-loathing--these are the emotions and feelings inspired in those who witness modern executions, if we may believe the testimony of most observers.¹³ (In an earlier day, equally inappropriate reactions were generated among those present at public executions; see the recent treatise by Michel Foucault, Discipline and Punish (1977).) But these effects so thoroughly defeat the principle of denunciation that we must either abandon it or adopt methods of punishment less savage than gas chambers, electric chairs, and firing squads.

What, then, emerges from our examination of retributive justice and the death penalty? If retributive justice is thought to require lex talionis, all one can say is that this principle has never exercised more than a crude and indirect effect on the actual punishments meted out. Other principles interfere with a literal and singleminded application of this one. Some murders seem improperly punished by death at all; other murders would require methods of execution too horrible to inflict; in still other cases any possible execution is too deliberate and monstrous given the nature of the

motivation culminating in the murder. Proponents of the death penalty rarely confine themselves to supporting the death penalty only for all murders.

But retributive justice need not be thought to require lex talionis. One may reject that principle as too crude and still embrace the retributive principle of proportional severity of punishments to the gravity of the offense. Even though one need not claim that life imprisonment (or any kind of punishment other than death) "fits" the crime of murder, one can claim that this punishment is the proper one for murder. To do this, the schedule of punishments accepted by society must be arranged so that this mode of imprisonment is the most severe penalty used. Opponents of the death penalty need not reject the principle of proportionality, just as defenders of the death penalty need not accept lex talionis.

In recent years, there has been a considerable upsurge of interest in retributive principles of punishment among those who have given serious thought to the injustices done in the name of deterrent and rehabilitative principles. Perhaps the leading contributions have been by Andrew von Hirsch, Doing Justice (1976) and the Twentieth Century Fund Task Force, Fair and Certain Punishment (1976). It is all the more important, therefore, to notice that none of these "new retributivists" supports the death penalty. None believes that justice in punishment requires society to have recourse to capital punishment for any crimes. I concur with this conclusion.

There are several reasons why this conclusion is all but inevitable. The most important is the belief that justice--which is the sole source of whatever is legitimate in retribution--is also the source of other moral principles that are in practice incompatible with capital punishment. Chief among these principles is the requirement of equal treatment, and the more so as the severity of punishments increase. Our Constitution itself recognizes

the priority in justice of equality over retribution, for it contains no explicit principles of retributive punishment, whereas the Fourteenth Amendment specifically requires "equal protection of the laws."

I conclude from this examination that it is virtually impossible to construct a reasonable defense of the death penalty on the ground that it is a requirement of justice and just retribution.

II. Racial Discrimination

The chief complaint against the death penalty in the United States during the past generation, both in litigation before the federal courts and in all other forums as well, has been the objection that this penalty as administered is either arbitrary or discriminatory, and in either case an indefensible violation of equal justice.

Chief among its discriminatory features has been the fact that capital punishment falls with an unfairly high probability upon racial minorities, chiefly black Americans of African descent. Although this evidence has never been presented in detail directly to the Senate,¹⁴ it has been made available to Congress,¹⁵ the federal courts,¹⁶ scholarly audiences,¹⁷ and some of it is even available in Capital Punishment, the annual bulletin published by the Department of Justice in its series of National Prisoner Statistics.

(1) Race of Persons Unlawfully Executed. The legal system in a community is never likely to perform in ways markedly out of step with the prevailing moral sentiments, and the racist aspects of the death penalty are foreshadowed in the ugly history of lynching. From records kept by the Tuskegee Institute, we learn that between 1882 and 1964, a total of 4,743 persons were illegally executed by lynching in the United States. Of these, 3,446 involved black victims.¹⁸ Although more whites than blacks by a wide

Table I

VICTIMS OF LYNCHING IN THE SOUTH,
1882 to 1964

<u>State</u>	<u>Race of Victim</u>	
	<u>White</u>	<u>Black</u>
Alabama	48	299
Arkansas	58	226
Florida	25	257
Georgia	39	492
Louisiana	56	335
Mississippi	42	539
North Carolina	15	86
South Carolina	4	156
Tennessee	47	204
Texas	141	352
Virginia	<u>17</u>	<u>83</u>
TOTAL	492	3,029

Source: A. D. Grimshaw, ed., Racial Violence in the United States (1969), p.57.

margin were lynched in a few states (e.g., in Oregon 20 whites have been lynched, only 1 black; in California, 41 whites and 2 blacks), and the same small number of each race in a few states (New York and New Jersey each lynched 1 white and 1 black), in all the Southern states the overwhelming preponderance of lynch victims were black. (See Table I)

(2) Race and the Death Penalty for Rape. The death penalty for rape was declared unconstitutional in 1977,¹⁹ and no one is under death sentence for this crime. Nevertheless, it is instructive to examine the tremendous differential impact this penalty had for black and white offenders, particularly because several states re-enacted capital statutes for rape between 1972 and 1977 after the predecessor statutes were invalidated by Furman v. Georgia in 1972.

Since 1930, 455 persons were executed for the crime of rape. Of these, 48 (10.5%) were white; 405 (89%) were black; and 2 (0.5%) were of other races.²⁰

These figures are much more significant and alarming when they are related to the race of the victim. A study of six states (Arkansas, Florida, Georgia, Louisiana, South Carolina, Texas) from 1945 through 1965 showed that a black male defendant convicted of raping a white female victim was far more likely to be sentenced to death than any other racial combination of offender and victim. More than a third (113 of 317) of the blacks convicted of rape were sentenced to death, whereas only one in fifty of the other three racial combinations resulted in a death penalty. (See Table II) Yet inter-racial rape of white victims by black offenders constituted only about a quarter of all the rapes examined (317 out of 1230).²¹

(3) Race of Persons Legally Executed. Under federal law since 1930 a total of 33 persons have been executed, including 28 white and 3 black. The last federal execution was in 1963.²² These numbers are perhaps too small to be significant.

Table II

RACIAL COMBINATIONS OF CONVICTED RAPE OFFENDER AND VICTIM
BY TYPE OF SENTENCE^a

1945-1965

	Death Sentence		Other Sentence		Total	
	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>
Black Offender/ White Victim	113	36	204	64	317	100
Other Racial Com- binations of Of- fender and Victim	<u>19</u>	2	<u>902</u>	98	<u>921</u>	100
Total	132		1,106		1,238	

$$\chi^2 = 275.72; \quad p < 0.001$$

Source: The Annals, May 1973, Table 2, p. 129

^a

Includes Arkansas, Florida, Georgia, Louisiana, South Carolina, Tennessee

Although only one person has been executed in the past thirteen years, and he was white (Gary Gilmore, Utah, January 1977), since 1930 a total of 3,860 have been lawfully executed. Of these, 1,752 were white offenders and 2,066 were black. Black offenders thus constitute 54% of all persons executed, whites 45%, and 1% other races.²³

During the past century, among nearly 6,000 recorded executions under state authority, "blacks were executed for less serious crimes and crimes less often receiving the death penalty...than whites,...blacks were often younger on the average than whites, whatever their offenses and whether or not they had appeals; and ...blacks were more often executed without appeal, whatever their offense and age at execution."²⁴

(4) Race of Persons Sentenced to Death. The latest unofficial figures for persons currently under sentence of death show that as of mid-April 1978, there are 493 persons on "death row" in 25 states. Of these, 235 (48%) are black, 240 (49%) are white, and the remaining 3% are American Indian and Hispanic.²⁵

These figures are of interest when compared with those available for two recent prior dates, mid-1972, when Furman v. Georgia brought to an end several years of litigation on the constitutionality of the death penalty; and mid-1976, when nearly four years of mandatory death penalties enacted in the wake of Furman were declared unconstitutional by the ruling in Woodson v. North Carolina. (Table III) As these data show, the only time in the past six years when the proportion of whites on "death row" significantly exceeded the proportion of blacks was under the short-lived mandatory death penalties of the mid-1970's. Discretionary death sentencing, whether of the older "unguided" variety prior to Furman, or the new "guided discretion" authorized under the rulings of Gregg v. Georgia, Jurek v. Texas, and Proffitt v. Florida, seems to allow the proportion of

Table III

PERSONS UNDER DEATH SENTENCE IN THE UNITED STATES
1972 to 1978

Date	Race of Persons on Death Row						Total
	White		Black		Other		
	Number	Percent	Number	Percent	Number	Percent	
June 29, 1972	267	42	351	56	13	2	631 ^a
July 2, 1976	214	51	179	42	30 ^d	7	423 ^b
April 15, 1978	240	49	235	48	18	3	493 ^c
Total	721	46.6	765	49.4	61	4	1,547

^a CALM Newsletter, October 1972.

^b NAACP Legal Defense Fund Memorandum, "Death Row Inmates," November 11, 1976.

^c NCADP Release, "Death Row Census," April 15, 1978.

^d Includes 9 for whom race is unknown.

blacks on "death row" to increase.

(5) Homicide Rates Among Blacks and Among Whites. Criminologists uniformly report that for "...homicide and other assaultive crimes in the United States...Negroes have rates between four and ten times higher than whites."²⁶ This fact is occasionally cited to explain away the high proportion of blacks on "death row" during recent years, as well as the historically greater numbers of blacks than whites who have been legally executed.

But most of these victims of homicide are themselves black if the offender is black, and white if the offender is white; inter-racial homicide is much rarer than the intra-racial variety.²⁷ The most recent reports indicate that in New York, for instance, "78.7 percent of all homicides involved persons of the same racial background."²⁸ Furthermore, since blacks constitute no more than 10 to 15 percent of all Americans, the differential impact of the death penalty on blacks cannot be explained solely by reference to their higher homicide rates. The generally greater poverty among blacks than among whites nationally is also, no doubt, a factor in the equation that explains the high incidence of blacks on "death row".²⁹ Still, it is likely that the factor of race also plays a direct role.

(6) Current Death Sentences and Race of Victim and Offender. This conclusion is confirmed by the most recent studies being conducted under the direction of Dr. William Bowers of the Center for Applied Social Research at Northeastern University.³⁰ Bowers and his associates, who wrote the important volume, Executions in America (1974), have under continuous examination all death sentences in Florida, Georgia, and Texas, the three states whose post-Furman capital statutes for murder were upheld by the Supreme Court in 1976 and where (as of April 15, 1978) 225 persons are

currently on "death row". By examining all possible racial combinations of victims and offenders, we can see a significant tendency toward racial discrimination where the death penalty is concerned. (See Table IV) The distribution as reported in Table IV is virtually identical with that reported in an earlier study by a different investigator studying the same phenomenon in 1976.³¹

The data reported by Bowers for persons currently under death sentence for murder in three southern states is strikingly parallel to the data reported by other investigators for persons sentenced to death for rape in six southern states a generation ago (recall Table II). Bowers's data are even more disturbing when seen in conjunction with the arrest-for-homicide data for the same states and covering the same period (see Table IV). Whereas only 4 percent of all arrests for criminal homicide are of black offenders charged with killing white victims, 36 percent of all persons on "death row" are blacks convicted of killing whites. Whereas half of all those arrested for criminal homicide are blacks charged with killing other blacks, less than one in ten of those on "death row" is a black who killed a black. Whereas 31 percent of those arrested for felony-type murder are whites charged with killing blacks, only 2 persons (1 percent) are on "death row" (Table V). The conclusion is inescapable that the death penalty is reserved for those who kill whites, because the criminal justice system in these states simply does not put the same value on the life of a black person as it does on the life of a white.

Justice Powell, writing in 1973, observed that "the possibility of racial bias in the trial and sentencing process has diminished...(and) discriminatory imposition of capital punishment is far less likely today than in the past."³² If true, it is owing primarily to the increased participation of black Americans in many aspects of the criminal justice system in their communities throughout

Table IV

ARRESTS AND SENTENCES FOR CRIMINAL HOMICIDE

BY RACE OF VICTIM AND OFFENDER

Florida, Georgia, Texas

1976-1978

Arrested for Criminal Homicide ^a		Race of Offender/ Victim	Under Sentence of Death ^b	
Number	Percent		Percent	Number
1,099	49	B/B	7	16
1,013	45	W/W	56	125
92	4	B/W	36	82
38	2	W/B	1	2
2,242	100		100	225 ^c

Source: Center for Applied Social Research, Northeastern University, Boston, Massachusetts

^a Uniform Crime Reports, supplementary homicide report, 1976 only

^b Florida (as of May 8, 1978), 101 persons; Georgia (as of April 28, 1978), 65 persons; Texas (as of August 1977), 61 persons.

^c Excludes two cases where more than one victim was involved not of the same race

Table V

ARRESTS AND SENTENCES FOR FELONY-TYPE MURDER

BY RACE OF VICTIM AND OFFENDER

Florida, Georgia, Texas

1976-1978

Arrested for Felony-Type Murder ^a		Race of Offender/ Victim	Under Sentence of Death	
Number	Percent		Percent	Number
64	29	B/B	5	8
112	51	W/W	54	80
37	17	B/W	40	59
6	31	W/B	1	2
219	100	Total	100	149

Source: Center for Applied Social Research,
Northeastern University, Boston, Massachusetts

^a Uniform Crime Reports, supplementary homicide report, 1976 only

the nation. In the context of his remarks, Justice Powell seemed to imply that the disgraceful record of racial discrimination where the death penalty was concerned depended upon the untrammelled sentencing discretion afforded the trial courts by the then prevailing system of capital sentencing, and that with the end of that system (an achievement of the ruling in Furman, from which, however, Justice Powell dissented) and the development of so-called "guided discretion" capital sentencing during 1973, this shameful record would not be repeated.

As yet, we have had no thorough study of the flow of criminal homicide cases from arrest to final disposition in any jurisdiction where the post-Furman "guided discretion" capital statutes have been operating. Consequently we have no assurance that the diminished possibilities of which Justice Powell spoke six years ago accurately characterize the present system. What evidence we do have, reviewed above, suggests that very little has changed. As one investigator put it, "There is no evidence to suggest that the post-Furman statutes have been successful in reducing the discrimination which leads to a disproportionate number of nonwhite offenders being sentenced to death."³³

The explanation of this fact and the virtual guarantee that nothing will change in the future is provided by the fact that the "guided discretion" statutes really offer very little constraint on choice of sentence. Every such statute uses language broad and vague enough to permit the community's racial prejudice to determine the sentence. Moreover, the "guided discretion" statutes do nothing to affect the great scope of discretion lodged in the police, prosecution, and courts at every phase of a criminal homicide case prior to actual sentencing. This deplorable feature of the post-Furman capital statutes has been discussed at length in persuasive and vivid manner

by Professor Charles L. Black, Jr., and there is no need for me to dilate upon it here. Comparable difficulties attach to the bill currently before the Senate, S.1382, the direct successor to S.1401 of 1973, and they were carefully surveyed by Senator Philip Hart in his report to the Judiciary Committee.³⁵

Thus, what has proved to be true in the several states--that the new "guided discretion" statutes yield results not less arbitrary and discriminatory than the old "unguided discretion" statutes--has not been circumvented by the proposed federal legislation to which this hearing is addressed.

III. The Alternative: Prison and Release

Michigan abolished the death penalty for murder in 1847, and has never reinstated it. Since that date, other states in the West, North Central, and New England regions have also completely abolished capital punishment. In 1964, the voters in Oregon went so far as to rewrite their state constitution to repeal the death penalty for all crimes. Since Furman, a few states have failed to reenact any capital statutes and thus have backed into a policy of total abolition that direct legislative reform probably could not have achieved. Thus, we have considerable experience with penal systems that execute no one.

From time immemorial, beginning with God's decree upon Cain, the first murderer (Genesis 4:11-16), the traditional alternative to the death penalty has been banishment. During the past century in this country, banishment took the form of life imprisonment without possibility of release. During the past generation, however, most opponents of the death penalty have opposed this harsh alternative, and instead have favored a policy of punishment

for the gravest crimes consisting of imprisonment of indefinite duration, with eligibility for release upon favorable recommendation by the adult authority or parole board after serving a fixed minimum time. The result is that in all but a few cases actual release eventually is granted. This has for some time been the policy followed in all jurisdictions with most convicted offenders convicted of murder and other grave crimes against the person.

To some extent, the merits of abolishing the death penalty are tied in with the adequacy of the alternative. How adequate, on moral and empirical grounds, is an alternative such as the one described above?

Great publicity is given to the occasional convicted murderer who recidivates, such as Edgar Smith, who served 14 years on "death row" in New Jersey and was eventually released in 1971 after a pro forma confession of guilt, only to be returned to prison in California after he committed a new crime of assault and battery.³⁶ Public opposition to the very idea of release from prison of such notorious offenders as Charles Manson and Richard Speck, no matter how much time they serve, is a matter of common knowledge. But are these cases representative? Do they show that it is wrong and dangerous to adopt a policy of complete abolition?

Let us notice first that once the mandatory death penalty has been put aside by the legislature or the courts--and it appears that a mandatory death penalty for any crime is now unconstitutional³⁷--incarceration of all offenders becomes a theoretical possibility. It must be assumed that it is a manageable one as well. Every jurisdiction in the United States at present has adopted such a policy. So it cannot be argued in defense of the death penalty that executions are necessary because some offenders cannot be incarcerated or released. The discretionary death penalty already shows

that the legislature contemplates the possibility that trial courts will sentence no one to death.

Second, if we turn to retribution, and assume that it is a legitimate goal of a system of punishment, then we must also conclude that our legislatures and the constitution tacitly assume that long term incarceration is retributive enough. This again follows from the fact that mandatory death penalties are not now constitutional, and that very few jurisdictions attempted to re-enact mandatory death penalties in any case.

Third, apart from such new statutes as the one in Texas, in which the sentencing court must make a judgment on the future dangerousness of the convicted murderer in order to recommend either a life or a death sentence,³⁸ it has never been the practice in this country to attempt to choose between a life and a death sentence for a convicted felon on the basis of any evidence concerning his likely future behavior. There is absolutely no evidence whatever that the thousands of those sentenced to death by trial courts in this century have been so sentenced because the sentencing authority knew, or had evidence to believe, that these persons were more dangerous, more likely to assault and kill in prison or after release, than the many thousands of other convicts guilty of similar crimes but never sentenced to death. Nor is this likely to be a development in the law, since prediction of future dangerousness is virtually impossible, given our present knowledge and techniques.³⁹

From the standpoint of social defense, we can try to measure the differential effects between imprisonment and the death penalty in each of three areas: General deterrence, counter-deterrence or incitement to crime, and prevention through incapacitation.

(1) Incapacitation. It seems obvious that executions must prevent crime more effectively than imprisonment. This is not strictly

correct, however. Executions necessarily prevent crimes only if the persons executed would have committed further crimes if they had been imprisoned instead. Executions incapacitate persons, of course, whether or not they would have committed any further crimes; and they incapacitate more effectively than prison does. Whether, therefore, executions prevent crimes through incapacitation turns on the evidence regarding the crimes, especially the felonies, including criminal homicide, that are committed by capital offenders who were not executed but instead were imprisoned and subsequently released.

We do not have adequate statistics on recidivism behavior of released murderers. Such evidence as I have been able to collect from various sources is reported in Tables VI and VII. Table VI shows that among 1,746 murderers released in eleven states during the years 1900 through 1972, 33 were returned for conviction of a subsequent felony and 6 were returned for conviction of a subsequent criminal homicide. Table VII is based on data released by the National Council on Crime and Delinquency in the Uniform Parole Reports. It shows that, nationwide, between the years 1965 and 1974, of 11,406 persons originally convicted of "willful homicide" and subsequently released from prison, 170 were returned during the first year for commission of a felony and 34 were returned during the first year for a subsequent criminal homicide. Both with regard to the commission of felonies generally and the crime of homicide, no other class of offender has such a low rate of recidivism.⁴⁰

These data are not complete, of course, but they are indicative. They show that the popular belief is true, murderers do sometimes kill again, even after years of imprisonment. The data also show that the number of such

TABLE VI

RECIDIVISM OF MURDERERS RELEASED IN ELEVEN STATES,
1900-1972

<u>State and Years</u>	<u>Murderers Released</u>	<u>Subsequent Conviction of Criminal Homicide</u>	<u>Subsequent Other Felony Conviction</u>
California, 1945-1954a	342	1	1
Connecticut, 1947-1960b	60	0	7
Georgia, 1943-1965c	50	0	1
Maryland, 1936-1951d	41	0	3
Massachusetts, 1900-1958e	10	0	0
Michigan, 1938-1972f	432	0	1
New Jersey, 1907-1960g	31	0	1
New York, 1930-1961h*	63	2	1
New York, 1945-1961h**	514	3	15
Ohio, 1945-1960i	169	0	2
Oregon, 1939-1964j	15	0	1
Rhode Island, 1915-1958k	19	0	***
Total	1,746	6	33

* Convicted of a first-degree murder

** Convicted of second-degree murder

*** No information

Table VI - (Continued)

- a California Assembly Report on the Death Penalty (1957), pp.12-13
- b Connecticut Bar Journal, March 1961, pp.50-51
- c Georgia Journal of Corrections, August 1974, p.48
- d Maryland Report on Capital Punishment (1962), p.15
- e Massachusetts Report on the Death Penalty (1958), pp.29, 118-120
- f Ohio Report on Capital Punishment (1961), p.82; and
Michigan State U. Office of Human Relations, Occasional Paper,
June 26, 1973
- g Rutgers Law Review, Fall 1964, pp.47-48
- h Crime and Delinquency, January 1969, pp.150-151
- i Ohio Report on Capital Punishment (1961), pp.81-82
- j Oregon Law Review, December 1965, pp.31-34
- k Massachusetts Report on the Death Penalty (1958), p.32

Table VII

RECIDIVISM DURING FIRST YEAR AFTER RELEASE,
 CONVICTED MURDERERS, BY TYPE OF SUBSEQUENT OFFENSE,
 1965-1975

<u>Year of Release</u>	<u>Number of Murderers Released</u>	<u>Subsequent Conviction of Willful Homicide</u>		<u>Subsequent Other Major Violation</u>	
		<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>
1965-1967 ^a	1,303	3	0.2	15	1.2
1967-1969 ^b	5,603	18	0.3	86	1.5
1974 ^c	1,601	5	0.3	22	1.4
1975 ^d	2,897	8	0.3	47 ^e	1.6
Total	11,406	34	0.3	170	1.5

Source: National Council of Crime and Delinquency,
 Uniform Parole Reports

^a
 UPR, December 1967

^b
 UPR, December 1972

^c
 UPR, September 1976; males only

^d
 UPR, Level II, Individual Data, Detailed Study, 1978
 forthcoming; males only

^e
 Calculated from a base of 2,867 released murderers

repeaters is very small. This leaves us with clear alternatives. If we cannot improve release on parole procedures so as to turn loose no one who will commit a further felony, then we can either undertake to execute every convicted murderer or we can undertake to release none of them. Or we can reconcile ourselves to the fact that parole procedures, like all other human institutions, are not infallible.

The moral cost to a policy of mandatory capital punishment is simply impossible to bear, and there is much evidence that no one really favors this alternative at all. The economic cost of abandoning parole release, or fixed terms short of natural life (say, ten years), is more than the public seems willing to pay. So the only alternative is the third, which in fact is already being practiced in all jurisdictions with all prisoners except for the handful sentenced to death.

If we turn to the issue of homicide and assault within prison, we find little evidence and none that is recent. The best study was done a decade ago by Professor Thorsten Sellin, for the year 1965 (see Table VIII). Sellin reported 61 homicides in United States prisons during 1965, committed by 59 different persons, sixteen of whom had originally been sentenced to death. Only two of these were by persons sentenced to death in states that had no death penalty; the other fourteen were committed by persons despite the fact that in doing so they risked being sentenced to death and executed.⁴¹ Of course, since we do not know the total number of murderers incarcerated in abolition and non-abolition jurisdictions during 1965, we cannot tell from Sellin's data whether the death penalty is or is not a more effective deterrent of homicide in prison than imprisonment. But what we can say is that imprisoned murderers committed a higher proportion of all within-prison homicides in death penalty states in 1965 than did imprisoned murderers in abolition states.⁴²

Table VIII

HOMICIDES IN PRISON,
BY TYPE OF JURISDICTION,
1965

<u>Offense</u>	Jurisdictions ^a (Number of offenses in parentheses)		<u>Total</u>
	<u>Death Penalty for Murder</u>	<u>No Death Penalty for Murder</u>	
No Fatal Assaults	17	6	23
Fatal Assaults	20 (53)	4 (8)	24 (61) ^b
No Data	4	1	5
TOTAL	41	11	52 (61) ^b

Source: Capital Punishment (ed. Sellin, 1967), pp.154-160

^a Includes 50 states, District of Columbia, and federal

^b Includes 8 staff members and 53 inmates

(2) Counter-deterrence. When the death penalty and imprisonment are compared for their incitive effects, a complex picture emerges. For over a century, there has been evidence that the death penalty may lead some persons to commit murder. Some times this takes the form of the suicide-murder syndrome, in which a person who wants to take his own life but fears to do so commits a murder so that society, using its power of capital punishment, will put him to death. There is also the executioner syndrome, in which persons become the self-appointed ministers of death to avenge real or fancied wrongs.⁴³ Thus, the power of the death penalty to incite murder must be seriously weighed against any alleged deterrent effect that it also has.

There seems to be no evidence that failing to execute a convicted murderer and placing him in prison incites or otherwise invites others to commit murder. Latejy, we have heard of an alleged exception to this in the new forms of international terrorism. As this crime category is especially relevant to the federal death penalty, it is useful to examine the situation more closely.

A number of cases have occurred recently in Europe, Africa, and Asia, in which terrorists have hijacked an airliner or taken hostages in order to blackmail the authorities into releasing imprisoned comrades. In some cases, the hostages have been murdered. It has been argued that if the imprisoned terrorists had been executed in the first place, such hostage-taking and subsequent murders would not have occurred. Such a view is open to at least two objections. First, this line of reasoning is not really a defense of the death penalty but of summary execution for captured terrorists, because any delay in executing them gives rise to hostage-taking opportunities by their unarrested colleagues. Second, terrorists willing to take hostages in order

to blackmail authorities into freeing their imprisoned colleagues are likely to be quite willing to commit reprisals against the innocent if the authorities were to abandon prison in favor of executions for all arrested terrorists. In short, escalation of violence is a strategy both sides can play. No sensible penal policy for coping with international terrorism can be predicated on the assumption that the current tactics of terrorists are vulnerable to a systematic policy of summary execution for arrested terrorists or of capital punishment for convicted terrorists.⁴⁴

(3) General deterrence. I cannot enter here into the vast area of general deterrence and the death penalty, except to say this. Recent research by some investigators, as is now well known, purports to show that the death penalty is a measurably better deterrent than imprisonment.⁴⁵ This conclusion has been attacked root and branch by many different investigators, and most recently, after close examination, by a panel from the National Academy of Sciences. Their conclusion is that these "findings...simply are not sufficiently powerful, robust, or tested at this stage...they are too uncertain and must, at best, be interpreted as tentative...The deterrent effect of capital punishment is definitely not a settled matter, and this is the strongest social scientific conclusion that can be reached at this time."⁴⁶

When all relevant factors of social defense are weighed together, therefore, the policy of abolition is surely as plausible as any retention of the death penalty.

An enlarged cost/benefit comparison of the death penalty and incarceration might well lead to the same conclusions. While it may be cheap to hang, gas, or electrocute convicts, it is extremely expensive to support the "death row" system of special custody in prison and the time-consuming ordeal of trial and appellate litigation that the death penalty entails.

Accurate and extensive cost/benefit studies of abolition and its alternatives have never been conducted, but preliminary examinations have led some observers to conclude that the relative costs and benefits dictate a rational preference for abolition and imprisonment, not executions.⁴⁷

In conclusion, I would prefer to strike a different note. Doing away with capital punishment would do away with the gravest abuses and injustices that can occur in the course of lawful punishment. The strongest moral objection traditionally directed against the death penalty is its irrevocable and irreparable nature. Erroneous infliction of death cannot be corrected, and there is no remedy or compensation for its undeserved infliction. What is wrong with capital punishment, in the end, is what is wrong with its historically allied techniques of social control: Torture, mutilation, flogging, and branding. Each is an affront to human dignity. It is undignified to inflict such things on another person, undignified to undergo them, and undignified to witness their infliction. No justification can exist for placing at the disposal of government methods such as these, which violate our most fundamental ideals. The same decision must be made regarding the death penalty. Ending it would be taking a small but definite, positive step toward enhanced respect for human life. The value, dignity, and sanctity of human life are put in jeopardy and violated when it is permissible to punish some prisoners by putting them to death. The function of government in a just society is to protect and enhance human life and the lives of all its members. It is indefensible for government to use its immense power and authority to sanction the deaths of any persons where no duty or necessity demands doing so and where no benefit is uniquely conferred by it.

- 1- Brief for the United States as Amicus Curiae, *Fowler v. North Carolina*, O.T. 1974, No. 73-7031, at 41 note 15; also Brief for the United States as Amicus Curiae, *Gregg v. Georgia*, et al., O.T. 1975, No. 74-6257, etc., at 47 note 25.
- 2- *Gregg v. Georgia*, 428 U.S. 153, 183-184 (1976).
- 3- See Hart, Punishment and Responsibility (1967); The Philosophy of Punishment (ed. Acton, 1969); Honderich, Punishment: The Supposed Justifications (1969); Justice and Punishment (ed. Cederblom and Blizek, 1977); Richards, The Moral Criticism of Law (1977).
- 4- See Kazis, "Judaism and the Death Penalty," in The Death Penalty in America (ed. Bedau, 1967).
- 5- National Prisoner Statistics, "Capital Punishment 1976," Table 1, p.13.
- 6- Kant, The Metaphysical Elements of Justice (tr. Ladd), p. 106.
- 7- Keedy, "History of the Pennsylvania Statute Creating Degrees of Murder," 97 U. Pa. L. Rev. 759 (1949).
- 8- Cardozo, "What Medicine Can Do for Law," in Selected Writings of Benjamin Nathan Cardozo (ed. Hall, 1947), at 204.
- 9- *McGautha v. California*, 402 U.S. 183 (1971), at 204.
- 10- See, e.g., Zimring, Eigen, and O'Malley, "Punishing Homicide in Philadelphia: Perspectives on the Death Penalty," 43 U. Chicago L. Rev. 227 (1976); and Bedau, "Felony Murder Rape and the Mandatory Death Penalty: A Study in Discretionary Justice," 10 Suffolk U. L. Rev. 493 (1976).

- 11- Camus, Resistance, Rebellion, and Death (1961), at 199.
- 12- Royal Commission on Capital Punishment, Report (1953), ¶53.
- 13- Reid, Eyewitness: I Saw 189 Men Die in the Electric Chair (1973);
Duffy and Hirshberg, 88 Men and 2 Women (1962); Lofland, "The
Dramaturgy of State Executions," in State Executions Viewed Historically
and Sociologically (1977), 275-325.
- 14- See "To Establish Constitutional Procedures for the Imposition of
Capital Punishment," Hearing Before the Subcommittee on Criminal Laws
and Procedures, Committee of the Judiciary, U.S. Senate, 94th Congress,
1st Session, on S. 1382, May 18, 1977; "Imposition of Capital Punishment,"
Hearings Before the Subcommittee on Criminal Laws and Procedures, Committee
of the Judiciary, U.S. Senate, 93rd Congress, 1st Session, on S. 1, S. 1400,
and S. 1401, February-July, 1973; "To Abolish the Death Penalty," Hearings
Before the Subcommittee on Criminal Laws and Procedures, Committee of the
Judiciary, U.S. Senate, 90th Congress, 2nd Session, on S. 1760, March-
July 1968.
- 15- "Capital Punishment," Hearings Before Subcommittee No. 3, Committee of
the Judiciary, H.R., 92nd Congress, 2nd Session, on H.R. 8414 etc.,
and H.R. 12217, March-May 1972.
- 16- Brief for Petitioner, Maxell v. Bishop, O.T. 1968, No. 622;
Brief for NAACP Legal Defense and Educational Fund as Amici Curiae,
Boykin v. Alabama, O.T. 1968, No. 642; Briefs for Petitioners, Aikens
v. California, Furman v. Georgia, Jackson v. Georgia, Nos. 68-5027,
69-5003, 69-5030; Brief for Petitioner, Fowler v. North Carolina,
O.T. 1974, No. 73-7031; Brief for Petitioner, Jurek v. Texas, O.T. 1975,
No. 53-94.

- 17- See Capital Punishment in the United States(eds. Bedau and Pierce, 1976).
- 18- Racial Violence in the United States 56-57 (ed. Grimshaw, 1969);
and Daniel T. Williams, "The Lynching Record at Tuskegee Institute"
(memorandum, 1969).
- 19- *Coker v. Georgia*, 97 S. Ct. 2861 (1977).
- 20- National Prisoner Statistics, "Capital Punishment 1976", Table 1, p.13.
- 21- Wolfgang and Riedel, "Race, Judicial Discretion, and the Death Penalty,"
407 *The Annals* 119 (1973), at 129.
- 22- National Prisoner Statistics, "Capital Punishment 1976," Table 27, p.59.
- 23- *Op. cit.*, Table 1, p. 13.
- 24- Bowers, Executions in America (1974), at 102.
- 25- National Coalition to Abolish the Death Penalty, "Death Row Census,"
April 11, 1978 (news release).
- 26- Studies in Homicide (ed. Wolfgang, 1967), 8; cf. *op. cit.*, pp.118, 225.
- 27- See Garfinkel, "Inter- and Intra-racial Homicides," in Studies in
Homicide (ed. Wolfgang, 1967), 45-65.
- 28- New York Times, August 28, 1977, pp.1, 34.
- 29- See "A Study of the California Penalty Jury in First-Degree-Murder
Cases," 21 *Stanford L. Rev.* 1302 (1969) at 1419.
- 30- New York Times, March 6, 1978; Southern Poverty Law Report, Spring, 1978.
- 31- Riedel, "Discrimination in the Imposition of the Death Penalty: A

Comparison of the Characteristics of Offenders Sentenced Pre-Furman, and Post-Furman," 49 Temple L. Q. 261 (1976), Table 11, at 286.

32- Furman v. Georgia, 408 U.S. 238, 450 (1972).

33- Riedel, supra note 17, at 282.

34- Black, Capital Punishment: The Inevitability of Caprice and Mistake (1974); Black, "Due Process for Death: Jurek v. Texas and Companion Cases," 26 Catholic U. L. Rev. 1 (1976); Black, "The Death Penalty Now," 51 Tulane L. Rev. 429 (1977).

35- "To Establish Rational Criteria for the Imposition of Capital Punishment," Report from the Committee on the Judiciary, Together with Additional Views, Senate, 93rd Congress, 1st Session, March 1, 1974..

36- See Bernstein, "Neither Dead Nor Alive: The Protracted Litigation of Edgar Smith," N.J. State Bar J., Summer 1969, 312-315; New York Times, December 7, 1971, p.1; New York Times, November 14, 1976, p. 37; Smith, Brief Against Death (1968).

37- Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 45 L.W. 4584 (1977).

38- Texas Code Crim. Proc., Art. 37.071(b) (Supp. 1975-1976).

39- Von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," 21 Buffalo L. Rev. 717 (1972); Morris and Hawkins, The Honest Politician's Guide to Crime Control (1970) (...all available prediction methods have relatively low predictive power..." (p.244)).

- 40- "... (P)aroled murderers actually present some of the best parole risks" (NCCD Newsletter, Uniform Parole Reports, December, 1972, p.2); "... (C)ompared with other groups, murderers are actually the best parole risks" (Stanton, "Murderers on Parole," 15 Crime and Delinquency 149 (1969)).
- 41- Sellin, "Prison Homicides," in Capital Punishment (ed. Sellin, 1967), 154-160.
- 42- See also Buffum, "Prison Killings and Death Penalty Legislation," 53 The Prison J. 49 (1973).
- 43- See Sellin, The Death Penalty 65-69 (1959); The Death Penalty in America 264 (ed. Bedau, 1967); Capital Punishment in the United States 419-457 (eds. Bedau and Pierce, 1976).
- 44- See Thornton, "Terrorism and the Death Penalty," America, December 11, 1976, pp.410-412.
- 45- Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," 63 Amer. Economic Rev. 521 (1973), and subsequent publications.
- 46- Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (eds. Blumstein, Cohen, and Nagin, 1978); at 358, 359.
- 47- See letter to the New York Times, August 29, 1977, by Hans Zeisel; Nakell, "The Cost of the Death Penalty," 14 Crim. L. Bull. 69 (1978).

Mr. BEDAU. I also have some exhibits that I would like to see placed in the record, because they will amplify points that I touch on in my statement and that we will develop in discussion now and that I think would be a useful part of the public record.

Because as often is true in these matters, some of the most interesting information is least accessible to the ordinary reader. And while it is true that not very many ordinary readers take Government documents to bed with them for light evening reading, still it is true that once the materials are in that source, they are available readily for interested viewers more so than many obscure publications.

I don't have copies with me today to leave with the staff, but I shall see to it that they are sent directly.

Senator ABOUREZK. Please identify them properly, and we will include them in the record.

Mr. BEDAU. I have been asked today to speak in regard to three issues, among the many that need to be discussed, where the death penalty, including the Federal death penalty, is under discussion.

One of them concerns the role of retribution in the theory and justification of punishment. This is an important matter, ever since the Solicitor General's amicus briefs in 1976, and the Supreme Court's decisions in that year developed an endorsement of retribution as a legitimate aspect of the theory of punishment in connection with the defense of the death penalty.

Second, I have been asked to speak in regard to the arbitrariness and the discriminatory impact of the death penalty as its history of administration shows, particularly with application to minority races in this country.

And, last, I want to say something about the availability of an adequate alternative.

We know that the question of the death penalty has never been the question of putting people to death or not punishing them at all. It has always been a question of whether they should be put to death or imprisoned.

As Professor Zeisel has discussed the indifferent deterrent effectiveness of death versus prison, I want to speak about related matters, because it is quite important that our confidence in imprisonment be shored up at every point if we are to seriously talk about abolishing the death penalty.

As Professor Zeisel has rightly said, if we believed—if he believed or if I believed—that the death penalty was a uniquely effective deterrent upon the behavior of the general public, that would cause us to rethink the degree to which we could favor its abolition.

Similarly, if we seriously believe that persons who have committed the gravest crimes could not be imprisoned and could never be paroled under any circumstances that also would cause us to rethink the legitimacy of the alternative.

So let me speak first with regard to the matter of retribution. Some attack the death penalty, primarily on the grounds that they believe the only way to defend it is as a method of retribution, and they attack retribution as a legitimate part of any theory of punishment, and so they are against the death penalty.

On the other hand, many support the death penalty, just because they believe that it is the only adequate retribution for grave crimes. And, like it or not, we must be retributive and so we must continue to support the death penalty.

My own view, and I think it is increasingly, the prevailing one among philosophers and moralists who think about the theory of punishment is that really both of these attitudes are wrong.

I think a strong case can be made for including aspects of retribution within a legitimate and justifiable theory of punishment. But once that is done, I don't think there is any reason to infer that the death penalty is a necessary component in that outlook.

The reason why I pursue the matter in this way is because I think it is extremely important for opponents and supporters of the death penalty to find such common ground as they can in a larger theory of punishment, outside of that controversy. There is not much chance of our resolving our disputes, unless we can find some common ground.

One of the issues that has been much debated and contested is the role of retribution in the theory of punishment.

I think all around us in our society in the late 1970s we see evidence that criminologists, penalogists, social philosophers, jurisprudence, and the legal profession are generally much more conservative and willing to consider an augmented role for what we would call retribution.

I don't wish to quarrel with that at all. Two of the most important recent books on the theory of punishment are one by the New York commission headed by Andrew VonHirsch, entitled "Doing Justice," and the other that came out at the same time in 1976 by the 20th Century Fund with an important essay by Allen Dershowitz, called "Fair and Certain Punishment."

Both of these books back away from the failures of a rehabilitative approach to imprisonment and back away from the failures of general deterrence.

And to the extent that they give up deterrence and give up rehabilitation, there is nothing left to fall back on, except retribution.

The interesting thing to note is that in neither of those two treatises do we find any support for capital punishment.

I think that is the view that I wish the Solicitor General of the United States had held and that I wish the majority of the Supreme Court had held in *Gregg v. Georgia*, and the related cases, in which it upheld the death penalty, in part upon the legitimacy of retribution.

I think retribution can play a legitimate role. Retribution plays a legitimate role, I think, in four different aspects of our theory of punishment.

First of all, retribution assures us that crime must be punished, because it is unfair to the law abiding. It is unfair to the victims of crime to leave criminals unpunished.

Senator ABOUREZK. If that's the only theory—to support retribution—that people have a feeling that crime has to be punished—what value does that have to society in general?

Mr. BEDAU. I think it has the value of helping to reinforce what it is assumed is a fair system of laws in the first place.

Of course, if what we are using punishment to do is to enforce an unfair system of laws, then there is nothing to be said for the retributive effect.

If I am going on the assumption that we believe, and are correct in believing, that the general structure of the criminal law is designed to protect basic rights of all people and that, therefore, the violations of that law are unfairly ignored, and fairness requires us out of respect to those who have abided by the law and out of concern for those who have become the victims of violations not to be indifferent with those who are the violators—

Senator ABOUREZK. Are you saying that—assuming the criminal has been caught and tried and found guilty—a life sentence for murder is not sufficient retribution for society and that it has to be another killing?

Mr. BEDAU. Not at all. I am not speaking now as to the penalty scale at all. I am merely saying that retribution lays down as a general consideration the acknowledgment of a system of punishment, whatever its modes and schedules might be.

Senator ABOUREZK. I think it is absolutely accurate, but can you zero in on the death penalty aspect of retribution?

Mr. BEDAU. Yes. As I said, this was simply one of four retributive aspects, as I see it, in the theory of punishment.

A second one is that the nature of punishment must be an infliction of hardship or suffering or deprivation on the offender. We take this so for granted no one would dispute it. But it is an important retributive feature of what counts as a punishment.

The idea of retribution is the idea of paying back to people something akin to what they inflicted and crimes inevitably harm their victims. Punishment, naturally enough, is itself a harm upon the offender.

Senator ABOUREZK. What is the theory behind victimless crimes and punishment for victimless crimes then? It is certainly not retribution.

Mr. BEDAU. That is a long story.

Perhaps it doesn't have too much bearing on the death penalty issue, because we admit that the kinds of crimes that even the most misguided legislature is going to want to punish with death are indeed crimes where there are victims.

I think you can't understand very adequately the doctrine of victimless crimes from the retributive standpoint. In fact, in some publications I have argued that insofar as retribution is relevant to understanding the nature of crimes and punishment, that is one more argument against the category of victimless crimes and against having such crimes.

The third principle, and I think it it perhaps the most important of the retributive principles relative to the death penalty, is the principle of proportionality—the severity of punishments must be proportional to the gravity of the offense.

And the fourth point is one that has also been given considerable prominence in recent years. It is what I call the principle of denunciation. That only a severe penalty for a grave crime can adequately express society's abhorrence of the offense.

Now I think all four of these principles, while they may not be sufficient to constitute a whole theory of punishment or a whole basis for its justification, do go a long way.

I think that anyone who wants to criticize the death penalty in a way that will attempt to make common ground with those who support it, perhaps is wise to concede these four principles; and I do.

The point I want to make is that it is really only the principle of proportionality here that is likely to divide the opponents from the supporters of the death penalty.

Opponents of the death penalty believe that crime should be punished. Opponents of the death penalty believe that punishment is a hardship. Opponents of the death penalty believe that insofar as the denunciatory aspect of punishment is important, prison terms of long duration do accomplish that and are needed.

So the only issue on which people divide that has to do with retribution is the issue of proportionality.

And here I think the danger of those who support the death penalty is to be quite inconsistent and arbitrary.

We know that the old principle of life for life, eye for an eye, and a tooth for a tooth—the principle of retaliation or *lex talionis*—is often invoked. We also should know that it has long been pointed out that it cannot be the basis of a penalty schedule with any consistency.

Our actual practice of capital punishment in this country has been to use it for many crimes in which life has not been taken or jeopardized. So the truth of the matter is that in our own social history, the defenders of the death penalty have never relied exclusively on *lex talionis*. They have relied on other considerations, particularly having to do with alleged deterrence.

Second, we have never relied on *lex talionis* in the complementary aspect, because we have never in 200 years really ever intended to punish all criminal homicides in this way.

From the standpoint of the victims, of course, the victim is dead whether as the consequence of manslaughter or as the consequence of willful and deliberate and premeditated homicide.

The law has always respected, at least in this country, the difference between murder and manslaughter, and the distinction between degrees of murder was invented in this country nearly 200 years ago.

The purpose of these distinctions in the law was to exclude that subcategory of criminal homicide, undeserving of death and thus to make a clear compromise with the principle of *lex talionis*.

So the idea that the principle of proportionality can be explained or interpreted in terms of *lex talionis*, and thereby defend the death penalty, is an illusion. It is simply not true.

So what you are left with is the question of can we defend the principle of proportionality to try to apportion severe punishment for grave offenses and milder punishments for less severe offenses? Can we preserve that principle or must we give it up because we have to accept *lex talionis*, and it leads to absurd consequences.

And if we accept the principle of proportionality, must we retain the death penalty. My answer is: No. We do not need the death penalty. We can construct a gradation of severity of offenses with-

out using the death penalty as the upper bound of the permissible punishment.

It is quite obvious that every society that has abolished the death penalty has succeeded in doing this. We can respect the fundamental principle of proportionality of crimes to punishment without using as the upper bound of our punishment schedule punishments which take the lives of persons, just as we can and have given up punishments which mutilate people. There was a time when it was thought that either deterrence or retribution or both required us to brand thieves, to lop off the hand of robbers, to castrate sex offenders, and so on; and there are persons in society who would still defend these punishments, though I am happy to say I think they are not in the majority and at least their views do not prevail in the law.

For some reason or other capital punishment has been exempted from that criticism that has been attached for a long time to mutilative and corporal punishments generally.

My point is the simple one that we can respect whatever we need to under the rubric of retribution without for one minute believing that that will lead us down the path that requires us to embrace these horrible punishments.

So I would say on the first point: Does the principle of retribution require us to keep the death penalty? And the answer I think is clearly no.

We do not need to abandon retributive principles in our theory of punishment in order to provide reasonable criticism of any use of capital punishment.

I will turn to the second category of my remarks. Here I have attempted to assemble a variety of considerations, some of which are not very new and some of which are brand new.

I would draw your attention, in particular, if you have the text of my remarks in front of you to the table that appears after page 13, table 4.

This is information that was just made available to me yesterday from the Center of Applied Social Research at Northeastern University in Boston by Dr. William Bowers who is the director of that research center.

It draws to our attention the relationship between arrests for criminal homicide on the lefthand side of the table and death sentences on the right side of that table in three States in the South—Florida, Georgia, and Texas—during the last 3 years.

Now these three States have been selected for careful study, because it is those three States who capital punishment laws have been sustained by the Supreme Court in the rulings it delivered in 1976, nearly 3 years ago.

The table is organized to show us the distribution of arrests and of sentences to death with respect to the correlation between the race of the offender and the race of the victim.

Thus, if you look at the top row of the table, you will see that 1,099 arrests were made in 1976 in these three States for the crime of criminal homicide where the offender was black and the victim was black.

But that at the present time, there are only 16 people under sentence of death for those crimes.

Now this is a remarkable winnowing out of the arrested and the indicted and the tried and the convicted from the sentenced. Sixteen over 1,099—a very, very small fraction.

But if we now look at the third row, which tells us the number of black offenders who were arrested for killing white victims, we see that there were a very small number of such offenses—only 92 arrests—in that year.

But if we look at all of the people currently under sentence of death who were black offenders and who killed white victims, there are 82—a very large proportion of the total.

This is simply half of the information that this table contains, but what it indicates I think is very, very clear.

The strongest objection to the death penalty in the United States during the last generation has been the way in which it works as a racially selective factor.

Along with all of the other burdens that are borne in our society by the nonwhite, and in particular black Americans, the death penalty is yet another one of them.

In my testimony, I have included as a reminder of the background in this matter, the lynching record in the Southern States, which shows an overwhelming number of black victims, proportional to the white victims.

I have also included the evidences of earlier studies that were published at the time that the *Furman* decision was handed down, concerning the distribution of death sentences for black offenders who were convicted of raping white victims.

Here, again, in the southern States which had the death penalty for rape, the proportion of death sentences falling upon those offenders who were convicted of crimes against those victims was enormously disproportionately large.

What you see here on this table is, in effect, another indication that pretty much the same pattern continues.

If you look in the table, you will see that those who have killed white victims, constitute 92 percent of those currently on death row in these three States.

If you look at those who killed black victims, you will see that they constitute only 8 percent of those who were on death row.

And yet black victims of criminal homicide constitute exactly half of all homicides in these States.

The only way to understand this datum is that as far as the criminal justice system is concerned in these three States, the life of a white victim is more important than the life of a black victim. And this, I think, is an important factor in trying to assess the legitimacy of the use of this mode of punishment in our society.

Whatever steps we are taking in the direction of improving the participation of minority Americans in the criminal justice system, especially the role of black Americans in the criminal justice system in the South, and it is improving indeed, we still have this phenomenon today.

This is not 10 years ago, and I think it may very well, however, be true 5 or 10 years from now.

While it is true that the Federal death penalty itself may be immune from this kind of maladministration, at least relative to the way in which the death penalty is applied in the states, the

symbolic and other influence that a Federal death penalty lends to the use of the death penalty by the states is, of course, enormous as in every other matter of Federal-State legislative relationships.

Let me turn, thirdly, to the last part of my remarks concerning the adequacy of the alternative.

If you will turn to table 6, which follows page 18 in my testimony, I have here attempted in the time that I had available to do so, to assemble some information spreading over 11 different States from one end of the Nation to the other, spread over 70 years of this century, the recidivism record of persons who have been convicted of criminal homicide in most of these cases of first-degree murder and in many of these cases of persons who were originally sentenced to death and then commuted—but not in all—and then to show the record upon release of these persons who were released and the kind of subsequent felony record they had, including subsequent conviction of some form of criminal homicide.

The data show that of 1,746 such released murderers, there were 6 who committed a subsequent criminal homicide and an additional 33 other felony convictions.

That is not a perfect record. The public is quite right when it believes that occasionally convicted murderers do kill again.

Six out of 1,746 did so, according to these data—not zero out of that number, but 6.

Senator ABOUREZK. Is there data for other States besides these 11?

Mr. BEDAU. I don't know of any available source of data. This is just one of the other scandals, if you will, concerning the availability on short notice of adequate information on a matter of this importance, stretching over this period of years.

Our information has never been collected in a central place with regard to the parole records of murderers.

I have tried to show on the following table, table 7, aggregate national data available from the National Council of Crime and Delinquency. And this shows a record not very different from what I have just reported to you in table 6.

This is aggregate national data covering all the 50 States, reporting on the recidivism rate during the first year of release of persons originally convicted for murder. It shows that in the period from 1965 through 1975, roughly a decade though some years are omitted, over 11,000 such persons were released and 34 of them did commit a criminal homicide during the first year.

It is important that we acknowledge—those of us who are against the death penalty—that parole boards do make errors. Parole boards, I think, have a remarkable record as these data show. But it is not a perfect record.

Senator ABOUREZK. Is that three-tenths of 1 percent?

Mr. BEDAU. That is exactly right.

Three-tenths of 1 percent of murderers released in the most recent decades recidivate by committing another homicide. And that is quite a remarkable record of success, but is isn't perfect.

The question is what we should do about the fact that it isn't perfect, and here I think our alternatives are very clear and they are very few.

We can either decide to set ourselves in motion against all social factors and try to reintroduce the mandatory death penalty—

The way to have prevented those 34 murders was to have electrocuted or gassed all 11,000 of these murderers. That is quite clear; that would have been sufficient.

Given the inaccuracies of parole prediction, it probably would have been necessary. That is one alternative.

I think it is perfectly absurd and morally outrageous and no one would seriously recommend it.

Senator ABOUREZK. These are actual first-degree murder and not manslaughter and not unintentional?

Mr. BEDAU. That is quite right.

Senator ABOUREZK. They are all first degree?

Mr. BEDAU. Yes.

Senator ABOUREZK. That is a very interesting statistic.

Mr. BEDAU. Yes; it is. And that is why I present it to the committee, because I think it is extremely important and it deserves more publicity.

The other alternative, of course, if we are unwilling to embrace the mandatory death penalty, is to release none of these prisoners.

I think many of the public would be quite happy for that policy.

Whenever the question arises of the release, or even the consideration of parole, of somebody like Richard Speck or Charles Manson, the public is up in arms and quite understandably.

I share the same distress and anxiety.

The trouble is, of course, that parole as a principle and release from prison as a principle of our policy gets a bad name from some of the horrible crimes that are committed by those who might become eligible and who, however, are rarely released after 5, 10, or even 15 years.

Those who are released have made the record that we have in front of us, and it is not a hideous record of failure. It is a respectable, though not perfect, record. It is a tribute both I think to the judgment of parole boards and to the law-abiding conduct of persons who started out with a very severe handicap by virtue of their behavior.

The third alternative, it seems to me, if we are not willing to keep them all in prison and not willing to kill them all, is to do, in fact, exactly what we are doing, trying to use our best possible judgment after a long period of incarceration, ranging typically in the period of 10 to 12 years, to use our best judgment and selectively release such persons.

I think that is, in fact, the alternative that the prisons have followed for 50 years with regard to the vast majority of those who have committed crimes against the person, including murder.

So the policy of abolishing the death penalty would merely extend to an additional 100 or so per year, the policy that the institutions of our Nation confronted with prisoners have been using for decades.

It does not strike me as a matter providing ground for great public alarm or for any special new methods of prediction of dangerousness or parole supervision or anything else.

I do not defend the policy of the universal release of every person, once they have served some time. I think we have some

knowledge about liability to future dangerousness that may very well enable us to be sure that releasing this person at this time would be not in the public interest.

But I do think the record supports the feasibility of the alternative to the death penalty, that most of us who have argued against it can agree in supporting—a fixed period of incarceration in prison upon conviction, followed by eligibility for release and actual release as a function of review by those most familiar with the record of the prisoner.

I would like to end my testimony this morning on a slightly different note that goes rather apart from what I have just been saying, What I have been giving you is a selective review of the data that is in my full testimony and that are at the disposal of all of us as we try to weigh the merits of a social policy that does not involve putting anybody to death.

I think that a different note needs to be struck in order to give a setting to these data.

Doing away with capital punishment, would do away with the gravest abuses and injustices that can occur in the course of lawful punishment.

Senator ABOUREZK. Excuse me just a minute.

Back on table 4, the numbers don't seem to jive with the percentages. You have 1,099 arrested for homicide—black and black. What does the 49 percent stand for?

Mr. BEDAU. That is 49 percent of 2,242 of the total.

Senator ABOUREZK. Then come over under sentence of death where it says 7 percent.

Mr. BEDAU. That is of all of those currently under sentence of death.

Senator ABOUREZK. I understand the table now; 7 percent seemed high compared to 1,099, but I am comparing it to the wrong number.

Mr. BEDAU. I'm sorry. I didn't do a walk-through on the whole table. Perhaps I should have.

Senator ABOUREZK. That is all right. We were just reading it wrong.

Please proceed.

Mr. BEDAU. I was saying that I think the strongest moral objection traditionally directed against the death penalty is its irrevocable and irreparable nature.

Erroneous infliction of death cannot be corrected, and there is no remedy of compensation for its undeserved infliction.

What I think in the end is wrong with capital punishment is what is wrong with its historically allied techniques of social control—torture, mutilation, flogging, and branding. Each of these is an affront to human dignity.

It is undignified to inflict them on another person. It is undignified to undergo them. It is undignified to witness their infliction.

No justification can exist for placing at the disposal of Government methods such as these which violate our most fundamental ideals.

The same decision must be made regarding the death penalty. Ending it would be a small but definite positive step towards enhancing social respect for human life. The value, dignity, or

sanctity of human life are put in jeopardy and violated whenever it is permissible to punish some prisoners by putting them to death.

The function of government in a just society is to protect and enhance human life and the lives of all of its members. It is indefensible for government to use its immense power and authority to sanction the deaths of any persons where no duty and no necessity demand it and where no benefit is uniquely conferred thereby.

Thank you.

Senator ABOUREZK. Professor Bedau, that was an excellent presentation.

As I said, the statistics are extremely interesting, and I think they will be very valuable in the ongoing debate on this issue in the Congress. I intend to borrow freely from your statement.

Mr. BIDEAU. Please do. That is exactly why I have supplied it.

Thank you very much.

Senator ABOUREZK. I thank you very much, and I appreciate it.

The final witness for the hearing today is Henry Schwarzschild, director, National Coalition Against the Death Penalty, director, ACLU Capital Punishment Project, New York City, N.Y.

I would like to welcome you to the committee.

STATEMENT OF HENRY SCHWARZSCHILD, DIRECTOR, NATIONAL COALITION AGAINST THE DEATH PENALTY; DIRECTOR, ACLU CAPITAL PUNISHMENT PROJECT, NEW YORK CITY, N.Y.

Mr. SCHWARZSCHILD. With your permission, I would like to submit my prepared statement for the record, together with some accompanying exhibits which I shall properly mark in sequence and submit to your staff for inclusion in your record.

Senator ABOUREZK. Your entire statement will be included in the record as though read.

[The material supplied follows:]

Testimony of

HENRY SCHWARZSCHILD,

Director, Capital Punishment Project, American Civil Liberties
Union, and
Director, National Coalition Against the Death Penalty,

on

S. 1382

("to establish rational criteria for the imposition of the
penalty of death")

before the

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE,

May 11, 1978.

Mr. Chairman, Senators:

I am Henry Schwarzschild, and I appear here, together with my colleague Deborah Leavy, at the request of Senator James Abourezk, Chairman of the Subcommittee on Administrative Practice and Procedure, in my capacities of Director of the American Civil Liberties Union's Capital Punishment Project and of Director of the National Coalition Against the Death Penalty, to discuss certain aspects of the larger social and moral policy issue of whether the United States should re-enact a death-penalty statute.

The American Civil Liberties Union, by policy resolutions adopted by its National Board of Directors, is absolutely

opposed to capital punishment under all circumstances, on the grounds (among others) that in our judgment the death penalty in principle violates the cruel-and-unusual punishment clause of the Eighth and empirically and unavoidably violates the due-process clause of the Fifth and the equal-protection-of-the-laws clause of the Fourteenth Amendments to the United States Constitution.

The National Coalition Against the Death Penalty is a coordinating agency for over fifty major national and regional organizations in the fields of religion, public-interest law, the minority communities, professional, community, and political concerns, all come together in their commitment to the abolition of capital punishment generally and to the prevention of executions in particular. Among the National Coalition's affiliated groups are the National Council of the Churches of Christ in the U.S.A., most of its major denominational constituents, such as the Episcopal Church, the United Church of Christ, the United Methodist Church, the United Presbyterian Church, the Lutheran Church, and others, the Synagogue Council of America, the Central Conference of American Rabbis, the American Friends Service Committee, the N.A.A.C.P., the National Conference of Black Lawyers, the National Council on Crime and Delinquency, the American Orthopsychiatric Association, the American Civil Liberties Union, and many others. With your permission, I shall submit for the record of this hearing a list of the affiliated organizations of the National Coalition, together with a list of the members of its Governors' Council Against Executions, comprising over thirty incumbent and former

state governors who have agreed to intercede with any sitting governor who confronts a decision about signing a death warrant to commute each and every death sentence.

Mr. Chairman: Six months ago, in December 1977, the Nobel-Peace-Prize-winning organization Amnesty International, at a conference held in Stockholm, Sweden, with the unanimous endorsement of 200 delegates and participants from over fifty countries of Asia, Africa, Europe, the Middle East, North and South America, and the Caribbean region, adopted a statement known as the Stockholm Declaration that I should like to enter into the record of this hearing and from which I want to read to you only some operative paragraphs:

The Stockholm Conference on the Abolition of the
Death Penalty ...
Recalls That the death penalty is the ultimate cruel,
inhuman and degrading punishment and violates the
right to life; ...
Affirms That it is the duty of the state to protect the
life of all persons within its jurisdiction without
exception; ...
Declares its total and unconditional opposition to the
death penalty (and)
its condemnation of all executions in whatever
form committed or condoned by governments, ...
(and)
Calls upon ... all governments to bring about the immediate
and total abolition of the death penalty.

Mr. Chairman: The civilized nations of the earth have long since proceeded progressively to abolish capital punishment. None of the countries of western Europe except France and Spain has used the death penalty in the last decade, and it is a great rarity in these two nations. In most of the European countries, capital punishment has been constitutionally abolished. In Great

Britain, it was abolished (except for treason) in 1971. Canada abolished it by act of Parliament in 1976. Even Israel, laboring under the pressures of wars and hostile commando raids, retains it only for the crime of genocide. Indeed, among the developed countries of the world, the United States is in the company primarily of the Soviet Union and South Africa in maintaining (indeed: reinforcing) its use of the death penalty as an ordinary component of the system of criminal justice. That is not ennobling company to keep for a nation that prides itself on its humaneness, whose Administration proclaims its devotion to human rights all over the world, and that needs urgently to reestablish its credibility in the human family as one that does not use its enormous power to the detriment of human life.

Earlier witnesses before you this morning, my distinguished colleagues Professors Hans Zeisel and Hugo Adam Bedau, have already dealt with many of the central issues underlying enlightened and concerned opposition to the death penalty. You already know the classic arguments about the merits of the death penalty: its dubious and unproved value as a deterrent to violent crime; the arbitrariness and mistakes inevitable in any system of justice instituted and administered by fallible human beings; the persistent and ineradicable discrimination on grounds of race, class, and sex in its administration in our country's history (including the present time); the degrading and hurtful impulse toward retribution and revenge that it expresses; the barbarousness of its process (whether by burning at the stake, by hanging from the

gallows, by frying in the electric chair, by suffocating in the gas chamber, by shooting at the hands of a firing squad, or by lethal injection with a technology designed to heal and save lives); even the deeply distorting and costly effect the death penalty has upon the administration of the courts, upon law enforcement, and upon the penal institutions of the country.

Let me therefore concentrate my remarks upon a few selected issues about which much unclarity exists in the public mind, in the media, and even in many legislative chambers.

I want to discuss these issues in the context of the evident support of public opinion for the reintroduction of capital punishment in the country. Let me be candid: For the past few years, public opinion polls, whether national or regional, have tended to reflect a substantial majority of the American people affirming their support for the death penalty, to the level of between 65% and 75% -- enough to make many an elected official surrender his or her religious or moral principles against capital punishment. As little as twenty years ago, the polls reflected almost precisely the opposite distribution of views in the country. It is not hard to infer what has turned the American people back toward support of so atavistic and demonstrably useless a criminal sanction. The causes are (a) the rising rate of violent crime in the past two decades, (b) the increasing panic about that rising crime rate, together with a justified (as well as exaggerated) fear for the safety of lives and property, (c) the understandable reaction to a terrible series of assassinations and attempted

assassinations of our national leaders and other prominent personalities (President John Kennedy, Senator Robert Kennedy, the Rev. Dr. Martin Luther King Jr., Governor George Wallace, Malcolm X, Medgar Evers, and others), (d) the rise of international terrorism, including aircraft hijackings and the murder of prominent political and business leaders as well as the random political killings of innocent victims, (e) many years of the effective discontinuation of capital punishment and the remoteness from actual experience of its horrors, and finally (f) a largely subliminal but sometimes almost articulated racism that attributes most violent criminality to the minority community, that knows quite well that the poor and the black are most often the subjects of the death penalty, and that thinks that's just the way it ought to be.

What, then, are the rational answers to this series of partly understandable and partly impermissible misconceptions in the American public?

True, violent crime has risen sharply in the past two decades, but to begin with it has been abundantly demonstrated by social research that the availability of the death penalty has no effect whatsoever upon the rate of violent crime; to the contrary, there is some scientific evidence that death sentences imposed and carried out may, for peculiar reasons of social and psychic pathology, be an incentive to further acts of violence in the society. Furthermore, while the rates of most major, violent felonies have been rising -- most probably by reason of increased urbanization, social mobility, economic distress, and the like --

the rate of non-negligent homicide has been rising at a rate slower than the other major felonies, and non-negligent homicide is, of course, the only crime for which the death penalty has been declared constitutionally permissible by the Supreme Court. The crisis in violent crime, such as it is, has therefore been least acute in the area of homicide. Indeed, in the past three years, the murder rate in this country has actually been declining. Thirdly, there is the appalling number of about 20,000 non-negligent homicides in this country per year. But we would have to return to the condition of the mid-1950's to execute as many as one hundred persons per year, and even that would constitute only one in every two hundred murderers. In other words, we have always picked quite arbitrarily a tiny handful of people among those convicted of murder to be executed, not those who have committed the most heinous, the most revolting, the most destructive murders, but always the poor, the black, the friendless, the life's losers, those without competent, private attorneys, the illiterate, those despised or ignored by the community for reasons having nothing to do with their crime. Ninety-nine and one half per cent of all murderers were never executed -- and the deterrent value (which very likely does not exist at all in any case) is reduced to invisibility by the overwhelming likelihood that one will not be caught, or not be prosecuted, or not be tried on a capital charge, or not be convicted, or not be sentenced to death, or have the conviction or sentence reversed on appeal, or have one's sentence commuted. And if we took the other course and eliminated those

high chances of not being executed but rather carried out the death penalty for every murder, then we should be executing 400 persons per week, every week of the month, every month of the year -- and that, Mr. Chairman, would strike even the most ardent supporters of the death penalty as a ghastly bloodbath, not as a civilized system of criminal justice, one should think.

Assassinations and terrorism are well known to be undeterrable by the threat of the death penalty. They are acts of political desperation or political insanity, always committed by people who are at least willing, if not eager, to be martyrs to their cause. Nor would executing terrorists be a preventive against the subsequent taking of hostages for the purpose of setting political assassins or terrorists free. There would of course be a considerable interval of time between arrest and execution, at least for the purpose of trial and the accompanying processes of law, and during that time their fellow activists would have a far more urgent incentive for taking hostages, since not only the freedom but the very lives of their arrested and sentenced colleagues would be at stake. Let me only respectfully add that distinguished fellow citizens of ours who have suffered terrible sadness in their lives at the hands of assassins, such as Senator Edward Kennedy and Ms. Coretta King, are committed opponents of the death penalty.

No one in this Committee surely is guilty of that shoddiest of all impulses toward capital punishment, namely the sense that white, middle-class people, irrespective of their crime,

in fact hardly ever get sentenced to death and in such an extremely rare case are virtually never executed. You, Mr. Chairman and Senators, and I and probably everyone in this hearing room are in fact absolutely immune, no matter what ghastly crime we might commit, from the likelihood of being executed for it. The penalty of death is imposed almost entirely upon members of what the distinguished social psychologist Kenneth B. Clark has referred to as "the lower status elements of American society." Blacks have always constituted a dramatically disproportionate number of persons executed in the United States, far beyond their share of capital crimes, and even as we sit here today they represent half of the more than 500 persons on the death rows of our state prisons. Indeed, not only the race of the criminal is directly proportional to the likelihood of his being sentenced to death and executed but the race of the victim of the crime as well. The large majority of criminal homicides are still disasters between people who have some previous connection with each other (as husband and wife, parent and child, lovers, business associates, and the like), and murder is therefore still largely an intra-racial event. i.e. black on black or white on white. Yet while half the people under sentence of death right now are black (showing egregious discrimination on the grounds of the race of the murderer), about 85% of their victims were white. In other words, it is far more likely to get him into the electric chair or the gas chamber if he has killed a white person than if he had killed a black person, quite irrespective of his own race. (I say "he" in this context for good reason: the death penalty is

also highly discriminatory on grounds of sex. Of the 500 death-row inmates in the country today, only six are women, and even they are far more likely objects of executive commutation of their death sentences than their male counterparts.)

Let me add here that, to the extent to which fear of crime and greater exposure to it, combined with inadequate police protection and more callous jurisprudence has made the minority communities also voice increasing support for the death penalty, they have not yet fully realized that the death penalty will not protect them from what they (and all of us) rightly fear and that their support of capital punishment will only put their brothers and husbands and sons in jeopardy of being killed by the same state that has been unable to protect their lives, their rights, or their property to begin with.

In sum: The public is deeply uninformed about the real social facts of the death penalty and is responding to the seemingly insoluble problem of crime by a retreat to the hope that an even more severe criminal penalty will stem the tide of violence. But it will not. We do not know what will. Judges and lawyers do not know how to deal adequately with crime, philosophers and criminologists don't, not even civil libertarians or legislators know the answer -- if any of us did, we would have long since accomplished our purpose of reducing crime to the irreducible minimum. But legislators are not therefore entitled to suborn illusory solutions merely because they would garner widespread though

uninformed public approval, in order to signal to the electorate that they are "tough on crime." Capital punishment does not deal with crime in any useful fashion and in fact deludes the public into an entirely false sense of greater security about that complex social problem. The death penalty is a legislative way of avoiding rather than dealing with the problem of crime, and the American public will come to learn this very dramatically and tragically if the Congress should unwisely enact the bill before you today.

Two final words about public support for the death penalty.

First: There are strong indications that the public in great numbers answers in the affirmative when asked whether they support capital punishment because they want a death penalty law on the books in the hope that this threat will deter criminals from committing violent crimes. Many, perhaps most, of the people who support the enactment of the death penalty do not want executions and would be horrified at being asked to sentence a living human being to a premeditated, ceremonial, legally sanctioned killing. They want deterrence, not electrocutions; prevention, not lethal injections; safety, not firing squads. But a re-enactment by this Congress of a federal death-penalty statute will give them at best only electrocutions or lethal injections or firing squads, but neither deterrence nor crime prevention nor safety from violence.

Secondly: The last stand of supporters for the death penalty, when all the other arguments have been rebutted or met,

is that of retribution or revenge, the proposition that a murderer has forfeited his life and that we should kill him as an act of abstract equity, irrespective of whether executions serve any social purpose whatsoever. We do not need to preach to each other here this morning, but it is important to have it said once more that civilized societies have instituted systems of justice precisely in order to overcome private acts of retribution and revenge and that they have done so with the understanding that social necessity and social usefulness will be the guideposts of their punishments. Since there has never been and cannot be a showing of social usefulness or social necessity for capital punishment, the virtually unanimous voices of the religious community of our land, our leading thinkers and social analysts, in unison with enlightened opinion for hundreds, perhaps thousands, of years should guide your actions on this matter. Whatever the understandable, bitter, vengeful impulses might be of any of us who suffer the disastrous tragedy of having someone we love or respect murdered by pathological or cruel killers, the society's laws are written not to gratify those impulses but to channel them into helpful, healing, and life-sustaining impulses. Gratifying the impulse for revenge is not the business of a government that espouses the humane and liberating ideas expressed in our Declaration of Independence and Constitution. It would be rather a return to the darkest instincts of mankind. It would be arrogating unto the state, unto government, either the god-like wisdom to judge who shall live and who shall die or else the totalitarian arrogance to make that judgment. We, as a nation,

have foresworn that idolatry of the state that would justify either of these grounds for the legally sanctioned killing of our fellow citizens, of any human being, except perhaps in personal or national self-defense.

Mr. Chairman: The question before the country and before the Congress ultimately is whether it is the right of the state, with premeditation, with the long foreknowledge of the victim, under color of law, in the name of all of us, with great ceremony, and to the approval of many angry people in our land, to kill a fellow citizen, a fellow human being, to do that which we utterly condemn, which we utterly abhor in him for having done. What does the death penalty, after all, say to the American people and to our children? That killing is all right if the right people do it and think they have a good enough reason for doing it? That is the rationale of every pathological murderer walking the street, that he is the right person to do it and has a good reason for doing his destructive deed. How can a thoughtful and sensible person justify killing people who kill people to teach that killing is wrong? How can you avert your eyes from the obvious; that the death penalty and that executions in all their bloody and terrible reality only aggravate the deplorable atmosphere of violence, the disrespect for life, the brutalization of ourselves that we need to overcome?

If the death penalty were shown, or even could be shown, to be socially necessary or even useful, I would personally still have a deep objection to it. But those who argue for its re-enactment have not and cannot meet the burden of proving its necessity or usefulness. At the very least, before you

kill a human being under law, do you not have to be absolutely certain that you are doing the right thing? But how can you be sure that the criminal justice system has worked with absolute accuracy in designating this single person is the guilty one, that this single person is the one that should be killed, that killing him is the absolutely right thing to do? You cannot be sure, because human judgment and human institutions are demonstrably fallible. And you cannot kill a man when you are not absolutely sure. You can (indeed sometimes you must) make sure that he is incapacitated from repeating his crime, and we can obviously accomplish that by ways other than killing him. And while there is fallibility there also, death is different: it is final, irreversible, barbarous, brutalizing to all who come into contact with it. That is a very hurtful model for the United States to play in the world, it is a very hurtful model for a democratic and free government to play for its people.

Mr. Chairman, there are a great many other dispositive reasons why we believe the Judiciary Committee and the Senate should not adopt S.1382. In addition to the points made by the other witnesses and the few matters I have examined here this morning, we could deal in greater detail with the arguments about the costs of lifetime incarceration as against the costs of maintaining the death penalty, which suggest strongly that even in the tawdry terms of cold, cash disbursement by the

criminal justice system, capital punishment is far more expensive than even the problematic alternative of life imprisonment. We could speak at length about the reasons why every major religious denomination and group in America committedly opposes the death penalty. (With your permission, I should like to give you and to enter into the record of this hearing a booklet entitled "Capital Punishment: What the Religious Community Says," a compilation of the policy statements of all the major religious bodies of the country, recently recompiled by the National Interreligious Task Force on Criminal Justice, a body related to the National Council of Churches of Christ in the U.S.A.

Mr. Chairman and Senators, we call upon you in the interest of the good name of our country and in the cause of human decency to vote down S.1382 and to defeat any attempt to re-enact legally sanctioned killing into our already troubled society.

Mr. SCHWARZSCHILD. I shall concentrate my remarks on the question that was touched on very briefly initially by Professor Zeisel earlier; namely, the context of the evidently large public support for the reintroduction of capital punishment in the country.

I do that because it seems to me that it might be extremely important, and perhaps even dispositive, for a legislative body of elected officials to have due regard for the weight and significance of such expressed public views.

I think we need to be candid about that.

For the past few years, public opinion polls, whether national or regional, have tended to reflect a substantial majority of the American people affirming their support for the death penalty to the level of between 65 and 75 percent—enough, indeed, to make many an elected official surrender his or her religious or moral principles against capital punishment.

As little as 20 years ago, the polls reflected almost precisely the reverse distribution of views in the country.

I think it is not too hard to infer what has turned the American people back towards support of so atavistic and demonstrably useless a criminal sanction.

The causes are, first, the rising rate of violent crime in the past few decades; second, the increasing panic about the rising crime rate, together with a justified as well as an exaggerated fear for the safety of lives and property; third, the understandable reaction to a terrible series of assassinations and attempted assassinations of our national leaders and other prominent personalities, such as President John Kennedy, Senator Robert Kennedy, the Reverend Dr. Martin Luther King, Jr., Gov. George Wallace, Malcolm X, Medgar Evers, and too many others.

Fourth, the rise of international terrorism, including aircraft hijackings and the murder of prominent political and business leaders, as well as the random political killings of innocent victims.

Fifth, the many years of the effective discontinuation of capital punishment in our country and the remoteness from actual experience of its horrors.

And, finally, a largely subliminal but occasionally almost articulated racism that attributes most violent criminality to the minority community that knows quite well that the poor and the black are most often the subjects of the death penalty and that thinks that is just the way it ought to be.

What, then, are the rational answers for this series of partly understandable and partly quite impermissible misconceptions of the American public.

Violent crime has risen sharply in the past few decades.

But as you have heard already, it has been abundantly demonstrated by social research that the availability of the death penalty has no effect whatsoever upon the rate of violent crime.

To the contrary, there is some scientific evidence that death sentences imposed and carried out may, for peculiar reasons of social and psychic pathology, be an actual incentive to further acts of violence in the society.

Furthermore, while the rates of most violent felonies have, indeed, been rising, most probably by reason of increased urbanization of social mobility and economic distress and the like, the rate

of nonnegligent homicide has been rising at a rate slower than that of the other major felonies. Nonnegligent homicide is, of course, the only crime for which the death penalty has been declared constitutionally permissible by the Supreme Court.

The crisis in violent crime, therefore, such as it is, has been least acute in the area of homicide. Indeed, in the past 3 years, we can say authoritatively on the basis of FBI crime statistics, that the murder rate in this country has actually been declining.

There is an appalling number of about 20,000 nonnegligent homicides in this country per year.

We would have to return to the conditions of the mid-fifties to execute as many as 100 persons per year; and even that would constitute only one in every 200 murderers.

In other words, we have always picked quite arbitrarily a tiny handful of people among those convicted of murder to be executed—not those who have permitted the most heinous and the most revolting and the most destructive murders but always the poor, the black, the friendless, the losers, those without competent private attorneys, the illiterate, and those who are despised or ignored by the community for reasons having nothing to do whatever with their crime; 99.5 percent of all murderers have never been executed in our country.

The deterrent value, which very likely doesn't exist to begin with, is reduced to invisibility by the overwhelming likelihood that one will not be caught or not be prosecuted or not be tried on a capital charge or not be convicted or not be sentenced to death or have a conviction or sentence reversed on appeal or have a sentence commuted, even if one does indeed commit a murder.

And if, indeed, we took the other course and eliminated the high chances of not being executed, but rather carry out the death penalty for every murderer, then we should be executing 400 persons per week, every week of the month, every month of the year.

And that, Senator ABOUREZK, would strike, it seems to me, even the most ardent supporters of the death penalty as a ghastly social bloodbath and not as a civilized system of criminal justice.

Senator ABOUREZK. I'm not certain about that.

Mr. SCHWARZSCHILD. I have residual confidence that even those who disagree with us on this point might blanch at the prospect of 400 executions per week in our society.

Senator ABOUREZK. I think your point that it depends on whose child has the measles or who is being killed in this case, makes a difference too.

I think it is an excellent point, and I would tend to agree with it.

Mr. SCHWARZSCHILD. Let me continue, if I may.

On the point of the support for the death penalty, having been in part accentuated by the recent experience of assassinations and terrorism, they are, of course, well-known to be undeterrable by the threat of the death penalty. They are acts of political desperation or political insanity, almost always committed by people who are at least willing and very often eager to be martyrs to their cause.

Nor would executing terrorists be a preventive against the subsequent taking of hostages for the purpose of setting political assassins or terrorists free. For there would, of course, be a considerable

interval of time between the arrest and execution of such a terrorist, at least for the purpose of trial and the accompanying processes of law.

During that time, their fellow activists would have a far more urgent incentive for taking hostages, since not only the freedom but the very lives of their arrested and sentenced colleagues would be at stake.

Let me only respectfully add that very distinguished fellow citizens of ours who have suffered terrible sadness in their lives at the hands of assassins, including Senator Edward Kennedy and Mrs. Coretta King, are committed opponents of the death penalty.

No one in this committee, I trust, is guilty of that shoddiest of all impulses toward capital punishment; namely the secure sense that white middle class people, irrespective of their crime, hardly ever get sentenced to death. In such an extremely rare case, they are virtually never executed.

You, Mr. Chairman, and I and probably everyone in this hearing room are, in fact, absolutely immune, no matter what ghastly crime we might commit, from the likelihood of being executed for it.

The penalty of death is imposed almost entirely upon members of what the social psychologist, Kenneth Clarke, has referred to as the lowest status elements of American society.

Blacks have always constituted a dramatically disproportionate number of the persons executed in the United States, far beyond their share of capital crimes.

Even as we sit here today, they represent half of the more than 500 persons on the death rows of our State prisons.

Indeed, as Professor Bedau has examined with some care, not only the race of the criminal is directly proportional to the likelihood of being sentenced to death and executed but the race of the victim of the crime as well.

The large majority of criminal homicides are still disastrous between people who have some previous connection with each other, such as husband and wife, parent and child, lovers, business associates, and the like.

And murder is, therefor, still largely an intraracial event—that is, black on black and white on white.

And yet while half the people under sentence of death right now are black, showing the egregious discrimination on the grounds of race of the murderer, about 85 percent of the victims were white.

In other words, as Professor Bedau has indicated, it is far more likely to put a man or woman into the electric chair or the gas chamber if he or she has killed a white person, than if he or she had killed a black person, quite irrespective of his or her own race.

If we say "he" in this connection most often, it is because the death penalty is also highly discriminatory on the grounds of sex.

