

P U B L I C    H E A R I N G

before

ASSEMBLY JUDICIARY COMMITTEE

on

SENATE BILL NO. 799 AND  
ASSEMBLY BILLS 556 and 1318  
(Death Penalty)

Held:

June 27, 1972

Assembly Chamber

State House

Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman William K. Dickey (Chairman)

Assemblywoman Ann Klein

Assemblyman Walter C. Keogh-Dwyer

Assemblyman Herbert C. Klein

Assemblyman David A. Wallace

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ASSEMBLYMAN WILLIAM K. DICKEY (Chairman): Ladies and gentlemen, this is a public hearing before the Assembly Judiciary Committee concerning Senate Bill No. 799, Assembly Bill No. 556, and Assembly Bill No. 1318, all of which deal with the subject of the death penalty in certain criminal cases.

The Judiciary members who are present today, to my left, Assemblyman Walter Keogh Dwyer of Sussex County, Assemblyman Herbert Klein of Passaic County, Assemblyman David Wallace of Hudson County, and I am Assemblyman William Dickey of Camden County and Chairman of the Committee.

The first witness to appear today will be the sponsor of Senate Bill No. 799, Senator Joseph Azzolina.

J O S E P H     A Z Z O L I N A: Mr. Chairman and former Speaker, my name is Joseph Azzolina, Senator from Monmouth County.

I speak for the release from the Judiciary Committee of Senate Bill 799. In requesting this action I express the views of the majority of residents of my county of Monmouth, the views of the majority of residents of the State of New Jersey and the views of the majority of residents of the United States of America.

Since introducing this bill on March 16, 1972, I have received hundreds of letters and telephone calls asking, yes even pleading, that this legislation be enacted into law. Many of these letters relate personal experiences of assaults received while walking alone at night, coming home from a bus stop or just leaving their home to mail a letter. Others tell of individual tragedy, where loved ones, family members or close friends have been murdered and where those convicted of these crimes now again prowl the streets, paroled after serving a few years in prison. Almost all these letters ask the same questions: Why don't our laws protect us? Why is a convicted killer given so much consideration? What has happened to justice in our country?

Numerous newspaper editorials have also called for

the enactment of this legislation. In one such editorial, which appeared in the May 11th issue of the Trentonian, the opinion was given, "There is little question in our mind that State Senator Joseph Azzolina's bill to reinstate the death penalty in New Jersey in certain murder situations would be overwhelmingly supported if put to the test of a public referendum."

Certainly this is true, for a Gallop Poll conducted in March, 1972, among 1,567 persons 18 years of age and older, residing in more than 300 localities across the nation, the majority of those polled on the question "Are you in favor of the death penalty for persons convicted of murder?" answered in the affirmative. In the East and in the West, in small communities and in huge cities, the answer was yes. Among Catholics and among Protestants, among Republicans and among Democrats, the majority answered yes.

As additional evidence of both public and studied approval, I refer you to the Report of the New Jersey Commission to Study Capital Punishment, dated October, 1964. In the report the conclusion states, "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 some potential murderers from committing capital crimes".

Gentlemen, if but one life is saved through the enactment of this legislation, who can speak against it?

The Commission report continues, "It is the Commission's concept that the death penalty should be, and normally is, meted out only for the most heinous and aggravated type of murder; but there is a possibility of excessive use of the death penalty as long as a jury is not given an adequate alternative for a somewhat less shocking crime. It is only by increasing the absolute meaning of life imprisonment that an adequate alternative could be presented. We, therefore, recommend that the Legislature give consideration to amending the laws concerning life imprisonment

to provide that life imprisonment means imprisonment without the possibility of parole".

Gentlemen, as you now know, under our present law for someone committing murder life imprisonment means that in about 14 years he is eligible for parole and will walk the streets again.

Bill S-799 follows these recommendations. Where the death penalty is called for in certain types of crimes, the jury is also permitted to render a verdict of life imprisonment without probation or parole, and is additionally permitted to render a verdict of life imprisonment without probation or parole for a minimum of 30 years.

I have also asked that an amendment be added to the bill in cases where second degree murder has been committed. As amended, the penalties possible are life imprisonment without probation or parole, life imprisonment without probation or parole for a minimum of 30 years, and a much less severe penalty wherein the judge may sentence the convicted to between 1 and 30 years without probation or parole until two-thirds of such sentence has been served.

This is the kind of legislation that the public needs and wants. This is the kind of legislation that our police and law enforcement agencies need and want. This is the kind of legislation that must be enacted into law if we hope to prevent, or at least lessen, cop killing and premeditated murder. This is the kind of legislation that tells would-be murderers quite clearly and bluntly, if you commit murder and are convicted of such a crime, you will either be executed or sent to prison in handcuffs and carried out in a box. This is the kind of legislation we must have if our police, our citizens and our laws are to be protected and respected.

During this public hearing you will undoubtedly be addressed by representatives of organizations opposing the use of capital punishment regardless of the fiendish nature of such acts. You gentlemen know that it is always the minority who are the most vocal in their demands. The great

majority of law-abiding, loyal Americans remain quiet, depending on you and me and the other duly elected Legislators to speak and act on their behalf.

I, therefore, call upon you, the members of the Judiciary Committee to exercise your responsibility by releasing this bill to the General Assembly where it may be openly debated and decided upon by the 80 Assembly Representatives of the citizens of New Jersey.

I would like to read a letter that I received this morning in the mail. This comes from the Baptist Home Society of New Jersey in Newark, signed by its Administrator. "Mr. Azzolina - Dear Sir: To acquaint you with the thinking and convictions of some of your public, I am writing to indicate that this Society, made up of several thousands of people, for the most part favors the death penalty. It is taught in the Holy Scripture and was never abrogated that 'Thou shalt not kill' commonly quoted, actually reads 'Thou shalt do no murder.' God gave it and it stands as irrefutable."

I would like to read one other letter that I received from Woodbridge. I will show you the letter but I don't want to divulge the person's name.

"Dear Mr. Azzolina" - this is dated March 15, 1972 - "I would like to compliment you on your proposals to reinstate the death penalty. It certainly is comforting to know that there are still some politicians concerned with the welfare of citizens and the value of human life. I believe with the abolishment of the death penalty and the present coddling of hardened criminals lies the reason for the high rise in crime. My kid brother, age 30, at the time, was murdered 3 years ago. The killer had a long prison record and threatened others with intent to kill before killing my brother. It being my family's first time in court in regard to a murder trial, we were shocked at all the advantages afforded the killer and how very little the victim's families were considered. It was constantly



repeated that the killer had small children that he loved and should be returned to soon. No mention was made of my brother's sons, ages 6 and 7 at the time, because we were told it may prejudice the jury and derive sympathy from the killer. My brother's oldest son, now going on 10, has been under psychiatric treatment for two years. He once was a normal happy child. He was very close with his father. Although it's too late to change our situation, I feel many other families could and should be spared the agony and torment we suffered and still feel. There is always more than one victim involved. We have to look into the faces of these fatherless boys every day. His killer was given 10 to 20 years on second degree although they all knew it was premeditated. In 7 years he will be back on the streets. May God bless you and grant you the strength to carry on your work in making our society a safer and worthwhile place again to raise our children and teach all the values of laws and human life."

I will make this letter available, if you so desire.

This concludes my statement, although I do have a great number of letters and I do have petitions here from them, the PBA does support this legislation, the State Jaycees do, the Grand Jury Association does, the PBA submitted these petitions which I will be glad to loan to you, if you would like. I have gotten some from an employee who works in the Court House in Mercer County here who submitted a number of petitions, and the Jaycees have been out collecting petitions also.

Gentlemen, I feel again, as I stated, I think you should release the bill from Committee. The Prosecutor from Mercer County has one recommendation for the bill which he will give you in his statement. And under my present bill every murderer has to stand trial, and under his recommendation they may not have to stand trial. He has other alternatives. My main concern is that if we do pass a death penalty bill that it be constitutional, and however we can make it constitutional I would be willing to amend

the bill in such a way.

Thank you very much for having me here today. If you have any questions, I will be glad to answer them now or later.

ASSEMBLYMAN DICKY: Thank you, Senator.

Mrs. Klein, do you have any questions?

ASSEMBLYWOMAN KLEIN: No, I have no questions.

ASSEMBLYMAN DICKY: Mr. Klein?

ASSEMBLYMAN KLEIN: No. I have no questions.

ASSEMBLYMAN DICKY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No questions.

ASSEMBLYMAN DICKY: Thank you very much, Senator.

Is Assemblyman Apy in the room? (No response)

Assemblyman Bornheimer? (No response)

The next witness is Mr. Stephan Nagler, Director, American Civil Liberties Union of New Jersey.

S T E P H E N M, N A G L E R: Mr. Chairman and members of the Committee, as you know, I am Stephen M. Nagler. I am Executive Director of the American Civil Liberties Union of New Jersey. I, too, am here to testify, although from a slightly different position than Senator Azzolina, with regard to the measures involving the death penalty, what would be the reestablishment of the death penalty in the State of New Jersey.

The thesis of my argument, fundamentally, is that to reestablish the death penalty in any form in the State of New Jersey would purely and simply be to reduce the State to the level of the murderer, to place the two on a par, to operate on the theory - which is, in fact, the only theory upon which a death penalty can be justified - that the State must vindicate the murder with another murder, the State must exchange - to place it in terms of the biblical aphorism - an eye for an eye. I don't believe and I don't think that most people who are aware of the

realities of the situation today believe that that is a thesis upon which public policy in a civilized society can be based.

The primary argument, however, in favor of the death penalty is that it will deter others from committing a crime of murder. This argument is completely without statistical support. Comparisons between neighboring or similar states with and without the death penalty reveal no relationship between the murder rate and capital punishment. Abolition states have an average murder rate of 4.6 per hundred thousand in 1970, substantially lower than do retentionist states - 7.7 per hundred thousand. Indeed, 7 out of the 10 states with the lowest murder rates do not have capital punishment, and the 5 states at the bottom of the list are abolition states.

It would be incorrect to claim, I believe, negative correlation between the death penalty and the murder rate, but it is clear that the data cannot support the contention that the death penalty deters. I will return to that, with your permission, at the end.

But why should one expect the death penalty to be a deterrent? The majority of murders are committed within the family or between persons who know each other. To quote the Uniform Crime Reports of 1968, "As it has been pointed out in prior issues of this publication, the police are powerless to prevent a large number of these crimes which is readily apparent from the circumstances or motives which surround criminal homicide. The significant fact emerges that most murders are committed by relatives of the victim or persons acquainted with the victim. It follows, therefore, that criminal homicide is to a major extent a national social problem beyond police prevention." Crimes of passion are frequent and not deterred by the thought of punishment or even in most cases punishment of death.

Let me quote Burton Roberts, District Attorney of Bronx County in New York, who has the reputation of an extremely

tough Prosecutor, who stated for the News Letter of Citizens Against Legalized Murder in 1970, and I quote: "I am opposed to the restoration of the death penalty for the simple reason that it does not benefit society and indeed causes society great harm. It certainly does not act as a deterrent. Most homicides are spur-of-the-moment impulse killings committed by persons who are either acquainted or related to the victim. Those who commit this type of homicide do not consider the consequences of their act. The professional killer is also in no way deterred by the possibility of capital punishment. He does not envision being caught and being brought before the bar of justice. Even though crimes of violence, such as robbery, have increased tremendously over the last five years, examination of homicide statistics reveals that while there has been an increase they have not increased at the same rate. One must conclude, therefore, that the abolition of the death penalty in and of itself has not caused an increase in the commission of homicides."

Opponents of the death penalty are often asked if they would change their stand if it could be demonstrated that a single murder was prevented by the possibility of capital punishment. There usually followed statements from apprehended criminals to the effect that they used empty or toy guns and the like to avoid the possibility of the death penalty. First of all, these statements are obtained under somewhat peculiar circumstances under which the caught criminal is likely to say anything that will put him in a better light. Nor is it clear whether such persons are deterred by thought of the death penalty in particular or punishment in general. Penologists seem to agree that the surest deterrent is not the severity of the punishment but its swift and certain application.

To quote Clinton Duffy, former Warden of San Quentin: "I do not favor capital punishment because I do not believe it is a deterrent to crime. From 1929 to 1952 I talked with every man that was convicted in San Quentin under penalty

of death. I have asked, personally, every man if they gave any thought to the fact that they might be executed should they commit a murder. I have to date not heard one person say they had ever thought of the death penalty prior to the commission of his crime."

Moreover, any deterrent effect must be balanced against whatever number of psychopathic persons takes the death penalty as a means of suicide. That, too, with your permission, I would like to return to later with a few examples.

Far more importantly, we must realize that as long as we retain the death penalty we will eventually kill innocent persons. Michigan, Rhode Island and Maine all abolished capital punishment primarily because they executed innocent men. No court, no jury, no judicial process is infallible. In the words of Thomas Jefferson: "I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me."

No one knows, of course, the actual number of innocent persons among the over 3,000 put to death since 1930, for interest in a case ceases after the execution. However, "near misses" are easy to document and it is difficult to imagine the anguish that accompanies an innocent man on the way to execution by the state, whether or not he reaches the point of death. That, too, I will have some examples of later, by your leave.

If the death penalty is reinstated in New Jersey, we must face the certainty that we will kill innocent men in the electric chair in Trenton sooner or later. Anyone who still imagines the death penalty to be a deterrent must know the price he pays for his deterrence.

In summary, there is no statistical evidence that the death penalty is a deterrent.

Second, we believe that the death penalty discriminates against racial and economic minorities. Data abound to show that the death penalty is disproportionately applied to the poor and members of racial minorities. From the very beginning

when he has no access to a well paid lawyer, investigators or bail; to the final process of commutation of sentence the poor man and especially the black man is at a disadvantage. The situation was aptly described by Michael V. DiSalle, former Governor of Ohio: "The men in death row in the Ohio State Penitentiary today, as during my administration, have one thing in common, they are penniless. I have never seen a person of means go to the chair. It is the poor, the illiterate, the underprivileged, the member of the minority group who become society's blood sacrifice."

A recent report issued by the Ohio State Legislature, Research Commission, found that during 1950 blacks accounted for 37% of all death sentences although only 6.5% of the State's population. Moreover, of those sentenced to death, whites more frequently than blacks had their sentences commuted to life imprisonment. Far more often than whites, blacks were found guilty of rape, received death sentences and were executed.

In Florida, sentences meted out for rape during the years 1940 to 1964 were examined by race of the offender and victim. Of 125 white males who raped white females, 6, or about 5%, received death penalties. Similarly, of the 68 black males who raped black females, 3, or about 4%, received death sentences. But of the 84 blacks convicted of raping white women, 45, or 54%, received the death penalty. Not one of the 8 white offenders who raped a black victim was sentenced to death.

Among the prisoners sentenced to death for rape in North Carolina from 1909 to 1954, 56% of the blacks, compared to 43% of the whites, were actually executed. Of all offenders committed to death row for burglary, 26.6% of the blacks, but none of the whites, were executed.

There can be no doubt that even today in the United States the death penalty has been applied in a discriminatory fashion. Discrimination is applied all along the line. For instance, with regard to commutation of sentence, in the period 1907 to 1960, 17.7% of the whites sentenced to death in New

Jersey had their sentences commuted, while only 8.1% of the blacks were similarly treated. The figures for felony-murder are similar - 9.7% of the whites were commuted but only 4.8% of the blacks.

Last, the death penalty distorts our judicial process. The existence of the death penalty distorts our process in several ways. Since it is extremely hard to obtain a conviction of first degree murder without a confession, over-zealous police are too often tempted to use questionable means to obtain the vital admission. At the very time when a dispassionate hearing is most crucial the aura of excitement and morbid interest attracts the news media with the inevitable effect on the public from which the jury must be chosen.

Before the recent ruling, a defense attorney in New Jersey could have been forced, out of fear for his client's life, to plead guilty or to negotiate for a lesser charge in order to avoid a trial and a capital offense.

The distortion also results in increased costs. I have no statistics on this matter but a typical quote by an informed person is that of our Attorney General, George Kugler, who was reported in 1970 along the following lines: "My view as a layman has been for a number of years that capital punishment hasn't deterred people from crime. I could be wrong in that judgment. I think the danger of capital punishment is a practical matter, and being very practical I think if capital punishment were abolished the criminal justice systems of many states would save millions of dollars because that's the thing the defense lawyers are fighting, to save a man from the chair. And the concomitant expenses of sequestering juries and going through all the rigmarole we do to send a man to the chair or to his death, which is of doubtful value anyway, doesn't seem to me in today's society to make much sense."

This distortion appears in the cries one hears for retribution, for revenge. It is understandable that family and friends of the victim may call for revenge, at least at

first, but society must be more dispassionate. The role of justice in our society is not revenge.

In 1965 the California Supreme Court held in re Estrada that only three ends were appropriate aims of punishment - deterrence, confinement to protect society, and rehabilitation.

We have spoken of deterrence and quite clearly the death penalty is aimed neither at confinement nor rehabilitation.

