

P U B L I C H E A R I N G

before

Assembly Judiciary Committee

on

Assembly Bill No. 90
(Abolish the Death Penalty in New Jersey)

Held:
April 23, 1970
Assembly Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Peter W. Thomas (Chairman)

Assemblyman James Cafiero

Assemblyman Paul Policastro

Assemblyman James M. Turner

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juror's mind by the mere existence of the statutory death penalty. For this reason, in my opinion, the death penalty is creating a deterrent, not to crime, but to law enforcement.

Another aspect of this decision is that it may free many convicted murderers now in death row. If they successfully appeal on the ground that they were not convicted by an impartial jury they will be entitled to a new trial. In fact, however, it will be extremely difficult to retry many of them because the witnesses may be unavailable or, if available, unable to recall and relate their facts.

Another decision of the court overturned a statute which induced defendants to plead guilty and thereby avoid the death penalty. Our New Jersey statute to that effect is therefore suspect, with all the consequential damage to law enforcement.

It is possible, that in the near future the Supreme Court may rule the death penalty unconstitutional on the ground that it constitutes "cruel and unusual punishment". Some believe that conclusion is inevitable if not imminent. That ruling would result in a simple life sentence with no minimum for a defendant convicted of first degree murder while the maximum sentence of 30 years would still apply to a defendant convicted of second degree murder. Obviously, the result is illogical and unjust.

New Jersey cases have already exposed the public's difficulty in rationalizing the penalties for murder-juries have asked the trial judge in murder cases if it is possible to get a life sentence without parole. A recent case is State v Conklin, (54N.J.540) decided by our New Jersey Supreme court on October 27, 1969. Unwilling to grant a life sentence with parole juries may sometimes resort to the death penalty, but it is more likely that they resort to a compromise verdict of murder in the second degree to ensure at least a 30-year-to-life sentence. This again is a deterrent to effective law enforcement and justice.

Assembly Bill 90 would eliminate death penalty provisions under New Jersey statutes, that is for murder in the first degree, kidnapping, treason and assault on high government officials. My bill, would also eliminate the alternative jury sentence of life imprisonment with the possibility of parole. In place of these two alternative penalties would be the single penalty of life imprisonment without parole, or imprisonment for the natural life of the defendant.

Other legislative proposals would abolish the death penalty and also the distinction between the penalties for murder in the first degree and murder in the second degree. This is, in my opinion not jurisprudential, that is, it is

neither logical nor just. Perhaps these proposals are appropriate if we also abolish the distinctions between first and second degree murder and reduce the statute to the single offense of murder without degree.

The offense of murder in the first degree is a willful, deliberate, premeditated killing, or it may be a felony homicide. The offense of murder in the second degree in any killing which is the probable consequence of an encounter, or the killing of a peace officer in the performance of his duty.

There are important and valid jurisprudential reasons for distinguishing the degrees of murder, but they are complex and I don't want to explore them now. My point is that as long as we perpetuate separate offenses for murder we must perpetuate penalties which acknowledge and serve that distinction in law.

There are other reasons for a natural life penalty. As expressed by the Mikado, "let the punishment fit the crime", and by the Bible, "an eye for an eye". My bill eliminates the "death for a death" penalty and substitutes "a life for a life" penalty. Since the penalty applies only to an heinous and unforgiveable offense justice requires such a penalty for the victim, for the victim's bereaved and for the sake of the survival of our society

in an era of criminality which is heir to an era of permissiveness.

In conclusion, I cite one of the recommendations of the President's Commission On Law Enforcement and Administration of Justice: "When a State finds that ... the death penalty is being imposed but not carried into effect, the penalty should be abandoned." I believe New Jersey finds itself in that position and for the sake of our law enforcement officers and the administration of justice - for the sake of the victim and our society - I urge your favorable recommendation of Assembly Bill 90 to the Legislature.

ASSEMBLYMAN THOMAS: Are there any questions?

ASSEMBLYMAN POLICASTRO: Yes, I want to ask a question, Assemblyman.

This provision of no parole, do you think that anybody who is charged with first degree murder would take a plea of guilty - of course, he couldn't take a plea of guilty if he was going to get life, he'd rather go to trial and take his chances and then have all these appeals?

ASSEMBLYMAN KRAVARIK: Well, I don't think that we would get - there would always be appeals. For instance, I was speaking with Judge Goldmann only Monday morning, as a matter of fact I urged the Judiciary Committee of our House to invite Judge Goldmann to speak in the hearings on the Public Defender's Office.

He had a case on his desk where a man - and not for a capital offense - at the cost of the taxpayers was on his fifth appeal; he had already been released from his sentence which was not very grave and was only trying to expunge the record to avoid multiple offenses if he were convicted of a subsequent crime.

We are not going to discourage appeals. However, the appeals under the death penalty are of a particular nature and we would extinguish the many appeals of that type which we now have pending in our courts and have had for a decade now. Also I concede an argument has been raised that a man who commits a murder in his twenties is a different man in his fifties and, therefore, we should consider rehabilitation and freeing him on parole. I have trouble with that in a couple of respects.

First of all, I sincerely believe that for the fabric of our society and for true justice in a moral sense we have to consider the victims of crime.

Now when a man commits a crime as brutal as murder in the first degree, and as I said there are very distinct differences between first and second degree, - when a man commits that kind of a crime, I think the least we can do, if we are not going to vindicate the victim by taking his life in the form of an execution, certainly society should have the confidence that the man will be put away.

I think the cases in which the juries have

questioned the judge as to whether they could impose a life sentence without parole indicates that this is a thing that is on the mind of the public. Therefore, I think it's appropriate.