Of the 500 death row inmates in the country today, those people under sentence of death and facing imminent execution, only six are women; and even they are far more likely objects of executive commutation of their death sentences than their male counterparts.

Let me add here that to the extent to which the fear of crime, and the greater exposure to it, combined with an adequate police

protection and the generally more callous jurisprudence that has made the minority community itself also voice increasing support for the death penalty, they have not as yet fully realized that the death penalty will not protect them from what they and all of us rightly fear and that their support of capital punishment will only put their brothers and husbands and sons in jeopardy of being killed by the same society that has been inadequately able to protect their lives, their rights, and their property to begin with.

In sum, the public is deeply uninformed about the real social facts of the death penalty and is responding to the seemingly insoluble problem of crime by a retreat to the hope that an even more severe criminal penalty will stem the tide of violence.

But it will not. We don't know what will.

Judges and lawyers do not know how to deal with crime; philosophers and criminologists don't; not even civil libertarians or legislators know the answer. If any of us did, surely we would have long since accomplished our purpose of reducing crime to the irreducible minimum.

But, Senator, legislatures, in our judgment, are not, therefore, entitled to suborn illusory solutions merely because they would garner widespread, though uninformed, public approval in order to signal to the electorate that they are tough on crime.

Capital punishment does not deal with crime in any useful fashion. In fact, it deludes the public into an entirely false sense of greater security about that complex social problem.

The death penalty is a legislative way of avoiding, rather than dealing, with the problem of crime; and the American public may come to learn this very dramatically and tragically if the Congress should unwisely enact Senate bill 1382 which is before you today.

Let me conclude with two final words about the question of public support for the death penalty.

First, there are strong indications that the public in great numbers answers in the affirmative when asked whether they support capital punishment because they want a death penalty law on the books in the hope that this threat will deter criminals from committing violent crimes.

Many of them—perhaps most—who support the enactment of the death penalty, do not want executions and would be horrified at being asked to sentence a living human being to a premeditated, ceremonial, and legally sanctioned killing.

They want deterrence and not executions. They want prevention and not lethal injections. They want safety and not firing squads.

But a reenactment by this Congress of the Federal death penalty statute will give them, at best, only electrocutions and lethal injections and firing squads—but neither deterrence nor crime prevention nor safety from violence.

Second, the last stand of supporters for the death penalty, when all these other arguments have been rebutted and met, is that of retribution or revenge—the proposition that the murderer has forfeited life and that we should kill him as an abstract equity, irrespective of whether executions serve any social purpose whatsoever.

We have preached at each other this morning already sufficiently, and I shall try not to do that any more. But I think it may be

important to restate once more that civilized societies have instituted systems of justice precisely in order to overcome private acts of retribution and vengeance and that they have done so with the understanding that social necessity and social usefulness will be the guideposts of their criminal punishments.

But since there has never been and there cannot be a showing of social usefulness or social necessity for capital punishment, the virtually unanimous voices of the religious community of our land—which I shall submit to you with your permission in a recently published pamphlet by the National Council of Churches—the unanimous voices of our leading thinkers and social analysts, in unison with enlightened opinion for hundreds, if not thousands, of years should guide the Senate's actions on this matter.

Whatever the understandable, bitter, or vengeful impulses might be of any of us who suffer the disastrous tragedy of having someone we love or respect murdered by pathological or cruel killers, the society's laws must be written, not to gratify those impulses but to channel them into helpful, healing, and life-sustaining order.

Gratifying impulses for revenge is not the business of a government that espouses the humane and liberating ideas expressed in our Declaration of Independence and the Constitution.

It would be arrogating unto the State and unto the Federal Government, either the God-like wisdom to judge who shall live and who shall die, or else the totalitarian arrogance to make that judgment.

But we as a Nation, thank God, have foresworn that idolatry of the State that would justify either of those grounds for the legally sanctioned killing of our fellow citizens or of any human being, except perhaps in personal or national self-defense.

Let me not weary you with the conclusion of my prepared statement which you have in front of you.

I will be submitting to you, and have indeed already given it to your staff, the most recent census of death row inmates in the State prisons of our country.

There are, as I have indicated in my comments here this morning, slightly in excess of 500 people under sentence of death in a good many instances, particularly in the States in which the death penalty statute was specifically declared constitutional by the Supreme Court in the *Gregg* case; namely, Florida, Texas, and Georgia, and some others—people who are now confronting the immediate possibility of the exhaustion of the legal remedies and the denial of executive clemency and the immediate and imminent prospect of their being executed.

The world noted with deep concern and with a disastrously sinking feeling the only execution that the United States has carried out in the last decade; namely, that early last year of Gary Mark Gilmore in the State of Utah.

Even though he was an otherwise insignificant person and even though Salt Lake City, Utah, is remote from major centers of international interest in the matter, such as London, Rome, Paris, New Delhi, and Tokyo, his execution produced banner headlines all over the world.

I submit that this is true, not only because most of the civilized world has abolished the death penalty and that we are now essen-

tially in the developed countries only in the company of the Soviet Union and South Africa as a country that uses the death penalty in the ordinary course of the criminal justice system—not very happy company I dare say for us to be in—but also because the United States had, in our recent lifetime, regrettably and in a very melancholy fashion attained and earned the reputation in the world that it uses its enormous political, military, social, and economic power for murderous ends in the world.

We had only recently theretofore concluded the longest war in our history with enormous casualties, for which the world at large saw very little justification and reason.

And having finally gotten ridden of that incubus on the moral conscience and the moral standing of the United States and the world, we then very soon thereafter apparently began to say to the world that if we were compelled to surrender the use of our power for the killing and destruction of human beings in large numbers, we were going to continue to insist on using that power to kill them, one by one.

And that is not a very happy reputation for the United States to live with, when it continues to espouse in principle those ideas.

When an administration devotes itself publicly to the principle of human rights across the world and when I think we need to work desperately and industriously at reestablishing our credibility as a country that will use its powers for the enhancement of human life and not for its destruction.

Thank you.

Senator ABOUREZK. That was an excellent statement. I appreciate it very much.

I would like to thank you for your appearance and for the testimony that you have given today. It has been very helpful to us.

Mr. SCHWARZSCHILD. Thank you.

Senator ABOUREZK. The hearing is adjourned.

[Whereupon, at 11:50 a.m., the hearing adjourned.]

Appendix

[COMMITTEE PRINT]

JUNE 9, 1977

95TH CONGRESS
1ST SESSION

S. 1382

IN THE SENATE OF THE UNITED STATES

APRIL 26 (legislative day, FEBRUARY 21), 1977

Mr. McCLELLAN (for himself, Mr. BARTLETT, Mr. ROBERT C. BYRD, Mr. CANNON, Mr. DeCONCINI, Mr. DOLE, Mr. DOMENICI, Mr. EASTLAND, Mr. GARN, Mr. GOLDWATER, Mr. HATCH, Mr. HAYAKAWA, Mr. HELMS, Mr. JOHNSTON, Mr. LAXALT, Mr. McCLURE, Mr. ROTH, Mr. SCOTT, Mr. THURMOND, and Mr. ZORINSKY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JUNE , 1977

Reported by Mr. McCLELLAN, with amendments

[Strike out all after the enacting clause and insert the part printed in *italic*]

A BILL

To establish rational criteria for the imposition of the sentence of death, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*
 3 ~~That chapter 227 of title 18 of the United States Code is~~
 4 ~~amended by adding after section 3562 a new section 3562A,~~
 5 ~~to read as follows:~~

6 ~~“§ 3562A. Sentencing for capital offenses~~

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

1 ~~"(b) When a defendant is found guilty of or pleads~~
2 ~~guilty to an offense for which one of the sentences provided~~
3 ~~is death, the judge who presided at the trial or before whom~~
4 ~~the guilty plea was entered, or any other judge if the judge~~
5 ~~who presided at trial or before whom the guilty pleas was~~
6 ~~entered is unavailable, shall conduct a separate sen-~~
7 ~~tencing hearing to determine the punishment to be imposed.~~
8 ~~The hearing shall be conducted—~~

9 ~~"(1) before the jury which determined the de-~~
10 ~~fendant's guilt;~~

11 ~~"(2) before a jury impaneled for the purpose~~
12 ~~of the hearing if—~~

13 ~~"(1) before the jury which determined the de-~~
14 ~~fendant's guilt;~~

15 ~~"(2) before a jury impaneled for the purpose of the~~
16 ~~hearing if—~~

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

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

21 ~~"(C) the jury which determined the defend-~~
22 ~~ant's guilt has been discharged for good cause; or~~

23 ~~"(D) appeal of the original imposition of the~~
24 ~~death penalty has resulted in a remand for redetermi-~~
25 ~~nation of sentence under this section; or~~

1 ~~“(3) before the court alone, upon the motion of~~
2 ~~the defendant and with the approval of the court and of~~
3 ~~the Government.~~

4 ~~A jury impaneled pursuant to paragraph (2) of this subsec-~~
5 ~~tion shall consist of twelve members, but, at any time before~~
6 ~~any conclusion of the hearing, the parties may stipulate in~~
7 ~~writing with the approval of the court that it shall consist~~
8 ~~of any number less than twelve.~~

9 ~~“(e) In the sentencing hearing the court shall dis-~~
10 ~~close to the defendant or his counsel all material contained~~
11 ~~in any presentence report, if one has been prepared, except~~
12 ~~such material as the court determines is required to be with-~~
13 ~~held for the protection of human life or for the protection~~
14 ~~of the national security. Any presentence information with-~~
15 ~~held from the defendant shall not be considered in the deter-~~
16 ~~mination of the sentence of death. In the sentencing hearing,~~
17 ~~evidence may be presented as to any matter relevant to sen-~~
18 ~~tence and shall include matters relating to any of the ag-~~
19 ~~gravating or mitigating factors set forth in subsections (f),~~
20 ~~(g), (h). Any information relevant to any mitigating fac-~~
21 ~~tors, including those set forth in subsection (f), may be pre-~~
22 ~~sented by either the Government or the defendant, regard-~~
23 ~~less of its admissibility under the rules governing admission~~
24 ~~of evidence at criminal trials; but the admissibility of infor-~~
25 ~~mation relevant to any aggravating factors, including those~~

1 ~~set forth in subsections (g) and (h), shall be governed by~~
2 ~~the rules governing the admission of evidence at criminal~~
3 ~~trials. The Government and the defendant shall be permitted~~
4 ~~to rebut any information received at the hearing and shall be~~
5 ~~given fair opportunity to present argument as to the adequacy~~
6 ~~of the evidence to establish the existence of any of the ag-~~
7 ~~gravating or mitigating factors, and as to the appropriateness~~
8 ~~in that case of imposing a sentence of death. The burden of~~
9 ~~establishing the existence of any aggravating factors is on the~~
10 ~~Government, and is not satisfied unless established beyond a~~
11 ~~reasonable doubt. The burden of establishing the existence~~
12 ~~of any mitigating factors is on the defendant, and is not~~
13 ~~satisfied unless established by a preponderance of the~~
14 ~~evidence.~~

15 “(d) After hearing all the evidence, the jury, by unani-
16 mous vote, of it there is no jury, the court, shall return special
17 findings setting forth the aggravating and mitigating factors,
18 set out in subsections (f), (g), and (h), found to exist. The
19 jury, or if there is no jury, the court, shall then determine
20 whether or not any aggravating factors found to exist, when
21 taken in conjunction with all the evidence, outweigh any
22 mitigating factors found to exist, and, based upon this deter-
23 mination, shall return a finding as to whether or not a sen-
24 tence of death should be imposed.

25 “(e) Upon the unanimous finding of the jury, or if there

5

1 is no jury, upon a finding by the court, that a sentence of
2 death should be imposed, the court shall sentence the de-
3 fendant to death. In all other cases, the court may impose a
4 sentence of life imprisonment or any term of years.

5 “(f) In determining whether a sentence of death is to
6 be imposed on a defendant, the following mitigating factors
7 shall be considered:

8 “(1) the youthfulness of the defendant at the time
9 of the crime;

10 “(2) the defendant’s capacity to appreciate the
11 wrongfulness of his conduct or to conform his conduct to
12 the requirements of law was significantly impaired, but
13 not so impaired as to constitute a defense to the charge;

14 “(3) the defendant was under unusual and substan-
15 tial duress, although not such a duress as to constitute a
16 defense to prosecution;

17 “(4) the defendant is punishable as a principal for
18 aiding and abetting the offense, under section 2 (a) of
19 this title, but his participation was relatively minor; or

20 “(5) the defendant could not reasonably have fore-
21 seen that his conduct in the course of the commission of
22 murder, or other offense resulting in death for which he
23 was convicted, would cause, or would create a grave
24 risk of causing, death to any person.

25 “(g) If the defendant is found guilty of or pleads guilty

1 ~~to an offense under section 794 or section 2381 of this title~~
2 ~~the following aggravating factors shall be considered:~~

3 “(1) ~~the defendant has been convicted of another~~
4 ~~offense involving espionage or treason for which a sen-~~
5 ~~tence of life imprisonment or death was authorized by~~
6 ~~statute;~~

7 “(2) ~~in the commission of the offense the defendant~~
8 ~~knowingly created a grave risk of substantial danger to~~
9 ~~the national security; or~~

10 “(3) ~~in the commission of the offense the defendant~~
11 ~~knowingly created a grave risk of death to another~~
12 ~~person.~~

13 *Provided*, ~~That if the charge is under section 794 (a) of this~~
14 ~~title, the sentence of death shall not be imposed unless the~~
15 ~~jury or, if there is no jury, the court further finds that the~~
16 ~~offense directly concerned nuclear weaponry, military space-~~
17 ~~craft or satellites, early warning systems, or other means of~~
18 ~~defense or retaliation against large scale attack; war plans;~~
19 ~~communications intelligence or cryptographic information; or~~
20 ~~any other major weapons system or major element of de-~~
21 ~~fense strategy.~~

22 “(h) ~~If the defendant is found guilty of or pleads guilty~~
23 ~~to any other offense for which the death penalty is available,~~
24 ~~the following aggravating factors shall be considered:~~

1 ~~“(1) the death or injury resulting in death occurred~~
2 ~~during the commission or attempted commission of, or~~
3 ~~during the immediate flight from the commission or at-~~
4 ~~tempted commission of, an offense under section 751~~
5 ~~(prisoners in custody of institution or officer), section~~
6 ~~794 (gathering or delivering defense information to aid~~
7 ~~foreign government), section 844 (d) (transportation~~
8 ~~of explosives in interstate commerce for certain pur-~~
9 ~~poses), section 844 (f) (destruction of Government~~
10 ~~property by explosives), section 844 (i) (destruction of~~
11 ~~property in interstate commerce by explosives), section~~
12 ~~1201 (kidnaping), or section 2381 (treason) of this~~
13 ~~title, or section 902 (i) or (n) of the Federal Aviation~~
14 ~~Act of 1958, as amended (49 U.S.C. 1472 (i), (n))~~
15 ~~(aircraft piracy);~~

16 “(2) the defendant has been convicted of another
17 Federal offense, or a State offense resulting in the death
18 of a person, for which a sentence of life imprisonment or
19 a sentence of death was authorized by statute;

20 “(3) the defendant has previously been convicted of
21 two or more State or Federal offenses punishable by a
22 term of imprisonment of more than one year, committed
23 on different occasions, involving the infliction of serious
24 bodily injury upon another person;

1 ~~"(4) in the commission of the offense the defendant~~
2 ~~knowingly created a grave risk of death to another person~~
3 ~~in addition to the victim of the offense;~~

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

6 ~~"(6) the defendant procured the commission of the~~
7 ~~offense by payment, or promise of payment, of anything~~
8 ~~of pecuniary value;~~

9 ~~"(7) the defendant committed the offense as consid-~~
10 ~~eration for the receipt, or in the expectation of the re-~~
11 ~~ceipt, of anything of pecuniary value; or~~

12 ~~"(8) the defendant committed the offense against—~~

13 ~~"(A) the President of the United States, the~~
14 ~~President elect the Vice President, the Vice Presi-~~
15 ~~dent elect, the Vice President designate, or, if there~~
16 ~~is no Vice President, the officer next in order of suc-~~
17 ~~cession to the office of the President of the United~~
18 ~~States, or any person who is acting as President~~
19 ~~under the Constitution and laws of the United~~
20 ~~States;~~

21 ~~"(B) a chief of state, head of government, or~~
22 ~~the political equivalent of a foreign nation;~~

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

1 ~~“(D) a Justice of the Supreme Court, a Fed-~~
2 ~~eral law enforcement officer, or an employee of a~~
3 ~~United States penal or correctional institution, while~~
4 ~~performing his official duties or because of his status~~
5 ~~as a public servant. For purposes of this subsec-~~
6 ~~tion, a ‘law enforcement officer’ is a public servant~~
7 ~~authorized by law or by a Government agency to~~
8 ~~conduct or engage in the prevention, investigation,~~
9 ~~or prosecution of an offense.”~~

10 SEC. 2. Section 34 of title 18 of the United States Code
11 is amended by changing the comma after the words “im-
12 prisonment for life” to a period and deleting the remainder of
13 the section.

14 SEC. 3. Section 844 (d) of title 18 of the United States
15 Code is amended by striking the words “as provided in sec-
16 tion 34 of this title”.

17 SEC. 4. Section 844 (f) of title 18 of the United States
18 Code is amended by striking the words “as provided in sec-
19 tion 34 of this title”.

20 SEC. 5. Section 844 (i) of title 18 of the United States
21 Code is amended by striking the words “as provides in sec-
22 tion 34 of this title”.

23 SEC. 6. The second paragraph of section 1111 (b) of
24 title 18 of the United States Code is amended to read as
25 follows:

1 ~~“Whoever is guilty of murder in the first degree shall be~~
2 ~~punished by death or by imprisonment for life;”~~

3 ~~SEC. 7. Section 1116 (a) of title 18 of the United States~~
4 ~~Code is amended by striking the words “, except that any~~
5 ~~such person who is found guilty of murder in the first degree~~
6 ~~shall be sentenced to imprisonment for life”.~~

7 ~~SEC. 8. Section 1201 of title 18 of the United States Code~~
8 ~~is amended by inserting after the words “or for life” in sub-~~
9 ~~section (a) the words “and if the death of any person~~
10 ~~results, shall be punished by death or life imprisonment”.~~

11 ~~SEC. 9. The last paragraph of section 1716 of title 18~~
12 ~~of the United States Code is amended by changing the com-~~
13 ~~ma after the words “imprisonment for life” to a period and~~
14 ~~deleting the remainder of the paragraph.~~

15 ~~SEC. The second to the last paragraph of section~~
16 ~~1992 of title 18 of the United States Code is amended by~~
17 ~~changing the comma after the words “imprisonment for life”~~
18 ~~to a period and deleting the remainder of the section.~~

19 ~~SEC. 11. Section 2031 of title 18 of the United States~~
20 ~~Code is amended by deleting the words “death, or”.~~

21 ~~SEC. 12. Section 2113 (c) of title 18 of the United~~
22 ~~States Code is amended by striking the words “or punished~~
23 ~~by death if the verdict of the jury shall so direct” and insert-~~
24 ~~ing in lieu thereof the words “or if death results shall be~~
25 ~~punished by death or life imprisonment”.~~

26 ~~SEC. 13. Section 903 of the Federal Aviation Act of~~

1 1958, as amended (49 U.S.C. 1473), is amended by strik-
2 ing subsection (c).

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

"3562A. Sentencing for capital offenses."

6 SEC. 15. Section 3566 of title 18 of the United States
7 Code is amended by adding a second paragraph as follows:

8 "In no event shall a sentence of death be carried out upon
9 a pregnant woman".

10 SEC. 16. Chapter 235 of title 18 of the United States
11 Code is amended by inserting immediately after section 3741
12 the following new section:

13 **~~§ 3742. Appeal from sentence of death~~**

14 "In any case in which the sentence of death is imposed
15 after a proceeding under section 3562A of chapter 227 of
16 this title, the sentence of death shall be subject to review by
17 the court of appeals upon appeal by the defendant. Such
18 review shall have priority over all other cases. On review of
19 the sentence, the court of appeals shall consider the record,
20 including the entire presentence report, if any, the evidence
21 submitted during the trial, the information submitted during
22 the sentencing hearing, the procedures employed in the sen-
23 tencing hearing, and the special findings under section 3562A

12

1 ~~(d). The court shall affirm the sentence if it determines that:~~
2 ~~(1) the sentence of death was not imposed under the in-~~
3 ~~fluence of passion, prejudice, or any other arbitrary factor;~~
4 ~~(2) the evidence supports the jury's or the court's special~~
5 ~~finding of the existence of any aggravating factor or the fail-~~
6 ~~ure to find any mitigating factors, as enumerated in section~~
7 ~~3562A; and (3) the sentence of death is not excessive, con-~~
8 ~~sidering both the crime and the defendant. In all other cases~~
9 ~~the court shall remand the case for reconsideration under the~~
10 ~~provisions of section 3562A of this title. The court of appeals~~
11 ~~shall state in writing the reasons for its disposition of the~~
12 ~~review of the sentence."~~

13 SEC. 17. ~~The analysis of chapter 225 of title 18 of the~~
14 ~~United States Code is amended by adding at the end thereof~~
15 ~~the following new item:~~
16 ~~"3742. Appeal from sentence of death."~~

17 SEC. 18. ~~The provisions of sections 3562A and 3742 of~~
18 ~~title 18 of the United States Code, as added by this Act, shall~~
19 ~~not apply to prosecution under the Uniform Code of Military~~
20 ~~Justice (10 U.S.C. 801).~~

21 *That chapter 227 of title 18 of the United States Code is*
22 *amended by adding after section 3562 a new section 3562A,*
23 *to read as follows:*

24 **"§ 3562A. Sentencing for capital offenses**

25 *"(a) A person shall be subjected to the penalty of death*
26 *for any offense prohibited by the laws of the United States*

1 *only if a hearing is held in accordance with this section.*

2 “(b) *When a defendant is found guilty of or pleads*
 3 *guilty to an offense for which one of the sentences provided*
 4 *is death, the judge who presided at the trial or before whom*
 5 *the guilty plea was entered, or any other judge if the judge*
 6 *who presided at trial or before whom the guilty pleas was*
 7 *entered is unavailable, shall conduct a separate sentencing*
 8 *hearing to determine the punishment to be imposed. The*
 9 *hearing shall be conducted—*

10 “(1) *before the jury which determined the de-*
 11 *fendant's guilt;*

12 “(2) *before a jury impaneled for the purpose of the*
 13 *hearing if—*

14 “(A) *the defendant was convicted upon a plea*
 15 *of guilty;*

16 “(B) *the defendant was convicted after a trial*
 17 *before the court sitting without a jury;*

18 “(C) *the jury which determined the defend-*
 19 *ant's guilt has been discharged for good cause; or*

20 “(D) *after initial imposition of a sentence un-*
 21 *der this section, redetermination of the sentence*
 22 *under this section is necessary; or*

23 “(3) *before the court alone, upon the motion of*
 24 *the defendant and with the approval ~~of the court~~ and of*
 25 *the Government.*

26 *A jury impaneled pursuant to paragraph (2) of this subsec-*

1 tion shall consist of twelve members, but, at any time before
2 the conclusion of the hearing, the parties may stipulate with
3 the approval of the court that it shall consist of any number
4 less than twelve.

5 “(c) Notwithstanding rule 32(c) of the Federal Rules
6 of Criminal Procedure, when a defendant is found guilty of
7 or pleads guilty to an offense for which one of the sentences
8 provided is death, no presentence report shall be ^{prepared} ~~filed with the~~
9 ~~court~~. In the sentencing hearing, evidence may be presented
10 as to any matter relevant to the sentence and shall include
11 matters relating to any of the aggravating or mitigating fac-
12 tors set forth in subsections (f), (g), and (h). Any informa-
13 tion relevant to any mitigating factors, including those set
14 forth in subsection (f), may be presented by either the Gov-
15 ernment or the defendant, regardless of its admissibility under
16 the rules governing admission of evidence at criminal trials;
17 but the admissibility of information relevant to any aggravat-
18 ing factors, including those set forth in subsections (g) and
19 (h), shall be governed by the rules governing the admission of
20 evidence at criminal trials. The Government and the defend-
21 ant shall be permitted to rebut any information received at the
22 hearing and shall be given fair opportunity to present argu-
23 ment as to the adequacy of the evidence to establish the exist-
24 ence of any of the aggravating or mitigating factors, and as
25 to the appropriateness in that case of imposing a sentence of
26 death. The Government shall open the argument. The defend-

15

1 ant shall be permitted to reply. The Government shall then be
2 permitted to reply in rebuttal. The burden of establishing the
3 existence of any aggravating factors is on the Government,
4 and is not satisfied unless established beyond a reasonable
5 doubt. The burden of establishing the existence of any mitigat-
6 ing factors is on the defendant, and is not satisfied unless
7 established by a preponderance of the evidence.

8 (d) After hearing all the evidence, the jury, by ^{majority} ~~unani-~~
9 ~~more~~ vote, or if there is no jury, the court, shall return
10 special findings setting forth the aggravating and mitigating
11 factors, set out in subsections (f), (g), and (h), found to
12 exist. If no aggravating factors, set out in subsections (g)
13 and (h), are found to exist the court shall impose a sentence
14 of life imprisonment. If one or more aggravating factors
15 are found to exist, the jury, or if there is no jury, the court,
16 shall then determine, in light of all the evidence, whether the
17 aggravating factors found to exist sufficiently outweigh any
18 mitigating factors found to exist, or in the absence of miti-
19 gating factors whether the aggravating factors are themselves
20 sufficient, to justify a sentence of death. Based upon this
21 determination, the jury, or if there is no jury, the court,
22 shall return a finding as to whether a sentence of death is
23 justified.

24 "(e) Upon the unanimous finding of the jury, or if there
25 is no jury, upon a finding by the court, that a sentence of

1 death is justified, the court shall sentence the defendant to
2 death. In all other cases, the court shall impose a sentence of
3 life imprisonment.

4 “(f) In determining whether a sentence of death is to
5 be imposed on a defendant, the following mitigating factors
6 shall be considered:

7 “(1) the youthfulness of the defendant at the time
8 of the crime;

9 “(2) the defendant’s capacity to appreciate the
10 wrongfulness of his conduct or to conform his conduct to
11 the requirements of law was significantly impaired, but
12 not so impaired as to constitute a defense to the charge;

13 “(3) the defendant was under unusual and substan-
14 tial duress, although not such a duress as to constitute a
15 defense to prosecution;

16 “(4) the defendant is punishable as a principal, ~~for~~
17 ~~aiding and abetting the offense, under section 2(a) of~~
18 ~~this title~~, but his participation was relatively minor; or

19 “(5) the defendant could not reasonably have fore-
20 seen that his conduct in the course of the commission of
21 murder, or other offense resulting in death for which he
22 was convicted, would cause, or would create a grave
23 risk of causing, death to any person.

24 “(g) If the defendant is found guilty of or pleads guilty

1 to an offense under section 794 or section 2381 of this title
2 the following aggravating factors shall be considered:

3 “(1) the defendant has been convicted of another
4 offense involving espionage or treason for which a sen-
5 tence of life imprisonment or death was authorized by
6 statute;

7 “(2) in the commission of the offense the defendant
8 knowingly created a grave risk of substantial danger to
9 the national security; or

10 “(3) in the commission of the offense the defendant
11 knowingly created a grave risk of death to another
12 person.

13 “(h) If the defendant is found guilty of or pleads guilty
14 to any other offense for which the death penalty is available,
15 the following aggravating factors shall be considered:

16 “(1) the death or injury resulting in death occurred
17 during the commission or attempted commission of, or
18 during the immediate flight from the commission or at-
19 tempted commission of, an offense under section 751
20 (prisoners in custody of institution or officer), section
21 794 (gathering or delivering defense information to aid
22 foreign government), section 844(d) (transportation
23 of explosives in interstate commerce for certain pur-
24 poses), section 844(f) (destruction of Government

1 *property by explosives), section 844(i) (destruction of*
2 *property in interstate commerce by explosives), section*
3 *1201 (kidnaping), or section 2381 (treason) of this*
4 *title, or section 902 (i) or (n) of the Federal Aviation*
5 *Act of 1958, as amended (49 U.S.C. 1472 (i), (n))*
6 *(aircraft piracy);*

7 “(2) the defendant has been convicted of another
8 *Federal offense, or a State offense resulting in the death*
9 *of a person, for which a sentence of life imprisonment or*
10 *a sentence of death was authorized by statute;*

11 “(3) the defendant has previously been convicted of
12 *two or more State or Federal offenses punishable by a*
13 *term of imprisonment of more than one year, committed*
14 *on different occasions, involving the infliction of serious*
15 *bodily injury upon another person;*

16 “(4) in the commission of the offense the defendant
17 *knowingly created a grave risk of death to another person*
18 *in addition to the victim of the offense;*

19 “(5) the defendant committed the offense in an
20 *especially heinous, cruel, or depraved manner;*

21 “(6) the defendant procured the commission of the
22 *offense by payment, or promise of payment, of anything*
23 *of pecuniary value;*

24 “(7) the defendant committed the offense as consil-

eration for the receipt, or in the expectation of the receipt, of anything of pecuniary value;

“(8) the defendant committed the offense after substantial planning and premeditation to cause the death of a person; or

“(9) the defendant committed the offense against—

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

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

“(C) a foreign official ^{or internationally protected person} listed in section 1116(b)

(1) of this title, if he is in the United States because of his official duties; or

“(D) 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 subsec-

1 tion, a 'law-enforcement officer' is a public servant
2 authorized by law or by a Government agency to
3 conduct or engage in the prevention, investigation,
4 or prosecution of an offense."

5 SEC. 2. Section 34 of title 18 of the United States Code
6 is amended by changing the comma after the words "im-
7 prisonment for life" to a period and deleting the remainder
8 of the section.

9 SEC. 3. Section 794(a) of title 18 of the United States
10 Code is amended by changing the period at the end of the
11 section to a comma and by adding immediately thereafter the
12 words "except that the sentence of death shall not be imposed
13 unless the jury or, if there is no jury, the court, further finds
14 that the offense directly concerned nuclear weaponry, military
15 spacecraft or satellites, early warning systems, or other means
16 of defense or retaliation against large-scale attack; war plans;
17 communications intelligence or cryptographic information; or
18 any other major weapons system or major element of de-
19 fense strategy."

20 SEC. 4. Section 844(d) of title 18 of the United States
21 Code is amended by striking the words "as provided in sec-
22 tion 34 of this title".

23 SEC. 5. Section 844(f) of title 18 of the United States
24 Code is amended by striking the words "as provided in sec-
25 tion 3 of this title".

1 *SEC. 6. Section 8(i) of title 18 of the United States*
2 *Code is amended by striking the words "as provided in sec-*
3 *tion 34 of this title".*

4 *SEC. 7. The second paragraph of section 1111(b) of*
5 *title 18 of the United States Code is amended to read as*
6 *follows:*

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

9 *SEC. 8. Section 1116(a) of title 18 of the United States*
10 *Code is amended by striking the words ", except that any*
11 *such person who is found guilty of murder in the first degree*
12 *shall be sentenced to imprisonment for life"*.

13 *SEC. 9. Section 1201 of title 18 of the United States*
14 *Code is amended by inserting after the words "or for*
15 *life" in subsection (a) the words "and if the death of*
16 *any person results, shall be punished by death or life*
17 *imprisonment"*.

18 *SEC. 10. The last paragraph of section 1716 of title 18*
19 *of the United States Code is amended by changing the com-*
20 *ma after the words "imprisonment for life" to a period and*
21 *deleting the remainder of the paragraph.*

22 *SEC. 11. The second to the last paragraph of section*
23 *1992 of title 18 of the United States Code is amended by*
24 *changing the comma after the words "imprisonment for life"*
25 *to a period and deleting the remainder of the section.*

1 *SEC. 12. Section 2031 of title 18 of the United States*
2 *Code is amended by deleting the words "death, or".*

3 *SEC. 13. Section 2113(e) of title 18 of the United*
4 *States Code is amended by striking the words "or punished*
5 *by death if the verdict of the jury shall so direct" and insert-*
6 *ing in lieu thereof the words "or if death results shall be*
7 *punished by death or life imprisonment".*

8 *SEC. 14. Section 903 of the Federal Aviation Act of*
9 *1958, as amended (49 U.S.C. 1473), is amended by strik-*
10 *ing subsection (c).*

11 *SEC. 15. The analysis of chapter 227 of title 18 of the*
12 *United States Code is amended by inserting after item 3562*
13 *the following new item:*

"3562A. Sentencing for capital offenses."

14 *SEC. 16. Section 3566 of title 18 of the United States*
15 *Code is amended by adding a second paragraph as follows:*

16 *"In no event shall a sentence of death be carried out upon*
17 *a pregnant woman".*

18 *SEC. 17. Chapter 235 of title 18 of the United States*
19 *Code is amended by inserting immediately after section 3741*
20 *the following new section:*

21 **"§ 3742. Appeal from sentence of death**

22 *"In any case in which the sentence of death is imposed*
23 *after a proceeding under section 3562A of chapter 227 of*
24 *this title, the sentence of death shall be subject to review by*

1 the court of appeals upon appeal by the defendant. Notice of
2 appeal must be filed within the time prescribed for appeal of
3 judgment in section 2107 of title 28 of the United States Code.
4 An appeal under this section may be consolidated with an
5 appeal of the judgment of conviction. Such review shall have
6 priority over all other cases.

7 On review of the sentence, the court of appeals shall con-
8 sider the record, ~~including the entire presentence report, if~~
9 ~~any~~ the evidence submitted during the trial, the information
10 submitted during the sentencing hearing, the procedures em-
11 ployed in the sentencing hearing, and the special findings
12 under section 3562A(d).

13 "The court shall affirm the sentence if it determines that:
14 (1) the sentence of death was not imposed under the in-
15 fluence of passion, prejudice, or any other arbitrary factor;
16 (2) the evidence supports the jury's or the court's special
17 finding of the existence of any aggravating factor or the fail-
18 ure to find any mitigating factors, as enumerated in section
19 3562A; and (3) the sentence of death is not excessive, con-
20 sidering both the crime and the defendant. In all other cases
21 the court shall remand the case for reconsideration under the
22 provisions of section 3562A of this title. The court of appeals
23 shall state in writing the reasons for its disposition of the
24 review of the sentence."

1 *SEC. 18. The analysis of chapter 235 of title 18 of the*
2 *United States Code is amended by adding at the end thereof*
3 *the following new item:*

"3742. Appeal from sentence of death."

4 *SEC. 19. The provisions of sections 3562A and 3742 of*
5 *title 18 of the United States Code, as added by this Act, shall*
6 *not apply to prosecutions under the Uniform Code of Military*
7 *Justice (10 U.S.C. 801).*

 Amend the title so as to read: "A bill to establish constitutional procedures for the imposition of the sentence of death, and for other purposes."

No. 75-5444

Ehrlich Anthony Coker, Petitioner, v. State of Georgia.	}	On Writ of Certiorari to the Su- preme Court of Georgia.
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[June 29, 1977]

Syllabus

While serving various sentences for murder, rape, kidnaping, and aggravated assault, petitioner escaped from a Georgia prison and, in the course of committing an armed robbery and other offenses, raped an adult woman. He was convicted of rape, armed robbery, and the other offenses and sentenced to death on the rape charge, when the jury found two of the aggravating circumstances present for imposing such a sentence, *viz.*, that the rape was committed (1) by a person with prior capital-felony convictions and (2) in the course of committing another capital felony, armed robbery. The Georgia Supreme Court affirmed both the conviction and sentence. *Held*: The judgment upholding the death sentence is reversed and the case is remanded. Pp. 6-15 (opinion of WHITE, J.); p. 15 (statement of BRENNAN, J.); p. 1 (statement of MARSHALL, J.); p. 1 (opinion of POWELL, J.).

234 Ga. 555, 216 S. E. 2d 782, reversed and remanded.

MR. JUSTICE WHITE, joined by MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, concluded that the sentence of death for the crime of rape is grossly disproportionate and excessive punishment and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.

(a) The Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed, and a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.

(b) That death is a disproportionate penalty for rape is strongly indicated by the objective evidence of present public judgment, as represented by the attitude of state legislatures and sentencing juries, concerning the acceptability of such a penalty, it appearing that Georgia is currently the only State authorizing the death sentence for rape of an adult woman, that it is authorized for rape in only two other States but only when the victim is a child, and that in the vast majority (9 out of

10) of rape convictions in Georgia since 1973, juries have not imposed the death sentence.

(c) Although rape deserves serious punishment, the death penalty, which is unique in its severity and irreversibility, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not unjustifiably take human life.

(d) The conclusion that the death sentence imposed on petitioner is disproportionate punishment for rape is not affected by the fact that the jury found the aggravating circumstances of prior capital felony convictions and occurrence of the rape while committing armed robbery, a felony for which the death sentence is also authorized, since the prior convictions do not change the fact that the rape did not involve the taking of life, and since the jury did not deem the robbery itself deserving of the death penalty, even though accompanied by the aggravating circumstances of prior capital felony convictions.

(e) That under Georgia law a deliberate killer cannot be sentenced to death, absent aggravating circumstances, argues strongly against the notion that, with or without such circumstances, a rapist who does not take the life of his victim should be punished more severely than the deliberate killer.

Mr. Justice BRENNAN concluded that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.

Mr. Justice MARSHALL concluded that the death penalty is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.

Mr. Justice POWELL concluded that death is disproportionate punishment for the crime of raping an adult woman where, as here, the crime was not committed with excessive brutality and the victim did not sustain serious or lasting injury.

WHITE, J., announced the Court's judgment and delivered an opinion, in which STEWART, BLACKMUN, and STEVENS, JJ., joined. BRENNAN and MARSHALL, JJ., filed statements concurring in the judgment. POWELL, J., filed an opinion concurring in the judgment in part and dissenting in part. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined.

Mr. Justice WHITE announced the judgment of the Court and filed an opinion in which Mr. Justice STEWART, Mr. Justice BLACKMUN, and Mr. Justice STEVENS, joined.

Georgia Code Ann. § 26-2001 (1972) provides that "[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than 20 years."¹ Punishment is determined by a jury in a separate sentencing proceeding in which at least one of the statutory aggravating circumstances must be found before the death penalty may be imposed.² Petitioner Coker was convicted of rape and sentenced to death. Both conviction and sentence were affirmed by the Georgia Supreme Court. Coker was granted a writ of certiorari. — U. S. —, limited to the single claim, rejected by the Georgia court, that the punishment of death for rape violates the Eighth Amendment, which proscribes "cruel and unusual punishments" and which must be observed by the States as well as the Federal Government. *Robinson v. California*, 370 U. S. 660 (1962).

I

While serving various sentences for murder, rape, kidnapping, and aggravated assault, petitioner escaped from the Ware Correctional Institution near Waycross, Ga., on September 2, 1974. At approximately 11 p. m. that night, petitioner entered the house of Allen and Elnita Carver through an unlocked kitchen door. Threatening the couple with a "board," he tied up Mr. Carver in the bathroom, obtained a

knife from the kitchen, and took Mr. Carver's money and the keys to the family car. Brandishing the knife and saying "you know what's going to happen to you if you try anything, don't you," Coker then raped Mrs. Carver. Soon thereafter, petitioner drove away in the Carver car, taking Mrs. Carver with him. Mr. Carver, freeing himself, notified the police; and not long thereafter petitioner was apprehended. Mrs. Carver was unharmed.

Petitioner was charged with escape, armed robbery, motor vehicle theft, kidnapping, and rape. Counsel was appointed to represent him. Having been found competent to stand trial, he was tried. The jury returned a verdict of guilty, rejecting his general plea of insanity. A sentencing hearing was then conducted in accordance with the procedures dealt with at length in *Gregg v. Georgia*, 428 U. S. 153 (1976), where this Court sustained the death penalty for murder when imposed pursuant to the statutory procedures.³ The jury was instructed that it could consider as aggravating circumstances whether the rape had been committed by a person with a prior record of conviction for a capital felony and whether the rape had been committed in the course of committing another capital felony, namely, the armed robbery of Allen Carver. The court also instructed, pursuant to statute, that even if

¹ Ga. Code Ann. § 26-2002 (1976 supp.)

² Capital offenses; jury verdict and sentence.—Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

³ Ga. Code Ann. § 27-2-02 (1976 supp.)

⁴ Recommendation to mercy.—In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge.

⁵ Ga. Code Ann. § 27-234.1 (1976 supp.)

⁶ Mitigating and aggravating circumstances; death penalty.—(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district

¹ The section defines rape as having "carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ."

² See n. 3, *infra*.

aggravating circumstances were present, the death penalty need not be imposed if the jury found they were outweighed by mitigating circumstances, that is, circumstances not con-

attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

"Ga. Code Ann. § 27-2537 (1976 supp.)

"Review of death sentences.—(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1 (b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"(1) Affirm the sentence of death; or

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of these similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

stituting justification or excuse for the offense in question, "but which, in fairness and mercy, may be considered as extenuating or reducing the degree" of moral culpability or punishment. App. 300. The jury's verdict on the rape count was death by electrocution. Both aggravating circumstances on which the court instructed were found to be present by the jury.

II

Furman v. Georgia, 408 U. S. 238 (1972), and the Court's decisions last Term in *Gregg v. Georgia*, *supra*; *Proffitt v. Florida*, 428 U. S. 242 (1976); *Jurek v. Texas*, 428 U. S. 262 (1976); *Woodson v. North Carolina*, 428 U. S. 280 (1976); and *Roberts v. Louisiana*, 428 U. S. 325 (1976), make unnecessary the reexamining of certain critical aspects of the controversy about the constitutionality of capital punishment. It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed. It is also established that imposing capital punishment, at least for murder, in accordance with the procedures provided under the Georgia statutes saves the sentence from the infirmities which led the Court to invalidate the prior Georgia capital punishment statute in *Furman v. Georgia*, *supra*.

In sustaining the imposition of the death penalty in *Gregg*, however, the Court firmly embraced the holdings and dicta from prior cases, *Furman v. Georgia*, *supra*; *Robinson v. California*, 370 U. S. 660 (1962); *Trop v. Dulles*, 356 U. S. 86 (1958); and *Weems v. United States*, 217 U. S. 349 (1910), to the effect that the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Under *Gregg*, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted. In *Gregg*, after giving due regard to such sources, the Court's judgment was that the death penalty for deliberate murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. But the Court reserved the question of the constitutionality of the death penalty when imposed for other crimes. 428 U. S., at 187 n. 35.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

"(i) The sentence review shall be in addition to direct appeal. If taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

III

That question, with respect to rape of an adult woman, is now before us. We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.⁴

X

As advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman. At no time in the last 50 years has a majority of the States authorized death as a punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female.⁵ By 1971 just prior to the decision in *Furman v. Georgia*, that number had declined, but not substantially, to 16 States plus the Federal Government.⁶ *Furman* then invalidated most of the capital punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws.

With their death penalty statutes for the most part invalidated, the States were faced with the choice of enacting modified capital punishment laws in an attempt to satisfy the requirements of *Furman* or of being satisfied with life imprisonment as the ultimate punishment for any offense. Thirty-five States immediately reinstituted the death penalty for at least limited kinds of crime. *Gregg v. Georgia*, *supra*, at 179 n. 23. This public judgment as to the acceptability of capital punishment, evidenced by the immediate, post-*Furman* legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in *Gregg v. Georgia*. 428 U.S., at 179-182.

But if the "most marked indication of a society's endorsement of the death penalty for murder is the legislative response to *Furman*," *Gregg v. Georgia*, *supra*, at 179-180, it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In revising death penalty laws to satisfy *Furman*'s mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only

three provided the death penalty for rape of an adult woman in their revised statutes—Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* and *Roberts*. When Louisiana and North Carolina, responding to those decisions, again revised their capital punishment laws, they reenacted the death penalty for murder but not for rape; none of the seven other legislatures that to our knowledge have amended or replaced their death penalty statutes since July 2, 1976, including four States (in addition to Louisiana and North Carolina) that had authorized the death sentence for rape prior to 1972 and had reacted to *Furman* with mandatory statutes, included rape among the crimes for which death was an authorized punishment.⁷

Georgia argues that 11 of the 16 States that authorized death for rape in 1972 attempted to comply with *Furman* by enacting arguably mandatory death penalty legislation and that it is very likely that aside from Louisiana and North Carolina, these States simply chose to eliminate rape as a capital offense rather than to require death for each and every instance of rape.⁸ The argument is not without force; but four of the 16 States did not take the mandatory course and also did not continue rape of an adult woman as a capital offense. Further, as we have indicated, the legislatures of six of the 11 arguably mandatory States have revised their death penalty laws since *Woodson* and *Roberts* without enacting a new death penalty for rape. And this is to say nothing of 19 other States that enacted nonmandatory, post-*Furman* statutes and chose not to sentence rapists to death.

It should be noted that Florida, Mississippi, and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult.⁹ The Tennessee statute has since been invalidated because the death sentence was mandatory. *Collins v. State*, — U.S. — (1977). The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.

The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it

⁴ Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so. We observe that in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system.

⁵ See *Ivey*, Recent History and Present Status of Capital Punishment in the United States, 17 J. Crim. L. & Criminology 234, 241-242 (1926).

⁶ Ala. Code, Tit. 14, § 395 (1958 recomp. vol.); Ark. Stat. Ann. § 41-4303 (1964); Fla. Stat. Ann. § 794.01 (1965); Ga. Code Ann. § 26-2001 (1970 rev. vol.); Ky. Rev. Stat. Ann. §§ 435.080-435.090 (1963); La. Rev. Stat. Ann. § 14:42 (1950); Md. Code Ann. § 27-461 (1957); Miss. Code Ann. § 2358 (1956 recomp. vol.); Vernon's Mo. Stat. Ann. § 559.260 (1953); Nev. Rev. Stat. § 200.363 (1967) (rape with substantial bodily harm); N. C. Gen. Stat. § 14-21 (1958); Okla. Stat. Ann., Tit. 21, § 1115 (1958); S. C. Code Ann. §§ 16-72, 16-80 (1962); Tenn. Code Ann. § 39-3702 (1955); Vernon's Tex. Penal Code Ann. § 1189 (1961); Va. Code Ann. § 18.144 (1960 repl. vol.); 18 U.S.C.A. § 2031 (1970).

⁷ 1970 Okla. Sess. Laws, c. 1, p. 627 (First Extraord. Sess.) (July 23, 1976); La. Acts 1976, No. 657 (Sept. 3, 1976); La. Acts 1976, No. 694 (Sept. 10, 1976); 1970 Ky. Acts, c. 15 (Extraord. Sess.) (Dec. 22, 1976); 1977 Wyo. Sess. Laws, c. 122 (Feb. 28, 1977). Recent legislative action has taken place in North Carolina, Virginia, Maryland, California, and New Jersey. The legislation has been signed into law in North Carolina and Virginia, N. C. Sess. Laws, (May 19, 1977); 1977 Va. Acts, c. 492 (Mar. 29, 1977), and has been vetoed in Maryland and California, Washington Post, May 27, 1977, at 1, col. 1; N. Y. Times, May 28, 1977, at S, col. 6. The Governor of New Jersey apparently has not yet acted on the legislation in that State.

⁸ The legislation that respondent places in this category is as follows: Ky. Rev. Stat. § 507.020 (1975); La. Rev. Stat. Ann. § 14:30 (1974); Md. Code Ann., Art. 27 § 413 (Supp. 1976); Miss. Code Ann. §§ 97-3-19, 97-3-21, 97-25-55, 99-17-20 (Cum. Supp. 1975); Vernon's Mo. Stat. Ann. §§ 559.005, 559.009 (Supp. 1976); Nev. Rev. Stat. § 200.030 (1975 Rev.); N. C. Gen. Stat. §§ 14-17, 14-21 (Cum. Supp. 1975); 21 Okla. Stat. Ann. §§ 701.1-701.3 (Supp. 1975); S. C. Code Ann. § 16-52 (Supp. 1975); Tenn. Code Ann. §§ 39-2402, 39-2406, 39-3702 (1975); Va. Code Ann. §§ 182-10, 182-21 (1975 Rev.). Brief for Respondent 19 n. 38.

⁹ Fla. Stat. Ann. § 794.011 (2) (1976); Miss. Code Ann. §§ 97-3-63 (1974); Tenn. Code Ann. § 39-3702 (1974).

obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.¹⁰

B

It was also observed in *Gregg* that "[t]he jury . . . is a significant and reliable index of contemporary values because it is so directly involved." 428 U. S. at 181, and that it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried. Of course, the jury's judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed. As far as execution for rape is concerned, this is now true only in Georgia and in Florida; and in the latter State, capital punishment is authorized only for the rape of children.

According to the factual submissions in this Court, out of all rape convictions in Georgia since 1973—and that total number has not been tendered—63 cases had been reviewed by the Georgia Supreme Court as of the time of oral argument; and of these, six involved a death sentence, one of which was set aside, leaving five convicted rapists now under sentence of death in the State of Georgia. Georgia juries have thus sentenced rapists to death six times since 1973. This obviously is not a negligible number; and the State argues that as a practical matter juries simply reserve the extreme sanction for extreme cases of rape and that recent experience surely does not prove that jurors consider the death penalty to be a disproportionate punishment for every conceivable instance of rape, no matter how aggravated. Nevertheless, it is true that in the vast majority of cases, at least nine out of 10, juries have not imposed the death sentence.

IV

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self."¹¹ It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the

capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage.¹² Because it undermines the community's sense of security, there is public injury as well.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person.¹³ The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderers; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and revocability," 428 U. S. 187, is an excessive penalty for the rapist who, as such, does not take human life.

This does not end the matter; for under Georgia law, death may not be imposed for any capital offense, including rape, unless the jury or judge finds one of the statutory aggravating circumstances and then elects to impose that sentence. Section 26-3102 (supp. 1975); *Gregg v. Georgia*, *supra*, at 165-166. For the rapist to be executed in Georgia, it must therefore be found not only that he committed rape but also that one or more of the following aggravating circumstances were present: (1) that the rape was committed by a person with a prior record of conviction for a capital felony; (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or (3) the rape "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim."¹⁴ Here, the first two of these aggravating circumstances were alleged and found by the jury.

Neither of these circumstances, nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape. Coker had prior convictions for capital felonies—rape, murder and kidnapping—but these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.

It is also true that the present rape occurred while Coker was committing armed robbery, a felony for which the Georgia statutes authorize the death penalty.¹⁵ But Coker was tried for the robbery offense as well as for rape and received a separate life sentence for this crime; the jury did not deem the robbery itself deserving of the death penalty, even though accompanied by the aggravating circumstance, which was

¹⁰ In *Trop v. Dulles*, 356 U. S. 86, 102 (1958), the Court took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only three retained the death penalty for rape where death did not ensue. United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 56 (1968).

¹¹ Law Enforcement Assistance Administration Report, Rape and Its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies (1975), quoting Bard & Ellison, Crisis Intervention and Investigation of Forcible Rape, The Police Chief (May 1974), Reproduced as Appendix I-B to the Report.

¹² See Note, The Victim In a Forcible Rape Case: A Feminist View, 11 Am. Crim. Law Rev. 335, 338 (1973); Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Calif. L. Rev. 919, 922-923 (1973).

¹³ See n. 1, *supra*, for the Georgia definition of rape.

¹⁴ There are other aggravating circumstances provided in the statute, see n. 3, *supra*, but they are not applicable to rape.

¹⁵ In *Gregg v. Georgia*, the Georgia Supreme Court refused to sustain a death sentence for armed robbery because, for one reason, death had been so seldom imposed for this crime in other cases that such a sentence was excessive and could not be sustained under the statute. As it did in this case, however, the Georgia Supreme Court apparently continues to recognize armed robbery as a capital offense for the purpose of applying the aggravating circumstances provisions of the Georgia Code.

stipulated, that Coker had been convicted of a prior capital crime.¹⁶

We note finally that in Georgia a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. He also commits that crime when in the commission of a felony he causes the death of another human being, irrespective of malice. But even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion, and we do not, that the rape, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim. The judgment of the Georgia Supreme Court upholding the death sentence is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE BRENNAN, concurring in the judgment.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227 (1976), I concur in the judgment of the Court setting aside the death sentence imposed under the Georgia rape statute.

MR. JUSTICE MARSHALL concurring in the judgment of the Court.

In *Gregg v. Georgia*, 428 U. S. 153, 231 (1976), I stated, "In *Furman v. Georgia*, 408 U. S. 238, 314 (1972) (concurring). I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view."

I then explained in some detail my reasons for reaffirming my position. I continue to adhere to those views in concurring in the judgment of the Court in this case.

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I concur in the judgment of the Court on the facts of this case, and also in its reasoning supporting the view that ordinarily death is disproportionate punishment for the crime of raping an adult woman. Although rape invariably is a reprehensible crime, there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury. The plurality, however, does not limit its holding to the case before us or to similar cases. Rather, in an opinion that ranges well beyond what

is necessary, it holds that capital punishment *always*—regardless of the circumstances—is a disproportionate penalty for the crime of rape.

The Georgia statute, sustained in *Gregg v. Georgia*, 428 U. S. 153 (1976), specifies aggravating circumstances that may be considered by the jury when appropriate. With respect to the crime of rape, only three such circumstances are specified: (i) the offense was committed by a person with a prior record of conviction for a capital felony; (ii) the offense was committed while the offender was engaged in another capital felony or in aggravated battery; and (iii) the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Ante*, at 3. Only the third circumstance describes in general the offense of aggravated rape, often identified as a separate and more heinous offense than rape. See, e. g., Model Penal Code § 207.4, Comment, p. 246 (Tent. Draft No. 4, 1955); *id.*, § 213.1 (Proposed Official Draft, 1962); Nev. Rev. Stat. § 200.363 (1975 Rev.). That third circumstance was not submitted to the jury in this case, as the evidence would not have supported such a finding. It is therefore quite unnecessary for the plurality to write in terms so sweeping as to foreclose each of the 50 state legislatures from creating a narrowly defined substantive crime of aggravated rape punishable by death.¹

In accord with our decisions last Term, the prevailing opinion states that:

"the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed." *Ante*, at 6.

Thus, capital punishment may be imposed on those sentenced in accordance with the procedures identified in *Gregg* and *Woodson*, at least when the offender is convicted of murder, the crime involved in all five of last Term's capital cases.

¹ It is not this Court's function to formulate the relevant criteria that might distinguish aggravated rape from the more usual case, but perhaps a workable test would embrace the factors identified by Georgia: the cruelty or viciousness of the offender, the circumstances and manner in which the offense was committed, and the consequences suffered by the victim. See also *Ralph v. Warden*, 438 F. 2d 786 (CA4 1970), cert. denied, 408 U. S. 942 (1972); *id.*, at 794 (opinion of Haynsworth, J.). The legislative task of defining, with appropriate specificity, the elements of the offense of aggravated rape would not be easy, see *Furman v. Georgia*, 408 U. S. 238, 490 (1972) (Powell, J., dissenting), but certainly this Court should not assume that the task is impossible.

The dissent of THE CHIEF JUSTICE, relying on selected excerpts from my opinion in *Furman*, seeks to buttress the view that for sentencing purposes meaningful distinctions cannot be drawn between rapes regardless of the circumstances and effect upon the victim. *Post*, at 4 n. 2. The dissent emphasizes the difficulties of proof. But the jury system is designed and operates successfully to resolve precisely this type of factual issue. The law of negligence, for example, is replete with issues requiring the jury to determine degrees of culpability and the extent or permanency of physical and psychological injury.

I am complimented by the frequency with which THE CHIEF JUSTICE, in his dissent, cites and quotes from my opinion in *Furman*. That opinion, however, did not prevail, and—as with most of the writing in *Furman*—it now must be read in light of *Gregg* and *Woodson*, which have established the controlling general principles. But contrary to implications in THE CHIEF JUSTICE's dissent, my opinion in *Furman* did emphasize that the proportionality test as to rape should be applied on a case-by-case basis, noting that in some cases the death sentence would be "grossly excessive." *Furman*, *supra*, at 401. I remain in disagreement with the simplistic all-or-nothing views of the plurality opinion and the dissenting opinion of THE CHIEF JUSTICE.

¹⁶ Where the accompanying capital crime is murder, it is most likely that the defendant would be tried for murder, rather than rape; and it is perhaps academic to deal with the death sentence for rape in such a circumstance. It is likewise unnecessary to consider the rape-felony murder—a rape accompanied by the death of the victim which was unlawfully but nonaccidentally caused by the defendant.

Where the third aggravating circumstance mentioned in the text is present—that the rape is particularly vile or involves torture or aggravated battery—it would seem that the defendant could very likely be convicted, tried and appropriately punished for this additional conduct.

Today, in a case that does not require such an expansive pronouncement, the plurality draws a bright line between murder and all rapes—regardless of the degree of brutality of the rape or the effect upon the victim. I dissent because I am not persuaded that such a bright line is appropriate. As noted in *Snider v. Peyton*, 356 F. 2d 626, 627 (CA4 1966), “[t]here is extreme variation in the degree of culpability of rapists.” The deliberate viciousness of the rapist may be greater than that of the murderer. Rape is never an act committed accidentally. Rarely can it be said to be unpremeditated. There also is wide variation in the effect on the victim. The plurality opinion says that “[l]ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.” *Ante*, at 13. But there is indeed “extreme variation” in the crime of rape. Some victims are so grievously injured physically or psychologically that life is beyond repair.

Thus it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape. Final resolution of the question must await careful inquiry into objective indicators of society’s “evolving standards of decency,” particularly legislative enactments and the responses of juries in capital cases.³ See *Gregg v. Georgia*, 428 U. S., at 173–182 (plurality opinion); *Woodson v. North Carolina*, 428 U. S., at 294–295 (plurality opinion); *Furman v. Georgia*, 408 U. S., at 436–443 (Powell, J., dissenting). The plurality properly examines these indicia, which do support the conclusion that society finds the death penalty unacceptable for the crime of rape in the absence of excessive brutality or severe injury. But it has not been shown that society finds the penalty disproportionate for all rapists. In a proper case a more discriminating inquiry than the plurality undertakes well might discover that both juries and legislatures have reserved the ultimate penalty for the case of an outrageous rape resulting in serious, lasting harm to the victim. I would not prejudice the issue. To this extent, I respectfully dissent.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

In a case such as this, confusion often arises as to the Court’s proper role in reaching a decision. Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a State to do under its reserved powers. In striking down the death penalty imposed upon the petitioner in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature. I accept that the Eighth Amendment’s concept of disproportionality bars the death penalty for minor crimes. But rape is not a minor crime; hence the Cruel and Unusual Punishment Clause does not give the Members of this Court license to engraft their conceptions of proper public policy onto the considered legislative judgments of the States. Since I cannot agree that Georgia lacked the constitutional power to impose the penalty of death for rape, I dissent from the Court’s judgment.

³ These objective indicators are highly relevant, but the ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment—as the plurality notes, *ante*, at 12—must be decided on the basis of our own judgment in light of the precedents of this Court.

(1)

On December 5, 1971, the petitioner, Ehrlich Anthony Coker, raped and then stabbed to death a young woman. Less than eight months later Coker kidnapped and raped a second young woman. After twice raping this 16-year-old victim, he stripped her, severely beat her with a club, and dragged her into a wooded area where he left her for dead. He was apprehended and pleaded guilty to offenses stemming from these incidents. He was sentenced by three separate courts to three life terms, two 20-year terms, and one eight-year term of imprisonment.¹ Each judgment specified that the sentences it imposed were to run consecutively rather than concurrently. Approximately one and one-half years later, on September 2, 1974, petitioner escaped from the state prison where he was serving these sentences. He promptly raped another 16-year-old woman in the presence of her husband, abducted her from her home, and threatened her with death and serious bodily harm. It is this crime for which the sentence now under review was imposed.

The Court today holds that the State of Georgia may not impose the death penalty on Coker. In so doing, it prevents the State from imposing any effective punishment upon Coker for his latest rape. The Court’s holding, moreover, bars Georgia from guaranteeing its citizens that they will suffer no further attacks by this habitual rapist. In fact, given the lengthy sentences Coker must serve for the crimes he has already committed, the Court’s holding assures that petitioner—and others in his position—will henceforth feel no compunction whatsoever about committing further rapes as frequently as he may be able to escape from confinement and indeed even within the walls of the prison itself. To what extent we have left States “elbow room” to protect innocent persons from depraved human beings like Coker remains in doubt.

(2)

My first disagreement with the Court’s holding is its unnecessary breadth. The narrow issue here presented is whether the State of Georgia may constitutionally execute this petitioner for the particular rape which he has committed, in light of all the facts and circumstances shown by this record. The plurality opinion goes to great lengths to consider societal mores and attitudes toward the generic crime of rape and the punishment for it; however, the opinion gives little attention on the special circumstances which bear directly on whether imposition of the death penalty is an appropriate societal response to Coker’s criminal acts: (a) On account of his prior offenses, Coker is already serving such lengthy prison sentences that imposition of additional periods of imprisonment would have no incremental punitive effect; (b) by his life pattern Coker has shown that he presents a particular danger to the safety, welfare and chastity of women, and on his record the likelihood is therefore great that he will repeat his crime at first opportunity;

¹ On March 12, 1973, the Superior Court of Richmond County, Ga., sentenced Coker to 20 years’ imprisonment for the kidnapping of petitioner’s second victim, and to life imprisonment for one act of rape upon her. On May 28, 1973, the Superior Court of Taliaferro County, Ga., sentenced Coker to eight years’ imprisonment for aggravated assault upon the same victim, and to life imprisonment for the second rape upon her. On April 6, 1973, the Superior Court of Clayton County, Ga., sentenced Coker to 20 years’ imprisonment for the rape of petitioner’s first victim, and to life imprisonment for her murder. *Appendix*, at 306–312.

(c) petitioner escaped from prison, only a year and a half after he commenced serving his latest sentences; he has nothing to lose by further escape attempts; and (d) should he again succeed in escaping from prison, it is reasonably predictable that he will repeat his pattern of attacks on women—and with impunity since the threat of added prison sentences will be no deterrent.

Unlike the Court, I would narrow the inquiry in this case to the question actually presented: Does the Eighth Amendment's ban against cruel and unusual punishment prohibit the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime and who has not hesitated to escape confinement at the first available opportunity? Whatever one's view may be as to the State's constitutional power to impose the death penalty upon a rapist who stands before a court convicted for the first time, this case reveals a chronic rapist whose continuing danger to the community is abundantly clear.

Mr. JUSTICE POWELL would hold the death sentence inappropriate in this case because "there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury." *Ante*, at 1.² Apart from the reality that rape is inherently one

of the most egregiously brutal acts one human being can inflict upon another, there is nothing in the Eighth Amendment that so narrowly limits the factors which may be considered by a state legislature in determining whether a particular punishment is grossly excessive. Surely recidivism, especially the repeated commission of heinous crimes, is a factor which may properly be weighed as an aggravating circumstance, permitting the imposition of a punishment more severe than for one isolated offense. For example, as a matter of national policy, Congress has expressed its will that a person who has committed two felonies will suffer enhanced punishment for a third one, 18 U. S. C. § 3575 (e)(1); Congress has also declared that a second conviction for assault on a mail carrier may be punished more seriously than a first such conviction, *id.*, § 2114. Many States provide an increased penalty for habitual criminality. See, e. g., Wis. Stat. § 939.02; see also Annot., 58 A. L. R. 20, 82 A. L. R. 345, 79 A. L. R. 2d 826.³ As a factual matter, the plurality opinion is correct in stating that Coker's "prior convictions do not change the fact that the instant crime being punished is rape not involving the taking of life," *ante*, at 14; however, it cannot be disputed that the existence of these prior convictions make Coker a substantially more serious menace to society than a first-time offender.⁴

"There is a widely held view that those who present the strongest case for severe measures of incapacitation are not murderers as a group (their offenses often are situational) but rather those who have repeatedly engaged in violent, combative behavior. A well-demonstrated propensity for life-endangering behavior is thought to provide a more solid basis for infliction of the most severe measures of incapacitation than does the fortuity of a single homicidal incident." Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1080 (1964). (Emphasis added.)

In my view, the Eighth Amendment does not prevent the State from taking an individual's "well demonstrated propensity for life-endangering behavior" into account in devising punitive measures which will prevent inflicting further harm upon innocent victims. See *Gregg v. Georgia*, 428 U. S. 153, 183 n. 28 (1976). Only one year ago Mr. JUSTICE WHITE succinctly noted: "death finally forecloses the possibility that

² The position today adopted by Mr. JUSTICE POWELL constitutes a disquieting shift from the view he embraced several Terms ago in *Furman v. Georgia*, 408 U. S. 238, 460-401 (1972), where he stated:

"While I reject each of [petitioners'] attempts to establish specific categories of cases in which the death penalty may be deemed excessive, I view them as groping toward what is for me the appropriate application of the Eighth Amendment. While in my view the disproportionality test may not be used either to strike down the death penalty for rape altogether or to install the Court as a tribunal for sentencing review, that test may find its application in the peculiar circumstances of specific cases. Its utilization should be limited to the rare case in which the death penalty is rendered for a crime technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category." (Emphasis added.)

While Mr. JUSTICE POWELL purports to dissent from the broadest sweep of the Court's holding, I cannot see that his view differs materially from that of the plurality. He suggests two situations where it might be proper to execute rapists: (1) where the "offense [is] committed with excessive brutality"; and (2) where "the victim sustained serious or lasting injury." The second part of this test was rejected by Mr. JUSTICE POWELL himself in *Furman*, and with good reason: "the emotional impact [upon the rape victim] may be impossible to gauge at any particular point in time. The extent and duration of psychological trauma may not be known or ascertainable prior to trial." *Id.*, at 400. Can any Member of the Court state with confidence that a 16-year old woman who is raped in the presence of her husband three weeks after giving birth to a baby "sustained [no] serious or lasting injury?" This bifurcation of rape into categories of harmful and nonharmful eludes my comprehension.

The difficulty with the first part of Mr. JUSTICE POWELL's test is that rape is inherently an aggravated offense; in Mr. JUSTICE POWELL's own words, "the threat of both [physical and psychological] injury is always present." *Id.*, at 450. Therefore the "excessive brutality" requirement must refer to something more. I assume, then the force normally associated with physically coercing or overpowering the will of another. Rather, what must be meant is that the rapist has engaged in torture or has committed an aggravated battery upon the victim. See *ante*, at 1-2, and n. 1. However, torture and aggravated battery are offenses separate from rape, and ordinarily are punished separately. The clear negative inference of Mr. JUSTICE POWELL's analysis therefore appears to be that where rape alone is committed, i. e., rape unaccompanied by any other criminal conduct, the death penalty may never be imposed.

³ This Court has consistently upheld the constitutional validity of such punishment-enhancing statutes. See, e. g., *Spencer v. Texas*, 385 U. S. 564, 559-560 (1967):

"No claim is made here that recidivist statutes are . . . unconstitutional, nor could there be under our cases. Such statutes and other enhanced-sentence laws, and procedures designed to implement their underlying policies, have been enacted in all the States, and by the Federal Government as well. . . . Such statutes . . . have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." (Footnote and citations omitted; emphasis added.) *Accord*, *Oyler v. Boles*, 368 U. S. 448, 451 (1962).

⁴ This special danger is demonstrated by the very record in this case. After tying and gagging the victim's husband, and raping the victim, petitioner sought to make his getaway in their automobile. Leaving the victim's husband tied and gagged in his bathroom, Coker took the victim with him. As he started to leave, he brandished the kitchen knife he was carrying and warned the husband that "if he would get pulled over or the police was following him in any way that he would kill—he would kill my wife. He said he didn't have nothing to lose—that he was in prison for the rest of his life, anyway. . . ." Testimony of the victim's husband, Appendix, at 121 (emphasis added).

a prisoner will commit further crimes, whereas life imprisonment does not." *Roberts v. Louisiana*, 428 U. S. 325, 354 (1976) (WHITE, J. dissenting); see also *Furman v. Georgia*, 408 U. S., at 238 (WHITE, J., concurring).

In sum, once the Court has held that "the punishment of death does not invariably violate the Constitution," *Gregg v. Georgia*, 428 U. S., at 160, it seriously impinges upon the State's legislative judgment to hold that it may not impose such sentence upon an individual who has shown total and repeated disregard for the welfare, safety, personal integrity and human worth of others, and who seemingly cannot be deterred from continuing such conduct.³ I therefore would hold that the death sentence here imposed is within the power reserved to the State and leave for another day the question of whether such sanction would be proper under other circumstances. The dangers which inhere whenever the Court casts its constitutional decisions in terms sweeping beyond the facts of the case presented, are magnified in the context of the Eighth Amendment. In *Furman v. Georgia*, 408 U. S., at 238, MR. JUSTICE POWELL, in dissent, stated:

"where, as here, the language of the applicable [constitutional] provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency." (Emphasis added.)

Since the Court now invalidates the death penalty as a sanction for all rapes of adults at all times under all circumstances,⁴ I reluctantly turn to what I see as the broader issues raised by this holding.

(3)

The plurality, pp. 12-13, *ante*, acknowledges the gross nature of the crime of rape. A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack—it is destructive of the human personality. The remainder of the victim's life may be gravely affected, and this in turn may have a serious detrimental effect upon her

husband and any children she may have. I therefore wholly agree with MR. JUSTICE WHITE's conclusion as far as it goes—that "[s]hort of homicide, [rape] is the 'ultimate violation of the self.'" *Ante*, at 12. Victims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery. To speak blandly, as the plurality does, of rape victims which are "unharmful," or, as the concurrence, to classify the human outrage of rape in terms of "excessively brutal," *ante*, at 1, versus "moderately brutal," takes too little account of the profound suffering the crime imposes upon the victims and their loved ones.

Despite its strong condemnation of rape, the Court reaches the inexplicable conclusion that "the death penalty . . . is an excessive penalty" for the perpetrator of this heinous offense.⁵ This, the Court holds, is true even though in Georgia the death penalty may be imposed only where the rape is coupled with one or more aggravating circumstances. The process by which this conclusion is reached is as startling as it is disquieting. It represents a clear departure from precedent by making this Court "under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility in diverse areas of the criminal law, throughout the country." *Powell v. Texas*, 392 U. S. 514, 533 (1968) (Opinion of MARSHALL, J.).⁶ This seriously strains and distorts our federal system, removing much of the flexibility from which it has drawn strength for two centuries.

The analysis of the plurality opinion is divided into two parts: (a) an "objective" determination that most American Jurisdictions do not presently make rape a capital offense, and (b) a subjective judgment that death is an excessive punishment for rape because the crime does not, in and of itself, cause the death of the victim. I take issue with each of these points.

(a)

The plurality opinion bases its analysis, in part, on the fact that "Georgia is the sole jurisdiction in the United States at the present time that authorizes the sentence of death when the rape victim is an adult woman." *Ante*, at 11. Surely, however, this statistic cannot be deemed determinative, or even particularly relevant. As the opinion concedes, *ante*, p. 9, two other States—Louisiana and North Carolina—have enacted death penalty statutes for adult rape since this Court's 1972 decision in *Furman v. Georgia*, 408 U. S. 238. If the Court is to rely on some "public opinion" process, does this not suggest the beginning of a "trend"?

³ Professor Parker addressed this:

"What are we to do with those whom we cannot reform, and in particular, those who by our failure are thought to remain menaces to life? Current penal theories admit, indeed insist upon, the need for permanent incapacitation in such cases. Once this need is recognized, the death penalty as a means for incapacitation for the violent psychopath can hardly be objected to on grounds that will survive rational scrutiny, if the use of the death penalty in any situation is to be permitted. And its use in rape cases as a class, while inept, is no more so than its use for any other specific offense involving danger to life and limb." 77 Harv. L. Rev., at 1081. (Emphasis added.)

⁴ I find a disturbing confusion as to this issue in the plurality opinion. The issue is whether Georgia can, under any circumstances and for any kind of rape—"mild" or "gross"—impose the death penalty. Yet the plurality opinion opens its discussion, apparently directed at demonstrating that this was not an "aggravated" rape, saying that following the rape and kidnapping, "Mrs. Carver was unharmful." (*Ante*, p. 2.) If the Court is holding that no rape can ever be punished by death, why is it relevant whether Mrs. Carver was "unharmful"?

⁵ While only three Justices have joined MR. JUSTICE WHITE in this portion of his opinion, see separate opinion of MR. JUSTICE POWELL, *ante*, I take this to be the view of the Court in light of MR. JUSTICE BRENNAN's and MR. JUSTICE MARSHALL's statements joining the judgment.

⁶ Only last Term in *Gregg v. Georgia*, 428 U. S. 153 (1976), MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS earned that "the requirement of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts," and noted that "we may not act as judges as we might as legislators," *id.*, at 174-175. Accord, *Roberts v. Louisiana*, 428 U. S., at 355-356 (WHITE, J. dissenting). The plurality further noted that "[t]he deference we owe to decisions of the state legislatures under our federal system, [Furman v. Georgia, 407 U. S.], at 465-470 (REHNQUIST, J. dissenting), is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.' *Gore v. United States*, 357 U. S. 386, 393 (1958)." 428 U. S., at 176. (Emphasis added.)

More to the point, however, it is myopic to base sweeping constitutional principles upon the narrow experience of the past five years. Considerable uncertainty was introduced into this area of the law by this Court's *Furman* decision. A large number of States found their death penalty statutes invalidated; legislatures were left in serious doubt by the expressions vacillating between discretionary and mandatory death penalties, as to whether this Court would sustain any statute imposing death as a criminal sanction.⁹ Failure of more States to enact statutes imposing death for rape of an adult woman may thus reflect hasty legislative compromise occasioned by time pressures following *Furman*, a desire to wait on the experience of those States which did enact such statutes, or simply an accurate forecast of today's holding.

* In any case, when considered in light of the experience since the turn of this century, where more than one-third of American jurisdictions have consistently provided the death penalty for rape, the plurality's focus on the experience of the immediate past must be viewed as truly disingenuous. Having in mind the swift changes in positions of some Members of this Court in the short span of five years, can it rationally be considered a relevant indicator of what our society deems "cruel and unusual" to look solely to what legislatures have refrained from doing under conditions of great uncertainty arising from our less than lucid holdings on the Eighth Amendment? Far more representative of societal mores of the 20th Century is the accepted practice in a substantial number of jurisdictions preeding the *Furman* decision. "The problem . . . is the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago." *Furman v. Georgia*, 408 U. S., at 410 (BLACKMUN, J., dissenting). Cf. *Rudolph v. Alabama*, 375 U. S. 889 (1963).

However, even were one to give the most charitable acceptance to the plurality's statistical analysis, it still does not, to my mind, support its conclusion. The most that can be claimed is that for the past year Georgia has been the only State whose adult rape death penalty statute has not otherwise been invalidated; two other state legislatures had enacted rape death penalty statutes in the last five years, but these were invalidated for reasons unrelated to rape under the Court's decisions last Term. *Woodson v. North Carolina*, 428 U. S. 280 (1976); *Roberts v. Louisiana*, 428 U. S. 325 (1976). Even if these figures could be read as indicating that no other States view the death penalty as an appropriate punishment for the rape of an adult woman, it would not necessarily follow that Georgia's imposition of such sanction violates the Eighth Amendment.

The Court has repeatedly pointed to the reserve strength of our federal system which allows state legislatures, within broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results. See, e. g., *Whalen v. Roe*, 45 U. S. L. W. 4160, 4168, and n. 22 (Feb. 22, 1977); *Johnson v. Louisiana*, 406 U. S. 356, 376

(1972) (opinion of POWELL, J.); *California v. Green*, 399 U. S. 149, 184-185 (1970) (Harlan, J., concurring); *Fay v. New York*, 332 U. S. 261, 296 (1947). Various provisions of the Constitution, including the Eighth Amendment and the Due Process Clause, of course place substantive limitations on the type of experimentation a State may undertake. However, as the plurality admits, the crime of rape is second perhaps only to murder in its gravity. It follows then that Georgia did not approach such substantive constraints by enacting the statute here in question. See also § (3)(b), *infra*.

Statutory provisions in criminal justice applied in one part of the country can be carefully watched by other state legislatures, so that the experience of one State becomes available to all. Although human lives are in the balance, it must be remembered that failure to allow flexibility may also jeopardize human lives—those of the victims of undeterred criminal conduct. See pp. 22-23, *infra*. Our concern for the accused ought not foreclose legislative judgments showing a modicum of consideration for the potential victims.

Three state legislatures have, in the past five years, determined that the taking of human life and the devastating consequences of rape will be minimized if rapists may, in a limited class of cases, be executed for their offenses.¹⁰ That these States are presently a minority does not, in my view, make their judgment less worthy of deference. Our concern for human life must not be confined to the guilty; a state legislature is not to be thought insensitive to human values because it acts firmly to protect the lives and related values of the innocent. In this area, the choices for legislatures are at best painful and difficult and deserve a high degree of deference. Only last Term Mr. JUSTICE WHITE observed:

"It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere." *Roberts v. Louisiana*, 428 U. S., at 325 (WHITE, J., dissenting). (Emphasis added.)

The question of whether the death penalty is an appropriate punishment for rape is surely an open one. It is arguable that many prospective rapists would be deterred by the possibility that they could suffer death for their offense; it is also arguable that the death penalty would have only minimal deterrent effect.¹¹ It may well be that rape victims would become more willing to report the crime and aid in the apprehension of the criminals if they knew that community disapproval of rapists was sufficiently strong to inflict the extreme penalty; or perhaps they would be reluc-

⁹ The statute here in question does not provide the death penalty for any and all rapists. Rather, the jury must find that at least one statutorily defined aggravated circumstance is present. Ga. Code Ann. §§ 26-3102, 27-2534.1 (b) (1), (2) and (7).

¹¹ "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Furman v. Georgia* [408 U. S.], at 403-405 (BURMAN, C. J., dissenting). *Gregg v. Georgia*, 428 U. S., at 186 (plurality opinion).

¹⁰ I take no satisfaction in my predictive caveat in *Furman*:

"Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress." *Furman v. Georgia*, 408 U. S., at 403 (BURMAN, C. J., dissenting).

tant to cooperate in the prosecution of rapists if they knew that a conviction might result in the imposition of the death penalty. Quite possibly, the occasional, well-publicized execution of egregious rapists may cause citizens to feel greater security in their daily lives;¹² or, on the contrary, it may be that members of a civilized community will suffer the pangs of a heavy conscience because such punishment will be perceived as excessive.¹³ We cannot know which among this range of possibilities is correct, but today's holding forecloses the very exploration we have said federalism was intended to foster. It is difficult to believe that Georgia would long remain alone in punishing rape by death if the next decade demonstrated a drastic reduction in its incidence of rape, an increased cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the rule of law on the part of the populace.

In order for Georgia's legislative program to develop it must be given time to take effect so that data may be evaluated for comparison with the experience of States which have not enacted death penalty statutes. Today, the Court repudiates the State's solemn judgment on how best to deal with the crime of rape before anyone can know whether the death penalty is an effective deterrent for one of the most horrible of all crimes. And this is done a few short years after JUSTICE POWELL's excellent statement:

"In a period in our country's history when the frequency of [rape] is increasing alarmingly, it is indeed a grave event for the Court to take from the States whatever deterrent and retributive weight the death penalty retains." *Furman v. Georgia*, 408 U. S., at 450 (POWELL, J., dissenting) (footnote omitted).

To deprive States of this authority as the Court does, on the basis that "the current judgment with respect to the death penalty for rape . . . weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman," *ante*, at 11, is impermissibly rash. The current judgment of some Members of this Court has undergone significant change in the short time since *Furman*.¹⁴ Social change on great issues generally reveals itself in small increments, and the "current judgment" of many States could well be altered on the basis of Georgia's experience, were we to allow its statute to stand.¹⁵

(b)

The subjective judgment that the death penalty is simply disproportionate for the crime of rape is even more dis-

¹² "There are many cases in which the sordid, heinous nature of a particular [rape], demeaning, humiliating, and often physically or psychologically traumatic, will call for public condemnation." *Furman v. Georgia*, 408 U. S. 450 (POWELL, J., dissenting).

¹³ Obviously I have no special competence to make these judgments, but by the same token no other Member of the Court is competent to make a contrary judgment. This is why our system has, until now, left these difficult policy choices to the state legislatures, who may be no wiser, but surely are more attuned to the mores of their communities, than are we.

¹⁴ Indeed as recently as 1971—a year before *Furman*—a majority of this Court appeared to have no doubt about the constitutionality of the death penalty. See *McGautha v. California*, 402 U. S. 183 (1971).

