HB

140

#2

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: 1/13/84

REQUEST
Bill/Resolution No.: HB 140
Title: "An Act Authorizing Capital Punishment"
Sponsor: Rep. Pestinger
Requestor: House Judiciary
Date of Request: 1/11/84

FISCAL DETAIL
Agency Affected: Dept. of Administration
Program Category Affected: Due Process
BRU, Program or Subprogram(s) Affected: Public Defender Agency

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES		1271.9	1348.2	1429.1	1514.8	1605.7
200 TRAVEL		169.0	179.1	189.8	201.2	213.3
300 CONTRACTUAL		710.0	752.6	797.8	845.7	896.4
400 SUPPLIES		34.0	36.0	38.2	40.5	42.9
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	2233.9	2315.9	2454.9	2602.2	2758.3
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	2233.9	2315.9	2454.9	2602.2	2758.3
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		22.0	22.0	22.0	22.0	22.0
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

GENERAL FUND

ANALYSIS: Attach a separate page for analysis

Prepared By: Dana Fabe
Division: Public Defender Agency
Phone: 279-7541
Date: 1/13/84

Approved by Commissioner: Lisa Rudd
Agency: Administration
Date: 1/17/84

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

House Bill 140
Fiscal Note Analysis
Prepared by Public Defender Agency
Department of Administration

Date: January 16, 1984

If this death penalty bill is enacted, representation of the poor in death cases must be adequate. This is due to the possibility that an innocent person might be killed by mistake. Some degree of mistake is of course a potential problem in all criminal cases. But in non-death cases, the system stands ready to correct those mistakes where they become known. An execution can never be corrected.

Due to these considerations, the processing of a death case is much more complex and expensive than other criminal cases. Not only are extraordinary amounts of attorney time and substantial expert fees necessary in the guilt phase of a trial, but the penalty phase, in which a jury determines whether or not to put a person to death, takes on tremendous significance. This penalty phase requires extensive preparation, the use of psychiatric experts and family and friends from out of state, and other necessary expenditures.

Finally, even after the death penalty has been imposed, the appeal procedures in death penalty cases are lengthy and time consuming. After guilt and penalty phases of a case, the following procedures would be routinely necessary:

(1) Appeal of conviction to the Alaska Court of Appeals.

(2) Petition for Hearing to the Alaska Supreme Court.

(3) Automatic sentence review by Alaska Supreme Court.

(4) Writ of certiorari to the United States Supreme Court.

(5) Post-conviction relief proceedings in state court.

(6) Appeal of post-conviction relief proceedings in the Court of Appeals.

(7) Petition for Hearing of post-conviction relief proceedings to the Alaska Supreme Court.

(8) Writ of certiorari to the United States Supreme Court.

(9) Petition for Writ of Habeus Corpus in the Federal District Court.

(10) Appeal to the United States Court of Appeals.

(11) Rehearing in the United States Court of Appeals.

(12) Writ of certiorari to the United States Court of Appeals.

(13) Commutation applications to executive branch.

(14) Emergency stays to the United States Supreme Court.

The figures in this fiscal note are based on the average number of cases which would have qualified under the bill as capital cases which were handled by this agency during the past two fiscal years. This agency handles approximately 30 first degree murder cases each year which would qualify as capital cases under this bill. The specific figures were arrived at as follows:

(1) Personal Services. This agency is currently 13 attorneys short of the LEAA standards for the maximum number of cases to be handled by an attorney to ensure competent representation when no death penalty cases are involved. Death penalty cases take substantially more attorney time than other cases. For example, the Florida Legislature has adopted standards which permit an attorney to handle no more than eight death penalty trial cases per year, or five death penalty appeal cases per year. For comparison, the LEAA figures are 150 non-death felonies or 25 appeals a year. Some states have applied far more stringent standards. For example, the California state appellate defender permits attorneys to handle only two death penalty appeals per year. Given the fact that the attorneys who handle death penalty cases will have to be given drastic caseload relief, their extra cases will be loaded onto the caseloads of attorneys whose caseloads already exceed recommended maximums. Thus, at a minimum, this agency must be brought close to the nationally recommended number of attorneys required to handle the caseload as it exists without the death penalty. This necessitates the addition of twelve additional attorneys, plus necessary investigation and clerical support staff.

(2) Travel and Contractual Fees. The New York State Defender Association has estimated that a minimum figure for expert witness fees must be $30,000 for the guilt phase and $30,000 for thepenalty phase per case. Thus, the contractual and travel costs for expert witnesses has been calculated at $60,000 per case. This figure does not include any expert fees which might be necessary at the appellate stages. The amount of contractual fees estimated in this fiscal note is substantially less than that amount estimated by the New York Defender Association.

(3) Equipment and Supplies. Other costs include expanded office space for additional personnel as well as equipment and supply money for additional personnel.

House Bill 140
Fiscal Note Analysis
Prepared by Public Defender Agency
Department of Administration

Date: January 16, 1984

The above costs do not take into account contingencies such as reversals and retrials after appeal, travel to Seattle and Washington, D.C. to argue before the Ninth Circuit Court of Appeals and the United States Supreme Court and other costs which at this time are difficult to predict. However, the cost of defending a capital case is tremendous given the unique nature of the death penalty, and without adequate representation a conviction will not withstand appellate challenge.

BUDGET SUMMARY

Personal Services		
An Attorney IV at Sitka-	70.2	
Juneau-	67.9	
Bethel-	88.2	
Palmer-	70.2	
Nome/Kotzebue	91.4	
Three Attorney IV at Fairbanks-	231.9	
Four Attorney IV at Anchorage-	271.6	
Two Investigator III at Fairbanks-	106.4	
Two Investigator III at Anchorage-	93.6	
A Legal Secretary I at Sitka-	29.4	
Bethel-	35.9	
Juneau-	28.6	
Fairbanks	31.9	
Two legal secretaries for Anchorage-	57.2	
TOTAL		1271.9
Travel:		
Based on 30 capital cases per year		
Guilt phase-		
Penalty phase-		
Appellate phase-		169.0
Contractual:		
Based on 30 capital cases per year		
Guilt phase-		
Penalty phase-		
Appellate phase-		
Additional office space for Fairbanks and Anchorage-	70.0	710.0
New Office Space for Sitka	20.0	
Supplies:		34.0
Equipment:		49.0
TOTAL		2,233.9

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 17, 1984

SUBJECT: Sectional analysis of HB 140

TO: Representative Charlie Bussell
Chairman, House Judiciary Committee

FROM: Edward H. Hein
Legislative Counsel

Section 1 makes first degree murder a capital felony.

Section 2 provides that a person convicted of a capital felony is subject to a mandatory sentence of 20 - 99 years' imprisonment or death.

Section 3 adds a new section, AS 12.55.115, to the statutes. Subsection (a) allows an automatic appeal to the Alaska Supreme Court of a death sentence for a period of 60 days after the sentence is handed down. The court may extend the time limit. Such an appeal must be given first priority by the court and the court may adopt special rules for hearing such an appeal. The court is required to make three determinations:

(1) was the sentencing influenced by passion, prejudice or arbitrariness?;

(2) was the finding of an aggravating factor supported by the evidence?; and

(3) is the death penalty imposed in similar cases?

Under subsection (b), if the Alaska Supreme Court upholds the death sentence, the trial court is required to specify the time, place and manner of execution.

Section 4 adds five new sections to the statutes:

(1) AS 12.55.177 establishes a procedure for the sentencing of a person convicted of a capital felony. Under subsection (a), sentencing is a separate proceeding following the trial or guilty plea. The proceeding is conducted before the trial jury or, if there was no jury trial, before a specially impaneled jury. Under subsection (b), the state and the defendant may present any relevant evidence concerning aggravating and mitigating factors, so long as the evidence was not obtained in violation of the state or federal constitution and so long as the defendant has the opportunity to rebut hearsay statements.

It is not clear whether subsection (b) is intended to disallow invocation of evidentiary privileges in a sentencing proceeding. The rules relating to evidentiary privileges are the only rules of evidence which are specifically made applicable to sentencing proceedings by Rule 101 of the Alaska Rules of Evidence. In light of the requirements of the Alaska Constitution and of Uniform Rule 39(c) that bills must note any changes being made to court rules, it would be prudent to clarify the legislative intent of subsection (b).

(2) AS 12.55.178 requires the sentencing jury to produce an advisory sentence for the court. The jury must decide three questions:

(A) did aggravating factors exist that justify a death sentence?;

(B) were there mitigating factors involved that outweigh the aggravating factors?; and

(C) should the sentence be a term of imprisonment or death?

(3) AS 12.55.179 requires the sentencing court to consider the evidence and the jury's advisory sentence and to enter a sentence. Subsection (a) provides that if a death sentence is imposed, the court must state in writing the aggravating

factors that exist to justify the sentence and any mitigating factors considered by the court. Subsection (b) restates the fact that a death sentence may be automatically appealed to the Alaska Supreme Court under AS 12.55.115.

(4) AS 12.55.180 lists seven aggravating factors, any one of which could justify imposition of a death sentence if not outweighed by mitigating factors. The aggravating factors are:

(A) committing torture or aggravated battery amounting to deliberate cruelty during the crime;

(B) creating a risk of imminent physical harm to three or more persons;

(C) having a prior conviction of a violent felony;

(D) committing the crime under contract or for money;

(E) committing the crime while on release for another felony charge or for a conviction involving assault as a necessary element;

(F) the victim was a judge, prosecuting attorney, police officer, correctional employee or fireman and the crime was committed during or because of the victim's exercise of official duties; and

(G) the crime resulted from a conspiracy of five or more persons.

(5) AS 12.55.181 lists four mitigating factors:

(A) the defendant committed the crime under duress, coercion, threat or compulsion;

(B) the defendant was young and was influenced to commit the crime by a more mature person;

(C) the defendant acted in response to serious provocation by the victim; and

(D) the defendant helped authorities detect or apprehend others involved in the crime.

At page 4, line 12, the bill states that all mitigating factors, including the four that are listed, must be considered. Thus, a defendant is entitled to raise anything that could be construed as a mitigating factor, even if it is not listed. This statute, however, does not specify who must consider the mitigating factors. Is it the court, the jury, or both? Likewise, this statute does not say whose judgment controls on the question of whether the mitigating factors outweigh any aggravating factors that exist. Under AS 12.55.178(2), the sentencing jury would be required to balance mitigating factors against aggravating factors. But the jury's findings are only advisory. It is not clear, under AS 12.55.181, whether a finding by the jury that the mitigating factors outweigh the aggravating factors is sufficient to prevent imposition of the death sentence if the judge disagrees with the jury's findings. In light of the gravity of this determination, legislative intent should be made clear. This could be done by using the active voice instead of the passive voice at page 4, lines 10-13. The same considerations just discussed apply to the language at page 3, lines 16-18.

Section 5 removes from the jurisdiction of the state court of appeals cases in which a death sentence has been imposed. Note that under the 1984 legislative drafting manual, nothing less than a full subsection should be amended in a bill. Thus, the full text of AS 22.07.020(a) should appear in section 5.

Section 6 The purpose of this section is not clear. Apparently this section is an attempt to remove appeals of death sentences from the jurisdiction of the state court of appeals. The statute being amended, however, deals only with jurisdiction over appeals of sentences of imprisonment. Thus, section 6 is both confusing and superfluous.

EHH:ojb
J2/C34

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: January 17, 1984

REQUEST:
Bill/Resolution No.: HB 140
Title: "An Act authorizing capital punishment...."
Sponsor: Pestinger, Ward, Flood and Liska
Requestor:
Date of Request:

FISCAL DETAIL:
Agency Affected: ADULT CORRECTIONS AGENCY
Program Category Affected: Administration of Justice
BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES			986.4	1016.0	1046.5	1077.9
200 TRAVEL			5.5	5.7	5.9	6.1
300 CONTRACTUAL			7.6	7.8	8.0	8.2
400 COMMODITIES			6.6	6.8	7.0	7.2
500 EQUIPMENT			2.6	-0-	-0-	-0-
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	1008.7	1036.3	1067.4	1099.4
CAPITAL	-0-	1900.5	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	1900.5	1008.7	1036.3	1067.4	1099.4
FEDERAL FUNDS						
OTHER (Specify Source)						
TOTAL	-0-	1900.5	1008.7	1036.3	1067.4	1099.4

POSITIONS:

FULL-TIME	-0-	-0-	18	18	18	18
PART-TIME						
TEMPORARY						
TOTAL	-0-	-0-	18	18	18	18

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

The funding source was not identified by the author of the bill.

ANALYSIS: Attach a separate page for any Analysis.

Prepared By: William W. Ladwig (William W. Ladwig) Phone: 465-3376
Division: Administrative Services Date: January 17, 1984

Approved by Commissioner: William W. Ladwig for Roger Endell Date: January 18, 1984
Department: ADULT CORRECTIONS AGENCY

Distribution:
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency (ies)

12/1/8

ANALYSIS

A. Assumptions:

Enactment of House Bill No. 140 would change the State law to permit capital punishment for the crime of murder in the first degree. Current estimates indicate three convictions per year for this offense would involve executing the death penalty. Because of the lengthy appeal process in cases where the death penalty has been imposed, it is anticipated that a significant number of persons would have to be confined in a separate confinement area. The national average length of time between sentencing and execution of the death penalty is 6 to 7 years. Therefore, we are predicting the need for a maximum of 20 death row beds.

1. Capital expenditures required to provide specialized space not currently available in existing State correctional centers. Details follow in B-1.

2. The new space will be adjacent to an existing facility, but isolated. Existing authorized staff could not provide for the necessary security of inmates housed in the area designated for prisoners sentenced to execution.

3. Two additional fixed guard posts to be created and one post for roving patrol due to the high security and high risk nature of the unit. To man one post 24 hours per day, 7 days per week requires 5 Correctional Officers II plus 1 Supervisor Correctional Officer III.

4. Inflation is estimated at 6% per year except as noted.

5. The unit will be available for occupancy July 1, 1985.

B. Estimated Costs

1. Capital Expenditures

a. Functions and square footage allocations are derived from accepted space standards and are adjusted to an existing design for a 20-cell complex.

b. Assumes this structure will be an addition to an existing institution with all activity for prisoners sentenced for execution to be limited to this maximum security unit.

Analysis (continued)

c. Assumes only the usual 6% equipment factor and does not include costs for whatever type of equipment would be appropriate for the specified method of execution.

d. It is estimated that the cost will be $281.00 per square foot, considering the fact that this unit must be more secure than other facilities under construction and the relatively small size of the building.

e.

Area Identification	Square Footage	
Secure Control Room	120	
20 cells w/commodes @ 80 sq. ft. per cell	1600	
Day room/Dining area	300	
Shower Rooms (Male, Female)	140	
Counseling/Attorney Room	120	
Secure visiting room	90	
Sallyport	75	
Hot cart/storage	80	
Exercise area (inside)	80	
Execution chamber/anteroom	600	
Net Area	3,205	sq. ft.
	x 1.6	net to gross area factor
Gross Area	5,128	sq. ft.
	x $281	
	$ 1,440,968	bldg. cost 10/81
	20,988	secure outdoor rec. yard
	$ 1,461,956	bldg. & yard
	438,587	30% admin/ overhead factor
Total Projected Cost	$ 1,900,543	

Analysis (continued)

2. Salaries & Related Costs Starting in FY 1986

a. Staff
Based on FY85 Budget
Costs + 4%

15 Correctional Officer II Positions Salary/Benefits	$ 825,762
3 Correctional Officer III Positions	160,661
Total	$ 986,423

b. Other Costs

Travel (Staff Training)	5,500
Utilities, Cable TV, Subscriptions	7,600
Food, Clothing, Bedding	6,600
Equipment	2,600
Total	$ 1,008,723

c. For years after FY86 assumes 3% inflation factor.

NOTE:

It is assumed that State expenditure will also occur in the Department of Law and the Public Defender's Office for the lengthy appeal process. The costs for the other two agencies are not addressed in this fiscal note.

ADULT CORRECTIONS AGENCY
Pouch T
Juneau, Alaska 99811

POSITION PAPER
House Bill No. 140

Amended
January 17, 1984

"An Act authorizing capital punishment, classifying murder in the first degree as a capital felony, and establishing sentencing procedures for capital felonies."

House Bill No. 140 classifies first degree murder as a capital offense and establishes the death penalty as an available penalty under specified circumstances.

With the Furman vs. Georgia ruling in 1967, the United States Supreme Court declared what amounted to a moratorium on capital punishment. The moratorium was, in effect, lifted in 1975 when the Court approved death penalty legislation which had been passed in Florida, Georgia, and Texas. Thirty-seven states have subsequently passed death penalty legislation but, despite continuous, vigorous effort on the part of state prosecutors, there has been little success in implementation of these statutes. As of December 31, 1982, there had been five executions. Gary Gilmore, executed by a firing squad in January 1977 in Utah, and Jesse Walter Bishop, executed by a gas chamber in Nevada in October 1979, did not appeal and succeeded in obtaining court rulings prohibiting others from proceeding with the appeal process in their behalf. Steven Judy, who was electrocuted in Indiana on March 9, 1982, also elected to forego the appeal process. Therefore, John Spenkelink, who was electrocuted in Florida in May 1979, and Charlie Brooks, Jr., who was injected intravenously in Texas in December of 1982, are the only two people to have been involuntarily executed. Persons were executed during 1983, however, these statistics are not yet available from the US Bureau of Census.

Meanwhile, the number of men and women on death rows around the country has risen to almost 1050. All of these offenders are in various states of the appeal process. The legal costs and the associated costs to these states are enormous. The maintenance of a "death row" is also extremely expensive because of space and staff requirements. There is a likelihood that the death penalty is the most costly remedy possible in a criminal proceeding, even more costly than life imprisonment.

House Bill No. 140 presumably uses model provisions which are designed to meet constitutional requirements for a legal capital punishment statute. The bill does not, however, speak to the method of execution. Neither does the bill indicate what agency of the State would be assigned to this responsibility. A determination would have to be made as to whether the State would electrocute, hang, shoot, gas or lethally inject the guilty party and who would do it. We can be certain that no other state or jurisdiction would be willing to take on this kind of task for us by contract. The costs, the confusion, the controversy, and the negative psychic impact that would surely accompany our having to take on this function for ourselves would be profound.

Perhaps undertaking this new approach to punishing murderers in Alaska would be worthwhile if we could be sure that the result would be fewer murders. There is no doubt that capital punishment effectively deters those subjected to it, but whether it has any value in deterring others, especially those with the most serious homicidal tendencies, is questionable. During the eight-year moratorium, the United States Supreme Court listened to a great deal of testimony on the issue of deterrence, but was unable to conclude from the evidence presented that there was a deterrent value to capital punishment.

Prepared by: Susan E. Knighton
Susan E. Knighton
Research Analyst IV

Date: 1/17/84

Approved by: William W. Ladwig
William W. Ladwig
Assistant Commissioner
for Administration
Adult Corrections Agency

Date: January 18 1984

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Alaska State Legislature
HOUSE OF REPRESENTATIVES

REPRESENTATIVE
CHARLIE BUSSELL
CHAIRMAN

Committee on Judiciary

Passed Out 1/10/84

HB 140
TABLE OF CONTENTS

I. House Bill No. 140
"An Act authorizing capital punishment, classifying murder in the first degree as a capital felony, and establishing sentencing procedures for capital felonies."

II. Sectional Analysis
Edward H. Hein, Legislative Counsel.

III. Fiscal Note/Analysis--Department of Administration
Dana Fabe, Public Defender Agency.

IV. Fiscal Note/Analysis--Department of Health and Social Services
William W. Ladwig, Adult Corrections Agency.

V. Position Paper--Department of Health and Social Services
William W. Ladwig, Adult Corrections Agency.

VI. Issue Analysis
A. Capital Punishment--National Status and History:
1. "Reinstating the Death Penalty"
Nancy Pease, Legislative Analyst, House Research Agency.
2. "Death Penalty Laws"
Mary Fairchild, Researcher, National Conference of State Legislatures.
3. Capital Punishment Survey Among the States
Corrections Compendium, December 1982.
4. "Alaska Death Penalty"
Juneau Empire, 22 February, 1957.
5. Past Alaska Legislation
Senate Bill No. 73, 1981.
6. "Surprising Facts About the Death Penalty"
Institute for Southern Studies, Durham, NC.

B. Capital Punishment--Alaskan Perspectives:
1. STATE OF ALASKA v. NEWTON LAMBERT
a. "Lambert Sentenced to 99 Years in Prison"
Juneau Empire, 18 January, 1984.
b. Projected Custodial Costs
House Research Agency.
2. Editorials and Public Sentiment News Clippings
Juneau Empire, Anchorage Daily News, Anchorage Times.

MEMBERS:
REP. JOHN LISKA, VICE CHAIRMAN; REP. RAMONA BARNES, EMERITUS;
REP. JOE HAYES; REP. HUGH MALONE; REP. DON CLOCKSIN; REP. RON WENDTE

3. Senate Judiciary Hearings on SB 121
   a. Testimony, Timothy V. Ewell, Executive Director, Moral Majority of Alaska.
   b. Testimony, Dana Fabe, Public Defender.
   c. Testimony, Judy Zimicki, Citizen.
   d. "Debate Heats Up Over Capital Punishment Bill", Anchorage Times, 19 March, 1983.

C. Capital Punishment as a National Issue:
   1. "Capital Punishment 1982", Bureau of Justice Statistics Bulletin.
   2. "Capital Punishment: Pro and Con Arguments", Congressional Research Service, Education and Public Welfare Division, 3 August, 1966.
   3. "An Eye for an Eye", Time, 24 January, 1983.
   4. "Pro and Con: Revive the Death Penalty?", U.S. News & World Report, 20 April, 1981.
   5. "America's Inability to Resolve...", The Washington Post, 15 June, 1982.
   6. "Supreme Court's Death Row Dilemma", U.S. News & World Report, 17 October, 1983.
   7. "American Justice: ABC's of How it Really Works", U.S. News & World Report, 1982.
   8. "Capital Losses: The Price of the Death Penalty for New York State." Public Defense Back-up Center to the Senate Finance Committee, the Assembly Ways and Means Committee and the Division of the Budget, New York State Defenders Association.

D. Capital Punishment--Effect as a Deterrent:
   1. "The Effect of Harsher Penalties on Crime" Jonathan Sherwood, Legislative Analyst, House Research Agency.
   2. "Deterrence, Death, and the Victims of Crime: A Common Sense Approach", Vanderbilt Law Review, Frank G. Carrington.
   3. "The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's", Minnesota Law Review, Brain E. Forst.
   4. "Strong and Weak Research Designs for Detecting the Impact of Capital Punishment on Homicide", Rutgers Law Review, David P. Phillips.
   5. "Statistical Evidence on the Deterrent Effect of Capital Punishment", The Yale Law Journal.
   6. "The Deterrent Effect of the Death Penalty: A Statistical Test", Stanford Law Review, Peter Passell.
   7. "The Deterrent Effect of the Death Penalty: Facts v. Faith", The Supreme Court Review, Hans Zeisels.

VII. Capital Punishment Statutes:
A. Code of Alabama 1975, Volume 12, 15.18.81 - 15.18.85.
   A federal court declared this Alabama law unconstitutional in June of 1980. A new "constitutional" law was passed in 1981 reinstating the death penalty.
B. Colorado Revised Statutes 1973, Volume 8, 16.11.402 - 16.11.404.
C. General Statutes of Connecticut, Volume 9, 54.99 - 54.101.
D. Idaho Code 1982, Volume 4, 27.19.2701 - 27.19.2716.
E. Montana Code Annotated, 46.19.103; 46.19.201.
F. West's Revised Code of Washington Annotated 1982, 10.70.020.

APPENDIX

Below is a list of individuals and agencies contacted during the course of this research.

The Alaskan Judicial Council

Leigh Bienen,
New Jersey Public Advocacy Special Project

The Center for Jury Studies

The Justice Center,
University of Alaska Anchorage

Martin Kaplan, Professor of Psychology,
University of Northern Illinios

Jeanne Marsh, School of Social Service Administration
University of Chicago

The National Association of District Attorneys

The National Conference of State Legislatures

The National Institute of Mental Health

Bruce Sayles, Professor of Psychology,
University of Arizona

The Southern Poverty Law Center

The following agencies were contacted on our behalf by the National Conference of State Legislatures.

The National Information Center of the National Institute of Corrections

The National Institute on Crime and Delinquency

Mr Chairman & Committee #1

THE CHAIR IS BOLTED TO THE FLOOR NEAR THE BACK OF A 12 FT. BY 18 FT. ROOM. YOU SIT ON A SEAT OF CRACKED RUBBER SECURED BY ROWS OF COPPER TACKS. YOUR ANKLES ARE STRAPPED INTO 1/2 -MOON-SHAPED FOOT CUFFS LINED WITH CANVAS.

A 2 IN. WIDE GREASY LEATHER IS SECURED AROUND YOUR WAIST, JUST ABOVE THE HIPS. A COOL METAL CONE ENCIRCLES YOUR HEAD. YOU ARE NOW ONLY MOMENTS AWAY FROM DEATH.

BUT YOU STILL HAVE A FEW SECONDS LEFT. TIME BECOMES STRETCHED TO THE OUTERMOST LIMITS. TO YOUR RIGHT YOU SEE THE MAHOGANY FLOOR DIVIDED THAT SEPERATES FOUR BROWN CHURCH-TYPE PEWS FROM THE REST OF THE ROOM. THERE IS ANOTHER DOOR AT THE BACK THROUGH WHICH THE WITNESSES ARRIVE AND SIT IN THE PEWS. YOU STARE UP AT TWO GROUPS OF FLOURESCENT LIGHTS ON THE CEILING. THEY ARE ON. THE PAINT ON THE CEILING IS PEELING.

YOU FIT IN NEAT AND SNUG. BEHIND THE CHAIR'S BACK LEG ON YOUR RIGHT IS A CABLE WRAPPED IN GREY TAPE. IT WILL JUICE THE ELECTRICAL CURRENT TO THREE OHER WIRES: TWO GOING TO EACH OF YOUR FEET AND THE THIRD TO THE CONE ON TOP OF YOUR HEAD. THE ROOM IS VERY QUIET. THE AIR WENT ABOVE YOUR HEAD IN THE CEILING BEGINS TO HUM. THE EXECUTIONER HAS TURNED ON THE FAN TO SUCK UP THE SMELL OF BURNING FLESH. THERE IS NO TIME LEFT. ON YOUR RIGHT YOU CAN SEE THE WAIST-HIGH, ONE-WAY MIRROR IN THE WALL. BEHIND THE MIRROR IS THE EXECUTIONER, STANDING BEFORE A GREY MARBLE CONTROL PANEL WITH GAUGES, SWITCHES, AND A FOOT LONG LEVER OF WOOD AND METAL AT HIP LEVEL.

THE EXECUTIONER PULLS THIS LEVER 4 TIMES. EACH TIME 2,000 VOLTS WILL CURSE THROUGH YOUR BODY, MAKING YOUR EYEBALLS FIRST BULGE, THEN BURST AND THEN BROILING YOUR BRAINS.

Don Mueller
10260 Jamestown #28
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~~Dep. of Committee~~

TODAY, AN OLD ARRAY OF TOUGH QUESTIONS DEALING WITH CAPITOL PUNISHMENT IS BEING EXAMINED. ~~SENATE BILL NO. 121~~ House bill NO 140 "AN ACT AUTHORIZING CAPITOL PUNISHMENT, CLASSIFYING MURDER IN THE FIRST DEGREE AS A CAPITAL FELONY, AND ESTABLISHING SENTENCING PROCEDURES FOR CAPITOL FELONIES" IS ON ITS WAY TO US THE VOTERS.

ALASKA HAS ~~NEVER~~ HAD A DEATH PENALTY ~~AND~~ IT IS NOT TIME FOR ONE NOW OR VER. TODAY I AM GOING TO EXAMINE THREE QUESTIONS DEALING WITH CAPITOL PUNISHMENT.

--IS CAPITOL PUNISHMENT A DETERRENT TO MURDER?

--IS CAPITOL PUNISHMENT FAIR?

THAT IS DOES IT FALL EQUALLY ON THE WEALTHY WHITE SURGEON REPRESENTED BY EDWARD BENNETT WILLIAMS AND THE INDIGENT BALCK WITH COURT APPOINTED COUNSEL?

--IS IT CIVILIZED TO TAKE A LIFE IN THE NAME OF JUSTICE?

THE IDEA OF DETERRENCE CAN BE QUICKLY REDUCED TO VERY PERSONAL RUDIMENTS: IF I KNOW I WILL BE PUNISHED SO SEVERELY FOR A CRIME, I WILL NOT COMMIT THE CRIME. ACCORDING TO NY UNIVERSITY LAW PROFESSOR ANTHONY AMSTERDAM "WAHT DETERS EOPLE FROM CRIME IS THE LIKELY'OOD OF GETTING CAUGHT AND UNDERGOING PUNISHMENT" TODAY EVEN AT A RATE OF 100 EXECUTIONS ANNUALLY, AN IMPLAUSIBLY HIGH FIGURE GIVEN TODAYS JUDICIAL GUARANTEES AND APPEALS PROCESS, A KILLERS CHANCES OF GETTING CAUGHT, CONVICTED AND EXECUTED WOULD FOR HIM STILL BE COMFORTABLY LOW, 250 TO 1.

IS IT FAIR? PROSECUTORS HAVE GREAT LEAWAY IN DECIDING WHICH HOMICIDES TO TRY AS CAPITOL MURDERS. A KILLER CAN BE PERSUADED TO TESTIFY AGAINST AN CCOMPLICE TO SAVE HIS OWN LIFE. A MURDERER BROOKS, WAS CONVICTED AND EXECUTED; FOR THE SAME MURDER HIS PARTNER MUST SERVE ONLY EIGHT MORE YEARS IN PRISON. A RECENT STUDY ON HOMICIDE CASES IN HUSTON'S HARRIS COUNTY IS TROBLING. IN

IN CASES WHERE A BLACK OR CHICANO HAD KILLED A WHITE, 65% of the defendants WERE TRIED FOR CAPITOL MURDER.\ WHILE ONLY 25% OF WHITES WHO KILLED A BLACK OR HICANO FACED THE DEATH PENALITY.\ A SERIOUS PROBLEM IS THE QUALITY OF LEGAL HELP FOR MURDER DEFENDANTS. THE TEXAS STUDY FOUND THAT 3/4 OF THE MURDERERS WITH COURT APPOINTED LAWYERS WERE SENTENCED TO DEATH AGAINST ABOUT A THIRD OF THOSE REPRESENTED BY PRIVATE ATTORNEYS. CHARLETTE HOLDMAN DIRECTOR OF FLORIDAS CLEARINGHOUSE ON CRIMINAL JUSTICE SAYS "EVERY PERSON SENTENCED TO DIE COMES FROM A CASE FOUGHT WITH ERRORS. IF YOUR ADEQUATELY REPRESENTED YOU DON'T GET DEATH. IT"S THAT SIMPLE". ACCORDING TO ACLU'S SCHWARSCHILD, "A SOCIETY THAT BELIEVES THAT THE KILLING OF A HUMAN BEING IS A SOLUTION TO ANY PROBLEM IS DEEPLY UNCIVILIZED. THE MARGINALLY DEMENTED GUY, SAYS SCHWARSCHILD SEES AN EXECUTION AS A PERSCRIPTION NOT A THREAT. HE THINKS \ IF THE STATE HAS A QUARREL WITH GARY GILMORE IT KILLS HIM. IF I HAVE A QUARRELL WITH SOMEONE I'LL KILL HIM'. THE ELECTRIC CHAIR CAUGHT ON SLOWLY IN THE US AND NOT AT ALL ABROAD. DURING THE 1920s and 30s THE CYANIDE GAS CHAMBER BECAME STAE OF - THE AMERICAN ART. NOW THERE ARE LETHAL INJECTIONS WHICH ARE SEEN AS STILL MORE "HUMANE." THIS LATEST TECHNICAL REFINEMENT WHICH THE EUROPEAN PRESS FINDS, CHILLING AND FACINATING SEEMS TO REMAIN STRICTLY A US PRACTICE.

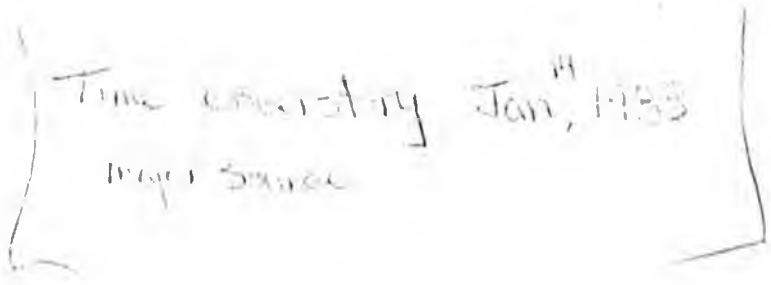
NOTRE DAME THEOLOGY PROFESSOR SUMS UP OUR OBSESSION WITH "HUMANE" CAPITAL PUNISHMENT LIKE THIS: "THIS SEARCH FOR A HUMANE WAY OF KILLING IS A BUNCH OF SENTIMENTAL SECULAR HUMANISM. WHY DO YOU WANT IT TO BE HUMANE? TO REASSURE YOURSELF?

EVIDENCE SHOWS CAPITOL PUNISHMENT IS NOT A DETERRENT OT MURDER.\ CAPITOL PUNISHMEN CASES ARE NOT HEARD FAIRLY AND WITH OUT EXAGURATED BIASIS.\ WE SAY WE THINK HUMAN LIFE IS SCARED. AND THEN, TO PROVE THAT, WE KILL SOMEBODY. WE CALL THAT CIVILIZED.!'

House Bill No 140

BY VOTING DOWN ~~SENATE BILL NO 121~~ WE ARE NOT LEFT WITHOUT ANY ALTERNATIVE. TODAY CURRENT LAW DEMANDS AT LEAST 20 YEARS BUT NOT MORE THAN 99 YEARS IN A CONVICTION OF FIRST DEGREE MURDER.

IN THE MAJORITY OF CASES THIS SENTENCE IS SUFFICENTLY HARSH. STATISTICS SHOW THAT FEWER THAN 1% OF FREED MURDERERS KILL AGAIN AFTER THEIR RELEASE FROM PRISON. DO WE WANT TO TAKE THAT CHANCE? ARE YOU WILLING TO PUT THE LIFE OF YOUR WIFE OR CHILDREN ON THE LINE? ARE YOU WILLING TO RIST THAT A MURDERER LIKE CHARLES MANSON WILL NOT REPEAT HIS HIDIOUS CRIME? AS IT STANDS NOW, MANSON WILL BE ELIGIBLE FOR PAROLE IN 1985. WHAT I ADVOCATE IS A LIFE SENTENCE WITHOUT PAROLE. THIS MEETS ALL THE CRITERIA FOR JUST PUNISHMENT. A LIFE SENTENCE IS IN ITS SELF UNIMAGINABLY HARSH. AND IT PROTECTS OUR SOCIETY OUTYAND ME FROM REPEAT OFFENCES. AS JAYCEES AND ALASKANS WE MUST SEE THAT HOUSEBILL NO. 121 DOES NOT BECOME LAW. WHEN IT APPEARS ON YOUR BALLOT VOTE NO ON A DEATH PENALTY. STATE SANCTIONED MURDER IS UNQUESTIONABLY WRONG!



STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M April 10, 1984

SUBJECT: Sectional analysis of CSHB 140(Judiciary)

TO: Representative Charlie Bussell
Chairman, House Judiciary Committee

FROM: Edward H. Hein
Legislative Counsel

Section 1 makes first degree murder a capital felony.

Section 2 amends AS 12.30.040(b) to provide that a person convicted of a capital felony may not be released on bail either before sentencing or pending appeal.

Section 3 provides that a person convicted of a capital felony is subject to a mandatory sentence of 20 - 99 years' imprisonment or death.

Section 4 adds a new section, AS 12.55.115, to the statutes. Subsection (a) allows an automatic appeal to the Alaska Supreme Court of a death sentence for a period of 60 days after the sentence is handed down. The court may extend the time limit. Such an appeal must be given first priority by the court and the court may adopt special rules for hearing such an appeal. The court is required to make three determinations:

(1) was the sentencing influenced by passion, prejudice or arbitrariness?;

(2) was the finding of an aggravating factor supported by the evidence?; and

(3) is the death penalty imposed in similar cases?

Under subsection (b), if the Alaska Supreme Court upholds the death sentence, it is required to issue a death warrant and deliver it, with a copy of the court's opinion, to the commissioner of corrections. The commissioner then

specifies the time, place and manner of execution. The defendant may choose death by lethal injection or by firing squad.

Under (c) firing squad executions must take place at a state prison. The squad consists of six peace officers chosen by the commissioner of corrections and paid in an amount set by the commissioner.

Under (d) the commissioner must consult with a licensed physician and then select a method of injection and a drug or combination of drugs to be used in executions by injection.

Under (e) the commissioner and a licensed physician must be present at each execution. The commissioner may invite up to nine citizens to witness an execution, including, among others, relatives and religious persons designated by the defendant.

Under (f) the commissioner of corrections must certify the death of the person executed.

Under (g) six members of the news media may attend an execution and serve as a pool for other news media.

Under (h) cameras and other recording equipment may not be used at the execution site until the execution is completed and the body is removed. Violation of this provision is a class B misdemeanor.

Under (i) persons attending an execution may be searched.

Under (j) the only additional persons who may attend an execution are necessary staff designated by the commissioner of corrections. Minors may not attend.

Under (k) the Department of Corrections must adopt regulations governing attendance at executions.

Section 5 adds six new sections to the statutes:

(1) AS 12.55.177 establishes a procedure for the sentencing of a person convicted of a capital felony. Under subsection (a), sentencing is a separate proceeding following the trial

or guilty plea. The proceeding is conducted before the trial jury or, if there was no jury trial, before a specially impaneled jury. Under subsection (b), the state and the defendant may present any relevant evidence concerning aggravating and mitigating factors, so long as the evidence was not obtained in violation of the state or federal constitution and so long as the defendant has the opportunity to rebut hearsay statements.

It is not clear whether subsection (b) is intended to disallow invocation of evidentiary privileges in a sentencing proceeding. The rules relating to evidentiary privileges are the only rules of evidence which are specifically made applicable to sentencing proceedings by Rule 101 of the Alaska Rules of Evidence. In light of the requirements of the Alaska Constitution and of Uniform Rule 39(e) that bills must note any changes being made to court rules, it would be prudent to clarify the legislative intent of subsection (b).

(2) AS 12.55.178 requires the sentencing jury to produce an advisory sentence for the court. The jury must decide three questions:

(A) did aggravating factors exist that justify a death sentence?;

(B) were there mitigating factors involved that outweigh the aggravating factors?; and

(C) should the sentence be a term of imprisonment or death?

(3) AS 12.55.179 requires the sentencing court to consider the evidence and the jury's advisory sentence and to enter a sentence. Subsection (a) provides that if a death sentence is imposed, the court must state in writing the aggravating factors that exist to justify the sentence and any mitigating factors considered by the court. Subsection (b) restates the fact that a death sentence may be automatically appealed to the Alaska Supreme Court under AS 12.55.115.

(4) AS 12.55.180 lists seven aggravating factors, any one of which could justify imposition of a death sentence if not outweighed by mitigating factors. The aggravating factors are:

(A) committing torture or aggravated battery amounting to deliberate cruelty during the crime;

(B) creating a risk of imminent physical harm to three or more persons;

(C) having a prior conviction of a violent felony;

(D) committing the crime under contract or for money;

(E) committing the crime while on release for another felony charge or for a conviction involving assault as a necessary element;

(F) the victim was a judge, prosecuting attorney, police officer, correctional employee or fireman and the crime was committed during or because of the victim's exercise of official duties; and

(G) the crime resulted from a conspiracy of five or more persons.

(5) AS 12.55.181 lists four mitigating factors:

(A) the defendant committed the crime under duress, coercion, threat or compulsion;

(B) the defendant was young and was influenced to commit the crime by a more mature person;

(C) the defendant acted in response to serious provocation by the victim; and

(D) the defendant helped authorities detect or apprehend others involved in the crime.

(6) AS 12.55.182(a) provides that if there is reason to believe that a person sentenced to death is incompetent or pregnant, the commissioner of corrections must notify the sentencing court, the prosecuting attorney and the person's defense counsel. The sentence of execution is then stayed until further order of the court. The term "incompetent" is not defined.

Under (b) the mental condition of the person who is thought to be "incompetent" or pregnant must be examined in accordance with AS 47.30.060 - 47.30.070. These statutes, however, were repealed in 1981. If the person is found to be incompetent, the person shall be committed. It is not clear what happens if the person later is found to be competent after being committed. If the person is found to be competent in the initial examination, that finding must be sent to the supreme court and the commissioner of corrections. The supreme court then must issue another death warrant and deliver it to the commissioner with another copy of finding that the person is competent. This warrant must specify a date of execution 30 to 60 days thereafter.

Under (c) if the defendant is pregnant, the (trial?) court must transmit a certificate making that finding to the supreme court and the commissioner of corrections. The execution is then stayed until the defendant is no longer pregnant. Immediately after the child is born or the pregnancy is otherwise terminated the (trial?) court must certify that fact to the supreme court and the commissioner of corrections. The supreme court must then issue another death warrant specifying a date of execution 30 to 60 days thereafter.

Section 6 removes from the jurisdiction of the state court of appeals cases in which a death sentence has been imposed. Note that under the 1984 legislative drafting manual, nothing less than a full subsection should be amended in a bill. Thus, the full text of AS 22.07.020(a) should appear in section 5.

Section 7 the purpose of this section is not clear. Apparently this section is an attempt to remove appeals of death sentences from the jurisdiction of the state court of appeals. The statute being amended, however, deals only with jurisdiction over appeals of sentences of imprisonment. Thus, section 6 is both confusing and superfluous.

EHH:ajb
J6/017

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM January 17, 1984

SUBJECT: Sectional analysis of HB 140

TO: Representative Charlie Bussell
Chairman, House Judiciary Committee

FROM: Edward H. Hein
Legislative Counsel

Section 1 makes first degree murder a capital felony.

Section 2 provides that a person convicted of a capital felony is subject to a mandatory sentence of 20 - 99 years' imprisonment or death.

Section 3 adds a new section, AS 12.55.115, to the statutes. Subsection (a) allows an automatic appeal to the Alaska Supreme Court of a death sentence for a period of 60 days after the sentence is handed down. The court may extend the time limit. Such an appeal must be given first priority by the court and the court may adopt special rules for hearing such an appeal. The court is required to make three determinations:

(1) was the sentencing influenced by passion, prejudice or arbitrariness?;

(2) was the finding of an aggravating factor supported by the evidence?; and

(3) is the death penalty imposed in similar cases?

Under subsection (b), if the Alaska Supreme Court upholds the death sentence, the trial court is required to specify the time, place and manner of execution.

Section 4 adds five new sections to the statutes:

(1) AS 12.55.177 establishes a procedure for the sentencing of a person convicted of a capital felony. Under subsection (a), sentencing is a separate proceeding following the trial or guilty plea. The proceeding is conducted before the trial jury or, if there was no jury trial, before a specially impaneled jury. Under subsection (b), the state and the defendant may present any relevant evidence concerning aggravating and mitigating factors, so long as the evidence was not obtained in violation of the state or federal constitution and so long as the defendant has the opportunity to rebut hearsay statements.

It is not clear whether subsection (b) is intended to disallow invocation of evidentiary privileges in a sentencing proceeding. The rules relating to evidentiary privileges are the only rules of evidence which are specifically made applicable to sentencing proceedings by Rule 101 of the Alaska Rules of Evidence. In light of the requirements of the Alaska Constitution and of Uniform Rule 39(e) that bills must note any changes being made to court rules, it would be prudent to clarify the legislative intent of subsection (b).

(2) AS 12.55.178 requires the sentencing jury to produce an advisory sentence for the court. The jury must decide three questions:

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(B) were there mitigating factors involved that outweigh the aggravating factors?; and

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factors that exist to justify the sentence and any mitigating factors considered by the court. Subsection (b) restates the fact that a death sentence may be automatically appealed to the Alaska Supreme Court under AS 12.55.115.

(4) AS 12.55.180 lists seven aggravating factors, any one of which could justify imposition of a death sentence if not outweighed by mitigating factors. The aggravating factors are:

(A) committing torture or aggravated battery amounting to deliberate cruelty during the crime;

(B) creating a risk of imminent physical harm to three or more persons;

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(D) committing the crime under contract or for money;

(E) committing the crime while on release for another felony charge or for a conviction involving assault as a necessary element;

(F) the victim was a judge, prosecuting attorney, police officer, correctional employee or fireman and the crime was committed during or because of the victim's exercise of official duties; and

(G) the crime resulted from a conspiracy of five or more persons.

(5) AS 12.55.181 lists four mitigating factors:

(A) the defendant committed the crime under duress, coercion, threat or compulsion;

(B) the defendant was young and was influenced to commit the crime by a more mature person;

(C) the defendant acted in response to serious provocation by the victim; and

(D) the defendant helped authorities detect or apprehend others involved in the crime.

At page 4, line 12, the bill states that all mitigating factors, including the four that are listed, must be considered. Thus, a defendant is entitled to raise anything that could be construed as a mitigating factor, even if it is not listed. This statute, however, does not specify who must consider the mitigating factors. Is it the court, the jury, or both? Likewise, this statute does not say whose judgment controls on the question of whether the mitigating factors outweigh any aggravating factors that exist. Under AS 12.55.178(2), the sentencing jury would be required to balance mitigating factors against aggravating factors. But the jury's findings are only advisory. It is not clear, under AS 12.55.181, whether a finding by the jury that the mitigating factors outweigh the aggravating factors is sufficient to prevent imposition of the death sentence if the judge disagrees with the jury's findings. In light of the gravity of this determination, legislative intent should be made clear. This could be done by using the active voice instead of the passive voice at page 4, lines 10-13. The same considerations just discussed apply to the language at page 3, lines 16-18.

Section 5 removes from the jurisdiction of the state court of appeals cases in which a death sentence has been imposed. Note that under the 1984 legislative drafting manual, nothing less than a full subsection should be amended in a bill. Thus, the full text of AS 22.07.020(a) should appear in section 5.

Section 6 The purpose of this section is not clear. Apparently this section is an attempt to remove appeals of death sentences from the jurisdiction of the state court of appeals. The statute being amended, however, deals only with jurisdiction over appeals of sentences of imprisonment. Thus, section 6 is both confusing and superfluous.

EHH:ojb
J2/034

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NATIONAL CONFERENCE OF STATE LEGISLATURES
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NCSL STAFF CONTACT: MARY FAIRCHILD
303/292-6600

REV. DATE: 01/07/84

DEATH PENALTY LAWS

BACKGROUND

In FURMAN v. GEORGIA, 408 U.S. 238 (1972), the U.S. Supreme Court found that the procedures by which to impose the death penalty were "arbitrary and capricious" and therefore in conflict with the 8th and 14th amendments. The court did not declare the death penalty itself to be unconstitutional. Rather, the court found that the GEORGIA law did not provide any standards to guide the sentencing authority when deciding which defendants convicted of a capital offense should be sentenced to die and which should live.

After the FURMAN decision, GEORGIA and many other states designed new capital punishment laws to comply with the court decision. State legislatures generally enacted two types of laws: mandatory death penalty laws for persons convicted of a certain capital offense and laws to provide objective standards to guide the sentencer in determining what punishment should be imposed. Both types of law were written to reduce and define the discretion of the sentencer. Mandatory laws completely removed the decision of whether or not to impose the death penalty from the judge or the jury and were later declared unconstitutional. In WOODSON v. NORTH CAROLINA, 96 S. Ct. 2978 (1976) and ROBERTS v. LOUISIANA, 96 S. Ct. 3001 (1976), the U.S. Supreme Court held that a sentence of death cannot be an automatic consequence of guilt and such sentences must consider the circumstances of the case and the individual offender.

In 1976, the laws of GEORGIA, FLORIDA, AND TEXAS were upheld by the United States Supreme Court (See GREGG v. GEORGIA, 96 S. Ct. 2909; PROFFITT v. FLORIDA, 96 S. Ct. 2960; and JUREK v. TEXAS, 96 S. Ct. 2950). Each law provides standards to guide the sentencing authority in deliberations regarding the punishment of death. The following common characteristics can be found in these laws. First, the procedure is two-tier; a trial is held to determine guilt and a separate sentencing hearing is held to determine the appropriate punishment, life imprisonment or death. Second, during the sentencing hearing, the sentencing authority must consider certain factors, issues and circumstances specified or required by law. Evidence is introduced and both the prosecutor and the defendant can present arguments relating to these issues. Third, any decision to impose the death penalty is reviewed by the state supreme court. Although the laws are similar, each state has taken a somewhat different approach to establish standards to govern sentencing procedures.

In TEXAS and FLORIDA, sentencing hearings are held before a jury (Tex. Code Crim. Pro. 37.071 and Fla. Stat. Ann 921.141). GEORGIA law allows the judge or the jury to consider evidence during the sentencing hearing (GA Code Ann. 27-2503).

In order for a death sentence to be imposed in GEORGIA, the sentencing body must find at least one aggravating circumstance specified by law to exist and make a recommendation that the individual be sentenced to death (GA Code Ann. 26-3102 and 27-2534.1) A history of assaultive behavoir is an example of an aggravating circumstance. Unlike Georgia, FLORIDA lists both aggravating and mitigating circumstances to be considered by the sentencing jury. The sentencing jury then submits an advisory sentence to the court (Fla. Stat. Ann. 921-141). Among the circumstances considered to be mitigating factors are the defendant's state of mind and if the defendant is of a particularily young age. When considering the appropriate sentence to be imposed, the mitigating factors can outweigh the aggravating factors. The trial judge in FLORIDA makes the final decision of what sentence to impose, life imprisonment or death.

Neither aggravating or mitigating circumstances are specified in TEXAS law. However, the jury must consider three issues and render a verdict of "yes" or "no" on each issue. First, did the offender behave in a deliberate manner? Second, is the offender likely to commit future acts of violence? Third, if evidence has been presented to show that the offender was provoked by the victim, were the actions of the offender unreasonable in light of the provocation? If the jury answers "yes" to each issue it must consider, the court is required to sentence the offender to death (Tex. Code Crim. Proc. 37.071). In JURECK v. TEXAS, the court held that although "Texas has not adopted a list of statutory aggravating circumstances...its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose." (JURECK v. TEXAS, at 2955). The Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations (Tex. Penal Code 19.03, 1974).

In reviewing a death sentence, the GEORGIA state supreme court is required by state law to determine, 1) if the sentence was imposed in an arbitrary, prejudicial or passionate manner, 2) if the evidence supports the sentencing authority's finding of the aggravating circumstances, and 3) if the sentence is disproportionate or excessive to other sentences imposed in similar cases (GA Code Ann. 27-2537). Neither FLORIDA nor TEXAS laws direct the state supreme court to conduct a certain kind of review but review is automatic (Fla. Stat. Ann. 921-141 and Texas 37.071).

By specifying circumstances and issues for consideration when determining the appropriate sentence of a capital offender, the legislatures of GEORGIA, TEXAS and FLORIDA have provided an acceptable mechanism to reduce arbitrary decision-making. Supreme court review is an extra safeguard to protect against totally discretionary sentencing.

RECENT LEGISLATION

To date, thirty-eight states and the federal government have laws to impose the death penalty for certain crimes.

STATE	METHOD	# OF PERSONS ON DEATH ROW
ALABAMA Act. No. 81-178, H.B. 297, Regular Session 1981, 1981 Acts p. 203	electrocution	67
ARIZONA Ariz. Const. art. 22, sec. 22 Ariz. Rev. Stat. Ann. Secs. 13-703, 704.	gas	52
ARKANSAS Ark. Stat. Ann. secs. 41-803, 41-1351, 41-3952	lethal injection (or choice of electrocution for those sentenced before March 24, 1983)	24
CALIFORNIA Calif. Penal Code Secs. 37, 190 et. seq., 3604, 4500 (Deering)	gas	144
COLORADO Colo. Rev. Stat. 16-11-401, 18-1-105, 18-1-409	gas	1
CONNECTICUT Conn. Gen. Stat. 53A-46 Revised 1981	electrocution	0
DELAWARE Del. Code Ann. Tit. 11, [illegible] 4209	lethal injection	6
FLORIDA Fla. Stat. Ann. sec. 922.10 (West)	electrocution	204
GEORGIA GA Code Ann. sec. 27-2512	electrocution	112
IDAHO Idaho Code sec. 18-11-19 (2716)	lethal injection or firing squad	7
ILLINOIS Ill. Ann. Stat. Ch. 38 secs. 119-5, 1005-1-[illegible]	electrocution	64
INDIANA Ind. Code Ann. 35-1-46-9 (Burns)	electrocution	20

KENTUCKY KY Rev. Stat. Ann. sec. 431.220 (Baldwin)	electrocution	18
LOUISIANA LA Rev. Stat. Ann. Sec 15:569 (West)	electrocution	38
MARYLAND MD Ann Code Art 27, sec. 71	gas	11
MASSACHUSETTS MA General Laws, Chap. 279, Sect. 55 and 56		0
MISSISSIPPI Miss. Code Ann. sec. 99-19-51	gas	39
MISSOURI MO Ann. Stat. sec. 546.720 (Vernon)	gas	23
MONTANA Mont. Rev. Codes Ann. sec. 95-2303	hanging or lethal injection	4
NEBRASKA NE Rev. Stat. sec. 29-2532	electrocution	11
NEVADA Nev. Rev. Stat. sec. 176.355	lethal injection	20
NEW HAMPSHIRE NH Rev. Stat. Ann. sec. 630:5	hanging	0
NEW JERSEY Public Law 1982, Ch. 111	lethal injection	1
NEW MEXICO NM Stat. Ann. secs. 31-14-11 et seq. 31-18-2	lethal injection	5
NEW YORK NY Penal Law, Section 60.06	electrocution	1
NORTH CAROLINA N.C. Gen. Stat. secs. 15-187,188	gas or lethal injection	35
OHIO Ohio Senate Bill 1, adopted 1981	electrocution	16
OKLAHOMA OK Stat. Ann. tit. 22, sec. 1014	lethal injection	39

PENNSYLVANIA Pa. Stat. Ann. Tit. 18, secs. 1102, 1311; 585. 19 sec. 1121 (Pardon)	electrocution	50
SOUTH CAROLINA SC Code secs. 16-3-20, 24-3-530	electrocution	29
SOUTH DAKOTA 1979 SD Session Laws. Crim Pro. Ch. 160 sec. 10, 20-27	electrocution	0
TENNESSEE Tenn. Code Ann. sec. 40-3117	electrocution	34
TEXAS Tx. Code Crim. Proc. Ann. art. 43.14	lethal injection	162
UTAH UT. Code Ann. sec. 77-36-16	firing squad (recent amendment repealed hanging as an optional method)	4
VERMONT VT. Stat. Ann. Tit. 13, sec. 7106	electrocution	0
VIRGINIA Va. Code sec. 53-318	electrocution	20
WASHINGTON Wa. Rev. Code Ann. sec. 10.70.090	hanging or lethal injection	3
WYOMING WY. Stat. Sec. 7-13-405	gas	3

REPORTS AND PUBLICATIONS

Gettinger, Stephen, "The Death Penalty is Back--And So Is the Debate," CORRECTIONS MAGAZINE, June 1979.

Papp, Dennis M., "State Capital Punishment Schemes Expressly Upheld by NEW YORK

electrocution 1

the U.S. Supreme Court", Ohio Legislative Service Commission, April 13, 1979. (Available through NCSL's Legislative Information System. Document RCH7903198.)

"The Constitutionality of the Death Penalty Statutes in Florida, Ohio and Colorado", Colorado Legislative Council Staff, January 30, 1979. (Available through NCSL's Legislative Information System.)

"The Question of Capital Punishment", Contact Inc., Revised 1981. (This publication includes case law, legislation, and other detailed information and can be obtained for $10.00 from Contact Inc., P.O. Box 81828, Lincoln, Neb. 68501.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

January 27, 1984

MEMORANDUM

TO: Representative Charlie Bussell

FROM: Nancy Pease *Nancy Pease*
Legislative Analyst

RE: Reinstating the Death Penalty
Research Request 84-2

Craig Lovell of your staff requested information on the reinstatement of the the death penalty in other states. Specifically, he asked about the steps that were taken in other states to reinstitute or oppose the death penalty, and the issues that were raised. He also asked for a description of past Alaska legislation aimed at reinstating the death penalty.

Reinstatement through Legislation

A summary of death penalty laws released by the National Conference of State Legislatures on January 7, 1984 lists 38 states which prescribe capital punishment for heinous crimes (see Attachment A). In many of these states, the death penalty had at one time been abolished, declared unconstitutional, or invalidated by its similarity to death penalty statutes that were ruled unconstitutional in other states. In most cases, legislation was the means of reinstating or substantially revising the death penalty to meet constitutional requirements.

States where new death penalty statutes have been enacted through legislation include; New Jersey (1982); Connecticut, Idaho, Ohio and Washington (1981); Alabama (1980); South Dakota (1979); Maryland, Pennsylvania, Arizona, Maine, Maryland and South Carolina (1978); Illinois, Indiana, Missouri, Mississippi, Montana, Missouri, Nevada and North Carolina (1977); Florida, Georgia and Oklahoma, (1976); and Texas (1974).

Although legislation has been the method by which the death penalty has been reinstated in most states, the support or opposition of the executive branch, the judiciary, and the public have been strong factors in other states.

Public Initiatives and Referenda

In Massachusetts, voters reinstated the death penalty by approving a referendum amendment. In California, a ballot initiative succeeded in increasing the types of crimes and the circumstances in which the death penalty could be imposed. In Oregon, since 1914, voters have twice abolished and twice reinstated the death penalty (through both public initiatives and one legislative referendum). Most recently in Oregon, petitioners failed to collect enough signatures to place the two measures on the state ballot that would be necessary to reinstate the death penalty (a constitutional amendment of the Oregon Criminal Code and a statute providing for capital punishment). Michigan proponents of the death penalty also failed last year in their attempt to petition for a ballot vote on amending the Michigan constitution which currently prohibits capital punishment.

States Without A Death Penalty

The following states and U.S. jurisdictions do not have a death penalty: Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, North Dakota, Oregon, Rhode Island, West Virginia, Wisconsin and Guam.

As you are probably aware, both Alaska and Hawaii abolished capital punishment as territories, and, as states, have never instituted capital punishment laws. The District of Columbia has established through case law a criminal code which does not prescribe the death penalty. Guam has also never had a death penalty, and a referendum to institute one in the late 1970s failed through the electorate.

Michigan is the only state whose constitution prohibits capital punishment. According to Henry Schwarzchild of the American Civil Liberties Union's (ACLU) Capital Punishment Project, the northern tier of midwestern states have historically opposed the death penalty, dating back to the progressive farmer/labor movement of the mid-nineteenth century. Although South Dakota broke with that tradition in 1979, Mr. Schwarzchild guardedly predicted that the traditional opposition to the death penalty in the upper Midwest is "unlikely to be undone" in the near future. In Michigan, a 1983 referendum drive to amend the constitutional prohibition of capital punishment failed to collect enough valid signatures to place the amendment on the ballot. In Wisconsin, death penalty legislation is regularly introduced--and regularly fails to pass.

Gubernatorial Opposition

In other states, a strong stand by the governor has been a factor in preventing reinstatement of the death penalty. According to Mr. Schwarzchild of the ACLU, the governor of New York has vetoed death penalty statutes passed by that state's legislature in each of the past nine years. The Governor of Kansas also vetoed death penalty legislation in three recent years. In New Jersey, according to the assistant director of the New Jersey Department of Criminal Justice, the previous governor vetoed every death penalty bill approved by the state legislature during his eight-year tenure; only with the election of a new governor in 1982 did the death penalty become law. The previous Governor of Kentucky also blocked legislation to reinstate the death penalty for the length of his term in office.

Action on the Death Penalty Issue in Four States

In response to your interest in the dynamics and the debate surrounding death penalty legislation in other states, we contacted directly several states where the issue has recently been subject to public debate.

In South Dakota, Dennis Holmes of the Attorney General's office said that until recently, the death penalty issue had been in abeyance in his state for a number of years, partly because there were few sentencings in the 1950s and 1960s. In 1977, the legislature removed the death penalty from the statutes when its constitutionality was called into question by U.S. Supreme Court rulings against similar statutes in other states. In 1979, despite some public protest, a new death penalty was enacted by the South Dakota legislature as part of a major recodification of criminal procedure to meet federal guidelines. Since the reenactment, only three capital offenders have been prosecuted in South Dakota, and all three offenders were sentenced to life imprisonment. Mr. Holmes estimates that since the reenactment of the death penalty, opposition has dwindled, and public support has grown.

In Pennsylvania, according to Assistant Attorney General Rosalyn Robinson, the executive and the legislative branches have opposed one another on the death penalty issue in recent years. In 1971, the attorney general issued an opinion ordering the release of death row prisoners and the dismantling of the state's electric chair. In 1978, the legislature overrode the governor's veto of a new death penalty bill and amended three Pennsylvania statutes. The amended statutes provide for a bifurcated trial for capital crimes, procedural guidelines for weighing aggravating and mitigating circumstances, and an automatic review by the Pennsylvania Supreme Court of every death sentence. The new statutes have been upheld in the three cases appealed to the Pennsylvania Supreme Court to date.

An assistant attorney general in Vermont reported that his state is considered to be a de facto abolition state because the current death penalty is probably unconstitutional under the rulings of the U.S. Supreme Court in Furman v. Georgia. According to the assistant attorney general, capital punishment is limited to a very few crimes and because there are very few incidences of such crimes in Vermont. Although electrocution is the prescribed method of killing, Vermont has no electric chair, and no one has been executed in Vermont since the 1940s.

Except for an unsuccessful bill to revise the death penalty several years ago, there has been no real movement for or against the death penalty in Vermont. Th assistant attorney general perceived minimal legislative or gubernatorial interest in the issue, and said that public advocacy of the death penalty appeared to be insignificant.

By contrast, in Oregon, the death penalty has been hotly debated for the past seventy years. In 1914, a petition initiative amended the Oregon Constitution to abolish capital punishment. In 1920, voters in a primary election instituted capital punishment for unmitigated cases of first degree murder. In 1964, the people adopted a legislatively referred repeal of the death penalty. In 1971, the revision of the Criminal Code made no provision for the death penalty. In 1978, an initiative campaign succeeded in making aggravated murder a capital offense, but the Oregon Supreme Court disapproved the specified trial procedure. In 1981, a bill to reinstate the death penalty died in judiciary because the Oregon Constitution specifies that the penal system must provide rehabilitation and not retribution, and also specifically prohibits cruel and unusual punishment.

According to Stevie Remington of the Oregon chapter of the ACLU, death penalty bills have been introduced in every session of the Oregon legislature since 1963, and have died in committee almost every year. In one instance, the Rules Committee passed a measure on to the full chamber where it was defeated by a 2 to 1 margin. However, the current governor of Oregon supports capital punishment and public opinion polls show 80 percent of Oregon residents favor it. A petition drive is again under way to place a constitutional amendment and a death penalty statute on the ballot in 1984.

Debate of Death Penalty Issues

Our conversations with legal and legislative professionals and with advocacy groups in several states seem to confirm that capital punishment has aroused the same moral, ethical, legal and political controversies wherever and whenever it has been considered. Because of the complexity of the death penalty issues, none of the states we contacted

were able to furnish a brief summation of either the public or legislative debate. However the issues have been well summarized by respected scholars of the subject in a number of books and articles.

For advocates on both sides of the issue, Hugo Bedau's The Death Penalty in America has been for many years a useful repository of the facts and the main arguments. In his third edition of this "thinker's reference", Bedau has included a section of powerful arguments favoring capital punishment from such eloquent advocates as Walter Berns, Ernest van den Haag, and Glen D. King. These statements are balanced by such well-known abolitionists as Anthony G. Amsterdam, Charles L. Black, Jr., and Henry Schwarzchild. Both sides deal with the philosophical considerations that must be resolved in deciding whether or not the state has a right to kill a convicted felon. We will be happy to provide you with a library copy of The Death Penalty in America if you are not already familiar with this comprehensive reference.

In addition, we also have available two other summaries of the moral and legal issues that seem to have risen every time and place the death penalty has been considered.

History of Death Penalty Legislation in Alaska

Since the abolition of the death penalty in Alaska in 1957, legislators have introduced at least seven measures relating to capital punishment. Six of these measures, including three pending in the current session, would provide for reinstatement of the death penalty. The seventh related measure, introduced in the First Alaska Legislature, redefined "felony offense" to omit reference to punishment by death. Attachment A describes the death penalty bills and notes their sponsors, dates of introduction, and their assignments to committees. None of the bills to reinstate the death penalty in previous sessions succeeded in passing through the committee review process in both chambers of the legislature.

In addition to these bills, it is possible that the death penalty could have been proposed as part of broader revisions of the criminal code and stricken by amendments before the bill's passage.

* * *

We hope this information is helpful to you. If you have further questions on this or other subjects, please let us know how we can help.

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Attachments

ATTACHMENT A
ALASKA LEGISLATION RELATING TO THE DEATH PENALTY
1958-1984

Thirteenth Legislature

House Bill No. 140, sponsored by Rep. Pestinger and cosponsored by Reps. Ward, Flood, Liska, and Shultz, would authorize the death sentence in Alaska and classify first degree murder as a capital felony, punishable by 20-99 years in prison or by death. (Amends AS 11.41.100(b) relating to first degree murder and AS 12.55.125 relating to the sentence.)

Establishes procedures for automatic review by the Supreme Court of any death sentence handed down. Establishes sentencing procedures for capital felonies. In any sentence of death, the court must issue written finding of the aggravating factors that exist to justify the sentence and the mitigating factors considered by the court. Lists aggravating and mitigating factors to be considered in capital felonies. At least one aggravating factor must be found to exist in order to impose the death sentence. Aggravating factors must not be outweighed by mitigating factors, Does not provide for effective date (effective 90 days after Governor's signature).

Introduced January 28, 1983 and referred to Judiciary and Finance.

House Bill No. 235, sponsored by Rep. Bussell and cosponsored by Reps. Uehling, Liska and Shultz, would authorize an advisory vote on whether to institute the death penalty in Alaska for first degree murder. The question would appear on the ballot at the next general or special election in the following form: "Shall the Legislature of the State of Alaska enact laws instituting capital punishment for first degree murder?" Effective immediately.

Introduced March 4, 1983 and referred to Judiciary.

Senate Bill No. 121, sponsored by Sen. Pettyjohn and cosponsored by Sens. Kelly, P. Fischer and Faiks. Identical to HB 140, with one change. In HB 140, the jury would be responsible for issuing an advisory sentence to the court for capital felonies. The court would then deliberate and enter a sentence of death or a term of imprisonment. Under SB 121, the advisory sentence provision is eliminated and the jury would be directly responsible for issuing either the death sentence or a prison sentence.

Introduced February 11, 1983 and referred to Judiciary and Finance.

Twelfth Legislature

Senate Bill No. 73, sponsored by Sen. Bradley, would make first degree murder a capital felony (amendment to AS 11.41.100(b)) punishable by a definite term of imprisonment of from 20 to 99 years or by death (amendment to AS 12.55.125(a)). Currently murder in the first degree is an unclassified felony and is punishable by a definite term of imprisonment of from 20 to 99 years.

Adds new sections to AS 12.55 requiring automatic review of any death sentence by the Supreme Court within 60 days; outlining the sentencing procedure for a capital felony; requiring the jury to give an advisory sentence for a capital felony including aggravating or mitigating factors or whether the defendant should be sentenced to jail; and listing aggravating and mitigating factors to be considered in a capital felony case.

Amends the jurisdiction of the Court of Appeals to specifically state that the court does not have appellate jurisdiction in actions and proceedings commended in the superior court involving prosecution for a capital felony for which a death sentence is imposed (amendment to AS 22.07.020(a)(1) & (b)). Does not provide for an effective date.

Introduced January 14, 1981 and referred to State Affairs and Judiciary.

House Bill No. 458, sponsored by Rep. Hurlbert, is identical to SB 73

Introduced April 2, 1981 and referred to Judiciary.

Eighth Legislature

House Bill No. 675, sponsored by Rep. Saylors, relates to the imposition of the death penalty and changing Rule 35, Rules of Criminal Procedure. Amends AS 11.05 by adding a new section (Sec 11.05.015) entitled PUNISHMENT FOR CERTAIN MURDER CONVICTIONS.

Introduced February 21, 1974 and referred to Judiciary.

First Legislature

Senate Bill No 255, sponsored by the Judiciary Committee, reclassified crimes and redefined felonies and misdemeanors, removing punishment by death from the definition of felony; amending Sec. 65-2-2, ACLA 1949 as amended by Sec. 3, Ch. 132, SLA 1957; and providing for an effective date.

Signed into law on March 31, 1960.

Compiled, with revisions, from Alaska legislative records.

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A Point of View article submitted for publication in the Anchorage Daily News, Anchorage, Alaska, by Pastor Jack R. Bacher, Scenic Park Bible Church, 7145 Nadelynne Drive, Anchorage, Alaska 99504

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Recently (August 23, 1982) the readers of the Anchorage Daily News were editorially told that "Alaskans must reject it" (the death penalty).

I personally take issue with the tenor and conclusions of that editorial. It is riddled with glaring contradictions when compared to revealed truth; it describes as "uncivilized" those who hold the position of capital punishment.

There are many of us who take the position as taught in the Bible that capital punishment is fundamental to law as instituted by God. Therefore any statements made to demean or ridicule the principle are perceived as made directly against an all-wise God. The question I ask is this: why do we creatures resist the clear teaching of our Creator?

I believe I found the answer to that question in the first mention of capital punishment in the Bible. It is found in Genesis 9:6, "Whoso sheddeth man's blood, by man shall his blood be shed; for in the image of God made he man." This was stated long before the giving of the Ten Commandments and other precise statements of "Mosaic" law.

The stance of the entire law system in our country is "justice for all;" it comes directly from the Bible. Explicit instruction is recorded regarding the taking of life from another human being with premeditation (murder in the first degree). The person so doing and found guilty was put to death. Even the concept of second degree

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murder and manslaughter are carefully described and the punishment proscribed to fit the crime.

Many of us who believe the Bible do not believe that is subject to debate by finite social scientists who see themselves as "civilized". The continual debates, studies, research polls, on ad infinitum on the "deterrent" issue are nothing mor- than the product of our own thinking. It is obvious from the standpoint of Scripture that punishment is a deterrent to crime. However, that principle will not apply unless the punishment fits the crime, as ordained of God. Confusion and polarization always permeates a society which rejects Divine principles.

Perhaps some who are reading this are "seething" at this point because of their total rejection of Biblical concepts. However I have not yet made my point which really explains why we have such polarization of basic issues like capital punishment. It is found in the passage quoted above, Genesis 9:6. The words not only give the concept for capital punishment but also the reason for it. The reason why a murderer's life is to be taken: "for in the image of God made he man!"

Man is in a category of "equal importance." To God, the man's life who is taken in murder is equally important to the life of the one who took it. It is obvious that the man who took the life of another did not feel that way. And when we do not obey God and take the life of the murderer we side with the murderer who decided the life of his victim was not as important. And we call that position "civilized." Hardly!

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But that does not explain why we have this difference of opinion in our society today. This difference exists because many people do not believe that man "was created in the image of God." The Humanist teaching of the evolutionary hypothesis on origins has degraded our image of our fellow man. To many, man is only a creature of chance, with no particular reason for existence and certainly no destiny of any importance. (Today many animals enjoy greater protection under law than does man himself.)

Logically therefore we can take the position that the murderer is more important than his dead victim. After all, the murderer is still alive; his victim is dead. This same evolutionary thought has brought us to positions of difference over abortion and will become more apparent as the issues of infanticide and euthanasia are debated.

I certainly do not want to convey the "all is over for us attitude." The equal time debate on teaching Scientific Creation/ Evolution is a healthy sign that the generation now being schooled will have an opportunity for an alternative philosophical base. Scientists by the hundreds are withdrawing their support of the exclusivist position of offering only the evolutionary explanation on origins. Hopefully the American sense of fairness will demand that Scientific Creationism will be given equal time.

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Deterrence, Death, and the Victims of Crime: A Common Sense Approach

*Frank G. Carrington**

I. Introduction

The concept of deterrence is one of the most important in the formulations of the victim advocate, primarily because of two essential premises that underlie the entire field of victim advocacy. The first, but not necessarily the most important, of these premises concerns the policy that favors assuaging the plight of persons after they have been victimized. This relief can be provided in a number of different ways: compensation to innocent victims from the states; restitution to victims as a condition of granting probation to the criminal; victim counselling;[1] and victim/witness assistance programs.[2] The second premise of victim advocacy, namely, preventing victimization from ever occurring, is also of critical importance because, obviously, in each instance in which a given act of victimization is prevented, the palliative measures described above will not be necessary.

This preventive goal can be effectuated through two types of activity. First, victim advocates often engage in activity that encourages and assists the potential victim of crime to help himself in programs such as neighborhood watch, inscription of identifying serial numbers on personal property, and other citizen crime prevention programs. The second type of activity, with which this Article primarily deals, entails efforts by victim advocates to structure the system to deter would-be criminals from engaging in acts of victimization. It also requires efforts to deter third parties—for example, parole officials, whose duties include making decisions

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1. An example of this type of counselling occurs within rape crisis centers.

2. A number of these programs have been established in various prosecutors' offices across the country.

that may place dangerous criminals in a position to victimize again—from acting to the detriment of potential victims.

In sum, the notion of deterrence has assumed critical dimensions in the area of victim advocacy and assistance. Part II of this Article deals with deterrence generally as a common sense concept and emphasizes the potential impact that different attitudes toward this concept have on crime victims. Part III then focuses on particular aspects of deterrence in the capital punishment controversy—again by emphasizing the effect on victims. The final part of the Article explores a rather new area of the law that applies the concept of deterrence—by threatening civil liability for gross negligence in the handling and release of prisoners—to third party custodial officials in an attempt to prevent future victimization. The Article concludes that a common sense approach to the question of deterrence, rather than one which is based on delaying any decision until all the empirical evidence is compiled, is necessary to combat the serious crime problem that now faces the country.

II. Deterrence: A Common Sense Concept

To deter an individual from a contemplated activity, one must discourage or restrain that individual from acting or proceeding through the inducement of fear, doubt, or some sense of deprivation. Deterrence does not act as a direct restraint on conduct; rather, it works to manipulate the motives or incentives behind that conduct. The deterrence rationale depends on a conception of human motivation that is based on a function of cost over gain. Successful deterrence, therefore, requires that the certainty and quantum of punishment sufficiently outweigh any expectation of possible gain in the mind of the would-be wrongdoer.[3]

The value of punishment as deterrence rests not on how it affects individual offenders, but on how it affects the future conduct of the general public.[4] Indeed, in the individual case deterrence already has failed. As one contemporary proponent of deterrence, Ernest van den Haag, has pointed out, "[d]eterrent effects largely depend on punishment being meted out according to the crime, so that a prospective offender can know the likely cost of the offense and be deterred by it."[5] In other words, members of the public

3. *See, e.g.*, E. van den Haag, Punishing Criminals 113-14 (1975); J. Wilson, Thinking About Crime 53-55 (1975).

4. *See* E. van den Haag, *supra* note 3, at 60-61.

5. *Id.* at 61.

the poor face in attempting to improve their situation to the level of a literal truth, this argument assumes its conclusion. It boldly equates the condition of life in the inner cities with the conditions found in Attica, Green Haven, Soledad, or San Quentin. Indeed, if this argument were extended to its logical conclusion, it would identify every person who lives in the ghetto with a felon who is behind bars because society has deemed that he is too dangerous to be at liberty. The argument completely ignores the great majority of inner-city dwellers who are decent, hard-working individuals. These people admittedly live under conditions that are deplorable, but they do not become criminals; rather, they want nothing more than to conduct their affairs in relative freedom from criminal harm. If everyone who resided in the inner city were a criminal and found prison life preferable to ghetto life, this argument might have some superficial merit; the facts, however, simply do not support such a proposition.

A positive correlation between poverty and crime undoubtedly does exist, but, as James Q. Wilson contends, "[t]he desire to reduce crime is the worst possible reason for reducing poverty. . . . Reducing poverty and breaking up the ghettoes are desirable policies in their own right, whatever their effects on crime."[13] Opponents of deterrence, however, apparently conclude that if poverty is in some sense a cause of crime, then only the elimination of this cause will reduce crime. Wilson finds that these opponents have "become so preoccupied with dealing with the causes of the crime (whether . . . social conditions or police inadequacies) that [they] have almost succeeded in persuading [them]selves that criminals are radically different from ordinary people—that they are utterly indifferent to the costs and rewards of their activities."[14] He argues that no evidence exists to support this conclusion, and that regardless of whether criminals are prone to accept greater risks or have a weaker sense of morality than an average citizen, "if the expected cost of crime goes up without a corresponding increase in the expected benefits, then the would-be criminal . . . engages in less crime."[15]

Opponents of deterrence often base a second argument on sta-

13. J. WILSON, *supra* note 3, at 203. In response to the notion that poverty causes crime, Wilson notes that the dramatic increase in crime during the last fifteen years has occurred "concurrently with a general rise in the standard of living and thus could not be explained by worsening social conditions." *Id.* at 74.

14. *Id.* at 175.

15. *Id.* at 175-76.

must expect that if they commit a particular crime, their punishment will be comparable to what past offenders have received. If these offenders repeatedly are paroled, or if they are never apprehended at all, then the ostensible threat of a stiff statutory penalty has virtually no deterrent effect.[6]

These notions of a perceived threat and cost versus gain do not require that potential criminals perform some rational calculation of the cost/benefit ratio. Irrespective of their intellectual capacity to understand a concept, human beings are capable of responding to threats, learning from experience, and forming habits.[7] Deterrence, therefore, does not depend on the rationality of a response, but merely on the likelihood and regularity of a response to a particular threat.[8]

Some commentators, however, reject this theory of deterrence for a variety of reasons. One respected federal judge, for example, dismissed the concept outright in a recent article.[9] This criticism of the deterrence rationale primarily rests on two arguments, neither of which can withstand careful scrutiny. First, the article advances the theory that living in the inner city is worse than living in a prison, and that the threat of incarceration, therefore, has no deterrent effect on those who live in the ghettos.[10] From the premise that most crime is committed by members of "an underclass of brutal social and economic deprivation . . . [who] are raised in deteriorating, overcrowded housing . . . [and who] are denied [a] sense of order, purpose, and self-esteem,"[11] the article succinctly concludes that "the threat of prison may be a meaningless deterrent to one whose urban environment is itself a prison."[12]

By elevating a metaphorical illustration of the difficulties that

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6. *See infra* notes 16-20 and accompanying text.

7. *See* E. VAN DEN HAAG, *supra* note 3, at 113. Van den Haag notes,

> Prospective offenders need be no more rational than rats are when taught by means of rewards or punishments to run a maze. Experimenters must calculate the effects they desire and the means appropriate to achieve them. So must legislators. But the rats do not calculate, nor do the subjects of legislation need to.

Id.

8. *See* J. WILSON, *supra* note 3, at 174-77. Wilson contends that criminals may be less likely to respond to a given threat because they are willing to run greater risks. *Id.* at 175. He also argues that increasing the certainty of punishment deters crime more effectively than increasing its severity. *Id.* at 174.

9. Bazelon, *Crime: Toward a Constructive Debate*, 67 A.B.A.J. 438 (1981).

10. *Id.* at 440.

11. *Id.*

12. *Id.* (citing Diana Gordon, currently president of the ultrapermissive National Council on Crime and Delinquency).

tice, "an impotent society."[20]

Judge Bazelon candidly acknowledged in his article in the *American Bar Association Journal* that he has no ready answers for the country's crime problem.[21] This author makes the same acknowledgement.[22] The point of the foregoing discussion is simply that considering the unparalleled difficulties in apprehending and convicting criminals, the lack of a significant drop in crime rates as incarceration and lengths of sentences increase cannot alone support an argument against deterrence.

Many people today talk in reverent terms of empirical evidence—primarily statistics—as if this were the touchstone of any argument. The conclusion to Judge Bazelon's article typifies this approach:

> We need to know much more about the precise costs of an effective program of deterrence before we can dismiss the recent proposals. At the present time, however, the case for deterrence has not been convincingly made. After a comprehensive review of the literature a panel of the National Academy of Sciences concluded: "Despite the intensity of the research effort, the empirical evidence is still not sufficient for providing a rigorous confirmation of the existence of a deterrent effect. . . . Policy makers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence, which they themselves are frequently unable to evaluate, strongly supports the deterrence hypothesis."[23]

Nevertheless, the unifying theme of this Article is that considering all the variables at issue in such a volatile area as criminal justice, and taking into account all the statistics for and against deterrence, the entire matter ultimately reduces to principles of common sense.

The disagreement over the question of deterrence between the pragmatists—Wilson, van den Haag, and others[24]—and the theoreticians—represented by Judge Bazelon and the National Academy

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20. Address by Chief Justice Warren E. Burger, American Bar Association Annual Convention (Feb. 6, 1981), *noted in* Bazelon, *supra* note 9, at 438.

21. Bazelon, *supra* note 9, at 438.

22. *But see* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT (1981) [hereinafter cited as TASK FORCE REPORT]. This report contains a number of recommendations on bail abuse, admissibility of evidence, limitations on post-conviction release, and other procedural aspects of the criminal justice system that are designed to streamline the process and restore a balance between the rights of accused and convicted criminals and the rights of the law-abiding members of society. The author was a member of the Task Force and is naturally prejudiced in favor of the Report. Nevertheless, the recommendations at least are worthy of consideration in dealing with the current crisis in crime in this country.

23. Bazelon, *supra* note 9, at 441.

24. *See* E. VAN DEN HAAG, *supra* note 3; J. WILSON, *supra* note 3; authorities cited *infra* note 32.

tistics that purport to prove the ineffectiveness of deterrence; these statistics support the determination that although both the rates of incarceration and the lengths of sentences have risen, the crime rate has not diminished.[16] Thus, the argument concludes, increases in the probability or length of confinement must not deter offenders. This argument, however, ignores the distinction between the likelihood of punishment after apprehension and conviction and the likelihood of actually being apprehended and convicted. The greatest prerequisite of the deterrence argument is that for an action or threat of action to be effective as a deterrent, those against whom the threat is directed—in this case, criminals—must perceive the cost of their deeds to be greater than their prospective gain. In addition, the threat must be total, that is, it consistently must be credible from the time of arrest to actual imprisonment. Despite an almost certain probability of being arrested, an offender will not be greatly deterred from commiting a crime if he foresees only a negligible chance of going to jail. Conversely, the certainty of a long prison sentence after conviction is no deterrent to one who expects never to be apprehended.

Unfortunately, this consistency is absent today. A criminal of even marginal intelligence must know that although his chances of going to prison for a longer time are slightly higher now than they were in the past, his chances of ever being apprehended and convicted—especially in our major metropolitan areas—remain sufficiently minimal that the cost/gain ratio still favors committing the crime. Indeed, crime has reached such epidemic proportions that the police simply cannot deal with all of it, and the victims of this epidemic are bearing the burden. Moreover, our criminal justice system has instituted such a thicket of restraints on police activity and such a morass of contrived protections around criminal suspects—for example, the exclusion of evidence and confessions,[17] an almost unlimited right to bail despite the commission of other crimes while on bail,[18] and open-ended, post-conviction remedies[19]—that we indeed have become, in the words of the Chief Jus-

16. *See, e.g.*, Bazelon, *supra* note 9, at 440-41.

17. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

18. *See, e.g.*, The Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3150 (1976).

19. *See* Finley, *The Appellate System: On a Vulnerable Plateau*, TRIAL, Nov.-Dec. 1971, at 19; Hanley *Habeas Corpus Ad Infinitum*, NATIONAL SHERIFF, Dec. 1973-Jan. 1974, at —, 23-24.

The analogy between the current epidemic of crime and a medical emergency is in no way attenuated, and society thus needs to adopt measures that will abate the alarming rise in crime immediately—not some distant point in the future when everyone concludes that the concept of deterrence breeds no harmful side effects.

As individuals continue to become victims of crime, society's attempts to solve the problem remain frustrated because of the tension between the need for immediate action and the quest for reasonable certainty about the effectiveness of deterrence. No single aspect of the criminal justice system highlights this tension more clearly than the arguments for and against deterrence and the death penalty, which this Article discusses below. The thesis of the Article is that the plight of the victim should be society's overriding consideration, and that the only viable solution to the present stalemate lies in a common sense approach to deterrence and capital punishment.

III. Death and Deterrence: The Capital Punishment Controversy

Proponents of the deterrent value of capital punishment—or, for that matter, any other aspect of deterrence—find themselves in the unenviable position of having to prove a negative. If a person is deterred from doing something, then, by definition, he does not do it. Thus, the numbers of people who refrained from committing felonies because of their fear of execution are difficult to ascertain. Rarely does a resident drop by the station house in his local police precinct to confide to the desk sergeant, "You know, I was planning to kill my wife for the insurance money, but the thought of the death penalty kept me from doing it." Homicide figures in the United States roughly indicate how many people obviously were not deterred from killing, but the number of those who actually were deterred remains—and must remain—incalculable.

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virus—commonly known as swine flu—creating an epidemic among the American public during the following winter concerned United States public health officials. Researchers soon developed an effective vaccine, but it had potentially serious side effects for various segments of the population. Despite a sharp debate among policymakers about these risks compared to the benefits of a national immunization program, *see* Time, April 26, 1976, at 36, President Ford announced a $135 million program to innoculate the entire United States population. At that time, the Food and Drug Administration, which normally is the body that must approve such drugs before they are made available to the public, had neither tested the vaccine nor certified it as safe and effective. N.Y. Times, March 25, 1976, at 1, col. 1.

of Science panelists—can be stated clearly and succinctly. The former in effect argue that if the threat of punishment increases, or if the perceived cost of crime rises to exceed the perceived gain, then society will deter criminals. The theoreticians, on the other hand, take a conservative, cautious approach; they apparently would argue that policymakers must study the question of deterrence to a far greater degree—until they are clearly convinced of its soundness—before they would alter the system toward a more truly deterrent model.

The argument for delay ignores two salient points. First, criminal justice is not a finite science, and deterrence is not a finite concept. Theorists probably will never know with certainty the inner and outer limits of the deterrence model as a solution to the crime problem. This fundamental reality is the reason that this Article favors a common sense view of deterrence. Since no other approach has produced the desired results, a return to traditional notions about human behavior appears to be the only sensible alternative. Although some people might view this response as simplistic, the cost versus gain rationale is intrinsically logical, and no reason exists not to attempt to apply these principles to criminal justice, particularly when the more complex alternatives have failed demonstrably.

Second, from a pragmatic point of view, crime has reached such alarming proportions that society cannot afford the time that would be necessary to perform leisurely studies of deterrence—gathering empirical data on a gradual basis until the more learned professors are satisfied that deterrence works. Medical scientists, for example, have worked for years to produce cures for chronic, preexisting maladies such as the common cold, influenza, and arthritis that do not place the patient's life in danger. Studies and tests are time controlled: they are conducted first *in vitro* and then *in vivo* by beginning with laboratory animals and progressing to human experiments only under the most rigid conditions. This approach is known as the scientific method, and it is perfectly proper when the urgency is not immediate. The situation, however, is entirely different in emergency circumstances caused by a raging killer epidemic such as a plague or a new and deadly virus that is decimating the population. At this point, any potential remedy that appears likely to cure the disease or prevent its spread will be used without first undergoing rigid testing in clinical conditions.[25]

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25. In the spring of 1976, for example, the possibility of a new strain of an influenza

of this debate reinforce the contention that if the statistical theoreticians cannot agree—based on the best empirical evidence—whether capital punishment deters murderers, then perhaps returning to a common sense evaluation of the question, which all citizens are capable of making, will be a more feasible and productive approach to the problem.

This common sense perspective begins with a concession from capital punishment proponents that the threat of the death penalty cannot and will not deter every murderer. Crimes of passion, crimes committed by the certifiably insane, and crimes calculatedly undertaken for revenge are all examples of murders that no known threat can deter. Notwithstanding this admission, however, the proposition does not follow that because capital punishment does not deter all murderers, it deters *no* murderers. Justice Stewart succinctly articulated this theme in *Gregg v. Georgia*,[33] in which the Supreme Court affirmed—with Justices Brennan and Marshall dissenting—three state death penalty statutes. Justice Stewart reasoned,

> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter the cold calculus that precedes the decision to act.[34]

The first noteworthy aspect of the common sense analysis of the death and deterrence question is a simple cause and effect relationship. The several states quit executing murderers in 1966, a year in which slightly more than 10,000 murders were recorded.[35] This hiatus—initially de facto, but after 1972, de jure[36]—lasted approximately ten years, and during that period, the number of murders doubled to over 20,000 in 1976.[37] Undoubtedly, other factors also contributed to this increase, including population growth, deteriorating urban conditions, and an increasing disrespect for the law. The fact remains, however, that abandonment of the supreme

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Deterrent Effect of Capital Punishment: Another View, 85 AM. ECON. REV. 445 (1977); *A Symposium: Capital Punishment in the United States*, 14 CRIM. L. BULL. 5 (1978).

33. 428 U.S. 153 (1976).
34. *Id.* at 185-86.
35. *See* F. CARRINGTON, *supra* note 28, at 86.
36. *See* Furman v. Georgia, 408 U.S. 238 (1972).
37. F. CARRINGTON, *supra* note 28, at 86.

This discussion is not intended to suggest that those who are interested in statistics and empirical evidence have remained uninvolved in the deterrent controversy; indeed, a spirited, if rather arcane, debate currently is being waged among those who would seek to translate numbers and other variables into conclusions about the deterrent value of capital punishment. Of course, any detailed description of these statistical arguments about the death penalty and its deterrent effect is far beyond the scope of this Article. Briefly, sociologists and behavioral scientists initiated the discussion and purported to show—by comparing homicide rates in contiguous states that had adopted opposing positions on the death penalty—that capital punishment was not a crime deterrent.[26] Students of the crime problem accepted these findings almost without reservation for a good number of years.[27]

The debate subsequently widened with the entry of a new group of academic theorists: the econometricians. Using an econometric model that identified the various relevant determinants of murder, Isaac Ehrlich, a respected economist and opponent of the death penalty, published a paper in 1975[28] criticizing the sociologists' and behavioral scientists' method and indicating that each actual execution between 1933 and 1967 could have deterred an average of eight murders.[29] Ehrlich's conclusion drew immediate criticism,[30] to which he responded,[31] and the statistical warfare has continued up to the present.[32] The inconclusive results

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26. *See, e.g.*, J. SELLIN, THE DEATH PENALTY 34 (1959).

27. *See, e.g.*, W. RECKLESS, THE CRIME PROBLEM 508 (4th ed. 1967). *But see* van den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L.C. & P.S. (1969), *reprinted in* CAPITAL PUNISHMENT 111 (J. McCafferty ed. 1972).

28. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975). An amicus curiae brief in Gregg v. Georgia, 428 U.S. 153 (1976), cited Ehrlich's article. In many legal circles, it is credited with influencing the Court in its holding in *Gregg* that carefully drawn statutes providing for the death penalty are constitutional. For accounts of the Supreme Court's inconsistent holdings regarding the death penalty beginning with Furman v. Georgia, 408 U.S. 238 (1972), in which the Court held state death penalty statutes constitutionally invalid as "arbitrary and discriminatory," through *Gregg*, in which it reinstated the death penalty, see F. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 143-92 (1977); M. MELTSNER, CRUEL AND UNUSUAL (1973).

29. Ehrlich, *supra* note 28, at 398, 414.

30. Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975).

31. Ehrlich, *The Deterrent Effect of Capital Punishment: Reply*, 67 AM. ECON. REV. 452 (1977).

32. *See generally* F. CARRINGTON, *supra* note 28, at 82; Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977); Ehrlich & Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 65 J. LEGAL STUD. 35 (1977); Passell & Taylor, *The*

A dissenting opinion in a capital punishment case written by the late Justice Marshall McComb of the California Supreme Court[41] provides another example of the average criminal's perception of the death penalty's deterrent effect. To demonstrate the deterrence factor, Justice McComb collected statements from police files of fourteen arrested criminals who had failed to use deadly force in the commission of their crimes because of their fear of being executed. The police had arrested one of these criminals for assault with a knife. She told investigating officers: " 'Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*' "[42] In another case the police arrested three persons, two of whom had prior criminal records, for robbery. Using toy pistols, these offenders had forced their victims into a back room and bound them. When the investigating officers asked them why they had used toy guns instead of real ones, all three agreed that " 'real guns were too dangerous, as if someone were killed in the commission of the robberies, they would all receive the death penalty.' "[43] In yet another example cited by Justice McComb, an ex-convict with at least four aliases and a felony record that dated from 1941 was arrested for robbery. He had used guns in prior robberies in other states, but only pretended to carry a gun in the robbery in question. He told investigating officers that although he had spent only one month in the state, he had known about the California death penalty. When questioned about the gun bluff, he said, " '*I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber.*' "[44] Overall, the offenders demonstrated an awareness of the potential penal consequences of their conduct in each of the fourteen cited cases, and they all intentionally placed themselves in a situation in which an unacceptably adverse result—namely, capital punishment—could not possibly occur. Justice McComb concluded from this evidence that

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that "these people were simply telling the cops what they thought they wanted to hear." This explanation for the results of the survey might well be accurate, but the fact remains that the condition which gave rise to the study—that the weapon either was not used or could not be used—existed *before* the criminals knew that they would be apprehended, much less before they know whether they would be questioned about their failure to use the weapon.

41. People v. Love, 56 Cal. 2d 720, 366 P.2d 33, 16 Cal. Rptr. 777 (1961).

42. *Id.* at 735, 366 P.2d at 41, 16 Cal. Rptr. at 785 (McComb, J., dissenting) (emphasis in original).

43. *Id.*

44. *Id.* (emphasis in original).

penalty corresponded to a spectacular and unprecedented rise in the number of capital murders. At the very least, this ten year period of enlightenment—or softness—toward capital punishment created no parallel sense of gratitude in the hearts of potential killers. On the contrary, a more reasonable conclusion is that these people cynically and calculatedly took advantage of the new permissiveness. With the death penalty defunct and state parole laws allowing for release in a relatively few years, they justifiably believed that the murder of the victims of an armed robbery to avoid being identified, for example, was not an unacceptable risk considering the potential gain.

Another type of input offers additional support for the proposition that the relationship between the abandonment of capital punishment and the rise in the number of murders is one of cause and effect. Because actual thought processes and motivations are necessarily private matters that others can only approximate, criminals themselves may provide unique insights into their feelings about the death penalty. In 1970 and 1971 the Los Angeles Police Department surveyed persons whom they had arrested for violent crimes, but who either had carried no weapons, had not used their weapons, or had carried inoperative weapons.[38] Of the ninety-nine criminals who responded to the question about why they had not killed, or, alternatively, why they deliberately had avoided placing themselves in a position where they could have killed, their responses indicated that fifty percent were deterred by fear of the death penalty; about eight percent were unaffected by the death penalty because it was not being enforced; ten percent were undeterred by the death penalty and would kill whether it was enforced or not; and approximately thirty-two percent were unaffected by the death penalty because they would not carry a weapon under any circumstances, primarily because of a fear either of being injured themselves or of injuring someone else.[39] Thus, one out of every two persons who had avoided circumstances in which they might have killed provided the best possible empirical basis for believing in the deterrent effect of the death penalty—their own statements that a fear of the gas chamber governed their actions.[40]

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38. Los Angeles Police Dep't, A Study on Capital Punishment (February 1971).

39. *Id.*

40. This study was one of the rare instances in which the proponents of deterrence actually were able to "prove the negative." In discussions with capital punishment experts—both retentionists and abolitionists—the author often has encountered the caveat

fenders. By committing one or more violent crimes—murder, rape, robbery, mayhem, kidnapping with violence, and aggravated assault—an individual unequivocally demonstrates that he is a danger to the community. When this individual is apprehended, convicted, or confined to a mental institution, the government takes full control of him through some form of incarceration or commitment. Similarly, the government assumes partial responsibility for an individual when it places him on parole, probation, work release, or the like. If correctional officials release the individual or permit him to escape under circumstances that constitute some form of negligence, or if they negligently supervise or control him, then these officials arguably should be held liable for any injury that results from the individual's future violent conduct. Liability also could be imposed for a negligent failure to warn certain potential victims either of threats against them or of the offender's dangerous tendencies.

Under this theory of liability, therefore, either the victim or the victim's survivors avoid suing the perpetrators of the crime and instead proceed against those third parties whose negligence—or gross negligence—actually put the offender in a position to victimize. According to the theory, the deterrence value arises from the perceived likelihood that the custodial officials or the government entities for which they work will be held civilly liable for gross negligence in the release or handling of prisoners. The theory holds that this threat will ensure—through the mechanism of enlightened self-interest—that these officials make their decisions and dispositions with the proper regard for the safety of society. By giving officials an incentive to be wary in their decisionmaking, and by deterring them from taking unnecessary risks, this approach may well prevent a good many of the current victimizations.

Several courts have begun to implement this deterrent rationale by permitting actions against correctional officials. *Grimm v. Arizona Board of Pardons and Paroles*,[47] for example, which the Supreme Court of Arizona decided in 1977, is a landmark case in this area. In 1973 Mitchell Blazak robbed a tavern in Tucson and killed John Grimm in the process. Blazak was a parolee whom the Arizona Board of Pardons and Paroles had released after he had served one-third of a 1967 sentence for armed robbery and assault with intent to kill. The Parole Board had released Blazak despite his criminal record dating from 1961, which included—besides the

47. 115 Ariz. 260, 564 P.2d 1227 (1977) (en banc).

the death penalty was indeed an effective deterrent.[45]

The final argument in this common sense analysis of deterrence and the death penalty concerns those people who are most directly affected by the acts of violent criminals—the murder victims themselves. If one concedes that neither side in this debate can prove conclusively that capital punishment does or does not deter murderers, then two—and only two—options remain: either the death penalty does not deter any would-be murderers or it deters at least some of them. If the first possibility proves to be true, then the invocation of capital punishment will not save the lives of any potential victims. Society, however, will be rid of some of its most dangerous predators, and the possibility that these people will kill again should they be released or escape will be foreclosed. On the other hand, if the second possibility is true, then the deterrent effect of making the threat of execution a credible one actually will save a given number of innocent victims from being killed.

The essential question regarding the acceptance of a death penalty with an unproved deterrent value, therefore, becomes whether society should favor the lives of convicted murderers over the lives of innocent victims. Viewed from the perspective of its potential to spare lives, one unquestionably can save convicted murderers by not executing them, but only at a continued high cost in terms of the lives of the innocent. On the other hand, although saving the lives of innocent victims by executing criminals may be less certain, the costs to society of not doing so are also much more severe. Simply stated, a common sense, victim-oriented approach resolves the uncertainty about deterrence in favor of the potential victims rather than the convicted criminals.

IV. Positive Deterrence Through Third Party Victims' Rights Litigation

This part of the Article deals with an area of the law that advocates of victims' rights are just now beginning to accept: litigation on behalf of a crime victim against negligent, or grossly negligent, correctional officials.[46] This approach focuses on the concept of positive deterrence, which relies upon the threat of legal action to eliminate victimization opportunities for potential repeat of-

45. *Id.* at 734-35, 366 P.2d at 40-41, 16 Cal. Rptr. 784-85 (McComb, J., dissenting).

46. For the sake of brevity and convenience, the term "correctional officials" includes parole boards, probation officers, wardens, sheriffs, and anyone else who has a duty to handle prisoners in some manner.