I also feel if a man is put away at the age of 30 and spends 30 years of institutional living, except in rare cases as in the Leopold Case, - these men are not capable of coming out any longer and adjusting to the life outside. In fact, we've had cases of men, lifers, who were released in New York State only a couple of years ago - there was one, he went out and threw a brick through a window because he wanted to get back in, he couldn't adjust to the life outside.

ASSEMBLYMAN POLICASTRO: Well, don't you think that the Parole Board - it's up to the Parole Board. After all, they have to go before a parole board before they can get out and don't you think they know all the circumstances as to whether a person who has been in there sentenced to life, after 14 years he would be eligible for parole, that maybe they shouldn't let this particular one out or particular ones out and keep them for 18 or 20 years if they wanted to? Don't you have any confidence in the parole system at all, in the parole board?

ASSEMBLYMAN KRAVARIK: What difference does the expertise of the parole board mean to the victim?

ASSEMBLYMAN POLICASTRO: Well how many people

do you think would even take a plea instead of going to a trial, take a plea to murder and get a life sentence, knowing that he's going to get life and he can't get out. Everyone will go to trial whether they win or lose and take their chances on appeals. Isn't that right?

ASSEMBLYMAN KRAVARIK: Is that terrible?

ASSEMBLYMAN POLICASTRO: Sure I think it's terrible.

ASSEMBLYMAN KRAVARIK: I just told you that the Supreme Court has said you can't have a provision where a man can cop a plea to guilty in order to avoid the death sentence, anyway.

ASSEMBLYMAN POLICASTRO: But they could make a deal with the prosecutor, if they can get to him, and take a plea and get the life sentence, in this State.

ASSEMBLYMAN KRAVARIK: They can because of a decision by the New Jersey Supreme Court which upheld our statute, which is similar to the one overturned by the United States Supreme Court. I'm confident, or at least the probabilities are, if a case from New Jersey on a guilty plea for murder gets up to the Federal Supreme Court, our State is going to be thrown out. And, therefore, there is no analogy any longer.

ASSEMBLYMAN POLICASTRO: That's all right. Maybe it's better that way. A man gets a chance to get out. I don't think you can keep a man in there all his life.

If he's going to be there, gets life imprisonment, he should be treated like every other prisoner, and if he has the chance he should go before a parole board and if they think, in their opinion, the man has been rehabilitated enough to get out, they should let him out.

ASSEMBLYMAN KRAVARIK: Well, I'm sorry, there was only one man in history that's ever been resurrected and I feel if you take a life you have no natural right to that kind of treatment.

What's the deterrent to murder in the first degree, if you don't distinguish between the penalties for first and second degree murder?

ASSEMBLYMAN POLICASTRO: There are distinctions now but they still commit the crimes, but that hasn't anything to do with the parole system.

ASSEMBLYMAN THOMAS: I want to get clear in my mind what the resulting distinction in the penalty would be for murder in the first degree and murder in the second degree. Do I understand if you were found guilty of murder in the first degree you would be sentenced for your natural life?

ASSEMBLYMAN KRAVARIK: Yes, that's correct.

ASSEMBLYMAN THOMAS: And if you were found guilty of murder in the second degree the minimum would be 30 years.

ASSEMBLYMAN KRAVARIK: It would be 30 years to life.

ASSEMBLYMAN THOMAS: And you would not be eligible for parole until 30 years had passed.

MR. KRAVARIK: That's correct.

ASSEMBLYMAN THOMAS: Now at the present time a life sentence, even if you were found guilty of murder in the first degree, really entitles you to parole after some 14 years, doesn't it?

ASSEMBLYMAN KRAVARIK: In some cases sooner, theoretically, but, of course, that's in the hands of the Parole Board, as your distinguished colleague has pointed out. The fact of the matter is, that's why I suggest while the prosecutor is going for conviction for first degree murder, because of the nature of the offense, because of the particular heinousness of it, even greater than a murder for second degree, the jury is resorting to convicting people for murder in the second degree in order to insure that 30 year minimum because they're reluctant to give death and if they were to give the alternative penalty on a first degree conviction parole could be sooner than for a second degree conviction. And I think that we have to insure the distinction and insure the penalty for the more severe offense is a more severe penalty.

ASSEMBLYMAN THOMAS: You indicated earlier in your testimony that the death penalty was cruel and inhuman punishment. Don't you think committing somebody to jail for the rest of his natural life, without any

opportunity for parole, would constitute the same thing?

ASSEMBLYMAN KRAVARIK: Well, first of all, I did not say that the death penalty was cruel and inhuman punishment. If you will go through the transcripts of the public hearing, you will find a divergence of viewpoint at the two extremes of the death penalty in every walk of life, law enforcement, the clergy, as well as the lay public.

ASSEMBLYMAN THOMAS: Well, what do you feel?

ASSEMBLYMAN KRAVARIK: I don't believe the death penalty is cruel and inhuman punishment. I have in my file here a clipping that someone sent me about fine police work. It says, "We are afraid to shop in New Brunswick. Streets are not safe there. Unshackle the police, bring back the electric chair."

Now this is all well and good. I don't think the death penalty is cruel and inhuman punishment. Some people feel it's not civilized but, on the other hand, neither is murder. It's a penalty that's been invoked during the history of man and it worked successfully when it was done in a way in which it was public, in a way in which the defendant and criminal and murderer was relatively certain of meeting a fate akin to the one he put his victim to, but the truth of the matter is you are not going to get around the Supreme Court attitude through the Legislature and we have to acknowledge the reality of the situation that there is no death

penalty in this Country.

ASSEMBLYMAN THOMAS: Well, what has delayed - for instance, we have a man now who has been convicted and sentenced to death who has been in prison since 1958 - what has delayed the execution of his execution for this period of time?