¹⁵ To paraphrase Mr. Justice POWELL, "[w]hat [the Court is] saying, in effect, is that the evolutionary process has come suddenly to an end; that the ultimate wisdom as to the appropriateness of capital punishment [for adult rape] under all circumstances, and for all future generations, has somehow been revealed." *Furman v. Georgia*, 408 U. S., at 431 (POWELL, J., dissenting).

¹⁶ For example, hardly any thief would be deterred from stealing if the only punishment upon being caught were return of the money stolen.

turbing than the "objective" analysis discussed *supra*. The plurality's conclusion on this point is based upon the bare fact that murder necessarily results in the physical death of the victim, while rape does not. *Ante*, at 13, 15. However, no Member of the Court explains why this distinction has relevance, much less constitutional significance. It is, after all, not irrational—nor constitutionally impermissible—for a legislature to make the penalty more severe than the criminal act it punishes¹⁶ in the hope it would deter wrongdoing:

"We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhuman or disproportionate to the crime involved." *Gregg v. Georgia*, 428 U. S., at 153. Accord, *Furman v. Georgia*, 408 U. S., at 451 (POWELL, J., dissenting).

It begs the question to state, as does the plurality opinion:

"Life is over for the victim of the murderers; for the rape victim, life may not be nearly so happy as it was, but is not over and normally is not beyond repair." *Ante*, at 13.

Until now, the issue under the Eighth Amendment has not been the state of any particular victim after the crime, but rather whether the punishment imposed is grossly disproportionate to the evil committed by the perpetrator. See *Gregg v. Georgia*, 428 U. S., at 173; *Furman v. Georgia*, 408 U. S., at 458 (POWELL, J., dissenting). As a matter of constitutional principle, that test cannot have the primitive simplicity of "life for life, eye for eye, tooth for tooth." Rather States must be permitted to engage in a more sophisticated weighing of values in dealing with criminal activity which consistently poses serious danger of death or grave bodily harm. If innocent life and limb is to be preserved I see no constitutional barrier in punishing by death all who engage in such activity, regardless of whether the risk comes to fruition in any particular instance. See Packer, *supra*, 77 Harv. L. Rev., at 1077-1079.

Only one year ago the Court held it constitutionally permissible to impose the death penalty for the crime of murder, provided that certain procedural safeguards are followed. Compare *Gregg v. Georgia*, *supra*, *Proffitt v. Florida*, 428 U. S. 242 (1976), and *Jurek v. Texas*, 428 U. S. 262 (1976), with *Roberts v. Louisiana*, *supra*, and *Woodson v. North Carolina*, *supra*. Today, the Court readily admits that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" *Ante*, at 12. Moreover, as stated by Mr. Justice POWELL,

"[t]he threat of serious injury is implicit in the definition of rape; the victim is either forced into submission by physical violence or by the threat of violence." *Furman v. Georgia*, 408 U. S., at 460.

Rape thus is not a crime "light-years" removed from murder in the degree of its heinousness; it certainly poses a serious potential danger to the life and safety of innocent victims—apart from the devastating psychic consequences. It would seem to follow therefore that, affording the States proper leeway under the broad standard of the Eighth Amendment,"

¹⁷ Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice BREWER in *Gregg v. Georgia* noted that "in assessing a punishment selected by a democratically elected legislature against the constitutional measure [of the Eighth Amendment], we presume its validity. . . . A heavy

murder is properly punishable by death, rape should be also, if that is the considered judgment of the legislators.

The Court's conclusion to the contrary is very disturbing indeed. The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim. This casts serious doubt upon the unconstitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, *e. g.*, treason, airplane hijacking, and kidnapping. In that respect, today's holding does even more harm than is initially apparent. We cannot avoid judicial notice that crimes such as airplane hijacking, kidnapping, and mass terrorist activity constitute a serious and increasing danger to the safety of the public. It would be unfortunate indeed if the effect of today's holding were to inhibit States and the Federal Government from experimenting with various remedies—including possibly imposition of the penalty of death—to prevent and deter such crimes.

Some sound observations, made only a few years ago, deserve repetition:

"Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible." *Furman v. Georgia*, 408 U. S., at 411 (BLACKMUN, J., dissenting).

Whatever our individual views as to the wisdom of capital punishment, I cannot agree that it is constitutionally impermissible for a state legislature to make the "solemn judgment" to impose such penalty for the crime of rape. Accordingly, I would leave to the States the task of legislating in this area of the law.

COUNTRIES AUTHORIZING CAPITAL PUNISHMENT
FOR TREASON AND/OR ESPIONAGE

Prepared by Members of the Staff

July 1977



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Capital Punishment for Treason/Espionage

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<u>Country</u>	<u>War</u>	<u>Peace</u>
Bahama Islands	x	x
Bangladesh	x	x
Bermuda	x	x
Brunei	x	x
Canada	x	x
Fiji	x	x
Great Britain	x	x
Guyana	x	x
India	x	x
Nepal	x	x
New Zealand	x	x
Pakistan	x	x
Sri Lanka	x	x
St. Lucia	x	x
St. Vincent	x	x
Tonga	x	x
Trinidad & Tobago	x	x

Prepared by Members of the Staff
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CAPITAL PUNISHMENT FOR TREASON AND/OR ESPIONAGE
IN EUROPE AND ISRAEL

a) In time of peace

Belgium
Bulgaria
Czechoslovakia

France^{1/}
German Dem. Rep.^{2/}
Greece
Hungary^{2/}

Poland
Romania
USSR
Yugoslavia

Israel

b) In time of war

Belgium
Bulgaria
Czechoslovakia
Denmark
France^{1/}
German Dem. Rep.^{2/}
Greece
Hungary^{2/}
Italy
Norway
Poland
Romania
USSR
Yugoslavia

Israel

The following countries, whose legislation was also surveyed, do not provide the death penalty for the crimes mentioned, regardless of when they are committed: Austria, Finland, Federal Republic of Germany, Sweden, and Switzerland.

Prepared by Dr. Ivan Sipkov
Assistant Chief
European Law Division

Law Library, Library of Congress
August 1977

^{1/} Under French law these crimes are punishable without distinction between time of war or time of peace in some very specific cases enumerated in articles 70-73 of the Criminal Code. However, articles 74-85 authorize only a jail punishment (for life or time) in other forms of treason and/or espionage.

^{2/} Only in qualified cases, that is, when the circumstances described by the law are present, or the consequences of the act are extremely dangerous.

FAR EASTERN COUNTRIES

Far Eastern countries which authorize capital punishment
for treason and/or espionage are:

In time of war:

Burma
Cambodia
China, People's Republic of
China, Republic of
Hong Kong
Indonesia
Japan^x
Korea, North
Korea, South
Malaysia
Singapore
Thailand
Vietnam

In time of peace:

Burma
Cambodia
China, People's Republic of
China, Republic of
Hong Kong
Indonesia
Japan^x
Korea, North
Korea, South
Malaysia
Singapore
Thailand
Vietnam

^xJapan does not authorize capital punishment for espionage in either
wartime or peacetime.

Prepared by Members of the Staff
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HISPANIC NATIONS

Is capital punishment authorized for treason?

	<u>Peacetime</u>	<u>Wartime</u>
Argentina	No	No
Bolivia	Yes	Yes
Brazil	No	Yes
Chile	No	Yes
Colombia	No	No
Costa Rica	No	No
Cuba	Yes	Yes
Dominican Republic	No	No
Ecuador	No	No
Guatemala	No	No
Haiti	Yes	Yes
Honduras	No	No
Mexico	No	Yes
Nicaragua	No	No
Panama	No	No
Paraguay	No	Yes
Peru	Yes	Yes
Philippines	Yes	Yes
Portugal	No	No
Salvador	No	No
Spain	Yes	Yes
Uruguay	No	No
Venezuela	No	No

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NEAR EASTERN & AFRICAN COUNTRIES WHICH AUTHORIZE CAPITAL PUNISHMENT
FOR TREASON & ESPIONAGE

<u>COUNTRY</u>	<u>IN TIME OF PEACE</u>	<u>IN TIME OF WAR</u>
Afghanistan	Yes	Yes
Algeria	Yes	Yes
Benin	Yes	Yes
Botswana (no distinction)	Yes	Yes
Burundi	Yes	Yes
Cameroon	Yes	Yes
Central African Republic	Yes	Yes
Chad	Yes	Yes
Congo	Yes	Yes
Egypt	Yes	Yes
Ethiopia	Yes (in case of exceptional gravity)	Yes
Gabon	Yes	Yes
Guinea	Yes	Yes
Iran	Yes	Yes
Iraq	Yes	Yes
Ivory Coast	Yes	Yes
Jordan	Yes	Yes
Kenya	Yes	Yes
Liberia	Yes	Yes
Libya	No	Yes
Madagascar	Yes	Yes
Malawi	Yes	Yes
Morocco	Yes	Yes
Nigeria	Yes	Yes
Qatar	Yes	Yes
Rwanda	Yes	Yes
Senegal	Yes	Yes
Somalia	Yes	Yes
Sudan	No	Yes
Syria	No	Yes
Togo	Yes	Yes
Tunisia	Yes	Yes
Turkey	Yes	Yes
Upper Volta	Yes	Yes
People's Republic of Yemen	Yes	Yes
Zaire	Yes	Yes

Prepared by Members of the Staff
Near Eastern and African Law Division
Law Library, Library of Congress
July 1977



UNITED STATES CATHOLIC CONFERENCE

Department of Social Development and World Peace
1312 MASSACHUSETTS AVENUE N.W., WASHINGTON, D.C. 20005

Office of Domestic Social Development

May 15, 1978

Senator James Abourezk
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Abourezk:

The United States Catholic Conference appreciates this opportunity to present our reflections on the question of capital punishment and in particular S. 1382, which is designed to establish federal procedures for the imposition of the death penalty.

The use of capital punishment involves deep moral and religious questions as well as political and legal issues. In 1974, out of a commitment to the value and dignity of human life, the Catholic bishops of the United States declared their opposition to capital punishment. More recently in a statement entitled, "A Community Response to Crime", the bishops' Committee on Social Development and World Peace reaffirmed this position. A copy of this document is enclosed for your information.

In the recent statement, the bishops' Committee observed that past history indicates that the death penalty has been applied discriminatorily. Furthermore, they stated that recent data definitely raise questions regarding the effectiveness of capital punishment as a deterrent. While not challenging society's right to punish the serious and violent offender, the Committee stressed that the critical question for the Christian was how best to foster respect for life and that the appropriate response to this question could not be more deaths.

The 1976 U. S. Supreme Court decisions, which, in effect, approved the use of capital punishment so long as the law provided certain procedural guarantees, have focused the debate on capital punishment on the question of whether or not procedures for the imposition of capital punishment conform to the Supreme Court guidelines. S. 1382, the legislation now being considered by the Judiciary Committee, reflects this focus, as does the discussion in a number of states over the use of lethal injection as a more "humanitarian" approach to capital punishment.

As moral leaders and teachers, we believe that the issue before us should not be which procedure is constitutional or which type of execution is better, but rather how can we best promote respect for life and preserve the dignity of the human person. S. 1382 does not reflect a consideration of this broader question. We therefore oppose S. 1382 and all efforts to reinstitute capital punishment whatever the mechanism used.

Reverend James Abourzek

Page Two

May 15, 1978

We recognize that crime, especially violent crime, in our nation, cannot and should not be ignored. The incidence of violent crime underscores the need to seek effective ways to prevent crime, to assure a swift and certain response to criminal acts, to reform the criminal justice system, and to take steps to eliminate the complex causes of crime in our society. We do, however, believe that approaches to crime do exist which will protect our people and which at the same time reflect a deep commitment to human life. The development and utilization of these alternatives should be fostered rather than resorting to executions.

Accordingly, we would urge the Committee to oppose S. 1382 and all efforts to reinstitute the death penalty. Instead, we call upon Congressional leaders to seek methods of dealing with crime that are most consistent with concern for human life and dignity.

Your careful consideration of this view is deeply appreciated.

Sincerely,

(Rev. Msgr.) Francis J. Lally
Secretary

Enclosure

FJL:mh



22 May 1978

245 Second Street, N.E.
Washington, D.C. 20002
(202) 547-4343

Senator James Abourezk
3321 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Abourezk:

We are pleased to respond to your letter of May 8 requesting our viewpoint on S. 1382, which would reinstitute capital punishment at the federal level. Although the Friends Committee on National Legislation relates to the on-going life of the Religious Society of Friends, we do not purport to speak for all Friends, who cherish their rights to individual opinions.

We have enclosed a written statement for insertion in the record that elaborates our thoughts and feelings on S. 1382. In summary, we are unalterably and completely opposed to this legislation. We base our position on the Quaker belief that every person has value in the sight of God and on Quaker testimonies against the taking of human life. We believe that there are a few sparks of goodness in every person and that the administration of justice should be directed toward helping offenders become good, useful members of society.

We do not view capital punishment as an appropriate response to criminal activity. We see it as something which only furthers feelings of hatred and revenge, rather than bringing healing and reconciliation.

We also oppose reinstitution of the death penalty because: (1) it is arbitrarily and discriminately applied to poor and minority people; (2) it has no proven deterrent effect; and (3) it is irreversible--particularly reprehensible in cases where there has been a miscarriage of justice.

We urge instead adoption of legislation such as H.R. 848, which would abolish the use of the death penalty altogether and H.R. 7010/S. 551, which provides compensation to victims of violent crimes.

Thank you very much for the opportunity to share our concerns with you.

Sincerely,

Don Reeves

Don Reeves

Ralph Rudd
Clerk, General Committee
Ralph Rose
Clerk, Executive Committee
E. Raymond Wilson
Executive Sec. Emeritus
Edward F. Snyder
Executive Secretary
Frances E. Neely
Legislative Secretary
Don Reeves
Legislative Secretary
George I. Bliss
Field Secretary
Nick Block
Administrative Secretary
Evelyn W. Bradshaw
Administrative Assistant

DR/skm

Encl.

cc: Sens. James Eastland, Edward Kennedy, Birch Bayh, Robert Byrd, James Allen, Joseph Biden, Jr., John Culver, Howard Metzenbaum, Dennis DeConcini, Paul Hatfield, Strom Thurmond, Charles Mathias, Jr., William Scott, Paul Laxalt, Orrin Hatch, Malcolm Wallop

22 May 1978



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Memorandum in Support of May 22 Letter to Senator Abourezk

We oppose S. 1382, or any other legislation which would provide for capital punishment. We base our position on the Quaker belief that every person has value in the sight of God and on Quaker testimonies against the taking of human life.¹ In our judgment, the divine commandment, "Thou shalt not kill," applies equally to relationships among individuals and between the individual and the state. Opposition to capital punishment has been a long and deeply held conviction of Friends. In 1699, John Bellers, a British Quaker, called executions "a blot upon religion."

In expressing the belief of divinity within each person, Elizabeth Fry, a 19th century Quaker prison reformer, put it succinctly:

But is it for man [or woman] to take the prerogative of the Almighty into his [or her] own hands? Is it not his [or her] place rather to endeavor to reform such or to restrain them from the commission of further evil? At least to afford poor erring fellow mortals, whatever may be their offenses, an opportunity of proving their repentance by amendment of life?²

Fortunately, those people, including Friends, who called for the abolition of capital punishment in the past, are no longer lone voices crying out in the wilderness. The United States religious community now expresses overwhelming opposition to the death penalty with strongly worded statements: The death penalty violates "the belief in the worth of human life and the dignity of the human personality as gifts of God" (U.S. Catholic Conference); "A return to the use of the death penalty can only lead to the further erosion of respect for life in our society" (National Council of Churches); "The continuation of capital punishment, either by a state or by the national government, is no longer morally justifiable" (Union of American Hebrew Congregations).³

In light of the religious community's consensus that the death penalty is an immoral violation of human life, we are saddened by the recent Supreme Court's endorsement of the retributive value of capital punishment, as a possibly appropriate expression of "society's moral outrage at a particularly offensive conduct" (*Gregg v. Georgia*, 428 U.S. 153 at 183). We hope that Congress does not follow the Court's lead. We urge Congress to act according to a different moral standard--that the deliberate, premeditated killing of any human being in the United States, whether by another individual or by the government, is wrong!

Despite the strong chorus of religious, ethical, and moral objections now being raised against the death penalty, government-sponsored taking of human lives (mostly poor persons found guilty of murder) still finds support among many Americans--largely because of a desire for retribution. We hope the Committee will resist this emotional response by many who are rightly concerned about crime victims and their families. Capital punishment does not help these people. What is essential is adequate victim compensation and

Memorandum on S. 1382, page 2

greater community for persons who are victimized by crime. Violent forms of retribution, such as capital punishment, merely beget more hatred and violence. They do not bring healing and reconciliation, as recognized by some victims' families.

In a letter to the *St. Petersburg Times* (Florida), Roy Persons, whose wife Carol was murdered, protested against the death sentence which her convicted murderer, Willie Rivers, received. "Carol's death was a tragedy to all of those who loved her so dearly...but it is even more tragic that her death will, by sentencing Willie Rivers to death, reinforce and perpetuate feelings of vengeance, hate, and further human evil."⁴

In addition to these two fundamental reasons (the life of every human being has value, and retribution, in the violent form of capital punishment, merely begets more hatred and violence), we oppose the death penalty because:

1. The death penalty has been arbitrarily and discriminately imposed on the poor (because of their inability to pay for or otherwise secure effective counsel) and racial minority persons convicted of killing white people. Of 493 persons on death row, 253 (51.3%) are black, Spanish speaking, or Native American; 240 are white. A recent survey of three states that use the death penalty (Florida, Georgia, and Texas) shows that 50% of those persons on death row are whites who killed whites; 45% are blacks who killed whites; 5% are blacks who killed blacks. NO WHITE PERSONS WHO KILLED BLACKS ARE ON DEATH ROWS IN ANY OF THESE STATES. In these states, 46% of all murder victims were black⁵
2. The death penalty seems not to "deter" violent crime. All studies which are methodologically sound have not been able to detect any deterrent effect of capital punishment. Recent testimony before this Committee by Dr. Hans Zeisel (University of Chicago) indicated that the death penalty may actually be a counter-deterrent.
3. The death penalty is irreversible. If an innocent person is wrongly convicted of a capital crime and a death sentence is carried out, there can be no correction of the mistake.

In summary, the Friends Committee on National Legislation does not support the use of violence (in the form of capital punishment) in our nation's criminal justice system. We oppose S. 1382. For religious and moral reasons, we urge that it not be reported by your Committee. Our preference is for Congress to pass legislation (such as H.R. 848) which would altogether abolish capital punishment at both federal and state levels. We also urge a program of more aid to victims, through either restitution by offenders to victims or compensation to victims from general revenue. It is time that the United States decide that capital punishment is inconsistent with the rights and dignity of human beings and therefore is no longer tolerable for civilized society.

Memorandum on S. 1382, page 3

NOTES

- ¹American Friends Service Committee, "Statement on the Death Penalty," Nov. 1976. Friends Committee on National Legislation, "The Administration of Justice," *Statement of Legislative Policy*, April, 1977.
- ²Quoted in Fellowship of Reconciliation, "Aid to Homily on the Death Penalty."
- ³National Interreligious Taskforce on Criminal Justice, "Capital Punishment: What the Religious Community Says," 1978.
- ⁴Fellowship of Reconciliation, *op. cit.*
- ⁵Wayne King, "Few on Three Death Rows are There for Killing Blacks," *New York Times*, Mar. 6, 1978. The study is being conducted by Dr. William Bowers of Northeastern University.

THE DETERRENT EFFECT OF THE
DEATH PENALTY: FACTS v. FAITH

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I. THE PROBLEM

Once again in the 1975 Term, the Justices of the Supreme Court found themselves unable to express a unified position on the validity of the death penalty. The problem is a complex one because of murky precedents, disputed facts, and strong emotional commitments. It is proposed here to address just one of the issues raised in the cases, the question of the data supporting or controverting the deterrent effect of the death penalty.

In one of the opinions in *Gregg v. Georgia*¹—there was no opinion for the Court—Mr. Justice Stewart, speaking for himself and Justices Powell and Stevens, stated: “Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive.”² The Justice went on to cite with approval the position of Professor Charles L. Black, that no conclusive evidence would ever be available on the question of deterrence.³

¹ 96 S. Ct. 2909 (1976).

² *Id.* at 2930.

³ *Id.* at 2931, quoting BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 25–26 (1974).

... after all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this "deterrent" effect may be. . . .

... A "scientific"—that is to say, a soundly based—conclusion is simply impossible, and no methodological path out of this tangle suggests itself.

It is the purpose of this paper to show that both the Court's and Professor Black's views are wrong; that the evidence we have is quite sufficient if we ask the right question; and that the request for more proof is but the expression of an unwillingness to abandon an ancient prejudice.

II. THE STRUCTURE OF THE EVIDENCE

All studies that explore the possible deterrent effect of capital punishment are efforts to simulate the conditions of what is conceded to be an impossible controlled experiment. In such an experiment the population would be divided by some lottery process (randomly) into two groups. The members of one group, if convicted of a capital crime, would receive the death penalty; the members of the other group, if convicted of a capital crime, would receive a sentence of life in prison.

The random selection would assure that other conditions that could possibly affect the capital crime rate remain the same—within the calculable limits of the sampling error—in both groups, so that the "death penalty—life sentence" difference remains the only relevant difference between them.

Figure 1 shows the basic analytical structure of such an experiment. This hypothetical graph, denoting the constellation that would confirm the existence of a deterrent effect, begins with two populations of would-be murderers ($X + Y + Z$), equal in every respect except that the one lives under threat of the death penalty, the other does not. (X) is the number of would-be murderers in both groups deterred, even by the threat of prison; it can be read from the first bar and projected to the second. At the bottom end of each bar (Z) is the proportion of would-be murderers whom even the threat of the death penalty would not deter. It can be read from the second bar and projected to the first. The crucial test is whether a group (Y) can be found which would be deterred by the death penalty but

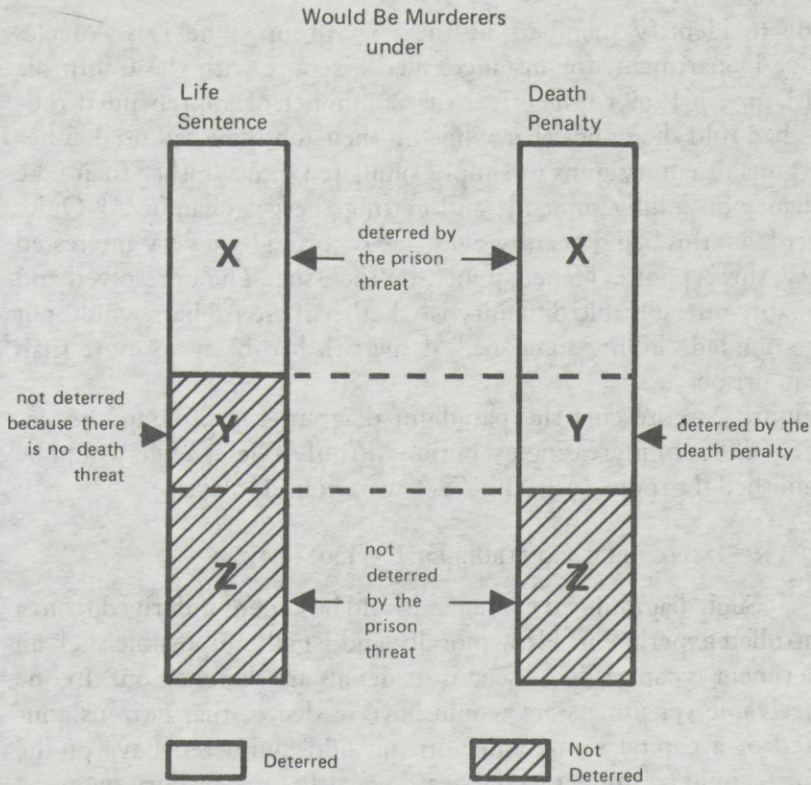


FIG. 1. Experimental paradigm showing a deterrent effect of the death penalty over the life sentence.

would not be deterred if there were only the life sentence. The statistical test that would establish the existence of group (Y) would reveal a significantly lower level of murders⁴ under threat of the death penalty.

In principle, it should be possible to identify individual members in each of the three groups. As a practical matter one can identify only the murderers who have not been deterred.⁵ Efforts have been

⁴ The paradigm is limited to murder. See also, however, Bailey, *Rape and the Death Penalty: A Neglected Area of Deterrence Research*, in BEDAU & PIERCE, EDS. CAPITAL PUNISHMENT IN THE UNITED STATES 336 (1976).

⁵ The task of tracing the effect of an experimental treatment through case histories of the persons who had been affected by it is less difficult if the treatment aims at a positive effect, not a negative, deterrent one. See ZEISEL, SAY IT WITH FIGURES ch. 11 (1965 ed.).

made to identify members of the (Y) group. The Los Angeles Police Department, for instance, filed a report with the California legislature in 1960 to the effect that a number of apprehended robbers had told the police that while on their job they had used either toy guns or empty guns or simply simulated guns "rather than take a chance on killing someone and getting the gas chamber."⁶ Quite apart from this being hearsay evidence reported by a very interested party, this is poor evidence, if any, on the issue. The unresolved and probably unresolvable difficulty is whether these robbers would not have minded "killing someone," if the risk had been no more than life in prison.

Figure 2 represents the paradigm diagram for proving the deterrent effect of increasing executions. Proof of deterrence would be established if groups (Y_1) and (Y_2) were found to exist.

III. THE IMPOSSIBLE CONTROLLED EXPERIMENT

Such diagrammed evidence would be cogent if derived from a controlled experiment. How morally and legally impossible such an experiment is can easily be seen if its details are sketched out. In one conceivable version a state would have to decree that citizens convicted of a capital crime and born on odd-numbered days of the month would be subject to the death penalty; citizens born on even-numbered days would face life in prison. A significantly lower number of capital crimes committed by persons born on uneven days would confirm the deterrent effect. The date of birth here is a device of randomly dividing the population into halves by a criterion that we will assume cannot be manipulated.⁷

The equally impossible experiment that would test the effect of differential frequencies of execution would require at least three randomly selected groups. In the first group everybody convicted of a capital crime would be executed. In the second, only every other such convict (again selected by lot) would be executed. In the third, nobody would be executed.

The data available to us for study of the deterrent effect of the death penalty are all naturally grown; none derive from a controlled

⁶ REPORT OF THE CALIFORNIA SENATE ON THE DEATH PENALTY 16-17 (1960).

⁷ Worried, expectant mothers, of course, could demand Caesarian delivery on an even-numbered date. Such intervention, however, would affect the purity of the experiment only if these mothers were also farsighted, *i.e.*, if their artificial birth-dates would comprise a higher rate of future murderers than the normal deliveries.

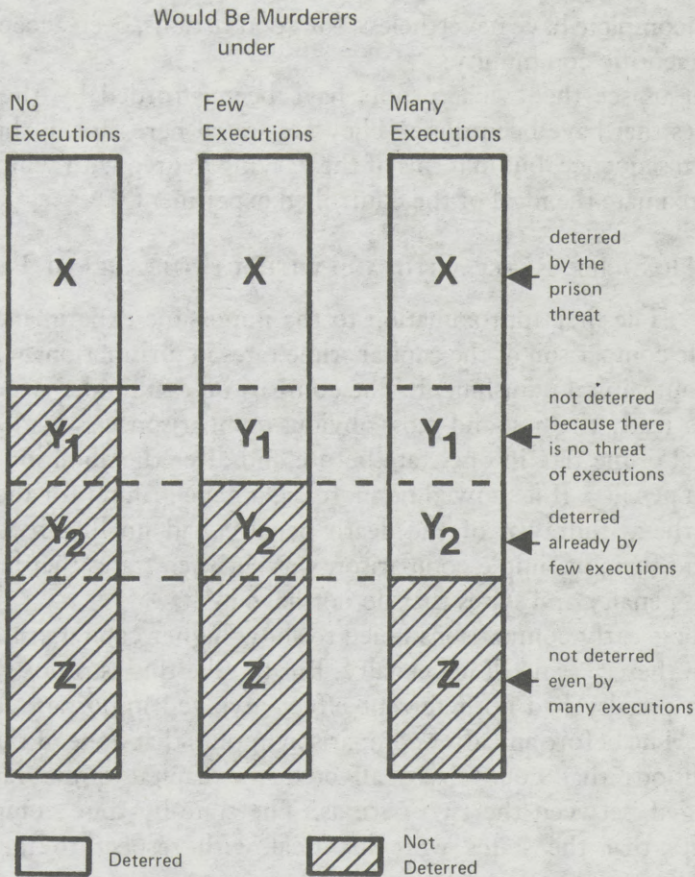


FIG. 2. Experimental paradigm showing a deterrent effect of increasing the rate of executions.

experiment. Yet they all are analyzed as if they had come from a controlled experiment. The structure of analysis is the same. What is missing is the prior randomization which insures comparability in all other respects. The analysis of naturally grown data must try to reproduce comparability by other means. Since none of these means is ever perfect, none of the studies based on naturally grown data ever completely simulates the impossible experiment.

It is this impossibility of the experiment and the unavoidable imperfection of nonexperimental data that account for despair of ever discovering "the truth about this 'deterrent' effect."⁸ The despair is unwarranted. Even in the so-called natural sciences proofs that

⁸ Note 3 *supra*.

are incomplete have nevertheless, for good reasons, been accepted by the scientific community.

Let us see then what proofs have been afforded by the many studies that have been done. They are stated here, not in their historical sequence, but in terms of the varying degree with which they approximate the ideal of the controlled experiment.

IV. HOMICIDE RATES WITH AND WITHOUT THE DEATH PENALTY

The first approximation to the impossible experiment is the simple comparison of the capital crime rates in jurisdictions with and without capital punishment. The comparison could take two forms. Historically the first and most obvious comparison was made of the capital crime rate in one state before and after the abolition of the death penalty. If it showed no increase, it gave ground for the belief that the withdrawal of the death penalty had no ill effect.⁹ The second form of simple comparison was between states that have the death penalty and states that do not have it.¹⁰

These early comparisons failed to show higher capital crime rates when there was no death penalty. But to take this as proof that the death penalty had no deterrent effect involved important assumptions. The before and after comparison implies that none of the other conditions that could have affected the capital crime rate had changed between the two periods. The state-by-state comparison implies that the states were identical with respect to the other conditions.

The first improvement on the simplistic structure of these comparisons was to put the before-and-after comparison side by side with developments in states which during that period had not changed their death penalty rule. Similarly, the comparison between

⁹ The first comprehensive data on before-and-after comparison were presented by Thorsten Sellin to the Royal Commission on Capital Punishment. *The Deterrent Value of Capital Punishment*, REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT App. 6 (Cmd. 8932 1953). Sellin's memorandum is published in the MINUTES OF THE EVIDENCE, 647. Cf. also KOESTLER, REFLECTIONS ON HANGING App. (1956); UNITED NATIONS, CAPITAL PUNISHMENT, REPORT (1960); Samuelson, *Why Was Capital Punishment Restored in Delaware?* 60 J. CRIM. L.C. & P.S. 148 (1969).

¹⁰ Sellin, *Homicides in Retentionist and Abolitionist States*, in SELLIN, ed., CAPITAL PUNISHMENT 135 (1967); Reckless, *The Use of the Death Penalty—a Factual Statement*, 15 CRIME & DELINQ. 43 (1969); ZIMRING & HAWKINS, DETERRENCE 265 (1973); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170, 171 (1976).

states was improved by limiting it to contiguous states, for which the assumption of comparability seems more justified.

Table 1 provides an example of contiguous states comparison.¹¹ Only in one of the five groups is the homicide crime rate in the no-death-penalty state (Maine) higher than in the other two states. In all others it is either the same or lower. This is neither evidence of a deterrent effect of the death penalty nor clear evidence of its absence. Even contiguous states are not strictly comparable. Over a span of sixteen years, the period covered by this table, the conditions favoring crime in those states may develop in different directions.

The state-by-state analysis becomes more convincing if averages for a long time period are replaced by the annual figures from which these averages were computed. In figure 3, the homicide rate in Kansas is compared with that of its neighbor states, Missouri and Colorado. Kansas was an abolitionist state until 1935.¹²

Figure 3 allows several observations. First, that annual rates exhibit considerable random fluctuations. It suggests that changes from one

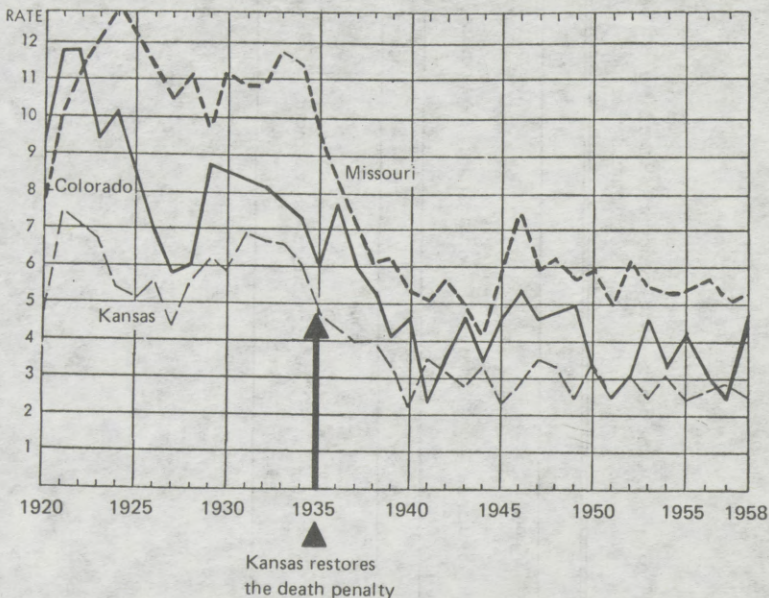


FIG. 3. Homicides per 100,000 population in Missouri, Colorado, and Kansas, 1920-58.

¹¹ ZIMRING & HAWKINS, note 10 *supra*, at 265.

¹² From SELLIN, note 10 *supra*, at 137.

TABLE 1
HOMICIDE DEATH RATES IN CONTIGUOUS STATES WITH⁽¹⁾ AND WITHOUT CAPITAL PUNISHMENT, 1940-55
(Average annual rate per 100,000 population)

Midwest						
Group 1		Group 2		Group 3		
Michigan	D	Minnesota	D	N. Dakota	D	Nebraska
3.5	Ohio	1.4	Iowa	1.0	1.5	1.8
	3.5		1.4			
New England						
Group 4		Group 5				
Maine	D	Vermont	D	Massachusetts	D	Connecticut
1.5	New Hampshire	1.0	Rhode Island	1.2		1.7
	0.9		1.3			

year to the next are unlikely to be significant. Figure 3 also shows that looking only at one state may lead to false conclusions. The Kansas homicide rate, except for the first two years, shows a sharp decline after 1935 and some early observers jumped to the conclusion that it was the restoration of the death penalty that did it. A glance at the homicide rates of Colorado and Missouri warns against this conclusion. The development of the Kansas rate does not noticeably differ from those of the two neighboring states, which had the death penalty throughout the entire span of years.

V. IMPROVING COMPARABILITY

Comparing the development of the capital crime rate in contiguous states with and without the death penalty has been challenged on the ground that contiguity is not a sufficiently solid guaranty of likeness. Three responses to this challenge have been forthcoming. One was to show that the contiguous states were in fact alike with respect to a great variety of factors that could, if they had differed from state to state, independently affect the capital crime rate. Table 2 is an example of such efforts.¹³

TABLE 2
DEMOGRAPHIC PROFILE OF CONTIGUOUS STATES COMPARED IN GROUP I OF TABLE 1
(1960 data)

	Michigan	Indiana	Ohio
Status of death penalty	...	D	D
Homicide rate	4.3	4.3	3.2
Probability of apprehension	.75	.83	.85
Probability of conviction	.25	.55	.33
Labor force participation (%)	54.9	55.3	54.9
Unemployment rate (%)	6.9	4.2	5.5
Population aged 15-24 (%)	12.9	13.4	12.9
Real per capita income (\$)	1,292	1,176	1,278
Nonwhite population (%)	10.4	6.2	9.8
Civilian population (000's)	7,811	4,653	9,690
Per capita government expenditures (\$)*	363	289	338
Per capita police expenditures (\$)*	11.3	7.6	9.0

* State and local.

¹³ From Baldus & Cole, note 10 *supra*, at 178.

Michigan, the state without a death penalty, had no higher homicide rate than neighboring Indiana, even though it had a lower probability of apprehension and conviction, a higher unemployment rate, a larger proportion of blacks in the population, greater population density—all factors which should tend to increase the capital crime rate. On the other hand, it had a higher per capita police expenditure. Ohio had a lower homicide rate and a higher apprehension rate. On most of the remaining characteristics Ohio was in an intermediary position.

The second analytical device for improving comparability was to replace the comparison of entire states by comparing more homogeneous subsections of these states, such as communities of comparable size or counties of comparable income levels.¹⁴ The third, most sophisticated response to the problem of comparability was to apply to it a tool called regression analysis. This is an instrument designed mainly to resolve problems such as this which call for separating the effect of one particular variable from the possible effect of a multitude of others.

Before discussing regression analysis in more detail, I turn to two additional efforts to sharpen the analytic approach aimed at detecting the existence of a deterrent effect for the death penalty.

VI. SHARPENING THE MEASURE OF CAPITAL CRIME

If the death penalty deters murder, the rate of wilful homicides should show the effect. There are, however, grades of wilfulness and some types of homicide will have a higher likelihood of resulting in the death penalty. These types of homicide should provide a more sensitive index for detecting deterrent effect, if one exists, than the overall homicide rate.¹⁵

The difficulty of developing such an index, of course, is the lack of adequate data. With one exception, namely, the killing of a police officer, records are not generally separated according to the type of homicide committed. An effort has been made to obtain counts of

¹⁴ Cf. e.g., Sutherland, *Murder and the Death Penalty*, 15 J. CRIM. L.C. & P.S. 520 (1925); Campion, *Does the Death Penalty Protect the State Police?* in BEDAU, ED., *THE DEATH PENALTY IN AMERICA* 361 (1967); Vold, *Can the Death Penalty Prevent Crime?* 12 PRISON J. 4 (1932).

¹⁵ Zimring & Hawkins, *Deterrence and Marginal Groups*, J. RES. IN CRIME & DELINQ. 100 (July 1968).

first degree murders from the country's prisons.¹⁶ But these numbers are affected by regionally differing apprehension and conviction rates, and indirectly also by differential standards of plea bargaining and jury nullification. Suffice it to note that this effort too failed to detect a deterrent effect of the death penalty.

Killing a policeman is a genuine "high death penalty risk" category and it is well recorded and counted. Again it was Thorsten Sellin who investigated them; table 3 summarizes his findings.¹⁷ Even this measure, rightly thought to be more sensitive than the general homicide rate, failed to reveal any difference between the threat of the death penalty and that of life imprisonment.

TABLE 3
RATE OF MUNICIPAL POLICE KILLINGS, 1920-54
(Per 10 years and 100,000 population)

No Capital Punishment		Capital Punishment	
Maine	.00	Vermont	.00
Rhode Island	.17	New Hampshire	.14
		Massachusetts	.22
		Connecticut	.14
Michigan*	.36	Ohio	.61
		Indiana	.64
		Illinois	.31
Minnesota	.42	Iowa	.56
Wisconsin	.53		
N. Dakota	.53	S. Dakota	.00
		Montana	1.58
		New York	.25
Detroit, Mich.	.85	Chicago, Ill.+	1.54

* Without Detroit.

† 1928-44.

VII. THE EFFECT OF EXECUTIONS

A sentence is likely to deter by the differential degree of fear it engenders in the would-be perpetrator. It has been argued, there-

¹⁶ Bailey, *Murder and Capital Punishment: Some Further Evidence*, in BEDAU, note 4 *supra*, at 314.

¹⁷ Sellin, *The Death Penalty and Police Safety*, in SELLIN, note 10 *supra*, at 138, 144, 145.

fore, that the dichotomy of jurisdictions with and without capital punishment is but a crude approximation to the reality of the threat. What matters was not the death penalty on the books but the reality of executions.

One response to this consideration was to transform the death penalty—life sentence dichotomy into the gradations provided by the number of executions carried out during any one year. I will return to this approach later. The other response was to try to find out whether publicized executions had a short-range depressing effect on the homicide rate.

Leonard Savitz recorded the homicide rates during the eight weeks before and after well-publicized executions in Philadelphia.¹⁸ He found no depressing effect of these executions, although he used one of the potentially more sensitive measures of deterrence, the frequency of felony murders, rather than the overall homicide rate.¹⁹

A similar effort with California data showed an effect, albeit an ambiguous one. William Graves compared homicide rates during execution weeks with non-execution weeks.²⁰ He had the weeks begin on Tuesday in order to keep Fridays, the execution day in California, at the midpoint. The comparison (fig. 4a) suggested a depressing effect during the days preceding the execution and an increase in homicides on the days following it. Graves was puzzled; others considered the data as proof of a counter-deterrent effect. Conceivably the data could be rearranged, as in figure 4b, with the week beginning on Friday, the execution day. The results would then suggest a reduction of homicides during the first three days following executions compensated by an increase during the rest of the week. In any event, Graves's data show, at best, a delaying rather than a deterrent effect, and the failure of the more sensitive Philadelphia data to show any effect casts doubt on the strength of the California result.

¹⁸ Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L.C. & P.S. 338 (1958).

¹⁹ A count of felony murders (for the non-lawyer: a homicide committed in the course of another felony such as robbery) can be made only with great difficulty and only in places, such as Philadelphia, where detailed police records are kept.

²⁰ Graves, *The Deterrent Effect of Capital Punishment in California*, in BEDAU, *THE DEATH PENALTY IN AMERICA* 322 (1967). (The rearrangement in figure 4b is not precise because the curves for Tuesdays through Thursdays will change under the redefinition.)

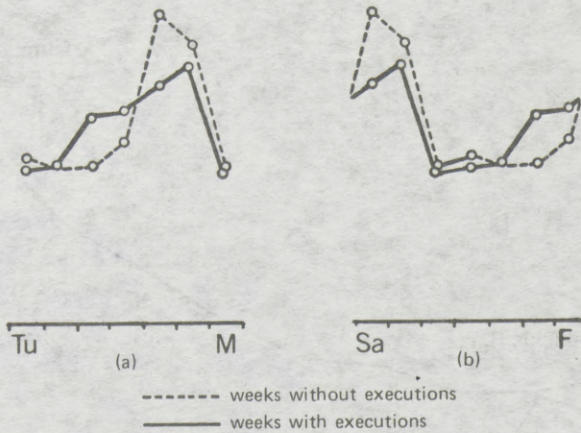


FIG. 4. Homicides during weeks with and without executions.

VII. THE CONTRIBUTION OF ISAAC EHRLICH

Isaac Ehrlich was the first to introduce regression analysis to efforts designed to determine whether the death penalty had a deterrent effect beyond the threat of life imprisonment.²¹ This was a new, powerful way of coping with the task of isolating the death penalty effect, if it should exist, uncontaminated by other influences on the capital crime rate. Ehrlich's paper was catapulted into the center of legal attention even before it was published, when the Solicitor General of the United States cited it with lavish praise in his *Amicus Curiae* Brief in *Fowler v. North Carolina*,²² and delivered copies of the study to the Court. The Solicitor General called it "important empirical support for the a priori logical belief that use of the death penalty decreases the number of murders."²³

In view of the evidence available up to that time, Ehrlich's claim was indeed formidable, both in substance and precision: "[A]n additional execution per year . . . may have resulted in . . . 7 or 8 fewer murders."²⁴ The basic data from which he derived this conclusion were the executions and the homicide rates as recorded in the

²¹ Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, Working Paper No. 18, National Bureau of Economic Research (1973). The paper was subsequently published under the same title in an abbreviated form in 65 *AM. ECON. REV.* 397 (1975).

²² 96 S. Ct. 3212 (1976).

²³ Reply Brief, p. 36.

²⁴ Ehrlich, note 20, *supra*, 65 *AM. ECON. REV.* at 414.

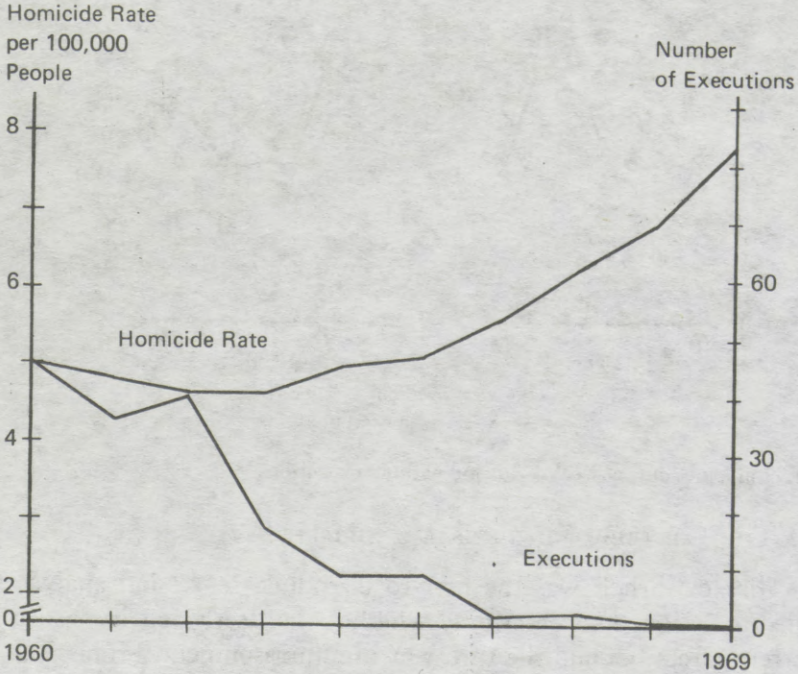


FIG. 5. United States homicide rate and number of executions, 1960-69.

United States during the years 1933 to 1969, the former generally decreasing, the latter, especially during the sixties, sharply increasing.²⁵ Figure 5 presents the crucial divergence between 1960 and 1969. Ehrlich considered simultaneously other variables that could affect the capital crime rate through calculations I shall discuss presently.²⁶

IX. REGRESSION ANALYSIS

Regression analysis proceeds essentially in the following manner. Suppose one knew for certain that, aside from the possible

²⁵ Data on murders from *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, Sources and Data, May 1975, Memorandum by I. Ehrlich. Data on executions from: National Prisoner Statistics, U.S. Bureau of Prisons.

²⁶ Ehrlich's analysis included the following variables: the arrest rate in murder cases; the conviction rate of arrested murder suspects; the rate of labor force participation; the unemployment rate; the fraction of the population in the age group 14 to 24; and per capita income.

deterrent effect of executing murderers, there was but one other factor that influenced the capital crime rate: the proportion of men between the ages of 17 and 24 in the total population. The analysis would then begin by relating the capital crime rate in the various states to the proportion of young men in those states, as in figure 6.

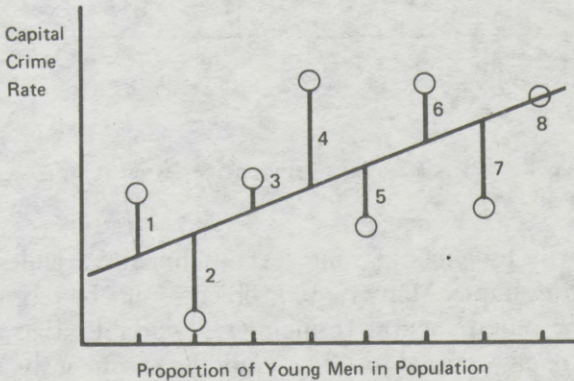


FIG. 6. Hypothetical relationship between the capital crime rate and the proportion of young men in the population.

The points in this graph may represent either different jurisdictions at one point of time, or different points of time in the same jurisdiction, or both. The straight line (the regression line) represents the best estimate of the relationship between the proportion of young men in the population and the capital crime rate. The vertical distance of each point from the regression line represents the residual part of the variations in the capital crime rate, the part that remains unexplained after the effect of the "proportion of young men" has been eliminated. One then proceeds to test whether these residuals are related to the frequency of executions, by plotting them against the number of executions in the respective states as in figure 7. If no relationship exists, a horizontal regression line will indicate that executions have no deterrent effect (a): No matter how executions vary, the capital crime rate remains the same. If a relationship exists (b), the downward slope of the regression line would indicate that as the frequency of executions increases, capital crime decreases. That graph, one will note in passing, is in appearance indistinguishable from the finding of a controlled experiment, if one could be made.

The complete apparatus of regression analysis is more compli-

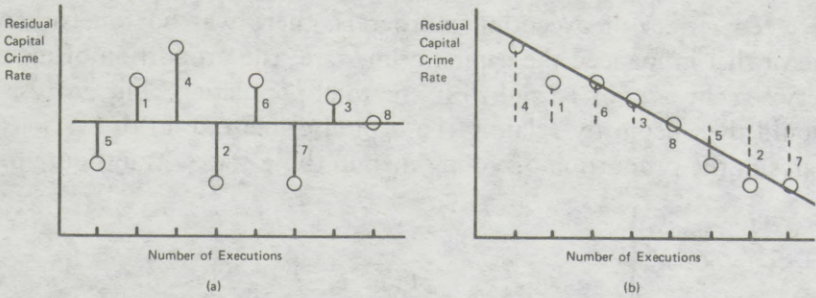


Fig. 7. Two hypothetical relationships between the frequency of executions and the residual capital crime rate.

cated, primarily by encompassing several control variables, not just one, as in our example. Many more problems must be resolved along the way. One requirement is to include all variables that affect the outcome. If one is omitted its effect could be erroneously attributed to one of the included variables. This danger of spurious correlation is particularly great if the analysis is concerned with so-called time series data, such as corresponding constellations of executions and capital crime over a series of consecutive years.

Another requirement is that the analysis account for feedback effects. Estimates of deterrent effects of punishment, for example, may be distorted if they fail to separate the simple statistical association between crime and punishment into its potential two components: the effect of punishment on crime, and the possible reverse effect of crime on punishment. For example, an increase in crime may overload the law enforcement system and thereby increase the defendant's chances of a lower sentence in the plea bargaining process.

All these and other technical refinements of the regression analysis have but one goal: to isolate, through a process of mathematical purification, the effect of any one variable upon the other, under conditions that exclude the interference from other variables. Regression analysis, thus, is but another effort to simulate with the help of nonexperimental data the experimental conditions outlined in figure 2 of this paper.²⁷ These examples suggest the sophistication

²⁷ A more elaborate effort by me to explain regression analysis to the non-statistician is in preparation and will be published in the *American Bar Foundation Research Journal*.

of this analytic instrument, but its sophistication is matched by a corresponding measure of delicacy. Applied to nonexperimental data, regression analysis is not a naturally robust instrument. Its results can be drastically affected by minor changes in the analytic pattern, for which the investigator has, as a rule, many options.

X. EHRLICH'S DETERRENCE CLAIM EVAPORATES

Ehrlich's study, because it ran counter to all the hitherto available evidence except that of Graves, and because it was introduced into a litigation of historic import, received extraordinary attention from the scholarly community.

First, Peter Passell and John Taylor attempted to replicate Ehrlich's finding and found it to hold up only under an unusually restrictive set of circumstances.²⁸ They found, for example, that the appearance of deterrence is produced only when the regression equation is in logarithmic form; in the more conventional linear regression framework, the deterrent effect disappeared.²⁹ They found also that no such effect emerged when data for the years after 1962 were omitted from the analysis and only the years 1933-61 were considered.³⁰

An effort to duplicate Ehrlich's findings from Canadian experience also failed.³¹ Kenneth Avio of the University of Victoria, after analyzing the thirty-five-year span, concluded that "the evidence would appear to indicate that Canadian offenders over the period 1926-60 did not behave in a manner consistent with an effective deterrent effect of capital punishment."³²

During 1975, the *Yale Law Journal* published a series of articles reviewing the evidence on the deterrent effect of capital punishment. Included in this series was a second attempt to replicate Ehrlich's result by William Bowers and Glenn Pierce.³³ In replicating Ehrlich's work, they confirmed the Passell-Taylor finding that

²⁸ Passell & Taylor, *The Deterrent Effect of Capital Punishment: Another View*, March 1975 (unpublished Columbia University Discussion Paper 74-7509), reprinted in Reply Brief for Petitioner, *Fowler v. North Carolina*, App. E. at 4e-6e.

²⁹ *Id.* at 6-8.

³⁰ *Id.* at 5, 6.

³¹ Kenneth L. Avio, *Capital Punishment in Canada: A Time-Series Analysis of the Deterrent Hypothesis* (mimeo, 1976).

³² *Id.* at 22.

³³ Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975).

Ehrlich's results were extremely sensitive to whether the logarithmic specification was used and whether the data for the latter part of the 1960s were included.³⁴ Bowers and Pierce also raised questions about Ehrlich's use of the FBI homicide data in preference to vital statistics data.³⁵

Ehrlich defended his work in this series in the *Yale Law Journal* by addressing some of the criticisms raised against his study.³⁶ He refuted some, but not the crucial ones. In his article he referred to a second study he made of the problem, basing it this time on a comparison by states for the years 1940 and 1950. Ehrlich claimed that the new test bolstered the original claim. But he described these findings as "tentative and inconclusive."³⁷ In the meantime, Passell made a state-by-state comparison for 1950 and 1960 but did not find what Ehrlich allegedly had found. Passell concluded: "We know of no reasonable way of interpreting the cross-section [*i.e.*, state-by-state] data that would lend support to the deterrence hypothesis."³⁸

A particularly extensive review of Ehrlich's time series analysis was made by a team led by Lawrence Klein, president of the American Economic Association.³⁹ The authors found serious methodological problems with Ehrlich's analysis. They raised questions about his failure to consider the feedback effect of crime on the economic variables in his model,⁴⁰ although he did consider other feedback effects in his analysis. They found some of Ehrlich's technical manipulations to be superfluous and tending to obscure the accuracy of his estimates.⁴¹ They, too, raised questions about variables omitted from the analysis, and the effects of these omissions on the findings.⁴²

Like Passell-Taylor and Bowers-Pierce, Klein and his collaborators replicated Ehrlich's results, using Ehrlich's own data, which by

³⁴ *Id.* at 197-205.

³⁵ *Id.* at 187-89.

³⁶ Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975).

³⁷ *Id.* at 209.

³⁸ Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61, 80 (1975).

³⁹ Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, Paper commissioned by the Panel on Research on Deterrence, National Academy of Sciences (June 1976).

⁴⁰ *Id.* at 18, 19-24.

⁴² *Id.* at 14-17.

⁴¹ *Id.* at 14.

that time he had made available.⁴³ As in previous replications, Ehrlich's results were found to be quite sensitive to the mathematical specification of the model and the inclusion of data at the recent end of the time series.

By this time, Ehrlich's model had been demonstrated to be peculiar enough. Klein went on to reveal further difficulties. One was that Ehrlich's deterrence finding disappeared after the introduction of a variable reflecting the factors that caused other crimes to increase during the latter part of the period of analysis.⁴⁴ The inclusion of such a variable would seem obligatory not only to substitute for the factors that had obviously been omitted but also to account for interactions between the crime rate and the demographic characteristics of the population.

Klein also found Ehrlich's results to be affected by an unusual construction of the execution rate variable, the central determinant of the analysis. Ehrlich constructed this variable by using three other variables that appear elsewhere in his regression model: the estimated homicide arrest rate, the estimated homicide conviction rate, and the estimated number of homicides. Klein showed that with this construction of the execution rate a very small error in the estimates of any of these three variables produced unusually strong spurious appearances of a deterrent effect.⁴⁵ He went on to show that the combined effect of such slight errors in all three variables was likely to be considerable, and that in view of all these considerations, Ehrlich's estimates of the deterrent effect were so weak that they "could be regarded as evidence . . . [of] a counterdeterrent effect of capital punishment."⁴⁶ In view of these serious problems with Ehrlich's analysis, Klein concluded: "[W]e see too many plausible explanations for his finding a deterrent effect other than the theory that capital punishment deters murder." And further: "Ehrlich's results cannot be used at this time to pass judgment on the use of the death penalty."⁴⁷

The final blow came from a study by Brian Forst, one of Klein's collaborators on the earlier study. Since it had been firmly established that the Ehrlich phenomenon, if it existed, emerged from developments during the sixties, Forst concentrated on that

⁴³ *Id.* at 24, 25.

⁴⁴ *Id.* at 28-30.

⁴⁵ *Id.* at 17-19.

⁴⁶ *Id.* at 18.

⁴⁷ *Id.* at 33.

decade.⁴⁸ He found a rigorous way of investigating whether the ending of executions and the sharp increase in homicides during this period was causal or coincidental. The power of Forst's study derives from his having analyzed changes *both* over time and across jurisdictions. The aggregate United States time series data Ehrlich used were unable to capture important regional differences. Moreover, they did not vary as much as cross-state observations; hence they did not provide as rich an opportunity to infer the effect of changes in executions on homicides.

Forst's analysis is superior to Ehrlich's in four major respects: (1) It focuses exclusively on a period of substantial variation in the factors of central interest. (2) Its results are shown to be insensitive to alternative assumptions about the mathematical form of the relationship between homicides and executions. The results were also invariant to several alternative methods of constructing the execution rate, to alternative assumptions about the nature of the relationships between homicides, and other offenses, executions, convictions and sentences, and to alternative technical assumptions. (3) By not requiring conversion of the data to logarithms, Forst's model does not require that false values be used when the true values of the execution are zero. (4) It incorporates more control variables.

Forst's study led to a conclusion that went beyond that of Klein: "The findings give no support to the hypothesis that capital punishment deters homicide."⁴⁹ "Our finding that capital punishment . . . does not deter homicide is remarkably robust with respect to a wide range of alternative constructions."⁵⁰

XI. THE OVERLOOKED NATURAL EXPERIMENT

Forst saw that Ehrlich, by using aggregate data for the United States as a whole, was forced to disregard the differences between states that had capital punishment and executions, and states that had either abolished the death penalty or at least had ceased to carry it out. Ehrlich's model thus could not evaluate the natural experiment which legislative history had built into the data. If Ehrlich's thesis—that it was the reduction of executions during the

⁴⁸ Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s* (September 1976, mimeograph).

⁴⁹ *Id.* at 27.

⁵⁰ *Id.* at 29.

sixties that made the capital crime rate grow—were correct, then no such growth should obtain in the states in which there could be no reduction in executions because there had been none to begin with. Yet as figure 8 shows, the growth of the capital crime rate during the crucial sixties was as large in the states without executions as in states with executions.

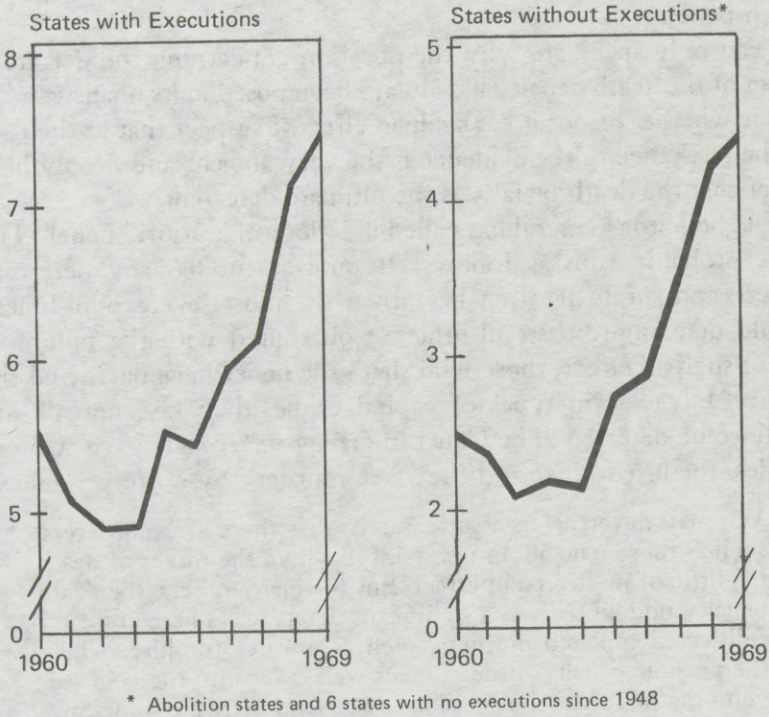


FIG. 8. Homicide Rates 1960-1969 in States With and Without Executions

XII. EVIDENCE VERSUS ANCIENT SENTIMENT

The evidence on whether the threat of the death penalty has a deterrent effect beyond the threat of the life sentence, its normal substitute, is overwhelmingly on one side. None of the efforts to sharpen the measurement yardstick by replacing the overall homicide rate through more sensitive measures succeeded in discovering a deterrent effect. Nor did any effort to sharpen the analytical instruments of analysis help. Even regression analysis, the most sophisticated of these instruments, after careful application by the scholarly community failed to detect a deterrent effect.

This then is the proper summary of the evidence on the deterrent effect of the death penalty: If there is one, it can only be minute, since not one of the many research approaches—from the simplest to the most sophisticated—was able to find it.⁵¹ The proper question, therefore, is whether an effect that is at best so small that nobody has been able to detect it, justifies the awesome moral costs of the death penalty.

I can only speculate why the question concerning the deterrent effect of the death penalty has always been posed in its unanswerable form: whether or not it has such an effect. I suspect that at the root of the resistance to the evidence is the very ancient and deeply held belief that the death penalty is the ultimate deterrent.

The Solicitor General has called it a “logical a priori” belief. The logic probably runs as follows: If punishment has any deterrent effect (and surely it often has) then the most severe punishment should deter more than all others. Confronted with the failure to detect such an effect, those who share the belief have narrowed the claim. Only certain types of capital crime, they say, not all, are likely to be deterred. The Court in *Gregg v. Georgia* gave two examples, the hired killer and the “free murder” by a life prisoner:⁵²

We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

If these are the best examples, the others must be poor indeed. The murderer for hire, knowing himself fairly safe from detection, is not likely to be concerned over the difference between death and prison

⁵¹ The one exception pointing in the other direction, the dubious California finding that executions appear to postpone some homicides for a few days, is of small import. An effort to duplicate the finding in Philadelphia failed. See text *supra*, at notes 18 and 20.

⁵² 96 S. Ct. at 2931. Further examples are afforded in a footnote: “Other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, the extortion murder of hostages or kidnap victims, and the execution-style killing of witnesses to a crime.” *Id.* at n.33.

for life. The "cold calculus" that moves the hired killer must surely tell him how small the probability is that he will be caught.⁵³ A good part of his careful contemplation goes to avoiding traces.

The life prisoner who kills is even a more interesting example. At first glance, the argument seems so irrefutable, that this type of homicide is occasionally the last capital crime on the statute books before the death penalty is abolished. It is a prize example because on "logical a priori" grounds his is by definition the "free murder" under the law. Again, it is useful to look at the facts, which Sellin was the first to illuminate. He found that, in 1965, the year for which he collected the data, sixteen prison homicides had been committed by men convicted of murder. Since not all murderers in prison are there with a life sentence, the true number of these "free murders" is likely to be even smaller.⁵⁴ In fact, of course, the "free murder" is probably altogether a figment because most life prisoners have some hope of being released before the end of their natural life, a hope that would be destroyed by a second murder. A prison, moreover, has ways of its own of punishing such a double murderer.

It is only fair, however, to take these examples of the Court for what they are, efforts to bolster with reasons the unwillingness to abandon the ancient sentiment. In that sentiment, the belief in deterrence plays but a small part. It is the belief in retributive justice that makes the death penalty attractive, especially when clothed in a functional rationalization. The belief has ancient roots, even if the rationale is modern. The Court in *Gregg* approvingly cites *Furman v. Georgia*.⁵⁵

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. . . . 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.

⁵³ An interview comes to mind with a former warden of the Cook County Jail who did not believe in the death penalty. The interviewer asked him, "You mean, you would even hesitate to execute a hired killer?" The warden's answer as I remember it was: "I shall cross that bridge when I come to it. In my many years here in the Cook County Jail, I have yet to meet the first hired killer. They are never caught, although Chicago would be a good place to catch them."

⁵⁴ Sellin, *Prison Homicides*, in SELLIN, note 10 *supra*, at 154, 157; see also Buffin, *Prison Killings and Death Penalty Legislation*, 53 *PRISON J.* (1974).

⁵⁵ 96 S. Ct. at 2930, quoting 408 U.S. 238, 308 (1972).

The depth of this feeling was revealed in a strange interchange during oral argument between Mr. Justice Powell and Professor Anthony Amsterdam, counsel for the petitioners:⁵⁶

Mr. Justice Powell:

Let me put a case to you. You've heard about Buchenwald, one of the camps in Germany in which thousands of Jewish citizens were exterminated. . . . If we had had jurisdiction over the commandant of Buchenwald, would you have thought capital punishment was an appropriate response to what that man or woman was responsible for?

Mr. Amsterdam:

. . . We all have an instinctive reaction that says, "Kill him." . . . But I think the answer to the question that your Honor is raising, . . . [to] be consistent with the 8th Amendment to the Constitution . . . my answer would be, "No."

Mr. Justice Powell asked the same question again, this time about a man who might destroy New York City with a hydrogen bomb. Amsterdam's answer, of course, was again no.

Significantly, both examples went to the issue of retribution, not deterrence. It is hard to think of any crime that would be less deterred by the difference between the death penalty and life imprisonment, for instance, in Spandau prison. The sentiment in favor of the death penalty does not stem from the belief in its deterrence and perhaps we overestimate altogether the importance of that issue.

Nowhere was the worldwide decline of the death penalty significantly connected with arguments about its effectiveness or the lack thereof. In some countries abolition became simply the logical end-point of a gradual decline in executions, probably accompanied by a parallel change in moral sentiments.

In other countries, abolition was clearly an expression of moral sentiment. The first de jure abolition of executions in czarist Russia goes back to A.D. 1020. Capital punishment reappeared in the fourteenth century but was again abolished when Elizabeth ascended the throne in 1742. On both occasions, the issue was one of morality not expediency.⁵⁷ In Germany, the 1946 Constitution abolished the death

⁵⁶ The colloquy occurred during argument in *Woodson & Waxton v. North Carolina*; transcribed record No. 75-5491, at 20.

⁵⁷ "Do not kill anyone, either guilty or not Do not destroy a Christian soul, even in case death is well deserved." Testament of the Grand Prince of Kiev,

penalty as a deliberate act of repudiation of the Hitler era, when the death penalty, legally or illegally imposed, claimed millions of lives. In Great Britain, after a century of controversy, the abolitionists won when a man, protected by all the vaunted safeguards of British justice, was executed for a crime that he had not committed.

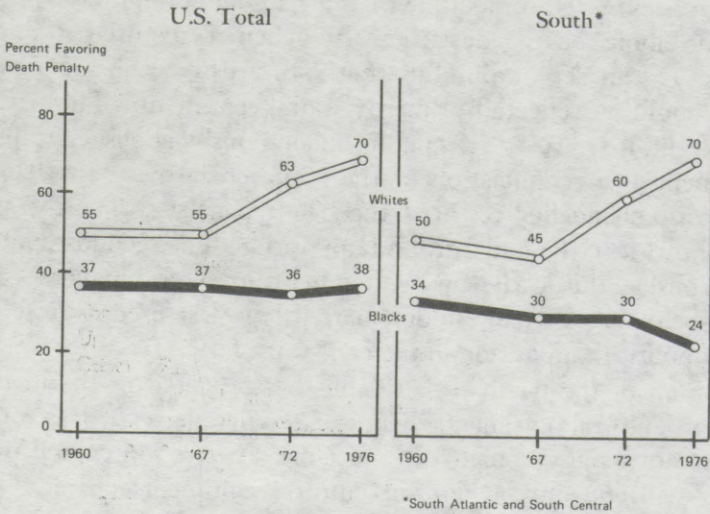
Ceylon abolished the death penalty when it acquired its independence, as an act of Buddhist faith. In Austria, the movement toward abolition reflected primarily moral sentiments. The parliament of the first Austrian republic unanimously abolished capital punishment as a renunciation of the monarchical past. In 1933, a semi-fascist chancellor restored the death penalty primarily as a political threat to the underground opposition. The second republic again abolished the death penalty, first in ordinary criminal cases and then also for cases triable under martial law, last used against the socialist political opposition in the civil war of 1934.

Abolition of the death penalty thus has reflected in the main a change in cultural sentiments, if not of the people, so at least of its legislators or its government. In the United States too capital punishment will end only when our cultural sentiments change. The people, a majority of whom now favor the death penalty, will be the last to change. The legislators will probably change before them; and our Supreme Court Justices conceivably may change even earlier.

Sentiment for the death penalty in the United States has grown during the last decade, stimulated by the unprecedented rise in violent crime during the second half of the sixties. In such times the demand for the death penalty grows because it is so easy to believe it will make law enforcement more effective. It is interesting to analyze the growth of this popular sentiment. In figure 9, four Gallup polls on the death penalty spanning sixteen years are analyzed. Sentiment for the death penalty did not rise until 1967, and then only among the white population. Black sentiment for the death penalty, always far below the corresponding figures for whites, remained unchanged. In the South, sentiment for the death penalty among whites and blacks has traditionally been below the average for the country. For the blacks, this is still true; their propor-

1125 A.D. Elizabeth purportedly promised God that if she were selected she would take no life. Adams, *Capital Punishment in Imperial and Soviet Criminal Law*, 18 AM. J. COMP. L. 575, 576 (1970).

tion favoring the death penalty has been declining, reaching in 1976 a new low of 24 percent. Among the whites, sentiment in the South has caught up with that of the country as a whole, at 70 percent.



* South Atlantic and South Central.

FIG. 9. Proportion of whites and blacks favoring the death penalty, 1960-76 (Gallup Poll).

The petitioners in *Gregg* all came from the South. In the last analysis the Court held that it had no power to override legislation that was grounded in a belief that even some of the Justices must have shared.

Still, one must not give up hope. The realization that the deterrent effect, if it exists at all,⁵⁸ can be only minute, should force us to look

⁵⁸ Two of the best studies—those of Forst and Passell—showed even a counter-deterrent balance for the death penalty. In both studies it was statistically insignificant. The possibility of a counterdeterrent effect does not come as a total surprise. It has theoretical support of long standing. There is the suicide-through-murder theory advanced first by STAUB & ALEXANDER, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC—A PSYCHOLOGICAL ANALYSIS* (1931); see also H. von Weber, *Selbstmord als Mordmotiv*, *MONATSSCHRIFT FÜR KRIMINALBIOLOGIE UND STRAFRECHTSREFORM* 161 (1937). Then there is concern over the generally brutalizing effect of the death penalty which just adds one more killing in cold blood. Also, as long as some states still consider crimes other than murder (e.g., rape) to be capital offenses, the old argument that killing the victim-witness may somehow “improve” the

once more at the balance sheet, and weigh against the, at best, minimal benefit, the awesome costs of the death penalty: the inhumanity of the act, the ever present danger of error, the ultimate impossibility to make a fair decision as to who is to die and who is to live.

For the committed who believe that there should be more search for the elusive deterrent effect, a new opportunity has arisen. By the grace of the Court we are in the midst of a new natural experiment. After a number of years during which, through *Furman*, the death penalty was held in abeyance throughout the land, some of our states will resume executions. There is thus another opportunity to see whether the capital crime rate in these states will decline compared to the states that still have no executions.

In the end one must remain skeptical as to the power of evidence to change ancient beliefs and sentiments. The greater hope lies in the expectation that with better times our sentiments will reach the "standards of decency that mark the progress of a maturing society."⁵⁹ Justices Brennan and Marshall thought—wrongly it appears—that we had already sufficiently matured.

The conclusion that the personal sentiments of the judges play a decisive role is strengthened by reading the decision of the Massachusetts Supreme Judicial Court in *Commonwealth v. O'Neal*,⁶⁰ which held a mandatory death sentence upon a conviction for rape-murder to be unconstitutional. That court had before it on the deterrence issue the very same evidence that was before the United States Supreme Court in *Gregg*. Yet the majority of the Massachusetts court accepted the evidence as proof of the inability of the death sentence to deter. The lack of proof of deterrent effect deprived the government of a "compelling state interest" to justify the death penalty.

Why did the Supreme Court and the Massachusetts court arrive at a different decision? The decisive factor was the simple fact that in the United States Supreme Court only two of the nine Justices felt that "the standard of decency" required abolition while on the Massachusetts court five out of seven felt that way.

criminal's situation is still valid. Cf. BEDAU, *supra* note 20, at 264 n.7. Consider also the case of Gary Gilmore, the Utah convict who succeeded in his objective to be the first person executed in the post-*Furman* period. See N.Y. Times, 18 Jan. 1977, p. 1.

⁵⁹ Chief Justice Warren, writing for the Court, in *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁶⁰ 339 N.E.2d 676 (Mass. 1975).

17 FIFTH ST. N.E.
Washington, D.C. 20002
June 7, 1978

Senator James O. Eastland
Chairman
Committee on the Judiciary
Dirksen Senate Office Building
Washington, D.C.

Dear Mr. Chairman:

I am submitting herewith my essay "Answering the Arguments of the Capital Punishment Abolitionists," to be included in the printed record of the recent hearings on S. 1382--if you will be so kind.

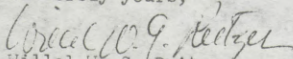
In going over the testimony of those hearings, I found sentiment opposing capital punishment under all circumstances.

Having studied this subject in some depth and having testified on it last November in connection with the code revision for the District of Columbia, I was moved to enlarge and reassemble my material in this form for the benefit of your deliberations on this issue.

The essay does not go into the particulars of bill S. 1382 as such, but seeks to remove major underlying objections that may impede its passage. The essay takes up 20 major arguments put forth by the abolitionists covering the various aspects--the anthropological, social, moral, penal, constitutional, psychological, and religious--and presents countermanding arguments and evidence. The arguments are in numbered sections, the first paragraph of each section summarizing the argument and its refutation. The sections also have subheadings for easier reference.

This is the most thorough treatment of the subject in existence that I know of. I hope you and the committee will find it useful.

Sincerely yours,


Willel W. G. Reitzer

ANSWERING THE ARGUMENTS OF THE
CAPITAL PUNISHMENT ABOLITIONISTS

by

Willel W. G. Reitzer
Universal Christian Publications
Washington, D.C.

One-time Supreme Court Justice Felix Frankfurter reportedly said that where one comes out on an issue depends on where one went in. That is particularly true on the capital punishment issue--as recent Supreme Court decisions verify.

Therefore it is germane to give a brief background sketch of the author as to where he went in. I grew up with a conviction of the rightness of the death penalty. But in my late twenties, when I had a complete reorientation of philosophy of life, resolving to live totally by Biblical principles, I determined to find and follow Biblical instruction on every issue regardless where it would come out. I put myself under only one obligation: to be faithful to Truth. I would give parents, friends, men of renown, church leaders, church pronouncements due deference, but would not be overwhelmed by any of them.

And I found myself forced to make major changes, such as in Sunday observance, and to accept new dogma, such as the superior value of celibacy.

My search during the past 25 years on the issue of capital punishment was not without its difficulties: unexpected uncertainties, and even some agonies. At one point I thought I had the solution well organized only to be restrained from publication at the last instant. But I persisted, because it was a crucial national issue, and because I believed the answer was obtainable--because all things are possible with God, especially in view of the promise: "the Spirit of Truth will guide you into all the Truth" (John 16:13). Moreover, I felt I had especial additional qualifications, having obtained degrees in both theology and law, and having had long experience in civil and criminal investigations, and in conducting extended research.

But as I sought the solution it became more and more obvious the wisdom of God is so vast that it takes abounding grace as well as immense self-discipline to fathom it--although at the same time His wisdom is readily apparent. Often the problem is that a missing element will seriously distort the whole. So there had to be developed a faithfulness not only to Truth but also to the requirements of its various components: to facts, to intuition, to conscience, to one's undisturbed relationship with the Father and the Son and the blessed Holy Spirit, to sincerity, to right motives (the love of God and the love of man), proper objectives (the welfare of man and the glory of God).

Now I am convinced that whoever goes in where I did will come out where I did. Because it was a long journey for me, and because there are many who want to travel the same road to a solution, I am solicitous they might learn because of my experience a few shortcuts.

The capital punishment issue has numerous aspects: anthropological, social, moral, penal, constitutional, psychological, religious. Abolitionists offer arguments on all of them. But a careful examination reveals each one is fallacious.

(1)

Abolitionists contend the "Thou shalt not kill" Commandment is absolute. But that is contrary to the text.

The Hebrew word ratzah (Ex. 20:13) connotes unjustifiable killing. Consequently, modern translations read: "Thou shalt not murder".

Moreover, in the next chapter certain crimes are specified carrying the death penalty: murder, smiting parents, cursing parents, kidnapping. Other capital crimes are defined here and there. Also, distinction is made between murder and nonintentional homicide.

The prohibition against taking life is repeated in the New Testament. Again, the Greek word used (phoneuo) means murder (Matt. 5:21). Also in this portion of Scripture the distinction is made between lawful and unlawful killings.

(2)

Abolitionists argue the import of Scripture is that human life has an inviolable value: that human life should never be deliberately taken from anyone as that violates human worth and dignity. But that view misinterprets the proper application of the value-of-life principle.

THE IMAGE OF GOD RATIONALE UNDERLYING THE DEATH PENALTY

Precisely because life is so sacred does the death penalty attach to its violation. That is the primary rationale behind the death penalty institution. Early in Scripture--and right after the human annihilation of the Flood--God commanded Noah: "The shedder of the blood of man, by man shall his blood be shed, for in the image of God He made man" (Gen. 9:6). This was not an isolated commandment, but was made in the context of a new beginning for the human race. Hence, it included also commands affecting the propagation of life (9:1,7) and the sustenance of life (8:22; 9:2b,3) in addition to the protection of life.

It is because of the image of God in man that it is such a serious offense to take life. And because all men everywhere at all time bear the image of God, it can be unequivocally concluded that the death penalty is to protect all men everywhere in all centuries, today, and as long as human life remains on earth.

THE DEATH PENALTY GIVES THE HIGHEST VALUE TO LIFE

Thus, to emphasize the value He places on human life, God attached to its violation the death penalty. By their transgression, capital offenders forfeit their right to life, just as lesser criminals forfeit their right to liberty and the pursuit of happiness, imprisonment behind bars in a sense being per se not compatible with human dignity either. As Lord Justice Denning remarked in the report of the Royal Commission of England on Capital Punishment: "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." The death penalty is the most emphatic denunciation.

Some criminals commit unspeakable crimes upon fellow human beings. Caryl Chessman committed 17 offenses in a 20-day crime spree involving 11 different persons. In all but one he was armed with a deadly weapon. One victim, a 17-year-old girl, was subjected to brutal depravity for four hours. Twelve years later she was still in a trance with little hope that she ever would come out of it. Another victim, a semi-paralytic, had been out of the hospital only a few days after a polio attack when Chessman molested her. Her pleas for mercy were disregarded. Twelve years later

she still wept uncontrollably when the subject was mentioned. The only appropriate response to such cases is to say: such gross abuse of the dignity and personality of a human being deserves death. Any lesser penalty would not sufficiently uphold the dignity and worth of the victim.

(3)

Abolitionists argue that the taking of life is such a grave matter that no person/state should arrogate to himself/itself this authority. But Scripture clearly extends this authority in appropriate circumstances.

JUSTIFIABLE HOMICIDE

Scripture contains a revealing incident involving the patriarch Abraham, one of the most God-fearing men of all time. When his nephew Lot was kidnapped, he organized a militia and went after the kidnappers and freed him. In the process there was a battle in which undoubtedly some were killed (nakah, to smite, to kill--Gen. 14:17). Afterwards Abraham was blessed by the priest Melchizekek, who said: "Blessed be the Most High God who has delivered your oppressors into your hand." It is tempting to dismiss these ancient individuals as semi-civilized superstitious primitives who conjured up deities to their own liking. But Scripture presents them as men of intimate acquaintance with the living God from whom we can learn much.

English Common Law and the statutes of American states recognize the right to kill in self defense as a matter of natural law. Courts have held this right inalienable, which society cannot take away by legislation. In general, the law recognizes a broader area called excusable or justifiable homicide. It operates to save life, to prevent a great crime, to accomplish a necessary public duty. Are we going to tell a police sharpshooter who has in his rifle sights a kidnapper holding a host of hostages in terror and uncertain fate he should not pull the trigger because the kidnapper's dignity and human personality would be violated? No more shall we say the same to the Utah firing squad that pulled the trigger on a man who had been found guilty of heinous crimes against humanity.