Finally, although there is little to add to this last point, it is the ACLU's position that the death penalty is unconstitutional because it constitutes cruel and unusual punishment. The argument that capital punishment is currently unusual can scarcely be denied. No one has been executed in the United States since 1967. And even before then the death penalty was generally reserved only for the poor black and unlucky. When judged by contemporary standards, the penalty is surely cruel.

In the words of Chief Justice Donald R. Wright of the California Supreme Court the death penalty "degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the State and is incompatible with the dignity of man and the judicial process."

No longer do we consider it fit to cut off the hand of a thief, no longer do we permit drawing and quartering. Society's standard of what is decent evolves. New Jersey should remain among the states which have outlawed the death penalty.

On January 17th the New Jersey Supreme Court ruled this State's death penalty unconstitutional. On February 18th the Supreme Court of California held that State's death penalty statute in violation of the provision in the California Constitution prohibiting cruel and unusual punishment.

Florida has just instituted an 18 month official moratorium on execution.

Within a year the Supreme Court of the United States



will rule on the "cruel and unusual" punishment issue, and thus on the constitutionality of the death penalty.

This is not the time, we submit, to return the death penalty to New Jersey. New Jersey should remain among the many counties and several states who have abolished it.

There are several case histories which, in addition, I would like to bring to the attention of the Committee, what we might call "misses" and "near misses" in the area of the death penalty. I mentioned earlier that there had been a number of circumstances in which, through out death penalty laws, things become very, very close - and, again, you can document this easily - to approaching the death penalty but haven't quite gone over the edge. The cases of actual mistakes are much harder to document.

JOHN VALLETUTTI, Brooklyn, New York, Trial, 1947, Kings County court; convicted by jury, first-degree murder; death sentence, electric chair. Court of Appeals reversed conviction March, 1948, Indictment dismissed September, 1948, by Judge Goldstein. Imprisoned 15 months. Actual culprit confessed. No compensation.

GEITHER HORN, Franklin County, Washington, Trial, November, 1935, Pasco Superior Court; convicted by jury, first-degree murder. Freed on writ of habeas corpus, U.S. District Court, June, 1959. Imprisoned 24 years. False-arrest suit settled out of court, 1963. Compensation, state legislature, \$6,000.

ISADORE ZIMMERMAN, New York City, Trial, January, 1939, General Sessions; convicted by jury, first-degree murder; death sentence, electric chair. Sentence commuted to life imprisonment, January, 1939, on execution day. January, 1962, Court of Appeals reversed conviction. February, 1962, indictment dismissed. Imprisoned 24 years. Suit pending.

JAMES FOSTER, Jefferson, Georgia, Trial, August, 1956, Piedmont Circuit Court; convicted by jury, first-degree murder; death sentence, electric chair. Two reprieves. Trial Judge Julian Bennett denied motion for new trial, September, 1956. Georgia Supreme Court affirmed conviction October, 1957. U.S. Supreme Court refused case March, 1958. New trial granted, directed verdict of acquittal August, 1958. Imprisoned 2 years. Actual culprit confessed. No compensation.

It goes on. There are at least three or four other instances but I don't wish to waste the Committee's time with them.

We mentioned earlier that the death penalty was not a negative deterrence. It's difficult to prove that it's a negative deterrence. And I suggested that there were circumstances in which psychopaths might in fact commit murder in perhaps a macabre search for their own deaths. I can give you a couple of examples of that:

Andrew Pixley, Convicted of the rape-slaying of two sisters, aged eight and twelve. He laughed when sentenced to death, testified that he did not want an appeal, and wrote to the State Supreme Court asking that his appeal be withdrawn when his lawyers filed one anyway. Executed December 10, 1965 in Wyoming.

James Donald French. Convicted of strangling his cellmate while serving a life sentence for an earlier murder. When the lawyer in his first murder case had French's first death sentence reduced to life imprisonment, French tried to have him disbarred. He told his psychiatrist that he had committed the second murder because he wanted to be put to death. He wrote the Governor and the State Supreme Court, asking that his execution not be delayed or prevented in any way. He got his wish. Executed August 10, 1966 in Oklahoma. The only man executed in the United States in 1966.

Louis Jose Monge. Convicted of killing his pregnant wife. The Monges were parents of ten children. While in his death row cell he contemplated suicide, but the prison's Catholic chaplain told him that the Church forbids suicide. However, explained the obliging chaplain, it was acceptable, in the eyes of the Church, for Monge to allow the state to commit suicide for him. Monge agreed. He was executed on June 2, 1967.

Aaron Mitchell. Convicted of killing a policeman - my last example - during a burglary attempt. True to his policy of not attending clemency hearings - his excuse being that he

is not a lawyer, and thus might be moved by emotional appeals to his sense of mercy or compassion - Governor Ronald Reagan, a supporter of capital punishment, did not attend Mitchell's clemency hearings on April 10, 1967. In his place, Governor Reagan sent his Clemency Secretary, Edwin V. Meese III, former Assistant District Attorney of Alameda County and charged with the responsibility of testifying before the Legislature in California in support of a bill to retain the death penalty. Reagan himself, during this clemency hearing - where was he? The San Francisco Chronicle reported that he was in Santa Monica for the Academy Awards presentations.

The day before his execution, Mitchell slashed his wrists with a razor blade he had hidden, but his wounds were dressed, and Mitchell was pronounced sane enough to be executed.

By law a man must be sane, conscious, and awake at the time of his gassing, so that he can appreciate what is being done to him. If, while he is on death row, his teeth need filling, or he needs new eyeglasses, or medical care of any kind, he will get it, so that he will be in the best of health and physical condition when the state kills him.

The San Francisco Chronicle ran a photograph of Governor Reagan, taken April 11, the night before Mitchell's execution, showing the Governor pitching for the California Angels at Anaheim. The next morning, promptly at 10 a.m. - just half an hour before a State Senate Committee opened hearings on a bill to abolish capital punishment - Mitchell was dragged into the gas chamber, screaming, "I am Jesus Christ." He was executed on April 12, 1967.

Thank you, Mr. Chairman.

ASSEMBLYMAN DICKEY: Thank you, Mr. Nagler.

Does any member of the Committee wish to ask questions?  
Mrs. Klein?

ASSEMBLYWOMAN KLEIN: No.

ASSEMBLYMAN DICKEY: Mr. Klein?

ASSEMBLYMAN KLEIN: Yes.

Mr. Nagler, have you read Assemblyman Bornheimer's bill, 1318?

MR. NAGLER: I don't recall the precise provisions of that bill, Mr. Klein.

ASSEMBLYMAN KLEIN: Well, that's a bill that provides for the death penalty in certain enumerated situations. I was wondering whether you were familiar with the provisions of that bill.

MR. NAGLER: I read both Assemblyman Apy's bill and Assemblyman Bornheimer's bill. I believe both deal with the restoration of the death penalty in cases involving the killing of a police officer and in certain other categories. I believe they differ in terms of detail. If there is any argument at all with regard to deterrence in the area of the death penalty, I respectfully submit that it certainly doesn't apply in the case of a police officer. The killing of a police officer is a matter which any sane killer - that's a strange statement - which any sane killer is not going to undertake. The killing of a police officer needs no deterrence, from the standpoint there is full recognition of the swiftness of justice in such cases. And, in fact, in cases in which individuals have been charged with the killing of a police officer there have been serious allegations that it has been virtually impossible for them to obtain a fair trial on whether or not they actually committed the killing. I think our entire citizenry is aware and conscientious about the problems of the risks to which police officers submit themselves. And I submit to you that the only potential rational purpose - and I think we're dealing in rational terms here, that is deterrence, - is not in any way served by re-establishing the death penalty for this purpose.

ASSEMBLYMAN KLEIN: All I asked was whether you were familiar with the bill. There are certain statutes, are there not, that, for example, provide for the death penalty where the act is committed by a convict under sentence of

life imprisonment?

MR. NAGLER: That's correct.

ASSEMBLYMAN KLEIN: Don't you think that, at least in that one situation, there is a deterrent effect?

MR. NAGLER: I would seriously doubt it. I don't think that the death penalty deters the killing - obviously we had no death penalty during the recent incident in which a Sergeant was killed in Trenton State Prison. I don't think that an individual who is in prison is likely to be deterred by the fear of a death penalty any more than he may have been deterred by the sentence that put him there in the first place. I simply see no deterrent value and I think that the comments by those who are experienced in this area - and, incidentally, there is a similar one which, unfortunately, I have not incorporated, by the former executioner at Trenton State Prison along the same lines as the statement by the former Warden at San Quentin with regard to the death penalty, as to whether or not he feels there is a deterrence. I think all the evidence points to the fact that there purely and simply is not.

ASSEMBLYMAN KLEIN: Thank you.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No questions.

ASSEMBLYMAN DICKEY: Thank you very much, Mr. Nagler.

MR. NAGLER: Thank you again.

ASSEMBLYMAN DICKEY: I will call Mr. Ronald Calissi of Bergen County, Author of the book COUNTERPOINT.

R O N A L D E. C A L I S S I: I will make this as short as possible because it isn't necessary to give a long speech because it's boring.

I am here speaking on behalf of two legislative bills introduced this year, they are Senate Bill 799 authored and sponsored by Monmouth County State Senator Azzolina, and Assembly

Bill No. 1178 authored and sponsored by State Assemblyman Anthony Imperiale. I will be referring specifically to provisions of N.J.S.A. 2A:113-2, 2A:113-3, 2A:113-4, as amended.

From the cradle to the grave punishment is imposed for whatever transgressions are committed. Society punishes for transgressions against the rights of its people. Punishment is and has been a way of life and is part of our culture. It is and has been an important part of civilization. There has existed variable degrees of crimes - from shoplifting to first degree murder - and there should also exist variable degrees of punishment.

The question is - what is just punishment for the particular criminal act committed? In my opinion, capital punishment, under circumstances that constituted a conviction of first degree murder, warrants the forfeiture of a legally sane murderer's life. The taking of that life by the State is just punishment and fits the crime.

The ultimate penalty for such a crime is prescribed by proposed Senate Bill No. 799 and Assembly Bill No. 1178. The penalty is included in the law and is not invoked after the commission of the crime. The legally sane person who wilfully, deliberately and with malice aforethought, murders, knows beforehand what his punishment is to be.

Many arguments have been offered pro and con on the deterrent factors of the death penalty. If capital punishment as a punishment for murder is not a deterrent, then some unknown

supreme authority repealed the first law of human nature - the law of self-preservation.

Punishment for first degree murder has certainly not been swift. In fact, it has been ludicrous when you consider that in a particular case in this State a person spent 14 and 1/2 years on death row, appealed 19 times in the various state and federal courts, and finally admitted his guilt in open court. A system where justice either for the defendant or the State is delayed to that extent is one that is wanting and lacking and is sorely in need of review and revision.

I am unalterably in favor of Senator Azzolina's Bill and Assemblyman Imperiale's Bill. If a legally sane person, whether that person and his aiders, abettors, counsellors and procurers be a cop killer, prison guard killer, killer for hire or the killer of an innocent victim, such person deserves only one punishment which fits the crime - the death penalty. Don't kill and thou shall not be killed.

Any arguments to the effect that there is possibility of an innocent person being executed is so-far fetched from a statistical viewpoint that it does not merit discussion. Our system of justice more than amply protects the constitutional rights of all persons accused of a crime - be the crime murder or otherwise.

I respectfully submit that I also favor the provisions in both Senator Azzolina's bill and Assemblyman Imperiale's bill, which gives discretionary powers to the jury in first degree murder cases, whereby life imprisonment without eligibility for suspension, reduction or remission thereof or for probation or parole is imposed; or when the jury by its verdict upon and after consideration of all the evidence recommends and invokes a sentence of life imprisonment without eligibility for suspension, reduction, or remission thereof, or probation, or parole until at least 30 years of said term shall have been served and not before 30 years have expired. I have sufficient confidence in our jury system to unequivocally accept such recommendation which I feel are quitable. I am not going to second guess the jury in its evidentiary findings, because it is the evidence that will speak to the jury and it will be the jury who will evaluate the evidence. On that basis, the jury will either invoke the death penalty or the more lenient punishment.

However, this shall not be construed as vacillating with regard to my belief in the death penalty as the ultimate punishment for a crime which the jury determines contains all the elements of a first degree murder offense and the jury finds no reasons for recommendation of mercy.



Thank you.

ASSEMBLYMAN DICKY: Thank you very much.

Any questions, Mrs. Klein?

ASSEMBLYWOMAN KLEIN: No.

ASSEMBLYMAN DICKY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No.

ASSEMBLYMAN DICKY: You presented your book, COUNTER-POINT, to us, Mr. Calissi.

MR. CALISSI: Yes.

ASSEMBLYMAN DICKY: Thank you very much for submitting that. We appreciate that.

MR. CALISSI: Thank you for letting me speak. I appreciate that very much.

ASSEMBLYMAN DICKY: Is there anyone here from the office of Stanley Van Ness, Public Defender?

(No response)

Mr. Bruce Schragger, Mercer County Prosecutor.

B R U C E     M.     S C H R A G G E R: Mr. Chairman and members of the Committee, I speak again on behalf of myself and the State Prosecutors Association when we offer our support to Senator Azzolina's bill to reinstate the death penalty in the State of New Jersey. We do this notwithstanding the Study Commission nor the pending appeal before the United States Supreme Court for we feel it is necessary for the continued processing of justice within the State to have the death penalty available. If it is available and at some other time declared unconstitutional, for example, no one will have been hurt by the conviction for the death penalty; on the other hand, if it is not available and the only available punishment is life imprisonment, the State may not retry a person if in the future it does become available.

We would note the one major suggestion for amendment that we have to Senator Assolina's bill is in regard to the need to try each case and not to be able to accept a plea. We would suggest - and the next speaker, C. Jud Hamlin, the First Assistant Prosecutor of Middlesex County, will speak to you at length regarding that - that a bifurcated trial situation be added to the Act or that the Act be amended to include that so that the State and the defendant may still accept pleas of guilty without the necessity of the expense of a trial in each and every case.

We would also suggest that the purposes for which the death penalty might be used be extended, as is set forth in Assembly Bill 1318, Assemblymen Bornheimer and Froude's bill, which has recently been introduced and basically sets forth the matters that Mr. Hamlin will discuss with you.

Why the death penalty? - and I will be brief; I think we've all heard the arguments, pro and con, for so long. It seems to me, though, as a practical standpoint, for certain crimes that certain individuals have committed against society there is no alternative but the death penalty. It's a difficult decision, I realize, but it is a decision that I

feel must be available and in certain instances must be used.

Mr. Nagler discussed the situation of Sergeant Bourne at the New Jersey State Prison, a case that occurred right here in my county and a case which has tremendous implications, I think, as a result of the failure of having the death penalty. The defendant, by the way, has entered a plea of guilty to that charge - last week - and is presently awaiting sentence. But what good is a sentence to a man serving 10 to 15 years for armed robbery, awaiting trial for atrocious assault and battery on a guard while he was incarcerated in Rahway, and now committing this murder? What does the State have to gain or can it gain by saving this life? What do we do with this particular individual who has other charges now pending? During a disciplinary hearing just a few weeks ago he picked up a chair and threw it over one of the officer's head. I mean, do we put this person in solitary for life or do we say that we have given this man a chance, he has not reacted to it, he is beyond rehabilitation, he is beyond control, the State should no longer be burdened by him, by his expense, and we should take his life.

Ladies and gentlemen of this Committee, I would suggest that we take his life.

There are other crimes - paid murders, your felony murders where people violently go out and rob and mutilate and murder, people who have had three or four chances before regrettably on the fifth chance the victim dies and is not just injured or whatever the situation might be.

Again I would only repeat my remarks of this morning regarding the purposes of the criminal system and of any type of punishment, yes retribution, and in certain instances it is the right of the State and the State should have that right.

ASSEMBLYMAN DICKEY: Thank you, Prosecutor.

Any questions, Mrs. Klein?

ASSEMBLYWOMAN KLEIN: Mr. Prosecutor, you spoke just now of the man who has repeatedly assaulted in a brutal

manner until on one occasion the victim accidentally dies.  
Is that what you referred to?

MR. SCHRAGGER: I wouldn't say accidentally. I gave as an example someone who has three or four prior convictions for robbery and on the fifth occasion during the course of the robbery he kills that person. At what point does the State have an obligation to itself to say that this person is beyond redemption and that the State should no longer be burdened with him either within or without an institution.

ASSEMBLYWOMAN KLEIN: That murder at that point would be first degree murder?

MR. SCHRAGGER: Well, it would be first degree murder today too.

ASSEMBLYWOMAN KLEIN: No, I mean --

MR. SCHRAGGER: You mean for the death penalty?

ASSEMBLYWOMAN KLEIN: Yes.

MR. SCHRAGGER: I would propose that it be, yes.

ASSEMBLYWOMAN KLEIN: According to these bills, death that occurs at the time of an armed robbery is first degree murder.