ASSEMBLYMAN KRAVARIK: Well, as you know, appeals can be brought in various ways and on various issues. Everyone has the right to at least one appeal as a matter of right. I have in front of me an article from The Sunday Home News, New Brunswick, New Jersey, Sunday, April 5, 1970. It gives the case of this man who has had these appeals, Edgar Smith, who was sentenced to death in 1957 for the murder of Victoria Zielinski. He killed a 15 year old girl.

ASSEMBLYMAN THOMAS: Is that by Bernard Gavzer?

ASSEMBLYMAN KRAVARIK: That's correct. It's an excellent article. It shows the sequence of appeals; it also shows the type of offense that was committed. And the reason I am urging a natural life sentence, I feel it's uncivilized not to extract that kind of retribution on behalf of this little girl and on behalf of her family which had to suffer so grievously as the result of the act of a single person against all of humanity.

ASSEMBLYMAN THOMAS: Do you know what aspect of this case is presently on appeal?

ASSEMBLYMAN KRAVARIK: I believe that at the present time his appeal was based on that recent decision which said that juries could not - I would have to check on this but I believe it is on this basis that in New Jersey for all time we have asked prospective jurors in murder cases whether they had any objection to imposing a death penalty and, if they did, they were excused for cause, or at least preemptively by an attorney on behalf of the State. And as a result of that Supreme Court decision and as a result of the fact that all men in death row were convicted by juries under those circumstances, they all have a good appeal to go on. In other words, they appeal on one point and they have habeas corpus and they have appeals as a matter of right, then they have appeals by certiorari which is granted by the court, and then the Supreme Court. They've exhausted all their appeals, there they are, the switch is ready to be thrown and then the Supreme Court of the United States makes another decision, applies it retroactively and gives them another issue on which to appeal and he's back before the court.

ASSEMBLYMAN POLICASTRO: Then I take it, you don't believe in the Supreme Court ruling on that part of the question about having just a hanging jury, everybody must agree that they're in favor --

ASSEMBLYMAN KRAVARIK: Everybody does not agree.

Well, there is no sense in retrying that case but everybody does not agree that they want the death penalty. What they agree is that they are not opposed to the death penalty and can fairly and dispassionately consider the case.

On the other hand, if a person says no, I can't impose the death penalty, how can he possibly fairly hear the case? He can't, because he's going to be listening for every possible reason to excuse the offense so that he will not impose the penalty to which he is for some reason conscientiously opposed.

ASSEMBLYMAN CAFIERO: Mr. Kravarik, did I understand you before to state that under our present system juries are prone to find the defendant guilty of second degree so that they have some control over the sentence?

ASSEMBLYMAN KRAVARIK: I believe so, yes. There is no one who can say that for sure because you are not entitled to interrogate a jury on that aspect. There have been appeals recently in the William's murder case in Middlesex County to that effect, that it's a compromise verdict to get around the death penalty. However, for very practical reasons the courts have not been disposed to uphold appeals on that ground, not necessarily because it's not true but because they feel this doesn't have a substantial bearing on the justice involved.

ASSEMBLYMAN CAFIERO: But I fully understood you to say that they find them guilty of second degree so that they can have some control over how long the defendant spends in jail.

ASSEMBLYMAN KRAVARIK: That's right. Because if they find them guilty of first degree and are reluctant to impose the death sentence, which must be unanimous, then they resort to second degree murder because if they convict them of first degree and give them life they can get out in a decade. But if they convict a person of second degree murder, he's got to stay in for at least 30 years. They have in fact asked the judge if they could convict him for murder one and give him life without parole, the juries have asked judges this.

ASSEMBLYMAN CAFIERO: Well, where is the authority for your statement that if they find them guilty of second degree they have to stay in for a minimum of 30 years?

ASSEMBLYMAN KRAVARIK: That is our statute.

ASSEMBLYMAN CAFIERO: Here?

ASSEMBLYMAN KRAVARIK: No. It's in there, yes. But it's also in our existing law.

ASSEMBLYMAN CAFIERO: Isn't the maximum sentence 30 years and the amount of the sentence is up to the judge? They have no control over the sentence on a

second degree conviction. Isn't that so?

ASSEMBLYMAN KRAVARIK: But as a matter of practice, for a crime of this nature the maximum is generally imposed.

ASSEMBLYMAN CAFIERO: But I mean the jury has no way of knowing what the sentence will be on a second degree conviction, isn't that true?

ASSEMBLYMAN KRAVARIK: That's true.

ASSEMBLYMAN CAFIERO: They have no control over it at all.

ASSEMBLYMAN KRAVARIK: No, the jury has no control over the sentencing under the second degree offense.

ASSEMBLYMAN CAFIERO: So isn't it true that on a second degree conviction if the judge wanted to impose a sentence of five or ten years he could do it?

ASSEMBLYMAN KRAVARIK: It is possible.

ASSEMBLYMAN CAFIERO: Then serving two-thirds of that minimum sentence or whatever the eligibility requirements are for parole the second degree convict could be out in three years.

ASSEMBLYMAN KRAVARIK: That's true, theoretically.

ASSEMBLYMAN TURNER: Mr. Chairman, may the record reflect that Assemblyman Turner is here?

ASSEMBLYMAN THOMAS: Let the record so reflect.

ASSEMBLYMAN TURNER: And, Mr. Kravarik, I apologize for not hearing your testimony. I am impressed

by the words that you've said. You are a member of the Bar and I'll ask you some lay questions based on my experience in government, if I may.

I will premise it by saying, as a Freeholder from my home county, I found it necessary once a year to appropriate large sums of money to meet the responsibilities of government and I found that large sums of money have been saved by capital punishment being on the books and by those who find themselves standing before justice being ably represented and advised of the hazards often do, as they say, cop a plea and save the State and the taxpayers large sums of money, additionally reduce their abilities to appeal which similarly saves large sums of money. Have you thought of that aspect before you submitted this bill?