DOES NOT VIOLATE THE BROTHERHOOD OF MAN CONCEPT

Genesis 9:6 expressly states: "The shedder of the blood of man, by man shall his blood be shed." Verse 5 is even more explicit: "At the hand of every man's brother will I require the life of man." This emphasizes that executing a capital offender in no way violates the brotherhood of man concept, but rather reinforces it. The implied rationale is that whoever violates the brotherhood of man concept cancels his right to be a part of it and must be forcefully excluded from it.

Scripture elsewhere details how man is to carry out such executions (elaborated below).

(4)

Abolitionists argue the urge to punish offenders is a primitive instinct that is unworthy of an advanced, enlightened civilization. But such an assertion misunderstands proper jurisprudence: it fails to distinguish between rightful vengeance and wrongful revenge; the latter is to be condemned, but the former is to be commended.

PUNISHMENT INHERENT IN JUSTICE

Punishment is an inherent element of justice. The law is necessary to define what is right and wrong. In order to indicate the severity of an offense, a penalty is attached. Without a penalty, a law is not a law at all, because it announces that it does not really matter whether the law is kept or not. If there is no badness in breaking a law then there is no goodness in keeping it. And then there is no reason to have it. Hence, punishment is the pain that one deserves for violating a law.

Moreover, punishment is a promise. If the law promises death for death, then if death results, death must be inflicted. Thus, to avenge is to inflict deserved punishment for a wrong.

VENGEANCE IS A VIRTUE

Vengeance is exemplified by God and therefore a virtue. In Romans 3:5, the Apostle Paul asks: "Is God unrighteous who takes vengeance?" And he replies: "Of course not, for then how shall God judge the world?" God's punishments meted out on Judgment Day upon the wicked have no other purpose than vengeance, that is, to satisfy justice.

Indeed, the whole of the Christian religion is based on God's taking just vengeance for mankind's sins by requiring His Son to take the death penalty they deserve in their place. As already prophesied in Isaiah 53:10--"It was the will of the Lord to crush Him." In Romans 3, Paul goes on to explain: God set forth Christ Jesus to be a propitiation, that is, to make an atonement--to pay the price that justice required. Only in this substitutionary way could God the Father deal with the sins of mankind and still be called righteous (3:25,26). Righteousness, or justice, requires that indignation and wrath be displayed against evil, which is the archenemy of holiness, of purity, of worth, of truth, of goodness, of justice, of virtue. It cannot be taken lightly by anyone who is interested in maintaining 100 per cent loyalty to these concepts. To take them lightly is an indication one is not really fully committed to them. It is therefore not surprising to find vengeance exhibited by the greatest saints, the Christian martyrs, who are depicted "under the altar" crying unto God to avenge their untimely death (Rev. 6:10).

WANTING VERSUS TAKING VENGEANCE

One must distinguish between wanting vengeance and taking vengeance. This distinction stands out in the Parable of the Unjust Judge in which a widow repeatedly importunes to be avenged of her adversary until she succeeds. One lesson is that vengeance--to seek justice--is obviously permissible. Another lesson is that one must seek it through the proper authority, and that it will be forthcoming if one persists, although it may take some time. The human tendency is to take justice into one's own hands, with the peril that it may be exacted too severely or upon innocent parties. In Mosaic times safeguards were introduced: in the case of a

homicide, a certain kinsman was designated "the avenger" and certain places were designated "cities of refuge" where suspects could flee until a trial could be conducted; and certain conditions were made under which the avenger was or was not permitted to take the life of a killer (Num. 35:9 ff.).

As Justice Potter Stewart noted in *Furman v. Georgia* (1972): "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." In a later case, although stating "retribution is no longer the dominant objective of the criminal law," he went on to add "neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men" (*Gregg v. Georgia*, 1976).

True, there are those who get a perverse satisfaction out of the imposition of capital punishment. But it is inherently unjust to mitigate the administration of justice in order to avoid such incidental undesirable ramifications--which often can be prevented by other measures.

THE NOBLENES OF VENGEANCE

The preciousness of a principle, the value of an observance, the worth of an object is indicated by the price that one must pay not only for breaking it, but also the price one must pay for keeping it. Thus it is noble--most noble--to lay down one's life for one's cause, one's country, one's beloved--to execute oneself, as it were (cf. John 15:13). Does it become ignoble to say that a human life is so precious that whoever takes it unjustly deserves to be executed? Does it become ignoble to want to see that penalty carried out? No! When seen in its true light, the sentiment that longs to see proper justice done--when mercy is inappropriate--is as noble as every other virtuous sentiment at the requisite time and place. And to see and/or do justice in a capital case, although it be a seemingly grim task and spectacle (whether by stoning, hanging, drowning, firing squad, electrocution), and to be satisfied when accomplished, is equally noble, according to Holy Scripture.

(5)

Abolitionists argue that to save a capital offender from death has a double advantage: i) it enables him to make up for the damage he has done and ii) it removes that burden from society. But Scripture takes a contrary view.

From a Biblical standpoint, no one has any standing to say how capital offenders are to be handled. If X kills Y's child, what is that to Z? It is primarily Y's loss. But even Y is not free to determine what should happen to X, because X is in the first instance a creature of God, as is Y, so that both are responsible for their actions primarily to God. Only God determines what is appropriate and what is not appropriate in any given situation. The same pertains to Z. Hence, every individual is to involve himself in any situation only to the extent that God determines.

Scripture teaches that failure to execute capital criminals puts a burden on society. The crime has the effect of defiling the community. As Numbers 35:33 notes: "Blood defiles the land, and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it." Deuteronomy 19:13 expresses it this way: "Thine eye shall not pity him (the premeditated murderer),

but thou shalt put away the guilt of innocent blood from Israel, that it may go well with you" (emphasis supplied).

On the other hand, if the capital offender is not executed, God will still see to it that he does not prosper. For Leviticus 20:4-6 records God saying: "I will set my face against that man and against his family and will cut him off from among his people."

(6)

Abolitionists contend capital punishment is inconsistent with the teaching of Jesus Christ. But this contention not only misinterprets His teaching but also fails to take into account all that He said and did.

JESUS AND THE LAW

At the outset it is to be noted that Jesus said He did not come to set aside the Mosaic Law. He reaffirmed the Ten Commandments (Luke 18:20). He did not revise them, but merely clarified them. He did it in such a way so as to i) indicate that the evolution of them had suffered some serious distortion in the course of time, and ii) so as to indicate His superior authority: "Ye have heard...but I say unto you..."

JESUS AND THE SIXTH COMMANDMENT

The Thou-shalt-not-kill commandment had become so hedged with procedural encumbrances that it was virtually impossible to convict anyone of murder. This approach continued in Judaism down to the present day because precedence is given to the Mishnah and the Gemara over the Biblical Scriptures on the premise that Jewish law is dynamic and developmental. Rabbi Israel J. Kazis pointed out that the deliberate intention has been to render capital punishment inoperative by introducing a variety of rules having that effect ("Judaism and the Death Penalty," Renewal, Canadian Correctional Chaplains' Association, February 1966, p. 20-22). The same tendency is evident elsewhere. But this goes in the face of Jesus' clarification here, because the underlying implication is that principles of justice are absolute, which are not to be tampered with by various devices so as to weaken or immobilize them under the guise of improving them.

Therefore Jesus had to impress on His hearers that the Sixth Commandment aimed at outlawing even a wrongful attitude, in this case hatred and anger. Such an attitude is wrongful when the underlying cause is unjust. In His illustrations, He distinguished three levels of culpability: i) the first kind made one liable to punishment by the lower courts, and, although they also had the power of capital punishment in certain cases, from the context it is evident the association is with punishments of a misdemeanor nature; ii) the second kind made one liable to the superior court, the Sanhedrin, and, again from the context, the association is with punishments of a felony nature; iii) the third kind evidently refers to capital offenses (such as falsely accusing one of apostasy) and made one liable to the punishment of "the fire of Gehenna", that is, to capital punishment (referring to Gei Hinnom, the Valley of Hinnom, where fire was always burning because of the trash that was dumped there, including the bodies of criminals that had been executed by the Romans--~~the Jews not having the authority under the Romans to perform executions even if they wanted to~~)--cf. Carr, Cambridge Bible for Schools and Colleges, on Matt. 5:22.

On applying this teaching to the capital punishment issue, whoever takes an unjust viewpoint of the death penalty and hates or is angry at those of the opposite persuasion, becomes guilty of wrongdoing. To apply the teaching further, how much more will be the guilt and penalty of anyone who denounces as criminal those who advocate and administer capital punishment--not to mention who actively seeks to dissuade them from their views and obligations?

JESUS AND THE EYE-FOR-AN-EYE PRINCIPLE

Later in the Sermon on the Mount Jesus also clarified the eye-for-an-eye principle. (Matt. 5:38 ff.). It too had been reinterpreted and become distorted. The scribes had ruled this Mosaic principle authorized personal retaliation of private wrongs and in general justified revenge--even though it was expressly forbidden elsewhere in Scripture (Lev. 19:18--"Thou shalt not take revenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbor as thyself").

Jesus enjoins that one should not even resist evil. But His injunction is not absolute. That is evident from the context, which cites four instances of relatively minor offenses (petty assaults, trivial disputes, annoying demands, small favors) that individuals should meet with disarmament and beneficence in the course of personal relations.

One must love one's enemies and turn the other cheek. But that teaching obviously applies only to individuals, not to civil governments, which are not concerned primarily with love, but with keeping order and justice. Even the government may be lenient and merciful--but only when there are mitigating circumstances. To be always merciful despises justice, and renders both mercy and justice meaningless.

Jesus could not have abrogated the eye-for-an-eye principle because any other rule in settling disputes would be unjust. If a person loses an eye in an auto accident because of another's criminal conduct, he is entitled to equivalent compensation. Are we going to say all such sufferers should swallow their loss? Moreover, the state should impose upon the wrongdoer an equivalent penalty. It would be manifestly unjust to let him off without suffering equally. Earlier in the same Sermon, Jesus had said one should pay one's obligations or else one's creditor has the right to sue and the court has the right to put one in prison until the debt is paid (Matt. 5:25). The Mosaic law expressly stipulated that if an assault victim does not die, then the offender is required to "pay for the loss of his time and shall cause him to be thoroughly healed" (Ex. 21:19; cf. also v. 22).

JESUS AND THE DEATH PENALTY CONCEPT

Although Jesus stressed love and mercy and pacifism, particularly in interpersonal relations, He also stressed the concept of justice, including approving reference to the death penalty. On one occasion He warned: "Whoever shall cause one of these little ones who believe in me to stumble, it is befitting him that he should have a large millstone hung around his neck and be sunk in the depth of the sea" (Matt. 18:6).

On another occasion Jesus accused His countrymen of being accomplices in past killings of prophets and that "the blood of all the prophets which was shed from the foundation of the world" would be "required of this generation" (Luke 11:47-51). The implication is devastating: that one becomes guilty of capital crimes by ratification of the past acts of others and subject to the same penalty they deserve. Moreover, God somehow in time will exact that punishment if it is not repented of. To make a modern day application, think of

the number of people who may have adversely implicated themselves at the time of the assassination of past famous personalities.

In the Parable of the Ten Pounds, Jesus has the nobleman saying on his return: "Moreover, mine enemies, those who were unwilling for me to reign over them, bring here and slay them before me" (Luke 19:27).

Another time He referred to the crime of cursing father or mother and its death penalty. If the penalty had been abrogated, He could have taken this opportunity to say so. But He merely accused His protagonists of invalidating this regulation by traditionalism (Matt. 15:1-6). The inference is the regulation and penalty were still valid. In practice, the Jews were forbidden by the Romans to use the death penalty, but they still subscribed to it in principle--as subsequent behavior verified--in limited circumstances, such as blasphemy (Matt. 26:65,66). The Romans themselves, of course, did use it. Yet Jesus never denounced its use although He might have done so, particularly on the cross on the behalf of others.

Jesus voluntarily submitted Himself to the death penalty. Although it was unjust in His particular case, because He had committed no sin, it was just--as indicated earlier--in that every person deserved to be physically executed for his own sin. So His death was a literal fulfillment of the death penalty as acceptable to the justice of God. The seeming paradox of justice being accomplished through injustice is resolved in the conviction that the Most High God can do no wrong. The same conviction underlies the seeming paradox of Jesus welcoming the repentant thief on the cross into His Kingdom and letting him die under capital punishment without a protest--although He had interceded on behalf of His disciples earlier to keep them from being arrested with Him (Luke 18:8).

JESUS AND THE USE OF THE SWORD

On another occasion, Jesus expressly granted not only the right but also the necessity and priority of bearing arms under certain circumstances. He counseled: "However, now...he who has no sword let him sell his coat and buy one" (Luke 22:35,36). This implies the use of the sword--even to the point of taking life. But when Peter began using his sword to prevent Jesus from being arrested, Jesus said: "Return your sword to its place, for all who take the sword shall perish by the sword" (Matt. 26:52). He meant that all who use the sword without proper authorization--and their act is serious enough--will lose their life by the state. The ultimate authority always is God and His will in a particular situation. Jesus went on to say to Peter: "Or thinkest thou that I am not able now to call upon my Father, and He will furnish me more than 12 legions of angels?" Jesus could have brought about the defeat of the entire Roman military force, but He concluded: "How then should the Scriptures be fulfilled that thus it must be?" (Matt. 26:53,54). Thus **self** defense was not authorized in this particular instance. But it might be in other instances. And certainly the state has the authority to use the death penalty to punish wrongful uses of the sword.

There are those calling themselves Christians who believe the Bible teaches they should not kill to save themselves, or others, or their own families from death at the hands of evildoers. But should they impose their belief by law upon their fellow citizens who do not have the same faith or hope they have? Should they impose their belief on police officers in the performance of their duties? This would be "cruel and unusual" indeed.

(7)

Abolitionists argue that the classic Pauline passages do not support capital punishment. But the weight of authority is that they do.

ROMANS 13:1-5

In this passage the Apostle Paul tells Christians in Rome how to conduct themselves under pagan rulers. He declared "the powers that be are ordained of God" who "bear not the sword in vain". This has reference to the police authority of the state, which is to be used to punish evildoers. The Greek word for "sword" is *makaira*, the same word used in Revelation 13:10--"he that killeth with the sword must be killed with the sword"--implying the right of capital punishment (in undermining the force of this last reference, one abolitionist denounced the entire Book of Revelation and its author!). If Paul had intended a less severe punishment, he would have used symbolism with less severe implications, such as "rod" or "prison keyes". Although the Romans had various forms of execution, referring to the use of the sword was the best term for universal comprehension. It may also be taken as an implied approval of that form of execution.

There is no justification for arguing the passage only applies to those times. Whenever qualifications attached to any of his pronouncements, the Apostle always stated them expressly so as to leave no doubt. Here there is no evidence of any qualification. All proper government officials are called ministers of God who are to "avenge" wrongdoing; they in effect express God's "wrath" upon evildoers, says Paul, by inflicting appropriate punishment. (v. 4). It is evident this right extends even to non-Christian governments.

Obviously, the possession of such power is open to abuse. It may be used when not warranted (King Herod had the Apostle James killed with a *makaira*--Acts 12:2). But possibility of abuse is not sufficient reason to abolish capital punishment entirely. For that would undermine justice in the opposite extreme.

ACTS 25:11

In this passage Paul is quoted as saying to the Roman procurator Festus: "If I...have committed any thing worthy of death, I refuse not to die...", clearly implying there were offenses for which the Roman government could put one to death.

However, abolitionists suggest Paul was in error on this point, and cite in support that Paul was likewise in error on the matter of slavery. But that reasoning proceeds on two false premises: 1) on the false presupposition that Paul was wrong on slavery, and 2) on the false inference that even if Paul were wrong on one issue he necessarily must also be wrong on this point.

A close study of Paul reveals he chose his words with great care and conscientiousness of his obligation to Truth. The reason he made his appeal in this manner to the Romans was to emphasize that he was not disputing the fundamental right of the Romans to try and punish people as long as it was done amenable to justice.

THE SUPPORT OF BIBLE EXPOSITORS

The right of the state to impose capital punishment has been accepted as Scriptural by leading expositors: Roman Catholicism's principal theologian Thomas Aquinas, Pope Pius XII, Reformers Luther and Calvin, one-time Archbishop of Canterbury Henry Alford, Anglicans H.C.G. Moule and Thomas Scott,

Presbyterians Charles Hodge and William G.T. Shedd, Methodist Adam Clarke, Lutherans H.A.W. Meyer and Hermann Olshausen, Baptist B.H. Carroll, as well as the Westminster Confession, Luther's Large Catechism, and the Baptist Broadman Commentary, to name a number.

(8)

Abolitionists contend the only moral ground for capital punishment is the protection and preservation of life, but the state has not only the right but the duty to punish evil.

As indicated earlier, this right is conferred by God and is stated in Scripture.

In Romans 13:1-5, Paul specifically mentions the evil of resisting, of setting oneself against (antitasso), the powers that be. This amounts to setting oneself against God's superintending rule, and makes one liable to punishment. Hence, whoever kills a government official, particularly a law enforcement officer, not only has taken a life but has seriously interfered with the God-given right of the state to carry out its appointed function.

Such an act deserves the death penalty regardless of other considerations. Police officers are right when they say they should have the assurance that if they get killed by a criminal, the criminal will also lose his life. And the implication of Paul in saying the powers that be wear not the sword in vain is that it should be so used.

The 19th century Swiss theologian F. L. Godet wrote in his commentary on Romans that a *makaira* denotes "a large knife with bent blade, like that carried by the chiefs in the Iliad, and with which they cut the neck of their victims" and refers to the weapon which was worn at the side, in the provinces, by the superior magistrates, to whom belonged the right of capital punishment, and which they caused to be borne solemnly before them in public processions.

(9)

Abolitionists argue that the Biblical data on capital punishment is not authoritative today; that retentionists certainly would not want the death penalty for every Biblical capital crime; that even Scripture itself manifests a progressive disuse of the extreme penalty. But these inferences misinterpret the basic thrust of Scripture in this area.

The Mosaic principles are designed to regulate the ideal human society. At various times in Old Testament history these principles were more adhered to than at other times, but generally in the last 1000 years before Christ there was a decline, not an upswing. On the other hand, in certain special instances (e.g. the sparing of Hosea's wife), God made overruling exceptions to the capital punishment requirement for special reasons.

When the Pilgrims came to the New World and organized a new society, they attempted to establish and maintain an ideal society by incorporating the Biblical principles in their laws. Indications are they had a much better society as a result, but they also had to contend with great temptations to go astray--and were not always successful. Since that time, American history generally has been a gradual relaxing of the codes in the various states because people thought it was not possible or not worth living that strictly. As a result, the quality of life has continually decreased and along with it

the blessings of life. Yet, while this is happening, the general conviction is that things are getting better and better. It proves that mankind has an evil tendency, first manifested by Adam and Even in the Garden, that to disregard God's prescriptions is a preferable course of action. And even when the evidence indicates otherwise, they are still prone to make rationalizations and excuses, and even outright denials.

God would have been delinquent if He had not defined the ideal society. He would have been delinquent if He had defined it more strictly than it could reasonably be realized. Jesus Christ, in a human body, proved that all of the Father's laws could be kept perfectly in a lifetime. So the fault is not with the laws, but with one's perception of them--and with one's expectations from oneself regarding the keeping of them.

(10)

Abolitionists contend that most capital criminals do not consider the consequences of their acts and therefore there is no appreciable benefit of deterrence achieved by enacting capital punishment. But this contention gives credence to unsound data while disregarding evidence to the contrary.

THE TESTIMONY OF CRIMINALS IS PREJUDICED

Abolitionists give too much credence to what criminals say about their motives, knowledge, passions, and intentions. It should be obvious that particularly capital criminals would not be inclined to admit to premeditation about the consequences, for that would make their acts more culpable. So they talk--with the help of attorneys--in terms of sudden passions, uncontrollable urges, great fear, alcoholic and drug influence, temporary insanity. The author's experience in talking with offenders revealed a distinct almost universal tendency to exonerate oneself from blame.

BIBLICAL DATA INDICATES PEOPLE FEAR THE CONSEQUENCES

In Romans 13:3 Paul writes: "Rulers are not a terror to those doing good, but to those doing evil. Do you desire to be not afraid of the authorities? Then practice good...but if you practice evil, fear; for they wear not the sword in vain."

Biblical teaching elsewhere indicates there is more prescience and culpability in criminality than is commonly believed. Not only human conscience but also God is operative in acts of wrongdoing: before, during, and afterwards. We know from experience that thoughts can flash in one's mind in split seconds in the course of conduct so as to influence--so as to arrest or deflect or accelerate--the intended outcome.

But to get some kind of statistical indication of how many people are deterred from capital crimes by the consideration of the consequences is impossible. How many people would be willing to come forward and admit to it? Obviously, the ones who were caught were not sufficiently deterred. But the real count is the number who were--who largely remain unknown.

SUFFICIENT NUMBERS DO CONFESS TO DETERRENCE

A Los Angeles Police Study (Feb. 1971) found 50% of the arrestees of violent crimes who were questioned said they avoided carrying loaded weapons or any weapon for fear of the death penalty. California Supreme Court Justice McComb cited a dozen actual cases occurring in the preceding three years involving death penalty deterrence that had come to his attention (People v. Love, 1961).

The author has in his files a collection of concrete examples, as the case of the felon who admitted: "I had him, I could have shot him, but I knew the penalty was the gas chamber" (Report of California Senate Judiciary Committee, 3-9-60, p. 13). Such examples are not to be written off as isolated cases, but as merely the tip of an iceberg. They are not to be written off as of questionable validity, because many are made on the scene during a confrontation. They do not indicate self-serving objectives, but rather tend to implicate one further.

THE PREDOMINANT BELIEF OF LAW ENFORCEMENT OFFICIALS

Most law enforcement officials believe criminals do consider the consequences. Los Angeles Sheriff Peter Pitchess, a former abolitionist, stated his change of conviction was due to "my direct contact with the criminals, who convinced me it (capital punishment) was a deterrent to them" (Report, supra, p. 151).

The "Report of the New Jersey Commission to Study Capital Punishment" concluded: "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 retribution and deterrent aspects....The Commission cannot conclude that easing the lot of the murderer will cause less crime or fewer criminal homicides....The Commission is convinced that capital punishment does deter....Those most intimately concerned with law enforcement gave evidence and their conclusions that capital punishment is a deterrent in some cases" (Oct. 1964, p. 7-9). It also concluded: "The Commission...in its obligation to the people of this State, is not justified in gambling the life of a single citizen."

CRIMINALS DO CALCULATE

Enough evidence exists that criminals do calculate. They not only know if the death penalty exists but also how well it is being enforced.

Maryland governor Mandel heard a felon who was threatening to kill hostages say that he had nothing to lose because he was serving life already. A similar incident occurred in the District of Columbia recently. Delaware state police intercepted a letter of an incarcerated felon who admitted he had killed his victim because he figured it would only mean serving 15 years.

One recent horrifying trend of unenforced capital punishment is robbers killing people to eliminate them as witnesses because it does not materially add to their sentence if caught, but materially to their not getting caught.

(11)

Abolitionists argue the death penalty is not a proven deterrent because of statistical studies. But such statistical studies are defective, the proof of capital punishment deterrence being satisfactorily established by Scripture, by reason, by intuition, by sufficient concrete examples.

Justice Potter Stewart held the statistical evidence presented to the Supreme Court in the latest capital punishment case to be "simply inconclusive" on the basis that social conditions are not the same in any two states of comparison, (Gregg v. Ga., 1976).

No, even geographically adjacent states differ as to a) density, stability, and moral values of the population; b) size, philosophy, and efficiency of the police force; c) concern, teaching, and influence of the Church and other pertinent agencies; and d) willingness of jurors, judges, governors to convict and execute.

BIBLICAL DATA

A concrete example of death penalty deterrence is recorded in Acts 5:1-11. It tells of the Apostle Peter pronouncing the death sentence on a couple, Ananias and Sapphira, for lying to the Church about their financial contribution. As a result of their death "great fear came upon all the church, and upon as many as heard these things."

In a passage dealing with the death penalty for enticing anyone into idolatry, it is stated: "And thou shalt stone him with stones, that he die....And all Israel shall hear, and fear, and shall do no more any such wickedness as this..." (Deut. 13:10,11). The same formula accompanies the death penalty for falsely accusing someone of a capital offense (Deut. 19:19,20) and for other capital offenses (Deut. 17:13; 21:21). By implication this same formula accompanies all capital offenses.

Psalms 78:34 notes: "When He slew them, then they sought Him; and they returned and inquired early after God."

STATISTICAL SUPPORT FOR DETERRENCE

A good illustration of deterrence appears in stage by stage tightening of the federal law against kidnapping over a two decade period. By 1932, kidnapping had grown to such proportions that Congress made it a federal offense when it involved crossing of state lines. But that was not enough deterrence. So in 1934, Congress attached the death penalty. Immediately the number of convictions declined: 79 in fiscal 1934 dropping to 40 in 1935 and to 31 in 1936. Until 1948, convictions never exceeded 50 (except 1938) despite population and general crime increase. Yet Congress was not satisfied. Under a 1956 amendment, the operation of the presumption that a kidnapper had crossed state lines was moved up considerably--from 7 days to 24 hours--thus bringing the FBI and the death penalty much closer on the kidnapper's heels. Thereafter convictions dropped sharply: the 48 in 1955 dropped to 22 in 1956 and averaged 26 during the next 8 years. Admittedly, not all factors are reflected in these statistics; yet it is undeniable that they reveal some support for capital punishment deterrence.

There is some further statistical support. One is the preponderance of states that abolished the death penalty only to restore it subsequently--the latest being Delaware (abolished 1958; restored 1961). Another is the sharp rise in

in crime following abolition. In the U.S. murder is now the fastest growing cause of death--accounting for a 19% increase between 1960-74 in the death rate of young adults. Early in the century after France had abolished the death penalty the murder rate rose 68%, resulting in the restoration of the guillotine in 1909. Julia E. Johnsen's compilation published in 1939 contains a large variety of statistics indicating the deterrence effect of capital punishment (Capital Punishment, H.S.Wilson Co., N.Y.).

REASON SUPPORTS DETERRENCE

The entire law enforcement philosophy rests largely on the principle that the severer the penalty the greater the deterrent effect. Of course, it does not hold true in every instance. But it is generally true, and it would be most unusual if it did not apply to the death penalty. It is certainly believed by the underworld where it is constantly employed to keep one another in line. An important reason why it is more effective is that it is swiftly and summarily carried out. Whenever that is done, such as in war time to prevent desertion or to suppress sabotage and espionage, the deterrent effects are readily evident.

R. L. Calder, Montreal King's Counsel, tells of a desertion epidemic in France in World War I. Warnings that the death penalty would be used went unheeded because it was thought it would not be imposed. It was only after the death penalty was finally used that the desertions ceased ("Is Capital Punishment Right", Forum, Sep. 1928, p. 321). He also tells of the drastic reduction in crime in Montreal for years after a series of executions.

As Ecclesiastes observes: "Because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil" (8:11). All the statistics downgrading deterrence are faulty because this factor is not sufficiently taken into account.

It is reasonable to assume the more certain capital punishment is, the more it will be feared. A principal reason it is feared by criminals is that it is an ignominious death. Few people would want to leave life in that manner. Supreme efforts are made to beat being executed. It is interesting to note that the insanity plea was made only in murder cases in Great Britain, and after the death penalty was abolished that plea in homicide cases dropped dramatically.

INTUITION SUPPORTS DETERRENCE

One may go a step further and say human intuition supports deterrence. People generally believe the death penalty has an overall restraining force. That accounts for its widespread use in the past in civilized societies. That accounts for its widespread retention in this country today in America, which is still in the forefront of charitable and missionary work throughout the world. It is not a sign of progress, but a sign of moral and spiritual decline, that the support for capital punishment is weakening.

CONCLUSION: THE EVIDENCE FOR DETERRENCE IS ADEQUATE

Although the statistical evidence for deterrence is not as substantial as many would like to have it, there is sufficient amount, coupled with the dictates of reason, intuition, and Scripture, to make the evidence for deterrence in the case of the death penalty adequate for legislative purposes. It still deters sufficient numbers to justify--and even to demand--its use.

(12)

Abolitionists argue that the death penalty is unjust because capital offenders are crippled personalities who are not completely responsible for their behavior, the community being partly to blame. But this contention presents an erroneous view of criminal responsibility.

It is true that all men are sinners who fall short of right behavior continually. But that does not lessen responsibility. The Scripture position is that everyone will have to give an account of what he has done--even to the extent of accounting for every idle word he uttered (Matt. 12:36). As indicated earlier, Jesus proved that a man can live perfectly in this life--with the help of God's grace. There is no temptation that cannot be withstood (cf. 1 Cor. 10:13). But from Biblical psychology we learn that the more one disregards the warnings of conscience and divine impingements, the more insensitive and the more uncontrollable one becomes. Scripture counsels that one must take utmost measures to keep from wrongdoing. Recall Jesus' remarks in the Sermon on the Mount about plucking out eyes that offend and cutting off hands that will not behave themselves.

CRIMES OF PASSION AND UNCONTROLLABLE IMPULSE ARE MORE CULPABLE

So-called crimes of passion are more culpable because a person has allowed himself to become more irresponsible by habitual lack of self-control. The responsibility increases in direct proportion to the number of years this has been allowed to progress. Therefore, to treat him as less responsible compounds injustice, as it rewards him for having let himself get progressively more prone to criminality.

BIBLICAL SOLUTION

To prevent such deterioration from developing in a person, God included in the Mosaic law the death penalty for incorrigible juvenile delinquency! The primary purpose was deterrence: "and all Israel shall hear and fear" whenever such an execution was carried out (Deut. 21:18-21). Most heinous crimes are the culmination of a series of progressively more serious violations. The effect of the enforcement of the provision against incorrigible juvenile delinquency is to prevent incorrigibility from culminating in capital offenses--as well as to prevent criminal tendencies from being passed on to offspring through inheritance (cf. Deut. 5:9).

OLIVER WENDELL HOLMES' APPROACH

One-time Supreme Court Justice Holmes expressed himself on this kind of case in a letter to Harold Laski in 1925. He observed that the law establishes a certain minimum standard of social conduct that people must keep at their peril. He was aware that this standard was most difficult for those least prepared for it. But "to make it more avoidable by others" an offender must be executed for "the common good". Moreover, "the law must keep its promises" (Holmes-Laski Letters, Harvard U. Press, 1953, I, 806). He concluded,

AVOIDING INCONSISTENCY

There is a certain amount of truth in the contention that society is somewhat to blame for an individual's crime. But that is an argument for keeping capital punishment, not for abolishing it. By abolishing it, society will even more contribute to individual crime. Only by keeping it and administering it properly will capital punishment reduce crime.

PASSION NOT AS PREVALENT AS ONE MAY THINK

Henry Barrett Chamberlin, Operating Director, Chicago Crime Commission cited evidence that the passion defense is overrated. He said in 15 years of close observation of the Chicago crime scene, only a few instances of murder by sudden passion occurred. In many cases, skillful methods were used to conceal the crime, great precautions taken to avoid capture, and "the keenest intellectual activity" employed in preparation of their legal defenses. (Rotarian, Nov. 1933, p. 12).

He also revealed that in 1921 there were 190 murders in Cook County for which 225 defendants were arraigned. Of these, 55 were convicted, but only 6 were sentenced to hang. This reveals that even that far back a capital punishment state for statistical purposes was virtually a noncapital jurisdiction.

(13)

Abolitionists argue that life imprisonment without possibility of parole is more fearsome as a deterrent and furthermore is sufficient as punishment for the worst offenses. But this argumentation poses grave difficulties.

A DIMINUTION OF JUSTICE

As indicated earlier, certain offenses are so abominable, the only just punishment is death. To attach any lesser penalty is to the diminution of justice, both educationally in principle and operationally in practice.

NOT AS GREAT A DETERRENT

An incident is recorded in the Book of Job in which the Patriarch was being tested by Satan to determine his loyalty to God. Satan contended that "all that a man has he will give for his life" and Job's loyalty would not really be tested until his life was in jeopardy. So God let Satan smite Job with a disease that was incurable and would within some months result in death (Job 2:1-10). Satan was wrong about Job's faithfulness, because Job did not falter; but he was right in the premise that life is a man's most precious possession.

Elsewhere in Scripture it is stated that greater love has no man than that he lay down his life for his friends. Inversely, greater fear has no man than to lose his life prematurely.

Marcus A. Kavanagh, judge of the Superior Court of Cook County, Illinois, stated many killers come before him in his 35 years on the bench (32 in Chicago) and had yet to see one who "did not struggle with all his resources to escape the death penalty" ("Does the Death Penalty Curb Crime?", Current History, Dec. 1930, p. 356). He said each one faced with the alternative would have gladly settled for life imprisonment.

DOES NOT ADEQUATELY PROTECT SOCIETY

Life imprisonment does not adequately deal with a lifer's potential to commit more crimes even while in prison or outside upon escaping--even though he may be committed without possibility of parole.

A significant number of capital offenders commit additional murder(s). They pose a continuing threat to the safety of others. Director Chamberlain of the Chicago Crime Commission stated many of the worst murders in Chicago were by professional criminals who killed deliberately during robberies and burglaries to eliminate witnesses and would have no hesitation in killing as many as necessary to escape from prison because they would suffer no physical harm. Gilmore's prosecutor stated that with his record of escape and suicide pacts (one victim suffered possible brain damage), the safety of prisoners and the community at large could not be guaranteed.

Imprisoned terrorists may still be able to direct operations from their cells. Many innocent persons have become victims of kidnappings and brutalization by gang members intent on freeing imprisoned comrades. By not executing certain heinous criminals, the state plays a kind of Russian roulette with its citizens.

Also underworld figures will still be able to operate from behind prison walls, not only directing the operations of associates but also corrupting public officials. For some strange reason, some of the worst capital offenders become heroes to the lesser criminals and can bask in their adulation, and further corrupt them. In the course of James Earl Ray's escape, evidence appeared that he had such admirers among the inmates. Sirhan Sirhan was pursuing a cause when he killed Robert Kennedy; finding out that he came out alive, he vowed to carry on. There are those who, for various reasons, stand ready to assist them.

It is argued that by executing certain capital offenders one merely makes martyrs out of them and the result is even worse. But that is not borne out by experience. In the great majority of instances, a dead martyr is substantially less effective than a living one. That is the principle totalitarian regimes operate on when eliminating key members of the opposition. Moreover, capital punishment puts a unwholesome stigma on a culprit, whereas letting him live conveys the impression (and even admiration) that he got away with it, that he dealt the opposition a telling blow without requisite recompense, and that he may get opportunity to inflict further damage. Obviously, as the renowned jurist Joseph Story noted in his classic article on capital punishment, "the safety of society is most effectually guarded by cutting him (the capital offender) off from the power of doing further mischief. (Encyclopedia Americana, 1830 ed.).

Society is also not protected by life sentences in that its sense of justice remains unsatisfied. This can set off a series of counter-consequences. That was tragically illustrated in the Hanafi uprising in Washington, D.C. The leader earlier had had several of his children murdered and the perpetrators had received only life sentences. A principal objective was to get the perpetrators out of prison and to execute them. In the process over a hundred persons were held hostage and terrorized for several days, and one innocent bystander was killed.

VIOLATES SCRIPTURE

As noted earlier (section 5), Scripture warns society not to pollute the land by failing to execute capital criminals. If they fail, God will punish all of society by withholding blessings and by sending various kinds of calamities. God does this to enhance the carrying out of justice. There is nothing in Scripture to indicate that this policy is not applicable today. Hence it is incumbent upon each jurisdiction to act accordingly in order to assure its fullest well being.

(14)

Abolitionists contend punishment primarily should be therapeutic; hence, the death penalty must be abolished as it precludes the possibility of rehabilitation. However, all things considered, rehabilitation can only be looked on as an incidental benefit in jurisprudence.

Some argue that Jesus' Atonement has put an end to all expiation for sin. But this is refuted by Jesus' own saying in the Sermon on the Mount, cited earlier, that everyone should come to terms with his creditors quickly in order to avoid being cast into prison. Also by Romans 13:1-5, referred to earlier, which makes anyone who violates government law liable to judgment, to punishment, including capital punishment. The Apostle Peter wrote a similar passage: "Be in subjection to every human institution, for the sake of the Lord--whether to a king or to governors--as to officials sent by Him for the purpose of punishing evildoers and praising them that do good, because that is the will of God..." (1 P. 2:13-15). The underlying rationale is that the primary welfare of society lies in the proper administration of justice, part of which consists of punishing law violators.

From a practical standpoint, if justice is strictly enforced at the lower levels of crime and punishment, then the number of serious crimes is minimized. It is said Spain is a good illustration of that. It has few capital crimes, but it has swift and stiff penalties for minor infractions. On the other hand, indications are that the relatively lenient system in Britain has neither prevented crime nor rehabilitated law breakers. In this country studies reveal many murders have a pattern of assaults before eventually committing homicide.

CERTAIN CRIMES PRECLUDE REHABILITATION

Scripture reveals certain crimes preclude any opportunity for rehabilitation. In some instances mercy may be extended in capital offenses when there are mitigating circumstances. King David was guilty of both adultery and murder. His life was spared because of an outstanding past record. Yet he was severely punished. But in other instances, such as involving malice and premeditation (Deut. 19:11-13; Ex. 21:14), mercy normally was out of order. There is a point where the use of mercy becomes excessive and undermines justice.

Further, from a practical standpoint, once a person has reached the calculating cold-blooded criminal stage, rehabilitation becomes too remote for the risk and the cost involved. Both Gilmore's juvenile court judge and prosecutor concluded he had become incorrigible and a high social risk. Gilmore himself said that if he ever got out again he probably would commit similar crimes. From my observation of the criminal scene over the past several decades, I am struck by how few serious criminals are repentant about their crimes. This is consistent with the Biblical principle that "evil men...shall wax worse and worse" (2 Tim. 3:13).

THE DEATH PENALTY AS THE BEST MEANS OF REHABILITATION

What is rehabilitation? From a Biblical standpoint, it is to believe that Jesus Christ is the Messiah, the Savior, and to surrender one's life and will completely to Him, and to the Father, and to the Holy Ghost. Even if a capital offender lives a completely lawful life after his crime, he will still go to perdition in the life to come without requisite faith in Christ.

Even such a liberal theologian as Richard Rothe wrote that the death penalty is the mightiest conviction method to Christian conversion. It is facing the stark imminent reality of eternity that may be the only sufficient force to bring a capital criminal to Biblical repentance. It may have been a factor in the conversion of the criminal on the cross.

Yet, although this criminal believed in and received the forgiveness of his sins, he still had to pay the earthly penalty. (Incidentally, he considered his death penalty to be just [Luke 23:41]--and Jesus did not dispute it.) Also today, a genuine conversion may not be enough in aggravated cases to dispense with the death penalty.

Thus, it could reasonably be argued that if society does not bring a capital criminal to face capital punishment, his chances for real rehabilitation may be diminished or precluded.

THE POSSIBILITY OF REDEMPTION IS NOT UNCEASINGLY AVAILABLE

Some abolitionists argue that to execute an unconverted man is blasphemous as it cuts off his further possibility for redemption. But Scripture clearly teaches that men only get so much opportunity to accept the Gospel and thereafter it is no longer possible nor available. That principle was succinctly stated in Proverbs 29:1--"He who is often reproved but stiffens his neck shall suddenly be destroyed beyond remedy." It reappears here and there in the New Testament. For instance, Jesus said: "While ye have the light, believe in the light, that ye may become sons of light" (John 12:36). On another occasion Jesus wept over Jerusalem saying: "If thou hadst known in this day, even thou, the things which belong unto peace; but now they are hid from thine eyes" (Luke 19:41-44).

The contention that God's redemptive power is unceasingly available to everyone is pernicious as it engenders false security. The thrust of the Gospels is that today is the day of salvation: there may not be another opportunity even if one lives another decade.

Furthermore, if God would want the state to suspend capital punishment for the purpose of affording more opportunity for repentance, it would mean He would have to modify the principle of justice as well as to suspend the force of deterrence. But that is unthinkable, as it would reveal God as working at cross purposes with Himself. As Joseph Story noted, to "open the chance of reform to the offender, which is, indeed, but too often a mere delusion...greatly diminishes the influence of another salutary principle, the deterring of others from committing like crimes."

WHAT ABOUT THE VICTIMS' OPPORTUNITY FOR REHABILITATION?

Most victims lose their life quickly and unexpectedly. Jack Graham blasted 41 people on an airplane into eternity in an instant. What about their opportunity for rehabilitation, for redemption, for even putting their affairs in order, for saying goodbye? Were they all prepared? Had they all reached fulfillment? It is too easily said that the victims cannot be brought back. The important consideration is whether they had to go. The Ehrlich Study (cited by the Justice Department in recent arguments before the Supreme Court) concluded that an average of seven or eight lives are spared from untimely death as a result of the deterrent effect of every state-authorized execution. Whatever the actual rate, since it is conclusive on Biblical authority that judiciously administered capital punishment saves lives, then one must have greater concern to save these lives than to rehabilitate those who have forfeited their right to continue living. To weaken deterrence in order to give capital criminals further opportunity for rehabilitation hence is grossly unjust. It would mean sacrificing other innocent victims. Abolitionists want to put the burden of proof on retentionists. But this prospect puts the burden of proof on them. If it is a question of giving preference to the guilty or the innocent, then clearly precedence should be given to the latter.

MORE IMPORTANT REHABILITATION CONCERN

Those concerned about the rehabilitation of capital offenders should devote more concern and energy to preventing the outrageous exposure to crime and violence through the media (one study reported the average child during ages 5-14 will see 13,000 destructions of life on TV) and to preventing people from developing expanding violence patterns.

UNDERWRITING THE REHABILITATION RISK

Abolitionists who want society to take the cost and risk of rehabilitating heinous criminals ought to volunteer to underwrite it: to pay for their upkeep, to pay for any and all damages that ensue, and even willing to give up their own life if "second murders" result. Otherwise their advocacy of rehabilitation is merely cheap rhetoric!

(15)

Some abolitionists argue the use of the death penalty may encourage capital crime: i) in suicidally-inclined persons whose object is self-destruction by state execution and ii) in some citizens who are taught by state executions that homicide is a legitimate and useful means of resolving human conflict so as to make it easier, in a moment of passion, to justify similar action.

In general, state execution is one of the least satisfactory methods of suicide so that few would-be suicides would want to risk it. However, there seems to be a conviction in a warped personality now and then that a state execution form of death has an advantage over other forms of death and they justify committing murder in order to attain it. But such cases could be frustrated simply by legislating that such homicides carry the penalty of life imprisonment without possibility of parole. One should not abolish the entire capital punishment system just to eliminate this small category of cases.

Because Gilmore was thought by some to be one of these, it should be added that one must be wary not to read such a motive into facts. He did leave the gun where it could easily be found. But that can have a number of explanations. If he wanted merely to commit suicide, why did he have to kill two people?

As to the second contention, the possibility is likewise very remote. Any deficiency in people's ability to distinguish between justified and unjustified homicide can better be dealt with through educational courses in junior and senior high school. On the contrary, a state execution is more likely to have a very sobering effect on the populace. Rather it is the manifold, random, sensationalized, insufficiently justified killings in the media that have a cheapening effect on the value of life, and cause people to act more irresponsibly.

(16)

Abolitionists argue the death penalty might be used upon innocent persons so as to leave no recourse for rectification of injustice. But today that possibility is impossible.

Although some innocent persons may have been executed in the past, current safeguards in criminal procedure make such future occurrences impossible. Not only are juries a safeguard against careless prosecutors, but also judges are a restraint on juries, and higher courts are a restraint on lower courts. Furthermore, governors with clemency powers can nullify questionable death sentences. Then, too, the abolitionists, the news media, and others are monitoring capital cases to insure nothing like that will happen. Finally, there is the superintending watchcare of divine providence. It is really unthinkable that any innocent person would ever be executed with such safeguards.

A more important concern, however, is as to the safeguards that relatively innocent persons will be protected against being murdered? There were 20,510 homicides in 1975. That compares with 9,850 in 1965--a tremendous leap in the 10 years without an execution. How many of these innocent lives might have been saved if capital punishment had been properly enforced? Could it be that abolitionists are consigning innocent persons irrevocably to execution by killers by being irresponsible in the evaluation of the evidence that capital punishment deters? This appears a much more live possibility.

The Royal Commission on Capital Punishment concluded: "Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment; and there is some evidence (though no convincing statistical evidence) that this is in fact so" (p. 24). With the benefit of Scripture evidence, it can be safely concluded there are a sufficient number of people influenced by the existence of the death penalty in the statutes so as to act as a general deterrent.

(17)

Some abolitionists argue the death penalty is forbidden by the Constitution's ban on "cruel and unusual" punishments. But this was rejected by the Supreme Court in the latest decision (*Gregg v. Ga.*, 1976).

The Court noted the death penalty has a long history of acceptance both in the U.S. and England, and that "it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction"--460 persons having been sentenced to death in a 4 year period (1972-76).

However, the Court noted the death penalty could be unconstitutional if it involved "the unnecessary and wanton infliction of pain" or if it be "grossly out of proportion to the severity of the crime" or if it is arbitrarily and capriciously administered. But none of these conditions existed in the case before it. Prior courts had specifically upheld execution by public firing squad and electrocution. Not long ago it was reported in the news that a new poison had been developed that could be administered to an unconscious convict so as to cause a painless death almost instantly.

Much has been made of the spectacle of the actual taking of a life by the state: of the trauma that is put on the offender, other prisoners, prison officials, other concerned parties, and the public at large. Much of this trauma is brought on by the abolitionists themselves. Moreover, it could largely be eliminated. Again, it would amount to throwing the baby out with the dirty bath water to eliminate

capital punishment on this ground.

It should be remembered that in Scripture the mode of execution in certain offenses was stoning. This was not because better methods were not available, but because this mode signified a visible representation of an underlying rationale. As Deuteronomy 17:7 states; the offender shall be stoned with stones until he die: "The hands of the witnesses shall be first upon him to put him to death, and afterward the hands of all the people." This was in the first instance a safeguard against false witnesses, and secondly it was a sign that execution was a community matter in which the whole community has a part.

Although there may be some who get a perverse satisfaction out of an execution, for a decent person this is an unpleasant task. So is amputating a leg, but if it is gangrenous, it must be done.

(18)

Abolitionists argue the administration of capital punishment is fraught with abuses and therefore should be abolished. But the correct solution is to abolish the abuses.

IMPAIRING THE ADMINISTRATION OF JUSTICE

Abolitionists contend the administration of justice is hampered because some juries and judges are reluctant to convict, trials are drawn out, frivolous claims to error are made, and the like. However, police and prosecutors told a Florida Commission that abolition would seriously impair the administration of justice, if capital punishment were abolished. That is true. For one thing, keeping capital offenders in prison puts an extra strain on prison officials, guards and other inmates. For another thing, the important use of the death penalty in obtaining confessions and implicating accessories would be eliminated.

Another increasingly important factor is the effect of terrorist activity. As recently demonstrated in the Moro kidnapping and killing in Italy, the purpose of the terrorists was to spread fear among the populace and to demonstrate the government's impotency to maintain order so as to undermine faith in the democratic system and to prepare the way for a revolution.

It is much easier to correct the abuses the abolitionists complain of.

INEQUALITY

Abolitionists say that some capital offenders avoid the death penalty because of lack of detection, escape, clever legal counsel, sentimental juries. But it really is not unfair to those who were executed because they got what they deserved. Such inequality is unintentional, and therefore incidental.

UNDERPRIVILEGED

Abolitionists contend most capital offenders are poor, uneducated, unemployed. But that does not necessarily mean they committed serious crimes because of this. There are enough poor and uneducated people who are decent and law-abiding. Moreover, from a Biblical perspective, people might well be poor and uneducated and unemployed because of improper attitude and lack of self-control in the past: they drop out of school, prefer to loaf or live by crime, gamble, drink excessively, get into drugs--and eventually wind up in a capital offense.

RACIAL DISCRIMINATION

Abolitionists say capital punishment discriminates against race because one race has a higher execution rate than another. But this does not take into account that one race might be more belligerent than another. For example, Chinese and Jewish ghettos have relatively low crime rates. The New Jersey Crime Commission found race was not "a statistically significant factor" in that state (1964 Report, p. 8).

LEGAL REPRESENTATION

It is said capital punishment is only meted out to those who have poor legal representation. That may have been true to some extent in the past, but is disappearing in these days. The New Jersey Commission found capital offenders were assigned counsel "of the highest level that the Bar of this State has to offer." A Washington D.C. government attorney stated that poor people get as good a legal defense as can be had in D.C. and in most states.

JURY SELECTION

Abolitionists argue that jury selection has favored death penalty conviction. However, in *Witherspoon v. Illinois* (1967) the Supreme Court made a ruling that persons who expressed conscientious or religious scruples against capital punishment and persons who opposed it in principle could not be excluded from a jury even though the state law called for the death penalty in the crime being tried. However, three justices dissented, one of them commenting that "this court today has written the law in such a way that States are being forced to try their murder cases with biased juries."

Abolitionists are still disturbed at the discrepancies in jury handling of capital cases. But, obviously, under a jury system, a certain amount of discrepancy will creep in unintentionally because complexions of juries inherently differ not only among differing jurisdictions but also within the same jurisdiction. It is well known that criminals are choosy about where they commit their crimes. They do avoid jurisdictions with death penalties, with strict judges, with other unfavorable features. They seem to know these facts before they act. Hence, the verdict that they get from a jury in a jurisdiction in which they chose to act criminally should not at all be considered unfair.

CONCLUSION

All the shortcomings to perfect administration of capital punishment would be eliminated if everyone involved would be expert at discerning God's will in each case. An illustration appears in Leviticus of a case in which "the mind of the Lord" was sought; the outcome of the case was that "the Lord spoke unto Moses, saying...let all the congregation stone him" (24:12). Would that we could settle each case that decisively (not necessarily with the same result)! Another case handled a similar way is recorded in Numbers 15:33-35.

Howbeit, the new safeguards incorporated into state law, as in Georgia, satisfied the Supreme Court that discrimination in the future in capital cases will be minimal.

(19)

Abolitionists argue that the death penalty is excessive in rape cases (and was sustained by the Supreme Court). But rape in some instances can be a most serious violation of personal integrity and well-being.

In *Coker v. Georgia* (1977), the majority consisted of 6 justices, with one justice concurring in part and dissenting in part, and the remaining two justices dissenting completely. The dissent held that rape should be a capital offense if any state so decides on the ground that it ~~"is not a crime 'light-years' removed from murder in the degree of its heinousness."~~ "it certainly poses a serious potential danger to the life and safety of innocent victims--apart from the devastating psychic consequences."

Justice Powell held the death penalty would not be excessive in cases involving excessive brutality or serious or lasting injury.

The author has not researched through the Biblical data on this offense. However, it would seem clearly justified to impose the death penalty when human personality is so damaged, as in the instances involving the two victims of Cheesman cited earlier, that the victim's personality is so destroyed as to be equivalent of murder--even though the person remains physically alive. There is also the question of the seriousness of rape in the case of minors. Another aspect concerns deviant rape. Homosexual acts in Scripture carry the death penalty for both parties.

As the dissent noted, the court by implication may be ruling out the death penalty in other cases not involving death, such as kidnapping. Having just seen a TV ~~portrayal~~ of an FBI kidnapping case, the author was struck by the intense trauma imposed upon the victim and family members involving potentially lifelong disruptions. Exodus 21:16 expressly authorizes the death penalty for this offense.

(20)

Abolitionists maintain their viewpoint is supported by conscience. But conscience is also cited by retentionists.

From Scripture we learn that conscience can be tampered with so that it gives distorted signals. The Apostle Paul mentions conscience in connection with the pertinent passage, Romans 13:1-5, with the implication that his advocacy of capital punishment was not in violation of his conscience, and that acknowledging the capital punishment power of the state was in keeping with a good conscience.

Moreover, capital punishment has the support of a universal innate sense of justice, as is reflected by Paul (Acts 25:11) and the criminal on the cross (Luke 23:41), and by a cross section of humanity that transcends religion, as indicated by legislation and practice in various countries. Admittedly for a century or more this conviction in the propriety of capital punishment has seen considerable decline. But in view of the concomitant decline in morality and righteousness in the same period, the decline in capital punishment cannot be taken as an indication of growing enlightenment. It can be interpreted as an indication more and more people are committing more and more capital offenses and do not want to be confronted with the seriousness thereof. So one category after another is

removed from capital punishment, with gathering momentum that all categories be removed.

But the effort does not really succeed, because capital crimes are capital crimes intrinsically. And one does not escape the serious consequences by reducing the penalty or even by legalizing them (such as the Model Penal Code proposes for such serious offenses as homosexuality, incest, and bestiality). That may explain why so many murderers commit or attempt to commit suicide.

As indicated earlier, capital punishment has found its strongest support in the Christian Church, in Bible believers. The more conservative they are the more likely they are to accept the death penalty. They are also deeply committed to the love of God and the love of man. This may seem a glaring contradiction--of which they are being constantly accused. But, as this paper tries to show, it has a firm Biblical basis as well as deep personal conviction.

What makes their position more difficult is that the terrorists, the underworld, the Nazis, the Communists, the fanatics also believe in the death penalty. But there is this difference: they do so for perverse, selfish reasons. We do so because it is required of us by God as best for His creation and glory.

Conclusion

Capital punishment is an institution established by God and founded in His justice. It is delegated to the state to be administered for such offenses as He designates. It upholds the dignity and worth of human life, and protects it from being extinguished or seriously violated. It is confirmed by Jesus Christ and reinforced by apostolic authority. It is recognized by an innate sense of justice. It is upheld by leading Biblical expositors and church authority. At one time it existed in every state law, and is still in three-fourths of the states--and declared constitutional by the highest court of the land. It serves the public good in that it puts potential evildoers in greater fear of the consequences; it removes heinous criminals from further threat, harm, and cost to society. The benefits of its employment outweigh any and all attending undesirable ramifications. The latest safeguards enacted in various states reduce possible abuses to a minimum. Yet it is only by the aid of divine wisdom that it can be administered most judiciously. The more the divine will is approximated, the more noble is its employment and the greater its benefits. Failure to use it sufficiently has several serious consequences: i) individually, through a greater number of victims of capital offenses than is normal, and ii) collectively, through a defilement of the entire jurisdiction that causes fewer blessings and greater calamities. Moreover, all who contribute to the unjust relaxation or disuse of capital punishment become accessories to all ensuing adverse consequences and merit requisite divine retribution.

--Willel W.G. Reitzer



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May 5, 1978

Honorable James Abourezk
Subcommittee on Administrative Practice
and Procedure
Room 162 Russell Senate Office Building
Washington, D.C. 20510

My dear Senator Abourezk:

I deeply regret my inability to attend your Committee's hearing on May 11, with respect to the pending death-penalty bill. I greatly appreciate the opportunity to transmit a written statement of my views. Since this letter will be rather long, I am taking the stylistic liberty of inserting captions, to make it easier to read.

Overview

The Supreme Court on 2 July 1976 revalidated the death penalty, in the case of Gregg v. Georgia and companion cases, sustaining state statutes providing for a bifurcated trial, with purported "guidelines" or "standards" for the second phase, where the decision as to death is made. The bill pending before you would establish similar procedures for federal capital cases.

The very first thing to notice--since effects are more important than formalities--is that, after all this travail, all this fiddling with "standards", the same old people are right back on death row out in the states: the black, the poor, the disturbed, the dull-witted. About half are black--though a startling recent study in the three states whose statutes were sustained in July 1976, shows that almost nobody is there for having killed a black, and no white is there for having killed a black, though over half the victims of homicide were black. All these data speak for themselves. That is what the death penalty is actually about in the United States. The question we face is not a philosophic question about "the State" and "the individual." We face rather the concrete political and moral question whether we want to continue and extend a system like this.

In my own work, I have stressed the gross deficiencies in due process which facilitate the achievement of these results. In my 1974 book, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE, I showed that arbitrary discretion pervades every decision on the road to the chair. The prosecutor, with entire and unreviewable freedom, decides what to charge. With the same entire and unreviewable freedom, he decides what guilty plea, if any, to offer or to accept--a most crucial point, for the great majority of criminal cases are disposed of this way. The jury, before it reaches the sentencing phase, has to make decisions on such issues as "insanity" and "premeditation"--issues which the acutest legal commentary has not succeeded in clarifying, and which, as all lawyers know, juries cannot and do not understand. The jury almost always is instructed on "lesser included offenses", and its discretion in finding a defendant guilty of such an offense, rather than of the capital offense, is unreviewable. The new "bifurcated trial" sentencing statutes invariably contain "jokers" which leave discretion pretty much free. "Clemency", the last stage, is of course entirely discretionary. The net result is that no one knows why the five hundred or so people on death row have really been picked for this agony, in a country where a homicide occurs every 26 minutes.

For brevity, sir, I have been assertive in the above. Let me in support just say that my book, in which these views are fully developed and defended, received many reviews, some good and some not so good. But, as far as I know, no reviewer ever so much as attempted to fault the accuracy of my description of the system.

A federal death-penalty system must and will have these same characteristics, for they are inherent in our criminal-justice system as it stands, and as it must continue to stand in any foreseeable future.

The Obligation of Congress As to the Supreme Court's Decisions.

Congress is limited by the Supreme Court's 1976 decisions, but Congress is by no means obligated to go as far as the Supreme Court will allow it to go. This statement, seemingly a mere truism, is very important in view of the nature of the Supreme Court's holdings and reasonings in July, 1976. I submit that the independent judgment of Congress ought to be that the Supreme Court's reasonings in those 1976 are totally flawed, and furnish no intellectual or moral basis for reviving the penalty of death.

The case that tests the intellectual legitimacy of the 2 July 1976 reasonings is Jurek v. Texas, because that case sustained the worst of the three statutes at bar. Of that case I have said:

The Texas sentencing statute occurs in a technical context newly weird and wonderful to me every time I look at it. Let me bridge it over by starting with the sentencing procedure, once a killing has been found to fall within one of the "capital" categories. The Court thus describes this:

In addition, Texas adopted a new capital-sentencing procedure. See Texas Code of Crim. Proc., Art. 37.071 (Supp. 1975-1976). That procedure requires the jury to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of one of the above categories of murder. The questions the jury must answer are these:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Texas Code Crim. Proc., Art. 37.071(b) (Supp. 1975-1976).

If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed.

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The second question, then, is, at the very least, almost always going to be the only one on which the jury actually decides anything it has not already decided. It is the life-or-death question.

Remember that the jury must find "yes" beyond a reasonable doubt on this question before a death sentence may be imposed. Remember, too, that the defendant is in any case going to the penitentiary for life, and can, beyond any doubt, reasonable or otherwise, be denied parole and kept indoors if the state's own agency thinks him a threat to society at large. Thus, in this context, the jury is being asked, "Is it true beyond a reasonable doubt that there is a probability that this defendant would commit criminal acts of violence that would constitute a continuing threat to society, while he is confined in the penitentiary, or years later, when he is released on parole--which need not happen if he has been seriously violent in the penitentiary or shown any threatening signs while there?"

I have said during this last year, before July 2d, that I did not see how any lawyer could at any time have upheld such a statute as against a due process objection. I should have thought that Mr. Justice McReynolds would have struck it down in 1925. Why have I been saying this? Let me particularize--for that which has seemed to me so obvious must now be searchingly, even tediously, examined.

(1) The concept of the existence of a "probability" "beyond a reasonable doubt" is and can be only puzzling--even mind-boggling--to a jury or to anybody. In strict mathematical terms, and in dealing with a subject strictly amenable to mathematical treatment, it is of course possible to assert that there "is a probability" not only "beyond a reasonable doubt" but to a certainty. But non-mathematicians

neither use language nor think in such a way. The terms "probability" and "beyond a reasonable doubt" are repugnant and at war with one another in the common speech in which juries, like all of us, talk and think.

(2) The word "probability" is itself triply ambiguous, and vague in at least two of its possible senses. In the mathematical usage I have just cited, it means one thing--any chance, however small. There is, beyond any doubt, a probability that each of 100 successively tossed coins will come up heads--a probability, namely, of one in 2^{100} --and this has no necessary connection, by the way, with what will happen when you toss, for it is, to the mathematician, quite irrelevant that you may actually toss either far more or far less than 2^{100} sequences of 100 before all of one sequence are heads. All this may seem very technical. But if you think that in laymen's usage the word "probability" cannot sometimes mean "small probability", listen to the next weather forecast on television.

Quite another usage would define "probability" as "more than a 50 percent likelihood of occurrence." This may be a more widely diffused usage. But then, what does it mean to predicate, of a presently existing person, that it is beyond a reasonable doubt more than 50 percent likely that under radically altered circumstances he will do certain unlawful things? Does anybody think that you, or I, or a jury of 12 good persons and true, can otherwise than arbitrarily make that fine-grained a prediction? What technique of prediction is being referred to? Does anybody think that a jury understands the words this way unambiguously--or has any reason to?

Finally, though I doubt the commonness and even the correctness of this usage, "probability" may, and perhaps sometimes does, mean "high probability"--converging on a prediction "beyond a reasonable doubt" as a limit. If that is what is meant, then the term "probability" is wholly or partially short-circuited

and the jury is asked to do something close--just how close we know not--to finding that the defendant will "beyond a reasonable doubt" do these things. But there are two things wrong with this. First, the jury is not told this. Second, there very surely exists no science of predicting human behavior which can reliably make such a prediction as to human beings "beyond a reasonable doubt." Any group, of say, nine mature persons ought to know that, even if this question were asked clearly, as it is not, no jury can predict "beyond a reasonable doubt" that X will cut up rough in the penitentiary.

(3) "Criminal acts of violence that would constitute a continuing threat to society" is a phrase composed of hopelessly vague terms. "Criminal" as a blow with the fist is criminal? "Violent" as such a blow is violent? A "threat" of what? "To society" in what sense, since the person is to be in prison, under whatever restraints the state finds necessary, and need not be released until the state is satisfied, to whatever degree it desires to be satisfied, that he is not a threat to society? If you think all this farfetched, then what do you do about the fact that this same plurality pointed with unequivocal approval, on this same July 2d, to the fact that the Georgia court had held "impermissibly vague" the phrase "substantial history of serious assaultive criminal convictions?"

I have been dissecting this statute verbally with the aim, I suppose, of giving some scientific precision to its plain shabbiness, to its self-speaking insufficiency as law. A year ago, I would have thought that unnecessary. I would have thought that the trained intuition of any seasoned lawyer would recognize at once, in this grimly silly statute, something far beyond serious consideration--much as one can tell that a batter has struck out without calculating the number of nitrogen molecules between the bat and the ball. But I do not think I have made a point amiss; I think I have partly shown

why, as ought to be obvious without all this, a jury must either resolve all these verbal puzzles for itself, without sufficient grounds for the resolution chosen, or else proceed in puzzlement to its own standardless decision--or do a bit of both.

What does the plurality opinion do with all this? Well, nothing. The staggering fact is that this plurality opinion, having clearly stated that defendant's counsel had argued that Question 2 was "so vague as to be meaningless," then embarks upon and finishes a paragraph which says nothing, absolutely nothing, about this contention. It vanishes from sight. Read if you doubt, as well you might. /Emphasis supplied/

This is the way not of reason but of fiat--the fiat of silence. I make bold to say that this way was chosen because there is not and cannot be any satisfactory answer as to the vagueness of this Texas statute. If it is to be upheld, the difficulties about its vagueness must be ignored, not discussed at all, and that is the path, I truly regret having to say, that the plurality opinion in Jurek selects. If reason, opened to public scrutiny, is the soul of law, and if the decision for death is the most solemn decision law can make, then I am right in thinking that this paragraph records one of the most disturbing and sorrowful moments in the long history of American constitutional judgment. Lest there be any question of inadvertence, let me add that the vagueness problem, far from being a mere off-spark of the fevered professorial brain, was earnestly and most ably presented by the two judges on the Texas Court of Criminal Appeals who dissented from the affirmance of the death penalty in Jurek when the case was in that court. The Supreme Court plurality opinion does not even mention the existence of these dissents. They should, nevertheless, be read with care by anybody who thinks this vagueness question was insubstantial enough to be waved away without so much as a word of answer.

I apologize for the length of this quotation, but I had to set it out to make my point. These words were uttered before a large audience at Catholic University in Washington. They were printed in the Catholic University Law Review over a year ago. The article as a whole was extensively summarized and reviewed by Arthur John Keeffe in his A.B.A.J. column--a column with perhaps the widest readership of any writing in the American legal community. In these words, I accuse the Supreme Court of the evasion of its obligation to reason--a deadly charge. Yet, with all this exposure, I have not seen or heard of any attempt to refute my charge.

I therefore submit that Congress ought to think a long time before it acts on the supposition that the July 1976 reasonings constitute a satisfactory moral or intellectual basis for reviving the death penalty at the federal level. I invite any member of your committee, sir, to read the Jurek opinion and see whether I was wrong. (And I ought to add that, for brevity, I have set out only one of my charges with respect to the July, 1976 opinions; none of the others has been answered either.)

The Deterrence Question

I have (I believe correctly) depicted the American capital punishment system as one in which uncontrolled and uncontrollable discretion plays a commanding part, and in which mistake is easily possible and hence must certainly sometimes occur. The "deterrence" question must be viewed in that framework; one should require quite definite evidence of the deterrent effect of the death penalty before deciding to take human lives as a result of the operation of such a system.

The "evidence" on this differential deterrent effect may, now, I think be looked on as non-existent.

The latest controversy has swirled around the work of Isaac Ehrlich, who presented studies, of great mathematical complexity, purporting to show this deterrent effect. The eminent sociologist Hans Zeisel, and others, attacked the scientific and mathematical validity of these studies. Then, very

recently, the National Academy of Sciences published the results of the work of a Panel On Research on Deterrent and Incapacitative Effects. This Panel subjected the Ehrlich studies to critical scrutiny, and then committed itself to the following conclusion:

In summary, the flaws in the null-effect results and the sensitivity of the Ehrlich results to minor variations in model specification and their serious temporal instability lead the Panel to conclude that the results of the analyses on capital punishment provide no useful evidence on the deterrent effect of capital punishment. [Emphasis supplied]

This would seem to leave the "deterrence" debate right where it was before the Ehrlich papers were published. Perhaps even more interesting is a further conclusion of the Panel:

Furthermore, we are skeptical that the death penalty, so long as it is used relatively rarely, can ever be subjected to the kind of statistical analysis that would validly establish the presence or absence of a deterrent effect.

In undertaking research on the deterrent effect of capital punishment, however, it should be recognized that the strong value content associated with decisions regarding capital punishment and the high risk associated with errors of commission make it likely that any policy use of scientific evidence on capital punishment will require extremely severe standards of proof. The nonexperimental research to which the study of the deterrent effects of capital punishment is necessarily limited almost certainly will be unable to meet those standards of proof. Thus, the Panel considers that research on this topic is not likely to produce findings that will or should have much influence on policy makers.

To put the matter quite simply, if we resume capital punishment, we will be choosing people to die by operation of a system deeply flawed by arbitrariness and mistake-proneness, and we will be doing this without at all knowing whether it does any good or not, and without any reasonable prospect of finding out whether it does any good.

The Retribution Theme

This, as all know, is the thing that supports capital punishment politically. The only contribution I can make to the discussion is to note that, if I am right as to the arbitrariness and mistake-proneness of our death-penalty system, then the question is not whether retribution in the abstract is a worthy value, but whether retribution is so important that it must be pursued even arbitrarily and sometimes mis-takenly. I find I cannot improve just now on my statement in my own book, referred to above:

I know no way, finally, of effecting a meeting of minds, through reason, on the question whether sheer retribution is a worthy motive for action by the political society. I have never been able to get beyond the point of seeing here one of those ultimate clashes of value which cannot be resolved by argument. I am revolted by the idea of retribution through officially imposed death, just as I am revolted by the idea of poisoning for money; in neither case, in the end, am I able to prove to another person that that person ought also to be revolted by either of these ideas or by both of them.

I do think, however, that those who believe in retribution as being in itself a valid ground for capital punishment may want to reexamine this belief if they are convinced that the thesis of this book is right. That thesis is that the penalty of death cannot be imposed, given the limitations of our minds and institutions,

without considerable measures both of arbitrariness and of mistake. If this thesis is right, then in the full context the retribution question takes on what seems to me a new form. One must now ask oneself whether the moral value of sheer retribution is sufficient to justify not only the infliction of death in accordance with clear standards and without error, but also the infliction of death without clear standards and by mistake. No one can establish by proof that an affirmative answer to the altered question is wrong; perhaps it may be thought that, in the moral order, the exaction of vengeance is so indispensable a good that one must continue to exact vengeance even though one has faced the fact that this exaction is commonly irrational and sometimes positively mistaken. I confess I cannot conceive the psychological possibility of such a conclusion, on the part of a normal person, but that is different from being able to prove it is wrong.

The Specifics of S. 1382

The heart of this bill is found in subsections (f), (g) and (h) of the proposed new Section 3562 A. These suffer from all the defects commonly found in the new State laws.

It would be a waste of words on the obvious to go into detail on this as to the "mitigating" factors in subsection (f). Subsection (f) is a hand of five wild cards ("youthfulness", "significantly", "unusual and substantial", "relatively minor", "reasonably"). A judge or jury can find something to spare the defendant, or not find it. I, for example, having seen a lot of death cases, have found hardly any in which I would not think (f)(2) to be satisfied; other people would almost never find it satisfied, on the same facts. The application of such a "standard" is a function, almost totally, of the temperament and sensitivities of the applier. We can be very sure that, to take (f)(1), one seventeen-year old youth will die, and one will live, not because of any discernible difference in them or in what they have done, but because of attitude difference in judges and juries.

I readily agree that this is true of most if not all the decisions made in our criminal-justice system; that is exactly why that system is not good enough to choose people for suffering the death-house agony.

When we get to the "aggravating" factors-- subsection (h) -- objections are many.

Vagueness is of course present in (h)(5), and to a very considerable extent in (h)(3) ("serious" bodily injury), and (h)(4) ("grave" risk).

Other parts of this subsection raise other questions.

For a first example, how could it be proposed that the national government delegate out to the States its judgment as to the death-worthiness of crime? Yet that is what is done in (h)(2) and (3), and the delegation is of a particularly odious kind, for it makes the judgment of death in the present case rest not only on a past state conviction (which may have been right or wrong, or even entered on a negotiated "guilty" plea) but also on the punishment not actually meted out by the state, but on that punishment which might have been meted out, theoretically, as the law of the particular State stood at that former time. Nor does the matter end there. The policy of particular prosecutors, in particular states, in days perhaps long gone by, is made the basis for death to be inflicted by the nation -- for prosecutorial policy on guilty pleas could easily affect the record relied on in (h)(2) and (3). And in one respect even the evidence in a state trial -- perhaps one that took place long ago -- will have to be examined; how else would one know that a previous state case was one "involving the infliction of serious bodily injury" (h)(3)?

As to (h)(6) and (h)(7), what is so special about money? Is a man who kills his wife for her insurance worse than a man who kills his wife so as to free himself to remarry? As to (h)(3)(D), does anyone really think it is worse to kill a Justice of the Supreme Court, or an F.B.I. agent, than to kill a judge on a Court of Appeals? Is it worse to shoot a U.N. employee for political reasons than it is to shoot the wife of a Vice-President for similar reasons? (h)(3)(D). Similar points could be multiplied almost endlessly. The fact is that the judgments made in these subsections -- and in this they resemble every state statute I have seen -- rest on no conceivably defensible moral judgments; they must result either from automatic writing or from the fashionability-in-reverse of certain crimes. (Here, again, I freely grant, and even urge, that it is not to be expected that anyone can sit down and construct a satisfactory list, in advance, of those killings that should, and those that should not, be punishable by death. That is, again, only to say that our criminal-justice system is intellectually and morally inadequate to the making of the death choice.)

So much (and it is only a sampling) as to the "aggravating" and "mitigating" factors. How are they to be used procedurally?

First, S. 1382 seems to say, quite clearly, that both aggravating and mitigating factors are to be found by "unanimous vote." This suggests a real puzzle. What is to be done if a jury unanimously finds one "aggravating" circumstance -- say, that the defendant has one California conviction as to which a sentence of life imprisonment might have been imposed (h)(2) -- but deadlocks 11-1 in the affirmative on two, three, or even all five "mitigating" circumstances -- and if you read them you will see that all five could easily concur. Can these "mitigating" circumstances be "weighed"? If not, is a sentence of death "mandatory". What should the jury be told about this? Some impasse of this type will not seem at all unlikely to anyone familiar with juries.

What is a jury to do if unanimity cannot be achieved on any aggravating or mitigating circumstance? What is the judge to do, if the jury, in such a case, nevertheless recommends death?

This brings me to the whole concept of "weighing." The word has a concrete, commonsense sound. But it has neither concreteness nor common sense in this context; its introduction here only illustrates the maxim that life is a comedy to those who think, and a tragedy to those who feel. One could have a lot of fun with the concept of "weighing" youth -- vaguely so referred to -- against the fact of the defendant's been implicated, by the felony-murder route, in the killing of a consul. Oranges and apples, the classic case of non-comparability, can at least be "weighed" on the same scale. In the case of this death bill, the "weighing" metaphor serves only to implant an erroneous suggestion of there being any kind of comparability at all among the "factors" listed. But people will die in earnest, after immense suffering, as a result of the enactment of this falsely suggestive metaphor. And no one will ever be able to compare cases and say why one died and one lived.

The provisions as to review are grossly inadequate. Centrally, the words "excessive, considering both the crime and the defendant" (Section 3742 A), are something like totally vague; their actual application will be, because it must be, a function of the sensitivities of the appellate panel. How will an appellate court proceed to determine that "the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor..."?

How can it be right for the Court of Appeals to see and consider the whole pre-sentence report, when the defendant may have been denied access to some of it?

What happens on "remand" for "reconsideration"? What "reconsideration" remains if an appellate court has already found the sentence of death "excessive"? What is the reason for the bill's not spelling this out?

One very serious point about review remains. Every state death-system so far upheld has provided for mandatory review by the highest criminal-appeals court in the system. How can a federal system of capital punishment do any less than that? Yet this bill does not provide for mandatory review by the Supreme Court. Is the death-sentence policy of the United States of America (and beyond doubt "policy" is, if anything, too polite a word, given the multiple vaguenesses of the bill) to be split nearly a dozen ways, Circuit by Circuit?

Summary

This bill is of a piece with the state death-laws that have been put in place in recent years. Like them, it drops into a criminal-justice system that could not produce any recognizable or explainable consistency of result, even if the "standards" were clear, for unreviewable discretion pervades the whole criminal-justice process, from arrest to execution. But the "standards" are not clear; they are the reverse of clear, in this bill as in the state laws. Such laws, in such a system, will produce unexplainable results -- unless one goes to extra-legal explanations -- blackness, ugliness, poverty.

This irrationality is not accidental, and cannot be corrected by taking thought. For human thought, as all our experience shows -- as, indeed, this bill shows -- is inadequate to the fair and wise decision on death. We use our criminal-justice system for decisions less agonizing than the death-decision, because we have to. We do not have to use it for choosing people to undergo the last agony.

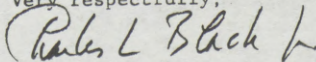
There is no such thing as capital punishment in the abstract, and there is nothing but arid abstractness, and attempted diversion from the matter actually at hand, in the question whether one would favor the death-penalty if it could be or were administered with ideal evenness. The single unitary question confronting the American people is whether they want to resume taking human life by law, using the deeply flawed system to which we are bound by human litigation. This bill, as I and others have shown, does not escape these limitations; rather, it illustrates them, and their inescapability.

After exhaustive investigation, after eagerly attempted application of new methodology, after keen critique, there is now no credible evidence that the death penalty deters more than does long imprisonment. Retribution is the only reason left. Can

anybody really stand up for retribution, when the system that chooses those on whom vengeance is to be wreaked is so deeply, so irremediably flawed?

Members of this Committee, sir, have a choice. They can do the drearily expected thing. Or they can begin -- and in this beginning, regardless of the immediate result, every vote will count -- to reverse the present tide toward the death penalty -- to the end that the United States, in this, may come to stand among the more enlightened nations of the world.

Very respectfully,

A handwritten signature in dark ink, reading "Charles L. Black Jr." with a stylized flourish at the end.

Charles L. Black, Jr.
Sterling Professor of Law

CLB/lm

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May 15, 1978

Senator James Abourezk
Senate Judiciary Committee
162 Russell Senate Office Building
Washington, D. C. 20510

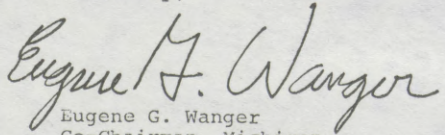
Dear Senator Abourezk:

Pursuant to your letter, I am enclosing for your record a recent statement, six letters and three fact sheets portraying the useless and harmful nature of capital punishment.

The Committee's attention is directed particularly to the emphasis throughout the material on Michigan which in 1846 was the first government in the English-speaking world to abolish the death penalty for murder and lesser crimes. It has never been restored.

Thus, Michigan has had more practical experience with a capital punishment free society than any other state in the union. For that reason the enclosed details, most of which are not readily available elsewhere, have unusual significance in any study of the death penalty question.

Sincerely,



Eugene G. Wanger
Co-Chairman, Michigan
Committee Against
Capital Punishment

EGW:m
Encl.

Why We Should Reject Capital Punishment

By EUGENE G. WANGER *

The tendency of civilization to resort to barbarism under stress is a commonplace of history. Thus, frustration over Michigan's serious (although recently reduced) violent crime rate, and wide ignorance of what capital punishment is and what it does, have led many persons to ask if a return to the death penalty for first-degree murder is the answer. That would be quite a step for Michigan, which in 1846 was the first government in the English-speaking world to abolish capital punishment for murder and lesser crimes, and which has never restored it.¹

In order to examine the question, three vital facts, which are surprising to many, must be understood at the beginning: First, Michigan's penalty for first-degree murder is mandatory life imprisonment, without the right to parole.² Only if the Governor exercises his constitutional discretion to commute the sentence is a convicted first-degree murderer even eligible for parole consideration.³ Second, as the Director of Michigan's Department of Corrections, Perry Johnson, pointed out three years ago, not one convicted first-degree murderer who has been commuted and paroled in Michigan since the parole board was established in 1938 has been returned to prison for committing another murder. Of the 395 who were paroled since 1938, only ten were returned for any reason and five of those were for technical parole violations.⁴ The record is similar in other states.⁵ Third, taken as a whole, convicted first-degree murderers are the best behaved convicts in prison. Not only in Michigan, but nationally.⁶ Perry Johnson, writing four years ago about Michigan's experience, put it this way:⁷

It is sometimes thought that people serving life sentences will be difficult to manage or control since there is "nothing further that can be done to them." While that may be true in some instances, lifers as a group are actually about the most stable element in any prison population. Some are of great assistance in operating the institution, and normally they do not present serious behavior problems. . .

One argument I have heard for capital punishment is that it is needed to protect the officers in the prison, since the man who has murdered and is serving first-degree life has nothing to fear from murdering again. I can only say that our experience seems to refute this very clearly. We have had but one corrections officer murdered in the history of the Michigan prison system, to my knowledge, as compared

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Eugene G. Wanger is an attorney practicing in Lansing and is a member of the State Bar of Michigan. He is Co-Chairman of the Michigan Committee Against Capital Punishment. Mr. Wanger authored Michigan's constitutional prohibition of the death penalty.

with some other states which have capital punishment but which have had many officers murdered by inmates. The one murder of the officer, which occurred last November, was not committed by a man serving first-degree life.

A related point is that lifers, including those serving for first-degree murder, tend to "carry their own weight" to a greater extent than most other prisoners. They are with us long enough to learn important tasks necessary to operation of the institutions, for which we might otherwise have to hire and pay free world employees. Therefore it may well be that the few hundred first-degree lifers in our system actually save the state more than their maintenance cost. . .

This exemplary record is no doubt partly due to Michigan's professionally run corrections system and to the state's long experience in handling convicted first-degree murderers. However, it is not unusual. The record is substantially similar elsewhere.⁸

The Uses of Punishment. So if, as has often been said, the possible uses of punishment are (1) reformation, (2) prevention and (3) retribution, the above facts tell us a good deal: They show that the risk of more killings by convicted first-degree murderers is negligible; and they are more than consistent with the belief, implicit in Christianity and other religions, that no human being is beyond hope of reformation.