MR. SCHRAGGER: Well, it's one of the suggestions I would make to amend Senator Azzolina's bill. It does not appear in Senator Azzolina's bill, but it seems to me it is one of the most difficult situations that the citizens of the community are faced with. The incidence of armed robbery is increasing at a tremendous rate. The individuals involved all too frequently have long prior records and I think, depending on the circumstances which the jury should determine, the death penalty should be available.

ASSEMBLYWOMAN KLEIN: Did you find, up until the time the death penalty was declared unconstitutional in the State of New Jersey, that these kinds of crimes occurred?

MR. SCHRAGGER: These crimes occurred? These crimes will continue to occur. If you are referring to deterrence, I don't think the death penalty other than in an institutional setting would have much of a deterrent effect. People don't

think they're going to get caught. So, from that standpoint, it's difficult to answer. It's difficult to answer whether there has been an increase because of the abolition of the death penalty or not, and I don't think you can. Here in Mercer County or in Trenton for this year we've had 14 murders up through last night, when there was another one, as opposed to 12 for the entire year last year. But my opinion is that there is no relationship.

ASSEMBLYWOMAN KLEIN: So that you are testifying that you really don't believe that there is a deterrent value to the death penalty.

MR. SCHRAGGER: Other than in situations involving killings within an institution. I think if inmates in a confined area are aware of the penalty they might consider it, but I don't think in crimes that occur on the street the matter is considered, basically because the people don't think they're going to be caught, or at least they anticipate that they won't be caught.

ASSEMBLYWOMAN KLEIN: And, as Mr. Nagler testified, it certainly does not have a rehabilitative quality. So the major aim, I gather from your testimony, is that at some point or in some way the State determines that it should no longer be responsible for a particular person or a particular person is beyond rehabilitation and therefore the State should take his life, not for the purpose of a deterrent, not for the purpose of rehabilitation, not particularly for the purpose of punishment but perhaps just because the State should no longer have to be bothered with this person.

MR. SCHRAGGER: That sets forth basically the rationale or one of the rationales behind my reasoning. As far as being a deterrent, I suppose maybe, with tongue in cheek, obviously it's a deterrent, he's not going to commit it again, or to him it is. Punishment, it's over; rehabilitation, no one, at least in this life, is going to be rehabilitated. I don't think you can discuss it in those terms. I think you've got to discuss it in the nature of the beast, the

nature of the person committing the crime, the nature of the crime, and the rights of the rest of us who are walking the streets.

ASSEMBLYWOMAN KLEIN: Well, you know, I think that's very frank testimony. Would you agree that if in fact the death penalty is used in this way, as a means for society to determine that it will no longer be bothered with certain persons, that it has in fact over the years been proven to be used in a rather discriminatory way and, as has been testified here earlier, that it tends to be the poor, the black, the minorities who do in fact suffer the death penalty?

MR. SCHRAGGER: I cannot buy that argument at all. The argument, to me, is senseless. Regrettably, the poor, the deprived, are those who commit more crimes than the wealthy. I think statistically that's probably the reason for it rather than one's wealth. Certainly today, with the availability of counsel to all defendants, no matter what their financial situation, and the payment to counsel in all cases, this rationale does not apply. I don't think anyone has done a study of those persons who could afford their own attorneys and those who had assigned counsel and then determined which ones received the death penalty. Then you would have to study each particular crime and the circumstances behind each one to determine the reasoning why the death penalty was or was not imposed. I do not believe Mr. Nagler's argument is factual.

ASSEMBLYWOMAN KLEIN: You believe that murder is almost limited to the poor and the black?

MR. SCHRAGGER: No, I didn't say that. I say that statistically you're going to have more committed by the poor when you consider the robbery situation. I would say that I clearly believe that such crimes of passion, that the death penalty should not be available for that kind of crime. We're talking about crime where there is premeditation or crimes where the actors are involved in the commission of other crimes, such as a murder which occurs during the course

of a robbery. I don't think any of us in law enforcement today are concerned about the boyfriend-girlfriend situation, concerned about it in terms of the death penalty, or the barroom brawl or the husband-wife situation. I think we're concerned about it in terms of rehabilitation. I think we're concerned about it in terms of proper enforcement of existing gun control legislation in New Jersey and the need for gun control legislation in other states that don't have the strong gun control legislation that we have.

I hope that has answered your question.

ASSEMBLYWOMAN KLEIN: Thank you.

ASSEMBLYMAN DICKEY: Mr. Klein?

ASSEMBLYMAN KLEIN: Mr. Schragger, a couple of comments.

You say you are not concerned about the boyfriend-girlfriend situation, that kind of situation, and yet a good many of such homicides are premeditated in the classic legal sense. Would you provide for the death penalty and make it optional with the court in that kind of situation?

MR. SCHRAGGER: No.

ASSEMBLYMAN KLEIN: In other words, you would exclude from the death penalty that kind of homicide, one motivated by passion whether it's premeditated or not.

MR. SCHRAGGER: Well premeditated, yes I would. Now when you're talking about the paid killer situation in the triangle affair where one goes out and hires a gun, then I would think it should be included both for the hirer and the actual triggerman.

ASSEMBLYMAN KLEIN: One other question. Virtually all of the discussion this afternoon has concerned itself with the death penalty feature of this bill but there is another feature of the bill as well and that is the requirement that, if no death penalty, there be an imposition of a sentence to life imprisonment with no possibility of parole prior to 30 years. Do you have any comments about that provision?

MR. SCHRAGGER: If we have no death penalty, I think --

ASSEMBLYMAN KLEIN: No, we're talking about a situation where there is a death penalty permitted but it's not imposed and instead a sentence of life imprisonment is imposed. But under the bills that we have before us that sentence of life imprisonment would have no possibility of parole for at least 30 years. What is your comment about that situation?

MR. SCHRAGGER: Generally, I'm in favor of that.

ASSEMBLYMAN KLEIN: Why?

MR. SCHRAGGER: Again, it seems to me that the taking of a life is obviously the most extreme, both from the State's standpoint and certainly from the defendant's standpoint. It seems to me in those situations, again excluding the crime of passion and things of that nature, society must know and the actor must know that he will have to serve a minimum mandatory extended term as his payment to society for the life that he took. And I would think in that situation you might have a greater deterrent effect than you might have in other situations.

ASSEMBLYMAN KLEIN: Thank you.

ASSEMBLYMAN DICKY: Any questions, Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKY: Mr. Wallace?

ASSEMBLYMAN WALLACE: Mr. Prosecutor, I do have something that disturbs me now, in listening to your testimony.

It seems to me that most of my preparation for this work, in studying the reinstating of the death penalty was based primarily on conversations and reports and other items that I may have read and listened to in commentaries, and what-not, indicated to me that the death penalty would be brought back as a deterrent to crimes of murder. Now it disturbs me that you say that this would not be a deterrent. I just wonder if you are absolutely firm and convinced that the death penalty restored would not be a deterrent to crimes of murder.

MR. SCHRAGGER: I am not convinced of it nor do I think any of the studies can really give you an exact or



scientific answer to it. It is only my personal opinion that no person who commits any crime considers the consequences of that crime, whether it be a possible jail sentence or a fine or even public exposure and censure. The actor does not consider being caught. Therefore, particularly in a murder situation, where if it's a planned murder there is a great deal of effort that goes into it, the actor doesn't feel he will be caught and I really don't believe that he considers the consequences.

ASSEMBLYMAN WALLACE: Well, my comment on that is that it does seem to me that the people are asking for the return of the death penalty principally because they believe that this would be a deterrent.

MR. SCHRAGGER: Well Assemblywoman Klein indicated that I was frank. I've always been, I guess, known for my frankness and I would not come up and tell this Committee or any other one that I felt it was a deterrent even though I realize many groups have argued that position. I don't think it can be empirically shown to be nor do I think it can be shown not to be. It's a difficult area. To me, it is not the important area when one considers the need to have or not to have the death penalty.

ASSEMBLYMAN WALLACE: Thank you.

ASSEMBLYMAN DICKEY: Thank you, Prosecutor.

MR. SCHRAGGER: Thank you.

ASSEMBLYMAN DICKEY: The next witness, Mr. C. Judson Hamlin, Prosecutor, Middlesex County.

C. J U D S O N H A M L I N: Thank you for the promotion; I'm the First Assistant.

By way of introduction, my name is Jud Hamlin. I'm not an author, I hold no elective office, I'm not an officeholder, I seek no elective office, I will not quote to you nor will I attempt to justify by great historical citation of 1909 rape cases the strength or weakness of the position.

I am the principal draftsman of what appears before you as A-1318, Assemblyman Bornheimer's bill.

What I am here to tell you about is what this act provides and why, if you plan on adopting, if at all, a homicide penalty act, for lack of a better name, this is probably the only constitutional way it's possible to do it.

By way of background, I am Assistant Prosecutor and have been for a year. Prior to that I was a Public Defender in charge of Middlesex County for four years, from the inception of the Public Defender program. I've tried murder cases for the defense, for prosecution. My office was responsible, as Public Defender, for over 5,000 indigent defendants in the course of four years. And out of that experience and my experience as Prosecutor, now, I've drafted what you see before you.

I will not attempt to justify the death penalty because that is something that everyone feels very strongly about. Suffice to say though, from my experience, I am not convinced that the death penalty is a deterrent and I frankly don't know of many who would disagree with that position because, as Prosecutor Schragger told you, most people don't believe they're going to be caught or don't consider the consequences if they are caught.

The basic philosophy of A-1318, as it is before you, is based upon the premise that at some point in time there are some people on the face of this earth who are such a constant threat to society and whose history indicates that their violent nature would mean that they would continue to be a threat to society, notwithstanding so-called rehabilitation, that at some point in time these people do not and cannot be permitted to exist within an organized society, for they go to jail and kill.

There are a number of cases and I will only cite you one that occurred to me this week. We had a murder of a four-year old child. The child's back was broken so severely that the aorta was severed. The individual who is charged with this crime four years ago had an infant child, 8 months old, admitted to the hospital twice with fractures,

signed out against the doctor's advice, readmitted with a fractured skull, dead. A year ago, this same individual, while living with a girlfriend and the child, injured the child by a broken arm. The mother refused to testify. There were no witnesses. The child was subsequently readmitted to the hospital with a broken leg. While in the hospital the child had an injury. No one will testify to these crimes. And that child suffered a broken back in that home.

I say to you, has that man forfeited his right to live in this society? A man with a record of violent crime prior to that? Is there no point in time when people are so violent and so dangerous to society that society cannot say to them, we demand your life?

Now, granted the arguments against capital punishment are strong, mistaken identity, the husband and wife affair, but if you read 1318, the important point of 1318 is an attempt to establish categories and criteria so as to recognize those repeated and dangerous offenders. It is not to be applied willy-nilly across-the-board.

You will note there are some provisions. First, there is a category of offenses without which the death penalty is not available. Now, I have heard many, including those high in law enforcement - the Attorney General has indicated that certainly a police officer is no better than anyone else and why should he be afforded special protection of a death penalty. I say to you that as an organized society we've authorized the policeman, we have asked him to defend us and we have thus thrust him into situations that are inherently more dangerous than common people face. Because we endanger him especially by society's own selection, he should be entitled to this special protection.

The categories regarding persons under custody are self-explanatory.

Again, establishing a category or a way of delineating people who are not amenable to rehabilitation, who will

consistently be a threat to society, note that the bill would only make the death penalty available in cases where special danger was shown or a record of conviction for a violent crime, where people are proven not to have any regard for human life or safety. Those are the people this bill is aimed at, not the husband-wife, not the barroom situation, not the first-time guy. This is aimed at the situation where people do not regard human life as valuable and, therefore, constitute a threat. And these are the people who will not be rehabilitated because this thing calls for people who have records of conviction for crimes of violence. And they are delineated there.

Now understanding that this penalty should not be invoked across the board, I have written into this bill several provisions which I think make it constitutionally proper.

First, it provides for a bifurcated trial, that is a two step trial. When our Supreme Court struck down the death penalty it wasn't because it ruled on the cruel and inhuman aspect of capital punishment but rather that it killed the defendant's right to a jury trial. By separating the trial as to guilt and innocence, that constitutional infirmity is avoided.

Secondly and very important, there is in this bill not only the bifurcated trial situation but a discretionary power built into the prosecutor. Notwithstanding a defendant falling within one of the categories which make him eligible for capital punishment, the prosecutor may, on evaluating the case, decide not to seek the death penalty, in which case it would not be imposed. And the procedure by which he would seek the death penalty is laid out in the statute. It provides an additional step of review. Likewise, in providing for two separate trials what we permit, which is very important, is the ability of the prosecution to accept a plea of guilty in a murder case.

Now that is extremely important because I think if you will look at statewide statistics you will see that approxi-

mately seventy to seventy-five percent of murder cases are pleas, or have been up to this date. The cost of prosecuting a murder case is high. I suggest to you that any legislation which requires that all murder cases be tried is probably constitutionally infirm but, apart from that, places a great burden upon the State. Not only that, the separation of a bifurcated trial as to guilt and penalty provides in the second trial for the state and the defendant to fully air all the aspects which would be necessary to come to an intelligent decision as to penalty. And that would include the defendant's background, anything he wishes to bring; it's a very wide latitude sort of situation, things that would not normally be admissible in a trial of a case with all the rules of evidence.

Lastly, the last built-in protective factor, of course, is in that jury situation on punishment. If one juror were to disagree as to the propriety of the death penalty, and there was what would normally be regarded as a hung jury, the provision is for the discharge of the jury and the imposition of life.

Now I would only make two other observations. First, that if in fact the jury decided the penalty or the defendant - you see, you're punishing the defendant here, not necessarily the crime, you're punishing the defendant who is so dangerous to society and so devoid of the possibility of rehabilitation that he constitutes an on-going danger -- if that criteria were not met in the mind of the jury, then certainly the decision must be inferred that the defendant is a possible candidate for rehabilitation and thus I would not be in favor of the mandatory sentence situation. Almost all mandatory sentence situations have been viewed by the courts with less and less favor in constitutional terms.

That essentially, what I have told you, is this bill. I think it is a good bill, it is a constitutional bill. And I might suggest this to you. There are certain things in here that are constitutionally necessary if any death

penalty is to be adopted. And while I agree with the basic aims of Senator Azzolina's bill, I would suggest to you that to amend any bill to be constitutionally permissible you are going to have to come very close to this type of bill with a bifurcated trial situation which permits pleas. That constitutionality aspect of this bill was recognized at the meeting of the Prosecutors that Prosecutor Schragger has referred to when they recognized the advantages of this.

I would only tell you one thing. I have been in this business on a daily basis. I am not an author but I know it first-hand. I've talked to defendants, I've defended them, I've prosecuted them. There is a need for the death penalty. Some people are so bad and so dangerous to society, either in jail or out of jail, that they constitute a clear and present danger. And for the protection of society, not necessarily a deterrent, - I don't agree with that - those people should be put to death.

ASSEMBLYMAN DICKEY: Prosecutor, where you have a plea of guilty to a murder charge, the bifurcated hearing would then be held with a jury. Is that right?

MR. HAMLIN: Absolutely right. It would protect the defendant's right to a jury trial on imposition of the death penalty. Yes.

ASSEMBLYMAN DICKEY: And they would determine then the appropriate penalty.

MR. HAMLIN: Yes. And I would also say that the bill, as written, clearly indicates that in no circumstances can a defendant waive that right as to the sentence portion of the trial.

ASSEMBLYMAN DICKEY: And it would have to be held with a jury.

MR. HAMLIN: Yes, sir.

ASSEMBLYMAN DICKEY: Not without a jury.

MR. HAMLIN: No, sir.

ASSEMBLYMAN DICKEY: Any questions, Mrs. Klein?

ASSEMBLYMAN KLEIN: No.

ASSEMBLYMAN DICKEY: Mr. Klein?

ASSEMBLYMAN KLEIN: No.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No, sir.

ASSEMBLYMAN DICKEY: Thank you, Prosecutor.

MR. HAMLIN: Thank you.

ASSEMBLYMAN DICKEY: The next witness, Mr. Yacovino, New Jersey State Policemen's Benevolent Association. Please state your full name and address.

P H I L I P Y A C O V I N O: Philip Yacovino, First Vice President, New Jersey State PBA. I live at 46 Summit Avenue, Sewaren, New Jersey.

We are here to support Senator Azzolina's and any other bill that pertains to keeping capital punishment in the State of New Jersey.

I will read a statement here by our Association:

Several years ago Governor Richard J. Hughes appointed nine distinguished citizens to the State Commission on Capital Punishment. The group, after many hours and days of hearings at which all shades of opinions were heard, recommended that the death penalty be retained for first degree murder. That recommendation remains as valid today as it was when it was presented to the Governor.

It is to prevent vicious, cold-blooded, premeditated murder, not vengeance, that should compel us to support capital punishment. As a law enforcement officer, whose task it is to protect the innocent as well as apprehend the guilty, I know from experience that those capable of the horrible crime of cold-blooded murder recognize only the harsh reality of the electric chair. Further, it must be remembered that the death penalty is imposed generally only by a jury convinced that the murder was clearly a vicious, premeditated act. There may come a time when moral standards of our

society rise to the point where capital punishment is no longer necessary. However, even a casual look at crime statistics makes it abundantly clear that the time is not yet here.