Citing the Arizona statute that set forth the criteria for parole release,[52] the court held that the Board's action in granting parole resulted in a voluntary assumption of responsibility over the convict.[53] The court reasoned that the supervision of a person having dangerous tendencies raises a duty to individual members of the general public and renders the Board liable for injury to individuals stemming from "grossly negligent or reckless release of a highly dangerous prisoner."[54] Under these circumstances, the court held that

> members of the Board are under a duty to inquire further before releasing the prisoner. . . . If the entire record of the prisoner reveals violent propensities and there is absolutely no reasonable basis for a belief that he has changed, then a decision to release the prisoner would be grossly negligent or reckless.[55]

Taylor v. State,[56] a 1973 jury verdict in a lower court case in the State of Washington, reached a result similar to that in *Grimm*. In *Taylor* the warden of the maxi-security state penitentiary in Washington had instituted an ill-conceived and unauthorized "take-a-lifer-to-dinner" program, under which prisoners serving life sentences were permitted to go to dinner outside the prison as a rehabilitative device. One of the beneficiaries of this program was a convict serving a life term who had a prior criminal record of forty-one felony convictions and seventeen escape attempts. The prisoner went to dinner at the home of an unarmed prison baker, crawled out the bathroom window, and subsequently murdered Mr. Taylor and wounded his wife during an armed robbery. Mrs. Taylor's suit against both the State of Washington and the warden—in his personal capacity—resulted in a jury award of $186,000.[57]

Grimm and *Taylor* are typical of those cases in which either victims or their survivors sue correctional officials for gross negligence in the handling of convicted criminals that results in harm to third parties. Despite several decisions in which courts have denied

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52. *Id.* at 262, 564 P.2d at 1229. The Arizona statute provides,

> If it appears to the board of pardons and paroles, from a report by the department of corrections, or upon the application by the prisoner for a release on parole, that there is a reasonable probability that the applicant will live and remain at liberty without violating the law, then the board may authorize the release of the applicant upon parole.

ARIZ. REV. STAT. ANN. § 31-412 (1976).

53. 115 Ariz. at 267, 564 P.2d at 1234.

54. *Id.* at 267, 564 P.2d at 1234.

55. *Id.*

56. No. 211-30 (Pierce County, Washington, Super. Ct., September 1, 1973).

57. *Id.*

armed robbery and assault with intent to kill—convinctions for burglary (twice), parole violation, and possession of marijuana.[48] In addition, the Board arguably possessed other evidence about the danger to society of releasing Blazak. The court in its opinion summarized eight different psychiatrists' prison evaluations that described him as

> "an extremely dangerous person who should not be free in society until some major psychological changes take place." He is a paranoid schizophrenic whose psychosis prevents him from distinguishing between right and wrong and from controlling his conduct. He has never made an adequate adjustment to society for any prolonged period and is unlikely to change. He has a definite potential for violence.[49]

In any event, the Board released Blazak after he had served only a fraction of his sentence, and shortly thereafter he murdered Mr. Grimm. Mrs. Grimm sued the members of the Parole Board for the wrongful death of her husband based on their gross negligence in the release; the Board defended on the grounds of an absolute immunity for public officials. On appeal, the Arizona Supreme Court ruled that the Parole Board members owed a duty to individuals when they make a decision "to release on parole a prisoner with a history of violent and dangerous conduct."[50] In holding that plaintiffs had stated a cause of action—subject, of course, to proof of all the other elements of actionable negligence—the court rejected the Board's absolute immunity rationale and affirmed the need for some method of accountability for bureaucratic decisionmaking. The court stressed the need to deter grossly negligent official action:

> We have come to this conclusion because of the increasing power of the bureaucracy—the administrators—in our society. The authority wielded by so-called faceless bureaucrats has often been criticized. . . . While society may want and need courageous, independent policy decisions among high level government officials, there seems to be no benefit and, indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officials responsible for shocking outrageous actions. In any case, democracy by its very definition implies responsibility. In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous.[51]

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48. *Id.* at 262, 564 P.2d at 1229.
49. *Id.* at 263, 564 P.2d at 1230.
50. *Id.* at 267, 564 P.2d at 1234.
51. *Id.* at 266, 564 P.2d at 1233 (citations omitted).

tion to victimize. Thus, the harmful result is not as immediately foreseeable, and a simple negligence standard arguably is inappropriate.

Correctional officials perform the most difficult and demanding job in criminal justice today. To second-guess every disposition made in good faith by these officials by permitting civil lawsuits might unfairly burden and unduly restrict their decisionmaking process. At the same time, a standard requiring intentional malefaction provides too little control over their actions. The proper balance between these two competing considerations, therefore, lies in the concept of gross negligence as a prerequisite for liability. Indeed, almost every court that has held correctional officials liable has based its decision on a finding of gross negligence.[61] The court in *Grimm*, for example, relied on this standard;[62] it reasoned that the standard struck "the proper balance between the competing interests. The public has an interest in protection from premature release of highly dangerous prisoners as well as an interest in holding public officials responsible for outrageous conduct. The Board members have an interest in freedom from suit for reasonable decisions."[63] Similarly, the recently published final report of *The Attorney General's Task Force on Violent Crime* also recommended a gross negligence standard in these situations.[64] For these reasons, a gross negligence standard, which requires a higher degree of culpability than a simple good faith mistake, strikes a proper balance between the unfettered discretion of correctional officials and the policy against second-guessing mistaken dispositions that are made reasonably in good faith. In any event, the wave of victim litigation against third parties is not likely to abate—nor should it. As long as the courts continue to be vigilant in maintaining an appropriate balance between competing societal interests, this type of litigation is the kind of benign, positive deterrence that furthers the policy goals of the American criminal justice system.

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61. *See, e.g.*, Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 267, 564 P.2d 1227, 1234 (1977) (en banc).

62. *Id.*

63. *Id.* at 268, 564 P.2d at 1235 (footnote omitted).

64. TASK FORCE REPORT, *supra* note 22, Recommendation 63. Recommendation 63 states that "the Attorney General should study the principle that would allow for suits against appropriate federal governmental agencies for *gross negligence* involved in allowing early release or failure to supervise obviously dangerous persons or for failure to warn expected victims of such dangerous persons." *Id.* (emphasis added).

recovery—principally on the traditional grounds of sovereign immunity[58]—these cases represent a discernible trend in the courts toward permitting recovery when the requisite elements of a negligence or gross negligence cause of action are present.[59] This line of cases is presented solely to illustrate the potential—and growing trend—for victims to utilize the civil courts in lawsuits against third parties, not only to vindicate their own rights—either as victims themselves or as victims' survivors—but also, and perhaps more importantly, to use the law itself as a deterrent against those who are far too willing to experiment with the safety and security of the innocent to advance their own rehabilitative theories.[60]

This application of the deterrence concept to tort litigation presents a difficult theoretical problem of determining the proper standard of care that correctional officials owe to each member of the public. In many, if not most, personal injury lawsuits, the connection between the defendant's action and the plaintiff's injury is relatively easy to foresee. In cases against correctional officials, however, the defendants are not the actors who directly cause the injury; rather, their negligence merely places the criminal in a posi-

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58. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980). *But see* Pate v. Alabama Bd. of Pardons & Paroles, 409 F. Supp. 478 (M.D. Ala. 1976); Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); Lloyd v. State, 251 N.W.2d 551 (Iowa 1977); Carrington, Martinez *Ruling Won't Bar Suits on Negligent Custodial Releases*, Nat'l L.J., Feb. 11, 1980, at 26, col. 1.

59. *See, e.g.*, Payton v. United States, 636 F.2d 132 (5th Cir. 1981) (reargued en banc Sept. 24, 1981); Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977), *aff'd en banc*, 580 F.2d 647 (1978); Semler v. Psychiatric Inst., 538 F.2d 121 (4th Cir. 1976); Patricia J. v. Rio Linda Union School Dist., 61 Cal. App. 3d 278, 132 Cal. Rptr. 211 (1976). *See generally* Carrington, *The Crime Victims Legal Advocacy Institute: A Victims' Legal Rights Organization Is Formed in Virginia*, 6 VA. B.A.J. 4 (1980); Carrington, *Victims' Rights Litigation: A Wave of the Future*, 11 U. RICH. L. REV. 447 (1977); Carrington, *Victims' Rights: A New Tort*, TRIAL, June 1978, at 39; Rottenberg, *Crime Victims Fighting Back*, PARADE MAGAZINE, March 16, 1980, at 1; Comment, *Victims' Suits Against Government Entities and Officials for Reckless Release*, 29 AM. U.L. REV. 595 (1980); Barbash, *Victims' Rights: New Legal Weapon*, Washington Post, Dec. 17, 1979, at 1, col. 1.

60. Areas other than the handling of prisoners also have utilized the concept of positive deterrence through victim lawsuits against negligent third parties. For example, victims who have been injured because of a failure of security on leased premises have successfully sued and recovered. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970); Duarte v. State, 84 Cal. App. 3d 729, 148 Cal. Rptr. 504 (1978); O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977). Likewise, innkeepers have been held liable for the failure to provide proper security for guests who were victimized. *See, e.g.*, Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp. 1210 (S.D.N.Y. 1976). Finally, owners of premises have been held liable to business invitees. *See, e.g.*, Quinn v. Smith, 57 F.2d 784 (5th Cir. 1932); Taylor v. Centennial Bowl, 65 Cal. 2d 114, 416 P.2d 793, 52 Cal. Rptr. 569 (1966); Earle v. Colonial Theater Co., 82 Mich. App. 54, 266 N.W.2d 466 (1978).

V. Conclusion

This Article has attempted to demonstrate that only a paucity of actual knowledge is available on the concept of deterrence. Although the theory of cost versus gain—a pure threat of sanction as a deterrent to criminal activity—is logically compelling, hardly anything in this area can be proven even by a preponderance of the evidence, much less with mathematical certainty. The question that society must address, therefore, is whether to accept the reasonable, but concededly unprovable, proposition that a would-be criminal's motivation to commit lawless and violent acts will diminish in direct proportion to the extent that the criminal justice system provides a credible threat of swift and certain apprehension and punishment. The only alternative solution apparently is to wait—as the theoreticians cited above would advocate[65]—until the concept of deterrence can be proven empirically. The thesis of this Article is that this latter approach is in large part responsible for the lamentable situation in which our criminal justice system now finds itself. The time has come for society to adopt a common sense approach to the question of deterrence and to return the rights of innocent victims to their rightful position as the principal priority of the American criminal justice system.

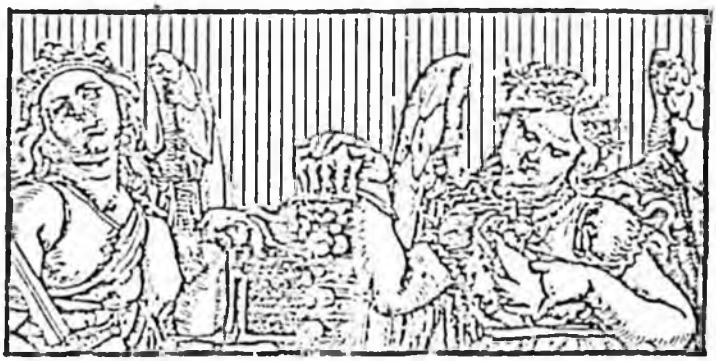
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65. *See supra* note 23 and accompanying text.

Corrections
COMPENDIUM

VOL VII NO 5 KNOWLEDGE IS POWER DECEMBER 1982

CRIME & CRIMINALS
CAPITAL PUNISHMENT
ENTER



CAPITAL PUNISHMENT

QUESTIONS:

1. Does your state currently have the authority to impose the death penalty?

2. If yes, for what crimes can the death penalty be imposed?

3. Is there any legislation currently underway to abolish the death penalty?

   To instigate the death penalty?

4. When was the most recent change in death penalty statutes in your state?

5. Have any important cases involving the death penalty been litigated in the past two years in your state?

6. By law, can minors/juveniles be sentenced to death?

7. Does your state have "Life Without Parole" sentence?

Not Responding:
Connecticut
Delaware
Puerto Rico

N/A = Not Applicable

— — — No Answer Provided

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Next month's *Compendium* will continue our look at capital punishment, covering methods of execution and death row inmate statistics.

STATE	Does State Have Death Penalty Provision	If Yes, For What Crimes Can Death Penalty Be Imposed	Legislation: Abolish / Instigate	Most Recent Change In Death Penalty In State	Important Cases Involving Capital Punishment Litigated In State	Can Minors/Juveniles Be Sentenced to Death In State	Does State Have Life Without Parole Sentences
ALABAMA	Yes	Murder	No N/A	May 1980—new death penalty law.	Yes; Federal Courts struck down old death law. New one enacted in 1980. Courts ordered new trials for those convicted under old law.	No	Yes
ALASKA	No	N/A	N/A Yes	Never in the statutes.	No	N/A	No
ARIZONA	Yes	Murder	No N/A	October 1, 1978	Yes; United States District Court ruled Arizona Death Penalty unconstitutional — overturned by United States Court of Appeals 9th Circuit Court — on appeal to the United States Supreme Court.	Yes	Yes
ARKANSAS	Yes	Capital Murder	No N/A	Yes; provides procedural provisions to impose the Death Penalty.	No	Yes; only if the individual is tried as an adult.	Yes
CALIFORNIA	Yes	Murder; Treason; Kidnapping, if death occurs; Rape, if death occurs; Arson, if death occurs; Robbery, Sodomy, Oral Copulation, Lewd and Lascivious Conduct with a Child, Burglary, Train Wrecking, if death occurs.	No N/A	Initiative measure increasing crimes/circumstances effective November 8, 1978.	Yes; *People v. Jachim* and *People v. Harris* upheld death penalty as constitutional.	No	Yes
COLORADO	Yes	Murder, Treason, Kidnapping, Assault during escape.	No N/A	— — —	No	No; must be an adult.	No
DISTRICT OF COLUMBIA	No	N/A	N/A No	None; accomplished by case law.	No	N/A	No
FLORIDA	Yes	Murder	No N/A	Unknown	No	Yes	No
GEORGIA	Yes	Murder; Rape	No N/A	March, 1973, new death penalty signed. 1976 U.S. Supreme Court ruled constitutional.	— — —	— — —	No
HAWAII	No	N/A	N/A No	June, 1957	No	N/A	Yes
IDAHO	Yes	Murder	No N/A	January 1981; Type of death.	Yes	Yes	Yes
ILLINOIS	Yes	Murder; while committing another felony, multiple or heinous.	No N/A	June 21, 1977	No	No	Yes

STATE	Does State Have Death Penalty Provision	If Yes, For What Crimes Can Death Penalty Be Imposed	Legislation Abolish / Instigate	Most Recent Change In Death Penalty In State	Important Cases Involving Capital Punishment Litigated In State	Can Minors/Juveniles Be Sentenced to Death In State	Does State Have Life Without Parole Sentences
INDIANA	Yes	Murder	No N/A	October 1, 1977; Amended statute to conform to U.S. Supreme Court cases.	Yes; *Judy v. State*, 416 N.E. 2d 95 (1980); *Brewer v. State*, 417 N.E. 2d 889 (1981); *Williams v. State*, 430 N.E. 2d 759 (1982); *Lowery v. State*, 434 N.E. 2d 868 (1982).	Yes	No ; Prior to October 1, 1977, Indiana did have life sentences. No parole was specifically provided. A parole could be obtained only after the sentence was commuted by the Governor. After September 1, 1979, those persons who were serving a single life sentence became eligible for parole after 15 years for crime other than murder and after 20 years for murder.
IOWA	No	N/A	N/A No	July, 1964; Legislative.	No	N/A	No
KANSAS	No	N/A	N/A No	– – –	No	N/A	No
KENTUCKY	Yes	Murder; Kidnapping unless the defendant voluntarily releases the victim alive, substantially unharmed and in a safe place prior to trial.	No N/A	1978; Provided for automatic appeal to State Supreme Court.	No	Yes	No
LOUISIANA	Yes	Murder	No N/A	Effective September 8, 1978 the sentencing court signs death warrant instead of Governor.	No	Yes	Yes
MAINE	No	N/A	N/A No	– – –	No	N/A	No
MARYLAND	Yes	Murder	No N/A	July 1978; Reinstated.	No; There is one case pending.	Yes; If over age 16.	Yes
MASSACHUSETTS	No	N/A	N/A Yes	The State Supreme Court ruled that a 1979 law reinstating capital punishment violated the constitutional ban on cruel and unusual punishment and discriminated against minorities.	Yes; See question No. 4.	N/A	– – –
MICHIGAN	No	N/A	N/A No	Abolished in 1846.	No	N/A	No
MINNESOTA	No	N/A	N/A No	Abolished in 1911.	No	N/A	No
MISSISSIPPI	Yes	Capital Murder; Hijacking.	No N/A	February 1977; Bring death penalty in line with U.S. Supreme Court ruling.	No	Yes, If certified for trial as an adult.	Yes
MISSOURI	Yes	Murder	No N/A	The law was passed in 1977 and was amended as to part of the punishment phase in 1980.	– – –	Only if they are declared to be adults by the court.	Have 50 years without parole.

STATE	Does State Have Death Penalty Provision	If Yes, For What Crimes Can Death Penalty Be Imposed	Legislation Abolish / Instigate	Most Recent Change In Death Penalty In State	Important Cases Involving Capital Punishment Litigated In State	Can Minors/Juveniles Be Sentenced to Death In State	Does State Have Life Without Parole Sentences
MONTANA	Yes	Murder; Aggravated Kidnapping with death.	No N/A	July 1977; Recodification, nothing major.	No	No	Yes
NEBRASKA	Yes	Murder	Yes (1981-82 legislative session)	1977; New criminal code and classification of offenses. Effective date January 1, 1979.	No	No; Juvenile under age 18 at time of offense cannot be sentenced to death. Age of majority in Nebraska is 19.	Yes; Commutation to term of years is necessary for parole of lifer.
NEVADA	Yes	Murder	No N/A	1977, Legislative.	No	Yes, If certified as an adult.	Yes
NEW HAMPSHIRE	Yes	Murder for Hire; Murder of Kidnap Victim; Murder of Law Officer.	No N/A	1974, Established capital murder statute.	No	No	Yes
NEW JERSEY	No	N/A	N/A Yes	January 1982	No	N/A	No
NEW MEXICO	Yes	Murder	No N/A	July 1979; Allows for certain circumstances.	No	Yes	No
NEW YORK	No	N/A	N/A Yes	1977; Law declared unconstitutional.	No	N/A	No
NORTH CAROLINA	Yes	Murder	No N/A	June 1, 1977; New capital punishment law.	Yes; All cases under litigation via automatic appeals process.	Yes	No
NORTH DAKOTA	No	N/A	N/A No	July 1975; Abolished death penalty.	No	N/A	No; 30 years without parole only.
OHIO	Yes	Murder	No N/A	October 19, 1981.	No	No	No
OKLAHOMA	Yes	Murder	No N/A	Crime in 1976 (July); Punishment in 1977 (April).	Yes; *Hayes v. Murphy, et al; Chaney v. State.*	No	No
OREGON	No	N/A	No; Attempt to place on ballot by referendum failed to acquire enough signatures.	– – –	No	N/A	All murder sentences are for life. The Board of Parole has the option to deny parole in any case, and did so in nine of the last 34 cases handled.
PENNSYLVANIA	Yes	Murder	No N/A	September 1978; Replacing statute ruled unconstitutional by State Supreme Court in December 1977.	– – –	– – –	Yes
RHODE ISLAND	No	N/A	N/A No	1979; Supreme Court (U.S.) ruled Rhode Island death law unconstitutional reversing a Superior Court decision.	Yes; *State of Rhode Island v. Paul Cline; State of Rhode Island v. Sidney Clark.*	N/A	No; All lifers are eligible after 10 years. If a paroled lifer violates parole on a new charge he cannot be paroled on new charge.

STATE	Does State Have Death Penalty Provision	If Yes, For What Crimes Can Death Penalty Be Imposed	Legislation Abolish / Instigate	Most Recent Change In Death Penalty In State	Important Cases Involving Capital Punishment Litigated In State	Can Minors/Juveniles Be Sentenced to Death In State	Does State Have Life Without Parole Sentences
SOUTH CAROLINA	Yes	Murder	No N/A	June 1978; 1978 Act No. 555.	Yes; All death are currently under appeal or seeking other post conviction relief.	Yes	No
SOUTH DAKOTA	Yes	Murder; Kidnapping.	No N/A	1979; Reestablished.	No	Yes; By state law, if a juvenile is tried as an adult he can be given the death sentence, however, recent U.S. Supreme Court decision which was remanded places doubt on the constitutionality.	Yes
TENNESSEE	Yes	Murder	No N/A	– – –	No	Yes	No
TEXAS	Yes	Murder	No N/A	1974; Panel Code Revised.	No	No	No
UTAH	Yes	Murder	No N/A	– – –	Yes	Yes	No
VERMONT	Yes	Murder	No N/A	13 USA § 2303; 1979.	No	Yes	No
VIRGINIA	Yes	Murder	– – – N/A	– – –	No	No	No
WASHINGTON	Yes	Murder	– – – N/A	May 14, 1981 ; Amended.	No	Yes, If tried as an adult.	Yes
WEST VIRGINIA	No	N/A	N/A No	February 1965; Abolished.	No	N/A	Yes
WISCONSIN	No	N/A	N/A No; Each legislative session there is a bill introduced to instigate the death penalty.	1853; Death penalty repealed.	– – –	N/A	No
WYOMING	Yes	Murder	No N/A	– – –	No	Yes	Yes
GUAM	No	N/A	N/A – – –	Guam has never had a death penalty; but referendum for death penalty several years ago failed through the electorate.	No	N/A	Yes
FEDERAL BUREAU OF PRISONS	Yes	Hijacking	No N/A	None	No	No	Yes

JUNEAU - Death by hanging (being) Alaska's most severe penalty for the commission of a crime would be abolished under terms of a bill passed by the territorial House today.

By a 14-9 vote, with one member absent, the House passed and sent to the Senate a bill that would strike all forms of capital punishment from the territorial law.

The vote followed a day and a half of debate in which the co-author of the bill, a lawyer, said "the hideous mistake of executing an innocent man" makes it impossible "ever to bring him out of the grave into God's (?)."

"I have been unfortunate enough to witness execution." said Rep. Warren Taylor (D-Fairbanks) "and the cold-blooded methodical way they are carried out makes you wonder if it isn't legal murder."

Taylor, who introduced the bill with Rep. Vic Fischer (D-Anchorage) told the House and a packed gallery yesterday that he had been a lawyer in Alaska 30 years next month.

"I've taken part in 31 homicide trials, quite a few in the first degree." he said, "both as a prosecutor and a defense attorney." he added.

"I recall a case in Valdez where I was prosecuting a very good friend of mine. A combination of cabin fever and raw alcohol led him to trouble, and unfortunately the jury brought in a verdict in the second degree. Had it been different, I would have carried to the grave that scar on my soul."

One of the strong opponents to the bill, Rep. Dora Sweeney (D-Juneau) recalled two famous cases in support of her argument that the death penalty should be continued.

"Remember Winnie Ruth Judd," Rep. Sweeney said, "A Juneau girl who horribly hacked up two persons and tried to ship their bodies all over everywhere in a trunk, she lives today in an institution, from which she has escaped several times."

Then she pointed to the recent case of John Gilbert Graham, the Colorado youth executed for planting a bomb aboard a commercial airliner and killing more than 50 persons.

"If that happens in Alaska," Mrs. Sweeney said, "and this bill passes , we could not penalize him with any more than life imprisonment -- from which he eventually could be freed."

Rep. Seaborn J. Buckalew, Jr. (D-Anchorage) protested that the bill "protects a class of people who don't deserve the consideration we are giving them."

Taylor said Rep. Sweeney believed in the commandment "of thou shall not kill-but," Taylor added: "There is a period after kill."

"And Mr. Buckalew," Taylor said, "has the District Attorney complex--show them no mercy."

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SB 73
Title "An Act classifying murder in the first degree as a capital felony,
Requested by Sen. Fischer Date 1/20/81
and establishing sentencing prodecures for capital felonies."

II. FISCAL DETAIL
Agency Affected Department of Law
Program Category Affected Administration of Justice
BRU, Program, or Subprogram(s) Affected Prosecution
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

		FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100	PERSONAL SERVICES						
200	TRAVEL						
300	CONTRACTUAL						
400	COMMODITIES						
500	EQUIPMENT						
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL	Unknown					

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS Unknown

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

This bill requires imposition of capital punishment for the crime of first degree murder in the presence of certain aggravating factors enumerated in section 12.55.180 of the bill. Obviously, should these factors be present, a most vigourous and lengthy defense can be expected from defendants' counsel. The amount of state resources required to prosecute capital cases is unquantifiable at this time. It is bound, however, to be considerable, both at the trial and appellate levels. Recent experience in other states suggests that very protracted and expensive litigation may be necessary to implement the provisions of the Act.
The Territorial Legislature abolished the death penalty in Alaska in 1957, and we simply do not have any historic data upon which we can make an accurate projection.

IV. DATE January 21, 1981 PREPARED BY Richard L. Pegues
Richard L. Pegues Dir Admin Services
AGENCY Department of Law
PHONE 465-3695

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/80

INSTITUTE FOR SOUTHERN STUDIES PO BOX 531 DURHAM, NC 27702 (919)688-8167



Surprising Facts About The Death Penalty

No white has ever been executed for the rape of a black in the U.S.

Nearly three quarters of all murders involve members of a family or acquaintances.

Since 1900, there has been, on the average, one case per year in the U.S. in which an entirely innocent person was convicted of murder.

Of all the people executed in the U.S. since 1930, over 54 percent were black. The population of the U.S. during this period was 9 percent black.

At the last public execution in the U.S. (a Kentucky hanging in 1938) 20,000 people turned out to watch.

Numerous studies have examined the risk presented by paroled murderers and the findings have always been the same: their rate of parole violation is by far the lowest of all classes of offenders.

In 1970, the average time spent in prison under sentence of death was 32.6 months.

The vast majority of capital crimes is committed during a moment of great emotional stress, in fear, or under the influence of drugs or alcohol. The question of deterrence seems inapplicable here.

States that have reinstated the death penalty after abolishing it have not shown a decreased rate of criminal homicide: In Deleware, for example, there was no death penalty from 1958 to 1961. After restoration, homicide increased by 3.7 persons per 100,000 population.

Though blacks constitute 54 percent of murder victims, only 13 percent of the persons currently on death row had black victims.

Since 1972, 62 percent of death row inmates were unskilled, service, or domestic workers; 60 percent were unemployed at the time of their crimes.

As of April 1980, nearly 75 percent of the national death row population is in the Deep South.

In Georgia, between 1973 and 1977, over three times as many convicted defendants who had killed white victims received a death sentence as did those who had killed

black victims.

During the same period, *geographical* discrepancies within the state were also significant: persons sentenced within Georgia's central region were four times as likely to get "death" as were those sentenced in the Atlanta area.

Never in the history of Florida has a white person been executed for a crime against a black person.

America's opinion of who should be killed has changed radically over the years. During the colonial years, King George III required the death penalty for 156 different crimes, including such offenses as stealing apples from an orchard, breaking the dam of a fishpond, cutting down trees in Putney Park — and the cultivation of tobacco plants.

Most prisoners under sentence of death are poor and so are represented by state-appointed lawyers. Most states make no provision for state-financed legal representation beyond the trial and direct appeals.

More than 650 men and women were on death row as of May, 1980, and the number is growing at the rate of over 10 a month. This is the largest death row population in U.S. history and may be the largest in the world.

Georgia has put 366 persons to death since 1930 — the highest rate for any state.

Of 455 men executed for rape in the U.S. since 1930, 405 (90 percent) were black; all but two of these executions occurred in the South.

Despite widespread publicity before and after the May 25, 1979, execution of John Spenkelink, Florida's first execution in 15 years, the state's murder rate jumped 14.4 percent during the first six months of 1980.

The state of Georgia has already spent nearly $1 million in preparation for Jack Potts' execution; meanwhile the condemned man has received only minimal medical attention for injuries sustained during his arrest six years ago, when a bullet hit his mouth, shattered his teeth and tongue and lodged 1 cm. from his spine.

In capital cases involving more than one participant, the prosecutor seldom asks for the death penalty for more than one of them. In order to obtain the powerful evidence necessary to win a death sentence, he will make a deal with all participants except one. The defendants who successfully "plea bargain" testify against the defendant chosen for the gallows and in return receive sentences of imprisonment or less. Thus, John Spenkelink died in the electric chair; his partner, Frank Brum, who cooperated with the prosecution, confessed to participation in the same murder and went free.

For a punishment to be a deterrent, it must be consistently and promptly employed: between 1930 and 1960, there was one execution for every 70 homicides, and the rate has dropped sharply since then.

In 1978, nearly 70 percent of U.S. whites favored capital punishment while only 24 percent of blacks felt the same. Juror selection can have serious implications for the outcome of capital cases.

A Delaware policeman who had forcefully argued for restoration of capital punishment in that state on the grounds of its deterrent value killed his wife just 10 days after the penalty was restored in 1961.

Between 1928 and 1949, average homicide rates in death penalty states were between two and three times higher than in abolition states.

Of the 553 people executed in the history of the U.S. for the crime of rape, 497 or 90 percent were black even though blacks comprise only about 11 percent of the nation's population. In 1976, the Supreme Court decided it was unconstitutional for a state to execute a person for the crime of rape. The 553 people lived — and died — too early in our country's history to enjoy their full Constitutional protections.

:GISLATURE

9 MARCH, '83
ANCH. TIMES

Debate heats up over capital punishment bill

Moral Majority for, Catholics against it

teve Hansen
s Writer

Two of the state's largest religious organizations — the Catholic Archdicese of Anchorage and the Moral Majority — have taken opposite sides in the emotional debate over imposing the death penalty in Alaska.

The archdiocese adamantly opposes capital punishment, while Moral Majority strongly favors it.

The religious organizations presented their opinions during a state Judiciary Committee public hearing here Friday.

In addition, more than a dozen others stated their opposition to the bill which, if approved, would allow juries to sentence to death people convicted of first-degree murder.

The meeting was marked by impassioned and emotional outbursts. Sen. Fritz Pettyjohn, R-Anchorage, one of four co-sponsors of the bill, argued several times with people who spoke against the legislation.

Few of those who testified addressed the bill itself. Most appeared to want a chance state their feelings on the controversial subject.

Father Steven Moore, who represented the archdiocese and Archbishop Francis T. Hurley at the hearing, said the death penalty is contrary to the teachings of Jesus.

"Jesus himself rejected a notion of punishment base on 'an eye for an eye, and a tooth for a tooth,' " Moore said. "Instead he urged forebearance in the face of evil, compassion and love.

"The ministry of Jesus was one of salvation, healing, and reconcillation."

But Tim Ewell, executive director of Moral Majority of Alaska, said, "Capital punishment is definitely a means God set forth for society."

About three-quarters of those who spoke Friday were against the death penalty. But during a recess late in the day, Pettyjohn said he didn't feel the testimony was representative of public sentiment.

"It's been 90 percent attorneys, a couple of ministers and one guy who's a private citizen," he said. "The people in my district are at work."

Pettyjohn represents South Anchorage. He estimated about 75 percent of his constituents favor the death penalty.

But Sen. Joe Josephson, D-Anchorage, co-chairman of the committee, said he opposed the bill. "I think the testimony shows the bill has many defects," he said.

Most of those opposing the bill said they didn't think the death penalty was a workable deterent against murder, that it tends to discriminate against minorities and that there is a chance an innocent person could be executed.



Norris Klesman of The Times

Dick Eliason, Joe Josephson and Fritz Pettyjohn, left to right, listened to arguments for and against the death penalty for first-degree murder Frida

Attorney Lynn Allingham added that someone sentenced to life imprisonment can always be released if new evidence is uncovered which proves innocence.

"But if we execute someone, there's no turning back," she said.

Former attorney general John Havelock said, "What you are doing is firing a cannonball into the air and no one knows where it'll land. I think it's is a dud."

But those in favor said capital punishment was needed to protect the public from killers.

Citing the 1982 murders of four Anchorage teen-agers by Charles Meach and six killings in McCarthy earlier this month, Burton Carney, a Moral Majority official, said, "I think there is a place in our society for capital punishment."

STATE OF ALASKA v. NEWTON LAMBERT

Lambert sentenced to 99 years in prison

No parole for 50 years, judge orders in killing

By CHRISTOPHER JARVIS
The Juneau Empire

Convicted murderer Newton Lambert was sentenced to 99 years in prison in Juneau Superior Court this morning and will not be eligible for parole for 50 years.

"I suppose this is the worst murder ever committed in this city," Juneau Superior Court Judge Rodger Pegues said as he handed down the sentence. "It was a gruesome, awful crime."

After hearing arguments for and against the maximum sentence, Pegues said "it all adds up to the maximum sentence."

Lambert, 21, declined the opportunity to speak on his behalf and showed no emotion as the sentence was pronounced.

"I don't have anything to say," a handcuffed Lambert said on leaving the courtroom.

Lambert will not be eligible for parole until the year 2034, when he will be 10 years older than Anne Benolken was when she has murdered.

Lambert was convicted in November of the April 4, 1982, beating and stabbing death of 61-year-old Mrs. Benolken in her South Franklin Street apartment. She was beaten, stabbed 60 times and sexually assaulted.

Lambert was acquitted of the beating and stabbing death of her 63-year-old husband James who was killed at the same time. He too was sodomized.

"People who are inherently law abiding don't need a criminal justice system, except to protect them," Pegues said.

Defense attorney Tom Findley called the length of the prison term "a death sentence" after arguing that Lambert should be sentenced to 40 years in prison with 10 suspended. That would have allowed Lambert's release at age 51.

After speaking of the drugs and alcohol Lambert said he took the hours before the murder, Findley said, "I don't offer Newton Lambert's condition as an excuse, but an observation."

Lambert was "not the deliberate, calculating cold-blooded killer," who deserved the maximum sentence, Findley argued.

Lambert testified at his trial he was on a binge of alcohol, cocaine, LSD and amphetamines in the days before the murder.

Lambert denied "and still denies" any involvement in the killings, Findley said.

His only memory before waking up in the bathtub of the dead couple's apartment was drinking a Heineken beer at a downtown Juneau bar after leaving a birthday party for him at the Indian Village, Lambert said during his trial.

Lambert said he entered the living room of the Lower F&L



Photo by Brian Wallis

Newton Lambert: 99-year sentence.

apartment where he found Anne Benolken's body on a mattress on the floor and the her dead husband's partially clad body kneeling over the end of it.

Findley argued that Lambert was not a "leader" in the crime, saying Svobodny alleged throughout the trial that co-defendant Emanuel Telles was the instigator.

Telles was acquitted of both murders during his trial.

Lambert should receive a shorter sentence and the opportunity to "at least give him the end of his life" out of prison, Findley said.

"The way it is now, he'll probably be dead before he gets the opportunity to go before a parole board and wheeze 'I'm 71, please let me out,'" Findley said.

Allowing him to live the last years of his life as a free men, Findley told Pegues, "is hardly asking you for a break."

Findley's recommendation would send the message that "if you participate in a murder, you will spend 30 years behind bars and 10 years on probationary status before society will let go of you," Findley said.

Pegues denied Lambert any "glimmer of hope," by ordering he serve at least 50 years in prison, Findley said later.

"Mr. Svobodny and Mr. Collins want you to turn out the light," Findley told Pegues. Robert Collins was the probation officer who prepared Lambert's presentence report.

No sentence rendered by the court would be sufficient, Svobodny said, "to bring back to society a member of this community," or to "wash away the fear" in the community during the year after the elderly couple's death.

"I wish I was a better orator," Svobodny said in urging Pegues to hand down the maximum sentence. "I wish I could make it clear to everyone in the courtroom what Mrs. Benolken went through just speaking the words."

Society was warned of what Lambert would do, Svobodny said, particularly after psychologist Dr. Anthony Mander said two months before the couple's death that Lambert had homicidal thoughts and could become assaultive at the "slightest criticism."

"There is nothing left to do but put him in a jail setting, frankly, for the rest of his life," Svobodny said.

Because of the record of assaults, two felony arrests, one felony conviction and a history of alcohol-related offenses, all since he was 13, "we had all kinds of notice about what Mr. Lambert was going to do the rest of his life," Svobodny said of any chance for rehabilitation.

The "legal profession is not a science but probably more an art," Svobodny said. Sentencing is "the most difficult part of the criminal justice system," because it requires balancing to assure justice is served while attempts are made to rehabilitate the criminal.

"This is one of the easiest sentences I've come to," Svobodny said, because "I can not find any factor to suggest Newton Lambert should be sentenced to anything less than 99 years."

HOUSE OF REPRESENTATIVES

OFFICE OF THE MAJORITY LEADER

Room 216
STATE CAPITOL

HB 140



TO: Rep Bursell

ATTN: _____

REMARKS:

A recent story (Jan 18) in the Juneau Empire told of Newton Lambert's being sentenced to 99 years - 50 without parole - for "sexually assaulting" and killing Anne Benolken by beating and stabbing her 60 times. (He was found not guilty of killing her husband, who also was sodomized and killed by beating and stabbing)

The attached printout (from House Research) shows the projected cost of nurturing and caring for him for the next 50 years. (used $88 per day and 6% inflation; obtained from Corrections

TOTAL COST $ 9,325,571

J Wood

Year	per [illegible]	annual cost	total cost
1	88.00	32,120.00	32,120.00
2	93.28	34,047.20	66,167.20
3	98.88	36,090.03	102,257.23
4	104.81	38,255.43	140,512.66
5	111.10	40,550.75	181,063.41
6	117.76	42,983.80	224,047.20
7	124.83	45,562.82	269,610.02
8	132.32	48,296.59	317,906.61
9	140.26	51,194.38	369,100.99
10	148.67	54,266.04	423,367.03
11	157.59	57,522.00	480,889.02
12	167.05	60,973.32	541,862.34
13	177.07	64,631.71	606,494.05
14	187.70	68,509.61	675,003.65
15	198.96	72,620.18	747,623.83
16	210.90	76,977.38	824,601.22
17	223.55	81,596.02	906,197.24
18	236.96	86,491.78	992,689.02
19	251.18	91,681.28	1,084,370.30
20	266.25	97,182.15	1,181,552.45
21	282.23	103,013.07	1,284,565.53
22	299.16	109,193.86	1,393,759.39
23	317.11	115,745.49	1,509,504.88
24	336.14	122,690.20	1,632,195.08
25	356.31	130,051.61	1,762,246.69
26	377.68	137,854.70	1,900,101.39
27	400.35	146,125.97	2,046,227.36
28	424.37	154,893.53	2,201,120.90
29	449.83	164,187.12	2,365,308.02
30	476.82	174,038.34	2,539,346.36
31	505.43	184,480.63	2,723,826.99
32	535.75	195,549.44	2,919,376.44
33	567.90	207,282.42	3,126,658.85
34	601.97	219,719.35	3,346,378.20
35	638.09	232,902.50	3,579,280.71
36	676.37	246,876.65	3,826,157.36
37	716.96	261,689.23	4,087,846.59
38	759.97	277,390.58	4,365,237.16
39	805.57	294,033.97	4,659,271.13
40	853.91	311,675.98	4,970,947.11
41	905.14	330,376.53	5,301,323.64
42	959.45	350,199.12	5,651,522.76
43	1,017.02	371,211.04	6,022,733.80
44	1,078.04	393,483.68	6,416,217.48
45	1,142.72	417,092.70	6,833,310.18
46	1,211.28	442,118.19	7,275,428.37
47	1,283.96	468,645.25	7,744,073.62
48	1,361.00	496,763.93	8,240,837.55
49	1,442.66	526,569.80	8,767,407.35
50	1,529.22	558,163.91	9,325,571.26

SB 121

TESTIMONY ON THE DEATH PENALTY

Dana Fabe, Public Defender, March 18, 1983

There are many ethical and moral reasons for not adopting the death penalty. The state is legitimizing the premeditated killing of humans. The death penalty is most often racially and economically discriminatory in its application. Innocent people can be killed by mistake. The death penalty does not act as a deterrent and in fact has a brutalizing impact on a community or society as a whole.

I oppose the death penalty for these reasons and many more. However, I would like to take my time for testifying to address the costs of implementing this bill, focusing on the costs of defending a death penalty case.

If this death penalty bill is enacted, representation of the poor in death cases must be adequate. This is due to the possibility that an innocent person might be killed by mistake. Some degree of mistake is of course a potential problem in all criminal cases. But in non-death cases, the system stands ready to correct those mistakes when they become known. An execution can never be corrected.

Due to these considerations, the processing of a death case is much more complex and expensive then other criminal cases. Not only are extraordinary amounts of attorney time and substantial expert fees necessary in the guilt phase of a trial, but the penalty phase, in which a jury determines whether or not to put a person to death, takes on tremendous significance. This penalty phase requires extensive attorney preparation, the use of psychiatric experts and family and friends from out of state, and other necessary expenditures.

Finally, even after the death penalty has been imposed, the procedures in death penalty cases are lengthy and time consuming. After the guilt and penalty phases of a case, the following procedures would be routinely necessary:

(1) Appeal of conviction to the Alaska Court of Appeals.

(2) Petition for Hearing to the Alaska Supreme Court.

(3) Automatic sentence review by Alaska Supreme Court.

(4) Writ of certiorari to the United States Supreme Court.

(5) Post-conviction relief proceedings in state court.

(6) Appeal of post-conviction relief proceedings in the Court of Appeals.

(7) Petition for Hearing of post-conviction relief proceedings to the Alaska Supreme Court.

(8) Writ of certiorari to the United States Supreme Court.

(9) Petition for Writ of Habeus Corpus in the Federal District Court.

(10) Appeal to the United States Court of Appeals.

(11) Rehearing in the United States Court of Appeals.

(12) Writ of certiorari to the United States Supreme Court.

(13) Commutation applications to executive branch.

(14) Emergency stays to the United States Supreme Court.

The Public Defender Agency estimates that it would cost approximately 3.5 million dollars next fiscal year to defend the estimated number of capital cases which would be assigned to this statewide agency. The figures in this fiscal note are based on the number of cases which would have qualified under the bill as capital cases which were handled by this agency during Fiscal Year 1982. This agency handled 30 first degree murder cases which would qualify as capital cases under this bill. The specific figures were arrived at as follows:

(1) Personal services. This agency is currently 11.5 attorneys short of the LEAA standards for the maximum number of cases to be handled by an attorney to ensure competent representation when no death penalty cases are involved. Death penalty cases take substantially more attorney time than other cases. For example, the Florida Legislature has adopted standards which permit an attorney to handle no more than 8 death penalty trial cases per year, or 5 death penalty appeal cases per year. For comparison, the LEAA figures are 150 non-death felonies or 25 appeals a year. Some states have applied far more stringent standards. For example, the California state appellate defender permits attorneys to handle only 2 death penalty appeals per year. Given the fact that the attorneys who handle death penalty cases will have to be given drastic caseload relief, their extra cases will be loaded onto the caseloads of attorneys whose caseloads already exceed recommended maximums. Thus, at a minimum, this agency must be brought up to the minimum number of attorneys required to handle the caseload as it exists without the death penalty. This necessitates the addition of twelve additional attorneys, plus necessary investigation and clerical support staff.

(2) Travel and Contractual Fees. (a) The New York State Defender Association has estimated that a minimum figure for expert witness fees must be $30,000 for the guilt phase and $30,000 for the penalty phase per case. Thus, the contractual and travel costs for expert witnesses has been calculated at $60,000 per case. This does not include any expert fees which might be necessary at the appellate stages.

(3) Equipment and Supplies. Other costs include expanded office space for additional personnel as well as equipment and supply money for additional personnel.

The costs described above do not take into account contingencies such as reversals and retrials after appeal or travel to Washington, D.C. to argue before the United States Supreme Court and other costs which at this time are difficult to predict. Furthermore, the cost of defending a death case is just one component of the total cost to the system of processing a capital case. The New York Defender's Association estimates the total of defense, prosecution and court costs of procesing a capital case at $1,498.100 prior to any appeals and $1,828,100 once all appeals have been processed. This figure does not include such costs as special telephone lines running from the prison to the Unted States Supreme Court or Governor's office. The cost of extra police personnel for crowd control and helicopter security are also hidden costs. Finally the cost of an actual execution can be high. The State of Georgia which executes by electrocution spent more than $250,000 solely for the anticipated but aborted, execution of Jack Howard Potts in 1980.

March 18, 1983

My name is Judy Zimicki. My address is SRA 4007-A, Anchorage, AK., 99502. I represent myself today as a citizen concerned about the degrading effect that the death penalty would have on the moral fabric of our society.

In January, 1977, a 10 year moratorium on capital punishment ended with the execution of Gary Gilmore in response to a rapidly rising crime rate and, maybe more importantly, the resultant dramatic increase in the fear of crime. The result is an institution of death at the hands of the state for certain types of homicide.

The strength of the cry for the death penalty can be directly correlated to specific events. In our state, the Meach killings last year brought close to home for all Anchorage residents the grim reality of murder. And, more recently, the seemingly calculated cold-blooded McCarthy killings bring out our animal instincts with a desire to kill, literally, a person who could commit such acts.

But the institution of the death penalty is much more than an emotional reaction. When capital punishment is legalized, the effects are profound and subtle, and still unknown.

The most common argument for the death penalty is deterrence. There seems to be no statistics to back this claim. The only study since 1945 that supports the deterrence argument was released in 1975 by an economist named Isaac Erlich. Review of his economic models immediately put his methodology under fire by both critics and proponents of capital punishment.

A look at some statistices may be helpful here. In 1033, the homicide rate in the United States was 9.7 murders per 100,000 people. During the 1930's executions averaged 150 per year. Through the post war years of 1945-60, the homicide rate fluctuated with a maximum of 6.4/100,000. In 1960, there

were 4.7 murders/100,000/ Executions at this time of relatively low homicide rates, however were down to an average of 24 per year, only 16% of the 1930's execution rate.

By 1973, the homicide rate had climbed to 9.4 and it currently rests at 9.8/100,000. Reasons offered to explain the high rate include such diverse factors as economic hard times (analogous to the 30's), the increased availability of hand-guns and the "coming-of-age" of the post-war baby boom. Looking at other countries, England, and abolitionist state, has a homicide rate of 1.1 while Japan, which practises capital punishment, has a rate of 1.0/100,000.

The moral argument against the death penalty is harder to express. In a few words, the state does not have a right to kill, no matter what heinous act someone has committed. Violations of human rights by individuals do not give the State a right to violate human rights. The United States is held up worldwide as an example of guaranteed civil liberties. The reinstitution of the death penalty in the United States is thus viewed as the first step in lessening of these rights and may promulgate executions elsewhere in the world. We watch with horror and disgust news reports of abuses of state power in other countries in the name of fighting terrorism or maintaining state stability. How, then, can we justify State murder in our own country in the name of reducing crime? And shouldn't we question the subtle negative effect state-sponsored murder might have by serving as an example of what to do when we think a wrong has been committed?

Let us look briefly at the number of criminals that would be considered for capital punishment in Alaska. In 1980, a review of felony sentences by the Alaska Judicial Council determined that 1.04% (or 5/481) sentences in urban courts were for first degree murder. During the same period, no first degree murder sentences were recorded in the 372 rural location felony sentences. Therefore, statewide, first

degree murders in 1980 accounted for 5/853 or just under one-half of one percent of felony sentences. In light of the moral questions mentioned above, is the institution of capital punishment for such a small percentage of felonies worth risking the uncertainties, biases, cost and moral degredation?

My final point today addresses the fear of crime which I mentioned earlier as one of the prime factors in the cry for the reinstitution of the death penalty. Crime is a frightening aspect of our daily lives, and the fear grows whenever we read a report of a burgulary, murder or rape situation in which the victim could have easily been ourselves or someone close to us.

As legislators and leaders in the State, you should be directing your efforts to the improvement of the criminal justice system and to the identification of and elimination of the social conditions that foster crime and unrest in our state. Capital punishment is not the answer. It is not a deterrent to crime and thus will not affect the crime rate nor ease our fears. Reinstitution of the death penalty in Alaska is only a symbolic and ineffective gesture of retribution. As such, instead of deterring crime, capital punishment would offer a false sense of security and ultimately delay any more positive measures.

Thank you for the opportunity to testify today.

TESTIMONY BEFORE THE HESS COMMITTEE OF THE SENATE OF THE STATE OF ALASKA

TIMOTHY V. EWELL
EXECUTIVE DIRECTOR
MORAL MAJORITY OF ALASKA
P.O. BOX 101779
ANCHORAGE, ALASKA 99510

Thank you for the opportunity to come before you today. It is indeed a privilege to be a part of my State Government. I feel as do many others, that it is not only my privilege but my duty to let you know how I feel on legislation that affects me and the people I represent.

My qualifications are not as great as those learned jurors that have appeared before you this morning. However, I am a citizen of the State of Alaska for some years now and I have been active in the social/political areas of our State for much of that time. I have served on the Anchorage Crime Commission and as lobbyist in Juneau.

I support the reinstitution of the Death Penalty in the State of Alaska and I support Senate bill number 121 as a means to do that.

First, let me clear up some misconceptions you may have. I have read a lot of letters to the editor lately that improperly quote Biblical references and because I believe in the Bible and its principles, I would like to clear those issues up. The one that comes up the most often is the commandment that is translated in the King James Version of the Bible as "Thou shalt not kill." In 16th century England the meaning was clear but today our language does not properly do it justice. The proper translation in modern language is "Thou shalt not commit murder."

The Bible is clear in showing that God imposed the death penalty and not just for murder offenses but in lesser cases also. And He did not always deal out the punishment directly but used the government established and in effect at the time to carry out that punishment.

God has the right to give life and the right to take it away. And God gave rules by which we must conduct ourselves. To disobey these rules is to subject oneself to the appropriate penalty. It was not judged on wealth, or who one knew but was given out the same to Kings and paupers.

Our founding fathers recognized that God was the creator of the universe and the giver of all laws. Upon that principle they built this land. But we have become a nation of people who not only refuse to recognize God's sovereignty but also that He exists at all.

I go through all this because what we are talking about today is very much a moral issue. And we must have a base for a moral consciousness or we cannot even communicate, which I fear is half our problem anyway.

Let us therefore make some suppositions. Let us assume that at all times and for all reasons, murder is unacceptable in our society. Then it follows that those who commit murder do so against the wishes of society.

If society offers no punishment for the crime, then what is to keep people from ignoring societies wishes.

I submit to you that human beings are more satisfied in their daily lives if they live within boundaries. That living within boundaries is the true test of freedom. The person who works at a job where the boss never says you're doing a good job or doing a bad job is liable to be insecure because he doesn't know what his boundaries of acceptability are. The person drives a car beyond the speed limit or in a reckless fashion does so with the clear feeling that he is overstepping the boundaries that have been established for him.

This is especially evident in the child abuse crimes that are now coming to light here in the city of Anchorage. I have known about this investigation for some time and I am glad it is finally out where it can be seen. I believe that the reason we are seeing such an increase in child abuse and the problems it creates is because of the past generation of "Spock" children who are now adults who were not disciplined properly and who were taught the philosophy "if it feels good, do it."

This problem did not exist 20 years ago like it does today. But the problem is that the parents did not establish boundaries for their children, there were no taboos, no rights and wrongs and hence the children experiment, often into adulthood to try to find where the real boundaries lie. They push it as far as they can.

Now don't get me wrong. I don't advocate child abuse in any form but corporal punishment, "The board of education applied properly to the seat of understanding" is proper and just.

And just as much as a child needs to know his boundaries, so do we as members of society need to establish and live within socially accepted boundaries.

One of those who testified this morning said that only "desperate and angry people cause crime and often under the effects of drugs and alcohol." This is blatently false. There are many people who commit crimes simply for financial gain. They don't <u>need</u> more money they just want it. And there are a great number of people who commit crimes "under the influence of drugs or alcohol" who in fact premeditated the crime and then used that as an excuse.

The public defender who spoke this morning said this bill would legitimitize premeditated murder. I disagree. I believe that the 1973 Roe vs. Wade decision which allowed the taking of unborn "innocent" human life, is the legitimitizing of premeditated murder. I further believe that this bill merely sets standards of conduct beyond which society will take certain action and it warns the would be offender that should he/she go beyond societies standards and take a human life, that the penalty shall be death.

That is truly justice. It should be fairly and equally meted to all.

When she spoke she also alluded to some statistics about Florida in 1979, and how that despite the institution of the death penalty, homicides had risen. She failed to speak to the fact that at this same time there was an influx of hundreds of thousands of Cuban/Haitian refugees into the south Florida area and that crime in general saw a great upsurge because of trying to deal with this unexpected situation.

Now I say that to say this, that statistics are really meaningless unless all factors involved are considered. For instance, when we talk about the rate of homicide we must look at the other social/economic conditions at work at the same time and not just the fact of whether or not capital punishment was in effect at the time.

Now just a few words about cost. What is the cost of trying the case in proportion to one "innocent" human life - I.E. the Charles Meach case. Four people might be alive today if he had earlier been found guilty of murder in the first degree and executed.

And this is not for the sake of revenge, but for the protection of society.

Now let's talk about the court system that deals with the problem. I am amazed at how our system of justice has changed over the last 60 or 90 years. I will bet that there is not more than one lawyer in this room who has spent any time at all seriously studying the law of Blackstone.

Today, we study case law which is not law it is "justice by precedent." But it is not justice because it cannot be equally handed down to all people. Instead, ever since supreme court justice Oliver Wendell Holmes, we have evolving law that changes not by what our elected legislators create, but by what a judge determines in his mind the law means at any given point in time in relation to any given set of circumstances.

And we see the results. We do not have justice. The attorneys who have testified here today have all told you about the fact that there is a disproportionate share of minorities in prison. That is because we do not have justice,

we have "judge law."

Now let me say a few words about the "American Image."

The nations of the world look to America to see how we are handling our crime problems. We are not doing a very good job. They see us as weak and inefficient. A strong statement on crime and punishment will strengthen our image abroad, not weaken it.

Now let me say a little bit about the jury process. Mr. Hitchcock seemed to hold some disdain for their ability to reach a reasoned determination of guilt or innocence. I submit that the jury probably has more ability in such matters than a whole school of judges and lawyers. That is why the system was established and that is why it has remained and been effective. But there are some who hold an elitist point of view that believe they know what is best for us. The question I would ask is: "Did your I.Q. and common sense miraculously become greater than that of the common man when you were graduated from law school or were appointed to the bench?" I believe there are those who believe so.

And as for the delegating to another the responsibility to make life and death decisions, i.e. a supreme court review or for that matter, the persons who actually perform the execution, they are hired by society to perform that job. If they do not wish to accept the responsibility, they do not have to hold the job.

But I think it all boils down to one thing. Either there is life after death, or there is not. If there is no life after death, then where is the sanctity in human life. However, if, as I believe, there is life after death, then God will be the final judge. He rules now in everything we say and do and He will rule then.

SENATE JUDICIARY COMMITTEE

SPECIAL HEARING IN ANCHORAGE

MARCH 18, 1983

on

SB 121

The meeting was called to order at 9:30 a.m. on the 5th floor of the court building located at 303 K Street, Anchorage, by Senator Josephson, Co-chairman.

Present at the hearing were Senators Josephson, Eliason and Pettyjohn.

The following individuals, most if not all of whom were members of or affiliated with the Moral Majority of Alaska, testified in favor of the bill:

Cecilia Young

Tim Ewell, executive Director of the Moral Majority of Alaska, who stated, among other things, that "God doesn't change, He gives you different ways to be saved".

John S. Jacobsen;

Burton Cortney;

George Steinberg;

Kenneth Anderson;

David Liddington;

Carolyn Glover on behalf of her husband;

Michael Hick;

Teresa Jones;

Richard Phillips.

The following individuals testified against the bill:

Tim Stearns, an attorney representing prisoners in the pending Cleary litigation, who focused on the lack of objective standards in Senate Bill 121 as presently drafted;

John Katcher, a Public Defender;

Linda Kincaid, on behalf of Judy Zimicki, a private citizen;

Dr. John Garvin, a member of the United Methodist Clergy and a Social Worker;

Dana Fabe, Public Defender, who focused on the cost of implementing the bill;

Robert Wagstaff, an attorney, who focused on having to deal with the reality of death as a human being;

Brant McGee, an attorney and life-long Anchorage resident;

Ron Zobel, an attorney, who cited a law review article by Jack Greenberg, (91 Yale L.J. 908);

John Havelock, the Director of Legal Studies, UAA, and former state Attorney General, whose statements included the following:

> This bill is basically a "dud" and no one will ever be executed under it because it is very poorly drafted and leaves open many crucial constitutional and interpretetional questions
>
> The bill promises what it just can't deliver and poses an endless series of headaches
>
> The bill will have a serious, adverse impact on racial relations
>
> The bill confuses charging elements and sentencing factors
>
> The bill establishes false standards incapable of being measured, and there are a number of mitigating factors missing
>
> Constitutional issues are raised by the fact that the bill utilizes factors as part of its sentencing procedure that other states use as elements of the crime itself
>
> An analysis of first degree murder convictions in Alaska in the past 10 years should be made.

Lynn Allingham, an attorney, who stated that the death penalty is simply barbaric;

Lewis Gordon, an attorney, co-founder and local leader of Amnesty International;

John Angell, a professor at UAA and the Director of the Justice

Center, who stated that the American Psychiatric Association opposes capital punishment because it's counter-productive;

Nancy Gordon, an attorney member of the Alaska A.C.L.U.;

Walter Share, an attorney who specializes in criminal appeals;

Murphy Archibold, an attorney;

John Suddock, an attorney appearing on behalf of the Alaska Academy of Trial Lawyers;

Father Steve Moore, on behalf of the Archdiocese of Anchorage;

Robert Burk, a private citizen;

Sylvia Short, an attorney and the Area Coordinator for the Unitarian Council;

Mark Johnson, a senior at West High in Anchorage, who had two main objections to the bill: (1) its cost and (2) the danger that a mistake will be made and an innocent person will be executed;

Roger Miller, a private citizen whose main message was that "we must not codify blood revenge";

John Murtagh, an attorney in private practice specializing in criminal matters, who focused on a number of defects and ambiguities in the present bill;

John M. Richards;

Karla Huntington;

Doug Elliot;

Phillip Weidner.

The meeting broke for lunch between noon and 1:30 p.m. and adjourned at 4:26 p.m.

SEN. HALFORD/Connie Halford

TRUE-LIFE DRAMA

LOUISE LACORTE KEEPS A KILLER IN JAIL



When she heard that the man who had murdered her daughter was up for parole after only seven years in prison, a peace-loving California beautician turned herself into a fighter overnight. This is the story of what she did—and why. By JOSEPH N. BELL

There's a 38-year-old convicted murderer at the California Men's Colony in San Luis Obispo named Richard Lanill Johnson. On February 11, 1976, he held a .22 rifle to the forehead of an 18-year-old girl he'd never seen before and shot her four times between the eyes. Less than seven years later—on October 26, 1982—a parole board met with Richard Johnson to decide whether or not to set him free.

Louise LaCorte of Arcadia, Calif., is the mother of Johnson's victim. In her half-century of life, she has survived two shocks almost beyond human endurance. The first was being told that her daughter, Cathy, had been brutally murdered. The second was learning that Cathy's killer—once sentenced to death—might be paroled. She couldn't do anything about the first shock. But she could—and did—do a whole lot about the second.

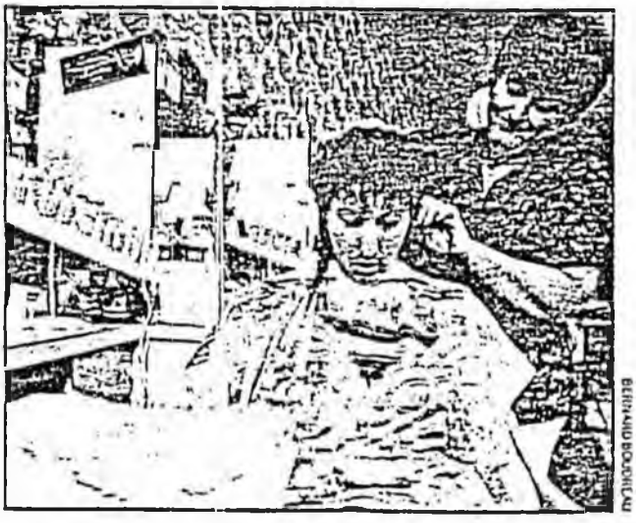
When the deeply concerned police officer who had originally found and arrested Cathy's killer told Louise and her husband, Sam, about Johnson's scheduled parole hearing, Louise turned her neighborhood beauty shop over to an assistant and charged head-on into battle. In the end, she not only managed to block Richard Johnson's parole, but also focused public attention on a system that makes it possible—even commonplace—for vicious killers to be turned loose into society.

The situation that faced Louise LaCorte was far from unique, especially in the state of California. In 1976, only a few weeks after Johnson was convicted of the murder of Cathy LaCorte, the California Supreme Court ruled that the state's death penalty law was unconstitutional. When the decision was handed down, Johnson became one of 104 men awaiting execution whose sentences were changed to life imprisonment. By now, 29 of these have been paroled, and 25 more have release dates! (One of those paroled committed a second murder and is back on death row again, under a new capital punishment law which was upheld in 1978. Since that law does not apply retroactively to people who had been sentenced before its passage, it does not affect Johnson.) Of the 2,175 people serving life sentences for murder in California, only two have been in prison more than 20 years, and the average convicted murderer has been confined about 12 years.

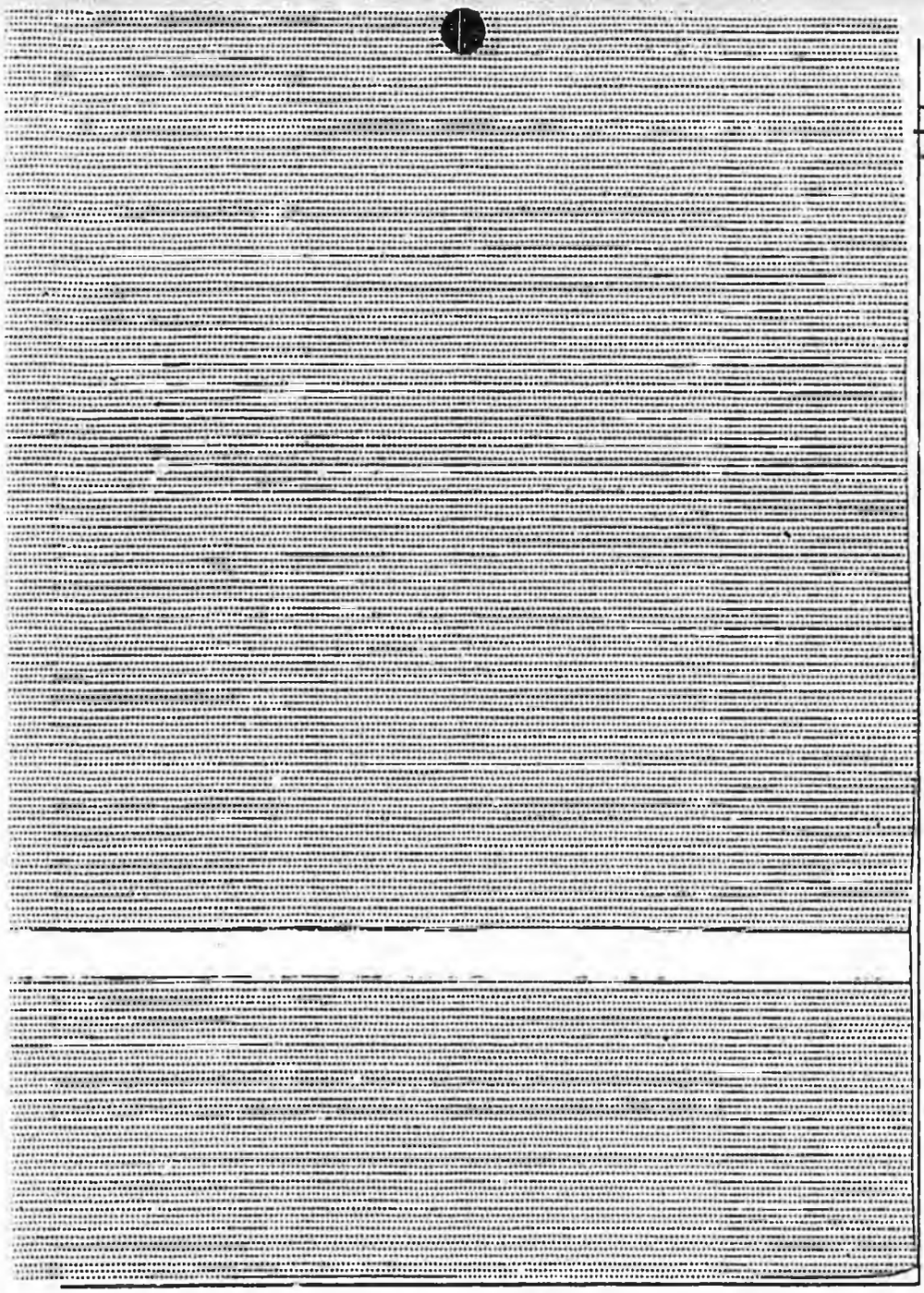
Among those who have been considered for parole in recent years are members of the Manson gang, the onion-field killers of Joseph Wambaugh's novel, and Sirhan Sirhan, the man who murdered Robert Kennedy.

The situation is not limited to California. In Utah, a convicted murderer named Jack Henry Abbott got a lot of national attention last year when author Norman Mailer and several literary colleagues argued eloquently and successfully for his release after he wrote a critically acclaimed book about prison life. Six weeks after he was paroled, he killed again. More recently, a Texas judge pledged to work for changes in the parole system because a man he had sentenced to 60 years in prison—the admitted killer of 13 women—would be eligible for parole in 20 years.

To page 54



To prepare for the next round of their battle to keep their daughter's killer in jail, Sam and Louise LaCorte continue to collect petitions (*top, left*). Behind them, in the living room of their Arcadia, Calif., home is a portrait of their late daughter, Cathy. At right, Louise at work in her neighborhood beauty shop. Her "customer" is her daughter, Linda, now 28, married and the mother of a daughter.



KEEP KILLERS IN JAIL

From page 50

Johnson's two-week trial in October 1976 had been agony for Louise and Sam LaCorte. Day after day they sat in the courtroom, watching their daughter's killer stare impassively at witnesses, with never a trace of emotion. (What the LaCortes wanted, of course, was a chance to confront him with one question: *Why did you kill her? Why?* But they never got their chance. Johnson remained as inflexibly mute as he had been during prior police questioning.) He never took the stand in his own defense.

The evidence was damning: A gun found in his house was identified by ballistics experts as the murder weapon; a fingerprint found at the scene matched a set of Johnson's prints on record from a previous arrest.

The verdict was guilty; the sentence, death. The LaCortes thought the sentence was fair (they are not opposed to capital punishment), as did Detective Frank Salerno, the man who had tracked down Johnson. Says Salerno, "He was wanted for rape and murder in St. Louis when we arrested him. He is one of the most coldblooded individuals I've ever met. People like him have no more feeling for the value of human life than that piece of paper on my desk. If they want something, they take it. This was the most brutal, senseless murder I've seen in 21 years of law-enforcement work."

When Johnson's sentence was changed to life imprisonment as a result of the Supreme Court decision, Louise and Sam were able to accept that as the law of the land. "But at the time," Louise says, "we thought that a life sentence meant *life*. We didn't know it could mean only seven years."

After Johnson had been locked up, the LaCortes set about trying to get their lives on track again. They couldn't afford to give in to grief. At the time, their youngest child, Kenneth, was only 10 (their daughter Linda was 21 and married), and Louise felt that "if I was going to give Kenneth anything like a normal life, he wasn't going to see his mother in tears every day. If I needed to cry, I did it in the car on my way home from work."

The tears had long since dried when Frank Salerno called the LaCortes last May with an appalling message: A parole hearing date had been set for Richard Johnson. Sam took the call, and Louise came home from a long day of work to find her husband badly shaken. "I kept asking myself," Sam recalls, "if Cathy's life was worth just seven years of her killer's life."

Louise turned shock and anger to instant action. She called Salerno and asked what they could do to prevent Johnson's parole. He told her to find as many people as she could to write letters of protest to the parole board. But time was short. The hearing was to be held on June 22, and any relevant material had to be in the hands of the board 10 days before the hearing. That gave the LaCortes only two weeks to muster the troops.

Sam LaCorte is a gentle and introspective man; Louise is outspoken and impulsive. So by mutual consent, Louise took charge of the campaign while Sam tended to his contracting business. "I couldn't believe the change in her," he says. "Normally, she would never say anything to upset anyone. But when she is fighting for Cathy's rights, she becomes a different person."

First, Louise assembled the family and told each of them to find as many letter writers as they could. Then she turned to the regular customers at her beauty shop. "Most of them didn't know about Cathy, and I couldn't stand there all day and tell the story over and over, so I put it all in a letter I left on the front counter for anyone to read."

The letter described Cathy as an 18-year-old freshman at Pasadena Bible Institute who had been known at Arcadia High School for her effervescent friendliness. It told how her boyfriend, Robert Morton, had come by the LaCorte home in his ancient VW van at noon on February 11, 1976, to take Cathy to school. A cleaning woman heard them discuss first driving into the hills behind Arcadia for a look at Los Angeles on a rare clear crisp day. They were never seen alive again. Their bodies were discovered at 4:30 that afternoon in the back of the van, parked on a dirt turnout overlooking the city. Cathy had been shot in the face and Bob—bound and gagged—had been killed by three shots in the back of the head.

It had taken nine months to find and convict the man who killed them—possibly for the $11 which was found missing from Bob's wallet. Now this man was being considered for parole, and Louise was looking for help. She concluded her letter: "This has been very hard for me to write; it opens old wounds. But we *must* take a stand. We must protect ourselves and our children from him and others like him. If we sit back and do nothing, he will be released from prison to stalk others. And don't kid yourself, *he will kill again.*"

The response was instantaneous. So many outraged customers wanted to pass the word on to others that Louise had the letter printed and within a few days handed out several hundred copies. Still, she couldn't be sure how many people were actually writing letters, so she looked for a more effective avenue of protest. When she tried local newspapers and TV stations, she found they weren't interested. ("We didn't have enough numbers yet.") Then she heard about an organization called Citizens for Truth. Formed by a young computer executive named John Mancino, the organization had been influential in preventing the release of Sirhan Sirhan by flooding the parole board with petitions. Public response to this effort was so positive that Mancino was now offering the help of his organization wherever it was needed to "keep killers, rapists and child molesters off the streets." Louise called Mancino, and he advised her to forget letters and circulate petitions instead, concentrating on big numbers. "He told me that the courts and politicians will *hate* to listen if you get enough people," says Louise.

Along with her daughter, Linda, and three close friends, Louise set out to do just that. "I don't think I went to bed for a week," she says. "I called everywhere I knew groups would be coming together—churches, beauty shops, clubs, shopping malls—and people who took petitions kept coming back for more. I also called on every public official I could think of whose support would help our campaign. Within five days, we had 10,000 signatures."

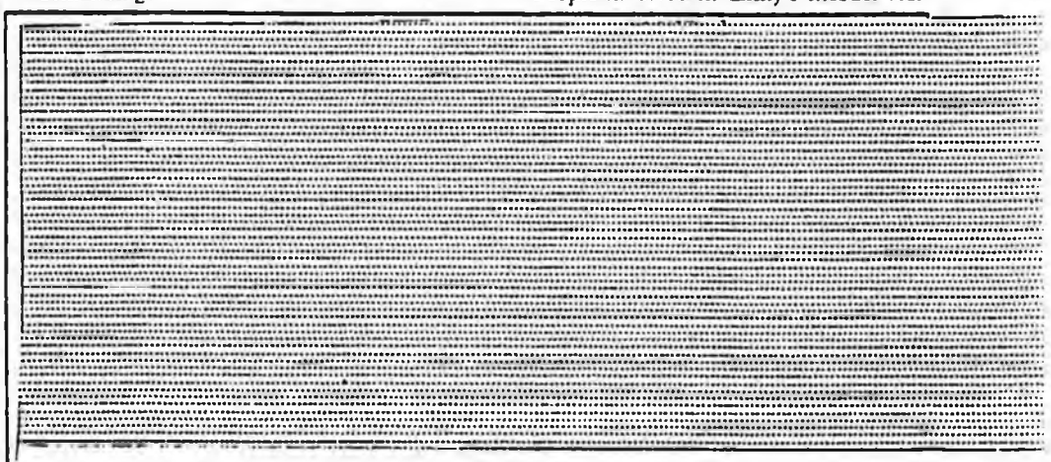
That's when Louise went back to the media. The local CBS station picked it up first. Then, with Mancino's help, Louise and Sam held a press conference that was covered by virtually every TV station and newspaper in the area, including the prestigious *Los Angeles Times*. At the same time, Louise was going after even bigger game. She called the Attorney General, a half-dozen state legislators, the Los Angeles County District Attorney and the court officials who would present the public's side in the parole hearing. When her calls weren't returned, she kept boring in, pleading with officials who had offered help to put pressure on those who hadn't.

She was indefatigable, and she won converts by the thousands. Before her two weeks were up, Louise had collected a total of 24,671 signatures on petitions protesting the release of Richard Johnson. Then, two days before the deadline, the LaCortes learned from a friendly newspaper reporter that the parole hearing had been canceled indefinitely, ostensibly because Johnson's attorney had gone to court to demand that his client be allowed to see the letters protesting his parole before the hearing took place.

Louise and Sam delivered their petitions to the prison anyway, followed by a horde of TV and newspaper reporters. They were received by Carl Weaver, acting classification and parole representative. When Louise handed him the petitions, she insisted on written assurance that they be notified by registered letter of the new hearing date. Recalls Sam: "Weaver was really gritting his teeth, because Louise was very demanding."

Now there was nothing to do but wait. Meanwhile, two related events happened rather quickly. First, California voters passed a proposition permitting the families of victims to testify at parole hearings. The proposition was quickly tested in the Supreme Court, declared constitutional and is now a law in the state of California. Second, a hearing was held on Richard Johnson's petition to see the letters before the hearing. Many of Louise's letter writers were terrified at the prospect of a vindictive killer at large who knew they had protested his release. The court agreed, ruling Johnson could see the letters but only with names and addresses removed. Johnson's parole hearing was then rescheduled for October 26, 1982.

People involved in Cathy's murder feel



strongly that rehabilitation is not an issue in Johnson's case. Says Frank Salerno: "You can't rehabilitate people who have broken the law as often as Johnson has and who have shown they don't want to—or can't—live lawfully within society."

The question of rehabilitation is basic to the concept of parole, first introduced in New York State in 1877 by social reformers who believed punishment should fit the criminal and not the crime. Within four decades, parole had spread to the Federal penal system and virtually all of the states, providing a means for early release of prisoners who were judged by a politically appointed parole board ready to be "rehabilitated."

The obvious inequities and unevenness of the system and a hardening attitude toward law and order in the last decade have spawned two different approaches to parole reform. The Federal penal system has now adopted a carefully weighted set of specific guidelines to evaluate a prisoner's parole "score," thus removing subjective judgments. At the same time, a growing number of states have adopted a form of determinate sentencing in which punishment for specific crimes is fixed by statute and the possibility of parole is much more severely limited. In spite of these reforms, however, thousands of convicted killers are walking the streets of America, and the horror stories pile up. While the LaCortes awaited Johnson's parole hearing, for example, a 10-year-old child was raped and murdered in their area, and the prime suspect was a man with a long record of child molesting who had just been paroled from prison.

The LaCortes don't want Richard Johnson out of prison—ever. And on October 26, 1982, in San Luis Obispo, they were allowed to testify to that point at Johnson's parole hearing. They were also allowed to present their petitions and argue the case for their dead daughter directly before the people who would decide whether or not to free her killer. The verdict: parole denied to Richard Lanill Johnson.

The LaCortes are pleased but wary. They know that under the existing law Johnson will come up for parole again and again. They've won this one, but there is a seemingly endless series of similar challenges looming ahead. They know that public support will be harder to muster as time goes on. But that doesn't moderate their determination.

"I feel so angry," says Louise, "to have had to go through that first parole hearing. And yet I know in a few years we'll have to go through it all again. We'll be waiting—and watching. I'll fight his parole as long as I have breath in me.

"If I could do anything to make up for Cathy's death, it would be to make our country a better place by fighting for changes that need to be made in our laws and our parole system. If what we've done can help bring that about, it almost makes the pain worthwhile." ■

We favor the death penalty

Juneau Empire 3/7/83

Eight people are shot to death and then set afire aboard a fishing boat anchored near Craig.

Six McCarthy residents are gunned down in cold blood.

Four Anchorage teen-agers are chased down and shot to death as they walk through a park.

Two elderly Juneau residents are bound, stabbed 60 times until they die and then sexually assaulted.

Listed above are multiple murders that happened in our state during the last year. These are not just crimes; they are outrages against society. The grief they have caused cannot be measured in prison sentences; it is not enough just to take those criminals off the streets.

For crimes so shocking, so hateful, we believe the death penalty should be imposed.

The death penalty cannot be debated without emotion.

In arguing against it, many people believe a "civilized society" should never take a life. They argue the "eye for an eye" tenet should never be applied, and that the sentence is not a deterrent.

In the vast majority of cases, those arguments stand up. A person who acts in a moment of passion, even if he kills another person, should be given the benefit of the doubt and no death penalty should be allowed.

In the some cases, though, the criminal has suspended the rules of humanity.

Multiple murders — when a person kills one person and then keeps on killing — do not qualify the criminal for the compassion of society.

Neither do planned murders.

Neither does the killing of a law officer.

A death sentence should be imposed only after all possible avenues of appeal are pursued, and there exists no shadow of a doubt that the criminal's rights have been protected and that he or she is guilty as charged.

The Alaska Legislature is reviewing proposals to reinstate the death penalty. We urge its members to adopt such a proposal, as long as it guarantees that all appeals may be pursued.

We do not take joy in advocating such a position. In fact, sometimes it hurts to advocate what we believe is the right thing. But it hurts us not nearly as much as it hurts the friends and families of victims of such horrible crimes and the society that allows such criminals to live



Killing criminals is no solution

To the Editor:

I am unconditionally opposed to the reinstitution of the death penalty in Alaska. A close look at homicide rates at different periods of our country's history demonstrates no correlation between the number of homicides and the practice of capital punishment. The recent increase in the U.S homicide rate from 4.7/100,000 in 1960 to the current 9.8/100,000 cannot be reversed or even slowed by the enactment of death penalty statutes on a state or federal level. People who commit murder do *not* stop to fully weigh the consequences of their acts and, therefore, will not be deterred by the threat of state-sponsored murder.

In most respects, the U.S. is a shining example in the world of consideration for civil liberties and fundamental human rights. In the industrialized world only Japan, South Africa, the Soviet Union and the United States still practise capital punishment. Reinstitution of the death penalty in the U.S. diminishes our credibility in our efforts to promote "liberty and justice for all" worldwide. Let's not be hypocrites. Instead of capital punishment we should concentrate on determining and then eliminating the causes for violent crimes. Killing individual criminals is not the answer.

— *Judy Zimicki*



Murder any way you slice it

Dear Sir:

Charles Meach was convicted of an unpardonable crime: murder Let's hope the state does not react by implementing murder as a legislative policy. Capital punishment is not a deterrent. It's institutionalized murder.

— *Sara Juday*



Don't turn justice system into circus

In Texas within the past four months, a crowd gathered outside the Huntsville Prison for the midnight execution of a convicted murderer. Anticipating a possible reprieve, certain supporters of the execution shouted encouragement with pep rally-style slogans. Vendors sold hot dogs. There was no reprieve and the convicted killer was executed.

Another man, tried on the same charge as the man who was executed, was convicted and received 40 years in jail. It was never proven which man pulled the trigger. One was executed, and one . . . paroled in a few years?

More recently, Andy Barefoot was granted a stay of execution just hours before he was to die. Since then a key witness has recanted her testimony and Barefoot will likely receive a new trial.

These cases present the death penalty in action; a definite, irrevocable punishment administered by an imperfect and inequitable system.

That some criminals deserve to die, I would not argue. That we can be perfect in our justice, I *would* argue.

As much as anyone, I wish such criminals removed from society. I want them locked away forever. And deep down, I know that if it happened to me and mine, I'd want to kill. However, justice is what we attempt with our laws. We seek equity, fairness and we seek to establish standards of morality, rather than succumb to base emotion.

Inequity, uncertainty, circuses, finality — the price exacted by the death penalty. Perfection of judgment is demanded, yet impossible to achieve.

The Alaska Legislature is now considering legislation that would establish the death penalty in this state.

Tell them no.

— *Roger Miller*



Death sentences do protect society

Contrary to belief, the death penalty has always been in effect in Alaska.

Criminals and murderers have been sentencing innocent people to death (without a trial) regularly. There is no reason why our society should feed and house a convicted murderer, (such as Meach) for the rest of his life.

It is my firm belief that even Meach would have gotten off with a slap on the wrist if the public hadn't been so outraged by his acts. A person, quite often, murders someone, gets a light sentence, then gets out on parole early, and the people who testified against him live a life of fear because the murderer may retaliate against them.

Is it any wonder our good citizens try not to get involved?

The death penalty may not, (although I think it will) deter anyone from committing his first murder but, he sure as hell won't commit a second!

It is time we quit coddling criminals with jail time, with TV and game rooms, etc. and make them pay according to their crime.

Yes, by all means, the death penalty should be reinstated.

— *Ben Rule*

A. Death penalty is no bargain

A common argument made in support of the proposed reinstatement of the death penalty is that the state and its taxpayers should not have to bear the cost of supporting for life those who have committed murder or other heinous crimes. Yet if the experience of other states holds true for Alaska, the cost of the death penalty to this state's citizens would be far greater than the present system of incarceration.

The reason for this is the extraordinarily high legal cost associated with the death penalty. Protracted appeals to the Court of Appeals, the Supreme Court and federal courts, including motions for stays of executions, and various emergency motions; probable appointment of two attorneys at state expense for defendants in capital cases, and challenges to the constitutionality of the statute itself ensure that tremendous expense will be borne by all Alaskans. Even though a prisoner sentenced to life imprisonment may be housed at state expense for decades, comparison of overall costs suggests it would be more economical to continue with thepresent system.

Numerous compelling non-economic arguments against the death penalty can be made. For those conceived primarily with the economics of capital punishment, it's high time to face the fact that the death penalty is no "bargain."

— *Lewis Gordon*

A. Let's not condone murder by state

A common argument for reinstitution of the death penalty is that others will be deterred from committing these horrible crimes once the criminals are executed. The studies on deterrence have proven nothing conclusively. It can be argued though, that most murders are committed impulsively, not in a premeditated manner, and that the death penalty would not deter these people.

Furthermore, I disagree with the state issuing a death sentence; as if the state carrying out the act made it justified. Murder is just that, no matter who commits it.

The recent introduction of lethal injections to carry out murder is by no means more humane or has it been proven painless. How can taking another person's life be considered painless or humane? Some doctors have stated their opposition to the use of medical practices to carry out a death sentence since their purpose (the doctors and their practices) is to heal people and preserve life.

Finally, in debating this issue both sides should remember the victim and the family and that neither are served by revenge. To serve a long sentence, a possible life sentence, and pay with the loss of freedom is a much more just and fitting punishment.

— *John Loin*

A. Life is a basic human right

There can be no justification for the violation of the most fundamental of human rights — life. There can be no justification even if a murder can be proven. Governments do not have the right to violate human rights regardless of the violations by the individuals; by doing so governments give tacit approval FOR the violation of human rights. Human rights are fundamental and therefore universal. There can be no exceptions made or we are all in danger.

— *Kimberly McGee*

A. Executions actually cost more

Just a thought on the Death Penalty issue: There are some people who believe it is cheaper to kill someone than it is to maintain them in a prison. According to the New York State Defender's Association, it is estimated to cost $1.5 million to prosecute a capital punishment case (1982 estimate), before any appeal was filed. We all know how many appeals can be filed. In comparison a year in prison in Alaska averages $21,500. You don't need to be a mathematical wizard to see where the "bargain" really is.

— *George Shedlock Jr.*

Q. "What is your view of the death penalty?

A. Too much talk about mercy

The death penalty should not be taken lightly. But what of the victims? Were they shown mercy? Did they die a painless death? What of the animals that kill children? In some cases, even here in Anchorage, the method of murder is enough to make you sick. There are those that say life sentences are excessive. Come on. Enough is enough. Mercy? I think not. Let the punishment fit the crime.

— *Richard Nofich*

A. Executions degrade society

The reintroduction of the death penalty would be a step backwards for Alaska. These industrialized countries have abolished capital punishment because it degrades the humanity of society without contributing to crime prevention. The homicide rates in the abolitionist countries are often much lower than in the United States. How many Alaskans would feel any safer in New York, Illinois or Florida where the death penalty exists. The effect of the death penalty has often been to discourage juries from convicting the accused of murder. Thus, instead of creating a real deterrent, the penalty can result in more acquitals. Given the weaknesses of the deterrance argument, the death penalty must be considered blood revenge. This state should not degrade itself by taking a person's life in revenge.

— *Bruce M. Landon*

A. Eye for eye makes a lot of sense

There are reasons other than a deterrent to crime (which the death penalty apparently is not) for re-instituting the death penalty.

1) When a person is murdered or rendered a basket case by torture, mutilation, etc., society has lost the beneficial services of that person, to say nothing of the suffering and deprivation of family and friends. To execute the person and/or persons responsible for this loss would be a very effective way of ensuring that those particular individuals would not ever cause such a loss again.

2) Not only has the criminal removed a productive individual from contributing to society but the criminal, if imprisoned rather than executed, costs society even more than the initial loss in terms of sheer upkeep in prison. It is a valid question to ask whether in point of fact that money could be used for a more productive purpose. Perhaps some of it could be used to compensate the victim's family; some could be used in social programs to aid elderly or economically disadvantaged families. Especially now, given the recession, such social help programs are greatly underfunded. What better use to put money than for something positive, rather than maintaining a social drain by supporting a criminal.

3) Regardless of whether the crime was perpetrated by a sane or an insane individual, the effect is the same: the loss of the beneficial contribution of the victim. The perpetrator is a negative contributor, not only removing a beneficial contributor but causing other negative effects, such as social stress, diversion of funds for upkeep of the criminal instead of using the money for social good, etc. Thus, sanity or insanity should have no bearing on the use of the death penalty in any particular case. The crime has been committed, period; society has suffered an irreplaceable loss and there is little logic in throwing good money after bad.

I realize that there is the danger of executing an innocent person. However, innocent people can be convicted and ruined just as effectively now under our current judicial system. The point is that society has to balance the cost of criminal maintenance versus execution and use of maintenance funds for other more generally beneficial social causes.

The Biblical axiom of an "eye for an eye and tooth for a tooth" may had greater social benefit than we have given it credit for.

— *Margaret Archey*

A. Don't tarnish image of U.S.

The United States has a substantial position as a world leader. Major elements of our life from our art to our government are exported to other countries. We set standards for other countries to follow if they are to receive our aid and/or favorable diplomatic treatment. In taking this kind of leadership in the world it is important that the U.S. set an example in the area of the death penalty. While some of us may see substantial differences in the way a U.S. court metes out the death penalty and the way a particular dictator, for example, dispatches that judgment, that perception of difference is unlikely to be clear to those without an intimate knowledge of our system. To effectively influence those in power in various countries with poor human rights records it is important that we set irreproachable standards for ourselves. We must not give those with lower human rights standards or irreverence for human life any excuse to abuse their power by using comparisons to the capital punishment standards of the U.S. (no matter how incorrect this perception may be). The death penalty should be abolished.

— *Robert L. Bu*

Death penalty debated

By TOM KIZZIA
Daily News reporter

3-1983

A long line of lawyers, academics and clergymen went to the podium of the Supreme Court chambers here Friday to call the state's proposed death penalty immoral, ineffective and, in some cases, counter-productive.

Their testimony was followed at the end of the day by that of the executive director of Moral Majority, a half-dozen representatives of a Christian academy and several others who said a death penalty would bring the power of retribution and justice to Alaska.

The state legislature is considering several bills that would, for the first time since territorial days, provide Alaska with the death penalty for certain aggravated murders.

Sen. Joe Josephson, D-Anch., who chaired Friday's hearing of the Senate Judiciary Committee, said at the end of the day that a poll of Alaskans today would probably find a majority in favor of the death penalty. "But my responsibility is to act on information," he said, "and I think the public attitude would change if they had the opportunity to hear the testimony today."

Josephson said he would vote against the death penalty bill.

R-Anchorage, who introduced the bill with three other senators, said no testimony in a public hearing would change his mind about the need for a death penalty. It would only help refine the legislation, he said.

Asked at noon about the morning's testimony, which had been unanimously against the proposed bill, Pettyjohn said, "My neighbors in south Anchorage aren't here. And I know how they feel about it."

Several speakers referred to capital punishment as "premeditated murder" and spoke of the chances for making mistakes, Where they contended that long prison terms would effectively isolate dangerous criminals from society, others who spoke at the end of the day said society demanded more.

Citing several multiple murders in Alaska, Burton Carney of Harvester Academy said, "I think there is a place for retribution."

"The way things are going now, you're either a killer or a killed," said Kenneth Anderson. "I'd rather be a member of a state with capital punishment than be on a list of the killed."

The abstract idea of capital punishment may be able to carry public opinion polls, said former Attorney General John Havelock, but he predicted public opinion would reverse itself if the bill were passed and the state actually executed somebody.

leveled his criticism at the legislators themselves and what he called "the Pontius Pilate aspects of the bill." The Senate bill would leave it to the state Supreme Court to decide the method of execution for criminals, and Wagstaff said legislators were ducking an unpleasant issue.

"You have to deal with the reality of death," Wagstaff said. "You cannot wash your hands and let the Supreme Court decide."

A number of speakers Friday cited studies that found imposition of the death penalty in other states had not deterred the crime of murder. In some cases, they argued, publicity surrounding an execution was credited with an increase in the number of murders over the next four to six weeks.

Dana Fabe, head of the Anchorage Public Defenders office, said the death penalty would mean 12 new appeal steps and cited a New York State estimate of the cost of a capital trial and appeals at $1.8 million. Fabe and others said the death penalty has historically been used disproportionately against blacks and Native Americans and in particular against murderers whose victims were white.

There would be a "serious impact on race relations . . . if the first person out of the chute that you're going to execute is an Eskimo," said Havelock, who is now director of legal studies for the University of Alaska.

Methodist minister John Garvin said he feared the state would "sweep the problems under the rug" by passing a death penalty when "social restoration" and pre-

Garvin questioned the motives of "law and order advocates who want to 'get the bastards.' "

To that, an embattled Pettyjohn responded, "What do you want to do with the bastards? Change their souls, right?"

"That's very well summed up," Garvin said.

Pettyjohn finally received some reinforcement about 3 p.m. when Tim Ewell, executive director of Moral Majority, said the death penalty was necessary to strengthen the line between right and wrong. "If society offers no punishment for the crime, then what is to keep people from ignoring society's wishes?" he asked.

He said the Bible's commandment "Thou shalt not kill" was actually a poor translation. The proper translation, he said, should be "Thou shalt not commit murder."

A different theological interpretation was offered the Judiciary Committee by the Rev. Steven Moore, who said that capital punishment would increase the cycle of violence in society by teaching "that the answer to vio-

DEATH PENALTY DEBATED CONT'D

lence is violence." Said Moore: "Law is a teacher of the values of society as well as the protector of values."

The Senate bill says a jury could apply the death penalty if a defendant:

- Was deliberately cruel and the murder involved torture or "aggravated battery."
- Endangered more than two other people.
- Has a prior violent felony conviction.
- Committed murder for pay.
- Was on release for another felony charge or conviction that involved assault.
- Killed a law enforcement officer acting in the line of duty.
- Committed murder to further the criminal objectives of an organized group of five or more persons.

Against these seven aggravating factors, a jury would have to balance four mitigating factors:

- The defendant's conduct was in some way forced.
- A young defendant was influenced by an older person.
- The defendant was seriously provoked by the victim.
- The defendant helped authorities capture others involved in the crime.

A similar bill in the state House would leave the balancing decision on the sentence to the judge. Several who testified Friday criticized separating the jury proceeding for sentencing in the Senate version, which would allow hearsay and other evidence not admitted during the criminal trial.

The name of repeat murderer Charles Meach was raised several times by proponents of the death penalty. "Four people might be alive today if he had earlier been found guilty of murder in the first degree and executed," said Ewell.

Opponents of the bill said life without parole would have been just as effective in getting Meach out of the way, and pointed out that Meach had not gone to jail for the first murder because of a successful insanity plea.

Pettyjohn observed that the state had since toughened its insanity statute. But attorney John Murtagh said that under the capital punishment proposal and the new guilty-but-mentally ill law, "society could spend 12 years restoring a person to mental health and then kill him."

Austin Times A-5 4/21/83

High court to review death row appeals

Associated Press

Washington — The Supreme Court is considering a case that may yield a life-and-death timetable for some 1,200 condemned murderers nationwide.

The justices are expected to use a Texas case argued before them today to decide, by July, how federal appeals courts should handle emergency appeals from death row.

At issue is what standard those 12 appeals courts should use in deciding whether to postpone the execution of a death row inmate who has filed a new appeal with them.

The 5th U.S. Circuit Court of Appeals, based in New Orleans, has adopted a policy of denying postponement requests unless the death row inmate can show the underlying appeal likely will be successful.

Other appeals courts use a much less demanding standard, granting execution delays if the underlying appeal is not frivolous.

The standard the Supreme Court selects could result in months, even years, of added court proceedings and execution delays.

Also at issue in the case of Thomas Barefoot, sentenced to die by lethal injection for the 1978 murder of a Texas police officer, is whether psychiatrists should be allowed to testify about a convicted murderer's "future dangerousness."

Juries now hear such testimony in choosing between the death penalty or life in prison as an appropriate punishment.

Barefoot was to die last Jan. 25, but less than 12 hours before his scheduled execution the Supreme Court ordered that he be kept alive and that his emergency appeal be made a test case.

Barefoot was convicted of the Aug. 7, 1978 shooting death of Carl Levin, a Harker Heights, Texas, police officer who had been investigating a night club fire.

A New Iberia, La., native, Barefoot was then a fugitive wanted in New Mexico on criminal charges. Prosecutors said he shot Levin in the head at close range to avoid arrest.

Barefoot's case attracted considerable unsolicited advice for the high court.

The Legal Defense Fund, a civil rights group active in representing death row inmates, and the American Bar Association, the nation's largest organization of lawyers, opposed the 5th circuit court's standard.

"A stay should be granted unless it can be determined on the face of the available documents that the inmate's claims are frivolous," ABA President Morris Harrell argued.

But the conservative Washington Legal Foundation urged the justices to uphold the 5th circuit court's more stringent standard.

"The instant case offers a primary illustration of the problems (of delay) which currently plague the administration of capital punishment . . . and undermine public confidence in the criminal justice system," the foundation's lawyers said.

The American Psychiatric Association urged the justices to ban psychological testimony on future dangerousness.

Use of such testimony "is constitutionally invalid because it undermines the reliability of the fact-finding process," the association contended.

"Because the prejudicial impact of such assertedly 'medical' testimony far outweighs its value, it should be barred altogether in capital cases," the association said.

It added: "At the minimum, psychiatrists should not be allowed to offer medical opinions concerning the likelihood of long-term future dangerousness unless they have conducted an in-depth psychiatric examination of the defendant."

Barefoot's jury, in determining his punishment, heard from psychiatrists who had not examined him but were asked hypothetical questions about his future danger to society.

Who needs protection?

This evening's March 19 TV news report pictured Sen. Joe Josephson stating, "We must be very, very careful to protect the rights of the A.P.I. residents to be different." The recent murders of four teenagers in Russian Jack Park is the finest example of protecting their rights to be different.

I would like to remind the Honorable Mr. Josephson that he should be equally careful to protect my right to not be murdered.

— Edward M. Boyd

Capital punishment

Dear Editor:

It seems our legislators forget that they represent the opinion of those who elected them. I believe the m jority of their constituents favor ..pital punishment. It is unfor..ate that those who are now ba..ing at passage of such a bill did ..t voice that opinion during the election campaign.

Re: a remark by one of these mental giants, "If we can't do it right, we shouldn't do it at all."

If his logic holds true, he should have never gone to Juneau.

Another profain remark: "Capital punishment discriminates against minorities."

Hogwash. This may be true in the Lower 48, but most of the likely candidates for capital punishment up here are white. Most Alaskans don't judge a person by his race or national origin, but on his own worth.

I agree that capital punishment is not a detereent to crime, but it's apparent the system we have now isn't either. Capital punishment will certainly deter second offenses. The automatic review and appeals in these capital convictions, along with the trial by jury, beyond a shadow of a doubt, should minimize mistakes.

I think it's time that our elected officials voice the will of the people they represent, even though it does not coincide with their own beliefs. If they canot represent us because of inner conflict, they should step down. Do it our way, or get out.

R. Wolf
3182 Prescot

Capital punishment

Dear Editor:

I don't want people getting the death penalty, because they have a right to live. They can live in jail.

I read about Charles Brooks being killed with a poison needle. The most common sentences to the death penalty are the gas chambers and the electric chair.

It's not right to kill. The Ten Commandents say, "Thou shall not kill" and "Forgive thy neighbor." People should not kill other people. Bread and water does not cost that much. The government could build more prisons for the overcrowding in the jails.

Do you know there are 1,137 people waiting to be executed? The executer will pull a lever four times. Each time it unleashes 2,000 volts of electricity. The first jolt will bulge your eyes, then it bursts you eyes and then it fries your brains.

If you're going to execute people by the electric chair you should at least get a new chair. The one in New York is almost 100 years old.

Darryl Leiser
6th grade student
Tudor School

Death Penalty

Dear Editor.

I often find myself at odds with you and the people of Juneau. I am one of those "fools and fanatics" who was and still is in favor of moving the capital.

However, I am strongly in agreement with your editorial reprinted in the Anchorage Times. It is the most eloquent argument I have heard yet in favor of the death penalty.

You are right when you say that the death penalty cannot be debated without emotion. I have wanted to write to the Anchorage papers to try to counter all the emotional letters and have been unable to find an unemotional way to express my views on this subject and I have thus been afraid that anything I say would just add to the heat and probably not change any minds.

Yet the best argument in favor of capital punishment is an emotional one. It is based on one of the most natural and decent of human emotions. That is revulsion to atrocities.

As you point out, many homicides may not warrant the death penalty. When a person kills one person in a moment of passion and perhaps even with some provocation, society cannot condone his act, but can show him some degree of compassion. But those who deliberately commit sadistic, perverted or debased acts and show absolutely no compassion for others are not themselves worthy of any compassion whatever.

Massachusetts recently became the 38th state to adopt a death penalty. Alaska should become the 39th. If our legislators are hesitant to act on this matter, then let them do as Massachusetts did and let the people vote on it at the next election. I feel confident that Alaska voters would approve reinstatement of the death penalty.

Sincerely,

Garry St. John
3322 Seppala, B
Anchorage 99503

What others say

Arguments in favor of the death penalty

Times 3-17-83

From The Juneau Empire

EIGHT PEOPLE are shot to death and then set afire aboard a fishing boat anchored near Craig.

Six McCarthy residents are gunned down in cold blood.

Four Anchorage teen-agers are chased down and shot to death as they walk through a park.

Two elderly Juneau residents are bound, stabbed 60 times until they die and then sexually assaulted.

LISTED ABOVE are multiple murders that happened in our state during the last year. These are not just crimes; they are outrages against society. The grief they have caused cannot be measured in prison sentences; it is not enough just to take those criminals off the streets.

For crimes so shocking, so hateful, we believe the death penalty should be imposed.

The death penalty cannot be debated without emotion.

In arguing against it, many people believe a "civilized society" should never take a life. They argue the "eye for an eye" tenet should never be applied, and that the sentence is not a deterrent.

In the vast majority of cases, those arguments stand up. A person who acts in a moment of passion, even if he kills another person, should be given the benefit of the doubt and no death penalty should be allowed.