Reformation. What about those killers who allegedly "can't be reformed"? Here, too, an answer is clear: There is no way accurately to predict who will become reformed, and no way of knowing with any degree of moral certainty who will not. All we know is that there have been many, many successes, even with the most vicious cases. In short, the hope of reforming even the worst killer is based on experience as well as faith, and capital punishment destroys it. To say that a person's life is "sacred" until it is thought useful to kill him is a contradiction of terms.

Prevention. The subject of prevention includes the prospect of deterring potential murderers, an important issue which has received careful attention over the last four decades. Probably no single subject in criminology has been studied more. Obviously no penalty will deter all murders; and probably any severe penalty will deter many. The key question is, Will the death penalty deter potential murderers better than life imprisonment? There is no credible evidence that it has, even when the risk of execution for murder in America has been relatively high.

Deterrence. If capital punishment deterred better than life imprisonment, it should show up in the homicide rate, for with rare exceptions all homicides in America have been reported since the 1920s. However, forty years of homicide rates show that whether one is a policeman, prison guard or other citizen one is no safer from being a victim of homicide in those states with the death penalty.⁹ The abolition of capital punishment in a state does not cause the homicide rate to go up, nor does the restoration of capital punishment or a higher frequency

of executions in a state cause the homicide rate to go down.¹⁰ And in those localities where capital punishment is carried out there are no fewer killings near the times of well-publicized executions when any deterrent effect would be greatest.¹¹ Sometimes there are more.¹² In short, there is no correlation between the ups and downs of the homicide rate, on the one hand, and the presence or absence of the death penalty on the other.

It is like an automobile. If a car runs at the same speed regardless of whether the brakes are on or off, that is pretty strong evidence that the brakes are not working. In the business world, would any reasonable executive adopt a new kind of sales program, for example, in the face of such evidence against it? The logical implication is clear: If would-be murderers consider the consequences at all, they are either deterred as much by life imprisonment as they are by the death penalty or they are planning on not getting caught.

This considerable body of evidence is usually ignored or quickly dismissed by those promoting executions. Their tendency, with some exceptions, as observed by this writer over the past dozen years, has been to argue instead along the following lines:

First, they assert that America's increase in homicide during recent years is a result of the cessation of executions in the late 1960s. Before Gary Gilmore was shot by Utah's firing squad in January, 1977, this country's last execution was in 1967. What they fail to note is that homicide has increased far less than the general crime rate throughout this period. The homicide increase is admittedly serious. But it is plainly irresponsible to suggest that it is attributable to the cessation of executions when, in fact, the rate of increase of crimes that were never punished by death has steadily outstripped the homicide increase by about two-to-one.¹³

Second, they argue that one cannot prove capital punishment does not deter murder because people who are deterred by it do not report the good news to their police departments. The inference they draw is that there are potential Richard Specks and others in our midst, who would be deterred from killing by the death penalty,¹⁴ but would not be deterred by life imprisonment, and that we have no possible way of knowing about them. That is like saying, for example, that we have no way of knowing about traffic safety because motorists do not report in when they are saved from having accidents by traffic safety programs or devices. That, however, has never stopped us from evaluating the effectiveness of those programs and devices by studying their effect on the accident rates where they are used for a reasonable time. Why use a different standard for evaluating the death penalty, especially when we have forty years of homicide rate data to work with?

Third, the advocates of execution refer to a 1973 study by Professor Isaac Ehrlich, the only purportedly empirical study claiming to

find any evidence of a deterrent effect of capital punishment. The study is based on a highly sophisticated and arbitrarily designed econometric formula comprising dozens of mathematical components. Its validity, design and findings have been thoroughly discredited by other econometricians at Columbia University,¹⁵ and elsewhere;¹⁶ and, so far as this writer knows, there is not one published econometric analysis (other than Ehrlich's) which supports Ehrlich's result.

Fourth, they allude to statements made to police (almost invariably to the Los Angeles Police Department) by criminal suspects under arrest to the effect that they did not kill or carried a toy gun because they feared the death penalty. The notoriously unreliable character of this anecdotal evidence was well summarized by Professor Anthony Amsterdam in 1972 Congressional testimony as follows:¹⁷

Let me point out several things that ought to be said about these reports of what arrested people tell police. First, they assume the police are reporting those conversations reliably. I have my doubts about that. I think the police—like other people—listen and hear very much what they want to hear; and police in most states are for the death penalty. . .

Second, even if the police are being totally level and not misled, the arrested guy will always tell the policeman what he thinks the policeman wants to hear. After conviction, experienced corrections officials like Warden Duffy of San Quentin and Warden Lawes of Sing Sing say the same people tell them, at that point, that they didn't think of the death penalty; and this comes at a time when their stories are more likely reliable because it is too late for what they say to the police to help them.

Number three, the stories about carrying toy guns and what have you ignore the fact that robbers often carry toy guns in Wisconsin and Michigan and in the other abolitionist states, too. For very good reason: there are lots of people who are robbers but not murderers, and don't want to kill, in the same way that you and I don't want to kill—not because of the death penalty, but because we could not take a life just for money.

And fourth, even if you take these statements of arrested persons at face value, all they show is that a greater penalty deters more. If you had the same people who are arrested in a state where robbery was punishable by fifteen years, and murder was punished by life imprisonment, they would tell you, "We did not kill because we were afraid of life imprisonment." In a state where the penalty for murder is death, they say the same thing by saying, "We were afraid of the electric chair." All that either of these statements is doing is describing what the maximum penalty is that, in fact, the law subjects them to. They are not saying you need capital punishment to frighten these men. They might just as well be frightened by life imprisonment.

And as Dr. LeMoyne Synder, former medico-legal director of the Michigan State Police and a national homicide authority, pointed out several years ago:¹⁸

The reason that toy guns are used is because they are cheap; they can be bought in any ten-cent store and usually accomplish their

purpose as well as a regular weapon. In states such as Michigan, which abolished capital punishment decades ago, the armed robbery with a toy gun is common.

Fifth, death penalty promoters sometimes list examples of convicted murderers who were not executed, and later killed again. They fail to point out that such cases are extremely rare,¹⁹ that only if the prior murder was first-degree is the case relevant (since no one wants to punish second-degree murder with death)²⁰ and that in most instances the second killing would not have happened but for lax security precautions or political (rather than professional) prison administration. As pointed out above, the risk of such repeat killings in a well-run penal system is negligible.

Finally, after all this, the response of many advocates of execution is to ask us to "take a chance." All we can possibly lose if we are wrong, they say, are the lives of "vicious and depraved" killers.²¹ Even putting humanitarian considerations aside, we have a lot more to lose than that.

Utilitarian Evils. Capital punishment brings with it a number of severe practical evils which we cannot afford. It seriously obstructs the certainty and swiftness of conviction and punishment, which is society's best deterrent to crime. It degrades the administration of justice and distorts the course of the criminal law. It causes the death of innocent persons by inciting additional killings, and by occasionally executing the innocent. It is inflicted discriminatorily against non-whites, severely aggravating racial tensions.

Certainty. Authorities agree that certainty and swiftness of conviction and punishment are the best deterrent to crime. Yet experience shows that juries often refuse to convict where the defendant's life may be at stake, and that where the penalty is life imprisonment, more convictions are possible with less delays. This has happened so often that there is a special name for it: "jury nullification." It has long plagued English and American legal history, and the Louis Harris Poll of June 14, 1973, disclosed that even where guilt was clear, almost one-third of the Americans surveyed were not sure they could vote to convict if the defendant would be executed.²² These facts take on added significance now that juries can no longer be "death qualified" as they could before *Witherspoon v. Illinois*;²³ and jury verdicts, of course, must be unanimous. Surely it is better that two first-degree murderers be sent to prison for life, than that one be executed and the other freed or convicted of a substantially lesser crime.

This problem is not unknown to the criminal sub-culture. As one professional who worked in group therapy programs in Michigan's prisons for many years put it,²⁴ "From most of my lifer friends I have heard statements like this: 'If there had been capital punishment in Michigan, I would never have served a day.' To a man, they are aware of the difficulty of getting convictions where the sentence is to be death."

Swiftness. Where the penalty is death the legal proceedings generally take much longer and are more fully fought out at every conceivable point, from selecting the jury to the last desperate motion, collateral attack, clemency hearing and appeal. Not even the most far-fetched possibility can be overlooked. The inevitable publicity invites it and the life at stake demands it. The resulting delay makes the deterrent effect of expeditious conviction and punishment impossible. It also costs much more, and the state must pay the costs of the defense, as well as the prosecution, when the defendant is indigent.²⁵

The Administration of Justice. The sensational publicity-potential of capital punishment provides a great political temptation to prosecutors, which experience shows has often degraded the administration of justice. Dr. LeMoyne Snyder, recently writing from California, put it this way:²⁶

One must realize that in many cases there is a deep political motivation involved in the performance of their duties. A lawyer becomes a prosecutor by political process and he requires publicity to become a judge or go to congress or otherwise improve his status. There is little publicity in a murder trial that is started and finished and no longer in the news in a day or two. But there is enormous publicity in murder trials that last for weeks and even months in which the names of the principal parties become household words. Capital punishment is the compelling force that makes this possible. And particularly to get the accused executed is regarded by some prosecutors as an enviable mark of distinction. Let anyone who thinks otherwise read some transcripts of murder trials where the prosecutor is pleading to the jury for the death of an individual sitting only a few feet away and in the vernacular of the courtroom 'going for the jugular.' Extinguishing a human life appears to become of little consequence and to me the exhibition is revolting.

Another degrading but equally practical use of capital punishment was described by Hans W. Mattick:²⁷

For one thing, the lazy prosecutor whose main interest lies in increasing his conviction rate in the furtherance of his political career finds the mere existence of the death penalty on the statute books to be an exceedingly useful, coercive device for obtaining easy convictions. In the bargaining system of justice that too frequently exists, the lazy prosecutor can always offer not to invoke the death penalty in exchange for a plea of guilty from a defendant who may be difficult to prosecute on the basis of the evidence. Such a coercive use of the death penalty disproportionately exposes the innocent to the possibility of execution for they have no motive to plead guilty. The bargaining power that the mere existence of capital punishment gives to the lazy, but ruthlessly ambitious, prosecutor is the most immoral of reasons for retaining it. . .

If any Michigan reader finds these characterizations startling (and certainly no slur against any Michigan prosecutor is intended), he or she should remember that they are made by professional observers of what actually happens in death penalty states, whereas our state has been without it for 130 years.

The Course of the Law. The death penalty also damages the administration of justice because appellate judges, like juries, sometimes distort the course of the criminal law in their sincere efforts to apply it justly to an appellant whose life is at stake. As Mr. Justice Jackson of the United States Supreme Court candidly admitted, "When the penalty is death, we, like State court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."²⁸ James V. Bennett, former director of the Federal Bureau of Prisons, bluntly testified before Congress in 1968 that,²⁹

At bottom, the retention of the death penalty has led to all sorts of controversial not to say inconsistent and erratic decisions of our courts on such things as mental responsibility for crime, use of confessions, admissibility of evidence, arrest and arraignment procedures, and so on.

Such results are in the very nature of things when judges who deeply value human life are immersed in an atmosphere so incompatible with the cool, rational processes of thought that are necessary to the best application and development of the law.

Additional Killings. Capital punishment causes additional killings. These include the so-called "suicide-murder" cases, many of them clinically documented of persons who wanted but feared to take their own lives and committed murder so that the state would execute them.³⁰ They include imitative killings by the weak minded, who are incited by the sensational publicity of capital trials. A famous example is the Michigan murder by Alfred Hotelling in the wake of the California Hickman trial in the 1920s.³¹ No one knows how many murders are indirectly caused by the moral lesson which the death penalty teaches to many: That killing is a permissible, even desirable solution to human problems. As Professors Morris and Hawkins said in their book, *The Honest Politician's Guide to Crime Control*,³²

If . . . we are to be sincere in our efforts to reduce violence, there is one type of violence that we can with complete certainty eliminate. That is the killing of criminals by the state. The question is, Will people learn to respect life better by threat or by example? And the uniform answer of history, comparative studies and experience is that man is an emulative animal.

Some death penalty advocates respond that executions should increase respect for human life.³³ But the maxim "practice what you preach" is believed by many, and it is difficult to convince them that we should kill people, who kill people, to prove that killing people is wrong. For those to whom examples speak louder than words, capital punishment is often a brutalizing hypocrisy. In short, as George Bernard Shaw put it, murder and capital punishment are not opposites that cancel one another, but similars that breed their kind.³⁴

Executing the Innocent. Conviction of the innocent does occur, and execution makes a miscarriage of justice irrevocable. Professor

Hugo Bedau in his well-known book, *The Death Penalty in America*, individually documents seventy-four cases since 1893 in which it has been responsibly charged and in most of them proved beyond doubt that persons were wrongfully convicted of criminal homicide in America.³⁵ Eight of the seventy-four were executed. Edward Radin and others specifically identify many additional cases.³⁶ Both document how difficult it is to uncover the facts when the authorities do not cooperate.

In Michigan alone since 1910, at least twelve persons are known to have been wrongfully convicted of first-degree murder. Later, for most of them years later, they were proved innocent. They are Robert MacGregor, Alexander Ripan, Lloyd Prevost, Vance Hardy, Gerald Crowden, Louis Gross, "Paget," Willie Calloway, Charles Clark, Ephriam Clark, Lindberg Hall and Sceola Kuykendall. The even more recent New Mexico bikers' case, and Florida's Pitts and Lee case, have already become legendary.³⁷

How many other innocent men and women have been convicted "beyond a reasonable doubt" of murder, and how many executed? How often have perjured testimony, mistaken eyewitness identification and even (as evidence was produced to show in the case of Louis Gross) a "frame-up" passed for truth? Considering how hard it is to uncover the facts after conviction, let alone after execution, it is obvious that there are more of these miscarriages of justice than we know. Executing a prisoner removes all motive for trying to save his or her life; and creates a host of motives for stifling further investigation: Political careers are at stake, and sometimes serious criminal liability, too, should proof of innocence be found.

Death penalty promoters frequently assert that procedures and safeguards imposed by Supreme Court decisions now make convicting the innocent impossible. It must, therefore, be emphasized that no possible judicial safeguards can prevent convicting the innocent. The known cases were almost invariably caused in one of four ways: (1) Mistaken eyewitness identification, one of the most prevalent dangers of our or any judicial system. (2) Perjured testimony by a convincing liar. (3) A frame-up. (4) The failure by an over-zealous prosecutor to disclose evidence of innocence known to him but not known to the defense. None of these causes are procedural. Further, it is important to remember that in almost all the known cases the defendant was proved not to have been the person who did the actual killing. First-degree murder requires much more than killing; and mistakes by the jury on the defendant's premeditation, sanity or self-defense, being almost always wholly subjective decisions, can rarely if ever be proved. No known "safeguards" can prevent these things. Only if the truth is discovered can the erroneous conviction be reversed. When the defendant has been executed, it is too late.

Discriminatory Infliction. Revival of the death penalty will severely aggravate racial tensions because the rate of execution of blacks in this country far exceeds the proportion of capital crimes committed by black defendants. Of all persons executed in America since 1930, 53.3% have been black although blacks have made up only about ten percent of the population.³⁸ On June 1, 1977, 51.9% of America's death row population was non-white.³⁹ The pattern is clear even after conviction and sentencing, even in Northern states. As the Washington Research Project pointed out:⁴⁰

A study of commutations in Pennsylvania between 1914 and 1948 revealed that whites were nearly twice as likely as blacks to have their sentences commuted. A similar study in New Jersey found almost precisely the same pattern—whites were twice as likely as blacks to have death sentences commuted. In Ohio, over a ten-year period, seventy-eight percent of blacks sentenced to death were actually executed, while only fifty-one percent of whites were.

As stated by Bowers in his recent book, *Executions in America*,⁴¹

Studies of death row populations in various states have consistently found that blacks were less likely than whites to have their death sentences commuted. The size of these racial differences in commutations varies from state to state with the largest differences tending to occur in the South. But in virtually every state where meaningful comparisons could be made, the condemned black man had less chance of receiving a commutation than his white counterpart.

As it is with executions, so it is with the sentencing: Of persons who have been convicted of capital crimes, a higher proportion of blacks than of whites have been sentenced to death.⁴²

There is much similar evidence, particularly from the Southern states, in which numerous non-racial factors were statistically evaluated to determine if any factor other than race could explain these results. None was found.⁴³ Given America's history of slavery and violent prejudice, where as Clarence Darrow said a few decades ago, in some places it was merely "an afternoon's pleasure to kill a Negro,"⁴⁴ those findings are not surprising. Despite recent progress toward racial justice in Michigan, it is wishful thinking to assert that discriminatory execution "can't happen here."

Retribution or Vengeance? Since all severe punishment may be seen and felt as retribution, there has been little practical need to ask if there is any difference between retribution and vengeance, which all right-thinking people condemn. If one wants to revive the death penalty as retribution, that question must be asked. This writer submits that there is no difference between retribution and revenge, at least where the death penalty is involved. For the great majority of mankind, who are little given to philosophical distinctions, executions pander to the lust for blood revenge which is present, to a greater or lesser degree, in all of us. The lesson of history is that such pandering is both evil and dangerous;

and that the suppression of vengeance remains one of the most arduous and important goals of civilization.

Although these are not the only reasons for opposing the death penalty, the above facts should be more widely known. Were this so there would be fewer cries for capital punishment, and more work for effective law enforcement. Michigan has been without the death penalty longer than any other government in the English-speaking world. It would be a tragedy of international consequence if we restored it.

FOOTNOTES

¹See A. Post, *Michigan Abolishes Capital Punishment*, 29 MICHIGAN HISTORY MAGAZINE 44-50 (1945); D. Davis, *The Movement to Abolish Capital Punishment in America, 1787-1861*, 63 AM. HIST. REV. 23-46 (1957)

²MICH. COMP. LAWS §§ 750.316, 791.234 (M.S.A. §§ 28.548, 28.2304)

³MICH. CONST. art. 5, § 14 (1963); see comment of Governor's legal advisor K. Frankland in *Letters on the Penalty of Death*, Michigan Committee Against Capital Punishment (1975) [hereinafter cited as LOPD].

⁴Lou Gordon Show, WKBD-TV (Channel 50), Detroit, Mich., Feb. 16, 1974. See also P. Johnson in LOPD.

⁵Parole data from seven other states were summarized by the Friends Committee on Legislation in *This Life We Take* (1970), showing that of 994 murderers paroled over a total of 172 years only two were imprisoned a second time for murder. Similarly, the national UNIFORM PAROLE REPORTS NEWSLETTER of Dec., 1972, shows that of the 6,908 persons paroled after conviction for Willful Homicide during the years 1965-1969, 98.23% were successful on parole during the crucial first year after release. They had no new major convictions or allegation of offenses resulting in their return to prison. "Willful Homicide" in this study included all degrees of murder and all types of manslaughter, except negligent manslaughter, manslaughter by vehicle, or negligent homicide.

⁶T. SELLIN, *THE DEATH PENALTY*, The Am. Law Inst. (1959), pp. 69-79

⁷LOPD, *op. cit.*

⁸SELLIN, *loc. cit.*

⁹See, e.g., LAWES, *MAN'S JUDGMENT OF DEATH*, (1924); SELLIN, *op. cit.*; Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54 (Nov., 1952); SELLIN (ed.), *CAPITAL PUNISHMENT*, Harper & Row (1967); Savitz, *The Deterrent Effect of Capital Punishment in Philadelphia*, reprinted in Bedau, *infra*, at 315; Graves, *The Deterrent Effect of Capital Punishment in California*, reprinted in Bedau, *infra*, at 322; MATTICK, *THE UNEXAMINED DEATH*, John Howard Assn. (1966); Forst, *The Deterrent Effect of Capital Punishment, a Cross-State Analysis of the 1960s*, 61 MINN. L. REV. 743 (MAY, 1977); Campion, *Does the Death Penalty Protect State Police*, reprinted in Bedau, *infra*, at 301; Sellin, *Does the Death Penalty Protect Municipal Police*, reprinted in Bedau, *infra*, at 284; Testimony of Thorsten Sellin in Hearings of the Subcommittee on Criminal Laws & Procedures of the U.S. Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968) pp. 80-83 (hereinafter referred to as *Senate Hearings*).

¹⁰See, e.g., T. SELLIN, *THE DEATH PENALTY*, *op. cit.*, at pp. 34-38; and articles summarized by W. BOWERS in *EXECUTIONS IN AMERICA*, Lexington Books (1974) at pp. 18-20.

¹¹BOWERS, *op. cit.*, at p. 20

¹²*idem*

¹³Based on the UNIFORM CRIME REPORTS of the F.B.I.; see, *Consolidated Reply Brief for Petitioners*, pp. 4-6 in *Jurek v. Texas*, 428 U.S. 262 (1976).

¹⁴The *Speck* and *Manson* cases, which seem to be those most often mentioned by execution advocates [for example see F. CARRINGTON, *THE VICTIMS*, Arlington House (1975) p. 185], are of course outstanding examples of killers who were not deterred by the death penalty.

¹⁵See P. Passell & J. Taylor, *The Deterrence Controversy: A Reconsideration of the Time Series Evidence*, in *CAPITAL PUNISHMENT IN THE UNITED STATES*, AMS Press (1976) pp. 359-371; P. Passell & J. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, reprinted in "Reply Brief for Petitioner" in *Fowler v. No. Carolina*, 428 U.S. 325 (1976).

¹⁶See W. Bowers & G. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 *YALE L.J.* 187 (1975); Forst, *op. cit.*

¹⁷*Hearings Before Subcommittee No. 3, House Committee on the Judiciary*, 92nd Cong., 2d Sess. (1972) pp. 65-66 on H.R. 8414, 8483, 9486, 3243, 193, 11797 and 12217 (hereinafter referred to as *House Hearings*). The Los Angeles Police Department also supplied the similar anecdotal evidence used in the *Love* case dissent of California Justice Marshall McComb (16 Cal. Repr. 777 at 785), who more recently has become the only state supreme court justice in American history to have been forced to retire from office because of senility (63 *Am. Bar Assn. J.* 1470-1471).

¹⁸*This Life We Take*, *op. cit.*, at p. 17

¹⁹SELLIN, *THE DEATH PENALTY*, *op. cit.*, p. 72

²⁰Or do they? F. Carrington included three such cases (in which the first murder was second-degree) in the list of six he described to Congress in *House Hearings*, *op. cit.*, at pp. 239-240. There would seem to be no logical reason to mention these cases (*Purvis*, *Gilbert* and *St. Martin*) unless one wanted the death penalty for second-degree (i.e., unpremeditated) murder.

²¹*Viz:* F. CARRINGTON, *THE VICTIMS*, *op. cit.*, at p. 188; E. VAN DEN HAAG, *PUNISHING CRIMINALS*, Basic Books (1975), at p. 216. Or they often argue that the death penalty is justified if its deterrent effect saves "one life," as did F. Carrington in *House Hearings*, *op. cit.*, at p. 223, apparently ignoring the innocent lives which are taken as a result of capital punishment.

²²*The Harris Survey*, Thursday, June 14, 1973

²³391 U.S. 510 (1968), holding that jury membership in capital cases could no longer be strictly limited to persons who support the death penalty.

²⁴Prof. Jack Schwartz, Dept. of Social Science, Lansing Community College, in *LOPD*, *op. cit.*

²⁵Washington Research Project, *The Case Against Capital Punishment*, Wash., D.C. (1971) pp. 61-62

²⁶LOPD, *op. cit.*

²⁷MATTICK, *op. cit.*, at 39-40

²⁸Stein v. New York, 346 U.S. 156, 196 (1953)

²⁹Senate Hearings, *op. cit.*, at 35

³⁰See SELLIN, THE DEATH PENALTY, *op. cit.*, at 65-69; West, *Medicine and Capital Punishment*, Senate Hearings, *op. cit.*, at 124-129; Testimony of Bernard Diamond, M.D., to the Calif. Senate Committee on Governmental Efficiency, April 12, 1967; and articles by West, Solomon and Diamond in 45 AM. J. OF ORTHOPSYCHIATRY, NO. 4 (JULY, 1975).

³¹BREARLY, HOMICIDE IN THE UNITED STATES, Univ. of N.C. Press (1932) p. 38

³²Univ. of Chicago Press (1970) p. 76

³³Viz: E. VAN DEN HAAG, *op. cit.*, at 213

³⁴Quoted by A. Multner, M.C., in Rept. #677 of the U.S. House Committee on the Dist. of Columbia, 87th Cong., 1st Sess. (1961).

³⁵H. BEDAU (ed.), THE DEATH PENALTY IN AMERICA, Revised Edn., Anchor Books (1967) pp. 440-452

³⁶E. RADIN, THE INNOCENTS, Wm. Morrow & Co. (1964); McNamara, *Convicting the Innocent*, 15 CRIME & DELINQUENCY 57 (1969), and works there cited; MATTICK, *op. cit.*, at 35-36

³⁷The Detroit News, Jan. 22, 1975, p. 1A; "The Inside Story of How The News Freed 4 From Death Row," Detroit News SUNDAY MAGAZINE, Jan. 11, 1976; G. MILLER, INVITATION TO A LYNCHING, Doubleday (1975); Miami Herald, Sept. 19, 1975; Daily News, Sept. 19, 1975.

³⁸Federal Bureau of Prisons, NATIONAL PRISONER STATISTICS, No. 46 (Aug., 1971) p. 1

³⁹Based on information provided by the NAACP Legal Defense Fund, ACLU affiliates, and official sources, as reported by the Nat'l. Coalition Against the Death Penalty.

⁴⁰Washington Research Project, *op. cit.*, at p. 52

⁴¹BOWERS, *op. cit.*, at p. 74

⁴²CAPITAL PUNISHMENT IN THE UNITED STATES, *op. cit.*, at 105

⁴³*idem*, at 108 *et seq.*

⁴⁴"Is Capital Punishment a Wise Policy?" debate at the Metropolitan Opera House, New York City, Sept. 23, 1924, reprinted in MACKAY (ed.), VOICES AGAINST DEATH, Burt Franklin & Co. (1976) at p. 169

LETTERS ON THE PENALTY OF DEATH

[Kenneth Frankland, Legal Counsel to the Governor in charge of commutations, who simply summarizes Michigan's present penal law applicable to first-degree murderers.]



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

WILLIAM G. MILLIKEN
GOVERNOR

February 4, 1974

Michigan Committee Against Capital Punishment
1202 Michigan National Tower
Lansing, Michigan 48933

Gentlemen:

It has recently been called to my attention that there may be a misunderstanding as to the applicable Michigan law relative to parole eligibility for prisoners sentenced for first degree murder.

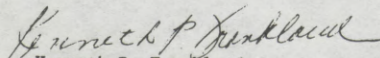
The mandatory sentence upon conviction of first degree murder is, of course, life imprisonment. Such sentence does not entitle the individual to parole eligibility.

Article V, Section 14 of the 1963 Constitution empowers a Governor to grant commutations of sentence after conviction for crimes including first degree murder. Therefore, the only way that a person convicted of first degree murder may be released from prison would be upon gubernatorial commutation of sentence to a term of years that would make an individual eligible for parole consideration.

Such life time sentence does not carry an automatic right to commutation and it is solely a discretionary act on the part of the Governor. Commutation of sentence is generally afforded only on meritorious cases following statutory procedures and upon the recommendation of the Michigan Parole and Pardon Board.

I trust that this information might be helpful in clarifying applicable Michigan law on this subject.

Very truly yours,


Kenneth P. Frankland
Legal Counsel

KPF:md

[Perry Johnson, Director of the Michigan Department of Corrections, former Warden of the world's largest walled prison at Jackson and a career penologist, who describes Michigan's actual experience with its convicted first-degree murderers, correcting several dangerous and widely-held popular misconceptions.]

STATE OF MICHIGAN



WILLIAM G. MILLIKEN, GOVERNOR

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STEVENS T. MASON BUILDING, LANSING, MICHIGAN 48913

PERRY JOHNSON, Director

June 3, 1974

Mr. Eugene G. Wanger
Michigan Committee
Against Capital Punishment
1202 Michigan National Tower
Lansing, MI 48933

Dear Mr. Wanger:

This is in response to your inquiry concerning prisoners serving for first degree murder. There are several points which may be worth noting about this group in view of some fairly common misconceptions.

It is sometimes thought that people serving life sentences will be difficult to manage or control since there is "nothing" further that can be done to them". While that may be true in some instances, lifers as a group are actually about the most stable element in any prison population. Some are of great assistance in operating the institution, and normally they do not present serious behavior problems. There are some who do present real risk to other inmates or staff, but there are such exceptions among persons committed for all kinds of offenses. In general the lifer is going to have to live in the institution for the foreseeable future and therefore has a vested interest in its orderly operation.

A related point is that lifers, including those serving for first degree murder, tend to "carry their own weight" to a greater extent than most other prisoners. They are with us long enough to learn important tasks necessary to operation of the institutions, for which we might otherwise have to hire and pay free world employees. Therefore it may well be that the few hundred first-degree lifers in our system actually save the state more than their maintenance cost. The concept that the state is put to vast expense to maintain these people is in any case not an accurate one.



Mr. Wanger
Page Two
June 3, 1974

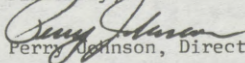
I don't think I need to repeat information you undoubtedly have from us already which indicates very clearly that people who are commuted and paroled on first-degree-murder convictions are better parole risks than any offense category, both in terms of frequency of violation and seriousness of violation. This is based on considerable experience. For while people sentenced for first-degree murder normally serve many years before they are released by having their sentences commuted, several hundred have been released over the last few decades and the failures among them can be counted on your fingers. Since none of these few have returned for murder, the fear that without capital punishment the paroled first-degree murderer will soon be back in the streets threatening further murder is a long way from realistic. Probably the relatively advanced age at which most will be leaving prison is the principal reason for the low recidivism, but in any case they do not present a significant risk after release.

One argument I have heard for capital punishment is that it is needed to protect the officers in the prison, since the man who has murdered and is serving first-degree life has nothing to fear from murdering again. I can only say that our experience seems to refute this very clearly. We have had but one corrections officer murdered in the history of the Michigan prison system, to my knowledge, as compared with some other states which have capital punishment but which have had many officers murdered by inmates. The one murder of the officer, which occurred last November, was not committed by a man serving first-degree life.

Finally, it may be of interest to note that most people serving for first-degree murder are not serving for premeditated murder as such. A majority are serving for murder committed during the course of a felony, such as armed robbery or even a breaking and entering. Some are serving as accomplices in such acts, who are equally guilty under the law. I mention this not because a homicide under such circumstances is at all less reprehensible, but only to correct the common impression that the first-degree murderer is always an individual who has coolly and intentionally planned the homicide in advance and then carried it out.

I hope these comments will provide some information on the areas of your concern. If you have other inquiries, please feel free to let me know and I'll try to respond to them.

Sincerely,


Perry Johnson, Director

PMJ:mv (6)

[Dr. LeMoyne Snyder, physician and lawyer, internationally known expert on legal medicine, former Medico-legal Director of the Michigan State Police, noted author on homicide investigation and member of the late Earl Stanley Gardner's Court of Last Resort, who specially emphasizes the severe injury capital punishment does to law enforcement.]

LEMOYNE SNYDER, M. D.

325 VALLEY VIEW DRIVE DRAWER 5

PARADISE, CALIFORNIA

95969

AREA CODE 916

877-5579

LEGAL MEDICINE

May 16th, 1974

Eugene G. Wanger, Esq., Chairman
Michigan Committee Against Capital Punishment
1202 Michigan National Tower
Lansing, Michigan 48933

Dear Mr. Wanger:

From my experience as one who for many years was closely involved in homicide investigations in Michigan and for the last twenty-five years in California, I sincerely believe that the State of Michigan would commit a colossal blunder if it restored the death penalty. It seems entirely futile to try to convince some people that capital punishment has no deterrent effect. Within fifty miles of where I live in California Juan Corona was convicted of murdering twenty-five persons and within recent years there have been several other multiple murders---one of which also involved the killing of the trial judge. Incidentally, the cost to the state for the trial of at least three of these murders amounted to over a million dollars each.

Nothing comparable to this ever happened during the years I was Medicolegal Director of the Michigan State Police from 1930 to 1948. Nearly all persons charged with first degree murder pled guilty and the trial was over in a day. In fact I recall that the Michigan Supreme Court granted habeas corpus in more than twenty cases where the murder, the apprehension of the killer, the arraignment, the guilty plea and incarceration for life in the state prison all occurred on the same day. While we don't approve of "quick justice" carried out in this fashion it does illustrate the contrast to what happens in capital punishment states where virtually no-one ever pleads guilty to first degree murder.

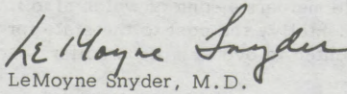
It is true in California and I believe equally true in other states which had capital punishment that the prosecuting attorneys as a group are opposed to the abolition of the death penalty. One must realize that in many cases there is a deep political motivation involved in the performance of their duties. A lawyer becomes a prosecutor by political process and he requires publicity to

Eugene G. Wanger, Esq.
May 16th, 1974
page 2

become a judge or go to congress or otherwise improve his status. There is little publicity in a murder trial that is started and finished and no longer in the news in a day or two. But there is enormous publicity in murder trials that last for weeks and even months in which the names of the principal parties become household words. Capital punishment is the compelling force that makes this possible. And particularly to get the accused executed is regarded by some prosecutors as an enviable mark of distinction. Let anyone who thinks otherwise read some transcripts of murder trials where the prosecutor is pleading to the jury for the death of an individual sitting only a few feet away and in the vernacular of the courtroom "going for the jugular". Extinguishing a human life appears to become of little consequence and to me the exhibition is revolting.

My best wishes to you and your colleagues in saving Michigan which was the first English speaking territory to abolish the death penalty from restoring this brutalizing relic of the Middle Ages.

All best,


LeMoyne Snyder, M.D.

LMS/vr

[Dr. Albert Silverman, M.D., Chairman of the Department of Psychiatry at the University of Michigan Medical School, who among several important points confirms how capital punishment causes the commission of additional murders.]



UNIVERSITY HOSPITAL

EDWARD J. CONMORE, DIRECTOR
ANN ARBOR, MICHIGAN 48104

THE UNIVERSITY OF MICHIGAN MEDICAL CENTER

NEUROPSYCHIATRIC INSTITUTE

ALBERT J. SILVERMAN, M.D., DIRECTOR AND CHAIRMAN
DEPARTMENT OF PSYCHIATRY

April 22, 1974

Eugene G. Wanger
Michigan Committee Against
Capital Punishment
1202 Michigan National Tower
Lansing, Michigan 48933

Dear Mr. Wanger:

I have become increasingly concerned to note what seems to be an increase in the campaign to reverse a most progressive law in Michigan—our law against capital punishment.

It seems clear that one of the powerful factors which has led to the present interest in restoring capital punishment, is the present wave of serious crime including murder in our State, especially in the metropolitan Detroit area. People are frightened and want a stop to the horror. A second powerful factor is the desire for revenge. A family whose child has been raped or whose father has been killed, develops almost overwhelming emotion for retaliation. There are those who would argue that this is appropriate. However, I would point out that revenge is anachronistic and brutalizing. It accomplishes nothing in our quest for a higher civilization. But more importantly capital punishment leads also to later guilt and distress when the prevailing passions have been stilled; so even among those in society crying out for death to the murderer, there is a later quotient of disturbance, as they realize their role in putting another human being to death— and the horror returns.

I won't spend any time in this letter pointing out the futility of the death penalty. The facts simply and most clearly show that the death penalty is not a deterrent to future crime. It cannot be for very good psychological reasons. Most murders for example are committed in extreme emotion. Studies of persons convicted for these acts show them NOT to be typical criminals at all. They resemble the public more than they do the psychopathic criminal. Those who kill wantonly or for profit or as part of a gang, etc. are not and never have been deterred by the death penalty.

Nor will I spend any time documenting the fact that the death penalty is "cruel and unusual punishment". It is legalized sadism. The incidence of psychiatric decompensation, while awaiting execution is enormous. We have removed physical torture from our laws. Is psychological torture less important? As waiting time increases, the incidence of psychiatric disturbance increases. Indeed very few of us can cope with this degree of societally induced stress.

Mr. Eugene Wanger

Page 2

April 22, 1974

I will not address myself to the obvious fact that this punishment discriminates against minorities and the poor. I'm sure you have much data to support that thesis, as well as the oft stated expense arguments.

However what bothers me as a psychiatrist and educator is the fact that there seems to be no recognition of the fact that the only thing capital punishment accomplishes is to increase the propensity for murder.

As you know we carry in our society a number of borderline personalities, who, depending on social sanctions will tend to act in one way or other.

Since capital punishment legitimizes killing as a solution to problems some of these individuals are actually incited to violence.

The model of our leaders sanctioning killing can and has led individuals to state- "our leaders do it, why can't I." (Surely you have heard this type of response in another context as a leader is involved in some conflict of interest or other wrong doing. The public response is obvious.)

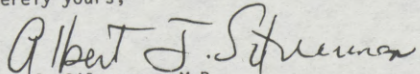
Others murder as a wish for suicide. Some murderers have scolded those in authority for denying them the death penalty. Patients have stated explicitly that they are "too chicken" to kill themselves. They kill in order to be killed by the state. These are sick people. The death penalty is an invitation, not a deterrent to them.

I could go on but perhaps I've made my point. The death penalty does not deter the committment of a crime and never has. It's only accomplishment is to incite some to crime who might otherwise be treated.

We do not need expensive trials for capital punishment and as you know, they all are expensive because of the nature of the struggle. Instead we need to learn more how to rehabilitate people who commit crimes and how to prevent people from criminal acts in the first place.

Killing them is not only not the answer. It compounds the felony.

Sincerely yours,



Albert J. Silverman, M.D.
Professor and Chairman

AJS:dc

[Donald Thurston, an 8-year member and former "lifer examiner" of the Michigan Parole Board, who relates in detail how the Michigan first-degree murderers who have been commuted and paroled have made outstanding adjustments - and in some cases considerable contributions - to society.]

STATE OF MICHIGAN



WILLIAM G. MILLIKEN, GOVERNOR

CORRECTIONS
COMMISSION

Max Biber, Chairman
 Duane L. Waters, M.D., Vice Chairman
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 Florence R. Crane
 G. Robert Cotton, Ph.D.

DEPARTMENT OF CORRECTIONS

STEVENS T. MASON BUILDING, LANSING, MICHIGAN 48913

PERRY JOHNSON, Director

May 29, 1974

Michigan Committee Against Capital Punishment
 1202 Michigan National Tower
 Lansing, Michigan 48933

Attn: Mr. Wanger:

Dear Mr. Wanger:

Not only have those lifers who have served for Murder in the 1st Degree, who have been released, compiled an outstanding record of adjustment to the community but some of them have contributed considerably to society since release.

Several are either foremen or supervisors in industrial plants and one is a vice-president of a small manufacturing concern. The Department of Corrections has employed one of those who could have been executed had Michigan had capital punishment. He has the responsibility of finding employment for parolees and persons discharging from prison who are in need. Another is hired by the Legislature as its ombudsman in the prison system. He had previously developed a very successful community concern program for aiding in their adjustment persons released from institutions.

One of the best community concern programs for persons incarcerated from a certain area is directed by another "lifer." This program combines assisting in adjustment after release with counseling during incarceration and is a very successful program. A second community has now started a similar program, also directed by a "lifer."

These are just a few who come to mind. We did not attempt to study the adjustment of those released but our memory of several of those released a few years ago was that they become useful and satisfactory members of the community. The percentage of those involved in any kind of known criminal behavior is almost nil.

Sincerely yours,

THE PAROLE BOARD

Donald R. Thurston
 Donald R. Thurston, Member



[Jack Schwartz, Assistant Professor at Lansing Community College, who has devoted much of his life to volunteer work with convicted first-degree murderers and other prison inmates at Jackson and Marquette. His letter shows the profound impact of long imprisonment and the general awareness of criminals of the difficulties of getting convictions where the penalty is death.]



Serving the Heart
of Michigan

Lansing Community College

419 M. CAPITOL AVE., LANSING, MICHIGAN 48914

March 13, 1973

Mr. Eugene G. Wanger, Co-Chairman
Michigan Committee Against Capital Punishment
1202 Michigan National Tower
Lansing, Michigan 48933

Dear Mr. Wanger:

In the way of establishing my expertise, let me state that I have an MA from Michigan State University in Sociology and that a part of my graduate study and research was in criminology. On an on-and-off basis for the past 15 years I have been involved as a volunteer in the group therapy programs in the Michigan prisons at Jackson and Marquette. Finally, many years ago as a news reporter for the Associated Press, I witnessed seven hangings.

Among the inmates I met in those group therapy programs were nine "lifers." All had been convicted of first-degree murder; all served terms of from 16 to almost 40 years; all are out of prison today. These men are among the best friends I have.

While they were in prison, they had access to the media. Their belief system in regard to a youthful orientation was identical with the vast mass of the population which has never been in prison. They were and are acutely aware of having missed "the best part of your life." To a man, they perceived themselves rotting alive while their youth flowed away from them.

Ted Hall, in his early thirties, told me once that he didn't expect to get out until he was 55. His ambition was to be a father. "Do you suppose that it's too late?" he asked. (He has been out a little more than a year; he wasted little time getting married and becoming the father of a baby girl.)

Attitudinal research on recently-released felons would discover the almost frantic efforts to "catch up" on the life they have missed. Such research would reveal in depth the immense sense of loss by those who have undergone extensive imprisonment. The newly-imprisoned exhibit bravado in expressions like, "I can do my time standing on my head." But the behavior of the newly-released indicates positively that phenomenological data of the first instance had little validity in relation to the released felon's attitudes and behavior. In plain terms, the man may have done his time "on his head," but when he got out, he was frantic to "catch up" on what he missed.

I find it impossible to believe that those who are of the criminal sub-culture are not, to the last man, in great fear of "doing time."

I would also hypothesize that it is a widely-held belief in the criminal sub-culture that in those states where death is the sentence for first degree murder that many fewer convictions are obtained. From most of my lifer friends I have heard statements like this: "If there had been capital punishment in Michigan, I would never have served a day." To a man, they are aware of the difficulty of getting convictions where the sentence is to be death.

Finally, for the record, I am strongly opposed to the re-introduction of capital punishment for any crime.

Sincerely,

Jack Schwartz
Jack Schwartz, Assistant Professor
Social Science Department

THREE FACT SHEETS

MICHIGAN'S HISTORIC BAN OF CAPITAL PUNISHMENT

Michigan, by statute in 1846, was the first governmental jurisdiction in the English-speaking world to abolish capital punishment for murder and lesser crimes. Our state has never restored it. Article IV, Section 46, of Michigan's 1963 Constitution says "No law shall be enacted providing for the penalty of death." This provision was added by the state's Constitutional Convention with only three dissenting votes. The recommendation of its Legislative Powers Committee in part stated:

"The compelling arguments against capital punishment were succinctly re-stated in the Journal of the American Jurisprudence Society of October, 1958, as follows:

1. The evidence clearly shows that execution does not act as a deterrent to capital crimes.
2. The serious offenses are committed, except in rare instances, by those suffering from mental disturbances; are impulsive in nature; and are not the acts of the 'criminal' class.
3. Conviction of the innocent does occur and death makes a miscarriage of justice irrevocable.
4. When the death sentence is removed as a possible punishment, more convictions are possible with less delays.
5. Unequal application of the law takes place because those executed are often the poor, the ignorant, and the unfortunate without resources.
6. The state sets a bad example when it takes a life. Imitative crimes and murder are stimulated by executions.
7. Legally taking a life is useless and demoralizing to the general public. It is also demoralizing to the public officials who, dedicated to rehabilitating individuals, must callously put a man to death. The effect upon fellow prisoners can be imagined.
8. A trial where a life may be at stake is highly sensationalized, adversely affects the administration of justice, and is bad for the community.
9. Society is amply protected by a sentence of life imprisonment.

"The Committee believes that it is both fitting and opportune for Michigan to step forward in the tradition which we began over 115 years ago and that the adoption of this provision would be a significant contribution to the concept of civilized justice which all of us seek to serve."

The Convention debates containing additional supporting information appear on pages 595-598 and 2968 of its two volume published record, available in your library.

Courtesy of:
 MICHIGAN COMMITTEE AGAINST CAPITAL PUNISHMENT
~~1202 Mich. National Tower~~, Lansing 48933
 524 South Walnut Street

4/74

WILL INNOCENT PERSONS BE EXECUTED IF THE DEATH PENALTY IS REVIVED IN MICHIGAN?

Based on publicly available facts, the only possible answer is Yes.

In at least 75 cases since 1893, it has been responsibly charged, and in most of them proved beyond doubt that persons were wrongfully convicted of criminal homicide in the United States. Eight of the 75 had been executed.

In Michigan since 1910, at least 9 persons have been wrongfully convicted of murder. Later, for most of them years later, they were proved innocent and freed. They are Robert MacGregor, Alexander Ripan, Lloyd Prevost, Vance Hardy, Gerald Crowden, Louis Gross, "Paget," Willie Calloway and Charles Clark. How many of these innocent men would have been executed if Michigan had had the death penalty?

Each of the above cases except Clark's is individually documented in Professor Hugo Bedau's well known book, *The Death Penalty in America*, at pages 434-452 of the 1967 edition. He also documents how very difficult it is to uncover the facts when the authorities do not cooperate. It is even more difficult after the execution.

Clark's tragedy is documented by the Michigan Supreme Court in volume 389, page 200, of its Reports; and the Legislature, by Act #1 of 1972, overwhelmingly voted him \$10,000 for the 30 years he spent in prison for the first degree murder he did not commit.

How many other innocent men and women have been convicted "beyond a reasonable doubt" for murder, and how many executed? How often have perjured testimony, mistaken identification and even (as evidence was produced to show in the case of Louis Gross) a "frame-up" passed for truth?

Thomas Jefferson said, "I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment presented to me." Has Michigan demonstrated that infallibility?

Courtesy of:
MICHIGAN COMMITTEE AGAINST CAPITAL PUNISHMENT
~~1202 Mich. National Tower~~, Lansing 48933
524 South Walnut Street

DOES THE PAROLE RISK OF CONVICTED MURDERERS JUSTIFY REVIVING THE DEATH PENALTY IN MICHIGAN?

Surprising as it may seem to advocates of the death penalty, paroled murderers are clearly the best risks of any class of offenders. Not only in Michigan, but nationally.

As Perry Johnson, Director of the Michigan Department of Corrections, pointed out in February, 1974, of all convicted first degree murderers paroled in Michigan since the state's parole board was established in 1938, not one has been returned to prison for committing another murder. Of the 395 who were paroled since 1938, only 10 were returned for any reason and 5 of those were for technical parole violations.

A study at the Department by Assistant Professor Jack Schwartz of Lansing Community College reveals that the first degree murderers paroled in Michigan between 1959 and 1972 had served an average sentence of 25 years each before release. In Michigan no one convicted of first degree murder can ever be paroled unless their sentence is commuted by the Governor.

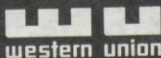
Parole data available from 7 other states were summarized four years ago by the Friends Committee on Legislation in This Life We Take, as follows:

	<u>Paroled Murderers</u>	<u>Second Imprisonment For Murder</u>
California (1945-54)	342	1
Connecticut (1947-60)	60	0
Maryland (1936-61)	37	0
Massachusetts (1900-58)	10	0
Ohio (1945-60)	169	0
New York (1950-59)	357	1
Rhode Island (1915-58)	19	0

Similarly, the national Uniform Parole Reports Newsletter of December, 1972, shows that of the 6,908 persons paroled after conviction for Willful Homicide during the years 1965-1969, 98.23% were successful on parole during the crucial first year after release. They had no new major convictions or allegations of offenses resulting in their return to prison. "Willful Homicide" in this study included all degrees of murder and all types of manslaughter except negligent manslaughter, manslaughter by vehicle, or negligent homicide.

Courtesy of:

MICHIGAN COMMITTEE AGAINST CAPITAL PUNISHMENT
~~1202 Mich. National Tower~~, Lansing 48933
 524 South Walnut Street



Telegram

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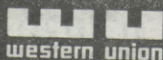
DEAR SENATOR ABOUREZK,

I WANT TO THANK YOU AND THE SENATE JUDICIARY COMMITTEE FOR GIVING ME THE OPPORTUNITY TO EXPRESS MY OPINION ON THE REINSTITUTING OF CAPITAL PUNISHMENT FOR CERTAIN FEDERAL CRIMES.

IN RECENT YEARS WE HAVE SEEN A DRAMATIC ESCALATION OF INCIDENTS OF BOTH PERSONAL AND POLITICAL VIOLENCE WHICH HAS PROMPTED A BACKLASH OF AMERICAN PUBLIC OPINION ON THE ISSUE OF THE DEATH PENALTY. HOWEVER MUCH I ABHOR SUCH ACTS OF VIOLENCE, I STRONGLY OPPOSE THE NON SOLUTION OF LEGALLY SANCTIONED EXECUTIONS FOR THE PERPETRATORS OF CRIMINAL AND TERRORIST ACTS.

AS ONE WHOSE HUSBAND AND MOTHER-IN-LAW HAVE BOTH DIED THE VICTIMS OF MURDER ASSASSINATION, I STAND YET FIRMLY AND UNEQUIVOCALLY OPPOSED TO THE DEATH PENALTY FOR THOSE CONVICTED OF CAPITAL OFFENSES. AN EVIL DEED IS NOT REDEEMED BY AN EVIL DEED OF RETALIATION. JUSTICE IS NEVER ADVANCED IN THE TAKING OF A HUMAN LIFE. MORALITY IS NEVER UPHELD BY LEGALIZED MURDER.

I PROTEST, THEREFORE, IN THE STRONGEST POSSIBLE TERMS, THE REESTABLISHMENT OF THE DEATH PENALTY AS AN APPROPRIATE PUNISHMENT FOR CRIME IN AMERICAN SOCIETY. I PROTEST THE IMPENDING EXECUTIONS OF THE MORE THAN 400 HUMAN BEINGS WHO AWAIT OUR VIOLENCE IN THE DEATH ROWS ACROSS AMERICA. I PROTEST, INDEED, THE VERY EXISTENCE OF DEATH ROWS IN A NATION WHICH PRIDES ITSELF IN ITS JUDAEO-CHRISTIAN HERITAGE OF REVERENCE FOR LIFE AND JUSTICE FOR ALL.



Telegram

WE HAVE AN OBLIGATION TO RESIST THE LEGALIZED VIOLENCE WHICH HAS BEEN PUT UPON US. WE ARE A MORAL PEOPLE, NOT A DEATH-DEALING PEOPLE AND WE CANNOT TOLERATE LAWS WHICH

SEEK TO MAKE US SO. JUST AS FEDERAL LAWS SUPERSEDE STATE LAWS, SO TOO MUST GOD'S LAW SUPERSEDE MANS. THOU SHALT NOT KILL.

APART FROM THIS MORAL IMPERATIVE, THERE ARE A NUMBER OF PRACTICAL REASONS WHICH TOGETHER FORM A POWERFUL ARGUMENT AGAINST CAPITAL PUNISHMENT.

FIRST, CAPITAL PUNISHMENT MAKES IRREVOCABLE ANY POSSIBLE MISCARRIAGE OF JUSTICE. TIME AND AGAIN WE HAVE WITNESSED THE SPECTRE OF MISTAKENLY CONVICTED HUMAN BEINGS SLAUGHTERED IN THE NAME OF AMERICAN CRIMINAL JUSTICE. TO THOSE WHO SAY THAT, AFTER ALL, THIS DOESN'T OCCUR TOO OFTEN, I CAN ONLY REPLY THAT, IF IT HAPPENS JUST ONCE, THAT IS TOO OFTEN. AND IT HAS OCCURRED MANY TIMES OVER THE YEARS.

SECONDLY, THE DEATH PENALTY ENTAILS AN UNWARRANTED ASSUMPTION THAT THE WRONG-DOER IS BEYOND REHABILITATION. IT MAY INDEED BE TRUE THAT SOME INDIVIDUALS CANNOT BE REHABILITATED, BUT, WHO AMONG US SHALL MAKE THAT DETERMINATION? IS ANY AMOUNT OF ACADEMIC TRAINING SUFFICIENT TO ENTITLE ONE PERSON TO JUDGE ANOTHER INCAPABLE OF SPIRITUAL REFORM?

PRESIDENT CARTER, IN A PROFOUND ACT OF PERSONAL FAITH, HAS EXPRESSED A FUNDAMENTAL BELIEF IN THE REDEMPTION OF THE WRONG-DOER IN A WAY THAT WE WOULD DO WELL TO EMULATE.. HE HAS TAKEN INTO HIS HEART AND HOME AN EX-OFFENDER, WHO WAS CONVICTED OF MURDER TO CARE FOR HIS YOUNGEST CHILD IN AN ARRANGEMENT WHICH HAS PROVEN MUTUALLY BENEFICIAL TO ALL.

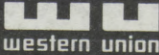


Telegram

A THIRD REASON WHY THE DEATH PENALTY SHOULD BE OPPOSED IS ITS INEVITABLE APPLICATION. APPROXIMATELY HALF OF THE 400 PERSONS ON DEATH ROW TODAY ARE BLACK. FROM 1530 THROUGH 1965 55.5 PER CENT OF THOSE EXECUTED WERE BLACK AMERICANS. ALL 100 MANY OF WHOM WERE REPRESENTED BY COURT-APPOINTED ATTORNEYS AND CONVICTED AFTER TWO OR THREE DAY TRIALS. THE ARGUMENT THAT THIS MAY BE AN ACCURATE REFLECTION OF GUILT AND HOMICIDE INTENTS INSTEAD OF A RACIST APPLICATION OF CAPITAL PUNISHMENT LACKS CREDIBILITY IN LIGHT OF A RECENT FLORIDA SURVEY WHICH SHOWED THAT PERSONS CONVICTED OF KILLING WHITES WERE FOUR TIMES MORE LIKELY TO RECEIVE A DEATH SENTENCE THAN THOSE CONVICTED OF KILLING BLACKS.

FINALLY; DEFENDERS OF CAPITAL PUNISHMENT OFTEN CITE A "DETERRENT EFFECT" AS THE MAIN BENEFIT OF THE DEATH PENALTY. THIS IS, PERHAPS, THE WEAKEST LINK IN A CHAIN OF DISCREDITED ARGUMENTS IN FAVOR OF LEGAL EXECUTIONS. NOT ONLY IS THERE NO HARD EVIDENCE TO SUBSTANTIATE THE CLAIM THAT MURDERING MURDERERS WILL DETER OTHER POTENTIAL KILLERS, BUT EVEN THE "LOGIC" OF THIS ARGUMENT DEFIES COMPREHENSION. NUMEROUS STUDIES SHOW THAT APPROXIMATELY 80 PER CENT OF HOMICIDES IN THE U.S. ARE COMMITTED BY THE VICTIM'S RELATIVES, FRIENDS AND ACQUAINTANCES IN "HEAT OF PASSION" SITUATIONS.

THIS STRONGLY SUGGESTS THAT RATIONAL CONSIDERATIONS OF FUTURE CONSEQUENCES ARE SELDOM A PART OF THE KILLER'S ATTITUDE AT THE TIME OF THE CRIME. AS PRISON WARDEN CLINTON T. DUFFY, WHO HAS WITNESSED 90 EXECUTIONS RECENTLY SAID, "I HAVE YET TO MEET THE MAN WHO LET THE THOUGHT OF THE GAS CHAMBER STOP HIM FROM COMMITTING MURDER. PEOPLE KILL ON IMPULSE AND THE PENALTY IS OF NO CONCERN AT THE MOMENT THE IMPULSE COMES."



Telegram

IT IS ALSO WORTH NOTING THAT STATES WHICH HAVE REINSTITUTED THE DEATH PENALTY HAVE SHOWN NO OVERALL DROP IN HOMICIDE RATES. INDEED, SOME HAVE SHOWN AN INCREASE.

THERE IS, HOWEVER, ONE LEGAL DETERRENT WHICH I BELIEVE CAN HAVE A REAL EFFECT ON DECREASING HOMICIDES IN OUR COUNTRY, THE BARING OF HANDGUNS AND HANDGUN AMMUNITION. IN 1975, FOR EXAMPLE, THE F.B.I. REPORTED THAT 51 PER CENT OF ALL MURDERS WERE COMMITTED WITH PISTOLS, ANOTHER 6 PER CENT BY RIFLE AND 9 PER CENT BY SHOTGUNS--A TOTAL OF 66 PER CENT OR TWO-THIRDS OF ALL HOMICIDES FOR THAT YEAR. IT IS CLEAR THAT WHAT IS NEEDED IS A COMMITMENT ON THE PART OF OUR POLITICAL LEADERSHIP TO STAND UP TO THE GUN LOBBY AND ENACT MEANINGFUL LEGISLATION TO CONTROL THE WANTON DISTRIBUTION OF THE WEAPONS OF DEATH.

IN CLOSING, I WOULD LIKE TO REITERATE A POINT OFTEN MADE BY MY LATE HUSBAND, DR. MARTIN LUTHER KING, JR. IT IS THAT VIRTUALLY ALL OF THE GREAT HOLY BOOKS AVAILABLE TO HUMANKIND BREAK THE CHAIN OF VIOLENT REACTION, THEREFORE, IS TO PRACTICE NONVIOLENCE AS INDIVIDUALS AND COLLECTIVELY THROUGH OUR LAWS AND INSTITUTIONS.

WITH THIS IN MIND, I URGE YOU TO PROSCRIBE THE DEATH PENALTY FOR ALL CRIMES AS THE ONLY MORAL ALTERNATIVE FOR A CIVILIZED SOCIETY.

SINCERELY,

CORETTA SCOTT KING
NNNN



MICHAEL S. DUKAKIS
GOVERNOR

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE DEPARTMENT

STATE HOUSE • BOSTON 02133

May 15, 1978

The Honorable James Abourezk
Chairman
Subcommittee on Administrative
Practice and Procedure
162 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Abourezk:

Thank you for your letter regarding my views on the question of reinstituting capital punishment for certain federal crimes. I have never supported the death penalty for two very fundamental reasons.

First, I cannot reconcile the willful taking of a human life by the state with my own moral and ethical beliefs. I do not believe that any government has the moral authority to execute human beings.

Second, I have never seen any convincing evidence that the death penalty is a deterrent to crime. The state, in my judgment, has no valid interest -- let alone a compelling one -- in requiring the killing of persons convicted of crimes.

I do not believe that capital punishment is an essential or even a valuable tool in the fight against crime. It is easy to sign death penalty legislation. It is more difficult to build a strong and effective law-enforcement program which embraces the courts, police, and correctional institutions.

I support efforts which take the latter course.

Sincerely,

Michael S. Dukakis
Michael S. Dukakis

MSD:sjs

TENNESSEANS AGAINST THE DEATH PENALTY

Box 117 Madison, Tennessee 37115

14 May 1978



Senator James Abourezk
162 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Abourezk,

We greatly appreciate the chance to share with you our stands on capital punishment and S. 1382. Earlier notification of the hearings may have ensured testimony in person from a member of our steering committee. Enclosed please find copies of our brochure and "one-pager," as well as other materials summarizing various opinions against the death penalty for inclusion in the hearing record, along with the remainder of this letter.

Since Tennesseans Against the Death Penalty is a coalition of organizations and individuals representing a broad spectrum of religious and political beliefs, our opposition to capital punishment is multifaceted. We briefly summarize for you the sources of this opposition.

We feel that the burden of proof that capital punishment is necessary in that it uniquely accomplishes a desired effect lies with its proponents. The most commonly voiced justification for the death penalty is deterrence. It is interesting to note that no evidence, statistical or otherwise, substantiating this claim has withstood close scrutiny. Most proponents in fact eschew a rigorous approach and cite a "gut feeling" as the foundation and sole justification of their claim. Are we to ritually snuff out human lives on such shaky grounds, especially when there are a disturbingly large number of recent cases indicating a counterdeterrent effect?

The death penalty adds to the climate of violence in America. By our example, we run the risk of encouraging the taking of human life by misguided individuals. There is some evidence that there is a temporary increase in the number of murders following a well publicized execution. Capital punishment clouds the distinction between us and those who offend us, at least with respect to the way we deal with our problems.

Almost every major religious denomination has issued statements urging the abolition of capital punishment. It is felt that human life is so sacred that only God may take it. The death penalty is viewed as a usurpation of a divine prerogative.

Much is made today of the overwhelming approval of the death penalty by the American public as expressed in many opinion polls. We contend that this cry for death is an intermittent phenomenon. A decade ago, the majority of Americans did not favor capital punishment while in the mid 1950's between 50% and 60% did. Furthermore, a Harris poll taken last year in New Jersey indicated that indeed the public favored capital punishment, but the majority of those in favor would not sit on a jury in a capital case! It is then reasonable to conjecture that people want a death penalty statutes, but no executions. Finally, recent polls show a slight decline in support of state sanctioned killing. Perhaps as actual executions draw near, Americans are beginning to have second thoughts.

Capital punishment inherently discriminates against the poor and the minorities. Since 1930, over 53% of those executed in the United States were black. Today there are over 400 persons on death row, half of whom are black. Studies are in progress examining the possibilities of discrimination by race of victim. It seems, especially in Florida, that most of those on death row were convicted of murdering whites. The upper class murderer can afford the best counsel and generally avoids the death sentence. It is particularly true with regard to the death penalty that "them without the capital get the punishment."

Reinstatement of capital punishment on the federal level in particular is in direct contrast to the trend in other advanced Western societies and the stated goals of the United Nations. By once again adopting the death penalty, we side with such unenlightened countries as Uganda, Saudi Arabia and South Africa. In this era of our concern for human rights, it should be even more important to make the distinction between ourselves and the most flagrant violators crystal clear.

Finally, we contend that the recent Supreme Court decision on Coker v. Georgia (1977) which forbids the death penalty for rape casts doubts on the constitutionality of S. 1382. One of the justices speculated that this decision will probably disallow execution as a penalty for any crime not involving the death of the victim. Since such crimes are included in S. 1382, we doubt that this bill would withstand any court test.

Thank you once again for this opportunity to express our views.
We remain

Sincerely,

Neal D. Hulkower

Neal D. Hulkower
Member, Steering Committee

Illinois Coalition Against The Death Penalty

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 (In Memoriam)

May 15, 1978

Senator James Abourezk, Chairman
 Subcommittee on Administrative Practice
 and Procedure
 162 Russell Senate Office Building
 Washington, D.C. 20510

Dear Senator Abourezk,

Thank you for your letter of May 8, 1978 which we received today telling about the Thursday, May 11 hearing of the full Judiciary Committee of the Senate on the subject of reinstatement of capital punishment for certain Federal crimes. We do wish to make comments for inclusion in the official hearing and hope that time will allow this.

The Illinois Coalition Against the Death Penalty is a broad based coalition of 56 organizations, the list of which is to be found on the back side of this sheet. Among others we list representatives of Catholic, Protestant, Jewish, and Humanist groups, human rights and community organizations, labor, criminal justice advocacy groups, certain lawyer organizations, etc. We are all united by one purpose. We wish to do all we can to end all capital punishment.

We believe the death penalty is an unrealistic approach to the very real problems of crime. It gulls us into thinking we have made our "streets safe" and stops us from working further. It has never been proved to be a deterrent and in our search to find out if it might be we are playing with human lives. It is disproportionately applied to the poor and minorities and by this violates the fifth and eighth amendments. It is irrevocable and morally offensive.

As the button we wear says, "Why do we kill people who kill people to show that killing people is wrong?"

Thank you for letting us share our feelings about capital punishment.

Sincerely yours,

Mary Alice Rankin
 Mary Alice Rankin, Coordinator

4297 Adonis Drive
Salt Lake City, UT 84117
15 May 1978

The Honorable James Abourezk
162 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Abourezk: Re S. 1382

The Utah Coalition Against the Death Penalty is pleased to respond to your letter of May 8, 1978, requesting comments on the use of the death penalty for certain Federal crimes (S. 1382).

We oppose the use of the death penalty in any circumstance. To list our reasons for this opposition would undoubtedly be to repeat what expert witnesses have already said in testimony to the Senate Judiciary Committee.

Your Committee has at its disposal, I thus assume, the full array of arguments against the death penalty, and we urge the Committee to give close attention to this material. Study should reveal that arguments against the death penalty are so strong that those who favor the death penalty are left, in the end, only with what amounts to a demand for vengeance: society's "right" to kill (some of) the people who kill other people.

We reject vengeance as an improper basis for government policy and law. Then, when we look at statistics (chiefly racial and economic) on those who are selected to die, and when we understand the workings of the system of justice which makes these selections for death, we conclude that the death penalty is indefensible.

And yet defended it is, as a simple solution to violent crime, in a tragic (and sometimes cynical) misleading of American public opinion.

The first argument of proponents of the death penalty is usually that it deters violent crime. Anyone who still believes that is invited to ponder the following--and to keep in mind at the same time the question whether the death penalty is counter-productive:

According to Gerald H. Kinghorn, Assistant County Attorney for Salt Lake County, who made these statements to me for use in this letter, the execution of Gary Mark Gilmore in Utah in January, 1978, "had no impact on the rate of homicide" in Utah's most populous county, Salt Lake County. On the contrary, in the 90-day period following the execution "we had a peak of violent crime in Salt Lake County."

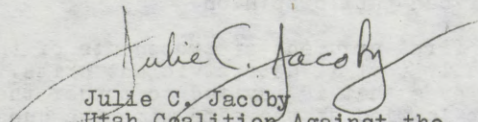
Many have deplored the almost circus-like atmosphere in Utah when Gary Mark Gilmore was executed, with the prison area, for example, packed with television vans, reporters from exotic places, protesters, anti-protesters, and extra police to keep the peace. It was a kind of grisly celebration of death. It was offensive in the extreme. And yet, a worse thing can be imagined: when an execution takes place and nobody notices. There are now about 500 people under sentence of death in the United States. This number of executions, if carried out, would make "legal" killings by the state routine, accepted. And we would as a people be diminished.

As an addendum, I have the permission of a University of Utah Distinguished Professor of Law, Jefferson B. Fordham, to identify him for the Senate Judiciary Committee as "a Utah citizen who is in principle strongly opposed to capital punishment at both federal and state levels."

Professor Fordham was unable to communicate with you more fully in time to meet your May 19 deadline.

Professor Fordham was Dean of the University of Pennsylvania Law School for eighteen years and was founder of the Section of Individual Rights and Responsibilities of the American Bar Association in 1966.

Yours very truly,


Julie C. Jacoby
Utah Coalition Against the
Death Penalty

SCCADF
533- B Harden Street
Columbia, South Carolina 29205

APP

The South Carolina Coalition Against the Death Penalty welcomes the opportunity to submit our views on S. 1382, a bill to establish criteria for imposition of the death penalty. In the comments that follow we will deal first with features of the proposed bill that we find objectionable and then with the philosophy underlying the bill.

1. Objectionable features of S. 1382. First, a trivial point. It appears on page 2 that lines 13-16 repeat lines 9-12 and should be struck.

In section (c) the bill says "the court shall disclose to the defendant... all material contained in any presentence report...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" (emphasis added). This exception, it seems to us, creates the possibility of withholding material that could be favorable to the defendant. To say that "any presentence information withheld from the defendant shall not be considered in the determination of the sentence of death" is, at best, to state the obvious and, at worst, to open the door to subterfuge. In no way does this provision assure the presentation of information that might be favorable to the defendant. Good intentions are not the same as guarantees of due process, for the very pressures that might lead the government to argue national security or danger to human life are likely to be the same that would lead to a demand for a death sentence in the first place. We believe that the bill should require a presentence report and that all information from this report should be made available to the defendant. The law must be as protective

of the life of the defendant as it is of the life of others who may be in danger.

The closing lines of section (c) state that "the burden of establishing the existence of any mitigating factors is on the defendant...." We believe that the burden of establishing the absence of any mitigating factors should be on the government, just as the government always has the burden of establishing guilt in criminal proceedings and (as provided elsewhere in section (c)) has the burden of establishing the existence of any aggravating factors. The presumption should always be in favor of the defendant. The bill should simply stipulate that the defendant may introduce evidence in support of the existence of any mitigating factors.

Section (f) sets forth five mitigating factors that may be considered in determining whether a sentence of death is to be imposed on a defendant. We believe the defense should not be limited to these five points, and we propose the following substitute wording as an introduction to section (f): "In determining whether a sentence of death is to be imposed on a defendant, the following mitigating factors shall be considered, together with any others introduced by the defense or his/her counsel:"

Another trivial point: page 9 line 21 "provides" should read "provided."

2. The philosophy underlying capital punishment. We found S. 1382 objectionable on first reading, and we believe the modifications proposed above would render the bill less objectionable. But we believe any bill that proposes to empower the government to take the life of either a citizen or alien is inherently objectionable and will remain so no matter how carefully amended.

Stated in its most simple terms, we believe it is improper for the government to be empowered to take the life of private individuals when it is

against the law for private individuals to take such power unto themselves. For the government to engage in the very action that it declares illegal is to set a contradictory example for citizens to follow. The body of law, we believe, must not only establish standards for private conduct but must hold the government to the same standards.

While we applaud the requirement that a court of appeals shall find that "the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor," we submit that when passion, prejudice, and other arbitrary factors actually affect sentencing, these factors are likely to be so pervasive that they will seem quite innocent to the prosecution, the trial court, and the various courts of appeal. Is there really any way we can write into law provisions that will genuinely safeguard the unpopular alien, the indigent, the outcast, the member of an unpopular racial or ethnic minority, the advocate of unorthodox ideologies, or the individual accused of a widely publicized, sensational crime--especially if the alleged victim is a person of standing in the community? We think not. If capital punishment is used at all, these are the very individuals for whom it will be reserved. Such individuals are likely to have few champions during their trial, during their appeals, or while awaiting execution. Their fate will be either to be forgotten or to receive a posthumous apology from the government. The only sensible social policy, it seems to us, is to renounce the penalty of death altogether and replace it with a policy of prison sentences, the length of the sentence graded according to the crime. This is the only policy that can avoid completely the risk of putting to death a person during a period of social frenzy when that same person, facing sentencing during a calmer period, might receive a prison sentence.

From a purely practical standpoint as well, we believe that a policy of abandoning capital punishment in favor of prison terms will simplify the administration of justice and eliminate the circus atmosphere that inevitably arises when a person is on trial for his life. A death sentence is unique in that it is irreversible and therefore cannot be carried out until all appeals have been exhausted. A death sentence rendered in an atmosphere free of passion, prejudice, or other arbitrary factors is inconceivable. These factors--passion, prejudice, and the arbitrary nature of a legal system in which each person who plays a part in a death sentence can excuse his own responsibility by saying that he was simply carrying out the law--are prerequisite to imposing and executing the penalty of death. A prison sentence, on the other hand, can be levied in a relatively calm atmosphere since everyone involved realizes that the sentence can be put into execution at once but that it will also be subject to review and can be reversed or reduced if at any time it becomes clear that the original sentence was improper or excessive.

In sum, we believe that S. 1382 fails in significant ways to safeguard the rights of defendants. We believe safeguards could be added to the bill to render it less objectionable but that any bill sanctioning the penalty of death is inherently objectionable. We therefore urge abandonment of this bill and propose instead a policy of prison sentences as an alternative to the punishment of death.

Coalition Against Capital Punishment*

200 N. Vineyard Blvd. / Room 102
Honolulu, Hawaii 96817 (537-2917)

May 17, 1978

Senator James Abourezk, Chairman
Subcommittee on Administrative
Practice and Procedure
Senate Judiciary Committee
162 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Abourezk:

Thank you for your letter of May 8, 1978, in which you invited our comments on whether we should have a Federal death penalty.

Our Coalition, which is composed of the groups listed on the attached list plus numerous individuals without affiliations, opposes the death penalty in any form. We would like to take this opportunity to present our views on this matter. Please note that our comments herein (a) present some of our arguments only, and (b) are summaries of specific points. We have not had sufficient time to prepare a more comprehensive and detailed testimony, as we received your invitation after the hearing date.

We oppose S. 1382 and any Federal death penalty because:

The death penalty offers no better protection than does long-term imprisonment. The deterrent effect of the death penalty has been examined in many, many studies. The overwhelming majority of these studies conclude that there is no evidence that this penalty reduces the crime rate.

The death penalty has discriminatory effects. Historically, persons executed have come disproportionately from certain ethnic and socio-economic groups. Despite recent efforts to make the quality of justice more equitable, through such programs as Public Defenders, there is reason to believe that a death penalty law will continue to be applied in a discriminatory fashion.

For example, of the persons currently awaiting executions in America, Blacks tend to be over-represented. In Texas, of the persons tried in capital murder cases from June 1973-February 1976, those who were represented by appointed counsel were more likely to be convicted than those appointed by retained counsel; and of those persons convicted in these cases, those who were represented by appointed counsel were more likely to be sentenced to death than those represented by retained counsel.

In Hawaii, the pattern of discrimination is apparent, even though we have no death penalty. Native Hawaiians constitute less than 10 percent of the persons

steering committee:

David Chandler - Sociology Department, University of Hawaii Robert Loveless - United Church of Christ
Rev. Robert R. Mackey - Hawaii Correctional Association Theodore Sakai - John Howard Association
Elizabeth Yonahara - American Civil Liberties Union

(*The Coalition is comprised of individuals & organizations opposed to Capital Punishment)

Senator James Abourezk
Page 2
May 17, 1978

arrested, yet make up more than 40 percent of our prison population. This suggests, to this writer at least, that our criminal justice system operates in a less than optimum manner.

There is a possibility that innocent persons will be executed. In our history, there have been at least 8 innocent persons who were executed. There may have been more. There is still controversy regarding the Rosenbergs, Sacco and Vanzetti, and other defendants. Even today, we read of cases in which convicted persons are later found innocent. Fortunately, these persons were sentenced to prison and could be freed. An execution is final; and if any mistakes are made, there is no way these errors can be atoned. In short, the death penalty is an infallible punishment that is imposed by a fallible system.

The death penalty is costly. The impact of the death penalty on the cost of operating our courts is well documented. Capital cases almost always result in trials which require extensive preparation, and they almost always result in appeals. The death penalty also adds considerably to the costs of our already expensive corrections system. Those sentenced to die require separate and special housing, which in turn necessitates additional, around-the-clock staffing. We would not be burdened by these expenses except for the capital punishment.

On the other hand, the familiar argument of saving money via executions (i.e., the "Why continue to house a person at \$XXX per period?" argument) is fallacious. Almost all of our prison costs are fixed. If everyone currently on death row were executed or freed, there would be virtually no change in the cost of our prisons.

Arguments like these compel us to believe that the death penalty has outlived its usefulness. Its costs are steep; it is discriminatory; it may lead to incorrectible mistakes; and it draws the courts' and prisons' resources. Its benefits are minimal: it does not add to the public safety; it offers, at best, a symbol of the government's power; at worst, it casts society in the role of killer and sanctions killing in particular situations.

The death penalty should be abolished.

Very truly yours,

(HAWAII) COALITION AGAINST CAPITAL PUNISHMENT

T. I. Sakai

Theodore I. Sakai

TIS/lrc
Enclosures

(HAWAII) COALITION AGAINST CAPITAL PUNISHMENT

1. AMERICAN CIVIL LIBERTIES UNION
(Jo Kim)
2. AMERICAN FRIENDS SERVICE COMMITTEE
(Karen Pohlig)
3. DEMOCRATIC ACTION GROUP
(Dan Friedman)
4. THE HABILITAT
(Ted Talbot)
5. HAWAII ASSOCIATION OF ASIAN & PACIFIC PEOPLES
(George Osakoda)
6. HAWAII COUNCIL OF THE NATIONAL COUNCIL ON CRIME & DELINQUENCY
(Don Moore)
7. HAWAII COUNCIL OF CHURCHES
(Rev. Stan Kain)
8. HAWAII FEDERATION OF TEACHERS
(Dennis Hokama)
9. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (ILWU)
(Robert & Ah Quon McElrath)
10. JOHN HOWARD ASSN. OF HAWAII
(Theodore Sakai)
11. KA OHANA
(Tom Coffman, Lois Lee)
12. NATIONAL ASSN. OF SOCIAL WORKERS
(Mako Araki)
13. PEACE EDUCATION PROJECT
(James Albertini)
14. UNITARIAN CHURCH/PUBLIC AFFAIRS COUNCIL
(John Peterson, Molly Rowland)
15. UNITED CHURCH OF CHRIST
(Rev. Robert Loveless)
16. WINDWARD COALITION OF CHURCHES
(Kay Goodhue)

17. PEOPLES COALITION FOR WELFARE AND EMPLOYMENT
(Cathy Alana)
18. KOOLAULOA WELFARE RIGHTS GROUP
(Margaret Richards)
19. WAIANAE INTER-AGENCY COUNCIL
(Marion Metz)
20. HAWAII CORRECTIONAL LEGAL SERVICES
(David Hobler)
21. HEALTH & COMMUNITY SERVICES COUNCIL
(Rev. David Harada)

The Case Against Reinstatement of Capital Punishment In Hawaii

"Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind," George Bernard Shaw advised.

Senator Edward M. Kennedy wrote, in connection with the sentencing of Sirhan Sirhan: "My brother was a man of love and sentiment and compassion. He would not have wanted his death to be a cause for the taking of another life."

Position papers by the
Hawaii Coalition Against Capital Punishment
200 N. Vineyard Boulevard
537-2917

INTRODUCTION AND SUMMARY

The Hawaii Coalition Against Capital Punishment is an organization of individuals and groups opposed to reinstating the death penalty. Our purpose is to research the issue and convey our findings to legislators and the public.

These position statements present findings on the death penalty issue in the state, around the country, and in other countries.

Some of the main issues are:

- * The "deterrent effect:" The before-and-after studies in jurisdictions which have abolished the death penalty tend to show the penalty is no deterrent to the crime of murder. In Hawaii in the ten years after the death penalty was abolished, the incidence of murder dropped one-third below the rate of the preceding decade.
- * Execution of the innocent: Many incidents have been documented of convicted people being subsequently found innocent, yet with the death penalty society cannot correct its mistake. The National Council on Crime and Delinquency said, "One of the gravest charges against the use of the death penalty is that it makes execution of the innocent inevitable."
- * Ethnic and class discrimination: The National Council on Crime and Delinquency said, "With rare exceptions, those who are executed are poor, of low social status, and predominantly members of minority national groups. . . ."
- * The main "pro" argument: During the 1975 legislature, the attorney general of Hawaii, speaking for the death penalty, admitted his argument rested solely on retribution, or vengeance. The fact is the death penalty does nothing to help those who have suffered the loss of a loved one.
- * The state's moral role: Like murder itself, capital punishment is the deliberate taking of life. Capital punishment commits society to engaging in the very act it is purportedly punishing.
- * The State corrections plan: The death penalty would fundamentally violate the State corrections master plan, which is predicated on pursuing a criminal's rehabilitation while providing society protection by incarcerating the offenders. Implementation of the security provisions of this plan, not the death penalty, will afford the community the most effective protection from criminals.
- * The cost issue: Justice Thurgood Marshall, in *Furman vs. Georgia*, said, "It costs more to execute a man than to keep a man in prison for life." The mandatory assignment of counsel, mandatory appeals, the cost of records paid by the state, the clemency apparatus for the condemned, and the apparatus of execution itself - all combine to inflate enormously the cost of death penalty cases.

- * The wish to die: What if the criminal expresses the wish to die? Opposition to the death penalty is not predicated on a desire to accommodate the offender. Neither should society accommodate a person's desire to die. Conceivably the death penalty might be an incentive for murder to a deranged person who has a deeply-rooted death wish but cannot bring himself to commit suicide.
- * Special cases: What if capital punishment were adopted for special cases, such as for the hired killer, or the murderer of a police officer or correctional officer? These special cases do not make the death penalty any less wrong.

Hawaii Coalition Against Capital Punishment
 200 N. Vineyard Blvd.
 Honolulu, HI 96817
 Phone: 537-2917

POSITION PAPER 1

THE DETERRENT EFFECT OF EXECUTING MURDERERS

Most states have a life sentence without possibility of parole for those convicted of the most serious murder. This is the case in Hawaii. So the question is whether the death penalty has any greater impact on deterring potential murderers, than spending the rest of their lives in prison.

There is sometimes confusion over what the term deterrence means. First of all, deterrence is not incapacitation. Deterrence does not mean that a person convicted of a crime is prevented from committing any other crime by being put into custody or executed.