Just a comparison by our Association. Just across the River in New York State where more than 300,000 abortions have been performed and the lives of unborn children have been snuffed out without benefit of a trial by jury, yet they receive the death penalty because they were unwanted by someone. They say that capital punishment is cruel and inhuman punishment and unconstitutional but what is more cruel and inhuman than taking one's life before it has a chance to begin to live.

In a presentation recently given at one of our previous classes by a member of the John Birch Society, we were told that our laws are developed from those of God. The Sixth Commandment is directed against this crime. The scriptural statement, "Thou shalt not kill", is the highest authoritative prohibition against the taking of the life of a fellow man by violent means. We have here a declaration of the dignity of man, irrespective of his race or creed, because man is created in the image of God and he has the inalienable human right to live. To rob a man of his inalienable right to live constitutes an outrage against God. God gave man a free will to choose the paths of good and evil. The exercise of this right was subject to reward and punishment.

In Exodus, Chapter 21, we find clear and distinct language how to treat the murderer. It prescribes as follows:

(V-12) He that smiteth a man, so that he dieth, shall surely be put to death;

(V-14) And if a man come presumptuously upon his neighbor, to slay him with guile; thou shalt take him from Mine Altar, that he may die.

(V-23) But if any harm follow, then thou shalt give life for life.

These brief statements were actually deterrents to



murder. God knew that man without spiritual laws would be like wild animals and that adherence to the spiritual law would prevent crime. The difference between the days of the Hebrew Commonwealth and today is that in the olden days man was spiritually inclined and was more interested in rewards from heaven than punishment for misdeeds. Hence, there were few capital punishment crimes.

Today we find that the criminal has no respect for the spiritual deterrents to committing murder and that he has forsaken the ways of God. The present-day statutes covering the penalty for murder are laughed at by the criminal because he knows that he will not have to pay with his life for the murder he commits. He will live on, while the murdered person is gone and cannot ever be brought back to life. Who has failed this generation? Religion or man? Man has failed, and, therefore, it is incumbent upon our Legislators to fulfill God's wishes and enact strict penalties for the commission of murder.

Without the death penalty, as laid down by God, the criminal will continue with his murders. The increase of crime is proof to the fact that the Legislators have failed God and have played into the hands of those who want no laws. Are man-made laws superior to the laws laid down by God? Never. Would our Legislators reenact capital punishment if their children would be murdered during their terms of office? You would be correct in assuming there would be some changes made in our laws, and quick.

Edgar Smith, the man who spent more than 14 years on Death Row in the New Jersey State Prison for the brutal murder of a pretty high school girl, was asked his opinion of capital punishment. He said, "I'm only totally opposed to capital punishment for myself. I'm a little bit ambivalent about the subject. There were people on Death Row I wouldn't like to get out and live next door to me. There are people who should never be out in circulation, and life imprisonment doesn't mean life. Still, capital punishment seems to be an

extreme way to put someone out of circulation." Is capital punishment a deterrent to would-be murderers? Smith was adamant. "It's not any kind of deterrent. People who premeditate murder also premeditate getting away with it. So whatever the punishment, it makes very little difference since they don't expect to pay any punishment."

The argument that the death penalty has done nothing to deter the crime of murder is a very weak one. In order for punishment to be effective it must be swift and certain. The due process system of this country makes a mockery of the effectiveness of the police. In 1971, 125 policemen were killed in the line of duty in this country. Yet not one murderer was executed for a premeditated murder. If these murderers were as certain to die as the police officers who accept this risk as an occupational hazard, perhaps they would think twice before committing such acts.

Again, gentlemen, no statistics will show how many murders have been prevented because a person or persons did not pull the trigger because the life he would be taking may be his very own because of the death penalty.

What about the victims? Let's not forget they were executed in a manner that was unconstitutional, illegal, and totally devoid of any due process of law. The murderer lives on while the victim is dead and the latter's family suffers. Old men and women are beaten to death for a few dollars, shopkeepers are shot down in cold blood and policemen are killed in the line of duty. I wish I could take all the anti-capital punishment people to the scenes of brutal murders in Woodbridge, Plainfield and other cities. We must start thinking more of the victims of crimes. I, as well as other policemen in New Jersey, am very concerned about increasing crime. As law enforcement people, we are calling for the death penalty for all major crimes and stiffer sentences for lesser ones. Judges have been guilty of crimes themselves. They are guilty of the crime of allowing criminals to roam the streets to continue their illicit life of preying upon innocent

victims.

The cliché "getting away with murder" was never truer than it is today.

Therefore, I want to make a public statement that the State PBA is still in favor of capital punishment in any form.

Thank you.

ASSEMBLYMAN DICKEY: Thank you, sir.

Any questions, Mrs. Klein?

ASSEMBLYWOMAN KLEIN: No.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No questions.

ASSEMBLYMAN DICKEY: Thank you, sir.

Mr. Thomas Jenkins. (No response)

Mr. Dale T. Taylor. Would you state your full name and address, please.

D A L E T. T A Y L O R: My name is Dale T. Taylor. I presently reside in Bordentown. I am a former Township Committeeman in the Township of Deptford in Gloucester County where I lived most of my life.

Mr. Chairman, Mr. Dickey, ladies and gentlemen of the Committee, I come here today as an ordinary citizen without title, without representing any special interest group. As a former Township Committeeman in this State, elected at the age of 22, I feel that I truly represent the full thoughts of the citizenry, having experienced those thoughts on the local level. As an ex-Marine, Vietnam Veteran, I have witnessed death on an almost daily basis and realize its full impact and implication.

The New Jersey State Legislature is to be commended for seeking to revise and update the criminal code of this State. In particular, it is also commendable that the State Legislature would want to take a very close look at the current definitions of murder in the first, second and third degree and subsequent penalties upon conviction of those crimes. It is further necessary, and critically so, that the state examine

its position with regard to capital punishment. While this is primarily a hearing concerned with pending legislation, I think it is a proper time to delve into contemporary feelings surrounding the death penalty. Not only should such a discussion serve to clear the air on a lot of poor logic concerning capital punishment, but such an analysis is directly related to the three bills now before this Committee.

The dilemma of the death penalty has evoked emotions, stimulated debate and occupied the minds of men for ages. Sincere and dedicated men of all professions and all walks of life have vigorously defended and opposed this issue. Should we take the life of one man who has killed another with premeditation? Indeed, this issue has been a personal subject of thought for several years. I offer the following testimony which is a consummation of that thought.

Let me cover some of the major arguments in opposition to the death penalty. First and possibly foremost, it is said that the death penalty constitutes "cruel and unusual punishment", and as such, violates the Constitution's Eighth Amendment. TIME Magazine recently suggested that it boils down to one basic question: "Has the U. S. reached the point at which the death penalty affronts the basic standards of decency of contemporary society?" Certainly our forefathers who drafted the Eighth Amendment in no way included the death penalty in their thoughts with regard to cruel and unusual punishment. The death penalty was accepted then as it is now as a just and reasonable punishment by many. Even as the Constitution lends itself to periodic interpretation by the U. S. Supreme Court, what in the world has changed in past years to indicate that there is anything more cruel or unusual about death in itself or as a penalty? If anything, death has become a more "usual" thing in everyday American life. A sad commentary, I am sure. But if crime in itself, especially murder, has lost none of its viciousness or degree of perpetration, which it certainly has not, what school of logic shows that we should arbitrarily reduce our degree of punishment? As far as the

death penalty "affronting the basic standards of decency of contemporary society", I would suggest that such a statement is plausible only in recognition of the fact that it is those very standards which have been lowered along with our constantly liberalized mores and values.

Even the courts of our land have failed to come to an agreement on this issue. As was pointed out, the California State Supreme Court has held that the death penalty does constitute cruel and unusual punishment. As was not pointed out, the Arizona State Supreme Court, as of just last Friday, has held that it does not constitute cruel and unusual punishment.

Many have pointed to Great Britain and other countries who have abolished capital punishment. These opponents of the death penalty say that such a measure has not resulted in an increase in murder. But how can we expect accurate conclusions from such examples when policemen in England do not even carry guns and there is an unwritten agreement with the underworld against their use? A far cry from the streets of America for sure. Efforts have also been made by opponents of capital punishment to cite the horrors of executions by whatever means. Strange that these same people seem to miss the far more ghastly sights of a raped and mutilated young girl or a gunned-down policeman. And what is so barbaric about the death penalty? Is it any more barbaric than the crime committed?

This brings us to the emotion of vengeance and whether or not we are "lowering ourselves to that of the murderer by resorting to the death penalty". I would remind those gathered here of the words of Oliver Wendell Holmes when he wrote "The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would go so far as to gratify the passion of revenge outside the law, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution." Indeed, we might apply this requirement to our Legislators

as well.

Religious arguments have been cited on both sides of the question, but religious truths are a matter of faith. Couple this with the fact that there are numerous books of laws depending on one's religion, as well as several versions of the Bible and both Testaments. There are religious quotes for and against the death penalty. Most Protestant churches are against it, Roman Catholics have granted the right to the state and Jews are against it except for genocide and war crimes.

Arguments of recent years center around whether or not the death penalty is a deterrent. The credentials of spokesmen on both sides of the question are impressive. Those against the death penalty cite that most murders result from crimes of passion in which the persons involved knew each other. They say that no penalty would deter these crimes as most are committed on the spur of the moment. They give examples of states with no capital punishment who have not experienced any increase in the number of murders as compared to those states with capital punishment. But what about those criminals who have acted with willfulness and deliberation? What of those - even if only one in a hundred - who commit a murder and are not mentally sick. What of those who commit a murder and are not a product of a social environment of the poor, the socially unacceptable, the illiterate or the hungry and impoverished? Shouldn't the decision on whether or not such circumstances have had an influencing effect upon the criminal be left to the jury in deciding whether or not to level the death penalty? Or do our professors and liberal intellectuals feel that such decisions are outside the realm and capability of the common man?

I will not concede which side of the deterrent question is most plausible. I will instead offer this thought: What is the purpose of any punishment for any crime? Does a man get five years for armed robbery because it has been predetermined that such a sentence will act as a deterrent to future commissions of such crimes? Or is the degree of

punishment relative to the degree of the crime committed in allowing for a debt to society to be paid? I believe that it is and it should be. You do not sentence a shoplifter to twenty years or an arsonist to thirty days. Each punishment is commensurate with the crime and its circumstances. In this context, the deterrent question is really irrelevant. But if one person stops to envision a waiting electric chair or the gas chamber before he risks committing a murder, then a deterrent has served to save at least one life. To say that a Manson or a Speck or an Eichmann should not be put to death is to say that no crime, humanly or inhumanly possible, warrants such a degree of punishment.

I believe that the people of the State of New Jersey would disagree with such a conclusion. I believe that now, more than ever before, at a time in history when there is such a lack of confidence in government as exists today, the frustrations and demands of the majority can no longer be ignored.

Assembly Bill No. 556 does not respond to those frustrations. Under the label of revision, A-556 diminishes murder, other than murder in the first degree, which is perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or murder which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, as murder in the second degree, and as such, allows the perpetrator to elude the death penalty. Yet, at the discretion of the jury, if such crimes were listed as first degree, the same punishments for second degree could still be leveled except the same as that imposed upon a conviction of murder in the third degree which is a provision of the second degree punishment. The key here is that such a decision would be properly left to the jury in deciding. It is not predetermined by the restrictions of law. In addition, while the murder of policemen in the line of duty certainly should remain a capital offense, especially in view of contemporary

lawlessness, what is any more valuable or wrong about a policeman losing his life over that of an innocent store-keeper killed during a robbery, or a young girl murdered during a vicious rape? In view of the present conflicts in society today, one also wonders why murder committed in perpetrating arson or kidnapping should be relegated to a non-capital offense. The whole issue here is that the state places a quality or value not on all life but on the methods and circumstances when a life is taken.

Senate Bill No. 799 still excludes felony murders in the commission or perpetration of arson, burglary, kidnapping, rape, robbery or sodomy, from capital offense status. Again, the penalties for first and second degree murders are almost identical with the exception of the death penalty. Rather than make this distinction by law, such a decision should be left to the jury.

Assembly Bill No. 1318 is what I would consider a proper revision. It amends the basic statute in question, N.J.S. 2A:113-4, and properly repeals 2A:113-3. It broadens the scope, and properly so, of murder in the first degree. In addition, very liberal provisions are made for the ascertainment of guilt whether by jury or plea by defendant. Very adequate and deliberate proceedings are established with regard to the determination of penalty.

I urge the State of New Jersey to enact into law A-1318. I urge this Committee to recommend such action. I hope that the Legislature of this great State will say the time has come when the very vicious and senseless act of murder will be dealt with in the only just way that it can. And by such a declaration, the people of this State can once more believe that laws are made to protect the innocent and not to aid the guilty.

Thank you.

ASSEMBLYMAN DICKY: Thank you very much, Mr. Taylor.  
Any questions, Mrs. Klein?

ASSEMBLYWOMAN KLEIN: No.



ASSEMBLYMAN DICKY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No questions.

ASSEMBLYMAN DICKY: Does anyone else wish to testify before the Committee? (No response) If not, the public hearing is closed.

(Hearing concluded)

# Citizens Against Legalized Murder, Inc.

Incorporated under the laws of the State of New York as a Not-for-Profit Corporation

P.O. Box 24 New York City 10024

(212) 787-1532

Douglas B. Lyons, *Executive Director*

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Testimony of Douglas B. Lyons

Executive Director of

Citizens Against Legalized Murder, Inc.

Before the New Jersey Assembly Judiciary Committee

Trenton, N.J.

Tuesday, June 27, 1972.

\*deceased

Mr. Chairman and Members of the Committee

I am Douglas B. Lyons, Executive Director of Citizens Against Legalized Murder, Inc., an organization which I formed in 1966 to work for the abolition of the death penalty. I have been active in the movement to end capital punishment for the last twelve years.

Along with my prepared remarks, I have provided the Members of the Committee with copies of "The Case Against Capital Punishment."<sup>1/</sup> This excellent pamphlet sets out in detail the major arguments against the death penalty. I hope each of you will have an opportunity to examine it in the course of your study of capital punishment.

Although there have been no executions in the United States since June 2, 1967 -- nearly five years ago, and none in New Jersey since January 22, 1963, nearly ten years ago --, this Committee is not simply engaging in an academic exercise by studying the death penalty, for there are today<sup>2/</sup> men on death row in the United States.

The existence of many death penalty statutes throughout the nation under which executions are never likely to be carried out is attributable on the one hand to the political tenacity which such statutes possess, and on the other hand to the lack of pressure to remove death penalty statutes from the books when nobody (or only an occasional unknown) is actually being sentenced to death or executed. Since

1930, New Jersey has carried out only 74 executions<sup>3/</sup> -- an average of less than two per year.

The National Commission on Reform of Federal Criminal Laws noted the nationwide trend away from executions when it stated in its Working Papers that ". . .while de jure abolition [of the death penalty] has ebbed and flowed, a de facto abolition has practically become a reality in the United States."<sup>4/</sup> Prof. Bedau characterized the effect of the retention of death penalty statutes in many states coupled with the incredibly small number of executions, as follows:

"In Massachusetts, it seems, we can go for a generation without a legal execution in our prisons (the last one was in 1947); we cannot go 1 day without the death penalty on our statute books."<sup>5/</sup>

Over half of the states which retain the death penalty today have had no executions in over a decade.<sup>6/</sup>

The real question before New Jersey, and before this Committee therefore, is not whether New Jersey should resume electrocutions, but whether or not to restore to the statute books a law which will be rarely, if ever, used; a law which discriminates against the poor, the friendless, and the members of racial minority groups; a law which serves no social end but revenge; a law which may lead to the electrocution of an innocent man; a law which may encourage murder;

a law which almost by definition teaches us that it is proper to solve a great social problem through the use of naked brute force; a law which would put New Jersey on record as believing that it is right to kill. The existence of the death penalty breeds disrespect for law.

A state senator recently urged restoration of the death penalty in New Jersey. He stated: "The only way killers should come out of prison is in a box."<sup>7/</sup> This barbaric statement belies the history of the death penalty in the United States and in New Jersey. As the President's Crime Commission put it:

"The most salient characteristic of capital punishment is that it is infrequently applied... [A]ll available data indicate that judges, juries, and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence."<sup>8/</sup>

In 1935, when there were a record one hundred and ninety-nine (199) executions in the nation,<sup>9/</sup> men were being put to death at the rate of more than one every other day. But since then, the number of executions carried out in the United States has declined dramatically: In the 1950's there were an average of 72 executions per year. In the 1960's the number was down to 19. During the last six years (1965-1971), there were approximately 78,000 homicides in this country. During the same period, roughly 600 men were sentenced to death for murder. Yet there were only three executions (all for murder) during the last six years.<sup>10/</sup>

In other words, we have executed only one two hundred and <sup>11/</sup>fiftieth of one per cent of all murderers -- 0.00004%.