IN SOME CASES, THOUGH, the criminal has suspended the rules of humanity.

Multiple murders — when a person kills one person and then keeps on killing — do not qualify the criminal for the compassion of society.

Neither do planned murders.

Neither does the killing of a law officer.

A death sentence should be imposed only after all possible avenues of appeal are pursued, and there exists no shadow of a doubt that the criminal's rights have been protected and that he or she is guilty as charged.

The Alaska Legislature is reviewing proposals to reinstate the death penalty. We urge its members to adopt such a proposal, as long as it guarantees that all appeals may be pursued.

What others say

Arguments in favor of the death penalty

TIMES 3-17-83

From The Juneau Empire

EIGHT PEOPLE are shot to death and then set afire aboard a fishing boat anchored near Craig.

Six McCarthy residents are gunned down in cold blood.

Four Anchorage teen-agers are chased down and shot to death as they walk through a park.

Two elderly Juneau residents are bound, stabbed 70 times until they die and then sexually assaulted.

LISTED ABOVE are multiple murders that happened in our state during the last year. These are not just crimes; they are outrages against society. The grief they have caused cannot be measured in prison sentences; it is not enough just to take those criminals off the streets.

For crimes so shocking, so hateful, we believe the death penalty should be imposed.

The death penalty cannot be debated without emotion.

In arguing against it, many people believe a "civilized society" should never take a life. They argue the "eye for an eye" tenet should never be applied, and that the sentence is not a deterrent.

In the vast majority of cases, those arguments stand up. A person who acts in a moment of passion, even if he kills another person, should be given the benefit of the doubt and no death penalty should be allowed.

IN SOME CASES, THOUGH, the criminal has suspended the rules of humanity.

Multiple murders — when a person kills one person and then keeps on killing — do not qualify the criminal for the compassion of society.

Neither do planned murders.

Neither does the killing of a law officer.

A death sentence should be imposed only after all possible avenues of appeal are pursued, and there exists no shadow of a doubt that the criminal's rights have been protected and that he or she is guilty as charged.

The Alaska Legislature is reviewing proposals to reinstate the death penalty. We urge its members to adopt such a proposal, as long as it guarantees that all appeals may be pursued.

Capital punishment is no crime

This is the mentality that leads to murder, rape and robbery. The criminal feels that the chances are excellent that he won't get caught or if caught that there will not be sufficient evidence to make an arrest, or that if arrested he won't be brought to trial, or if brought to trial that he won't be convicted and that if convicted he won't have to serve all his time.

This kind of thinking highlights the shortcomings of our "justice" system. Justice is defined by Webster as "the assignment of merited rewards or punishments." Meaningful words like "adultery, virginity, ethics, honor and justice" have fallen into disuse in our modern, enlightened age.

House Bill 140, authorizing capital punishment, is an attempt to turn this attitude around. Some say, "You can't legislate morality." Legislation is in itself an expression of the moral values held by that community or state. In my district, 88 percent of the voters favor capital punishment. If we care about the concept of justice we should overwhelmingly support this piece of legislation.

For those who feel capital punishment is wrong or anti-Biblical, I would like to make a few comments. Capital punishment is not a violation of the Sixth Commandment, "Thou shalt not kill." The Hebrew word translated "kill" in that commandment means "murder" and should be read "Thou shalt not murder."

Within the same context of the next chapter the commandment is given to execute persons for specific crimes and it says, "the murderer shall surely be put to death." The Sixth Commandment is given to individuals, not state or judicial council. Who would accuse a policeman or soldier of murder when killing in self-defense or in defense of others?

In the New Testament, Christ did not abolish death for a murderer. He stated in Matthew 26:52, "All they that take the sword shall perish with the sword," which is a restatement of the law of capital punishment found in Genesis 9:6, "Who so sheddeth man's blood, by man (courts and government) shall his blood be shed."

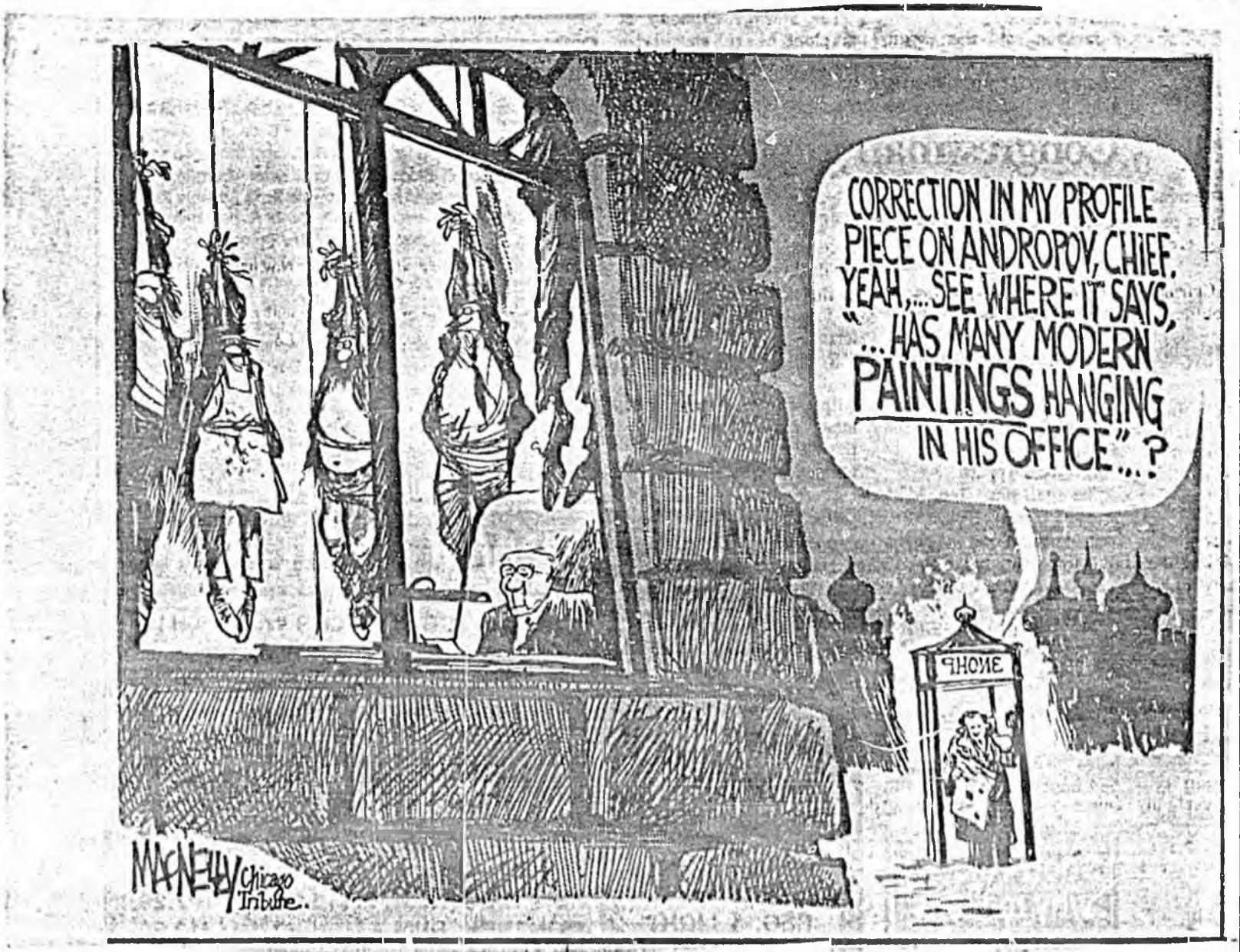
If you can't imagine Christ pulling the switch on the electric chair, read Matthew Chapter 23 or 25:41 where he says, "Depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels." Even as far over in the Scriptures as Revelation 13:10 we find Christ speaking to John saying, "he that killeth with the sword must be killed with the sword," a clear reaffirmation of the original law of capital punishment found in Genesis. In Deut. 19:11-13, God actually promises to bless the nation that obeys his command that the murderer be executed saying, "that it may go well with thee."

Mercy shown to a willful murderer is really cruelty to all mankind because the murderer has the potential to murder more people including you, me and our families. The murderer will find it easy to continue to kill those in society as well as in prison since he knows no worse punishment is awaiting him.

Some say those who support capital punishment must think we have an infallible system of justice. No so! However, let's not confuse the law with the administration of the law, as that would be like "throwing out the baby with the bathwater." A man should never be condemned to die until all doubt of his guilt has been satisfied. Many of those charged with murder are conclusively guilty, such as Hinkley.

Blackstone, the great authority on Anglo-Saxon law said, "Capital punishment for murder is the capstone of the arch of justice." Remove the capstone, and the whole structure will fall.

— Paul M. Anthony


CORRECTION IN MY PROFILE PIECE ON ANDROPOV, CHIEF. YEAH,... SEE WHERE IT SAYS, "...HAS MANY MODERN PAINTINGS HANGING IN HIS OFFICE"...?
PHONE
MACNELLY/Chicago Tribune.

Capital punishment

Times
3-4-83

Dear Editor:

The commandment "Thou Shalt Not Kill," was not meant only for the "bad guys." It is meant for All. This includes our legislators, and you and I: Everyone!

If House Bill 140 is passed into law, not only are our legislators guilty of murder but also those who sit back and make no effort to influence their vote are guilty.

I do not know how many times innocent men have been executed but I do know it has happened. Can we justify taking the life of an innocent person by mistake to punish the guilty?

"Vengence is mine, saith the Lord!" Not yours! Not mine! And He will have vengence on murders!

Passage of this bill would be a sin against God! And anyone allowing it to be passed will be guilty of murder each time a convict is executed!

Dorothy Bell
P.O. Box 3-672

Capital punishment

TIMES 2-26-83

Dear Editor:

So called enlightened experts on criminology may have come to conclusions about the death penalty not stopping the crimes it is supposed to. But us poor, uneducated and unenlightened non-experts are getting fed up to the eyeballs with your garbage and the continued killing by your "rehabilitated" criminals who roam the streets making it unsafe to go out of one's own house.

I refer to several incidents in this community such as the high school girl killed at Eastertime two or three years ago, the woman and her son who were killed about one and a half years ago and the most recent one at Russian Jack Springs Park less than one year ago, when four teen-agers died.

We have had enough. The death penalty may not deter killing in some people's point of view. But I'll tell you what: It sure as shooting eliminates sec- offenders. It's about time more people became aware of this — politicians and bureaucrats included.

A. Ulen
Soldotna

capital requirements are large in relation to

material of reprints by readers is welcome.

Malone questioned on judicial challenge stand

To the editor:

An open letter to Rep. Hugh Malone:

I understand you are a surveyor, I hope you get your transit out and take a good look at where you're going, as I understand you opposed the Milo Fritz bill which would repeal the law of peremptory challenge. By letting this law stay in running Judge Hornaday out of Homer, do you for one think this will solve the problem?

When there is a new judge assigned, regardless of his attitude toward drunken driving and other crimes, this will only tell lawyers who use this law to load their pockets with taxpayers' money. Apparently Chief Justice Burke and Judge Rowland want to keep this law on the books, perhaps for the day when they topple and have to take defending drunken drivers. I am told when Judge Rowland was a visiting judge in Homer, he apparently wasn't interested in saving taxpayers money, as he flew his own plane, landing on Lake Beluga. Another visiting judge recently, along with a district attorney and a game warden, were seen as they ran aground on the bar and he was so hard aground, he didn't show up to court till 2 p.m. the next afternoon. Judge Hornaday is a skilled navigator and keeps his ship off the bar.

If this peremptory law is so all-fired necessary, why not put our courts on a paying basis and let them pay for visiting judges, instead of having people who are able to survive the drunken drivers, as in most states one found guilty or the loser in a civil action is required to pay the cost of court. As of now, we the taxpayers are not only paying the cost, we're also paying for a public defender who apparently uses excess time with this peremptory or other laws, stalling to feather his own nest, telling people who want to plead guilty to plead not guilty so they can run up expense. Also, I know of one case where a man had a quite steady job on the Slope and a public defender, defending him on a criminal trespass case.

WHO is paying?

I'm almost to the point of advocating a repeat of history, as was in Colonial Williamsburg, Virginia, in 1658.

I hope you'll see the light.

Some questions for anyone interested in such subjects:

1. Why not breath-test equipment in all bars and places liquor is sold?

2. Why not let the people vote for all judgeships as long as we are paying their salaries?

3. Why couldn't we send other peremptied judges for a Homer visiting judge?

4. Why, as heard on a teleconference before a committee, are three Anchorage judges not sent as visiting judges to Homer — maybe too tough or lawyers can't dictate to?

5. I am told you are against the bill, Rep. Malone. Why?

I and many of the voters are watching to see if our representatives are satisfying the will of the people.

Calvin H. Hand,
Anchor Point

Capital punishment views sought

To the editor:

I am writing this in hopes that thinking people will become aware of House Bill 140, which as of this writing was awaiting a hearing in the House Judiciary Committee. This bill, if passed, would authorize capital punishment for certain offenses within the state.

With this bill, we seem to once again put aside the information gathered on the subject and resort to the ancient eye-for-an-eye and tooth-for-a-tooth philosophy. Admittedly, our justice system needs a radical overhaul, but the short-term solution of killing people for killing people, makes little sense to me. Many of the people who call themselves "experts" on criminology have basically come to similar conclusions, namely, the death penalty does not stop the kind of crimes it is designed to, but tends to show a lower stage of development for the societies which use it.

I'd like to again call on all those thinking people who feel other solutions should be sought in place of state-sanctioned killing, to write to our representatives on this bill. I'd like to especially appeal to my friends in the pro-life movement and hope that their desire for consistency will compel them to speak out on this issue.

Greg Stevens
Juneau

Letters to the editor

LETTERS TO THE EDITOR are the readers' opportunity to speak out on any legitimate or timely topic. Letters should be typed or neatly handwritten. Brevity is desireable. Anonymous letters will not be published, and the editor reserves the right to edit as necessary. Letter writers should include their address and phone number for the editor's reference.

Quotables

Resolved: to live with all my might while I do live. Resolved: never to lose one moment of time, to improve it in the most profitable way I can. Resolved: never to do anything which I should despise or think meanly of in another. Resolved: never to do anything out of revenge. Resolved: never to do anything which I should be afraid to do if it were the last hour of my life.

• *Johnathan Edwards*

Public reassurance in a civilized way

Superior Court Judge Victor Carlson admirably carried two big burdens in an Anchorage courtroom last week: protecting public safety and dealing with an angry outcry in the wake of the conviction of Charles L. Meach for the murder of four Alaska youths.

There was little doubt, once a Fairbanks jury convicted Mr. Meach of first-degree murder, that the circumstances demanded the stiffest possible sentence for one of Alaska's most brutal and vicious crimes. Charles Meach gunned down four separate victims in cold blood and without the least provocation. Eight years earlier he had killed a 22-year-old grocery clerk and been hospitalized for mental disease or defect. The public needed reassurance that he would never walk the streets again, and so it was done: Judge Carlson sentenced Mr. Meach to 396 years in prison — without chance of parole — in what was the maximum possible sentence and the longest prison term in state history.

But he did more than that. The remarkable part of Judge Carlson's sentencing comments was what he had to say about the "hue and cry for capital punishment" arising from the cold-blooded killings last spring. "I want this record to demonstrate," wrote the judge, "that capital punishment would be wrong and not in the public's interest if capital punishment was available in this case . . ."

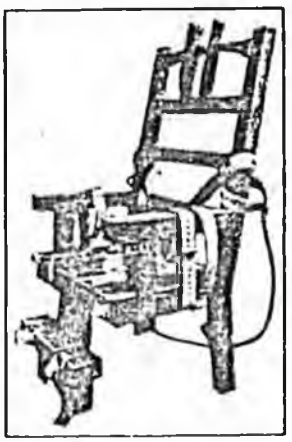
And he listed seven concise reasons why the death penalty is inappropriate to a society pretending to call itself humane:

- Homicide on behalf of the state is inconsistent with our culture's most basic respect for human life;
- The expense of trying a capital case is large, since absolutely "no stone can be left unturned" by either side when the life of a defendant is at stake;
- The extra emotional cost to all, especially jurors, encourages acquittals when the prosecution might otherwise meet its burden of proof beyond a reasonable doubt;
- The criminal justice system is not above error, but there can be no recourse if an innocent person is put to death;
- The death penalty skews the administration of justice when defendants — acutely aware that the trial process is not infallible — plead guilty to lesser offenses to avoid the threat of a death penalty;
- Imposition of the death penalty has not been without bias. A greater than representative number of illiterates, poor, minorities and political criminals have faced the death penalty in the United States; and
- Two wrongs do not make a right. The death of a murderer is only symbolic retribution, and can never bring back the victim.

Judge Carlson was correct to impose a sentence designed to keep Charles Meach behind bars the rest of his life — and equally correct to insist that taking still another life would serve no civilized purpose.

THE PUNISHMENT OF DEATH

it may deter a few; does it deter the many?



Who can quarrel with the intent of the death penalty? Its purpose is to validate the preciousness of human life by imposing the ultimate punishment on those who commit the ultimate crime.

Too bad it doesn't work that way.

Consider who qualifies for the death penalty.

Not the enraged individual who in unpremeditated fury kills a spouse or a barroom adversary—the single most common kind of murder.

Not the person who kills by accident or negligence.

Not the rare person who is so mentally deranged that he cannot be held legally accountable for his actions.

That leaves the professional and the otherwise premeditated murderer (both are statistically rare species) and the felony murderer who kills during the commission of another crime, such as robbery, burglary or home invasion.

In truth, the last is the only class of killer from whom innocent society needs systematic protection and for whom society demands execution. But most felony murderers do not intend to kill and do so out of panic, rage or accident. In the absence of prior intent to commit a capital crime, they are not deterred by prior considerations of capital punishment.

Which leaves a subclass of felony murderer whom society has every right to hate and fear: the sadistic psychopath, who doesn't just kill in the course of robbing but may commit robbery as an excuse to kill, terrorize or maim. This is the fellow who holds up the mom-and-pop grocery store for $60 and then pumps bullets into the owner pleading for his life or who takes the wallet from an unresisting victim and then sticks a knife in him.

Only the most principled humanitarian would spare these killers' lives—and maybe a few criminologists who find the threat of death not a deterrent to murderous behavior but an inducement to it.

Psychologists who specialize in violent antisocial behavior have long recognized that the most dangerously hostile, aggressive and sadistic criminals tend to be mentally deranged but legally sane individuals who are embarked on a campaign of self-destruction. Most of those criminals would laugh at that idea; and it certainly doesn't seem that way to their innocent victims. But where the badly troubled person from the so-called upper classes tends to turn his hostility inward, sink into an abyss of depression and end his own life with a bottle or a bullet, his less introspective and socialized counterpart takes his frustration and aggression out on others until he is caught or killed.

For this person, brutality has the immediate payoff of compensating for an intolerable sense of impotence; the ultimate reward is to be transformed by society into a celebrity murderer, attended regally by a vengeful justice system, and then to be solemnly and ceremonially executed by the state. To "ride the lightning."

The percentage of murderers who kill in order to be killed is unknowable, but it seems likely they outnumber those who rationally weigh the prospect of execution and are deterred.

Add to that another unhappy fact of criminal behavior: The rational felon whose planned or unplanned act could cost him his life may well elect to leave no living witnesses.

And add to that a cultural effect of capital punishment that to students of violent behavior is the most worrisome of all. By performing executions in the name of justice, the state validates the idea that killing is an appropriate response to sufficiently wicked or intolerable behavior. Which happens to be the exact frame of mind that prevails in the most common of murder situations—the bedroom or barroom rage. Whether cloaked in legal pageantry or performed in a moment of white fury, the message is the same: *The son of a bitch had it coming!*

Not even the Supreme Court has suggested that the death penalty deters murder. In 1976, it took, instead, the curiously honest position that execution primarily serves a retribution function, that it fulfills an emotional need of citizens outraged and frustrated at the prevalence of crime and violence. That it certainly does. Contrary to the lofty position of the true humanitarian, the less philosophical citizen may in fact derive comfort and genuine satisfaction from bloody vengeance. But a wiser court and wiser men in public office might have considered that the transient satisfaction of a blood sacrifice may well be paid for by additional violence and suffering inspired by its lethal example.

Death penalty debate

juds. 2-15-83

Legislators and onlookers in the Alaska Senate got a rueful chuckle out of committee referrals made by Senate President Jalmar Kerttula for a death penalty bill introduced last week. Sen. Kerttula sent the bill to both the Judiciary and Finance committees, noting that "it costs money" when the latter assignment drew guffaws. Sen. Joe Josephson, who chairs the Senate Health and Social Services Committee occasioned further chuckles with his observation that the bill "has certain health implications as well."

The laughter no doubt served to break the tension surrounding a very serious matter for all concerned. But committee referrals to at least two different panels suggest that the Senate will give the idea plenty of scrutiny before moving on any death penalty bill this session. And that scrutiny suggests a further consideration for chairmen planning committee hearings: the need for broad public participation in any decision to embrace the death penalty in our state.

The death penalty implicates every citizen in a cycle of violence the state seeks to stop. Before any death penalty bill can advance to a vote of the legislature, it must bear widespread scrutiny and debate among all Alaskans. Public hearings must be held around the state; reputable research about the death penalty and its impacts must be widely distributed and debated; the methods and circumstances of imposing capital punishment must be carefully defined; and, finally, Alaska citizens and their leaders must forthrightly confront the moral dimensions of a painful issue. Such scrutiny would be difficult at best, but it is the very least demanded of a democratic state that would adopt the authority to impose a penalty of death.

Senate finds some humor in crime bill

The Associated Press NEWS 2-1-85

JUNEAU — Alaska senators on Friday found some light humor in a grim subject — capital punishment.

The laughter followed the introduction of a bill to authorize the execution of murderers in Alaska. A similar bill was filed in the House last month.

Senate President Jay Kerttula, D-Palmer, referred the measure to the Finance Committee, which drew guffaws from senators.

"Hey. It costs money," Kerttula said.

When the laughter subsided, Sen. Joe Josephson, D-Anchorage, rose to say "I think it has certain health implications as well," which drew another roar from the lawmakers.

The measure (SB121), sponsored by Sen. Fritz Pettyjohn, R-Anchorage and others, would provide that a person convicted of a capital felony "shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years, or shall be sentenced to death."

The bill, which also will be reviewed by the Judiciary Committee, would classify murder as a capital felony.

The measure also would require a death sentence to be approved by the Alaska Supreme Court.

A similar bill was filed in the House by Rep. Sam Pestinger, R-Anchorage. The measure (HB140) is still in the House Judiciary Committee.

TIMES 4/6/83

editor

The death penalty

Dear Editor:

Sylvia Short's "capital punishment" letter of March 26, faults Moral Majority and certain Christian organizations for favoring the death penalty because she thinks it contradicts the teachings of the Prince of Peace. She admits to being puzzled.

It might help this widespread misunderstanding by non-Christians to know that while Jesus came to provide a way of salvation, he also spoke of the destruction of sinners. In Matthew 10:34, he said, "Think not that I come to send peace on earth: I came not to send peace but a sword."

The death penalty is clearly demanded by the word of God. An accused person who was tried and condemned by his peers was led outside the city gates and stoned to death.

In suggesting the head of Moral Majority be crucified like Christ, Ms. Short recommends the very violence she claims to abhor.

Bob Clark
P.O. Box 4-1908

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HV 8694 ED 153

CAPITAL PUNISHMENT:

PRO AND CON ARGUMENTS

JOYCE VIALET
Education and Public Welfare Division

August 3, 1956

TABLE OF CONTENTS

Section 1

Against Capital Punishment

		page
I.	The State Should Not Kill	1
II.	Deterrence	5
	A. The Statistics	5
	Contiguous Jurisdictions	7
	Abolition and the Criminality Curve in the Same Jurisdiction	9
	The Effect of Executions on a Community	10
	Police Safety	11
	B. The Psychology of Deterrence	13
	C. The Administration of the Death Penalty	16
III.	The Death Penalty as a Protective Measure	17
	A. "Murderers Make the Best Prisoners"	18
	B. The Danger from Released Murderers	18
IV.	Retribution vs. Vengeance	21
V.	The Death Penalty and Criminal Justice	23
	A. The Possibility of Error	23
	B. Inequality of Application	25
	C. The Administration of Criminal Justice	27
	D. Technicalities of the Law	29
VI.	The Religious Argument	34
VII.	Public Opinion	36

TABLE OF CONTENTS (cont)

Section 2

In Favor of Capital Punishment

page

I. The State Should Protect the Law-Abiding Citizen - - 38

II. Deterrence - - - - - - - - - - - - - - - - 40

A. The Evidence of Experience - - - - - - - - - 40

B. The Psychology of Deterrence - - - - - - - - 43

C. The Statistics - - - - - - - - - - - - - - 45

D. The Need to Protect the Police - - - - - - - - 48

III. The Death Penalty as a Necessary Protective Measure - 50

A. The Second-Time Murderer - - - - - - - - - - 51

IV. Retribution and the Sanctity of Human Life - - - - 54

V. The Abolition Movement and Modern Liberalism - - - - 56

VI. The Death Penalty and Criminal Justice - - - - - - 61

A. The Possibility of Error - - - - - - - - - - 61

B. The Alleged Inequality of Application - - - - - 63

C. The Need for Reform - - - - - - - - - - - - 64

VII. The Religious Argument - - - - - - - - - - - - 66

VIII. Public Opinion - - - - - - - - - - - - - - - 68

References Cited - - - - - - - - - - - - - - - - - 70

SECTION 1

AGAINST CAPITAL PUNISHMENT

I. THE STATE SHOULD NOT KILL

The central argument against capital punishment may be summarized as follows: In the absence of a clearly demonstrable benefit to society, it is morally wrong and pragmatically unsound for the State to be invested with the right to take the life of its citizens.

Abolitionists argue, first, that it is morally wrong to kill, and no less so for the State than for the private individual. Michael V. DiSalle, the former Governor of Ohio, writes:

> First of all, I believe that taking a human life, even to pay for a life already taken, is immoral....Society, echoing the Ten Commandments, says: Thou shalt not kill. Then society illogically continues: Killing is wrong, and in order to prove it is wrong, we will kill you if you kill.1/

While the moral argument, based as it is on the belief in the sanctity of human life, leads some abolitionists to argue that capital punishment is wrong regardless of whether or not it benefits society, this absolute stand is unusual. The following statement by Herbert L. Packer, Professor of Law at Stanford University, is representative of the more prevalent view:

> The case is not that the sanctity of human life is an absolute but rather that it is a highly cherished value that should give way only upon a persuasive showing that some other, more important end will thereby be served.... Unless it can be shown that capital punishment serves prime social purposes that cannot otherwise be served, the claims of its proponents are unconvincing.2/

1/ Michael V. DiSalle, The Power of Life or Death (1965), p. 6.
2/ Herbert L. Packer et. al., "Mr. Barzun and Capital Punishment," The American Scholar (Summer 1962), p. 449.

Abolitionists argue, secondly, that this belief in the sanctity of the individual human life is the central value of our society and should be supported by the actions of the State. They contend that, if the institution of capital punishment does not actually undermine this value, and many believe that it does, it clearly does nothing to reinforce it. Governor Edmund G. Brown of California writes:

> I oppose capital punishment, too, because it brutalizes man; because a society that takes human life cannot invest its citizens with respect for human life.1/

A New York Herald Tribune editorial entitled "The State Should Not Kill" puts it more strongly:

> Whenever the state takes life it cheapens life. Capital punishment panders to man's basic instincts, cloaking retribution in the mantle of the law, coloring vengeance with respectibility, setting a public example for private violence.2/

Third, abolitionist argue that the State should be granted legal power to take the lives of its citizens only if this is clearly necessary for self-defense which, in the case of capital punishment, means the protection of its law-abiding citizens. In the United States, this argument takes the traditional form of the need to protect the rights of the individual against the State, and is summarized as follows by Michael V. DiSalle:

> Those of us who are interested in the freedom of the individual realize that government exists only with those powers that have been delegated to it by the people, and the more restrictions we place upon government and the exercise of the powers that have been delegated to it, the more certain we are that we will have a democratic type of society where the freedom of the individual prevails. It should certainly not be the purpose of people within a society to delegate to government any more authority than that necessary to perform its functions; I feel that the delegation of the right to take away

1/ Edmund G. Brown, Statement on Capital Punishment (1963), p. 2.
2/ "The State Should Not Kill," New York Herald Tribune (March 27, 1960), in Capital Punishment, ed. Grant S. McClellan (1961), pp. 83-84.

> life can only be justified when a certain purpose is to be served; that purpose might be the preservation of society itself against a threat from the outside or a threat from within.1/

In general, abolitionists in the United States are more willing to grant that the death penalty would be justified by its clear necessity for the protection of "society itself against a threat from the outside or a threat from within," than are, for instance European abolitionists. The latter tend to be more concerned than American abolitionists with the danger that capital punishment will be used illegitimately by the State. A representative European view on this issue is expressed as follows by the late Albert Camus:

> ...for 30 years crimes of state have vastly exceeded crimes of individuals. I shall not even mention wars--general or local.... I am referring here to the number of individuals killed directly by the State, a number that has grown to astronomic proportions and infinitely exceeds that of "private" murders. There are fewer and fewer men condemned by common law, and more and more men executed for political reasons.... It is now so much against the individual killer that our society must protect itself than, as against the State. Perhaps this equation will be reversed in another thirty years. But for the present, a legitimate defense must be made against the State, before all else. Justice and the most realistic sense of our time require that the law protect the individual against a State given over to the follies of sectarianism and pride.2/

In summary, then, most American abolitionists argue that the death penalty should stand or fall on proof that it is necessary to protect society. Furthermore, because of the moral and practical evils they see as inherent in the institution of the death penalty, abolitionists argue that the burden of proof rests with its supporters.

1/ American Bar Association, Section of Criminal Law, 1959 Proceedings (1960), pp. 5-6.
2/ Albert Camus, "Reflections on the Guillotine", Evergreen Review (No. 3, 1957), p. 48.

It is generally agreed by both sides in the capital punishment controversy that there are two ways in which the death penalty might afford society unique protection. First, it might be a more effective deterrent against major crime that life imprisonment. The deterrent issue is defined as follows by Hugo Adam Bedau:

> The only question [regarding deterrence] which must be settled is this: is long term imprisonment (on the assumptions that it is less savage and more easily administered by the judicial system than capital punishment) as good a deterrent for the major crimes currently punished by death? This formulation leaves open, as it should, the question of how close either penalty is to a completely effective deterrent; and it does not raise the further question, as it shouldn't, whether death might be a better deterrent for certain crimes (e.g., against property) that no one would think of punishing in this way. To put it another way, the real dispute over deterrence is this: how many capital crimes, if any, have been (or might be) prevented by the threat of execution, which would not have been (or would not be) prevented by the threat of imprisonment?1/

Second, the death penalty might be the only way of protecting society against the incorrigibly dangerous. The debate with regard to this second function centers around the issue of whether or not the death penalty is in fact necessary, whether this protection is not provided equally well by measures short of execution.

Abolitionists argue that the death penalty has failed as a deterrent and is unnecessary as a protective measure. They argue that it should be abolished because there is no demonstrable proof that it affords society the unique protection which alone would justify its retention.

1/ The Death Penalty in America, ed. Hugo Adam Bedau (1964), p. 261.

II. DETERRENCE

Hugo Adam Bedau defines the doctrine of deterrence and comments on its importance in the capital punishment controversy as follows:

> ...by far the most common way to employ a punishment as a preventative of crime is to adopt a sufficiently severe penalty so as to compel general obedience out of fear of the consequences of disobedience--the classic doctrine of deterrence. Even though deterrence cannot override every other concern in formulating a rational penal philosophy, there is no doubt that the death penalty's efficacy as a deterrent is the major factual issue in dispute between abolitionists and retentionists.1/

Abolitionists argue that the death penalty's efficacy as a deterrent is, at the very least, called into serious question both by the available statistics and by the evidence of modern psychology.

A. The Statistics

In a study of the death penalty which he prepared at t request of the American Law Institute, Thorsten Sellin notes:

> Any one who carefully examines the... data is bound to arrive at the conclusion that the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent.2/

Sellin analyzes the four ways in which the deterrent value of the death penalty would be evident it it, in fact, existed:

> It seems reasonable to assume that if the death penalty exercises a deterrent or preventive effect on prospective murderers, the following propositions would be true:
>
> (a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states

1/ Bedau (ed.), op. cit., p. 260.
2/ Thorsten Sellin, The Death Penalty (1959), p. 63.

> that are as alike as possible in all other respects—character of population, social and economic condition, etc.—in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these states.
>
> (b) Murders should increase when the death penalty is abolished and should decline when it is restored.
>
> (c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crime occurred and its consequences are most strongly brought home to the population.
>
> (d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than in those without it.1/

In general, the various statistical studies which have been made in an attempt to test the deterrent value of capital punishment concern themselves with one or more of these four propositions.

It will be noted that the majority of the studies in this field have been conducted by Sellin. Professor Emeritus of Sociology at the University of Pennsylvania and President of the International Society of Criminology, Thorsten Sellin has been described as the "foremost statistician in the field of criminal law in the world."2/ He was the principal consultant to Great Britain's Royal Commission on Capital Punishment as well as to the majority of other official government commissions studying this subject. Bedau notes:

> ...[Sellin's] evidence has managed over the past decade to convince a wide variety of legislative committees throughout the English-speaking world, and not in every case were the members of these committees initially receptive to his conclusions.3/

1/ Sellin, op. cit., p. 21.
2/ California Legislature, Senate Committee on Judiciary, Hearing Report and Testimony... (1960), p. 65.
3/ Bedau (ed.), op. cit., p. 265.

Contiguous Jurisdictions - Sellin's studies of the homicide rates in contiguous jurisdictions with and without the death penalty are, in Bedau's words, "the cornerstone of the case against the deterrent superiority of the death penalty over imprisonment."[1] Table 1 below shows the results of four of these studies, described by Mr. Sellin as follows:

> The only fair comparison is one that takes into account regional differences and therefore compares the homicide rates of an abolitionist state with that of its neighbor states. The diagrams shown... [see below] are based on such comparisons. They show the annual size of the homicide death rate per 100,000 population for the period 1920-1958 and the general trend of the rate for each set of states compared.[2]

Sellin's conclusion on the basis of these studies follows:

> The striking thing about these diagrams is that within each set of states the rates are so nearly the same annually and the trends so closely alike that if the lines were not identified with each specific state, no one would dare to guess which lines represented the abolition states....
>
> It is proper to conclude that states which are similar in the character of their population, their urban and industrial development, and their mores have similar homicide rates, whether or not they have the death penalty. In other words, the presence of the death penalty for murder in a state appears to have no more influence on its homicide rates than the absence of the penalty in a comparable state has on the rates of that state. And, if our basic assumption is correct, what holds true for the homicide rates would hold true for the capital murder rates, were they obtainable.
>
> When it once becomes generally understood that the amount and the trends of murder depend on demographic, social, economic, and political conditions, one would realize that the explanation for rises or falls in the statistics of this crime must be sought through a study

1/ Bedau (ed.), op. cit., p. 263.
2/ Thorsten Sellin, "Capital Punishment," Federal Probation (Sept. 1961), p. 6. See also Sellin, The Death Penalty, pp. 23-34.

of these conditions, and that through such a study alone could any possible remedy be found. To hope that this remedy could be found in the application of the death penalty or in its introduction is to grasp at a straw.1/

TABLE 1

CONTIGUOUS JURISDICTIONS: HOMICIDE DEATH RATES FOR SELECTED STATES2/

DIAGRAM I

Homicide Death Rates, per 100,000 Population, in Maine, New Hampshire, and Vermont: 1920-1958

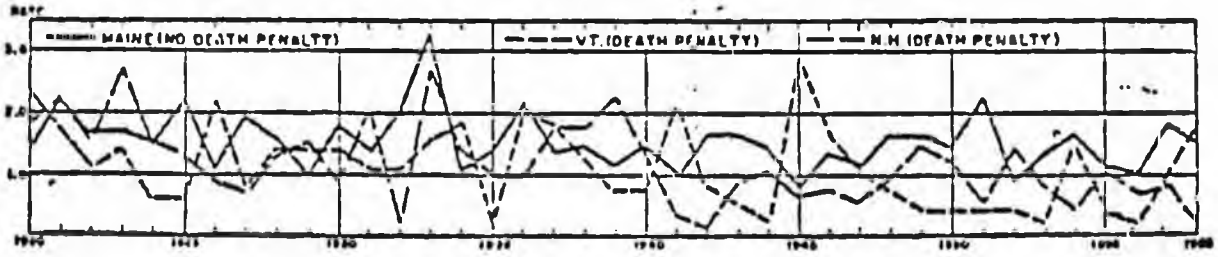


DIAGRAM II

Homicide Death Rates, per 100,000 Population, in Massachusetts, Connecticut, and Rhode Island: 1920-1958

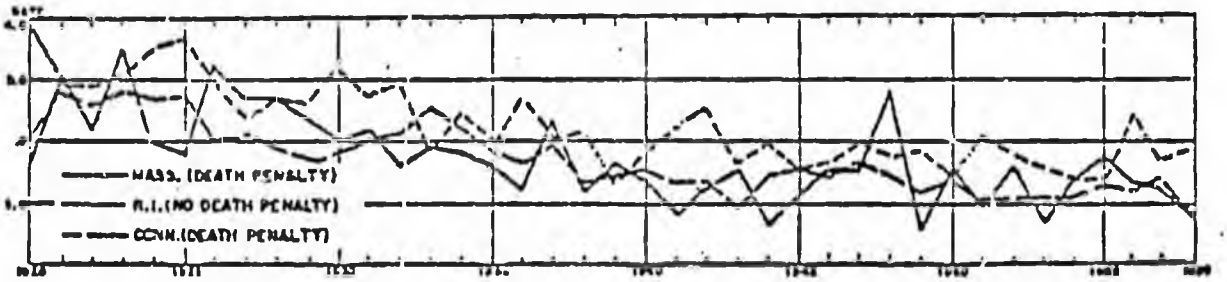
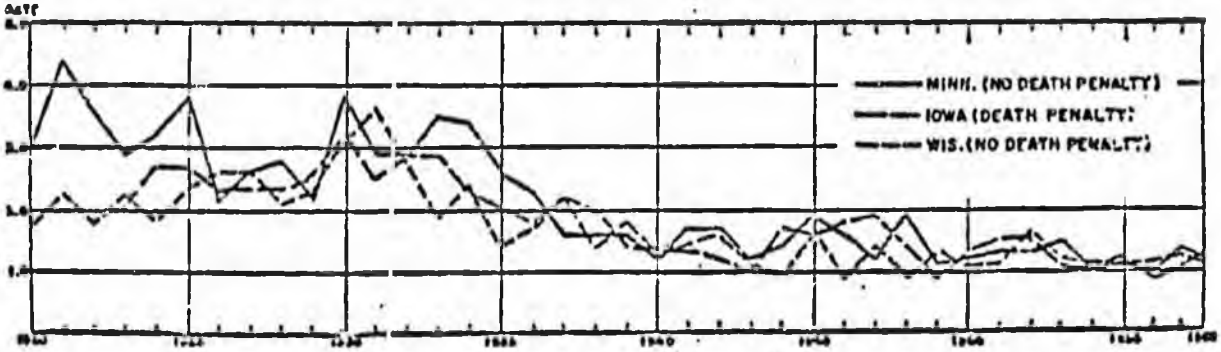


DIAGRAM III

Homicide Death Rates, per 100,000 Population, in Minnesota, Iowa, and Wisconsin: 1920-1955

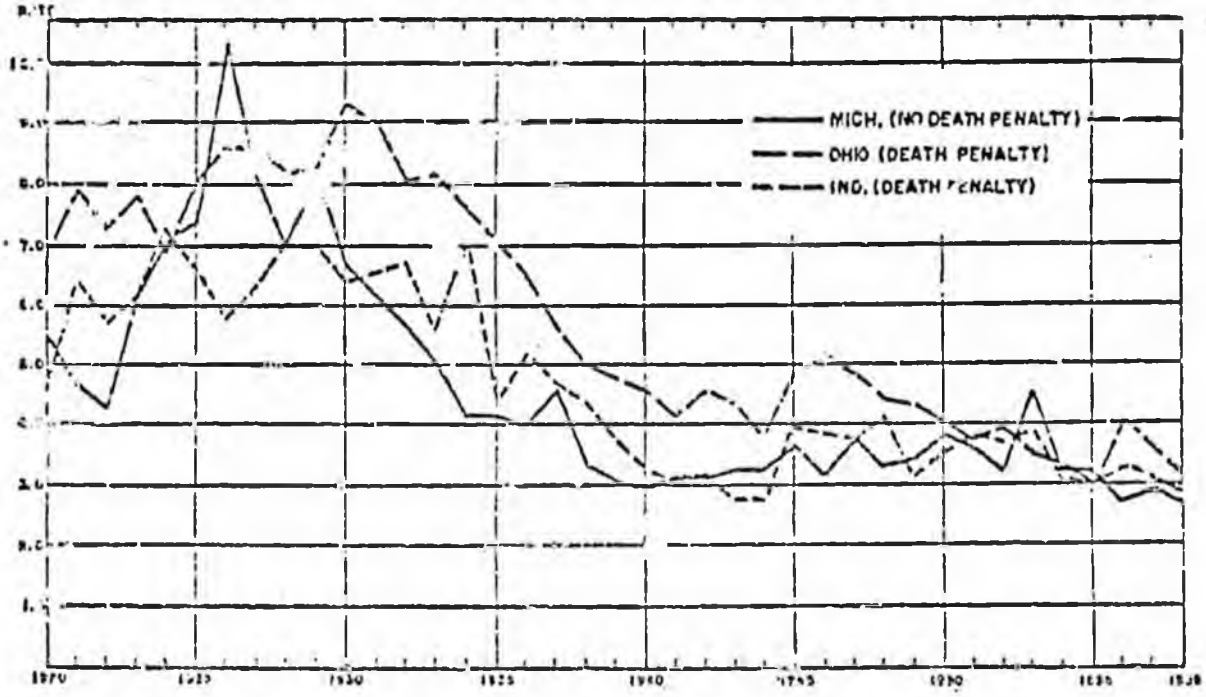


1/ Sellin, "Capital Punishment," p. 6.
2/ Ibid., pp. 7-8.

TABLE 1 (coht)

DIAGRAM IV

Homicide Death Rates, per 100,000 Population, in Michigan, Indiana, and Ohio: 1920-1952



Abolition and the Criminality Curve in the Same Jurisdiction -

Several studies have been made on the second assumption stated above by Sellin; namely, that, if capital punishment is a deterrent to murder, the homicide rate in a given jurisdiction should increase with the abolition of the death penalty and decrease with its restoration. Sellin has conducted such a study on the basis of the statistics available from states in this country which have abolished the death penalty. In his summary of this study, Bedau writes,

> The selection by Professor Sellin shows that in every abolition state, whether or not it later restored capital punishment, there is no correlation between the status of the death penalty and the homicide rate. This strongly suggests that in the ten states that abolished the death penalty and later restored it the reasons had nothing to do with the measurable effects of death vs. imprisonment as a deterrent to murder.1/

In general, the statistics available from other countries which have either partially or totally abolished capital punishment appear to follow the same pattern: abolition is not followed by an increase in crime. The United Nations report, Capital Punishment, contains the following observation on the effects of partial abolition:

> All the information available appears to confirm that such a removal has, in fact, never been followed by a notable rise in the incidence of the crime no longer punishable with death. This observation, moreover, confirms the nineteenth century experience with respect to such offenses as theft and even robbery, forgery and counterfeiting currency, which have progressively ceased to be punishable with death: indeed, these crimes, so far from increasing, actually decreased after partial abolition.2/

With regard to total abolition, the U.N. report concludes that, "The same general observation can usually be made regarding the total abolition of the death penalty."3/

The Effect of Executions on a Community - Studies have been made on the effect of a series of executions on the capital crime rate in the community where the executions occurred. The reasoning behind these studies is described by Sellin as follows:

1/ Bedau (ed.), op. cit., pp. 333-334.
2/ United Nations, Department of Economic and Social Affairs, Capital Punishment (1962), p. 54.
3/ Ibid., p. 55. See also Sellin, The Death Penalty, pp. 34-50.

> If the death penalty is a deterrent, its greatest effect should be shown through executions which are well publicized. Furthermore, the effect should be most noticeable in the community where the offense occurred, where the trial aroused wide publicity and the offender lived and had relatives, friends and acquaintances.1/

Such a study was conducted in Philadelphia by Robert H. Dann.2/ He compared the number of homicides occurring 60 days before and 60 days after five different executions. A total of 91 homicides occurred in the periods preceding the executions; 113 homicides occurred in the periods following them. Nineteen of the 204 homicides resulted in a sentence of first degree murder. Of these, nine occurred in the "before" period and ten occurred in the "after" period. A study conducted by Leonard D. Savitz in Philadelphia a number of years later yielded similar results. Savitz concluded:

> There emerges, therefore, no pattern that would indicate deterrence.... It can be said in summary, that the author is aware that the short period of time under analysis and the extremely small number of murders dealt with prevent conclusive findings, but we must conclude from the data at hand that there was no significant decrease or increase in the murder rate following the imposition of the death penalty on four separate occasions.2/

Police Safety - The two extensive studies of the comparative safety of the police in jurisdictions with and without capital punishment do not indicate that the death penalty affords the police greater protection. Sellin conducted a major study of the comparative safety of metropolitan police, described by him as follows for the American Bar Association Section of Criminal Law:

1/ Sellin, The Death Penalty, p. 50.
2/ Robert Dann, The Deterrent Effect of Capital Punishment (1935); see James A. McCafferty, "Major Trends in the Use of Capital Punishment," Federal Probation (Sept. 1961), p. 20.
2/ Leonard D. Savitz, "The Deterrent Effect of Capital Punishment in Philadelphia" (1958), in Bedau (ed.), op. cit., pp. 321-322. See also William F. Graves, "The Deterrent Effect of Capital Punishment in

> A few years ago, I sent a questionnaire to the chiefs of police in all cities with more than 10,000 population in the six states that at that time did not have the death penalty for murder, and in the states that bordered on them--seventeen in all. I asked them to give us year by year, beginning in 1920, the number of police killed by a criminal with a lethal weapon. We got a pretty good response--47 per cent--at least from all but the big metropolitan cities; a few of these responded but not enough to really make any comparison easy. We broke the information down in groups of cities by size; there were five or six population groups, so that the large city would not distort the information gained from smaller cities. We computed rates and found to our surprise that there was no difference in the information gathered between the states that had the death penalty and those that did not have it. There were as many police killed in the states with the death penalty, considering the size of the cities involved, as in the states without the death penalty. The argument of the police on the basis of that study falls by the wayside.1/

This study indicated that the rate of police killings was in fact higher in death penalty states than in abolition states: 1.3 per 100,000 in the former, compared to 1.2 per 100,000 in the latter.2/

A companion study of the comparative safety of state police was conducted by Donald R. Campion, S. J. Father Campion summarized his findings as follows:

> ...we conclude that the data available to us after a survey of half the state police forces of the United States do not lend empirical support to the claim that the existence of the death penalty in the statutues of a state provides a greater protection to the police than exists in states where that penalty has been abolished.3/

1/ American Bar Association, Section of Criminal Law, op. cit., p. 23.
2/ Sellin, The Death Penalty, p. 55.
3/ Donald R. Campion, "Does the Death Penalty Protect State Police?" (1955), in Bedau (ed.), op. cit., pp. 314-315.

B. The Psychology of Deterrence

In the opinion of many abolitionists, the deterrent value of capital punishment has been seriously called into question by the evidence of modern psychology and penology. As the U.N. report on capital punishment notes, the majority of specialists in these fields are themselves abolitionists:

> ...it will be noted that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists.1/

This is substantiated by Bedau in his discussion of what Americans think about the death penalty:

> ...psychiatrists, penologists and possibly social scientists and social workers generally, as well as higher government officials, tend to oppose the death penalty in this country at this time.2/

In his anthology, The Death Penalty in America, Bedau summarizes what in his opinion are the two major abolitionist arguments; one of these arguments is a comprehensive statement of the abolitionist objections to the psychological validity of the death penalty as a special deterrent to murder.3/ According to this argument, murders are either premeditated, or they are not. In the case of unpremeditated murders, no punishment will be effective as a deterrent. Mr. Bedau's comment here reflects the conviction held by many that

1/ United Nations, op. cit., p. 62.
2/ Bedau (ed.), op. cit., p. 236.
3/ Ibid., pp. 270-272. See p. 16 below for a discussion of the second argument.

this category comprises a considerable percentage of those who commit violent crimes:

> When one considers that most of the undeterrables are likely to be suffering from one or another form of mental illness, and that considerable evidence exists to show that murderers and condemned men generally include a large proportion who are sick, it seems pointless to threaten such offenders with death.1/

The argument continues that premeditated murders are committed by people who either do or do not expect to be caught. About the latter category, those who expect to be apprehended, Bedau comments:

> In the latter case, there is nothing whatever gained (so far as controlling his behavior is concerned) by threatening to kill him as his punishment; for he is likely to try to kill himself (just as he is likely to surrender to the police right after his crime). Such cases are by no means rare.2/

Abolitionists argue that, for this type of murderer the death penalty is, in fact, more apt to be an inducement than a deterrent. Sellin has noted the existence of

> ...good evidence that the availability of instruments used to inflict the punishment of death has induced people of unbalanced mind to seek that punishment as a devious means of suicide.3/

In a section entitled "Capital Punishment as Cause for Murder" in the study he made for the American Law Institute, Sellin itemizes cases of people attempting to commit suicide by execution.4/

It is equally difficult to see, the argument continues, what value as a deterrent the death penalty has for those who plan their murder on

1/ Bedau (ed.), op. cit., p. 271.
2/ Ibid.
3/ Sellin, "Capital Punishment," p. 4.
4/ Sellin, The Death Penalty, pp. 65-69.

the assumption that they will get away with it. Bedau comments:

> Gangland killings, kidnappings for ransom, and a large proportion of all serious crimes are committed by those who think they will never be caught. The obvious, and probably the only, way to deter such persons is by increasing the effectiveness of law enforcement and criminal prosecution in the courts.1/

This category of murderers, including as it does the gangland killer, is of considerable importance. It would seem that the deterrent theory should be applicable here, if anywhere: the gangster, murdering as a means to an end, would seem to be capable of rationally considering other possible ends of his action--for instance, his own death. However, the facts seem to justify the conviction of those engaged in organized crime that they have virtually no reason to fear the death penalty. Sellin testified as follows before the New Jersey Commission to Study Capital Punishment:

> Defenders of the death penalty would probably feel that if anybody deserved this punishment, it will be the hired killer in organized crime. It's a well-established fact that such murderers enjoy almost complete immunity, that the instances in which even a conviction has been secured are extremely rare, and that deterrence plays no role in this connection.2/

This leaves one final category: "those who are sane and cautious enough to weigh the risk of punishment against the anticipated gain from crime, and who would decide that the risk is too great if the threatened punishment is death, but not great enough to deter them if it is only imprisonment."3/ Bedau quotes the following passage

1/ Bedau (ed.), op. cit., p. 271.
2/ New Jersey Commission to Study Capital Punishment, Report (1964), p. 13. See also Sellin, "Capital Punishment," p. 5.
3/ Bedau (ed.), op. cit., p. 272.

from the Ceylon Report on Capital Punishment as the answer to the question, "How many such persons are there in the total population?":

> It would be most exceptional for a man to be insufficiently sane and normal to be deterred by the risk of a sentence of protracted imprisonment but yet sufficiently sane and normal to be deterred by the risk of his own execution, when both risks are at a level of contingency which he is doing his utmost to avoid.1/

C. The Administration of the Death Penalty

Those opposed to the death penalty argue that the very way in which it is necessarily administered undercuts whatever deterrent effect it might have for those capable of exercising some degree of rationality. Bedau considers this to be one of the two major abolitionist arguments, and discusses it in some detail:

> Since the time of Beccaria, Bentham, Rush and Livingston, most penologists have agreed that for any punishment to have optimum efficacy as a deterrent, the penalty must be imposed consistently, immediately and inexorably; that is, on all offenders, promptly after their crime, and in such a way that the general public expects exactly this. But in practice, not one of these conditions is satisfied by the way capital punishment is administered. Only a small proportion of first degree murderers are sentenced to death and even fewer are executed. The delay in convicting and executing those who do get a death sentence is increasing and notorious. So, almost anyone who contemplates some horrible crime can see some chance in getting away with it, or at least in not having to pay the supreme penalty. If, in practice, the death penalty is no more effective a deterrent for murder, rape and kidnapping than imprisonment is, this may be the reason. One must either admit it, and keep capital punishment on other grounds, in the knowledge that it cannot be made a better deterrent than it is; or else abandon the jury system, the right of appeal, and deprive the accused of most of his basic constitutional rights in all capital cases, in the hopes of improving the deterrent efficacy of the death penalty; or else get rid of the death penalty itself in the confidence that imprisonment is on the evidence as good a deterrent and considerably simpler to administer.2/

1/ Quoted by Bedau (ed.), op. cit., p. 272.
2/ Bedau (ed.), op. cit., p. 270.

III. THE DEATH PENALTY AS A PROTECTIVE MEASURE

Most abolitionists agree that the institution of the death penalty would be justified by its necessity as a protective measure against the incorrigibly dangerous. The debate here differs from the debate about deterrence in that there is clearly no question about the effectiveness of capital punishment as a protective measure. The argument turns on the issue of whether or not the death penalty is, in fact, necessary. In so far as there actually is a danger to society from those found guilty of capital crimes, is it possible to provide protection by some means short of their death? Abolitionists argue that this danger is considerably exaggerated by retentionists and, more importantly, that life imprisonment is a completely adequate protective measure. Sellin comments:

> In the last analysis, the argument that the life sentence does not offer an adequate safeguard against further homicidal criminality by a murderer who is not executed appears untenable. Basically, those who advance it probably feel that the life sentence, in practice, is not an adequate punishment for murder.1/

The abolitionist arguments on the issue of incapacitation are summed up as follows by the late Lewis E. Lawes, the warden for many years of Sing Sing Prison:

> Murderers make the best prisoners. They are least troublesome to any warden, and often they accomplish a great deal behind bars. I know of none released during my wardenship at Sing Sing who reverted to crime. Furthermore, it is not true—at least in New York State—that a murderer whose death sentence is commuted to life imprisonment can easily obtain his freedom. The average period of incarceration among those who receive the second commutation is about twenty years. Granted that other states are too lenient,

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1/ Sellin, The Death Penalty, pp. 78-79.

> that would be an argument for a better administration of justice, not for putting people to death.1/

A. "Murderers Make the Best Prisoners"

It is generally agreed that murderers do, in fact, make the best prisoners and that the percentage of violent crime committed by them in prison is negligible. A survey conducted in 1950 by the International Penal and Penitentiary Commission comparing the behavior of prisoners serving sentences for murder with the behavior of those serving sentences for other offenses clearly indicated this to be the case in countries abroad. Sellin discusses the results of this survey and continues:

> The same views as those...expressed by prison administrations in many European countries are held by American wardens and superintendents of correctional institutions. Lifers are generally considered to be among the best behaved prisoners. It would be unnatural were they not at times involved in disciplinary violations, and examples are known when some lifer has committed an assult in prison and even a homicide, but these appear to be very rare exceptions. Generally speaking, such murderous offenses are committed by prisoners serving sentences for other crimes than murder.2/

B. The Danger from Released Murderers

Statistics indicate that the behavior of first degree murderers released on parole is, in the words of Sellin, "very good, much better than that of other prisoners who have been paroled, especially property offenders."3/ This is equally true of those who have been pardoned. Bedau comments:

1/ Lewis E. Lawes, "Capital Punishment," Encyclopedia of Criminology, ed. Vernon C. Brannam and Samuel B. Kutash (1949), p. 44.
2/ Sellin, The Death Penalty, p. 72. See also Bedau (ed.), op. cit., pp. 400-401.
3/ American Bar Association, Section of Criminal Law, op. cit., p. 24.

> The general position of American penologists on the matter of pardoning (or paroling) murderers was stated succinctly a decade ago by the retired Director of the Federal Bureau of Prisons, Sanford Bates, when he informed the Royal Commission on Capital Punishment: "Cases of murder committed by persons pardoned from the death penalty are rare if not almost unknown." This is almost as true of all murderers, whether sentenced to death and commuted by the governor or sentenced to life imprisonment by the jury, and whether kept in prison or released....1/

Abolitionists are generally agreed that the misguided release of those who remain a danger to society indicates a need for the reform of a state's parole practices, rather than for retention or reinstatement of capital punishment. In the words of Robert G. Caldwell, a lawyer and noted criminologist:

> For example, it is clear that the possibility of releasing dangerous prisoners into the community could be reduced by improving the rehabilitative facilities of our correctional institutions and by strengthening our pardon and parole procedures. An execution, it is true, absolutely eliminates this possibility; but since it is to be prescribed as punishment for a crime, one can hardly maintain that in a given case it should be used not so much because a certain offense has been committed but because we are too lenient and inefficient in the operation of our correctional systems.2/

Moreover, abolitionists argue that the low rate of recidivism among paroled murderers indicates that in general dangerous prisoners are not being released, and that the danger of such releases is greatly exaggerated.

Finally, the abolitionist position on the alleged lack of a satisfactory alternative penalty is summed up as follows by Donal E. J.

1/ Bedau (ed.), op. cit., p. 397; see pp. 397-399 for state statistics.
2/ Robert G. Caldwell, "Why is the Death Penalty Retained?", The Annals (Nov. 1952), pp. 48-49. For statistics and a discussion of the actual length of life sentences in various states, see Sellin, The Death Penalty, pp. 72-76.

MacNamara, Dean of the New York Institute of Criminology:

> The record in abolition jurisdictions, some without the death penalty for more than one hundred years, both in the United States and abroad, in which imprisonment for indeterminate or stated terms has been substituted for the penalty of death, is a clear demonstration that alternative penalties are of equal or greater protective value to society than is capital punishment.1/

1/ Donal E. J. MacNamara, "The Case Against Capital Punishment," Social Action (April 1961), p. 12.

IV. RETRIBUTION VS. VENGEANCE

Abolitionists do not accept the argument that capital punishment is defensible on the grounds of retribution, apart from any benefit it may afford society either as a superior deterrent or as a necessary protective measure. According to many proponents of capital punishment, some criminals are simply unfit to live; they have committed acts so heinous that the only appropriate punishment is death. This function of the death penalty is commonly referred to on the retentionist side as retribution and on the abolitionist side as vengeance.

Abolitionists argue that the motivation behind this use of the death penalty is of the same order as the irrationality which provoked the criminal to the act for which he is being executed. Arthur Koestler comments:

> Yet though easy to dismiss in reasoned argument on both moral and logical grounds, the desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation or revulsion--whether the reasoning mind approves or not. This psychological fact is largely ignored in abolitionist propaganda--yet it has to be accepted as a fact. The admission that even confirmed abolitionists are not proof against occasional vindictive impulses does not mean that such impulses should be legally sanctioned by society, any more than we sanction some other unpalatable instincts of our biological inheritance. Deep inside every civilized being there lurks a tiny Stone Age man, dangling a club to rob and rape, and screaming an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the land.1/

The purpose of the criminal law is to provide protection against man's irrationality and violence, not to furnish a means of expressing it. Abolitionists contend that the death penalty is a violation of

1/ Arthur Koestler, Reflections on Hanging (1957), p. 100.

this purpose. In the words of Theodore McKeldin, former Governor of Maryland:

> The function of the criminal law is to protect the law-abiding, not to sate society's lust for revenge. Only as a protector of the lives and property of honest men does it deserve the respect and support of honest men. Hence anything that tends to associate it with the idea of vengeance impairs its dignity and subtracts from the respect that intelligent people accord it. The argument that the death penalty is needed to allay public excitement is an argument against capital punishment, not in its favor.1/

In summary, then, of the central argument against capital punishment, those who oppose the penalty believe that it does not deter would-be murderers more effectively than life imprisonment, and that life imprisonment is a fully adequate safeguard against those who have committed murder. In the words of Thorsten Sellin:

> The belief that the death penalty is a unique instrument for the protection of society against murder and superior to life imprisonment in this respect is not supported by any credible evidence now available to us.2/

In the absence of "credible evidence" that the death penalty is necessary to protect society, abolitionists argue that its only purpose is to satisfy man's desire for vengeance. The acceptance of vengeance as a legitimate goal of the criminal law of a civilized state is, according to abolitionists, morally wrong and pragmatically dangerous.

1/ Maryland Committee on Capital Punishment, Report (1962), p. 25.
2/ Sellin, "Capital Punishment," p. 9.

V. THE DEATH PENALTY AND CRIMINAL JUSTICE

A number of the arguments against capital punishment relate to its alleged incompatibility with equitable and efficient criminal justice. The following statement by Herbert L. Packer of Stanford Law School is representative of the opinion of many, particularly in the legal profession, who oppose capital punishment:

> The case for abolition rests most securely, I think, on pragmatic considerations. Very simply, capital punishment is more trouble than it is worth. Criteria for its even-handed application are totally lacking; its effect on the administration of justice is malign and pervasive; it brings the law into disrepute.1/

A. The Possibility of Error

A major argument in this area is the danger that an innocent man will be executed. The Marquis de Lafayette once said, "I shall ask for the abolition of the penalty of death until I have the infallibility of human judgment demonstrated to me."2/ The argument remains the same today. Sellin writes:

> Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possiblity that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed, perhaps after many years in prison, by the discovery of the real criminal.3/

In The Death Penalty in America, Bedau abstracts "seventy-four cases occurring in the United States since 1893, in which a wrongful conviction

1/ Packer, op. cit., p. 441.
2/ Quoted by Otto Pollak, "The Errors of Justice," The Annals (Nov. 1952), p. 115.
3/ Sellin, The Death Penalty, p. 63.

of criminal homicide has been alleged and, in most cases, proved beyond doubt."[1] These cases resulted in the following penalties:[2]

Death sentence executed	8
Death sentence not executed	23
Life sentence	30
Less than life sentence	10
Conviction averted	3
Total	74

Bedau comments that while there is some doubt whether the right men executed were innocent, "no doubt, however, attaches to the fact that nearly two dozen men have been sentenced to death for crimes they demonstrably did not commit."[3] He also points out that 11 of the 30 life sentences occurred in abolition states.

> Had the death penalty not been abolished in these states, it is likely that at least some of these eleven men would have received a death sentence and been executed.[4]

Several governors who have had to make the final decisions on executions have been particularly emphatic about the reality and seriousness of the danger of executing the innocent. Both Governor Edmund Brown of California[5] and Michael V. DiSalle, former Governor of Ohio,[6] recount incidents which illustrate this danger. Bedau points out that, reputedly, the States of Maine, Rhode Island, and Wisconsin abolished the death penalty during this century because of the hanging of innocent men.[7]

1/ Bedau (ed.), op. cit., p. 436; see pp. 434-452.
2/ Ibid., p. 438.
3/ Ibid., p. 440.
4/ Ibid., p. 438.
5/ Brown, op. cit., p. 6.
6/ DiSalle, op. cit., p. 6.
7/ Bedau (ed.), op. cit., p. 1[illegible].

B. Inequality of Application

Opponents of the death penalty are universal in their denunciation of the injustice with which this penalty is enforced. Mr. Bedau speaks for abolitionists in general in his comment that, "The whole pattern of treatment of capital convictions by the higher courts seems devoid of rhyme or reason."[1/]

Abolitionists charge that racial prejudice, particularly against Negroes, is a major factor in the unequal application of the death penalty. They cite particularly statistics on executions for rape. The Federal Bureau of Prisons, in its 1965 national prisoner statistics bulletin on executions, indicates that during the period 1930-1964, nine-tenths of all executions for rape have been of non-white males.[2/] On this subject, Bedau notes:

> ...as National Prisoner Statistics shows, of the nineteen jurisdictions that have executed men for rape since 1930, a third of them have executed only Negroes. In those six states, the very existence of rape as a crime with an optional death penalty is, in the light of the way it has been used, strong evidence of an original intent to discriminate against non-whites. This was probably the purpose behind the decision in Tennessee in 1915 to abolish capital punishment for murder and treason, but to retain it for rape.[3/]

According to abolitionists, a second factor in the inequitable use of the death penalty is reflected in the fact that with few exceptions, it is the "poor and friendless" who are executed. Because of the very nature of our law courts, the difference between life and death is frequently determined by the ability of the accused to provide himself with skilled legal counsel. Former

1/ Bedau (ed.), op. cit., p. 410.

Governor DiSalle writes:

> I have never seen a person of means go to the chair. It is the well-heeled gangster, the professional killer who can afford the best legal talent to defend him, who gets off with a lesser sentence. It is the poor, the illiterate, the underprivileged, the member of the minority group—the man who because he is without means is defended by a court-appointed attorney—who becomes society's blood sacrifice.
>
> The court-appointed defender, diligent though he may be, is always handicapped. Sometimes he is inept—there is no criterion of experience in criminal law to guide a court appointment—and always he lacks the staff and funds available to the prosecution. Without funds and personnel to investigate the background of jurors and witnesses, to check alibis and examine the evidence before trial, the court-appointed attorney and his client have two strikes against them before they even enter a plea.1/

Abolitionists argue that the inequalities involved in the actual use of the death penalty undermine the justification of it on the basis of the protection it may offer society. They maintain the facts indicate that, far from serving a rational, legitimate purpose, the death penalty is an instrument of class and racial prejudice and a test of expensive legal ingenuity.

Abolitionist argue further that the way in which the death penalty is actually used completely invalidates any possible defense of it on the grounds of society's right to retribution. They state for instance, that it is difficult to defend the position that Negro rapists merit death while white rapists, for the most part, do not. Sellin comments:

> ...If I were an adherent of the view of retributive justice, I might—if my emotions did not deprive me of my reason—wish to find out if retributive justice is efficiently and properly administered....
> If only about 4 percent of those who actually commit murders in the first degree [are executed], a figure based on what we conservatively estimate to be the

1/ [illegible] -- [illegible] -- 10-11.

> number of capital murders committed annually in the United States and the accurate knowledge we have of the number of executions, it is obvious that, whatever the elements may be that produce the attrition, retribution is but rarely achieved and in no equitable manner. Therefore, just as the death penalty has proved to fail as a special means of social protection, so it has failed as an instrument of retributive justice.1/

C. The Administration of Criminal Justice

Abolitionists contend that the existence of the death penalty has a bad effect on the administration of criminal justice. This point of view is summed up as follows in the report of the Florida Special Commission for the Study of the Abolition of Death Penalty in Capital Cases:

> When the life of an accused person is at stake, it is more difficult and takes longer to impanel juries because prospective jurors dislike such cases and are frequently disqualified because they do not believe in the death penalty. Trials become longer and more expensive and emotions are especially likely to confuse the issues. Indeed, the guilty person is more likely to escape punishment altogether because of the reluctance of the jury to convict and thereby make the death penalty a possibility. Appeals are more likely to result in reversals, and this brings on new and equally expensive trials. More are of the opinion that there would be many convictions for what are now capital crimes if life imprisonment replaced execution.2/

The issue of the disproportionate amount of time involved in capital cases was the subject of a study conducted in 1961 by the American Bar Foundation, the research branch of the American Bar Association. The Foundation concluded that that the long delays in capital trials and in the carrying out of death sentances weakened public confidence in the law.3/ The study was prompted by the Caryl Chessman case, which began

1/ Sellin, "Capital Punishment," op. cit., p. 10.
2/ Florida Special Commission for the Study of the Abolition of Death Penalty in Capital Cases, Report (1965), p. 26.

in June 1948 and ended with his execution on May 2, 1960. Abolitionists argue that, while this case is an extreme, it is not an anomaly. In 1957, two prisoners were executed in California after seven years of appeals and trials.

As the report of the Florida Special Commission indicates, another major objection in this area is that the emotion aroused by the spectacle of a man fighting for his life is not compatible with the just and rational administration of the law. Governor Edmund G. Brown of California has referred to the capital trial as "our modern equivalent of the Roman Circus."[1/] The effect of this emotion on the trial itself is seen by many eminent lawyers to be deplorable. Mr. Justice Frankfurter, in his appearance as a witness before the British Royal Commission, said:

> When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the bar, the public, the judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life.[2/]

The retentionist response to this category of arguments is that they indicate the need for legal reform, not the abolition of capital punishment.[3/] Those opposed to the death penalty reply that recommending legal reform is no answer unless retentionists are, to quote Herbert L. Packer, "prepared to propose the solution that has so far eluded all students of the subject."[4/] In fact, many abolitionists argue that the death penalty is a major factor operating against the

1/ Brown, op. cit., p. 5.
2/ Quoted by Richard C. Donnelly, "Capital Punishment," Congressional Record, Aug. 24, 1960, p. A6285.
3/ See below, pages 61-65.

reform of our criminal law. The late Professor Sam Bass Warner of Harvard Law School said that "the existence of the death penalty for first degree murder is one of the principal reasons, if not the main reason, why it is extremely difficult to get judges and legislators to remove procedural barnacles from our law."[1] Dr. Sheldon Glueck, a professor at Harvard Law School and an eminent sociologist, comments that the death penalty "bedevils the administration of criminal justice all the way down the line and is the stumbling block in the path of general reform."[2]

D. Technicalities of the Law

In the majority of jurisdictions which retain capital punishment, a person convicted of murder can only be sentenced to death if he is found to be legally sane and guilty of murder in the first degree. A number of eminent lawyers have argued that many of the abuses surrounding the death penalty stem directly from the inadequacy of the legal definition of sanity and the vagueness of what Herbert Ehrmann refers to as the "metaphysical" distinction between first and second degree murder.[3]

Mr. Justice Cardozo commented as follows on the distinction between first and second degree murder:

> I think the distinction is much too vague to be continued in our law.... The statute is framed along the lines of a defective and unreal psychology.... The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand

1/ Quoted by Herbert B. Ehrmann, "The Death Penalty and the Administration of Justice" (1952), in Bedau (ed.), op. cit., p. 433.
2/ Quoted by James A. McCafferty, "Major Trends in the Use of Capital Punishment," Federal Probation (September 1961), p. 21.
3/ Ehrmann, op. cit., p. 429. For a discussion of the distinction between first and second degree murder and its historical development,

> 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.1/

Professor Packer of Stanford Law School points out that the arbitrariness with which the death penalty is used is directly related to the lack of guidance afforded by the law in this area:

> All students of the subject agree that the grading of murder into degrees, characteristic of most American penal codes, is hopelessly inept. Tacit recognition that this is so underlies the fact that in most jurisdictions the grading of murder has been reinforced by conferring discretion on the jury to decide whether persons convicted of first degree murder shall be executed or imprisoned. The result is that in practice the selection of those to be executed is the result of arbitrary, whimsical and uninformed choice. At this most crucial point in the administration of even-handed justice, law abdicates completely. The choice of life or death reflects mainly the strains and tensions of our society, most notably in the Southern states, but throughout the country as well.2/

The stand taken by abolitionists on the issue of legal sanity in capital trials centers around their objection to the M'Naghten Rule, the test of sanity in most jurisdictions. This rule is based on a decision handed down in 1843 and states, in essence, that a person is legally sane if, at the time of the commission of his crime, he was capable of distinguishing between right and wrong. The abolitionist view of the effect of this ruling on criminal justice is summed up as follows in the report of the Florida Special Commission:

> Many feel that the death penalty makes the issue of insanity as a defense to a charge of capital crime a thorn in the side of the administration of criminal justice. Insanity of the accused is often in issue, but the law's test of ability to distinguish between right and wrong is hard

1/ Quoted by Ehrmann, op. cit., p. 429.
2/ Packer, op. cit., p. 441.

> to apply because modern medicine does not even recognize this type of "insanity" as a clinical entity. As a result, the expert medical witnesses often testify that the accused is suffering from mental disease, but then the judge tells the jury, in effect, that this is not the "insanity" recognized by the criminal law.1/

A prominent San Francisco psychiatrist, Dr. Bernard L. Diamond, testified before the California Legislative Subcommittee on Capital Punishment that "Only a driveling idiot has no conception of right and wrong." He went on to describe the consequences of the M'Naghten rule as follows:

> The result is that a given psychiatrist will answer, as to the knowledge of right and wrong, on the part of an accused person, in accordance with his own prejudices, or (worse yet) with the wishes of the side that hired him. The conclusion is, therefore, unescapable that the right and wrong test satisfies the requirements of neither psychology nor medicine, nor, indeed, of the law itself.2/

In summary, then, many, particularly in the legal profession, argue that our present laws on who shall and shall not be sentenced to death are inadequate. Furthermore, it is argued that these laws, particularly with regards to the issue of legal sanity, are essentially inaccessible to reform within the framework of the law as it now stands. In the opinion of many, it is no accident that the law relating to capital punishment has not been reformed along the lines of a more realistic view of psychology. This would mean opening the doors to a deterministic view of individual responsibility which is essentially incompatible with the assumptions underlying our system of law. Arthur Koestler writes in his book, Reflections on Hanging:

1/ Florida Special Commission, op. cit., p. 26.
2/ Quoted by Eugene B. Block, And May God Have Mercy (1962), p. 80.

> The reason why the law relating to capital punishment cannot be reformed is basically simple. It could only be reformed at the price of undermining the concept of criminal responsibility by such deterministic notions as "irresistible impulse" or "diminished responsibility"--that is, by making determinism statutory, as it were. This necessity does not arise in the case of other offenses, because the sentence is elastic.... To sum up. The deficiencies of the capital law are irremediable because the death-penalty is based on a philosophical concept of criminal responsibility which does not admit the compromises with the determinist view practiced in other courts. Regarding all other offences, the administration of the law is elastic; the death-penalty, by its nature, excludes gradings of culpability. This rigidity and finality, which is the very essence of the capital law, is at the same time the reason of its attractiveness and symbolic value for the anti-progressive forces in society.1/

Furthermore, abolitionists argue that it is essentially impossible to determine the degree to which an individual is responsible for his behavior with sufficient certainty to base a life and death decision on it. Koestler comments on this point:

> Yet even by revolutionizing the basic concepts of Common Law for the sole purpose of making capital law a little less barbaric, its self-contradictions would remain. Since the frontiers between "responsible" and "irresponsible" are fluid, problematical and bedevilled by metaphysical problems, any drawing of the line by legal definition would be arbitrary. And since it is impossible to define when a man acted freely and ought to die, or when he acted under compulsion and ought to live, the only solution is to bring capital law into line with the remaining body of the Common law by eliminating the unique, fixed, all-or-nothing penalty which admits of no gradations.2/

Abolitionists tend to see the difficulty of determining individual responsibility as relevant only to the death penalty, not to lesser sentences, or to penology in general. Many retentionists regard abolition of capital punishment as a triumph for the view that

1/ Arthur Koestler, Reflections on Hanging (1957), pp. 102-104.
2/ Ibid., p. 103.

criminal behavior is an illness which should be cured, not punished—a step in the transition, prophesied by Jacques Barzun, from law to social work.[1] Abolitionists argue that precisely the opposite is true, that it is the existence of the death penalty which has forced criminal justice to become embroiled in the issue of psychological determinism. Packer writes:

> But what...has been primarily responsible for the extremist position that criminals should all be regarded as sick rather than bad? Demonstrably, it has been capital punishment. This is the spur and this is the rallying point for the attack upon law. The polemic battle that has enlisted so much psychiatric talent has been waged almost entirely with reference to capital punishment. It is in the murder trial that the issue of the extent to which the mental condition of the defendant should excuse or mitigate has been most often and most acrimoniously litigated. As Chief Justice Weintraub of N.J. said: "For all practical purposes the furor...is confined to the disposition of offenders convicted of murder. It is the death penalty that sparks the quarrel."[2]

1/ Jacques Barzun, "In Favor of Capital Punishment" (1962), in Bedau (ed.), op. cit., p. 157. See page 57 below.

2/ Packer, op. cit., p. 442.

V. THE RELIGIOUS ARGUMENT

Many Protestant churches have taken an official stand against capital punishment. While the Roman Catholic Church has not taken a stand on either side, according to the recent U.N. study it has in recent years been moving more towards the view that the death penalty should be abolished.[1/] Most Jewish organizations are officially opposed to the death penalty.

The religious argument against the death penalty generally centers around the belief that even sinful men are the objects of God's redemptive love, and that vengeance belongs to God, not man. In the words of Bishop John Wesley Lord of the Washington, D.C. Conference of the Methodist Church:

> A Christian view of punishment must look beyond correction to redemption. It is our Christian faith that redemption by the grace of God is open to every repentant sinner, and that it is the duty of every Christian to bring to others by every available means the challenge and opportunity of a new and better life. We believe that under these circumstances only God has the right to terminate life.[2/]

Similarly, the following resolution was adopted in 1958 at the General Convention of the Episcopal Church:

> Inasmuch as the individual life is of infinite worth in the sight of Almighty God; and
> Whereas the taking of human life falls within the providence of Almighty God and not within the right of man; Therefore be it Resolved, That the General Convention goes on record as opposed to capital punishment.[3/]

The Bible is used by both sides in the capital punishment controversy. Abolitionists cite Romans, XII, 17, in which Paul says:

1/ United Nations, op. cit., p. 64.
2/ Maryland Committee, op. cit., p. 24.
3/ Quoted by Florida Special Commission, op. cit., p. 24.

> Recompense to no man evil for evil....avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord.

In the Old Testament, they point, first, to the fact that Cain was not put to death (Genesis IV, 15), and to the adjuration in Leviticus, XIX, 18:

> Thou shalt not avenge, nor bear any grudge against the children of they people, but thou shalt love thy neighbor as thyself: I am the Lord.

More generally, those opposed to capital punishment for religious reasons argue that the whole Christian concept of love and redemption as presented in the New Testament runs counter to use of the death penalty in a system of justice. In support of this, they refer specifically to the Sermon on the Mount (e.g., Matthew V, 44) and to Luke VI, 35.

In addition to the Old and New Testaments, abolitionists quote St. Augustine in opposition to capital punishment. The following passage is from a plea that some Donatists, a heretic African sect, who had confessed to the heinous murder of Christians, be spared the death penalty:

> We do not wish to have the the sufferings of the servants of God avenged by the infliction of precisely similar injuries in the way of retaliation. Not, of course, that we object to the removal from these wicked men of the liberty to perpetrate further crimes, but our desire is rather that justice be satisfied without the taking of their lives or the maiming of their bodies in any particular; and that, by such coercive measures as may be in accordance with the laws, they be drawn away from their insane frenzy to the quietness of men in their sound judgment, or compelled to give up mischievous violence and betake themselves to some useful labour.1/

1/ Quoted by Koestler, op. cit., p. 100.

VII. PUBLIC OPINION

The four most recent Gallup Poll surveys indicate a steady decrease of public support for the death penalty. In each case, the question asked was, "Are you in favor of the death penalty for persons convicted of murder?" The results of the four polls are shown below:[1]

	1966	1965	1960	1953
Yes	%42	%45	%51	%68
No	47	43	36	25
No Opinion	11	12	13	7

The waning public support for the death penalty is reflected on the state level by the fact that in 1965 alone four states abolished it.[2] On the federal level, 1965 saw the Justice Department's break with its previous official postion of neutrality on the issue. Deputy Attorney General Ramsey S. Clark wrote in a letter to the House District Committee:

> We favor the abolition of the death penalty.... This nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime.[3]

A number of sociologists have commented on the extent to which the retention or abolition of capital punishment depends on the public attitude toward it,[4] and have predicted that the current trend of increasing opposition will culminate in the abolition of the death penalty in this country, at least in practice if not in law. After itemizing

1/ Washington Post, July 2, 1966, p. A3.
2/ Iowa and West Virginia abolished it completely; New York and Vermont abolished it except for special crimes (e.g., killing a policeman acting in the line of duty).
3/ New York Times, July 24, 1965, p. 1.
4/ Bedau (ed.), op. cit., pp. 231-232.

various factors that have contributed to the decline of public support, Sellin concludes that:

> ...it is not difficult to explain the rapid downward trend in the number of executions annually from a high of 199 in 1935 to 57 in 1960. And this trend is likely to continue, barring unforeseen social crises, until executions will become a much greater rarity than today and will ultimately be abandoned.1/

There were seven executions in 1965, an all-time low in the history of this country.

SECTION 2

IN FAVOR OF CAPITAL PUNISHMENT

I. THE STATE SHOULD PROTECT THE LAW-ABIDING CITIZEN

The central argument in defense of capital punishment is that the first responsibility of the State, and thus of the criminal law, is the protection of the law-abiding. As long as there is substantial reason to believe that capital punishment serves this function, it should be retained. This argument is expressed as follows in the majority report of the New Jersey Commission to Study Capital Punishment:

> This Commission has an obligation to the people of the State of New Jersey. Our citizens deserve the maximum degree of protection from injury both to their persons and to their property. In case of doubt as to which method will create the most likely optimum of protection, this Commission is bound to retain the type of punishment which throughout history has proved to be the most severe. ... It seems clear that those who seek the abolition of capital punishment are concerned with the saving of the lives of those convicted of the crimes in question....Yet most, if not all of those seeking abolition would, the Commission is certain, retain the death penalty if they were satisfied that it would save innocent lives. One abolitionist witness thought that the saving of a single life would not be enough. The Commission, however, in its obligation to the people of this State, is not justified in gambling the life of a single citizen.1/

Retentionists argue that if this goal of providing the law-abiding citizen optimum protection conflicts with the welfare of the criminal, then it is the criminal who must be sacrificed.

1/ New Jersey Commission to Study Capital Punishment, Report (1964), pp. 7-8.

Retentionists assert that the death penalty affords the law-abiding unique protection in two ways. It is, they argue, superior to life imprisonment as a deterrent to would-be murderers, and it is necessary as a protective measure against the incorrigibly dangerous. Furthermore, those in favor of capital punishment contend that because of the responsibility of the State to protect its citizens, the burden of proof rests with the abolitionists. Those opposed to capital punishment must, according to retentionists, prove conclusively that the death penalty is ineffective as a deterrent and unnecessary as a protective measure before abolition can be seriously considered.

II. DETERRENCE

A. The Evidence of Experience

The case for retaining the death penalty has the support of a majority of the law enforcement profession. Ralph G. Murdy, Managing Director of the Baltimore Criminal Justice Commission, writes,

> There is no question that a large majority of law-enforcement officers throughout the country favor capital punishment. The June 1960 issue of the official publication of the International Association of Chiefs of Police was entirely devoted to capital punishment without any expression from a police administrator encountered who favored its abolition. Occasionally an endorsement will be seen from a police administrator in a noncapital punishment state. However, only a few are active in presenting a case against capital punishment.1/

Sheriff Peter Pitchess of Los Angeles County testified as follows before the California Senate Committee on the Judiciary,

> But I can tell you that the overwhelming majority of people in law enforcement—the ones who are dealing with these criminals, the ones who are seeing them not as statistics but real live human beings, and who are studying their human behavior—are overwhelmingly convinced that capital punishment is a deterrent.2/

J. Edgar Hoover, Director of the Federal Bureau of Investigation since 1925, is unqualifiedly opposed to the abolition of capital punishment. The 1959 issue of The Uniform Crime Reports for the United States contains the following statement by Mr. Hoover:

> The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty.... For the law enforcement officer the

1/ Ralph G. Murdy, "A Moderate View of Capital Punishment," Federal Probation (Sept. 1961), p. 13.
2/ California Legislature, Senate Committee on Judiciary, Hearing Report and Testimony... (1960), p. 150.

> time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessary ingredient.1/

The importance of the support of the death penalty by members of the law enforcement profession is evidenced by the weight placed on it in the following passage from the New Jersey Commission majority report:

> The Commission is convinced that capital punishment does deter some potential murderers from committing capital crimes. More particularly, it is believed that the deterrence is most significant in the area of felony murder and in the area of a truly premeditated crime. While the statistical information presently available does not indicate a significant difference in the homicide rates between abolition states and capital punishment states, even when adjoining, this statistical information was admittedly not restricted to capital crimes, did not include the incidence of felony murders, the relationship of aggravated assaults to homicides, or the relationship of Police woundings. Those presenting only raw homicide figures admitted that these were as yet the best available, and for the purpose of further analysis they would like to have available the additional information set forth above. On the other hand, those most intimately concerned with law enforcement gave evidence and their conclusions that capital punishment is a deterrent in some cases.2/

The conclusion that capital punishment has a deterrent value "in the area of felony murder and in the area of a truly premeditated crime" is emphasized and backed with evidence in the majority of the defenses of capital punishment. The following is the introductory paragraph of a report from the Los Angeles Police Department presented as evidence at hearings before the California Senate Committee on Judiciary:

1/ Federal Bureau of Investigation, The Uniform Crime Reports of the United States (1959), p. 14.
2/ New Jersey Commission, op. cit., pp. 8-9.

> "The following defendants in conversations with reporting officers stated that they either: (1) used toy guns; or (2) empty guns or (3) simulated guns in robberies rather than take a chance on killing someone and getting the gas chamber."1/

The report then discusses 13 defendants who had been involved in a total of 28 felonies, with 28 potential victims.

In his statement before the American Bar Association Section of Criminal Law in 1959, Richard E. Gerstein, as State's Attorney of the Eleventh Judicial Circuit of Florida, cited the following instances from testimony given by law enforcement officers concerning the deterrent value of the death penalty:

> (1) Criminals who have committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captor though by killing, escape seemed probable. When asked why they refrained from the homicide, quick responses indicated a willingness to serve a life sentence but not to risk the death penalty.
> (2) Criminals about to commit certain offenses refrained from carrying deadly weapons. Upon apprehension, answers to questions concerning absence of such weapons indicated a desire to avoid more serious punishment by carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty.
> (3) Victims have been removed from a capital punishment state to a non-capital punishment state to allow the murderer opportunity for homicide without threat to his own life. This in itself demonstrates that the death penalty is considered by some would-be killers. Statistics cannot tell us how many lives have thus been saved.

In several cases, the indication of the clear awareness and consideration on the part of the criminal of the capital laws of different states have led abolition states to reinstitute the death penalty. Thorsten Sellin testified before the British Royal Commission as follows:

1/ Quoted by California Senate Committee, op. cit., p. 17.
2/ American Bar Association, Section of Criminal Law, 1959 Proceedings (1960), p. 15.

> South Dakota reintroduced the death penalty because a couple of Illinois convicts, who had finished serving their terms, tramped across the state and killed a couple of filling-station attendants, if I remember correctly--they were robbery murders.1/

The Attorney General of Kansas testified before the British Royal Commission that:

> One of the contributing factors leading to the re-enactment [in the State of Kansas] of the death penalty for first degree murder was the fact that shortly prior thereto numerous deliberate murders were committed in Kansas by persons who had previously committed murders in states surrounding Kansas, where their punishment, if captured, could have been the death penalty. Such murders in Kansas were admittedly made solely for the purpose of securing a sentence to life imprisonment in Kansas if captured.2/

More recently, a letter was intercepted by the Delaware State Police in which a murderer wrote that he had known before he killed that the most he could get was 15 years. The murder occurred after Delaware had repealed capital punishment in 1958 and was a major factor in the reinstitution of the death penalty in that state in 1961.3/

B. The Psychology of Deterrence

> The majority report of the New Jersey Commission noted:
>
> No punishment would be a deterrent for a crime of passion, or a crime committed by one who is insane. These are not the persons who generally receive the death penalty.4/

The fact that many murders appear to be either crimes of passion or acts of insanity is interpreted by retentionists not as an indication of the death penalty's uselessness as a deterrent, but of its success in

1/ Quoted by Hugo Adam Bedau (ed.), The Death Penalty in America (1964), p. 336.
2/ Ibid.
3/ Maryland Committee on Capital Punishment, Report (1962), pp. 30-31.
4/ New Jersey Commission, op. cit., p. .

deterring people from premeditated murder. The following is from the Canadian Parliamentary Committee's Report on Capital Punishment:

> One measure of its [the death penalty's] deterrent effect was afforded by an analysis of murders which indicated that a considerable proportion, probably in excess of half, are committed under the compulsion of overwhelming passion or anger where no deterrent could have been effective. This would seem to demonstrate that the death penalty, coupled with the excellent standards of law enforcement prevailing in Canada, has been successful in deterring the commission of deliberate, premeditated murders and reducing their incidence to minimum proportions. The deterrent effect may also be indicated by the widespread association of the crime of murder with the death penalty which is undoubtedly one reason why murder is regarded as such a grave and abhorrent crime.1/

The minority report of the Massachusetts Special Commission contains a related observation:

> ...we believe that the death penalty threat is effective in preventing large numbers of wrongdoers from ever allowing themselves to reach that stage of criminality where they become victims of uncontrollable impulses and subjects of murder commissions. It is in this early grey zone of murder premeditation that the death penalty threat is most apt to be operative and effective.2/

As indicated in the passage from the Canada report quoted above, retentionists also believe that the death penalty is effective as a deterrent in the broadest sense, by reinforcing the public abhorrance of murder. It is argued that the death penalty reinforces the public's belief in the sanctity of human life by associating this abstract moral concept with the strong instinctive fear of one's own death. Richard Gerstein comments on this point as follows:

1/ Quoted by Bedau (ed.), op. cit., p. 268.
2/ Massachusetts Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases, Report and Recommendations (1958); the minority report is reprinted in Capital Punishment, ed. Grant S. McClellan (1961), p. 82.

> Furthermore, as the Royal Commission [of Great Britain] opined, the death penalty helps to educate the conscience of the whole community, and it arouses among many people a quasi-religious sense of awe. In the mind of the public there remains a strong association between murder and the penalty of death. Certainly one of the factors which restrains some people from murder is fear of punishment and surely, since people fear death more than anything else, the death penalty is the most effective deterrent.1/

C. The Statistics2/

Those in favor of capital punishment assert that the question of the superior deterrent value of the death penalty to life imprisonment most probably cannot be—and certainly has not been—definitively answered by statistical studies. This argument is supported by the following passage from the Florida Special Commission's report on capital punishment:

> Superficial consideration might lead one to conclude that this question [whether the death penalty is superior to imprisonment in deterring those persons who would otherwise commit serious crimes] might be answered by scientific and statistical studies, but such is not the case. There is no reliable method for determining who has contemplated committing a capital crime but refrained due to the fear of the death penalty as distinguished from other forms of criminal punishment.... It is probably impossible to subject deterrence to scientific study in any direct way. The facts cannot be ascertained so that they can be subjected to scientific analysis and interpretation.3/

1/ American Bar Association, Section of Criminal Law, op. cit., p. 17.

2/ The statistical studies of the deterrent effect of the death penalty are discussed in detail in Section 1, pp. 5-12 above. The following comment from the State of Florida's Report of the Special Commission for the Study of Abolition of Death Penalty in Capital Cases is relevant here:

> One caution is appropriate at this point: it is those opposed to the death penalty who have been active in research and who are responsible for the statistical studies discussed herein (p. 19).

3/ Florida Special Commission for the Study of the Abolition of Death Penalty in Capital Cases, Report (1965), pp. 13-14.

First, as the Florida report indicates, there is the obvious point that those who are deterred do not show up as statistics. Secondly, both abolitionists and retentionists agree that the available statistics are inadequate. Hugo Adam Bedau, an abolitionist, writes in The Death Penalty in America:

> In a word, there is no exact information anywhere as to the volume of capital crimes in the United States. Difficult as it is to specify the capital laws for the nation as a whole, it is impossible with the present sort of criminal statistics to specify the exact amount of capital crimes for even one jurisdiction in even one year for even one crime! Ten years ago, George B. Vold complained, "There are no general statistics available as to the number of offenses committed per year for which death is the required penalty." Nothing has changed in the interim.1/

The major difficulty is that the only murder figure available for use in attempting to gauge the effect of capital punishment on the murder rate is the "murder and non-negligent manslaughter" figure reported by the Federal Bureau of Investigation in its annual publication, Uniform Crime Reports for the United States. As Mr. Bedau points out:

> Since some states have no death penalty for murder, the national totals of "murder and non-negligent manslaughter" will exceed the number of homicides punishable by death. What is even more important, the F.B.I. does not distinguish between total murders (or first degree murders), which alone carry the death penalty, and all lesser forms of non-negligent criminal homicide, in particular second degree murder and voluntary manslaughter, crimes usually punished by imprisonment. Instead, all voluntary or non-negligent criminal homicides are lumped together in Uniform Crime Reports under the title, "murder and non-negligent manslaughter."... What one wants to know, of course, is what fraction of the totals entered in this fashion are murders; and what fraction of this fraction are capitally punishable homicides, i.e., murders where a normal adult (not a child, juvenile, or lunatic) is the

1/ Bedau (ed.), op. cit., pp. 56-57.

> criminal and where a capital indictment might issue (excluding, therefore, those cases where the murderer commits suicide). It is impossible to supply this information at present.[1]

Mr. Bedau comments as follows on the validity of this "murder and non-negligent manslaughter" figure for the purpose of capital punishment statistics:

> One of the first criminologists to discuss the statistical relationship between general homicides and capitally punishable homicides was the late Professor Edwin H. Sutherland. In 1925, he pointed out that although (a) the number of homicides far exceeded the number of first degree murders (and, by inference, the number of capitally punishable homicides), (b) the ratio of the two was sufficiently constant to use the former as a guide to the latter.... there is no doubt that [(a)]...is true. But what about (b)? It is extremely difficult to determine what evidence it is based on. Sutherland himself offered none, but advanced it as a plausible assumption. In the intervening generation, no criminologist has done any better.[2]

Mr. Bedau subsequently analyzes in some detail one specific difficulty involved in relying on inferences from homicide rates to capitally punishable murder rates:

> We have already seen...how sketchy the known connection is between the two rates. To whatever degree the former is an unreliable guide to the latter -- which we have no way of directly measuring at all -- to that degree all the studies... [relying on it] are unreliable at the crucial point: is the death penalty an effective deterrent for those kinds of homicides punishable by death? Here is one kind of difficulty that arises when one expects homicide statistics to provide a conclusive answer to this question. Data reported [in an article by Thorsten Sellin]...show that the ten-year average of annual homicide rates in Ohio fell during the 1920's from 7.9 per 100,000 of population to 3.8 in the 1930's. Yet if the death penalty had been abolished in Ohio at the beginning of this period and if (let us suppose) abolition had been followed by a dozen or so more murders each year thereafter, the general homicide rate would have decreased almost exactly as

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1/ Bedau (ed.), op. cit., p. 61.
2/ Ibid., pp. 68-69.

> in fact it has, and at no time would the rate for any given year be more than a tenth of one per cent greater than it has been. Thus, while we could truthfully say that the abolition of the death penalty in Ohio had been followed by a decrease in the general homicide rate, it would also have been true that abolition resulted in an increase in the total number of murders, and this despite the constancy of the ratio of total homicides to murders (except in the first year after abolition). For all we know, this is exactly what has happened in all the abolition states, which without exception show a steadily declining general homicide rate over the past several decades. The number of crimes at stake here is so small that they would never be noticed by anyone who relies on the ordinary vital and criminal statistics of homicide.1/

The report of the Florida Special Commission contains the following comment on the inadequacy of statistical comparisons based on the F.B.I. murder and non-negligent manslaughter figure:

> Perhaps it is fortunate that the judgment of most persons who have studied them is that they do not prove much; that while they do not prove that the death penalty is a superior deterrent, they do not prove that it is not .... J. Edgar Hoover, Director of the Federal Bureau of Investigation, favors retention of the death penalty, but he has charged that statistical comparisons [based on inferences from homicide rates to first degree murder rates] are "completely inconclusive."2/

D. The Need to Protect the Police

The defense of the death penalty on the grounds that it is necessary for police protection is a special case of the argument that its deterrent value is superior to that of the penalty of life imprisonment. It might be noted that two of the thirteen states which have generally abolished capital punishment have retained it for the offense of killing a policeman acting in the line of duty.

1/ Bedau (ed.), op. cit., pp. 265-266.
2/ Florida Special Commission, op. cit., p. 17.

Members of the law enforcement profession are generally convinced that the death penalty protects the police. The minority report of the Massachusetts Special Commission comments:

> We have been impressed by the urgent demands of large numbers of law-enforcement officers that the death penalty be retained. These men have not made the speculative study of the problem with which they are confronted that would enable them to present their conclusions in compelling statistical form. Their point of view is not, however, for this reason to be taken lightly, especially in view of their insistence that their own lives are endangered by their efforts to protect the lives and property of their fellow men....1/

1/ Massachusetts Special Commission, in McClellan (ed.), op. cit., p. 79.

III. THE DEATH PENALTY AS A NECESSARY PROTECTIVE MEASURE

Those in favor of the death penalty argue that the second way in which it affords society unique protection is by guaranteeing that certain criminals who have committed particularly heinous crimes will not have the opportunity to do so again. Jacques Barzun, Provost of Columbia University, defends the death penalty on these grounds as follows:

> The uncontrollable brute whom I want put out of the way is not to be punished for his misdeeds, nor used as an example or a warning; he is to be killed for the protection of others, like the wolf that escaped not long ago in a Connecticut suburb. No anger, vindictiveness or moral conceit need preside over the removal of such dangers. But a man's inability to control his violent impulses or to imagine the fatal consequences of his acts should be a presumptive reason for his elimination from society.1/

Retentionists do not accept the abolitionist position that life imprisonment is in all cases a sufficient safeguard. They argue that some criminals are incorrigibly anti-social and will remain potentially dangerous to society for the remainder of their lives. These men constitute a danger to prison officials and to the other inmates, and there is always the chance that they may escape.

Furthermore, retentionists argue that, because the life sentence rarely means that an offender is in reality imprisoned for life, there is a serious possibility that dangerous men will be released on parole. Mr. Barzun points out that it is impossible to be certain that a murderer has, in fact, been "cured":

1/ Jacques Barzun, "In Favor of Capital Punishment" (1962), in Bedau (ed.), op. cit., pp, 155-156.

> The "scientific" means of cure are more than uncertain. The apparatus of detention only increases the killer's anti-social animus.... Some of these are indeed "cured"—so long as they stay under a rule. The stress of the social free-for-all throws them back on their violent modes of self-expression. At that point I agree that society has failed—twice: it has twice failed the victims, whatever may be its guilt toward the killer.1/

The defense of the death penalty on the grounds that it is a necessary protective measure is directly related to the argument that there is no satisfactory alternative sentence for those criminals who clearly constitute a continuing danger to society The obvious possible alternative is the life sentence without the possibility of parole. However, a number of penologists believe that this is a highly unsatisfactory solution. They argue that such a sentence removes all inducement to improve and thus greatly increases the difficulty and danger involved in handling the man so sentenced. The Maryland report noted the reaction of Ralph G. Murdy, the Managing Director of the Baltimore Criminal Justice Commission, to such a suggestion as follows:

> ...Mr. Murdy observed that many penal experts believe the no-parole sentence for life-terms creates a hard core of incorrigibles in prisons who fear no authority because they can never be set free. They are robbed of the incentive to behave, he said.2/

Thorsten Sellin comments on the absolute life sentence as follows:

> Recent legislation in some states and proposed in others, depriving a person sentenced to life for murder of that hope [of future release], may prove to be most inadvisable.3/

The former Director of the Maryland Department of Parole and Probation, Mr. Wallace Reidt, indicated to the Maryland Commission that

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1/ Barzun, in Bedau (ed.), op. cit., p. 159.
2/ Maryland Committee, op. cit., p. 20.
3/ Thorsten Sellin, The Death Penalty (1959), p. 72.

the possibility of the no-parole life sentence replacing the death penalty was a major reason for his opposition to the repeal of capital punishment in that state:

> If capital punishment is abolished, there will be considerable pressure to prevent parole in life terms and there will be removed what I believe is a great deterrent in the handling of prisoners in institutions.
>
> Most persons connected with institutions feel that unless there is some fear of punishment or hope of reward that a good many life-termers would cause a great deal of trouble in the institutions and make the work of prison officials much more dangerous than it now is.1/

A. The Second-Time Murderer

Several states which have generally abolished capital punishment have retained it for a person found guilty of murder who then murders again. The argument that the death penalty should be retained for those who murder a second time is a limited version of both the argument that the death penalty is necessary as a protective measure, and the argument that it is more effective than life imprisonment as a deterrent. Sidney Hook, Professor of Philosophy at New York University, comments:

> ...in a sub-class of murderes, i.e., those who murder several times, there may be a special group of same murderers who, knowing that they will not be executed, will not hesitate to kill again and again. For them the argument from deterrence is obviously valid. Those who say that there must be no exceptions to the abolition of capital punishment cannot rule out the existence of such cases on a priori grounds. If they admit that there is a reasonable probability that such murderers will murder again or attempt to murder again, a probability which usually grows with the number of repeated murders, and still insist

1/ Maryland Committee, op. cit., p. 23.