Deterrence refers to an instance where a person refrains from doing something because he or she perceives a risk of punishment and fears punishment. Deterrence cannot be seen. It can only be measured indirectly in rates of criminal behavior.

Studies of deterrence are designed to isolate the effect of the death penalty, both as a statutory penalty and as it is actually applied, on rates of murder. It is important to separate the potential effect of the death penalty from other factors which cause a high or low murder rate.

The most common type of study explores whether the death penalty has any deterrent effect. States which have the death penalty are compared to states which do not. Any difference in the murder rates in these two categories of states can show the effect of executing murderers. The deterrence theory states that where the death penalty is available and used, rates of criminal homicide will be lower. The facts show that this is not the case. In reviewing dozens of studies for his book, Capital Punishment, Harper and Row, 1967, Thorstein Sellin says "the conclusion is inevitable that the presence of the death penalty - in law or in practice - does not influence homicide death rates." (p. 138)

The public is naturally concerned about the safety of the police officers who protect it. Does executing those who murder the police increase the safety of police officers.

Several studies have examined this question. Another study by Professor Sellin found that 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, 131 in states with the death penalty, 9 in states without the death penalty. In abolition states, 1.31 officers per 10,000 officers were killed, and 1.32 in the retention states bordering on them. Analysis of the data in the above studies fail to show any added protection for police in the death penalty states.

This conclusion is also reached by William Bailey in his review of the research that has been conducted in the last decade. After carefully analyzing other studies and conducting his own research on the topic, he finds that all results are "quite contrary to what deterrence theory would predict" (Capital Punishment in the United States, Hugo Bedau, 1976, p. 321).

In the last year one study has produced a conclusion that the death penalty has a deterrent effect. This research by Isaac Ehrlich (American Economic Review, June, 1975) was eagerly trumpeted by supporters of the death penalty. It was the only study done in decades of research that showed support for state executions. However, this study is not sound. Many subsequent researchers, some even using the same facts as Ehrlich, are unable to verify his conclusions. Peter Passell and John Taylor conclude that "the technical approach and the available data employed by Ehrlich do not permit any inference whatsoever about the deterrent effects of the death penalty" (Capital Punishment in the United States, Hugo Bedau, 1976, p. 359).

Here in Hawaii from 1947 to 1957, the year capital punishment was abolished, the murder rate was 4.3 per 100,000 people. In the decade following abolition, the murder rate dropped to 2.9 per 100,000.

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POSITION PAPER 2

UNDESIRABLE EFFECTS OF THE DEATH PENALTY

In 1967 the prestigious President's Commission on Law Enforcement and Administration of Justice reported on crime and criminal justice in the United States. The Commission's report concluded that the death penalty "clearly has an undesirable impact on the administration of criminal justice." The result of enactment of death penalty legislation by the Hawaii legislature would be a similarly undesirable impact on the administration of criminal justice in Hawaii.

The President's Commission pointed to the inordinate delays which attend death cases. Pretrial proceedings are substantially lengthened as defense lawyers present every pretrial motion that legal ingenuity can conceive, and trial judges meticulously weight each legal point. The jury selection process becomes protracted and trial rulings require additional time. The appellate process is substantially lengthened in death cases. Mr. Justice Jackson observed that "when the penalty is death, we, like State court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."

The problem of the "doubtfully condemned man," and the resultant reluctance of society to end his life, are inherent in any death penalty scheme. This is because the criterion for a criminal conviction, as we know, is proof beyond a reasonable doubt, not proof beyond all doubt. Instructing juries to convict on proof which does not dispel all doubt is a virtual necessity in a system of trials that depend on testimony by witnesses whose perceptions, judgments, and memories are never perfect. This means that guilt in criminal trials is rarely, if ever, proved to a certainty, but only on a scale of probabilities. Were it otherwise, few would ever be convicted. Such a system is tolerable so long, but only so long, as the power to pardon exists. It is intolerable when the penalty is irrevocable. Mistakes have been made and mistakes will continue to be made. The system cannot be made to be infallible.

Another particularly unhealthy aspect of death penalty cases is the spectacle of eleventh hour execution postponements and reschedulings occasioned by the inevitable exhaustion of all available habeas corpus and postconviction attacks on the pending sentence. In 1970, of 608 persons awaiting death in American prisons, 67 had been there eight years or more, and 232 had been there four or more, according to Federal Bureau of Prisons statistics. These delays were caused mostly by postconviction proceedings and clemency appeals. The case of the Rosenbergs was before the Supreme Court seven times before that pair were killed. Mr. Justice Frankfurter opposed the death penalty because "it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the judiciary is very bad." Frankfurter believed that the dubious deterrent value of punishment by death is outweighed by "the social loss due to the inherent sensationalism of a trial for life."

Former Attorney General Ramsey Clark noted that prison officials and guards are deeply affected by the ugly details of executions and reminded that the wardens of San Quentin, Alcatraz, Sing Sing, and Milan prisons had spoken out strongly against the ultimate sanction. Clark summed it up: "We torture ourselves through delay, indecision and doubt because we do not really believe in taking human life. No one in the process feels comfortable with himself, or about his

POSITION PAPER 3

THE DANGER OF THE REPEAT KILLER

Some people who support reinstatement of the death penalty in Hawaii point to the danger of convicted murderers being freed. They argue that the parole board sometimes releases people who are sentenced to life in prison and that these convicted murderers then kill again. If the killers had been executed for their first murder, then an innocent life would be spared, the argument goes.

Numerous studies have examined this argument. These studies have tried to determine whether murderers would commit crimes if paroled or released from prison. 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. (1)

In California, 342 first degree murderers were paroled between 1945 and 1954. About 10 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 for 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. (2)

Similar studies in other states have produced the same results. (3) 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." 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. 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. (4)*

- (1) Stanton, "Murderers on Parole," Crime and Delinquency, 15 (1969), p. 149.
- (2) California Assembly, Interim Committee Reports, Vol. 20, No. 3, "Problems of the Death Penalty and its Administration in California," (1957), p. 12.

Since the rate of repeat killing is so small, one in 1293 for the 9 states studied - and since no one could predict who would kill again - these states would have had to execute 1293 first time murderers to save the one life which was taken. Not only would this be a tragic waste of those who were rehabilitated and now lead useful lives with no danger to anyone else, but it would not work. History shows that American juries would never impose the death sentence to the extent required to prevent the second crime.

- (3) See for example, Massachusetts Department of Correction, An Analysis of Convicted Murderers in Massachusetts: 1943-1966 (1968) and Ohio Legislative Service Commission, "Capital Punishment," (1961).
 - (4) Testimony before the Subcommittee on Criminal Laws and Procedures.
- * For a review of this, see Austin Sarat and Neil Vidmar, Wisconsin Law Review, 1976, 171.

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POSITION PAPER 4

MORAL IMPLICATIONS OF THE DEATH PENALTY

"Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind," George Bernard Shaw advises. When the state kills one of its members, human life and dignity are demeaned. Senator Edward M. Kennedy wrote, in connection with the sentencing of Sirhan Sirhan: "My brother was a man of love and sentiment and compassion. He would not have wanted his death to be a cause for the taking of another life." Senator Spark Matsunaga, in a 1960 interview, put it simply: "It's not the prerogative of a man to take another man's life."

Opposition to capital punishment does not imply approval of murder and other serious crimes, but rather respect for the sanctity of human life. Capital punishment panders to the worst instincts in the human character. It posits killing criminals to "get even" with them. It denies the humanity of the criminal, and evidences a less than profound respect for life. In 1906 the Pacific-Commercial Advertiser editorialized about the death penalty:

If hangings were public, if everyone could see them, the outcry against this form of punishment might well bring about the abolition of the death penalty. "The worst use you can make of a man," as the old saying goes, "is to hang him." But hanging is also the worst example one can set to society, the worst use one can make of civilized law, which is thus forced to revert to the crude statutes of a day of barbarian vengeance when the demand was an eye for an eye and a tooth for a tooth. . . Our laws are careful, it is true, to exclude the idea of vengeance, and to excuse legal execution on the ground that it protects society from the ravages of human beasts of prey. But life imprisonment would do that and leave no blood on the hands of the law. . . And it /life imprisonment/ does not degrade the society as does the law's legalized murder - the calculated breaking of a neck - the choking out of life in the grip of a rope and all the shastly preliminaries of execution.

In 1957 Hawaii took what Camus called the "great civilizing step" of abolishing the death penalty. The 1976 U. S. Supreme Court has now said that capital punishment does not violate "the evolving standards of decency that mark the progress of a maturing society." It is to be hoped that Hawaii's "evolving standards" of decency, compassion, gentleness, and respect for human life will continue to outpace those of much of the rest of our nation.

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POSITION PAPER 5

THE DEATH PENALTY AND THE CORRECTIONAL MASTER PLAN

Some of the increased public sentiment for the return of the death penalty seems to be rooted in dissatisfaction with our correctional system. There is no doubt that this concern is justified. Our old prison has had many problems.

However, the administration and the legislature have moved to correct these problems. In 1973, the Hawaii legislature enacted Act 179, relating to the implementation of the Correctional Master Plan, as a means of responding to the many deficiencies that have plagued corrections.

This Plan will create a new system which will make us capable of meeting the dual purposes of corrections: protecting the public while providing offenders with the opportunities to become law-abiding and productive citizens. All of us are concerned about our safety from violent criminal offenders, and the Plan takes this into consideration. Soon we will have a new high security facility.

It has the "specific goal of control and treatment of the serious predatory offender and habitual recidivist." (Correctional Master Plan 3.61)

Today, our State is deeply into the process of implementing the Plan. Our out-moded prison will be replaced by a modern statewide complex of secure facilities.

The legislature and the administration have proceeded with an orderly, rational, and planned approach to the crime problem in Hawaii.

The support for the death penalty is based on an emotional response to crime and is inconsistent with the master plan. When the new facilities and programs are in place, public dissatisfaction with corrections should subside and with it the support for the death penalty.

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POSITION PAPER 6

THE EXECUTION OF INNOCENT PEOPLE

Under the death penalty, an innocent person could be executed.

In theory, the American criminal justice system provides great protection against the conviction and punishment of an innocent person. But this system is run by people and sometimes the police, prosecutors, defense attorneys, juries, and judges make mistakes. This is particularly true when the passions of a community are aroused, as they are in heinous murder cases.

Those who advocate the death penalty believe that no innocent person could be executed. This faith is not warranted by the facts.

There have been documented cases of 75 wrongful convictions for criminal homicide in the past hundred years. Eight of these innocent people were executed. No doubt there were more. Efforts to find new evidence and reverse convictions often cease when the convicted person is executed.*

Thomas Jefferson said, "I will ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me."

A recent case of wrongful conviction is that of Peter Reilly. On September 28, 1973, in a small town in Connecticut, Barbara Gibbons was sexually abused, beaten, and stabbed to death. The community was outraged. Her illegitimate son, Peter Reilly, was accused, tried, and convicted of manslaughter.

In November, 1976, evidence of his innocence was produced and he was freed. While the people of Connecticut cannot give Peter Reilly back the three years he spent convicted of a crime he did not commit, at least they can allow him freedom for the rest of his life.

Under the existing laws of Hawaii, a dangerous murderer can be sentenced to prison for the rest of his life. If subsequently he is found innocent, he can be released. These laws protect us from dangerous people. They also protect us from the responsibility of taking an innocent life if the state, in our name, executes the wrong person.

* Capital Punishment in the United States, Hugo Bedau and Chester Pierce, The American Orthopsychiatric Association, 1976, p. 422.

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POSITION PAPER 7

DISCRIMINATION AND THE DEATH PENALTY

The criminal justice system has always operated more harshly upon the socially and economically disadvantaged persons in society. It is probably true that these persons have historically committed a disproportionate amount of crime, but it is no less true that these persons are the least able to manipulate the discretionary mechanisms which are built into the criminal justice system.

From arrest through execution, the criminal justice system is characterized by the availability and exercise of discretion. Police are given discretion to arrest or not to arrest, prosecuting officials are given discretion to charge, to reduce charges or not to charge, judges and juries are given discretion in imposing sentences, and executive officials are given discretion to pardon and to commute sentences. Although discretion is typically employed mercifully to mitigate the harsh effects of statutes, rules, and practices in individual cases, the accused or convicted criminal's social and economic standing has an inevitable impact on the availability and result of discretionary decisions. The overall result is an arbitrary and discriminatory application of legal sanctions.

So even honest people doing their best to be fair in each case can produce bias and discrimination without knowing it. This problem has been studied extensively on the mainland and the results of the studies are very clear.

Warden Clinton Duffy of San Quentin Prison has suggested that capital punishment is "a privilege of the poor." Several studies seem to confirm this conclusion. For example, an examination of sentencing decisions by California juries in first degree murder cases over an eight-year period found that 42% of blue collar workers convicted of murder received death sentences, while the comparable figure for white collar workers was 5%. (1) This study concluded, after taking account of other factors such as previous criminal record, that low socio-economic status made it far more likely that a defendant would be sentenced to death, a fact which may reflect their inability to obtain good legal assistance.

Other studies indicate that the death penalty is applied disproportionately to black defendants. Of 455 men executed for rape in this country since 1930, 405 or nearly 95% have been black. With respect to other capital crimes, there are other indications of racial discrimination. Blacks constitute 76% of those executed for robbery, 83% of those executed for assault by a life prisoner, and 100% of those executed for burglary in the same period. Of all persons executed since 1930, 53.5% have been black. (2) Furthermore, when the death penalty was declared unconstitutional in 1972, 58% of the persons on death row were non-whites.

With respect to crimes other than rape, a study of all capital cases in New Jersey between 1930 and 1961 revealed that just under a half of the blacks convicted of capital crimes were sentenced to die. In the same period, less than 1/3 of the whites convicted of the same crimes received death sentences. (3) A study of homicide cases in ten North Carolina counties over a ten-year period found that of blacks convicted of killing whites, 37% were sentenced to death. No white defendant received death sentences for killing blacks.

With respect to who is actually executed, a study in Pennsylvania between 1914

and 1958 found blacks who were sentenced to death were twice as likely to be executed as were whites sentenced to death. A similar study in New Jersey found the same pattern. In Ohio, over a ten-year period, 78% of blacks sentenced to death were actually executed, while only 51% of whites were. (4)

So racial discrimination in the application of the death penalty is not ancient history. Every effort to eliminate it has failed.

Those who encourage the reinstatement of the death penalty must face up to the facts of how it is actually applied. They endorse a tragically unfair law.

- (1) "A study of the California penalty jury in first degree murder cases," Stanford Law Review, 1969.
- (2) National Prisoner Statistics.
- (3) Wolf" . . . Jury sentencing in capital cases in New Jersey," Rutgers Law Review, 1964. And, F. Garfinkel, "Research note on inter- and intra- racial homicides," Social Forces, 1949
- (4) M. Wolfgang, Kelly, and Nolde, "Executions and commutations in Pennsylvania," in The Death Penalty in America; and H. Bedau, "Death Sentences in New Jersey," Rutgers Law Review, 1964; Ohio Legislative Service Commission: Capital Punishment, 1961

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POSITION PAPER 8

DISCRIMINATION AND THE DEATH PENALTY: THE HAWAII CASE

Hawaii abolished the death penalty in 1957. Part of the reason for this was the evidence that the penalty had been used in a discriminatory way. Only one Caucasian had been executed in the history of Hawaii while almost half of those who died on the gallows were Filipino.

In Hawaii, of 47 persons executed between 1897 and 1944, the ethnic breakdowns were as follows:

Filipino	24
Japanese	10
Korean	6
Hawaiian	3
Puerto Rican	3
Caucasian	1

In most of these cases the defendants were poor plantation workers who were represented by court-appointed counsel. A substantial number did not even have an appeal from their conviction and sentence.

One of those was Myles Fukunaga, a young Japanese-American who was executed in 1929 for the murder of the son of a prominent haole businessman. As related in Dennis Ogawa's Jan Ken Po, The World of Hawaii's Japanese Americans, the Fukunaga case "shattered the illusions of racial peace and aloha in Hawaii's community" because of the apparent double standard of justice being applied to white and non-white. The Hawaii Hochi cited cases of haole murderers who were not executed and concluded that Hawaii "had one law for the white man and one law for the non-white man." Several years later, the Massie defendants, a navy lieutenant, his mother-in-law, and two enlisted men, were sentenced to 10 years at hard labor, but the sentences were commuted after one hour's wait in the governor's office - for killing a non-white who was thought by them to have raped the lieutenant's wife.

In another famous case of the period, the young part-Hawaiian defendants were sentenced to die for causing the death of a prominent Caucasian woman. James Majors and John Palakiko came within minutes of being hanged in Oahu Prison. Many people in the community felt that theirs was another clear case of the court being harsh when the defendants were local and the victim was Caucasian.

Whether a double standard of justice existed then or exists now, the death penalty will invariably contribute to the appearance of discriminatory justice, and thus tend to fuel the fires of social and racial strife.

An indication of who might be executed under a death penalty today can be found by looking at inmates now serving life without parole. Ten of 14 are Hawaiians or part-Hawaiians.

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POSITION PAPER 9

WHAT ABOUT THE VICTIM?

People concerned about the problem of the death penalty are also concerned about the victims and families of victims of homicides. The question they often pose is: if we refuse to impose the death penalty on the offender, are we not thereby displaying a more or less callous disregard for the rights or sensibilities of the innocent victims of his crime? We believe the answer is "no," because executing a murderer does not bring the victim back.

In fact, the only value of the death penalty, from the standpoint of the victim, is naked vengeance. It is not unnatural for victims of crime to desire vengeance, to desire that the government "get even" with the offenders for them. But this is a function of government which Hawaii, together with other progressive and compassionate communities, has denied itself. Hawaii's laws, since the abolition of the death penalty, have been designed to prevent crime, rather than to "get even" with particular criminals. We believe Hawaii has elected the more humane approach to crime and criminals, and that this approach does not disregard any legitimate need that our society has to protect itself.

Senator Edward M. Kennedy wrote, in connection with the sentencing of Sirhan Sirhan: "My brother was a man of love and sentiment and compassion. He would not have wanted his death to be a cause for the taking of another life."

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BIBLIOGRAPHY ON CAPITAL PUNISHMENT

These items represent only a few of the hundreds of research reports, books, and articles concerning the death penalty. Each has bibliographies on the topics discussed and additional bibliographies may be obtained from the Hawaii Coalition Against Capital Punishment.

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SENATOR JAMES ABOUREZK
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WE WISH YOU TO KNOW OF OUR OPPOSITION TO S.1382 WHICH WOULD REESTABLISH
FEDERAL CAPITAL PUNISHMENT. WE HAVE WORKED AGAINST THAT PENALTY
LEGISLATION IN VIRGINIA. WE REGRET THIS STATE HAS REINSTITUTED THE
DEATH PENALTY.

DETERRENTS ARGUMENTS HAVE PROVEN INCONCLUSIVE IN THIS MATTER. HERE IN
VIRGINIA, SOME LEGISLATORS ADMIT THAT VENGEANCE IS THERE REASON FOR
WANTING THE DEATH PENALTY. THIS ATTITUDE IS INCONSISTENT WITH CONCERN
FOR THE VALUE OF HUMAN LIFE. OUR NATION SHOULD NOT CONDONE KILLING
INDIVIDUALS WHO HAVE TAKEN LIFE.

WE BELIEVE STATE DEATH LAWS COVER CRIMES NOTED IN S.1382, THERE IS NO
LAW TO EXECUTE A PERSON TWICE. FEDERAL LEGISLATION IN THIS AREA
DUPLICATES AN EVIL REALITY. TO BE CRASS, WE THINK THIS APPROACH A WASTE
OF OUR TAX DOLLARS.

WE WISH YOU TO KNOW OF OUR OPPOSITION TO THIS LEGISLATION AND URGE
COMMITTEE REJECTION OF S.1382

CHARLES WARE
VIRGINIANS AGAINST THE DEATH PENALTY
2228 STUART AVE
RICHMOND VA 23220

10:36 EST

MGMCOMP MGM

TESTIMONY ON S.B. 1382

SENATE COMMITTEE ON THE JUDICIARY

MAY 11, 1978

Mr. Chairman, and Honored Members of the Senate Committee on the Judiciary.

One duty of our Commission is to advise the county, state, and federal governments on such legislation as it may deem necessary to insure equal rights for all persons.

The Montgomery County Human Relations Commission in Maryland stands opposed to the Death Penalty. The Commission points out that

1. There are alternatives to the Death Penalty.
2. There is serious reason to doubt its effectiveness as a deterrent.
3. There is always a chance of error; and in a case of error, the damage is irreparable.
4. There are many opportunities for arbitrary and capricious decisions.
5. Also, and most importantly, as the Minister of Justice in Belgium said in 1863 on abolishing the Death Penalty, "We have learned that the best means to teach respect for human life consists in refusing to take life in the name of the law."

Florence C. Welch
Chairperson, Justice Committee
Human Relations Commission of
Montgomery County, Maryland

FCW/dm

cc: Bob Nichols



SUPPLEMENTARY COMMENT ON S.1382
THE DEATH PENALTY

As a supplement to the formal statement by the Montgomery County Human Relations Commission of Maryland, I submit these three considerations in regard to the Death Penalty:

* * *

THE DEATH PENALTY LAW ITSELF, WHETHER APPLIED AT THE STATE OR THE FEDERAL LEVEL IS INHERENTLY DISCRIMINATORY. It is impossible to administer the Death Penalty for any crime without accepting the discriminatory premise that the person condemned is totally evil, and therefore deserving of total destruction. For purposes of the majority, the condemned is ruled out of the human race as a totally hopeless minority meriting only extinction.

Likewise the Death Penalty presupposes another "elite" - the judge, or the judges - to be all-knowing and therefore capable of judging subjectively as well as objectively whether the condemned person is totally evil and totally hopeless and therefore deserving of final irrevocable judgment.

Thus the Death Penalty admits of two minorities - one sub-human and one super-human - unequal to each other and basically unequal to members of the majority.

* * *

ALSO, THE DEATH PENALTY LAW DOES NOT FULFILL THE PURPOSE OF GOOD HUMAN LAW. The purpose of good law is to build, not to destroy - to preserve the human race - to enable all people to live together harmoniously - to promote peaceful human relationships, not to sever irrevocably all human relationships for certain persons. Good laws are based on equality, and their direction is positive.

1. The Death Penalty does not rehabilitate the criminal. It de-habilitates by removing him from our physical environs.
2. It does not in the long run enhance our national security. In fact it may well promote more violence by brutalizing society and as in the case of terrorism may set off a Kamikaze reaction escalating to war. Or it may temporarily bury a problem only to have it emerge later still unsolved and even more complex. There have never been such easy, instant solutions to human problems, for all individuals including criminals are interrelated, and interact down through the ages.
3. The Death Penalty corrupts a civilized society because it involves the total society in the negative act of Killing. It tends to inure society to the pain and lone-ness of others.

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The Death Penalty
Page 2

4. It is unjust in that it punishes the family of the executed criminal, and punishes other innocent people who have humane feelings toward the condemned.

5. It is also unjust if its aim is to punish one man in order to deter others. It is unjust if its aim is to deter even one man (the convicted Killer) from committing another Killing inasmuch as no person can with certitude predict the future.

6. It encourages a base act of retaliation, furthermore placing an approval upon retaliation under the euphemistic term retribution. And even if we accept the concept of retaliation or retribution, how can we ever measure it? No two eyes or teeth or deaths are alike.

Perhaps one reason why we are having so much trouble with this Death Penalty law is that we are attempting to measure what we have not the ability to measure. How can we be sure the bi-furcated trial is sufficient as compared with a tri-furcated trial? To what degree do collaborators in a murder aid and abet? What are the fine distinctions between 1st and 2nd degree murders and manslaughter? How much do certain factors aggravate and others mitigate? Might a murder be more heinous in the case of a beggar child than in the case of a law enforcement officer? Might a prisoner sentenced to life imprisonment and in solitary confinement have more understandable inclination to Kill than a free man surrounded by a loving family; and how does one justify differentiation by situation; or doesn't the press of circumstances figure prominently? * * *

THIRD AND LAST CONSIDERATION HAS TO DO NOT WITH THE MORALITY OR IMMORALITY OF THE DEATH PENALTY (although the mores of the U.S. are still a Kind of legislative history and the major churches have spoken out against the Death Penalty). ON SECULAR GROUNDS ALONE, THE DEATH PENALTY IS INADVISABLE BECAUSE IT UNDERMINES THE VERY BEDROCK OF OUR AMERICAN GOVERNMENT.

Whether the crime be treason or hijacking, espionage or counterespionage or even the assassination of a revered leader, the Death Penalty is a greater threat than the initial crime because the Death Penalty itself is a national crime. We have a Bill of Rights; and we are not at war or even in a state of siege. The call to arrest or incapacitate a murderer hardly requires the permanent extinction of that one person by the corporate state. There is a gross imbalance of power here (the whole nation against one man), and this unbalanced reaction is over-reaction. There certainly are less dramatic and in the long run more acceptable alternatives to the Death Penalty.

Death Penalty
Page 3

To sweep away all the basic Constitutional rights of a citizen forever is the absolute authoritarian act of a dictatorship, which places the State above the individual. To legalize the Death Penalty is to relegate to the State unlimited control over a subject with no opportunity of reprieve after the act, no leeway for error by the sovereign State. Certainly not every member of the national jury, not every citizen completely sanctions the Death Penalty, so even in the necessarily limited practical situation we are left with one person or one group of persons' preempting the role of the total aggregate of the citizenry to pronounce a sentence that even that total aggregation has no basic right to pronounce. The right to live, to pursue a happy life, is a right for which our forefathers fought. Even the deviates of a nation have an equal right to live. The right to live is a right by nature, beyond the province of another human being to grant or to deny, beyond the natural jurisdiction of the State. Accordingly, the Death Penalty is un-natural, un-Constitutional, and un-American. It allows the State to rise above the individual; it allows some people to reign "more equal" than others. It is the ultimate in aggression. It is alarmingly Totalitarian.

No wonder that legislators are uneasy with it.

Florence C. Welch

Florence C. Welch
Chairperson, Justice Committee
Montgomery County Human Relations
Commission

May 11, 1978

National Committee To Reopen The Rosenberg Case
853 Broadway, Room 1120, New York, N.Y. 10003
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STATEMENT OF N.C.R.R.C. May 12, 1978

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 Rev. Philip Zwerling

The National Committee to Reopen the Rosenberg Case appreciates this opportunity to record its firm opposition to any attempted res-toration of the death penalty, and to register its repudiation of cap-ital punishment. It was a tragic effect of capital punishment which resulted in the establishment of our committee. To obviate the need for committees such as ours, we look forward to the abolition of cap-ital punishment and to the restoration of the integrity of American judicial processes.

We are opposed to capital punishment for many reasons, but this statement will deal with our primary concern, "the possibility of irreversible error". Wrongly-imprisoned people can be released, but wrongly-executed people can never be restored to life!

Accused of being witches, many were executed by the Commonwealth of Massachusetts in the 1690s, in the hysterical atmosphere of the Salem Witch Hunts. It was too late to right the wrongs when sanity returned to the community. Only last August, fifty years after the executions of Sacco and Vanzetti, the State of Massachusetts admitted error; wrongful executions; just fifty years too late!

On June 19, 1978, 25 years will have passed since the electro-cutions of Julius and Ethel Rosenberg. From the moment of their executions, no, months before the executions, evidence of massive fraud and perjury of the chief prosecution witnesses began to mount. When the Second Circuit Court took note of "wholly reprehensible" prosecution conduct, there was still time to save the Rosenbergs' lives, if the Supreme Court had but listened to the pleas of Judges Learned Hand and Jerome Frank and granted certiorari. However, by



the time the courts recognized, after the Supreme Court's Gruenwald decision, that the Rosenberg-Sobell trial had been marred by the prejudicial and unlawful questioning by prosecutor Irving Saypol and Judge Irving R. Kaufman, it was many years too late.

Consider this: Judge Kaufman had ordered the executions with the "justification" that the Rosenbergs had stolen THE secret of the atom bomb and transferred it to the Soviet Union, and they were thereby responsible for the war in Korea and future world war three. When top atomic scientists proved that what had been described as "the secret of the atom bomb" was worthless, a hoax, a caricature, and the government admitted this in the federal courthouse in New York, it was much too late to restore the Rosenbergs to life. Furthermore, it denied Morton Sobell the new trial which would prove his innocence and the innocence of the Rosenbergs. It would have taken an unusually courageous court to order for Sobell the new trial required by conscience and by law, when such trial would confirm for the entire watching world that their pleas to spare the Rosenbergs had been more than justified, and that our refusal to look amounted to legal murder!

As in the case of Sacco and Vanzetti, the Rosenberg case shows how capital punishment may be followed by "cover-up", degrading the entire judicial system. It explains why honorable Supreme Court Justices Douglas and Frankfurter and Black protested the executions so passionately, and why the Supreme Court majority would close its eyes and its ears, refusing to review "The Case of the Generation". The very day of the executions, Justice Black voiced his bitter protest: "This court has never reviewed this record and has never affirmed the fairness of the trial below.....There will always be doubts."

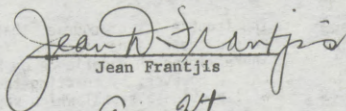
To protect the "cover-up", a U. S. President, Dwight Eisenhower, had to lie to protesting dignitaries in denying clemency, falsely claiming that all the courts had affirmed the fairness and appropriateness of the death sentences. And, as evidence accumulated of prosecution forgery, perjury, and fraud, decent judges had to sacrifice their integrity, denying their principles, to protect their colleagues' cover-up!

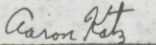
Fortunately, this country is blessed with a system of checks and balances. There is a Senate Judiciary Committee which has the authority to look into this cover-up, and to help with necessary legislation to restore the integrity of our judicial processes. Over one hundred law professors, led by Professor Vern Countryman of Harvard University Law School, have called upon the Senate and House Judiciary Committees to examine the prosecutorial role of Judge Kaufman in the trial, the sentences, and the cover-up resulting from this case of capital punishment.

The National Committee to Reopen the Rosenberg Case urges your committee, in considering the question of capital punishment, to carefully examine the Rosenberg case and its aftermath. We are confident that such examination will prove the desirability of abolition. It will also demonstrate the need to reopen the Rosenberg case and to establish the truth of the innocence of the Rosenbergs and Morton Sobell.

We should welcome the opportunity to testify before your committee and to answer any questions which you might have.

Respectfully submitted,


Jean Frantjic


Aaron Katz



NATIONAL COUNCIL ON CRIME AND DELINQUENCY

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May 17, 1978

Senator James Abourezk, Chairman
Subcommittee on Administrative
Practice and Procedure
162 Russell Senate Office Building
Washington, DC 20510

Dear Senator Abourezk:

This is in response to your cordial letter of May 8th in which you invited comments on the proposed reinstatement of the death penalty for certain federal crimes (S.1382).

The National Council on Crime and Delinquency is opposed to capital punishment for any crime. Our reasons are best spelled out in the enclosed policy statement.

Although the policy statement speaks for itself, I'd like to add a personal note. I believe the nation to be so tired of crime, so angry and frustrated, that it now wants the most stringent kind of action necessary to control crime. It would even countenance putting people to death in order to achieve that goal.

The trouble is, of course, that capital punishment will not reduce those kinds of crimes for which it is to be the penalty. There is enough experience on hand to show that this is the case. However, by enacting the capital punishment law, we will provide a signal which says that this country is ready for a period of unmitigated repression. We can then expect to see many harsh reactionary measures pushed through under the guise of crime control. This would be reversing a long tradition of rational development in the area of criminal justice. It would be a most pernicious development and I would hope that the Subcommittee on Administrative Practice and Procedure acts to prevent the reinstatement of capital punishment for any crime.

With kindest regards,

Sincerely,

Milton G. Rector
MILTON G. RECTOR
President

MGR:bb
cc: K. Harris

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Policy Statement on Capital Punishment

BOARD OF TRUSTEES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY

FOLLOWING is the text of a resolution adopted by the Council's Board of Trustees at its meeting on April 22, 1963:

"Whereas the death penalty is not a unique deterrent, and

"Whereas many who are executed are persons who have limited intellect and are mentally ill, their crimes being impulsive, not planned, and hence committed without thought of the penalty, and

"Whereas the fallibility of human beings and the legal process has resulted and may again result in the conviction of innocent persons, and their execution so long as the death penalty is used, and

"Whereas sentences should not be based on vengeance,

"Therefore be it resolved that the Board of Trustees of the National

Council on Crime and Delinquency condemns the use of the death penalty and urges its discontinuance and abolition in states in which it still exists."

Supporting Statement

DETERRENCE

Is the death penalty a unique deterrent? Where the death penalty has been abolished, is a sentence of life imprisonment an equally effective deterrent?

All available statistical evidence shows that the death penalty is *not* a unique deterrent. In states which have had both the death penalty at one time and abolition at another, a comparison of the two periods reveals no reduction in murders during the death penalty period. Comparison of murder rates in two culturally similar

states, one having the death penalty and the other not, again shows that the death penalty has no deterrent effect.

Conceding that the statistics do not reflect a deterrent effect, some law enforcement and prosecution advocates of the death penalty maintain that many criminals—gangsters, for example—avoid carrying loaded guns because they are well aware of the death penalty for murder. The facts are that many gang murders are committed despite the death penalty, that few of these murders are solved, and that a gang murder rarely results in the death penalty. Those who receive the death penalty are rarely professional killers or confirmed criminals. With rare exceptions they are persons of low social status, predominantly members of minority groups, and often mentally retarded or defective although deemed legally sane. Their crimes are impulsive, rather than planned—another factor bearing on the question of deterrence.

Writing of the 150 men and one woman he had escorted to the electric chair, Warden Lawes said: "In one respect they were all alike. All were poor, and most of them friendless."¹ In a study of 2,700 murders, Morris found that only thirty-seven were planned for economic, political, or other considered ends, such as vengeance or relief from suffering. Most were the spontaneous product of quarrels.²

Furthermore, there are recorded instances of murders committed because the murderer wanted to be executed. After considering such cases, the Spe-

cial Commission in Massachusetts concluded:

Against the possibility that the death penalty may in some exceptional case deter some potential murderer who would not be deterred by a sentence of life imprisonment, there must, then, be set the evidence that people do occasionally kill as an indirect means of committing suicide. It appears that in the United States, or at least in New England, both are infrequent, and since there is no appreciable difference in the rates of criminal homicide in comparable capital and non-capital punishment states, the one factor must offset the other.³

MURDERERS ON PAROLE

Opponents of abolition sometimes argue that the alternative, a life term, does not necessarily mean imprisonment for life and therefore results in the release of dangerous murderers. The fact is that the law-abiding record of murderers on parole is better than that of, for example, robbers on parole. It is extremely rare for a paroled murderer to commit another homicide. One study of seventy-eight prisoners in New York who had had their sentences reduced by clemency between 1943 and 1959 found that, of all classes of offenders in the group, "murderers are much the best risk. Only one of the twenty-three murderers on the list had a parole violation; he missed a date with a parole officer."⁴ Between 1950 and 1959, 357

¹ LAWES, TWENTY-THOUSAND YEARS IN SING SING 302 (1932).

² MORRIS, HOMICIDE: AN APPROACH TO THE PROBLEM OF CRIME (1955).

³ REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES 42-43 (1958). The Commission, like practically all other bodies of the kind which have studied thoroughly the matter of the death penalty, recommended abolition.

⁴ Samuels, *Parole—The Issue and the Promise*, New York Times Magazine, Sept. 18, 1960.

convicted murderers were paroled in New York State. None committed another homicide. In 1960 Frederick C. Wood, paroled after serving seventeen years, committed a double killing. (Wood made it clear that he wanted to die and opposed efforts at clemency on his behalf.)

Murder in Michigan is punishable by life imprisonment without eligibility for parole unless the sentence is commuted. Between 1937 and 1961, 175 men were released by commutation of sentence. Of these, none committed another homicide, and only four were returned for committing other offenses.⁵ In California, 342 men were paroled from first-degree murder commitments between 1945 and 1954. Up to June 30, 1956, thirty-seven (10.8 per cent) had violated their parole, but in only nine cases (2.6 per cent) did the violation consist of a new felony. The felonies were robbery (2), lewd acts with children (2), second degree murder (1), assault to murder (1), sex perversion (1), abortion (1), and narcotics violation (1). The parole record of convicted murderers is better than the record of almost every other category of offender.⁶

EXECUTION OF INNOCENT PERSONS

One of the gravest charges against the death penalty is that its use results inevitably in execution of the innocent. The process of accusation and trial is unfortunately—but inevitably, since it is administered by human beings—not infallible. Execution of the innocent is well document-

ed. Perhaps the most frequently cited material is Edwin M. Borchard's *Convicting the Innocent*. Of the sixty-five cases described, twenty-nine involved murder charges and the conviction of innocent men. A more recent study, similar to Borchard's, is *Not Guilty*, by Judge Jerome Frank and Barbara Frank. Of the thirty-six persons whose wrongful convictions are narrated there, several came within a hair's-breadth of execution. These are the cases in which the innocence of the convicted person was later conclusively established. What of those defendants about whose guilt doubt is raised but innocence cannot be established? Many such persons are executed, and almost invariably execution puts an end to efforts to establish innocence. Often, in the general run of cases, years are required to establish innocence; in capital cases, execution is rarely delayed more than a year following sentence. It has been estimated that 10 per cent of the persons in several groups studied who were executed or imprisoned for life were later found to be innocent.⁷ Errors that occur in life imprisonment cases are equally likely to occur in death sentence cases.⁸

Erle Stanley Gardner's *Court of Last Resort* demonstrates that once a person is convicted, it becomes extremely difficult for him to obtain his freedom. At that point the test becomes not a matter of reasonable doubt, enough to avert conviction on the original trial, but rather the establishment of innocence. Another study describes the case of a man convicted of murder and (because the state had abolished capital punish-

⁵ NCCD, MICHIGAN SENTENCING AND PENAL LAWS 29 (1961).

⁶ California Assembly, Interim Committee Report Vol. 20, No. 3, *Problems of the Death Penalty and Its Administration in California* 12 (1957).

⁷ Palmer, *A Study of Murder* 21 (1960).

⁸ Poliak, *The Errors of Justice*, Annals, November 1952, p. 115.

ment) sentenced to life imprisonment. It took twenty years to obtain his release through executive clemency on the grounds of innocence. Cited are twelve other cases of prisoners released for innocence, including seven who served nine years or more and three who served more than twenty years before release.⁹ The Los Angeles Public Defender's Office has "literally dozens of cases of men who, but for the accident of their happening to discover some piece of evidence, would probably have ended up on death row."¹⁰

DISCRIMINATORY USE OF DEATH PENALTY

It would generally be granted that disparity based on factors other than the characteristics of the defendant and the nature of his crime is unequal justice, contrary to the spirit and letter of the law. Such discrimination operates in the application of the death penalty.

From 1930 to 1961, 3,766 persons were executed in the United States. Of these, 1,695 (45 per cent) were whites and 2,030 (54 per cent) were Negroes, who constitute only 10.5 per cent of the population. The presumption is that bias operates in this aspect of criminal law administration as it does in others. In refutation it has been suggested that Negroes actually commit an equally disproportionate number of capital crimes, and the arrest figures of the Federal Bureau of Investigation are cited to support this correlation. But these are figures of arrest, not of crimes committed—and

numerous studies give evidence of bias against Negroes in liability to be arrested and to be subjected to related police lawlessness.

Negroes are more liable to be suspected of crimes than are whites. They are also more liable to be arrested. If the perpetrator of a crime is known to be a Negro the police may arrest all Negroes who were near the scene—a procedure they would rarely dare to follow with whites. After arrest Negroes are less likely to secure bail, and so are more liable to be counted in jail statistics. They are more liable than whites to be indicted and less likely to have their cases *not pressed* or otherwise dismissed. If tried, Negroes are more likely to be convicted. If convicted they are less likely to be given probation. For this reason they are more likely to be included in the count of prisoners. Negroes are also more liable than whites to be kept in prison for the full term of their commitment and correspondingly less likely to be paroled.¹¹

Of the sixty-one persons executed for rape in Georgia in the 1930-61 period, fifty-eight were Negroes and three were whites. The presumption is very strong that the disproportion is attributable entirely or almost entirely to prejudice and not to disproportionately greater criminality. In New York in the same period the figures show that eighty-nine Negroes

⁹ HOUTS, FROM ARREST TO RELEASE ch. 14 (1958).

¹⁰ Blease, *Abolition of the Death Penalty in California*, 19 LAW. GUILD REV. 58 (1959).

¹¹ TAFT, CRIMINOLOGY, A CULTURAL INTERPRETATION 95 (1950). The increased liability of Negroes to arrest is noted in WARNER & LUNT, SOCIAL LIFE OF A MODERN COMMUNITY 374 (1941). Their increased liability to the third degree and other police lawlessness is documented in AMERICAN JEWISH CONGRESS & NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CIVIL RIGHTS IN THE UNITED STATES IN 1949. 5 U.S. COMMISSION ON CIVIL RIGHTS, JUSTICE 109 (1961), finds that Negroes are the victims of police brutality far more, proportionately, than any other group in American society.

and 231 whites were executed for murder. But the data require this further observation: in New York the white group includes Puerto Ricans, who are subject to discrimination of much the same kind as Negroes. During the five-year period of November 27, 1957 to November 26, 1962, fifty persons, of whom twenty-nine were Negroes and eleven were Puerto Ricans, were sentenced to death in New York; of this number eleven were executed, all of them Negro and Puerto Rican.¹² Accordingly, the presumption that New York selectively executes Puerto Ricans and Negroes for murder is as great as that Georgia selectively executes Negroes for rape. And the presumption also exists that the national statistics indicate racially biased application of the death penalty.

CONCERN FOR THE VICTIM

It is argued that to abolish the death penalty is to show no concern for the victim. But to execute the murderer is no help to the victim. In the long run, the public is better protected by an ameliorative correctional system than by a punitive one.

On this point, the Massachusetts Commission cited above may be quoted:

The Commission is persuaded that the social usefulness of capital punishment is insignificant and is far outweighed by its considerable social damage. There is here no question of being either soft or tough

with murderers. It is easy to understand the force of human emotions which causes an individual who has had a member of his family, or a close personal friend, murdered, to feel like taking the law into his own hands and killing the murderer. But killing the killer does not restore the victim's life, nor prevent another killing. Such an act would be vengeance which, however understandably motivated, is nevertheless clearly and wisely forbidden by public policy. Yet it should be explicitly recognized that vengeance, pure and simple, may often be the unspoken, unadmitted, and unrecognized motive behind the rationalization of deterrence. Vengeance is an emotional spree that is too harmful for us to afford in a civilized community.¹³

Following adoption of the abolition resolution by the Board of Trustees the NCCD membership, at the business meeting held on June 10, 1963, at the Tenth Annual National Institute on Crime and Delinquency, approved the following resolution in favor of abolishing capital punishment:

"Whereas the death penalty is the antithesis of the rehabilitative orientation of modern scientific penology, and

"Whereas it has been demonstrated throughout history that the death penalty has not been a deterrent to crime,

"Be it resolved that the National Council on Crime and Delinquency recommends the abolition of the death penalty in all jurisdictions."

¹² Statement of Urban League of Westchester County, Inc., to the Temporary Commission on Revision of the Penal Law and Criminal Code, 1962.

¹³ *Op. cit. supra* note 3, at 43-44.

Community and Crime

A STATEMENT OF THE COMMITTEE ON SOCIAL DEVELOPMENT AND WORLD PEACE

FEBRUARY 15, 1978 / UNITED STATES CATHOLIC CONFERENCE

[The following is that portion of the Statement on Community and Crime which concerns capital punishment.]

C. Capital Punishment

44. The use of the death penalty involves deep moral and religious questions as well as political and legal issues. In 1974, out of a commitment to the value and dignity of human life, the Catholic bishops of the United States declared their opposition to capital punishment.¹⁶ We continue to support this position, in the belief that a return to the use of the death penalty can only lead to the further erosion of respect for life in our society.

45. Violent crime in our society is a serious matter which should not be ignored. We do not challenge society's right to punish the serious and violent offender, nor do we wish to debate the merits of the arguments concerning this right. Past history, however, shows that the death penalty in its application has been discriminatory with respect to the disadvantaged, the indigent and the socially impoverished. Furthermore, recent data from corrections resources¹⁷ definitely question the effectiveness of the death penalty as a deterrent to crime.

46. We are deeply troubled by the legislative efforts being undertaken under the guise of humanitarian concern to permit execution by lethal

injection. Such a practice merely seeks to conceal the reality of cruel and unusual punishment. We find this practice unacceptable.

47. The critical question for the Christian is how we can best foster respect for life, preserve the dignity of the human person and manifest the redemptive message of Christ. We do not believe that more deaths is the response to the question. We therefore have to seek methods of dealing with violent crime which are more consistent with the Gospel's vision of respect for life and Christ's message of God's healing love. In the sight of God, correction of the offender has to take preference over punishment, for the Lord came to save and not to condemn.

**The
Episcopal
Diocese
of Utah**

May 12, 1978

MAY 18 1978

The Honorable James Abourezk
162 Russell
Senate Office Bldg.
Washington, D. C. 20510

Dear Senator Abourezk:

I understand the Senate Judiciary Committee is considering Senate Bill No. 1382 with regard to "reinstating Capital Punishment for Certain Federal Crimes".

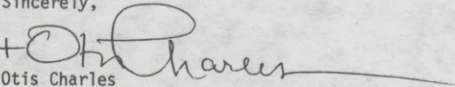
A little over a year ago the Utah community was faced with the question of reinstituting the death penalty. Those of us who opposed the execution of Gary Gilmore did so on the basis that capital punishment exercised a deadening effect upon the communities sensitivity to the value of life; contributed to violence rather than reducing violence; and could not be demonstrated as an effective deterrent to heinous and violent crime.

At the entrance to my office is a picture that appeared across the front page of the Salt Lake Tribune of the Dean of St. Mark's Cathedral, now the Episcopal Bishop of Minnesota. He is speaking at a rally against the death penalty. Behind him are emblazoned the words "No Executions, Abolish the Death Penalty".

If, in our development as a humane society, capital punishment is to be abandoned in the several states it must certainly be abandoned by the Federal Government. I urge the Judiciary Committee to reject the use of the death penalty under any circumstances whatsoever.

Enclosed is a copy of a sermon which I preached in St. Mark's Cathedral on January 16, 1977 after long and careful consideration. I offer it, together with this letter as my testimony for the Congressional Record.

Sincerely,

+ 
Otis Charles
Bishop of Utah

231 East First South
Salt Lake City,
Utah 84111
Telephone
(801) 363-7022

OC/d1

Sermon at St. Mark's Cathedral Church by the Rt. Rev. Otis Charles on Sunday,
January 16, 1977

God be in our minds and in our understanding;

God be in our hearts and in our believing;

God be in our mouths and in our speaking.

Amen.

I want to talk about the taking of life and of faith and of conversion.

We find ourselves about to be part of the experience that once again introduces into the midst of our life use of the death penalty as a means of correcting, or attempting to correct, deviant behavior. It is impossible to approach this issue without stirring deep emotion, anger and hostility. Simply talking about capital punishment seems to generate a kind of violence.

The decision of two General Conventions that the death penalty is not acceptable, cannot be accepted, and should not be participated in, reiterated by the Presiding Bishop and the Bishops of the Province of the Pacific, has seemed to some outrageous.

I want to speak this morning of the gospel good news of Jesus Christ. I want to speak of that which we are called to be.

One of the joys we share in the Church, in this particular part of the Church, is that the scripture readings are given to us week by week. They are not chosen because of events happening around us. Yet the propers and the prayers and the usual Sunday things we do become an illumination of the events in which we find ourselves involved. So it is today. The scripture is given us. The prayers are set before us. They speak to the depth of our being in terms of our vocation as Christians and of our involvement in the awful moment that is to be.

Also by happenstance we are baptizing today. The act of baptism is intended to set forth who we are and what we are about. It is our initiation into God's plan for us. God has called us to be the revelation of his word and his presence.

Is Jesus the revelation of God? Then we are the revelation of God.

It is the Christian's task day in day out, from the time of our baptism to the time we enter into the fullness of the Kingdom, to learn the meaning of this calling.

This morning we pray that we may be illuminated by Word and Sacraments and shine with the radiance of Christ. Why? In order that in this world of dis-order, in this world of confusion and darkness we may be light.

Before saying another word, I want to make my own public confession. I find myself standing here speaking at the eleventh hour when what I say will have no effect on the events moving inexorably onward. I hope in the long run they will make a difference, but they should have been spoken months ago.

I have been silent. Not only silent, but when asked what does the Church teach concerning capital punishment I said, "well in the light of the supreme court decision I think we will have to reconsider the whole matter. Obviously with the violence about us something must be done".

At Christmas a local reporter asked me to identify the significant issues to be faced in 1977. I spoke of the Prayer Book and I spoke of women's ordination but I never thought of the death penalty. I never thought of capital punishment. Indeed I did not think of it because my prayers, my study, the instruments through which we are drawn into the Holy Spirit, illumined and come to reflect the Holy Spirit, had been superseded by other concerns. My sensitivities were blunted. I forgot even the simple administrative teachings concerning capital punishment

in the journals of General Convention. I also forgot the word of the Lord in Holy Scripture and I was not a teacher and I was not a discernor of the Truth. I would not be standing here today saying these things if it were not for others who continued to say "what are you going to do? This cannot happen!"

By the gift of God this past week I was at the Church Divinity School of the Pacific with the bishops of the Province for five days of continuing education. There was time to spend in the library and I began to recover what should have been in my heart and mind all along. Then in the midst of the week a reminder came from the Presiding Bishop. The Church had spoken on the issue of capital punishment through General Convention in 1958 and again in 1969. Bishop Allin wanted me to know I was free to speak that word of truth in his name: No executions. No capital punishment. No death penalty. Slowly I began to understand.

We approach capital punishment as human beings and as converted, baptized people.

From the human point of view the words of Micah the Prophet have had different meaning at different times. What is required of you? To love mercy. To do justice. To walk humbly with your God. At the risk of being considered a humanist I will say there is a continuing evolution in personal and community values. Our understanding of justice is developmental. We do change. We do hear the words justice and mercy with deeper awareness. There is improvement.

There was a time when we lived quite comfortably with slavery. A time when the loft in the back of the church was reserved not for the choir but for people of another color; people considered outside the community. A time when we denied baptism, salvation and redemption to a person because of slave status.

And there was also a time when women had no place in the midst of the congregation.

Time was when individual human beings were deprived of their lives for reasons that seem incredible to us now. Adulterers, witchcraft, heresy, forgery, and robbery. We are more humane than we once were. Despite our recidivism we have developed and that development has taken place because of a basic inner understanding in the heart of every person that life is holy.

The violence of our response to the hideous crimes that we are trying to punish through capital punishment is testimony of this deep rooted reverence for life. We hate the taking of life. we abhor the taking of life, we act out our hatred and our violence.

Albert Schweitzer said "the first spiritual act of every human being is reverence for life".

Reverence for life has led us to the awareness that when we intentionally take a life, for whatever cause, we cut at the very roots of all life. By taking life - even the apparently just taking of a life - we share in the disordering of life which is both the cause and the result of the Fall, of our alienation from one another and from God, and of our fear. The taking of life dis-orders. We human beings are intended to share with God in the ordering of creation.

These past ten days my heart has also been touched with the reverence for life in other situations. I can no longer quietly assume abortion is right and just. I do not know where this awareness will lead me. There has been no time to move into the depth of that question but it must be a growing concern because of our responsibility to St. Mark's Hospital. There is also the incredibly complex arena of medical ethics.

In all these approaches to life: abortion, medical ethics, capital punishment - there are so many considerations that moral theologians give entire lifetimes to developing adequate responses. All we can try to do today is attempt to understand an essential part of ourselves, our reverence for life. If one life is not holy, no life is holy. Therefore I say, the execution of the death penalty tomorrow is wrong. It should not happen. We cannot support it.

In other places and less humane times, the Dean's picture placarded as it is today across the columns of the Salt Lake Tribune would have been cause for death. Remember that in certain countries where capital punishment has been abolished the death penalty still exists for political crimes. The calendar of the Church is liberally sprinkled with the names of martyrs who stood in opposition to the State.

I have spoken of the basic human reverence for life but in our present situation I want to speak to you particularly as the Body of Christ, the Christian Community. In baptism you have accepted a relationship with the Lord. That relationship makes a difference.

The Prophet Isaiah gives us an image of our relationship with the Lord. It is the image marriage, of husband and wife, of two people giving themselves to each other. That relationship makes all the difference. When it is accepted all decisions are different. All actions are different. All considerations are different. The future is different. Isaiah calls us to awareness of the breadth of our relationship with God. "As a young man weds a maiden, so shall the Builder marry you". (Isaiah 62:5). God who is the Builder, raising up humanity into that which he desires us to become, baptizes us to share with him in his building.

This is our particular call as Christians. It must be understood in the actions of Jesus. Jesus has given us a parable which we are to be.

On the night before he died Jesus stooped down and washed his disciples feet. He was in their midst as one who served. He served by caring and he cared to the end. His action spoke silent thoughts: You betray me, I love you. You desert me, I love you. You deny me, I love you. I die. I love you.

Washing the disciples feet is the expression of God's love for us, for each individual, for all of creation. It is an unconditional love. It is a love which knows no difference of person. The rain falls on the just and the unjust alike.

We are called to as Christians to walk with Jesus in this love. Today's Gospel shows the direction of that walk. At Cana of Galilee Jesus turns water into wine. We are the water. We are to be transformed into wine - the wine of God's love, the wine of God's Truth and mercy and justice, the wine of God's life in the midst of his people. This is the whole of our life.

To be a Christian is to live in a state of continual conversation. A state in which you desire and allow the water of your life to be transformed. Converted, you stand with Jesus in love. That's why we say "NO". No to the death penalty. No to taking the life of another.

To stand with Jesus is hard. It is an act of conversion, of allowing the word of the Lord to speak in your heart, of allowing your mind to be changed. You can grow insensitive. You can forget the word. I did. This is the nature of sin. But in his love Jesus calls you back again and again.

The way of love, the way of conversion, the way of Jesus, into which we have been called, is the way of the Cross. All the Saints who go before us testify to

this. When we stand in love of God and allow this love to be proclaimed lives by our actions, by our non-violence, by our unwillingness to participate in that which in the life of the State is against Christ's love we find ourselves the outsiders.

The ultimate living out of God's love can be for us, as it was for Jesus, the cross and death. Jesus said this is the center of our calling: "Greater love has no person than to give up his life for another.

Amen.

CAPITAL PUNISHMENT

Inasmuch, As the individual life is of infinite worth in the sight of Almighty God; and

Whereas, The taking of this 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.

General Convention 1958
Episcopal Church in the United States

Whereas, The General Convention of the Church in 1958 expressed opposition to capital punishment; and

Whereas, The Diocese of Pittsburgh in 1959 expressed similar opposition to capital punishment, and re-affirmed this stand in 1969; therefore, be it

Resolved, That the General Convention re-affirm its opposition to capital punishment; and be it further

Resolved, That this position of the Church be communicated to the proper authorities in all cases of impending capital punishment.

Special General Convention II 1969
Episcopal Church in the United States



NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

SEVENTEEN NINETY BROADWAY •

NEW YORK, N. Y. 10019 • 212-245-2100

May 26, 1978

Honorable James Abourezk,
Chairman, Subcommittee on
Administrative Practice
and Procedure
United States Senate
Committee on the Judiciary
Washington, D. C. 20510

Dear Senator Abourezk:

Thank you for your letter of May 8 requesting our views concerning the reinstitution of capital punishment for certain federal crimes.

The N.A.A.C.P. is opposed to capital punishment under any and all circumstances. We believe it is cruel, unusual, and inhuman punishment; that it does not deter crime, and can only brutalize the people and society which condones it.

We would, therefore, urge your committee to reject any proposals for reinstituting capital punishment for any crime.

With every good wish,

Sincerely,

Michael Meyers
Assistant Director

MM:tg



TESTIMONY ON
S. 1382
PRESENTED TO
THE COMMITTEE ON THE JUDICIARY

Presented by
Lennox S. Hinds, Esq.
National Director,
National Conference of Black Lawyers
and
Associate Professor of Criminal Justice,
Rutgers University

May 25, 1978

Mr. Chairman, I am pleased to have this opportunity to offer the view of the National Conference of Black Lawyers concerning S. 1382, a bill which proposes to "establish rational criteria for the imposition of the sentence of death, and for other purposes." I speak as National Director of the NCBL and as an official spokesperson for that organization. I am also an Associate Professor of Criminal Justice at Rutgers University in New Brunswick, New Jersey. I am not, however, an official spokesperson for Rutgers University.

The fundamental principles upon which the National Conference of Black Lawyers is founded create unique standing for this organization to express its views on this important matter. Providing vigorous defense of black people from those who consciously or otherwise deny them basic human and legal rights and assisting the black community to eliminate the root causes of poverty and powerlessness are primary objectives of this organization. (NCBL Constitution, Statement of Purposes Clause adopted May, 1969 in Washington, D.C.). What more basic a denial of human and legal rights than the imposition of the sentence of death, an irreversible sentence, on an innocent person, can be found? We at the National Conference of Black Lawyers whose daily work takes us into the courts of this country, know that the face on the target of the criminal law is black, brown, red and poor. We know, as all black people know, without reading statistics that our chances of being arrested, convicted, sentenced, imprisoned and executed are disproportionately high. We know that the worst and most dangerous criminals are rarely the ones executed. The death penalty is applied randomly at best and discriminatorily at worst. It violates the constitutional guarantees of the equal protection of the laws because it is imposed almost exclusively against racial minorities, the poor, the uneducated - persons who

are victims of selective prosecution, overt discrimination in the sentencing process and who cannot afford sophisticated legal defenses.

Statistical studies support what our impressions tell us. Since 1930, 3,859 persons have been executed in the United States. Of these, 2,066 or 54% were black. During these years, blacks constituted approximately one-eleventh of the population. For the crime of murder, 3,334 were executed; 1,630 or 49% were black. For rape, a total of 455 have been executed, all but two in the South; 405 or 90% were black. Furthermore, the New York Times of March 6, 1978, reported "Few on 3 Death Rows are There for Killing Blacks". A study currently being conducted by Dr. William J. Bowers of Northeastern University, surveyed the 3 states where death penalty laws survived a Supreme Court challenge in 1976. He found that in the states of Georgia, Florida and Texas, 45% of the Death Row inmates were blacks who killed whites, while only 5% were blacks who killed blacks. 50% were whites who killed whites. There were no white inmates of Death Row who killed blacks. The Times reported that "This study proved that blacks still make up a far greater proportion of the Death Row population than that are represented in the general population, but the real clincher is that death is reserved for those who kill whites."

President Carter's current campaign for Human Rights brings to mind President Truman's State of the Union address to Congress presented on January 7, 1948, in which he declared:

The basic source of our strength is spiritual. For we are a people with a faith. We believe in the dignity of man ... We have a profound devotion to the welfare and rights of the individual as a human being. Our first goal is to secure fully the essential human rights of our citizens... Any denial of human rights is a denial of the basic beliefs of democracy and of our regard for the worth of each individual.

That same year - while anti-lynch, anti-poll tax and Fair Employment Practices legislation remained deadlocked in Congress - these were some of the innumerable violations of the human rights of Black Americans:

Macon, Georgia - February: After a one-day trial, an all-white jury found Mrs. Rosa Lee Ingram, a Negro woman, and her two sons, 17 and 14 years old, guilty of murder in the first degree. The "crime" for which they were sentenced to death had occurred three months earlier when the two Ingram boys had defended their mother against the assault of a white farmer. In the struggle, one of the boys had struck the farmer a fatal blow on the head. The execution of Mrs. Ingram and her sons was stayed, and their sentence was commuted to life imprisonment, following widespread protests.

Trenton, New Jersey - February: After the murder of a white storekeeper, Trenton police rounded up dozens of Negroes, and eventually placed six Negro youths under arrest. Later, the police produced confessions signed by five of the prisoners. At the trial, however, all the accused offered satisfactory alibis; the chief defense witness was unable to identify the suspects; and three of the accused testified they had been doped by the police. The jury returned a verdict of guilty, and all six men were sentenced to be electrocuted. Defense counsel headed by former U.S. Assistant Attorney General O. John Rogge appealed the verdict.

Detroit, Michigan - June: After brutally manhandling Leon Moseley, a 15 year old Negro boy, two policemen shot him to death. The police report of the case stated that Moseley's car did not have lights.

August, Georgia - July: A Negro prisoner, Ike Crawford, died of wounds from a beating inflicted by Richmond County stockade guards. One of his eyes had been gouged out and his skull fractured.

Calhoun Falls, South Carolina - August: After Rev. Archie Ware, a Negro minister, had defied warnings not to vote in the primary elections, he was set upon, clubbed, stabbed and left for dead, while two policemen stood by and watched.

Montgomery County, Georgia - September: D.C. Carter, president of the county branch of the NAACP disregarded threats and voted in the state primary elections. He was beaten with iron bars by a gang of white men, and was ordered at the point of a gun to cease transporting neighbors to the polls.

Lyons, Georgia - November: Robert Mallard, a Negro

farmer, was shot on a lonely road by a group of white men, as he returned with his wife and child and two other Negroes from church services. The testimony of Mrs. Mallard and the other Negroes who witnessed the shooting was disregarded by local authorities.

On September 15, 1949, on being nominated as the Republican candidate for U.S. Senator from New York state, John Foster Dulles declared:

America is what it is because our people have always believed that the most important, the most worthwhile thing in the world is the human being - to develop him in soul and mind and to establish for him a friendly prospering environment, which stimulates him to think fine thoughts and to accomplish fine things.

What follows is a list of some headlines appearing during 1949 in the nation's three leading Negro newspapers - the Afro-American, the Pittsburgh Courier, and the Chicago Defender:

50 OFFICERS WHO BEAT MAN ALMOST TO DEATH FREED
JURY TAKES FIVE MINUTES TO RENDER VERDICT
(Miami, Florida, January 22)

FLORIDIAN FLOGGED BY WHITE MOB
TERROR LEAVES VICTIM'S MIND COMPLETE BLANK
(Orlando, Florida, March 19)

ALA. JUDGE LINKS SHERIFF TO BEATING
TELLS OFFICERS HELPED FLOG 7 MEN
(Chattanooga, Tennessee, April 30)

JUDGE SCORES GEORGIA SHERIFF
WHO GAVE UP PRISONERS TO KLANSMEN
(Trenton, Georgia, May 21)

SLAVERY IN JERSEY
ASBURY PARK PEONAGE COMPLAINT PROBED
(Asbury Park, New Jersey, June 18)

LYNCHED FOR HOGGING ROAD
(Houston, Mississippi, July 16)

S.C. WHITE MAN HELD IN MURDER OF BOY, 10,
WHO CURSED HIM
(Spartansburg, South Carolina, July 19)

WHITE MURDERER OF VET SET FREE
(Irwinton, Georgia, July 23)

MOB BESIEGES NEW OWNERS ...
2,000 IN GROUP

(Chicago, Illinois, August 6)

WHITE SLAYS ANOTHER IN 1948 LYNCH TOWN

(Lyons, Georgia, August 21)

FIVE LYNCH WELL-TO-DO GEORGIA FARMER

(Bainbridge, Georgia, September 10)

FIERY CROSS BURNED IN CAPITAL OF NATION

(Washington, D.C., September 12)

Despite the wholesale terror of the postwar period, the Negro people in the U.S. were unshakably determined to achieve once and for all, no matter what the opposition, equal rights as human beings and first class citizenship as Americans. And the National Conference of Black Lawyers remains unshakably determined today, in 1978, to carry out this very same goal, as we prepare for our Tenth Anniversary Convention in New Orleans, Louisiana, with the theme: A Decade in Defense of Human Rights.

Once again, while we are faced with President Carter's persistent declarations of concern for Human Rights in selected countries abroad, the most flagrant violations against human rights are those against the rights of minority and poor people here in the U.S.. In the six years since the Furman v. Georgia decision was handed down, 35 state legislatures have reinstated the death penalty, redrafted to "satisfy" the majority opinion Supreme Court's objections to the prior laws.

As of April 15, 1978, there are a total of 493 people on Death Row, including 6 women, 235 blacks, 240 whites, 16 Latinos, 2 Native-Americans. This means that out of a non-white population which

constitutes approximately 22% of the general population, 51.3% are represented on Death Row. Almost all have appointed counsel, the surest index to a poor defendant. All 493 Death Row inmates are there for homicide offenses.

The political climate in the United States has not changed significantly since colonial days when the branding, enslaving and corporal punishment of black slaves, Native-Americans and other minorities were both legal and commonplace. The death penalty and the other criminal sanctions are still tools selected by those in power to be applied toward those who are most powerless to resist. What is interesting about S. 1382, and most revealing, is the section which defines the aggravating factors to be considered in determining whether a sentence of death is to be imposed on a defendant. It specifies almost entirely crimes against the state or political crimes, i.e., espionage or treason, knowingly creating a grave risk of substantial danger to the national security, as almost the exclusive considerations. This section talks in the language of war: "... the sentence of death shall not be imposed unless the jury or, if there is no jury, the court further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy." American citizens have not been informed of any threat of war which exists to this country at this time. But it is important to note that Senator McClellan first attempted to introduce

this bill as an amendment to another bill which is currently pending in the House, H.R. 6869, commonly known as "son of S.1", former U.S. Attorney General Mitchell and former President Nixon's legacy to the Federal Criminal Code. It might be recalled that the Mundt-Nixon Bill, "An Act to Protect the United States Against Un-American and Subversive Activities," was drafted with the avowed aim of outlawing the Communist Party in May of 1947. It was a time when Communist leaders were indicted under the Smith Act, called by Professor Zechariah Chafee of the Harvard Law School, "the most drastic restrictions on freedom of speech ever enacted in the United States during peace ... the first Federal peacetime restrictions on speaking and writing by American citizens since the ill-fated Sedition Act of 1798 ", for nothing more than holding certain ideas. It was a time when Acting Assistant Attorney General Raymond P. Whearty announced at a Congressional committee hearing in Washington, D.C., that the FBI was ready to arrest 21,105 Americans for "subversive activity." Let history not repeat itself.

We lawyers may argue in the highest court or in the Senate by every means possible, but it will not be attorneys who shall vanquish this new move toward racism and repression. As in the past, it will be the people of this country, telling those in power clearly and unmistakeably that the legalized death penalty must join chattel slavery and other badges and indicia of racism in the blood-stained pages of the American Experience. To quote the Declaration of

Independence:

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness ...

¹ See National Prisoner Statistics (1969)

² Capital Punishment is cruel and unusual in the constitutional sense or denies the equal protection of the laws if it can be established that it is imposed and executed in a manner that discriminates against blacks or other racial minorities or the poor in violation of the Eighth and Fourteenth Amendments. The Furman court divided on this common ground. Justices Douglas, Marshall and Stewart based their objections to the death penalty on that reasoning. There was no firm consensus on any aspect of the five man majority opinion but certain elements were touched upon by all. The majority agreed that the death penalty is a cruel and unusual punishment because it is imposed under no clear standards; that the Eighth and Fourteenth Amendments should bar legislatures from imposing sanctions which as administered serve no valid social purpose; and that the death penalty is unpredictably used.

All members of the Court with the exception of Justice Rehnquist personally opposed capital punishment.

The Deterrent Effect of Capital Punishment: An Assessment of the Estimates

LAWRENCE R. KLEIN, BRIAN FORST,
and VICTOR FILATOV

While the very thought of death as a legal penalty may be repugnant to many people, it generally seems to be tolerated under circumstances in which a sufficiently large number of innocent lives are spared. There has been little or no objection, for example, to the killing of persons caught in the act of hijacking airplanes. This is not precisely the same as the execution of a convicted murderer, but it may suggest nonetheless that most people might prefer capital punishment if it were known that executions deterred a sufficiently large number of homicides.

Of course, no one can reasonably claim to know exactly how many homicides would, in fact, be prevented as the result of an execution. The existence of data on executions and homicide does, however, provide an opportunity to estimate the average number of homicides that were deterred (or encouraged) by an execution. Such estimates have indeed been made.

Estimates of this sort ordinarily go no further than graduate seminars and scholarly journals. Estimates of the deterrent effect of capital punishment, however, have been introduced as evidence before the United States Supreme Court.¹ Hence, the empirical aspect of the issue has quite literally become a matter of life or death—certainly for death row inmates and quite possibly for potential victims.

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¹*Fowler v. North Carolina*, Case No. 73-7031, U.S. Supreme Court term beginning in October 1974; also five cases (Nos. 74-6257, 75-5394, 75-5491, 75-5706, and 75-5844) in the 1975 term.

It is the primary purpose of this paper to review the prominent analyses that have been done in this area of inquiry. These studies are by no means in agreement. We then address the major methodological issues raised by these studies, with emphasis on a time-series analysis by Isaac Ehrlich that has become a subject of particular controversy. We conclude with an assessment of the suitability of presenting available estimates as a basis for judicial or legislative decisions about capital punishment.

I. A REVIEW OF THE LITERATURE

Theories about the deterrent value of punishment are two centuries old at the very least. A much earlier belief in the deterrence theory may be suggested by the especially public nature of executions and lesser punishments in imperial Rome, medieval Europe, and elsewhere. Cesare Beccaria, who argued against capital punishment in the 18th century in *Dei Delitti Dele Pene*, was nonetheless among the first to reason: "It is better to prevent crimes, than to punish them." Jeremy Bentham argued later in the same century in *The Rationale of Punishment* that punishments should be designed to discourage greater "evil," under the premise that each person behaves according to a "felicific calculus."

A. THE WORK OF THORSTEN SELLIN

A paucity of data and limited computational capabilities prevented empirical tests of the deterrence theory of punishment until the 1950s. The first important statistical investigation of the deterrent effect of punishment, by Thorsten Sellin (1959), focused on the death penalty. Sellin's study is significant also because it provided no support for the deterrence hypothesis.

Sellin's method consisted primarily of comparing homicide rates over time between contiguous states, some with statutes permitting executions, others with laws abolishing capital punishment. He attempted to control for other factors by matching states that were as nearly alike as possible except for the legal status of capital punishment. Sellin concluded:

Within each group of states having similar social and economic conditions and populations, it is impossible to distinguish the abolition state from the others. . . . The inevitable conclusion is that executions have no discernable effect on homicide death rates (p. 34).

Sellin's study has been both praised and criticized for its simplicity. Baldus and Cole (1975) regard it as a study that provides a more reliable basis for drawing inferences about the deterrent effect of capital punishment than a more recent study that was "statistically more sophisticated" (p. 173). The Solicitor General of the United States (Bork *et al.* 1974), on the other hand, has faulted Sellin's work for its failure "to hold constant factors other than the death penalty that might influence the rate of murders" (p. 37).

Sellin's analysis has been criticized also by Peck (1976) for its essentially subjective selection of states under comparison and its failure to separate the deterrent effect of executions on homicides from the reverse effect of changes in homicides on the demand for executions.

B. THE WORK OF ISAAC EHRLICH

Perhaps the strongest attempt at refutation of Sellin's work has come from Isaac Ehrlich, who writes that "the statistical methods used by Sellin and others to infer the nonexistence of the deterrent effect of capital punishment do not provide an acceptable test of such an effect and consequently do not warrant such inferences" (1975a, p. 398). Ehrlich has criticized Sellin's analysis along several lines, including those by the Solicitor General and Peck cited above (Ehrlich 1975a, pp. 411, 415; 1975b, pp. 221-224). Ehrlich adds that Sellin's analysis is flawed by its having ignored the extent of use of capital punishment in those states where it had not been abolished—he criticizes Sellin for drawing strong conclusions from the similarity of homicide rates in retentionist states and adjacent abolitionist states when, in fact, many of Sellin's retentionist states rarely used capital punishment (1975b, pp. 222-223).²

Ehrlich also formulated an elaborate theory, following that of Gary Becker. This theory "emphasizes the interaction between offense and defense—the supply of and the (negative) social demand for murder" (1975a, p. 398). A fundamental element of this analysis is that it "rests on the presumption that offenders respond to incentives" (p. 415). Ehrlich's theory leads eventually to his asserting that the deterrent effect of executions "must be identified empirically through appropriate simultaneous equation estimation techniques" (p. 406).

²This criticism may be too strong, since the perception of the risk of execution in a retentionist state that only rarely uses capital punishment may greatly exceed that in an abolitionist state, even though the relative frequencies of execution are similar in the two states—identically zero in one and nearly zero in the other.

His first empirical test of this theory is based on a regression analysis of aggregate United States data for the individual years 1932-1970.³ This analysis is extraordinary at least insofar as it employs a vast array of manipulations: to create values of missing data, to test alternative time-lag structures, to reduce bias or efficiency loss associated with autoregressive disturbances, to avoid undefined values of the independent variable of central interest, and to test alternative systems of simultaneity.⁴ An end product of this exercise is the statement (Ehrlich 1975a, p. 398):

In fact, the empirical analysis suggests that on the average the tradeoff between the execution of an offender and the lives of potential victims it might have saved was of the order of magnitude of 1 for 8 for the period 1933-67 in the United States.

Ehrlich arrives at this conclusion by way of his "murder supply function:"

$$\frac{Q}{N} = k P_a^{\alpha_1} P_{c/a}^{\alpha_2} P_{e/c}^{\alpha_3} U^{\beta_1} L^{\beta_2} Y_p^{\beta_3} A^{\beta_4} \exp(v_1), \quad (1)$$

where Q/N is the homicide rate, k is a constant, P_a is the probability of apprehension, $P_{c/a}$ is the conditional probability of conviction of murder given apprehension, $P_{e/c}$ is the probability of execution given conviction, U is the unemployment rate of the civilian labor force, L is the labor force participation rate of the adult civilian population, Y_p is an estimate of real per capita income, A is the proportion of the residential population in the age-group 14-24, and v_1 is the disturbance term (pp. 406, 408). He finds data for the construction of each variable in equa-

³A second empirical test reported by Ehrlich (1975b, p. 217) but not yet published is based on two cross-sectional analyses of the United States—one using 1940 state data and the other using 1950 data.

⁴Specifically, values of missing data were produced via auxiliary regressions (Ehrlich 1975a, pp. 409, 412), using both linear and geometric interpolation techniques; alternative time lags were produced under linear and nonlinear distributed lag regressions (p. 408); the coefficient of serial correlation was estimated by way of the Cochrane-Orcutt iterative procedure (p. 410), with associated parameters estimated via Ray Fair's nonlinear three-round estimation procedure (p. 406); the arbitrarily selected number 1 was used to replace the observed value 0 in three instances in which Ehrlich took the logarithm of the probability of execution variable (p. 409); and the conditional probability of execution variable was treated alternatively as predetermined and endogenous (pp. 408, 410). The parameters of primary interest result from his regressing modified first differences of murder rates, in natural logarithms, on corresponding modified first differences of selected variables (p. 410).

tion (1) toward the estimation of α_3 , the elasticity of the murder rate with respect to the conditional probability of execution.

C. ASSESSMENTS OF EHRLICH'S ANALYSIS

Ehrlich's study received considerable attention once it was introduced to the Supreme Court, by the Solicitor General of the United States, as evidence in support of capital punishment (Bork *et al.* 1974, pp. 35-38). It is surely accurate to state that Ehrlich's analysis has become controversial and has been attacked on several different fronts.

Passell and Taylor (1975) were among the first to criticize Ehrlich's regression estimates. They attempted to replicate his findings and were unable to do so up to rounding errors, although they have come close in most cases. They discovered nonetheless that their own estimates of the effect of changes in the execution rate on the homicide rate were quite sensitive to whether the regression equation was log linear or linear

$$\frac{Q}{N} = b_0 + b_1 \cdot P_a + b_2 \cdot P_{c/a} + b_3 \cdot P_{e/c} + \dots \quad (2)$$

as in eq.(1). In particular, they obtained a significant negative relationship between Q/N and $P_{e/c}$ (i.e., the appearance of a deterrent effect of executions on homicides) under Ehrlich's multiplicative form and a positive insignificant relationship under an additive model (pp. 6-8). They reported also that the finding of a deterrent effect did not hold up when the years after 1962 were excluded from the analysis (pp. 5, 21, 22).

A second attempt to replicate Ehrlich's work was reported by Bowers and Pierce (1975). Like Passell and Taylor, they obtained a much stronger appearance of a deterrent effect under the log-linear form than under the linear form (pp. 199-205). Also like Passell and Taylor, they obtained results consistent with the deterrence hypothesis only when data from the latter half of the 1960's were included in the analysis (pp. 197-202). Nor were Bowers and Pierce able to replicate Ehrlich's findings precisely. In addition, Bowers and Pierce faulted Ehrlich for his choice of data sources (pp. 187-189), specifically with respect to his use of FBI rather than Vital Statistics data.

D. CROSS-SECTIONAL ANALYSES

Sellin's study of selected pairs of states and Ehrlich's time-series analysis of aggregate United States data represent two fundamentally different empirical approaches to the testing of the hypothesis that capital punishment deters homicide. Regional effects are explicitly accounted for in Sellin's work and ignored in the time-series analysis. Ehrlich's time-series study, on the other hand, attempts to isolate a pure deterrent effect of capital punishment by controlling explicitly for the effects of other variables, including alternative sanction variables; by accounting for simultaneity among the offensive and defensive aspects of homicide; and by measuring the magnitude of the execution rate, under several alternative constructions. The advantages cited here of each of these studies appear at the same time to be weaknesses of the other.

A recent study by Peter Passell (1975) has attempted to overcome these weaknesses by applying econometric techniques to cross-state data. This general approach provides the potential for a more thoroughly controlled estimate of the effect of changes in executions on homicides not only by way of the existence of large inter-regional variation in several of the included variables, the incorporation of a regional dummy variable, and a corresponding reduction in aggregation bias, but also by way of the opportunity to include a term-of-imprisonment variable, which is not available in time-series. We shall say more about this potentially important substitute sanction for capital punishment in a following section on omitted variables.

Passell tested the deterrence hypothesis using a model similar to those put forward by Becker and Ehrlich.⁵ He reported separate results based on 1950 data for 41 states and 1960 data for 44 states (Passell, p. 66), using both ordinary least squares (OLS) and two-stage least squares (2SLS) estimation techniques (pp. 69-77), for both the linear and log-linear models (pp. 69-73), and using alternative constructions of the execution rate variable (pp. 77-78). Passell found five variables to be related systematically to the homicide offense rate: the homicide conviction rate, the average term of incarceration for convicted murderers, poverty, age, and racial migration. He summarized his findings for the execution rate variable as follows: "Students of capital punishment must look elsewhere for evidence confirming deterrence. We know of

⁵See Becker 1975, pp. 176-179; Ehrlich 1973, pp. 524-543; Ehrlich 1975a, pp. 398-406; and Passell 1975, pp. 64-66.

no reasonable way of interpreting the cross-section data that would lend support to the deterrence hypothesis" (p. 80).⁶

These cross-section results provide a useful complement to the aggregate national time-series analysis. By analogy with econometric analysis in more conventional economic settings, this is a common procedure. We often look at given problems from the point of view of cross-section analysis in econometrics. In the present context, state-to-state variation in homicide rates and execution rates are suggested with a similar or possibly amplified set of other variables, and it is necessary to think through the parametric specification as well as the classification of variables into endogenous and exogenous categories.

Sellin's analysis (1959) is, in effect, a cross-section analysis, but it is not a parametric regression analysis, and it is not multivariate to the degree needed for comparison with the time-series results. Sellin's findings, however, together with Passell's, prompt us to contrast the cross-section and time-series cases.

The failure of these cross-section studies to find a significant negative deterrent effect is similar to discrepancies that have arisen in econometric investigations of consumer spending. In national time-series samples, there is evidence of significant positive association, at the margin, between an index of consumer attitudes and spending on durable goods; but in cross-section samples, with family-to-family variation, this same effect cannot readily be found. This lack of correspondence between the time-series and cross-section findings has always cast some doubt on the validity of the former. It has also been the case that significant time-series effects have not always carried over from sample to extrapolation. There have been serious enough reversals in appraisals of the macro-economy through methods based on time-series that we may be led by analogy to mistrust the policy extrapolation of Ehrlich's time-series results in the absence of cross section as well as other confirmations of his findings.