The selectivity with which the death penalty is enforced is best exemplified by the case of Eddie Slovik. Theoretically, all 40,000 American soldiers who deserted during World War II could have been executed. In fact, though, only Slovik faced the firing squad -- the only <sup>12/</sup>American soldier executed for desertion since the Civil War.

#### RACIAL DISCRIMINATION

Death row in New Jersey is an outrage and a disgrace. I know. I visited the prison, which was built in 1798.

The National Crime Commission stated, in its Report, that "The death sentence is disproportionately imposed and carried <sup>13/</sup>out on the poor, the Negro, and the members of unpopular groups."

The most blatant example of racial discrimination in capital sentencing is in rape cases: Since 1930, 455 men have been executed for rape in the U.S., 405 (89%) were black. <sup>14/</sup>

But the problem of racial discrimination in death penalty cases is not limited to rape cases, nor is it limited to southern states: Since 1930, a total of 3,859 people have been executed in the entire nation: 2,066, over half, were black -- a number far out of proportion to the rate at which blacks commit capital crimes. Nor is the evidence of racial discrimination a mere historical footnote: Today, over half the men on death row are black: 58% of the murderers, and an incredible 89% of the men

on death row for rape are black.

During the 20 years prior to New Jersey's last execution, there were 30 executions -- 11 white and 19 non-white. When the death penalty was ended in New Jersey, there were 7 white and 17 non-white on death row at Trenton.

Of the 20, 17 had been condemned to death for crimes against white people.

#### WORLD-WIDE ABOLITION

The trend towards abolition of the death penalty is world-wide in scope. Among the Western European nations outside the Soviet bloc, only France, Greece, and Spain still prescribe the death penalty for murder and other peacetime crimes -- and France may soon abolish capital punishment. In the Western Hemisphere, this nation stands virtually alone in keeping the death penalty. Capital punishment for murder, rape, and kidnaping has been almost totally abandoned in the Anglo-American world--except for the United States.<sup>15/</sup>

In this country, the current situation is this: When the Supreme Court of New Jersey did away with this State's death penalty statute, New Jersey joined 14 other states which no longer have the death penalty, or which have it only for a very limited variety of offenses.<sup>16/</sup> Most recently, on February 18 of this year, the California Supreme Court declared<sup>17/</sup> that state's death penalty unconstitutional as "cruel or unusual punishment."

The Supreme Court of the United States is now considering whether the death penalty is "cruel and unusual punishment," prohibited by the Eighth Amendment.

The last abolition state to restore the death penalty is Delaware, New Jersey's neighbor. Delaware abolished capital punishment in 1958, and restored it in 1961. An examination of the Delaware experience indicates that Delaware's murder rate was unaffected by the existence, abolition, or restoration of the death penalty.<sup>18/</sup> In Delaware, as in New Jersey, the homicide rate depends upon a variety of complex and interrelated factors. The death penalty is not one of them.

#### DETERRENCE

"The only moral ground on which the State could conceivably possess the right to destroy human life would be if this were indispensable for the protection or preservation of other lives. This places the burden of proof on those who believe that capital punishment exercises a deterrent effect on the potential criminal. Unless they can establish that the death penalty does, in fact, protect other lives at the expense of one, there is no moral justification for the State to 'take life.'" (Emphasis added) <sup>19/</sup>

This was the conclusion of members of the Massachusetts Commission to Investigate the Advisability of Abolishing Capital Punishment. I agree. The death penalty does not now exist in New Jersey. If this Committee should consider recommending that the death penalty be resurrected, the proponents of legalized murder must bear the heavy burden of proving beyond doubt that capital punishment is "indispensable"



for the protection or preservation of life.

Why is the death penalty retained in so many American jurisdictions? The major argument put forth to keep the death penalty is that it is a deterrent to serious crimes, especially to murder.

If the death penalty were a deterrent to murder, it would follow that those states which have and used the death penalty would have lower murder rates than the states which have abolished the death penalty. But just the opposite is true. In 1970 the death penalty states had an average of 7.7 homicides per 100,000 population, while the abolition states had an average murder rate of only 4.6. Furthermore, in 1970 the states which had the three highest murder rates, Georgia (1970 murder rate: 15.3); South Carolina (14.6); and Florida (12.7) were all states which have and used the death penalty. On the other hand, the states with the three lowest murder rates in 1970 were all abolition states: Maine (1.5); Vermont (1.1); and North Dakota (0.5).<sup>20/</sup>

If the death penalty were a deterrent to murder, the situation would be reversed. That is, the abolition states would have the highest murder rates, and the states which have capital punishment would have the lowest murder rates. This is not the case.

The President's Crime Commission studied the death penalty with particular reference to its alleged value as a deterrent. The Commission concluded:

"It is impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes. The most complete study on the subject, based on a comparison of homicide rates in capital and non-capital jurisdictions concluded that there is no discernible correlation between the availability of the death penalty and the homicide rate. This study also reveal that there was no significant difference between the two kinds of States in the safety of policemen. Another study of 27 States indicated that the availability of the death sentence had no effect on the rate of assaults and murders of prison guards." (Emphasis added) 21/

With regard to deterrence, the British Royal Commission on Capital Punishment, which studied the death penalty from 1949 to 1953, made the following finding:

" . . . We agree with Professor Sellin that the only conclusion which can be drawn from the figures is that there is no clear evidence of any influence of the death penalty on the homicide rates of those States [neighboring abolition and death penalty states, studied by Sellin] and that, whether the death penalty is used or not and 'whether executions are frequent or not, both death penalty States and abolition States show rates which suggest that these rates are conditioned by other factors than the death penalty.'"

" . . . The general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall." 22/

The conclusions reached by the President's Crime Commission and the British Royal Commission on the alleged value of the death penalty as a deterrent are typical of the many studies which have been conducted on this precise aspect of capital punishment. Some others are set out below:

1. Capital punishment does not act as an effective deterrent to murder. <sup>23/</sup>

2. Capital punishment is ineffective in deterring murder. <sup>24/</sup>

3. The evidence indicates that the death penalty for murder has no discernible effects in the United States. <sup>25/</sup>

4. The use or non-use of capital punishment has no effect on the number of murders committed within a state or the nation. <sup>26/</sup>

5. Capital punishment has had no appreciable influence on the murder rate in the states which have been investigated. <sup>27/</sup>

6. Statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value. <sup>28/</sup>

7. The capital punishment controversy has produced the most reliable information on the general deterrent effect of a criminal sanction. It now seems established and accepted that the death penalty makes no difference to the homicide rate. <sup>29/</sup>

8. The death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. <sup>30/</sup>

9. The studies suggest no discernible relationship between the presence of the death penalty and homicide rates. <sup>31/</sup>

10. In jurisdictions which abolish the death penalty, abolition has no influence on the rate of criminal homicide. <sup>32/</sup>

11. Jurisdictions which reintroduce the death penalty after having abolished it do not show a decrease rate of criminal homicide after reintroduction.<sup>33/</sup>

12. Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.<sup>34/</sup>

13. Police officers on duty do not suffer a higher rate of criminal assault and homicide in abolition jurisdictions than in death penalty jurisdictions.<sup>35/</sup>

The experience of New York State, which abolished the death penalty for virtually all crimes in 1965 is illuminating: The murder rate in New York has been on the rise since 1960, but it has not increased at a greater rate since 1965 than before. That is, the abolition of the death penalty in New York State had no affect on the homicide rate.

Furthermore, the retention by New York State of capital punishment for the murder of policemen has had no demonstrable effect on the homicide rate for policemen.

Far from deterring murder, the continued existence of the death penalty lulls us into the mistaken belief that we are actually "doing something" about murder. In fact, we are doing nothing about it. We have been killing murderers for eons -- but the murders continue.<sup>36/</sup> The time has come for us to realize that we cannot stop killing with more killing.

As Shaw said: "It is the deed that preaches, not the name we give it. Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind."

The restoration of the death penalty in New Jersey would have a disastrous national impact. It would allow other states to point to New Jersey as an example of the widespread acceptance of the death penalty, and would thus allow them to justify the continued existence of the death penalty in their own states.

THE DEATH PENALTY AND THE ADMINISTRATION  
OF JUSTICE 37/

The existence of the death penalty has an indelible and harmful effect on the administration of justice. In 1966 Queen Elizabeth issued a royal pardon to Timothy John Evans, who was hanged in 1950 for a crime he did not commit. I hope that the death penalty will be abolished throughout the United States before we are reduced, by the execution of a man later proven innocent, to the ultimate absurdity: a posthumous pardon. 38/

But the effect of the death penalty on the administration of justice is by no means limited to the problem of executing innocent people. One obvious problem is delay. The length of time spent on death row has nearly doubled in the last ten years. At last report, the median elapsed time spent on death row was 36.7 months -- nearly three years. 39/

The median time spent on New Jersey's death row by the inmates who were under sentence of death before the <sup>40/</sup>Funicello decision was 55 months.

During these months and years on death row, men under sentence of death appeal to the state courts, to the federal courts, back to the state courts, to the governor and back to the courts again. The litigation takes years -- an untold expenditure of time, money and effort, by judges, prosecutors, public defenders and private attorneys -- all ultimately paid by the State.

#### CONCLUSION

As the Archbishop of Canterbury said after England's abolition of the death penalty in 1969:

"Abolition of capital punishment, once and for all, will help create a more civilized society in which to continue the search for the causes of crime... I am certain it will redound in very many ways to 41/ the advantage and honor of the nation."

I urge this Committee to reject revenge and retribution as elements of the policy of the State of New Jersey. The ultimate abolition of capital punishment in New Jersey will demonstrate that this State believes in act as well as word, that killing is wrong.

1. "The Case Against Capital Punishment", published by The Washington Research Project." [hereafter CASE]. (1971)
2. For a list of condemned men in each state, see Appendix A.
3. Source: U.S. Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No.46, "Capital Punishment 1930-1970", (August, 1971). [hereafter NPS]. p.10.
4. National Commission on Reform of Federal Criminal Laws, "Working Papers", pp.1350-1351. (1971)
5. Bedau, The Death Penalty in America, Review and Forecast, 35 FEDERAL PROBATION 32, 38 (June, 1971)
6. For a list of the states which have capital punishment but which have had no executions for a decade or more See Appendix B.
7. Quoted in the New York Times, May 5, 1972, 1:1.
8. "The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice" [hereafter REPORT] (1967), p.143.
9. NPS, p.8.
10. Ibid.
11. See "This Life We Take", published by the Friends Committee on Legislation, San Francisco (1970), p. 47.

For detailed analyses of the arbitrary application of the death penalty in New Jersey see:

Bedau, Death Sentences in New Jersey 1907-1960, 19 RUTGERS L.REV. 1 (1964)

Bedau, The Struggle Over Capital Punishment in New Jersey in Bedau, "The Death Penalty in America" [hereafter BEDAU] (1967), p.374.

Wolf, Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey: 1937-1961, 19 RUTGERS L.REV. 56 (1964).

12. See Huie, "The Execution of Private Slovik."
13. REPORT, p.143.
14. NPS, p.8.
15. For a list of nations which have abolished the death penalty, see Appendix C.

16. Ibid.
17. People v. Anderson, 6 Cal.3d 628, 100 Cal.Rptr.152, 493 P.2d 880 (1972).
18. For analyses of the Delaware experience, see:  
Bennett, Historical Move: Delaware Abolishes Capital Punishment, 44 AMERICAN BAR ASSOC.JOURNAL 1053 (1958)  
Cobin, Abolition and Restoration of the Death Penalty in Delaware, in BEDAU, p. 359.  
Samuelson, Why Was Capital Punishment Restored in Delaware, 60 J.C.L.C. & P.S. 148 (1969). [hereafter SAMUELSON]
19. MASSACHUSETTS SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS [hereafter MASS.] (1958)
20. Source, "Crime in the United States, Uniform Crime Reports, 1970", U.S. Department of Justice, FBI (1971) [hereafter UCR] pp.72-81. For a list of all 50 states, in descending order of homicide rates, see Appendix D.
21. REPORT, p.143.
22. ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, Report (1953), p.23.
23. Chambliss, Types of Deviance and the Effectiveness of Legal Sanctions, 1967 WISCONSIN LAW REVIEW 703, 706 (1967).
24. Doleschal, The Deterrent Effect of Legal Punishment: A Review of Literature, 1 INFORMATION REVIEW ON CRIME AND DELINQUENCY (No.7) 7 (1969).
25. Reckless, The Use of the Death Penalty - A Factual Statement, 15 CRIME AND DELINQUENCY 43, 52 (1969).



26. Lunden, THE DEATH PENALTY (1960).
27. Andenaes, Does Punishment Deter Crime?, 11 CRIMINAL LAW QUARTERLY 76,83 (1968).
28. Schuessler, The Deterrent Influence of the Death Penalty, 284 THE ANNALS 54, 62 (1952)
29. Morris and Zimring, Deterrence and Corrections, 381 THE ANNALS 137, 143 (1969).
30. Sellin, THE DEATH PENALTY, Appendix to the Model Penal Code, American Law Institute (1959) [hereafter Sellin (1959)] p.63.
31. Zimring, Perspectives on Deterrence (NATIONAL INSTITUTE OF MENTAL HEALTH, (January 1971)) p. 17.
32. Sellin (1959) 34-38; Sellin, "The Death Penalty" (1967) [hereafter Sellin (1967)] 122-124; SAMUELSON.
33. Sellin (1959), 34-38. Sellin (1967) 122-124; SAMUELSON, pp.150-151.
34. MASS., pp. 21-22.  
  
Sellin (1967), 154-160; Sellin, Homicides and Assaults in American Prisons, 1964, 31 ACTA CRIM. ET MED. LEG. JAP. 139 (1965).
35. Sellin, Does the Death Penalty Protect Municipal Police? in BEDAU, 284-301;  
Campion, Does the Death Penalty Protect the State Police?, in BEDAU, 301-315

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36. See Appendix E.

37. See CASE, p. 53, Appendix F.

38. For a full account of the Evans case, see Kennedy, "Ten Rillington Place" (1971)

39. NPS. p.34.

40. Ibid.

41. Quoted in the New York Times, December 19, 1969, p.9.

APPENDIX A

# Citizens Against Legalized Murder, Inc.

Incorporated under the laws of the State of New York as a Not-for-Profit Corporation

P. O. Box 24 New York City 10024

(212) 787-1532

Douglas B. Lyons, Executive Director

## CONTACT:

DOUGLAS B. LYONS

(212) 787-1532 or

(212) 586-8397

PEOPLE UNDER SENTENCE OF DEATH AS OF JUNE 27, 1972.

ABOLITION STATES ARE UNDERLINED

STATE	TOTAL	MURDER	RAPE	OTHER	YEAR OF LAST EXECUTION	TOTAL EXECUTIONS 1930-1971
					YEAR OF ABOLITION	
ALABAMA	25	20	5		1965	135
<u>ALASKA</u>	XXX				1957	XXX
ARIZONA	20	20			1963	38
ARKANSAS	1	1			1964	118
CALIFORNIA	XXX				1967	292
COLORADO	2	2			1967	47
CONNECTICUT	3	3			1960	21
DELAWARE	3	3			1946	12
DIST. OF COL.	3	3			1957	40
FLORIDA	99+	73	26		1964	170
GEORGIA	41	27	12	2 - Armed Robbery.	1964	366
<u>HAWAII</u>	XXX				1957	XXX
IDAHO	0				1957	3
ILLINOIS	31	31			1962	90
INDIANA	8	8			1961	41
<u>IOWA</u>	XXX				1962	18
KANSAS	2	2			1965	15
KENTUCKY	21	21			1962	103
LOUISIANA	43	31	12		1961	133
<u>MAINE</u>	XXX				1885	1887
MARYLAND	23	18	5		1961	68
MASSACHUSETTS	23	23			1947	27
MICHIGAN	XXX				1847	XXX
<u>MINNESOTA</u>	XXX				1911	XXX
MISSISSIPPI	9	9			1964	154
MISSOURI	16	16			1965	62
MONTANA	0				1943	6
NEBRASKA	2	2			1959	4
NEVADA	8	8			1961	29
NEW HAMPSHIRE	2	2			1939	1
NEW JERSEY	XXX				1963	1972
NEW MEXICO*	XXX				1960	1969
<u>NEW YORK*</u>	5	5			1963	1965
NORTH CAROLINA	10	8	2		1961	263
<u>NORTH DAKOTA°</u>	XXX				1905	1915
OHIO	55	55			1963	172
OKLAHOMA	16	16			1966	60
<u>OREGON</u>	XXX				1962	1964
PENNSYLVANIA	25	25			1962	152
<u>RHODE ISLAND°</u>	XXX				1852	XXX
SOUTH CAROLINA	12	11	1		1962	162
SOUTH DAKOTA	0				1947	1
TENNESSEE	16	11	5		1960	93
TEXAS	49	39	8	2 - Armed Robbery.	1964	297
UTAH	5	5			1960	13
<u>VERMONT°</u>	XXX				1954	1965
VIRGINIA	12	9	3		1962	92
WASHINGTON	10	10			1963	47
<u>WEST VIRGINIA</u>	XXX				1959	1965
<u>WISCONSIN</u>	XXX				1853	XXX
WYOMING	0				1965	7
FEDERAL	0				1963	33
TOTAL	600	517	79	4		3,859

\*: N.M.keeps the death penalty for killing an on-duty policeman or prison guard, and multiple murder. N.Y.keeps it for killing an on-duty peace officer, and killing by a life term prisoner. °: Death penalty retained for a limited number of crimes, such as treason and piracy. +: indicates number of women.