ASSEMBLYMAN KRAVARIK: Yes. Apparently before you arrived I discussed the fact that while the New Jersey Supreme Court has upheld our statute, which permits copping a plea to avoid the death penalty, a similar statute of another state was declared unconstitutional by the Federal Supreme Court. All I feel it would take is an appeal from New Jersey on our statute to the Federal Supreme Court and that present service to our society would no longer be available.

ASSEMBLYMAN TURNER: I appreciate that, and I

also appreciate you avoided one of the questions about the opinions of the Supreme Court. I as layman, it's a little bit more difficult to understand and I would question where able counsel wouldn't, and I appreciate your answer. Thank you.

ASSEMBLYMAN THOMAS: I just want to get this clear in my mind. You would maintain the present penalty for second degree murder.

ASSEMBLYMAN KRAVARIK: That's correct.

ASSEMBLYMAN THOMAS: Which provides a maximum penalty of 30 years, not a mandatory minimum of 30 years.

ASSEMBLYMAN KRAVARIK: That's right.

ASSEMBLYMAN THOMAS: Now there was a commission that studied this problem and reported back in October, 1964, and it is my understanding of the majority report of that commission that they, in effect, did recommend as one of two alternatives the substance of your bill --

ASSEMBLYMAN KRAVARIK: That's correct.

ASSEMBLYMAN THOMAS: -- for life imprisonment, imprisonment for the balance of the natural life of the convicted for first degree.

ASSEMBLYMAN KRAVARIK: Page 10 of the recommendation.

ASSEMBLYMAN THOMAS: Right. And an alternate recommendation that they made was a minimum mandatory sentence for first degree conviction of 30 years with

the right of parole thereafter. But because they apparently couldn't make up their minds, they recommended that until the Legislature took further action we continue the death penalty. In addition to that, the minority report came right out and said, we recommend minimum mandatory 30 years with right of parole after that on a first degree conviction.

Do you have any comments about this penalty instead of life for a first degree conviction?

ASSEMBLYMAN KRAVARIK: Well, I guess from a practical standpoint the effect, you see, of a minimum 30 year sentence depends on the age of the defendant, and is that fair? It may be a natural life sentence for one man and it may be an early retirement for another man.

ASSEMBLYMAN THOMAS: Are you suggesting that it be based on life expectancy?

ASSEMBLYMAN KRAVARIK: I think that we should be able to tell our children that if you do this kind of an offense to your fellowman, this will be the penalty and that if you kill somebody at age 40 you're going to die in prison and if you kill somebody when you are age 20 you're going to get out in time to retire. I don't think that's rational.

ASSEMBLYMAN THOMAS: Do you have any statistics from other states indicating which states, if any, have abolished the death penalty?

ASSEMBLYMAN KRAVARIK: No, I don't, but it's relatively available. I would be happy to get it for you.

ASSEMBLYMAN THOMAS: Could you make that information available to the Committee?

ASSEMBLYMAN KRAVARIK: I will.

ASSEMBLYMAN THOMAS: Now we haven't executed anybody here in New Jersey since 1963 and, I understand, we have 23 men in the death row here. Are all of these men there under a death penalty being delayed because of one type of an appeal or another?

ASSEMBLYMAN KRAVARIK: That's correct, all 23. Richard Hughes, our former Governor, had considered commuting them all before he left office and decided not to.

ASSEMBLYMAN THOMAS: What is the effect of commuting a death sentence? What results? What's the penalty that's left if you commute a death sentence?

ASSEMBLYMAN KRAVARIK: Well you would reduce it to the lesser penalty for the same offense which would be life.

ASSEMBLYMAN THOMAS: And then he would be eligible for parole after a period of time?

ASSEMBLYMAN KRAVARIK: That's correct. For some of them this might theoretically mean upon application to the parole board almost immediate release.

ASSEMBLYMAN THOMAS: There is a body of sentiment that feels as you do with one distinction and that is that the death penalty should be retained if there is a first degree conviction for the murder of a police officer. Do you have any comment about that?

ASSEMBLYMAN KRAVARIK: My own comment is that it's principally an emotional appeal, that it doesn't have any practical effect. If we are not under the present death penalty deterring killing police officers, which apparently we're not, I don't think retaining it while abolishing it for other offenses would have any practical effect either. I have no objection because I, myself, am not here to plead that the death penalty is immoral or inhuman.

ASSEMBLYMAN THOMAS: That's another thing that disturbs me and gets intertwined here. There is a considerable body of feeling, and I gather from your testimony you may feel this way too, that the death penalty doesn't act as a deterrent to the crime of taking another's life.

ASSEMBLYMAN KRAVARIK: Yes, I would like to express my reasons why.

ASSEMBLYMAN THOMAS: All right, go ahead.

ASSEMBLYMAN KRAVARIK: At one time all executions were public and then, in the name of civilization, we put it behind prison walls and we allowed witnesses to

attend, principally the press, sometimes the bereaved of the victim. Then we made executions exclusively closed, no witnesses except those required by the State, a medical official, someone to throw the switch, security officers. As a result there was no longer any credibility to the death sentence. If you make it a sterile act, unseen, unfelt by the public, how can it deter anyone? It has no impact. We're dealing with human nature here. And in order for a death penalty to have any impact on the thinking of society, it has to be driven home. You can't do it by making it a sterile procedure that no one can see.

ASSEMBLYMAN POLICASTRO: Assemblyman, getting back to 23 prisoners that are held now under the death penalty, if that was commuted to life imprisonment, there isn't any guarantee that they would be let out by the parole board.

ASSEMBLYMAN KRAVARIK: There is no guarantee either way.

ASSEMBLYMAN POLICASTRO: It's all up to the parole board. If they don't think that they've been rehabilitated enough they could keep them for 20 years, 30 years, 40 years. It's all up to the parole board.