⁶We find no serious problems with the Passell paper. The analysis appears fairly straightforward, with generally adequate robustness tests. It does not address the potential problem of heteroscedasticity, a not uncommon problem in cross-sectional analyses, and reports only unweighted regression results. This could have distorted the estimated standard errors of the regression coefficients, but ought not to have altered the positive sign for the execution rate variable. We have not attempted to check Passell's calculations, and so cannot attest to their accuracy. Isaac Ehrlich has also analyzed cross-state data and reports having found once again that capital punishment deters murder (1975b, p. 217). We do not explore the differences between Passell's cross-state results and Ehrlich's, prior to the publication of Ehrlich's paper. One cannot help but be puzzled, however, that two apparently similar approaches would yield such strikingly different findings.

II. THE EHRLICH MODEL AND SOME METHODOLOGICAL ISSUES

The deterrence problem examined in Ehrlich's time-series analysis is not strictly an econometric problem, and the methods used are not strictly econometric. There are various analogies to econometrics, but references to the methods of econometrics should not be used in support of the findings, and it should be remarked that the analogy to econometric method is not fully implemented—that being a strong reservation about some of the conclusions that are drawn.

Ehrlich's problem is one of generalized regression. The use of nonexperimental data and the attempt to deal with simultaneity give some superficial resemblances to econometrics. Ehrlich (1975a, p. 399) lays out a model of rational behavior for:

... analysis of the incentive to commit murder and other crimes against the person by explicitly incorporating into the model the uncertainties associated with the prospective punishments for crime.

His theoretical model is much like that used to derive specifications for demand and supply functions in the economic analysis of consumption and production. In that respect, we find his theory strongly contrived, i.e., set up in an essentially imitative way vis à vis the design of economic theory that is used to generate specifications of econometric models. We have doubts about the insight that this approach is likely to bring to an understanding of criminal behavior. There is much to be said for an investigation that links together economic, criminological, and other sociological aspects of behavior, but this is not to suggest that the analysis start from some rational utility analysis of criminal behavior that is designed to look like the standard model of rational utility analysis of economic behavior.

A much more fruitful approach would seem to be the methodology used in the smoking-cancer link studies. These do not attempt to lock the analysis into a utility calculus or some other limited set of specifications. In using such a technique, greater scope could be given to the exploration of effects of other variables, possibly subjective in character, to allow for emotional behavior and other social phenomena.

Apart from all the trappings of a utility theory of the incentive to commit murder, Ehrlich specifies a fairly common aggregative model, with no formal bridge between the microcosmic utility analysis and national supply function. The aspects of this function that resemble econometrics are:

1. Some of the variables are interdependent; the empirical estimates of probabilities of arrest, conviction given arrest, and execution given conviction are assumed to be mutually dependent
2. Other variables are assumed to be exogenous, or independent
3. The stochastic part of the murder supply function is assumed to be serially correlated, following a first-order autoregressive process

Econometric models are generally designed so that they consist of some mutually dependent (endogenous) variables and some independent (exogenous) variables. The equations of such models are usually assumed to be linear in unknown parameters with additive stochastic parts that satisfy a first-order autoregressive process.

This is the substance of the econometrics of the model specification. The economic variables of the model are classified in the exogenous set and contribute nothing to the interdependence of the model that is usually characteristic of econometric systems. An interesting research challenge nowadays is to integrate economic and sociological systems with mutual feedback or interdependence between the sociological (or criminological) variables and the economic variables. Such an approach is lacking in the Ehrlich model; he assumes that economic factors affect criminal behavior but that criminal factors do not affect economic behavior through the economic variables that he has selected. This is certainly a drawback to the generality of his approach.

Given the specification of the single equation—some interdependent variables and autoregressive errors—Ehrlich followed the latest and best econometric practice in estimating the parameters of the equation. These generalized regression methods would be recommended whether the model were an econometric one or not, as long as it had the structure specified above by Ehrlich.

The two-stage least squares method used by Ehrlich takes account of the interdependence aspect, while the serial correlation adjustment takes account of the autoregressive aspect. None of the estimated autoregressive parameters is very large, and some are quite small. In such circumstances, the autoregressive corrections are superfluous and may even lead to poorer estimates if used when they are not needed. This aspect of best econometric practice might well have been avoided in several cases, at least. The two-stage type of estimator is all right for the problem but probably contributes much less to the claimed superiority of Ehrlich's estimates than the reader may be brought to believe.

In fact, the real contribution to the strength of Ehrlich's statistical findings lies in the simple graph of the upsurge of the homicide rate

after 1962, coupled with the fall in the execution rate in the same period. The whole statistical story lies in this simple pairing of these observations and not in the theoretical utility model, the econometric type specification, or the use of best econometric method. Everything else is relatively superficial and dominated by this simple statistical observation.

A. OMITTED VARIABLES

This leaves us with the question: Did the decline and eventual ending of executions during the 1960's cause some portion of the sharp increase in the homicide rate, or would the homicide rate have increased at least as much anyway?

To address this question, we can first acknowledge the obvious, that ending the practice of capital punishment in the 1960's does not constitute a controlled experiment from which one can safely draw conclusions about deterrence by observing only homicides and executions. Factors other than the ending of capital punishment surely affected the homicide rate during this period. Ehrlich's use of explanatory factors other than the execution probability in equation (1) is an explicit recognition of this fact. What may be less obvious is that the omission of factors other than those used by Ehrlich to "control" his analysis may have contributed to his finding a negative relationship between the homicide rate and the execution probability.⁷ Some of the factors omitted by Ehrlich have, in fact, been found previously to affect crime rates.

For example, Ehrlich himself found in an earlier (1973) study that long prison sentences, the conventional alternative to capital punishment, serve as an effective crime deterrent. This factor was omitted from Ehrlich's time-series analysis because of the unavailability of data. To the extent that his previous analysis is correct and to the extent that the length of prison sentences declined during the 1960's, Ehrlich's attributing the increase in homicides to the elimination of capital punishment could be erroneous.

We do find evidence that the actual time served in prison, both for homicides and for other offenses that often result in homicide, did indeed decline in the 1960s. Based on *National Prisoner Statistics*

⁷We are grateful to Isaac Ehrlich and William Landes for reminding us that some of the omitted variables may have worked to understate the estimated deterrent effect of capital punishment. We refer here to the *net* effect of the omission of all other factors on the deterrence estimates.

figures for the 33 states that reported in both 1960 and 1970, we find that 46.8 percent of the prisoners released in 1960 who had been convicted of homicides had served at least 5 years; only 35.8 percent of those released in 1970, imprisoned for the same offenses, had served that long. The computer that printed out a significant negative regression coefficient for Ehrlich's execution variable might not have done so had it known that terms of incarceration for murders became more lenient during the 1960's.

Other factors omitted from Ehrlich's regression model also appear to have contributed to the increase in the homicide rate during this period. One of these is the availability of guns. The contribution of handguns to the murder upsurge of the 1960's has been indicated in a study by Newton and Zimring (1969). Phillips, in addition, has reported that from 1961 to 1970 the rate of murders with firearms increased from 2.5 to 6.1 per 100,000 persons (Phillips 1973). It is likely that increased gun possession may partly follow a relaxation in punishment, but gun possession is sure to have grown during the period for other reasons as well, such as the increased availability of inexpensive foreign models.

The importance of the omitted variables problem may be seen in another way. Crime increased generally during the 1960's. Some of the increase is no doubt due to factors measured by Ehrlich and some to yet other factors. It is sobering to note that while the FBI reported murders and non-negligent manslaughters to have increased by 74 percent from 1960 to 1970, burglaries increased by 142 percent, auto thefts by 183 percent, and larcenies (\$50 and over) by 245 percent. Of these four crime categories, the only one potentially deterrable by capital punishment is the one that showed the most modest gain, even though executions came to a halt by 1967. This suggests to us that the strength of Ehrlich's statistical relationships between executions and homicides depends significantly on changes during this recent decade in variables omitted from the analysis, variables that would explain the increase in crime generally.⁸

⁸That Ehrlich's time series results depend upon the inclusion of the years since 1964 is clearly due to temporal heterogeneity, rather than to the loss of degrees of freedom in excluding the recent years. Ehrlich has reported results that indicate that his deterrence estimates are not weakened by the exclusion of the eight observations, 1933 through 1940 (Ehrlich 1975a, p. 410). He also indicated that the deterrent effect disappears when data from the six years 1964 through 1969 are excluded from the analysis (Ehrlich 1975b, p. 217).

B. NEGATIVE BIAS IN THE EXECUTION MEASURE

Ehrlich indicates in a footnote (1975a, p. 207) that he calculated his execution rate variable, $P_{e/c}$ as

$$P_{e/c} = \frac{E}{\hat{C}} = \frac{E}{Q \cdot P_a \cdot P_{c/a}} \quad (3)$$

where $\hat{C}$ is the estimated number of convictions, Q is the reported number of murders and non-negligent manslaughters, and P_a and $P_{c/a}$ are as defined in equation (1).

The use of Q both as the numerator of the homicide rate and as part of the denominator of the execution rate could have biased Ehrlich's estimate of the regression coefficient for $P_{e/c}$ toward the appearance of a deterrent effect. It is immediately apparent that any errors in the measurement of the true number of homicides could cause Q/N and $P_{e/c}$ to move in opposite directions. Sources of error in Ehrlich's measure of Q , based on FBI homicide statistics, have been thoroughly discussed by Hindelang (1974, pp. 2-5).⁹

What may not be so apparent is the magnitude of this bias, even for small errors in the measurement of homicides. If the homicide rate were in fact totally insensitive to changes in the execution rate, measurement errors even as small as those caused by Ehrlich's having used a homicide series rounded to the nearest 10 murders would have biased his estimate of this key relationship toward a negative unit elasticity.¹⁰ That Ehrlich has estimated elasticities for $P_{e/c}$ considerably nearer to zero than to -1 could be regarded as evidence that the true elasticity is positive, indicating a counterdeterrent effect of capital punishment.

One might suspect that this bias would be diminished under constructions of $P_{e/c}$ that do not use current values of Q directly. In fact, not all of Ehrlich's constructions of $P_{e/c}$ use the immediate values of

⁹For example, some murders and non-negligent manslaughters are never discovered, others are not reported to local authorities as such, local jurisdictions may define these terms differently, and some jurisdictions do not report to the FBI.

¹⁰This can be seen by solving for values of E that force $P_{e/c}$ to be constant, such as the mean value Ehrlich computes for $P_{e/c}$ (which happens to be 0.0259, but any constant will do), and then adding a random disturbance term (distributed normally with mean zero) to Q in both the homicide rate and the execution rate. Under certain conditions worked out by Daniel Nagin (in this volume), the random disturbance terms will cause each k percent increase (or decrease) in $P_{e/c}$ to correspond with a k percent decrease (or increase) in Q/N , giving an elasticity of -1 .

Q .¹¹ To test whether this bias is lessened when the current value of Q is not used directly to form the denominator of P_{elc} , we have tested the effect of adding noise to Q in amounts that average 2 percent of Q , distributed normally, and use these values within the structure of Ehrlich's equation (6), from Table 3 (1975a, p. 410).¹² Equation (6) uses P_{elc} constructed as an endogenous variable, so that current values of Q are not used directly in the estimate here. The result of this exercise is an estimated elasticity of -1.01 for the execution rate variable, which is consistent with our prediction of the previous paragraph.

This is by no means the only source of bias produced by Ehrlich's method of estimating values for P_{elc} . We have found that another source of bias results from his having P_a and P_{cla} comprise part of the denominator of P_{elc} and having them serve also as separate explanatory variables. If these variables were all measured with perfect accuracy, they would be correlated with one another at least to the extent that they are substitute sanctions within the criminal justice system. They will surely be artificially correlated due to measurement errors, under Ehrlich's construction of P_{elc} .¹³

We find that if P_a and P_{cla} were both measured with a mean random error as small as 2 percent, a deterrence elasticity of -0.05 would be produced even if, in fact, no relationship existed between the homicide rate and the conditional execution probability. If Ehrlich's estimates were accurate in every other respect, this bias alone would lead one to conclude that his estimates provide no support to the deterrence hypothesis. While it is often the case that measurement errors bias the regression coefficient toward zero, we have here a situation in which

¹¹Ehrlich has informed us through correspondence that concern about this bias was a primary motivation for these alternative constructions.

¹²This test consisted of using the basic data that produced a replication of equation (6), up to rounding errors; using the values of Q , P_a , and P_{cla} in this data and solving for values of E , for each observation, such that P_{elc} would equal its mean value, .0259; setting E equal to these solved values, a sufficient condition for producing artificially the circumstance of no effect of P_{elc} on Q/N ; adding 2 percent mean noise to Q in both P_{elc} and Q/N to get new values of P_{elc} and Q/N ; forming the endogenous counterpart to these revised values of P_{elc} ; and reestimating equation (6) with this counterpart and the original data for the other variables in the model.

¹³Errors are indeed evident. For example, Ehrlich created artificial values for P_{cla} for the years 1933, 1934, 1935, and 1961, for which data were missing. Errors are indicated also by visual inspection. It is not easy to explain, for instance, how factors other than measurement error could have caused the true probability of conviction given arrest for murder to have increased from 0.258 to 0.496 from 1936 to 1939. In addition, evidence has been presented by Bowers and Pierce (1975) that the FBI's estimates of arrests and convictions are based on nonrandom samples, with response rates that vary considerably over the period 1933 to 1969 (pp. 190-191).

errors in three crucial variables— Q , P_a , and $P_{c/a}$ —all appear to work in such a way as to bias the coefficient of P_{elc} negatively.¹⁴

C. ALTERNATIVE MODELS

A more complete theoretical model specification ought to go in two directions:

1. Imbed the murder decision in a more general model of criminal behavior
2. Integrate the economic and sociological or criminological variables into a more general model of behavior

The criminal who commits murder may also have a propensity to commit other crimes. On the occasion of carrying out a criminal act, the final murder decision may be quite impulsive, but the criminal may weigh the penalty associated with a more serious crime against that associated with a less serious crime. A plausible mode of behavior may be one in which armed robbery will be carried out without murder if at all possible because the penalty, without murder, is less severe; therefore, murder will be committed only in an act of desperation. In such a situation, the murder decision depends not only on penalties associated with homicide but also with other lesser crimes. In this case, we write:

$$Q/N = f(P_a, P_{c/a}, P_{elc}, \dots, q_a, q_{c/a}, \dots)$$

where q_a and $q_{c/a}$ are probabilities of arrest and conviction given arrest associated with other crimes. There may be several such arguments in f .

The model is incomplete not only with respect to other variables affecting the murder decision but also with respect to the behavior of the law enforcement system. The whole point of casting the problem in a simultaneous equations mode is to consider jointly the actions of all the decision makers involved. If Q/N and P_{elc} are to be mutually dependent, the decision of the judicial system (subject to public opinion and many other factors) about the rules for the invocation of the death penalty must be simultaneously modeled. It is plausible to suggest that decisions about P_{elc} depend on the frequency of homicide and many

¹⁴Although we have not explicitly estimated the extent to which small errors in the measurement of P_a and $P_{c/a}$ also bias the elasticities Ehrlich estimates for these variables, due to multicollinearity with P_{elc} , we are led by this analysis to question his estimates of these elasticities, too.

other factors—notably society's ethical and moral values. We might write

$$P_{e/c} = g(Q/N, S, \dots)$$

where S stands for societal values. Other variables, too, enter the g -function, but the whole process is not investigated by Ehrlich.

This means that the use of the two-stage-least-squares method as an estimation procedure might start from quite a different reduced form expression. Many exogenous variables in the system (S , for one) are candidates for inclusion. Without careful investigation, the problem is pretty much open at this stage. Ehrlich could argue, of course, that he has selected a subset of the relevant exogenous variables and consequently has obtained consistent estimates, but that is hardly an adequate stand in a small-sample situation such as the one at hand. There are, undoubtedly, significant small-sample biases associated with omission of relevant exogenous variables from the entire model.

In addition, variables representing other arrest/conviction rates could have been included as endogenous variables. These variables may not be readily measured with decent accuracy, but there is a way around this complication—namely, to introduce frequency of occurrence of other crimes in place of their penalty rates. In the theory of demand in economics, we may use the whole price vector as arguments or develop “mixed demand functions” with own penalties (prices) and other crime rates (quantities) as the arguments. In two-stage estimations for such an enlarged system, the reduced forms should include the specific exogenous variables from the behavioral equations associated with the other crimes.¹⁵ It is quite evident that Ehrlich has only scratched the surface in serious model building and has a long way to go in order to establish his results as definitive.

Economic variables affect crime rates. It makes good sense to include labor force participation, income, and unemployment rate in the equation for Q/N . The same is true of police and other government

¹⁵There is an additional justification for including the rate or frequency of other crimes—doing so is likely to reduce the distortions produced by omitted variables. We have noted earlier that if the factors that caused crime generally to increase during the period on which Ehrlich's deterrence finding depends had been included, the estimated deterrent effect might have been quite different. The rate at which other crimes are committed might serve as a useful proxy for these factors.

expenditures. But do crime rates—the murder rate in particular—have an impact on the economy? Ehrlich assumes that they do not, but we think otherwise. For example, an increase in crime rates might cause a wave of business closures and could thereby increase unemployment rates. There is little doubt that police expenditures are influenced by Q/N . Although, in a purely formal sense, police expenditures for the previous year are used in Ehrlich's model, the exogeneity of such a variable cannot be established by a dating mechanism alone. At the macro level, there are many avenues for establishing relationships between crime rates and the unemployment rate. Crime of all sorts, including homicide, can impede the smooth functioning of the economy and thus affect unemployment or labor force participation.

Students of econometrics ought to learn very early that significant economic conclusions can rarely be drawn from estimates of single equations, much less from single parameters. Partial analysis is all right for giving empirical content to some piece of economic structure, but it is hardly ever adequate to the problem of policy formation. In the present case, where very serious national legal policy is being considered, it would be a travesty of model building to use only part of the necessary analysis to come to strong conclusions about a complete system problem. The problem being considered is serious enough that there is no compelling reason to try to draw a conclusion in a hurry from premature analysis.

In a separate paper critically examining Ehrlich's work, Passell and Taylor (1975) introduce the important distinction between a structural equation and the reduced form of a system. They also show that the relevant coefficient within the single equation is not simply the coefficient of execution given conviction, because the dependent variable, the number of murders, appears also in the denominator of another dependent explanatory variable—namely, the arrest rate. The partial variation of murders, Q , with respect to execution, E , can go either way, i.e., positive or negative—large or small—depending on the joint variation of the arrest rate with the execution rate. That, however, is the whole point of simultaneous equation construction and estimation. It is extremely important to examine covariation between Q and E through the workings of complete system solutions and not through examination of isolated parameters or isolated equations. Ehrlich estimates an unrestricted reduced form regression to cope with this problem, but his reduced form is not derived from complete system construction and is not the appropriate equation through which to examine the total effect of E on Q .

III. THE EMPIRICAL RESULTS

An important issue in the debate over Ehrlich's findings has been the matter of replicability. The degree to which other investigators have been able to reproduce Ehrlich's results has been substantial, but not quite satisfying, in the sense that they have found approximately the same numerical estimates of coefficients, but not exactly the same. The discrepancies cannot be safely attributed to round-off error, the use of different computer programs (for the same estimators), or the use of different hardware. We are happy to report, however, that we can reproduce Ehrlich's main results up to round-off error, using his own data series, which he has kindly made available to one of the present authors. Other investigators have approximated some of his statistical series but have not used identical data, and results with fairly small samples (fewer than 35 observations in the present case) are often sensitive to small numerical changes in data.

For example, Ehrlich's equation (1) (Table 3) compares with our estimate as follows:

$$\begin{aligned}\Delta^*Q/N = & \\ & -3.176 - 1.553\Delta^*\hat{P}_a^o - 0.455\Delta^*\hat{P}_{c/a}^o - 0.039\Delta^*PXQ_1 - 1.336\Delta^*L \\ & -3.238 - 1.537\Delta^*\hat{P}_a^o - 0.457\Delta^*\hat{P}_{c/a}^o - 0.039\Delta^*PXQ_1 - 1.341\Delta^*L \\ & + 0.630\Delta^*A + 1.481\Delta^*Y_p + 0.067\Delta^*U - 0.047\Delta^*T \\ & + 0.633\Delta^*A + 1.481\Delta^*Y_p + 0.067\Delta^*U - 0.047\Delta^*T\end{aligned}$$

The top row of coefficients is taken from Ehrlich's Table 3, while the figures in the bottom row are taken from our computer sheets. The discrepancy in the constant term is associated with a slight difference in the origin for chronological time. The variables have the same meaning as in Ehrlich's article—namely, all are measured as natural logarithms except T and all are modified first differences, i.e., autoregressive transformations of the original variables, measured in logarithmic units. Similar results have been obtained for Ehrlich's equations (2) and (6) as well.

These coefficients are all the same, except for round-off error, as Ehrlich's, but his estimate of the residual variance is high. He reports the square root of this estimate as 0.052, while we calculate it as 0.047. The t -statistics associated with his estimated coefficients should have been correspondingly larger. His arguments about statistical sig-

nificance—not magnitude of effect—are, therefore, weaker than they should be.

We cannot emphasize enough that the fact that we replicated his results in itself gives no support to his conclusions.¹⁶ This replication serves only to ensure that our sensitivity tests are valid. If we did not perform these tests on an accurate replication of Ehrlich's data and methodology, we would have no assurance that the tests were really isolating the effects of specific model perturbations on the findings.

A. TEMPORAL HETEROGENEITY

It was remarked earlier that the major statistical contribution to Ehrlich's results on the strength of the deterrent effect of capital punishment (i.e., execution by implementation of the death sentence) on the occurrence of homicides was the rise in the murder rate since 1962, coupled with the falling off in the implementation of capital punishment. It is possible to argue, in line with Ehrlich's findings, that the former was produced by the latter. But if the death penalty were really a basic deterrent, it should have acted as such in other periods as well, taking into account the whole range of variables being considered. The principal argument against changing the sample to investigate only the period up to 1962 is that valuable statistical observations are lost—not simply the observations that make the case, but observations that contribute in a general way to the overall number of degrees of freedom, which are precious and in short supply for analysis of the problem at hand.

Other investigators, particularly Passell and Taylor, have also made calculations dealing with the possibility that Ehrlich's results would not stand up in sample variations that dealt differently with the period after 1962. It is worthwhile reporting our own, however, since we are closer to a replication of Ehrlich's primary result, having the advantage of working with his own data set. We find that the truncated sample, 1935-1962, leads to a slightly smaller and statistically insignificant coefficient of the crucial execution variable. Our result is for the specification in Ehrlich's equation (6).

¹⁶Ehrlich has regarded previous replications as strong support of the deterrence hypothesis. He writes, for example (1975b, p. 210):

First and foremost, the Bowers and Pierce work, however inadvertently, has lent considerable strength to the case for the deterrent effect of capital punishment, because their application of the theory and econometric methods outlined in my paper over the entire period considered in my analysis produces results quite similar to my own.

This opinion assumes that Ehrlich's theory and empirical methods produce accurate estimates of the deterrence effect, which, of course, begs the basic issue addressed by those who have attempted to replicate his results.

$$\begin{aligned}
\Delta^*Q/N = & -6.891 - 0.358\Delta^*\hat{P}_a^o - 0.304\Delta^*\hat{P}_{c/a}^o - 0.046\Delta^*P\hat{X}Q_1 \\
& (2.089) \quad (0.424) \quad (0.084) \quad (0.048) \\
& - 2.514\Delta^*L + 0.280\Delta^*A + 0.951\Delta^*Y_p \\
& (0.550) \quad (0.160) \quad (0.208) \\
& + 0.029\Delta^*U - 0.036\Delta^*T \\
& (0.017) \quad (0.008) \\
R^2 = 0.967 \quad SE = 0.027 \quad \hat{\rho} = 0.015 \quad D = 1.59
\end{aligned}$$

The corresponding estimates of the key coefficient ($\Delta^*P\hat{X}Q_1$) in Ehrlich's equation (6) is -0.059 with a t -ratio of -1.73 . It appears, therefore, that the deterrent effect does not show up as significantly in the period before 1962 as in the whole period that combines both pre- and post-1962 values for within-sample contrast.

It is not as though the combination of pre- and post-1962 data accounted for the significance of the coefficient of the execution variable at all, for it has had a sharp relationship after 1962. If we combine both parts of the sample together, into one overall equation specification with a "dummy" variable D to designate the period 1963-1969 separately, we get

$$\begin{aligned}
\Delta^*Q/N = & -6.343 - 0.305D - 0.655\Delta^*\hat{P}_a^o - 0.317\Delta^*\hat{P}_{c/a}^o \\
& (3.483) \quad (0.073) \quad (0.679) \quad (0.119) \\
& - 0.059\Delta^*P\hat{X}Q_1 - 0.099D\Delta^*P\hat{X}Q_1 - 2.214\Delta^*L \\
& (0.055) \quad (0.054) \quad (0.903) \\
& + 0.412\Delta^*A + 1.141\Delta^*Y_p + 0.045\Delta^*U - 0.040\Delta^*T \\
& (0.234) \quad (0.279) \quad (0.026) \quad (0.010) \\
R^2 = 0.909 \quad SE = 0.045 \quad \hat{\rho} = -0.148 \quad D = 1.52
\end{aligned}$$

This equation suggests that the significance of the coefficient of the execution variable falls (from $t = -1.73$ to $t = -1.07$) if intercept and slope dummy variables are introduced to take account of differences in sample phases, but there are two difficulties with the interpretation of this result:

1. The coefficients of D are negative, indicating that in the later period there was a lower propensity to commit murder than in the earlier period. This appears to be counter-intuitive
2. The serial correlation coefficient estimated to account for non-

randomness among residual variation is negative, while it is generally expected that it would be positive

This experimental calculation, thus, is inconclusive because as an overall equation estimate it is not entirely plausible.

B. INTRODUCTION OF OTHER CRIMES

Equally important, in comparison with our investigation of robustness under changes in Ehrlich's sample period, is our consideration of alternative specifications, the most relevant being the joint consideration of other related crimes. We have introduced a measure of a crime index (excluding homicide). This index covers six crimes: rape, robbery, aggravated assault, burglary, larceny-theft, and auto theft. Data on frequency of such crimes are taken from the Uniform Crime Reporting Section of the FBI and are weighted in an average measure by using estimates of seriousness estimated by Wolfgang *et al.* (1972). The weights are, respectively, 0.390, 0.135, 0.227, 0.092, 0.060, and 0.095.

The basic equation, corresponding to Ehrlich's (1), with an index of other crime, CR , added as an endogenous variable, gives the result

$$\begin{aligned} \Delta^*Q/N = & -6.243 - 0.468\Delta^*\hat{P}_a^o - 0.342\Delta^*\hat{P}_{cla}^o - 0.025\Delta^*PXQ_1 \\ & (4.020) \quad (0.931) \quad (0.151) \quad (0.023) \\ & + 0.436\Delta^*\hat{C}R - 1.216\Delta^*L + 0.425\Delta^*A + 1.148\Delta^*Y_p \\ & (0.298) \quad (0.860) \quad (0.315) \quad (0.375) \\ & + 0.038\Delta^*U - 0.056\Delta^*T \\ & (0.035) \quad (0.013) \\ R^2 = & 0.901 \quad SE = 0.045 \quad \hat{\rho} = 0.341 \quad D = 1.36 \end{aligned}$$

A number of coefficients change statistical status in this estimate, particularly in becoming insignificant, although many of the main features of Ehrlich's equation remain invariant. Nevertheless, the key estimate, for the coefficient of Δ^*PXQ_1 , becomes insignificant, as well as dropping in point value. The coefficient of CR , on the other hand, has a slightly lower associated t -ratio than the original estimate of the coefficient of PXQ_1 . The result suggests a form of complementarity, not necessarily in the strict sense, between homicide and other criminal acts. For given values of the other variables being considered, the homicide rate is positively associated with a broad crime rate. We do

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not want to argue in any confident manner about the discovery or uncovering of an alternative effect, but we do argue very strongly that there is sufficient evidence in favor of alternative specifications and alternative judgments about the deterrent effect of the death penalty that one is not justified in drawing policy conclusions from Ehrlich's results.

It is possible to push the present line of investigation a bit further by attempting to distinguish between violent crime (other than homicide) and property crime. The violent category consists of rape, robbery, and aggravated assault among the six listed above. In this case, the effect is even more dramatic. The coefficient of violent crime is very strong and statistically significant, while the deterrent effect of the death penalty practically vanishes:

$$\begin{aligned} \Delta^*Q/N = & -0.047 + 0.331\Delta^*\hat{P}_a^o - 0.096\Delta^*\hat{P}_{c/a}^o \\ & (5.196) \quad (1.093) \quad (0.233) \\ & + 0.005\Delta^*PXQ_1 + 1.099\Delta^*V\hat{C}R - 1.124\Delta^*L \\ & (0.034) \quad (0.424) \quad (1.210) \\ & - 0.008\Delta^*A - 0.405\Delta^*Y_p - 0.052\Delta^*U - 0.040\Delta^*T \\ & (0.512) \quad (0.788) \quad (0.062) \quad (0.016) \\ R^2 = 0.723 \quad SE = 0.066 \quad \hat{\rho} = 0.566 \quad D = 1.85 \end{aligned}$$

The intercorrelation of violent crimes with homicide is so strong that it dominates the relationship to the extent of "crowding out" other effects. This result indicates that there is a complicated interrelationship among various types of crime and that a more detailed system of relationships, sorting out these associations, needs to be worked out before we can feel confident of having found the underlying structure of criminal behavior, particularly homicidal behavior.

In the case of property crime, the use of an index of its occurrence in the basic equation shows so little net effect that it has practically no influence on the estimated coefficients for Ehrlich's specification. It appears to be a case of strongly interrelated aspects of violent criminal behavior that is involved.

C. LINEAR SPECIFICATION

Finally, in our examination of alternative specifications, we have looked (following Passell and Taylor as well as others) at a linear as

opposed to a log-linear equation. It is worthwhile repeating this exercise here because we have been able to replicate Ehrlich's results, up to round-off error, with his data. As the others have found, the effect of the death penalty variable on the homicide rate is not significant in a linear form equation with the same variables that Ehrlich used. There is nothing in the statistical nature of our results to lead one to prefer a logarithmic specification, and there is certainly no *a priori* theoretical reason for using a log-linear instead of a straight linear regression. Using the same two-stage least squares estimator, with correction for autoregressive errors, we compute from a "search" algorithm for values of $\hat{\rho}$,

$$\begin{aligned} \Delta^*Q/N = & 0.191 - 0.000579\Delta^*\hat{P}_a^o - 0.000517\Delta^*\hat{P}_{c/a}^o \\ & (0.057) \quad (0.000412) \quad (0.000197) \\ & - 0.000439\Delta^*PXQ_1 - 0.256\Delta^*L + 0.184\Delta^*A \\ & (0.01070) \quad (0.076) \quad (0.055) \\ & + 0.000116\Delta^*Y_u + 0.000325\Delta^*U - 0.00317\Delta^*T : \\ & (0.000019) \quad (0.000178) \quad (0.000511) \\ R^2 = 0.930 \quad SE = 0.00225 \quad \hat{\rho} = 0.245 \quad D = 1.72 \end{aligned}$$

As Passell and Taylor emphasize, the principal change in this estimate in comparison with Ehrlich's equation (1) is that the coefficient of PXQ_1 has fallen to insignificance. Ehrlich (1975b, p. 219) reports a linear equation and reaches a different conclusion about the significance of the estimated coefficient of Δ^*PXQ_1 , but his estimated value of $\hat{\rho}$ apparently does not produce a (global) minimum sum of squared residuals.¹⁷

IV. CONCLUSION

The building and use of statistical models of structural relationships in the field of criminal behavior, human capital, and the broader interface between sociological and economic relationships is in its infancy.

¹⁷We searched over values of ρ between -0.6 and $+0.4$ in increments of 0.0005 . The surface is quite flat over the interval. Double-precision computer calculations on our IBM 370/168 provided standard error estimates—for the second-stage regression equation—of 0.019422 and 0.0019401 , with Ehrlich's $\hat{\rho}$ equal to -0.119 and our $\hat{\rho}$ equal to $+0.2445$, respectively.

Many results look very promising, suggestive, and provocative. We might well classify this research effort as being at the stage that econometric modeling reached in the 1940's and 1950's. A great deal of further painstaking developmental work was necessary to build up econometrics to the point at which the numerical findings ceased to be just interesting from an academic viewpoint and became applicable in public policy analysis. We believe that current results must undergo the same kind of testing and scholarly scrutiny over a period of years before they are ready to be used in an application as serious as the one that is associated with the use of the death penalty.

In the first instance, application might be made to general questions of public policy in the field of criminology—such questions as budgetary allocations for police work, deployment of police personnel, or use of training programs. But it seems unthinkable to us to base decisions on the use of the death penalty on Ehrlich's findings, as the Solicitor General of the United States has urged (Bork *et al.* 1974, pp. 32-39). They simply are not sufficiently powerful, robust, or tested at this stage to warrant use in such an important case. They are as fragile as the most tentative of econometric estimates of parameters, and we know full well how uncertain such results are under extrapolation. It is not that Ehrlich's estimates are demonstrably wrong; it is merely that they are too uncertain and must, at best, be interpreted as tentative at this stage.

There is nothing wrong with Ehrlich's particular numerical findings. His arithmetic is correct; his formulation is imaginative; but application to the most serious of issues is premature. In short, we see too many plausible explanations for his finding a deterrent effect other than the theory that capital punishment deters murder.

Following is a list of reasons that Ehrlich's results cannot be used at this time to pass judgment on the use of the death penalty.

1. The conclusion is being drawn on the basis of the estimate of a single parameter in a single equation. It is standard econometric practice to make policy application judgment on the basis of complete system solutions (simulations). Ehrlich must specify and build his interrelated system before he can try to draw policy conclusions from his work. He may not necessarily come to different conclusions, but there is no way of knowing this in advance.

2. The estimate of the coefficient of the execution variable is not significantly negative if the sample is truncated at 1962, an index of other crimes is introduced in the equation, or the equation is specified in linear form.

3. The absolute value of the estimate of the coefficient of the execution variable may be upwardly biased in an absolute sense, as a result of measurement error.

4. The partial effect of execution on homicides, if computed with allowance for the fact that homicides are used to estimate the arrest rate, is not necessarily significantly negative.

5. Cross-sectional analyses have produced results that are not consistent with the hypothesis that capital punishment deters homicide.

Sellin, Ehrlich, Passell, and others are to be congratulated on opening up a fascinating area of research with much scholarly potential. It remains to pursue this line of research to the point at which it can be used in the future for making important contributions to legal policy. The deterrent effect of capital punishment is definitely not a settled matter, and this is the strongest social scientific conclusion that can be reached at the present time.

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The Cost of the Death Penalty

By Barry Nakell*

Many people mistakenly believe that it is less costly to execute a murderer than to keep him in prison for life. Although at one time capital punishment was cheap, we are no longer willing or able to march condemned prisoners expeditiously from the courthouse to waiting gallows. Today, considering all the costs—including the financial expense and the wear and tear on our courts and prisons—a system of capital punishment is considerably more expensive than a criminal justice system without capital punishment.

Do not misunderstand. The point is not that it is cheaper to keep a particular person in prison for life than it is to execute him. It is, rather, that the system—the judicial and correctional processes—will be less expensive if it is not burdened by a death penalty.

That was true before the United States Supreme Court's 1976 death penalty decisions,¹ but the procedures apparently required by those decisions further increase the expense of a capital punishment system. Those procedural requirements were developed in the wake of the 1972 Supreme Court decision in *Furman v. Georgia*.² In *Furman*, the Court held the death penalty as then applied to be cruel and unusual punishment. Only two Justices believed that death itself was an unconstitutional punishment.³ The three Justices who joined those two to make a majority⁴ found that the death penalty was being applied in so freakish and arbi-

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¹ *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

² 408 U.S. 238 (1972).

³ The two Justices were Brennan and Marshall. *Id.* at 257-306 (Brennan, J., concurring), 314-371 (Marshall, J., concurring).

⁴ The three "swing" Justices were Douglas, Stewart, and White. *Id.* at 240-257 (Douglas, J., concurring), 306-310 (Stewart, J., concurring), 310-314 (White, J., concurring).

trary a pattern as not to serve any legitimate purpose.⁵ In the 1976 death penalty decisions, the Court upheld capital punishment schemes in Georgia, Florida, and Texas that appeared to provide procedural protections against such haphazard application, and struck down those such as North Carolina's and Louisiana's that did not.⁶ There were principally three procedures in the approved statutes that seemed to impress the Court⁷; (1) a "bifurcated" trial procedure, providing a trial first on the issue of guilt or innocence and then, if the verdict is guilty of capital murder, a separate trial on the issue of life or death, so that evidence relevant to penalty can be presented to the jury at the second trial without prejudicing its determination of guilt or innocence at the first⁸; (2) standards to guide the jury at the second trial in the exercise of its discretion to decide death or life as the penalty⁹; and (3) appellate review of the sentence as a statewide stabilizer to guard against disparity or discrimination in the decision for death.¹⁰

⁵ See *id.* at 242, 245, 249-250, 253, 255-257 (Douglas, J., concurring); (Stewart J., concurring), 309-310 (Stewart, J., concurring), 311-314 (White, J., concurring).

⁶ The Court held: "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, note 1 *supra*, at 189.

⁷ The Court cautioned: "We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system along these general lines would inevitably satisfy the concerns of *Furman* . . ." *Id.* at 195 (plurality opinion).

⁸ *Id.* at 190-192, 196-197 (plurality opinion); *Proffitt v. Florida*, note 1 *supra*, at 248 (plurality opinion); *Jurek v. Texas*, note 1 *supra*, at 267, 269, 276 (plurality opinion).

⁹ *Gregg v. Georgia*, note 1 *supra*, at 192-195, 199, 206 (plurality opinion), 220-222 (White, J., concurring); *Proffitt v. Florida*, note 1 *supra*, at 251, 253-258 (plurality opinion); *Jurek v. Texas*, note 1 *supra*, at 270, 273-274 (plurality opinion); *Woodson v. North Carolina*, note 1 *supra*, at 302-303 (plurality opinion); *Roberts v. Louisiana*, note 1 *supra* at 334-335 (plurality opinion).

¹⁰ *Gregg v. Georgia*, note 1 *supra*, at 198, 203, 204-206, 207 (plurality opinion), 222-224 (White, J., concurring); *Proffitt v. Florida*, note 1 *supra*, at 253, 258-259 (plurality opinion); *Jurek v. Texas*, note 1 *supra*, at 269, 276 (plurality opinion); *Woodson v. North Carolina*, note 1 *supra*, at 303 (plurality opinion); *Roberts v. Louisiana*, note 1 *supra*, at 335-336 (plurality opinion); see also *Gardner v. Florida*, 97 S. Ct. 1197, 1206 (1977).

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The Trial Process

The trial process is more expensive in a capital punishment system.

Ordinarily criminal cases, including murder cases, are resolved by guilty pleas and without the expense of a trial. Eighty-five or 90 percent are determined that way.¹¹ All capital cases, by contrast, require jury trials—and the trials are longer, more complex, and more expensive than those in other cases, including other murder cases.

Although a defendant may be permitted to plead guilty to capital murder, few will do so. The reason is simple. Defendants plead guilty to win some measure of leniency, such as a reduction in the degree of the charges, the dismissal of other charges, or an expectation of favorable consideration in sentencing.¹² Their guilty pleas are the product of bargaining between their lawyers and the prosecutors. Some defendants charged with capital murder will win concessions by the prosecutor in the form of a reduction of the degree of the crime to a lesser homicide, but then the case is no longer a capital one. No longer is it meaningful to talk about the death penalty in such a case. Here the existence of the death penalty only serves as bargaining leverage for the prosecutor.

When the death penalty is a real consideration in a case, the prosecutor has nothing to offer the defendant in exchange for a guilty plea. The natural result is that few defendants will plead guilty.

Even those who do plead guilty, however, will still have a jury trial on the issue of penalty. This means that every capital case will require a jury trial (*ten times as many jury trials as in non-capital cases*)—and that most will require at least two jury trials. But not only will there be more jury trials in capital cases, those trials will also be longer and more expensive.

Jury trials will be more protracted and more expensive in capital cases for several reasons. First, the jury selection process will be longer and involve more jurors. There is an inherently greater difficulty in selecting juries for capital cases because many prospec-

¹¹ See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 9 (1967).

¹² *Id.*: see also *Santobello v. New York*, 404 U.S. 257, 260-261 (1971); *Braun v. United States*, 397 U.S. 742, 749-750 (1970).

tive jurors are opposed to the death penalty. Opposition to the death penalty is not a ground for disqualifying a juror from service on a capital jury unless the juror is adamantly unwilling to vote for the death penalty in any case, regardless of the facts that are developed in the trial.¹³ As a consequence, considerable time is spent in capital cases with the lawyers exploring with the jurors on voir dire their personal views regarding the death penalty. The upshot is still the disqualification of many jurors on this ground. In addition, each side is generally allotted a larger number of peremptory challenges in a capital case.

Capital cases naturally capture public attention and attendant publicity, and this fact further complicates their trials. Juries must be selected from among people whose views on the case have not been prejudiced by publicity.¹⁴ This often means moving the trial of the case away from the publicity to a different county, subjecting the citizens there to the burdens of the trial of a capital case not involving their community. Or jurors may be summoned from another county to attend the trial in the county where the crime occurred. Either method increases the costs of the trial. Even then, the lawyers must take court time to discuss with the prospective jurors the effect, if any, that the publicity may have had on them, and this could result in the disqualification of more members of the panel.

Once the jury is selected, the trial is still more complex and longer than noncapital trials. Difficult issues such as the insanity defense are more likely to be raised,¹⁵ and to be more expensive to litigate because of the necessary involvement of expert witnesses. When the trial reaches the second or penalty phase of the bifurcated process, the defendant's whole life is open for exploration. No longer is the trial confined by relevancy limitations to the circumstances surrounding a relatively narrow incident. Instead, any evidence

¹³ *Davis v. Georgia*, 97 S. Ct. 399 (1976); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

¹⁴ *Murphy v. Florida*, 421 U.S. 794 (1975); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

¹⁵ See Goldstein, *The Insanity Defense* 143, 167-170 (1967); cf. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

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that tends to shed light on the background, behavior, and beliefs of the defendant, or his personal, family, business, or social life, may be introduced, disputed, and debated.¹⁶ Expert witnesses are likely to be called here, even if they were not called in the first trial, to evaluate these facts and explain their meaning to the jury.

The Appeals Process

The appeals process is more expensive in a capital punishment system.

When all that is over, there will be more appeals in these cases. If the judgment is death, the case will be appealed; indeed, most statutes provide for automatic appeal of death sentences.¹⁷ The appeal will be more thorough, reflecting the same kinds of judicial concerns about assuring the reliability of the fact-finding and sentence-determining missions of the jury as prompted the more elaborate procedural machinery for death cases in the first place. Historical experience teaches that appellate courts are more likely to find errors in death than in noncapital cases, and that those errors are characteristically more likely to be found prejudicial. This applies to federal and state courts across the country. Much "bad law" has been written to accommodate the special concerns of courts in death cases. For examples: the United States Supreme Court decisions in *Witherspoon v. Illinois*¹⁸ providing special rules against jury disqualification in capital cases,¹⁹ in *United States v. Jackson*²⁰ providing special limitations on plea bargaining in capital cases, and in the 1976 death penalty cases themselves, providing special procedural requirements in capital cases.²¹ This is not

¹⁶ See *Gregg v. Georgia*, note 1 *supra*, at 203-204 (plurality opinion); *Proffitt v. Florida*, note 1 *supra*, at 248 (plurality opinion); *Jurek v. Texas*, note 1 *supra*, at 267, 276 (plurality opinion).

¹⁷ See, e.g., Fla. Stat. Ann. § 921.141(4) (Supp. 1976-1977); Ga. Code Ann. § 27-2537(a) (Supp. 1976); N.C. Gen. Stat. § 15-2000(d)(1) (Supp. 1977).

¹⁸ 391 U.S. 510 (1968).

¹⁹ Indeed, last term in *Davis v. Georgia*, 97 S. Ct. 399 (1976), the Court held that *Witherspoon* requires reversal of a capital sentence even if only one juror is excluded in violation of its principle.

²⁰ 390 U.S. 570 (1968).

²¹ See also *Gardner v. Florida*, 97 S. Ct. 1197 (1977). In that case last term, the Supreme Court held that the Constitution forbids a trial judge to impose a

a new phenomenon. It is as old as the death penalty in civilized countries. The broadening of the old "benefit of clergy" is a prominent historical example.²² The reports of early state decisions provide other striking examples. One North Carolina decision voided a death sentence solely because the indictment contained the following misspelling in the description of the place of the fatal wound: "in and upon the aforesaid left *brest* of him."²³

So, we will not only have more trials in capital cases, we will also have more *retrials*. The complex, expensive processes will be repeated more frequently than usual.

We must note further that the appellate review in capital cases will be by the state supreme courts. In ordinary cases in most states, intermediate courts of appeals relieve the state supreme courts of much of their workload. Not so with capital cases. They go directly to the state supreme courts.²⁴

Furthermore, those courts will be required to perform a role new to most of them: they will have to review the *sentence* as well as the conviction. The new statutes provide for that procedure, and the 1976 death penalty cases probably require it.²⁵ In order for appellate review of the sentence to fulfill its function in this scheme, the appellate court must have information about the actual practices of juries in deciding which cases deserve death and which do not, and probably also about the policies of prosecutors in selecting cases for capital consideration by juries.²⁶ This requires

death sentence on the basis of confidential information that is not disclosed to the defense. The judge may do so in noncapital cases. *Williams v. New York*, 337 U.S. 241 (1949). Indeed, the Court acknowledged in its plurality opinion in *Gardner* that five of the Justices "have now expressly recognized that death is a different kind of punishment than any other which may be imposed in this country." *Id.* at 1204.

²² 1 Stephen, *A History of the Criminal Law of England* 459-472 (1883).

²³ *State v. Carter*, N.C. Court of Conf. Rep. 210 (1801).

²⁴ See statutes cited at note 17 *supra*.

²⁵ See cases cited at note 10 *supra*.

²⁶ The statute upheld in *Gregg v. Georgia* requires the state supreme court to collect the records of all recent "capital felony cases." 428 U.S. 153, 167 n.10. The Supreme Court observed that the statute authorizes the state supreme court to consider not only cases in which a death sentence was actually meted out but also convictions for capital crimes that resulted in noncapital sentences, and that the Court "does consider appealed murder cases where a life sentence has been imposed." *Id.* at 204 n.56; see also *id.* at 233 n.11 (White J., concurring).

Evidently, this comparative appellate review is acceptable to the Court even

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a new bureaucracy for data collection and evaluation to be available to the Supreme Court, an additional expense. The Georgia scheme upheld by the Supreme Court provides expressly for such bureaucratic assistance for its state supreme court,²⁷ but the Florida and Texas schemes, also upheld, do not. Although the bureaucracy may not itself be constitutionally necessary or statutorily provided, it will develop if the state supreme courts take their role seriously in this regard, as they can certainly be expected to do. Thus, through the Administrative Office of the Courts, through a new agency established for this purpose, or by adding law clerks or administrative assistants to their present staffs to collect and analyze the necessary information, the state supreme courts will need additional expensive resources to carry out their responsibilities in death cases.

A state supreme court decision affirming a judgment of death does not finally settle the validity of the conviction and sentence. The exceptional example of Gary Gilmore notwithstanding, prisoners sentenced to death exhaust every imaginable avenue for relief. They seek review in the U.S. Supreme Court, file postconviction petitions in the state courts, file habeas corpus petitions in the federal courts, ask their governors for commutation, and then, if still unsuccessful, file more state and federal applications for review. Many other prisoners exhaust judicial resources in a similar manner, but all capital convicts do so. Moreover, the courts generally give all of their petitions conscientious scrutiny. The expenses involved in the compensation of the attorneys who represent them, the state attorneys generals' officers who resist them, and the courts that review them need to be computed among the financial costs of the death penalty.

though it does not include a systematic method for the state court to canvas convictions for all capital crimes. Cf. *id.* at 225 (White, J., concurring). The Court said that it did not find "that the Georgia courts review process is ineffective." *Id.* at 204 n.56.

²⁷ The statute upheld in *Gregg v. Georgia* specifically provides for the employment by the state supreme court of a staff to "accumulate the records of all capital felony cases" and "to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence." Ga. Code Ann. § 27-2537(f), (g), (Supp. 1976); see *Gregg v. Georgia*, note 26 *supra*, at 167 n.10, 204 n.56.

The Corrections Process

The corrections process suffers in a capital punishment system.

The death penalty imposes terrible strains on our prison system. Special security precautions require that a portion of state prisons be designated a "death row," a maximum security section warehousing condemned convicts during the years that their cases are processed through the appeals, habeas corpus, and clemency application stages. The expenses of "administering the unit add up to a cost substantially greater than the cost to retain them in prison for the rest of their lives."²⁸ The existence of such a cellblock has a deleterious effect on the prison of which it is a part and on the entire prison system. It increases tension by a geometric factor. It has a dehumanizing effect on inmates and staff alike—staff who serve only as custodians with no way to help or offer hope to its charges.

Without the sentence of death, the condemned would not necessarily be the most dangerous prison inmates demanding the limited single cells available for strict security. In consequence, the prison system is severely restricted in its ability to find secure space for its own troublemakers. This creates a maddening situation for corrections administrators.

The time surrounding an execution, shortly before and until some time after is an extraordinarily difficult time in the prisons. The execution weighs heavily on all the inmates and guards, creating major and minor problems throughout the system.

An Important Point

An important observation that squares with commonsense expectations has been confirmed in empirical research²⁹: The actual imposition of the death penalty under the new guided-discretion capital punishment systems has been similar to that under the former unguided discretion systems. Most of the defendants who go through the capital process of jury trial, possible appeal, penalty

²⁸ McGee, "Capital Punishment as Seen by a Correctional Administrator," 28 Fed. Probation 13-14 (June 1964).

²⁹ Riedell, "Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman," 49 Temple L.Q. 261 (1976).

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trial, possible retrial, appeal, possible postconviction challenges, possible commutation applications, will ultimately avoid the death penalty and receive sentences of life imprisonment. The Supreme Court noted that juries with sentencing discretion in first-degree murder cases do not impose the death penalty "with any great frequency."³⁰ What this means is that after squandering the extraordinary resources, financial, judicial, and correctional, to make the life or death decision in these cases, these people will still be on our hands for life imprisonment—and all the expenses involved with that.

Thus, although it may cost less to execute a particular prisoner than to maintain him for life, it costs far more to finance a system by which we decide to execute some people and end up still maintaining for life many of the people processed through that system. Yet, the wear and tear of the process on our judicial and correctional systems and on the hearts and minds of our citizens and our government servants—and the exorbitant financial costs—have never been shown to serve a useful governmental purpose.

Some argue that the enormous cost is justified by the deterrence and retribution purposes of the death penalty.³¹ But we have no reliable basis for believing that the death penalty serves either.

The death penalty does deter the murderer himself from *further* murders. But, (1) the risk that murderers will repeat their homicidal crimes is relatively low (most murders are committed between people who knew each other and for reasons that are unlikely to recur³²; less than one percent of felonies result in homicides); and (2) the question must be whether the death penalty deters the murderer better than anything else, such as life imprisonment,

³⁰ *Woodson v. North Carolina*, 428 U.S. 280, 295, 295-296 n.31.

³¹ The Supreme Court observed: "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, note 26 *supra*, at 183 (plurality opinion). The Court observed that retribution is not "a forbidden objective nor one inconsistent with our respect for the dignity of men." *Id.* With regard to deterrence, the Court recognized that the results of the studies of the deterrent effect of capital punishment "simply have been inconclusive," *id.* at 185, but nevertheless surmised, without supporting data, *id.* at 186 n.34, that, for some murderers, "the death penalty undoubtedly is a significant deterrent." *Id.* at 185-186.

³² See, e.g., Wolfgang, "A Sociological Analysis of Criminal Homicide," 25 *Fed. Probation* 49 (March 1961); FBI, 1975 *Uniform Crime Reports* 18-19 (1976).

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because death is different from all other punishments "in its severity and irrevocability."³³

We do not have any data conclusively showing whether the death penalty is a general deterrent.³⁴ Most of the studies suggest that it is not³⁵; one,³⁶ largely discredited,³⁷ suggests that it is. The social scientists cannot, however, control all the variables that affect our lives to isolate the effect that any particular one—such as the death penalty—has on the murder rate.³⁸ The murder rate does not, of course, lend itself to controlled experiments.

In the absence of strong evidence that the death penalty does deter, commonsense reasons suggest that it does not. When we talk about the death penalty, ordinarily we are not talking about family, barroom, or feud killings. These generally are not subjected to the severe sanction. As the list of aggravating and mitigating factors in the new death penalty statutes suggests, we are really trying to deter with the death penalty murders committed in the course of other crimes or for monetary gain. In these cases, the perpetrators are primarily intent on the other crimes and commit murders incident to them. These are the kinds of murderers that scare us. But people are not deterred by the criminal sanction from committing robberies, burglaries, or rapes because they do not think they will be caught.

That belief is reasonable. They probably will not be caught—unless they kill somebody; then their chances of getting caught are greater. They are not likely, however, to be deterred from committing their robberies, burglaries, or rapes by the prospect of a death penalty for a crime they do not expect to commit. Some-

³³ *Gregg v. Georgia*, note 26 *supra*, at 187, 188 (plurality opinion); *Woodson v. North Carolina*, note 30 *supra*, at 305 (plurality opinion).

³⁴ See *Gregg v. Georgia*, note 26 *supra*, at 184-185; but see *Furman v. Georgia*, 408 U.S. 238, 347-354 (Marshall, J., concurring).

³⁵ See, e.g., Bedau (Ed.), *Capital Punishment in the United States* 299-335 (1976); Bedau (Ed.), *The Death Penalty in America* 258-332 (1964); Bowers, *Executions in America* 19-20, 121-163, 193-194 (1974).

³⁶ Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," 65 *Am. Econ. Rev.* 397 (June 1975).

³⁷ See authorities cited in *Gregg v. Georgia*, note 26 *supra*, at 235-236 (Marshall, J., dissenting).

³⁸ See Black, *Capital Punishment: The Inevitability of Caprice and Mistake* 25-26 (1974).

COST OF DEATH PENALTY

thing on the order of 27.0 percent of our armed robbers and 17.5 percent of our burglars are caught.³⁹ By contrast, around 78.3 percent of our murderers are caught.⁴⁰

There is another factor complicating the calculation of deterrence: in some cases the death penalty *encourages* or *stimulates* murders.⁴¹ Official execution sets an example of violence. We know that violence has a way of inciting further violence, especially when it is publicized. By cold-blooded execution, the state teaches violence. Prison authorities realize this well enough to batten down the hatches whenever executions take place within their institutions. We cannot take similar precautions against the inciting effect of executions among free society.

The Gary Gilmore case in Utah⁴² may be another kind of example. Evidence suggests that Gilmore committed his murders in a capital punishment jurisdiction in order to be executed.⁴³ The violence he directed against innocent victims may have been his way of committing suicide, aided, of course, by the State. His behavior after the crimes—two suicide attempts and consistent insistence on his own execution—supports this theory. Gary Gilmore may not have killed but for the death penalty. How do we calculate for this phenomenon in computing the deterrent effect of the death penalty?

The proposals, some serious, that we televise executions to exploit their maximum deterrent effect, twist the misguided notions behind the death penalty to a bizarre extreme. If televised fictional violence encourages real-life violence, is it not natural to expect the real thing to have at least the same effect? Imagine the reaction of lonely, depressed individuals obsessed with the worthlessness of their own lives watching one of their own achieve significance for his by committing murders and then demanding his own execution in Gilmore's macho fashion.

Even if we were satisfied that murder could best be deterred

³⁹ FBI, note 32 *supra*, at 166.

⁴⁰ *Id.*

⁴¹ See Bowers, *Executions in America* 194 (1974).

⁴² See generally *Gilmore v. Utah*, 97 S. Ct. 436 (1976).

⁴³ See Bedau, "The Death Penalty and Gary Gilmore" *Hastings Ctr. Rep.* 5, 6 (Feb. 1977).

by a penalty of a penny fine, many people would still clamor for the death penalty. They seek revenge. The argument is made that the State must provide "retribution"—a form of collective revenge sanctioned by the community—or its citizens will wreak personal vengeance.⁴⁴

The argument supports a severe penalty for murder, but it does not support the death penalty. The question is not whether we are going to have capital punishment or no retribution, but whether we are going to have capital punishment or some other manner of retribution—such as life imprisonment. There is no basis for concern that the citizenry will turn to vigilante riots if we sentence murderers only to life imprisonment as long as we deal with them stringently.

Conclusion

Concern about costs seems petty when issues affecting life or death are at stake, and seems a pedestrian argument among the philosophical, moral, and religious positions against the death penalty. Those who are not convinced by the loftier arguments against the death penalty, however, should at least be persuaded by this cost-benefit analysis that capital punishment is a bad investment of public resources.

⁴⁴ *Gregg v. Georgia*, note 26 *supra*, at 183 (plurality opinion).

THOMAS PERRY THORNTON

Terrorism and the Death Penalty

A spate of terrorist activity in the past several months has focused public attention on terrorism more than at any time since the Munich massacre of Israeli Olympic athletes four years ago. The most dramatic of these recent acts were the hijackings of an American aircraft by Croatians and of a French plane by Palestinians. The latter caught particular public attention because of the dramatic rescue operation mounted at Entebbe while the plane was under the eye of Ugandan dictator Idi Amin.

Hijackings and other forms of hostage-taking are the terrorist act par excellence of our time, just as the bombing of crowned heads was at the turn of the century. The Air France hijacking, for instance, attracted much more attention here than did the murder by terrorists of two American diplomats in Beirut, even though there were no American lives lost at Entebbe. The reason is simple: hijackings not only affect a broad range of people with whom the public can readily identify; they are also protracted affairs that get extensive play in the media. A murder is top news for one day while a hijacking can go on for as long as a week.

There are, of course, many forms of terrorism other than hijacking and hostage-taking, such as bombing, assassination and armed robbery. Whatever the form, however, terrorist acts share a crucial characteristic. They have a high symbolic content in that they seek to make an impact on public opinion—to gain support if possible, but at least to draw attention to the terrorists' causes. Some instances, such as the Croatian hijacking, are pure public relations ventures, but even

those that have a more specific goal are usually successful in engaging the public consciousness.

Once engaged, however, public opinion sets forth its own demands. It views terrorism not simply as another kind of ordinary crime, but as an especially outrageous form of behavior that demands exemplary punishment. The spectacular rescue at Entebbe had a high emotional appeal precisely because it was gratifying at the symbolic level. The drama of the rescue exceeded that of the hijacking itself so that justice was seen to be done in a satisfying way. The punishment fit the crime.

Deus ex machina outcomes of the Entebbe variety are not common, however, and few terrorist episodes have results that satisfy the public. Terrorists mostly go scot-free for one reason or another, and when they are captured, trials tend to drag on. Even the ultimate sentence of imprisonment does not seem to match the gravity or the emotional impact of the offense. Rather, major successes over the past years in dealing with terrorism have been in the unglamorous areas of prevention carried out by police and intelligence forces that operate far from public view. In fact, we have

What our society needs is respect for life, not more capital punishment. Even in the case of terrorism, no convincing moral or legal argument can be advanced for the penal taking of life

greatly reduced the incidence of terrorism that we otherwise might have expected, but it is the dramatic terrorist successes that capture public attention and shape the public response to this challenge to international order. It is hardly surprising, then, that demands for action against terrorism focus on symbolically satisfying and dramatic means of prevention and retribution. Even less surprisingly, the proposals made for prevention and retribution are often bizarre and of questionable efficacy and legality. The death penalty appears high on most peoples' lists, and the problem of hostage-taking is at the center of concern.

A soberly argued discussion of ways and means of coping with terrorism was offered by C. L. Sulzberger in his New York Times column of July 7, just after the Entebbe operation. Mr. Sulzberger focused on practical steps rather than symbolic retribution, concluding his piece with a plea for executing "condemned" terrorists. Although he did not spell this idea out in detail and the idea is not novel, his article makes a good point of departure for discussing terrorism and the death penalty, because it raises the matter rationally and because Mr. Sulzberger is otherwise opposed to capital punishment.

The argumentation for executing terrorists runs as follows: when a person is apprehended and imprisoned for any kind of terrorist act, there is a substantial likelihood that other like-minded terrorists will seek to force his release by taking hostages and threatening to kill them unless their imprisoned comrade is set free. The nation holding the terrorist prisoner faces a



dilemma: either acquiesce in the demand and release the prisoner, thus demonstrating once again that terrorism is a low-risk undertaking even for those who are caught; or refuse to yield to the demand and thereby endanger the lives of the innocent hostages. Indeed, even if the demands are met, the hostages will still have been subjected to the very considerable dangers routinely involved in such a situation. In Mr. Sulzberger's words, "every live convicted terrorist in prison increases the chance of dead innocents abroad."

If, however, convicted terrorists are executed, there will be no reason for their comrades to take hostages to force their release. At most there might be attempts to exact revenge. These, however, would probably be directed at police or judicial officials rather than innocent people who had no connection with the terrorist's execution and with whom the public does not readily identify.

Terrorism is, in fact, along with treason and murder committed by prisoners serving life terms, one of the prime tests of arguments against the death penalty. Terrorism is outrageous in the public view. The line of argumentation set forth by Mr. Sulzberger and others has a compelling rational content. But the death penalty is a gravely serious measure to invoke in any circumstance, and in this case there are weighty legal and logical counterarguments in addition to the unavoidable moral considerations that weigh against any taking of life.

The initial problem is that of definition. What is, after all, "terrorism"? Its definition has been debated extensively in the scholarly literature for years. I am well satisfied with one I offered over a decade ago—"a symbolic act designed to influence political behavior by extranormal means, entailing the use or threat of violence"—but I have no illusions that this definition or any other could or should stand up before a court of law. Although we can define the phenomenon of terrorism broadly and certain acts are clearly terrorist by any reasonable definition, there are immense gray areas that would open the way to serious miscarriages of justice, for "terrorism" is a highly subjective concept. Attempts to

develop international law concerning terrorism have foundered on the fact that one man's terrorist is the other man's freedom-fighter, whether he be a member of Black September or the Stern Gang.

This semantic ambiguity was illustrated during Daniel Patrick Moynihan's successful bid for the Democratic Senate nomination in New York this year. The former UN Ambassador suggested that his anti-terrorist record in the UN would in some way be relevant to stopping "terror" in the darkened streets of New York City, but in fact it

'In the present political and social context, we must live with the fact that "terrorism" is simply not a useful way of categorizing antisocial behavior, let alone a legally tenable definition of capital crime'

is hard to see any connection between muggings and aircraft hijackings. In the present political and social context, we must live with the fact that "terrorism" is simply not a useful way of categorizing antisocial behavior, let alone a legally tenable definition of a capital crime.

The definitional problem cannot be avoided by defining hostage-taking, rather than terrorism, as the crime that triggers the death penalty. First, this would do little to meet the requirement of making terrorists harmless, since not all terrorist acts involve taking hostages or hijacking. (Very little IRA activity, for example, has involved hostage-taking.) Second, there are no doubt hundreds of hostage incidents in the United States every year, few of which have anything to do with terrorism and many of which are not very serious. Do we really want to extend the death penalty to all of these?

In a sense, terrorism is a description of a state of mind rather than a definition of specific criminal acts. A man may commit a political murder that can be defined reasonably as terrorism, and under many legal sys-

tems he would receive a death sentence. But a "terrorist" may also commit armed robbery that does not result in any deaths, and he would not be likely to receive more than a prison term. If, however, we define terrorism as the crime, irrespective of the content of the terrorist act, then both men would be executed in order to prevent like-minded comrades from seizing hostages to free either of them. In doing this, we would have moved onto novel legal terrain: we would be executing people, not for specific crimes that they have committed, but for what other people might do on their behalf. As illustrations of the logical dilemma let us take two hypothetical cases.

The first would be the semi-active accomplice of a fatal hijacking operation who provided shelter for the terrorist hijackers before the operation took place. Even if conspiracy to murder could be proved, the death penalty would be an extremely harsh sentence to impose. Yet this accomplice, if jailed, would be just as likely to trigger a subsequent hostage-taking operation to force his release as would terrorists who committed more serious crimes. The purpose of such operations is to generate publicity and get people out of jail. The specific grounds of imprisonment is a secondary consideration.

Closer to home, there is the Patricia Hearst case. Let us assume she had been captured during the bank robbery she participated in. Bank robbery is not a capital crime, but had there been legislation on the books in California that prescribed death for terrorists, Miss Hearst would certainly have had to be executed. The Symbionese Liberation Army was, if nothing else, a terrorist organization, and prevailing opinion at the time would have held that her SLA colleagues would likely have sought to force her release from prison by taking hostages. But would justice have been served?

A final dilemma is offered in two hypothetical hijacking cases. In one, an embezzler hijacks a plane and holds the passengers hostage in order to escape from the law. In the other, terrorists hold passengers hostage in pursuit of some political goal. Both fail and are captured, and the opera-

tions are bloodless. Hijacking that does not result in death is no capital crime under U.S. law, but the terrorists would be executed on the grounds that their sympathizers might try to force their release. The embezzler received only an additional jail term, because there is no reason to believe that anybody would mount a rescue operation on his behalf. Yet both have equally endangered lives by taking hostages. This would be a grossly unequal application of the law and would no doubt be unconstitutional in the United States.

We encounter still a further problem. In law-governed societies, at least, capital trials tend to take a considerable amount of time, and review and appeal processes can drag on even longer before a death sentence is carried out. Thus, would-be rescuers of captured terrorists still could have ample time to mount their rescue operation. Indeed, the chances of their doing so could be greatly increased if their imprisoned comrades face execution, for under present circumstances the only pressing motive to force a release is a political one. Making terrorism a capital crime could in this way raise the likelihood of hostage-taking operations, quite the opposite of what was originally intended. There is an obvious logical remedy: instruct law-enforcement officers to kill terrorists promptly upon capture, acting as apprehender, judge and executioner. The grotesqueness of this "logical conclusion" should be painfully obvious to all but the most hardened viewers of late-night Westerns.

Finally, although deterrence is not the issue at stake in this matter, it must be noted that there seems to be no correlation between deterrence and the death penalty. The threat of capital punishment is particularly unlikely to deter terrorists, given their total commitment to fighting a political or social order that they find abhorrent.

We cannot really divorce the question of capital punishment for terrorists from the broader question of the morality of the death penalty, as I have done thus far. It was a fitting coincidence that the Entebbe raid came within a few days of the Supreme Court's decision on *Gregg v. Georgia* that reopened the possibility

'Many . . . find the death penalty neither cruel nor unusual. . . .

Taken together with widespread attitudes favoring liberal abortion laws, it is evident that a disturbingly large number of Americans do not place all that high a value on human life'

of the death penalty in the United States, including, presumably, for terrorism if we choose to take that path. This is not the place to argue the pros and cons of the death penalty in general, but there is something to be learned by looking at the matter in the light of the terrorist problem.

If abhorrence of the perceived injustice of the political and social order is what drives men to terrorism and contempt for human life, the terrorist is only the child of his age. The criterion for capital punishment set forth in *Gregg v. Georgia* ("an expression of society's moral outrage at particularly offensive conduct") is simply the mirror image of the terrorist's outlook. It, too, decides that the price of outrage at this time in history is fairly set at human life. We must recognize that *Gregg v. Georgia* is not an arbitrary plunge backward in mankind's progress toward civilization and humaneness, decided in isolation by five misguided men. Rather, it is an accurate reflection of the attitudes of much of American society—a point that Justice Potter Stewart made abundantly clear in his decision. Many, perhaps most, Americans find the death penalty neither cruel nor unusual as an expression of their outrage. Taken together with widespread attitudes favoring liberal abortion laws, it is evident that a disturbingly large number of Americans do not place all that high a value on human life—at least not on the lives of inconvenient members of society. Terrorists, whether of the Black September or Hitler type, only take this attitude to its logical conclusion. Many of them are at least fully consistent in showing contempt for their own lives as well.

If this is the case, then the legal, moral and logical arguments about executing terrorists may not be rele-

vant. Perhaps society does demand exemplary and symbolically satisfying retribution against terrorists as well as murderers—and, ultimately, rapists and muggers and others who commit "outrageous" crimes. After *Gregg v. Georgia*, the gates are open.

Increasingly throughout the civilized world, there is a widespread view that capital punishment is incompatible with humane society, and this growing consensus is one of the more substantial ethical accomplishments of recent years. Despite the court ruling, we still have hope to save it in the United States. There would be a spectacular irony, however, if terrorism were among the crimes that urge our society to restore the death penalty. The ultimate aim of the true terrorist is to undermine the values of the society that he detests. Mr. Sulzberger's abandonment of a long-held moral opposition to capital punishment shows that in one case, at least, the terrorists have been successful. Both individuals and societies at times take on the attributes of their tormentors as a means of self-protection. If we abandon our respect for life in order to cope with the terrorist, we will become an unwitting but sadly willing accomplice in his attempt to destroy us.

Stalin and Hitler, as well as contemporary dictators, have shown us that ruthless repression can root out the terrorism of political agitation. The price, however, has been the institution of another kind of terror. If 20th-century history has taught us anything, it is that the terrorism of governments is vastly more destructive, both physically and morally, than the actions of a few dozen, or even hundreds of bomb-throwers, hijackers and assassins. Terrorism is real, and it is gruesome. It does not, however, pose the "clear and present danger" that, in the words of a much better Supreme Court opinion, is the sole justification for a society's violating its own values in the cause of self-preservation.

[Thomas Perry Thornton is a member of the Department of State's policy planning staff, but the views in this article are his own and do not necessarily reflect U.S. Government policy.]



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PAROLE RISK OF CONVICTED MURDERERS

The use of parole in the correctional process has always been understood to entail some elements of risk. The parolee risks his new freedom upon his ability or willingness to "stay clean" by avoiding further offenses or even those situations and conditions of life which might result in a higher probability of misconduct and subsequent revocation of parole (i.e., chronic unemployment, use of drugs or alcohol, associations with persons of known bad character, etc.). The correctional authorities can be said to "risk" the safety and welfare of the public when they release a convicted offender from custody and thereby return him to society.

These risks, and others, are accepted as largely inevitable if parole and probation programs are to operate. Nevertheless, every effort is still made to reduce the gamble by determining prior to release whether a person is a "good" or "bad" parole risk. Though perhaps all too often this determination is still based upon what amounts to professional intuition, evidence is being assembled to enable parole decision-makers to find sounder bases for their judgments. The Uniform Parole Reports Project has sought to contribute to the development of better parole decision-making through its collection, interpretation, and reporting of data from most of the nation's adult parole agencies.

Few things are more distressing to parole administrators than the commission of a further offense by a parolee. This type of parole failure shakes the public's confidence in parole programs, sparks legislative ire, and decreases the chances for the offender's eventual rehabilitation.

Because, from the viewpoint of the general public, the murderer is perceived as the most dangerous type of offender, it might be supposed that murderers as a group present the worst risk on parole. In fact, this is simply not the case. Data collected and reported by UPR in the December, 1967, Newsletter¹ supported much earlier research in refuting this assumption by showing that paroled murderers actually present some of the best parole risks. In that survey of 1,303 persons convicted of Willful Homicide,² 91.25 percent had a favorable parole performance during the crucial first one year period after release on parole. Further, data showed that 98.31 percent of those persons had no new major offense convictions during the one year period following release. These results indicated that persons convicted of murder, as a group, present unusually good parole risks.

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sampled.*

This year, five years after the initial UPR Newsletter report, a subsequent examination of the parole results of Willful Homicide offenders has been conducted. From a sample totaling 6,908 persons paroled after conviction for Willful Homicide during the years 1965-1969 and reported to the Uniform Parole Reports--over five times the size of the 1967 sample--results indicate that 98.23 percent (6,786) were successful on parole during the first year following their release. They had no new major convictions or allegations of offenses resulting in their return to prison.

¹"Paroled Murderer Kills Again," Uniform Parole Reports Newsletter. Davis, California: National Council on Crime and Delinquency Research Center, December, 1967.

²Willful Homicide includes all degrees of murder and all types of manslaughter except negligent manslaughter, manslaughter by vehicle, or negligent homicide.

TABLE I

New Major Convictions or Allegations with Prison Return
during the First Year after Parole of Persons
Imprisoned for Willful Homicide

New Major Offense Conviction	Number	Percent
NONE	6786	98.23
Willful Homicide	21	.30
Negligent Manslaughter	0	.00
Armed Robbery	12	.17
Unarmed Robbery	1	.01
Aggravated Assault	29	.42
Burglary	18	.26
Theft or Larceny, except Car	7	.10
Vehicle Theft	7	.10
Forgery, Fraud, Larceny by Check	3	.04
Other Fraud	0	.00
Forcible Rape	2	.03
Statutory Rape	1	.01
Other Sex Offenses, Juveniles	2	.03
Prostitution and Pandering	0	.00
Other Sex Offenses, not Juveniles	3	.04
Narcotics Violations	6	.09
Alcohol	2	.03
All Other Offenses	8	.12
TOTAL NEW MAJOR OFFENSE CONVICTIONS OR ALLEGATIONS	122	1.77
TOTAL	6908	100.00

Table I gives a breakdown of the 122 cases who failed on parole and shows the offenses committed. Included in this table are persons who were convicted of new major offenses and persons who were returned to prison as technical violators in lieu of prosecution for a major offense (allegations). Table II shows convictions only. In this same sample, 98.81 percent (6,826) had no major offense convictions with prison return during this first year after release on parole. As Table II indicates, only 15 persons (.22 percent) were convicted of another willful homicide during this period.

TABLE II

Major Offense Convictions with Prison Return
during the First Year after Parole of Persons
Imprisoned for Willful Homicide

New Major Offense Conviction	Number	Percent
NONE	6826	98.81
Willful Homicide	15	.22
Negligent Manslaughter	0	.00
Armed Robbery	9	.13
Unarmed Robbery	1	.01
Aggravated Assault	18	.26
Burglary	12	.17
Theft or Larceny, except Car	4	.06
Vehicle Theft	5	.07
Forgery, Fraud, Larceny by Check	1	.01
Other Fraud	0	.00
Forcible Rape	1	.01
Statutory Rape	0	.00
Other Sex Offenses, Juveniles	2	.03
Prostitution and Pandering	0	.00
Other Sex Offenses, not Juveniles	2	.03
Narcotics Violations	5	.07
Alcohol	2	.03
All Other Offenses	5	.07
TOTAL NEW MAJOR OFFENSE CONVICTIONS	82	1.19
TOTAL	6908	100.00

These results support strongly the 1967 UPR findings and add further importance to these findings on the basis of this larger sample. When these statistics are compared to the parole results for the same period of time of persons imprisoned for all other types of offenses, involving a study population of 79,322 parolees, it is readily apparent that persons convicted of Willful Homicide are among the best parole risks. A comparison of Table III with Table I shows that the rate of parole failure among all other offenders is substantially higher than that of paroled murderers: 9.03 percent failure rate for all other offenders as compared to a rate of 1.77 percent for paroled murderers.

TABLE III

New Major Convictions or Allegations with Prison Return
during the First Year after Parole of Persons
Imprisoned for all Other Offenses

New Major Offense Conviction	Number	Percent
NONE	72192	91.01
Willful Homicide	106	.13
Negligent Manslaughter	26	.03
Armed Robbery	782	.99
Unarmed Robbery	237	.30
Aggravated Assault	351	.44
Burglary	2268	2.86
Theft or Larceny, except Car	627	.79
Vehicle Theft	708	.89
Forgery, Fraud, Larceny by Check	852	1.07
Other Fraud	50	.06
Forcible Rape	129	.16
Statutory Rape	27	.03
Other Sex Offenses, Juveniles	65	.08
Prostitution and Pandering	0	.00
Other Sex Offenses, not Juveniles	44	.06
Narcotics Violations	356	.45
Alcohol	24	.03
All Other Offenses	478	.60
TOTAL NEW MAJOR OFFENSE CONVICTIONS OR ALLEGATIONS	7159	9.03
TOTAL	79322	100.00

Major offense convictions with return to prison during the first year after release on parole of persons imprisoned for all offenses other than Willful Homicide amounted to 5,238 parolees out of the study population of 79,322 or 6.73 percent. For Willful Homicide parolees the results came to 82 persons convicted of a new major offense during this same period out of a total Willful Homicide study population of 6,908 or a new major conviction rate of 1.19 percent. See Table IV and compare it with Table II above.

TABLE IV

Major Offense Convictions with Prison Return
during the First Year after Parole of Persons
Imprisoned for All Other Offenses

New Major Offense Conviction	Number	Percent
NONE	73984	93.27
Willful Homicide	83	.10
Negligent Manslaughter	23	.03
Armed Robbery	650	.82
Unarmed Robbery	184	.23
Aggravated Assault	218	.27
Burglary	1769	2.23
Theft or Larceny, except Car	447	.56
Vehicle Theft	544	.69
Forgery, Fraud, Larceny by Check	553	.70
Other Fraud	36	.05
Forcible Rape	96	.12
Statutory Rape	18	.02
Other Sex Offenses, Juveniles	43	.05
Prostitution and Pandering	0	.00
Other Sex Offenses, not Juveniles	31	.04
Narcotics Violations	264	.33
Alcohol	12	.02
All Other Offenses	367	.46
TOTAL NEW MAJOR OFFENSE CONVICTIONS	5238	6.73
TOTAL	79322	100.00

These results make clear that persons convicted of willful homicide and subsequently released on parole are less likely to become parole failures, and hence more likely to achieve complete rehabilitation, than, as a group, are those persons who have been paroled after conviction for some other type of offense.

The facts presented raise many questions about the reasons underlying this outcome. It is beyond the scope of this brief report to attempt to answer these questions. While the data presented are quite powerful evidence of the relatively good parole adjustment of the willful homicide offender, they do not explain the reasons for this good adjustment.

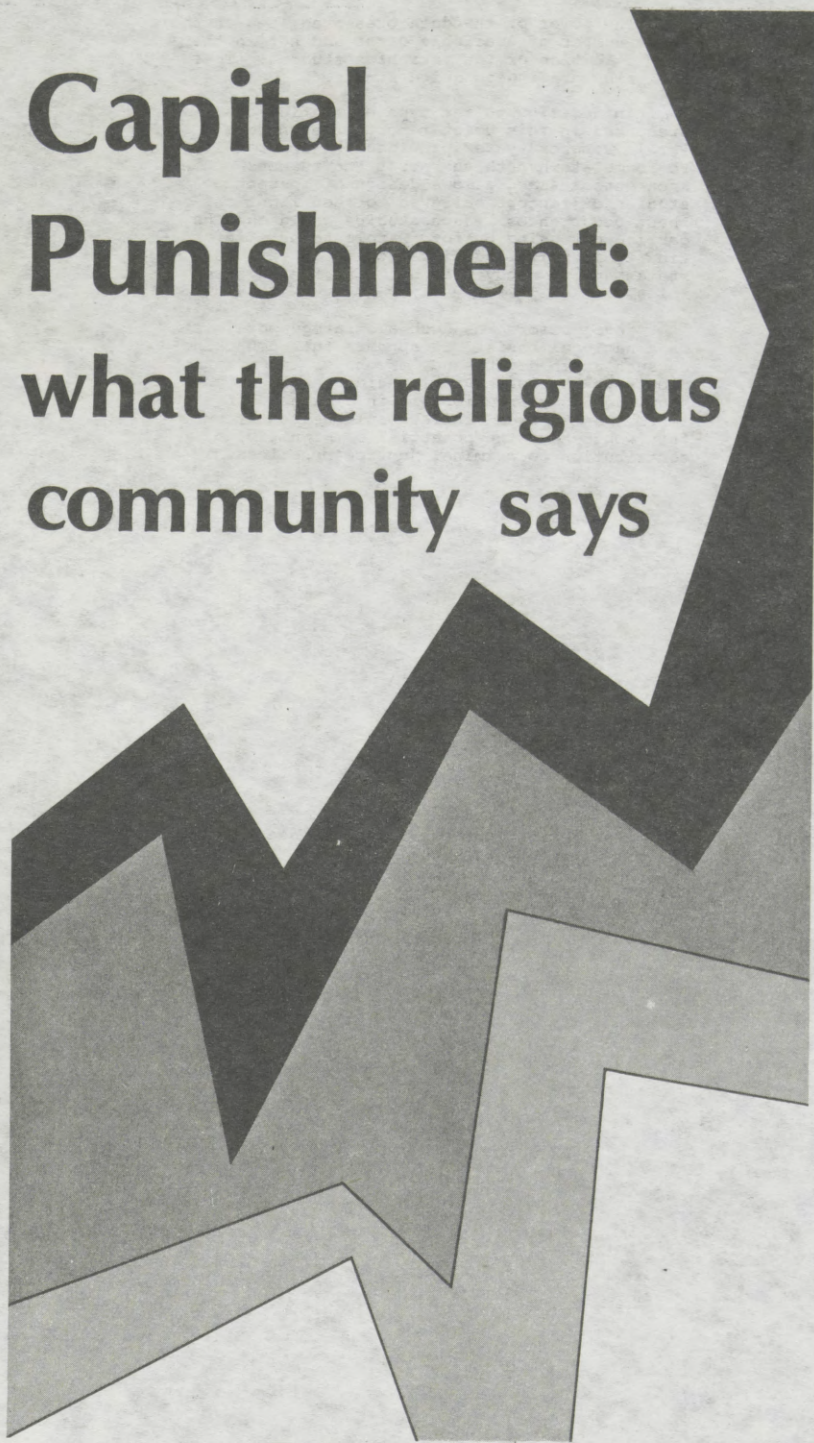
The power of the data presented lies in the large number of available cases and not in the sophistication of the variables studied. These variables are indeed quite simple.³

In addition to the type of statistics presented in this brief report, the Uniform Parole Reports system provides the opportunity to formulate hypotheses about the reasons behind such outcomes and allows design of in-depth studies of factors believed to shed light on these occurrences. Such studies could then be carried out using Uniform Parole Reports information to identify individual cases in various states and to study them by going to the case files.