# Citizens Against Legalized Marijuana, Inc.

Incorporated under the laws of the State of New York as a Not-for-Profit Corporation

P. O. Box 24 New York City 10024

(212) 787-1532

Douglas B. Lyons, Executive Director

## CONTACT:

DOUGLAS B. LYONS  
(212) 787-1532 or  
(212) 586-8397

## RACIAL BREAKDOWN

## ALL CRIMES

PEOPLE UNDER SENTENCE OF DEATH AS OF JUNE 27, 1972.

STATE	TOTAL	WHITE	BLACK	OTHER	UNKNOWN
ALABAMA	25	10	15		
ARIZONA	20	13	6		
ARKANSAS	1	1			1 - Mex.
COLORADO	2	1	1		
CONNECTICUT	3	1	1		1 - P.R.
DELAWARE	3	2	1		
DIST. OF COL.	3	1	2		
FLORIDA	99	35	64		
GEORGIA	41	8	33		
IDAHO	0				
ILLINOIS	31	17	14		
INDIANA	8	7			1 - P.R.
KANSAS	2	2			
KENTUCKY	21	11	10		
LOUISIANA	43	8	35		
MARYLAND	23	4	19		
MASSACHUSETTS	23	15	8		
MISSISSIPPI	9	1	8		
MISSOURI	16	7	9		
MONTANA	0				
NEBRASKA	2	1			1 - Mex.
NEVADA	8	8			
NEW HAMPSHIRE	2	2			
NEW YORK	5	3	2		
NORTH CAROLINA	10	4	5		1 - Ind.
OHIO	55	27	28		
OKLAHOMA	16	9	6		1 - Mex.
PENNSYLVANIA	25	11	14		
SOUTH CAROLINA	12	9	3		
SOUTH DAKOTA	0				
TENNESSEE	16	4	12		
TEXAS	49	18	24		7 - Mex.
UTAH	5	5			
VIRGINIA	12	4	7		1 - Ind.
WASHINGTON	10	7	3		
WYOMING	0				
FEDERAL	0				
TOTAL	600	256	330	14	

TOTAL WHITE: 256

TOTAL NON-WHITE: 344

TOTAL OTHER: 2 Indian; 10 Mexican; 2 Puerto Rican.

# Citizens Against Legalized Murder, Inc.

Incorporated under the laws of the State of New York as a Not-for-Profit Corporation

P.O. Box 24 New York City 10024

(212) 787-1532

Douglas B. Lyons, Executive Director

CONTACT:

DOUGLAS B. LYONS  
(212) 787-1532 or  
(212) 586-8397

RACIAL BREAKDOWN      MURDER  
PEOPLE UNDER SENTENCE OF DEATH AS OF      JUNE 27, 1972.

<u>STATE</u>	<u>TOTAL</u>	<u>WHITE</u>	<u>BLACK</u>	<u>OTHER</u>	<u>UNKNOWN</u>
ALABAMA	20	10	10		
ARIZONA	20	13	6		
ARKANSAS	1	1		1 - Mex.	
COLORADO	2	1	1		
CONNECTICUT	3	1	1		
DELAWARE	3	2	1	1 - P.R.	
DIST. OF COL.	3	1	2		
FLORIDA	73	29	44		
GEORGIA	27	6	21		
IDAHO	0				
ILLINOIS	31	17	14		
INDIANA	8	7			
KANSAS	2	2		1 - P.R.	
KENTUCKY	21	11	10		
LOUISIANA	31	8	23		
MARYLAND	18	4	14		
MASSACHUSETTS	23	15	8		
MISSISSIPPI	9	1	8		
MISSOURI	16	7	9		
MONTANA	0				
NEBRASKA	2	1			
NEVADA	8	8		1 - Mex.	
NEW HAMPSHIRE	2	2			
NEW YORK	5	3	2		
NORTH CAROLINA	8	4	4		
OHIO	55	27	28		
OKLAHOMA	16	9	6		
PENNSYLVANIA	25	11	14	1 - Mex.	
SOUTH CAROLINA	11	9	2		
SOUTH DAKOTA	0				
TENNESSEE	11	4	7		
TEXAS	39	15	17	7 - Mex.	
UTAH	5	5			
VIRGINIA	9	4	4		
WASHINGTON	10	7	3	1 - Ind.	
WYOMING	0				
FEDERAL	0				
<hr/>					
TOTAL	517	245	259	13	

TOTAL WHITE:

245

TOTAL NON-WHITE:

272

TOTAL OTHER: 1 Indian; 10 Mexican, 2 Puerto Rican.

# Citizens Against Legalized Murder, Inc.

Incorporated under the laws of the State of New York as a Not-for-Profit Corporation

P.O. Box 24 New York City 10021

(212) 787-1532

Douglas B. Lyons, Executive Director

## CONTACT:

DOUGLAS B. LYONS  
(212) 787-1532 or  
(212) 586-8397

## RACIAL BREAKDOWN      RAPE PEOPLE UNDER SENTENCE OF DEATH AS OF JUNE 27, 1972

<u>STATE</u>	<u>TOTAL</u>	<u>WHITE</u>	<u>BLACK</u>	<u>OTHER</u>	<u>UNKNOWN</u>
ALABAMA	5		5		
ARIZONA					
ARKANSAS					
COLORADO					
CONNECTICUT					
DELAWARE					
DIST. OF COL.					
FLORIDA	26	6	20		
GEORGIA	12	2	10		
IDAHO					
ILLINOIS					
INDIANA					
KANSAS					
KENTUCKY					
LOUISIANA	12		12		
MARYLAND	5		5		
MASSACHUSETTS					
MISSISSIPPI					
MISSOURI					
MONTANA					
NEBRASKA					
NEVADA					
NEW HAMPSHIRE					
NEW YORK					
NORTH CAROLINA	2		1	1 - Ind.	
OHIO					
OKLAHOMA					
PENNSYLVANIA					
SOUTH CAROLINA	1		1		
SOUTH DAKOTA					
TENNESSEE	5		5		
TEXAS	8	1	7		
UTAH					
VIRGINIA	3		3		
WASHINGTON					
WYOMING					
FEDERAL					
TOTAL	79	9	69	1	
TOTAL WHITE:	9	11.4%			
TOTAL NON-WHITE:	70	88.6%			
TOTAL OTHER: 1 Indian.					

# Citizens Against Legalized Murder, Inc.

Incorporated under the laws of the State of New York as a Not-for-Profit Corporation

P.O. Box 24 New York City 10024

(212) 787-1532

Douglas B. Lyons, Executive Director

CONTACT:

DOUGLAS B. LYONS

(212) 787-1532 or

(212) 586-8397

RACIAL BREAKDOWN

CRIMES OTHER THAN MURDER AND RAPE

PEOPLE UNDER SENTENCE OF DEATH AS OF JUNE 27 1972

<u>STATE</u>	<u>TOTAL</u>	<u>WHITE</u>	<u>BLACK</u>	<u>OTHER</u>	<u>UNKNOWN</u>
ALABAMA					
ARIZONA					
ARKANSAS					
COLORADO					
CONNECTICUT					
DELAWARE					
DIST. OF COL.					
FLORIDA					
GEORGIA	2		2	ARMED ROBBERY	
IDAHO					
ILLINOIS					
INDIANA					
KANSAS					
KENTUCKY					
LOUISIANA					
MARYLAND					
MASSACHUSETTS					
MISSISSIPPI					
MISSOURI					
MONTANA					
NEBRASKA					
NEVADA					
NEW HAMPSHIRE					
NEW YORK					
NORTH CAROLINA					
OHIO					
OKLAHOMA					
PENNSYLVANIA					
SOUTH CAROLINA					
SOUTH DAKOTA					
TENNESSEE					
TEXAS	2	2		ARMED ROBBERY	
UTAH					
VIRGINIA					
WASHINGTON					
WYOMING					
FEDERAL					
TOTAL	4	2	2		
TOTAL WHITE:	2	50%			
TOTAL NON-WHITE:	2	50%			



APPENDIX B

STATES WHICH HAVE CAPITAL PUNISHMENT, BUT WHICH HAVE HAD NO  
EXECUTIONS IN THE YEARS OR MORE

<u>STATE</u>	<u>YEAR OF LAST EXECUTION</u>
CONNECTICUT	1960
DELAWARE	1946
DISTRICT OF COLUMBIA	1957
IDaho	1957
INDIANA	1961
LOUISIANA	1961
MARYLAND	1961
MASSACHUSETTS	1947
MONTANA	1943
NEBRASKA	1959
NEVADA	1961
NEW HAMPSHIRE	1939
NEW MEXICO	1960
NORTH CAROLINA	1961
SOUTH DAKOTA	1947
TENNESSEE	1960
UTAH	1960

Source; U.S. Department of Justice, Bureau of Prisons,  
National Prisoner Statistics Bulletin No. 45, "Capital  
Punishment 1930-1968" (August, 1969), pp. 8-9

APPENDIX C

# WORLD-WIDE ABOLITION OF THE DEATH PENALTY

Source: Citizens Against Legalized Murder, Inc. Newsletter

Volume V, No. 2, November, 1971

C.A.L.M., Inc., P.O. Box 24, N.Y., N.Y. 10024

## WORLDWIDE ABOLITION

This table lists abolitionist jurisdictions outside the U.S. by year of *de jure* abolition, except for Lichtenstein, Luxembourg, Nicaragua, and Surinam, for which the last execution year is given to mark the beginning of *de facto* abolition. Nine of the listed jurisdictions retain execution as the penalty for certain extraordinary civil offenses (the 4 Australian jurisdictions, Canada, Israel, Nepal, New Zealand, and United Kingdom); 8 permit the death penalty in wartime or under military law (Brazil, Denmark, Finland, Italy, Netherlands, Norway, Sweden, and Switzerland); and two executed Nazi collaborators after World War II (Netherlands and Norway).

ARGENTINA	1922
AUSTRALIA (Federal)	1945
New South Wales	1955
Queensland	1922
Tasmania	1968
AUSTRIA	1968
BELGIUM	1863 <sup>1</sup>
BOLIVIA	1961
BRAZIL	1946
CANADA	1967 <sup>2</sup>
COLOMBIA	1910
COSTA RICA	1880
DENMARK	1930
DOMINICAN REPUBLIC	1924
ECUADOR	1897
FINLAND	1949
GERMANY, West	1949
GREENLAND	1954
HONDURAS	1957
ICELAND	1940
INDIA, Travencore	1944
ISRAEL	1954
ITALY	1944
LICHTENSTEIN	1798 <sup>3</sup>
LUXEMBOURG	1821 <sup>3,4</sup>
MEXICO (Federal)	1931
29 of 32 States	1931-1970
MONACO	1962
MOZAMBIQUE	1867
NEPAL	1950
NETHERLANDS	1886
Antilles	1957
NEW ZEALAND	1961
NICARAGUA	1892 <sup>3</sup>
NORWAY	1905
PANAMA	1915
PORTUGAL	1867
SAN MARINO	1848
SURINAM	1927 <sup>3</sup>
SWEDEN	1921
SWITZERLAND	1942
UNITED KINGDOM	
Great Britain	1965
Northern Ireland	1966
URUGUAY	1907
VATICAN CITY STATE	1969
VENEZUELA	1863

1. Excludes one soldier executed in 1918. 2. Statute abolishing capital punishment for murder expires after a 5-year period (beginning 1967) if not renewed. 3. *De facto* only; date is last execution. 4. Excludes one.

## ABOLITION STATES

This table lists abolition states, with date of *de jure* abolition.

ALASKA	1957
HAWAII	1957
IOWA	1845
MAINE	1857
MICHIGAN	1847 <sup>1</sup>
MINNESOTA	1911
NEW MEXICO	1909 <sup>2</sup>
NEW YORK	1965 <sup>3</sup>
NORTH DAKOTA	1915 <sup>4</sup>
OREGON	1964
PUERTO RICO	1929
RHODE ISLAND	1852 <sup>5</sup>
VERMONT	1965 <sup>2</sup>
VIRGIN ISLANDS	1957
WEST VIRGINIA	1965
WISCONSIN	1853

1. Death penalty retained for treason until 1963. 2. Death penalty retained for murder of police officer or prison guard, or for commission of second unrelated murder. 3. Death penalty retained for murder of police officer and for any homicide by life term prisoner. 4. Death penalty retained for treason and for murder by life term prisoner incarcerated for murder. 5. Death penalty retained for murder by life term prisoner.

APPENDIX D

# APPENDIX D

## STATES IN DESCENDING ORDER OF MURDER RATE

SOURCE: CITIZENS AGAINST LEGALIZED MURDER, INC. NEWSLETTER  
VOL. V, NO. 2, NOVEMBER, 1971  
C.A.L.M., INC., P.O. BOX 24, N.Y., N.Y. 10024

'STATE	MURDER RATE PER 100,000 POP., 1970	TOTAL EXECUTIONS FOR MURDER 1930-1970
GEORGIA	15.3	299
S. CAROLINA	14.6	120
FLORIDA	12.7	133
ALASKA	12.2	0
ALABAMA	11.7	106
LOUISIANA	11.7	116
TEXAS	11.6	210
MISSISSIPPI	11.5	130
KENTUCKY	11.1	88
N. CAROLINA	11.1	207
MISSOURI	10.7	52
ARKANSAS	10.1	99
ILLINOIS	9.6	90
ARIZONA	9.5	38
NEW MEXICO	9.4	8
MARYLAND	9.2	44
MICHIGAN	8.9	0
NEVADA	8.8	29
TENNESSEE	8.8	66
VIRGINIA	8.4	71
NEW YORK	7.9	327
CALIFORNIA	6.9	260
DELAWARE	6.9	8
OHIO	6.6	172
COLORADO	6.2	8
WEST VIRGINIA	6.2	36
OKLAHOMA	5.9	54
NEW JERSEY	5.7	74
WYOMING	5.7	7
PENNSYLVANIA	5.3	152
INDIANA	4.8	41
KANSAS	4.8	15
IDAHO	4.6	3
OREGON	4.6	19
SOUTH DAKOTA	3.8	1
HAWAII	3.6	0
CONNECTICUT	3.5	21
MASSACHUSETTS	3.5	27
WASHINGTON	3.5	46
UTAH	3.4	13
MONTANA	3.2	6
RHODE ISLAND	3.2	0
NEBRASKA	3.0	4
MINNESOTA	2.0	0
NEW HAMPSHIRE	2.0	1
WISCONSIN	2.0	0
IOWA	1.9	18
MAINE	1.5	0
VERMONT	1.3	4
NORTH DAKOTA	0.5	0

(Source: Crime in the United States, Uniform Crime Reports — 1970, United States Department of Justice, pp. 72-81; U.S. Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, Capital Punishment, 1930-1968.) Abolition states are italicized.

APPENDIX E

# MEDICINE AND CAPITAL PUNISHMENT<sup>1</sup>

(Louis Jolyon West, M.D.)<sup>2</sup>

According to the Gallup Poll the majority of Americans no longer favor capital punishment (1). Yet only 13<sup>3</sup> of our 50 States have essentially eliminated it (four in the last year). The Federal Government and the District of Columbia still retain it. Meanwhile, although the death penalty is widely used in Communist countries, it has been virtually abandoned by most of the Western democracies except for the United States and France.

Most people in this country know very little about the death penalty. They are likely to have strong opinions about it— for or against— but few facts (2). Moreover, it is uncommon for someone to seek spontaneously to inform himself on the subject. In fact, there is a puzzling resistance to enlightenment, for which an explanation will be proposed.

When experience requires someone to deal with capital punishment directly, he is likely to become opposed to it. Thus approximately 90% of prison wardens come to support indictments of it by such leaders among them as Lewis E. Lawes of Sing-Sing and Clinton T. Duffy of San Quentin (3).

The man ultimately responsible for an execution possesses a terrible and hateful power, which has been analyzed and condemned by former Governor Michael V. DeSalle of Ohio (4). Governor Edmund G. Brown of California (himself a former district attorney and attorney general) in 1960 told the California legislature:

"The naked simple fact is that the death penalty has been a gross failure. Beyond its horror and inelivility, it has neither protected the innocent nor deterred the wicked. The recurrent spectacle of publicly sanctioned killing has cheapened human life and dignity without the redeeming grace which comes from justice meted out swiftly, evenly, humanely."