> they would never approve of capital punishment, I would conclude that they are indifferent to the lives of the human beings doomed, on their position, to be victims.1/

Of the thirteen states which have generally abolished capital punishment, four of them retain it for some type of second-time murder, as follows:

> New York: Killing a peace officer acting in the line of duty; and murder committed by a prisoner acting under sentence of life imprisonment.
>
> North Dakota: Murder in the first degree committed by a prisoner already serving a sentence for murder in the first degree.
>
> Rhode Island: Murder committed by a prisoner under sentence of life imprisonment.
>
> Vermont: Second conviction of murder, at discretion of jury, provided the two cases are not related; and first-degree muder of a police officer or prison guard who is on duty.

1/ Sidney Hook, "The Death Sentence" (1961), in Bedau (ed.), op. cit., p. 153.

IV. RETRIBUTION AND THE SANCTITY OF HUMAN LIFE

Capital punishment is defended by some on the grounds that it satisfies a legitimate communal need for retribution aroused by particularly heinous crimes. Society's desire that a man pay with his life for a violent crime represents both society's moral condemnation of such acts, and the closing of the ranks against those who violate society's laws. Thus, Lord Justice Denning testifie before the British Royal Commission on Capital Punishment that:

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent of reformative or preventive and nothing else.... The ultimate justification on any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime; and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.1/

Closely related to the defense of the death penalty on the grounds that it satisfies the legitimate public demand for retribution is the argument that capital punishment is, in fact, a public and official testimony to the belief in the sanctity of human life. This argument was stated as follows by Roy A. Gustafson, District Attorney of Ventura County, before the California Senate Committee on the Judiciary:

> Capital punishment...is based upon our concept of the high value placed upon life. We consider life to be the most precious possession and, therefore, when the crime is the most heinous and most grave of all crimes, then we make the man forfeit the thing that is most precious to him, namely, life.2/

1/ Quoted by Richard C. Donnelly, "Capital Punishment," in Congressional Record, Aug. 24, 1960, p. A6284.
2/ California Legislature, Senate Committee on Judiciary, op. cit., p. 103.

In answer to the abolitionist assertion that capital punishment is, in fact, a violation of the sanctity of human life, retentionists argue as follows:

> There is too much loose talk about the sacredness of human life. A life is sacred only when it makes itself sacred; when it respects the lives and rights of others.... A cold-blooded murderer, having cunning intelligence without moral restraint, is infinitely more dangerous than any other animal on earth.1/

J. Edgar Hoover characterizes as "maudlin" the view that "the most wanton slayer [is] 'a child of God' who should not be executed," and continues, commenting on a crime committed recently in California:

> Was not this small, blonde six-year-old girl a child of God? She was choked, beaten, and raped by a sex fiend whose pregnant wife reportedly helped him lure the innocent child into his car and who sat and watched the assault on the screaming youngster. And when he completed his inhuman deed, the wife, herself bringing a life into the world, allegedly killed the child with several savage blows with a tire iron. The husband has been sentenced to death. Words and words and words may be written, but no plea in favor of the death penalty can be more horribly eloquent than the sight of the battered, sexually assaulted body of this child, truly a "child of God."2/

1/ Evelle J. Younger, "A Sharp Medicine Reconsidered" (1956), in McClellan (ed.), op. cit., p. 16.
2/ J. Edgar Hoover, "Statements in Favor of the Death Penalty" (1961), in Bedau (ed.), op. cit., p. 133.

V. THE ABOLITION MOVEMENT AND MODERN LIBERALISM

There is a strong feeling among those in favor of capital punishment that the abolition movement of today is in many respects a corrollary of the permissive, deterministic view of individual behavior which characterizes much modern psychology and is reflected in the thinking of many liberal intellectuals. With regard to penology, this view is characterized—so the retentionist argument goes—by a belief that society is responsible, and thus to blame, for the ills of its misfits, and by a preference for the black sheep over the white. Retentionists point to such passages as the following to illustrate their case:

> By the establishment of a motive, an understanding of the crime, at least in the legal sense, is achieved, and no more official effort is extended from or charged to the authorities to go beyond and find a deeper insight into the true motivation of the mind of the man who kills.
>
> Acceptance in legal procedures of the motive at large is based on the presumption that, unless it is proved otherwise through the intricacies and formalities of the court trial, the individual [murderer] is like any other person, who could exercise at pleasure any function he chose. There is no recognition of the fact that if he had been in possession of such perfect powers of reasoning and such ideal forces of will, he could have prevented the occurrence of the fatal act. In reality, he is in his predicament for the very reason that he was incapable of behaving like a complete man, the master of himself. However, people in general refuse to look upon him as an invalid, and find considerable gratification in obtaining for society a maximum security and protection by imposing a maximum retribution.1/

The distance between this approach and that of many retentionists may be seen by contrasting the above passage with the following statement by Jacques Barzun, Provost of Columbia University:

1/ Ralph S. Banay, "Study in Murder," The Annals (Nov. 1952), p. 33.

> I happen to think that if a person of adult body has not been endowed with adequate controls against irrationally taking the life of another, that person must be judicially, painlessly, regretfully killed before that mindless body's horrible automation repeats.1/

Barzun sums up the general viewpoint discussed above as follows:

> Social science tends steadily to mark a preference for the troubled, the abnormal, the problem case. Whether it is poverty, mental disorder, delinquency or crime, the "patient material" monopolizes the interest of increasing groups of people among the most generous and learned. Psychiatry and moral liberalism go together; the application of law as we have known it is thus coming to be regarded as an historic prelude to social work, which may replace it entirely. Modern literature makes the most of this same outlook, caring only for the disturbed spirit, scorning as bourgeois those who pay their way and do not stab their friends. All the while the determinism of natural science reinforces the assumption that society causes its own evils. A French jurist, for example, says that in order to understand crime, we must first brush aside all ideas of Responsibility. He means the criminal's and takes for granted that of society. The murderer kills because reared in a broken home or, conversely, because at an early age he witnessed his parents making love. Out of such cases, which make pathetic reading in the literature of modern criminology, is born the abolitionist's state of mind: we dare not kill those we are beginning to understand so well.2/

Generally speaking, retentionists argue that, regardless of the developments of the day in the field of psychology, law and order cannot exist unless people are held individually responsible for their actions and thus subject to the control of punishment if they fail to obey the law. Those in favor of capital punishment argue that it reflects, both pragmatically and symbolically, this fundamental tenet of our society, and that its abolition could well be seen as an endorsement of the kind of liberalism described by Mr. Barzun—a view which,

1/ Barzun, in Bedau (ed.), op. cit., p. 159.
2/ Ibid., pp. 157-158.

if incorporated into our laws, would lead to social anarchy. Richard Gerstein commented on this point as follows before the American Bar Association:

> Society must also consider what effect the abolition of capital punishment could have upon the philosophy of the youth of our country. Many of them might very well look upon the criminal code, including that part of it forbidding murder, as a mere convention of society which advanced thinking and progressive social theories permit them to set aside as a matter of no consequence. This theory leads to the belief that each is a law unto himself; that each may choose the laws which he will obey, and that he may violate the rest. This type of thinking would eventually lead us into virtual anarchy.1/

More specifically, retentionists argue that the concern of abolitionists for the criminal has led them to place far too much emphasis on rehabilitation, as opposed to deterrence and protection, as the purpose of punishment. Richard Gerstein comments that, "we must not forget that reformation is an enjoyable by-product, not the sole goal of punishment."2/ The minority report of the Massachusetts Special Commission notes,

> ...it might be well here to point out that it is the opinion of the minority that the majority report lays too great stress on the welfare of the individual criminal subject to a sentence of execution. It is not our intent to deprive the criminal of every consideration which may be afforded to him by the executive powers of the state subsequent to his sentencing to execution. However, the urge that this one could be rehabilitated or that one could be given psychiatric treatment and therefore they all are salvable does not solve the problem of suppressing potential murderers. If one becomes convinced that the drastic measure of execution is the effective deterrent, then it must logically follow that the innocent lives saved thereby

1/ American Bar Association, Section on Criminal Law, op. cit., p. 18.
2/ Ibid.

> are of far greater import than the criminal life sacrificed. This method of thinking must of necessity divorce itself from any thought of the rehabilitation of the properly condemned criminal.1/

The New Jersey Commission majority report comments in a similar vein,

> The great increase of crime in this State has coincided with a greater tendency to emphasize the rehabilitation factor in criminology as against the punishment or retributive and deterrent aspects of criminology. The Commission cannot conclude that easing the lot of the murderer will cause less crime or fewer criminal homicides.2/

The supporters of capital punishment contend that this misplaced emphasis on rehabilitation as well as the general willingness to "brush aside all ideas of Responsibility" is a corollary of the fact that many abolitionists argue from theory rather than from a direct experience with the realities of crime and law enforcement. J. Edgar Hoover comments,

> As a representative of law enforcement, it is my belief that a great many of the most vociferous cries for abolition of capital punishment emanate from those areas of our society which have been insulated against the horrors man can and does perpetrate against his fellow beings.3/

Direct experience with law enforcement has led most members of this profession to support the death penalty. Sheriff Pitchess of Los Angeles County testified as follows before the California Senate Committee investigating capital punishment:

> ...When I was in law school, I remember that I prepared a paper supporting the abolition of capital punishment. I changed my mind. I went directly from law school into the F.B.I. I can't tell you whether it was within a year or two years, but it wasn't long after I had been in the active field of investigating that I changed my mind, and I have become progressively more convinced.

1/ Massachusetts Special Commission, in McClellan (ed.), op. cit., p. 78.
2/ New Jersey Commission, op. cit., p. 7.
3/ Hoover, in Bedau (ed.), op. cit., p. 130.

> I wish I could be as positive and as certain as the proponents of abolition--I wish I could be. I am as certain as I can be, after searching my own conscience, that it is a deterrent, but my change--and I am not ashamed to admit that I did change my mind--was based on my direct contact with the criminals, who convinced me that it was a deterrent to them.1/

1/ California Legislature, Senate Committee on Judiciary, op. cit., pp. 150-151.

VI. THE DEATH PENALTY AND CRIMINAL JUSTICE

With regard to the complex of arguments relating to capital punishment and criminal justice (see pp. 23-33), retentionists contend, first, that the institution of capital punishment should stand or fall on the issue of whether or not it provides maximum security for the law-abiding, and not on the fact that certain abuses exist in its use, or that it is time-consuming and expensive to adminster. Secondly, they argue that many of the abuses alleged by abolitionists either do not actually exist or are remediable through a reform of the courts. Supporters of the death penalty point out that its efficacy as a deterrent is itself undermined by the inequalities and inefficiencies in the administration of criminal justice; what is indicated here is not the need to abolish the death penalty, but the need to reform criminal procedure.

A. The Possibility of Error

A major issue in this area is the alleged danger of executing the innocent. First, there are those who argue that this is not, in fact, a real possibility, given the precautions taken by the courts in capital cases. Judge Learned Hand commented,

> Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream.1/

There have been no known cases of the execution of an innocent man in this country.2/

1/ Quoted by Florida Special Commission, op. cit., p. 29.
2/ Bedau (ed.), op. cit., p. 440; see pp. 23-24 above.

The position of those retentionists who admit that the possibility of error does exist is summed up by the Florida report as follows:

> Proponents of capital punishment who admit that the possibility of convicting an innocent man is present maintain that such a possibility is extremely remote today due to the painstaking care that the courts take and the many avenues for correcting trial error. . The task of conducting capital punishment trials is carried out with every possible precaution in favor of an accused thereby making the chance of a miscarriage of justice infinitely small.1/

Those who support the death penalty argue that, insofar as there is a risk that an innocent man will be executed, it is justified by the protection afforded to society by the death penalty. This argument is stated as follows by the minority report of the Massachusetts Special Commission:

> We do not feel, however, that the mere possibility of error, which can never be completely ruled out, can be urged as a reason why the right of the state to inflict the death penalty can be questioned in principle.... All that can be expected of [human authorities] is that they take every reasonable precaution against the danger of error. When this is done by those who are charged with the application of the law, the likelihood that errors will be made descends to an irreducible minimum. If errors are then made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angels but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty aims to provide effective remedies.2/

1/ Florida Special Commission, op. cit., p. 29.
2/ Massachusetts Special Commission, in McClellan (ed.), op. cit., p. 61.

B. The Alleged Inequality of Application

Abolitionists allege that there is a discrimination in the use of the death penalty, based primarily on race, wealth, and legal counsel. The retentionist answer to this allegation is well stated as follows by Hugo Adam Bedau, himself an abolitionist:

> One of the contentions of abolitionists in this country, popularized by the late Warden Lawes, is that "only the poor, the friendless and the foreign-born" are sentenced to death and executed. As a description of the class of persons executed, this is probably fairly accurate (though, with the virtual curtailment of immigration, the place of the foreign-born has been taken by native non-whites). But if it is meant to imply deliberate discrimination by trial courts, appellate courts and boards of pardons, it remains unproved. The vast majority of all prisoners throughout our country's history have been the poor, the friendless and the foreign-born (or non-white). It has yet to be shown that murderers or prisoners under death sentence differ significantly in these respects from other criminals.1/

On the specific issue of the high percentage of Negroes sentenced to death, it has been noted:

> Much previous research in criminal homicide, which includes murder in the first degree, has demonstrated the fact that a disproportionate contribution to the homicide rate is made by Negroes. It is no surprise, therefore, that as many as thirty-six per cent of persons placed on death row are Negro. Consistent with independent research and the Uniform Crime Reports, Negroes comprise between three and four times more of the criminal homicide cases (either as offenders or as victims) than they do of the general population.2/

1/ Bedau (ed.), op. cit., pp. 411-412. For statistics which substantiate Bedau's argument, see California Legislature, Senate Committee on Judiciary, op. cit., pp. 106-108.

2/ Marvin E. Wolfgang, Arlene Kelly, and Hans C. Nolde, "Executions and Commutations in Pennsylvania" (1962), in Bedau (ed.), op. cit., p. 473.

C. The Need for Reform

As indicated above, retentionists view the existence of abuses in the administration of the death penalty not as an argument for abolishing the death penalty, but for reforming the courts and the criminal procedure. Mr. Barzun's comment on the danger of executing the innocent is generally relevant here:

> ...what is at fault in our present system is not the sentence [of death] but the fallible procedure.... What the miscarriages point to is the need for reforming the jury system, the rules of evidence, the customs of prosecution, the machinery of appeal.1/

Retentionists contend that if the death penalty is a less effective deterrent than it might be, a major reason is the rarity of its use. A number of abolitionists concur. Thorsten Sellin comments:

> We arrive then at the conclusion that if the death penalty is to have any restraining effect there must be an adequate threat of execution, but no one has ventured to calculate how great the risk of possible execution must be in order to constitute an adequate threat.2/

Bedau develops this argument at some length:

> Since the time of Beccaria, Bentham, Rush and Livingston, most penologists have agreed that for any punishment to have optimum efficacy as a deterrent, the penalty must be imposed consistently, immediately and inexorably; that is, on all offenders, promptly after their crime, and in such a way that the general public expects exactly this. But in practice, not one of these conditions is satisfied by the way capital punishment is administered. Only a small proportion of first degree murderers are sentenced to death and even fewer are executed. The delay in convicting and executing those who do get a death sentence is increasing and notorious. So, almost anyone who contemplates some horrible crime can see some chance of getting away with it, or at least in not having to pay the supreme penalty. If, in practice, the death penalty is no more effective a deterrent for murder, rape and kidnapping than imprisonment is, this may be the reason.3/

1/ Barzun, in Bedau (ed.), op. cit., p. 163.
2/ Sellin, The Death Penalty, pp. 20-21.
3/ Bedau (ed.), op. cit., p. 270.

Those in favor of retaining the death penalty do not accept the abolitionist argument that it is impossible to effect the reforms necessary to make capital punishment a more credible threat to the man contemplating a horrible crime. The Massachusetts Special Commission minority report comments:

> I does not seem logical to say that the death penalty should be abolished because statistics prove that it is not a deterrent. It seems more consistent to urge that every effort be made to minimize the influence on the effectiveness of the death penalty of factors extrinsic to itself, and thus to realize to the maximum its intrinsic value.... If we admit that the state has, in principle, the right to inflict it, we should admit likewise a corresponding obligation on the part of the state to make it effective and we should not urge failure to do this as proof that the death penalty itself is not necessary.1/

1/ Massachusetts Special Commission, in McClellan (ed.), op. cit., p. 77.

VII. THE RELIGIOUS ARGUMENT

The defense of capital punishment on religious grounds rests primarily on two points. First, it is argued that the death penalty is a testimony to the sacredness of life, and—in the case of the Hebrew-Christian tradition—that the Bible clearly differentiates between murder and the death penalty as a just punishment for the taking of God-given life. This argument is supported by the following passages, as well as others, from the Old Testament:

> Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man (Genesis, 9:6).
>
> He that smiteth a man, so that he die, shall be surely put to death....But if a man come presumptuously upon his neighbor to slay him with guile; thou shalt take him from mine altar, that he may die (Exodus, 21: 12, 14).
>
> Whose killeth any person, the murderer shall be put to death by the mouth of witnesses.... Moreover ye shall take no satisfaction for the life of a murderer, which is guilty of death; but he shall be surely put to death ...and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it (Numbers, 35: 30, 31, 33).

Turning to the New Testament, it is argued that the law of love preached by Jesus implies the need for the existence of a strong civil law, and that it is a misreading of the New Testament to see it as advocating leniency for criminal behavior. This argument is summed up as follows by Rev. Jacob J. Vellenga who, since 1958, has served as Associate Executive of the United Presbyterian Church in the United States:

> The law of love, also called the law of liberty, was not presented to do away with the natural laws of society, but to inaugurate a new concept of law written on the

> Church is ever to strive for superior law and order, not to advocate a lower order that makes wrongdoing less culpable...wherever and whenever God's love and mercy are rejected, as in crime, natural law and order must prevail, not as extraneous to redemption but as part of the whole scope of God's dealing with man.1/

He continues:

> The law of capital punishment must stand as a silent but powerful witness to the sacredness of God-given life. Words are not enough to show that life is sacred. Active justice must be administered when the sacredness of life is violated.2/

In addition to the Old and New Testaments, St. Thomas Aquinas is also quoted in support of capital punishment: "It is lawful to kill an evil-doer insofar as it is directed to the welfare of the whole community."3/

1/ Jacob J. Vellenga, "Christianity and the Death Penalty" (1959), in Bedau (ed.), op. cit., pp. 127-128.
2/ Ibid., p. 129.
3/ St. Thomas Aquinas, Summa Theologica. New York, Benziger Bros., 1947, II, 1467.

VIII. PUBLIC OPINION

Thirty-seven states, the District of Columbia, and the Federal Government have the death penalty. Of the thirteen states which have abolished it, only eight have done so completely. Five retain it on a limited basis, for such crimes as killing a policeman acting in the line of duty and the killing of a prison guard by an inmate who is serving a life term for murder. Jacques Barzun's assertion that his views in favor of the death penalty "are now close to unpopular" has been answered by Jerome Hathanson, a leading abolitionist, as follows:

> When I read this I wondered if he and I live in the same United States. How close is close?...A few years ago a special Massachusetts commission recommended abolition of the death penalty, whereupon the legislature promptly voted against its own commission. A few years ago Delaware abolished capital punishment. Subsequently, as has happened elsewhere, an especially outrageous crime led to a demand for its restoration. The legislature responded favorably to the demand, the Governor vetoed the measure, and it was passed again over his veto. The Governor of California is a supporter of abolition, but there is hardly the ghost of a chance, after the furor over the Chessman case, that it will be realized during his administration, even if he is elected to another term in office.... One could go on and on...After working a number of years in behalf of abolition, I have the contrary impression that the preponderance of popular sentiment is on [Mr. Barzun's] side.1/

The reason for such public support--and its importance as an argument in favor of the retention of the death penalty--is commented on by Mr. Ralph G. Murdy, Managing Director of the Baltimore Criminal Justice Commission, as follows:

> Traditionally, our people have believed capital punishment necessary to control attacks on body and life. A majority today still holds that belief despite evidence of growing hesitation and question. To fly in the face of such

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1/ "Capital Punishment"

> conviction by completely doing away with the death penalty would only serve to further weaken the faith of our citizens in the administration of justice.1/

The abolitionist argument that such popular feelings are based on emotion and prejudice rather on a knowledge of the facts is answered by the retentionists as follows:

> Abolitionists say the public is not enlightened. That argument is always used to rationalize a minority point of view; but it is no more valid in this case than in any other case where two points of view exist and the question is resolved in accordance with the democratic process.2/

1/ Mundy, op. cit., p. 13.
2/ Younger, in McClellan (ed.), op. cit., p. 17.

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COVER STORY

An Eye for an Eye

Death Row (pop. 1,137) may soon lose a lot more residents to the executioner

The chair is bolted to the floor near the back of a 12-ft. by 18-ft. room. You sit on a seat of cracked rubber secured by rows of copper tacks. Your ankles are strapped into half-moon-shaped foot cuffs lined with canvas. A 2-in.-wide greasy leather belt with 28 buckle holes and worn grooves where it has been pulled very tight many times is secured around your waist just above the hips. A cool metal cone encircles your head. You are now only moments away from death.

But you still have a few seconds left. Time becomes stretched to the outermost limits. To your right you see the mahogany floor divider that separates four brown church-type pews from the rest of the room. They look odd in this beige Zen-like chamber. There is another door at the back through which the witnesses arrive and sit in the pews. You stare up at two groups of fluorescent lights on the ceiling. They are on. The paint on the ceiling is peeling.

You fit in neat and snug. Behind the chair's back leg on your right is a cable wrapped in gray tape. It will sluice the electrical current to three other wires: two going to each of your feet, and the third to the cone on top of your head. The room is very quiet. During your brief walk here, you looked over your shoulder and saw early morning light creeping over the Berkshire Hills. Then into this silent tomb.

The air vent above your head in the ceiling begins to hum. This means the executioner has turned on the fan to suck up the smell of burning flesh. There is little time left. On your right you can see the waist-high, one-way mirror in the wall. Behind the mirror is the executioner, standing before a gray marble control panel with gauges, switches and a foot-long lever of wood and metal at hip level.

The executioner will pull this lever four times. Each time 2,000 volts will course through your body, making your eyeballs first bulge, then burst, and then broiling your brains . . .

That big old mahogany armchair is practically antique, but it still works. First used in 1890, it is the world's oldest and most prodigious electric chair: 695 convicted men and women died in its grip, nearly one a month for the better part of a century. For most of those years it was housed at Sing Sing, contributing to that place's hellhole notoriety. Now it squats on the fourth floor of Green Haven prison in New York.

But the state has killed no one since the summer of 1963, when Eddie Lee Mays was electrocuted at Sing Sing. And for some time to come, this prototypical electric chair with the flip nickname ("Old Sparky") seems likely to remain nothing more than a grim curiosity. The state's new Governor, Mario Cuomo, promises to veto any capital-punishment statute the New York legislature passes, just as his predecessor did every chance he got.

But New York is not typical of these angry times. The country's decade-long moratorium on capital punishment ended in 1977 when Gary Gilmore dared Utah to shoot him and, six years ago this week, Utah obliged. Five men have been executed since. One shared Gilmore's flashy passion for martyrdom: Jesse Bishop, who gunned down a newlywed during a casino holdup, practically volunteered for Nevada's gas chamber. Three were electrocuted: John Spenkelink in Florida, for killing a ne'er-do-well like himself; Steven Judy in Indiana, for strangling a motorist he waylaid and drowning her three children, ages two to five; and Frank Coppola in Virginia, for bludgeoning to death his robbery victim. Last month in Texas, Charlie Brooks Jr., the only black among the six, achieved a milestone when he became the first American ever executed by means of a drug overdose.

Other states seem anxious to get in step. Two weeks after Brooks was executed, Massachusetts became the 38th state with a death penalty on the books, and Oregon seems likely to become the 39th, 20 years after capital punishment was abolished there by popular vote.*

The national death-row population today is 1,137. That is 200 more than a year ago, twice as many as in 1979, and larger, moreover, than ever before. Florida alone has 189 death-row prisoners, Texas has 153, Georgia and California 118 each. The inmates include about a dozen teen-agers, 13 women (five of them in Georgia) and six soldiers. Half of the condemned are white.

The long-building public sentiment to get tough with violent criminals, to kill the killers, seems on the verge of putting the nation's 15 electric chairs, nine gas chambers, several gallows and *ad hoc* firing squads back to regular work. In addition, five states have a new and peculiarly American technique for killing, lethal anesthesia injections, which could increase public acceptance of executions. Experts on capital punishment, both pro and con, agree that as many as ten to 15 inmates could be put to death this year, a total not reached since the early 1960s. "People on death rows are simply running out of appeals," says the Rev. Joe Ingle, a prison activist and death-penalty opponent. "I fear we are heading toward a slaughter."

For years, the capital-punishment debate has been sporadic and mainly intramural—professor *vs.* professor, lawyer *vs.* lawyer—as executions took place only once or twice annually at most. Says Florida's Governor Robert Graham, who signed Spenkelink's death warrant in 1979: "We haven't enforced the death penalty much, so we've been able to avoid all the responsibilities that go with that experience."

But now an old array of tough questions—practical, legal, moral, even metaphysical—is being examined. Is the death penalty an effective, much less a necessary, deterrent to murder? Is it fair? That is, does it fall equally on the wealthy white surgeon represented by Edward Bennett Williams and the indigent black with court-appointed (and possibly perfunctory) counsel? Most fundamental, is it civilized to take a life in the name of justice?

Fear, pure and simple, is behind the new advocacy of the death penalty. Between 1960 and 1973, the U.S. homicide rate doubled, from 4.7 murders per 100,000 people to 9.4. The rate has leveled off considerably and stands at 9.8 per 100,000 today. (Other countries' rates are, by U.S. standards, amazingly low: England, 1.1, and Japan, 1.0, are typical.) No more precipitous increases are expected this century: criminologists believe that the murder spree of the '60s and early '70s was mostly the doing of World War II baby-boom children passing through their crime-prone years of adolescence and young adulthood. As it happened, the number of young people and cheap, readily available handguns burgeoned at the same time. Handguns are used in 50% of U.S. murders.

But a U.S. public that has felt terrorized by murderers and thugs is unreceptive to promises that the worst may be over and understandably finds the current level of violent crime intolerable. According to a Gallup poll last fall, 72% of Americans now favor capital punishment, up from just 42% in 1966. "People are frightened and upset about crime in the streets," says William Bailey, a Cleveland State University sociologist. "Nothing seems to be done to solve the problem, so the feeling grows that if we

*Other states now without a death penalty: Alaska, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, North Dakota, Rhode Island, West Virginia and Wisconsin.

"I Didn't Like Nobody"



On the night of June 3, 1973 a Chevrolet Caprice, driven by a woman, was forced off Interstate 57 in southern Cook County, Ill., by a car carrying four men. One of them pointed a 12-gauge pump shotgun at her, ordered her to strip and then to climb through a barbed-wire fence at the side of the road. As she begged for her life, her assailant thrust the shotgun barrel into her vagina and fired. After watching her agonies for several minutes, he finished her off with a blast to the throat. Less than an hour later, the marauding motorists stopped another car and told the man and woman inside it to get out and lie down on the shoulder of the road. The couple pleaded for mercy, saying that they were engaged to be married in six months. The man with the shotgun said, "Kiss your last kiss," then shot both of them in the back, killing them. The total take from three murders and two robberies: $54, two watches, an engagement ring and a wedding band.

The man ultimately convicted of the "I-57 murders" now sits confined in the Menard Condemned Unit, the official name for death row in the Illinois prison system. Yet Henry Brisbon Jr., 28, does not face execution for those three killings nearly ten years ago. Illinois' death penalty was invalidated in 1972 and was not restored until 1977, the year that Brisbon was finally brought to trial. At that time, the judge sentenced him to a term of 1,000 to 3,000 years in prison. It took Brisbon less than one year to kill again, this time stabbing a fellow inmate at Stateville Correctional Center with the sharpened handle of a soup ladle. At the trial for this murder, Will County State's Attorney Edward Petka described Brisbon as "a very, very terrible human being, a walking testimonial for the death penalty." The jury agreed.

Brisbon's eleven months on death row have been quiet, compared with his Stateville years, when he took part in 15 attacks on inmates and guards, instigated at least one prison riot, trashed a courtroom during a trial and hit a warden with a broom handle. "I'm no bad dude," he says, "just an antisocial individual." The third of 13 children, Brisbon thinks that his upbringing by a strict black Muslim father made him different: "I was taught to be a racist and not like whites. As I grew up, I decided I didn't like nobody."

Brisbon has 90 well-supervised minutes each day outside his small (7 ft. 7 in. by 5 ft. 10 in.) cell. He works out with weights, keeping his 155 lbs. (on a 5-ft. 9-in. frame) in shape. He complains about his confinement: "Can't take two steps in this cage. It's inhuman. And that dull-ass color blue on the walls in no way brightens my life." He has devised a novel idea about judicial reform: "All this talk about victims' rights and restitution gets me. What about my family? I'm a victim of a crooked criminal system. Isn't my family entitled to something?" The shadow of the death penalty does not faze him: "I don't see that happening to me. What would killing me solve? Isn't that just another murder? If I get to die, it's going to be of natural causes." The state of Illinois thinks otherwise. Says Michael Ficaro, who prosecuted the I-57 case: "On the day he dies in the chair at Stateville, I plan to be there to see that it's done. Nobody I've heard of deserves the death penalty more than Henry Brisbon."

can't cure murderers, something we *can* do is kill them." Jim Jablonski, 44, a Chicago steelworker, speaks for a lot of furious citizens. "Murderers got to pay," he says. For him the next sentence follows self-evidently: "I say, fry the bastards."

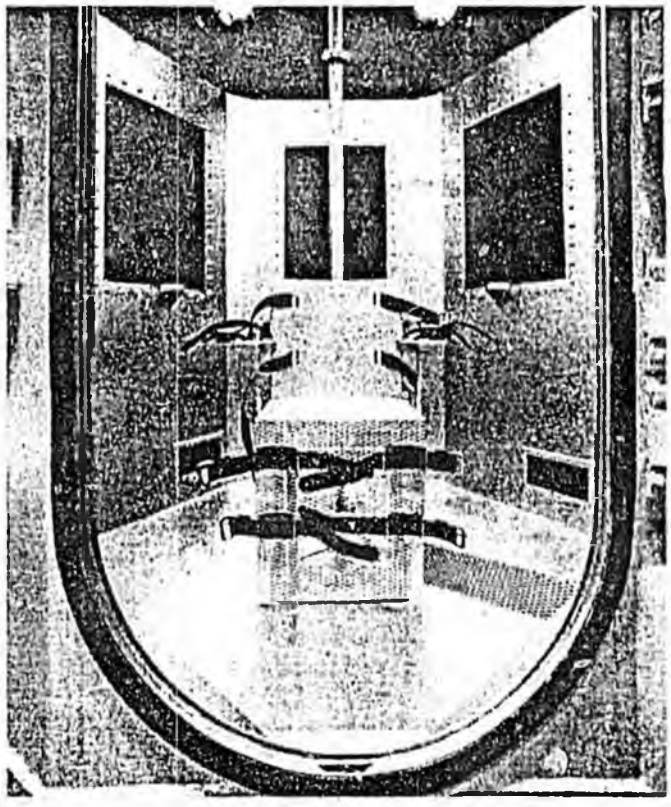
Execution by injection may be too new to have its tough-guy slang like "fry." But last month outside the prison at Huntsville, Texas, the sentiment was the same. As Charlie Brooks waited to be injected, a crowd of 300 gathered to celebrate. Some of the pro-execution revelers, mostly college students, carried placards; KILL 'EM IN VEIN, said one. "Most of the people I know are for capital punishment," declared Paula Huffman, 21, a Sam Houston State University senior at the deathwatch. "And so am I. Definitely." Nevertheless, when the moment arrived, just after midnight, she and the rest of her shivering, smiling chums suddenly turned quiet and grave.

Historically, American executions were public, the last in Kentucky in 1936. Hanging was standard for 200 years, through the 1800s. More primitive means—burnings in particular—were extreme rarities even in the 17th century. Up until 1900, nearly all executions were carried out by local jurisdictions; lynchings were as frequent as legal hangings. But by the start of the Depression, state authorities had mostly taken over the grim chore.

At that time, the U.S. was hardly less murderous than it is today. In 1933 there were 9.7 homicides per 100,000 Americans, which is just shy of the 1981 figure. The murder rate began a steady decline in 1934, but judges and juries meted out death sentences at a ferocious clip for the rest of the '30s. As many as 200 people a year were legally executed, more than ever before or since in the U.S. During the '30s, and even through the '50s, executions were so routine that they merited at most a paragraph or two in out-of-town newspapers.

Not just murderers were put to death. Rapists were executed every year in the U.S. until 1963.* After 1930, there were 455 men executed for rape, most of them in the South and 89% of them black, a majority grotesquely out of proportion to black sexual offenses. Black murderers too were executed much more frequently than white killers, a pattern that prevailed through the 1960s.

*There is still one man condemned to die for a crime other than murder: Lusious Andrews, 31, sentenced in Florida in 1981 for the "sexual battery of a child."



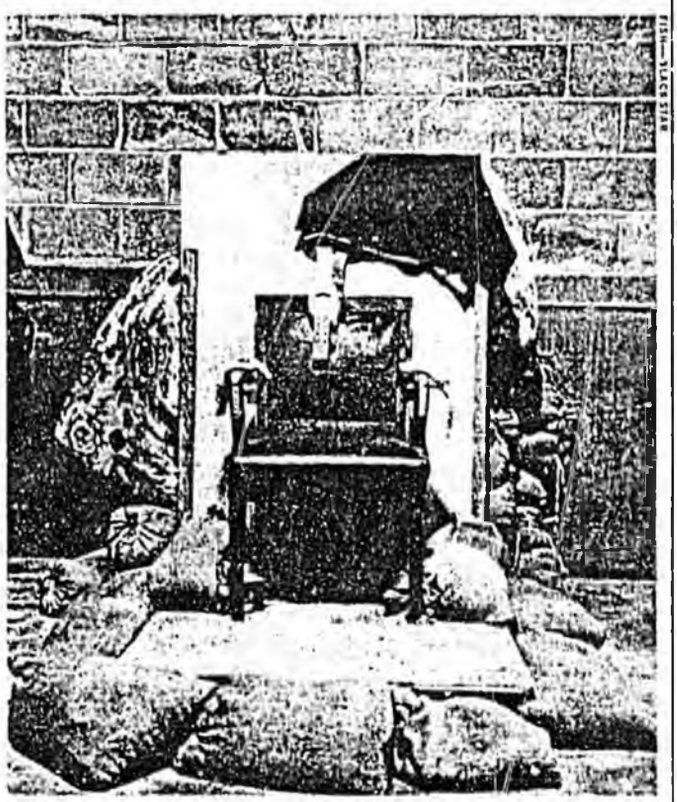
Maryland's gas chamber: 14 people wait

After World War II, executions became less popular. The reduction was steady: 82 by 1950, 49 in 1959 and finally just two in 1967, one of whom was Aaron Mitchell, a California murderer denied clemency by then Governor Ronald Reagan. The nation's chairs, gallows and gas chambers were temporarily retired partly because judicial standards became more scrupulous—often after legal battles waged by the NAACP Legal Defense Fund (L.D.F.) and the American Civil Liberties Union—and, more ineffably, as an extension of two centuries of penal reform *(see box)*. But most important, during the decade and a half after the war, the U.S. homicide rate stayed fairly constant and unalarming, never rising above 6.4 per 100,000 (in 1946). Year after year, there were roughly 8,000 killings (a third of the 1981 total), seemingly as predictable and steady as deaths from accidental drownings (5,000 a year) or falls (19,000). Americans felt unthreatened. They could afford the emotional luxury of indulging their instincts for reason. During 1964 and 1965, three states (Oregon, Iowa and West Virginia) abolished capital punishment, and Vermont narrowed its applicability mainly to those who murdered policemen or prison guards.

But in most places the retreat from capital punishment was not a formal, statutory change. At any one time no more than a third of the states have been without a death-penalty provision. It seems that Americans want it both ways, retaining the right to exterminate miscreants, as well as having the option not to exercise that awful power. It is easy and sometimes appealing to talk tough and demand mercilessness in the abstract. But to *really* "fry the bastards"? How many? Which ones? "What a person says on a public opinion poll," observes Thomas Reppetto, president of the Citizens Crime Commission of New York City, "and what they'll say on a jury, might well be two different things."

The ambivalence seemed apparent in last November's elections, when capital punishment was a potent political issue but not a decisive one. Like New York, Massachusetts this month inaugurated a Governor opposed to the death penalty. But just three weeks earlier, the legislature in Boston had once again legalized executions. Even increasingly hard-line voters in California chose an attorney general who disapproves of capital punishment.

The uneasiness with capital punishment has led this nation



Utah's rifle range: the chair in which Gary Gilmore died in 1977

"I Don't Think I'm Guilty"



Texas law-enforcement officials and Claude Wilkerson, 28, agree on one point: when the murder for which he was later tried, convicted and sentenced to death took place, Wilkerson was locked up in Houston's Harris County jail. Beyond that incontrovertible fact stretches a tangle of contradictions. Two of Wilkerson's confederates have been tried for the same murder and now face execution. A fourth man, who admitted being present at the scene of the crime, is serving a life sentence, a leniency granted for his cooperation with investigators. Says Wilkerson from his cell on Texas' death row in Huntsville: "I don't think I'm guilty of capital murder, and I don't think the court proved I was."

Wilkerson's road to extraordinary trouble began with an ordinary childhood. The son of a pipefitter, he moved with no particular distinction through his education. He recalls, with irony: "In a high school science class we took a straw poll on the subject of capital punishment. I voted in favor of it." Wilkerson dropped out of Mesa College in Colorado after one year, married, divorced and knocked about in a couple of ill-fated business schemes. He then went to work for Houston Businessman Don Fantich, who local police suspected was an operator in the penumbra of the underworld.

On Jan. 23, 1978, Fantich disappeared, along with a woman who ran a jewelry store, which Fantich owned, and an apparently innocent bystander, Dr. William Fitzpatrick. Police picked up Wilkerson for questioning. While he was in custody, all three missing persons were shot and buried about 100 miles west of Houston. From testimony pieced together from a variety of sources, police found the bodies and deduced that the victims were part of an extortion and kidnaping scheme that Wilkerson had masterminded. While Wilkerson owned up to the plot, he denied any involvement in the murders. Prosecutor Don Stricklin scoffs at this: "He could have told us earlier and saved those people's lives."

Wilkerson's first trial ended in a hung jury, but the second resulted in his conviction. [For reasons of strategy, prosecutors limited charges to the murder of the doctor.] Says Sherman Ross, now a judge, who represented Wilkerson both times: "The district attorney's office good-old-boyed him into a death penalty." For his part, Wilkerson tries to make the best of life on death row: "It takes a great deal of personal effort to not become hard within yourself and hate the free world."

A pudgy soft-spoken man, he has used his abundant time to polish his skill in drawing. Late last year a friend in New York City asked Wilkerson to send samples to be sold at a party. The prisoner netted $200 and has since sold some other artwork. He uses a typewriter in his cell for a widespread correspondence with, among others, some leaders in the American Indian movement. A grandmother of his was a Catawba Indian, and Wilkerson has grown intensely interested in this heritage and its culture. He has taken an Indian name, Ches-ne-o-na-eh, which translates as "the man who kills the wolves." Wilkerson suggests another meaning that this name could convey: "a beautiful being in a scarred world."

"I Want to Die"



"I've put life in one hand and death in the other and weighed the two. To me, death is my only route to freedom." Doris Ann Foster speaks from a small cell at the end of a third-floor hallway at the Maryland Correctional Institution for Women in Jessup, a small town midway between Baltimore and Washington. A heavy door marked "Maximum Security" isolates her not just from the outside world but from other prisoners as well. She is on death row and could become the first woman ever to be executed by the state of Maryland.

Foster says she is ready: "I have thought it out very carefully. I know what I am doing." She has sent a letter to the Maryland Court of Appeals and the U.S. Supreme Court requesting them to pay no attention to the efforts of her public defender lawyers, who have been trying to get her sentence reduced to life, with parole then a possibility after 12½ years. She does not know whether the courts will heed her request, but she dreads the prospect of a long, drawn-out appeal: "If the court says you're guilty and you're going to die, why spend all this money to fight it? Let them carry it out. They will be satisfied, and I will have peace."

Foster previously served four years in other states for robbery and passing bad checks, so she knows about prison. Continuing on death row strikes her as intolerable: "This is ruining my body and eventually would ruin my mind. I could see what I'd be like after ten years here. I don't want to be hostile. I don't want to lose my peace. I have no desire to continue on in such an inhumane existence."

Her acceptance of punishment does not exactly constitute an admission of guilt. Although she was convicted last year of stabbing a 71-year-old woman motel keeper to death with a screwdriver during a holdup, Foster now says, "I couldn't have done it. And if I did, I would not do it with a screwdriver, not to some old lady." This declaration sounds less than ringing. Moreover, it was testimony from her husband Tommy, who had checked into the motel with her, that helped convict Doris Ann. Yet she seems to bear him no grudge. He is in a different Maryland prison, where he is serving a lighter sentence for theft and obstruction of justice, and she corresponds with him regularly. She has 35 other pen pals, including some Indians on death rows elsewhere.

A thin, wide-eyed woman with long, lustrous dark hair, Foster claims to be three-quarters Cherokee (she also says she is 27; Maryland lists her as 38). The walls of her cell are decorated with bold, dark drawings of Indian faces. Books on Indian lore are piled together with other texts on Buddhism, martial arts and the occult. She is allowed half an hour out of her cell each morning for a shower and an hour of exercise later in the day, but she has felt increasingly estranged from other inmates and no longer takes a recreation period. She receives no visitors because she says her surroundings would depress relatives and friends.

She is aware of the notoriety gained by other prisoners who have asked to die, and wants no part of it: "I'm not a Gary Gilmore. I don't want anyone to write a book about me. I want to die or be free. I have a dream to go West with my people. If I got out, that's what I would do." She does not expect that to happen. Instead, she hopes to arrange for the presence of an Indian medicine man at her execution.

of tinkerers to an odd inventiveness. Elsewhere in the world where executions are still regularly carried out—among industrialized nations, only Japan, South Africa and the Soviet Union—the bullet and the noose are used exclusively. Yet in the U.S., only half a dozen states call for old-fashioned firing squads or hangings. The electric chair killed quickly and, it was thought, painlessly. It seemed, in any case, up to date, civilized. (This progressive image is somewhat at odds with the testimony of Willie Francis, 17, who survived a sublethal shock by Louisiana's portable apparatus in 1946. Francis said the experience was in all "plumb miserable." His mouth tasted "like cold peanut butter," and he saw "little blue and pink and green speckles." Added Francis: "I felt a burning in my head and my left leg, and I jumped against the straps." A year later, back in the chair, he was successfully executed.)

The electric chair caught on slowly in the U.S. and not at all abroad. During the 1920s and '30s, the cyanide-gas chamber became state-of-the-American-art. It too was popular only in the U.S. Now there are lethal injections, which are seen as still more "humane." This latest technical refinement, which the European press finds chilling and fascinating, seems sure to remain strictly a U.S. practice. Sums up Notre Dame Theology Professor Stanley Hauerwas: "This search for a humane way of killing is a bunch of sentimental secular humanism. Why do you want it to be humane? To reassure yourself?"

The dilemma of whether to kill the killers comes up in only a small fraction of all U.S. homicides. The criteria for capital murder vary from state to state and even, inevitably, from case to case. In general, there must be "aggravating circumstances." These can be as specific as the murder of a fireman or one by an inmate serving a life sentence; as common as a homicide committed along with a lesser felony, like burglary; and as vague as Florida's law citing "especially heinous, atrocious or cruel" killings. It is estimated that about 10% of U.S. homicides currently qualify, or some 2,000 murders last year. Those killings are the ones the threat of capital punishment is meant to prevent.

The idea of deterrence can be quickly reduced to very personal rudiments: *If I know I will be punished so severely, I will not commit the crime.* The logic is undeniable. Yet in the thickets of real life and real crime, deterrence, while central to practically all punishment, is often very uncertain, and its effect on prospective murderers is especially unclear. Unfortunately, public discussion usually consists of flat-out pronouncements. Capital punishment, says Conservative Commentator William F. Buckley, "is a strong, plausible deterrent." No, declares New York Governor Cuomo, "there has never been any evidence that the death penalty deters." Neither is altogether wrong, but the stick-figure oversimplifications on both sides do a disservice to a complicated question.

The scholarly evidence is not quite as unequivocal as some abolitionists claim. But it does not make much of a case for deterrence. The most persuasive research compared the homicide rates of states that did and did not prescribe the death penalty. For instance, Michigan, which abolished capital punishment in 1847, was found to have had a homicide rate identical to adjacent states, Ohio and Indiana, that were executing. Similarly, Minnesota and Rhode Island, states with no death penalty, had proportionately as many killings as their respective neighbors, Iowa and Massachusetts, which had capital punishment. In 1939 South Dakota adopted and used the death penalty, and its homicide rate fell 20% over the next decade; North Dakota got along without capital punishment for the same ten years, and homicides dropped 40%.

Similar before-and-after studies in Canada, England and other countries likewise found nothing to suggest that capital punishment had deterred murderers any better than the prospect of long prison terms. Used in Britain during the 1950s, a typical "lifer" actually served only about seven years, compared with a much tougher average U.S. "life" term today of 20 years. A comprehensive study in the U.S., by the National Academy of Sciences in 1978, also found that the death penalty had not proved its worth as a deterrent.

Were it not for the work of Economist Isaac Ehrlich, the deterrence debate would be entirely one-sided. Using econometric

modeling techniques to build a "supply-and-demand" theory of murder, Ehrlich argued in a 1975 paper that capital punishment prevents more murders than do prison sentences. Because of the 3,411 executions carried out from 1933 to 1967, Ehrlich speculates, enough potential murderers were discouraged so that some 27,000 victims' lives were saved.

That stunning conclusion drew immediate attacks. Critics, and they are legion, cite a variety of defects: Ehrlich did not compare the effectiveness of the death penalty with that of particular prison terms; his formula does not work if the years between 1965 and 1969 are omitted; and in accounting for the increase in homicides during the '60s, he neglects the possible influences of racial unrest, the Viet Nam War, a loosening of moral standards and increased handgun ownership.

To work at all, deterrence requires murderers to reckon at least roughly the probable costs of their actions. But if a killer is drunk or high on drugs, that kind of rational assessment might be impossible. Passions are often at play that make a cost-benefit analysis unlikely. Most killers are probably not lucid thinkers at their best. Henry Brisbon Jr. *(see box)* may be legally sane, but he is by ordinary standards demented enough to make a mess of any theory of deterrence. Says New York University Law Professor Anthony Amsterdam: "People who ask themselves those questions—'Am I scared of the death penalty? Would I not be deterred?'—and think rationally, do not commit murder for many, many reasons other than the death penalty."

Former Prosecutor Bernard Carey, until 1980 state's attorney for Cook County, favors capital punishment, sparingly used. Yet he says, "I don't think it's much of a deterrent because the kinds of people who commit these crimes aren't going to be deterred by the electric chair." Some might be encouraged. "For every person for whom the death penalty is a deterrent," says Stanford Psychiatry Professor Donald Lunde, "there's at least one for whom it is an incentive." Such murderers, says Amsterdam, "are attracted by the Jimmy Cagney image of 'live fast, die young and have a beautiful corpse.' "

The arguments for capital punishment are usually visceral or anecdotal. Ernest van den Haag, professor of jurisprudence and public policy at Fordham University, says flatly, "Nobody fears prison as much as death." Florida's Governor Graham, who has signed 45 death warrants, cites the case of a restaurant robbery seen by a customer. "Afterward," recounts Graham, "he was the only witness. So the two guys took him out to the Everglades and shot him in the back of the head. If they had felt that being convicted for robbery and first-degree murder was sufficiently different, they might have had second thoughts."

In a sense, death's deterrent power has never really been given a chance in the U.S. Even during the comparative execution frenzy of the 1930s, hardly one in 50 murderers was put to death, a scant 2%. Reppetto estimates that if 25% of convicted killers were executed, 100 a week or more, there might be a deterring effect. But it is unthinkable, he agrees, that the U.S. will begin dispatching its villains on such a wholesale basis. Even at a rate of 100 executions annually, an implausibly high figure given today's judicial guarantees, a killer's chances of getting caught, convicted and executed would for him still be comfortably low: 250 to 1.

Even if executions were on television, there is no guarantee that prospective ax murderers would pay heed. As Camus noted in his 1957 essay against capital punishment: "When pickpockets were punished by hanging in England, other thieves exercised their talents in the crowds surrounding the scaffold where their fellow was being hanged."

But U.S. society is not unprotected just because it lacks weekly or daily executions. "The issue is not whether we slay murderers or free them," notes University of Michigan Law Professor Richard Lempert. "It is whether we send them to their death or to prison for life." Prison is a far more manageable weapon than death, and the U.S. is not at all hesitant to put criminals behind bars: the population there has doubled since 1970, to 400,000. "One trouble with the death penalty," says Henry Schwarzschild, an A.C.L.U. official, "is that it makes 25 years seem like a light sentence."

Opponents of capital punishment feel that prison terms

"I Can't Stop Crying"



At Dunbar High School in Fort Myers, Fla., he was a triple threat: in football, an all-state wide receiver; in basketball, an all-conference playmaking guard; in track and field, a state champion in the 440-yd. run. An honors student, he went on to Edison Community College in Fort Myers but dropped out after 1½ years to enlist in the Army. He was given a medical discharge after 17 months because of attacks of grand mal epilepsy. He married, fathered a son and went back to college, this time in California. His marriage soured, and he returned to Fort Myers, where he sank into alcoholism and despair. Sometime between Oct. 13 and 15, 1973, a woman named Margaret Mears, 68, was raped and beaten to death.

Doug McCray, now 32, had been on a drinking binge and could not account for his whereabouts at the time of the crime when police arrested him for murder six weeks later. The F had matched his palm print with one found in Mears' apartment. Nearly ten years later, McCray says he still does not know whether he is guilty. He has passed two polygraph tests, which prosecutors would not permit in evidence at his trial. An eyewitness who placed McCray in the woman's neighborhood at the time of the slaying later recanted, saying police had coached and coerced him. The physical evidences of rape could not be linked to McCray.

Nevertheless, he now awaits his fate on death row in Florida State Prison at Raiford. McCray looks back in anger: "I feel victimized by the Florida Supreme Court, which waited 5½ years to rule on my case, which granted me a new trial and then abruptly took it away. [A 4-3 decision last March in McCray's favor was reversed six months later when one justice changed his vote without explanation.] I feel victimized by my clemency lawyer, who never even bothered to read the transcript of my trial. I feel victimized by a lawyer who took my mother's few dollars and never came to see me for almost eight years."

Outside observers, including New York *Times* Columnist Anthony Lewis, have rallied to McCray's defense. When a St. Petersburg attorney phoned him and volunteered to help, McCray remembers, "I started to cry. I can't stop crying in this place. It meant so much to me, after all the other things that happened, that this man cared."

McCray lives in a 6-ft. by 9-ft. cell. He and the other 194 inmates on Florida's death row each have a small black-and-white TV. He uses the light from the set to read constantly. "I've read thousands of books. Prison can be as rewarding as college if you actually have a desire to improve your mind." Yet his thoughts always wheel back to the central mystery that has brought him to this place. "The state says it's convenient for me to say I don't remember. But if it were convenient, I could have plea-bargained or made up some alibi. My girlfriend and one of my brothers say I was with them all that night. I wish I knew, even if it meant knowing that I'd done it. Who would want to live after committing such a terrible crime?" Since last fall, McCray has grown progressively more despondent. He now says he will not seek another stay of execution. "I'm tired. I hurt. I just wish to lie in peace. I will allow the state to do what it may.

"I am tired."

without parole would deter as many potential murderers as the death penalty. Says Amsterdam: "The *degree* of punishment is not necessarily a deterrent even to someone who thinks rationally. What deters people from crime is the *likelihood* of getting caught and undergoing punishment." Reppetto agrees: "I always favor something that will get tough with a lot of offenders instead of getting very tough with just a handful."

Two diehard proponents of the death penalty, deterrence hardly matters anyway. Declares Buckley: "If it could be absolutely determined that there was no deterrent factor, I'd still be in favor of capital punishment." Taking the lives of murderers has a zero-sum symmetry that is simple and satisfying enough to feel like human instinct: the worst possible crime deserves no less than the worst possible punishment. "An eye for an eye," says Illinois Farmer Jim Hensley. "That's what it has to be. People can't be allowed to get away with killing." Counters Amsterdam: "The answer can hardly be found in a literal application of the eye-for-an-eye formula. We do not burn down arsonists' houses." The scriptures do preach mercy as well as retribution. Last Saturday, in fact, Pope John Paul II sweetly recommended "clemency, or pardon, for those condemned to death."

The Moral Majority's Rev. Jerry Falwell relies more peculiarly on Christian authority. He claims that Jesus Christ favored the death penalty. On the Cross, Falwell says, He could have spoken up: "If ever there was a platform for our Lord to condemn capital punishment, that was it. He did not."

But was Jesus ever vengeful? Ordinary people are. "Execution is primarily a vengeance mechanism," says Notre Dame's Hauerwas, a pacifist, "but that is not necessarily a bad thing. Vengeance is a way society gestures to itself that justice has forced against injustice." A main point of criminal laws, after all, is to make private feuds unnecessary. "No society should put the burden on me to seek personal retribution," says New York University's Herbert L. London, a social historian. "The state has an obligation not to make me a killer."

During troubled times in the ancient Greek colonies, prominent men would volunteer to be scapegoats. Each was housed and well fed by the authorities, and then, after a year of comfortable

Revenge Is the Mother of Invention

Socrates was lucky. Found guilty of heresy and "corruption of the young," he was condemned to drink a cup of hemlock, a relatively honorable and painless death. By the standards of history, his execution in 399 B.C. was singularly humane.

Not until the Enlightenment, 200 years ago, did societies seriously question the states' right to kill. Until then, the only dilemma had been to find the most ingenious and cruel methods of execution. Boiling, burning, choking, beheading, dismembering, impaling, crucifying, stoning, strangling, burying alive—all were in vogue at various times. The Crucifixion of Jesus Christ was, for its day, only a routine execution.

In ancient China, an occasional penalty was "death by the thousand cuts," the slow slicing away of bits of the body. A 19th century French traveler described an excruciating method in India during the rule of the rajahs: "The culprit, bound hand and foot, is fastened by a long cord, passed round his waist, to the elephant's hind leg. The latter is urged into a rapid trot through the streets of the city, and every step gives the cord a violent jerk, which makes the body of the condemned wretch bound on the pavement . . . Then his head is placed upon a stone, and the elephant executioner crushes it beneath his enormous foot."

What kinds of crime incurred such punishments? Murder and treason have almost always ensured death. Under the Mosaic law, capital offenses ranged from gathering sticks on the Sabbath and adultery to the sacrifice of children to the god Molech. A medieval German code decreed: "Should a coiner [counterfeiter] be caught in the act, then let him be stewed in the pan or a cauldron."



Execution by elephant in 19th century India

England's response to the bewildering social evils caused by the Industrial Revolution was unique even in a world long used to such officially sanctioned slaughter as the Spanish Inquisition, when tens of thousands of convicted heretics were burned. The English meted out the death penalty for more than 200 offenses, including stealing turnips, associating with gypsies, cutting down a tree or picking pockets. "Hanging days" were public holidays, and in 1807 a crowd of 40,000 became so frenzied at an execution that nearly a hundred were trampled to death. Frequently both victims and executioner were drunk, and occasionally the job was botched, with the condemned man being hanged two or even three times. Afterward, the crowds surged toward the corpse, because it and the scaffold were believed to have curative powers.

Death sentences were often arbitrarily applied. The social standing, sex, citizenship or religion of the victims usually determined the degree of horror they would suffer. Death alone was rarely considered a sufficient penalty unless it was preceded by terror, torture and humiliation, preferably in public. One of history's most spectacular executions was that of Damiens, the unsuccessful assassin of Louis XV, in Paris in 1757. His flesh was torn with red-hot pincers, his right hand was burned with sulfur, his wounds were drenched with molten lead, his body was drawn and quartered by four horses, his parts were set afire and his ashes scattered to the winds. The execution was accomplished before a large crowd.

"The more public the punishments are, the greater the effect they will produce upon the reformation of others," declared Seneca in ancient Rome. Over the centuries, many societies came to believe otherwise. The rituals of execution, rooted perhaps in a primitive need for sacrifice, catharsis and revenge, seemed less to cast out the evils of humanity than to feed its blood lust. By the late 18th century, a reform movement had taken hold in Europe, aided by the invention of such "humane" devices as the hanging machine and the guillotine.

Today the death penalty has been abolished in Canada, at least officially in much of Latin America, and in most of Western Europe. In Eastern Europe only Albania has abandoned capital punishment, and it remains in force throughout Asia and the Islamic world. Last year, the world leader in announced executions was Iran, with more than 600.

and black killer, but only 13% when a white had killed a black.

A serious problem is the quality of legal help for murder defendants. The Texas study, conducted by the Governor's judicial council, found that three-quarters of murderers with court-appointed lawyers were sentenced to death, against about a third of those represented by private attorneys. Amsterdam, who has argued eight capital cases before the Supreme Court, contends that "great lawyering at the right time would save virtually everybody who is going to be executed." Scharlette Holdman, director of Florida's Clearinghouse on Criminal Justice, persuades volunteer lawyers to represent death-row inmates. "Every person sentenced to die comes from a case fraught with errors," she says. "If you're adequately represented you don't get death. It's that simple."

Aside from public defenders, there are only about a dozen attorneys working full time on behalf of the condemned. Court-appointed lawyers in most states are not required to stay on a murderer's case after a conviction. "Drunk lawyers, lazy lawyers, incompetent lawyers, no lawyers," says Holdman. "You can have all the correct issues for appeal, but if you don't have a good lawyer to raise them, they don't mean a damn thing." Of 2,000 death sentences imposed during the post-*Furman* decade, about half have been reversed or vacated by the courts.

The careful legal course demanded by the Supreme Court is expensive. Last year the New York State Defenders Association estimated the trial costs for a typical capital-punishment case: a defense bill of $176,000, about $845,000 for the prosecution and court costs of $300,000. The total: $1.5 million, and this before any appeal is filed. Getting a writ before the Supreme Court, just one appellate step, might cost $170,000.

It is often argued, with blithe inhumanity, that there are good fiscal reasons for executing murderers: prison is too costly. It is cheaper to send a student to Stanford for a year than it is to keep a con in nearby San Quentin ($10,000 *vs.* $20,000). But imprisoning one inmate for 50 years would require less than $1 million in New York, not bad compared with the costs of the painstaking appeal process.

Everyone seems afraid of imposing bona fide life sentences, however, and for reasons unconnected with expense. Seventeen states have laws providing for life without parole for those convicted of murdering a robbery victim. Abolitionists say such a sentence is excessive. Statistics show that fewer than 1% of freed murderers kill again after their release from prison, in part because of their advanced age. But if capital punishment is abandoned, it may make sense, politically and emotionally, to permit the public some vengeful satisfaction. Life without parole is unimaginably harsh. But it would be a way occasionally to formalize the revulsion at Charles Manson and his ilk. As it is, Manson will be eligible for parole in 1985.

On death rows, the emotional tone is stuck in some weird, high-strung limbo between hope and hopelessness. Inmates' optimism is the manic wishfulness of losing gamblers. Their fatalism is generally not wise but numb, a brute shrug.

In Illinois, death row is up on a bluff in a sandstone prison opened in 1878. The 49 current inmates have a 19th century landscape artist's view—the Mississippi River and miles of rich farmland beyond—except for the bars and razor wire. Menard Correctional Center (pop. 2,600) is the principal industry of Chester, Ill. (pop. 8,000). The inmates, two of whom are scheduled to be electrocuted this spring, are alone in their cells for at least 21 hours a day. When they are in transit, once a day to the law library and once a day to the recreation room, they are handcuffed. Four of them are "honor residents," permitted to roam unchained in the gray hallways. One of these is John Wayne Gacy, 39, the building contractor and amateur clown convicted three years ago of murdering 33 young men and boys.

Death row is about the same size in Alabama, where 55 men await the chair in Holman. Mitchell Rutledge, 23 years old, I.Q. 84, is among them. "You're just sitting there waiting for somebody to come kill you," says Rutledge of his purgatory, "just like a dog out there in the dog pound." But he does not claim innocence. No: he did kill a man two days before Christmas 1980. Rutledge was doped up and drunk with two friends. One pal brought along a gun, and with it they took off on a joyride in the van of a driver they had robbed of $20 and stashed in the back. It was decided that the victim, Gable Holloway, 28, should die. He begged for his life. But Rutledge, like a zombie, took the pistol and fired. He fired again and again, five shots in all.

On death row, Rutledge, who was orphaned as a teen-ager, is visited only by his lawyer. He seems full of remorse. "I can't make nobody feel sympathy for me for what I did," he says. "But I just want to let everybody know that I'm sorry for what I did."



Texas' needle: last month the first execution by injection

To most people the life of a foolish punk like Rutledge does not count for much. He is defective. His death would not be unbearably sad, but his destruction by the state of Alabama would be: not a large tragedy, not final proof that the U.S. is barbaric, but still better left undone. Executing Rutledge would be a waste, not so much of his diminished humanity, but of society's moral capital. The gunslinging heroes of corny adventure fiction had it right: there are guys not *worth* killing. Let Rutledge sit and stew in his 8-ft. by 5-ft. pen in Alabama. Forget him.

But then blue-eyed, kind-looking Lawrence Bittaker jerks into view, disrupting high-minded composure. Bittaker, 42, is on death row at San Quentin for kidnaping and murdering five teen-age girls. But that is not all. He and a partner raped and sodomized four of them first, for hours and days at a time, sometimes in front of a camera. But that is not all. He tortured some of the girls—pliers on nipples, ice picks in ears—and tape-recorded the screams. But that is not all. The last victim was strangled with a coat hanger, her genitals mutilated and her body tossed on a lawn so that he could watch the horror of its discovery.

If not for the Bittakers (and Judys, Gacys, Mansons, Specks and Starkweathers), the capital-punishment debate might already have been decided in the abolitionists' favor. Bittaker's prosecutor had an apt beyond-the-pale phrase for Bittaker and his partner: "mutants from hell." Can they be human? Without killers in this league, more of America's logic and instinctive sense of mercy could prevail. There might be more electorates like Michigan's and more Governors like New York's who declare that capital punishment is unworthy of a decent society.

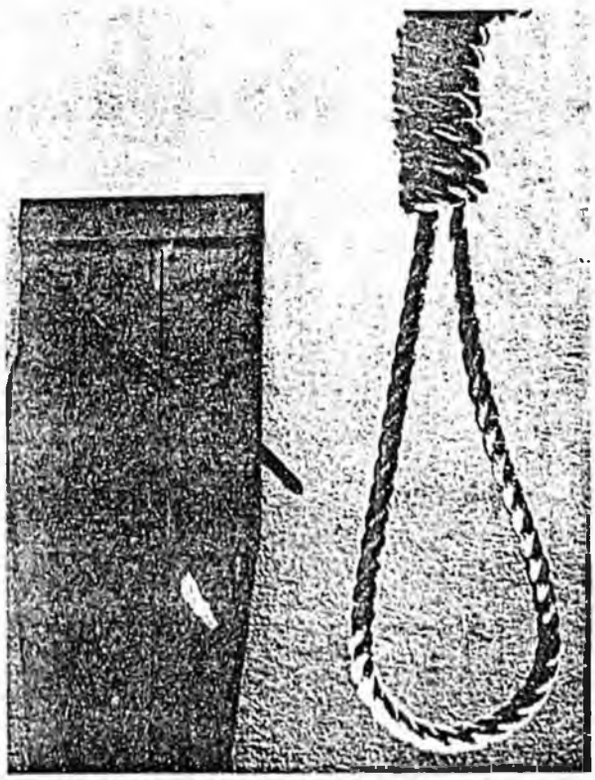
Administration of the death penalty perhaps cannot be made fair enough. As a deterrent, it is probably not necessary. But public passions are inflamed by the inevitable monsters. Civil reason is suspended in the face of what looks like evil incarnate. "It's an emotional issue. It's not a rational issue." Says who? Lawrence Bittaker, an emotional man, whose life is very hard to save. *—By Kurt Andersen. Reported by Lee Griggs/Chicago, B.J. Phillips/Atlanta and Janice C. Simpson/New York*

confinement, taken outside the city and stoned to death. In the view of some death-penalty abolitionists, contemporary executions are not really so different. Each execution is mere "spectacle," according to the A.C.L.U.'s Schwarzschild, "a dramatic, violent homicide under law." Says he: "A society that believes that the killing of a human being is a solution to any problem is deeply uncivilized." Executing murderers does not demonstrate resolute regard for the sanctity of victims' lives. "The marginally demented guy," says Schwarzschild, sees an execution as a prescription, not a threat. "He thinks, 'If the state has a quarrel with Gary Gilmore, it kills him. Then if I have a quarrel with someone, I'll kill *him*.' We say we think human life is sacred. And then to prove that, we kill somebody. That's crazy."

Capital punishment, says L.D.F. Lawyer Joel Berger "attempts to vindicate one murder by committing a second murder. And the second murder is more reprehensible because it is officially sanctioned and done with great ceremony in the name of us all." Not simply just as bad, but worse: this may be the central emotional truth for those who most passionately disapprove of executions. The cretinous killer or the seething psychopath is a loose cannon. But the well-orchestrated modern execution, careful, and thoroughly considered, is horrible because of its meticulous sanity. Executions are worse, in the abolitionists' moral scheme, because the government is always in control; it knows better, but kills anyway.

Proponents see the distinction between murder and state-sanctioned executions in a different light. "One is legal, the other is not," Van den Haag says. "If I take you and put you in a room against your will, it is called kidnaping. If I put on a uniform and put you in a room against your will, it's called arrest."

What was once perhaps the most potent argument against capital punishment arises less often these days. Yet there is a good chance that an innocent man was hanged in England in the 1950s. And in the U.S. today, as death rows swell and the pace of executions quickens, the risks of such a mistake grow. "You know there are going to be some," warns Michael Millman, a California state public defender. Abolitionist Sanford Kadish, a leading authority on criminal law, is less worried. Says he: "The chances are exceedingly remote."



Washington's gallows: only four states still prescribe hanging

Kadish puts his trust in the exhaustive system of judicial review that is now required in capital cases. Today no death-row inmate will be executed until his case has been brought to the attention of his state's highest court, a federal district court, a federal circuit court of appeals and the U.S. Supreme Court. The process is properly slow. In California it takes an average of three years after conviction for a capital case to work its way through the state court system alone. The improbably named James Free, 27, is on death row in Illinois for a double murder. Confesses Free: "I'll use every appeals route I can dream up. That will buy time, maybe five or ten more years."

In 1953, by contrast, a pair of Missouri kidnapers were executed only eleven weeks after their crime. A quarter of the people executed during the 1960s had no appeals at all, and two-thirds of their cases were never reviewed by any federal court.

The historic decision came in 1972, after five years without an execution, and just as fierce public majorities were forming in support of capital punishment. In *Furman* vs. *Georgia*, the Supreme Court nullified all 40 death-penalty statutes and the sentences of 629 death-row inmates, declaring that judges and juries had intolerably wide discretion to impose death or not. This lack of standards made the death sentence "freakishly imposed" on "a capriciously selected random handful" of murderers, wrote Justice Potter Stewart. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." Within a few years, 37 state legislatures had passed statutes designed especially to meet the court's objections.

Most of the new laws went too far, mandating death for certain murders regardless of circumstances, and were overturned by the court. But the statutes adopted by Georgia, Florida and Texas were ruled acceptable. Death is a constitutional punishment, the court decided, not cruel or unusual as long as the judge and jury have given due consideration to the murderer's character and the particulars of his crime, the "mitigating factors."* Against these are weighed the aggravating factors that distinguish capital murder from ordinary homicide.

The court's decisions since have essentially been refinements and tidying addenda. Last January in *Eddings* vs. *Oklahoma*, for instance, the Justices ruled that the judge or jury must consider any mitigating factor the convict claims. Yet to many observers, that sounds like a return toward uncontrollable discretion, the very flaw the court prohibited in 1972. Says former L.D.F. Lawyer David Kendall: "We're right back to *Furman*."

Abolitionists hope so, anyway. They are now arguing a subtle paradox. The prudence and selectivity required by the court, they say, means that executions will be carried out only rarely, and thus will remain arbitrary and freakish, a sort of death lottery. There is always caprice along the way to death row. Prosecutors have great leeway in deciding which homicides to try as capital murders. A killer can be persuaded to testify against an accomplice to save his own life. Brooks was convicted and executed; for the same murder his partner must serve only eight more years in prison.

The Supreme Court's refusal last month to stay Brooks' execution does not give abolitionists much hope for a new landmark ruling in their favor. "We've become technicians," says the L.D.F.'s Berger of his small litigious corps. "The great moral issues have been removed from the legal arena."

At the time of *Furman* it was widely recognized that the system was unquestionably stacked against black defendants, especially in the "death belt" of the South. Some of the racism has been wrung out. Yet clear bias remains, much attributable to prosecutorial choices. A recent study of homicide cases in Houston's Harris County is troubling. In cases where a black or Chicano had killed a white, 65% of defendants were tried for capital murder; only 25% of whites who killed a black or Chicano faced the death penalty. "I don't think it's overt racism," says University of Texas Law Professor Ed Sherman. But prosecutors want to win, and they "perceive that a Texas jury is more likely to give the death penalty to a black who killed a white." A similar South Carolina study found an almost identical pattern: local prosecutors over four years sought death sentences in 38% of homicides involving a white victim

*Of the nine on today's Supreme Court, only Thurgood Marshall and William Brennan believe that the death penalty itself is unconstitutional.

20, April 1981

Pro and Con

Revive the Death Penalty?

YES—"It is morally required as the only appropriate punishment for some crimes"



Interview With Professor Walter Berns

Resident Scholar, American Enterprise Institute

Q Professor Berns, why do you favor the death penalty?

A It is morally required as the only appropriate punishment for some crimes: Treason, particularly heinous forms of murder and particularly heinous rapes, such as the rape of a child or a mass rape of one victim by several individuals. I do not say it ought to be applied to every convicted murderer or even to every convicted first-degree murderer.

Q Doesn't the death penalty verge on the kind of "cruel and unusual punishment" that the Constitution prohibits?

A The men who wrote the Constitution didn't see it that way. The proof is contained in the language of the Constitution itself. The due process clauses of the Fifth and 14th Amendments both speak of the necessity to provide due process when depriving a person of life.

Q Some argue that when society itself takes away life, this undermines the sanctity of life and sets a poor example for citizens—

A On the contrary. The law and the legal community make their respect for life very clear when they threaten to punish murderers by executing them, just as they manifest their respect for property by threatening to jail or fine a person for taking property illegally.

Q Isn't there the danger of punishing the wrong person and then being unable to correct the injustice?

A That possibility always exists, and it becomes a terrible thing when you make a mistake of this sort. Maximum caution must be exercised, and the wording of the statutes ought to embody such caution. A good example is the Florida statute, which makes it absolutely clear to the court that the assessment of the death penalty is—and should be treated as—an extraordinary event.

But in this country, you will search the records in vain for a single example of the wrong person being executed. I know that this has been alleged in the case of Bruno Hauptmann, who was executed in the Lindbergh kidnapping, but I am not persuaded that he was indeed innocent. It has also been alleged in the cases of Sacco and Vanzetti, but I think the evidence clearly shows that Sacco was certainly guilty of those murders and that Vanzetti was executed because he—perhaps foolishly—stood loyally by Sacco and refused to exculpate himself.

Q Is there any real proof that capital punishment deters crime?

A The evidence on this point is inconclusive. For a long time, sociologists in this country made studies that came to the conclusion that the death penalty did not have a deterrent effect greater than that of life imprisonment. But then Isaac Ehlich, an econometrician at the University of Chica-

NO—"Terribly mixed-up people" won't be deterred by the threat of the death penalty



Interview With Patrick V. Murphy

President of the Police Foundation

Q Mr. Murphy, why do you oppose the death penalty?

A Because I don't believe it would have a significant impact on crime. It wouldn't reduce it. Look at the people we've executed recently—like Steven T. Judy, who murdered a woman and then drowned her three children. These are terribly mixed-up people. The threat of the death penalty won't deter people like that from committing murder.

Q Not any of them?

A I've been a policeman for over 35 years, and I've dealt with many of these psychos. Cops always say, "I'd much rather go up against an experienced con than against a psycho, a crazy kid who is going to kill you when you say, 'freeze.'"

When it's all over and you've got the handcuffs on them and they're under control, it turns out that most of them have had horrible lives—they were brutalized as children, their old man was an alcoholic, their mother a prostitute. You try to find out how such a psycho could have put a bullet into that old woman's head, and you find it's because that kid doesn't respect life. He never got much respect for his own life from others.

Q Are you saying that because of mitigating circumstances, that killer you have described does not deserve the death penalty?

A No, that's not what I mean. I don't want to be misunderstood as excusing or condoning crime. Never call me soft on crime. After all, I'm a policeman. What I'm saying is that this kind of person is too far gone to be deterred by the threat of execution.

Q Some argue, however, that the death penalty can have a general crime-deterring effect on everybody by increasing respect for the law—

A If you think so, why not go one step further and make the executions public, as was done in the old days? If you think it is going to deter others, why not do it in a big stadium, in front of a large crowd? I don't think anybody is seriously advocating that today.

Actually, the death penalty may well have the opposite effect of leading to an increase in crime.

Q In what way?

A Violence begets violence. I believe that many policemen lost their lives in this country in the last 10 or 15 years because the police used excessive force, including deadly force, in making arrests. By analogy, I think that when the state applies the death penalty, this supports violence in a way which tends to increase violent crimes.

Q It is often argued, though, that there was less violent crime

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go, examined the question with different statistical techniques and came to the conclusion that one execution may—and I emphasize the word *may*—deter as many as eight murders. That conclusion gave rise to a tremendous controversy, and that is where matters now stand.

My argument for the death penalty is not based on the claim that it necessarily reduces the number of murders. I do think, however, that it has a general deterrent effect on crime by promoting law-abidingness.

Q How do you mean?

A Let me illustrate with an example. What is the proper punishment for someone like the Nazi war criminal Adolf Eichmann, who was hanged? You don't punish an Eichmann because you want to deter others. It would be foolish to think you could do that. You surely don't punish him because you want to rehabilitate him. You don't punish him because you want to incapacitate him. After all, he no longer represents a present danger. What that leaves is retribution, which is indeed an altogether proper purpose of punishment. It's altogether proper to pay criminals back, and how do you pay back someone like Eichmann except by putting him to death?

At the sight of crime, law-abiding citizens feel—and ought to feel—a righteous anger. That kind of anger is absolutely essential for a decent, just society. Like love, and unlike greed, for example, anger is a passion that can reach out to other people. It can be a manifestation of caring for other people. We'd all be lost if everyone reacted as people did in the case some years ago of a woman who was screaming because she was being mugged and murdered: No one even bothered to pick up the phone and call the police.

Righteous anger should be satisfied by punishing the criminal. In this way, by rewarding it, you may promote law-abidingness, which is a general deterrent to all kinds of crime. And in the case of particularly heinous crimes, the anger is rightly so intense that only punishment by death will satisfy it.

Q Could the mandatory death penalty backfire—as in the case of a kidnapper who, knowing he faces the electric chair anyway, might decide to murder the only witness to his crime?

A Yes, that could conceivably happen. On the other hand, there is the case of the inmate serving a life sentence who, knowing he cannot be executed, might decide to murder a guard or a fellow prisoner.

Q Do you think that the mandatory death penalty might sometimes make a jury unduly reluctant to convict a guilty person?

A I'm not sure that the death penalty has any more effect in this regard than another drastic form of punishment, such as life imprisonment.

Q Has there been a movement away from the death penalty in the Western World?

A Yes, but on this point there has been a split between the sophisticated intellectual and the man in the street. All the polls show that the professors want to get rid of the death penalty and the people want to keep it. The law is the embodiment of our morality, of our sense of right and wrong. And, in the last 30 years, respect for the law has declined markedly. ☐

at the time when the death penalty was being more widely applied—

A I don't buy that. It's like arguing that since there was less crime during the Depression, it follows that poverty and unemployment have nothing to do with crime. There are factors other than lack of the death penalty that account for the recent rise in crime. The easy availability of handguns—50 million of them—is at the heart of the problem. And the death penalty won't help resolve it.

Q The Bible speaks of "an eye for an eye and a tooth for a tooth," which implies that the punishment should fit the crime. In the case of particularly heinous crimes, wouldn't that call for the death penalty?

A Well, the Catholic bishops of this country have come out against the death penalty. So have the bishops of Italy. So have many Protestant leaders.

Of the Western European countries, only Spain and France still resort to executions.

Q Some argue that life imprisonment is often a more cruel form of punishment than death. Some inmates have said they would prefer death—

A Yes, I know some of these fellows have said they wanted to die. But I still would prefer not to have the state engage in executions. You know, we're all human, and sometimes we're liable to make a mistake and execute the wrong person. And that is something we can never correct.

Furthermore, if you look at the history of the death penalty in this country, you'll find that its application has been arbitrary, capricious and discriminatory.

Q In what ways?

A The poor and minorities tend to be overrepresented on death row. Blacks who kill whites are overrepresented in relation to blacks who kill blacks. That tells us something about the way the system works.

People who can afford expensive lawyers can beat the system when it comes to the death penalty as well as other kinds of punishment.

Also, I'm a bit of a cynical New York cop. I have found in the weeds the bodies of mob guys bumped off by other guys in the mob. Those are the coldest, most calculating kinds of murderers—the mob hit men. Their crimes are well planned, very hard to detect and witnesses don't talk, so those are not the people who get executed for murder.

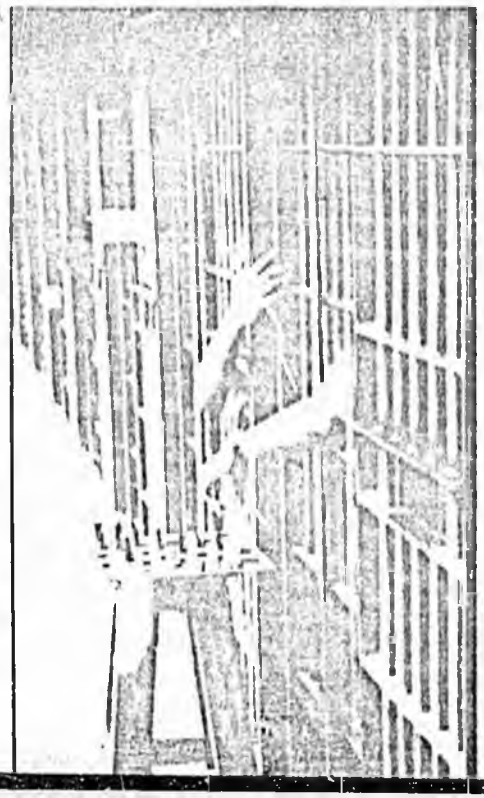
The ones who do get executed are often pathetic, mentally defective people, or are people who killed a wife, a husband, a lover in the heat of passion.

Q What about somebody who is already serving a life sentence and who murders a prison guard? Wouldn't the death penalty be the logical punishment for him?

A You're kidding yourself if you think that by executing one of those types you are going to have a peaceful prison. Those types really place no value on their own life. I'd rather concentrate on preventing that kind of occurrence through reforming our prisons, which are understaffed and overcrowded boiling pots.

How do we deal with crime? I'm looking for the right answers—but I honestly don't believe the death penalty is one of them. ☐

Death-row inmates in a Texas prison play a game of chess between their cells.



America's Inability to Resolve the Cap

COL. I COL. II COL. III

Last of a series

By Phil McCombs
Washington Post Staff Writer

When American University professor Robert Johnson decided last fall to teach a course on the death penalty, he was amazed that 75 students signed up—more than he's ever had in a class. A poll found they favored the penalty 49 to 31 percent with the rest undecided.

Johnson saw it as his job—and moral duty—to change that.

"Death should require absolute guilt on the part of the offender and absolute innocence on the part of the society," he said. "Violence is a social product. . . . Today's capital offenders are invariably drawn from the ranks of the underpriviledged and inadequate. . . . Each and every one of these persons can point to some mitigating circumstances that relieve them of some culpability for their crimes and partially implicate society in their actions."

Like Johnson, most academics and the college-educated oppose the penalty, but polls indicate that Americans as a whole strongly support it.

"Liberals generally feel guilty," said Ernest van den Haag, a Fordham University law professor and conservative theorist. "They think that somehow it's their fault that crimes are being committed. . . . Intellectuals belong to a class that is not greatly endangered by murder. . . . They can afford to be terribly humanitarian . . . People who are less educated and have less money are endangered by violent crime."

America's debate on the death penalty encompasses a wide range of moral, legal and political questions of the sort that seem calculated to raise ideological temperatures on both the left and right. Some of the issues, such as whether the penalty deters criminals, have spawned intricate scholarly analyses; others, such as why the poor are executed with disproportionate frequency, raise painful sociological questions. Finally, there is the simple, awesome question of whether it is ever right to take a human life.

Confronted with questions of such magnitude, the nation's political and judicial systems have been unwilling or unable to definitively resolve the nation's capital punishment dilemma. There is little evidence that this will change soon even though six years ago the U.S. Supreme Court declared the death penalty constitutional and 35 state legislatures passed new death statutes based on the high court guidelines.

While the future of the penalty remains in limbo, its pros and cons are argued by legal scholars, philosophers, law enforcement officials and social scientists as well as ordinary citizens. The debate can be cool and intellectual, with complex arguments and empirical research, or highly emotional, drawing on deeply held feelings of right and wrong. For the most part, the debate "has been waged on moral grounds," wrote Supreme Court Justice William J. Brennan Jr. "The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death."

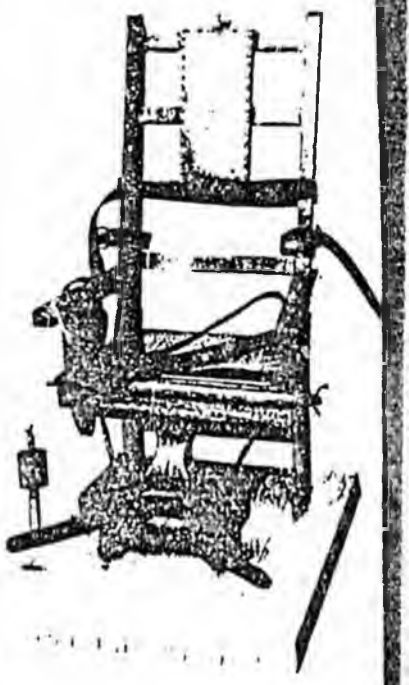
For Henry Schwarzschild, head of the American Civil Liberties Union capital punishment project, the answer is an emphatic no: "Society should not be in the business of killing human beings . . . God knows what [murderers] deserve. The question is not what they deserve, it is what we are entitled to do to each other . . . We have seen in the 20th century states shed torrents and rivers of blood. We create political institutions to protect and enhance human life, not to kill . . . People learn the lesson from executions that killing somebody is an acceptable answer to some problems . . . No society that believes that can consider itself civilized."

The Supreme Court and the D

1972 Decision



Justice Thurgood Marshall, citing evidence that the death penalty does not deter, wrote that it is "morally unacceptable to the people of the United States at this time in their history" . . .



share the earth with you. This is the reason, and the only reason, you must hang."

Schwarzschild called the Berns argument in favor of retribution—and by extension the Arendt argument—"deeply dangerous" and "prefascist."

"I really do take offense at that," said Berns. "Does that say the U.S. is a fascist country in its history when it executed criminals? Was Israel fascist when it executed Eichmann? . . . Was Abraham Lincoln, who signed 262 death warrants, fascist?" Berns said his support of the penalty is contingent on its being applied only to the worst criminals without racial discrimination.

"The thought that murderers are to be given as much right to live as their victims oppresses me," wrote van den Haag. "Never to execute a wrongdoer, regardless of how depraved his acts, is to proclaim . . . no human being can be wicked enough to be deprived of life. Who actually can believe that? I find it easier to believe that those who affect such a view suffer from a failure of nerve."

Johnson, the American University professor, said the ultimate penalty should be life in prison because it "leaves open the door for mercy. You can always reconsider [if there are] dramatic and enduring changes of character . . . or new evidence." And Johnson argues that the conditions on death row itself are so painful as to constitute cruel and unusual punishment.

In its 1976 landmark decision upholding the constitutionality of the death penalty for murder, the U.S. Supreme Court specifically endorsed retribution as "an expression of society's moral outrage." The lead opinion said while this "may be unappealing to many, . . . it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs. . . . The decision that capital punishment may be the appropriate sanction [for murder] must be directly related to the personal culpability of the criminal defendant."

Since 1930, 3,859 persons have been executed in the United States, 54 percent of them for murder committed in the southern states. Many of the executions were for crimes that would not be considered capital offenses today. Many were for crimes committed by persons who were juveniles, mentally retarded or insane. Many were for crimes that occurred accidentally as the offender fled during a robbery in a state where 298 of the 366 people executed since 1930 were black.

Two justices, William J. Brennan Jr. and Thurgood Marshall, declared the penalty unconstitutional under any circumstances. "The calculated killing of a human being by the state involves, by its very nature, a denial of the executed person's humanity," wrote Brennan. Marshall cited evidence that the penalty doesn't deter and said, "It is morally unacceptable to the people of the United States at this time in their history."

The decision invalidated death laws of 41 states, the District of Columbia and the federal government and took more than 600 off death row.

In response, 35 state legislatures and Congress drafted new death laws. Polls showed increasing concern with crime and support for the penalty.

In its landmark 1976 decision, the court approved, by a 7-to-2 majority, death-for-murder laws in Georgia, Florida and Texas drafted in response to its 1972 decision. The new laws provided for "guided discretion" in capital sentencing. Factors of aggravation and mitigation would be considered in special sentencing hearings and later reviewed by higher courts to safeguard against prejudice.

"It is an extreme sanction, suitable to the most extreme of crimes," said the lead opinion by Justices Stewart, Lewis F. Powell Jr. and John Paul Stevens. ". . . The concerns expressed in [the 1972 decision] can be met by a carefully drafted statute that [focuses] the jury's attention on the particularized nature of the crime and . . . individual defendant . . . In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence."

Concurring, Justices White and William H. Rehnquist and Chief Justice Warren E. Burger scolded opponents of the penalty for

Exactly the opposite, wrote Walter Berns, author of "For Capital Punishment: [illegible]e and the Morality of the Death Penalty," [illegible]e execute the worst criminals "out of moral necessity . . . We want to punish them *to pay them back* [and by doing so] we demonstrate that there are laws that bind men across generations [and] nations. . . . The criminal law must . . . be made awe-inspiring. . . . It must remind us of the moral order by which alone we can live as *human* beings. . . . To punish criminals, even to execute them, is to acknowledge their humanity . . . as responsible moral beings."

Perhaps nothing illustrates so sharply the difference between these two as their views of Ismel's capture, trial and execution in 1961 of former SS Lieutenant Colonel Adolf Eichmann, who sent millions of European Jews to their deaths. Schwarzschild, a Jew who escaped Nazi Germany at 14, adamantly opposed the execution. Berns said justice demanded it, and it was the passion of Nazi-hunter Simon Wiesenthal who made him realize the moral necessity of retribution.

In many ways, the Eichmann case is the ultimate test for an opponent of the death penalty—like asking, on a larger scale, if that opponent would still oppose the penalty for someone who had brutally raped and murdered his wife and 3-year-old daughter. Eichmann provides the "supreme justification of the death penalty," wrote Hannah Arendt in her book, "Eichmann in Jerusalem: a Report on the Banality of Evil." She argued that the justice of retribution for the crime of mass murder might have been better understood had the judges simply told Eichmann:

". . . We are concerned here only with what you did, and not with the possible non-criminal nature of your inner life and of your motives or with the criminal potentialities of those around you. You told your story in terms of a hard-luck story [but] there still remains the fact that you have carried out . . . a policy of mass murder . . . And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to want to in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

∞

While philosophers have struggled with the moral implications, the courts have engaged in a painstaking effort of their own to reach a consensus on capital punishment and when, if ever, it was justified.

In 1636 in New England the death penalty was imposed for idolatry, witchcraft, blasphemy, assault in sudden anger, sodomy, buggery and adultery, among others. By 1850 abolitionist sentiment was strong, and gradually laws making death mandatory for specified crimes were eliminated. Many states dropped the penalty entirely.

By the 1930s, the high point of executions in America, there were 167 executions a year, an average that dwindled to 72 a year in the 1950s. Executions ceased in 1967 as officials waited to see what the Supreme Court would do.

For years the court had avoided the issue entirely. Then in 1972, faced with the increasingly urgent need to provide some guidance, it finally spoke.

In a narrow 5-to-4 decision the court declared the penalty was being administered in an unconstitutional way because juries operating with "untrammeled discretion" were handing it out in an arbitrary, discriminatory, even "freakish" way.

Receiving a death sentence was "cruel and unusual in the same way that being struck by lightning is cruel and unusual," wrote Justice Potter Stewart. Byron R. White added, "There is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." William O. Douglas said the death laws were "pregnant with discrimination" against the black and poor. "One searches our chronicles in vain for the execution of a member of the affluent strata of this society."

One of the court's key concerns in 1972 was possible racial discrimination. The three cases that brought on the decision—a murder and a rape in Georgia and a rape in Texas—all involved black offenders and white victims. The murder, a shooting, had occurred during a robbery.

arguing that no matter how effective the death penalty may be as a punishment, government created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law." The penalty is necessary, they said, even though "mistakes will be made and discriminations will occur."

At the same time, the court declared mandatory death laws unconstitutional because they treat "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass."

States like Virginia that had passed mandatory statutes after 1972 quickly redrafted them along "guided discretion" lines. Virginia's new law, patterned after the new Georgia law approved by the Supreme Court in 1976, went into effect in 1977, Maryland's in 1978. The District never drafted a new statute and in 1980 killed the old one. The last execution in a local jurisdiction was in Virginia in 1962.

After the 1976 decision the "capital punishment bar," as the small but devoted band of lawyer-opponents to the penalty is known, switched to delaying tactics and began filing every possible appeal in every death case. Four executions have taken place, but a de facto moratorium on executions in America now exists and the United States in effect has joined most Western nations in either dropping the penalty or letting it fall into disuse.

No one knows how long this may last. American juries continue to send 150 murderers a year to death row, where there are already 1,009 residents, according to the NAACP Legal Defense and Educational Fund Inc.

"My own armchair reading is the public feels comfortable in having [the death penalty] on the books," said Washington attorney David E. Kendall, who has handled death cases, "but there is an enormous inertia and resistance to actually executing people."

Scholars who search for the reasons behind the strong public support for the penalty believe that people are concerned by crime and that they hope the penalty will deter criminals. "I think crime in the streets and law and order have become a genuine concern to a lot of people," said Tufts Uni-

Col. I Col. II Col. III

eath Penalty

1976 Decision



Justice Potter Stewart, in the lead opinion w'in justices Lewis F. Powell Jr. and John Paul Stevens, said that the death penalty is "an extreme sanction, suitable to the most extreme of crimes" . . .

versity philosophy professor Hugo Adam Bedau, editor of "The Death Penalty in America."

Col. IV

Does the death penalty deter criminals?

Ever since the 18th century man of letters Dr. Samuel Johnson observed pickpockets at work in a crowd watching a pickpocket hang, researchers have faced the problem that it is clear when the penalty fails to deter but not when it succeeds.

Early studies by Thorsten Sellin, professor of sociology emeritus at the University of Pennsylvania, found states with the penalty had as many murders and murderous assaults on police as states without it. Murder didn't decrease when states instituted the penalty or increase when they abolished it.

Executions may even encourage murder, said William J. Bowers and Glenn L. Pierce of Northeastern University's Center for Applied Social Research. Studying a 56-year period in New York, they found two additional murders after each execution and decided executions send messages of "lethal vengeance."

But a 1975 analysis by Isaac Ehrlich found each execution in America may have saved eight lives by deterring potential murderers. While Bowers and Pierce said the study has been called into question by other research, the Supreme Court conc'ed death "undoubtedly is a significant ...erent" for "many" potential murderers.

"No other punishment deters men so effectually from committing crimes," said an early expert quoted by the Supreme Court. "This is one of those propositions which it is difficult to prove. . . . It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction."

State legislators depend on such experience in passing death laws, and Justice White wrote that their actions should not be viewed "as some form of vestigial savagery or as purely retributive [but as] solemn judgments, reasonably based, that imposition of

clearly racist in a vast majority of cases. Gary Kleck, writing in the American Sociological Review, found "huge racial differentials" in death sentences handed out to blacks and whites for rape because the penalty was used to punish blacks who raped whites in the South. There have been no executions for rape outside the South or border states since 1930, and today death for rape has virtually disappeared. Only two persons are now on death row for rape, and their victims were children. In 1978 the Supreme Court outlawed the penalty for rape of an adult woman.

Studying the racial characteristics of those who received the death penalty since 1930, Kleck found that in 25 of 38 years examined, white murderers were more likely to receive death sentences than black murderers. For the period as a whole, he put the chance of a black convicted murderer receiving a death sentence at .972 percent versus 1.043 percent for a white murderer.

In the South, however, he found blacks more likely to receive death sentences for murder—but only prior to 1950; after that, the rate was the same for both black and white murderers.

Outside the South after 1950, however, white murderers had a higher chance of being sentenced to death than black murderers.

"Every single study consistently indicating discrimination toward blacks was based on older data from southern states," he wrote. ". . . The evidence considered as a whole indicates no racial discrimination in use of the death penalty for murder outside the south [prior to 1950]."

Bowers and Pierce, the Northeastern University social scientists, studied death sentences imposed between 1972 and 1977 and found another kind of discrimination: Blacks who killed whites were far more likely to receive death sentences than killers in any other racial combination.

Writing in the journal Crime & Delinquency, they reported that in Georgia they found a black 33 times as likely to get death for murdering a white as for murdering another black. The same black murderer was also substantially more likely to get death than a white murderer, regardless of whether the white murdered a black or white.

On the other hand, a black who murdered someone of his own race was substantially less likely to get death than a white murderer regardless of the race of his victim.

Bowers and Pierce attributed their findings to the "racist tenet: that white lives are worth more than black lives," although this would not appear to explain why a white was substantially more likely than a black to get death for murdering a black.

Kleck, who also noted that blacks were "devalued" as crime victims, added that "white paternalism," or the view that blacks are "child-like creatures who were not as responsible for their actions as whites," may help explain why a white murderer would be held more accountable than a black murderer in the case where the victim was a "devalued" black.

Like Kleck's, the Bowers-Pierce overall data, if not broken down by race of victim, actually shows white murderers in Georgia taken as a whole twice as likely to be sentenced to death as black murderers.

That is because there were in Georgia almost twice as many black-on-black murders—the combination that got by far the lowest death-sentence rate—as all other murder combinations taken together.

Bowers and Pierce think the court needs to consider their research because "either discrimination by race of offender or disparities of treatment by race of victim of the magnitudes we have seen here are a direct challenge to the constitutionality of the [new] capital statutes."

Supreme Court's Death-Row Dilemma

New confusion over the death penalty spread in early October when a convicted murderer received an 11th-hour reprieve as he lay strapped on a death bed awaiting a lethal injection.

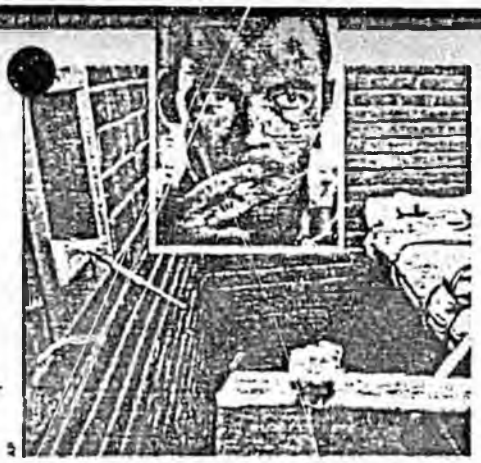
U.S. Supreme Court Justice Byron White granted the unusual stay October 5 just as a saline solution was being pumped into James Autry's veins at the Texas penitentiary in Huntsville to prepare him for execution. Only two days earlier, White was part of the Supreme Court majority that denied Autry's appeal in a 5-to-4 ruling.

The swift turnaround astonished even the condemned man's attorney, Stefan Presser of the American Civil Liberties Union, who said: "On Monday, because he didn't invoke the right words and the right theory, the Court was going to let him die. Then he said the right words, and the Court gave him life."

Autry, 29, was convicted of killing a store clerk in 1980 after she asked him to pay for a six-pack of beer.

Meanwhile, the fate of 1,230 convicts on death rows across the country remained as murky as ever, with prosecutors and defense lawyers alike puzzled over what to do next.

"I don't know how to proceed," said Alan Dershowitz, a Harvard law professor who represents three condemned inmates. He termed the Justices' handling of the Autry case a "scandalous spectacle of ineptitude."



Autry was strapped and awaiting lethal injection when reprieve came down.

Paul Richwalsky, a state prosecutor in Louisville, said: "We as prosecutors look to higher courts, especially the Supreme Court, for guidance. What kind of barometer is this?"

Justice White's switch came after Autry's new lawyers raised a fresh constitutional issue—whether a state must review each death sentence to make sure it is in line with others imposed for similar crimes. The Court hears arguments on that question—raised in a California case—on November 7.

The Justices have made numerous attempts in recent years to clarify how the death penalty can be imposed. But each time they dispose of one issue, defense lawyers raise a new one. Result: Only eight death-row inmates have been executed since 1967. □

Current Quotes

"A very keen sight and sharp pen when it comes to the power of evil and baseness of human beings."
The Nobel Committee naming Britain's William Golding, 72, author of *Lord of the Flies*, as winner of the Nobel Prize for Literature.

"Today's Moral Majority can become tomorrow's persecuted minority."
Senator Edward Kennedy (D-Mass.) reminding a Moral Majority audience of the importance of separation of church and state.

"When comfortable people, relaxing at their country clubs, deplore the alleged decline of the work ethic, they should not be taken too seriously."
AFL-CIO President Lane Kirkland addressing the labor group's convention in Hollywood, Fla.

"Instead of a mean, lean department, we've created a soft, somnolent fatso."
Senator John Danforth (R-Mo.) criticizing a proposed department of international trade and industry to replace the Commerce Department.

"News people are being asked to put 5 pounds of news in a 1-pound package. You can't do that without serious damage."
Retired CBS anchorman Walter Cronkite telling broadcasters that their news stories don't provide enough information.

"This goes a long way toward bringing St. Louis into the 20th century."
St. Louis Mayor Vincent Schoemehl on a new law letting downtown stores open on Sunday for the first time since 1825.