ASSEMBLYMAN KRAVARIK: Quite true. If I committed a murder, I might die in jail; and if you committed one, you might commit the same kind of a murder and be out in ten years. I don't see any justice in that.

ASSEMBLYMAN THOMAS: I want to finish one thought that I had here. Do you feel that a life sentence, by that I mean natural life sentence, is going to act as a deterrent?

ASSEMBLYMAN KRAVARIK: Yes, I believe it is.

ASSEMBLYMAN THOMAS: Well how do you make that distinction that that will and the death penalty won't?

ASSEMBLYMAN KRAVARIK: Well some of the questions raised by the Committee itself show that the natural life sentence is a penalty, the gravity of which does have an impact on the human psychology. These men here feel it may be cruel and inhuman; they feel it's a harsh penalty. Well, if you are going to deter a harsh crime you need a harsh penalty.

ASSEMBLYMAN THOMAS: But your statement before was that the harsh penalty of death was no longer effective because nobody watched it, and nobody is going to watch these men in jail. So the public viewing aspect of bringing about the deterrent --

ASSEMBLYMAN KRAVARIK: But here are the practical aspects of our time. A jury is reluctant to impose the death penalty and factually, on the record, asks for life with no parole. I think we should give the public that remedy for which they're looking to redress the crime of murder in the first degree.

ASSEMBLYMAN THOMAS: Then doesn't it really boil itself down to a position of a moral reluctance to

pull the switch on another man's life?

ASSEMBLYMAN KRAVARIK: I would say it responds to the psychology of our times. And I think in another time, in another generation that the penalty might well be appropriately something else. I think this is the kind of a civilization we're evolving into. The law, including the criminal law, will have to remain flexible and change with the psychology of the times to do the maximum good for the society of that time.

I might add, at one time you will recall that under the common law in England the death penalty extended to many, many offenses, and the reason it was slowly withdrawn is for the very same reason we are probably about to withdraw it for capital offenses in New Jersey, and that is, a time evolved when you couldn't find a jury anymore that would convict a man because of the death penalty.

ASSEMBLYMAN THOMAS: Well we have seen a situation in Maryland where they abolished the death penalty and then they reinstated it some three years later because of the emotion of the time. Is that the kind of evolutionary process you think we should go through?

ASSEMBLYMAN KRAVARIK: No, I think that's disruptive. I don't know the exact circumstances, how they got their penalty through in the first place. Apparently it was an unpopular decision in the first

place or in a short period of time they wouldn't have reverted, apparently some kind of political straw in the wind there.

ASSEMBLYMAN THOMAS: Apparently there are no other questions. I want to thank you. It has been a very enlightening experience this morning. You obviously have done your homework and are rather dedicated on this point of view.

Is there anybody else who wishes to present any testimony this morning?

There was a Mr. Trainor who contacted me and specifically asked to be permitted to testify. Is he here? (No response)

If there is nobody else, we will recess for the present and if another witness appears and wants to testify, he may do so. The hearing will remain open, except being in recess, until five minutes of eleven.

(Recess)

(After recess)

ASSEMBLYMAN THOMAS: We will come to order.

Will you please identify yourself?

M I L L I C E N T H. F E N W I C K: I am Mrs. Millicent Fenwick, former President of the Morrow Association on Correction, a citizens' group interested in the correctional processes in New Jersey.

ASSEMBLYMAN THOMAS: You are also an Assemblywoman, aren't you?

ASSEMBLYWOMAN FENWICK: Yes, I am also an Assemblywoman.

ASSEMBLYMAN THOMAS: Go ahead.

ASSEMBLYWOMAN FENWICK: Shall I proceed, Mr. Thomas?

ASSEMBLYMAN THOMAS: Go ahead, please.

ASSEMBLYWOMAN FENWICK: I think it is an important thing that this hearing should be held today on the question of capital punishment in our State. I have never met but one authority in the field of penology who felt that the capital punishment penalty --

ASSEMBLYMAN THOMAS: Excuse me a minute. Will the Sergeant-at-Arms clear out the back so that we can hear the witness?

Please continue.

ASSEMBLYWOMAN FENWICK: I have never met but one authority in the field of penology who believed that the capital punishment was of any use as a

deterrent and, in fact, that one single exception felt that the psychological impact on the community at large was a far greater use socially because he himself also doubted that the effect of the death penalty had any effect whatsoever on anybody. His feeling was that the longing for vengeance and the repulsion that the community feels when a terrible crime has been committed gets some outlet if the public knows that the offender is to be killed.

Other authorities, whose views I share, feel that the community is no longer so unaware of what chance there is in this life that they are crying for vengeance when a terrible crime has been committed.

The effect on the juries who, like all of us I think in society have come to feel that the cold killing of a man, no matter what he has done, is something rather abhorant in our modern society, - the effect on the jury is very often to confuse the issue, they don't want to find guilty when the death penalty hangs over their conscience and over that man's head. And, therefore, when you take the wardens of Sing Sing, the wardens of Alcatraz, the wardens of all the great penitentiaries and prisons, federal and state, in this Nation who will tell you, with very few exceptions perhaps the warden in a prison, if a man is in on a life sentence for having killed someone and he kills a warden well, perhaps the death penalty should be imposed on him

because there isn't any other restraint. But with very, very few exceptions, judges, everybody concerned in this area feels that the death penalty as it now stands constitutes merely an obstacle to efficient operation of justice and to the cause of a more equitable and conscientious society.

I think that's the crux. It serves no purpose, Mr. Chairman, socially, in the field of crime, therefore, how can it be justified? And if in fact it has this deterrent effect on the jury, is it not almost a deterrent to justice?