I went through a war (including periods of service in the infantry and the military police), a medical education, and a psychiatric residency with no particular opinion on capital punishment. If asked I would probably have replied that I was for vigorous law enforcement and prompt justice, including the death penalty wherever the law specified. However, an experience as medical examiner at an execution transformed me into a student of the problem.

In one hour on a hot Iowa morning in 1952 I learned that a typical chronic schizophrenic man can qualify for hanging; that those who came to watch are likely to have a strange and unhealthy glitter in their eyes; that a man hits the end of a rope with a terrible crack; that he doesn't just dangle there but is likely to writhe for some time; and that the heart stops reluctantly, as the medical examiner discovers, listening with a stethoscope all the while. As I listened (for an interminable 12 minutes and 23 seconds) there was time for me

<sup>1</sup> Submitted for publication to The Journal of the American Medical Association.

<sup>2</sup> Professor and Head, Department of Psychiatry, Neurology and Behavioral Sciences, University of Oklahoma School of Medicine, 800 Northeast 13th Street, Oklahoma City, Oklahoma 73104.

<sup>3</sup> Several of these will nominally retain it for special circumstances, ranging from the murder of a policeman or prison guard to "treason."



to ask myself a host of troublesome questions. For the past 14 years I have been seeking some answers. This paper might be considered a progress report on the search.

I now believe that any physician who objectively studies the subject will be likely to arrive at the firm conclusion that the death penalty should be abolished. True, he will be shocked at the horrors that violent criminals are capable of perpetrating; and he will be filled with concern and sympathy for their victims. He will ask himself, "Suppose *my* daughter were raped and butchered?" The very question fills me with the passion of vengeance, and acquaints me with the power of my own potentialities for murder!

But the prisoner convicted of a capital crime is confined; he is safe from vengeful personal retaliation; and society is safe from him. Should society exterminate him, now, deliberately and righteously? When the scholar considers this question in depth, the weight of evidence makes itself felt. It moves him to the viewpoint held by the vast majority, not only of wardens and Governors, but of criminologists, jurists, and those social and behavioral scientists who have surveyed the same ground (5). Briefly this viewpoint is as follows:

The death penalty should be abolished because it is: (1) *Out-dated*. It is clear that we are rapidly moving toward *de facto* abolition despite the existing laws, since the number of executions tends to decline year after year. Last year there were more than 7000 capital crimes in the United States, and only seven executions. The Attorney General of the United States recently stated that the death penalty is passé. (2) *Immoral*. No murder is as cold-blooded as legal execution. It poses a constant example of violence, and violates the modern teachings of most major religions. Most of the Protestant churches, the Orthodox and Reformed Jews, and many Roman Catholic officials have passed resolutions condemning capital punishment. (3) *Wasteful*.

The cost of the apparatus and maintenance of the procedures attending the death penalty, including death row and the endless appeals and legal machinery, far outweighs the expense of maintaining in prison the tiny fraction of criminals who would otherwise be slain. One man's execution recently cost California more than \$500,000. And many of those whose lives might be spared, like "The Birdman of Alcatraz" who was a double murderer, can be useful even though they spend their lives in prison. (4) *Cruel*. Everyone must die, but only the condemned prisoner is subjected to the terrible agony of prolonged waiting—sometimes for years, tormented by hope—to be deliberately slaughtered by a self-righteous society. This torture is harsher than the thumbscrew and rack. (5) *Inhuman*. The killing of a helpless captive is a brutally degrading experience. If those alone who have participated in an execution could vote on the death penalty, it would be abolished tomorrow. (6) *Unfair*. Of all the uncertain manifestations of justice, capital punishment is the most inequitable. It is primarily carried out against the destitute, forlorn, and forgotten. A rich white Protestant is practically safe from it. A complicated insanity plea may save the well-heeled, while the penniless psychotic goes to the gallows. Members of racial and cultural minority groups suffer most. The hundreds of extraneous factors, including geography, that decide whether a convicted man will actually live or die, makes capital punishment a ghastly, brainless lottery. (7) *Irrevocable*. Justice can miscarry.

At least two states were shocked into outlawing the death penalty only after executing men later shown to be innocent. A prisoner discovered to be blameless can be freed; but neither release nor restitution is possible for a corpse. (8) *Obstructive*. Proved a failure, capital punishment now undermines attempts to apply modern criminology to our society's needs. Professor Sheldon Glueck of Harvard has stated, "The presence of the death penalty as the keystone of our penal system bedevils the administration of criminal justice all the way down the line and is stumbling block in the path of general reform and of the treatment of crime and criminals." (9) *Useless*. After seeing 150 executions one prison warden said, "I have yet to meet the man who let the thought of (execution) stop him from committing murder." Its failure as a deterrent to crime is highlighted by the fact that the murder rate (including fatal attacks on police officers) is actually lower in those states and countries that have eliminated it. (10) *Dangerous*. The public fails to realize that today fewer than one murderer in a thousand will be executed. Meanwhile society feels protected, and fails to legis-

late indeterminate sentences and penal reforms. Dangerous criminals are thus more likely to make their way back into a society which retains the illusion of safety engendered by the death penalty's false promise.

There are some additional complexities of the problem of the death penalty that are particularly significant to physicians. Most of us are likely to find ourselves in the abolitionist camp by virtue of the arguments listed above. However there are five more factors which, if carefully considered by our profession, should serve to move us from passive disapproval to militant antagonism against capital punishment.

1. *The physician is sworn to preserve life.* There have been ironic occasions when physicians have worked long and hard to keep a man alive--for the hangman. Of course the rationale for this lies in the possibility of last-minute clemency. Furthermore, the doctor lives closer to the issue of life and death; he knows from personal experience how remarkable is the investment of cold flesh and bones with the vital spark; to preserve this spark he has put aside even euthanasia. As Dr. Karl Menninger has put it: "To a physician discussing the wiser treatment of our fellow men it seems hardly necessary to add that under no circumstances should we kill them. It was never considered right for doctors to kill their patients, no matter how hopeless their condition. True, some patients in state institutions have undoubtedly been executed without benefit of sentence. They were a nuisance, expensive to keep and dangerous to release. Various people took it upon themselves to put an end to the matter, and I have even heard them boast of it. The Hitler regime had the same philosophy. But in most civilized countries today we have a higher opinion of the rights of the individual and of the limits to the state's power." (6)

2. *Capital punishment breeds murder.* Philosophers and social scientists have long contended that the legal extermination of human beings in any society generates a profound tendency among the citizens to accept killing as a solution to human problems (7). No matter how ultimate that solution may seem, or how rarely it is employed, its official existence symbolizes the fact that it is permissible--even desirable--to resolve issues by murder; it is only necessary to define the criteria for justification. The late Albert Camus steadfastly held that it would be necessary for mankind to eliminate the death penalty before we could ever hope to eliminate war (8) and it is remarkable that no nation which has wholly and permanently abolished capital punishment has ever started a war.

But there is an even more specific way in which the death penalty breeds murder. It becomes more than a symbol. It becomes a promise, a contract, a covenant between society and certain warped mentalities who are moved to kill. These murders are discovered by the psychiatric examiner to be, consciously or unconsciously, attempting *suicide by homicide*.

Recently an Oklahoma truck driver had parked to have lunch in a Texas roadside cafe. A total stranger--a farmer from nearby--walked through the door and blew him in half with a shotgun. When the police finally disarmed the man and asked why he had done it, he replied, "I was just tired of living."

In 1964 Howard Otis Lowery, a life-term convict in an Oklahoma prison formally requested a judge to send him to the electric chair after a District Court jury found him sane following a prison escape and a spree of violence. He said that if he could not get the death penalty from the jury he would get it from another, and complained that officials had failed to live up to an agreement to give him death in the electric chair when he pleaded guilty to a previous murder charge in 1961.

Another murderer, James French, asked for the death penalty after he wantonly killed a motorist who gave him a ride while hitch-hiking through Oklahoma in 1958. However he was "betrayed" by his Court-appointed attorney who pleaded him guilty and got him a life sentence instead of the requested execution. Three years later French strangled his cell-mate for no obvious reason: a deliberate, premeditated slaying. He has been convicted three times for that crime, declared legally sane and sentenced to death each time. This sentence he deliberately invites in well-organized, literate epistles to the Courts and in provocative challenges to the jurors. During a psychiatric examination in 1965 French admitted to me that he had seriously attempted suicide several times in the past but "chickened out" at the last minute, and that a basic motive in his murdering

another prisoner was to force the State to deliver the electrocution to which he feels entitled and which he deeply desires.

Many other examples may be found in which the promise of the death penalty consciously or unconsciously invites violence. Sellin reviewed a number of them (9). Wertham's analysis of Robert Irwin, who attempted suicide by murder, is a classic (10). Some who seek execution even borrow somebody's else's murder! A few months ago Joseph Shay in Miami admitted that he had falsely confessed to an unsolved murder "because I wanted to die." The intimate connection between murder and suicide was noted by Freud and has been treated extensively by Karl Menninger as well as Franz Alexander, Gregory Zilboorg, and other psychiatrists. In a recent book (11) West noted that in England nearly half of all murders are followed by suicidal attempts, of which two-thirds succeed. In Denmark, where there is no death penalty (and the murder rate is far lower than ours), 40% of all murderers subsequently commit suicide!

That the death penalty is a *failure* as a *deterrent* to murder has been demonstrated in many ways. That it is a *success* as an incentive to murder, either generally through its influence as symbolic representation of the acceptability of killing, or specifically in cases like those described above, is increasingly clear. It makes it easier to understand why, in the year following the re-establishment of capital punishment in formerly abolitionist Oregon in 1920, the State's homicide rate nearly doubled.

3. *The death penalty tends to pervert the professional identity of the psychiatrist.* The employment of psychiatrists in trials at law has gone far beyond what society expects from any other type of expert witness. This is manifest primarily in trials where the death penalty is involved. Here we find the anomaly of a physician, sworn to devote himself to the preservation of human life, dealing out opinions whereby the survival or destruction of another human being hinges on the turn of a word. Testifying for the defense, the psychiatrist's image is of either "a knight in shining armor" or a "bleeding heart." Testifying for the prosecution he is either "the conscience of society" or "an accessory to legal homicide." No matter how he may be seen on the witness stand, however, the psychiatrist who has been used this way is not functioning as a physician. Many psychiatrists refuse any longer to serve as expert witnesses, only to find themselves criticized for lack of social responsibility.

4. *Death sentences create a grisly laboratory: Death Row.* As a student of experimental psychopathology I have employed many techniques for inducing transient changes in the mood, thought, or behavior of normal subjects. In the scientist's laboratory such undertakings are always approached with the utmost caution and handled with many safeguards for the mental well-being of the research subject. But it seems to me that Death Row must constitute the ultimate experimental stress, in which the condemned prisoner's personality is incredibly brutalized.

Often prisoners deteriorate rapidly following the imposition of the death penalty. I have examined Jack Ruby a number of times since April 28, 1964; and by every objective medical criterion he has become grossly psychotic since he was sentenced to death. Yet the stress upon him has perhaps been rather less than that experienced by many condemned individuals who over the course of several years approach scheduled death down to the last month, or week, or minute; then live through a breath-taking reprieve only to face another horrible countdown.

Slovenko (12) points out that, while executions are decreasing in number, Death Row is growing. At the end of 1962, there were 275 prisoners under sentence of death. During 1963, 21 were executed and 91 more were sentenced to die, leaving a new total of 345 awaiting extermination.

A good many of these doomed men end up in the hands of the psychiatrist. The strain of existence on Death Row is very likely to produce behavioral aberrations ranging from malingering to acute psychotic breaks. In most States the warden will transfer such a person to the psychiatric unit of the prison or to the security area of a mental hospital. Here the prisoner is not unlikely to pass the rest of his days as a member of that vaguely defined population, "the criminally insane."

What is the psychiatrist to do with such a patient when he improves? Specify him as ready for death? In practice this almost never happens. As Menninger has put it, the psychiatrist is not likely to choose to serve as the executioner's assistant. Ironically, the ward personnel may develop the threat of sending the prisoner back to the Penitentiary for execution into a powerful restraining influence upon his behavior, thus making of him a model inmate.

Of course the question of the non-executability of the condemned man who becomes mentally ill points to the heart of the capital punishment issue. Why should he not be executed? Wouldn't it protect society as well? Wouldn't it deter others just as well? True, the psychotic prisoner is less likely to produce new evidence or participate knowledgeably in a last minute appeal, but it could well be said of a sane man, no matter how long the execution had been postponed, that he might eventually be able to devise a better defense or help his attorneys to develop new evidence—if he were kept alive. No, since the death penalty is now carried out in strictest privacy (like the loathsome act it is) there can be only one reason for sparing the condemned maniac. It is that he must not be executed unless or until he is in full possession of his mental faculties so that he can appreciate what is being done to him! This gives clear insight into the most basic motive for the execution: Revenge.

5. *The psychodynamics of resistance to abolition of the death penalty deserves scrutiny.* A formula might be proposed as follows:

$$\begin{array}{lcl} \text{Conscious} & & \\ \text{Resistance} & = & (\text{Ignorance} + \text{Rationalization} + \text{Indifference}) \times \text{Vengeance} \\ \text{(to abolition)} & & \text{Enlightenment} \end{array}$$

The factors above the line are natural enough and to be expected in our society. When one asks why it is that enlightenment (which must develop if abolition is to come) should be growing so slowly, one discovers a trio of unconscious resistances which might be labelled, "The Scapegoat" (S), "The Sacrificial Lamb" (SL), and "The Secret Self-Deterrent" (SSD). Thus:

$$\text{Enlightenment} = \frac{\text{Objective Information}}{S + SL + SSD}$$

*The Scapegoat* phenomenon has been considered elsewhere at some length (7): a person whose misdeeds are discovered and punished serves through his death to exorcise the guilt engendered by the crimes of all.

*The Sacrificial Lamb* on the other hand serves the purpose of warding off the powers of evil or danger in an uncertain universe. Society uses its occasional legal victim of the gas, the rope, or the electric chair, as a lightning rod to focus upon one outstanding sinner divine vengeance against general human sinfulness, while at the same time magically insinuating the survivors into the good graces of the Gods by the blood sacrifice. Logical arguments related to the unevenness of justice by death in this country will obviously have little effect upon such superstitious specifications. As Shirley Jackson's challenging story "The Lottery" so well reminds us, these requirements are just as well fulfilled randomly or by lot as by reason (13).

The dynamic forces involved in the *Secret Self-Deterrent* are related to the foregoing but have a structure of their own. Each individual must develop defenses against his own unconscious violent and destructive strivings. Into the effort he is likely to throw all of the resources that his culture provides. Developmentally, fear of punishment or retaliation plays a certain part. The average citizen senses, and strives to defend himself against, his basic instinctual kinship to the violent criminal; he fails to comprehend the significance of his own much healthier ego structure. Thus he whispers to himself, "Perhaps all that restrains me from an act of violence is fear of the talionic destruction I would bring upon myself. This must be all that restrains many others like myself. I become anxious at the prospect of eliminating the death penalty because it means I shall be forced to rely more upon my own controls and less upon expectation of punishment."

Obviously these more or less conscious factors will affect different individuals in different ways. From them may arise ambivalent feelings leading to all kinds of behavioral paradoxes. Thus we find on the one hand the passionate believer in capital punishment who readily admits he would never throw the switch himself and who shudders at the prospect of watching an execution. On the other hand there is the highly vocal abolitionist who cries incessantly about the horrors of legalized murder but is strangely apathetic when it comes to organized action that might bring about the desired end.

What can be done to hasten the inevitable abolition of the death penalty in America? Of course continuing public information is vital. However, the importance of influential leadership cannot be under-estimated, because of the role that unconscious fear plays in resistance to abolition of capital punishment. The increased sense of security that large groups of people may feel when ministers, judges, and great public figures take a positive stand can help to swing the balance toward abolition. Men like Governors DiSalle and Brown strike important blows against the death penalty in their states, even though so far without success.

But resistances are stubborn. Dr. Karl Menninger has been a colossus on the scene of American psychiatry for nearly half a century, yet his stirring appeals have been insufficient to move the people of Kansas on this issue where he has moved them successfully on so many others. Four of last year's seven executions were in Kansas! Nor have voices like Menninger's inspired notable action within the medical profession. The American Dental Association has officially supported the use of toothpaste containing fluorides. Other health organizations have formally and publicly endorsed various vaccinations, mass chest X-Rays, and other measures of significance to our nation's physical health. But what has organized medicine had to say on the subject of capital punishment?

Perhaps it would not be too much to propose that physicians should assume some responsibility--as individuals, as community leaders, and as members of powerful organizations--to rid our society of this ugly and dangerous anachronism. Locally, state by state, and nationally we should join systematically and vigorously with forces of enlightenment in the Law, in the Pulpit, in the Universities, and in the average American home, so that the United States might soon become one of that growing body of civilized countries which are committed by Statute to reverence for human life. In this effort the concerted influence of modern medicine, a profession which is wholly concerned with the human condition, should mobilize itself around the most basic of all human issues--the proposition that human life is so uniquely precious that it must never be needlessly destroyed.