Grass-Roots War Over Gun Control

Firearms advocates and critics are fighting a touch-and-go battle over gun control that stretches from city halls and state legislatures to Congress and the Supreme Court.

The Justices on October 3 left intact a handgun ban in the Chicago suburb of Morton Grove, refusing to consider arguments that the measure violates the constitutional right to "keep and bear arms." The action removed a cloud over antigun measures on the books in several Illinois cities, and now towns across the country are expected to consider similar laws. Other developments cited by gun-control advocates—

- A decrease by one third in Chicago gun murders in 1982, the same year the city barred new handgun registrations.
- A new law in Washington State that lengthens a waiting period to buy a pistol and lets police seize guns from persons accused of domestic violence.
- A federal judge's ruling that gun manufacturers can be held liable for damage that results when their products fall into the wrong hands.

Opponents of gun control, led by the National Rifle Association (NRA), also claim a string of new victories headed by last fall's defeat at the polls of a handgun-registration proposition in California. On the same day, Nevada and New Hampshire approved measures guaranteeing citizens' right to own guns, and Utah residents will vote next year.

Several cities now have ordinances that require residents to own weapons, although the laws are regarded as symbolic and are not enforced.

Only hours after the Supreme Court's Morton Grove decision, trustees in the Chicago suburb of Skokie voted 4 to 3 against banning handguns. Member Frank McCabe, who voted no, said passing an ordinance "with no intent to enforce it causes contempt for the law."

The next big local skirmish is expected in Ft. Lauderdale, Fla., where county officials are considering several gun-control measures.

The U.S. Senate is studying a proposal to relax federal curbs on gun sales—a plan praised by the NRA as an aid to hunters and collectors but assailed by critics who say it would allow criminals to obtain guns by mail.

With firearms used in 60 percent of America's murders, both sides say gun control will be hotly debated in 1984 election campaigns. Said the NRA's Andrew Kendzie: "It will always be one of the country's most volatile issues." □



AMERICAN JUSTICE

In the wake of a serious crime, justice is swift: Police sift the clues and track down the culprit, the prosecutor throws the book at him; judge and jury do their duty, and the criminal slinks off to prison—a social menace no more.

Then the credits roll and the television show is over. Americans turn their attention back to the real world, where things are different.

The real world, where—

- In 4 out of 5 cases of serious crime, there is not even an arrest, let alone a conviction.
- Of the cases in which arrests do occur, some are dropped, and just about half end in guilty pleas or convictions.
- One lawbreaker might draw a stiff penalty, another a light penalty for the same offense.
- Most convicts serve only a fraction of their prison terms before being put back on the street, and many of them return to crime.

The rate of violent crime has more than quadrupled during the last two decades—creating unprecedented strains. Police and prosecutors are overworked. Courts are staggering under heavy backlogs. Prisons are bursting with surplus inmates. The result: Bitter controversy engulfs almost every method by which our society struggles to cope with lawlessness. Americans are angry. Many of them believe that the institutions of law and order somehow have come unglued, exposing them and their families to a growing risk of death, injury or property loss at the hands of thugs.

Civil proceedings are arousing fears as well. An explosion of lawsuits has made people feel more and more vulnerable to a wrathful passer-by, customer, neighbor, employe, business partner—perhaps even one's own child. The crush of litigation also has quickened concern about the fees and ethics of lawyers, whose ranks have swollen fast.

Yet how the justice system works—how it *really* works—remains a mystery to many. People's "knowledge" often boils down to a stream of half-truths and misimpressions gained from Hollywood, TV and newspapers. This prompted *U.S. News & World Report* to prepare this 24-page section to help readers understand procedures that are designed not only to punish the guilty but also to protect the innocent. □

A Quiz of Your Legal IQ

Here is a simple quiz to measure how much you know about the U.S. system of justice (the answers appear below).

1. How much time does the average police officer spend dealing with crime?
A. 75 percent. B. 15 percent. C. 40 to 50 percent.

2. The average salary of a police officer after five years on the force is:
A. $13,000. B. $22,000. C. $18,000.

3. The job of a grand jury is to:
A. Weigh the defendant's guilt or innocence. B. Determine whether inmates get parole. C. Decide whether a case goes to trial.

4. How many persons slated for trial on serious criminal charges plead guilty?
A. 60 percent. B. 10 percent. C. 80 percent.

5. The average time served in prison by a person convicted of a felony—a serious crime—is:
A. 26 months. B. 6 months. C. Between 5 and 6 years.

6. How many appeals are filed with the Supreme Court each year?
A. 750. B. 5,300. C. 1,500.

7. How may federal judges be removed from office?
A. Impeachment and conviction by Congress. B. Supreme Court order. C. Dismissal by the President, with Senate consent.

8. Which constitutional amendment protects citizens against unreasonable searches?
A. Fourth Amendment. B. First Amendment. C. Fourteenth Amendment.

9. Junior attorneys in law firms are paid an average salary of:
A. $15,900. B. $35,200. C. $26,600.

10. How many civil suits are brought annually in the United States?
A. About 1 million. B. Almost 37 million. C. More than 12 million.

11. Which side wins most often when a civil suit is tried?
A. The plaintiff—the person suing—wins 80 percent of the time. B. The defendant is victorious in 68 percent of cases. C. Each side wins about half the time.

12. The standard used by juries to decide a civil case is:
A. The preponderance of the evidence. B. Guilt beyond a reasonable doubt. C. The reasonable-man standard.

13. In most small-claims courts:
A. Lawyers are required to reduce their fees. B. Disputes under $700 are tried. C. Written evidence is excluded at all times.

ANSWERS
1. C. 2. B. 3. C. 4. C. 5. A. 6. B. 7. A. 8. A. 9. B. 10. C. 11. C. 12. A. 13. B.

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490,000 officers, plus 210,000 support employes. Of this total, 525,000 work for local governments, 100,000 for states and 75,000 for the U.S. government. Average starting salary for police officers is $14,300; after five years, $18,000.

Cost to taxpayers: [illegible]

[illegible]

284,000 guards, probation and parole officers and others. Of these, 12,000 work for U.S., 163,000 for states and 109,000 for local governments. Typical prison guard is paid about $16,000.

Cost to taxpayers: [illegible]

[illegible]

28,000 judges, plus 141,000 clerks, bailiffs and other court employes, handle civil and criminal cases. About 1,400 judges work in federal courts, 8,000 in state courts and 18,600 in local courts. Average pay for state trial judges is nearly $50,000.

Cost to taxpayers: [illegible]

[illegible]

25,500 lawyers, including 10,000 prosecutors and 7,500 public defenders, plus 62,000 investigators and other aides. Of the total, 8,500 work for the U.S., 24,500 for states and 54,500 for local governments. Prosecutors earn average of $25,000, public defenders $20,000.

Cost to taxpayers: [illegible]

[illegible]

32,000 employes of training, planning and construction units that affect all segments of the justice system.

Cost to taxpayers: [illegible]

[illegible]

The Complex Maze in Criminal Courts

"Adversary justice" pits prosecution against defense in a war that is governed by intricate rules. For a guided tour of the battlefield—

When a person is arrested for a serious crime—and the handcuffs snap shut around his wrists—he enters a legal maze with many possible exits.

He may find one within hours and quickly be back on the streets. Or, if he is one of the unlucky few, he may never know freedom again.

Critics seethe with indignation over procedures that they believe give the guilty too many loopholes for escape. "It's difficult to explain to crime victims the weaknesses and inefficiencies of our system," laments Philadelphia's district attorney, Edward Rendell.

Most defenders acknowledge that the process has its flaws, which smart lawyers and jailhouse-wise hoodlums feel no compunction about exploiting. But they contend that when analyzed step by step the system makes more sense than critics admit.

After an arrest, the first milestone is a hearing to determine whether the *defendant* will be released until trial or held in the county jail. The judge may free the person on his own *recognizance*, a written pledge to appear for trial, or may require deposit of bail that is forfeited if the accused fails to show up in court.

In about half the states, the judge can deny bail altogether if the suspect has a criminal record or seems to be a danger to the community. In the rest of the states and in federal courts, the law allows denial of bail only when there is substantial doubt that the person, if freed, will return for trial. Many judges, however, faced with a defendant perceived to be a social menace, do not hesitate to set bail so high that the suspect cannot pay it.

Nearly 90 percent of those released do show up for trial—but more than 10 percent of them commit new crimes in the meantime.

The DA weighs in. Police lay out the evidence they have for the district attorney and his assistants, who decide whether to prosecute. The basic question these lawyers ask: Is there enough proof to convince a jury of guilt "beyond a reasonable doubt"—the test that prevails in criminal courts?

In a significant number of cases, the answer is "No" and the charges are dropped. Even if a case is acceptable on legal grounds, prosecutors may scuttle it because of a backlog of more-important prosecutions. The majority of law violations in the U.S. are not crimes of violence but lesser offenses such as vandalism and public drunkenness, which are often referred to social-service agencies instead of the courts.

When prosecutors decide to take a case to trial, in about half the states they file an *information* with the court stating the charges.



Defendant and his lawyer face the judge. Fully 80 percent of jury trials are averted or cut short by guilty pleas.

In the rest of the nation, serious criminal accusations are forwarded instead to a panel of six to 23 citizens chosen to sit for periods of several months as a *grand jury*. These sessions are closed to the public. The grand juries hear government lawyers present documents or testimony from major witnesses.

Unless called as a witness, the defendant never sets foot in the grand-jury room and is not permitted to offer a defense. Reason: The grand jury does not seek to determine the truth of the charges, but only whether there is enough evidence to warrant a trial.

If the answer is "Yes," the grand jury votes a *true bill*—an indictment laying out the charges. In theory, this decision is made independently. But most experts agree that with rare exceptions grand juries follow prosecutors' cues.

By this time, the accused more often than not already will have a lawyer—a right of every person charged with a crime. Three fourths of all defendants can't afford to hire an attorney. They rely on publicly paid lawyers who either work full time as public defenders or are appointed by the courts for such work part time.

While the estimated 25,000 lawyers in private criminal-law practice can select their own clients, the typical public defender is overburdened. Often young lawyers no more than a few years out of law school, they grapple with 400 cases a year, or more than one a day.

Truth on trial. The role of defense lawyers in U.S. courts is just as crucial as that of prosecutors.

In many countries, the questioning of witnesses in criminal proceedings is handled by judges or some other neutral official, and guilt and innocence are decided by a judge or panel of judges.

U.S. trial procedures are built on a different premise: That the facts are brought out best—and justice best served—by pitting opposing counsels against one another before a neutral judge and jury. This *adversary system* has defects. For one thing, the lawyers are not always equal in talent. One attorney's superior trial tactics may overshadow the substance of the case.

What's more, appeals to emotion and the withholding of evidence from the other side until the last possible moment are commonplace. Nicholas Kittrie, a professor of law at American University, says "the surprise witness, document or demonstrative evidence" often influences a jury's findings.

Still, most experts agree with Prof. Alan Dershowitz of Harvard Law School that the adversary system "generally produces accurate results" while safeguarding the rights of the accused.

However a case comes out in the end, the defense starts at a disadvantage. "The prosecution has all the police reports, laboratories and computers," says Rick Wilson of the National Legal Aid and Defender Association. "That leaves the defense in the dust."

Squaring off. A defendant's first chance to rebut the charges comes at the *preliminary hearing*, a court session held soon after an indictment. The prosecution presents evidence aimed at establishing a basis for the case to go



Arrest. After a suspect is apprehended, prosecutor and grand jury decide whether the case should go to trial.



Selection of jury. Both prosecution and defense probe the attitudes of jurors carefully before accepting them.

to trial. The defense may make a motion that evidence be excluded on grounds that it was seized unlawfully, that the suspect's rights were violated during police questioning or that some other infraction of civil liberties occurred. These basic protections are outlined in the box on page 40. Attorneys for presidential assailant John W. Hinckley, Jr., were able to bar some police testimony from his trial because his lawyer wasn't present when federal agents first questioned him.

The judge can dismiss all or some of the charges. Usually, he rules that while some evidence may be inadmissible, the case can go to trial.

Many defendants who lose this first round decide to plead guilty. Often, they can win a reduction in the severity of charges—and thus a lesser sentence—by negotiating a *plea bargain* with the prosecutor.

Although most guilty pleas come just before trial, a defendant can plead guilty at any time before the verdict is in. One Virginia man, fearful of getting the death penalty, decided to plead guilty to a reduced murder charge as the jury was deliberating over his case—only to learn later that the jurors had been prepared to acquit him.

At least 80 percent of cases end in guilty pleas. Prosecutors thus avoid costly, time-consuming trials and the risks of acquittals. Defendants get lighter sentences than they might have received had they fought to the bitter end.

Cases that do not end in plea bargains before trial rarely go to trial quickly. A survey of 32 metropolitan areas by the National Center for State Courts showed that the median time from filing of charges to trial ranged from 42 days in Portland, Oreg., to nearly a year in Buffalo.

Court backlogs are only one reason for delays. Defense lawyers often seek to postpone trials in the hope that prosecution witnesses will decide not to testify or will perhaps forget details of the crime. "The world's greatest defense attorney is Father Time," says Tulsa lawyer Patrick Williams.

Day of reckoning. Once the trial date finally arrives, the lawyers match their wits first in the empaneling of the jury. Its makeup is vital because—when the crime is serious—a unanimous vote of 12 jurors is needed to reach a verdict. Selection can take many hours and even many days as the lawyers question potential jurors on their backgrounds and beliefs.

Once the jury is chosen, the prosecutor makes an opening statement, sketchily describing the case against the accused. The defendant's attorney briefly tells the jury what line of defense will be offered.

Next, the prosecutor starts calling witnesses to build his case. When he completes his questioning of each, the defense attorney gets a chance to *cross-examine*—an interrogation often used to attack the witness's credibility. Says legal scholar David Neubauer: "In cross-examination, each side has the opportunity to examine the witnesses' truthfulness, to probe for possible biases and to test what witnesses actually know, not what they think they know."

Then comes the defense's turn to call witnesses, though it is not obliged to do so and may rely entirely on challenging prosecution evidence.

Many legal battles are fought out of the jury's presence, with both sides debating before the judge what evidence may be presented to jurors.

Although some criminal trials are over in a day or less, many take weeks or months as each side raises a string of objections to the other's evidence. Some defense lawyers make no bones that they do this partly in the hope that an appeals court later will overturn a conviction because of an erroneous ruling by the trial judge.

"We are obligated as lawyers to do

Questioning of witnesses. Each side presents testimony buttressing its case.



Cross-examination. Each lawyer has a chance to shake the credibility of the opposition's witnesses.



When Juveniles Run Afoul of the Law

The nation's juvenile-justice system, designed to shield delinquent youths from the harsh treatment given to adult criminals, is doing its job too well.

That is the view of critics of the juvenile courts, who contend that the lenient handling of youthful offenders is as much to blame as anything for the surge of violent crime by the young.

It is an issue on which public attitudes have come full circle in recent decades. When juvenile courts were created at the turn of the century, reformers believed young lawbreakers needed to be sheltered in a variety of ways, in addition to being kept apart from adult criminals.

Juvenile-court hearings and records were closed to the public. A jargon was created so delinquents would not be tainted by criminal-court terms. Youths were accused in a "petition," not an indictment, and were not locked up without bail but rather "detained in their best interests." Instead of being found guilty, they were "adjudicated delinquent" and sent not to prisons but to "training schools."

Without the trappings of the adult justice system, youths often found themselves in court with only a judge, a social worker and their parents.

Over the years, critics came to believe that this closed system—whatever the intent—did not always treat delinquents fairly. Judges' philosophies of treatment varied so much that some youths were sent to prison when they should have been sent home; others were set free when they should have been thrown behind bars.

In a noted 1967 case, *In re Gault*, the Supreme Court declared that youths have the right to a lawyer and other legal protections. Since then, juvenile-court proceedings have become more and more like adult trials, with prosecutors, defense attorneys and stricter rules of evidence. Many hearings now are open.

In recent years, 14 states have passed laws to send to adult courts certain youths under 18 charged with serious crimes. After conviction there, they may end up in adult prisons. Several other states have made it possible for even younger children—some as young as 10—to be sent to criminal court.

Nearly 500,000 youths are jailed in detention units each year, either to await trial or to serve sentences that typically run a year or less. Judges send about 65,000 annually to state training schools—youth prisons where delinquents spend one or two years, on average.

In most states, the jurisdiction of juvenile authorities ends at age 21. For this and other reasons, young offenders tend to spend less time behind bars than adults implicated in similar crimes.

But the conditions in places where juveniles are held are often so poor that critics say they encourage criminality. "The cells at Alcatraz are better than what many of those kids are sitting in today," contends Mark Soler of the San Francisco-based Youth Law Center.

It's too soon to gauge effects of the get-tough drive, analysts say. Harsher measures may keep some violent youths off the streets for longer periods, but experts predict that whether they remain in juvenile courts or are shifted to adult tribunals, delinquents will continue to be treated more leniently than adult criminals.

Says Louis McHardy, director of the National Council of Juvenile and Family Court Judges: "All we're doing is creating a new juvenile-justice system within the adult system. Young criminals require special attention, and most will continue to get it."

everything we can to assist our clients," comments John Ackerman, president of the National Association of Criminal Defense Lawyers. "If we fail to do so, we should be disbarred and can be sued for malpractice."

Once each side has presented its case, including rebuttal testimony, opposing lawyers deliver *final arguments*—perorations putting the evidence in the light they want the jury to see it.

Jury takes the driver's seat. The judge then instructs jurors on how to apply the law to the facts. For example, the jury may be told that it can find the defendant guilty of first-degree murder only if the evidence shows intent to kill and premeditation. By contrast, killing someone through negligence constitutes manslaughter, which carries a far lower penalty.

Jurors sometimes are told the range of penalties for the offenses at issue, so they have an idea what a finding of guilty will mean to the defendant. In a few states, juries recommend punishments or actually impose them. In others, the judge sets the punishment.

Nearly three fourths of trials end in guilty verdicts. Virtually all such verdicts are appealed, if for no other reason than that the courts now afford every defendant the right to an attorney for appeals as well as for trials.

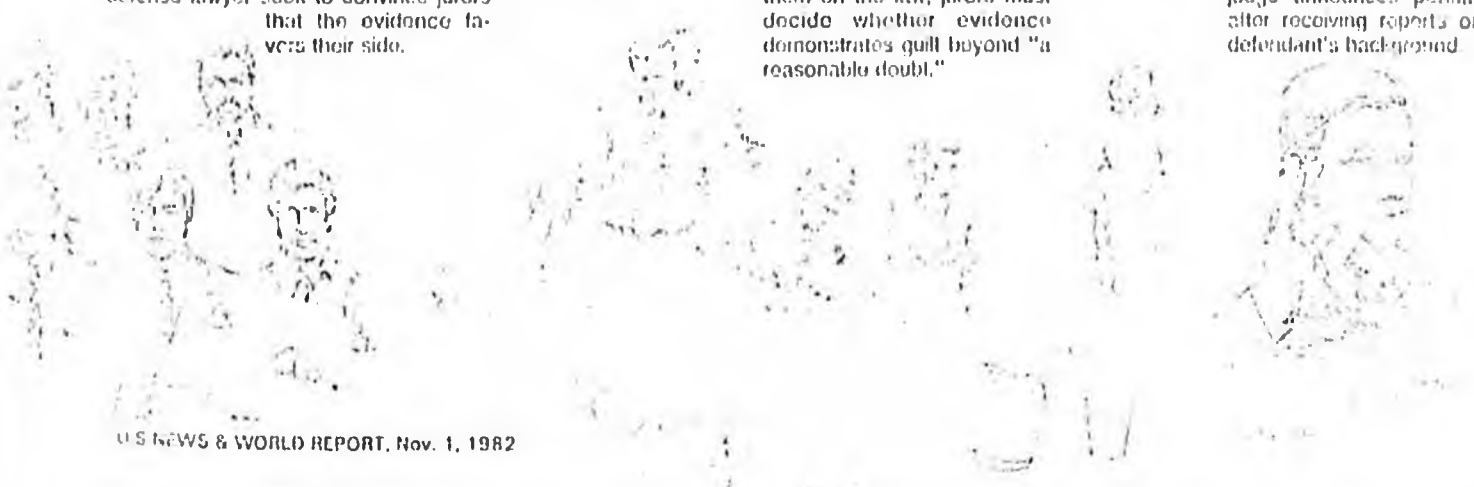
Defendants held in custody before their trials begin serving prison terms—if one is imposed—while the appeal is pending. Some of those who were out on bail before trial are locked up once the jury returns a guilty verdict, but many remain free until appeals are exhausted.

A person can seek reversal of a con-

Final arguments. Prosecutor and defense lawyer seek to convince jurors that the evidence favors their side.

Jury deliberates. After the judge instructs them on the law, jurors must decide whether evidence demonstrates guilt beyond "a reasonable doubt."

Sentencing. The judge announces penalty after receiving reports on defendant's background.





viction from the trial judge, then from an appeals court and then from the state supreme court. Separately, civil suits can be filed either in state or federal courts seeking release on the ground that a conviction was contrary to *due process of law*—a constitutional right not to be deprived of one's liberty except in accordance with fair procedures. These *habeas corpus* suits—a Latin phrase for "You have the body"—are sometimes taken all the way to the U.S. Supreme Court.

In appellate proceedings, no witnesses are called, and there is no jury. The judges simply review the transcript of the trial, read lawyers' briefs and listen to their oral arguments.

Posttrial maneuvering can drag on four or five years or even longer. A task force appointed by Atty. Gen. William French Smith reported in 1981 that "public confidence in the criminal-justice system tends to be eroded by a perception that the law allows a virtually endless stream of attacks on the conviction."

Appeals courts also come under attack for reversing criminal convictions on technical points. However, only a small percentage of guilty findings are in fact reversed.

Contours of a crackdown. Congress, state legislatures and the courts themselves have paid increasing attention in recent years to demands for criminal-justice reforms.

High on the agenda is speeding up the handling of cases. Chief Judge Lawrence H. Cooke of New York State, citing the dozen postponements that occur in the average criminal trial in New York City, has launched a crackdown on delays that he hopes will be a model for the nation.

Declares Cooke: "Judges have got to stiffen up and not give in to the 'easy come, easy go' court system favored by the lawyers."

In 1974, Congress passed a law requiring trials within 100 days of a federal indictment; most states now have similar rules. But the defendant may give up his right to a speedy trial, hoping that a delay will benefit him or her. "Speedy-trial guidelines have had little impact because they are not enforced," says Alexander Aikman of the National Center for State Courts.

Reformers also want to clamp down on appeals. Among changes being considered in Congress and some states are limiting convicts' right to file *habeas corpus* suits and putting time limits on steps in the appeal similar to the speedy-trial laws now on the books.

Others would lessen the restrictions on what is admissible as evidence.

Alaska has eliminated plea bargaining, and some local prosecutors have curtailed the practice, especially for aggravated offenses.

Says Robert Macy, district attorney of Oklahoma City: "If the defense wants to accept my recommendation, fine, but I don't bargain."

Even so, few sweeping changes are likely in what have come to be regarded as basic American rights.

"Due process of law was the weapon used against arbitrary, capricious and unreasonable acts by government officials," declares criminal-law expert Isidore Starr. "It may permit some criminals to escape their just deserts, but it also protects the innocent. The principle should not be changed lightly." □

Our Rights in Court: How They've Changed

Americans accused of crime enjoy a wide array of legal protections rooted in the U.S. Constitution and the body of common law inherited from England.

These safeguards—interpreted, reinterpreted and amended over the decades by the courts, Congress and the state legislatures—"are extended to defendants not because we sympathize with their actions but because in upholding their rights we protect our own," says Judge Damon Keith of the U.S. Court of Appeals for the Sixth Circuit.

Still, there are sharp divisions over how broad these protections should be. Some critics assert that the courts have applied them so sweepingly that the legal system now favors defendants unduly.

For a look at key criminal-law issues and the debate over them—

No unreasonable searches. Since 1961, the Supreme Court has ruled in a series of cases that evidence obtained by police in violation of the Fourth Amendment cannot be used in court. To protect people against "unreasonable searches and seizures," the Constitution requires police to get a warrant from a judge before invading privacy in pursuit of evidence. The Justices have held that warrantless searches can be made only in connection with an arrest or when an object is in plain view.

Police officers complain that the Court has not provided clear and consistent guidance. For example, the Justices ruled that officers need a warrant to search containers in an automobile, and then just a year later reversed themselves.

Critics argue that evidence gathered in good faith should be admissible even if seized in violation of court-mandated procedures. Defenders of current law say this would spur undue intrusions on privacy.

Self-incrimination ban. The Fifth Amendment provides that a person cannot be compelled "to be a witness against himself." The Supreme Court ruled in the 1966 case of *Miranda v. Arizona* that before questioning suspects, police must tell them of their rights to remain silent and to have a lawyer present. Statements obtained under coercion were declared inadmissible, and some convictions have been overturned on this basis. Asserts Chief Justice Robert Donnelly of Missouri: "The *Miranda* rule is an example of tipping the balance in favor of the accused."

Proponents say the procedure keeps law officers from abusing persons in custody. "I wouldn't want to see the third degree come back," says one prosecutor.

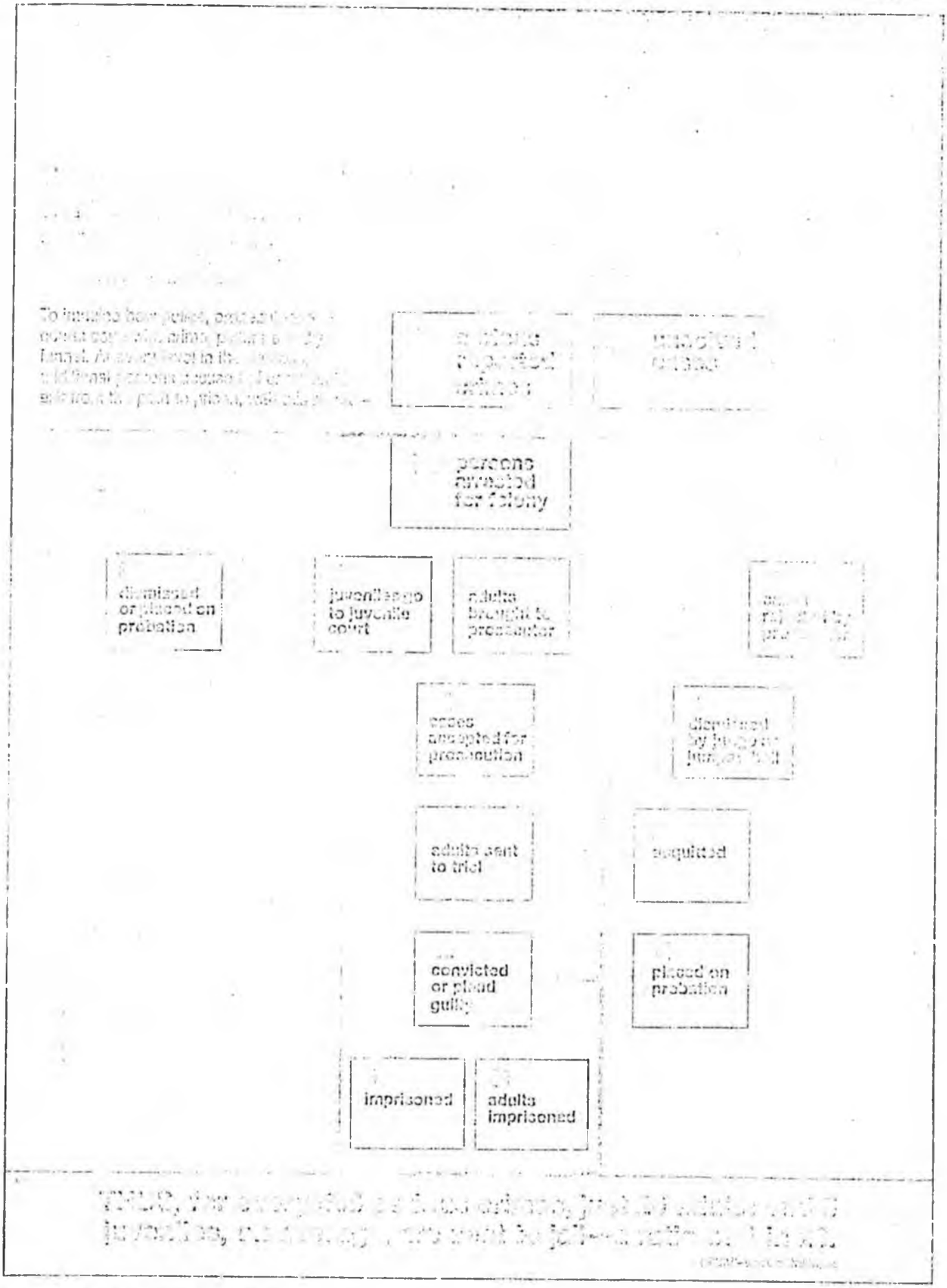
Presumption of innocence. Under English common law, accused persons are presumed innocent until they plead guilty or are tried and convicted. Traditionally, they were seen as entitled to release until trial unless there were grounds to believe they would flee.

Because many criminals often commit crimes while on bail, however, the trend in the U.S. has been to give judges the power to deny bail to suspects considered dangerous to the community. Civil libertarians oppose such "preventive detention" as contrary to the presumption-of-innocence principle.

Other defendants' rights—all widely accepted:

- The Sixth Amendment gives defendants the right to a trial "by an impartial jury."
- The Fifth Amendment prohibits double jeopardy—being tried more than once on the same charge.
- Under a traditional doctrine of adversary justice, witnesses may testify only to what they know first hand. Hearsay—secondhand information—is inadmissible because the other side cannot cross-examine the source.
- The self-incrimination ban also bars disclosing a defendant's criminal record to jurors unless he chooses to testify in his own defense.

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.


persons arrested for felony
dismissed or placed on probation
juvenile age to juvenile court
adults brought to prosecutor
cases accepted for prosecution
adults sent to trial
acquitted
convicted or plead guilty
plead on probation
imprisoned
adults imprisoned

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

Police Find Themselves in Double Squeeze

It's no wonder the forces in blue don't catch more crooks. Their budgets continue to get tighter and society keeps giving them extra chores.

For America's police, the rise of violent crime during most of the last two decades is only headache No. 1.

Police officers are expected not only to collar lawbreakers but perform a wide array of other community roles as well, from argument settler to dogcatcher. They are what one chief calls with pride, "do-everything guys."

Yet declining revenues and new federal priorities have caused many police forces to shrink even as population, crime volume and paper work swelled.

"Police work used to be a very comfortable world in which we did pretty much what we pleased," says Minneapolis Police Chief Anthony Bouza, a 29-year veteran of law enforcement. "But the pressure of street crime has changed all that and created heavy demands for improved performance."

To meet the challenge, a new breed of cop has emerged, far better trained than his predecessor of only 10 years ago. The language of police chiefs now includes such business-school terms as "cost analysis" and "managing by objective." The computer is becoming as standard a piece of police equipment as the .38 special.

The modern management techniques and new technology have been grafted onto what is probably the most decentralized law-enforcement network in the world, a jumble of overlapping jurisdictions.

Since the first full-time professional foot patrolman was assigned his beat in Manhattan in 1845, five levels of authority have grown up: Municipal forces, ranging from New York City's 23,351 sworn officers to any number of one-constable hamlets; county sheriff's units; state police forces, often dubbed "the highway patrol"; national-government agencies, of which the Federal Bureau of Investigation is only the best known, and many independent, specialized police units such as housing, transit and park police.

Illustrating the potential for chaos in such a system, an Encyclopaedia Britannica writer created a hypothetical European who is studying in California, picks up a young woman in Nevada, brings her back to campus and murders her. The investigation could involve university police, town police, a county sheriff's office, the FBI because the criminal crossed state lines, immigration authorities because the suspect is a foreigner and, if the woman used drugs, narcotics agents.

The sheer numbers of police units in the U.S. boggle the mind. The FBI receives annual crime reports from more than 15,000 units large enough to keep such data. In addition, there may be as many as 3,000 smaller forces. At the federal level, there are armed law-enforcement and investigative officers operating in more than 100 agencies.

Where most Americans live and work, though, the backbone of law enforcement is the local cop, who represents the overwhelming majority of the estimated 490,000 sworn full-time peace officers on duty nationwide. Affirmative-action efforts have brought women into law enforcement in recent years, but 95 percent of U.S. police officers are male.

Many people think of police work as highly dangerous, and there is no doubt that it can be fatal—about 100 police officers die each year in work-related incidents. Still, the law-enforcement death rate is about half that among construction workers, miners, farm laborers and firefighters.

Police careers would be riskier if officers spent all their time patrolling the streets and answering crime-in-progress reports. In all forces except the smallest, however, there are other specialties to be staffed, among them traffic control, detective work, bomb disposal, SWAT commando-type operations, juvenile delinquency, records and communications.

New York officer on his beat. Pressures on police are mounting.



The Washington-based Police Executive Research Forum has found that, as a nationwide average in towns of 50,000 population or more only 45 officers are actually on patrol in the streets out of every 100 on duty at a given time.

Crime time. Other studies have shown that police officers now spend only about 15 percent of their time dealing with crime. Rival demands vary from filling out reports to handling complaints about uncollected trash and answering medical-emergency calls.

Police always have had to juggle such diverse duties. But only recently have they had to contend with the shrinkage of budgets that has come with economic recession, reduced federal aid—including abolition of the federal Law Enforcement Assistance Administration—and, in some instances, voter-demanded cuts in property taxes.

New York City's force declined from 27,632 sworn officers to 23,351 over five



Maryland State Police unit evacuates an injured person; patrolman writes a traffic ticket. Police are only part-time crime fighters.

years. Philadelphia, Los Angeles and Boston have all lost personnel, while ever sprawling Dallas has 1,990 officers, only 22 more than in 1977.

The average-sized U.S. force decreased by nearly 8 percent between 1978 and 1981—from 130 to 120 employes. The rate of serious crime rose by 22 percent in approximately the same period.

The upshot: Hassled cops made arrests in only 19 percent of the 13 million-plus incidents of violent crime and serious property theft last year. In 4 out of 5 cases, the culprits never encountered a prosecutor, let alone a jury or a jail. The wheels of justice had no chance to grind.

Although serious crime dropped by 5 percent in the first half of 1982, the rate remains so high that in high-crime urban areas most reports of lesser offenses are filed and forgotten. There aren't enough officers to investigate them all.

What's more, prosecutors throw out a substantial number of arrests for lack of evidence. Traditionally, police officers have been rated on the number of "collars" they make—not on whether the charges can be made to stick.

Assembling a prosecutable case takes skill and perseverance that not every officer has. Studies have shown that 15 percent of the typical force makes more than half of the arrests that lead to convictions.

New breed. Despite the array of problems facing them, police leaders in many areas are upbeat about the future.

One reason for the optimism, says Chief Kenneth Medeiros of Bismarck, N.D., a 22-year police veteran, is that "the level of intelligence, education and professionalism has risen in the police community. And the screening process has improved. Gone is the day when you'd line up the applicants, look for the biggest, meanest one and give the badge and gun to him."

In 1969, only 10 states required even minimum training for police recruits. Today, all do so, with at least 120 hours of basic training mandatory everywhere and much more in some states. Course topics showcase the changing demands of police work: Crisis-intervention methods, criminal law and job-stress problems.

Even newer is a drive to make high-quality work uniform throughout the country by offering a seal of accreditation to forces that qualify. Sponsored by top police-leadership groups, the Washington-based Commission on Accreditation of Law Enforcement Agencies is field testing about 1,000 procedures. The guidelines deal with subjects such as collective bargaining with increasingly militant police unions, working with prosecutors and the courts, and minimizing use of deadly force.

The police-brutality issue is a source of strain in many departments. The Justice Department gets more than 10,000 complaints annually of officers killing or beating someone without sufficient cause, of which as many as 100 are serious enough to warrant federal prosecution. Others are charged in local courts or named in lawsuits that at times lead to big damage verdicts.

Law-enforcement leaders insist that the brutality problem is waning. Whether this is true or not, a warier breed of cop clearly has come on the scene. In Passaic Township, N.J., for example, police videotape booking procedures—and let the suspect know it. Several officers record all potentially tense street encounters with pocket tape recorders. "In many places," comments Passaic Chief Howard Runyon, "people sue the police for just no reason. In our area, the police are starting to sue such people back."

Police work is being strengthened by use of computers for paper work and by division-of-labor cooperation among neighboring outfits. A small-town unit might patrol on its own but use the sheriff's computer and ambulances.

Above all, however, law officers are striving to revive the police-community working partnership that preceded the crumbling of the inner cities and the shift from foot patrols to squad cars that occurred in the 1950s and 1960s.

"Not our job alone." In towns small and large, citizens are being asked to be the eyes and ears of the law—individually or through watch groups—and to look out for each other as well. One example is the growth of telephone networks among senior citizens. Says Bismarck's Medeiros: "We're going back to the public and saying, 'Look, folks, this is not our job alone. We're the professionals, but you've got to help.'"

Police are seeking to re-establish themselves in community life, aiming, as Houston's Chief Lee Brown puts it, "to utilize the concept of the foot patrol in a motorized way." Houston, like some other municipalities, is decentralizing its force, giving patrol officers long-term assignments to particular neighborhoods and requiring them to bone up on local problems and build a network of contacts.

Leaders of law enforcement say a start has been made toward blending new techniques and old-time enthusiasms.

Yet the outlook remains uncertain as the modern cop struggles to be crime-fighter, watchman, psychologist and "Mr. Fix-It" all wrapped into one—while the police share of public revenues grows smaller and smaller. □

The Prosecutor in Action Behind the Scenes

Most district attorneys are the courtroom crusaders they are depicted to be. But the job has another side that the public knows much less about.

The nation's prosecutors, stung by charges that they bargain justice away in the back rooms of the courthouse, are experimenting with new ways to crack down on criminals.

These 18,000 lawyers perform one of the most powerful, but least visible, roles in the justice system. As Prof. James Vorenberg of Harvard Law School puts it: "The fate of most of those accused of crime is determined by prosecutors, but typically this takes place out of public view."

Although the arrests police make and the sentences judges impose get most of the attention, it is the prosecutor who decides which cases go to court and what law violations are cited.

Grand juries—citizen panels that review criminal cases before they are filed—evolved centuries ago as a check on prosecutors' authority. But they rarely have served that purpose well and nowadays are used routinely in only half the states.

Violations of federal law range from such white-collar crimes as tax evasion, fraud and bank embezzlement to drug peddling, kidnapping and racketeering. These infractions are prosecuted by 94 U.S. attorneys around the country—appointed by the President—and by 1,900 assistant U.S. attorneys and nearly 400 Justice Department lawyers, who are based in Washington, D.C.

But most offenses, from murder and other violent crimes to shoplifting, are prosecuted in state courts by state's or district attorneys, who are elected by the voters.

DA's are the most political figures in law enforcement. The job sometimes is a springboard to higher office and just as often is fought over by rival political factions determined to prevent investigations of themselves or their allies. "The biggest myth about prosecutors is that they charge people for malicious reasons," according to Dean John Jay Douglass of the National College of District Attorneys. "I'm more concerned about what they don't do—by failing to investigate or dismissing cases—than what they do."

Of the some 2 million serious criminal cases filed each year, not 1 case in 5 actually goes to trial. The others end in dismissals or guilty pleas. Critics charge that prosecutors all too often settle for pleas to lesser charges than the offense warrants.

Typical case: A mugger gravely injures his victim and is charged with both robbery and assault. A prosecutor agrees to drop the assault count if the suspect pleads guilty to robbery. That avoids a trial but also reduces the maximum penalty—a result that may anger crime victims and others.

For their part, many prosecutors assert that the large volume of cases leaves them no choice but to plea bargain in many instances. Other DA's say plea bargaining is appropriate only if a prosecutor discovers that he can't prove an initial charge. "The public has the notion that prosecutors are giving away the store, but it's not true," says District Attorney Edwin Miller of San Diego. "And if anyone does go too far, he must answer to the voters."

The public image of prosecutors is largely shaped by television programs and the movies, in which they are portrayed battling defense lawyers in court. That is part of their job, but most of their work is behind the scenes, overseeing the gathering of evidence.

In the past, district attorneys often waited for police to come to them with proof of wrongdoing. Then they reached a decision on whether a case was worth taking to court.

Today, prosecutors increasingly instruct detectives on what evidence is needed to win in court. In complex cases, they supplement police with their own investigators. Says Los Angeles County prosecutor John Van de Kamp: "We can't rely totally on police. We end up picking up the ball in many cases."

Target: The hard core. Simultaneously, district attorneys are stepping up their efforts against "career criminals"—those with long records who commit numerous crimes.

It used to be that chronic criminals often were out on bail committing new offenses while their cases moved slowly through the courts. This still happens sometimes, but prosecutors these days tend to assign such cases to their best aides, with instructions to handle them promptly. "We're getting these cases to trial within two months," says District Attorney Harry Connick of New Orleans, who adds that the pursuit of repeaters is prompting judges to impose stiffer penalties.

Prosecutors also are addressing the long-neglected problems of victims and witnesses. As cases are delayed time and again—often on the day they are scheduled for trial—witnesses and victims who have dutifully reported to court sometimes become frustrated and refuse to participate further.

To avert this, many prosecutors have set up units to inform those interested in a case of its progress. Some DA's also listen to the victim's version of a crime before making a plea agreement with a suspect. "Prosecutors are becoming champions of victims' rights, and our image is improving," says Louisville prosecutor David Armstrong.

While these and other techniques are making life tougher for criminals, prosecutors are sure to remain under fire.

Comments State's Attorney Andrew Sonner of Montgomery County, Md.: "In this job, your enemies accumulate. You investigate someone; you refuse to fix parking tickets; police object when you charge them with brutality. Prosecutors will always be under pressure." □



ILLUSTRATIONS BY JEAN PALMS

A big part of prosecutors' work is outside court, supervising gathering of evidence.



Jury System Not Perfect, But It Works

The ordinary citizens who decide guilt or innocence get high marks from most experts. Still, they're being put under closer scrutiny than ever.

Despite scientific "proof" that it cannot fly, the bumblebee does. So, too, the jury system: By logic, it shouldn't deliver justice, but it usually does.

"Why should anyone think," asks former U.S. Solicitor General Erwin Griswold, "that 12 persons brought in from the street, selected, in various ways, for their lack of general ability, should have any special capacity to decide controversies between persons?"

Yet much more often than not, most observers agree, when jurors are left to apply their experiences and common sense to the evidence presented to them, they render as impartial a brand of justice as is humanly possible.

Trial by jury is guaranteed by the Sixth and Seventh Amendments to the Constitution. But the system isn't frozen in an 18th-century mold.

A growing reform movement is easing many strains, helping to bring "12 good men and true" into the modern era.

Jury service can be an ordeal. Jurors must endure a tedious and intrusive selection process, sit bemused by lawyers' legerdemain and benumbed by judges' hocus-pocus, and then somehow sift the facts and return what may well be an unpopular verdict.

More than 3 million citizens a year are summoned for jury service. Some are on duty for several months, but the trend is toward the so-called one-day, one-trial system: Jurors who aren't selected go home after one day; those who are chosen serve for just one trial.

The old key-man system of calling only community leaders has been largely abandoned in favor of random lists compiled from voter and tax rolls, telephone books and car registrations. Many potential-juror lists are computerized, but some counties still draw numbers out of a barrel.

Not always a dozen. The number 12 is no longer sacrosanct in civil cases. As few as six jurors now are used in many trials, and 31 states allow less-than-unanimous verdicts.

The citizens summoned are, in a sense, on trial, not for any crime but for their attitudes and prejudices. In what is known as voir dire—old French for "to say the truth"—jurors not accepted by the prosecution or the defense are excused either for cause, or without explanation, up to a limit.

In these choices, lawyers long have relied on ethnic stereotypes and seat-of-the-pants hunches to a degree. Today, however, the emphasis is on more-sophisticated selection techniques.

Firms that specialize in jury research for lawyers use such tools as "micromomentaries," fleeting changes of expression that indicate whether a potential juror is telling the truth; "alpha factors," which indicate juror assertiveness, and trick questions to spot hidden biases.

Elaborate shadow juries, chosen for their similarity to the real jury, observe the trial and each night feed back their impressions to the lawyers trying the case.

Lawyer Robert F. Hanley says simulated opening arguments before surrogate jurors helped win a 1.8-billion-dollar antitrust judgment in 1980 for his client, MCI Communications Corporation, against AT&T. The award was the largest antitrust jury verdict in U.S. history. Hanley and associates honed their case by watching the practice jury deliberate behind a see-through mirror.

Research for the rich? Many lawyers see jury research as just another aid to winning cases.

But critics say all the psychological poking into jurors' backgrounds invades privacy, smacks of unconstitutional manipulation of the justice system and, because of the costliness of such a process, tends to favor the richer side in a dispute.

What's more, jury selection now can take almost as long as the trial itself. In one California murder trial of three defendants, it took five months to question more than 250 potential jurors in a screening that filled more than 18,000 pages of transcript. The trial took seven months.

Jurors' ability in complicated cases to understand the issues and render intelligent and impartial verdicts is increasingly being called into question. In England—the birthplace of the jury in the Middle Ages—and in many other countries juries have been abolished in most civil cases for this reason.

The Supreme Court so far has refused to decide whether some cases are too complex to be decided by a jury. But Chief Justice Warren Burger has commented that "it borders on cruelty to draft people to sit for long periods trying to cope with issues largely beyond their grasp."

Other experts are not so sure. "We currently know little about the capacity of juries to evaluate rationally the evidence in complex cases or about the capacity of judges to do the same," says Richard Lempert of the University of Michigan.

In their classic study, *The American Jury*, Harry Kalven, Jr., and Hans Zeisel of the University of Chicago found that in about 80 percent of the criminal and civil cases examined, judges agreed with jury verdicts. In civil cases, juries were only slightly more generous with damage awards than judges.

Unpopular jury verdicts, such as the insanity acquittal of John W. Hinckley, Jr., President Reagan's assailant, fuel critical scrutiny of the system by the public and press. Nonetheless, an abiding, almost mystical faith in a jury of one's peers is deeply rooted in America. In the words of the late Judge Frank W. Wilson of the U.S. district court in Chattanooga:

"For centuries now, the institution of the jury has helped assure English-speaking people all over the world that they got the kind of justice they wanted, and not just the sort of justice that the experts thought was good for them." □

Getting Onto the Bench

Judges, who serve as the conscience of the justice system—setting its tone and shaping its ground rules—typically reach the bench with a helping hand from politicians. But once installed, they are hard to dislodge.

At the federal level, the 132 appeals and 515 district-court trial judges are nominated by the President and must be confirmed by the Senate. Most are recommended by home state senators, who if they are of the President's party have what amounts to a veto over nominees.

After clearing these hurdles, a federal judge acquires unique job security. Only impeachment and conviction by Congress can remove him—a rare event that has not occurred since 1936. A 1980 law increased the judiciary's power to discipline its members through such steps as suspending a judge's right to hear cases. The power of federal judges is broad: The Supreme Court reviews fewer than 1 percent of their rulings.

In the states. Selection and duties of the 26,000 state and local judges vary widely. All states have supreme courts, 30 have intermediate appeals courts and all states have trial courts. Most cities have courts limited to city-law infractions, mostly traffic cases.

When the nation was founded, most state judges were chosen by governors or legislatures. But by the 1830s, says Larry Berkson of the American Judicature Society, "people resented that property owners controlled the judiciary."

In the decades that followed, most states made judgeships elective and many judges soon came under fire as "political machine" candidates. States then began shifting to merit systems in which judges are chosen by governors but go before voters periodically for a yes-or-no vote.

Today, judges are elected in about two thirds of the states, and appointed in the remainder.

Although all states have agencies to discipline misbehaving judges and recommend removal in extreme cases, it usually takes blatant or repeated wrongdoing before a judge is ousted.



Corruption Is Still a Fact of Life

A cop on the beat palms an apple from a grocer's bin. A prosecutor snares a campaign donation by ignoring evidence of a politician's crime. A judge pockets a bribe to let a defendant off easily.

Despite the rectitude maintained by the majority of public servants, corruption small and large does reach into the justice system at times.

Police. From every sign, the problem is greatest with the police. Patrol officers and detectives come into daily contact with the seamy underside of society, where the itch to make a fast buck can be contagious.

A drug dealer caught with his merchandise, for example, might offer officers valuable narcotics under the table not to book him. More often, the effort is to buy permanent insurance against arrest. The Mafia and other organized-crime elements try to shield their gambling, drug-selling and prostitution rackets by putting cops "on the pad" for regular payments.

This type of police corruption—an old story in the big cities of the East and Midwest—now is a growing concern in the Southeast, where a flood of illicit drugs is coming into the country.

In perhaps the most thorough probe of police wrongdoing ever, conducted a decade ago in New York, the so-called Knapp Commission found "corruption to be widespread." The panel described two kinds of violators: "Meat eaters," who "aggressively misuse their police powers for personal gain," and "grass eaters," who "simply accept the payoffs that the happenstances of police work throw their way."

In a Yale University study of police officers in Boston, Chicago and Washington, D.C., about 20 percent were seen breaking the law or admitted that they do so. Typical offenses: Accepting money or goods from a business in exchange for better protection and overlooking minor infractions; taking bribes to void traffic tickets.

Judges. Like the police, judges can use their power for personal gain. In one recent case, a Washington, D.C., judge was found guilty of accepting free moving services from a firm after dropping hundreds of traffic tickets the company had accumulated.

Peter Coruzzi, a New Jersey trial judge, recently was convicted of receiving $22,000 in bribes for releasing one convict from prison and giving another probation instead of a jail term. Coruzzi was sentenced to five years in prison after the verdict, which he is appealing.

Improper influences can creep into judges' lesser duties, too. State judges often must run for re-election, and much of their campaign aid comes from lawyers who expect in return such favors as allowing them delays in filing court papers.

Prosecutors. State's or district attorneys, themselves elected officials, also can be tempted to breach the law for money or political favors. They have wide discretion in pressing—or dropping—investigations, and most of the decisions they make are not put on the public record.

How common abuses of this power are, no one knows, because prosecutors' decisions are seldom probed. Occasionally, wrongdoing comes to light. In one case, a Michigan prosecutor was convicted of embezzling money allocated for paying informers and using it to buy a house.

Corrections officials. Prison guards and probation and parole officers are subject to bribery attempts by inmates and others wanting special privileges. In Westchester County, N.Y., two state-prison employes pleaded guilty in mid-1982 to taking bribes for permitting drugs behind bars.

Law-enforcement authorities have stepped up efforts in recent years to clean up corruption within their own ranks. A special staff of the New York state attorney general's office has successfully prosecuted several hundred police officers and other justice officials. The U.S. Justice Department's public-integrity section has pursued charges of corruption in law enforcement around the country since 1976.

The result: Most experts believe there is less crookedness in law enforcement today than in the past. Yet with power spread so widely, corruption will never be stamped out entirely. □

Get-Tough Approach Makes a Comeback

Judges are handing out stiffer jail terms these days, but that is no panacea: Prisons already are overflowing and there is no relief in sight.

Lock 'em up and throw away the key!

Crudely put, that increasingly is the rallying cry in an America fed up with violent crime.

The idea that criminals can be reformed into law-abiding citizens is waning after holding sway for almost a century. Edging it out is the urge to punish for the sake of punishment.

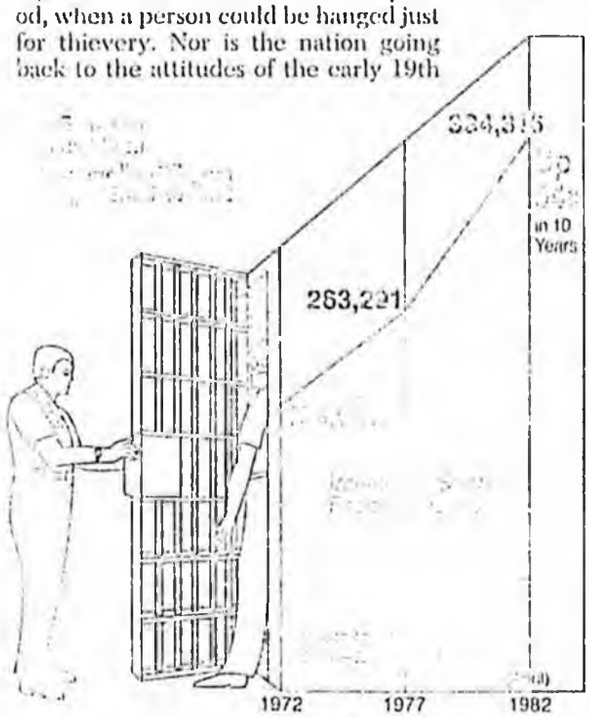
Legislators in state after state, angered by the many ex-convicts who return to crime, have been enacting mandatory prison terms. Judges are handing out longer sentences on their own. "There's a lot of pressure to make the system swift and harsh," says criminologist Sheldon Messinger of the University of California.

The result: America's prisons are bulging with nearly 400,000 convicts, double the total of a decade ago. The U.S.—with one of the world's highest rates of violent crime—also has one of the highest incarceration rates.

No one suggests the country is returning to the harshness of the colonial period, when a person could be hanged just for thievery. Nor is the nation going back to the attitudes of the early 19th century, when Americans invented the penitentiary and, in the words of Thomas Murton, a former Arkansas prison warden, "It was assumed that there was an equation between sin and crime. . . . Inmates were isolated to reflect on their evil deeds until they became converted."

Still, the mood today has more in common with the 1700s and 1800s than with the first two thirds of the 20th century, when "rehabilitation" was the gospel of penologists. That school became entrenched between 1900 and 1920 as most states created systems of probation and parole. Even now, despite the crackdown, these systems supervise three fourths of the 2 million persons under a judge's sentence.

Instead of serving time behind bars, offenders on probation or parole hold jobs or go to school while reporting periodically to a court official. The reasoning is that this helps them adjust to society's pressures and makes them less likely to return to crime than would spending idle time in prison with hardened criminals.



Probationers avoid prison altogether. Parolees are released early; to ease their transition to normal life, many live for a while in halfway houses in residential neighborhoods. Those caught breaking the law or associating with ex-convicts usually are sent back to jail, and may forfeit a chance for such special treatment again.

Studies show that up to 25 percent of probationers and parolees are arrested for new crimes. Defenders of the rehabilitation concept see that as a tolerable success ratio. Critics see it as proof the system is still too lenient.

As for lawbreakers who do considerable jail time, only a small fraction get much job training or education while behind bars. Most prisons do not provide much of either, and many prisoners are not interested in conventional forms of self-improvement, anyway.

Many inmates are in no sense rehabilitated when they leave prison. Recidivism—crime by former convicts—cannot be measured precisely, but it is substantial. The New York-based Criminal Justice Institute reports that about one third of prisoners have served time previously. But some experts believe the true rate of repeat criminality may be 70 percent or more. What the official figures do not show is how many persons return to crime after one conviction but are never caught again.



Arkansas inmates on the "hoe line." Rehabilitation is giving way to punishment more and more.

Increasingly, the view of many judges and other experts is that the best way to cope with recidivism is simply to keep criminals in prison—and off the streets—longer.

Yet there continue to be widespread disparities in sentences. Because each of the country's 28,000 judges has his own idea of justice, of 3 persons committing similar offenses, 1 may be put on probation, another may get a short prison stint and the third a long stay in custody.

In many states, stretches in prison vary by location. In a city where robberies are common, a judge might send an armed robber away for 10 years; the same crime occurring rarely in a rural area might bring 35 years.

Such apparent inequities feed public cynicism and exacerbate prisoners' feelings that the world is stacked against them—feelings that can explode in more antisocial acts later on.

Polls consistently find that Ameri-

cans believe the courts are too lenient in imposing sentences. Judges respond that the public typically knows only the facts of a crime and that jurists, in setting a penalty, must also take into account reports prepared by court officials on defendants' backgrounds.

Propelled by public indignation, many state legislatures in recent years have narrowed the discretion permitted judges and parole boards. Nine states have adopted so-called determinate sentences, which specify in advance the amount of time to be served and bar early release. Another approach, sentence "enhancement," used in 46 states, requires judges to give longer terms to repeat offenders. In some jurisdictions, an extra penalty also attaches to the use of a gun in a crime.

Two states, Minnesota and Pennsylvania, have adopted sentencing guidelines that tell judges what penalty to impose based on facts about the crime and the defendant.

Nationwide, partly as a result of such laws, the average time that convicted felons spend behind bars has risen to 26 months. That average would be longer if more cells were available. But lengthened sentences and stepped-up prosecutions have crammed prisons to overflowing. Parole boards must serve as a "safety valve" at times—releasing inmates early just to make room for new prisoners.

Accordingly, most inmates do far less prison time than what is announced by judges. In many states, one third of a term is routinely chopped off if a prisoner commits no serious infractions while in custody. When other credits are taken into account—such as subtracting time spent in jail awaiting trial—a person with a "life sentence" can be free in less than 10 years.

Bed check. About 90 percent of today's 400,000 prison inmates are in state institutions; the remainder are in federal lockups. Based on the view of corrections experts that inmates should have 60 square feet of space each, the nation's prisons are overcrowded by more than 100,000 persons.

That doesn't even count the 90,000 inmates serving one year or less in local jails and some 70,000 suspects housed there while awaiting trial.

Congestion and other poor conditions have prompted courts in 31 states to order prison improvements. But efforts to keep up with the inmate surge are falling short.

The 90,000 cells either under construction or on the drawing boards will not be enough to accommodate newly arrived prisoners, let alone to reduce overcrowding. Occupancy in what one defense lawyer calls "the crossbar hotel" jumped in 1981 by 40,000—more than 12 percent.

Providing adequate prison space would cost several billion dollars, and there's no sign that either legislators or the voters are willing to foot the bill. A Gallup Poll shows that 57 percent of Americans think their states need more prisons, yet only 49 percent would raise taxes to pay for them.

Fingering "heavy hitters." Many experts doubt that the answer to the crime wave is more prisons, anyway. They say what is needed is a more coherent sorting out of who should be sent to prison and who should not be. "We must make sure that the heavy hitters go to prison but that the lightweights get probation," declares Brad Smith of the National Council on Crime and Delinquency.



Louisiana's electric chair.

Some criminologists believe the stiffest sentences ought to go to persons who have the earmarks of "career criminals." Such things as a history of drug abuse, juvenile delinquency and a poor employment record suggest a likelihood of future lawbreaking, they say.

Criminals who were considered to be better bets for rehabilitation would be placed on probation, which costs only one tenth of the more than $10,000 needed to house a prison inmate for a year.

Critics of this approach argue that no one can accurately predict a person's behavior and that to base sentences on sociological theory is unjust. They contend that respect for the law is undermined unless people are punished evenhandedly for their infractions.

Rehabilitation efforts have not been abandoned. Prison-industry programs are being expanded so that at least some inmates can repay more of the costs of their care and possibly provide restitution to their victims. Even so, many convicts emerge from the penitentiary more disposed than ever to commit crime.

Experts predict that the moves toward more punitive sentences and better rehabilitation opportunities will continue simultaneously, limited by the tax money available.

"Legislators are coming up with patchwork solutions to sentencing," says Robert Cushman of the Sacramento-based American Justice Institute. "They want to banish criminals, but they don't want to pay for it." □

The Legal Logjam On Death Row

Opinion polls show a majority of Americans believe that murderers—in extreme cases—ought to be given a dose of their own medicine.

Yet few of the more than 1,000 persons under sentence of death are likely to be executed soon. Because of fierce legal wrangling, no more than five death-row inmates have been put to death since 1967.

Capital punishment has had a checkered history in America, starting in colonial days when a number of crimes ranging from murder to witchcraft were hanging offenses. In the late 1960s and early 1970s, various legislatures abolished the death penalty as being too harsh. But by the 1980s, many states had restored it, and for a time almost 200 were being executed each year.

In the 1960s, the civil-rights movement was galvanized into action by evidence that blacks were being executed more often than whites committing similar crimes. A legal attack was launched, and in 1972 the Supreme Court held that Georgia, which alone has accounted for nearly 10 percent of the 3,530 U.S. executions in the last 50 years, had violated the Constitution's ban on "cruel and unusual punishment." The ruling struck down all state death-penalty laws.

Though the justices split in this and later cases, the majority holds that the death penalty is constitutional if imposed in a consistent and nondiscriminatory manner for truly heinous crimes.

At present, there is no federal death statute, but since the Court's ruling, 37 states have adopted new laws allowing capital punishment for murder. Some also permit it for aggravated rape or kidnapping.

Death-row inmates seek to prove that even the revised statutes are unfair. Many prisoners' appeals, however, are expected to be exhausted in a few years—perhaps unleashing the biggest round of executions in a half century.

In Prisons, the Pendulum Is Even Headed Worse

Loss of freedom, overcrowding, bad food and dangers behind bars make convicts angry at society. But a close-up look at two prisons shows how improvement of conditions can dampen resentments.

WARTBURG, Tenn.

The man who murdered four people in what he calls "a small reign of terror" has a key to his own cell.

The man who blew off his neighbor's foot and then bashed him in the face with a shotgun butt is treated with respect by his guards.

The man who burgled pharmacies to get drugs can gripe about prison life, and the warden listens.

Here, in a green valley hugged by the high hills of East Tennessee, is the Morgan County Regional Correctional Facility. If there could be such a thing, this would be a prisoner's paradise.

Hell is on the other side of the mountain, a fortress of stone and steel called Brushy Mountain State Prison. The two penitentiaries are just 2 miles apart as the crow flies, 9 miles by winding country road and half a century in terms of how criminals are treated.

There are murderers, rapists, thieves and child molesters in both facilities. Yet one offers a modicum of hope that some criminals can be rehabilitated. The other is simply a place for punishment.

"Brushy," as the convicts call it in tones of awe, looks, smells and feels like a zoo for humans. Behind its 20-foot-high stone walls, topped with guard turrets, concertina wire and 2,300 volts of electricity, are cells in use that, though soon to be improved, have been ruled unfit for human habitation by a state judge. A visitor is led under close escort through cellblocks, shoes crunching scraps of food that the prisoners have tossed onto the corridor through their steel-barred doors. Kept paired in narrow cells stacked four high on each floor and reached by catwalks, men bear the marks of close confinement—nearly every one has a black eye or a puffed lip, cuts, bandaged hands or crude jailhouse tattoos. They look at the passing entourage in the manner of caged creatures, with flat, blank stares or sidelong glances. Their silence is palpable.

Plotting in solitary. Only in the solitary block do the inmates show spirit. Here, seven men call out jeers about their starchy dinner: Grilled cheese on white bread, corn bread, beans and slaw. An escort says that these men, all white, got a pistol into the prison and shot two black inmates to death last February. How they managed to get a weapon into a maximum-security prison is unknown. An official shrugs: "They've got hours and hours to sit there and outthink you."

Still, there has never been a successful escape in the seven years that Brushy Mountain has been a maximum-security prison. James Earl Ray, the assassin of the Rev. Martin Luther King, Jr., somehow got over the walls in 1977 and again in 1979 but was recaptured and finally transferred to the main state prison in Nashville. There are only a few ways out of Brushy: Die, do the time or do good.

With a record of good behavior, even a murderer in Tennessee may win transfer to a medium-security prison such as Morgan County, where most inmates are young first offenders serving time for nonviolent crimes.

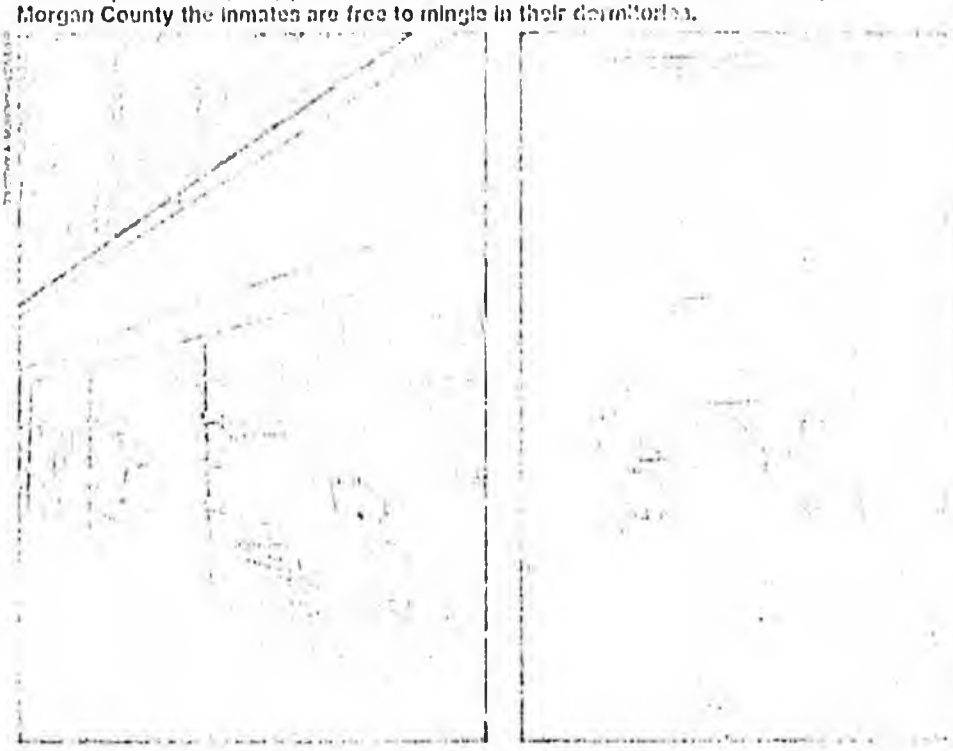
Campus life. From the road, the Morgan County prison looks like a high school with few windows. The warden, Otie Jones, likes to call it a "campus." Inside a 17-acre compound surrounded by a 10-foot-high chain-link fence and arranged in a circle are 16 dormitories that house about 25 men each. All but a few inmates have private rooms with toilet, washbasin, desk, wardrobe and bunk. They can lock their own rooms during daylight hours.

A man can better himself here—if he's ambitious and lacking in basic skills. There are classes that lead to a high-school-equivalency diploma. Also offered are state vocational-school certificates in welding, masonry, small-engine repair, building trades, plumbing and electricity, woodworking and food services. Correction Department officials say they have a good record of finding jobs for those who earn the certificates.

Still, the atmosphere of this institution reeks of servitude, not scholarship. To be inside the compound is to feel less than a man. The prisoners' rooms are hardly bigger than closets—7 by 12 feet—with bare concrete floors and cinderblock walls. At the dining hall, prisoners are given plastic forks with which to eat slabs of tough, unidentifiable meat. There are no plastic knives, the warden says, "because they just take them to their rooms to eat peanut butter."

Four times a day the men must stand like children for a head count, and be prepared to submit to a frisking at any time. There is a correctional officer for every four prisoners. Around the perimeter are three guard towers, each manned by an officer with shotgun, rifle and pistol. Outside

At Brushy Mountain, left, prisoners are locked two to a cell, while at nearby Morgan County the inmates are free to mingle in their dormitories.



the fence is a kennel with four bloodhounds. Most of the inmates pass their days at hard labor under armed guard, tending crops or chopping wood on the prison's surrounding 1,600 acres of farm and forest.

The effect of such a life is evident in the men's manner. And it is odd. Here are 421 hardened men, whose standing among fellow prisoners is based in part on dangerous misdeeds they committed on the outside and on their willingness and ability to fight for themselves on the inside. But faced with a visitor from what they call "the free world," they are diffident, uncertain, even shy. Handshakes are quick and soft; eye contact is brief.



Medium-security convicts at Morgan County work under armed guard to build a shed at kennels of bloodhounds used to track escapees.

Look at reality. To go among them is to lose some notions absorbed from TV cop shows and old James Cagney prison films. At this facility there is a degree of courtesy between guards and convicts, who sometimes exchange greetings and smiles. Convicts questioned say they accept responsibility for being jailed. Only once does an inmate approach a visitor with a tale of innocence: "Got me in here for six years for car theft and forgery, and that forgery charge is wrong because I can't read or write," says a wispy-thin youth with tears in his eyes. Then he adds, "I get out of here tomorrow. They're sending me to the nut house."

More common is the response of French Price, who says, "I should have gotten something for what I did." Price is serving a three-to-five-year term for what he did after, he says, a man tried to lure his daughters—then age 8 and 9—into a car. "I took matters into my own hands," says Price. "I went to his house and he opened the door and I shot him with a double-barrel shotgun. Blew his right foot off. His left calf, too. I wasn't drinking, wasn't trying to kill. I wanted him to suffer. He lay there on the porch and I smashed his face with the gun butt. His folks came out crying, and I said, 'Shut up or I'll shoot him again.' After he cried for a while, I told them, 'O.K., now you can call the ambulance.' Then I sat and waited for police."

In a stunned silence that meets this account, Price searches his cell for a petition for parole that he says has been signed by all the guards. It describes him as "mature, respectful and of a good nature. He does not cause any type of trouble and is not easily provoked."

Plenty of room. Violence, in fact, is rare at Morgan County because, inmates and the warden agree, it is not overcrowded. Designed to house 400 men, it seldom has more than 30 above that limit. In the two years it has been open, officials say, there has never been a knife fight. In early September a woman counselor here was held hostage for 6 hours by a prisoner armed with a sharpened nail fixed to a toothbrush handle. She was freed when tactical-squad officers burst into her office and overpowered the man, who is serving 20 years for murdering a little girl. A week later, the other prisoners were still gritting teeth over the incident: The counselor is popular, and baby killers and child molesters are outcasts in prison society. "We'd have stomped him," said one convict. The inmates say racial tensions are low and homosexual rapes just don't happen. "It's because there are no blind spots in this layout where they can grab you," says an inmate. "It's because I can put my thumb on the bullies," says Warden Jones.

The warden monitors prisoners' complaints through monthly meetings of the inmates' council, made up of one prisoner from each dormitory chosen by his peers. "But the most important things are ignored," claims a former council secretary, W. David Smithe. Among his gripes: TV reception is poor because the prison's antenna is too short to pull in signals over the surrounding mountains; prisoners suffer from gastrointestinal disorders because food trays are often dirty. The warden says he is trying to get cable TV, and a dishwasher will be used soon when a venting system can be installed.

"You want to know what it's like here?" asks Smithe, a burglar doing 10 to 18 years. "It's to become totally dependent again now you are an adult. From when and why you get up in the morning to when and what you eat, decision making is denied. You can't control your own health, your diet. In broad terms you are reduced to nothing.

"Not a moment here you don't feel some tension—a word, a glare, a move. You've got some primitive individuals here. Even if they're young, they're dangerous. It's a lie that prisons are schools for criminals, that a youth going in is learning to crack a safe. But what does occur is a learned willingness to commit crimes that were beyond you before prison. It's a state of mind that's learned. That's what makes people here dangerous."

The man with the most dangerous record here is Jim, who says, "I was an animal. I should have been executed."

Anonymity plea. Jim doesn't want to be further identified "because a certain community would scream if they knew I wasn't doing hard time." Kidnapping, armed robbery and two double murders in 1970 got him a 318-year sentence. With time off for good behavior, he jokes, "I'll get out in year 2121."

But Jim now is a model prisoner, cited by the warden as an example of how one with the right attitude can rehabilitate himself. While doing his time, he has accrued three years of college credits with a 4.0 average. He is writing a novel, working here as a teacher's aide and using his considerable wit to hold his classes' attention. Instead of teaching illiterates to read, "See Dick and Jane run," he offers lines like, "See Trigger Bates kick the warden."

His years behind bars have made him a jailspun penologist with an insider's view of how to rehabilitate criminals.

"Do contract sentencing," he argues. "Set goals for a prisoner when he comes in, that he will earn time off for getting so many years of education, for working in Alcoholics Anonymous, for self-improvement programs. Now you get good time for nothing, just for not making trouble. There's no incentive.

"We don't have prisons run by sadists," he says. "What we have are prisons run by people who are totally apathetic. The public must remember that 97 percent of all men who enter pens return to the free world. If we have guards calling us names, bad food, poor medical treatment, there's nothing we can do about it here. So when we get out, some innocent member of society suffers for the anger we bottle up in the pen. I came out of prisons in Indiana and Kansas truly vicious. I hated everybody and myself. I took off on a small reign of terror. That's why the free world should care about what happens here. Their lives will depend on it." □

The Nature and Pattern of a Lawsuit

For a look at a fast-growing American pastime: How litigation starts, what it costs, the tortuous trail it follows, the odds of winning—

"As a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."

The [illegible] fear that the revered Judge Learned Hand expressed 60 years ago is felt more keenly by Americans today than ever before—and no wonder.

The flood of lawsuits has swelled to a tidal wave in recent decades—more than 12 million suits now are brought each year. Awards in big personal-injury cases are scraping the sky—they jumped almost 25 percent in dollar volume in a recent 12-month period.

Some lawsuits involve billions of dollars; others, goals on which no one could put a price, such as custody of a child. Some suits seek damages for breach of a cut-and-dried contract; others attempt to salve wounded pride.

Lawsuits, fortunately, do not erupt every time someone gets mad. The vast majority of disputes are prevented, settled or resolved out of court.

Moreover, pressure is growing to minimize use of the courts for solving disputes, particularly those that once were settled through church, school and family.

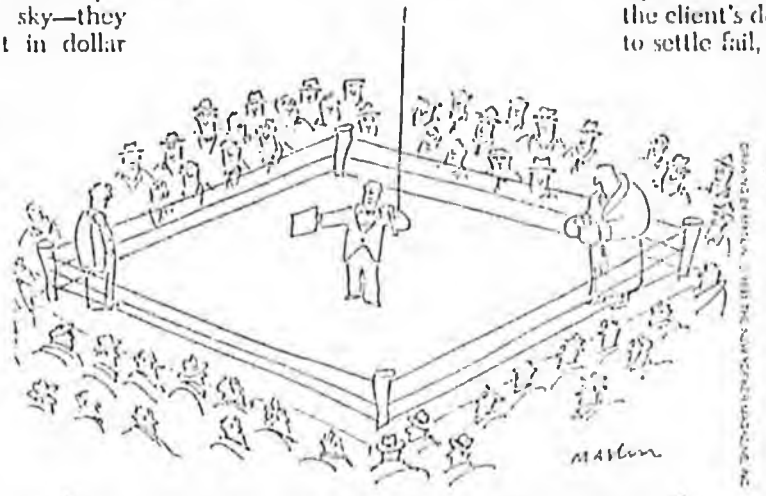
In fact, more than half of the lawyers in the United States rarely if ever set foot in a courtroom. Instead, they may advise corporate clients on tax and other business matters or negotiate sticky situations on their behalf. Many lawyers with individual clients also practice preventive law—preparing wills, trust and estate plans, and advising on financial strategies.

Yet many disputes cannot be prevented by wise planning or tightly written agreements. Planes crash, buildings collapse, and food spoils and poisons people.

New legal hot spots develop in response to changing times: The "palimony" suit against actor Lee Marvin a few years ago triggered similar suits by women who felt jilted by their live-in partners. Corporate marriages have spawned a "takeover bar" that thrives on the Byzantine intricacies of mergers and acquisitions.

Suits in the name of "the public interest" have made the courts a forum for solving a welter of social problems from discrimination to pollution.

"The litigation process was not originally designed to decide broad political questions [or] delicate balances in the allocation of scarce public money," notes Richard Neely, a justice of West Virginia's Supreme Court. He contends that courts often end up making public policy because legislators and bureaucrats all too often duck tough issues.



"In this corner, a man prone to costly and lengthy litigation."

Add to this burden the seemingly limitless spate of "silly suits"—by a schoolboy against the maker of a cookie that was hurled like a discus into his eye, by a wife against her husband for not shoveling snow off the sidewalk, by football fans against a referee's call.

A cause is born. Most lawsuits have their formal beginnings when a person goes to see a lawyer. Ethical standards bar lawyers from actively seeking out clients—so-called ambulance chasing. Lawyers who do so are subject to discipline by the courts, but advertising bans largely have been lifted, making it easier for a person with a legal problem to find a lawyer.

The lawyer either takes the case, explains why there may be no remedy or recommends another lawyer. A lawyer who passes a case on to another often receives a referral fee.

For many persons, the most painful topic during that first interview is not the private details that might have to be discussed—legally protected from disclosure by the doctrine of lawyer-client privilege—but the lawyer's fee.

Veteran practitioners typically demand $100 an hour on average. A day in court costs clients—for the lawyer alone—from $672 in the Northeast to $795 in California.

If the case involves a personal-injury claim, the lawyer will want a contingent-fee arrangement: One fifth to one half of the total money award off the top to him. If no money is received, no fee is paid. But costs of the suit, such as for investigators and expert witnesses and transcribing of testimony, must be paid by the person suing—usually on a pay-as-you-go basis.

Before a case is taken to court, a lawyer typically sends a letter or makes a phone call, vowing legal action unless the client's demands are met. If efforts to settle fail, the case enters the more costly litigation phase.

Most civil suits are filed in state courts. Cases go to federal court only when an issue involving the U.S. Constitution is at stake; when the federal courts are legally bound to take the case, such as with patents or bankruptcies; or when the dispute is between citizens or companies from different states.

First blood. The *plaintiff*, the party bringing the suit, makes allegations in a complaint filed with the court. To give a *defendant* notice and a fair chance to defend himself, a copy must be delivered to each defendant along with a summons, an order to appear in court.

A few states require that the summons be delivered in person. Others allow service by registered mail or legal notice in newspapers. *Long-arm statutes* allow a plaintiff who suffered a legal wrong in his home state to bring his case there rather than in the state of the defendant.

In that first volley, the plaintiff alleges that certain facts are true—for example, that the defendant's auto sideswiped his, injured him and kept him from work for two weeks—and asks for damages to pay for repairs and medical costs not covered by insurance.

In a *class-action suit*, a complaint is filed by one or a small group of persons on behalf of scores or even thousands of

prisoners, stockholders, bank customers or other classes of people with the same grievance.

For instance, 33 makers of corrugated-cardboard containers, who were sued in a flurry of class-action suits a few years back, agreed out of court to pay 325 million dollars. Their opponents, purchasers of their products, claimed they had conspired to fix prices. One firm that held out, Mead Corporation, was found liable and agreed to pay 45 million dollars.

The target of a suit has between 10 and 60 days, depending on the jurisdiction, to file an answer. Failing to do so probably will result in a victory for the plaintiff by default. The defendant also can allege new facts as defenses—for instance, that the plaintiff's speeding actually caused the accident.

In what is called *discovery*, the second stage of a lawsuit, the defendant has a chance to get even. The idea is to turn the contest from blindman's buff into a closer determination of the truth by giving both sides equal access to all of the facts in the case.

The discovery process often promotes out-of-court settlements because it lets parties assess the strengths and weaknesses of their case. Still, some lawyers play legal hardball with pretrial maneuvering, using it to shake their opponents' resolve.

Even in routine cases, there may be much out-of-court testimony. One side—or its witnesses—accompanied by lawyers, goes to the opposing lawyer's office, there to face a barrage of questions that can go on for days. A court stenographer and attorneys' objections to opponents' questions add to the tense courtlike atmosphere as these *depositions* are taken.

In addition, each side peppers the other with *interrogatories*—written questions—or requests for other evidence, such as documents or photos. Here, too, the timing and the scope of the inquiries can be used to tactical advantage.

As a rule, lawyers take the discovery process seriously and turn over even documents that might prove fatal to their case. They know that if they fail to do so, a court may fine or even jail their clients for contempt of court, dismiss a suit or declare a victory for the other side.

Pretrial discovery may take weeks, months or even years, and can add significantly to the length and expense of a lawsuit.

Courtroom crush. There were 205,000 civil cases pending in federal district courts in late 1982, or 399 per federal trial judge, while the median disposition time was 19 months for cases going to trial.

Litigation is even slower in the states. In only two of 32 courts studied by the National Center for State Courts did the median time from filing to jury trial take less than a year. Cases typically took much longer, up to a median time of four years and 135 days in Providence, R.I.

"When it takes four years to get to trial in a civil case, something is radically wrong," says California legal scholar B. E. Witkin. "No one who understands the system can say that it is operating in an efficient manner."

In both state and federal courts, some civil cases jump to the head of the line. Persons seeking emergency action to save a historic building or a rare tree from destruction, or prevent a board of directors from holding a meeting, or allow an election to proceed, ask the court to issue a *temporary restraining order* or an *injunction*. A court will grant the emergency relief if it is convinced that irreparable injury will occur otherwise and that any mon-

Only Trials? Not Every Time

Athenian elders in the time of Pericles, 2,500 years ago, arbitrated civil disputes. Today, clogged courts and widespread vexation over the expense and quality of the judicial system are prompting a second look at arbitration, mediation and other means of settlement.

In more than 180 programs in 50 states, trained mediators or ordinary people help fellow citizens solve their problems. Many issues are picayune, but others involve large sums.

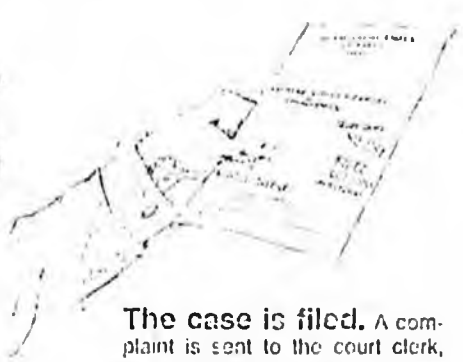
The Community Board in San Francisco trains and supports citizens' panels in several of the city's polyglot neighborhoods. Operating by consensus, the groups mediate neighbors' disputes, simple-assault cases, landlord-tenant issues and the like. The goal, says Director Ray Shonholtz, is to let



Seeing a lawyer. The client explains the problem. The lawyer takes the case, and they agree on a fee.



Getting tough. The lawyer explains his client's position to the other side in an effort to resolve the matter.



The case is filed. A complaint is sent to the court clerk, setting out the allegations, and the document is recorded.



Discovery. Before the trial, each side gathers facts and testimony from the other in transcribed sessions.

"Those who have the greatest stake in a case become directly involved in resolving it."

When a coalition of Colorado environmentalists challenged Homestake Mining Company's plan to mine uranium in Gunnison National Forest, long and costly litigation was avoided. Using the services of the Seattle-based Institute for Environmental Mediation, the two sides hammered out an accord.

In Cleveland, Chief Police Prosecutor José Feliciano set up a mediation program that is expected to handle up to 14,000 complaints a year in hearings conducted by specially trained law students. The program is aimed at the type of complaint that often is dropped by police because it does not meet legal standards or involves friction between close relatives.

New York State Chief Judge Lawrence H. Cooke notes that citizens believe there is more fairness in mediated cases than in adjudicated ones. In one study, 90 percent of defendants in mediated cases said they had a chance to tell their side of the story, compared with 40 percent in court cases, which are governed by much stricter rules of procedure.

Arbitration, a more formal method of dispute resolution in which the arbitrators' decision is binding, is gaining adherents. Chief Justice Warren Burger says arbitration "can cope more effectively with complex business contracts, economic and accounting evidence and financial statements."

Some federal courts have experimented with mandatory arbitration in certain cases in which damages sought are less than $100,000—an approach that Burger asserts "may reduce by as much as half the number of such cases that would otherwise go to trial."

Going private. Shaken by the high costs of litigation, corporations are turning to companies such as Endispute, Inc., to keep them out of court. The Washington, D.C., firm offers "dispute management" services.

One such method: A privately held minitrial, pioneered in 1978 in a dispute between TRW, Inc., and Telecredit, Inc. Lawyers for both sides presented a short version of the case before senior executives of both firms, who then settled their differences.

Another way to skirt clogged courts has been called "rent a judge"—paying a retired judge to hold a full-dress trial, the results of which can be appealed. Los Angeles lawyer Seth Hufstedler resurrected a long-forgotten state law allowing such jurists to hear cases with the consent of both parties. Other litigants have used the same law.

The practice has drawn sharp criticism. Robert Gnaizda, a partner in Public Advocates, Inc., a leading public-interest law firm in San Francisco, calls it "legal apartheid" that allows only wealthy litigants to buy a speedy—and private—solution.

ey that might be awarded if the suit is successful would not compensate for the damage.

At any time before trial, or even during or after trial, the parties to a civil lawsuit can settle. In recent years, *structured settlements* have become the vogue in personal-injury cases—a cash nest egg for the injured victim and attorney fees up front, then periodic payments for life, rather than just one lump-sum payment.

In one such case, parents of a 2-year-old girl who suffered extensive brain damage an hour after birth at Stanford University Hospital agreed in September, 1982, to what at the time was the largest malpractice settlement in U.S. history. Anna Cunningham will never walk, crawl, sit or feed herself, says her lawyer, James Bostwick, but if she reaches 78, her normal life expectancy, she will have received 122 million dollars in annual payments.

Only about 10 percent of cases that enter the litigation phase are tried. The others are dropped, dismissed or settled.

At last: The trial. Civil trials are similar to criminal trials. Prospective jurors are questioned, and six to 12 jurors plus alternates are empaneled. The plaintiff presents his case, with each witness being subject to cross-examination by the opposing attorney. Then the defendant does the same, both sides sum up their cases, and the jury deliberates after getting legal instructions from the judge.

As with criminal prosecutions, rules of evidence can play a large role in shaping the civil case, limiting the evidence to the best, most reliable and relevant information.

Although most civil trials last no more than a day or two, some drag on for many months, straining the stamina and the resources of the litigants and the ability of the judge and jury to sift out the truth.

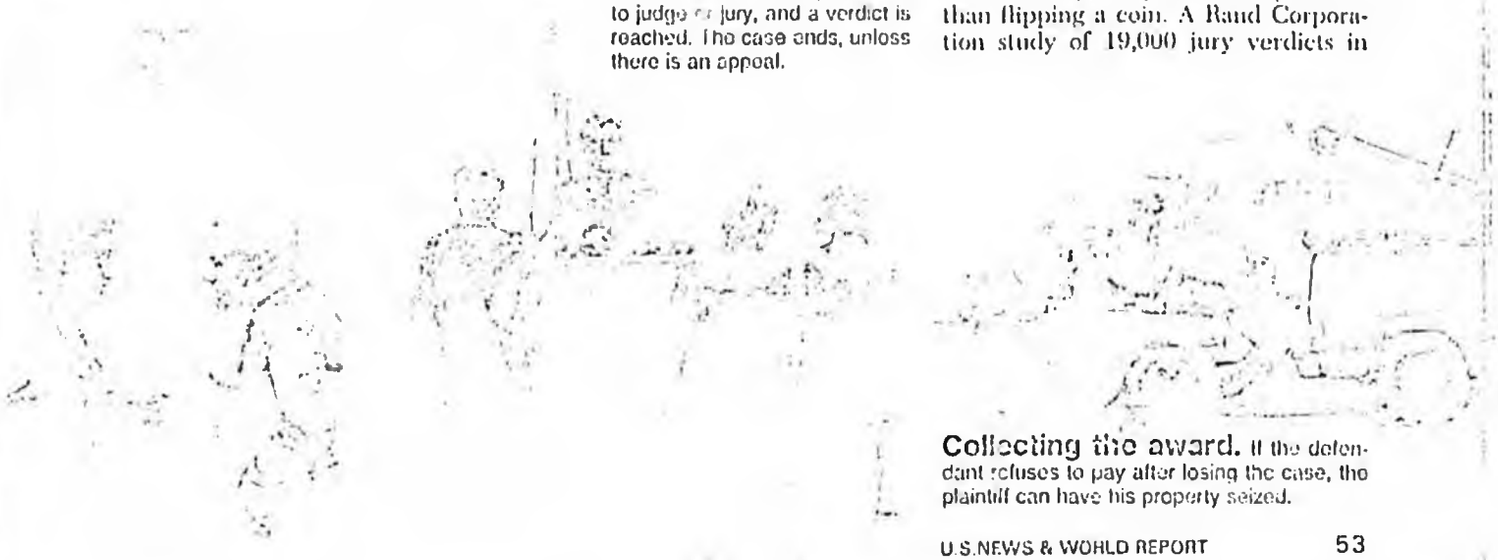
When the trial ends, 31 states do not require, as in most criminal trials, that the verdict be a unanimous one. In all states, however, the agreement of at least two thirds of the jurors—if not more—is required.

The odds of winning?

Statistically, they are hardly better than flipping a coin. A Rand Corporation study of 19,000 jury verdicts in

Settlement talks. With a costly trial approaching, the lawyers make at least one more attempt to resolve the dispute out of court.

Trial. Evidence is presented to judge or jury, and a verdict is reached. The case ends, unless there is an appeal.



Collecting the award. If the defendant refuses to pay after losing the case, the plaintiff can have his property seized.

Cook County, Ill., over a 20-year span, found that plaintiffs won 51 percent of them.

Nevertheless, the same study found that the average damage award, in 1979 dollars, had more than doubled from $30,600 to $69,000 in the previous two decades.

Nationally, malpractice awards against doctors and hospitals averaged $451,000 in 1981.

Infrequently, a judge will overrule the jury or reduce a damage award when it appears that the jury did not act on the basis of "the preponderance of the evidence"—the test applied in civil cases.

The case still may not be over. Either side can appeal to higher courts. If the defendant refuses to pay, the plaintiff might have to get a court order directing the sheriff to seize his property and sell it to satisfy the judgment. Even here, bankruptcy may foil the quest for payment.

Hour of reform. As courts have been strained to the breaking point by the litigation explosion, reformers have sought to reduce case loads. The number of federal judges had increased from 397 in 1975 to 647 by late 1982. Yet the case load per judge actually increased 36.5 percent over the seven-year period.

A study by the National Center for State Courts says the problem is that each of the legal professionals in a suit—the lawyers for both sides and the judge—expects the others to move slowly, so they all move slowly.

The key to ending the logjam, the center says, is "case management" by the judge—setting time standards for each step of the trial and firm trial dates, riding herd on laggards and granting delays only for good cause.

Four judges in Phoenix who tried case management disposed of 39.1 percent more cases than the rest of the court, and 44.7 percent more trials.

Proposed changes in the Federal Rules of Civil Procedure would give judges the power for the first time to control pretrial discovery, preventing its use to "wage a war of attrition or to coerce a party." Lawyers would be penalized for filing frivolous motions.

Suits filed by persons—prisoners, mainly—on their own behalf make up one fourth of the U.S. District Court's case load in Washington, D.C. Screening catches most of the worthless cases, yet too fine a mesh may prevent a case with merit from being heard.

Videotaping evidence, even whole trials, and pretrial telephone conferences are among some of the technological timesaving innovations that have been used successfully in several states.

Yet no such finite solutions exist for reducing American litigiousness—a way of life that shows no signs of abating. The trauma of the lawsuit may never disappear either, but someday it may be over sooner. □

New Patterns in Family Courts

Reflecting deep, wide currents of social change, family courts are in great ferment. No longer is the husband and father the paterfamilias, the absolute ruler of wife and child. Family courts today are busy aligning the new, more evenhanded order of things.

While not long ago these courts were concerned with breaches of promises to marry and with narrow grounds for divorce, today they must tackle thornier issues.

Family courts establish paternity with complex blood tests and deal with artificial insemination and test-tube babies. Unwed fathers, formerly ignored in custody and adoption proceedings, now have rights of notice.

The "best interests of the child" are taken into account in determining custody and visitation rights. Joint custody is allowed in 28 states, and courts no longer automatically assume that the mother is best at caring for children.

All states but Illinois and South Dakota allow no-fault divorces in which couples dissolve their bonds without accusing each other of adultery or mental cruelty. Simplified procedures permit legal clinics to handle divorces for a modest fee.

Dividing the apple. Financial-support arrangements reflect women's new economic independence. The courts are beginning to give financial recognition to the wife's contributions in the home, while also granting alimony to husbands when their ex-wives earn more. All-but-wed partners, now separated, are demanding that courts grant them support, and some are getting it.

"Virtually no tradition or precedent is secure. There is a real conflict of interests," say family-law experts Henry H. Foster and Doris Jonas Freed. "Everyone in the family is entitled to do his or her thing; and like the members of the Swiss Navy, they are all admirals."

What Happens In Little Cases

Criminal cases and big-money lawsuits grab the headlines, but the largest number of people who go to court are involved in traffic offenses or minor disputes.

Traffic court. Driving cases come before a variety of judges ranging from rural, part-time justices of the peace to full-time jurists in metropolitan areas.

Most of the nation's 59 million traffic violations each year are settled when a motorist simply mails in a fine.

To contest a charge, you must be in court on the date listed on the ticket. Experts advise that you bring witnesses and photographs, if appropriate. If your defense is plausible, you may have a good chance of winning.

You probably don't need a lawyer, since most traffic courts operate informally. But if the charge is drunk or reckless driving, which could bring a jail term, legal assistance may be helpful.

Small-claims court. About 3.5 million times each year, people with gripes against local merchants, neighbors or others turn to small-claims court to resolve the matter simply and quickly. A judge or arbitrator hears both sides, then decides the issue either on the spot or in a short time.

Some pointers:

- Monetary damages are limited—$700 maximum on average.
- Special forms to file a complaint are usually provided at the courthouse. A small fee—$2 to $20—is required, and a waiting period of two weeks is common.
- Be sure to show up for the trial on time, although you may have to wait until your case is called. Many small-claims courts are open evenings or weekends.
- Bring papers, receipts, photos and other items that will help prove your case. Witnesses may help if they appear to be reliable.
- In some states, lawyers may not argue a client's case in small-claims court because that would give the client an unfair advantage. But consider retaining one if the other side will have one.
- Don't be concerned about legal niceties, and avoid long-winded explanations. Just state your case as succinctly as you can.

The Pervasive Influence of Lawyers

The ranks of a multitude for whom the law is a profession grow more numerous by the day—as do the controversies over fees, ethics, training.

Little in this country today remains untouched by lawyers. They abound at every turn, from the fight for life's necessities such as air, water, food and shelter to the quest for liberty and the pursuit of happiness. They advocate, regulate, and—their critics say—often obfuscate.

Richly rewarded for interpreting the sacred entrails of the law, lawyers nonetheless pay a steep price for living off the conflicts with which society is riven: Low public esteem in polls that sometimes rank them with used-car salesmen and garbage collectors.

The contemporary tongue-in-cheek comment about St. Ives, a 13th-century lawyer, still brings knowing chuckles: "He was a lawyer, yet not a rascal, and the people were astonished."

The U.S. has 610,000 lawyers, two thirds of the world's total and almost three times as many as in 1951. About 70 percent are in private practice. Half of the rest work for the government.

The growth of the profession's ranks has been so rapid that a glut exists in many urban areas. Recession and deregulation have put a crimp in the once booming law business in Washington, D.C.—home base for some 27,000 lawyers.

Still, eye-popping salaries and hourly fees show no sign of declining. In law firms, partners' "draws" or earnings average $90,000. Some "rainmakers"—well-connected lawyers who bring in the business—such as Washington lawyer Joseph A. Califano, Jr., pull in between a half-million and a million dollars a year. San Francisco antitrust lawyer Moses Lasky won a million-dollar fee from Telex Corporation for filing just one brief at a critical point in its suit against IBM.

Associates—salaried lawyers who are striving to become partners—average $35,200, but young lawyers at a few New York firms start at $43,000 a year. Fees for lawyers with four or five years of experience average $74 per hour, while beribboned veterans such as the legendary Louis Nizer may charge up to $350 per hour.

Some lawyers, denounced as "greedy swashbucklers" by consumer advocate Ralph Nader, are becoming increasingly bold in charging their clients more as the stakes get larger.

In 1981, law practices took in 24.1 billion dollars, or 0.9 percent of the gross national product, more than the air-transport industry and one fifth as much as the health-services economy.

That claim on the GNP might be smaller were it not for laws in all of the states prohibiting nonlawyers from providing legal services. Although wills often are drafted in law offices by paralegals or unlicensed legal assistants, a nonlawyer who sells advice to the public on how to write the same document can be prosecuted.

Bar groups say this monopoly helps protect the public from charlatans, but the closed society that lawyers constitute has come under increasing antitrust scrutiny in recent years. A ban on lawyer advertising, enforced by the bar for decades, was struck down by the Supreme Court in 1977.

Since then, a flowering of storefront legal clinics that offer low, standardized fees in a Spartan setting has occurred. "The Lawyers at Dart Drug" advertise uncontested divorces at $195 next to panty hose at $2.49. This kind of mass marketing offends the traditional sense of propriety felt by many attorneys, but it is making legal services more accessible to the nonaffluent.



Hiring a famed courtroom practitioner such as Louis Nizer of New York can cost $350 an hour.

Ways to Pick A Good Attorney

Legal experts offer the following tips on finding a lawyer competent to deal with your problems—

- Begin by asking friends or others you trust for a recommendation. Get a consensus if you can.
- Bar-association referral services can help, but they list lawyers without evaluating them.
- For a simple will, real-estate closing or some other routine legal need, a low-cost legal clinic may well fill the bill.
- Consider consulting a certified specialist in complex areas such as tax, trusts or trial work.
- Visit the lawyer and see how you get along. Expect to pay for this consultation.
- Don't be shy in asking about the attorney's credentials. The *Martindale-Hubbell Law Directory*, found at your public library, rates lawyers' abilities and notes key clients.
- Check with your state's lawyer-discipline agency to find out whether the lawyer has had an ethics violation.
- Pin down *fees* and costs in writing. Is there a retainer fee to be paid in advance? Will there be an hourly charge or will your lawyer get a percentage of your recovery in a damage suit?

The elastic ethics and the ineptness of some lawyers and the downright dishonesty of others have hurt the reputation of lawyers even more than high fees, and triggered demands for reform from lawyers themselves.

The American Bar Association, which represents half the nation's lawyers, is putting the finishing touches on a new code of professional responsibility that would strengthen the hand of clients who think they have been cheated. Disciplinary procedures, often lengthy and lenient, are being beefed up. And law schools are teaching more ethics and emphasizing "real life" situations more in training.

Even so, lawyers will never be popular, says New York lawyer Eugene C. Gerhart: "They cannot expect to be liked by those they oppose. They can only hope to be respected for their courage, their competence, their integrity and their loyalty to the eternal ideal of justice." □

The "Hidden Judiciary" And What It Does

They are called ALJ's, and you will find their fingerprints on many of the actions taken by bureaucrats both in Washington and in the states.

Bring up the subject of how an individual's legal rights are determined, and most people picture a black-robed judge perched high on his bench in a marble-paneled courtroom.

Yet the average citizen is touched far more often by rulings made in a less august judicial arena, by what some have called the hidden judiciary.

It consists of a special tier of judges who act as checks on state and federal agencies that make millions of administrative decisions each year—dealing with everything from the issuance of drivers' licenses and the payment of jobless benefits and Social Security pensions to the regulation of utility rates and television stations.

The vast majority of these determinations are not challenged. But hundreds of thousands of them annually are appealed to the 1,153 administrative-law judges (ALJ's) employed by federal agencies or to similar judges at the state level.

In addition, when regulations are being written—whether the subject is surface mining, building design for the handicapped, mechanically deboned meat or one of the myriad other areas in which government intervenes—ALJ's preside over the hearings.

While bureaucrats carry out policies through rules and regulations, the job of ALJ's or hearing examiners is to make sure there is due process, that agency decisions are legal and fair.

No jurors. In appeals of agency decisions, they function much like trial judges in nonjury cases. Parties are represented by lawyers in formal hearings, evidence is submitted, witnesses are heard. In most cases, an ALJ renders a written opinion, which is appealable to agency administrators or commissioners, then to the courts.

Most appeals of agency decisions touch on only one person or one firm, but ALJ rulings at times affect citizens and businesses nationwide. A decision by ALJ Chester Naumowicz at the Federal Communications Commission in 1976 opened up the telephone industry to greater competition.

It is ALJ's who initially try the civil suits filed by regulatory agencies. At the Federal Trade Commission, they decide, among other things, whether corporate activities conflict with antitrust laws or FTC guidelines.