ASSEMBLYMAN THOMAS: Mr. Kravarik's bill, A-90, suggests, as an alternative to the death penalty, for conviction of first degree murder a penalty of a life sentence for the natural life of the convicted person. The report of the Capital Punishment Commission, back in 1964, actually recommended two alternatives, that which is achieved through Assemblyman Kravarik's bill or imprisonment for the balance of your natural life, or, in the alternative, a minimum mandatory sentence of 30 years with permissible parole after that point. Do you have any feelings or recommendations as to what sentence should be imposed in the alternative or in lieu of the death penalty?

ASSEMBLYWOMAN FENWICK: Yes. I am constitutionally against mandatory sentences. I think that those who are concerned and whose views I most respect in the field of

penology, including our own Chief Justice, I believe, who has pronounced on this, mandatory sentences are not a good part of penology. I would not favor the imposition of mandatory sentences. I think these things should be left to the discretion of the judge.

ASSEMBLYMAN THOMAS: Then if a person was convicted of first degree murder, you would leave to the judge's discretion the sentence that would be imposed?

ASSEMBLYWOMAN FENWICK: Within certain limits, yes.

ASSEMBLYMAN THOMAS: Well, what limitations would you recommend?

ASSEMBLYWOMAN FENWICK: Well, that's a technical matter and I have not prepared myself to testify on that. I think maybe, you know, ten to fifteen years, ten to twenty-five years, whatever the - ten to thirty years. I mean, I think the indeterminate sentence is the wiser because very often - I think we all know this - the pattern of a man's life and the nature of the crime, the circumstances of the crime, the motive of the crime, everything surrounding the frightful incident has to be taken into consideration in determining the safety of society and the rehabilitation of the man. Those are the only two things that are important, the protection of society at large and the rehabilitation, if possible, of the prisoner.

Now we have country after country without the death penalty. Italy has comparatively little crime and no death penalty and very few troubles connected with it. The nations that have abolished the death penalty or have never had it are, I think, in better shape than we are.

ASSEMBLYMAN POLICASTRO: Mrs. Fenwick, would you agree - as it stands now by abolishing the death penalty you get a life term with the probabilities of getting the parole, leaving it up to the Parole Board?

ASSEMBLYWOMAN FENWICK: I think for first degree murder, let's say, a ten to thirty year sentence depending on how the prisoner - the nature of the crime, the circumstances and motive and the development of the prisoner within the prison walls. Those would determine whether it was ten years or twelve and parole, of course.

ASSEMBLYMAN THOMAS: I gather you would go even further than this bill and the recommendations of the previous Capital Punishment Commission, and would favor no mandatory minimum sentence at all and leave it to the discretion of the judge and the Parole Board thereafter.

ASSEMBLYWOMAN FENWICK: I would not think it unreasonable, but I would like, as I have said, to have had preparation on this particular point, to have a minimum of ten years for first degree murder and a maximum of thirty and leave it to the judge to decide in between.

ASSEMBLYMAN THOMAS: Is there any group or organization or a group of criminologists who share this position that you have expressed with respect to the first degree penalty?

ASSEMBLYWOMAN FENWICK: You mean as to what the penalty should be?

ASSEMBLYMAN THOMAS: Yes.

ASSEMBLYWOMAN FENWICK: I'm not as well informed on that as I should be, Mr. Chairman, and I should really, if I had been more prudent, have requested not to answer on that point. These are my own views. And I would strongly suggest that the present President of the Morrow Association, a very brilliant young Lawyer, Joseph Steinberg, would be willing and able to testify adequately on this point.

ASSEMBLYMAN THOMAS: Does anybody have any questions? (No questions)

Thank you very much.

ASSEMBLYWOMAN FENWICK: Thank you.

ASSEMBLYMAN THOMAS: Is Mr. Trainor here? (No response)

Is there anyone else who wishes to be heard?

Please identify yourself.

P H I L I P E. K U N Z: My name is Philip E. Kunz. I am the Director for the Trenton Office of the New Jersey Council of Churches. We have no lengthy testimony for you gentlemen this morning but we just

wnat to substantiate and reinforce some of the previous testimony by going on record with you folks this morning in being opposed to substituting mandatory sentences in prison for the death penalty. And to be perfectly clear for the record also, we are, of course, opposed to the existing death penalty in this State and we are going to work on having it removed. In the meantime, we hope that when these hearings are completed and when the Legislature has had due process that we will not have in its place a series of bills or a bill which will be in essence a lock-them-up-and-throw-away-the-key effect. And that, briefly, is our position at this time and we will be working on that.

ASSEMBLYMAN THOMAS: Do you have any alternate suggestions with respect to the penalty for conviction of murder in the first degree?

MR. KUNZ: Yes, sir. I think that the consensus across our constituency at this point would be something like this, because no two crimes even where premeditation is a factor, that is first degree murder, are exactly alike and no two culprits are exactly alike; therefore, for the protection of society and for an adequate rehabilitation process some kind of minimum sentence, perhaps in the neighborhood of 15 years would be, you know, a good prospect for those two arguments - first of all, for the protection of society, which the public is going to insist on

realistically in any case; but, secondly, because we want to see the whole rehabilitation process upgraded and professionalized. And a deep kind of therapy is going to be necessary for some people, particularly in the case of a hired criminal. This is a person who is a sociopath and we are going to have to confine him for a length of time adequate for him to have some kind of intensive therapeutic situation. That's not possible right now so some kind of minimum sentence would be indicated. But, again like some of your previous witnesses, we would like to see you folks in the Legislature develop the idea of having more flexible sentencing, of having the judges in a position to make decisions based on the merits and the circumstances of a particular case, and also having the people in the State Prison Department being in exactly that position of having ongoing evaluation of a prisoner and saying when they might be turned back into the mainstream of society.

ASSEMBLYMAN THOMAS: How do you avoid the situation of the difference in judges in the imposition of sentences? There are some judges who are known as hanging judges.

MR. KUNZ: Right.