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Source: Hearings before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, Ninetieth Congress, Second Session, on S. 1760, A Bill to Abolish the Death Penalty Under All Laws of the United States, and for Other Purposes (1968), p.124.

THE LAST FOUR MEN EXECUTED IN THE UNITED STATES

SOURCE: CITIZENS AGAINST LEGALIZED MURDER, INC. NEWSLETTER

VOL. V, NO. 1, JUNE, 1971

C.A.L.M., INC., P.O. BOX 24, N.Y., N.Y. 10024

**ANDREW PIXLEY.** Convicted of the rape-slaying of two sisters, aged eight and twelve. He laughed when sentenced to death, testified that he did not want an appeal, and wrote to the State Supreme Court, asking that his appeal be withdrawn, when his lawyers filed one against his wishes. *Executed, December 10, 1965, Wyoming.*

**JAMES DONALD FRENCH.** Convicted of strangling his cellmate while serving a life sentence for an earlier murder. When the lawyer in his first murder case had French's first death sentence reduced to life imprisonment, French tried to have him disbarred. He told the psychiatrist that he committed the second murder because he wanted to be put to death. He wrote the Governor and State Supreme Court, asking that his execution not be delayed or prevented in any way. *Executed, August 10, 1966, Oklahoma. (Note: French was the only man executed in the United States in 1966!)*

**AARON MITCHELL.** Convicted of killing a policeman during a burglary attempt.

The day before his execution, Mitchell slashed his wrists with a razor blade he had hidden, but his wounds were dressed, and he was pronounced sane enough to be executed.

The next morning, April 12, 1967, at 10 a.m., just half an hour before a State Senate Committee opened hearings on a bill to abolish capital punishment, Mitchell was dragged into the gas chamber, screaming, "I am Jesus Christ!" *Executed, April 12, 1967, California.*

**LUIS JOSE MONGE.** Convicted of killing his wife and three of their seven children. While on death row, Monge contemplated suicide, but the prison's Catholic chaplain told him that the Church forbade suicide. However, explained the obliging chaplain, it was acceptable, in the eyes of the Church, for Monge to allow the state to commit suicide for him. Monge agreed. *Executed, June 2, 1967 - the last man executed in the United States.*

APPENDIX F

"THE CASE AGAINST CAPITAL PUNISHMENT"  
THE WASHINGTON RESEARCH PROJECT  
1823 JEFFERSON PLACE, N.W., WASHINGTON, D.C. 20036

pages 53-60.

**THE DEATH PENALTY  
AND THE ADMINISTRATION  
OF CRIMINAL JUSTICE**

Many students of the criminal law believe, with the President's Crime Commission, that "the death penalty . . . clearly has an undesirable impact on the administration of criminal justice."<sup>1</sup> The existence of the penalty creates a sensational atmosphere which prevents calm and dispassionate trials, leads to acquittals and new rules of law motivated by abhorrence of capital punishment and the fear of executing an innocent man, and generates endless litigation which clogs the courts and produces delays which themselves bring discredit on the law.

**A. SENSATIONALISM**

As the President's Commission has said, "[t]he trial of a capital case is a stirring drama, but that is perhaps its most dangerous attribute."<sup>2</sup> There are of course sensational trials in noncapital cases, but they are exceptional. Where the death penalty is involved, lurid press coverage and high public emotion is the rule



rather than the exception. Press and public attention centers, not on the facts and legal principles involved in the case, but on the penalty. The public hears its representative, the prosecutor, harangue the jury to kill the defendant, often with the most blood-curdling appeals to emotion. Defense attorneys engage in maudlin orations, little related to the law or the relevant facts. The gruesome details of the crime and the heart-rending history of the defendant's life, both usually irrelevant to questions of guilt or innocence, dominate the case. Public opinion often polarizes between a lust for vengeance and sympathy for a lonely and often pathetic underdog fighting for his life.

The effect of all this cannot be lost on the jury or even the judge. The inevitable result is a reduction of the possibility of a fair and dispassionate trial. Further, such spectacles—former Governor Brown of California has called the capital trial “our modern equivalent of the Roman Circus”—cannot but lower public respect for the law. This effect alone has been enough to condemn capital punishment in the eyes of many students of the problem. In his testimony before the British Royal Commission on Capital Punishment, the late Mr. Justice Frankfurter said that he was:

“strongly against capital punishment for reasons that are not related to concern for the murderer or the risk of convicting the innocent . . . When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the judiciary, I regard as very bad.”

#### **B. HARD CASES MAKE BAD LAW**

Throughout history, capital punishment has been opposed by law enforcement authorities who realized that distaste for it generally, and horror at the idea of killing an innocent man in particular, has often led juries to acquit guilty men charged with capital crimes. The movement to abolish the death penalty for theft offenses was led in England by businessmen who found that the laws against stealing were not being enforced because juries would not return guilty verdicts which would result in the defendant being hanged.

Today, retentionists argue that this problem has been eliminated by granting the jury discretion to return a guilty verdict “without capital punishment” in most cases. However, in many jurisdictions,

the jury recommendation of mercy must be unanimous, while in others it must be by a majority." Hence there is still the strong chance that a juror, opposed to executing the defendant but fearing that he will not achieve unanimity in behalf of a recommendation of mercy, will vote to acquit on the first degree murder charge and either hang the jury or force a conviction on a lesser offense. The President's Crime Commission has cited "unwarranted acquittals" as a continuing problem in capital cases.

Another effort to deal with this problem has been "death-qualification" of juries, under which those potential jurors who state any personal opposition to the death penalty have been excused for cause. Recently the Supreme Court, noting that, according to public opinion polls, perhaps half the population is opposed to capital punishment, has held that this practice violates the requirement that a jury represent a cross-section of the community and produces an unconstitutionally stacked jury on the issue of penalty. The practical impact of this decision cannot yet be determined, but it may lead to an increase in acquittals or hung juries in capital cases.

Many now believe that the most serious detrimental effect of the death penalty on the enforcement of the criminal law is its influence on appellate courts. Many landmark decisions extending the rights of criminal defendants have come in capital cases, and there is reason to believe that these decisions have been influenced by general opposition to the death penalty or, at the very least, by a natural desire to insure that every safeguard is observed before a defendant is executed. As Mr. Justice Jackson 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."

James Bennett, former director of the Federal Bureau of Prisons, has argued that the death penalty has warped the criminal law:

"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. We might not have the *Miranda*, *Escobedo*, *Mallory*, *Durham*, and other decisions were it not for the fact that the death penalty was involved."<sup>10</sup>

In at least two areas of substantive criminal law, the death penalty has influenced legal doctrine so as to produce vague and confusing charges to juries, and many appellate reversals. The first is the convoluted distinction between degrees of murder, originally enacted to mitigate the harshness of mandatory death sentences for murder. Mr. Justice Frankfurter described one jury charge attempting to explain the distinction as "the dark emptiness of legal jargon."<sup>11</sup> Mr. Justice Cardozo said of it:

"I think the distinction [between degrees of murder] is much too vague to be continued in our law . . . [It] is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its mystifying psychology, scores of men have gone to their deaths."<sup>12</sup>

Another area of doctrinal confusion resulting from the death penalty has been the insanity defense. In practice, the insanity defense is normally raised only in capital cases, since acquittal by reason of insanity usually leads to life-long incarceration in hospitals for the criminally insane. Like the distinction between degrees of murder, the insanity defense has consumed inordinate judicial time, lengthened trials and confused jurors, caused numerous appellate reversals, and in the end produced vague definitions which satisfy few students of either criminal law or mental illness.<sup>13</sup>

Barrett Prettyman, a former law clerk for the United States Supreme Court, has described the dilemma engendered by the application of doctrines attributable to the death penalty to the criminal law system as a whole:

"Life is precious and sacred, and the state undertakes no more awesome a responsibility than when it deliberately sets about to excise the life of one of its citizens. Every protection must be accorded innocent and guilty alike, regardless of delay, lest a mistake be made for

which there can be no remedy. As terrible as life imprisonment would be for an innocent man, nothing transcends the horror of a life wrongly taken—not in the heat of passion, not in a haze of alcohol, not through provocation or hatred or revenge, but coolly, deliberately, by society itself. Because of this possibility, doubts are resolved in favor of the accused. Rules are stretched. Some bad law is made. And all because there are no second chances once the penalty has been exacted.

"It is my own belief that many delays, many votes, and many decisions in these cases can be explained only in terms of the schizophrenic situation in which the Justices find themselves—compelled to recognize and even enforce a penalty they abhor: the death penalty."<sup>14</sup>

### **C. DELAY IN THE COURTS**

The death penalty clogs the courts with litigation on behalf of condemned men, and, in the words of the President's Crime Commission, the resulting "spectacle of men living on death row for years while their lawyers pursue appellate and collateral remedies contradicts our image of humane and expeditious punishment of offenders."<sup>15</sup> The American Bar Foundation concluded after a 1961 study that the endless litigation in capital cases weakens public respect for the law.<sup>16</sup>

In the first place, capital trials are almost inevitably long, drawn-out affairs—at least where the accused is adequately represented by competent counsel. Impaneling a jury in such a case may take weeks, even months, both because jurors dislike such cases and often seek to be excused, and because those who state that they would under no circumstances vote for the death penalty are ineligible to serve. The trials themselves are typically protracted; since life is at stake, every possibly relevant point must be explored. In some states, there are two trials, one on the issue of guilt, and, if the defendant is convicted, another on the issue of penalty.

Then begins the longest part of the process: the appeals, collateral litigation, and clemency proceedings, all of which typically consume years. The result is well known. Caryl Chessman's trial began in June 1948 and ended with his execution on May 2, 1960.

That long a stay on Death Row was unusual at the time, but since then has become almost commonplace. As of the end of 1968, some 35 prisoners had been on Death Row for eight years or more.<sup>17</sup> There have been no executions since that time, so presumably most of them are still there. Edgar Smith has spent nearly fourteen years on Death Row in New Jersey. When his book, *Brief Against Death*, was published in 1958, there had been 14 separate rulings in his case by state and federal courts.

There can be little doubt that condemned prisoners generate a disproportionate amount of post-trial litigation. It is true that some prisoners who are not under sentence of death are inveterate "writ-writers" who barrage the courts with pleas and appeals, but their numbers are few and in many cases their efforts can be quickly dismissed as frivolous. Almost all condemned prisoners, at least those under real threat of execution, are constantly in litigation. Richard Hammer, in his book *Between Life and Death*, reports that few appeals went from Death Row in Maryland to the federal courts while a governor with a liberal commutation policy held office. However, when a new governor took office and announced that he would not commute death sentences, "that was when the guys started appealing. Of course after that it got to be a habit to appeal, to look for grounds, and it's kept right on."<sup>18</sup>

Legal actions brought by condemned men are never treated lightly by the courts. Barrett Prettyman has described the procedure in the Supreme Court:

"What happens in practice is that some cases are so obviously frivolous that the Justices agree not even to discuss them. However, I have never known a capital case to be treated in this manner. On the contrary, the Court overcomes all kinds of difficulties to devote to such cases a disproportionately large amount of time. Most capital cases involve indigents, and their appeals come to the Court *in forma pauperis*—that is, without the ordinary expenses involved in presenting an appeal. Thus, instead of filing forty printed briefs and records, the attorney for an indigent files only one. Sometimes the petition is in the defendant's own handwriting—ungrammatical, barely legible, and wild in its accusations. The single copy is circulated among all nine Justices,

accompanied by a memorandum prepared by one of the Chief Justice's law clerks. Nevertheless, despite these unpropitious circumstances, each Justice gives meticulous attention to the file when he sees the label 'capital case' printed in red on the outside cover. In fact, the capital case receives more attention than any other class of cases coming before the Court."<sup>19</sup>

Lengthy periods of incarceration on Death Row have become common only in recent years. In the past, most executions were carried out quite promptly after sentence of death was passed. There are two main reasons for this change.

First, the great majority of persons sentenced to death are too poor to hire lawyers. For a variety of reasons, the quality of representation by appointed counsel has greatly improved in the past dozen years. Moreover, in the past the right to be appointed counsel was generally limited to the trial level—leaving the defendant unrepresented on appeal, collateral proceedings, or clemency proceedings. The few condemned men able to obtain proper legal help—Sacco and Vanzetti, for instance—were not executed for many years after sentence was passed. Recently, Supreme Court decisions requiring the appointment of counsel on appeal, public funding of legal aid, and a new growth of interest in criminal law among lawyers has meant that many criminal defendants, and most condemned men, can obtain good post-courtroom legal representation.

The second development has been an expanded access to the writ of habeas corpus and other collateral remedies. In the past, a criminal defendant was largely confined to matters raised by his lawyer at trial. Legal points not raised were considered waived, even when legal doctrines pertaining to the defendant's procedural rights were expanded after the trial. Appointed counsel would sometimes forego raising legal points which would require extra research and trial time. Thus men have been executed even though their convictions were obtained on the basis of unconstitutionally coerced confessions, for no better reason than that lawyers whom they had no part in choosing failed to raise the point at their original trials or because the standards of inadmissibility were tightened after their trials.<sup>20</sup> Today, such points may be raised in federal court, and in some state courts, on petition for habeas corpus after trial and appeal. Federal courts will no longer dismiss substantial points on

technical procedural grounds, particularly when a human life is at stake.<sup>21</sup>

#### **D. CONCLUSION**

In short, extended delay is an inevitable consequence of capital punishment once the system sees that condemned men are properly represented, and as long as the courts take meticulous care to see that no defendant is wrongly executed. And yet when the delay is as great as it is, much of the effect of punishment as a deterrent, dependent as it is on swiftness and certainty, is lost. Respect for the law is seriously eroded in the public mind. And the cruelty of the death penalty is enhanced, as condemned men live for years in the terrible environment of Death Row, with the uncertain threat of death always close to them.

#### **CHAPTER VIII**

1. President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Courts* (1967), at 27.
2. *Id.*
3. Brown, "Statement on Capital Punishment" (1963), at 5.
4. Quoted in E. Gowers, *A Life for a Life* (1956), at 59-60.
5. A. Koestler, *Reflections on Hanging* (1957).
6. Knowlton, "Problems of Jury Discretion in Capital Cases", 101 *Univ. of Pennsylvania Law Review* 1099 (1953).
7. President's Commission, *supra* note 1, at 27.
8. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).
9. *Stein v. New York*, 346 U.S. 156, 196 (1953).
10. HART HEARINGS at 35.
11. *Fisher v. United States*, 328 U.S. 463, 487 (1946) (dissenting opinion of Mr. Justice Frankfurter).
12. B. Cardozo, *Law and Literature* (1931) at 99-101.
13. Ehrmann, "The Death Penalty and the Administration of Justice", in H. BEDAU at 430.
14. B. Prettyman, *Death and the Supreme Court* (1961), at 308.
15. President's Commission, *supra* note 1, at 28.
16. McIntyre, "Delays in the Execution of Death Sentences", American Bar Foundation Research Memorandum Series, No. 24 (1960).
17. NPS at 26.
18. R. Hammer, *Between Life and Death* (1969), at 231-232. (Note: The current governor of Maryland, Marvin Mandel, has halted all executions in the state pending a decision by the United States Supreme Court on the constitutionality of the death penalty.)
19. B. Prettyman, *supra* note 14, at 305.
20. *Williams v. Georgia*, 349 U.S. 375 (1955), 350 U.S. 950 (1956). The case is described in detail in B. Prettyman, *supra* note 14, at 258-294.
21. *Fay v. Noje*, 372 U.S. 391 (1963).

APPENDIX G



PERSONS EXECUTED IN THE UNITED STATES  
1930 - 1971

CALVIN H. HUNTER

VOLUME IV, NO. 2 DECEMBER 1978

Offenses Against Federal Jurisdiction

P.O. Box 24 New York City 10024

## RAPE

The table below show the correlation between executions and race. Figures indicate total number executed, and percentages. Source: National Prisoner Statistics Bulletin No. 45, August 1969, CAPITAL PUNISHMENT.

OFFENSE	TOTAL	BLACK	WHITE	OTHER
MURDER	3334	1630	1664	40 <sup>1</sup>
	100%	48.9%	49.9%	1.2%
RAPE	455	405	48	2 <sup>2</sup>
	100%	89%	10.5%	0.4%
ARMED ROBBERY*	25	19	6	0
	100%	76%	24%	0%
KID-NAPPING	20	0	20	0
	100%	0%	100%	0%
BURGLARY	11	11	0	0
	100%	100%	0%	0%
SABOTAGE	6	0	6	0
	100%	0%	100%	0%
AGGRAVATED ASSAULT BY A LIFE TERM PRISONER	6	1	5	0
	100%	16.5%	83.5%	0%
ESPIONAGE	2	0	2	0
	100%	0%	100%	0%
TOTAL	3859	2066	1751	42
	100%	53.5%	45.4%	1.1%

\* Includes 2 Federal executions for bank robbery with homicide.

<sup>1</sup> 17 American Indians, 13 Filipinos, 8 Chinese, 2 Japanese.

<sup>2</sup> American Indians.



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