In a case involving General Foods' Maxwell House coffee, for example, an administrative-law judge ruled against the FTC staff, holding that the firm had not used unfair methods of competition to dominate the coffee market.

The agency's staff had filed an antitrust suit against General Foods. After losing the first round, bureaucrats of the FTC appealed to their five-member commission.

At the National Labor Relations Board, 110 administrative-law judges in Washington, San Francisco, New York and Atlanta hear about 1,200 unfair-labor-practice and union-representation cases a year, out of 40,000 filings. The rest are settled by NLRB bureaucrats or dismissed.

More than two thirds of the federal ALJ's work for the Social Security Administration in 125 field offices. They hear more than 250,000 cases a year, determining eligibility for benefit payments. Such hearings are short and relatively simple, taking a matter of hours in most instances.

Outside of Social Security, however, administrative hearings often drag on for many months. The so-called American Telephone & Telegraph basic-rate case at the FCC in the mid-1970's spawned a 16,437-page transcript—plus 15,864 additional pages of exhibits—during 103 days of hearings.

Even after the hearings are over, it can be a long time before a case is wrapped up. Several years ago, the General Accounting Office, the audit-

Special Courts For Special Cases

Within the federal system are a number of specialized courts that handle cases in some complicated or technical areas. These courts, most of which are in Washington, D.C., include:

U.S. Claims Court—Established October 1 to replace old U.S. Court of Claims. Its 16 judges handle every type of money claim against the United States except those involving personal injury.

Court of International Trade—Set up in 1980, its nine judges review government actions dealing with imports, such as disputes over classification or valuation of goods and antidumping laws. Handled 3,207 cases in 1981. Sits in New York.

Bankruptcy Court—Established in 1978, ordered reorganized by Supreme Court in 1982. Some 241 judges in 91 district courts across the country handled a record 527,811 filings in year ended June 30, 1982. Under the U.S. Constitution, all personal and corporate bankruptcies and reorganizations are heard by federal courts.

Court of Appeals for the Federal Circuit—Established October 1 to replace old Court of Customs and Patent Appeals. Handles appeals from Claims Court and Court of International Trade plus patent appeals and patent-infringement cases. Its 12 judges sit in three-judge panels.

Foreign Intelligence Surveillance Court—Set up in 1978 to review applications for electronic surveillance by the government of foreign powers and their agents. Seven district judges, serving part time on the court, approved all 431 requests in 1981.

Tax Court—In this agency, established in 1924, 19 judges have about 30,000 cases pending involving deficiencies or overpayments in income, estate and gift taxes. Ten other special trial judges hear "small tax cases," where the tax due is less than $5,000.

Court of Military Appeals—Established in 1950 as the final appellate tribunal to review court-martial convictions in the armed services. Three civilian judges, who serve 15-year terms as presidential appointees, decided 153 cases in 1980.

ing arm of Congress, studied four agencies it considered typical and found the median time from hearing to final agency decision was 352 days.

The delays often draw complaints from Capitol Hill and private citizens. ALJ's bristle at any suggestion that they are to blame, saying it is the bureaucrats who use up most of the time—a contention borne out by the GAO study.

As little known as they are to many Americans, administrative-law judges date to the days of George Washington, when customs officers were appointed to figure the duties payable on imports and to determine which soldiers were disabled. In time, the system lost public respect because agency actions were often merely rubber-stamped.

Congress tried to correct that problem in 1946 by passing the Administrative Procedure Act, which established the autonomy that ALJ's enjoy today.

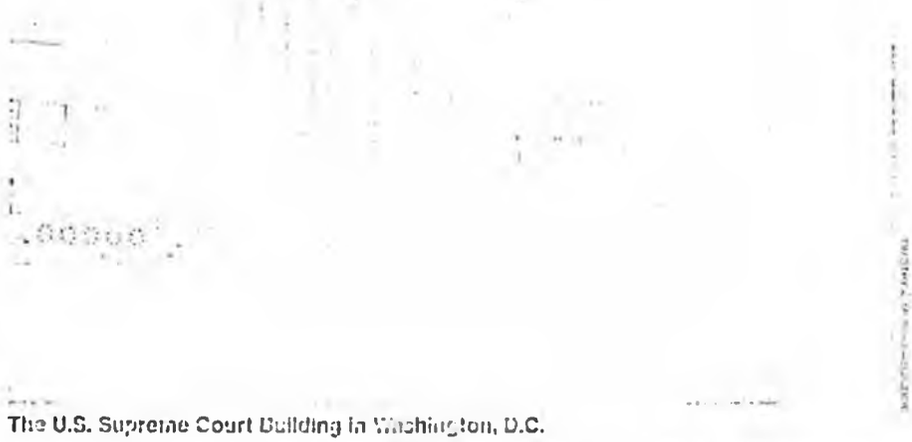
They are still employes of the various agencies, as previously, but their pay—about $57,000 for most—now is controlled by the Office of Personnel Management. They are assigned cases on a rotating basis and may not be supervised by any official who performs investigative or prosecutory functions.

It is not a job for burned-out legal hacks looking for an easy berth in government. ALJ's are selected through a rigorous merit program, and 70 percent of applicants are rejected. A former chief justice of a state supreme court was among those recently chosen.

Guarding the turf. The issue of their independence is at the core of a burgeoning controversy over a Reagan administration attempt to clean up the disability rolls. State agencies, working with new Social Security Administration (SSA) guidelines, cut off benefits for some 245,000 of the 2.7 million people on the rolls. But about three fifths of those who have appealed have been reinstated by ALJ's using looser standards developed by the U.S. courts.

Alarmed by the high reversal rate, the SSA has been overruling some decisions—and riling many ALJ's. They say the agency wants them to act more as bureaucrats implementing regulations than as independent judicial officers.

One method of assuring greater independence is a corps or central panel of ALJ's, not tied to any agency, that provides trial services on demand. New Jersey, one of eight states with such a pool, also has reported substantial cost savings. Judge Irving Sommer, chairman of the National Conference of Administrative Law Judges of the American Bar Association, sees an intangible plus: "People know they're getting a fair shake because the judge isn't attached to any particular agency." □



The U.S. Supreme Court Building in Washington, D.C.

A Supreme Court Under Pressure Is Back in the Spotlight

Overwork and ideological divisions, authorities say, are sapping the effectiveness of the nine Justices who sit at the apex of the judicial system.

The U.S. Supreme Court, deluged with cases and split philosophically, is working under the greatest strains it has faced in its 193-year history.

The Court's nine members, among the world's most prestigious judges, are finding it harder and harder to perform their historic dual role—to insure justice for individual Americans while guiding the nation on the meaning of its laws.

The volume of appeals has reached flood stage, with the result that a citizen today has only a slim chance of having a case heard by the Court.

At the same time, sharp and shifting divisions among the Justices over abortion, racial discrimination, prisoners' rights and many other questions often produce murky decisions that confuse lawyers and judges alike and inspire still more lawsuits. The Justices—five of whom are 73 or older—were besieged in 1981-82 with 5,311 appeals from state and federal courts. When the 1982-83 term began, the docket was already two-thirds full.

Today's Supreme Court is far different from the six-member bench set up in 1789. In the early days, almost every case presented was heard. Now, the 200 cases per year that the Court is able to review in detail make up fewer than 5 percent of the appeals filed. Says former U.S. Solicitor General Erwin Griswold, "All you can do is knock on the door and ask to be let in."

Hotly contested issues involving such subjects as taxes, labor rules and other government regulations can remain unresolved for years. On many such questions, some of the 12 federal appeals courts have ruled in opposite ways.

About one third of the Supreme Court's case load is set by law. Included: Lower-court decisions striking down federal laws, state-supreme-court rulings interpreting the U.S. Constitution and boundary disputes between states.

As for the remainder, the votes of four Justices are needed to grant a full hearing. Beyond that, "there are no rules," says Eugene Gressman, University of North Carolina law professor. "Each Justice votes to grant review of cases he or she thinks are important enough to warrant the Court's attention."

A milestone. Since the famed 1803 case of *Marbury v. Madison*, the Court has claimed the power to strike down laws it decides conflict with the Constitution. Virtually no one challenges that doctrine today.

Yet debate rages over the extent to which Justices can broaden past interpretations of constitutional rights, fill in gaps they perceive in laws, or supervise public institutions. Typifying the criticism of "judicial activism" is the charge of former Senator Sam Ervin, Jr. (D-N.C.) that "the people of our land are being ruled by the transitory personal notions of Justices who occupy for a fleeting moment of history seats on the Supreme Court."

In recent decades, split opinions



Justice Stevens at work with law clerks, whose role at the Court has grown.

have guaranteed women broad rights to have abortions, barred prayer from public schools, given wide rights to criminal suspects, ordered schools desegregated and set minimum standards in prisons and mental hospitals.

The Justices became increasingly willing to strike down U.S., state and local statutes, voiding more since 1920 —761—than the 386 ruled unconstitutional in the previous 130 years, says legal scholar Bruce Fein. Activism reached its peak during the 1950s and 1960s under Chief Justice Earl Warren.

All current Justices have joined activist rulings at least on occasion, but William Brennan, Jr., the Court's senior member, and Thurgood Marshall have done so most often.

On the other end of the spectrum, Chief Justice Warren Burger and Justices William Rehnquist and Sandra Day O'Connor, advocates of "judicial restraint," tend to defer to the legislative and executive branches of government. The other Justices—Harry Blackmun, Lewis Powell, Jr., John Paul Stevens and Byron White—swing from one camp to the other, depending on the issue.

In the 1981-82 term, 33 cases—nearly one fifth of the opinions issued—were decided by a one-vote margin, twice as many as in 1980-81. Justices also are more likely nowadays to issue opinions stating their individual views.

No moot points. Justices have ways of rationing the use of their power. For one thing, no matter how important the issue, they refuse to take a case unless it is a real dispute affecting litigants, not a hypothetical question.

As quarrelsome as they may sometimes seem, the Justices try to resolve differences privately. Once or twice during each week of oral arguments, they gather with no aides present, shake hands with each other, discuss the cases they've heard and take a preliminary vote on their decisions. If the Chief Justice is in the majority, he decides who will write the explanation of the Court's reasoning; otherwise, the senior Justice makes the assignment.

Opinion writing can take months. First, drafts are circulated among Court members who voted together. The Justices may sign the proposed opinion, try to persuade the drafter to alter it, or write their own versions. Occasionally, Justices reverse their initial votes after reading other members' drafts. Wade McCree, Jr., U.S. solicitor general from early 1977 to mid-1981 and at one time a federal appeals judge, describes the give-and-take this way: "Justices fight for language they prefer, but to get others to concur, they may soften their positions. That's what a collegial court is all about."

Policy disagreements on the Court will never end, but reformers have proposed several ways to cope with the increasing case load.

One idea, endorsed by four Justices, is creation of a "National Court of Appeals" to which the High Court could refer cases requiring attention but not raising crucial national issues. Justice Stevens has proposed a new court to decide which cases the Supreme Court should hear. In addition, all of the Justices have asked lawmakers to eliminate the requirement that they hear certain categories of cases.

Justice Powell has called, too, for dividing among the Court members the job of screening appeals, eliminating the tradition that "each Justice has to vote on every doggone petition."

Others would curb or abolish oral arguments, the hour-long sessions in which Justices pepper lawyers with questions about their cases.

Reformers are split over the role of law clerks, young law-school graduates who serve as research aides. As recently as 1950, Justices each had only one clerk; now, most have four.

Some analysts believe the Court needs more clerks to help screen cases; others complain that the longer, more difficult-to-understand opinions being issued today are partly due to the proliferation of the clerks who draft them.

Flak from the right. Many critics would actually narrow the Court's power. Among ideas being pushed by some conservatives: Taking away the authority of federal courts to hear cases on such subjects as abortion and school prayer and forcing federal judges—all of whom are now appointed for life—to run for office periodically. Opponents assert that such measures would dangerously undermine the independence of the nation's judiciary—a vital element in the American system.

Supreme Court Justices themselves have studiously avoided taking a stand on the court-curbing proposals because they would likely decide the constitutionality of any such measure passed by Congress.

The Court has tempered its activism a bit in recent years—a change some analysts attribute to the wave of criticism being leveled at judges.

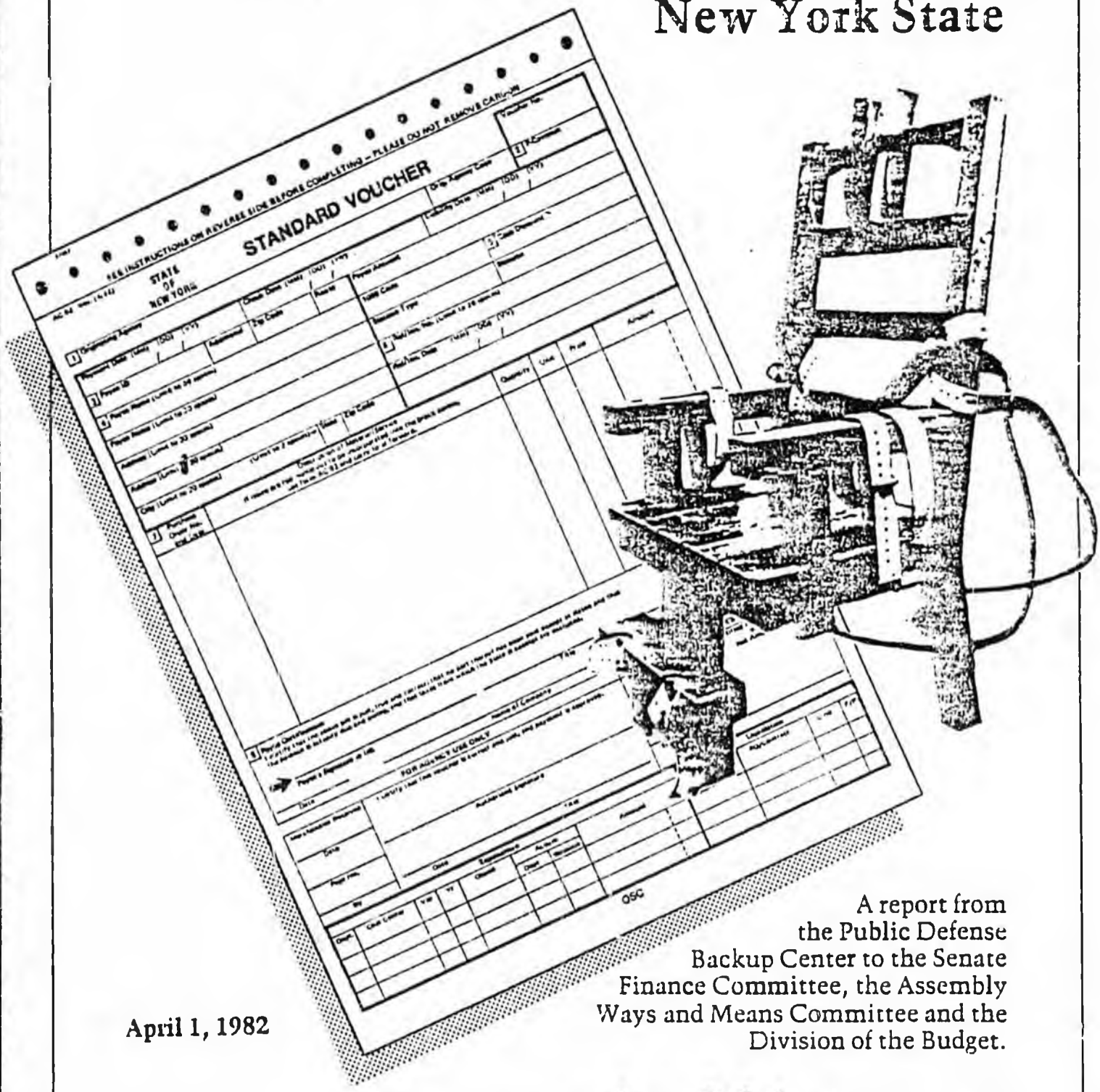
Over all, however, experts see little chance that a philosophical majority capable of steering a consistent path will reappear at any time soon. The intellectual ferment and doubts that the Justices reflect run deep throughout American society.

Then, too, observes Potter Stewart, who retired in 1981 after 23 years as a Justice: "Unlike any institution in the world, there is no boss of the Court. Your only boss is the Constitution and the law. Nobody can tell another Justice what to do or what not to do." □

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Capital Losses: The Price of the Death Penalty for New York State



A report from the Public Defense Backup Center to the Senate Finance Committee, the Assembly Ways and Means Committee and the Division of the Budget.

April 1, 1982

New York State Defenders Association, Inc.
150 State Street • Albany, NY 12207

TABLE OF CONTENTS

Preface ii

Introduction iii

PART I:
The Nature of Defense Services Under the Proposed Death Penalty Bill 1

PART II:
The Cost of Capital Litigation (Ten Levels and Beyond) 7
The Guilt and Penalty Phases
A. Death is Different 11
B. Motion Practice 12
C. Investigators 13
D. Experts and Auxiliary Services 15
E. Sentencing in the Penalty Phase 16
The Cost of the Guilt and Penalty Phases 18
Direct Appeal to the Court of Appeals 19
Supreme Court Review 21

PART III:
A Note on the Cost of the "Correctional" Process 23

Conclusion 25

PREFACE

Under its contractual obligation with the state of New York to review, assess and analyze the public defense system, the New York State Defenders Association periodically publishes reports to the Legislature, the Governor, the Judiciary and other appropriate instrumentalities. The report which follows preliminarily examines the costs of capital litigation and the fiscal impact of the death penalty on New York State. This report is directed to those who have a legal responsibility to analyze that fiscal impact.

INTRODUCTION

In the last five years, efforts in both houses of the Legislature have pushed New York closer and closer to the passage of a death penalty. During this time, shrill voices have argued every major proposition with reference to the death penalty except one—its actual cost. The floor debates during this period of time provide little hard cost data, but, as will be seen, they make clear that the death penalty will call for the most irrational and disproportionate expenditure of energy and money in the history of criminal justice in this state.[1]

Despite this reality, one searches in vain for legislative information on the subject of actual cost. The memorandum in support of this year's death penalty bill (S.7600/A.9379), as in the past, states that there are "no fiscal implications." Yet, as late as the end of March 1982, the Senate sponsor of the bill reportedly did not know the fiscal implications of the death penalty.[2] The Senate Research Service states in its death penalty briefing paper, "Insofar as the fiscal implications of the death penalty are concerned, the costs of its imposition and the related appeals process are uncertain."[3] Likewise, though the New York State Department of Correctional Services has recognized the issue,[4] it has not projected costs under a death penalty statute.[5]

At a time when New York State is under tremendous fiscal constraint in its efforts to deliver basic human services, it is ironic that no one in government has attempted to assess and project the actual cost of a death penalty here.

Conventional wisdom suggests that it is less expensive to execute a person than to imprison a person for life. Conventional wisdom is wrong. As Mr. Justice Marshall stated in *Furman v. Georgia*, 408 U.S. 238, 357-8 (1972):

> "As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if

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[1] The New York State Defenders Association opposes the death penalty for any crime because it is immoral, discriminatory, and inevitably capricious. The penalty provides, and will always provide, the opportunity for masking racism and prejudice. Its history marches in step with the history of genocide; its cadence is the cadence of expediency; its failure, the failure of humankind. The death penalty is obscene violence. There is no excuse for its existence, and someday it will be abolished.

We do not by this paper retreat from these positions.

In the course of this paper, we will comment on sections of the death penalty bill, and, in particular, on those sections dealing with publicly supported defense representation for the poor. Nothing we say here should be read as approval of the bill or an appraisal of its ultimate constitutionality. We are reporting cost data, and that is the purpose of this paper. It is important for state officials and the public to know the price tag which is attached to capital punishment. The costs outlined here are the bottom line. Because death has been held constitutionally to require greater procedural protections, *Gardner v. Florida*, 430 U.S. 349 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976), legally required procedures and their attendant costs will continue to escalate.

[2] *Legislative Gazette*, March 29, 1982, at 8, col. 1.

[3] SENATE RESEARCH SERVICE, ISSUES IN FOCUS, No. 82-48, DEATH PENALTY 4 (Jan. 28, 1982).

[4] In July 1978, New York's Department of Correctional Services reported, but did not evaluate the anti-death penalty position that, "... capital punishment is more costly from an economic viewpoint than other alternatives if all costs are counted, including court, prosecution, defense and correctional." DEPARTMENT OF CORRECTIONAL SERVICES, DIV. OF PROGRAM PLANNING, EVALUATION AND RESEARCH, OVERVIEW OF DEATH PENALTY AND REVIEW OF ARGUMENTS FOR AND AGAINST ITS USE 9 (July 1978).

[5] Significantly, states with a death penalty cannot afford the "luxury" of non-examination. The Legislature of Florida knows full well the projection of costs made by Louie L. Wainwright, Director, Florida Division of Corrections. Florida projects an expenditure (absent inflation) of more than $57 million by the year 2000 just to maintain the death row population. BUREAU OF PLANNING, RESEARCH AND STATISTICS, STATISTICAL FACTS, No. SF-80-9, FLORIDA DEP'T. OF CORRECTIONS—DEATH ROW ANALYSIS 2 (Aug. 29, 1980).

true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases.

"At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

"During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the state. There are also continual assertions that the condemned prisoner has gone insane. Because there is a formally established policy of not executing insane persons, great sums of money may be spent on detecting and curing mental illness in order to perform the execution. Since no one wants the responsibility for the execution, the condemned man is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball. The entire process is very costly.

"*When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.*" [Footnotes omitted.] (Emphasis supplied.)

The authority of Mr. Justice Marshall's assertions,[6] as well as other recent work,[7] indicate in general terms, but without contradiction, that a criminal justice system with the death penalty is inordinately more expensive than a criminal justice system without the death penalty.

Seventeen years ago, the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, in its report recommending the abolition of the death penalty in New York State, said:

". . . [O]wing to their importance, capital cases take longer to litigate at the trial level and obstruct the general administration of criminal justice accordingly; . . . the appellate ramifications are intricate and extensive; . . . the pursuit of other post-judgment remedies leads to many courts, both state and federal, involving substantial segments of the judiciary; . . . the battle to save the 'doomed' man reaches into the executive branch of the government; and, in general, . . . capital cases are disruptive of the orderly process of criminal justice. . . . [W]hatever aspect of the death penalty one examines, one finds nothing but

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[6] T. THOMAS, THIS LIFE WE TAKE 20 (3d ed. 1965); B. ESHELMAN AND F. RILEY, DEATH ROW CHAPLAIN 226 (1962); Caldwell, *Why Is the Death Penalty Retained*, 284 ANNALS 45, 48 (Nov. 1952); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION, No. 2, at 11, 13-14 (June 1964); Sellin, *Capital Punishment*, 25 FED. PROBATION, No. 3, at 3 (Sept. 1961); Slovenko, *And the Penalty Is (Sometimes) Death*, 24 ANTIOCH REVIEW 351, 363 (1964); Bailey, *Rehabilitation on Death Row*, in BEDAU, THE DEATH PENALTY IN AMERICA 556 (1967 rev. ed.); T. ARNOLD, THE SYMBOLS OF GOVERNMENT 10-13 (1935). See also: *Stein v. New York*, 346 U.S. 156, 196, 73 S.Ct. 1077, 1098, 97 L.Ed. 1522 (1953) (Jackson, J.); cf. *Reid v. Covert*, 354 U.S. 1, 77, 77 S.Ct. 1222, 1261-1262, 1 L.Ed.2d 1148 (1957) (Harlan, J., concurring in result); *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Carnativo v. California*, 357 U.S. 549, 78 S.Ct. 1263, 2 L.Ed.2d 1531 (1958).

[7] Nakel, *The Cost of the Death Penalty*, 14 CRIM. L. BULL., No. 1, at 69 (Jan. 1978). See also the newly revised BEDAU, THE DEATH PENALTY IN AMERICA (3rd ed. 1982).

obstruction, confusion and waste."[8]

The Commission saw early on the direction of capital litigation in the United States and, accepting the inevitable consequences of the then developing moratorium on executions,[9] rejected the death penalty as an inappropriate adjunct to the administration of criminal justice. Since 1955, while we have lived with and without a death penalty in New York State, and in recent years while we have vigorously debated its reemergence, there has been no systematic effort to identify and compute costs. This paper is a preliminary examination of those costs.

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[8] STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, FOURTH INTERIM REPORT: SPECIAL REPORT ON CAPITAL PUNISHMENT, LEG. DOC. NO. 25, at 97 (1965).

[9] From 1967 until 1977, executions in the United States were suspended by litigation in the federal courts seeking the resolution of constitutional challenges to the death penalty. The United States Supreme Court, in a plurality opinion, declared in *Furman v. Georgia*, 408 U.S. 238 (1972), that discretionary death penalty statutes then in effect constituted cruel and unusual punishment because death was imposed infrequently and in the absence of clear standards. The rare, unpredictable, discretionary use of the sanction of death was deemed to violate the Eighth and 14th Amendments to the United States Constitution. State legislatures responded to *Furman* by enacting either mandatory death statutes or "guided discretion statutes" which utilized bifurcated trial procedures to determine guilt and then punishment. In 1976, the Supreme Court ruled in *Woodson v. North Carolina*, 428 U.S. 280, 310 (1976), that the mandatory death penalty for first degree murder was unconstitutional because it treated all convicted persons not as "... uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." On the same day, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld "guided discretion" statutes which required objective standards to guide, regularize, and make rationally reviewable the process of imposing death. Since *Gregg*, more than a dozen substantial procedural issues have been decided on behalf of defendants by the United States Supreme Court. Capital litigation routinely raises those and other constitutional questions at every stage of review.

PART I:
THE NATURE OF DEFENSE SERVICES UNDER THE PROPOSED DEATH PENALTY BILL

One of the great concerns of the New York State Defenders Association concerning the implementation of the death penalty in New York is whether or not the representation of the poor in death cases will be adequate. The current delivery mechanism for public defense services is clearly inadequate to a death penalty. The County Law leaves to each county responsibility for the development of its own system of defense services. The result is that a crazy quilt of county defender systems exists in the state. The services are insulated, autonomous and unregulated. Resources differ from county to county. It follows that the adequacy of defense representation differs from county to county as well.[10]

The problems of the system have not gone unnoticed in the legislative debate concerning the death penalty in New York. Some representative comments from the Assembly and Senate floor debates follow:

> "The fact is, ladies and gentlemen, we will look at the defense capability. Throughout New York State today there are 20 counties that have . . . no . . . investigators to help in any case, much less a capital case . . . Nine counties have one investigator available, four of them have two and four have three. *Forty-one of our counties—over two-thirds, do not have the investigative capability that the defense attorney needs to defend his client.*" [Emphasis supplied.][11]

> "We are talking in many instances of assigned counsels who are paid very little money by any contemporary standard. *We are talking about a system where the defense really doesn't have the ability to investigate* . . . ***that's the question you are asking yourself, and that's the question each of us has to ask ourselves before we vote on this bill. . . ." [Emphasis supplied.][12]

> "Forty-six counties have asked the New York State Public (sic) Defenders Association for help in doing appeals, the appeal work for the felony criminal matters. *What kind of justice is that, where 46 counties say, after the trial, 'We don't have the expertise and the ability to deal with the appeal process.'* That is the fair trial we are talking about, with an irrevocable penalty." [Emphasis supplied.][13]

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[10] Article 18-B of the County Law requires each county to adopt a systematic plan for furnishing counsel to indigent defendants. The counties may choose: 1)representation by a public defender; 2)representation by contract with a legal aid society; 3) representation by counsel furnished pursuant to an assigned counsel plan of a bar association; or 4) a combination of these. In the greater part of the state, public defense is a part-time job. Training is not a mandatory part of the statutory scheme. Assigned counsel plans are shrinking as a result of the very low fees paid to public defense attorneys. Nationally, New York ranks 45th with the lowest reimbursement rate at the trial and appellate level. There are 76 distinct defender systems in this state. The common thread that binds them together is underfunding at the county level, a lack of standards for their operation, and the unpopularity of the clients they serve.

[11] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Hevesi), at 875.

[12] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Miller), at 1020.

[13] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Hevesi), at 875-876.

"Who is going to get the death penalty? The poor defendant, the defendant with the poor lawyer more likely. I'll tell you one thing, if there is one certainty—if there is one certainty in what you're about to do—it is that, if you pass the bill and it goes into effect, I am certain that no millionaire will ever burn, that no rich person will ever have the sentence carried out, and that's a fact, and I think we all acknowledge that that's a fact. *The victim of this, the person upon whom this penalty will be carried out, will be the poor unfortunate, the person with the lawyer of less skill or experience than others.*" (Emphasis supplied.)[14]

"When you look at the kinds of people who have been convicted and sentenced to death, they invariably are people from the low income bracket and *there are those of us who believe . . . that if you're poor, you do not necessarily get the kind of legal representation that you would if you had the money to afford the right kind of attorney.* I know you will say that that's not the case, and that there is equitable provision under the law and that there is a fair share, and everyone else will get their day in court, but I think the real world proves that poor people generally carry the brunt when they are charged with murder, particularly if there is a difference in ethnicity." (Emphasis supplied.)[15]

All of these comments reflect upon a defense system that is basically inadequate. Three critical aspects are identified. First, there is no set of experiential standards to be met for the representation of defendants in felony cases in this state. Second, there is county-based disparity in the financing of the public defense system such that certain counties are without the resources to provide adequate representation. Third, there are exceedingly low fees for attorneys, experts, investigators, and other necessary auxiliary services.

The Volker/Graber bill (S.7600/A.9379) responds directly to these issues by: a) removing the burden from counties and making the cost of defense services a state charge; b) attempting to create experiential standards for the representation of defendants in capital cases; and c) creating a standard whereby attorneys, experts, investigators and others will be paid the customary fee for similar privately retained representation or services. In pertinent part, the bill states:

§722-g. Assignment of counsel and related services in criminal actions in which the death sentence may be imposed. 1. *Notwithstanding any other provision of law to the contrary*, in every criminal action in which a defendant is charged with an offense defined in section 125.27 of the penal law, *a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert or other reasonably necessary services at any time either* (a) *prior to judgment*, or (b) *after the entry of a judgment imposing a sentence of death but before the execution of that judgment; shall be entitled to the appointment of one or more attorneys and the furnishing of such other services* in accordance with the remaining provisions of this section.

2. If the appointment is made prior to judgment, at least one attorney so appointed must have been admitted to practice in the courts of this

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[14] RECORD OF PROCEEDINGS, SENATE, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Senator Connor), at 145.

[15] RECORD OF PROCEEDINGS, SENATE, STATE OF NEW YORK (Monday, March 23, 1981) (statement of Senator Bogues), at 1279-1280.

state for not less than five years, and must have had not less than three years' experience in the actual trial of felony cases in this state.

3. If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the courts of this state for not less than five years, and must have had not less than three years' experience in the handling of appeals in felony cases.

4. Upon a finding in an ex parte proceeding that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore pursuant to the provisions of subdivision five hereof. Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement.

5. *Notwithstanding the rates and maximum limits generally applicable* to criminal cases and any other provision of law to the contrary, *the court shall fix the compensation to be paid to attorneys* appointed pursuant to this section *and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services* authorized pursuant to subdivision four of this section *at such rates or amounts* as the court determines to be appropriate *in order to provide such defendant with representation by counsel and other services as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal.*

6. Any compensation, fee or expense to be paid pursuant to this section *shall be a state charge* payable on vouchers approved by the court which fixed the same, after audit by and on the warrant of the comptroller. [Emphasis supplied.]

The bill is an effort to overcome a defective statutory scheme. It is designed to assure equality of service for the poor. Under its terms, the state must appoint and pay for counsel for those unable to afford a lawyer both prior to judgment and at any time up until the actual imposition of the sentence of death.

Investigative, expert and other auxiliary defense services, as well as counsel fees, will be paid on the basis of customary rates for the services in amounts which will provide the defendant with representation and other services " . . . as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal."

The meaning of this language and the full scope and extent of what the Volker/Graber bill means is made crystal clear by a review of statements made by the bill's sponsors in debate on the floor of the Legislature. Referring to §722-g(5), Assemblyman Graber stated in 1978:

" . . . [A]nd I surmise today, as this debate progresses, we are going to hear, and hear loud and clear, from those who will say this bill is an attack at minorities, that they cannot get a fair trial, they cannot obtain good counsel, and to those of you who are going to make comment on that particular issue, please read page 9, line 10, section 5 of the bill—

and I would like it read into the record: 'Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provisions of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed pursuant to this section, and the fees and expenses to be paid for investigative, expert and other reasonably necessary services authorized pursuant to Subdivision 4 hereof, at such rates or amounts as the court determines to be appropriate in order to provide such defendant with representation by counsel and other services as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal.'

"I think that says a lot, for it is in that section we are *guaranteeing to those minorities, those indigent people who in the past have not been able to afford good expert counsel; we here, in the State, are going to pay the bill to make sure that they do get the counsel that they need.*" [Emphasis supplied.][16]

Again in 1980, in moving A.8431, Assemblyman Graber stated:

"I am sure later today we will hear that indigent people are unable to get adequate defense counsel because they cannot afford same. ***[Referring again to proposed §722-g[5]] I think that's brand new as far as this state is concerned, that we provide for adequate defense counsel at state cost *to make it absolutely certain that anyone charged with a capital offense . . . would, in fact, have adequate defense.*" [Emphasis supplied.][17]

Last year, on February 17, 1981, referring again to the same section, Assemblyman Graber stated:

"It provides for the appointment of attorneys with experience of three years, if the defendant is unable to employ such an attorney. I am sure later today we will hear that indigent people are often unable to afford adequate defense counsel, because they cannot afford it. *** [722-g[5]] is a first for New York, I believe. *I don't know of any other state that incorporated that into the text of their law.*" [Emphasis supplied.][18]

Thus, a reading of the Assembly debates makes clear that the intent of the sponsors has been to pass a death penalty bill in New York distinctly different and more extensive than any other such bill in America.

Those who are familiar with New York's defense system may find it anomalous that while New York continues to rank 45th in its assigned counsel fee structure for non-capital cases, its Legislature has declared that it shall pay whatever is necessary in death penalty cases. Any doubt regarding this legislative intent, however, is laid to rest by a review of the remarks of the bill's co-sponsors. In 1980, Assemblyman George Friedman stated:

" . . . [N]ever before, never before in the history of any country operating under a system like we operate in the United States of America,

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[16] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, March 20, 1978) (statement of Assemblyman Graber), at 2040-2041.

[17] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Graber), at 60.

[18] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Graber), at 854.

have rights of accused individuals been protected as they are in this bill. This bill doesn't say you have a right to counsel; it doesn't say just that the State will give you counsel, *it says that the State will pay the going rate for counsel competent to represent you. That is that under this bill you have the right to get somebody like Percy Foreman to represent you and the State is going to foot the bill. Under no other system do you have that right. . . .*" [Emphasis supplied.][19]

Last year in responding to Assemblyman Hevesi's remarks concerning the inadequacy of counsel and investigative services (*supra* n.11), Assemblyman Friedman stated:

"The bill does not say that investigative services will be provided only where investigators exist or work in the county where the trial is held. No, not at all.

"This bill says that investigative services will be supplied, period, whether it is Onondaga County or Bronx County. If you need investigators for the defense of this accused person, you will get them no matter what county he is in. . . .

"***Any fair-minded person would have to say, yes, it is possible an innocent person might be convicted. But I ask you to consider the other side of it. *This happens to be the most humane and fairest capital punishment bill ever passed in any house of any legislature in any state, and probably any country in the world.*

"*This bill provides . . . for the best lawyers to represent the poor Blacks that you were talking about.* You are right, Blacks in the past, and *minority people in the past, have suffered under capital punishment bills because they have not been able to get the best kind of legal representation. But under this bill, they could, because the bill requires that the State pay the equivalent rate for lawyers in that field. . . .*

***[If] I were accused of a capital crime, I could not hire a lawyer like the fellow now representing Jean Harris down in Westchester County, because he charges some $100 to $150 an hour, and if he was going to put in 100 or 200 hours for my defense, I could not afford it or pay for it. I would have to get one of my friends from Bronx County.

"But a poor person . . . under this bill . . . could go hire Joel Arnou now defending Mrs. Harris; F. Lee Bailey, if he feels like coming in; Mr. Edelstein from Brooklyn, you name it. Under this bill the poor person is going to have that lawyer representing him. It is not just the lawyer, it is the investigative services.

"You know the guys that were found, after their convictions, to have actually been innocent, were found to be innocent because somehow they managed, over the years, to get investigators working for them to dig into the facts and find out what actually happened, and uncover the real truth of the cases. This bill says you are going to have those investigative services at the very beginning. *Whatever is necessary, whatever is needed, if an army is necessary, you can hire them under this bill,* and you can prepare a defense if a defense is necessary." [Emphasis supplied.][20]

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[19] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Friedman), at 99-100.

[20] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Friedman), at 881-890.

In 1980, Assemblyman Clark Wemple, another Assembly co-sponsor, stated:

> "This bill is as carefully constructed a piece of legislation that has ever come before this house. There is not a single provision in our Penal Law, our Code of Criminal Procedure, absolutely nothing that comes within shouting distance of this particular bill in terms of its attention to the rights of the accused. ***Any defendant under this bill can have *unlimited funds* to hire the top attorney in his community, in his state, in the Nation, to defend him. ***You can get not just competent counsel under this bill, *you can get the best counsel.* That is the point of distinction." [Emphasis supplied.][21]

And again last year, during the debate on this bill, Assemblyman Wemple stated:

> ". . . [T]*his bill goes far beyond anything we have ever had in this State or in the country in terms of providing those constitutional rights and extra-constitutional rights* that you don't generally find." [Emphasis supplied.][22]

Assemblyman Morahan, speaking in 1981 on the floor of the Legislature, stated:

> ". . . [A]nd they have provided adequate money for defense, and I am not talking about the average public defender brand of defense, but *defense equal to those who would have money.*" [Emphasis supplied.][23]

It is apparent that the supporters of the Volker/Graber death penalty bill recognize the inadequacies of the current system for providing public defense services. It is also absolutely clear that the legislative intent of §722-g(5) is to respond to those inadequacies by supplying "unlimited funds" to the defense in capital cases. In what follows, the price of that response and other costs of capital litigation are detailed.

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[21] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Wemple), at 86-87.

[22] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Wemple), at 908.

[23] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Morahan), at 997.

PART II:
THE COST OF CAPITAL LITIGATION (TEN LEVELS AND BEYOND)

It is now clear that a permanent and indispensible feature of capital litigation involves the review of constitutional, statutory and discretionary questions at a minimum of ten state and federal judicial levels. These include, but are not limited to:

1. the guilt and penalty phases of trial;
2. review by the highest state court of a sentence of death and the underlying conviction;
3. writ of *certiorari* to the United States Supreme Court;
4. post conviction proceedings including evidentiary hearings to vacate judgment or set aside sentence or both;
5. review by the highest state court of adverse determinations in such post-conviction proceedings;
6. writ of *certiorari* to the United States Supreme Court;
7. petition for writ of *habeas corpus* to the United States District Court;
8. appeal of a negative determination of a writ of *habeas corpus* to the Federal Court of Appeals for the circuit encompassing the district wherein the writ was brought;
9. a petition for rehearing *en banc* from a negative determination of the Court of Appeals;
10. a writ of *certiorari* to the United States Supreme Court to review a negative determination of either the Court of Appeals or a rehearing *en banc*.

After final judicial review, commutation applications directed to the executive branch are conducted. Stays at each level or stage of litigation are routine. A litigation process lasting eight to ten years is the norm.[24]

These levels of judicial review are the mandatory daily fare of capital litigation even in states where death penalty statutes, unlike the Volker/Graber bill, fail to provide representation beyond the highest state court.

There is a nationwide network of lawyers, legal workers and organizations routinely seeing to it that lawyers are supplied in the post-conviction stages of capital cases everywhere in the country.[25]

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[24] While nostalgic longing for simpler times may be appealing, it will not change the course or the length of capital litigation in the United States. The most recent death case before the Supreme Court, *Eddings v. Oklahoma*, __U.S.__, 102 S.Ct. 869 (1982), vacated a sentence of death and remanded for resentencing. The decision handed down January 19, 1982, concerned a shooting which occurred April 4, 1977. If *Eddings* is resentenced to death, the appeal process will begin again. This time-consuming judicial resolution of complex legal questions is something to be proud of. It is one of the indicia which distinguishes the United States of America from a host of "overnight republics" which dot the globe. Furthermore, litigation delay is by no means unique in or limited to death cases. *United States v. IBM*, 615 F2d 923 (2d Cir. 1980) was an antitrust suit brought by the Justice Department in 1969. The suit alleged that IBM had, *inter alia*, monopolized the electronic digital computer market. Discovery lasted from approximately 1969 to 1975. In that year the government's direct case commenced. It lasted for almost three years. From 1972 to 1980, IBM appealed at least five orders from the District Court, two of which were appealed to the Supreme Court. The IBM defense began in 1978. In January of 1982 the lawsuit was discontinued. As of 1979, 90,000 pages of testimony had been transcribed, several hundred witnesses had been deposed and 70 trial witnesses had been called.

[25] This network, partially the outgrowth of the death penalty moratorium strategy, is now in permanent place throughout the country. Thus, even in states which do not provide for representation beyond the highest state court, litigation still takes place and generates all the costs of responding to petitions for writs of *certiorari*, *habeas corpus* and other forms of state and federal post-conviction relief. More importantly, the

By an examination of these ten levels of judicial review, it is possible to actually chart the costs of capital litigation (see Table 1).

TABLE 1[26]
A Model Charting System for Projecting Capital Litigation Cost

STATE I

TRIAL						1.
PENALTY PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						
GUILT PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

[illegible]AL						2.
COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						3.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

extent to which capital litigants are entitled to counsel in seeking state and federal post-conviction review (in states failing to provide it) is, itself, a question raised in capital litigation. It is clear that, from an ethical point of view, a lawyer cannot just "drop a capital case." Furthermore, canon 2 of the CODE OF PROFESSIONAL RESPONSIBILITY (DR2-110[A][2]) can be read to require the lawyer in a capital case to pursue the matter in federal court independent of the state's statutory scheme. See also *In Re Anderson*, 69 Cal. 2d 613 (1968). A strong argument that counsel should be required constitutionally to pursue the case into federal court is developing. Sevilla, *Do Court Appointed Counsel In Capital Cases Have A Duty To Pursue The Case In Federal Court?*, 1 DEATH PENALTY REPORTER, No. 9, at 1 (May 1981). It is reasonable to assume that eventually in capital cases a right to counsel for *all* levels of review, similar to the New York State statute, will be constitutionally mandated. The cost of the death penalty in those states that have failed to provide counsel will, at that time, be geometrically increased since such a ruling will no doubt be given retroactive effect.

[26] This chart depicts three channels of review in which capital litigation takes place: "State I," "State II" and "Federal." The stages are numbered in the theoretical order in which a "model" case would proceed. In reality, remands, evidentiary hearings, stays, and certain concurrent proceedings would both alter and add to the numbering system. The boxes represent in graphic form a means to allocate state and county costs across the ten levels of judicial review for defense, prosecution, courts, corrections, and other miscellaneous categories. In our model, "State I" is the first channel of litigation and includes the state trial court proceeding,

STATE II

POST-CONVICTION PROCEEDING						4.
	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						5.
COURT OF APPEALS	Defense	Prosecution	Court	Corrections	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						6.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

FEDERAL

PETITION FOR WRIT OF HABEAS CORPUS						7.
DISTRICT COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						8.
U.S. COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

REHEARING						9.
U.S. COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						10.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

EXECUTIVE

COMMUTATION APPLICATION						11.
	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

In what follows, we discuss "State I"—the first three stages of capital litigation. We will trace a death penalty case through trial, appeal, and United States Supreme Court review. To the extent possible, we allocate and chart the costs for defense,[27] prosecution,[28] corrections,[29] courts,[30] and other miscellaneous categories.

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direct appeal to the Court of Appeals, and federal relief in the form of *certiorari* to the United States Supreme Court. In the event that relief is denied in this channel, litigation in "State II" (the state's post-conviction remedy channel) commences. Post-conviction proceedings at the trial level, direct review by the Court of Appeals, and again a writ of *certiorari* to the Supreme Court are envisioned. The "Federal" channel includes *habeas corpus* relief in the U.S. District Court, review of adverse decisions by the U.S. Court of Appeals, discretionary relief by rehearing *en banc* in the U.S. Court of Appeals, and again a writ of *certiorari* for Supreme Court review. The eleventh level of this review process includes executive clemency. It should be noted that the statutory apparatus for clemency in the state of New York does not appear to be procedurally sufficient for death cases. See N.Y. CORRECT. LAW ARTICLE 11 (McKinney 1968).

[27] In addition to other authority cited throughout this paper, in February and March of 1982, the New York State Defenders Association conducted a telephone survey of public defender offices, private attorneys, expert witnesses, investigators, correctional personnel, and others in order to determine costs involved in litigating death penalty cases.

[28] Throughout the remainder of this paper, we apply a uniform formula to estimate capital prosecution costs. This formula is based on existing average statewide disparity rates between prosecution and defense. For the purposes of the estimates, we use the baseline defense costs and apply three prosecution to defense ratios. The first, a 2 to 1 ratio, is applied to counsel costs in the guilt and penalty phases. The second, a 3 to 1 ratio, is applied to expert witness and investigation costs in the guilt and penalty phases. The third, a 1 to 1 ratio, is applied to the cost of appeals to the New York Court of Appeals and the United States Supreme Court. These ratios are a reflection of actual experience based on defense/prosecution cost data. As applied, they will consistently yield what we believe are uniformly conservative dollar amounts. Actual prosecution/defense disparity is much greater than 2 to 1 or 3 to 1. In some jurisdictions, disparity runs as high as 8 or 10 to 1. The reader can thus take the prosecution costs reported hereinafter as the minimum cost of capital prosecution, resting precariously upon the assurance that these costs will be no less than what is reported, and will probably be much more. While we hesitate to say how much more, if recent experience is the bellwether, counties will assuredly go bankrupt as they pay for the cost of prosecution in capital cases. Under the capital litigation scheme envisioned for New York by the Volker/Graber bill, prosecution costs will remain a county charge.

[29] We do not yet know the correctional costs generated by the death penalty at the local level. There will be higher security costs attached to capital incarceration in the areas of housing, monitoring, maintenance, transportation, and feeding. Most local jails will be hard pressed to achieve adequate capital case security. We do not, herein, estimate local correctional costs generated by the death penalty. In the state system (post-verdict), capital incarceration takes a tremendous and distinctly identifiable toll. We discuss certain costs associated with state level incarceration infra at PART III.

[30] The difficulty of retrieving useful data for the purpose of projecting court costs in New York State has previously been recognized. NATIONAL CENTER FOR STATE COURTS, NEW YORK STATE BUDGET REVIEW MANUAL: A REPORT OF THE SENATE SELECT TASK FORCE ON COURT REORGANIZATION (1978). For this reason, in this report we rely on survey data from other states.

THE GUILT AND PENALTY PHASES

A. Death Is Different

The United States Supreme Court has recognized that death penalty cases require greater due process procedural safeguards than do non-capital cases. In *Gardner v. Florida*, 430 U.S. 349, 357 (1977), the Court stated:

> ". . . [F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. [Citations omitted.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

The Legislature's intent to have the state pay the defense bill no doubt arises from court decisions like *Gardner* which establish that death cases require greater procedural protection.[31]

In recognizing this constitutional principle, the Legislature has declared its commitment to this new brand of equal protection. It has stated that where the state seeks the irrevocable sanction of death, inability to pay for the best counsel and auxiliary services will not be a bar to receiving them. Under the Legislature's view of due process, in such cases, the state will pay for representation, no matter what it costs.

In the ordinary criminal case in which the appointment of counsel is made for a person unable to afford counsel, the court will appoint counsel. The legislative debates indicate, however, that, although it is not a requirement of our present statutory scheme and has not yet been recognized as an element of the Sixth Amendment,[32] an indigent defendant facing the death penalty in New York State will have the opportunity to choose the lawyer to be appointed. Additionally, although the mechanism for this process of appointment has not been made clear by the Legislature, the Legislature has explicitly pointed out that this will not just be competent counsel but will be the best counsel money can buy:

> ". . . [W]hat we are saying is that whatever the fees are that F. Lee Bailey and the best attorneys, the best criminal attorneys get, are the kind of fees that the State is going to provide for the defense of accused persons who may come under the restrictions of this bill."[33]

While the use of the name F. Lee Bailey may be somewhat symbolic, there is no

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[31] See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). Mr. Justice Harlan, concurring in *Reid v. Covert*, 354 U.S. 1, 77 (1957), stated: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case." *Gardner* makes clear that a majority of the Court accepted this position.

[32] The U.S. Court of Appeals for the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel is violated when a trial court judge fails to accord appropriate weight to an existing attorney/client relationship in determining whether to grant a continuance founded on the temporary unavailability of the defendant's particular attorney. *Slappy v. Morris*, 649 F.2d 718 (9th Cir. 1981). On March 29, 1982, the United States Supreme Court agreed to review the case. *Morris v. Slappy*, 81-1095. See also *N.Y.L.J.*, March 30, 1982, at 1, col. 4. Thus the question of whether or not a defendant has a federal constitutional right under certain circumstances to "counsel of choice" may soon be resolved.

[33] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, March 20, 1978) (statement of Assemblyman Friedman), at 2079-2080.

question that his fee structure is real. If New York is prepared to pay for the "best" counsel with taxpayers money, it can begin with his law offices in Boston. Bailey's office reported that in serious felony (non-capital) cases, it requires an initial retainer of $50,000. This does not include expenses or per diem trial costs.[14]

Norris Gelman, a Pennsylvania attorney with much trial experience in death penalty cases, stated that an appropriate retainer in a capital case runs anywhere from $25,000 to $50,000 depending on the fact pattern.

Ken Rose, an attorney with Team Defense in Atlanta, an organization that specializes in defending death penalty cases, reported that private attorneys in the Atlanta area require initial retainers ranging from $15,000 to $40,000. The Southern Poverty Law Center similarly found that private attorneys in Alabama require retainers of not less than $25,000.

Fees thereafter will be based on hourly and daily (trial) rates. Fees ranging from $100 to $200 per hour will not be uncommon. The bill provides for the appointment of "one or more attorneys" and it is reasonable to assume that the appointment of two or more attorneys will be the rule, not the exception.[15]

The natural result of the death penalty statute will be that jury trials will be conducted in all capital murder cases. The jury trials will be longer and more expensive than in non-capital cases. Long before the jury is empaneled, however, there will be very high pretrial costs. These include motion practice, investigations, and the use of expert witnesses. A discussion of these follows.

B. Motion Practice

Pretrial motions play an important role in *most* criminal cases. However, a death penalty trial is strikingly different than other felony trials because of the length of each procedural stage and its overall importance to the ultimate objective—preventing the imposition of the sanction of death. Extensive pretrial motions play, therefore, a crucial role in *every* death penalty case.

Motions request specific legal relief or action; they help to educate the trial court and appellate courts as to the standards of extra-special due process that have to be applied to each procedural question in a death case. Motions create a record and set a course of strategy upon which the entire litigation effort in a capital case is patterned.

The usual number of pretrial motions in non-capital cases vary between five and seven. In death penalty cases, every motion will be critical, requiring substantially more time to prepare. Experienced attorneys state that the typical capital case requires the filing of between 10 and 25 trial motions.[16] Many pretrial motions will relate solely to the unique aspects of the defendant's underlying criminal case. Others will be specifically a function of there being a death penalty statute in existence.

Thoroughly researched constitutional attacks on the death statute, motions directed at insulating the jury from ourside influences, and in-depth motions for discovery and the right to inspect and test evidence will be routine. Ordinary motions in criminal

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[14] Significantly, F. Lee Bailey reportedly spent $350,000 for his own defense against charges of conspiracy to defraud investors arising from his involvement with Glenn Turner (*Time*, Feb. 16, 1976, at 50.) Nor is he alone. John Ehrlichman is reported to have spent $400,000 on his defense. (*Time*, Jan. 13, 1975, at 14.)

[15] Unlike the proposed Volker/Graber bill, the California death statute is silent on the number of lawyers to be appointed in capital cases. Nevertheless, the California Supreme Court has held that a court should presumptively appoint a second attorney if such an attorney "... may lend important assistance in preparing for trial or presenting the case." *Keenan v. The Superior Court of the City and County of San Francisco*, 30 Cal. 3d_____ (Feb. 8, 1982).

[16] *Motions for Capital Cases*, Southern Poverty Law Center, 1981, p. 2.

cases take on a different meaning in death cases. Thus, motions to suppress physical evidence or suggestive identification procedures, motions to dismiss the indictment, or motions to contravert search warrants, the routine matter of any criminal case, are longer, more complicated and more heavily litigated in death cases.

In capital cases, motions for the appointment of expert witnesses, the employment of investigators, the utilization of private psychiatrists for trial and sentencing and special motions to increase the court's consciousness of the requirements of "super due process" are not only routine but required as an element of the effective assistance of counsel.

In virtually every death penalty case, the defense will file motions for change of venue, individual *voir dire*, sequestration of jurors during *voir dire*, and sequestration of a petit jury. The motions are essential to offset prejudicial pretrial publicity and to ensure the defendant an impartial jury.[37] There are reported cases of individual examination of potential jurors that have lasted two to four weeks. The cost of sequestering the jury in a trial that, on the average, lasts from four to six weeks in a capital case, is also substantial.[38]

Professor Robert Buckhout, a professor of psychology at Brooklyn College, Brooklyn, New York, has testified in over 80 death penalty cases. His expertise involves the sufficiency of eyewitness identifications as well as conducting juristic psychological surveys. Juristic psychological surveys involve consulting with the attorneys and preparation of sample questionnaires to assist in targeting special jurors during *voir dire*. At times, he has even assisted attorneys in the actual conduct of *voir dire*. Professor Buckhout's fee for the surveys is $500 per day for in-courtroom testimony with a consulting fee of $100 per hour. In 1977, Professor Buckhout submitted a $25,000 bill in a death penalty trial for a juristic psychological survey.

C. Investigators

Once an attorney appears in a death penalty case, and ordinarily before many of the aforementioned pretrial motions are brought, there arises the need for auxiliary defense services. Foremost among these is the need for an investigator.

Investigators' fees, in our survey, range from $500 to $1500 per day. Hourly rates for experienced investigators were reported to range between $75 and $200. The Office of the State Public Defender in California has found the cost for investigators at trial in some death penalty cases to have been in excess of $40,000. Similar amounts were reported by private attorneys. The National College for Criminal Defense in Houston found that the bare minimum needed for investigation is $10,000, and this figure only represents the investigation required for the trial phase. This figure, by New York standards, is concededly low.[39]

The Sixth Amendment right to the effective assistance of counsel in both federal and state courts requires thorough investigations in all criminal cases. Apparently, this has not gone unnoticed by the Legislature. The legislative debate on what would be paid for investigators included a comment by Assemblyman Friedman about defendants who, years after conviction, were able to secure their freedom with "late" investigative

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[37] *Motions for Capital Cases*, Southern Poverty Law Center, 1981, pp. 43-44, 78-83.

[38] This cost is not detailed nor estimated herein. It will, however, be a substantial charge.

[39] In *People v. Gravdon*, 43 A.D.2d 842 (1974), a non-capital murder case involving a shooting in a social club, the American Service Bureau, the private investigation firm on the case, found and interviewed more than 35 witnesses. The work in that non-capital matter included the investigation of each complaining witness and the retrieval of statements. The cost of this alone exceeded $25,000.

help. Referring to this issue he stated, *supra*, at n. 20, "This bill says you are going to have those investigative services at the very beginning."

"Up front" investigative services have been shown to be essential. In the recent case of Johnny Ross, imprisoned in Louisiana at 15 and sentenced at 16 to die for a rape he didn't commit, investigative services set him free. These investigative services should have been available pretrial, but were not supplied until the Southern Poverty Law Center brought a *habeas corpus* petition (in the "Federal" or third litigation channel).

The Southern Poverty Law Center received a letter from Johnny Ross in 1975 pleading his innocence. Ross was 16 at the time—the youngest person on death row in America—and the Center took his case. Ross's 1975 trial had lasted less than one day despite the fact that it was a capital case in which his life was at stake.

Among numerous other things, the Southern Poverty Law Center hired Gary Eldredge, a private investigator from New Orleans, to complete the investigation in the Johnny Ross case:

> "Eldredge read the trial transcript and began tracking down alibi witnesses, interviewing investigating officers and pursuing other leads. In reading the transcript, he noticed that the prosecutor had introduced, through the testimony of a criminalist, the rapist's blood type, as determined from a semen sample taken from the rape scene, but the prosecutor had never tied this piece of evidence to Ross.
>
> "For the sake of thoroughness, Eldredge decided to check it out and contacted Ross to see if he knew his blood type. The rapist's was the 'B' group. Ross didn't know his, but told Eldredge he had donated blood a number of times since he'd been imprisoned. So Eldredge contacted the blood bank that served the prison.
>
> "Each of the numerous times Ross had donated, his blood had been typed, and each time it had come up 'O +.' But these were the results of testing by technicians, not physicians, so after informing [the Southern Poverty Law Center] of his findings, Eldredge arranged for a prominent university doctor to test Ross, and his tests produced exactly the same results. ***[The Southern Poverty Law Center] took the evidence to the district attorney's office. Soon thereafter, Ross was released. He is now living with his sister in Denver."[40]

The price of the Gary Eldredge investigation in the Johnny Ross case was $3500. It took place, however, years later than it should have, in conjunction with a federal *habeas corpus* petition. The waste of taxpayer dollars that ensued from unnecessary litigation is nothing compared to the abuse of Johnny Ross's liberty—a deprivation of freedom arising directly from poverty.

A typical criminal case investigation, obviously heightened in a death case, involves searching for and interviewing every potential favorable and adverse witness. It includes crime scene investigations, photographs, the search for and retention of experts, and the review of testimony presented at pretrial hearings and other evidentiary proceedings. The investigator retrieves evidence, follows leads, and develops factual theories. Frequently, the investigator is deeply involved in surveys to test for prejudice within a community and among potential jury veniremen. In a system which requires the marshalling of facts before they are applied to law, the investigator is a crucial and vital part of the defense team.

Nor should it be forgotten that the sentencing phase of the bifurcated trial process is

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[40] *Poverty Law Report*, Vol. 10, No. 1, Jan./Feb. 1982, at 3.

a co-equal part of capital litigation at the trial level. Thus, the marshalling of facts on the issue of guilt is but 50 percent of the work that a good private investigator will be doing in a capital case.

D. Experts and Auxiliary Services

Experts, such as forensic scientists, juristic psychologists, psychiatrists, crime scene reconstructionists, criminalists, polygraph experts and others contacted in our survey, reported fees ranging from $500 to $1,000 a day for their services. These people are critically necessary to the defense team. While any particular case may require a different configuration of the experts required, all cases will require the extensive use of numerous experts. The fees reported below are exclusive of the expenses required for travel.

Judith Bunker, a technical specialist to the medical examiner in Atlanta, and one of the top crime scene reconstructionists and blood stain analysts in the country, has advised NYSDA that the going rate for such services ranges from $700 to $1,000 per day.

In many capital cases, difficult issues, such as the insanity defense, are often raised. Psychological Evaluations, Inc., in Atlanta, has performed psychiatric and psychological evaluations in death penalty cases throughout the country. Although the individual fees vary, Dr. Anthony Stone, a psychologist, reports the average fee is approximately $700 a day exclusive of expenses.

Our office interviewed Mr. Robbie Robertson of W.A. Robertson and Associates from Atlanta, Georgia. Mr. Robertson is an expert in the administration and analysis of polygraph examinations. He has participated in approximately 25 capital murder cases in which his testimony and analysis were used at pretrial proceedings, and trial and sentencing phases of the bifurcated capital process. His present fee is $200 per day for courtroom testimony. In addition, he charges $150 for the administration of the polygraph examination with the average bill approximating $500 plus expenses.

As stated earlier, Professor Robert Buckhout has appeared in his capacity as an expert witness regarding eyewitness identifications. His courtroom fee is $500 per day. His consulting fee, once again, $100 per hour.

Dr. George Jurow of New York, New York, has been involved in approximately 25 death penalty cases. His expertise centers on *Witherspoon* issues.[41] His research concludes that the exclusion of jurors opposed to the death penalty at trial results in biased juries. His services include consulting with the attorney and sometimes testimony at the pretrial stage. Frequently, he is a witness in support of defense motions to empanel a separate jury for the sentencing phase. His fee is $100 per hour for consulting as well as testimony.

Dr. David Rothstein, of the Michael Reese Medical Center, Chicago, Illinois, is a psychiatrist. Dr. Rothstein has testified in several capital cases in both the trial and penalty phases. His fee is $125 per hour for in-court testimony and $110 per hour for analysis. This fee is exclusive of expenses.

Dr. Seymour Halleck, of the School of Psychiatry at the University of North Carolina at Chapel Hill, has testified in both the trial and penalty phases of capital trials. With a standard fee of $150 per hour, he approximated his average bill to be $2500 for both phases.

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[41] *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), held that a death sentence may not be "... carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

A typical death case will use these experts or others just like them. A hypothetical case can easily be designed. Let us assume a case in which three days of crime scene reconstruction, a juristic psychological survey and a polygraph examination are required. Let us further assume a *Witherspoon* jury challenge that takes three days of work and four hours of testimony and the use of one psychiatrist who has conducted a five hour exam and testifies for two hours. This relatively modest use of experts will run up a bill for the state of more than $30,000 in just the guilt phase of a capital case. These costs are real. They will be paid by the state. They will be present in every capital trial.

E. Sentencing in the Penalty Phase

Any aspect of the defendant's character or record and any other circumstance offered in mitigation of punishment must be considered by the jury in the penalty phase of a capital trial. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). *Lockett* followed on the heels of *Woodson v. North Carolina*, 428 U.S. 280 (1976). In *Woodson*, the Supreme Court, in defining the requirements of capital sentencing procedures, stated that courts must consider the:

> "character and record of the individual offender and the circumstances of the particular offense *as a constitutionally indispensible part of the process of inflicting the penalty of death.*" (Emphasis supplied.) *Id.*, at 304.

In *Gardner v. Florida*, 430 U.S. 349, 358 (1977), the Court held that:

> "[I]t is now clear that *the sentencing process*, as well as the trial itself, *must satisfy the requirements of the Due Process Clause* ***[*T*]*he sentencing is a critical stage of the criminal proceeding at which* [*the defendant*] *is entitled to the effective assistance of counsel.* ***The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence. . . ." (Citations omitted.) (Emphasis supplied.)

At this critical stage of the proceeding, the defense may use many of the socio-psychiatric witnesses employed during the trial phase. However, this stage additionally requires the investigation of the defendant's family, friends, neighbors, school personnel, and social workers.

The investigation at the sentencing phase requires a complete retrospective analysis of every positive aspect of the defendant's life from the day of birth to the date of sentence. The witnesses called to this proceeding, vital to establishing evidence in mitigation of sentence, must be made available to testify, requiring, in many cases, the reimbursement of travel expenses and accommodations. Military, school, work, and other records must be designated, located and retrieved.

The Volker/Graber bill will permit the court, upon a showing of prejudice, to discharge the trial jury and empanel a new sentencing jury.[42] Hence, defense counsel will undoubtedly make the same motion as was made at trial for individual *voir dire* at the sentencing phase and for sequestration of the sentencing jury. Here again, a lengthy process of individual *voir dire* is, in many cases, the only possible remedy to empanel a fair and impartial jury on the question of sanction. The main reason courts have granted individual *voir dire* is that it is uniquely suited to capital cases.

Death cases ordinarily are accompanied by tremendous publicity and notoriety. Infection of the jury panel by this kind of publicity, and its resultant effect on jury fact-finding, creates reversible error. Therefore, it is in the interest of the court system to

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[42] Proposed CRIM. PROC. LAW §400.27(2), S.7600/A.9379 §8 (1982).

permit individual *voir dire* and sequestration of jurors during *voir dire*. Such *voir dire* enables the defense to delve into the area of prejudice without fear that the answers of one juror will taint the entire panel. Such taint preserves an issue for later litigation.

Three of the mitigating factors described in the proposed death bill for New York require the sentencing jury to consider whether ". . . [t]he murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug . . . ,"[43] whether ". . . [t]he defendant was under unusual and substantial duress or under the domination of another person . . . ,"[44] and whether ". . . [t]he defendant's mental capacity . . . or his ability to conform his conduct to the requirements of law was significantly impaired. . . ."[45] These circumstances clearly contemplate a situation where the defense will be called upon to present extensive testimony of psychologists and psychiatrists. The previously discussed costs of such services will *again* be incurred by the state. They will probably be higher in the penalty phase of the capital trial since the importance of such testimony is magnified by the omnipresence of death.

Furthermore, since 1978, it has been constitutionally explicit that:

> ". . . [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[46]

The requirements which permit relevant evidence in mitigation also result in the defense calling witnesses to establish the cruelty of the death penalty. Former death row inmates, theologians and witnesses to prior executions are the type of non-traditional expert witnesses that now, under rules laid down by the Supreme Court, testify in the penalty phase of capital litigation. The expense of these experts at the sentencing proceeding will be considerable. Little, if any, of this evidence can be legally excluded from the sentencing phase of a capital trial in the United States.

Mr. Lloyd McClendon, Deputy Administrator, Ohio Penal Industries, Columbus, Ohio, is an ex-death row inmate, having spent two years on death row. He has been certified as an expert witness in approximately six death penalty trials throughout the country. His testimony is used at the sentencing stage to rebut the deterrent effect of the death penalty and to support mitigating factors such as the defendant's positive potential. Mr. McClendon's fee is presently $500 a day for in-court testimony. In a recent case in the state of Florida, he submitted a bill to the public defender's office for approximately $2000.

The array of expert witnesses, including social psychiatrists, criminologists, and counselors, whose testimony will bear on the inadequacy of the death penalty as a sanction, requires preparation for a full blown evidentiary, adversarial proceeding. Experts to testify on the death penalty as it is applied in a particular state, professors to testify on the philosophical question of capital punishment, social scientists to resolve jury doubts, and many others are called as witnesses in the penalty phase. Testimony on the inefficacy of the death penalty as a deterrent, on attitudes toward the

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[43] Proposed CRIM. PROC. LAW §400.27 (8)(f), S.7600/A.9379 §8 (1982).

[44] Proposed CRIM. PROC. LAW §400.27(8)(c), S.7600/A.9379 §8 (1982).

[45] Proposed CRIM. PROC. LAW §400.27(8)(b), S.7600/A.9379 §8 (1982).

[46] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

death penalty, on racial prejudice, and on every imaginable issue that can prevent the execution of a human being is permissible and systematically used in the sentencing phase of a capital case.[47]

THE COST OF THE GUILT AND PENALTY PHASES

The first stage of "State I" has been seen to be expensive. We recap costs here.

Defense: Charges for the defense will conservatively total $352,700. One hundred seventy six thousand, three hundred fifty dollars ($176,350) is allocated for each phase (guilt and penalty)[48] as follows:

Attorneys	$106,350
Investigators	40,000
Experts	30,000
	$176,350

Prosecution: Our estimate of prosecution costs at the trial level for the guilt and penalty phase of the average capital case in New York is $845,400.[49]

Court: As previously stated,[50] court data is difficult to retrieve for the purpose of capital litigation cost modeling. We do, however, have a guidepost and, in the absence of hard data, we use it. John Ackerman, dean of the National College for Criminal Defense, reports that a local Texas judge, counting only court-time, employees time and jury sequestration, estimated the county cost of a recent death penalty case at over $300,000. This amount did not include appeal, and the defendant in that case did not receive a sentence of death. In fact, the case is now on appeal.

Correctional Cost: As previously stated,[51] we do not estimate or allocate local jail capital incarceration costs.

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[47] It should be noted that the only experiential competence statutorially required under the Volker/Graber bill is in the *trial* of felony cases (three years). However, the two stages of the bifurcated capital process require experiential competence in both the guilt phase (trial) and the penalty phase (sentencing). The art of sentencing advocacy is a new and developing area. Experience in New York felony court representation, absent more, is not sufficient experience for the sentencing phase of a capital case. Additionally, in New York, experiential competence in similar sentencing proceedings would be virtually impossible to acquire. Although Article 400 of the Criminal Procedure Law presently provides for presentence conferences, summary hearings, and other specified hearing procedures, these proceedings do not approach the complexity or importance of penalty phase proceedings in death cases. Furthermore, the CPL proceedings can only be held before a judge [CPL §§400.10; 400.15(7)(a); 400.16(2); 400.20(a); 400.21(7)(a); 400.30; 400.40(5)] while penalty phase proceedings are held before juries. Although the Volker/Graber bill clearly permits hiring special counsel to assist in penalty phase procedures, including post-trial, presentence motion practice, presentence investigations, hearing preparation and the sentencing hearing itself, we do not independently calculate these fees.

[48] This assumes a concededly low model four week trial of 120 trial hours, exclusive of motions. It assumes two trial lawyers, one investigator, and the expert costs detailed *supra* at D. One hundred twenty five (125) hours of motion work are allocated to the guilt phase, and 344 hours of lawyer time to investigation and preparation (research, witness preparation, client interviews).

[49] See n. 28, *supra*.

[50] See n. 30, *supra*.

[51] See n. 29, *supra*.

We can now allocate and chart some of the costs arising in the first stage of capital litigation—the guilt and penalty phases. (See Table 2 below.)

TABLE 2
COST OF THE GUILT AND PENALTY PHASES

TRIAL						
PENALTY PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$176,350	—0—	$150,000	—0—	?	$326,350
County Charge	—0—	$422,700	—0—	?	?	$422,700
GUILT PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$176,350	—0—	$150,000	—0—	?	$326,350
County Charge	—0—	$422,700	—0—	?	?	$422,700

STATE $652,700
COUNTY $845,400
TOTAL $1,498,100

Under the Volker/Graber bill, it will cost New York State and its counties more than $1.4 million to bring a capital case to the point of a death sentence. However, the drain of taxpayers' money will have just begun. The costs associated with the ensuing nine levels of appellate review are substantial.[52] The first two stages of the appellate process within "State I" are detailed below.

DIRECT APPEAL TO THE COURT OF APPEALS

The Volker/Graber bill authorizes a direct appeal to the Court of Appeals from judgment of conviction and sentence of death. The Court of Appeals will review the law and the facts. It will examine the presence of passion, prejudice, or arbitrariness in the sentence. It will review statewide sentencing patterns and determine whether the sentence of death is disproportionate or excessive. The appellate process will increase the total cost of the death penalty procedure by: 1) being more expensive than non-capital appeals; and 2) regenerating the costs of the trial process when cases are remanded for trial. The latter result is not infrequent in death penalty appeals.

The California Office of the State Public Defender reports that nine out of the first 11 death judgment appeals under California's death penalty statute resulted in either

[52] It bears repeating that the proposed bill does not limit the reimbursement of appellate defense counsel to the state appellate forum. Indeed, it requires the appointment of appellate counsel for the federal as well as the state level. The costs associated with "State II" and the "Federal" litigation channel (see Table 1, *supra*) (post-conviction proceedings, appeals, writs of *certiorari*, federal *habeas corpus* petition, federal appeals, rehearings, and writs of *certiorari*) are not detailed in this paper. Furthermore, the Attorney General will represent the state as respondent at each application for a writ of *habeas corpus* and other federal relief. The weighty state costs associated with this representation at three federal stages of litigation are also not detailed herein.

reversals or retrials. That office also reports the cost of a death penalty appeal on the state level to be in excess of $30,000 per case.

The proposed New York bill would require appellate counsel to perfect two appeals at once, i.e., the sentence review[53] and the direct appeal. The expense of this procedure will also be felt by the state and county as they attempt to defend the conviction. The constitutionality of a death penalty statute is almost always attacked on appeal. In New York, this will require the Attorney General's office to appear and defend the constitutionality of this statute.[54]

In our survey on appellate death penalty costs, F. Lee Bailey's office reported a minimum cost of $25,000 to take a non-capital felony appeal. Again, this figure is exclusive of expenses.

The Southern Poverty Law Center reported the cost of an appeal to range from $20,000 to $30,000. Under the New York statute, the costs will be higher.

In order to accurately quantify time involved in a capital case, we examined jurisdictions which have objectified the appellate process by the development of workload standards. In California and Michigan, the state defender offices have quantified non-capital appellate work into work units. By calculating the number of hours to prepare one brief from 300 pages of transcript, the Michigan Appellate Defender Office has developed an "an appellate unit"—a work unit equal to 55 hours of attorney time. Under this formula, a minor non-capital case directly appealed to the highest state court would require 3.7 work units or approximately 203½ hours. This includes an application to appeal, an appellate brief, oral argument, and motion for rehearing. It does not cover reply briefs, client visits, or expenses. The standards for California are substantially similar.

Significantly, the Appellate Section of the National Legal Aid and Defender Association[55] has developed capital case appellate standards and has also done so on the basis of work units. Under these standards, which can permissibly be met under the express provisions of the Volker/Graber bill, 30 work units are the standard work load for one appellate attorney for one year. A direct appeal of a death case to the New York Court of Appeals would constitute 14 work units under these standards.

This figure, which may be somewhat low considering the extensive research and innovation that will be required in the first onslaught of constitutional challenges to the Volker/Graber bill, translates into about five months work or between 800 and 900 billable hours. At the rates charged by the "best" counsel, *supra*, at n. 33, this will translate into defense costs of $80,000.

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[53] The costs associated with the constitutionally required disproportionality review have not been assessed. The death penalty statute will require the arresting police officer, the prosecuting attorney, the defendant's attorney, and the trial judge to file reports with the Court of Appeals in every case where a defendant is indicted for first degree murder. These reports will have to be filed with the Court of Appeals within 30 days of a disposition by a superior court. They will also have to be separately analyzed in conjunction with each death penalty sentence appeal. The contents of the reports will be designed by rule of the Court of Appeals. They are obviously, therefore, not detailed in the bill. It is, however, clear that, independent of other increased capital case judicial costs, the judicial system will need significant additional resources just to carry out disproportionality review.

[54] N.Y. EXEC. LAW, §71 (McKinney 1972).

[55] The workload standards reported here were presented at the National Appellate Defender Conference conducted by the National Legal Aid and Defender Association, April 10-12, 1981, in Indianapolis, Indiana. The capital case workload standards of 30 work units define a capital brief as 10 units, and a petition for *certiorari* as four.

A direct appeal of a capital case to the New York State Court of Appeals will, therefore, cost New York taxpayers no less than $160,000[56] exclusive of correctional and court costs, as indicated in Table 3 below.

TABLE 3
COST OF DIRECT APPEAL TO THE NEW YORK STATE COURT OF APPEALS

APPEAL						
COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$80,000	—0—	?	?	?	$80,000
County Charge	—0—	$80,000	—0—	—0—	?	$80,000

STATE $80,000
COUNTY $80,000
TOTAL $160,000

SUPREME COURT REVIEW

Final judgments of the Court of Appeals rendered in death penalty cases are next reviewable by the United States Supreme Court by writ of *certiorari*. Bringing such petitions is routine capital practice. Preparation of the petition and the brief on the merits involve complete review of, and familiarity with, the entire trial transcript and all state court proceedings. The transcripts to be reviewed frequently contain thousands and thousands of pages.

Edward Nowak, Public Defender of Monroe County and an able appellate lawyer who successfully argued the landmark case of *Dunaway v. New York*, 99 S.Ct. 2248 (1979), before the Supreme Court, estimates that the amount of time to adequately prepare a non-capital case for Supreme Court review averages between 150 and 200 hours. Seventy to 100 of these hours cover the preparation of the petition for *certiorari*. Once the petition is granted, however, fine points have to be honed and final briefs have to be prepared. Six lawyer weeks is not an unusual amount of time in non-capital cases.

In capital cases, far more is involved. The record is longer, the issues more complex, the stakes higher. More importantly, the constitutional principles involved have frequently only recently been enunciated and are subject to precise case by case refinement. During this process of review, while the cost of defense services will be a state charge, the cost of prosecutorial time will be a county charge.

The Supreme Court does not look at a *certiorari* petition to do justice to an individual litigant. Despite its reputation, the Supreme Court does not sit as a "court of last resort." Rather, in exercising its *certiorari* jurisdiction, the court seeks to either refine existing propositions of law, explore potential areas for applying settled principles of law, or to resolve constitutional conflicts among the state or federal circuits. In death cases, these principles heighten the existing pressure to find novel issues for Supreme Court reversal.

In the most recent case before the Court, *Eddings v. Oklahoma*, ____U.S.____, 102 S. Ct. 869 (1982), the question presented was whether or not the infliction of the death penalty on a minor who was 16 at the time of the crime constituted cruel and unusual

[56] Prosecution costs are calculated at a ratio of 1 to 1 with defense. See n. 28, *supra*.

punishment under the Eighth and 14th Amendments to the Constitution of the United States. A second question was whether or not the Supreme Court should address the plain error committed by the trial court when it refused to consider relevant mitigating evidence. The petition for *certiorari* was 26 pages long. The state's opposition brief, 20 pages long. The brief on the merits, filed for the petitioner, was 68 pages long. It argued three points of law, cited 81 cases, and discussed 95 domestic statutes. It reviewed the statutes of 11 countries. Seventy-seven other authorities were cited in the brief. Five appendices containing in-depth social research were filed.

The *Eddings* case is not an unusual effort on behalf of a capital defendant. It involved hundreds and hundreds of attorney hours to research, prepare and present the case.[57]

Applying the Michigan work unit formula, a non-capital petition for *certiorari*, brief and argument before the United States Supreme Court requires four units or 220 hours of attorney work. The California formula, applied to Supreme Court review in a non-capital case, would require three appellate work units and approximately 200 hours of attorney time for research, preparation, brief writing, and oral argument. Applying the NLADA Appellate Section standards, a petition for *certiorari* in a capital case would require approximately 256 hours of preparation. Supreme Court review itself, including legal research, preparation, *certiorari* petition, briefs, and oral argument would be equal to or surpass 46 percent of an attorney's work year. This is billable at approximately 883 hours.

Under the provisions of the Volker/Graber bill, which provides fees at the rates charged by the "best attorneys," *supra*, at n. 33, this will translate into defense costs of $85,000.

Supreme Court review of a New York capital case will, therefore, cost New York taxpayers no less than $170,000[58] exclusive of correctional costs as indicated in Table 4 below.

TABLE 4
COST OF SUPREME COURT REVIEW

WRIT OF CERTIORARI						
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$85,000	—0—	?	?	?	$85,000
County Charge	—0—	$85,000	—0—	?	?	$85,000

STATE $85,000
COUNTY $85,000
TOTAL $170,000

[57] Significantly, the Supreme Court decided the narrower of the two questions in *Eddings*. The constitutionality of imposing the death penalty on a 16-year-old thus remains an open question. The case is now in Oklahoma awaiting a resentencing procedure. NYSDA has been informed that a motion has been made seeking the appointment of a new sentencing judge. This will, of necessity, have to be decided before the case can proceed.

[58] Prosecution costs are calculated at a rate of 1 to 1 with defense. See n. 28, *supra*.

PART III:
A NOTE ON THE COST OF THE "CORRECTIONAL" PROCESS

The fiscal wastefulness of a criminal justice system with a death penalty is epitomized by the cost of incarceration. Since 1976, when the death penalty was held not to be unconstitutional *per se* by the Supreme Court, four people have been executed in the United States.[59] The vast majority of capital defendants do not get executed; rather, ultimately, after enormous agony and squandering of the public treasury, they are sentenced to life imprisonment. It will be the same in New York State. New Yorkers will not only pay for the cost of trial, appeal, and nine levels of review, but also for the incarceration of the inmate during the process and most probably for the rest of his life. It would, in the eyes of some, be better at the outset to offer life imprisonment as the only sanction for first degree murder.

The annual cost of maintaining an inmate in a New York State prison was calculated at $15,050 in 1978.[60] Assuming that the average age of persons convicted of first degree murder is 30,[61] and that they will live until age 70, the cost of life imprisonment for 40 years would be $602,000. At a cost of $1.4 million, a death penalty trial alone will exceed the cost of life imprisonment.

For the defendant facing capital punishment, the cost of special death row security must be added to the annual charges above. Thus, according to representatives of the Florida Clearinghouse on Criminal Justice, during the eight to ten years involved in post-conviction appellate review, an additional $15,000 per year for each inmate will probably be required. This security cost reflects the need to deal with the death row inmate individually, to maintain an individual cell, and to separate the inmate from the general population. This issue is certainly not new to correctional administrators.[62]

Richard McGee, then Administrator of the California Youth and Adult Corrections Agency, stated 18 years ago:

> "There is also the argument of cost. Why support some murderer for the rest of his life when we could execute him and save all that money, the argument goes.
>
> "Like so many arguments favoring the death penalty, this does not

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[59] Note that of the four, three—Gary Gilmore (1977); Jesse Bishop (1979); and Steven Judy (1981)—all desired execution. Only John Spenkelink did not wish to die. He is thus the only person to be executed against his will since 1967. Since 1976, eight persons on death row have, however, committed suicide.

[60] D. McDONALD, THE PRICE OF PUNISHMENT: PUBLIC SPENDING FOR CORRECTIONS IN NEW YORK 13 (1980).

[61] Florida reports the average age at admission to its death row is 30.8 years. BUREAU OF PLANNING, RESEARCH AND STATISTICS, FLORIDA DEP'T. OF CORRECTIONS—DEATH ROW ANALYSIS 1, STATISTICAL FACTS (Aug. 29, 1980).

[62] Thorsten Sellin, writing in 1961, said: "It has . . . been claimed that [the death penalty] is an economical way of disposing of criminals who, otherwise, would have to be supported at public expense—perhaps for the rest of their lives. Those who employ this cynical argument may be ignorant of the sometimes mountainous costs of the administration of justice in capital cases and they certainly have no knowledge of the realities of prison administration. It is no doubt true that some prisoners, including some lifers, do not make adequate returns to the state—measured in dollars and cents—for some of them are mentally or physically incapable of doing so. But most lifers work in prison. They perform domestic services, they work in prison shops, they do clerical work. If they were paid a wage commensurate with their services, they would be able to pay the costs of their maintenance, but since they are paid little or nothing, it is easy to forget that they are a source of financial profit to the institution in one way or another. Any prison warden will testify to the fact that it is from the group of lifers that he draws a considerable number of trusted inmate employees." *Capital Punishment*, 25 FED. PROBATION, No. 3, at 3 (Sept. 1961).

hold up under factual analysis. The actual costs of execution, the cost of operating the super-maximum security condemned unit, the years spent by some inmates in condemned status, and a pro-rata share of top level prison official's time spent in administering the unit add up to a cost substantially greater than the cost to retain them in prison the rest of their lives.

"Furthermore, perhaps half of those condemned could make highly useful prisoners. It is a common experience that many long-term prisoners settle down to responsible jobs in the prison community which could conservatively be valued at a minimum of half the salary of an employee in industrial, maintenance, clerical and other roles. This would more than pay for both their own keep and that of the other half.

"*Thus, our studies indicate that just on the basis of prison costs alone, it would actually be cheaper to do away with the death penalty.* When the other costs of death penalty cases are added—the longer trials, the sanity proceedings, the automatic and other appeals, the time of the Governor and his staff—then there seems no question but that economy is on the side of abolition."[63] (Emphasis supplied.)

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[63] McGee, *Capital Punishment as Seen By a Correctional Administrator*, 28 FED. PROBATION, No. 2, at 13-14 (June 1964).

CONCLUSION

Throughout this paper we have suggested the existence of certain indirect costs or made reference to specific costs we do not calculate.[64] These include court costs, jury sequestration, security costs for local correctional facilities, the cost of hiring special penalty phase counsel, and millions of dollars that will be associated with state and federal post-conviction review.

It should by now be clear that government has failed to look at the actual costs of defending and prosecuting capital cases. It has failed to examine the impact of the death penalty on the state's correctional system. It has no idea what the price tag for capital litigation by the Attorney General's office will be.

While prosecution costs in capital cases will probably bankrupt some counties, local governments, already caught in a quagmire over a jail crisis, have yet to examine the impact of capital case security requirements on local correctional facilities.

All these issues must be confronted without appeal to bloodlust. Bloodlust in the name of the public good is a political lie.

And the public? The public is concerned with security on the streets, in homes, at school, in offices. The public is, at best, overlooked by a government's death-bent myopia and, at worst, disregarded.

Crime and justice need to wear a common yoke. The death penalty permanently disengages them one from the other. There can be no murder in the name of justice.

Capital cases do not need to exist. The expenditures outlined in this paper are not necessary. Millions of dollars directly attributable to a death penalty and capital litigation can be instantly saved and redirected by not reinstituting capital punishment in New York State. This is not a choice ordinarily posed to voters or those others who live petrified and diminished by the fear of crime.

Political rhetoric, however, should not be permitted to obscure the true pain of the families of homicide victims. They need closure. For capital defendants, delay and legal review mean life. For the families of homicide victims, delay and legal review mean pain. For both, the process is agonizing.

While many have voiced concern over victims or perpetrators, few seem to know the true agony of either—the agony that comes from the notoriety of five or six appeals, from two or three reviews by the Supreme Court, from being dragged, alone, through the cruel and unusual punishment of waiting.

For the victim's family, it is the seemingly endless grief, memories of the morgue, recounting the report of death, refeeling aloneness.

The death penalty perpetuates victim pain. It also eats at the innards of the accused. Death row:

> ". . . is set up with one thing in mind: to hold a person until execution. None of the programs of education or rehabilitation available to others in even the strictest of prisons are available to death row inmates. The prison is required only to house, feed and then kill the inmate. This makes life on death row far more depressing and meaningless than life normally is in prison. . . . [D]eath row, . . . a ghastly zoo organized and wholly devoted to carrying out the most sordid act imaginable ***is just barely living. It is instinctive existence where the days are stitched together by a thin thread of hope that either the laws under which the penalty was decreed will be ruled unconstitutional or one's conviction will be reversed for some reason. The effects of years of isolation and deprivation, the lack of human contact, touch, and

** See nn. 25, 26, 29, 30, 38, 47, 52, 53, 54, *supra*, and text accompanying them.

sexuality builds unrelievable pressures. The constant possibility of execution added to those pressures makes for a grinding, withering life that is all but intolerable—a 'slow coming dark.' "[65]

The debate on the death penalty has become sordid and loud. It has diminished us all. We have come very far down the road from morality. Too far. The distance is shamefully represented by the theme of this paper—cost. Capital litigation and the costs of the death penalty, however, will not go away until the death penalty is abolished.

As can be seen from Table 5 below, some of the costs of the first three stages of capital litigation will total no less than $1,828,100.

TABLE 5
COST OF STATE I
(Trial, Appeal, Supreme Court)

	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$517,700	—0—	$300,000	?	?	$817,700
County Charge	—0—	$1,010,400	—0—	?	?	$1,010,400

STATE $817,700
COUNTY $1,010,400
TOTAL $1,828,100

By the time the first 40 New York death cases have been tried to verdict, over $59 million will have been expended. By the time the first 21 New York death cases have reached the United States Supreme Court, New York State and its counties will have expended as much as the Governor, in his February crime message, deemed appropriate for the entire statewide Major Offense Prosecution Program. An amount exceeding the Legislature's fiscal year 1982-83 local criminal justice assistance budget will rapidly be spent to pay for the death penalty in New York.

A recent analysis of the criminal justice system[66] indicates that the cost of the system has increased by 120 percent every five years since the early 1900's, while the rate of inflation has only increased by 40 percent every five years. A capital case, therefore, that necessarily taps resources from all facets of the criminal justice system, can be estimated to increase in cost at a similar rate. If 20 percent of the murder cases in New York (251 convictions in 1980)[67] are prosecuted through three stages of litigation as capital offenses at an average cost of $1.5 million, then in current dollars the death penalty will generate costs of approximately $75,000,000. If we assume that the cost will grow in proportion to the cost of the criminal justice system as indicated by the study, then in the year 2000 A.D., the death penalty will cost $1,075,000,000 annually. Perhaps that is what the Temporary Commission on Revision of the Penal Law meant

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[65] D. MAGEE, SLOW COMING DARK: INTERVIEWS ON DEATH ROW 5, 6 (1980).

[66] Sepler, *The Next Twenty-Five Years Facing the Criminal Justice System: Using Standard Celeration Charting for Systems Analyses*, 6 AM. J. CRIM. LAW 47 (1979).

[67] *Annual Report '80—Crime and Justice*, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, at 224.

in 1965 when, regarding the death penalty, it found "nothing but obstruction, confusion and waste."[68]

We have not detailed the costs of an actual execution. They singularly generate inordinate, almost uncontrollable, expense. The state of Georgia, which executes by electrocution, spent more than $250,000 solely for the anticipated, but aborted, execution of Jack Howard Potts in 1980.[69]

Special telephone lines running from the prison to the United States Supreme Court and to the Governor's office are necessary. The cost of extra police personnel for crowd control, helicopter security and the shutdown of federal air space over the prison are but a few items of the irrational cost that will be generated in the rare handful of cases that ever reach the execution stage.

It is our hope that a rational discussion of the costs of the death penalty will lead New York State to a rational conclusion. ■

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[68] See n. 8, *supra*.

[69] *Atlanta Journal*, Feb. 11, 1982, at 1, col. 1.

FOR MORE INFORMATION CONTACT:
Connie Kastelnik 212-887-4060

FOR IMMEDIATE RELEASE
FEBRUARY 13, 1983
PLEASE CREDIT "ABC NEWS"

One out of five Americans has been a crime victim in the past year, according to a new ABC News poll, and 13 percent of the adult population - nearly 22 million people - have been victims of violent crime.

The results of a special ABC News crime poll on the perceptions and realities of crime will be broadcast nationally during two weeks of special ABC News programming on "Crime in America," beginning Sunday, February 13.

The poll also revealed that three out of 10 Americans living in cities were victims of crime last year, along with nearly one quarter of all suburbanites and about one in seven Americans living in small towns and rural areas.

The ABC News poll also found that:

- Blacks are two-and-one-half times more likely than whites to be confronted by violent criminals. Twenty-six percent of all Blacks say they have been violent crime victims, compared to 10 percent of all whites.

- One in 12 Americans has had a close relative murdered, and one in eight knew someone in their neighborhood who was slain. Blacks are more than three times as likely as whites to have had a relative murdered. Twenty percent of blacks have had a relative slain, compared to six percent of whites.

- Twenty-six percent of those surveyed said they worried at least a "good deal of the time" about being murdered. Forty-three percent of victims of crime worry about being murdered, compared to 23 percent of people who never have been victims of violent crime.

- Nearly half of the women polled - 46 percent - said they worry about rape either a good deal or a great amount. Three percent report that they have been raped.

MORE MORE MORE

- Fifty-eight percent of those polled said unemployment, poverty, and related problems are the factors more responsible for crime in the U.S. Eighteen percent blamed drugs and 15 percent blamed breakdowns in family, society, morals, etc.

- A majority of 56 percent feels most judges have more sympathy for criminals than for their victims. Nearly two-thirds think judges have been giving shorter sentences in the last few years, and 88 percent said that is not the way they want it.

- Seventy-six percent want the death penalty for murderers. Seventy percent approve of building more prisons so that longer sentences can be given to criminals and 88 percent of these people are willing to have their taxes raised to pay for the new prisons.

- Seventy percent felt prisons mainly should be places that "teach criminals how to be useful, law-abiding citizens when they get out" rather than places to "punish criminals."

- Most people - 65 percent - disagree that armed citizen patrols are the only way to solve the crime problem. Forty-seven percent believe the best protection against crime is a strong police department.

- More than two-thirds of the gun owners polled said they would use their firearms if a burglar broke into their home. Nearly half of the American households - 47 percent - have firearms.

- Eighty percent said there would be less crime if more parents strictly disciplined their children. Exactly half of those polled said juveniles between the ages of 14 and 18 should be punished as adults if they commit a crime, and 46 percent said they should not be punished as adults.

Some 2,500 people were interviewed for the ABC News poll between December 7 and 18. The margin of error is plus or minus three percent.

(EDITOR'S NOTE: ABC News' two-week programming effort on "Crime in America" will focus on the myths and realities of crime, law enforcement, criminal justice and the prison system in the U.S. It will begin Sunday, February 13 with a special edition of "This Week with David Brinkley," with guests William Webster, FBI Director and William French Smith, Attorney General. The two weeks of programming (February 13 to February 25) will continue on "World News This Morning," "Good Morning America," World News Tonight," "Nightline," "20/20," "The Last Word" and "Viewpoint."

# #

U.S. Department of Justice
Bureau of Justice Statistics



Bureau of Justice Statistics
Bulletin

Capital Punishment 1982

July 1983

The capital punishment series began in 1930 with an annual report of the number of executions in each State. Several significant additions to the series have been made over the years. Beginning in 1953, statistics were published on the death-row population at yearend. In subsequent years, the series was expanded to include the number and characteristics of persons sentenced to death each year including age, sex, race, marital status, and education. Statistics were also published on the offender's previous homicide or other felony convictions and on whether the offender was in prison, on probation, or on parole at the time of the capital offense. The frequency of judicial and legislative action on capital punishment in the 1970's led to the annual collection of information on the legal status of the death penalty in each State. More recently, the Bureau of Justice Statistics began collecting information on those States that subject each death sentence to automatic appeal and on the minimum age at which an offender may be sentenced to death.

The complete series of capital punishment statistics is published in an annual report that may be obtained by request from the Bureau of Justice Statistics.

Steven R. Schlesinger
Director

Two persons were executed during 1982, one each in Virginia and Texas, bringing to six the total executed since 1967. All six took place after the last major U.S. Supreme Court rulings on the death penalty in 1976.[1] By year's end, the number of inmates under sentence of death stood at 1,050, the largest ever recorded in the Nation.[2] The number of persons sentenced to death during the year was 264—higher than in any other year except 1975—while departures from death row by means other than execution fell to 68, one of the smallest totals in recent history.

The large number of persons on death row at the end of 1982 reflected both an increase in the number of death sentences handed down over the years and lengthened stays because of long appeals. The 264 persons sentenced to death in 1982 represented an increase of 8% over the number condemned in 1981. Twenty-eight of the 37 States with death penalty laws sentenced inmates during 1982. The largest number of sentences were handed down in California and Florida, each with 39 persons, followed by Texas[3] with 28 and Alabama with 20. Ohio and Wyoming were the only States that sentenced persons during 1982 but not 1981. A new death penalty law was passed in Ohio during 1981.

Since 1976, the number of removals from death row has dropped each year with the exception of 1980, when 42 persons were relieved of the death sentence in Alabama as the result of a major court decision. The relationship between removals and additions has varied from year to year, but by 1982 about four persons received the death sentence for every one relieved of it.

During 1982, only 16 States had departures from death row, 5 fewer than in 1981. The largest number of removals occurred in Texas (24) and Florida (13); each of the remaining 13 States granted 6 or fewer removals (departures prompted by legislative or judicial action).

About half of the 64 persons who left death row by means other than death had both their convictions and their sentences vacated, while the next largest group, 31%, had only their sentences vacated. Six deaths occurred among the condemned population, including two executions, three murders, and one suicide. The total number of persons who have died on death row since 1972 is 32, including the six who were executed.

The 1,050 persons awaiting the death penalty at yearend 1982 was almost double the record high on death row at the time of Furman v. Georgia, 408 U.S. 238, in 1972, and 2-1/2 times the number on death row at the end of 1976, the year from which most of the current laws date. More than two-thirds of the 1982 total were held in Southern States. Only one Northeastern State, Pennsylvania, held prisoners on death row. The largest numbers were under sentence in Florida (189), Texas (148), California (120), and Georgia (100). In all, 31 of the 37 States with the death penalty held at least one condemned prisoner at yearend.

About 40% of those under sentence

[1] A seventh person was executed in Alabama on April 22, 1983. All of the seven were men.

[2] The 1982 figures exclude 6 men with military death sentences held under Armed Forces jurisdiction.

[3] The figures for Texas and Georgia on the table on page 2 exclude condemned inmates still held in county jails but will be revised to include them as they enter the State correctional system.

Status of death penalty statutes and prisoners under sentence of death, by region and State, 1982

Region and State	Death penalty in force as of 12/31/82	Prisoners under sentence of death 12/31/81	Changes during 1982			Prisoners under sentence of death 12/31/82
			Received under death sentence	Removed from death row	Executed	
United States	---	856	264	68[1]	2	1050
Male	---	845	262	66	2	1037
Female	---	11	4	2	0	13
Federal[2]	Yes	0	0	0	0	0
State	---	856	264	68	2	1050
Northeast	---	15	9	0	0	25
Maine	No	0	0	0	0	0
New Hampshire	Yes	0	0	0	0	0
Vermont	Yes	0	0	0	0	0
Massachusetts	No	0	0	0	0	0
Rhode Island	No	0	0	0	0	0
Connecticut	Yes	0	0	0	0	0
New York	Yes	0	0	0	0	0
New Jersey[3]	Yes	0	0	0	0	0
Pennsylvania	Yes	16	9	0	0	25
North Central	---	77	26	3	0	100
Ohio	Yes	0	3	0	0	3
Indiana	Yes	10	5	0	0	15
Illinois	Yes	41	10	2	0	49
Michigan	No	0	0	0	0	0
Wisconsin	No	0	0	0	0	0
Minnesota	No	0	0	0	0	0
Iowa	No	0	0	0	0	0
Missouri	Yes	14	8	1	0	21
North Dakota	No	0	0	0	0	0
South Dakota	Yes	0	0	0	0	0
Nebraska	Yes	12	0	0	0	12
Kansas	No	0	0	0	0	0
South	---	617	157	61	2	711
Delaware	Yes	4	1	0	0	5
Maryland	Yes	8	7	1	0	14
District of Columbia	No	0	0	0	0	0
Virginia	Yes	17	4	1	1	19
West Virginia	No	0	0	0	0	0
North Carolina	Yes	17	12	1	0	28
South Carolina	Yes	21	2	6	0	17
Georgia	Yes	95	8	3	0	100
Florida	Yes	163	39	13	0	189
Kentucky	Yes	9	6	2	0	13
Tennessee	Yes	22	8	1	0	29
Alabama	Yes	16	20	0	0	36
Mississippi	Yes	27	10	0	0	37
Arkansas	Yes	23	3	2	0	24
Louisiana	Yes	14	1	2	0	13
Oklahoma	Yes	36	8	5	0	39
Texas	Yes	145	28	24	1	148
West	---	140	72	4	0	214
Montana	Yes	3	0	0	0	3
Idaho	Yes	2	5	0	0	7
Wyoming	Yes	0	3	0	0	3
Colorado	Yes	1	1	0	0	2
New Mexico	Yes	3	2	0	0	5
Arizona	Yes	38	15	2	0	51
Utah	Yes	3	0	0	0	3
Nevada	Yes	12	5	0	0	17
Washington	Yes	1	2	0	0	3
Oregon	No	0	0	0	0	0
California	Yes	83	39	2	0	120
Alaska	No	0	0	0	0	0
Hawaii	No	0	0	0	0	0

NOTE: Some of the figures for yearend 1981 are revised from those shown in Capital Punishment 1981 (final report), December 1982, NCJ-86484. These figures exclude 5 inmates in Texas who were relieved of the death sentence before December 31,1981, and 1 in Pennsylvania who was reported twice—first in 1979 and again in 1981, and include 24 inmates (6 in Pennsylvania, 6 in Texas, 4 in Georgia, 4 in Louisiana, 2 in Florida, 1 in Tennessee, and 1 in Washington) who, although sentenced to death before the end of 1981, were either reported late to the NPS program or were not in the custody of State correctional authorities by December 31, 1981.

[1]Includes one Maryland inmate who committed suicide and three inmates (one each in Arizona, Oklahoma, and South Carolina) who were murdered by another inmate.

[2]Excludes six prisoners held under Armed Forces jurisdiction.

[3]The death penalty was in effect in New Jersey as of August 6, 1982.

were blacks, roughly the same proportion as in recent years. Twelve members of other races were under sentence—seven American Indians and five Asians.