ASSEMBLYMAN THOMAS: How do you get away from that kind of situation so that there is an even meting out of penalty to every convicted first degree murderer

regardless of who tries his case? How do you put that into a formula?

MR. KUNZ: That certainly is a very grave problem in itself and the only intelligent response that I think I can make to that is that we would prefer to work on that problem directly, we would prefer to work with the appointment of judges, with the education of existing jurists, with the strengthening of the rehabilitation process when a prisoner is sentenced, but we don't feel that a hanging judge, or for that matter a lax judge - you know, there, -my-boy, -go-on-your-way judge - is really going to be dealt with by tampering, in a manner in which this A-90 does, with the mandatory sentence kind of thing. This is a problem. It's very serious and has to be dealt with by finesse, in other words another kind of piece of legislation dealing with the organization and the administration of courts and penology is more in order here. At least, that's our view.

ASSEMBLYMAN POLICASTRO: Mr. Kunz, wouldn't the fact then that if a judge sentences a man to life imprisonment and then he has the chance of going before the Parole Board after a certain length of time do away with all of these - instead of the judges giving sentences, it would be up to the Parole Board later on to see if the man has been rehabilitated and is eligible for parole? As the system works now we have

a parole board and a man gets a life sentence and he's eligible for parole after 14 years but there is no guarantee that he will get out after 14 years, he could be in there for 20 years or 25 years, according to his actions and behavior while he is in prison.

MR. KUNZ: Right.

ASSEMBLYMAN POLICASTRO: Don't you think that's a better system?

MR. KUNZ: Yes, I do, and I would hope - you know, if there's a problem with the existing system then we ought to work with the parole system and deal with the abuses that way.

ASSEMBLYMAN TURNER: Sir, I feel from hearing your testimony that you express a certain amount, in fact a great deal of compassion for those who are found standing before the courts for such a crime as murder but I wonder what your suggestions are for those who are responsible for law and order, those who are responsible for protecting society? How can we find the way to protect the innocent without this death penalty? Do you have an answer to that?

MR. KUNZ: I have what I hope is the sketching of a response to that that holds weight and that is, I am concerned, with you, that people are - let's take a hard case, let's take a hired killer - I know it's hypothetical - there are such creatures, unfortunately, loose, and slap-on-the-write penalties are

bad news when you're dealing with someone who is brought in as a gunman. None the less, we feel that the problem for us to begin to work on is to begin to have a therapeutic process to work on those guys. Now it may fail and the people in the parole system, in the prison system where a man is already incarcerated may say, we worked on this guy for 15 years and he is a loser, it is our recommendation that he not be turned loose, and you better keep him in.

ASSEMBLYMAN TURNER: Well, I understand your compassion for any soul, any man, and to attempt to rehabilitate those who should be rehabilitated, but I'm still concerned with the moral fibre of our society; I'm still concerned about the fact that there is an increase in crime; I'm still concerned with maintaining our society. We talk about the crime of passion, the murder of the moment, and I certainly understand the difference between an assault and battery and an accidental death as a result of two individuals arguing over a point, but when we have questions of sedition, we have questions of aircraft hijacking and mass murder, how, without the death penalty, do we reward those who are so entitled?

MR. KUNZ: Right, and that's a crucial point. Now I haven't brought a body of psychiatric testimony with me this morning but I will have to skim and just portray our position. It is our belief that intensive

psychiatric and sociological looking into this problem, that is the anarchistic killer, the bomb threats that we're going through these days, the revolutionary who trips out - you know, he might put a bomb in this chamber, for example, a horrible prospect, what are we going to do about this? And here is our position. Dealing with a personality so distorted, a death penalty threat really doesn't get through to them. They are not threatened, such as you and I would be, by the prospect of going to a gas chamber or what-have-you. In fact, they don't even seem to be terribly threatened by prison in itself, either one of the penalties that we impose. Maybe this is to say that we are really arguing with a temporary sociopathic person, and threatening them with punishment doesn't work. In short, we're trapped with a problem.

ASSEMBLYMAN TURNER: Unless we were to go back to the whipping post and that kind of public --

MR. KUNZ: Well, maybe, maybe, we don't know. In other words, all the threats of corporal punishment don't seem to be getting through to the potential Lee Harvey Oswald and some of the other celebrated assassins and so on. The proof is more in the interviews that people have had with those who survive. They go and talk to them and say what was going through your mind, and these people are oblivious to the kind of emotion and thought pattern that most of 200 million

people experience. 2

ASSEMBLYMAN TURNER: One other question, if I may, and I won't try to embarrass you. Do you have any idea as to the fiscal cost of trying to invoke the rehabilitation that you suggest and have you considered that as compared to other priorities of our society?

MR. KUNZ: Right. Well, I think that the police chiefs and the district attorneys can probably make better projections as to how many murders we are going to have. What I want to suggest is that I don't have figures on fiscal costs but I don't think the fiscal cost is going to be so great because under our present system we end up incarcerating those people and having them in any case. We're paying for their room and board right now. Now it's true there would be an addition if you upgrade the system. If you bring some kind of better therapeutic system, that's going to cost some money. On the other hand, it might be partially offset if you have a man in a more intensive program for 15 years rather than keeping him locked up for 30. You will have to look and establish a balance sheet on that, on where the cost crossover is going to exist. It's cheap to kill a man, by the way, that we do know. If you want to save money you throw the switch and the current isn't too much.

ASSEMBLYMAN TURNER: It also cuts down the cost

of appeals too.

MR. KUNZ: It certainly does, yes.

ASSEMBLYMAN TURNER: Thank you, sir.

ASSEMBLYMAN THOMAS: Thank you very much.

Mrs. Arthur Hawkins, please.

M R S. A R T H U R H A W K I N S: I am Mrs. Arthur Hawkins, Legislative Chairman, Department of Christian Social Relations, Episcopal Diocese of Newark.