Never before was such a strategy possible on a national basis. It appears that embarking on such an in-depth study of one or two offender groups in the near future would be wise as our knowledge in corrections is in dire need of improvement. Such studies would be costly but they would have the potential of significant contribution to criminal justice practices.

³For definitions of variables, see the Uniform Parole Reports Coding Manual, available from the project.

Capital Punishment: what the religious community says



PREFACE

On June 2, 1967, Louis Jose Monge was executed in the gas chamber of the Colorado State Penitentiary. Ostensibly, a moratorium on the use of the death penalty extended for nearly ten years from that time. It was broken on January 17, 1977, when a firing squad shot Gary Mark Gilmore to death at the Utah State Prison.

During the moratorium, which resulted mainly from the constitutional challenges to the death penalty that were being made by the NAACP Legal Defense Fund at every level of the judicial system, the churches relaxed their once-vigorous efforts for the full abolition of capital punishment.

From the mid-1950's until around 1968, national church bodies took firm positions opposing the death penalty. During this precise period of time the number of executions annually in the United States diminished rapidly.

Although there is no way to determine the influence of the churches on reduction of executions, during this period of time there was a vast amount of church study and discussion on the issue of capital punishment. The arguments the churches presented were opposed to the death penalty. Significantly, no national religious body went on record in favor of capital punishment at that time.

One reason for the churches' quietness during the moratorium was their premature confidence that the trend toward abolition was strong and irreversible. They believed that the rightness of the cause was upheld in the Eighth Amendment to the Constitution of the United States and would be ultimately confirmed in a decision of the Supreme Court. Attempts to discuss the issue stirred little interest, since no gassings, hangings, or electrocutions were actually taking place.

On July 2, 1976, the Supreme Court of the United States upheld the discretionary death penalty statutes of three states. Almost immediately state legislatures rushed to pass death penalty statutes that would be in conformity with the Supreme Court rulings. Now thirty-two states have capital punishment laws.

Churches and other religious organizations must now work to overcome the view that the violence of the state is a moral response to the violence of an individual. Violence in a society cannot be overcome by increasing violence, even if legal.

Churches need to deliver a positive moral message in the critical debate over the issue of the death penalty. That message must emphasize God's gift of life. An urgent interpretation of the Gospel needs to

be made once again for the Gospel would direct us to compassion and mercy—even in the face of murder.

The Christian faith requires that we do not treat criminals less than human. Jesus said, "Love your enemies; do good to those who hate you; bless those who curse you" (Luke 6:28). His commandment to love even those who would attempt, as enemies, to destroy, means at the very least, that Christians cannot participate in dehumanizing actions toward criminals. Perfect love casts out fear.

The debate over capital punishment in the United States will surely continue. Hopefully, the churches will lead the effort to keep the issue alive. Capital punishment is a moral issue that must be discussed on moral grounds. The effort to abolish the death penalty is an issue the churches must lead now and in the future.

The National Interreligious Task
Force on Criminal Justice
Work Group on the Death Penalty
John P. Adams, Chairperson

The National Interreligious Task Force on Criminal Justice is administratively related to the Joint Strategy and Action Committee, Inc. (JSAC). It is programmatically related to and staffed by JSAC and the Division of Church and Society of the National Council of Churches of Christ in the U.S.A.

American Baptist Churches

Resolution on Capital Punishment

Passed by the General Board of the American Baptist Churches, June, 1977

Until the Gilmore case in 1977, there had been no execution in the United States in 10 years. The ritual taking of life had ceased while debate continued in the courts regarding the constitutionality of capital punishment.

Now that the death laws in some states have been upheld, over 400 persons nationwide face possible execution by hanging, firing squad, asphyxiation, or electrocution. Such punishment has been abolished in Canada and most of Europe, where it is seen as morally unacceptable and a form of cruel and unusual punishment inconsistent with religious and/or ethical traditions.

The majority of those on death row are poor, powerless, and educationally deprived. Almost 50 per cent come from minority groups. This reflects the broad inequalities within our society, and the inequity with which the ultimate is applied. This alone is sufficient reason for opposing it as immoral and unjust.

Since further legal actions to stop executions appear unpromising it is more important than ever that the religious community speak to the moral, religious and ethical implications of killing by the state. Numerous secular and religious groups have recently taken positions in opposition to capital punishment.

THEREFORE, we as American Baptists, condemn the current reinstatement of capital punishment and oppose its use under any new or old state or federal law, and call for an immediate end to planned executions throughout this country.

We urge American Baptists in every state to act as advocates against the passage of new death penalty laws, and to act individually and in concert with others to prevent executions from being carried out.

We appeal to the governors of each state where an execution is pending to act with statesmanship and courage by commuting to life imprisonment without parole all capital cases within their jurisdiction.

American Baptist Churches in the USA
Valley Forge, Pennsylvania 19481



Church of the Brethren

Statements on Capital Punishment

Annual Conference, 1957

"Because we regard human life as sacred, and because we believe that the sixth commandment has application to organized societies as well as to individuals, we stand ready to give our support to legislation, now proposed in many states, for the abolition of capital punishment."

Annual Conference, 1959

"Because the Church of the Brethren holds that the sanctity of human life and personality is a basic Christian principle which the state is also committed to uphold; and because we believe that capital punishment does not really serve the ends of justice, often resulting in tragic and irrevocable miscarriages of justice;

"We commend current efforts to abolish capital punishment, and call upon Brethren everywhere to use their influence and their witness against it."

Annual Conference, 1975

(The following statement is part of a much longer paper on "Criminal Justice Reform." It is included in a section of recommendations entitled, "Reforming the System.")

"... Brethren are encouraged to work for the following changes: That the use of capital punishment be abolished."

Church of the Brethren
1451 Dundee Avenue
Elgin, Illinois 60120



U.S. Catholic Conference

Statement on Capital Punishment

Committee on Social Development and World Peace

March 1, 1978

The use of the death penalty involves deep moral and religious questions as well as political and legal issues. In 1974, out of a commitment to the value and dignity of human life, the Catholic bishops of the United States declared their opposition to capital punishment. We continue to support this position in the belief that a return to the use of the death penalty can only lead to the further erosion of respect for life in our society.

Violent crime in our society is a serious matter which should not be ignored. We do not challenge society's right to punish the serious and violent offender, nor do we wish to debate the merits of the arguments concerning this right. Past history, however, shows that the death penalty in its application has been discriminatory with respect to the disadvantaged, the indigent and the socially impoverished. Furthermore, recent data from corrections resources definitely question the effectiveness of the death penalty as a deterrent to crime.

We are deeply troubled by the legislative efforts being undertaken under the guise of humanitarian concern to permit execution by lethal injection. Such a practice merely seeks to conceal the reality of cruel and unusual punishment. We find this practice unacceptable.

The critical question for the Christian is how we can best foster respect for life, preserve the dignity of the human person and manifest the redemptive message of Christ. We do not believe that more deaths are the response to the question. We therefore have to seek methods of dealing with violent crime which are more consistent with the Gospel's vision of respect for life, and Christ's message of God's healing love. In the sight of God, correction of the offender has to take preference over punishment, for the Lord came to save and not to condemn.

U.S. Catholic Conference
Committee on Social Development and World Peace
1312 Massachusetts Avenue, NW
Washington, D.C. 20005



Christian Church (Disciples of Christ)

Concerning Capital Punishment

Approved by the General Assembly, 1973

The Situation: The Christian Church (Disciples of Christ) has on two occasions approved Assembly (International Convention) resolutions opposing capital punishment. These resolutions, passed in 1957 and 1962, were an affirmation of Christian attitudes at a time when there was a decline in the use of the death penalty in the United States. Subsequently, in June of 1972, the Supreme Court in effect invalidated capital punishment statutes as they were then written and implemented on the grounds that they constituted "cruel and unusual punishment."

As a result of the Supreme Court's decision, the Congress and the state legislatures throughout the nation were required either to abandon the practice of capital punishment or to rewrite their statutes so as to be in compliance with the ruling of the Court. Since then the legislatures in thirteen states have passed laws re-instituting capital punishment, presumably within the guidelines laid down by the Supreme Court. It would appear that this trend has not run its course.

The Court's ruling and the federal and state legislatures' reconsideration of the issue have come at a time when there is great concern in the country over rising crime rates. Crimes such as murder, assault, rape and armed robbery, as well as lesser but nevertheless serious offenses such as automobile stealing and housebreaking, have greatly multiplied, particularly in larger cities. Under such circumstances, valid concern for the rights and welfare of accused wrongdoers cannot be allowed to overshadow equally valid concern for the welfare and rights of the victims and possible victims of crime, many of whom are among the weakest, most underprivileged and vulnerable members of our society. It is understandable, therefore, that in casting about for answers to the problems of increasing crime rates that many people have urged a return to past practices of dealing with crime—including capital punishment.

However, sociological studies comparing states with and without the death penalty tend to conclude that the rate of capital crime is not affected by the existence or non-existence of capital punishment laws on the books. In short, the death penalty does not seem to serve as a deterrent to crime.

Earlier brotherhood resolutions of 1957 and 1962 have stated the ethical reasons for opposing capital punishment. In 1957 the then International Convention of Christian Churches (Disciples of Christ) said:

"We believe that Christians can no longer justify support of the practice of capital punishment. It has become increasingly clear that the *certainty* of apprehension and conviction rather than severity of punishment is the real deterrent to crime. Under such circumstances the death sentence becomes not a real protection to society but only a crude form of vengeance or retributive justice. Christian justification of punishment is always found in the hope of rehabilitation of the offender; since dead people cannot be rehabilitated we can in no way defend capital punishment on Christian grounds.

"In a very real sense also the practice of capital punishment stands in the way of more creative, redemptive and responsible treatment of crime and criminals: There is the danger that society by concentrating attention on the execution of a few criminals may mislead its members into thinking that it is dealing effectively with crime prevention. Christians must insist upon the importance of crime prevention and the rehabilitation of offenders rather than upon retribution."

In 1962 a resolution proposed by The United Christian and Baptist Church of Kalona, Iowa and approved by the International Convention requested that the brotherhood go on record as favoring a program of rehabilitation for criminal offenders rather than capital punishment." The preamble of the 1962 resolution called attention once more to the "evidence that shows the death penalty itself is unequally applied, falling mainly on the poor, the friendless, the mentally unstable, the ignorant, and minority groups, while many other criminals with means escape execution, and there is always the possibility (as had been the case) of executing the innocent . . ."

In the decade from 1962 until the Supreme Court decision the death penalty remained legal in most states but was rarely used. Its disfavor with courts and juries as a practical instrument of justice, together with the redemptive-rehabilitative stance of the religious community, seemed to indicate that capital punishment was fading into oblivion. The Supreme Court decision, however, faced the Congress and each state with the practical problem of accepting the new rule of law or revising statutes to conform with the Court's ruling.

Meanwhile, the guidelines set forth in President Nixon's criminal reform bill have encouraged the use of capital punishment, permitting

the death penalty for specific crimes such as treason, sabotage, espionage when "war related," killing of law enforcement officers and prison guards, skyjacking, kidnapping or bombing of public buildings. In general these guidelines have been followed by the thirteen states which have re-instituted capital punishment, the proposed legislation in nearly 50 per cent of the other state legislatures and in the United States Senate and House of Representatives.

In reconsidering the issue of capital punishment in view of the Supreme Court ruling and subsequent developments, the Division of Homeland Ministries recognizes the legitimate concern of everyone for the rising crime rates in the United States. The division encourages all serious and carefully thought out procedures designed to provide some adequate police protection, more rapid apprehension of criminals and greater certainty of conviction, punishment and rehabilitative action for offenders. It feels, however, that the actions of the church in passing the brotherhood resolutions in 1957 and 1962 are still valid: capital punishment does not deter crime; it interferes with legitimate efforts at crime prevention; and it denies the possibility of seeking rehabilitation and redemption of persons.

THEREFORE BE IT RESOLVED, that the General Assembly of the Christian Church (Disciples of Christ) meeting at Cincinnati, Ohio, October 26-31, 1973, reaffirms its declaration of 1962 "favoring a program of rehabilitation for criminal offenders rather than capital punishment" and calls upon congregations and members of the Christian Church (Disciples of Christ) to support those state legislators and members of Congress who oppose capital punishment; and,

BE IT FURTHER RESOLVED, that the Division of Homeland Ministries be encouraged to develop an education and action program to support regional manifestations of the church and congregations in opposing capital punishment; and,

BE IT FURTHER RESOLVED, that the General Minister and President send copies of this resolution to the President of the United States, the United States Attorney General, the relevant United States Senate and House Committees; and that regional ministers be requested to send copies of this resolution to state governors and relevant committees of state legislatures; and that regional manifestations of the church consider developing programs of education and action when capital punishment is under consideration by the state legislative bodies in their areas.

Christian Church (Disciples of Christ)
222 South Downey Avenue
Indianapolis, Indiana 46219



The Episcopal Church

Statement on Capital Punishment

General Convention, 1968

WHEREAS, The conscience of many thoughtful people has been aroused by the condemnation to death of individuals who may be innocent; and

WHEREAS, There is a growing body of public opinion which believes that capital punishment is archaic and ineffective to protect society, as shown by the fact that states which have abolished it have the lowest homicide rates; and

WHEREAS, Research has demonstrated that the death penalty falls for the most part on obscure, impoverished, friendless or defective individuals and rarely on the well-to-do and educated; and

WHEREAS, The Church believes that each individual is sacred, as a child of God, and that to legalize killing of an offender is to deny the basic Christian doctrines of forgiveness of sin and the power of redemption, and that mercy is a Christian duty, and

WHEREAS, Resolutions urging abolition of the death penalty have been recently passed by Six Dioceses, one Missionary district and the Synod of the Eighth Province, therefore be it

RESOLVED, The House of Deputies concurring that this 59th General Convention of the Protestant Episcopal Church in the United States of America record its conviction that the death penalty ought to be abolished.

General Convention, 1969

WHEREAS, The General Convention of the Church in 1958 expressed opposition to capital punishment; and

WHEREAS, The Diocese of Pittsburgh in 1959 expressed similar opposition to capital punishment, and re-affirmed this stand in 1969; therefore be it

RESOLVED, That the General Convention re-affirm its opposition to capital punishment; and be it further

RESOLVED, That this position of the Church be communicated to the proper authorities in all cases of impending capital punishment.

The Episcopal Church
815 Second Avenue
New York, New York 10017



American Friends Service Committee

Statement on the Death Penalty

November, 1976

The American Friends Service Committee reaffirms its opposition to the death penalty. We base our stand on the Quaker belief that every person has value in the eyes of God and on Quaker testimonies against the taking of human life.

The US Supreme Court decisions of July, 1976, rejected the major constitutional arguments against the death penalty, which had stopped executions in the U.S.A. in the previous decade. These decisions denied that execution is cruel and unusual punishment, citing the passage of death penalty laws by a majority of the states in recent years as evidence that the public does not consider execution to be cruel and unusual. In our view, alleged public support for capital punishment does not diminish the cruelty nor warrant the taking of human life.

The Supreme Court agrees that there is no conclusive evidence that the death penalty acts as a deterrent to crime. It recognized that the continuing demand for capital punishment is in part a manifestation of a desire for retribution. We find it particularly shocking that the Supreme Court would give credence to retribution as a basis for law.

Punishment by death is inflicted most often upon the poor, and particularly upon racial minorities, who do not have the means to defend themselves that are available to wealthier offenders. A minority person convicted of a capital offense is much more likely to pay the extreme penalty than a white person convicted of the same crime. Discretion as to whether to execute continues under the Supreme Court's guidelines, and minority persons will continue to be victims of this discretion. The Supreme Court in its 1976 decision ignores this reality.

The grossly disproportionate number of nonwhites sentenced to be executed and the continuing demand for the death penalty indicate that the death penalty may constitute an outlet for unacknowledged racist attitudes. This outlet is now legally sanctioned, but it is none the less morally unacceptable.

The death penalty is especially abhorrent because it assumes an infallibility in the process of determining guilt. Persons later found to have been innocent have been executed. This will happen again when killing by the state begins anew.

It is bad enough that murder or other capital crimes are committed in the first place and our sympathies lie most strongly with the victims. But the death penalty restores no victim to life and only compounds the wrong committed in the first place.

We affirm that there is no justification for taking the life of any man or woman for any reason.

American Friends Service Committee
1501 Cherry Street
Philadelphia, Pennsylvania 19102



Friends Committee on National Legislation

Statement on Capital Punishment

(Taken from statement on Administration of Justice dated April, 1977)

We challenge the philosophy of punishment which underlies our criminal justice system. The administration of justice should be directed toward making available such services to those convicted of crimes as are needed to help them become useful members of society. It should also provide equitable prompt restitution for the victims of crime.

We also advocate: . . . abolition of capital punishment and reduction of maximum sentences.

Friends Committee on National Legislation
245 Second Street, NE
Washington, D.C. 20002



The American Lutheran Church

Statement on Capital Punishment

Sixth General Convention, October 9, 1972

1. The issue of whether capital punishment is, or is not, constitutional currently is a matter on which the courts are expected to rule. Whichever way the courts decide, the decision likely will not be popular. People disagree sharply on whether it is good, right, or necessary for the government to put guilty persons to death. Christians disagree on what they understand the Scriptures to say regarding the death penalty.

2. The Lutheran theological tradition generally has both accepted and affirmed the right of the state to impose the death penalty. It finds Scriptural support in such passages as Gen. 9:6, Num. 35:29-33, and Matt. 26:52, as well as in Rom. 13:1-7, where powers and duties of government are outlined. Based upon such Scripture passages, Luther said of the Fifth Commandment, "Therefore neither God nor the government is included in this commandment, yet their right to take human life is not abrogated. God has delegated His authority of punishing evil-doers to civil magistrates" The Augsburg Confession does not name capital punishment as such. Nevertheless, Article XVI accepts the right of Christians to "serve as princes or judges, render decisions and pass sentence according to imperial and other existing laws, punish evil-doers with the sword, engage in just wars, serve as soldiers . . ." (emphasis added).

3. Other Christian traditions emphasize other portions of Scripture and so come to different conclusions regarding the death penalty. Nevertheless, nearly all Christians agree that the basic function of government, under God, is to preserve public order, to foster justice, and to deter evil-doing. As it works to assure peace, order, and tranquility, to safeguard justice and equity, and to promote the general welfare, government protects the well-being both of persons and of society as a whole.

4. Christians generally agree, too, that government must have the power and the means to fulfill its basic functions. Thus they have accorded to government powers over their purse, over their time and energies, and perhaps even over their lives. For many centuries the governing authorities have imposed the death penalty. The exercise of this penalty was felt to be necessary to preserve public order, to foster justice, and to deter evil-doing. Whether capital punishment is still

needed to achieve these governmental functions is a question under vigorous debate today. It is a question which needs to be discussed openly and objectively, in light of research data and the current requirements of wise public policy.

5. A growing body of public opinion holds that the exercise of capital punishment actually hinders the state from performing its total God-given role with justice and equity. Voices for this viewpoint argue that the state should abolish capital punishment because:

- a) Errors and miscarriages of justice are impossible to correct once the sentence has been executed.
- b) The penalty typically is administered with a double standard of justice, weighing more heavily against nonwhite than white, poor than rich, uneducated than educated.
- c) The interests of society require not vengeance and punishment but protection of the innocent and correction and rehabilitation of the offender.
- d) The fear of capital punishment has no proven value as a deterrent to criminal behavior.
- e) Humanity, compassion, and reconciliation are stronger values for the state to symbolize than are the inhumanity, retaliation, and rejection which capital punishment expresses.

6. There is much merit in many of these criticisms. Capital punishment often has been administered unjustly, with racism, prejudice, hostility, and vengeance. The logic by which the death penalty was decreed for certain offenses was not always clear. Mandatory punishments for specific deeds cannot take into account the circumstances under which the deeds were done, nor how the person felt about what he had done. The threat of capital punishment is far less a deterrent than is the realization that a person's offense surely will be detected and that he will quickly be brought to trial.

7. Nevertheless, is it wise or necessary for the state totally to give up its power to put persons to death? How does a society protect itself and its members against persons who repeatedly in their deeds prove their hate, their hostility, and their rejection of those basic values which protect persons and society? May there be some acts which are so evil and so destructive that the person guilty of committing them must expect to forfeit his life? If a government totally gives up the power of the sword does it perhaps weaken its ability to govern in crisis situations? If government is felt to be easy on malefactors, will its citizens begin to take private vengeance? Should not good law provide for mercy, as an element of love and justice?

8. Whichever way the courts decide on capital punishment,

vigorous and intensive efforts should be directed to the deeper issues of crime and corrections. These efforts should be addressed to: (1) careful reconsideration and redefinition of crime so as to protect the poor, the uninformed, and the powerless against those who use the law and its power legally to exploit, to victimize, and to impoverish; (2) the improvement of the total system of criminal justice; (3) the development of more effective methods of law enforcement; (4) quick identification, early apprehension, and swift prosecution of offenders against law, order and justice; (5) the correction of conditions which contribute to crime; and (6) the search for and use of a variety of more effective ways of dealing with persons who commit hostile acts against persons and society. We urge the members of The American Lutheran Church to use their influence to bring about such salutary efforts to attack the roots of crime and to improve the handling of those found guilty of harming persons or society.

9. As Lutherans living in the final decades of the twentieth century we affirm our theological heritage which accords to the state the right to impose the death penalty. We know, however, that many Lutherans believe that the death penalty no longer should be exercised. We, therefore, welcome the debate as to whether, and under what sorts of circumstances, the state must exercise this power. We encourage members of The American Lutheran Church to join in this debate. They should listen carefully to the arguments offered, and should test the validity of these arguments against research data, tradition and practice, and common sense. The words of Amos are as true for us as for his generation, "Hate evil, and love good, and establish justice in the gate" (Amos 5:15). Much is at stake, alike for persons and for society, in the course of action which American public policy will take on the issue of capital punishment.

The American Lutheran Church
422 South Fifth Street
Minneapolis, Minnesota 55415



Lutheran Church in America

Statement on Capital Punishment

*Adopted by the Third Biennial Convention, Kansas City, Missouri,
June 21-29, 1966*

Within recent years, there has been throughout North America a marked increase in the intensity of debate on the question of abolishing the death penalty. This situation has been accompanied by the actual abolition of capital punishment in ten states and two dependencies of the United States, qualified abolition in three states, and in six states a cessation in the use of the death penalty since 1955. Although the issue of abolition has been widely debated in Canada in recent years, a free vote in Parliament on April 5, 1966, failed to end the legality of the death sentence. However, during the last two years or more, death sentences in Canada have been consistently commuted.

These developments have been accompanied by increased attention to the social and psychological causes of crime, the search for improved methods of crime prevention and law enforcement, efforts at revising the penal code and judicial process, and pressure for more adequate methods in the rehabilitation of convicted criminals. There has been a concurrent concern for persons who, because of ethnic or economic status, are seriously hampered in defending themselves in criminal proceedings. It has been increasingly recognized that the socially disadvantaged are forced to bear a double burden: intolerable conditions of life which render them especially vulnerable to forces that incite to crime and the denial of equal justice through adequate defense.

In seeking to make a responsible judgment on the question of capital punishment, the following considerations must be taken into account:

1. The Right of the State to Take Life

The biblical and confessional witness asserts that the state is responsible under God for the protection of its citizens and the maintenance of justice and public order. For the exercise of its mandate, the state has been entrusted by God with the power to take human life when the failure to do so constitutes a clear danger to the civil community. The possession of this power is not, however, to be interpreted as a command from God that death shall necessarily be employed in punishment for crime.

On the other hand, a decision on the part of civil government to abolish the death penalty is not to be construed as a repudiation of the inherent power of the state to take life in the exercise of its divine mandate.

2. Human Rights and Equality Before the Law

The state is commanded by God to wield its power for the sake of freedom, order and justice. The employment of the death penalty at present is a clear misuse of this mandate because (a) it falls disproportionately upon those least able to defend themselves, (b) it makes irrevocable any miscarriage of justice, and (c) it ends the possibility of restoring the convicted person to effective and productive citizenship.

3. The Invalidity of the Deterrence Theory

Insights from both criminal psychology and the social causes of crime indicate the impossibility of demonstrating a deterrent value in capital punishment. Contemporary studies show no pronounced difference in the rate of murders and other crime of violence between states in the United States which impose capital punishment and those bordering on them which do not.

In light of the above considerations, the Lutheran Church in America:

urges the abolition of capital punishment

urges the members of its congregations in those places where capital punishment is still a legal penalty to encourage their legislatures to abolish it;

urges citizens everywhere to work with persistence for the improvement of the total system of criminal justice, concerning themselves with adequate appropriations, the improved administration of courts and sentencing practices, adequate probation and parole resources, better penal and correctional institutions, and intensified study of delinquency and crime;

urges the continued development of a massive assault on those social conditions which breed hostility toward society and disrespect for the law.

Adopted by the Sixth Biennial Convention, Dallas, Texas, June 30-July 6, 1972

In keeping with the social statement, "Capital Punishment," adopted in 1966, the church should work for abolition of capital punishment or oppose its reinstatement where it has been suspended.

Canada Section

Resolution on Capital Punishment

Adopted June, 1965

Resolutions:

Resolved, That Lutheran Church in America - Canada Section express to the Government of Canada its view that capital punishment ought to be abolished

and,

That Lutheran Church in America - Canada Section request the Synods to call upon their congregations and their members and their fellow citizens to work toward and support improved treatment facilities in our correctional institutions, additional facilities for those on probation and parole, and those preventive efforts that help reduce the incidence of delinquency and crime.

Lutheran Church in America
231 Madison Avenue
New York, New York 10016



Mennonite General Conference

Statement on Capital Punishment

Adopted August, 1965, Kidren, Ohio

In view of the prophetic commission given to the church as set forth in two recent statements of Mennonite General Conference, *A Declaration of Christian Faith and Commitment with Respect to Peace, War, and Nonresistance* (1951), and *The Christian Witness to the State* (1961); in view of the sanctity of human life; and in view of our redemptive concern for the offender, be it

RESOLVED That we appeal to the parliament of the Dominion of Canada and to the federal and state governments of the United States, to discontinue the use of the death penalty and that we refer to our conferences and congregations for study and discussion of the paper, "A Christian Declaration on Capital Punishment," as prepared by the Peace Problems Committee.

In view of our responsibility as ministers of reconciliation, be it further

RESOLVED That we confess that we have not adequately fulfilled our obligation to the offender nor for the reduction of crime in our society. We need to be more faithful in bringing a Christian witness to persons in prison and in laboring for the reform of prison procedures, for the rehabilitation of released prisoners and for the correction of spiritual, economic, and social conditions which contribute to the making of juvenile offenders and to the spread of crime.

We pray that in our brotherhood the Spirit may deepen each member's conviction and understanding of his obligation to individual criminal offenders, to the government under which he lives, and to Christ. And we pray that God may grant us wisdom, vision, and courage that as a brotherhood we may engage in this ministry as the Holy Spirit gives us direction.

Mennonite Central Committee
21 South 12th Street
Akron, Ohio 17501



National Council of Churches of Christ in the U.S.A.

A Resolution on the Death Penalty

Adopted by the Governing Board, October 8, 1976

For nearly ten years there has been no execution in the United States. Appeals of death sentences have been taken to the Supreme Court, asking it to declare such sentences unconstitutional as "cruel and unusual punishment." As the moratorium has lengthened, so has the roll of those awaiting the outcome on "death row," not knowing whether they are finally to live or die and, if to die, when. There are more than 600 of them, of which over 60% are black, brown or red, and nearly all of them are poor, suggesting that the ultimate sanction continues to fall more heavily on minorities and those who cannot afford extensive legal defense.

The Supreme Court of the United States has at last ruled that the death penalty is not unconstitutional (*Gregg v. Georgia*, decided July 2, 1976), and may be justified as an expression of the outrage of society at particularly heinous crimes. Legislators have hastened to enact new statutes to legitimize the reinstatement of capital punishment. It seems only a question of time until some state will execute one of its citizens, break the moratorium, and open an avalanche of legal slaughter.

Most of the churches of the National Council of Churches have opposed the death penalty for years, and in 1968 the General Board of the NCCC adopted a policy statement entitled "Abolition of the Death Penalty." Yet the churches have not been articulate about this issue over the past few years, when they could have been helping their members to understand the moral and religious issues at stake. Instead, many church people have been drawn into the agitation for reinstatement of the death penalty.

The Governing Board of the National Council of Churches:

- 1) Reasserts the conviction expressed in the policy statement of 1968 that the death penalty is wrong and opposes its reinstatement;
- 2) Urges the churches to redouble their efforts in this cause to make up for lost time;
- 3) Directs that the NCCC become a member of the newly-formed National Coalition Against The Death Penalty, and

that its \$1,000 membership subscription be paid from the Priority Implementation Fund;

- 4) Calls upon the member denominations to provide the funds necessary for the Division of Church and Society to organize effective ecumenical action against the resumption of executions;
- 5) Encourages contributions by denominations and individuals to the NAACP Legal Defense Fund, which has been spearheading legal action against the death penalty;
- 6) Urges the enlistment of volunteer lawyers to assist persons facing execution;
- 7) Pledges that the staff of the NCCC will initiate contacts with state councils of churches in strategic states to mobilize church people and others to resist the re-enactment and implementation of death-penalty statutes;
- 8) Urges the churches to put their policies opposing death penalty into more effective action, especially through their own congregations and judicatories;
- 9) Commits the NCCC to join with others in seeking clemency for those sentenced to die, when all remedies at law have been exhausted;
- 10) Calls church people to a day of protest and mourning whenever and wherever an execution may be scheduled, especially the first one.

Abolition of the Death Penalty

Adopted by the General Board, September 13, 1968

In support of current movements to abolish the death penalty, the National Council of Churches hereby declares its opposition to capital punishment. In so doing, it finds itself in substantial agreement with a number of member denominations which have already expressed opposition to the death penalty.

Reasons for taking this position include the following:

- 1) The belief in the worth of human life and the dignity of human personality as gifts of God;
- 2) A preference for rehabilitation rather than retribution in the treatment of offenders;
- 3) Reluctance to assume the responsibility of arbitrarily termi-

nating the life of a fellow-being solely because there has been a transgression of law;

- 4) Serious question that the death penalty serves as a deterrent to crime, evidenced by the fact that the homicide rate has not increased disproportionately in those states where capital punishment has been abolished;
- 5) The conviction that institutionalized disregard for the sanctity of human life contributes to the brutalization of society;
- 6) The possibility of errors in judgment and the irreversibility of the penalty which makes impossible any restitution to one who has been wrongfully executed;
- 7) Evidence that economically poor defendants, particularly members of racial minorities, are more likely to be executed than others because they cannot afford exhaustive legal defense;
- 8) The belief that not only the severity of the penalty but also its increasing infrequency and the ordinarily long delay between sentence and execution subject the condemned person to cruel, unnecessary and unusual punishment;
- 9) The belief that the protection of society is served as well by measures of restraint and rehabilitation, and that society may actually benefit from the contribution of the rehabilitated offender;
- 10) Our Christian commitment to seek the redemption and reconciliation of the wrong-doer, which are frustrated by his execution.

Seventy-five nations of the world and thirteen states of the United States have abolished the death penalty with no evident detriment to social order. It is our judgment that the remaining jurisdictions should move in the same humane direction.

In view of the foregoing, the National Council of Churches urges abolition of the death penalty under federal and state law in the United States, and urges member denominations and state and local councils of churches actively to promote the necessary legislation to secure this end, particularly in the thirty-seven states which have not yet eliminated capital punishment.

National Council of Churches of Christ in the U.S.A.
475 Riverside Drive
New York, New York 10027



Reformed Church in America

Resolution on Capital Punishment

General Synod, 1965

The Christian Action Commission hereby recommends that the General Synod of the Reformed Church in America adopt a resolution opposing the retention of capital punishment as an instrument of justice within our several states.

In presenting this recommendation, we offer the following reasons to substantiate our position:

1) Capital punishment is incompatible with the spirit of Christ and the ethic of love. Although Christ is not the premise for the actions of the state, He is the premise from which the Church speaks to the state. In the light of Christ, the Church is hard-put to justify the continued use of the death penalty. As Christians we are confronted with the necessity of making the principle of love the motivating factor in our relationships with other men. The law of love does not negate justice, nor does it indulge in sentimental softness toward the wrongdoer. But it does nullify the motives of vengeance and retribution by forcing us to think in terms of redemption, rehabilitation and reclamation. The application of the death sentence puts an offending person outside the pale of human help or hope. The cold demands of abstract justice may be met, but the warm concern of love for the person is completely denied. The death penalty is a total giving up of the sinner. It cuts him off from all opportunity to face himself and his sin; it is a foreclosure on repentance and possible redemption. The Christ who refused to endorse the stoning of the woman taken in adultery would have us speak to the word of compassion, not vengeance.

2) Capital punishment is of doubtful value as a deterrent. One of the primary arguments for capital punishment rests on its supposed value of curbing homicidal tendencies and curtailing capital crimes. Practically all available documentation fails to substantiate this argument. Those states and nations which have abolished the death penalty have had no increase in the rates of homicide; indeed, many studies indicate decreases. It is of some significance to read that in England, when pocket-picking was a capital crime, the pick-pockets attended the public executions to ply their trades. Fear of punishment even of the most severe sort, has not been an effective restraint. One

reason for this is that many of those bent on a particular crime, work under the illusion that they are clever enough to get away with it.

But beyond this is the fact that most capital crimes are crimes of passion, committed in moments of anger or jealousy, with no thought or regard for the consequences. The Minority Report of the New Jersey Commission to study capital punishment states: "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."

3) Capital punishment results in inequities in application. The actual application of the death penalty demonstrates that it is an uneven and unfair instrument of justice. In no other area is the law applied as unevenly as with such obvious discrimination. A Committee of the House of Representatives, Sixty-ninth Congress, considered the following testimony: "As now applied, the death penalty is nothing but an arbitrary discrimination against an occasional victim. It cannot even be said that it is reserved as a weapon of retributive justice for the most atrocious criminals. For it is not necessarily the most guilty who suffer it. Almost any criminal with wealth or influence can escape it, but the poor and friendless convict, without means or power to fight his case from court to court, or to exert pressure upon the pardoning executive, is the one singled out as a sacrifice to what is little more than tradition." Although juries do not consciously discriminate against the weak, their verdicts are affected by inadequate legal counsel or public apathy toward the out-cast.

4) Capital punishment is a method open to irremediable mistakes. The attorney, Norman Redlich, advises those who endorse the death penalty to remember the injunction: "Know ye that ye may be mistaken." And mistakes are made. The innocent are sometimes executed. It is estimated that the wrong person is executed as high as five percent of the time. A report on capital punishment by the Presbyterian Church in the United States: "It is not unreasonable to ascribe infallibility to judge, juryman, witnesses, counsel, law-enforcement officers and other assistants?" . . . There are too many variables, such as vagaries of memory, erroneous recognition, fallibility of experts, faulty summing up, shortcomings of legal aid, jurors, rough police methods of obtaining evidence, sensational newspaper coverage and biased public opinion. In consideration of these all-too-human elements, no decision upon a man's life should be final.

5) Capital punishment ignores corporate and community guilt. The death penalty presupposes the total guilt of the offender, and

refuses to acknowledge society's share of the blame. A society which teaches vice through permitting pornography, glorified crime and violence through the entertainment industry, permits substandard schooling and housing through segregation has a share in the making of the offender. Emil Brunner reminds us that "In every crime the first chief criminal is society!" If expiation is to be made, then both the criminal and society must make it. In an informal paper, the Rev. Charles Wissink of New Brunswick Seminary writes, "How can both be punished? The criminal can make expiation by enforced imprisonment and the loss of freedom, by submitting to forcible education until rendered harmless. How does society offer expiation? By paying for the tremendous expenses incurred in the penal colonies under this type of arrangement, and also by trying to stamp out all those ills which contribute to the breeding of criminals, e.g., fighting unemployment, prejudice, injustice of any form, inequalities, anything which provokes criminal intent in an individual." But capital punishment is too cheap and easy a way of absolving the guilty conscience of mankind.

6) Capital punishment perpetuates the concepts of vengeance and retaliation. A society which considers itself somewhat enlightened should not resort to primitive and base instincts and methods. The family of a victim may desire vengeance by seeing the criminal executed. But it is not the function of society to satisfy such personal vengeance. As an agency of society, the state should not become an avenger for individuals; it should not presume the authority to satisfy divine justice by vengeful methods. For the state to descend to this level is to contribute to the brutalizing tone of life.

7) Capital punishment ignores the entire concept of rehabilitation. The Christian faith should be concerned not with retribution, but with redemption. Any method which closes the door to all forgiveness, and to any hope of redemption, cannot stand the test of our faith. The elimination of the death penalty would place a greater burden upon the consciences and efforts of men. But it would open the doors to hope, and it would direct energies toward the need of the person.

In asking for a resolution against capital punishment, the Christian Action Commission is not advocating that society abdicate its need and right to deal with the offender. We fully recognize that justice must be administered, the offender punished and society protected. It is our contention, however, that capital punishment does not serve the real requirements of justice within our social system. Other methods are at the disposal of men in maintaining justice and

in promoting security. Christians, guided by Biblical and humanitarian considerations, will continually speak against any system which is unjust, and will explore all creative ways and means of dealing with problems of crime in our social order.

In making the recommendation opposing capital punishment, we are aware that this is but one of many problems connected with the administration of justice in criminal affairs and that the elimination of capital punishment in itself although we hold it to be both expedient and right, will not solve all problems related to crime in society. We are troubled by the ignorance and indifference of the public in these matters of vital and social ethical concern. We recommend encouragement of forward looking study in all areas related to criminology; support of all efforts to improve our penal institutions, crime prevention agencies and police procedures; provision of adequate staff and budget for prisons, parole boards and similar institutions so that the possibilities for the rehabilitation of convicted persons may be more fully realized, and persons who, for the necessary safeguard of society, cannot presently be allowed their freedom, may be more effectively recognized and their needs provided for.

Reformed Church in America
475 Riverside Drive, 18th Floor
New York, New York 10027



United Church of Christ

Resolution on Capital Punishment Overture to General Synod

Adopted, Eleventh General Synod, July 1-5, 1977

WHEREAS, The United Church of Christ in General Synod Seven and General Synod Nine has declared its opposition to capital punishment on religious, moral, ethical and practical grounds and

WHEREAS, the July 2, 1976 Supreme Court decision declaring the death penalty to be a constitutional punishment under certain conditions has effectively halted the 10 year moratorium on executions, and

WHEREAS, officially sanctioned execution has resumed, there is an urgency for the United Church of Christ to take action to implement its previous declarations

BE IT THEREFORE RESOLVED, that the Eleventh General Synod of the United Church of Christ instruct the Executive Council to:

1. Develop strategies, coordinate the church's witness against capital punishment and provide the necessary funds;
2. Join, as a denomination, the National Coalition Against the Death Penalty.

Statement on Capital Punishment

Actions of the Seventh General Synod — June 25 and July 2, 1969

WHEREAS the Committee for Racial Justice, the Council for Christian Social Action, and the UCC Ministers for Racial and Social Justice are unalterably opposed to capital punishment and cannot remain silent regarding its continuance in our society, and

WHEREAS the human agencies of legal justice are fallible, and

WHEREAS we are concerned about the disproportionate number of black and poor who occupy death row and, white or black, are victims of an evil which decent people of our society have too long

endured and which violates categorically our Judeo-Christian ethic, and

WHEREAS this outdated and barbaric practice has been found to discriminate on the basis of skin color and economic condition, and

WHEREAS the last-minute stay of execution of 17-year-old Marie Hill in the gas chamber of North Carolina reminds us that one of the gross injustices in our judicial system is the retention of this barbaric practice,

THEREFORE BE IT RESOLVED that the United Church of Christ commit itself to join in a nationwide campaign for the abolition of capital punishment and call upon other secular and religious institutions to join in a maximum effort for the abolition of capital punishment in the following:

a) Enlisting the support of Conferences and of other denominations and agencies and cooperating with existing efforts to abolish capital punishment.

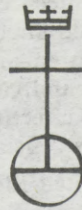
b) Developing legislative and other political action for the abolition of capital punishment.

c) Resisting efforts to reinstitute capital punishment in those states where it has been abolished.

d) Testing the constitutionality of laws permitting capital punishment.

e) Making available and assisting in the raising of funds to pursue the above.

United Church of Christ
297 Park Avenue, South
New York, New York 10010



The United Methodist Church

Resolution on Capital Punishment

Adopted by the 1976 General Conference, Portland, Oregon

There have been new calls for the use of the death penalty in the United States. Although there has been a moratorium on executions for the past several years, a rapidly rising rate of crime in the American society has generated support for the use of the death penalty for certain serious crimes. It is now being asserted, as it was often in the past, that capital punishment would deter criminals and would protect law abiding citizens.

The United Methodist Church is convinced that the rising crime rate is largely an outgrowth of unstable social conditions which stem from an increasingly urbanized and mobile population, from a long period of economic recession, from an unpopular and disruptive war, a history of unequal opportunities for a large segment of the nation's citizenry and from inadequate diagnosis and treatment of criminal behavior. The studies of the social causes of crime continue to give no substantiation to the conclusion that capital punishment has a deterrent value.

The United Methodist Church is convinced that the nation's leaders should direct attention to the improvement of the total criminal justice system and to the elimination of the social conditions which breed crime and cause disorder, rather than fostering a false confidence in the effectiveness of the death penalty. The use of the death penalty gives official sanction to a climate of violence.

The United Methodist Church declares its opposition to the retention and use of capital punishment and urges its abolition.

Social Principles

(This statement is part of a larger section on crime and rehabilitation printed in the Social Principles of the United Methodist Church, 1976)

"... we oppose capital punishment and urge its elimination from all criminal codes."

Board of Church and Society
of the United Methodist Church
100 Maryland Avenue, NE
Washington, D.C. 20002

Statement on Capital Punishment

Council of Bishops, November 19, 1976

The Bishops of the United Methodist Church reaffirm the position of the General Conference of the United Methodist Church which asserts that the use of the death penalty gives official sanction to a climate of violence. Any government undermines its moral authority when it presumes upon the prerogatives of God by taking human life in response to criminal deeds. The offense is compounded when the frequently poor and relatively defenseless are those ultimately penalized.

On the basis of the teachings of the Christian faith and the ideal of equal treatment under the law which is an integral part of our national heritage we appeal to the President, the President-elect, and all of the governors to use their power to grant clemency to those facing the death penalty.

Furthermore, we call upon all members and officials of the United Methodist Church, lay and clergy, to petition the President, President-elect, and others in authority to extend clemency to all persons facing capital punishment.

We further urge all fellow Americans to lend their support to clemency for those now facing the death penalty. As we draw to the close of this Bicentennial year we urge the American people to participate in acts of reconciliation between victims of tragic crimes and criminal offenders that we may share in the uncomparable experience of forgiveness and underscore the meaning of the phrase: "One nation under God."

Council of Bishops
Secretary, Bishop James K. Mathews
100 Maryland Avenue, NE
Washington, D.C. 20002



United Presbyterian Church in the USA

Resolution on Capital Punishment

Whereas, the 171st General Assembly (1959) declared "that capital punishment cannot be condoned by an interpretation of the Bible based upon the revelation of God's love in Jesus Christ, that as Christians we must seek redemption of evil doers and not their death, and that the use of the death penalty tends to brutalize the society that condones it." and

Whereas, the power of the state to kill remains in conflict with humane principles, and Christians in a representative democracy cannot isolate themselves from corporate responsibility, including responsibility for every execution, as well as for every victim; and

Believing that the resumption of executions can only degrade and dehumanize all who participate in its process, that it is not necessary to any legitimate goal of the state, and that it is incompatible with the basic principles of Christian faith and practice; and

Believing that a deep reverence for human life is the best security of life and that a renewed belief and commitment to that precept can lead us to more rational and effective ways of dealing with crime and criminal offenders; and

Believing that the Christian communities of the nation are facing an opportunity now for moral leadership in dealing with the issues and problems of capital punishment;

Therefore, the 189th General Assembly (1977):

1. Calls upon judicatories and members of the United Presbyterian Church to:

a) Work to prevent the execution of persons now under sentence of death and further use of the death penalty.

b) Work against attempts to reinstate the death penalty in state and federal law, and where such laws exist, to work for their repeal;

c) Work for the improvement of the justice system to make less radical means available for dealing with persons who are a serious threat to themselves and to the safety and welfare of society.

2. Requests the agencies of the General Assembly to implement these recommendations through appropriate education and action materials and strategies, including efforts to support the enlistment of volunteer lawyers to assist persons facing execution, and including participation in and support of ecumenical and coalition programs.

The United Presbyterian Church in the USA

475 Riverside Drive

New York, New York 10027



Unitarian Universalist Association

Statement on Capital Punishment

Adopted by the Fifth General Assembly of the Unitarian Universalist Association, Hollywood, Florida on May 21, 1966

RESOLVED: That the Unitarian Universalist Association urges the complete abolition of capital punishment in all United States and Canadian jurisdictions; and

BE IT FURTHER RESOLVED, that the Unitarian Universalist Association seeks to encourage the governors of the states and the Canadian cabinet to pursue a policy of commuting death sentences until such time as capital punishment is abolished throughout the United States and Canada.

BE IT FURTHER RESOLVED, that the Unitarian Universalist Association urges its member churches and fellowships to work for the formation of state councils affiliated with the American League to Abolish Capital Punishment, or work with such state councils where they already exist and to support the Canadian Society for the Abolition of the Death Penalty.

Statement on Capital Punishment

Adopted at the Thirteenth General Assembly of the Unitarian Universalist Association, New York City, June 26, 1974

WHEREAS: At this time, even though there has been no execution in the United States for the past seven years, twenty-eight states have already passed legislation seeking to re-establish capital punishment, and

WHEREAS: The act of execution of the death penalty by government sets an example of violence,

BE IT RESOLVED: That the 1974 General Assembly of the Unitarian Universalist Association continues to oppose the death penalty in the United States and Canada, and urges all Unitarian Universalists and their local churches and fellowships to oppose any attempts to restore or continue it in any form.

Unitarian Universalist Association
25 Beacon Street
Boston, Massachusetts 02108



American Ethical Union

Resolution on Capital Punishment

Adopted September 17, 1976

The American Ethical Union is unalterably opposed to capital punishment. The willful taking of human life is cruel and inhuman punishment and violates our belief in the intrinsic worth of every human being. It is wholly unacceptable, whether imposed to prevent repetition of a crime by an individual, as a deterrent to others, or as societal retribution.

The American Ethical Union therefore calls for the abolition of capital punishment. Where the death penalty now prevails, it urges state legislatures to enact statutes abolishing it. States which do not now impose capital punishment are strongly urged not to enact (or reenact) enabling legislation.

Further, the American Ethical Union encourages its members to work toward these ends in their own states.

American Ethical Union
2 West 64 Street
New York, New York 10023



The American Jewish Committee

Statement on Capital Punishment

Adopted at the 66th Annual Meeting, May 6, 1972

WHEREAS capital punishment degrades and brutalizes the society which practices it; and

WHEREAS those who seek to retain the death penalty have failed to establish its deterrent effect or to recognize the fallibility of criminal justice institutions; and

WHEREAS capital punishment has too often been discriminatory in its application and is increasingly being rejected by civilized peoples throughout the world; and

WHEREAS we agree that the death penalty is cruel, unjust and incompatible with the dignity and self respect of man:

NOW THEREFORE BE IT RESOLVED that the American Jewish Committee be recorded as favoring the abolition of the death penalty.

The American Jewish Committee
165 E. 56th Street
New York, New York 10022



Synagogue Council of America

Statement on Capital Punishment

On September 9, 1971, the six constituent agencies of the Synagogue Council submitted an *amicus curiae* brief to the U.S. Supreme Court asking the Court, in its consideration of four capital punishment cases then before it, to abolish the death penalty.

The SCA had previously filed similar friend-of-the-court briefs to the Supreme Court in 1969 and 1970.

The position taken by the SCA in those briefs is outlined below;

"All of the *amici* are opposed as a matter of principle to the imposition of the death penalty and support its abolition. Their position is based on their judgment as to the demands of contemporary American democratic standards, but also has its roots in ancient Jewish tradition."

The brief pointed out that, contrary to the common view that Jewish law (as an outgrowth of the Torah) favored capital punishment, in reality the rabbis shunned the death penalty and almost never resorted to it. It described the requirements for imposing the death penalty in halacha: two eyewitnesses to the act who warned the criminal of punishment for his action beforehand; a *non-unanimous* Sanhedrin decision, etc. And it quoted the statement in the Talmud that a Sanhedrin which executed a criminal once in seven years (Rabbi Eliezer ben Azariah said one in *seventy*) was a "court of destroyers."

The SCA brief then dealt with the issues of the death penalty, "cruel and unusual punishment," and the effects of capital punishment. It quoted numerous studies to indicate that the death penalty has no deterrent effect on potential criminals, and then stated that even if a deterrent effect could be demonstrated, that capital punishment should *still* be unacceptable in current society:

"Those who wrote and those who adopted the Eighth Amendment undoubtedly shared the common assumption that punishment was an effective deterrent of crime and that the more severe the punishment the more effective it was likely to be as a deterrent . . . (But) they made a deliberate judgment that even deterrence of homicidal crimes may not be purchased at a price which violated what they judged to be America's standards of civilization and humaneness."

The brief also made an extensive case for the fact that the death penalty had been, and inevitably would be, imposed disproportionately on the poor and on racial minorities.

The only exception to the Synagogue Council's blanket opposition to capital punishment which was mentioned in the brief was that, in framing this policy, the agencies had not addressed themselves to "international crimes such as genocide."

Synagogue Council of America
1776 Massachusetts Avenue, NW
Washington, D.C. 20036



Union of American Hebrew Congregations

Resolution on Capital Punishment

Unanimously adopted by the 45th Biennial General Assembly, Miami Beach, Fla., Nov. 14-19, 1959

We believe it to be the task of the Jew to bring our great spiritual and ethical heritage to bear upon the moral problems of contemporary society. One such problem, which challenges all who seek to apply God's will in the affairs of men, is the practice of capital punishment. We believe that in the light of modern scientific knowledge and concepts of humanity, the resort to or continuation of capital punishment either by a state or by the national government is no longer morally justifiable.

We believe there is no crime for which the taking of human life by society is justified, and that it is the obligation of society to evolve other methods in dealing with crime. We pledge ourselves to join with like-minded Americans in trying to prevent crime by removal of its causes, and to foster modern methods of rehabilitation.

Union of American Hebrew Congregations
2027 Massachusetts Avenue, NW
Washington, D.C. 20036



איחוד
ליהדות
מתקדמת
באמריקה

Amnesty International

Declaration of Stockholm

December 11, 1977

The Stockholm Conference on the Abolition of the Death Penalty, composed of more than 200 delegates and participants from Asia, Africa, Europe, the Middle East, North and South America and the Caribbean region,

RECALLS THAT:

— The death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life.

CONSIDERS THAT:

— The death penalty is frequently used as an instrument of repression against opposition, racial, ethnic, religious and underprivileged groups,

— Execution is an act of violence, and violence tends to provoke violence,

— The imposition and infliction of the death penalty is brutalizing to all who are involved in the process,

— The death penalty has never been shown to have a special deterrent effect,

— The death penalty is increasingly taking the form of unexplained disappearances, extra-judicial executions and political murders,

— Execution is irrevocable and can be inflicted on the innocent.

AFFIRMS THAT:

— It is the duty of the state to protect the life of all persons within its jurisdiction without exception,

— Executions for the purposes of political coercion, whether by government agencies or others, are equally unacceptable,

— Abolition of the death penalty is imperative for the achievement of declared international standards.

DECLARES:

— Its total and unconditional opposition to the death penalty,

— Its condemnation of all executions, in whatever form, committed or condoned by governments,

— Its commitment to work for the universal abolition of the death penalty.

CALLS UPON:

— Non-governmental organizations, both national and international, to work collectively and individually to provide public information

materials directed towards the abolition of the death penalty,
—All governments to bring about the immediate and total abolition
of the death penalty.

— The United Nations unambiguously to declare that the death
penalty is contrary to international law.

*This statement is included because many of the participants in the
Stockholm Conference were representatives of religious bodies.*

Amnesty International
10 South Hampton Street
London, WC 2E-7HF



DECLARATION OF STOCKHOLM

11 December 1977

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- The United Nations unambiguously to declare that the death penalty is contrary to international law.

NATIONAL COALITION AGAINST THE DEATH PENALTY

22 East 40th Street / New York, N.Y. 10016 / (212) 725-1214

GOVERNORS' COUNCIL AGAINST EXECUTIONS

Hon. Elmer L. Anderson, former governor, Minnesota
 Hon. Elmer Benson, former governor, Minnesota
 Hon Ray Blanton, Governor, Tennessee
 Hon Edmund G. Brown, Sr., former governor, California
 Hon. David F. Cargo, former governor, New Mexico
 Hon. Elbert N. Carvel, former governor, Delaware
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 Hon. LeRoy Collins, former governor, Florida
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 Hon. Herschel C. Loveless, former governor, Iowa
 Hon. Tom McCall, former governor, Oregon
 Hon. William D. Milliken, Governor, Michigan
 Hon. Frank B. Morrison, Sr., former governor, Nebraska
 Hon. Endicott Peabody, former governor, Massachusetts
 Hon. Rudy Perpich, Governor, Minnesota
 Hon. Francis W. Sargent, former governor, Nevada
 Hon. Grant Sawyer, former governor, Nevada
 Hon. Robert Straub, Governor, Oregon
 Hon. John C. West, former governor, South Carolina

NATIONAL COALITION AGAINST THE DEATH PENALTY

22 East 40th Street / New York, N.Y. 10016 / (212) 725-1214

Affiliates as of May 1978

American Civil Liberties Union
 American Ethical Union
 American Friends Service Committee
 American Orthopsychiatric Association
 Catholic Committee on Urban Ministry
 Central Conference of American Rabbis
 Committee of Southern Churchmen
 Episcopal Church
 Fellowship of Reconciliation
 Fortune Society
 Friends Committee on National Legislation
 Jewish Peace Fellowship
 Martin Luther King, Jr., Center for Social Change
 Law Students Civil Rights Research Council
 Legal Action Center
 Lutheran Church in American (Division for Mission in North America)
 National Alliance Against Racist & Political Oppression
 National Association for the Advancement of Colored People
 National Bar Association
 National Committee Against Repressive Legislation
 National Committee to Reopen the Rosenberg Case
 National Conference of Black Lawyers
 National Council of Churches
 National Council on Crime and Delinquency
 National Jury Project
 National Lawyers Guild
 National Ministries, American Baptist Church in the U.S.A.
 National Moratorium on Prison Construction
 Network
 Prisoner Visitation and Support Committee
 Southern Christian Leadership Conference
 Southern Coalition on Jails and Prisons
 Southern Poverty Law Center
 Southern Prison Ministry
 Team Defense Project
 Union of American Hebrew Congregations
 Unitarian Universalist Association
 United Church of Christ
 United Methodist Church (Board of Church and Society)
 United Presbyterian Church in the U.S.A.
 U.S. Jesuit Conference
 War Resisters League
 Women's Division of the United Methodist Board of Global Ministries
 Women's International League for Peace and Freedom

NATIONAL COALITION AGAINST THE DEATH PENALTY

22 East 40th Street / New York, N.Y. 10022 / (212) 725-1222

STATE COALITIONS AGAINST THE DEATH PENALTY

<u>STATE</u>	<u>CONTACT</u>
Alabama Coalition Against the Death Penalty P.O. Box 1972 University, Alabama 35486	Ginny Looney
Arizona Coalition Against the Death Penalty c/o ACLU of Arizona 1429 North 1st Street Phoenix, Arizona 85004	Nancy Hicks
Arkansas Coalition Against the Death Penalty c/o ACLU of Arkansas Death Penalty Project P.O. Box 2832 Little Rock, Arkansas 72203	Pat Bailey
California Coalition Against the Death Penalty c/o ACLU of Northern California 814 Mission Street Suite 301 San Francisco, California 94103	Marlene DeLancie Dorothy Erlich
California Coalition Against the Death Penalty c/o ACLU of Southern California 633 S. Shatto Place Los Angeles, California 90005	Dr. William Grace Mary Saylin Marvin Schacter
Colorado Coalition Against the Death Penalty c/o ACLU of Colorado 1711 Pennsylvania Street Denver, Colorado 80203	James Joy
Connecticut Coalition Against the Death Penalty c/o ACLU of Connecticut 57 Pratt Street Room 713 Hartford, Connecticut 06103	William Olds
Delaware Coalition Against the Death Penalty c/o ACLU of Delaware 2409 West 17th Street Wilmington, Delaware 19806	Robert Stewart

Florida Citizens Against the
Death Penalty
222 West Pensacola Room 146
Tallahassee, Florida 32301

Susan Cary

Georgia Committee Against the
Death Penalty
c/o ACLU of Georgia
88 Walton Street, N.W.
Atlanta, Georgia 30303

Derek Alphan

Hawaii Coalition Against Capital
Punishment
200 West Vineyard Boulevard
Honolulu, Hawaii 96817

Prof. David Chandler
Rev. Robert Loveless
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ROSTER OF DEATH-ROW POPULATION AND DEATH PENALTY-LAWS BY JURISDICTION
at April 15, 1978

STATE	DEATH ROW POPULATION				TOTAL	LAW p-F = post-furman enactment p-G = post-Grey enactment
	Black	White	Hispanic surname	American Indian		
Alabama	19	15	-	-	34	pre-Furman ¹ and p-F
Alaska	-	-	-	-	-	None
Arizona	4	15	6	-	25	p-F
Arkansas	4	3	-	-	7	p-F
California	-	-	-	-	0	p-G
Colorado	2	3	-	-	5	p-F
Connecticut	-	-	-	-	0	p-F
Delaware	-	-	-	-	0	p-G
Florida	42	56 (1F)	1	-	99	p-F
Georgia	37	34 (1F)	-	-	71	p-F
Hawaii	-	-	-	-	-	None
Idaho	-	-	-	1	1	p-G
Illinois	1	-	-	-	1	p-G
Indiana	3	1	-	-	4	p-G
Iowa	-	-	-	-	-	None
Kansas	-	-	-	-	-	None
Kentucky	-	-	-	-	0	p-G
Louisiana	2	3	-	-	5	p-G
Maine	-	-	-	-	-	None
Maryland	-	-	-	-	0	p-G
Massachusetts	-	-	-	-	-	None
Michigan	-	-	-	-	-	None
Minnesota	-	-	-	-	-	None
Mississippi	8	2	-	-	10	p-G
Missouri	-	-	-	-	0	p-G
Montana	1	3	-	-	4	p-G
Nebraska	-	4	-	-	4	p-F
Nevada	-	6	-	-	6	p-G
New Hampshire	-	-	-	-	0	p-G
New Jersey	-	-	-	-	-	None (legisl. action pending)
New Mexico	-	-	-	-	-	None
New York	-	-	-	-	-	p-F ¹ (legisl. action pending)
North Carolina	1	1	-	1	3	p-G
North Dakota	-	-	-	-	-	None
Ohio	60 (2F)	33 (2F)	-	-	93(*)	p-F (under challenge)
Oklahoma	3	4	-	-	7	p-G (injection law enacted)
Oregon	-	-	-	-	-	None
Pennsylvania	9	4	-	-	13(*)	p-F (under challenge)
Rhode Island	2	-	-	-	2	p-F
South Carolina	3	2	-	-	5	p-G
South Dakota	-	-	-	-	-	None
Tennessee	-	4	-	-	4	p-G
Texas	30	41	9	-	80	p-F (injection law enacted)
Utah	2	3	-	-	5	p-G (execution 1/17/77)
Vermont	-	-	-	-	0	pre-Furman ²
Virginia	2	-	-	-	2	p-G
Washington	-	3	-	-	3	p-G
West Virginia	-	-	-	-	-	None
Wisconsin	-	-	-	-	-	None
Wyoming	-	-	-	-	0	p-G
U.S. Code	-	-	-	-	-	pre-Furman ² and p-F ³ (legisl. action pending)
U.C.M.J.	-	-	-	-	0	pre-Furman /action pending
Dist. of Columbia	-	-	-	-	-	None
TOTAL	235 (2F)	240 (4F)	16	2	493 (6F)	35 death-penalty states 2 death-penalty federal jurisdictions 15 non-death-penalty states
Percentage of total by ethnic group	47.7%	48.7%	3.2%	0.4%	100%	

F = including x females.

(*) = actual total somewhat greater because a small but unknown number of persons under sentence of death held in county facilities.

1 = For homicide by person serving life sentence only.

2 = Statute violates Furman rule but has remained unchallenged because unused.

3 = For death resulting from aircraft hijacking only.

NYT 3-15-78

ALBANY SENATE VOTES BY 39-19 TO RESTORE CAPITAL PUNISHMENT

Tally Falls One Short of Number
Needed to Override Carey Veto
—Bill Goes to Assembly

By STEVEN R. WEISMAN

Special to The New York Times

ALBANY, March 14—After five hours of bitter debate, the Senate tonight approved a bill restoring a broad use of the death penalty in New York State. But the 39-to-19 vote fell just one vote short of the margin required to override Governor Carey's expected veto.

Proponents of capital punishment, weary after a debate that ended at 9 P.M., immediately predicted that rising political pressures would force one or more of those who voted "no" to change positions when the time came, and even foes of the death penalty conceded this was possible.

Prosecutors Oppose It

Even before the debate began, most of the top prosecutors and other law-enforcement officials of the state and in New York City said they opposed the death penalty, saying it did little, if anything, to deter crime. Although their opinions may have little effect on Albany, the extent of their disagreement with the legislation was surprising. [Page B18.]

Opponents of the death penalty had hoped to count today's Senate action as a significant, if limited, victory. But two Senators who had been wavering all afternoon — Thomas Bartosiewicz of Brooklyn and Joseph A. Tauriello of Buffalo, both Democrats—decided dramatically in the waning hours of debate to support the bill, clearly disappointing lobbyists who oppose it.

LAW OFFICERS OPPOSE DEATH PENALTY BILL

City and State Aides Hold View That Capital Punishment Does Not Serve to Reduce Crime

By TOM GOLDSTEIN

As the New York State Legislature debates a sweeping capital punishment bill, most of the top city and state law-enforcement officials said yesterday that they opposed the death penalty because they felt it had little, if any, effect in deterring crimes.

In separate interviews, many of these same officials also expressed doubts about the effectiveness of Governor Carey's proposed alternative to the electric chair—life imprisonment without parole for those convicted of intentional murders.

While the opinions of these officials may have little impact in Albany, where some legislators have pointed to public-opinion polls showing voters favoring capital punishment, what was surprising was the extent of agreement among this group of officials, who have had great experience dealing with criminals. And while most of the officials said their opposition to the death penalty was a long-held view, all said they would carry out whatever legislation was enacted.

"I don't think the death penalty will be effective as a deterrent," said District Attorney Mario Merola of the Bronx. "If you stay calm and cool, how can you come to any other conclusion?"

"I just don't go along with killing anyone in any circumstances," said Edward R. Hammock, chairman of the State Board of Parole.

Jury Actions Are Viewed

District Attorney Denis Dillon of Nassau County said: "From my experience, juries are reluctant to convict when there is a death penalty. If you poll prospective jurors, 70 percent are for the death penalty. But when they sit in a jury, they really scrutinize a case."

Herbert J. Sturz, the New York City Deputy Mayor for Criminal Justice, noted that criminological studies on the deterrent effect of the death penalty had been inconclusive. "They come out on either side," he said. "But a great, great majority of homicides are committed by people who when they wake up in the morning don't know they are going to

commit a murder."

Another high-level law enforcement official in the Koch Administration—Robert J. McGuire, the Police Commissioner—is also opposed to the death penalty. During the early parts of the mayoral campaign in particular, Mr. Koch campaigned on the necessity of a strong death penalty law.

But his view is not widely shared among professionals in the area.

"I guess I'm alone among the District Attorneys on this one," said District Attorney Thomas R. Sullivan of Staten Island. "I have no philosophical problems with it. In certain types of cases—contract murder, cold-blooded murder—it is an apt kind of punishment."

The other District Attorneys in the city—Mr. Merola, John J. Santucci in Queens, Eugene Gold in Brooklyn and Robert H. Morgenthau in Manhattan—have all opposed the death penalty.

According to an aide, Mr. Morgenthau said he was preparing a "comprehensive statement" on the issue.

Proposed Legislation Backed

In Westchester County, District Attorney Carl Vergari said he "strongly supported" the proposed legislation because "based on my judgment and observations in 30 years of law enforcement, the only deterrent to crime is strong penalties."

But implicit in the responses of most of his colleagues was the notion that the penalties in the state were already strong enough—and that even Governor Carey's proposed lifetime-without-parole measure was unsound.

"With the present sanctions, we've adequate time right now," said Mr. Santucci. "But the sanctions need to be enforced." At present, those convicted in New York State for intentional murder can be paroled after 15 years, but that is by no means automatic.

Neither Benjamin Ward, Commissioner of the State Department of Correctional Services, nor William Cuiros Jr., Commissioner of the City Department of Correction, would comment on the proposed legislation.

Nor would Charles D. Breitel, the state's chief judge. But last fall, in dissenting to an opinion of the Court of Appeals that found key portions of New York's existing death penalty statute unconstitutional, Judge Breitel said in a footnote:

"Speaking for myself alone among the dissenters, I find capital punishment repulsive, unproven to be an effective deterrent" and "unworthy of a civilized society (except perhaps for deserters in time of war) because of the occasion of mistakes and changes in social values as to what are mitigating circumstances, and the brutalizing of all those who participate directly or indirectly in its infliction."

Prison Killings and Death Penalty Legislation

By
Peter C. Buffum*

In the wake of the *Furman* decision over half the states have passed new death penalty legislation. A feature of many of these new acts is the provision for a mandatory death penalty upon conviction for certain specified crimes, such as contract killings. The killing of a prison official or a murder committed by a prisoner serving a life sentence are two provisions which are often included in these acts as the result of inflamed public opinion and the organized efforts of correctional officers and other enforcement officials.

The need for these legislative provisions is articulated in several related arguments. In the first instance it is reported that prison work is a dangerous and deadly occupation. Unarmed and surrounded daily by persons of unstable or aggressive character, the correctional officer needs the additional protection afforded by the deterrent power of the death penalty. The rise in prison killings since the time when capital punishment was abolished is given as supporting evidence. The second and somewhat less common rationale for this kind of legislation is that it provides a fitting punishment for one who not only takes a human life, but also attacks the very personification of society's system of law and order.

The other common legislative provision deals with murders committed by prisoners already sentenced to life. Here the focus is no longer on potential victims but on likely offenders. While it is conceded that not all prisoners are dangerous, what is to prevent the person with no cause for hope from lashing out and killing? What about the convicted slayer sentenced to one or more life sentences? What is to prevent him from turning on his fellow inmates or guards? This kind of argument implies that prison killings are not altogether uncommon, and further, that it is the convicted slayer against whom some special deterrent must be lodged.

It is clear that an empirical study of prison killings would help clarify the viability of the arguments. It is also apparent that the importance of any study of prison homicides goes well beyond the narrow issue of appropriate penalties. The prison homicide is perhaps the single most dramatic and terrifying event to transpire

* Staff Sociologist, Pennsylvania Prison Society.

behind prison walls. The importance of such events goes well beyond the matter of their frequency, for their impact is often of such magnitude as to alter prisoner-staff relationships, treatment-custody relationships, existing power configurations, prison climate, and daily routine.

Some have argued that the study of prison homicides properly belongs in the broader study of assaultive behavior in prisons. Etiologically, this may be correct. The difference between the commonplace stabbing and the infrequent homicide is often a matter of factors beyond the control of the actors, e.g., the availability of emergency medical care. Nevertheless, the impact of the homicide clearly sets it apart from the garden-variety assault as a unit of analysis. The prison homicide quite plainly serves as a symbolic event of immense importance that can shape the life of the prison for a number of years.

In view of its bearing on death penalty legislation as well as its impact on the institution, it is surprising to find that there has been so little study of this phenomenon. This paper aims to fill some of this gap.

This brief report is actually the second in a series of investigations preliminary to a longer study of prison homicides in the United States from 1964-1973 being conducted by the Pennsylvania Prison Society. An earlier report (Buffum, 1973) considered prison homicides in Pennsylvania state and county prisons. This report will discuss prison killings and applicable death penalty provisions in the light of the empirical literature at hand.

STUDIES USING NATIONAL DATA

The empirical work on prison homicides is scanty. Studies relating prison homicides to background causal factors have been identified for only the United States, Canada, and England.

The United States data is contained in two national studies conducted by Thorsten Sellin (1964, 1965) a decade ago. The first of these studies involved all homicides occurring in state or federal institutions for the year 1964. The second study examined the data for the following year. Both studies were based on mailed questionnaires, with response rates of 84 percent and 90 percent respectively. The findings showed that there had been thirty-one inmates but no prison staff killed in 1964. In 1965, the figures rose to fifty-three inmates and eight staff killed.

These killings were spread across forty-one of the fifty-one total jurisdictions. The 1965 data, which is the more complete, shows California then leading the nation with ten homicides followed by the federal prison system (seven), Virginia (six), and Louisiana (five). The less complete data for the previous year also shows California (five) as the most lethal prison setting, followed in order by the federal system (three) and Georgia (three). No other jurisdiction had more than two killings. *Of principal importance was the finding that whether a state was a death penalty state or not had no bearing on the incidence of prison homicides.*

One of the notable features of the Sellin data of 1964-1965, which emerges on reanalysis, is that only two of the eight slain staff were rank-and-file correctional officers. The remainder were higher ranking personnel or specialists, such as work supervisors. Perhaps this highlights problems with authority as the etiological factor of specific importance with respect to staff killings. Should these differences hold up over larger samples, there would be room for reexamining Sykes' (1958) observations concerning authority relations between inmates and guards. One might conclude that the informal bargain struck between guard and inmate may insulate the guard from harm but may ultimately jeopardize the guard's superiors.

The underlying motivation behind the killings of inmates is not clear but virtually half of the homicides in Sellin's 1965 data occurred during an altercation. Out of forty-six events in which known assailants participated, only four events involved homosexuality. Two arose from racial conflict, one involved a disciplinary action, another a gang fight, and yet another occurred during a riot. A pattern of premeditation can not be ruled out in any of these instances, but it seems more likely that most of these homicides occurred spontaneously and were a byproduct of situational factors.

The Pennsylvania data from 1964-1973 generally parallel Sellin's earlier findings. There were only fourteen killings during the ten-year period, most of which were marked by spontaneous rage. It is notable, however, that the bulk (nine) of the homicides cluster in the past three years in what is probably indicative of a trend which has yet to run its course. In Sellin's work, nearly all the offenders were characterized by a prior history of assault behavior, but only 27 percent were actually serving sentences for murder at the time of the killing. In Pennsylvania, this figure rises to 46 percent over the past decade.

There were four staff killings in Pennsylvania in the past decade, and a single killing in the previous ten years. Two of these

involved guards, the remainder involving a warden, his deputy, and a lieutenant.

To place these figures in context, victimization rates are calculated for several populations including prison staff.

Table 1
Selected Rates of Homicide Victimization

<u>Class of Victims</u>	<u>Victimization Rate/10,000</u>	<u>Period Covered</u>	<u>Area Covered</u>
Police Officers	4.0	1966-1973	United States
City Residents	2.0	1972	United States
Philadelphia Residents	2.1	1972	Philadelphia
Prison Staff	1.8	1954-1973	Pennsylvania
Prison Inmates	0.8	1964-1973	Pennsylvania

Source: Buffum (1973)

Although these rates are crude and in some cases not directly comparable to one another, the relative safety of prison staff and inmates is striking. For prison staff this is a finding which has been noted previously (Ackman, 1968; Thomas, 1972), but is not widely acknowledged.

Systematic data from other states for the period 1964-1973 has not yet been collected, although the design and testing of instruments is in process. Still, some limited data is in our possession and bears scrutiny. In California the number of inmates killed by assaultive action has risen sharply in recent years. (Table 2).

Table 2
Prison Killings in California

<u>Year</u>	1966	1967	1968	1969	1970	1971	1972
Inmates killed by Assaultive Action*	4	10	16	15	11	17	35

*includes those shot on escape.

Source: California Adult Authority

San Quentin, one of the nation's largest institutions, continues to bear grim witness to most of these deaths. In 1973, there were seven violent deaths at this institution alone.

The Louisiana State Penitentiary at Angola with its population of some 3,000 is possibly the most dangerous facility. In 1973, there were reportedly 15 killings (Plaisance, 1974). A recent issue of the Angolite, their inmate periodical, carries five pages of signed articles urging a stop to the killings. Posters frame the entrance of their dining hall and dramatically echo the morbid plea to stop the violence. After two and a half months of the new year there had been only two new homicides, but one hundred and two stab wounds had been reportedly treated -- thereby highlighting the thin line between assault and homicide.

Although the Pennsylvania data and the earlier national findings tend to show that the homicide problem is not as severe as we might expect, these more recent California and Louisiana data give rise to serious questions concerning the true amount of the recent increase in prison deaths, and whether that increase does not have further implications for death penalty legislation.

The Canadian study (Akman, 1967) covers the same years, 1964-1965, as the Sellin work but focuses to a greater degree on the rate of assaultive behavior in Canadian prisons. In these two years there were only two killings - one guard and one inmate. In the prior decade there had been three additional staff homicides; no comparable data exists for inmates.

Akman's data can easily be translated into mortality rates, although it is recognized that these rates cover short time periods and are likely to be unstable. For the two years 1964-1965, the average victimization rate for inmates is 1.4 per 10,000, while the comparable staff rate is somewhat higher at 3.1 per 10,000. Both rates are on the same order of magnitude as the data from the United States.

England is the third country for which there is an identified study, an article describing "Murders of English Prison Service Staff Since 1850." During this period the author, Dr. J. E. Thomas, reports finding only eight such incidents. There were no staff murders at all in local prisons and none in any prison for the last hundred years. Five offenses took place prior to 1900. The three offenses committed in this century all took place in youth (Borstal) institutions.

A case-by-case analysis of the eight English staff killings by the author revealed that two occurred pursuant to escape attempts

and one during the course of an attempted rape. The motive for the remainder appeared to be revenge for what an inmate considered to be some unfair action.

Thomas speculates on the reasons for the low rate of prison staff killings:

It may be that our society, at all levels, including the delinquent, is less ready than some others to resort to extreme violence as a means of resolving even very difficult personal problems. But it is also possible to argue that on the whole, at a personal level, relations between staff and inmates are very much closer and more workable than some investigations would claim. There is a special need in this respect to challenge the stereotype of the severe Victorian officer bearing heavily upon the prisoners. (Thomas, 1972:10)

Unpublished Sources of Data

No further studies have been unearthed, although it is likely that a number of countries and smaller governmental units have the requisite data on file. The Pennsylvania Prison Society recently contacted by mail key officials in seventeen countries with questions about prison killings. (On the first mailing there was response from seven countries for a 41 percent rate. A follow-up letter is being sent.)

Scandinavian countries such as Norway and Denmark replied quickly but negatively. There were no known studies of prison homicides in those countries.¹ In Argentina, our inquiry has been routed to the Federal Penitentiary Service from whom we await a reply.

From four countries we received partial data on the incidence of prison homicides. The most complete data came from Japan, where there have been fourteen inmate killings and two staff killings in the past decade. Although the staff killings took place in recent years -- 1972 and 1973 -- the inmate killings show no upward trend during this same period. The prison population on which these figures is based is approximately 50,000 persons, yielding annual inmate victimization rates on the order of 0.3 per 10,000 persons.

¹These questionnaires were sent to one or more reputed experts in each country. The drawbacks of the approach are acknowledged, but the method seems suitable at this stage of our inquiry.

Table 3
Prison Killings in Japan

Year	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973
Staff Killings	0	0	0	0	0	0	0	0	1	1
Inmate Killings	0	2	4	2	3	1	0	0	0	2

From Belgium, it is reported² that there has not been a prison killing in the past ten years. Further, there have only been two staff killings reported in the last fifty years. The prison population in Belgium is currently about 6,000 persons. While Belgium is not known as a violent country, there have been episodic outbursts of violence associated with work stoppages and national labor strikes. Such violence has apparently not spread to the penitentiary system.

The situation in Australia is similar to that in Belgium. David Biles, Assistant Director of Research at the Australian Institute of Criminology writes:³

I have been associated with Australian prisons for the past 20 years, including 11 years of actual work in prisons, and over that period I have not heard or read about any homicide in prison. There have been occasional deaths from natural causes, mostly of alcoholics in police cells, as well as occasional suicides by prisoners, but I know of no homicides. This is, of course, not conclusive proof as a homicide can be made to look like suicide, but any case of death occurring in prison or police cells is followed by a very detailed investigation which is conducted in public, and if there were even the slightest suggestion of improper conduct, it would inevitably invite an outcry of public opinion.

Biles concludes:

In my view, the low or zero homicide rate in Australian prisons is due most entirely to the

level of surveillance maintained by the staff.

In South African prisons there were nineteen homicides during fiscal year 1971. The National Institute for Crime Prevention⁴ (Capetown) calculates a prison homicide rate of 4.3 per 100,000, nearly six times lower than their national rate of 25.3 per 100,000. Actually, this discrepancy appears to be more artifactual than real. [The prison homicide rate was apparently calculated on the basis of total prison admissions rather than the average daily population. Use of the latter measure would provide a far higher and more accurate rate.]

CONCLUSION

What do these limited data indicate? First, it is apparent than in all the surveyed countries, prison homicides are extremely rare. Whether this is principally a reflection of prison discipline or of violence-proneness in the broader society remains to be determined. Second, the risk of becoming a victim, particularly for the inmate or for the lower-ranking prison guard, is quite small. A number of professions have far higher mortality rates. Even the city resident in the United States has a higher homicide victimization rate. Third, there has been a marked increase in prison deaths in the United States in recent years. Whether this rise outstrips or merely parallels the rise in societal homicide rates remains to be determined. Whether reinstitution of capital punishment would have a dampening effect on this rising rate seems dubious but can not be ruled out entirely. Fourth, there are no data to indicate that most prison killings are committed by those serving life sentences for similar serious offenses. Nevertheless, this type of assailant may be increasingly involved in such incidents. Only broad-based data such as found in a national survey will permit an accurate determination.

In general, it can be said that the available data fail to provide empirical support for the currently popular legislative provisions incorporating the death penalty, insofar as these provisions depend on an underlying argument of deterrence. This is not to say

²Personal communication, Mr. Genonceaux, Administration des Etablissements Penitentiaires, 1974.

³Personal communication, David Biles, Australian Institute of Criminology, 1974.

⁴Personal communication, R. Graser, National Institute for Crime Prevention and Rehabilitation of Offenders, 1974.

that these data prove the contrary case. Nor is it to say that there may not be other arguments of merit for or against retention of capital punishment.

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The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are determined by the laws of the theory of the structure of the atom. This is a circular argument, but it is the only way to proceed.

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