Twelve States, the largest number since data became available in 1978, held a total of 59 Hispanic inmates under sentence of death. During the 1978-83 period, the number of Hispanics increased more rapidly than the death-row population as a whole—3-1/2 times versus 2.

There were 13 women on death row in eight States, including 4 in Georgia. The number was the highest since data on women have been available. Since 1972, 12 States have sentenced 31 women to death, but 24 women, including 6 sentenced before 1972, have had their capital sentences lifted.

The number of persons on death row was more than double that in 1968, when a sharp increase began because of an informal moratorium on executions. The moratorium allowed the courts to scrutinize the many challenges to the death penalty then being raised at all levels, culminating in the landmark Furman v. Georgia decision in June 1972. In that decision, the High Court held that death penalty statutes as they currently existed were in violation of the Eighth Amendment's protection against cruel and unusual punishment. While the more than 600 persons then on death row waited to have the new ruling applied to them individually, the States began to revise their laws to withstand the Court's scrutiny.

Inasmuch as the Furman decision provided little in the way of guidelines for new legislation, the years that immediately followed it saw a number of attempts and failures by the States to meet standards acceptable to the Supreme Court. These standards emerged gradually through a series of rulings by the Court, mainly in 1976 and 1977. Most current capital punishment legislation, in fact, dates from 1976, modeled after the laws of Georgia, Florida, and Texas that were upheld in rulings during that year.[4]

Today's death penalty laws provide the death sentence only for specific types of murder, for example, murder committed during a felony, murder of a law enforcement officer, and murder for hire.[5] They also provide for

[4]Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. [illegible], 428 U.S. 262 (1976).

[5]In addition to specific types of murder, each of the following crimes, most of which have not passed tests of constitutionality at the U.S. Supreme Court level, is a capital offense in at least one State: aircraft piracy resulting in death, armed robbery resulting in death of the (continued on page 3)

"guided discretion," laying down specific guidelines to assist the sentencing judge or jury in weighing both aggravating and mitigating circumstances to the crime. Thus the Court struck a balance between the wide discretion allowed before Furman and the rigidity of mandatory death penalty laws passed in response to Furman but found unconstitutional in several rulings during 1976.

The years that followed the 1976 Supreme Court decisions saw a number of refinements added to the established standards. In 1977, the death sentence was found to be a disproportionate penalty for the rape of an adult woman. Other rulings have held that the capital prisoner is to be afforded every possible legal right, such as the right to have all mitigating circumstances to the crime considered at the time of sentencing.

By the end of 1982, 37 States and the Federal government provided for the death penalty. During the year, New Jersey was added to the list when it enacted a new death penalty law; its previous law had been declared unconstitutional in 1972. For the first time since the Furman ruling, no State's death penalty law had been overturned.

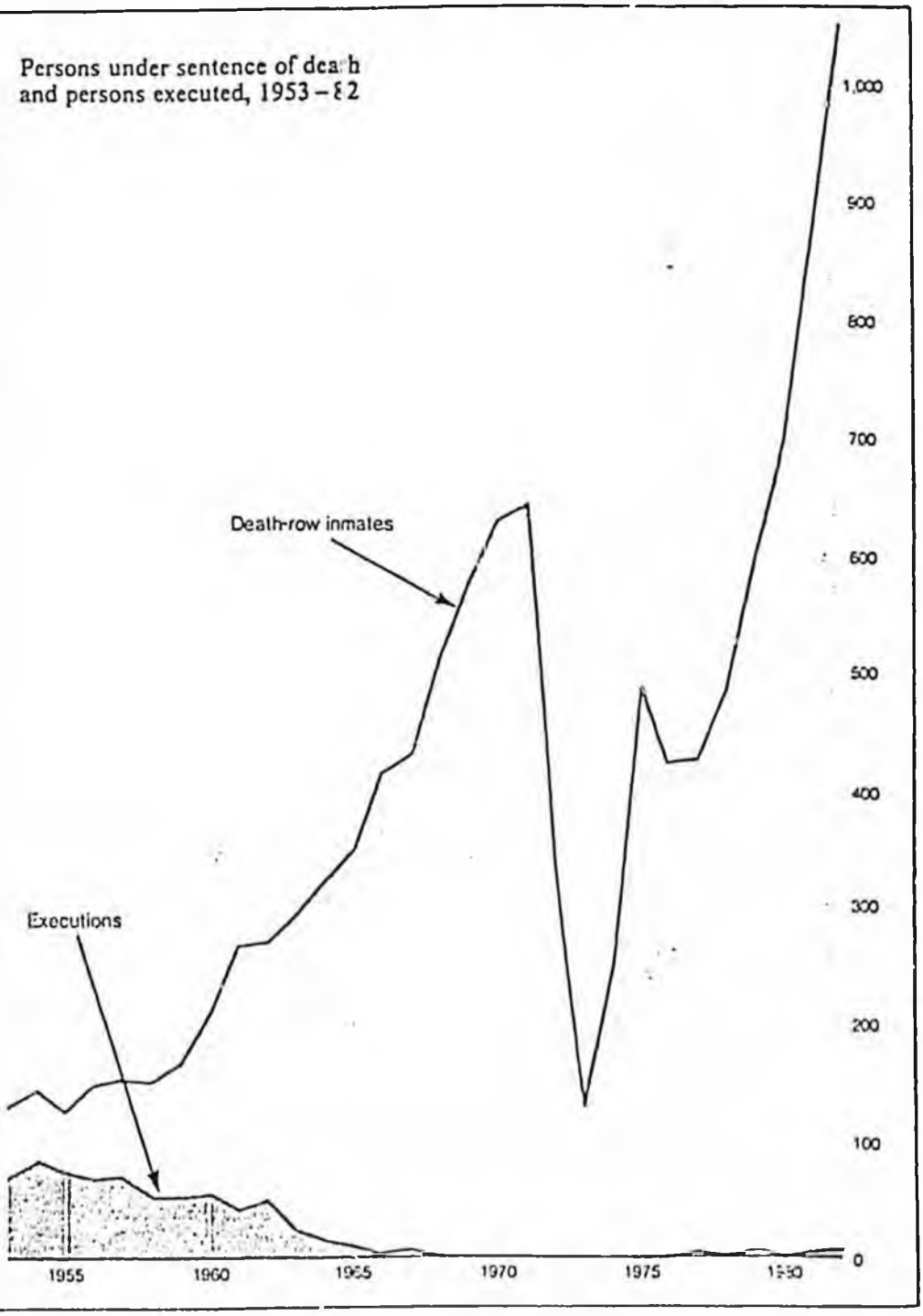
Seven other States made either substantive or procedural changes in their statutes. Arizona provided for a separate sentencing hearing. Idaho added death by a firing squad as an alternative to lethal injection. Nebraska limited the death penalty to those age 18 or older at the time of the crime. Oklahoma further specified the types of murder that constituted capital offenses. South Dakota refined the section of its death penalty law on aggravating and mitigating circumstances. In Utah, revisions were made to the sections dealing with the sentencing hearing and the nature of the jury for that hearing. Virginia made its law more specific by revising the language on murder committed by an inmate confined in a State or local correctional facility.

In addition to legislative actions, a number of court decisions at both the State and Federal level had some impact on the death penalty situation.

In January 1982, the California Supreme Court ruled in California v. Ramos that the required instruction to sentencing juries that a life sentence without parole could be commuted by

[5] (Continued from page 2) victim, assault by a life prisoner resulting in death, hindering preparation for war causing death, kidnaping resulting in severe injury, kidnaping resulting in death, murder by a life prisoner, murder by an inmate of a correctional facility, omitting to note defects in articles of war resulting in death, perjury resulting in the death penalty, rape of a child under age 12, and rape of a child under age 14.

Persons under sentence of death and persons executed, 1953–82



Number of women on death row, yearend 1972–82

late	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982
United States	4	3	3	8	7	6	5	7	9	11	13
Alabama	-	-	-	-	-	-	1	1	-	1	1
California	3	-	-	1	2	-	-	-	-	-	-
Florida	-	-	-	-	1	1	1	1	1	-	-
Georgia	1	2	1	1	1	1	1	2	3	4	4
Kentucky	-	-	-	-	-	-	-	-	1	1	-
Maryland	-	-	-	-	-	-	-	-	-	1	2
Mississippi	-	-	-	-	-	-	-	-	-	-	1
Nevada	-	-	-	-	-	-	-	-	-	-	1
North Carolina	-	1	2	3	-	-	2	1	1	1	1
Ohio	-	-	-	2	3	4	-	-	-	-	-
Oklahoma	-	-	-	1	-	-	-	1	1	1	1
Texas	-	-	-	-	-	-	-	1	2	2	2

the Governor was unconstitutional. However, removal of potentially affected prisoners from death row was suspended pending a review by the U.S. Supreme Court.

In Eddings v. Oklahoma, the U.S. Supreme Court determined that the failure of the State court to consider as a mitigating circumstance a 16-year-old's emotional disturbance and turbulent family history was unconstitutional. The Supreme Court stipulated that sentencing and reviewing courts may determine the weight to be given relevant mitigating circumstances, but that they may not exclude such evidence totally.

In State v. Logan, South Carolina's Supreme Court decided that the State could not try a defendant for capital murder under death penalty statutes that had been declared unconstitutional before the date of the crime. The State had contended that, since only procedural changes were needed to render the old death penalty statutes constitutionally acceptable, the substantive provisions of the law should be considered as if in effect at the time of the murder. The South Carolina Supreme Court, however, held that the death penalty statute in existence when the crime was committed could not be enforced, and that to try the defendant under such circumstances would violate constitutional guarantees against the application of ex post facto laws.

At the end of 1982, Arkansas, New Jersey, New York, and the Federal system were the only jurisdictions whose death penalty statutes did not require an automatic appeal. Some State laws provide for a review of the sentence, while others require a review of both conviction and sentence.

In most States, the youngest age at which a person can be sentenced to death is the age at which they can be tried as an adult. Since in many States this age standard can be waived, the theoretical minimum age for the imposition of the death penalty ranges from age 10 (Indiana) to age 18. Sixteen States reported no minimum age for the imposition of the death penalty.

Bureau of Justice Statistics Bulletins are prepared by the staff of the bureau. Carol B. Kalish, chief of data analysis, edits the bulletins. Marilyn Marbrook, bureau publications chief, administers their publication, assisted by Julie A. Ferguson. The author of this bulletin is Mimi Cantwell of the U.S. Bureau of the Census.

July 1983, NCJ-89395

Methodological note

Data on persons under sentence of death are collected annually for the Bureau of Justice Statistics by the U.S. Bureau of the Census as part of the National Prisoner Statistics (NPS) program. Data are obtained from the departments of corrections in each of the 50 States and the District of Columbia. The Bureau of Justice Statistics gratefully acknowledges the cooperation of State officials whose generous assistance and unfailing patience make National Prisoner Statistics possible.

Statistics in this series may vary from other death-row counts for any of the following reasons:

- Inmates are not added to the NPS death-row counts at the time the court hands down sentence, but at the time they are admitted to a State or Federal correctional facility.
- Inmates sentenced to death under statutory provisions later found unconstitutional are removed from the death-row count on the date of the relevant court finding rather than on the dates the finding is applied to individual cases. Thus, persons who are technically under sentence of death, but who are no longer at risk, are not counted.
- NPS death-row counts are always as of the last day of the calendar year and will therefore differ from estimates made for more recent periods.

Further reading

A final report on the death-row population in 1982 will be published in late 1983. To obtain the final 1982 report, Capital Punishment 1982, or be added to the bulletin mailing list, write to the National Criminal Justice Reference Service, Box 6000, Rockville, Md. 20850 (301/251-5500). Other National Prisoner Statistics Bulletins include—

- Veterans in Prison, October 1981, NCJ-79232;
- Prisons and Prisoners, January 1982, NCJ-80697;
- Death-row Prisoners 1981, July 1982, NCJ-83191;
- Prisoners 1925-81, December 1982, NCJ-85861;
- Prisoners and Alcohol, January 1983, NCJ-86223;
- Jail Inmates 1982, February 1983, NCJ-87161;
- Prisoners and Drugs, March 1983, NCJ-87575;
- Prisoners in 1982, April 1983, NCJ-87933.

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Bulletin

COMMITTEE REPORT

HOUSE

FURTHER:

Date: 4-10-84

Mr. Speaker:

The Committee on JUDICIARY has had HB 760

under consideration and reports it back as follows:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for HB 760 (Ref) [X] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____ CHAIRMAN

The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's

Brian E. Forst*

The debate over capital punishment, which for centuries has been waged over essentially nonempirical matters, has focused quite recently on the extent to which executions prevent (or encourage) homicides. Interest in this aspect of capital punishment was considerably heightened when, in the amicus curiae brief submitted in *Fowler v. North Carolina*,[1] the Solicitor General of the United States cited statistical evidence[2] reported by Professor Isaac Ehrlich supporting the hypothesis that capital punishment deters murder.[3]

Before vacating and remanding *Fowler*,[4] the Court received briefs and heard oral arguments in five other death penalty cases,[5] in which the deterrence question, as before, figured prominently.[6] Soon afterward, the Court ruled that "the punishment of death does not invariably violate the Constitution,"[7] and stated that for many murderers "the death penalty undoubtedly is a significant deterrent."[8]

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* Senior Research Analyst at the Institute for Law and Social Research, Washington, D.C. The author is deeply indebted to the following persons for their helpful comments: Anthony Amsterdam, Hugo Bedau, Frank Easterbrook, Shelby Haberman, William Hamilton, Lawrence Klein, Jeffrey Roth, and Hans Zeisel. Funding for this project was provided by the Lilly Endowment. The author assumes full responsibility for any errors.

1. 428 U.S. 904 (1976).
2. Brief for the United States as Amicus Curiae at 35-38.
3. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 Am. Econ. Rev. 397 (1975).
4. 428 U.S. 904 (1976).
5. Roberts v. Louisiana, 428 U.S. 325 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).
6. Brief for the United States as Amicus Curiae at 34-45, 9a-16a, Gregg v. Georgia, 428 U.S. 153 (1976).
7. Gregg v. Georgia, 428 U.S. 153, 169 (1976). *But see id.* at 231 (Marshall, J., dissenting); Commonwealth v. O'Neal, 339 N.E.2d 676, 682-85 (Mass. 1975).
8. Gregg v. Georgia, 428 U.S. 153, 185-86 (1976). Although the Court did not support its belief in the deterrent value of capital punishment with empirical evidence, this evidence was not ignored:

The Supreme Court is by no means alone in its belief that capital punishment deters crime. Eighty-four percent of the respondents to a 1977 National Observer plebiscite supported restoration of the death penalty, and belief in the deterrent effect of capital punishment was the reason most often cited.[9] Public support for the death penalty has been similarly revealed by the Gallup Poll[10] and other opinion surveys.[11]

Belief in the deterrent value of the death penalty, however, is less common within the academic community. While support for Ehrlich's research exists,[12] replications of his analysis[13] have shown that his evidence of deterrence depends upon a restrictive assumption about the mathematical relationship between homi-

"Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view." *Id.* at 185 (footnote omitted). Professor Hans Zeisel has taken issue with this opinion, arguing that the evidence about the deterrent effect is, indeed, "quite sufficient" and that "the request for more proof is but the expression of an unwillingness to abandon an ingrained prejudice." Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317, 319.

9. Egan, *Plebiscite Results: Restore the Death Penalty*, National Observer, Jan. 29, 1977, at 1, col. 3.

10. During the decade ending in April, 1970, support for the death penalty among Gallup Poll respondents rose from 42 percent to 65 percent. *Id.*

11. *See* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1255 (1974) ("Belief in deterrent effectiveness is probably the most frequently assessed rationale for support of capital punishment.")

12. Although Tullock characterized Ehrlich's study of capital punishment as "sophisticated," the praise was qualified: "Unfortunately, the data available for this study were not what one would hope for, so that much reliance can be put upon his results as one normally would expect to work by such a sophisticated econometrician." Tullock, *Does Punishment Deter Crime?* 36 PUB. INTEREST 103, 108 (Summer 1974). Further support has been expressed in Posner, *The Economic Approach to Law*, Text of the Will E. Orgain Lecture, University of Texas Law School at 19-20, 31 (March 1975) (on file at MINNESOTA LAW REVIEW).

13. *See* Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975); Klein, Forst, & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates* (paper commissioned by the National Academy of Sciences, September 1976 draft, to appear in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (A. Blumstein ed. 1977) (forthcoming) [hereinafter cited as DETERRENCE AND INCAPACITATION]; Passell & Taylor, *The Deterrent Effect of Capital Punishment: Another View*, Columbia University Discussion Paper 74-7501 (March 1975), reprinted in Reply Brief for Petitioner, App. E., Fowler v. North Carolina, 428 U.S. 325 (1976).

cides and executions,[14] the inclusion of a particular set of observations,[15] the use of a limited set of control variables,[16] and a peculiar construction of the execution rate, the key variable.[17]

This Article first discusses briefly the strengths and weaknesses of time-series and cross-section analyses to test the hypothesis that capital punishment deters homicides. A method that avoids the more serious of these weaknesses is then described and applied to state data for 1960 and 1970 to test the above hypothesis. The results of this initial test do not support the hypothesis. To ensure that these findings reflect reality rather than simply the way in which the key variable was measured, alternative measures of the execution rate are substituted. Similar attempts are made to eliminate other possible biases that have been identified in the literature. None of these modifications of the basic model is found to alter the initial finding in any important way. It is concluded that the evidence of the 1960's supports the theory that capital punishment does not, on balance, deter homicides.

I. TIME-SERIES AND CROSS-SECTION STUDIES

Professor Ehrlich's landmark statistical test of the hypothesis that capital punishment deters homicide consisted of a regression analysis of aggregate data for the United States for the period 1933 through 1969.[18] His basic approach is commonly referred

14. Bowers & Pierce, *supra* note 13, at 199-203; Klein, Forst, & Filatov, *supra* note 13, at 31-32; Passell & Taylor, *supra* note 13, at 6-8; note 33 *infra*.

15. Ehrlich reported that his deterrence result remained when data from the 1930's were excluded, Ehrlich, *supra* note 3, at 410, but others found that the result disappeared when data from the latter part of the 1960's were excluded. Bowers & Pierce, *supra* note 13, at 197-204; Klein, Forst, & Filatov, *supra* note 13, at 20-28; Passell & Taylor, *supra* note 13, at 5, 21, 22.

16. Klein, Forst, & Filatov, *supra* note 13, at 14-17, 20-30. Control variables are used in the analysis of nonexperimental data to reduce the danger of erroneous inferences about relationships between variables. To the extent that the murder conviction rate influences both the execution rate and the murder rate, for example, its omission from an analysis of the deterrent effect of executions would produce the appearance of an association between executions and homicides even if, in fact, no association existed. *See* notes 21-23 *infra* and accompanying text. In the present analysis this problem is recognized and controlled for. *See* notes 38-41 and accompanying notes *infra*.

17. *See* Klein, Forst, & Filatov, *supra* note 13, at 17-19.

18. Ehrlich, *supra* note 3, at 408, 409. Regression analysis is a standard statistical method for determining the mathematical equation that best describes the relationship between a dependent variable (in this case, the homicide rate) and one or more predictor variables. Ehr-

to as "time-series analysis," since the units of observation consist of a series of time intervals—in this case, individual years.

One of the crucial unresolved issues in Ehrlich's time-series analysis centers around the sensitivity of his findings to the exclusion of data from the 1960's. Specifically, he found no deterrent effect when data for the period since 1964 were excluded from the analysis.[19] This conclusion is not surprising, since during the 1960's the murder rate rose precipitously, after decades of slow decline, while the use of capital punishment diminished until terminated in 1967;[20] but it does raise the question of the extent to which the key statistical relationship found in Ehrlich's time-series analysis reflects a true causal relationship. It is possible that the appearance of deterrence that emerges in Ehrlich's time-series study is primarily the product of variables omitted from the analysis, an omission due largely to the unavailability of data.[21] While all nonexperimental measurements are subject to limitations, inferences about deterrence drawn from the analysis of aggregate time-series data appear to be especially prone to error because only a limited array of factors can be incorporated[22] or otherwise reflected[23] to safeguard against spurious findings.

lich's study was the first to estimate the deterrent effect of capital punishment by: (1) measuring factors other than the death penalty that may have affected the homicide rate; (2) measuring the extent to which the death penalty was used when it existed; and (3) attempting to account explicitly for the reverse effect of homicides on the demand for executions.

19. Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209, 217 (1975). This phenomenon was first reported by Passell & Taylor. Passell & Taylor, *supra* note 13, at 5, 21, 22.

20. *See* FEDERAL BUREAU OF PRISONS, DEPARTMENT OF JUSTICE, NATIONAL PRISONER STATISTICS: CAPITAL PUNISHMENT, table 2, at 2 (No. SD-NPS-CP-3, November 1975).

21. It is, of course, also possible that omitted variables cause the finding to understate the true effect of executions on homicides.

22. A key variable not available on an annual basis is the average term of imprisonment for persons convicted of homicide and not executed. The potential importance of this variable lies in its role as a substitute sanction for capital punishment. In an earlier study based on time-series data, Ehrlich himself found that this variable was an effective homicide deterrent. Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POLIT. ECON. 521, 551 (1973). The aggregate number of homicide convictions, a crucial variable in the analysis, is also not available annually. Aware of the potential importance of this variable, Ehrlich constructed rough approximations of its values from F.B.I. estimates of the annual number of homicides, the annual probability of arrest, and the annual probability of conviction given arrest. Ehrlich, *supra* note 3, at 407.

23. One way of reflecting regional factors is with the use of [illegible]

Professor Ehrlich's second empirical test—based on a regression analysis of data for individual states, with separate results for 1940 and 1950—has been cited to further support the theory that capital punishment deters murder.[24] This "cross-section" technique has certain advantages over analysis based on aggregate time-series data: it allows the researcher to observe larger differences in the relevant factors,[25] to control for specific regional effects,[26] and to include potentially important factors about which information is not available on an annual basis.[27]

Several scholars have suggested that the existing estimates of the deterrent effect of capital punishment can be improved by analyzing data that reflect variation *both* temporally and geographically.[28] A method to accomplish this is set forth in the following section.

II. CROSS-SECTION ANALYSIS OF CHANGES

During the 1960's, after years of gradual decline, the homicide rate for the United States as a whole increased sharply (see Figure 1). Although the homicide rate in most states followed this general pattern, it rose much more sharply in some states

regional variables in data that manifest geographical variation. *See* notes 28 & 41 *infra*.

24. Ehrlich referred to these results in his reply to critics, Ehrlich, *supra* note 10, at 213, 217, and reported them in Punishment and Deterrence: Some Further Thoughts and Additional Evidence, a paper delivered at the Joint Meeting of the Operations Research Society of America and the Institute of Management Science, Las Vegas (November 3, 1975) [hereinafter cited as Ehrlich, Punishment and Deterrence]. Here Ehrlich has described these findings as "preliminary and incomplete." *Id.* at 1, they will not be discussed in detail here.

Professor Peter Passell has also performed a cross-state analysis of the deterrent effect of capital punishment, with separate results for 1940 and 1960. His findings differ sharply from Ehrlich's; he concludes that there is "no reasonable way of interpreting the cross-section data that would lend support to the deterrence hypothesis." Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61, 80 (1975).

25. *See* note 69 *infra*.

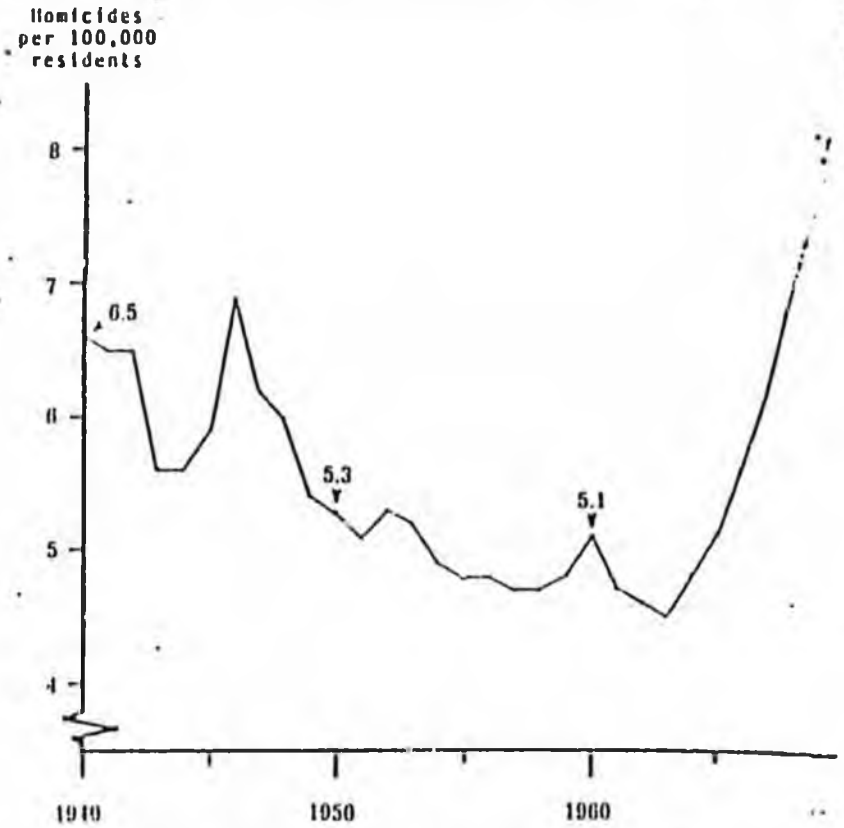
26. Aggregation errors associated with the failure to account for these effects are discussed in Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170, 175-77 (1975).

27. *See* note 22 *supra*.

28. Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359, 361 (1976); Zeisel, *supra* note 6, at 317, 330; [illegible], Book Review, 67 J. CRIM. L. & CRIMINOLOGY 359, 360 (1976) (W. BOWERS, EXECUTIONS IN AMERICA).

than in others, and even declined in a few.[29] This cross-state variation, coupled with the differences from state to state in the rate at which use of the death penalty declined from 1960 to 197[illegible], provides a unique opportunity to estimate the deterrent effect of capital punishment on the commission of homicides. The changes in these and other relevant variables that occurred between 1960 and 1970 in each state for which data are available can be measured and used to estimate the average effect of reductions in the execution rate on the rate at which homicides occur in the population. To the extent that capital punishment deters homicides, the homicide rate should have increased by the largest amounts from 1960 to 1970, *ceteris paribus*, in those states with the greatest reductions in the probability that a person convicted of murder would be executed.

Figure 1. The homicide rate in the United States, 19[illegible]-1970*



* Sources: Uniform Crime Reporting Section, Federal Bureau of Investigation, United States Department of Justice, Index of Crime United States, 1933-1972 (Special tabulation presented to the author in March 1975; copy on file with Minnesota Law Review).

Bureau of the Census, United States Department of Commerce, The Statistical Abstract of the United States, table 2, at 5 (1971).

29. From 1960 to 1970 the homicide rate increased in 43 states, declined in five states (Alabama, Maine, Montana, Oklahoma, and Virginia), and was unchanged in two states (Nevada and North Dakota). It increased mostly sharply in Missouri (from 4.6 homicides per 100,000 residents in 1960 to 10.7 in 1970) and New York (from 2.0 in 1960 to [illegible] in 1970). Federal Bureau of Investigation, Department of Justice, Uniform Crime Reports, table 3, at 38-52 (1960), & table 4, at [illegible] (1970).

Examining the data in this manner should overcome the potentially serious problems associated with aggregate time-series analysis.[30] Analyzing intertemporal changes in the relevant variables across states should also improve the estimates available from conventional cross-section analysis,[31] partly by reducing biases associated with omitted variables.[32] Moreover, the results of this approach appear less sensitive to alternative assumptions about the mathematical form of the model that describes the relationships among the relevant variables than do those of either the conventional time-series or cross-sectional approaches.[33] By

30. *See* notes 10-27 *supra* and accompanying text.

31. The cross-section analyses by Ehrlich and Passell are based on the levels of variables for individual census years. *See* note 24 *supra* and accompanying text. These single-year levels are used to estimate the elasticity of the homicide rate with respect to the probability of execution, given conviction for murder. The elasticity of one variable, y, with respect to another, x, is a number indicating the percentage increase (a negative number indicates a decrease) in y that results from a one percent increase in x. Ehrlich has estimated that the elasticity of the homicide rate with respect to the probability of execution, given conviction for murder, is around −0.00. Ehrlich, *supra* note 3, at 414. Since elasticity is a measure of the *effect of a change* in one variable on another variable, estimating elasticities by analyzing actual changes in variables in a cross-section of jurisdictions has considerably more appeal than estimating them from the levels of variables for any given year.

32. According to Klein, estimates based on cross-sectional data are prone to errors of spatial heterogeneity, although in certain instances, these errors can be eliminated by "differencing" two successive cross sections. Specific biases that can be eliminated under this technique include the bias produced by the failure to measure personality effects in samples of households and that produced by failure to measure entrepreneurial effects in samples of business firms. L. Klein, A Textbook of Econometrics 360, 358 (2d ed. 1974). Commenting on a draft of this article, Professor Klein suggested that interstate differences in social mores may constitute a class of effects that can be accounted for by applying this method to cross-state data.

33. Whether the homicide rate is related to other factors in a linear

estimating the differential of the homicide rate rather than the parent relationship between the homicide rate and its determinants, one can be sure of describing a function that is additive in the differences of the explanatory variables.[34]

Applying this method of analysis to the 1960's is appealing for other reasons as well. More control variables are available for the most recent census years, and their measurement tends to be more accurate than it was in 1940 or 1950.[35] Moreover, there has been a great deal of controversy about the period from

or loglinear fashion is very much in controversy. Bowers & Pierce, *supra* note 13, at 190-206; Ehrlich, *supra* note 3, at 406; Ehrlich, *supra* note 19, at 217-19; Klein, Forst, & Filatov, *supra* note 13, at 3[illegible]; Passell & Taylor, *supra* note 12, at 6e-7e; Peck, *supra* note 26, at 300-01. Estimates of the deterrent effect of capital punishment have been found to be quite sensitive to whether the relationship is assumed to be linear or loglinear. *See* note 14 *supra* and accompanying text.

The assumption of loglinearity and the use of logarithms in previous studies have created additional problems. During 1968, 1969, and 1970 there were no executions. Because it is impossible to take the logarithm of zero, Ehrlich assumed that one execution took place in each of these years so that he could use the loglinear model. Ehrlich, *supra* note 3, at 409 n.6. This procedure, however, builds biases into the analysis.

While the true relationship between the homicide rate and its determinants may be nearly linear or nearly loglinear, it is likely, in fact, to be precisely neither.

34. In regressing the change in the homicide rate on the changes in the relevant independent variables, partial differential coefficients rather than slope coefficients are obtained. Letting the homicide rate, Q/N, be determined by the rate at which convicted murderers are executed, E/C, and by other factors, $X_1, X_2, \ldots$, the general relationship is written as

$$Q/N = f(E/C, X_1, X_2, \ldots).$$

The differential of the homicide rate is of the form

$$d\frac{Q}{N} = \frac{\partial \frac{Q}{N}}{\partial \frac{E}{C}} d\frac{E}{C} + \frac{\partial \frac{Q}{N}}{\partial X_1} dX_1 + \frac{\partial \frac{Q}{N}}{\partial X_2} dX_2 + \ldots,$$

regardless of whether the parent function is linear, loglinear, or any other continuous expression. Since the partial differential coefficients will be constants only if the parent function is linear, the differential of the homicide rate will not generally be a linear function. It will, however, be additive in the differences of the explanatory variables. Hence, the regression coefficients produced in the estimate of the differential equation may be viewed as approximations of the averages of the respective partial differential coefficients over the range of observed values.

35. Ehrlich has also suggested that more recent data are likely to be better. Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. Legal Studies 259, 272 (1972).

1960 to 1970 in the reviews of the available time-series evidence.[36] In short, analyzing changes during this decade cross-sectionally would appear to permit one to discover more directly whether the association between the cessation of capital punishment and the upsurge in the homicide rate during the 1960's was primarily causal or coincidental.

A. The Model

The model that provides the initial structure for this analysis is

(1) $Q/N = f(E/C, C/Q, T, Cr, Age, NW, Male, Urb, Enr, Pop, Div, Y, Pov, Emp, S).$

This equation represents the notion that the homicide rate (Q/N) is potentially influenced by the rate at which persons convicted of murder are executed (E/C), the rate at which murders result in conviction (C/Q), the average prison term served by convicted murderers (T), the factors that determine the rate at which crimes other than homicide are committed (Cr), social and demographic characteristics [age (Age), race (NW), sex (Male), urbanization (Urb), school enrollment rate (Enr), resident population (Pop), divorce rate (Div)], economic variables [median family income (Y), proportion of families in poverty (Pov), employment (Emp)], and a binary variable indicating whether the state is southern (S). The sources of data for these variables are given in the Appendix.[37]

Professor Ehrlich has provided theoretical justification for the inclusion of the criminal justice sanction variables and the economic variables.[38] The social and demographic variables have been added to minimize the degree of spuriousness in the estimates of central concern here, those reflecting the effects of the sanction variables on homicides.[39] The rate at which

36. *See* notes 15 & 19 *supra* and accompanying text.

37. *See* pp. 765-67 *infra*.

38. Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in Essays in the Economics of Crime and Punishment 68, 70-92 (G. Becker & W. Landes eds. 1974); Ehrlich, *supra* note 3, at 398-406.

39. Any factor that influences both the execution rate and the homicide rate, if omitted from the analysis, will tend to distort the estimated effect of executions on homicides. Age, race, sex, schooling, population density and size, and family stability are all basic characteristics that would appear to be capable of producing such distortion. Ehrlich has incorporated the first five of these factors in his study of deterrence. Ehrlich, *supra* note 38, at 93.

crimes other than homicide are committed[40] and a binary Southern variable[41] are incorporated to capture the effects of additional exogenous factors that the other control variables do not specifically measure. Values of each of these variables for 1960 and 1970 are shown in Table 1.

Table 1. Aggregate United States values, mean state values and standard deviations for the variables used in the analysis, 1960 and 1970

	U.S. total*		State means[a]		Standard deviations[a]	
	1960	1970	1960	1970	1960	1970
Variable:						
Q/N[b]	5.1	7.8	4.7	6.6	3.2	3.7
E/C	.0157[c]	0	.0192	0	.0290	0
C/Q	.4132[d]	.3459[d]	.4304	.3729	.1215	.1220
T	82.23[e]	67.54[e]	101.64	70.20	55.60	30.74
Cr[b]	1032.9	2738.5	942.7	2364.1	404.3	954.7
Age	.0482	.0634	.0493	.0636	.0043	.0060
NW	.1143	.1253	.1131	.1164	.1424	.1244
Male	.4926	.4867	.4957	.4893	.0094	.0082
Urb	.6006	.7348	.6189	.6810	.1494	.1444
Enr	.822	.860	.8453	.8873	.0041	.0456
Pop[f]	180.0	203.8	3.324	3.766	4.142	4.791
Div	.0022	.0035	.0031	.0042	.0049	.0029
Y[g]	5600	0586	5418	0172	1002	1467
Pov[d]	.184	.107	.1070	.1154	.0902	.0524
Emp	.4486	.4991	.4250	.4815	.0057	.0588
S	.3333	.3333	.2013	.2813	.4508	.4568

(a) Means and standard deviations are unweighted statistics for the 32 states for which no data were missing or undefined; (b) per 100,000 residents; (c) based on 48 states (Alaska and New Jersey did not report these statistics in 1960); (d) based on the 33 states that reported in both 1960 and 1970; (e) based on data from 34 states; (f) in millions; (g) based on income earned in the previous year.

* Aggregate U.S. values are used only in these two columns, in Figure 1, and in the concluding section of this paper.

Following the rationale described in the preceding section, the effects of interest are estimated by forming the equation of first differences:

40. A rationale for the inclusion of the nonhomicide crime rate is given in Klein, Forst, & Filatov, *supra* note 13, at 17-19, and in text accompanying notes 64-65 *infra*.

41. It has become a standard practice in cross-state econometric analysis to incorporate a binary Southern variable to reflect other social and demographic characteristics. The use of such a variable in an analysis of homicides is further warranted by the fact that the homicide rates in the South are about twice that of the rest of the nation.

$$(2)\quad \Delta(Q/N) = a + b_1\Delta(E/C) + b_2\Delta(C/Q) + b_3\Delta T + c_1\Delta Cr + c_2\Delta Age + c_3\Delta NW + c_4\Delta Male + c_5\Delta Urb + c_6\Delta Enr + c_7\Delta Pop + c_8\Delta Div + c_9\Delta Y + c_{10}\Delta Pov + c_{11}\Delta Emp + c_{12}S,$$

where Δ denotes the change in a variable calculated by subtracting the 1960 level from the 1970 level, "a" denotes a constant term, b_i denotes a partial differential coefficient for a sanction variable, and c_j denotes a partial differential coefficient for a control variable.

II Parameter Estimates

These coefficients can be estimated using ordinary least-squares regression analysis, with the full set of independent variables incorporated as regressors. These estimates are based on data from the 32 states[42] for which values of all the variables shown were reported both for 1960 and 1970:[43]

$$(3)\quad (Q/N) = \underset{(2.70)}{5.011} + \underset{(12.7)}{11.82}\Delta(E/C) - \underset{(1.92)}{5.714}\Delta(C/Q) + \underset{(.00773)}{.001378}\Delta T - \underset{(15.8)}{38.88}\Delta Pov + \underset{(.00006)}{.001708}\Delta Y + \underset{(.0000002)}{.001430}\Delta Cr + \underset{(17.8)}{38.97}\Delta NW - \underset{(139)}{189.2}\Delta Age - \underset{(.877)}{.95053} - \underset{(34.2)}{29.65}\Delta Emp - \underset{(8.52)}{9.021}\Delta Enr + \underset{(15.5)}{11.24}\Delta Urb + \underset{(150)}{92.58}\Delta Div + \underset{(.000000411)}{.000002382}\Delta Pop + 0\Delta Male \qquad (R^2 = .692)$$

The numbers in parentheses are standard errors, and R^2 is the coefficient of determination, a measure of the proportion of the variance in the dependent variable that is explained by the independent variables used. Thus, 69 percent of the cross-state variance in the change in the homicide rate from 1960 to 1970 can be attributed to the set of variables in the right-hand side of equation (3).

42. The 32 states on which these estimates are based are Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, and Wyoming. Conviction data were missing for 17 states in 1970, and the average term of incarceration was not available for an additional state (Vermont) in that year.

43. Similar results are obtained when the 1960 level of the homicide rate is included as a regressor to account for nonlinearity in Q/N.

The first result provides no support for the hypothesis that capital punishment deters homicide. The positive regression coefficient for the execution rate variable is, in fact, consistent with a counterdeterrent effect,[44] but the standard error of this estimate is too large for this finding to be taken seriously.[45] Equation (3) does provide evidence, on the other hand, of a deterrent effect of convictions on homicides. Those states with the largest reductions in the ratio of homicide convictions to homicide offenses tended to have the largest increases in the homicide rate, other factors held constant.

This regression equation, however, has too many shortcomings to allow it to stand alone as an adequate test of the deterrence hypothesis. Foremost among these is the imprecision in parameter estimation caused by the inclusion of 15 independent variables—ten of which are not significant (at the .10 level)—in an equation constructed from only 32 observations.[46] Eliminating these ten variables, except for the variable of primary interest, Δ(E/C), produces a result that fits the data better:

$$(4)\quad \Delta(Q/N) = \underset{(R^2=.577)}{} - \underset{(2.10)}{4.222} + \underset{(8.55)}{17.84\Delta(E/C)} - \underset{(1.68)}{5.070\Delta(C/Q)} - \underset{(7.52)}{24.91\Delta Pov} + \underset{(.000507)}{.001515\Delta Cr} + \underset{(13.3)}{30.60\Delta NW} + \underset{(.000526)}{.0004679\Delta Y}$$

44. Ehrlich explained the potential for a counterdeterrent effect as follows: "[O]ne may argue that the differential deterrent effect of capital punishment on the incentive to commit murder may be offset by the added incentive it may create for those who actually commit this crime to eliminate policemen and witnesses who can bring about their apprehension and subsequent conviction and execution." Ehrlich, *supra* note 3, at 398. Courts or juries may also be more reluctant "to convict defendants charged with murder when the risk of their subsequent execution is perceived to be undesirably high." *Id.* at 405. This latter possibility is discussed in text accompanying notes 57-59 *infra*. Von Weber has suggested as an alternative explanation that capital punishment may induce suicidally-inclined persons to commit murder. H. von Weber, *Selbstmord als Mordmotiv*, Monatsschrift Für Kriminalbiologie und Strafrechtsreform 161 (1937).

45. If executions had no effect on homicides, the probability is .91 that random factors alone would have caused the ratio of the regression coefficient for (E/C) to its standard error to be at least 0.91, the result in equation (3).

46. Estimates become increasingly precise (that is, subject to less random error) either as the number of observations increases or as the number of insignificant variables in the regression equation diminishes. The importance of precision in the estimation of the deterrent effect of capital punishment has been discussed by Ehrlich, *supra* note 10, at 22.

This result is basically similar to (3) for the variables of principal focus, except that elimination of nine weak independent variables increases the adjusted coefficient of determination, a standard measure of goodness-of-fit,[47] from .44 to .68, and increases the statistical significance of five of the six remaining variables.

Equation (4) provides evidence that the sharp increase in the homicide rate during the 1960's was the product of factors other than the abolition of the death penalty. Accounting for what appear to be the most important of these other factors—the murder conviction rate, economic variables, race, and the factors that caused non-capital offenses to escalate during the 1960's—it is apparent that these states in which the actual use of capital punishment ceased during the 1960's experienced no greater increase in the murder rate than did the states that did not use capital punishment in the first place. Under the theory that capital punishment deters murder, one would have predicted the opposite.

C. Robustness Tests

Before drawing inferences from data that are not produced by controlled experimentation, it is appropriate to test whether the estimates are "robust" to (that is, hold up under) departures from the assumptions on which the estimates are grounded.[48] Equation (4) is based on several assumptions: (1) the murder rate in any given year is influenced by the number of executions in that year; (2) none of the sanction variables is influenced by any of the other variables used in the regression analysis; (3) the variance in the homicide rate is no larger for highly populated states than for the less populated states; and (4) the rate at which non-capital crimes are committed is not affected by, nor does it affect, the other variables in the analysis. Each of these assumptions can be altered to test for robustness, which

47. The formula for the adjusted coefficient of determination, $\overline{R}^2$, is

$$\overline{R}^2 = R^2 - (1 - R^2)\left[\frac{K}{(N - K - 1)}\right]$$

where R^2 is the coefficient of determination, K is the number of independent variables, and N is the number of observations. A. Goldberger, Econometric Theory 217 (1964).

48. The importance of robustness tests is well established in econometric analysis. H. Theil, Principles of Econometrics 615-16 (1971).

will indicate the reliability of the estimates obtained in equation (4).

1. *Alternative Constructions of the Execution Rate*

Since the execution rate is the independent variable of principal focus in this analysis, it is surely appropriate to vary the methods of measuring it.[49] The construction used in equations (3) and (4) is based on the number of executions and convictions in 1960 and 1970. One alternative is to use executions in 1961 and 1971 instead of executions in 1960 and 1970, respectively, as objective forecasts of the probability that a murder conviction will lead to execution, since executions have been reported to lag behind convictions by about a year.[50] The result corresponding to equation (4) using this alternative measure, which is denoted (E_{+1}/C), is

(5) $\Delta(Q/N) = -8.391 + 2.977\Delta(E_{+1}/C) - 5.631\Delta(C/Q)$ $(R^2=.508)$ (2.21) (11.5) (1.83)
$- 27.32\Delta Pov + .0012486\Delta Cr + 42.01\Delta NW$ (8.03) (.000571) (13.3)
$+ .0007816\Delta Y$ (.000565)

This result is fundamentally no different from equation (4), suggesting that lagging executions does not alter the observed effects of executions on homicides.[51]

To reduce the sampling error associated with the small number of executions that occurred around 1960 and test another lag structure, one can make the numerator of the execution rate the average number of executions over the three-consecutive-year period centered about the year of the convictions in the denominator.[52] This execution rate variable is denoted (E_m/C), and is used in place of (E/C) in equation (4), giving

(6) $\Delta(Q/N) = -5.302 + 15.69\Delta(E_m/C) - 5.823\Delta(C/Q)$ $(R^2=.525)$ (2.15) (15.4) (1.78)
$- 26.83\Delta Pov + .001403\Delta Cr + 40.57\Delta NW$ (7.50) (.000551) (14.2)
$+ .0008700\Delta Y$ (.000545)

Again, this alternative does not produce a result that differs in any important respects from equation (4).

Another execution rate variable can be formed by combining the independent variables (E/C) and (C/Q) into the single variable (E/Q). Although this combination causes an important control variable, the murder conviction rate, to be lost, it allows all 50 states to be included in the analysis.[53] The result is

(7) $\Delta(Q/N) = -2.161 + 13.17\Delta(E/Q) - 13.38\Delta Pov$ $(R^2=.521)$ (1.80) (30.1) (6.02)
$+ .001441\Delta Cr + 33.00\Delta NW + .0001917\Delta Y$ (.000480) (13.4) (.000445)

This result is remarkably similar to equation (4) except for the substantial reduction in the proportion of variance in the homicide rate explained by the independent variables, which is produced by the exclusion of the conviction variable and the use of a larger number of observations. This reduction provides further support for the hypothesis that convictions deter homicides, consistent with findings by Ehrlich[54] and Passell[55] and with the results of equations (3) through (6).

A final construction of the execution rate is designed to eliminate whatever bias results from the reverse effect that changes in the homicide rate may have on the execution rate. All of the above regression equations assume that the causality runs strictly from executions to homicides. These results will be biased to the extent that the execution rate is a function of the

50. The potential importance of alternative constructions has been stressed in previous analyses of the deterrent effect of capital punishment. Ehrlich, *supra* note 3, at 407-08; Passell, *supra* note 24, at 74-77.

50. Ehrlich, *supra* note 3, at 407. Using data from the Federal Bureau of Prisons, I calculated that the median delay between sentence and execution for persons executed during the period 1950 through 1961 was 14 months. The distribution is skewed in the positive direction, indicating a mean delay of somewhat more than 14 months. Federal Bureau of Prisons, Department of Justice, National Prisoner Statistics: Executions 1 (No. 23, February 1960).

51. The decline in R^2 from equation (4) to (5) might be regarded as evidence that the homicide rate is less sensitive to variation in lagged executions than to variation in current executions. More fundamentally, however, it appears systematically related to neither.

52. This idea comes from Passell, *supra* note 24, at 68, who used instead a four-year average of executions.

53. *See* note 42 *supra* and accompanying text.

54. Ehrlich, *supra* note 3, at 410-11. Ehrlich's findings suggest that arrests, convictions, and executions each independently deter the commission of homicides, with arrests appearing to have the strongest effect and executions the weakest.

55. Passell, *supra* note 24, at 69-71.

homicide rate, which would occur, for example, if the demand for capital punishment was stimulated by an increase in the homicide rate. This bias can be reduced by replacing the variable $\Delta(E/C)$ with the estimator $\Delta^{\circ}(E/C)$, formed separately by regressing $\Delta(E/C)$ on all the predetermined variables in Table 1.[56] This alternative produces the result

$$\begin{aligned}(8)\quad \Delta(Q/N) = &- \underset{(2.24)}{3.841} + \underset{(12.8)}{23.05}\Delta^{\circ}(E/C) - \underset{(1.71)}{6.003}\Delta(C/Q)\\ &- \underset{(7.82)}{23.60}\Delta Pov + \underset{(.000525)}{.001527}\Delta Cr + \underset{(13.7)}{38.30}\Delta NW\\ &+ \underset{(.000551)}{.0004168}\Delta Y\end{aligned}$$

which, again, is basically the same as the other equations. Thus, the major finding—that decreases in the execution rate are not associated with increases in the homicide rate—is robust with respect to alternative methods of constructing the execution rate variable.

2. *Alternative Structures of Simultaneity*

Although equation (1) assumes that the causation is unidirectional, some variables in the equation may be both determinants of murder and products of either the homicide rate itself or factors that influence the homicide rate. This phenomenon, known generally as "simultaneity," was assumed in equation (8). One variable other than the execution rate that may be determined simultaneously with the homicide rate is the rate at which homicide offenders are convicted; it may both affect the homicide rate, as is hypothesized in equation (1), and be produced by changes in the homicide rate. The latter would occur if, for example, the ability to convict homicide offenders was

56. The predetermined variables are ΔAge, ΔNW, ΔMale, ΔUrb, ΔEnr, ΔPop, ΔDiv, ΔY, ΔPov, ΔEmp, and S. An alternate estimator, constructed from these variables together with ΔCr, produced a similar result. This general method, called the "two-stage, least-squares regression technique," is described in most standard econometrics textbooks. Because the coefficient of determination, described at equation (3), is difficult to interpret under the application of this technique, it is not reported for equations (8), (9), and (10). *See* P. Dhrymes, Econometrics: Statistical Foundations and Applications 240-03 (1970). Application of this technique to the analysis of crime deterrence, however, may create problems, since one cannot be confident that the control variables included in the equation of primary interest actually permit accurate identification of the crime function. Fisher & Nagin, *On the Feasibility of Identifying the Crime Function in a Simultaneous Model of Crime Rates and Sanction Levels*, in Deterrence and Incapacitation, *supra* note 13.

hampered by an increase in the load of homicide cases. Failure to account for this reverse effect, or for the effect of changes in the execution rate on the conviction rate,[57] might bias all the regression coefficients estimated. To deal with this problem, the estimator $\Delta^{\circ}(C/Q)$ is constructed by regressing $\Delta(C/Q)$ on the predetermined variables.[58] This alternative measure of the conviction rate produces the equation

$$\begin{aligned}(9)\quad \Delta(Q/N) = &- \underset{(3.62)}{4.007} + \underset{(10.4)}{17.66}\Delta(E/C) - \underset{(6.63)}{7.634}\Delta^{\circ}(C/Q)\\ &- \underset{(13.3)}{27.13}\Delta Pov + \underset{(.000820)}{.001300}\Delta Cr + \underset{(18.9)}{42.38}\Delta NW\\ &+ \underset{(.000707)}{.0006370}\Delta Y\end{aligned}$$

Once again, the homicide rate appears unaffected by changes in the execution rate.[59]

Another type of simultaneity may exist with regard to the average term of incarceration served by persons convicted of homicide, T. This would result if, for example, sentences were lengthened in response to an increase in the homicide rate, in an attempt to discourage further homicides. The potential bias produced by this simultaneity can be reduced by forming the variable $\Delta^{\circ}T$, constructed by regressing ΔT on the predetermined variables.[60] The result produced under this construction is

$$\begin{aligned}(10)\quad \Delta(Q/N) = &- \underset{(2.12)}{4.560} + \underset{(8.55)}{17.08}\Delta(E/C) - \underset{(1.66)}{6.019}\Delta(C/Q)\\ &+ \underset{(.007b8)}{.000252}\Delta^{\circ}T - \underset{(7.60)}{26.68}\Delta Pov + \underset{(.000521)}{.001363}\Delta Cr\\ &+ \underset{(14.1)}{44.72}\Delta NW + \underset{(.000548)}{.0006326}\Delta Y\end{aligned}$$

This result is basically similar to the others reported above.

The true system of simultaneity among variables is likely to be considerably more complicated than has been hypothesized. The results obtained by treating the execution rate, the conviction rate, and the average term of incarceration as endogenous variables, however, as was done in equations (8), (9), and (10), respectively, indicate that the biases due to failure to capture

57. *See* note 44 *supra*.

58. The predetermined variables under this formulation include those already cited, *supra* note 56, and $\Delta(E/C)$.

59. Alternative estimators of $\Delta(C/Q)$, one formed without $\Delta(E/C)$ and another formed with ΔCr, produce similar results.

60. *See* note 56 *supra*.

these simultaneous effects in equations (3) and (4) are not large.[61]

3. *Use of Weighted Regressions*

In cross-section analysis the variance of the dependent variable is often larger for more heavily populated places. This condition, known in a more general form as "heteroscedasticity," produces biased estimates of standard errors of the regression coefficients and biased tests of statistical significance. The presence of heteroscedasticity is commonly identified by visual inspection of a plot of the data, although more rigorous methods are available.[62] To eliminate this bias each observation is generally adjusted by weighting it by the square root of the population. Applying this weighting technique to the observations, under equation (4), the result is

$$(11)\quad \Delta(Q/N) = -4.627 + 18.59\Delta(E/C) - 6.340\Delta(C/Q) \quad (R^2=.595)$$
$$(2.54) \quad (10.6) \quad (1.80)$$
$$- 26.49\Delta Pov + .001243\Delta Cr + 50.32\Delta NW$$
$$(8.91) \quad (.000478) \quad (15.8)$$
$$+ .0007042\Delta Y .$$
$$(.000564)$$

The similarity of this equation to equation (4) suggests that the general findings are robust with respect to conventional weighting.[63]

4. *Exclusion of the Other-Crimes Variable*

One of the control variables used in equations (1) through (11) is the rate at which crimes other than homicide are committed. It was included in an attempt to account for the factors that caused crime to increase generally during the 1960's, since the failure of previous analyses to capture these effects may have interfered substantially with their ability to isolate a pure deterrent effect of capital punishment.[64] Certain offenses incorporated in this control variable, however, are likely to differ from homicide only in that the victims did not die. Since it is possible that some nonhomicide offenses may themselves be deterred by capital punishment, having them in the right-hand side of the regression equation may have affected the estimates of the deterrent effect that were reported above.

It is possible to test the effect of this potential bias, whose direction is not obvious, a priori, by estimating a counterpart to equation (4) without other offenses as a control variable.[65] The result is

$$(12)\quad \Delta(Q/N) = -5.371 + 9.564\Delta(E/C) - 6.040\Delta(C/Q) \quad (R^2=.420)$$
$$(2.36) \quad (0.27) \quad (1.02)$$
$$- 10.00\Delta Pov + 42.72\Delta NW + .001412\Delta Y .$$
$$(8.37) \quad (15.8) \quad (.000480)$$

As before, the deterrent effect of capital punishment is not apparent. While the omission of factors that caused crimes other than homicide to increase during the 1960's produces a result that differs somewhat from equation (4),[66] it does not, in this analysis, materially alter the finding.

III. CONCLUSION

The aim of this Article was to investigate empirically the deterrent effect of capital punishment. Building on studies by Ehrlich[67] and Passell,[68] the influence of the execution rate on the homicide rate was estimated by controlling for the effects of other variables and for the reverse effects of the homicide rate on the sanction variables. This analysis differs from previous ones, however, both because it focuses on a unique decade during which the homicide rate increased by over 50 percent and the use of capital punishment ceased and because it examines changes in homicides and executions over time and across states.[69]

61. Similar results are obtained by endogenizing the rate at which crimes other than homicide are committed.

62. *See* Goldfeld & Quandt, *Some Tests for Homoscedasticity*, 60 J. AM. STAT. ASS'N 539 (1965).

63. All the unweighted regression results reported in this paper have also been obtained under the weighted technique, with similar results in each instance.

64. *See* note 60 *supra*.

65. When ΔCr is removed from equation (3) the only independent variables that are statistically significant (at .10) are $\Delta(C/Q)$, ΔPov, ΔNW, and ΔY. Hence, our selection of an efficient subset of independent variables, used in equations (4) through (11), is unaffected by the exclusion of ΔCr.

66. The inclusion of ΔCr in equation (4) reduces substantially the appearance of a strong effect of median family income on the homicide rate obtained in (12). Behind this reduction is a large correlation coefficient (.05) for the pair ΔCr and ΔY. The actual relationships between (Q/N), Cr, Y, and other factors are likely to be extraordinarily complex, and, although the topic is important, exploration of these relationships is beyond the scope of this discussion.

67. *See* Ehrlich, *supra* note 3; Ehrlich, Punishment and Deterrence, *supra* note 24.

68. *See* Passell, *supra* note 24.

69. This approach appears also to yield more efficient estimates of

The findings do not support the hypothesis that capital punishment deters homicides. The 53 percent increase in the homicide rate in the United States from 1960 to 1970 appears to be the product of factors other than the elimination of capital punishment. Foremost among these are a decline in the rate at which homicide offenses resulted in imprisonment (from 41.3 percent in 1960 to 34.6 percent in 1970 for the states that reported in both years) and increasing affluence during the 1960's.[70]

To obtain a sense of how well the estimates, based as they are on individual observations of 32 states, generalize to the United States as a whole, the coefficients of the basic equation, (4), can be combined with changes in the respective independent variables given in the first two columns of Table 1. This produces a predicted increase of 2.68 homicides per 100,000 residents. That the actual increase was 2.7, as shown in Table 1, provides some assurance that the estimates generalize to the aggregate of 18 states not analyzed in equation (4).

The apparent strength of the incarceration rate variable and the apparent weakness of the execution rate and term of imprisonment variables as deterrents to homicide lend some support to Cesare Beccaria's two-hundred-year-old suggestion that certainty of punishment deters more effectively than its severity.[71] There are, however, other explanations for these findings. The appearance of a strong deterrent effect of imprisonments on homicides may be the result of changes in factors omitted from this analysis.[72] And the apparent weakness of the deterrent effect of long imprisonments may be the product of the inaccuracy of our term-of-imprisonment variable,[73] since random errors in the measurement of this variable will bias downward estimates of the deterrent effect of the length of imprisonment.

It seems likely, nonetheless, that this finding of a deterrent effect of imprisonments of persons convicted of murder is more real than spurious. Errors in the measure of murder imprisonments are sure to exist, and these are likely to cause estimates of the deterrent effect of incarceration to understate the true effect.[74] Moreover, this particular finding is consistent with empirical results presented by Ehrlich and Passell.[75] And it supports von Hirsch's suggestion that if penalties for homicide were eliminated entirely it is difficult to imagine that the homicide rate would not increase.[76]

The finding that capital punishment, on the other hand, does not deter homicide is remarkably robust with respect to a wide range of alternative constructions of the execution rate, alternative assumptions about simultaneity among the crime and

the relationship of primary interest, based on the coefficients of variation of the relevant variables. A variable's coefficient of variation is the ratio of its standard deviation to its mean value. In the extreme case in which a factor does not vary, it can have no relationship at all with another factor.

In fact, the coefficients of variation of both the homicide rate and the execution rate are substantially larger (0.023 and 1.51, respectively) in this study than the coefficients of variation for the homicide rate (0.157) and execution rate (0.940) based on annual aggregate United States data for the period 1933 to 1969. The coefficients of variation for the aggregate time-series data are calculated from the independent constructions of Q/N and PXQ_1, based on Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, Sources of Data at 2, 6 (May 1975) (unpublished paper on file at MINNESOTA LAW REVIEW).

70. One can only speculate as to why the homicide rate rose the most in those states with the greatest increases in wealth. Increased wealth may have provided more attractive targets to potential offenders and produced heightened expectations and frustration. Since the nationwide increases in family income reported here are attributable to real growth and to inflation in roughly equal shares, see U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, table 1323, at 811 (1972) & Table 1, at p. 752 *supra*, the inflation component may have produced further frustration, thereby exerting additional upward pressure on the homicide rate. According to table 1323, the Consumer Price Index went from 88.7 to 116.3 between 1960 and 1970, an increase of 31.1 percent. During the same period the median family income rose from $5660 to $9586, see Table 1, at p. 752 *supra* (values for variable Y), an increase of 67.6 percent. Thus, the percentage increase in the median family income due to inflation was 46.6.

71. C. BECCARIA, ON CRIMES AND PUNISHMENTS 58 (H. Paolucci trans. 1963).

72. Suppose, for example, that exogenous changes in omitted social factors in the 1960's produced a disproportionate increase in stranger-to-stranger homicides. This would cause an increase in the homicide rate to coincide with a decrease in the imprisonment rate, since it is harder to apprehend those who commit stranger-to-stranger homicides. The appearance of a deterrent effect would then be false.

73. Passell, *supra* note 24, at 67, has discussed potential sources of error in the measurement of this variable. A particularly important potential source of error comes from the fact that the measure of the average term of imprisonment is based on released homicide offenders, exclusive of homicide offenders who die in prison, some of whom had surely already served lengthy terms of incarceration.

74. On the other hand, errors in the measurement of the number of homicides, which appears both as the numerator of the homicide rate, (Q/N), and the denominator of the conviction rate, (C/Q), are likely to bias the estimates toward the appearance of a stronger deterrent effect of incarceration than may really exist. Kleiman, Forst, & Filatov, *supra* note 13, at 17-19.

75. *See* notes 54-55 *supra* and accompanying text.

76. A. von Hirsch, Doing Justice 39 (1976).

sanction variables, whether or not the observations are weighted, and the inclusion of different subsets of available control variables.

Capital punishment may be a justly deserved and appropriate sanction in some instances. It is certainly an effective way to ensure that a person convicted of murder will not commit further crimes. The results of this analysis suggest, however, that it is erroneous to view capital punishment as a means of reducing the homicide rate.

APPENDIX

DATA SOURCES FOR THE VARIABLES USED IN THIS ANALYSIS

Q/N *Criminal Homicide Rate* = Number of murders and nonnegligent manslaughters per 100,000 residents. FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS, table 3, at 38-52 (1960) & table 4, at 72-81 (1970).

E/C *Execution Rate* = Ratio of the number of executions to the number of homicide prisoners received from court. E/C denotes the ratio of executions to murder convictions that occur in the same year. E_{+1}/C denotes the ratio of executions to convictions, with the executions occurring the year after convictions. E_m/C denotes the ratio of executions to convictions, where E_m is the mean annual number of executions over the three-year period centered about the year of the convictions. The source of the number of executions is FEDERAL BUREAU OF PRISONS, DEPARTMENT OF JUSTICE, NATIONAL PRISONER STATISTICS: CAPITAL PUNISHMENT, table 2, at 8-9 (No. 45, August 1969) for 1960 and 1961 data, and table 2, at 18-19 (No. SD-NPS-CP-3, November 1975) and table 3 (No. 20, February 1959) for the construction of 1959 data. The source of the number of homicide prisoners received from the court in 1960 is FEDERAL BUREAU OF PRISONS, DEPARTMENT OF JUSTICE, NATIONAL PRISONER STATISTICS: CHARACTERISTICS OF STATE PRISONERS, table A5, at 50-51 (1960); the source of the 1970 data is FEDERAL BUREAU OF PRISONS, DEPARTMENT OF JUSTICE, NATIONAL PRISONER STATISTICS, STATE PRISONERS: ADMISSIONS AND RELEASES, table A2, at 6 (1970).

C/Q *Incarceration Rate* = Ratio of the number of homicide prisoners received from court to the number of murders and nonnegligent manslaughters. The source of the number of homicide prisoners received from the court is given under E/C. The number of murders and nonnegligent manslaughters is calculated as the criminal homicide rate, described under Q/N, multiplied by the resident population. The source of the resident population is U.S. BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, table 11, at 12 (1974) [hereinafter cited as CENSUS ABSTRACT].

T *Term of Incarceration* = Mean time, in months, served by homicide prisoners released from prison (including parolees). Calculated from data given in FEDERAL BUREAU OF PRISONS, DEPARTMENT OF JUSTICE, NATIONAL PRISONER STATISTICS: PRISONERS RELEASED FROM STATE AND FEDERAL INSTITUTIONS, tables 6-54, at 22-70 (1960) and FEDERAL BUREAU OF PRISONS, DEPARTMENT OF JUSTICE, NATIONAL PRISONER STATISTICS, STATE PRISONERS: ADMISSIONS AND RELEASES, table R4, at 47-81 (1970).

Cr *Nonhomicide Crime Rate* = Number of offenses other than murder and nonnegligent manslaughter reported to police per 100,000 residents, calculated as the total crime index rate minus the criminal homicide rate described under Q/N. The sources of the total crime index rate data are the same tables that were cited under the description of Q/N.

Age *Proportion of Residents of the Ages 21-24* = Ratio of the number of residents of the ages 21 through 24 to the total resident population. The source of the number of persons of the ages 21-24 for 1960 is CENSUS ABSTRACT, *supra*, table 19, at 27 (1962); the source of the 1970 data is CENSUS ABSTRACT, *supra*, table 36, at 31 (1972). The Census Bureau gives the 1960 data for persons between the ages 20-24, which we multiply by 0.8. The source of the total resident population is given under C/Q.

NW *Proportion of Nonwhites* = Ratio of the number of nonwhite residents to the total resident population. The source of the number of nonwhite residents is CENSUS ABSTRACT, *supra*, table 31, at 29 (1974). The source of the total resident population is given under C/Q.

Male *Proportion of Males* = Ratio of the number of male residents to the total resident population. The source of the number of male residents is CENSUS ABSTRACT, *supra*, table 17, at 25 (1962) & table 25, at 25 (1972). The source of the total resident population is given under C/Q.

Urb *Proportion of Urban Residents* = Ratio of urban population to the total resident population. The source of the urban population is CENSUS ABSTRACT, *supra*, table 18, at 19 (1974). The source of the total resident population is given under C/Q.

Enr *Enrollment Rate* = Ratio of the number of persons enrolled in public elementary and secondary schools to the number of residents of the ages 5-17. CENSUS ABSTRACT, *supra*, table 196, at 122 (1974).

Pop *Resident Population* = Number of residents, in millions, as of July 1. CENSUS ABSTRACT, *supra*, table 11, at 12 (1974)

Div *Divorce Rate* = Ratio of the number of divorces to the number of residents. The source of the number of divorces is CENSUS ABSTRACT, *supra*, table 95, at 67 (1974). The source of the number of residents is given under C/Q

Y *Median Family Income* = Amount of income, in dollars, such that exactly half the resident families earn at least that much. CENSUS ABSTRACT, *supra*, table 627, at 3[illegible] (1974).

Pov *Proportion of Families in Poverty* = Ratio of the number of families below the low income level to the total number of resident families. CENSUS ABSTRACT, *supra*, table 634, at 391 (1974).

Emp *Proportion of Adults Employed* = Ratio of the number of residents employed in nonagricultural establishments to the number of residents at least 16 years of age. The source of the number of employed residents is CENSUS ABSTRACT, *supra*, table 363, at 226 (1972). The number of residents at least 16 years of age is calculated from the CENSUS ABSTRACT, *supra*, table 19, at 27 (1962) & table 36, at 31 (1972), as follows: For 1960 we use the resident population at least twenty years of age plus 0.8 times the number of residents between 15 and 19 years of age. For 1970 we use the resident population at least 18 years of age plus one-half the number of residents between 14 and 17 years of age.

S *Binary Southern Variable* =1 if the state is Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, or West Virginia; otherwise = 0.

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

Answer Critic From Utah

JUNEAU (AP) — Democratic leaders of the Alaska Legislature pointed to the record today in defense of legislative activities which drew the fire of a Republican congressman.

Rep. Dawson (R-Utah), in a House speech yesterday, accused the Democratic controlled territorial Legislature of actions which might endanger Alaska statehood.

Dawson accused Democrats of "playing politics" in the rejection of 26 of 35 nominations to territorial boards and commissions by acting Gov. Waino Hendrickson.

The Utah Republican, a strong statehood supporter, also criticized a pre-legislative proposal by former Rep. Wendell Kay of Anchorage, speaker of the House in 1955, that the governor be stripped of patronage powers.

House Speaker Richard Greuel (D-Fairbanks) commented:

"Apparently Rep. Dawson is unaware of the old political custom in Alaska: the elected Legislature usually turns down a large percentage of the appointed governor's board appointments. Actually, the 1957 Legislature departed from tradition in confirming the vast majority of the governor's appointments."

"In confirming two-thirds of the Republican governor's appointees," said Senate President Victor Rivers (D-Anchorage), "the Alaska Legislature demonstrated its willingness to cooperate."

Rivers, a brother of Alaska's provisional "representative in Washington, Ralph Rivers, added:

"In the interest of harmony and good government, the democratic majority went two-thirds of the way. This is in contrast to the Republican controlled Legislature of 1953 which rejected all appointments of a Democratic governor."

Kay, a registered lobbyist at the 1957 Legislature, commented:

"Unfortunately, Rep. Dawson is 4,000 miles away from the Alaska situation. Perhaps this demonstrates how much we need statehood. I still feel it is obvious that an elected Alaskan can better manage Alaska than an appointed federal official."

There has been introduced in the territorial Legislature a much-criticized Democratic-sponsored bill calling for an elected administrative governor, to serve along side the governor appointed in Washington. The latest version of the proposal would make the appointed governor the first administrative governor, serving until the 1958 general election.

A leading Senate Republican, Sen. Mike Stepovich of Fairbanks, supported Dawson's comments. Stepovich said:

"I think he is correct. We'd bet-

ALASKA DEATH PENALTY

JUNEAU (AP) — Death by hanging for Alaska's most severe crimes, like that of the commission of a crime would be established under terms of a bill passed by the territorial House today.

By a 19-9 vote, with one member absent, the House passed and sent to the Senate a bill that would strike all forms of capital punishment from the territorial law.

The vote followed a day and a half of debate in which the co-author of the bill, a lawyer, said "the hideous mistake of executing an innocent man" makes it

Name Rondy Queen Tonight

(Continued from Page 1)

neau, Clark Monk and Glen Phillips of Sun Valley, Idaho; Leon Johannsen, brother of the famous Sven Johannsen, racing under the colors of the Girdwood Ski Club; Charles Burnham of Elelson Air Force Base; Erik Jorgensen, Danny McDonald and Art Stubbings of Fairbanks and seven University of Alaska students—Bill King, Norm Saunders, Hazel Owens-Ann Price, Dave Teague, Harvey Turner and Donald Boyce.

Luke Zell, president of the Anchorage Ski Club, announced the following lineups, according to classes, for the slalom and downhill racing at Arctic Valley.

Class A — Joe Young, Gary King, Clark Monk, Ronnie Seater, Glen Phillips, Bill Northway, Jerry Edwards, Johannes Berge, Harvey Turner, Ray Morris and Gene Cox.

Class B — Earle Walker, Mike Beavers, Frans Bjorklund, Merle Akers, Dick Brown, Roger Ridgeway, Erik Jorgensen, Joe Jurkiewicz, Ray Erchaney, Dan McDonald, Art Stubbings, Ron Ferch, Butch Schwende and Pat McElroy.

Class C — Charles Burnham, Norm Saunders, Bill King, Alanson Bartholomew, Warren Henry, Edwin Harper, Roger Shaffer, Jerry Palmer, Robert Boehm, Jerry McMillan, Dave Teague, Sperry Zervas, Ron Davis, Ole Aanjensen, Don Boyce, Arne Ewald, E. B. Mackenzie, Dick Quinn, Bill Earl, Luke Zell, Sam Price, Ray Ervais, Larry Connor and DeHar Long.

Women's division — Hazel Owens Linda Crocker, Bonnie Weimer, Marie Simon, Laurita Heiner, Marion Brown, Pat Graham and Valerie Brote.

Fur Rendezvous ski trophies will be presented at a banquet Sunday night, 8 o'clock at Forest Park Country Club.

The Alaska Sled Dog Championship races continue tomorrow and finish Sunday. A 25-mile leg is run each day [illegible] of the territory's [illegible]

been unfortunate enough to witness executions," said Rep. Warren Taylor (D-Fairbanks), "and the cold-blooded, methodical way they are carried out makes you wonder if it isn't legal murder."

Taylor, who introduced the bill with Rep. Victor Fischer (D-Anchorage), told the House and a packed gallery yesterday that he had been a lawyer in Alaska 20 years next month.

"I've taken part in 31 homicide trials, quite a few in the first degree," he said, "both as a prosecutor and a defense attorney," he added:

"I recall a case in Valdez where I was prosecuting a very good friend of mine. A combination of cabin fever and rum alcohol led him to trouble, and fortunately the jury brought in a verdict in the second degree. Had it been different, I would have carried to the grave that scar on my soul."

One of the strong opponents to the bill, Rep. Dora Sweeney (D-Juneau) recalled two famous cases in support of her argument that the death penalty should be continued.

"Remember Winnie Ruth Judd," Rep. Sweeney said. "A Juneau girl who horribly hacked up two persons and tried to ship their bodies all over everywhere in a trunk, she lives today in an institution, from which she has escaped several times."

Then she pointed to the recent case of John Gilbert Graham, the Colorado youth executed for planting a bomb aboard a commercial airliner and killing more than 50 persons.

"If that happened in Alaska," Mrs. Sweeney said," and this bill passes, we could not penalize him with any more than life imprisonment—from which he eventually could be freed."

Rep. Seaborn J. Buckalew Jr. (D-Anchorage) protested that the bill "protects a class of people who don't deserve the consideration we are giving them."

Taylor said Rep. Sweeney believed in the commandment "of thou shall not kill—but," Taylor added: "There is a period after kill."

"And I say, Buckalew," Taylor said, "has the district attorney complex—show them no mercy."

The bill, as passed after amendments, provides for mandatory life imprisonment for persons convicted of first degree murder.

The old statute also was revised in a section which provides for first degree convictions for persons accused of wrecking a railroad train.

The amendment to that would include mandatory life for a person who "places obstruction on [illegible]

DEW Line Bids Opened

[illegible] bids for building two [illegible] stallations in southwest Alaska are $3,461,000 under the best of the government estimates and $2,347,274 under the highest pair of bids.

The bids were opened by the Alaska District Office of the Corps of Engineers here yesterday.

The low bidder was Monsen-Osberg Co. Its bid for the installation at Cold Bay, near the tip of the Alaska Peninsula, was $3,625,536. Its bid for a similar job at Cape Sarichef, about 100 miles to the west on Unimak Island, was $3,717,551.

The firm also said it would knock off $100,000 if it receives both jobs.

Nine bids were submitted. The government estimate for Cold Bay was $4,959,200; for Cape Sarichef $4,719,222.

The other bids, with Cold Bay listed first, were:

Chris Berg, Inc., Seattle, $5,162,077 and $4,681,280.

Baker & Ford, Bellingham, $5,396,446 and $4,509,906.

Peter Kiewit Sons, $4,122,843 and $3,453,324.

Birch-Green Co., $4,830,512 and $3,216,742.

Morrison-Knudsen Co., $5,042,388 for Sarichef; no bid on Cold Bay.

Bock Constructors and Baker & Kiel, Seattle, $5,191,270 on Sarichef only.

S.S. Mullen Co., Seattle, $4,873,259 on Cold Bay only.

Grove, Shepherd, Wilson & Kruse of New York and Seattle and J. A. Jones Co., of Charlottesville, N.C., and Seattle, $5,093,157 and $5,346,942.

The projects are the first two of six planned in an extension of the defense warning system to the Aleutians.

Baby Show Is Tomorrow

Parents entering their children in the Fur Rendezvous Baby Contest are to bring them to the high school cafeteria tomorrow morning.

Children aged nine months to two years will be judged from 9 to 10; two to three years, 10 to 11; and 3 to 4, 11 to 11:45. Winners in each age group will compete at 2 p.m. tomorrow for the crown of baby king or queen.

Entry blanks are still available at the Spenard Hobby Shop, Northern Commercial Baby Department, Stork Shop and Jack and Jill Shop. To save time, parents are asked to have the entry forms filled in before bringing the children to the show.

The Elmore Homemakers are [illegible]

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

STRONG AND WEAK RESEARCH DESIGNS FOR DETECTING THE IMPACT OF CAPITAL PUNISHMENT ON HOMICIDE

David P. Phillips*

I. Introduction

This article does not attempt to provide a systematic review of studies on the deterrent effect of capital punishment.[1] Instead, the article encompasses two related topics: (1) a discussion of some common methodological shortcomings of many studies on the deterrent effect of capital punishment, and (2) a suggestion for a type of study design that appears to avoid many of these shortcomings.[2]

To determine whether capital punishment influences the homicide rate, one needs to disentangle the effect of capital punishment from the effect of other variables on homicide. This "disentangling" can be accomplished in two major ways. First, one can use a controlled experiment, or an approximation to one. This approach is favored in the natural sciences and has been the method of choice for most research on the effects of capital punishment. Second, one can use statistical techniques, including regression analysis, correlation, analysis of variance, path analysis, etc.

This paper concentrates on studies that use the controlled experiment as a model study design. Most of these investigations have implicitly followed the study design represented in Table 1. A careful examination of this table will help to reveal systematically some of the common shortcomings of research on capital punishment.

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1. Capital studies on the deterrent effect of capital punishment may be found in H. Bedau, "The Death Penalty in America" (1964); W. Bowers, Executions in America (1974); Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in Deterrence and Incapacitation (1978); Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faith*, 1976 Supreme Court Review 317.

2. For examples and criticisms of the type of study, see Bowers & Pierce, *The Illusory Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 Am. Econ. Rev. 397 (1975); Ehrlich, *Deterrence: Evidence and Inference*, 85 Yale L.J. 209 (1975); Klein, Forst & Filatov, *supra* note 1; Zeisel, *supra* note 1; P. Passell & J. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, Discussion Paper #74-91, Columbia University Department of Economics (1974).

TABLE 1

A COMMON PARADIGM FOR MANY STUDIES OF THE DETERRENT EFFECTS OF CAPITAL PUNISHMENT

	Time 1	Time 2	
Experimental Group	h(1)	h(2)	$d = h(2) - h(1)$
Control Group	h'(1)	h'(2)	$d' = h'(2) - h'(1)$

II. A Paradigm for Evaluating the Soundness of Some Research on the Deterrent Effects of Capital Punishment

The experimental group in Table 1 consists of a population subject to capital punishment at time 1 and not subject to capital punishment at time 2. Ideally, the control group is identical to the experimental group in every respect except one: unlike the experimental group, the control group is never subject to capital punishment. h(1) denotes the homicide rate of the experimental group at time 1, when it is still subject to capital punishment. h(2) denotes the homicide rate of the same group at time 2, after capital punishment has been abolished. d is the difference between the experimental group's homicide rate before and after capital punishment was abolished. In other words, d denotes the amount by which the experimental group's homicide rate has changed during the study period. h'(1) is the homicide rate of the control group at time 1, while h'(2) is the homicide rate at time 2. d' denotes the amount by which the control group's homicide rate has changed during the study period.

Suppose that the experimental group's homicide rate changes over time in one way, and the control group's homicide rate changes in another way. In other words, suppose that d is different from d'. Because the experimental and control groups are similar in every way except for their experience of capital punishment, a large difference between d and d' may then be plausibly attributed to the difference in exposure to capital punishment in the two groups.

As indicated earlier, this seemingly simple study design has frequently been the model for research on capital punishment. Therefore, it is surprising and regrettable that no investigation in the literature meets all the requirements of this study design. No study provides all four pieces of information, h(1), h(2), h'(1), and h'(2), required in Table 1. Instead, a variety of incomplete study designs prevail. In the following section, these incomplete study designs are

III. Four Types of Inconclusive Study Designs

A. *Only Information on* $\left|\begin{matrix} h(1) & h(2) \end{matrix}\right|$ *Is Provided*

In this type of study, there is no control group. The author merely measures the experimental group homicide rate before and after the abolition of capital punishment. If the homicide rate increases after the abolition of capital punishment, the author may be tempted to attribute this increase to the disappearance of capital punishment. In fact, however, the abolition of capital punishment may be only one of many changes experienced by the experimental group between time 1 and time 2. Any of these other changes may be the real explanation for the increase in the homicide rate.

B. *Only Information on* $\left|\begin{matrix} h(1) \\ h'(1) \end{matrix}\right|$ *Is Provided*

In this type of study, the homicide rate in an experimental group, h(1), is compared with the homicide rate of a control group, h'(1), at a time when the first group is subject to capital punishment and the second group is not. A typical example of this type of study occurs when one compares the homicide rate of a state *with* capital punishment to the homicide rates of adjacent states *without* capital punishment. If the homicide rate of the "capital punishment" state is lower than the homicide rate of the "non-capital punishment" states, the author may wish to attribute the lower rate to the presence of capital punishment. In fact, however, adjacent states differ in a great many ways that have nothing to do with capital punishment. Out of the multitude of differences between adjacent states, it seems unreasonable, without additional evidence, to select the presence of capital punishment as the definitive explanation for a low homicide rate.

C. *Only Information on* $\left|\begin{matrix} h(1) \\ h'(2) \end{matrix}\right|$ *Is Provided*

At first sight, it is difficult to imagine how a careful researcher could produce a study of this sort, in which a group at one time is compared with a different group at another time. In fact, however, it is surprisingly easy to conduct a flawed investigation of the sort. Consider, for example, a comparative study of the United States homicide rates in, say, 1950 and 1960. This appears to be a study of type

$$\left|\begin{matrix} h(1) & h(2) \end{matrix}\right|$$

already discussed, but is actually a study of type

$$\left|\begin{matrix} h(1) \\ h'(2) \end{matrix}\right|$$

of forty-eight states, whereas in 1960 it consisted of fifty states. Thus the group being studied in 1950 is not the same as the group examined in 1960, even though the name of the two groups is identical.

In this example, the effect of the error is not very great, and the flaw in the study design, though embarrassing, may not be serious in some circumstances, however, this type of flaw may be both embarrassing and serious. It is serious, for example, whenever comparisons are made using United States homicide statistics for the period 1900-1932. During this period, vital statistics rates were not known for the entire United States, only for those states eligible for inclusion in the Death Registration Area.[4] The geographic makeup of this area changed continually from 1900 to 1932. (From 1933 on, all forty-eight states were included.) Thus, an examination of "United States" homicide rates in the early part of the century generally involves a constantly changing entity. The changes in this entity are masked, however, because the name of the entity remains unchanged.

D. *Only Information on* $\left|\begin{matrix} & h(2) \end{matrix}\right|$ *Is Provided*

This type of study, fortunately, is more common in the popular than in the professional literature. The author of this type of study notices, for example, that California had a high homicide rate in 1970. Out of the myriad features that characterized California in 1970, the author selects one, the absence of capital punishment, and asserts that this is the reason for the high homicide rate. The author does not attempt to determine whether the California homicide rate was equally high *before* the abolition of capital punishment, nor does he attempt to compare changes in California homicide rates with changes in the homicide rates of a matched control group. It is evident that a study of this type cannot provide compelling evidence on the deterrent effect of capital punishment.

Thus, the paradigm for evaluating some studies of capital punishment

$$\left|\begin{matrix} h(1) & h(2) \\ h'(1) & h'(2) \end{matrix}\right|$$

highlights the shortcomings of four common study designs:

$$\underset{\text{A}}{\left|\begin{matrix} h(1) & h(2) \end{matrix}\right|} \qquad \underset{\text{B}}{\left|\begin{matrix} h(1) \\ h'(1) \end{matrix}\right|} \qquad \underset{\text{C}}{\left|\begin{matrix} h(1) \\ h'(2) \end{matrix}\right|} \qquad \underset{\text{D}}{\left|\begin{matrix} & h(2) \end{matrix}\right|}$$

IV. Other Shortcomings of Research on Capital Punishment

So far, only those shortcomings that are revealed by a close consideration of the paradigm illustrated by Table 1 have been discussed. Two additional shortcomings should also be mentioned.

First, almost all studies in the literature seek to determine whether laws, or the absence of laws, about capital punishment affect the homicide rate. Typically, the researcher seeks to determine whether the abolition or reinstatement of the death penalty changes the homicide rate. This type of research often has two obvious weaknesses, in addition to the shortcomings already discussed above: (1) the death penalty is abolished or reinstated very rarely in any given area, and consequently the researcher has very few cases to study; (2) the fact that a state has a law permitting capital punishment does not necessarily mean that the state actually practices capital punishment. If capital punishment is "on the books" but not practiced, it may not have the same effect as a law that is enforced. For these two reasons, studies of the deterrent effect of capital punishment *laws* may not reveal a deterrent effect, even if such an effect actually exists.

Second, almost all studies on capital punishment use yearly rather than weekly or daily statistics.[7] Research using yearly data has typically failed to find a deterrent effect of capital punishment. Such failure may have occurred because (1) there is no deterrent effect, or (2) there is a deterrent effect, but it cannot be detected with crude yearly data. Short-term deterrent effects are obviously more likely to be discovered with weekly than with yearly statistics.

These methodological shortcomings are common in the literature on capital punishment. The next section of this paper describes a type of research that appears to avoid many of them.[8]

V. The Effect of Publicized Executions on the Level of Homicides

As noted earlier, it is desirable to examine daily or weekly homicide statistics in order to detect short-term effects of capital punish-

[7] Cannot locate only two studies. Besides those cited by the author that use weekly or daily homicide statistics to examine the deterrent effect of executions, see H. Dicks, The Deterrent Effect of Capital Punishment, Home Office Research Unit, Research Bulletin No. 34 (1943); Grove, *A Doctor Looks at Capital Punishment*, 40 J. Crim. L. Criminology & Police Sci. 545 (1950); Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 86 Am. J. Sociology 139 (1980). Dicks's study found no evidence of a deterrent effect, perhaps because the author examined only five executions. Grove's study also found no deterrent effect but only a small fraction of the executions studied were well publicized.

Additionally, one Pennsylvania study examined the deterrent effect of death penalty *sentences* rather than executions. Only four sentences were examined, and no deterrent effect was found. See Sellin, *A Study of Capital Punishment*, 49 J. Crim. L. & Criminology 189, 190 (1958).

ment. A search of the vital statistics collections of the Library of Congress, the National Library of Medicine, and the British Museum revealed only one jurisdiction, England, that both practiced capital punishment and published weekly homicide statistics over a given period of time. The weekly homicide statistics for London from 1858 to 1921 were available for study.

A list of highly publicized English executions for the same time period was generated from a standard encyclopedia of notorious murderers. Table 2 lists these executions, ranked by the amount of publicity each received, together with the number of homicides before, during, and after the week of each execution. The week in which the execution was publicized in the newspaper will henceforth be termed "the execution week" or "the experimental period." The week just before the experimental period and the week just after will be termed "the control period." It is evident that the London in each control period is nearly identical to the London in the corresponding experimental period, except for the presence of an execution in the experimental period. Thus, this procedure for choosing controls avoids the problem of dissimilar experimental and control periods encountered in other study designs.

If executions deter homicides, then the number of homicides in the experimental period should generally be smaller than the number of homicides in the control period. Table 2, column 6, shows the average weekly number of homicides in each control period; column 7 indicates whether the number of homicides in the experimental period was less than the weekly average in the control period (indicated by a "-1") or more than the weekly average (indicated by a "+1"). In three cases the number in the experimental period equaled the weekly average in the control period. In the remaining nineteen cases in Table 2, there are fifteen "-1"s and four "+1"s. In short, there is a general tendency for homicides to decline in the week of a publicized execution.

These data are consistent with the hypothesis that publicized executions produce a brief decline in homicides. This hypothesis is further supported by an additional piece of evidence: the more publicity given to the execution, the more homicides decline. This is evident from an informal inspection of Table 2 and also from a more refined statistical analysis reported elsewhere.[9]

It is difficult to think of a plausible alternative explanation for the findings. The findings are sufficiently strong so that they cannot easily be attributed to chance fluctuations in the data. In technical terms, the results are statistically significant.[10] The findings cannot result

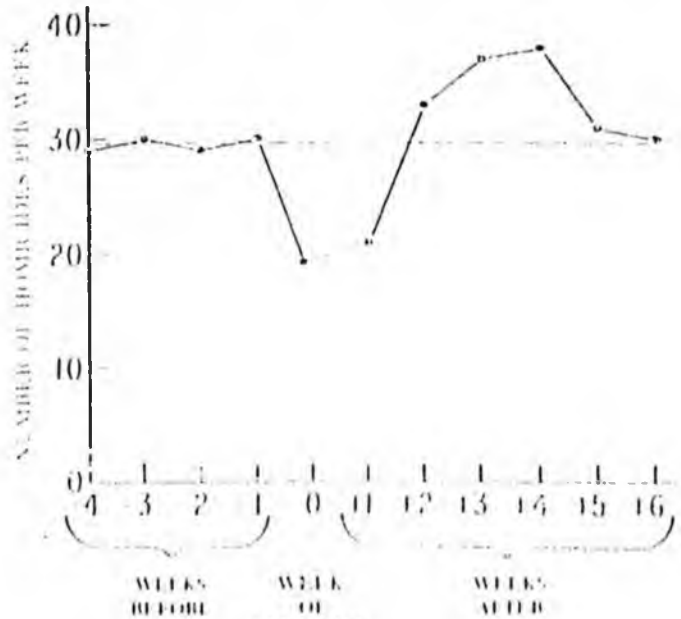
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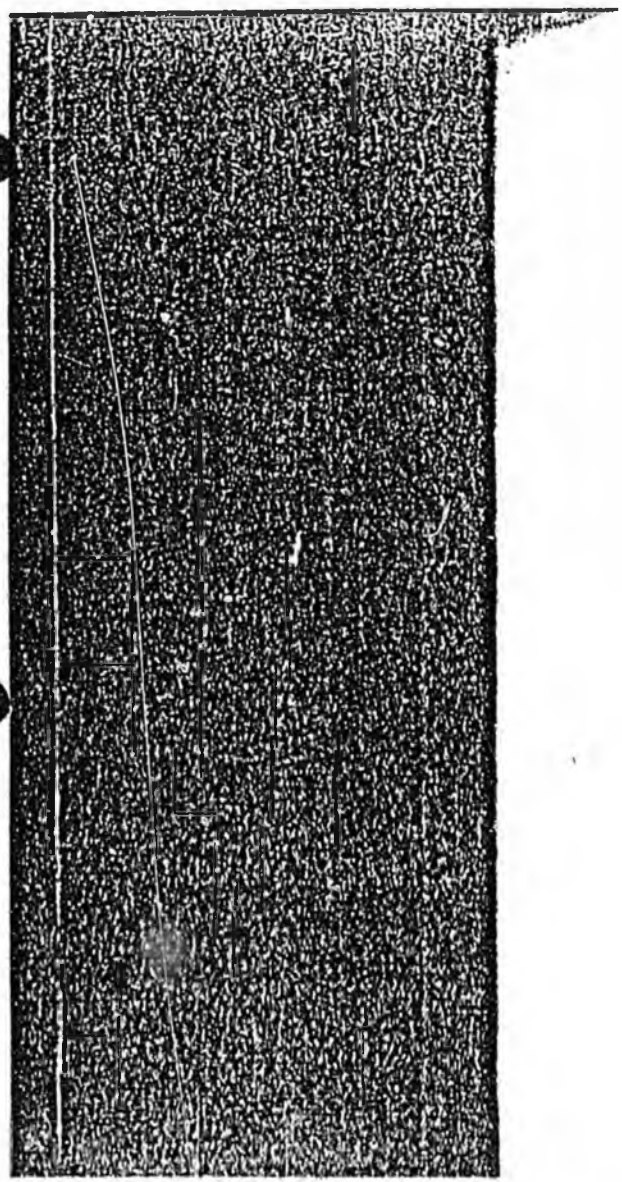
Weekly Homicides Before, During and After Publicized Executions, London, 1858-1921

Name of person executed and date of execution (men in The Times)	No. of homicides during week of execution	Control Period: No. of homicides per week in the 4 weeks before execution week	Control Period: No. of homicides per week in the 3 weeks after execution week	Control Period: No. of homicides per week in the 7 weeks before and after execution week	Average no. of weekly homicides in control period	Difference between observed no. of deaths in execution week and 3 and no. expected (col. 4 − col. 5)
Wainwright 12/22/1875	1000	0	1	0	0.5	−0.5
Coppen 11/23/1910	1550.0	0	1	0	0.5	−0.5
Mullin 11/15/1864	1062.0	1	1	1	1	0.0
Wooler 3/30/1859	922.0	0	2	1	1	1.0
Mapleton 11/29/1881	928.0	2	1		1.0	1.0
Lamson 8/27/1882	930.0	0	0		1.0	−1.0
Seddon 4/19/1912	840.0	1		1	1	0.0
Cream 12/20/1892	958.0	0	1	0	0	0.0
Ruhl & Cass 3/5/1921	650.0	0	1	0	0.0	0.0
Chapman 4/8/1903	1005.0	0	1		1	−1.0
Pace 2/28/1879	963.0	0	1		1	−1.0
Read 12/7/1901	1014.0	2	1		2	0.0
Mahon & Condon 6/4/1849	2016.0	0		1	1.0	−1.0
Owen 8/9/1859	2216.0	0	1	1	1.0	0.0
Dennison 8/16/1911	2154.0	1		0	1	0.0
Marlow 1/30/1911	2014.0	0	1	0	0.5	0.5
Sherrard 12/1/1920	1980.0	2		1	1	1.0
Dowse 12/9/1911	1563.0	1		0.5	0.5	0.5
Bentley 8/11/1901	1270.0	2	1	0.5	1.5	
Parker 10/1/1912	1014.0	0	0		0	0
Dickman 8/10/1910	1014.0	0	1	0.5	0.5	0.5
Stratton Brothers 5/4/1905	2028.0	1	0	0.5	0.5	0.5

from a trend in homicides over time because the selection and treatment of controls corrects for the effects of trend. The findings also cannot be attributed to seasonal fluctuations because the control and experimental periods occur during the same seasons of the year. Similarly, the findings cannot be attributed to day of the week fluctuations in homicides because the experimental and control periods each cover the same days of the week. At present, the best available explanation of the findings is that publicized executions in London from 1858 to 1921 caused a brief decline in homicides during the execution week.

So far, we have examined homicides for a three-week period centered on the execution week. It is instructive to graph the fluctuation of homicides for a longer period of time. When such a graph is made, a curious and unexpected phenomenon is discovered: the dip in homicides just after the execution is canceled by an equally large rise in homicides soon afterwards. Figure 1 shows this pattern quite





clearly. The most plausible explanation of this graph is that homicides are *temporarily* deterred for a two week period; then these temporarily deterred homicides reappear after the publicized execution has faded from memory. Apparently, the "lesson of the scaffold" is real but only temporary, at least in London from 1858 to 1921.

Without further research, it is inappropriate to generalize these findings to contemporary America. The chief value of the study described herein lies not in its findings but in its design. The study examines the effect of executions, rather than death penalty legislation, it employs weekly rather than yearly homicide statistics, and finally, it uses a control group that is nearly identical to the experimental group. Because of these features, the study design avoids many of the shortcomings of traditional investigations. Future research should attempt to apply this study design to contemporary American data.

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I. INTRODUCTION

The debate
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A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*

David C. Baldus† and James W. L. Colet‡

During the last 20 years, a substantial number of empirical studies—most prominent among them the work of criminologist Thorsten Sellin—have concluded that the death penalty has no measurable deterrent effect beyond that of life imprisonment.[1] A recent study by Isaac Ehrlich, an economist, challenges this traditional view.[2] Ehrlich criticizes Sellin's statistical methods and, on the basis of a more complex statistical procedure, estimates that "an additional execution per year over the period in question [1933-1969] may have resulted, on average, in 7 or 8 fewer murders."[3] In *Fowler v. North Carolina*,[4] the constitutional challenge to the death penalty now pending in the Supreme Court, the Solicitor General presented Ehrlich's findings to the Court and in his amicus brief cited them as "important empirical support for the a priori logical belief that use of the death penalty decreases the number of murders."[5] The Solicitor General asserted that earlier studies, and specifically those of Sellin, suffered from "investigatory flaws" and that only Ehrlich's work provided a reliable basis for judging whether the death penalty has a deterrent effect.[6] Now that *Fowler* has been set for reargument,[7] an assessment of the Solicitor General's claims has particular importance.

A statistical study cannot prove that executions deter murders, nor

* We are grateful for the assistance of David Engels in the preparation of this article.

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1. T. SELLIN, THE DEATH PENALTY (ALI 1959) [hereinafter cited as THE DEATH PENALTY]; Sellin, *Capital Punishment*, 25 FED. PROBATION 3 (1961); Sellin, *Homicides in Retentionist and Abolitionist States*, in CAPITAL PUNISHMENT 135 (T. Sellin ed. 1967) [hereinafter cited as *Homicides*]. For other studies confirming these findings, see W. BOWERS, EXECUTIONS IN AMERICA 19-20 (1974). *See generally* Allen, *Capital Punishment*, 2 INT'L ENCY. SOC. SCI. 290 (1968); F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973).

2. I. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life or Death, 1974 (Working Paper No. 18, Center for Economic Analysis of Human Behavior and Social Institutions) [hereinafter cited as Ehrlich 1974]. A condensed version of the paper was recently published as Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397 (1975) [hereinafter cited as Ehrlich 1975].

3. Ehrlich 1975, *supra* note 2, at 414.

4. State v. Fowler, 285 N.C. 90, 203 S.E.2d 801, *cert. granted sub nom.* Fowler v. North Carolina, 419 U.S. 961 (1974), *argued*, 43 U.S.L.W. 3562 (U.S. Apr. 21, 1975), *restored for reargument*, 422 U.S. 1049 (1975).

5. Brief for the United States as Amicus Curiae at 30 [hereinafter cited as Amicus Brief]. The Solicitor General submitted the Ehrlich Working Paper, *supra* note 2, to the Court on March 4, 1975.

6. *Id.* at 36-38.

can it prove that they do not. Given a hypothesis about a causal relationship, however, a statistical analysis can determine whether that hypothesis is consistent with past experience. Both Sellin and Ehrlich tested the hypothesis that capital punishment deters murders. Both used a variable to represent the threat of capital punishment, and both compared that variable with the behavior of homicide rates in the United States.[8] However, they used different statistical methods to make their comparisons and arrived at different conclusions.

Sellin used a "matching" technique.[9] He selected clusters of neighboring states "closely similar" in "social organization, composition of population, [and] economic and social conditions"; in each grouping at least one state had abolished the death penalty and at least one retained it.[10] He then compared the homicide rates for the years 1920-1955 and 1920-1962 in abolitionist and retentionist states within each group, and found that the rates in abolitionist states were not significantly or systematically different than the rates in retentionist states.[11]

8. Since the public records kept by the FBI do not include statistics on the number of murders committed each year, the researchers in this area must use the number of "murders and nonnegligent manslaughters" as a surrogate measure of the number of murders. This statistic is generally considered adequate on the assumption that the proportion of murders to nonnegligent manslaughters remains constant from one year to the next. Sellin, *Capital Punishment*, *supra* note 1, at 5-6; *see* Ehrlich 1975, *supra* note 2, at 406-07 (accounting for possible increasing trend in fraction of capital murders among all murders by including chronological time as a factor influencing the homicide rate). Throughout this paper we refer to the "homicide rate" in discussing the data analyzed by Sellin and Ehrlich, with the understanding that the underlying theoretical relationship is between executions and the *murder* rate.

9. Sellin also has performed longitudinal studies of crime rates before and after a change in punishment policy in a given jurisdiction. *See* note 16 *infra*.

10. THE DEATH PENALTY, *supra* note 1, at 23.

11. Tables I and II illustrate the results reported in THE DEATH PENALTY, *supra* note 1, at 24-31, and *Homicides*, *supra* note 1, at 130-31.

TABLE I

Comparative Crude Homicide Death Rates in States with and States without the Death Penalty—Average Annual Rate 1920-1955 (Death Penalty States Are Marked †)

Midwest

Matched Group 1			*Matched Group 2*			*Matched Group 3*		
	†	†			†		†	†
Michigan	*Indiana*	*Ohio*	*Minnesota*	*Wisconsin*	*Iowa**	*North Dakota‡*	*South Dakota‡*	*Nebraska*
4.8	4.8	6.1	2.2	1.8	4.7	1.4	1.6	2.7

New England

Matched Group 1			*Matched Group 2*		
	†	†		†	†
Maine	*New Hampshire*	*Vermont*	*Rhode Island*	*Massachusetts*	*Connecticut*
1.6	1.1	1.2	1.7	1.7	2.5

* 1921-1955 ‡ 1921-1955 § 1930-1955

Adapted from I. Ehrlich, *supra* note 1, at 396; see also data from THE

the conclusions of the study as "completely unfounded."[18] If Ehrlich's study is reliable, it may be difficult to claim that the death penalty is "excessive and unnecessary" and therefore violates the Eighth Amendment. Because the technical merits of the Ehrlich study have thus become relevant to an important constitutional adjudication, the *Journal* is publishing what is essentially a statistical debate between Ehrlich and his critics.