We oppose A-90 - I have no formal statement because we have made dozens of them at every hearing we have had, the hearing six years ago when Governor Hughes appointed a Capital Punishment Commission and we have made many statements heretofore, but I would like to recommend to you a book by a man named Thorsten Sellin who is one of the world's greatest experts on capital punishment. He is a Professor at Penn State University. This book is about this thick (indicating) and has all the statistics that you could possibly want.

ASSEMBLYMAN THOMAS: What's his name again?

MRS. HAWKINS: Thorsten Sellin, and he is without a doubt this country's greatest expert, except possibly for people in the Department of Justice, on capital punishment and variations on such.

From the Christian point of view, we object to capital punishment on the basis of redemption. We believe that even the greatest criminal can see the

light and become a good person. And we feel if that person is dead it is impossible for him to do that.

We also feel that it is a crime to kill a person because we can't reform them. We do feel that that person should be prevented from continuing what he's doing, if he is a repeater, but we also feel that by killing that person we set an example of the State killing which is a bad example for those who have the desire to kill.

We feel that if a person is given, with all the new knowledge there is of psychiatry and psychoanalysis and various other aspects that have been studied since capital punishment which was, of course, as Phil Kunz said, an easy way to get rid of somebody who was causing trouble - we feel that if we can put all of our strength toward rehabilitating these person that we might very well retrieve some of these lost souls. So we feel that it is a very serious problem and one that should be thought about from the Christian point of view of belief in the individual and his possibilities of redemption.

ASSEMBLYMAN TURNER: Ma'am, I would like to ask you a question. I appreciate your beliefs and your attitude but as one who is responsible for maintaining the State and law enforcement procedures, I can only think of say in the last two weeks where unfortunately four state policemen in California were murdered, and

I'm concerned about protecting the innocent as well as being fair to the guilty. And I wonder, inasmuch as you have reflected your strong stand against capital punishment, if you would give me your insight as to what I can do to make society and the violators of the law more respectful and protect human life?

MRS. HAWKINS: Well, that's a thesis in itself.

ASSEMBLYMAN TURNER: It sure is.

MRS. HAWKINS: And frankly I think our social problems are brought on by our lack of help for the poor and for the psychiatrically damaged. I think that if we did a real job of rehabilitation in our juvenile homes, a real job, if we had this kind of help in the school where we would catch it young, we would have far less crime and it would be a far more humane way of doing it than putting these people in prison where they just vegetate. And if you have read any of the new studies on prisons, about homosexuality and homosexual rape and things like that, you don't think that a prison is the place to put a young boy who is trying to grow up and maybe had a very difficult time doing it.

ASSEMBLYMAN THOMAS: What do you suggest as an alternative penalty for first degree murder?

MRS. HAWKINS: Well, I think that we ought to have prison for life, as we have now, and rehabilitation. I prefer, I think it's S-318, the bill that

says 30 years unless the jury recommends mercy.

I don't like mandatory sentences. I think there should be a rehabilitation process that a person goes through who has committed a crime which would then take a jury or group of psychiatrists and sociologists and criminologists and people who know the business, and have them judge whether this person is fit to return to society or not.

I think a bad crime, a murder, is an illness, a sickness. Maybe you can't rehabilitate some of them but I think you could rehabilitate a great many.

ASSEMBLYMAN THOMAS: Would you make any distinction between - would you continue the distinction between first and second degree murder and continue a distinction in the penalty for conviction of one or the other?

MRS. HAWKINS: Circumstances differ so that - and I am not a lawyer so I'm not really well versed in the variations of this, but I do think that there should be possibly a greater penalty for first than second degree murder, but I also feel that the system should be changed. I think that unless there is a real effort to rehabilitate a person, our prison system is only a punitive thing and we are getting away, all the time, in our sociological and other areas, from the strictly punitive which was nice and simple, I agree, very, very nice and simple but doesn't cure anything,

ASSEMBLYMAN TURNER: You haven't however, talked about the unknown statistics, the amount of murders that have been avoided by the death penalty, the unknown factor. I am concerned, as I said before, about society itself, and it's protection, and there is no way that we truly know what the present laws have done to maintain and protect the innocent from those who would offend. I only say that if you find that I don't consider this in the judgment that you like, you understand the reasons why.

MRS. HAWKINS: Oh, I understand why you do it and I think we have to search for whatever means we can to prevent this but I think we also have to take in the larger view of society as a whole where certainly our prison system has not been a success.

ASSEMBLYMAN TURNER: Well, I appreciate your testimony, ma'am. Thank you very much.

ASSEMBLYMAN POLICASTRO: Mrs. Hawkins, wouldn't you be satisfied with the present system, if a person gets a life sentence that he's eligible for parole after 14 years, to go before a parole board?

MRS. HAWKINS: I would because I think it's up to the judgment of the parole board which is properly selected and if a rehabilitation program has gone forth then why kill? Why should we kill? I'm just as guilty as the man who pulls the switch.

ASSEMBLYMAN POLICASTRO: But you would be satisfied

with a system like that, with a parole board?

MRS. HAWKINS: Yes.

ASSEMBLYMAN POLICASTRO: Instead of a life sentence - assuming that the death penalty is abolished they would get a life sentence under the law.

MRS. HAWKINS: Yes.

ASSEMBLYMAN POLICASTRO: And then after a certain length of time he would be eligible to go before the parole board. There is no guarantee that they would let him out unless he has been rehabilitated and learned some trade or something.

MRS. HAWKINS: Exactly. Well, I don't think just learning a trade is rehabilitation. I think there are a lot of murderers who kill once and would never kill again. But I think rehabilitation should be stressed rather than murder.

ASSEMBLYMAN THOMAS: Thank you, Mrs. Hawkins.

We will now declare this hearing officially at an end.

(Hearing concluded)

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