In the first article, Messrs. Baldus and Cole defend Sellin and contend that his technique is better than Ehrlich's regression method for testing the deterrence hypothesis; in the second article, Messrs. Bowers and Pierce argue that Ehrlich's data are fundamentally inadequate for the method he uses and that no evidence of a deterrent effect is found when his method is correctly applied. Professor Ehrlich then responds with methodological and statistical arguments in support of his initial study and further elaborates on the basic issues underlying his research. In the next issue of the *Journal*, Professor Jon K. Peck[19] will comment on the debate between Ehrlich and his critics.

The difficulties a court faces in attempting to arbitrate an "abstruse statistical dispute" between parties to a litigation were forcefully noted by Judge J. Skelly Wright in *Hobson v. Hansen*,[20] a suit challenging different per-pupil expenditures among elementary schools in the District of Columbia. Judge Wright commented on "the added difficulties which beset the truth finding process when it is necessary to rely upon easily manipulated statistical analyses," and deplored the "overgrown garden of numbers and charts and jargon" which he suggested had obscured the basic issues in the suit.[21] He added:

> The reports by the experts—one noted economist plus assistants for each side—are less helpful than they might have been for the simple reason that they do not begin from a common data base, disagree over crucial statistical assumptions, and reach different conclusions. Having hired their respective experts, the lawyers in this case had a basic responsibility, which they have not completely met, to put the hard core statistical demonstrations into language which serious and concerned laymen could, with effort, understand.[22]

The articles which follow attempt to meet this "basic responsibility" in the context of the statistical debate over the deterrent effect of capital punishment; to the extent it is not met, the Court must rely, as did Judge Wright, "upon burden of proof, and upon straightforward moral and constitutional arithmetic."[23]

> penalty] concluded that, over the past several decades, each execution actually carried out deterred a significant number of murders. Other studies of the death penalty are infected by serious analytical flaws, and so do not provide support for a contrary conclusion.

Id. at 9.

18. Reply Brief for Petitioner, App. C at 6. *See* Rule[?], *infra* at 19 n.31. Petitioner submitted two statistical critiques of the Ehrlich study, *id.* Apps. C & E.

19. Assistant Professor of Economics, Yale University.

20. 327 F. Supp. 844, 851 (D.D.C. 1971).

21. *Id.* at 865, 870.

22. *Id.* at 870.

These articles also illustrate the inherent vulnerability of complex statistical techniques to the adversary process. Any statistical analysis depends on a variety of explicit and implicit assumptions which can be challenged by opposing parties and on which experts may reasonably differ.[24] Since courts generally have no expertise to resolve statistical disputes, they will tend to ignore the evidence altogether once such a dispute arises.[25] The probative value of any study can be destroyed by raising a large number of technically complex objections, which, if not sufficient to disprove the results of the study, will at least undermine them to the point where the decisionmaker refuses to rely on them. This process tends toward Chief Justice Burger's characterization of the evidence on deterrence in *Furman*—an "empirical stalemate."[26] The usefulness of statistical analyses to the courts may depend on the development of procedures to resolve the technical debates which seem inevitably to arise when such studies are put before them.[27]

24. *See, e.g.*, J. Johnston, Econometric Methods 121-23 (2d ed. 1972) (mathematical statement of assumptions needed for regression analysis).

25. Finkelstein has noted this tendency in administrative proceedings in which regression studies have been introduced. *Regression Models*, *supra* note 15, at 1111. The lack of success in the use of sophisticated statistical evidence in administrative proceedings necessarily raises doubts about the chances for its success in litigation before the courts, because agencies are likely to be both more able and more willing than courts to use this evidence. An agency has a staff which can develop the expertise necessary to construct an econometric model of a regulated industry. *See, e.g.*, Khazzoom, *The FPC Staff's Econometric Model of Natural Gas Supply in the United States*, 2 Bell J. Econ. & M. Sci. 51 (1971). In addition, statistical evidence often bears directly on the predictions and policy decisions that the agency must make. For example, in a ratemaking proceeding, the agency must forecast the effect of the proposed change in rates on demand and supply in the regulated industry—a question which lends itself to econometric analysis. The relevance of the statistical evidence to regulatory decisionmaking may therefore lead agencies to encourage its use. *See, e.g.*, Southern La. Area Rate Proceeding, 10 F.P.C. 530, 626 (1968), *modified*, 41 F.P.C. 301 (1969), *aff'd*, 428 F.2d 407 (5th Cir.), *cert. denied*, 401 U.S. 950 (1970), *quoted in Regression Models*, *supra* at 1156, Madison Gas & Elec. Co., 5 P.U.R.4th 28, 49 (1974).

26. 408 U.S. 238, 395 (1972) (Burger, C.J., dissenting).

27. Finkelstein, in *Regression Models*, *supra* note 15, at 1155-61, proposes that an administrative agency decide in advance on the data to be used in regression studies put before it in a given proceeding and that the agency require a party objecting to the statistical analysis presented to demonstrate the numerical significance of its objections or even to present a superior alternative analysis of the designated data. While possibly quite useful, these procedures are not likely to be sufficient to yield what their proponent describes as

> a progression towards greater refinement and correctness in statistical methodology which will not only be apparent to the decisionmaker, but which may also achieve results meriting at least tacit agreement among experts.

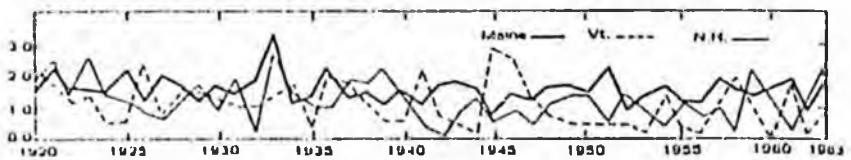
Id. at 1161. Instead, each side, using high speed computers, may be able to "mine" a limited sample of data for results which support its hypothesis. *See id.* at 1119 n.27; Hobson v. Hansen, 327 F. Supp. 844, 869 (D.D.C. 1971) ("the studies by both experts are tainted by a vice well known in the statistical trade: data shopping and scanning to reach a preconceived result"). Although its implications have not been fully discussed, this problem of "data-mining" has been recognized in economic journals. *See, e.g.*, Jorgenson, Hunter & Nadiri, *The Predictive Performance of Econometric Models of Quarterly Investment Behavior*, 38 Econometrica 213-15 (1970).

From this evidence he drew the "inevitable conclusion . . . that executions have no discernible effect on homicide death rates . . . ."[12]

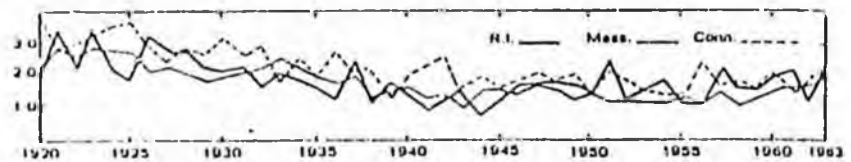
Ehrlich focused instead on the relationship in the nation as a whole between the homicide rate and "execution risk"—the fraction of persons convicted of murder who were subsequently executed. He compared the differences in homicide rate and execution risk for the years 1933-1969, and found a positive simple correlation between changes in the homicide rate and changes in execution risk—increases in execution risk were associated with increases in the homicide rate.[13] However, when he controlled for the influence of other variables on the homicide rate by using a multiple regression analysis, the relationship became negative. More precisely, he estimated that the elas-

TABLE II

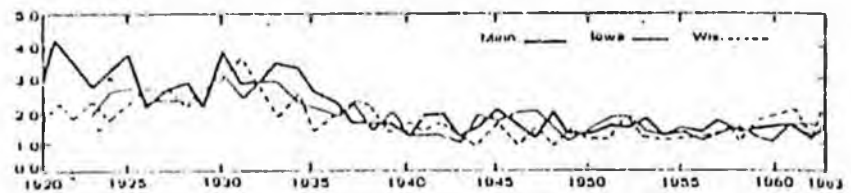
Homicide Death Rates (per 100,000 Population) in Contiguous Abolitionist and Retentionist States, 1920-1963.



Maine is an abolitionist state.



Rhode Island is an abolitionist state.



Minnesota and Wisconsin are abolitionist states.

Reprinted with permission from Sellin, *Homicides in Retentionist and Abolitionist States*, in CAPITAL PUNISHMENT 135 (T. Sellin ed., Harper & Row). Copyright © 1967 by Thorsten Sellin.

12. THE DEATH PENALTY, *supra* note 1, at 34; *see Homicides*, *supra* note 1, at 138 ("The conclusion is inevitable that the presence of the death penalty—in law or practice does not influence homicide death rates.")

13. Ehrlich 1975, *supra* note 1, at 409. Simple correlation analysis does not take into account the influence of other factors on the homicide rate, and hence is statistically less sophisticated than the multiple regression analysis on which Ehrlich relies for his

ticity of the homicide rate with respect to the execution rate was approximately —.06[14]—that is, a .06 percent decrease in the homicide rate was associated with a one percent increase in execution risk. This finding was the basis for his estimate that "on the average the tradeoff between the execution of an offender and the lives of potential victims it might have saved was of the order of magnitude of 1 for 8 for the period 1933-67 in the United States," and for his "tentative and rough calculation [that] the decline in [execution risk] alone might have accounted for about 25 percent of the increase in the murder rate between 1960 and 1967."[15]

In this paper, we compare the work of Sellin and Ehrlich and attempt to assess the reliability of their statistical evidence as a basis for making inferences about the deterrent effect of capital punishment. We consider three aspects of their approach: (1) the choice of a measure to represent capital punishment; (2) the choice of the nation or state as the unit of observation; and (3) the ability to control for factors other than the death penalty which may affect the homicide rate. We then discuss the replication or corroboration of their results by studies using the same or similar methods. While we do not argue that Sellin and others who have followed his approach have proven conclusively that the death penalty has no greater deterrent effect than life imprisonment, we believe that Sellin's work, despite its methodological shortcomings, offers a more reliable basis than Ehrlich's recent work for inferring whether the threat of capital punishment deters murders. Future studies by Ehrlich or others may weaken the credibility of work that went before him, but on the record to date Sellin makes the stronger case.

It is quite true that Ehrlich's approach is statistically more sophisticated than Sellin's. But statistical sophistication is no cure for flaws in model construction and research design. There are many questions which, because of inadequacies of data or theory, are best studied by simpler methods. The deterrent effect of capital punishment is at this point just such a question.

I. Measuring the Threat of Capital Punishment: Actual Use or Legal Status

The Solicitor General criticized Sellin's work on the ground that it "relied not upon the actual *use* of the death penalty, but upon its statutory authorization, as the independent variable against which the

14. *Id.* at 410 (Tables 3 & 4).

15. *Id.* at 399, 411 n.45.

murder rate was compared."[16] This criticism echoed Ehrlich's argument that "the actual enforcement of the death penalty [as measured by execution risk] may be a far more important factor affecting offenders' behavior than the legal status of the penalty."[17]

There is, of course, a necessary link between the legal status and actual use of capital punishment; the penalty cannot be used if it is not authorized. Moreover, the factor which is directly controlled by courts and legislatures is the legal status of the penalty. The precise question now facing the Supreme Court is whether capital punishment must be abolished, not whether its use should be increased or decreased assuming it is retained. For some purposes, it may be of interest to investigate the effects of increasing the number of executions in retentionist jurisdictions. But in the debate over abolition, the essential question is the effect of changing from a retentionist to an abolitionist jurisdiction.[18] Sellin's approach is directly addressed to this policy choice, and Ehrlich's approach is not.

Sellin compared the homicide rates within six clusters of abolitionist and retentionist states.[19] The execution levels in the retentionist states ranged from New Hampshire (one execution in the years 1920-1955) to Ohio (an average of seven executions a year).[20] Assuming that the penalty, if retained, would be applied as infrequently as in the past 15 years,[21] Sellin's comparisons of abolitionist states with retentionist states which rarely executed people become highly relevant. His other comparisons bear directly on the choice between abolition and retention at the higher execution levels of the earlier years.[22]

Ehrlich's comparison of the homicide rates with the ratio of executions to convictions—execution risk—is less relevant to the question of abolition. His analysis focuses on the marginal effects of small changes in execution risk—the number of murders deterred by one

16. Amicus Brief, *supra* note 5, at 36 (emphasis in original).

17. Ehrlich 1975, *supra* note 2, at 415.

18. For a discussion of the relative reliability of various research designs as a basis for making causal inference about the impact of a particular law, see D. Campbell & J. Stanley, "Experimental and Quasi-Experimental Design for Research (1966); Social Experimentation: A Method for Planning and Evaluating Social Intervention 92-116 (H. Riecken & R. Boruch eds. 1974); L. Zeisel & G. Hawkins, *supra* note 1, at 249-320; Campbell, *Legal Reforms as Experiments*, 23 J. Legal Educ. 219-30 (1970).

19. Sellin did not, however, rely simply on the legal status of the penalty. He included in the category of abolitionist states three which had abolished the penalty except for treason and certain types of murders and had never applied the penalty after it was abolished for ordinary murders. The Death Penalty, *supra* note 1, at 1-2.

20. *Id.* at 25, 28, 32.

21. There was an average of 36 executions in the years 1961-1961, seven in 1965, one in 1966, two in 1967, and none since 1967. W. Bowers, *supra* note 1, at 29.

22. Rates of executions for the five year periods between 1930 and

more execution—rather than on the difference between jurisdictions which do and do not use capital punishment. In Ehrlich's regression equation, the estimated homicide rate increases proportionally as execution risk declines. To predict the effect of abolition on the homicide rate, execution risk is simply set equal to zero in the equation. Representing abolition by zero execution risk fails to distinguish de facto abolition—where the death penalty is authorized but not currently applied—from de jure abolition. Yet even the legal possibility, however remote, of execution might have some deterrent effect. Because of its reliance on execution risk rather than the statutory authorization of the penalty, Ehrlich's study could not detect such an effect.

Moreover, for the particular mathematical form in which Ehrlich constructs his equation, zero execution risk implies either an infinitely large or a zero homicide rate (depending on whether the elasticity for execution risk is negative or positive).[23] These absurd implications show the equation was not designed to predict the effect of abolition. Even if one used a mathematical form which could generate a meaningful prediction of the homicide rate after abolition, such a prediction would be unreliable if based on the data used to construct Ehrlich's equation, because the possibility of error increases as the number of executions on which the prediction is based departs from the average (75) over the period which Ehrlich studied.[24]

II. Choice of Unit of Observation: Nation or State

Presumably because adequate data on arrests, convictions and executions—from which the risk of execution after conviction is computed—are not readily available on a state-by-state basis, Ehrlich compared executions and homicides for the nation as a whole. This aggregate approach cannot measure the extent to which changes in the execution

23. Ehrlich posits a "murder supply function" in which the homicide rate is equal to the product of execution risk and six other variables which in theory influence the homicide rate. Ehrlich 1975, *supra* note 2, at 406 (equation (6)); pp. 129-80 *infra*. Each of those seven explanatory variables is raised to an exponent—the elasticity of the homicide rate with respect to that variable. If the elasticity for execution risk is negative, then as execution risk approaches zero, the product of the variables approaches infinity (because multiplication by a quantity raised to a negative exponent is equivalent to division by the same quantity raised to a positive exponent—in this case, by a quantity approaching zero). If the elasticity for execution risk is positive, then as execution risk approaches zero, the product of the variables approaches zero. To perform the regression analysis for the years 1968-1970, in which there were no executions, Ehrlich had to assume that one execution in fact occurred each year. Ehrlich 1975, *supra* note 2, at 409 n.b.

24. See R. Wonnacott & T. Wonnacott, Econometrics 27-31 (1970). The prediction is based on execution risk, not number of executions. But as the latter declines so will [illegible] convictions do not decline in a greater proportion than executions.

rate are associated with changes in the murder rate for *individual* jurisdictions.

To illustrate this problem, consider the simplified example of a nation composed of three states, two retentionist (*R1* and *R2*) and one abolitionist (*A*). Assume that execution risk decreases in *R1* and remains constant in the other states, and that the murder rate increases in one state, not necessarily *R1*, and remains constant in the other two. No matter which of the three states experiences the increase in murders, the nation as a whole would show an aggregate increase in murder rate and decrease in execution risk; analyzing these aggregate figures would suggest a deterrent effect. This inference would be justified only if the increase in the murder rate occurred in *R1*, where execution risk has decreased. If instead the murder rate increased in state *A* or *R2*, the aggregate correlation would be misleading, because the increase in the murder rate in one jurisdiction could not be attributed to lower execution risk in another. The actual behavior of the murder rate and execution risk in different jurisdictions is, of course, far more complicated than in this example. But the point remains that Ehrlich's use of national data obscures the relationships between murder and execution rates and may yield results which seem consistent with a deterrent effect where no such effect actually exists. Sellin's comparison of murder rates in abolitionist and retentionist states, on the other hand, shows us whether or not homicide rates differ substantially in similar jurisdictions which do and do not use capital punishment. Because it examines differences in homicide rates among retentionist and abolitionist jurisdictions, Sellin's work does not contain the aggregation errors which may vitiate Ehrlich's results.

The aggregation approach used by Ehrlich has the further drawback of concealing regional differences. It is well-known that homicide rates are higher in the South than elsewhere in the United States,[26] and it is entirely possible that the deterrent effects, if any, of capital punishment would vary from one part of the country to another. These differences may be of considerable relevance to a decisionmaker considering the abolition of capital punishment in the United States. Sellin's method, which compares data for groups of contiguous states, would reveal regional differences if they existed; Ehrlich's approach, which aggregates the data for the entire United States, cannot. The fact that Sellin observed no deterrent effect in any region does not minimize the importance of taking a regional approach.[28] It merely adds plausibility to his conclusion that the threat of capital punishment has no measurable deterrent effect.

III. Holding Other Factors Constant

The Solicitor General asserted that "perhaps most importantly, [Sellin] failed to hold constant factors other than the death penalty that might influence the rate of murders." The Solicitor General also stated that Ehrlich's study alone was immune from this flaw.[27] We disagree. Sellin's matching method is simply a different technique for taking account of the influence of other variables than the multiple regression analysis used by Ehrlich. With either method there is the risk that variables not taken into account, or imperfectly taken into account, may influence the observed results. The issue is whether Sellin's or Ehrlich's method is more successful in reducing that risk.

Sellin was acutely aware of the problem of controlling for the influence of other variables on the murder rate. He recognized that the problem had been neglected by earlier work on the deterrent effect of capital punishment,[28] and used a matching method as "a deliberate attempt to eliminate differences other than those in punishment policy that might influence the crime rate."[29] A matching method controls for the effect of other variables by comparing areas which are as similar as possible with respect to those variables, but are different with respect to the variable whose effect is being isolated. Sellin assumed that the important factors influencing the murder rate were roughly similar in neighboring states. As Table III shows, this assumption is supported by a state-by-state comparison for a small sample of the law enforcement and socioeconomic factors which Ehrlich has hypothesized as determinants of the murder rate.[30]

26. The matching technique could not be applied in the Deep South, where there are no abolitionist states. However, Sellin did compare homicide rates in Missouri, which has authorized and applied the penalty, and Kansas, which did not enact it until 1935. THE DEATH PENALTY, *supra* note 1, at 32-33.

27. Amicus Brief, *supra* note 5, at 37-38.

28. *See* Sellin, *Capital Punishment*, *supra* note 1, at 6.

29. J. ZEISEL, H. CALVERT & G. HAWKINS, *supra* note 1, at 264. For this reason, Zeisel, Calvert and Hawkins conclude that Sellin's work is "more reliable than nonmatched interstate comparisons." *Id.*

30. Table III presents comparative socioeconomic data for 1960 and law enforcement data for 1960 for the five groups of states matched by Sellin. (The law enforcement data reflect only a small, nonrandom sample of all the jurisdictions in each state, and are therefore unreliable.) The Table shows that the differences in these factors among the states in each group are generally small, and more importantly, that they do not explain the differences in the observed homicide rates. Consider, for example, the match between [illegible] rate of [illegible] and retentionist states

There are, of course, difficulties in attempting to control for other factors through a matching technique. In selecting areas for matching, it always is possible that an important difference among states will be overlooked. But such a difference would not vitiate the results of the matching study unless the difference were consistently and systematically related to the choice of a punishment policy.[31] The Solicitor General suggested that a difference in arrest and conviction rates might be systematically related to a difference in punishment policy, because jurisdictions which abolish capital punishment could use an increased likelihood of arrest and conviction as an alternative deterrent.[32] A finding that the homicide rate in a retentionist state was similar to the rate in an abolitionist state with higher arrest and conviction rates would then be consistent with the hypothesis of a deterrent effect for capital punishment. However, neither the Solicitor General nor Ehrlich offered evidence to support this relationship.[33]

Ehrlich's multiple regression analysis controls for the influence of variables other than execution risk by incorporating a set of additional explanatory variables into a mathematical formula for the homicide rate. Ehrlich posits a "murder function" in which the national homicide rate is determined by execution risk and six other factors. Of the six, two are law enforcement variables: the arrest rate (the fraction of all murders which are cleared by the arrest of a suspect) and the conviction rate (the fraction of suspects arrested for murder who are subsequently convicted of murder). The other four are socioeconomic variables: the labor force participation rate, the unemployment rate,

Massachusetts and Connecticut with homicide rates of 1.1 and 1.6 respectively. All but two of the variables civilian population and percentage of nonwhites suggest that Rhode Island's homicide rate should be *higher* than the neighboring states, while in fact it is lower than the rates in both Massachusetts and Connecticut.

The sources of data in Table III are as follows: *Column 1*-legal status of death penalty, E. Zimring & G. Hawkins, *supra* note 1, at 265; *Column 2*-homicide rate 1960, FBI, Uniform Crime Reports for the United States 31-37 (1961) (Table 2). *Columns 3, 4, 11*-FBI (unpublished data on file with *Yale Law Journal*); *Columns 5, 7, 8*-calculated from Bureau of the Census, U.S. Dep't of Commerce, General Social and Economic Characteristics: 1960 Table 5-3 (1961); *Column 7*-calculated from *id.* Table 99; *Column 8*-calculated from formula in M. Thomsen, A Theory of the Consumption Function 1 (1952), using data from F. Kami, The Value of Time and the Demand for Money, 1921, Table 33 (unpublished doctoral dissertation, Univ. of Chicago). U.S. Public Health Serv., Dep't of Health, Education, and Welfare, Vital Statistics Rates in the United States 1900-1960 Table 71 (R. Grove & A. Hetzel eds. 1968); U.S. Dep't of Commerce, Survey of Current Business 10 (Aug. 1966) (Table 1), and U.S. Dep't of Commerce, Survey of Current Business 3 (Aug. 1974) (Table 2); *Columns 9 & 10*-calculated from General Social and Economic Characteristics, 1960, *supra*, Table 5-3; *Column 11*-Bureau of the Census, U.S. Dep't of Commerce, Data by States 1960, at 27 (1961) (Table 15); *Column 12*-*id.* at 29-30 (Table 16).

31. E. Zimring & G. Hawkins, *supra* note 1, at 266.

32. Amicus Brief, *supra* note 5, at 37-38.

33. *Id.* *But see* Ehrlich 1975, *supra* note 1, at 411.

TABLE III

Comparative Law Enforcement and Socioeconomic Data for Four Groups of States Matched by Sellin (1960 Data Except as Indicated)

State	(1) Status of Death Penalty*	(2) Homicide Rate	(3) Probability of Arrest	(4) Probability of Conviction Per Arrest	(5) Labor Force Participation (%)	(6) Unemployment Rate (%)	(7) Population Aged 15-24 (%)	(8) Real Per Capita Income ($)	(9) Nonwhite Population (%)	(10) Civilian Population (000's)	(11) Per Capita Govt. Expenditures ($)	(12) Per Capita Police Expenditures ($)
Washington		4.8	.75	.85	54.9	6.9	12.7	1292	10.4	7811	365	11.5
Indiana	D	4.3	.83	.55	55.3	4.2	13.4	1176	6.2	4653	289	7.6
Ohio	D	3.2	.85	.33	54.9	5.5	12.9	1278	8.9	9690	338	9.0
Minnesota		1.2	.88	.44	55.3	5.0	13.1	1101	1.3	3409	353	7.5
Wisconsin		1.5	.95	.55	53.8	3.9	12.8	1173	2.4	3947	320	10.6
Iowa	D	.6	.40	.50	54.3	3.2	13.0	1078	1.1	2755	332	6.7
North Dakota		.5	1.00	1.00	53.7	3.6	14.2	899	2.1	626	394	5.5
South Dakota	D	2.1	...	1.00	54.2	4.1	13.4	877	4.2	675	329	5.1
Nebraska	D	2.3	1.00	.40	55.2	3.1	13.0	1080	3.7	1398	372	6.3
Maine		1.7	1.00	.67	53.0	6.5	13.8	999	.6	952	323	6.6
New Hampshire	D	1.8	1.00	...	57.4	4.3	13.0	1094	.5	600	334	6.9
Vermont	D	.3	1.00	0	54.4	4.5	13.9	966	.2	389	374	5.6
Rhode Island		1.0	0	.50	55.6	5.3	13.7	1194	2.3	853	296	10.5
Massachusetts	D	1.4	.80	.29	56.5	4.2	12.7	1304	2.5	5108	335	12.9
Connecticut	D	1.6	.84	.54	58.3	4.6	12.1	1342	4.6	2523	347	11.8

* D = Retentionist State

- 1966 Data (unreliable because based on very small nonrandom sample)

‡ State and Local Governments

the fraction of the population in the age group 14 to 24, and estimated per capita income.[34] The regression analysis applied to these variables yields an algebraic equation which gives a numerical estimate of the effect of each explanatory variable on the homicide rate. In this sense, Ehrlich's study accounts more precisely for the influence of this set of factors than does Sellin's study.

This precision, however, is misleading. In order for the statistical results to be reliable, the equation must include all variables which significantly affect the homicide rate. The omission of any significant variable not only renders the model incapable of fully explaining the behavior of the homicide rate, but distorts the effects of those variables which have been included.[35] The regression method is therefore best suited to testing a hypothesis based on a well-developed theory which isolates a few determinants of the variable under study.

Hypotheses about the causes of murder cannot rely on such a theory. Ehrlich's analysis relies on an economic postulate—"that the propensity to perpetrate such crimes [as murder] is influenced by the prospective gains and losses associated with their commission."[36] There is no reason to think that economics or any other discipline has yet identified the determinants of the murder rate with enough confidence to rely on results obtained from regression analysis. Indeed, there are strong a priori reasons for thinking that the murder rate would be influenced by a number of variables not considered by Ehrlich, such as rates of migration from rural to urban areas, per capita ownership of weapons, and the level of violent crimes against property. As Zimring and Hawkins point out in their discussion of deterrence:

> Very few, if any, studies done on the impact of criminal law variations on crime give us reason to believe that most of the many factors which should be included in such a statistical analysis are present and accounted for.
>
> . . . .

34. Ehrlich 1975, *supra* note 2, at 398-402 (theoretical discussion of factors influencing murder), 406-09 (empirical discussion of data chosen to measure those factors). In substituting the measured for the true homicide rate, Ehrlich inserts a time trend as an explanatory variable. *Id.* at 406-07.

35. The extent to which the regression analysis explains the behavior of the homicide rate is measured by the coefficient of determination, which is not less than zero and not greater than one. A regression which omits a relevant variable will have a lower coefficient of determination than a regression which correctly specifies the relationship. The omission of important variables from the regression model will also bias the results obtained for the variables which are included. *See* J. JOHNSTON, ECONOMETRIC METHODS 169 (2d ed. 1972) ("*Exclusion* of relevant variables from the regression may be a very serious error . . .") (emphasis in original), 211 (omitted variables may cause the statistical problem of serial correlation in the disturbance term).

36. Ehrlich 1975, *supra* note 2, at 398-99. His other "basic proposition" is that these crimes [illegible] rational conflicts involving pecuniary

> . . . Only when the statistical complexity of such methods lulls the researcher into a false sense that all relevant variables have been accounted for, or that natural variations are in fact present, does multiple-correlation analysis become more dangerous than helpful.[37]

Our a priori skepticism about the adequacy of the variables included in Ehrlich's model is supported by the results of reanalyses of his data, which we discuss below.[38] These reanalyses found that the sign of the elasticity for execution risk changes from positive to negative when the recent years are dropped from Ehrlich's data series. The apparent change in the effect of execution risk on the homicide rate indicates that the variables included by Ehrlich do not explain the behavior of the homicide rate in a consistent manner over subperiods in his sample and suggests that variables not included by Ehrlich may be necessary for a better explanation.

Regression analysis requires the assumption not only that the homicide rate is a function of a fixed set of variables, but also that the function has a particular mathematical form. Ehrlich postulated that the homicide rate was equal to the product of seven explanatory variables and a random error term. The equation which Ehrlich actually estimates is a particular characterization of this relationship in which the logarithm of the homicide rate is set equal to the weighted sum of the logarithms of the explanatory variables. The weights provide estimates of the effect of each explanatory variable on the homicide rate. Since other investigators who have performed Ehrlich's regression analysis using natural numbers rather than logarithms have found no evidence of a deterrent effect, Ehrlich's results seem to depend on his assumptions about the mathematical form of the relationship.[39]

Even assuming that Ehrlich's regression equation successfully isolated the true determinants of the murder function and correctly specified its mathematical form, a serious problem remains with Ehrlich's use of the equation to estimate the tradeoff between executions and murders. Ehrlich measures this tradeoff by the partial elasticity of the homicide rate with respect to the execution rate—the percent decrease in homicide rate produced by a one percent increase in execution risk, assuming that the other variables affecting the murder rate are held constant as execution risk varies. The estimated elasticity of −.065 im-

37. F. ZIMRING & G. HAWKINS, *supra* note 1, at 267-68. Multiple correlation analysis is closely related to, but less sophisticated than, the multiple regression technique used by Ehrlich. *See* R. WONNACOTT & T. WONNACOTT, *supra* note 21, at 107-30; note 11 *supra*.

38. Pp. 181-85 *infra*.

39. *See id.*

plies that at the average levels of executions and murders during the period studied, an additional execution would result in seven or eight fewer murders.[40] Yet, as Ehrlich recognizes, the conviction rate is likely to decline as execution risk increases, because juries seem less inclined to convict a defendant charged with murder the greater the chance the defendant will subsequently be executed.[41] Since in Ehrlich's model the conviction rate also has a deterrent effect, the effect of the decline in the conviction rate will tend to offset the effect of the increase in execution risk. Indeed, if a one percent increase in execution risk produces more than a .175 percent decrease in the conviction rate, then the effect on the homicide rate of the decrease in the conviction rate will outweigh the effect of the increase in execution risk. As a result, the increase in execution risk will cause a net increase, rather than a decrease, in the homicide rate.[42] In reporting his estimated tradeoffs between executions and murders, Ehrlich conceded that "[t]he actual tradeoffs . . . depend partly upon the ability of law enforcement agencies to control simultaneously all [law enforcement variables]"—in other words, to hold arrest and conviction rates constant as execution risk increases.[43] Moreover, in performing another regression which eliminated this problem of interaction between execution risk and the conviction rate, he found smaller, although in most cases still significant, deterrent effects.[44]

Given the difficulty of isolating the determinants of the homicide rate, specifying their mathematical form, and adjusting for the interaction between execution risk and the other law enforcement variables, it is not at all clear that Ehrlich's analysis is more reliable than Sellin's. It is certainly not true that Ehrlich's study of the deterrent effect of the death penalty is uniquely successful in holding other factors constant. The problems are not that simple, nor Ehrlich's approach that satisfactory.

IV. Replication and Corroboration by Other Studies

As we have shown, both matching and regression techniques are necessarily imperfect methods for testing the deterrent effect of capital punishment. Given these inherent imperfections in research technique, the credibility attaching to each study depends on the extent to which consistent results are obtained when a similar approach is applied to different data. A crucial test of the reliability of the results is whether they can be reproduced or corroborated by other studies.

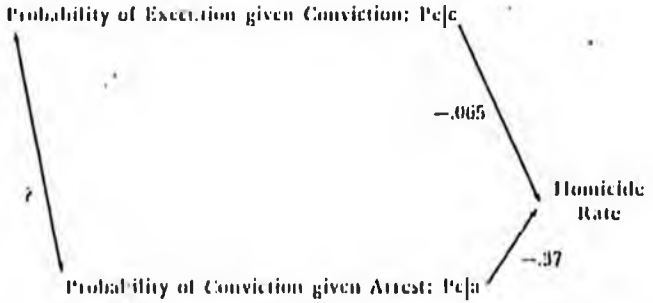
Sellin consistently found no discernible effect of capital punishment on homicide rates in matching a large number of clusters of states. At least four other investigators have used the matching method on different data and reached similar conclusions.[45] Moreover, Sellin's re-

40. Ehrlich 1975, *supra* note 2, at 414 & n.15.

41. *Id.* at 405. In estimating his equations, Ehrlich used a two-stage procedure designed to take account of the interdependence of the law enforcement variables. Ehrlich 1973, *supra* note 2, at 50-60 (statistical appendix). We note that Ehrlich's second stage regression does not hold fixed the four socioeconomic variables which he uses in the first stage but which he does not explicitly include in his murder supply function. Ehrlich 1975, *supra* note 2, at 409 (variables denoted X_1 in Table 2—fraction of nonwhites in residential population, civilian population, per capita real expenditures of all governments, per capita real expenditures on police). Our fundamental criticism, however, is that in using those estimates to calculate the tradeoff between murders and executions, he neglected the interdependence.

42. We owe this point to P. Passell & J. Taylor, The Deterrent Effect of Capital Punishment: Another View, Feb. 1975, at 9-11 (Discussion Paper 74-7509, Columbia Univ. Dep't of Economics) (on file with *Yale Law Journal*). Figure 1 depicts the net effect of the increase in execution risk Pe|c.

Figure 1



The arrows represent causal influences, and the numbers accompanying the arrows represent the elasticities reported by Ehrlich in Equation 3 of his Table 4. Ehrlich 1975, *supra* note 2, at 410. The question mark represents the elasticity of the probability of conviction given arrest, Pc|a, with respect to the probability of execution given conviction, Pe|c. Given the reluctance of juries to convict where execution may follow, this elasticity is expected to be negative, i.e., as Pe|c increases, Pc|a decreases. According to these elasticities, a decline of one percent in the probability of conviction would be associated with a .065 percent increase in the homicide rate. But that same one percent decline in the probability of execution given conviction would lead to some unknown (X percent) increase in the probability of conviction given arrest. And this increase would lead in turn to a decrease of .37 × X percent in the homicide rate, compensating more or less for the increase in the homicide rate resulting directly from the decline in the probability of execution given conviction. In particular, if the elasticity of Pc|a with respect to Pe|c is .175 percent, the result from this causal chain will be a .065 percent (.175 × .37) decrease in the homicide rate. This decrease will exactly offset the .065 percent increase in the homicide rate resulting from the decline in the probability of execution given conviction.

43. Ehrlich 1975, *supra* note 2, at 415.

44. *Id.* at 415 n.16. *But see* P. Passell & J. Taylor, *supra* note 42, at 10-11 (arguing these results are unreliable).

45. W. Bowers, *supra* note 1, at 137-47 (homicide rates in abolitionist states and contiguous retentionist states for four years prior and subsequent to the 1967 judicial moratorium on capital punishment); Bailey, *Murder and the Death Penalty*, 65 J. Crim.

sults are independently corroborated by his comparisons of crime rates in particular jurisdictions before and after capital punishment was either adopted or repealed.[46] These longitudinal studies have imperfections of their own, but as Zimring and Hawkins point out, "the combination of two or more imperfect research approaches may reveal a relatively clear picture about the relation of the variables being studied to rates of crime."[47]

Ehrlich also recognized the need for the broadest possible empirical base for his conclusions. He analyzed his data with six different measures for the key explanatory variable—execution risk—and obtained similar results.[48] He indicated concern that his analysis not be unduly sensitive to changes in the time period to which it was applied, to minor modifications in the selection or computation of variables included in the analysis, or to the use of natural values rather than logarithms as a functional form.[49] Reapplying the statistical analysis to data spanning shorter time periods, he reported results generally consistent, if not in perfect agreement, with his basic conclusions.[50]

However, the efforts of Passell and Taylor to reproduce Ehrlich's results using identical estimation procedures have yielded significant discrepancies, apparently due to minor differences in the data on which the replication was based.[51] These discrepancies necessarily call into

1. & Const'y 116, 121 (1974) (eight groups of states); Schuessler, *The Deterrent Influence of the Death Penalty*, 284 Annals 54, 58 (1952) (five groups); Sutherland, *Murder and the Death Penalty*, 15 J. Crim. L. & Crim'y 522, 526 (1925) (one group of states and one group of cities).

46. The Death Penalty, *supra* note 1, at 34-38 (American states), 38-50 (foreign countries). From the behavior of homicide rates before and after the change in punishment policy, Sellin concluded that the death penalty "exercises no influence on the extent or fluctuating rates of capital crimes." *Id.* at 63. Other longitudinal studies confirm Sellin's results. W. Bowers, *supra* note 1, at 117-57 (comparing homicide rates in states changing from mandatory to discretionary capital punishment); Task, *The Canadian Experiment with Abolition of the Death Penalty*, in W. Bowers, *supra* at 121; Samuelson, *Why was Capital Punishment Restored in Delaware?*, 60 J. Crim. L.C. & P.S. 148, 149 (1969); Schuessler, *supra* note 45, at 58-59.

47. F. Zimring & G. Hawkins, *supra* note 1, at 270.

48. Ehrlich 1975, *supra* note 2, at 407-08 (definition of the six measures of execution risk), 410-11 (regression results for each measure).

49. *Id.* at 412-13.

50. *Id.* at 410 (Table 4), 413 ("[T]he qualitative results . . . are for the most part insensitive to changes in the specific interval . . . time . . . . However, the absolute magnitudes of some of the estimated elasticities . . . do change when estimated from different subperiods.")

51. P. Passell & J. Taylor, *supra* note 12, at 2-4. Ehrlich has provided complete documentation of the data sources for his study in a memorandum released in August, 1975, and dated May, 1975, The Deterrent Effect of Capital Punishment: A Question of Life and Death, American Economic Review (June, 1975); Sources of Data for file with *Yale Law Journal*). This documentation was not available at the time of the replications by Passell and Taylor. Consequently these authors were forced to reconstruct parts of the data base using whatever expenditures seemed most appropriate.

question the reliability of Ehrlich's conclusions. More importantly, further analysis of Ehrlich's data by Passell and Taylor, and later by Bowers and Pierce, indicates that the evidence of a deterrent effect reported by Ehrlich disappears when the model is estimated with natural numbers rather than logarithms or when it is estimated for shorter time periods which exclude the recent years from 1963 to 1969.[52] Furthermore, Ehrlich's model does not explain the homicide rate as well over the long run (1935-1969) as it does in shorter periods, for which it reveals no significant relationship between execution risk and the homicide rate. If a model correctly explains a set of relationships, it will not decrease in explanatory power as more data (years, in the present context) are brought into the analysis. Ehrlich's model has just the opposite property—showing less predictive power over the long run than over the short run. A final piece of evidence on the issue of corroboration is a recent regression study, based on Ehrlich's theoretical model but using 1950 and 1960 data for more than 40 states, which found no deterrent effects associated with execution risk.[53]

Conclusion

It is quite possible that because of the complexity of the social phenomenon involved, we will never know with certainty whether capital punishment does or does not deter murder. Statistical analyses can only test with the available data the hypothesis that a significant deterrent effect exists. On the basis of the work of Sellin and others who have taken his approach, we are inclined to attach more credibility to their view that capital punishment does not have a significant deterrent effect. The credibility we assign to this hypothesis is based upon our confidence in Sellin's choice of a variable to measure the threat of capital punishment, in his use of the state rather than the nation as his unit of observation, his technique for controlling for the influence of other variables which affect the homicide rate, and in the consistent results which he and others have produced applying these methods to different time periods and different jurisdictions.

estimated permanent income and labor force participation as well as particular values from the police expenditure and conviction rate series which Ehrlich had estimated by an unspecified process of interpolation. P. Passell & J. Taylor, *supra* at 3.

52. P. Passell & J. Taylor, *supra* note 12, at 1-8; Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975). Ehrlich reported that his "regression results [were] found to be robust with respect to the functional form of the regression equation," but offered no results in support of this statement. Ehrlich 1975, *supra* note 2, at 412.

53. Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 Stan.

Given this substantial body of competent research, we are unwilling to abandon the view that it supports on the basis of Ehrlich's single study. Ehrlich's study relies on a measure of the death penalty threat which does not reflect the relationship between executions and murders in specific jurisdictions and which does not focus on the relevant policy question of the effect of abolition. Moreover, Ehrlich's estimated tradeoff rests on the highly doubtful assumptions (1) that the probability of conviction could be kept constant while the probability of execution varies, and (2) that the equation used to control for the effects of variables other than execution risk combines all the significant determinants of the homicide rate in the proper mathematical form.

The use of the Sellin and Ehrlich studies in the context of a constitutional challenge to capital punishment illustrates the need for judicial procedures to evaluate statistical analysis presented by litigants in support of their positions. There is a certain danger in relying on academic work, designed to promote inquiry and further research, as a basis for deciding disputes in a court of law—especially where the stakes involved are high and the implications for society are great. The courts presently do not provide systematic factfinding procedures to resolve issues of "legislative" fact[51] that are critical to the policy judgments courts must make. Until the courts develop procedures to bring complex statistical studies under the scrutiny of the adversary process, it will be necessary to carry on the technical debate over such legislative facts largely in the law reviews.

51. K. Davis, Administrative Law Text § 7.05, at 161 (3d ed. 1972).

The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*

William J. Bowers† and Glenn L. Pierce††

In this critique of Professor Ehrlich's recent research on capital punishment,[1] we conclude that he has failed to provide any reliable evidence that the death penalty deters murder. His data are inadequate for the purposes of his analysis and he misapplies the highly sophisticated statistical techniques he employs. We begin with an evaluation of the data he uses to measure the critical variables in his theoretical formulation and then consider flaws in his analysis which would invalidate his conclusions even if his data were adequate. We conclude by explaining how Ehrlich's analysis produces results which seem consistent with the deterrence hypothesis when in fact they are not.[2]

I. Inadequacies in Ehrlich's Data

The credibility of Ehrlich's conclusions depends on the quality of the data he has used. For measures of the variables at the core of his theoretical analysis, he relies on the Uniform Crime Reporting System (UCRS) of the FBI.[3] The behavior he seeks to explain (the dependent

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1. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 Am. Econ. Rev. 397 (1975) [hereinafter cited as Ehrlich 1975]; I. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 1973 (Working Paper No. 18, Center for Economic Analysis of Human Behavior and Social Institutions) [hereinafter cited as Ehrlich 1973].

2. The findings presented here are drawn from a more extensive and detailed critique of Ehrlich's work by the present authors. Deterrence, Brutalization, or Nonsense, 1975 (unpublished manuscript, Center for Applied Social Research, Northeastern Univ.). This manuscript includes as appendixes the full regression results for equations used to estimate coefficients in the present paper [of appendix ... and Val. Law Journal] and a complete listing of the data values ... analysis [of ap-

variable) is the annual criminal homicide rate for the United States as reported by the UCRS, and his deterrence variables are the rates of arrest, conviction, and execution for homicide, which also come entirely or in part from the UCRS. Only if these data are sound throughout the full time period covered by Ehrlich's analysis do his findings deserve serious consideration.

A. *The Dependent Variable*

The FBI's national homicide statistics collected in the early years of the UCRS are unreliable. A staff report of the National Commission on the Causes and Prevention of Violence emphasizes this problem:

> [M]any reporting agencies, especially in the nonurban areas, were slow in joining the *UCR* network; there were only 400 agencies reporting to the *UCR* in the 1930's, while today there are about 8,500. Thus, trends of both violent and nonviolent crimes during the early years of the *UCR* are highly questionable as representative of national figures.[4]

Furthermore, the President's Commission on Law Enforcement and the Administration of Justice warns that "figures prior to 1958, and particularly those prior to 1940, must be viewed as neither fully comparable with nor nearly so reliable as later figures."[5]

Ehrlich indicates that he used "readjusted" estimates of the homicide rate supplied by the FBI.[6] The FBI has periodically adjusted their estimates of offenses for earlier years on the basis of recent data on offenses from jurisdictions that entered the reporting program after 1958. Yet to our knowledge there are no published indications of how the readjustments are performed. In any case, the adjustment of figures for as long ago as 40 years on the basis of the current homicide levels of agencies recently added to the sample is of dubious value.

Less problematic are the willful homicide figures compiled by the Bureau of the Census. Unlike the voluntary reporting system of the FBI, Census reports of willful homicide are mandated by law in each state. The annual collection of mortality statistics including willful homicide began in 1900, 30 years before the beginning of the FBI reporting system. By 1933, all states had met the 90 percent coverage requirement for admission to the national Vital Statistics program.[7] Thus, the Census homicide statistics for the nation have been relatively complete since the early 1930's.[8] Furthermore, the classification of "willful homicide" has remained essentially constant over time.[9] For these reasons, perhaps, the Census homicide figures have gained a reputation for reliability, and have been used more widely than the FBI figures in previous studies of the deterrent effects of capital punishment.[10]

If both FBI and Census data provided accurate estimates of the homicide rate, the statistics would, of course, agree. Table II[11] shows that the figures drawn from the two agencies are reasonably well correlated except during the 1930's, when the FBI's reporting system was in its inception. Notably, the FBI homicide estimates are 15 percent below the Census figures for the 1930's, whereas the difference is only about three percent lower for the period after 1940. By all indications, these discrepancies are the result of inadequate sampling, reporting, and estimating in the early years of the UCRS.

4. [illegible] Staff of the Nat'l Comm'n on the Causes and Prevention of Violence, Crimes [illegible] (1969).

5. [illegible] President's Commission on Law Enforcement and Administration of Justice,

7. 1 U.S. Public Health Serv., Dep't of Health, Education, and Welfare, Vital Statistics of the United States 1950, at 29 (1954).

8. Tests of the completeness of birth registrations made in 1940 and 1950 indicated that these statistics were, respectively, 92.5 and 97.9 percent complete. Although precise indices of the completeness of death registrations are not available for this period, the compilers of the Vital Statistics believe that they are even more complete than birth registrations. *Id.*

9. The Department of Health, Education, and Welfare reports:

> Since 1900, the causes of death have been classified according to seven different revisions of the International Classification of Diseases. Each revision has produced some breaks in the comparability of cause-of-death statistics. However, homicide is among the causes for which the classifications are essentially comparable for all revisions.

National Center for Health Statistics, U.S. Dep't of Health, Education, and Welfare, Homicide in the United States 1950-1964, at 9 (1967).

10. *E.g.*, T. Sellin, The Death Penalty (ALI 1959); Schuessler, *The Deterrent Influence of the Death Penalty*, 284 Annals 54 (1952).

11. TABLE I

Correlations Between Homicide Rates Based on FBI and Census Data by Decade

Effective Period	*Annual Homicide Rates*	*Year to Year Changes in Homicide Rates*
1933-1939	.21	-.69
1940-1949	.81	.90
1950-1959	.95	.76
1960-1969	.98	.79

For data sources, see Appendix, nos. 1, 13.

A correlation of .21 between FBI and Census annual homicide rates for the 1930's means that there is little consistency (only six percent common variance) between the two data sets in this decade. A correlation of -.69 between year to year changes in FBI and Census homicide rates means that an increase between adjacent years in one set [illegible] combine years

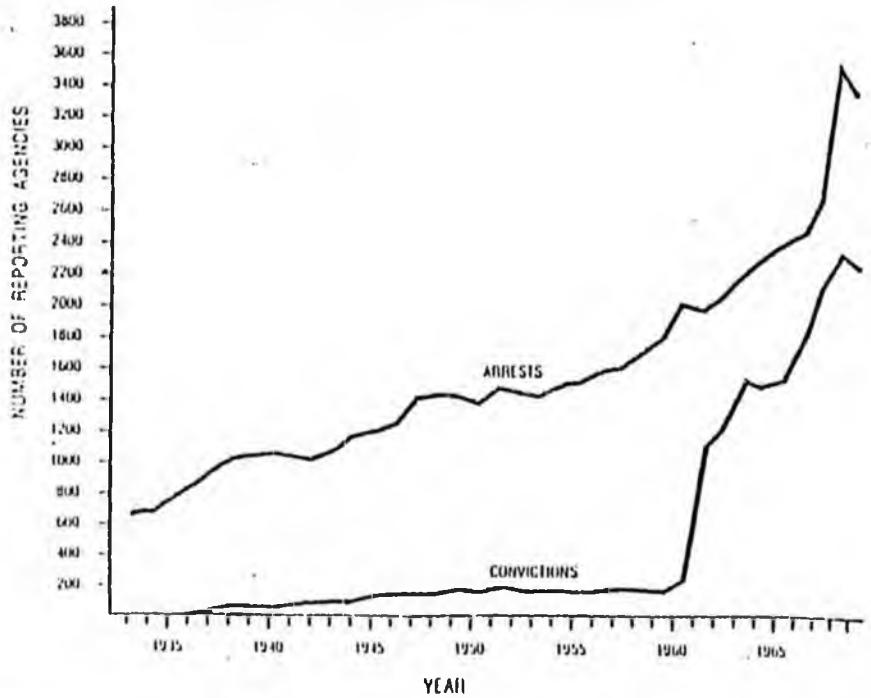
B. *The Deterrence Variables*

The FBI data on arrest and conviction rates are even less reliable. The agencies reporting arrest and conviction statistics have remained a relatively small, self-selected subsample throughout most of the period during which these statistics have been compiled. Indeed, the arrest and conviction figures are based on such small and unrepresentative samples of law enforcement agencies that the FBI has made no effort to readjust earlier arrest and conviction figures on the basis of more recent returns.

As shown in Figure 1,[12] the number of agencies reporting arrest data did not reach 2,000, or about one-quarter of the total number of agencies, until the 1960's, and the number of agencies reporting convictions did not exceed 300 until the 1960's. The abrupt increase between 1960 and 1961 in agencies reporting convictions represents a major change in reporting practices for conviction statistics by the UCRS. Notably, in 1936, the first year in which conviction rates were

12. Figure 1

NUMBER OF AGENCIES REPORTING ARREST AND CONVICTION STATISTICS BY YEAR

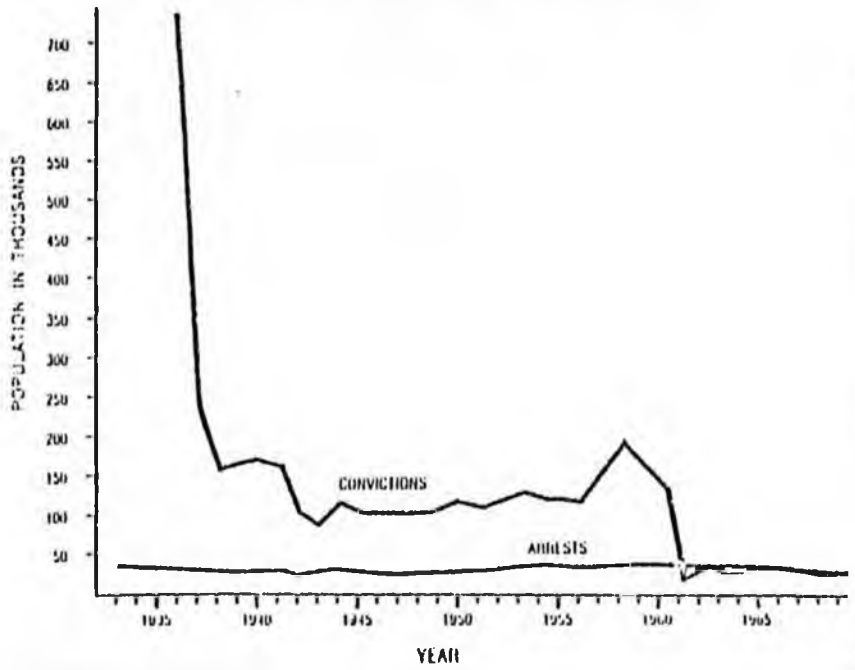


reported, the figure Ehrlich used as a national estimate was based on only 13 jurisdictions.

Figure 2[13] shows that the average size of jurisdictions reporting conviction data declined substantially in the late 1930's and the early 1960's. According to recent evidence, conviction rates are relatively low in the nation's largest jurisdictions.[14] Hence the conviction data drawn from disproportionately large jurisdictions in 1936 and 1937 are apt to underestimate the national conviction levels for these years. In fact, the reported conviction levels for these two years are far below those for other years—respectively −5.91 and −4.51 standard deviations below the mean conviction level for the period 1938-1969. Because the 1936 and 1937 conviction levels figure prominently in Ehrlich's estimation of missing conviction values for the years 1933-1935, the conviction rates for the entire period 1933-1937 are apt to be grossly biased in his analysis.[15]

13. Figure 2

POPULATION COVERAGE PER AGENCY REPORTING ARREST AND CONVICTION STATISTICS BY YEAR



For data sources, see Appendix, nos. 2, 3.

11. In 1971, only 31.9 percent of those charged with homicide in jurisdictions with populations of 250,000 or more were convicted, as compared to approximately 50 percent in smaller jurisdictions. Unpublished FBI data on file with *Yale Law Journal*.

12. A May 1975 memorandum prepared by Ehrlich (The Deterrent Effect of Capital

Finally, the measurement of execution risk—the key explanatory (or independent) variable in Ehrlich's work—is confounded by the inadequacies in the homicide, arrest, and conviction data, because execution risk, as defined by Ehrlich, incorporates all three of these variables.[16] Thus, like his dependent variable, all three of his deterrence variables are subject to potentially serious measurement error. While we do not contend that all of Ehrlich's data are inaccurate, we have identified substantial problems with his core variables which cast doubt on his ability to perform a meaningful regression analysis.

II. Errors in Ehrlich's Regression Analysis

We have independently applied Ehrlich's regression technique to comparable data. On the basis of this replication, we find that his evidence of deterrence emerges only under restrictive assumptions about

Sources of Data (on file with *Yale Law Journal*) supplies the auxiliary equations he used to estimate the missing conviction values for 1933 through 1935. To show the importance of the effect of the values for 1936 and 1937 on the conviction estimates Ehrlich obtains for the missing years, we have estimated conviction rates for the years 1933-1937 on the basis of the data for the 1938-1969 period with the auxiliary equation used by Ehrlich to estimate the years 1933-1935 for the data from the 1936-1969 period. It is instructive to compare our estimated conviction rates with the corresponding values used by Ehrlich:

	Ehrlich's Conviction Rates		*Alternative Estimates*	
	Annual Conviction Estimates	*Standard Deviations from the 1938-1969 Mean*	*Annual Conviction Estimates*	*Standard Deviations from the 1938-1969 Mean*
1937	30.3	−4.51	43.7	−.40
1936	25.8	−5.91	44.1	−.29
1935	28.3	−5.18	44.1	−.26
1934	26.9	−5.59	42.8	−.69
1933	30.2	−4.58	43.3	−.53

We have already noted that the reported conviction rates for 1936 and 1937 are far below the mean for the 1938-1969 period. The above comparison also makes clear that these reported rates are far below the values that would be estimated for these two years by applying Ehrlich's auxiliary equation to the data for the 1938-1969 period. Furthermore, Ehrlich's estimated conviction rates for 1933-1935 are also four to five standard deviations below the mean for 1938-1969; as the alternative estimates show, they would be far higher if they were estimated on the basis of the 1938-1969 time period rather than the 1936-1969 time period.

16. Ehrlich 1975, *supra* note 1, at 401. All of his measures of execution risk are in various ways and degrees biased negatively with respect to the criminal homicide rate. Thus, random error in the number of homicides reported will tend to produce a negative correlation between the homicide rate and execution risk as measured by PXQ_t and PXQ_{t-1} because the number of reported homicides in a given year, Q_t, is both the numerator of the homicide rate and a component in the denominator of these two execution measures. See Appendix, nos. 1, 4. The remaining four measures of execution risk will tend to be negatively correlated with the homicide rate as a result of autocorrelated error in the reported number of homicides, because these measures all incorporate prior (lagged) homicide level, in one way or another.

the form of relationships among the variables and only under a narrow selection of the time period for analysis. The limitations required to obtain these results are not justified, since Ehrlich's regression model fits the data better without them. Thus, even if Ehrlich's data were free of errors, the analysis, when properly conducted, would not show that the death penalty has a deterrent effect.

A. *Replication of Data and Regression Results*

To ensure comparability in the replication of Ehrlich's regression analysis, we attempted to use exactly the same data as Ehrlich. Table II[17] describes Ehrlich's and our variables and gives the means and

17. Table II

Variables Used in the Regression Analysis: Annual Observations 1933-1969
(Means and Standard Deviations in Natural Logarithms)

	Variable	*Our Mean*	*Ehrlich's Mean*	*Our Standard Deviation*	*Ehrlich's Standard Deviation*
D_t	$\left(\frac{Q}{N}\right)^a$ = Crime rate: offenses known per 1,000 civilian population.	−2.853	−2.857	.150	.156
Y_t	P^a_a = Probability of arrest: clearance rates.	4.497	4.997	.038	.038
	$P^a_{c\|a}$ = Conditional probability of conviction: fraction of those charged who were convicted of murder.	3.742	3.741	.172	.175
	$P^a_{e\|c}$ = Conditional probability of execution. PXQ_t = the number of executions for murder in year $t + 1$ as a percent of the total number of convictions in year t.	.172	.176	1.718	1.719
X_t	L_t = Labor force participation rate of the civilian population.	−.544	−.546	.029	.030
	U = Unemployment rate of the civilian labor force.	1.743	1.743	.728	.728
	A = Fraction of residential population in the age group 14-24.	−1.759	−1.740	.122	.118
	Y = Friedman's estimate of permanent income per capita.	6.889	6.868	.337	.338
	T = Chronological time (years).	2.685	2.685	.867	.867
N_t	NW = Percent of nonwhite residential population.	−2.216	−2.212	.061	.063
	N = Civilian population in 1,000's.	11.911	11.911	.161	.161
S_t	$XGOV$ = Per capita (real) expenditures on all governments in million dollars.	−7.753	−7.661	.256	.501
	$XPOL_{t-1}$ = Per capita (real) expenditures on police in dollars lagged one year.	2.200	2.111	.146	.306

For data sources, see Appendix and Ehrlich 1975, *supra* note 1, at 409. In his memorandum, *supra* note 15, Ehrlich indicated that the mean of P^a_a is incorrectly stated in his table, and

standard deviations of their logarithms. In most cases, our means and standard deviations correspond quite closely to Ehrlich's. For 11 of the 13 variables, they differ by no more than three percent, and generally by less than one percent. Differences of two or three percent may indicate that where alternates were available we chose a different data source than Ehrlich did. The two variables that show discrepancies of greater than three percent between the two data sets—the indexes of total per capita expenditures of governments ("XGOV") and of per capita expenditures on police ("XPOL$_{-1}$")—differ primarily in standard deviations.[18] In all cases where discrepancies exist, however, we have checked our data carefully, and we are satisfied that we have accurate measures of the variables.

With these data, we have reproduced Ehrlich's basic regression analysis. Table III[19] contains the estimated effects of six different measures of execution risk on the criminal homicide rate. The effects are represented by partial regression coefficients (or elasticities[20]), and their statistical significance is indicated by the ratio of these coefficients to their standard errors—the *t* values of the coefficients. (*t* values of more than 2.0 indicate statistically significant relationships between the dependent and independent variables.)[21]

The six measures of execution risk are alternative ways of representing the conditional probability of execution given conviction for murder. In five of the six measures, Ehrlich incorporates a delay between conviction and execution by dividing the number of executions in one year by the estimated number of convictions in the previous year.[22] In two cases,[23] he estimates execution risk at a given point in time in terms of the numbers of executions and convictions over a prior period of three or four years.[24]

18. Ehrlich's memorandum, *supra* note 15, describes the procedures that he used in obtaining his variables. For XGOV and XPOL$_{-1}$, the two variables with significant differences between the two data sets, we believe that our measures more faithfully reflect Ehrlich's definitions of the variables. Although Ehrlich described XGOV as per capita expenditures of local, state, and federal governments, his memorandum indicates that he actually used government purchases of goods and services and a price deflator for government purchases, instead of government expenditures and an appropriate price deflator. His memorandum also indicates that he failed to exclude defense purchases or expenditures. This is a serious oversight since defense expenditures and purchases represent resources not available for law enforcement activity. Our measure is based on government expenditures and excludes defense expenditures and purchases.

It was virtually impossible to replicate XPOL$_{-1}$ exactly because Ehrlich used an unspecified auxiliary regression equation to estimate unavailable police expenditure data for odd years prior to 1952. Furthermore, his memorandum indicates that he used a price deflator for government purchases rather than a price deflator for government expenditures, as we did.

We constructed two other variables differently than Ehrlich did. While "A" is described as the proportion of the residential population aged 14-24, Ehrlich's memorandum reveals that he used the number of 14- to 24-year olds in both the residential population and the armed forces overseas as a proportion of the total residential population. This is clearly inappropriate since youngsters in this age group overseas cannot contribute to the domestic homicide rate. The slightly greater standard deviation of our measure based exclusively on residential population figures undoubtedly reflects movements of this age group in and out of the country during the war years.

Secondly, "AW" is described as the proportion of nonwhites in the residential population, but Ehrlich's memorandum indicates that he took the number of nonwhites in the total population as a proportion of all those in the residential population. Moreover, he used annual estimates of the nonwhite population from the *Current Population Reports* for the 1960's (see Appendix, no. 1), instead of readjusted estimates based on the 1970 decennial censuses. Again, our measure, based exclusively on residential population figures and readjusted annual estimates, is a more accurate representation of the variable as originally defined.

For further evidence of comparability between the two data sets, note the values of corresponding correlation coefficients for the period 1934-1969:

	Ehrlich's Correlations	*Our Correlations*
PXQ_1 by P^{*}_{-4}	−.028	−.029
PXQ_1 by $P^{*}_{-1}/_{-4}$	−.19	−.181
PXQ_1 by $\left(\frac{O}{N}\right)^{*}_{-1}$	.110	.133
PXQ_2 by $\left(\frac{O}{N}\right)^{*}_{-1}$	.085	.077
PXQ_3 by $\left(\frac{O}{N}\right)^{*}_{-1}$	.026	.077

19. Table III

Estimated Effects of Execution Risk on the Criminal Homicide Rate

Six Alternative Measures of Execution Risk	*Effective Period*	*Partial Regression Coefficients*	*t Values*
PXQ_1	1935-1969	−.018	−.39
PXQ_2	1935-1969	−.068	−3.15
PXQ_{3-1}	1936-1969	−.023	−1.12
TXQ_1	1938-1969	−.059	−2.76
PDL_4	1939-1969	−.065	−3.45
PXQ_4	1935-1969	−.001	−.113

The definitions of these variables are contained in Ehrlich 1975, *supra* note 1, at 406-09.

20. When the execution and homicide variables are in logarithmic form, see pp. 199-200 *infra*, the partial regression coefficients indicate the elasticity of the homicide rate with respect to execution risk—that is, the percentage change in the homicide rate that can be expected from a one percent change in execution risk. Thus, an elasticity of −.068 (associated with PXQ_2) means that a one percent increase in this measure of execution risk can be expected to yield a decrease of .068 percent in the homicide rate.

21. A *t* value of 2.0 is generally taken as an indication of statistical significance because if the true value of the regression coefficient were actually zero, an estimated regression coefficient with a *t* value greater than 2.0 would only occur approximately five times out of 100. A *t* value greater than 2.0 is required for this level of statistical significance when the number of data observations exceeds the number of explanatory variables by five or less.

22. PXQ_4 does not incorporate such a delay.

23. TXQ_2 and PDL_4.

24. Two of Ehrlich's regression equations—PXQ_{3-1} and TXQ_1 in his Table 3, Ehrlich 1975, *supra* note 1, at 410—appear to be either misspecified or mislabeled in terms of the effective period of analysis. Given his data and analytic procedures, 1935 is the earliest possible beginning date for a regression analysis using any of the measures of execution

Table III shows a negative value for the regression coefficient associated with each of the six measures of execution risk. That is, the results of this initial regression analysis appear to indicate that, other things being equal, as the risk of execution among convicted offenders increases, the homicide rate decreases and, conversely, as execution risk declines, the homicide rate rises. For three of the six measures of execution risk, the estimated effect is at least twice its standard error, suggesting that the effect is not likely to have occurred by chance.

These results are similar to Ehrlich's.[25] He finds negative coefficients, ranging from −.039 to −.068, for the six execution measures. In four cases, his negative coefficients are statistically significant. In

tained prior to 1934 since values of many variables lagged one year are required by the reduced form equation. The modified first differences obtained in the second stage of the regression analysis by the Cochrane-Orcutt procedure cannot be obtained prior to 1935 since all exogenous and endogenous variables must be lagged one year. But with PXQ_{t-1} as the measure of execution risk (*see id.* at 406-09), the earliest starting date is 1936. The reduced form first stage equation requires that a lagged value of PXQ_{t-1} be used to estimate arrest and conviction rates, but the first legitimate value of PXQ_{t-1} is that for 1934, not for 1933, since the denominator of this measure incorporates values of homicides, arrests, and convictions lagged one year. This means that estimated arrest and conviction rates cannot be obtained before 1935 and that modified first differences cannot be estimated for periods beginning before 1936. Since Ehrlich gives 1935 as the beginning of the effective period, he may have used an erroneous (probably zero) value for PXQ_{t-1} in the first stage estimation procedure.

With TXQ_t as the measure of execution risk (*see id.* at 406-09), the earliest beginning point for the effective period should be 1938. Since values of TXQ_t depend on data from three prior years, the first values cannot be obtained before 1936; the first stage estimation of arrest and conviction rates with lagged TXQ_t cannot be made for years earlier than 1937; and hence modified first differences cannot be calculated for effective periods starting earlier than 1938. If, as Ehrlich indicates, 1937 is actually used as the beginning date of the effective period, lagged TXQ_t in the first stage equation will be an arbitrary (probably nonzero) value based on data from only two prior years (and a zero value for the third year).

PXQ_{t-1} and TXQ_t are used more extensively than any of the other execution measures in Ehrlich's regression analyses, and in virtually all cases the effective period of analysis begins one year too soon. The following equations in both of his papers would appear to be misspecified, and therefore improperly estimated, in terms of the effective period of analysis: equations 3 and 4 in Table 4 of Ehrlich 1973, *supra* note 1, at 53, and Table 3 of Ehrlich 1975, *supra* note 1, at 110; equations 2-5 in Table 5 of Ehrlich 1973, *supra* at 54, equations 1-6 in Table 6 of *id.* at 55, and Table 4 of Ehrlich 1975, *supra* at 110, and equations 3 and 4 in Table 7 of Ehrlich 1973, *supra* at 57.

We believe these equations are not simply mislabeled but are, in fact, improperly specified with respect to the effective period of analysis. With the data generated from information in Ehrlich's memorandum, *supra* note 15, we have estimated each of the above equations for its maximum proper effective period and for the apparently incorrect one indicated in Ehrlich's tabulations. In every case, we found that the results reported by Ehrlich correspond more closely with the estimates we have obtained for the incorrectly defined effective period. However, the resulting errors of estimation are relatively small in magnitude since they enter the second stage regression results through [illegible] in the first stage estimation of arrest and conviction rates.

[illegible] note 1, at 409-11.

addition, the relative strengths of the effects of arrest (P^ea), conviction ($P^ec|a$) and execution ($P^ee|c$) are the same as Ehrlich reports.[26] According to Ehrlich, "[t]he regression results regarding the effects of P^ea, $P^ec|a$, and $P^ee|c$ constitute perhaps the strongest findings of the empirical investigation. Not only do the signs of the elasticities associated with these variables conform to the general theoretical expectations, but their ranking, too, is consistent with the predictions . . . ."[27] Thus, by reproducing the rank order of effects among arrest, conviction, and execution rates, we have replicated an especially important aspect of his regression results.[28]

B. *Temporal Specification*

If the results of a time series regression analysis are a faithful representation of underlying causal processes, the values of the estimated coefficients will be independent of the specific time period chosen for the analysis. Thus, if the values of the coefficients associated with the various measures of execution risk change substantially when they are estimated for alternative time intervals, the negative values reported in Table III are not a reliable basis for inferring that capital punishment has a deterrent effect on murder.

Ehrlich addressed this issue by repeating the regression analysis for selected subperiods. He performed seven regressions in which varying numbers of years were removed from the beginning of the time series and two analyses in which three years were dropped from the end of the series. These alterations in the effective period of analysis do not appreciably change the elasticities associated with execution risk.[29] Ehrlich does, however, concede that the deterrent effects of arrest, conviction, and execution rates become weaker when as many as seven years are dropped from the recent end of the time series.[30]

We find that all empirical support for the deterrent effect of capital

26. *Id.*
27. *Id.* at 411.
28. Our results are comparable to Ehrlich's in other respects (see appendix B, *supra* note 2, for the full regression results). The elasticities associated with the alternative measures of execution risk are less in absolute magnitude than those associated with arrest and conviction rates, but relative to their standard errors, they tend to fall between those of the arrest and conviction measures. In addition, the signs of the elasticities associated with the remaining causal factors are the same as those obtained by Ehrlich.
29. Ehrlich 1975, *supra* note 1, at 110; Ehrlich 1973, *supra* note 1, at 54.
30. Ehrlich 1973, *supra* note 1, at 20.

punishment disappears when the five most recent years are removed from the time series that Ehrlich selected for analysis. Table IV[31] shows the estimated effects of execution risk on the criminal homicide rate for 16 periods with successively earlier ending dates. For the period ending in 1964, there are no statistically significant negative elasticities associated with the various measures of execution risk. For the period ending in 1963, the estimated elasticities have become positive in every case. Indeed, of the 24 coefficients reflecting the effects of execution risk for periods ending in 1963 and earlier, 20 are positive and only four are negative.

Furthermore, we find that the regression results are more adequate and consistent for the periods with earlier ending dates. The standard errors of the regressions are less, the F and R^2 statistics are consistently higher, and the Durbin Watson statistics are generally more acceptable for the periods ending in 1960 and 1963 than for those ending in 1966 and 1969.[32] In addition, the estimated coefficients for the other variables in the regression equations for the two shorter periods are generally closer in value than in the equations for the longer periods.[33]

Hence for the periods in which the model gives evidence of being more adequately specified, the regression analysis consistently shows a slightly positive—though not statistically significant—effect of execution risk on the homicide rate.

31. Table IV

Estimated Effects of Execution Risk on the Criminal Homicide Rate for Effective Periods with Successively Earlier Ending Dates (Variables in Natural Logarithms)
(t Values in Parentheses)

Ending Date of Effective Period	Six Alternative Measures of Execution Risk					
	PXQ_t	PXQ_t	PXQ_{t-1}	TXQ_t	PDL_t	$\overline{PXQ}_t$
1969	−.018	−.068	−.023	−.059	−.065	−.001
	(−.69)	(−3.15)	(−1.12)	(−2.70)	(−3.15)	(−.113)
1968	−.026	−.069	−.030	−.059	−.069	−.019
	(−.99)	(−3.50)	(−1.41)	(−2.76)	(−4.09)	(−1.36)
1967	−.041	−.061	−.061	−.061	−.068	−.060
	(−1.36)	(−3.65)	(−3.18)	(−3.61)	(−4.55)	(−4.98)
1966	−.020	−.055	−.053	−.050	−.056	−.013
	(−1.00)	(−3.79)	(−3.31)	(−2.88)	(−3.40)	(−1.59)
1965	−.016	−.041	−.031	−.025	−.037	−.031
	(−.99)	(−1.51)	(−1.20)	(−.98)	(−1.53)	(−1.41)
1964	.028	−.021	−.017	−.009	−.013	.015
	(.91)	(−.70)	(−.58)	(−.31)	(−.40)	(.57)
1963	.057	.003	.003	.005	.008	.017
	(1.77)	(.08)	(.08)	(1.63)	(1.60)	(1.02)
1962	.052	−.030	−.021	.060	.021	.010
	(1.11)	(−.60)	(−.51)	(1.30)	(.35)	(.84)
1961	−.015	.011	.011	.006	.050	−.019
	(−.26)	(.67)	(.29)	(2.10)	(1.02)	(−.33)
1960	.013	.029	.009	.070	.067	.013
	(.24)	(.52)	(.25)	(1.72)	(1.36)	(.22)

32. See equations 1.1 to 1.4 in appendix B, *supra* note 2. These statistical measures are

33. Not only does the evidence for deterrence disappear, but Ehrlich's more general theoretical formulation is weakened by our findings. When we examine the results for periods ending in 1963 or earlier, we find only three instances out of 30 possible results which conform to his rank order predictions of the relative strengths of the deterrence variables. See pp. 196-97 *supra*; appendix B, *supra* note 2.

34. See J. Johnston, Econometric Methods 47-50 (2d ed. 1972); R. Wonnacott & T. Wonnacott, Econometrics 91-98 (1970).

35. Ehrlich 1975, *supra* note 1, at 412-13; Ehrlich 1973, *supra* note 1, at 36-37.

C. *Functional Form*

Seldom does an initial theoretical formulation, such as Ehrlich's economic model of the determinants of murder, unambiguously dictate the mathematical function which describes the true relationships among the variables. When the functional form is open to question or when the analyst wishes to establish the generality of his findings, he will typically examine regression results obtained under different assumptions about the form of the model.

Ehrlich assumes that the factors which determine the murder rate have a multiplicative effect. Adopting a standard regression technique, he uses logarithmic values of the variables, in order to transform this multiplicative relationship into an equivalent linear form suitable for regression analysis.[34] He reports that his regression results are not dependent on the specific assumptions he has made about the form of the relationships among the variables—that there is evidence of a deterrent effect even when he performs the regression analysis with the natural values of his variables (which corresponds to a linear rather than a multiplicative relationship among the variables).[35]

Using the natural values of these variables, we have re-estimated the coefficients shown in Table IV. We show these results in Table V.[36] There are, among the 60 estimates in Table V, more positive than negative coefficients associated with the various measures of execution risk. Only two of them, both positive, are statistically significant. The direction and size of the estimated coefficients do not appear to be systematically affected by the choice of time period. In other words, the last few years of the time series, which are apparently responsible for the evidence of a deterrent effect when logarithmic

values are used, yield no such evidence with the natural values of the variables.

III. Sources of Ehrlich's Deterrence Evidence

We have seen that Ehrlich obtains evidence of a deterrent effect only by imposing highly restrictive conditions on his analysis. One might assume that this evidence of deterrence reflects either a strong deterrent effect operating exclusively in recent years or a more pervasive effect obscured by data inadequacies in the early years. We show instead that Ehrlich's evidence is strictly a statistical artifact, not the reflection of a deterrent effect over the entire period of analysis or the most recent subperiod.

in logarithms, the regression coefficients indicate the change in the homicide rate to be expected from a one unit change in execution risk. For example, a coefficient of −.00061 (for PXQ_t in the period 1935-1969) means that a reduction in the number of executions from 10 to nine (per 100 convictions for murder) can be expected to increase the homicide rate from 5.00000 to 5.00061 (per 100,000 population), or to add 12 homicides for a population of 200 million.

Table V

Estimated Effects of Execution Risk on the Criminal Homicide Rate for Effective Periods with Successively Earlier Ending Dates (Variables in Natural Values)
(t Values in Parentheses)

Ending Date of Effective Period	*Six Alternative Measures of Execution Risk**					
	PXQ_t	PXQ_s	PXQ_{t-1}	TXQ_t	PDL_t	PXQ_t
1969	.00008	−.00061	.00132	.00135	.00085	.00054
	(.05)	(−.73)	(1.02)	(.64)	(.43)	(.35)
1968	.00038	−.00068	.00126	.00131	.00085	.00054
	(.25)	(−.79)	(.96)	(.61)	(.41)	(.34)
1967	.00021	−.00051	.00629	.00106	.00039	.00016
	(.16)	(−.63)	(.56)	(.47)	(.18)	(.11)
1966	−.00023	−.00010	−.00013	.00110	.00016	−.00016
	(−.20)	(−.52)	(−.17)	(.54)	(.22)	(−.38)
1965	−.00027	−.00027	−.00038	.00121	.00087	−.00053
	(−.29)	(−.40)	(−.60)	(.81)	(.52)	(−.54)
1964	.00009	−.00021	−.00031	.00101	.00123	−.00001
	(.11)	(−.37)	(−.57)	(.78)	(.78)	(−.01)
1963	.00026	−.00019	−.00023	.00123	.00189	.00022
	(.29)	(−.28)	(−.37)	(.87)	(1.10)	(.24)
1962	.00030	−.00023	−.00032	.00058	.00120	−.00015
	(.38)	(−.39)	(−.56)	(.53)	(.80)	(−.21)
1961	−.00012	.00027	−.00003	.00117	.00216	−.00011
	(−.20)	(.54)	(−.05)	(1.36)	(2.00)	(−.68)
1960	.00001	.00011	.00005	.00139	.00235	−.00013
	(.04)	(.69)	(.09)	(1.30)	(2.17)	(−.20)

A. *The Recent Years*

What is it about the middle and late 1960's which causes the execution variables to show negative effects on the homicide rate when they are in logarithmic but not in natural form? The answer lies in the opposing trends in the two variables and in the nature of the logarithmic transformation. The national homicide rate, as reported by the FBI, rose precipitously in the middle and late 1960's to levels well above those of the 1940's and 1950's. Indeed, between 1962 and 1969 the homicide rate rose almost 60 percent to a level exceeded only by the rate for 1933. At the same time, executions literally came to an end. Hence execution risk—the number of executions among those convicted of murder—took on extremely low values, approaching zero, in the middle and late 1960's.[37] A property of the logarithmic transformation is to emphasize variations at the lower range of a variable. For example, if execution risk is converted into logarithms, a difference between one and two executions per 1,000 convictions will be greater than a difference between 350 and 650 executions per 1,000 convictions. Consequently, the logarithmic transformation accentuates the decline in execution risk that occurred in the 1960's.

To show the effect of the logarithmic transformation on these low values of execution risk, we present in Table VI[38] the corresponding logarithmic and natural values of one of the six measures of execution risk for the years from 1960 through 1969. The natural values of execution risk have dropped from about one percent in

37. There have been no executions since 1967. In order to extend the effective period of analysis through 1969, Ehrlich had to generate nonzero execution rates for the years after 1967, since the logarithm of zero is not defined. He did this by supplying one nonexistent execution for 1968 and 1969 in the calculation of PXQ_t. Ehrlich 1975, *supra* note 1, at 409 n.h.

38. Table VI

Logarithmic and Natural Values of Execution Risk (PXQ_t) for Each Year 1960-1969

	Logarithms		*Natural Values*	
	The Absolute Value	*Standard Deviations from the Mean*	*The Absolute Value*	*Standard Deviations from the Mean*
1969	−3.823	−2.524	.022	−.123
1968	−3.873	−2.564	.021	−.124
1967	−3.131	−2.103	.044	−.111
1966	−3.771	−2.491	.023	−.123
1965	−1.742	−1.252	.175	−.059
1964	−1.156	−1.077	.233	−.041
1963	−.642	−.580	.526	.011
1962	.171	−.001	1.191	.630

the years 1960-1962 to less than .05 percent for the years 1966-1969. The values for the years after 1964 are all slightly more than one standard deviation below the mean for the entire period from 1933 to 1969. Putting execution risk in logarithmic form greatly accentuates the decline. The difference between 1960 and 1969 in logarithmic values (from .229 to −3.823) is more than three times the corresponding difference in natural values (from 1.257 to .022). In fact, for the period from 1966 to 1969, the logarithmic values of execution risk are all more than two standard deviations below their mean. Thus, by using logarithmic values of execution risk, Ehrlich gives considerably more weight in his regression analysis to the extremely low values of this variable after 1964.

Ehrlich has stated that the recent behavior of arrest and conviction rates as well as that of execution risk plays an important role in his regression results.[39] To examine the effect of using the logarithmic values of execution risk and the possibility that the logarithmic transformation of arrest and conviction rates may also influence the regression results, we present, in Table VII,[40] simple correlations of the arrest, conviction, and execution rates with the criminal homicide rate; these are shown for logarithmic and natural values of the variables and for time intervals with successively earlier ending dates from 1969 through 1960. The data for the recent years have an extraordinary effect on the correlation between the logarithms of execution and homicide rates; adding the last five years reduces the correlation from .836 to .123. In contrast, the recent data have much

39. Ehrlich 1973, *supra* note 1, at 70.

40. Table VII

Correlations of Arrest, Conviction, and Execution Rates with the Homicide Rate for Effective Periods with Successively Earlier Ending Dates (Separately for Logarithms and Natural Values of the Variables)

	Arrest Rate (P^a_a)		*Conviction Rate* (P^c_c/a)		*Execution Rate* (PQX_e)	
Effective Periods	*Logarithms*	*Natural Values*	*Logarithms*	*Natural Values*	*Logarithms*	*Natural Values*
1933-1969	−.809	−.832	−.501	−.516	.423	.553
1933-1968	−.801	−.818	−.488	−.496	.270	.611
1933-1967	−.793	−.809	−.492	−.497	.112	.720
1933-1966	−.791	−.808	−.496	−.499	.563	.758
1933-1965	−.792	−.809	−.496	−.499	.716	.773
1933-1964	−.795	−.813	−.494	−.497	.806	.772
1933-1963	−.806	−.821	−.488	−.491	.858	.765
1933-1962	−.820	−.837	−.495	−.500	.857	.750
1933-1961	−.819	−.845	−.506	−.511	.816	.711
		.631	.516	.520	.836	.729

less effect on the correlation between the natural values of execution and homicide rates) adding the last five years reduces the correlation only from .729 to .553.[41] These years have virtually no impact on the correlations, in either logarithmic or natural form, of arrest and conviction rates with the criminal homicide rates. Thus, Ehrlich's evidence of deterrence rests heavily on the relationship between the values of execution risk and homicide rates for the years after 1964.

This conclusion might suggest that the use of the death penalty at the very low levels of execution risk in the middle and late 1960's had a deterrent effect strong enough to produce a measurable effect over the entire period when these recent years are combined with earlier years. We examine this possibility in Table VIII.[42] It shows annual changes in the homicide rate relative to national changes in the homicide rate for the period 1962 to 1968 among states that increased or decreased the number of executions imposed for murder. The relative changes in homicide rate are expressed in homicides per 100,000 people, and are obtained by subtracting the changes in the national homicide rate from changes in the individual states.

41. Note, in this connection, that Ehrlich's extension of the time series on execution risk from 1967 to 1969 by supplying executions for 1968 and 1969 in the calculation of PXQ_e, note 30 *supra*, reduces its correlation with the homicide rate in logarithmic values from .442 for 1933 to 1967 to .123 for 1933 to 1969 and in natural values from .720 to .553 for the same periods.

42. Table VIII

Annual Changes in Criminal Homicide Rate Among States Which Have Increased and Decreased Executions Relative to Annual Homicide Rate Changes in the Nation as a Whole for the Period 1962-1968

	States Which Have Decreased Executions			*States Which Have Increased Executions*		
Annual Change	*Relative Homicide Rate Change*	*Number of States*	*Population Proportion*	*Relative Homicide Rate Change*	*Number of States*	*Population Proportion*
1962-1963	−.10	11	.41	−.03	6	.17
1963-1964	.19	8	.33	−.33	3	.06
1964-1965	−.41	3	.13	.88	1	.02
1965-1966	−.93	4	.05	.50	1	.01
1966-1967	.62	1	.01	.09	2	.11
1967-1968	−.23	2	.11	—	—	—

States imposing executions for murder during this period were identified in Appendix A of W. Bowers, Executions in America 200-401 (1974); criminal homicides annually by state were obtained from FBI, Uniform Crime Reports for the United States (Table 4, 1962-1964; Table 4, 1965-1968); annual population estimates by state were taken from U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports: Population Estimates and Projection (Ser. P-25, No. 480, Oct. 1971) (1962-1968). Changes in homicide rates by groups of states that increased and decreased executions are exactly the average of the annual changes in the states that comprise the group weighted [illegible] population size. The data for these states [illegible]

Conclusion

We have shown that Ehrlich's findings are not a reliable basis for inferring the effects of capital punishment on the criminal homicide rate. Flaws in Ehrlich's data cast doubt on the ability to perform meaningful regression analysis. The analysis itself yields evidence of a deterrent effect only by relying on the unusual nature of the years after 1961 and on the logarithmic transformation of the data. When the analysis is performed for more appropriate periods, the hypothesis that the death penalty deters murders finds no support.

APPENDIX

Specific Data Sources Used in the Replication of Ehrlich's Regression Analysis

1. $\left(\frac{O}{N}\right)^*$ *Criminal Homicide Rate* = Number of Criminal Homicides per year/annual civilian population.

   (a) O = Annual number of murders and nonnegligent manslaughters from 1933 to 1969. Revised figures (1971) provided by the FBI.

   (b) N = Civilian population of the United States in 1,000's from 1933 to 1969. U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports: Population Estimates and Projections Tables 3, 4 (Ser. P-25, No. 499, May 1973).

2. P^*_a *Clearance Rate for Criminal Homicide* = Fraction of murders and nonnegligent manslaughters cleared by arrest. FBI, Uniform Crime Reports for the United States (1933-1969).

3. $P^*_{c|a}$ *Conviction Rate for Criminal Homicides* = Fraction of individuals found guilty as charged for murder and nonnegligent manslaughter. 1936-1969; *id.* After 1962 separate estimates are reported in the *Uniform Crime Reports* annual bulletin. Estimates from the time series which is continuous over the 1936 to 1969 period were chosen. These estimates were generally based on larger population bases. The value for 1961 is the average of the 1960 and 1962 estimates. 1933-1935: values 1933 to 1935 were obtained from Ehrlich (Ehrlich 1973, *supra* note 1, Figure 1).

4. $P^*_{e|c}$ *Execution Risk for Criminal Homicide* (PXQ_1, PXQ_2, PXQ_{3-5}, TXQ_6, PDL_7, PXQ_8) The measures of execution risk are all variations of the form $\frac{E}{C^*}$, where $C^* = Q \cdot P^*_a \cdot P^*_{c|a}$.

   (a) E = The number of executions for murder. U.S. Bureau of Prisons, Dep't of Justice, National Prisoner Statistics Bulletin Table 1 (No. 46, Aug. 1971).

   (b) [illegible] Number of convictions for murder.

5. L *Labor Force Participation Rates:*

   for 1940-1969 $L = \frac{CL}{(TN - TL + CL)}$

   for 1933-1939 $L = \frac{CL}{(N - P13)}$

   (a) CL, TL = The civilian and total labor force in 1000's from 1933 to 1969. U.S. Bureau of Labor Statistics, Dep't of Labor, Employment and Earnings Table A-1 (Jan. 1971).

   (b) TN = Total noninstitutional population from 1940 to 1969. *Id.*

   (c) N = Annual civilian population as defined in 1(b).

   (d) P13 = Annual population 13 years old and under from 1933 to 1939. U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports: Population Estimates and Projections (Ser. P-25, No. 311, July 1965).

6. U *Unemployment Rate of the Civilian Labor Force, 1941 to 1969.* Employment and Earnings Table A-1, *supra* 5(a).

7. A *Fraction of the Resident Population 14 to 24 Years of Age.*

   $A = \frac{P1424}{RP}$

   (a) P1424 = Number of persons 14 to 24 years of age in the resident population.

   1933-1939: Current Population Reports, *supra* 5(d).

   1940-1949: U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports: Population Estimates and Projections Table 1 (Ser. P-25, No. 98, Aug. 1954).

   1950-1959: *id.* Table 1 (Ser. P-25, No. 310, June 1965).

   1960-1969: *id.* Table 2 (Ser. P-25, No. 519, Apr. 1974).

   (b) RP = Resident population in 1000's.
   References same as given in (a) for each of the respective time periods.

8. Y *Friedman's Estimate of Real Permanent Income per Capita.* The following equation was used to compute Y:

   $Y_t = (.530)\, Y_{t-1} + (.226)\, Y_{t-2} + (.150)\, Y_{t-3} + (.100)\, Y_{t-4} + (.07)\, Y_{t-5} + (.019)\, Y_{t-6} + (.033)\, Y_{t-7} + (.023)\, Y_{t-8}$

   (a) The weights in the above equation were obtained from E. Kami, The Value of Time and the Demand for Money, 1971, Table 33 (unpublished doctoral dissertation, Univ. of Chicago).

   (b) Y_{t-1} through Y_{t-8} are logarithmic estimates of per capita real national income for the years 1925 to 1969. The national income figures were provided by E. Kami. Population figures for per capita estimates were obtained from:

   1925-1929: Current Population Reports, *supra* 1(b), Table 4.
   1930-1968: U.S. Dep't of Commerce, Survey of Current Business Table 7.6 (July 1969).

   (c) The per capita income was measured in terms of 1929 dollars using a price deflator obtained from source (a).

9. NW *Percent of Nonwhite Residential Population.*
   References same as given in 7(a) for each of the respective time periods.

If execution risk had a deterrent effect, states with declining numbers of executions would show a relative increase in homicide rate, and states with rising execution levels would show a relative decrease in homicide rate. But Table VIII demonstrates that there is no such pattern in the years since 1962. Among states which decreased executions, the homicide rate rose more than the national figure for two of the periods[42] and less than the national figure for four. Among states that increased executions, the change in homicide rate was below the national change in one comparison, very nearly the same in one case, and actually above in three of the five comparisons.

Table VIII also shows that the use of capital punishment during this period was restricted increasingly to a small minority of states. After 1961, no more than five states imposed executions in a single year, none of them imposed more than one execution per year, and none imposed executions two years in a row. In this situation, the national homicide rate cannot be expected to reflect possible deterrent effects presumed to occur primarily in the jurisdictions that actively use the death penalty. Thus, apart from problems of temporal specification and functional form, it would have been more appropriate, in view of the progressively restricted use of capital punishment in the nation, for Ehrlich to have shortened the effective period of analysis by removing the years after 1963, when no more than 10 percent of the states imposed executions, than to have extended the period of analysis two years beyond the end of executions in the United States.

B. *The Early Years*

We have already described the unreliability of data for the 1930's. By reproducing his regression analysis for effective periods with later beginning dates, Ehrlich may have hoped to diminish the effects of measurement error in these early years. But he has thereby given greater weight to the years after 1961, which are responsible in the first place for his evidence of a deterrent effect.

To determine the effects of measurement error in the early years, we must first remove the idiosyncratic recent years, and then successively drop years from the beginning of the time series. Accordingly, we have performed regressions for periods with 1963 as the ending date and with successively later beginning dates from 1935 through

[42] However, one of these two periods, 1960-1967, involves only one state, Texas.

1940. The estimated coefficients for logarithmic and natural values of two measures of execution risk are shown in Table IX.[43]

We know from Tables IV and V that the elasticities associated with execution risk for effective periods ending in 1963 and earlier are more often positive than negative, though usually not statistically significant. In Table IX, the coefficients are again predominantly positive, and become even more so as years are successively dropped from the beginning of the time series. In fact, the effective periods beginning in 1938, 1939, and 1940 show positive effects for execution risk in all 12 cases. These positive coefficients are, of course, absurd from the viewpoint of the deterrence hypothesis, although they may not be altogether meaningless.[44] They do, however, indicate unambiguously that data inadequacies in the early years of the time series have not obscured deterrent effects of capital punishment. Indeed, by all indications there are no deterrent effects to obscure.

Table IX

Estimated Effects of Execution Risk on the Criminal Homicide Rate for Effective Periods Ending in 1963 With Successively Later Beginning Dates (Separately for Variables in Logged and Unlogged Form) (t Value in Parentheses)

Beginning Date of Effective Period	*Logarithms*		*Natural Values*	
	PXQ_{t-1}	$P\bar{X}Q_t$	PXQ_{t-1}	$P\bar{X}Q_t$
1935	--	.037	--	.000219
	--	(1.02)	--	(.21)
1936	.003	.031	.000225	.000082
	(.08)	(.86)	(.37)	(.08)
1937	.007	.038	.000079	−.000001
	(.19)	(1.02)	(.12)	(−.00)
1938	.038	.033	.001147	.000833
	(.91)	(.95)	(1.46)	(.64)
1939	.062	.061	.001858	.001772
	(1.39)	(1.73)	(1.35)	(1.29)
1940	.095	.056	.001581	.001818
	(1.99)	(1.56)	(1.93)	(1.19)

Table IX presents the effects of two measures of execution risk, PXQ_{t-1} and $P\bar{X}Q_t$. PXQ_{t-1} is the measure used most frequently by Ehrlich, and $P\bar{X}Q_t$ of all the measures, is least biased by measurement error since its one year lagged homicide rate is only one of 18 variables that figure in its estimation. Equations 13.1-16.3 of appendix B, *supra* note 2, present detailed regression results for selected periods beginning in 1936, 1938, and 1940.

[43] The possibility that because of a "brutalizing effect," capital punishment may encourage rather than deter murders is beyond the scope of this paper but is considered in Bowers & Pierce, *supra* note 2. In particular, we discuss the meaning of the positive regression coefficients we obtained when we substituted the number of executions for execution risk.

11. NGOV *Per Capita Real Expenditures on All Governments in Millions of Dollars.*

$$NGOV = \frac{(FE + SLE\text{-}D)}{RP*PD*10}$$

(a) FE, SLE = Federal and state/local expenditure on all governments.
1933-1938: U.S. Dep't of Commerce, Historical Statistics of the U.S.: Colonial Times to 1957 (1960).

1939-1965: U.S. Dep't of Commerce, The National Income and Product Accounts of the United States, 1929-1965 Statistical Tables (1966).

1966-1969: U.S. Dep't of Commerce, Survey of Current Business (July 1970).

(b) D = National defense expenditures.
1933-1938: U.S. Dep't of Commerce, Historical Statistics of the U.S: Colonial Times to 19.7, *supra* (a).

1939-1952: (purchases of goods and services). National Income and Product Accounts of the United States, *supra* (a), Tables 1.1.

1953-1969: (purchases of goods and services). Survey of Current Business, *supra* (a), Table 3.10.

(c) RP = Residential population as defined by 7(b).

(d) PD = Implicit price deflator for all governments.
1932-1965: National Income and Product Accounts of the United States, *supra* (a), Table 8.4.

1966-1969: Survey of Current Business, *supra* (a).

12. $XPOL_{-1}$ *Per Capita Real Expenditures on Police Lagged One Year in Dollars.*

$$XPOL_{-1} = \frac{POLE*100{,}000}{RP*PD} \text{ where}$$

(a) POLE = Total police expenditure.
1932-1966: 6 U.S. Bureau of the Census, Dep't of Commerce, 1967 Census of Governments, No. 5, at 36 (1969).

1967-1969: U.S. Bureau of the Census, Governmental Finances in 1969-70, at 15 (1971).

(b) RP = Residential population as defined in 7(b).

(c) PD = Price deflator as defined in 11(d).

13. *Alternative Vital Statistics Estimates of Homicide.*
Q = Annual number of willful homicides (minus the annual number of executions after 1918, when the two mortality categories were combined).

1933-1936: U.S. Bureau of the Census, Dep't of Commerce, Mortality Statistics (1933-1936).

1937-1969: U.S. Bureau of the Census, Dep't of Commerce, Vital Statistics of the United States (1937-1945); U.S. Public Health Serv., Dep't of Health, Education, and Welfare, Vital Statistics of the United States (1950-1969).

Deterrence: Evidence and Inference*

Isaac Ehrlich†

Because of space limitations and the short time I have been given to prepare my response to the two critiques of my work published in this issue of the *Journal*, I shall confine myself principally to the critique by Bowers and Pierce.[1] I do that not because the paper by Baldus and Cole[2] does not warrant a detailed reply but because an elaborate response to the central issues they raise is contained in a study of mine now in progress which deals critically with published research by Sellin and others.[3] I choose to focus on the Bowers and Pierce piece also because, as I hope to show, their work largely misinterprets and misapplies the framework I have developed for testing the deterrence hypothesis. Addressing their work critically provides the opportunity to elaborate upon some pertinent aspects of my research, hopefully for the benefit of interested scholars.

The conclusions of my time series study of murder basically are two: (1) that previous research never adequately tested a set of direct and specific implications suggested by a general theory of deterrence and (2) that my empirical findings, while tentative and inconclusive by the very nature of observational statistics, are not inconsistent with rather sharp implications emanating from this theory, including the hypothesized deterrent effect of the conditional risk of execution. Bowers and Pierce tacitly accept the first conclusion and seek to evade the second, evidently on faulty grounds. In their efforts to obscure the empirical findings, they have selectively deleted observations, utilized an inferior regression specification, considered irrelevant variables and correlations, and revealed in the process misunderstanding of elementary statistical concepts, as I discuss in points III, IV, and V below. They do not provide evidence based on a systematic statistical analysis showing that capital punishment, or punishment in general, does not deter crime. Essentially, they make only the point that the observed deterrent effect of the risk of execution *can be* confounded

* This reply has been prepared in cooperation with Randall Mark.

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1 Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975).

2 Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on Capital Punishment*, 85 Yale L.J. 170 (1975).

when insufficient regard is shown for proper methods of hypothesis testing. Indeed, my principal response to Bowers and Pierce is that they concern themselves only with making a point (*i.e.*, confounding a result) rather than testing a hypothesis. There is a fundamental difference between a systematic and statistically coherent test of all the ramifications of a general hypothesis and an exercise in search of that set of circumstances which—for purely technical reasons—may weaken the effect of a single variable within a comprehensive model. Bowers and Pierce do not analyze the effects of variables other than the conditional probability of execution—variables such as estimates of apprehension and conviction risks and unemployment and labor force participation rates. Moreover, they do not address themselves at all to the question of the optimal form of testing for the deterrence hypothesis, given the technical limitations of observational statistics.

I shall respond in some detail only to the substantive issues raised by Bowers and Pierce and to a few of the arguments advanced by Baldus and Cole. Also, I shall point out only some of their more serious errors. For expositional convenience, the discussion below is ordered as seven general points.

I. Corroborating Evidence from Bowers and Pierce

First and foremost, the Bowers and Pierce work, however inadvertently, has lent considerable strength to the case for the deterrent effect of capital punishment, because their application of the theory and econometric methods outlined in my paper over the entire period considered in my analysis produces results quite similar to my own. This is noteworthy for several reasons.

A. Their data set is not identical to the set of data that I utilized.[1] Their comments indicate that at least four variables have been constructed differently in their work.[2]

B. In addition, Bowers and Pierce do not accurately execute my regression analysis in which two measures of execution risk are used to test the hypotheses of the model. Their results in connection with these measures of execution risk are likely to be inferior to my own because they omit an observation; therefore their results are based on fewer degrees of freedom.[3]

C. Furthermore, Bowers and Pierce may have used computational procedures different from those I utilized. That their regression results and coefficients of serial correlation always differ from mine is consistent with this view.[4]

Yet despite these differences, the regression results which Bowers and Pierce report are "similar to Ehrlich's."[5] More particularly, they confirm not only the apparent restraining effect of the conditional probability of execution on the murder rate but also my predicted ranking of estimates of elasticities of the murder rate with respect to the three deterrence variables—the probability of apprehension, the conditional probability of conviction, and the conditional probability of execution.[6] This is at once a confirmation of the strength of my approach and a corroboration of the basic findings. The results stand out in contrast to previous allegations that no evidence exists suggesting that the death penalty may have a restraining effect on the frequency of murder in the population. How Bowers and Pierce attempt to obscure these results is the subject of the three following points.

II. The Effects of Data Imperfections

Bowers and Pierce attempt to invalidate the results of my empirical investigation of the effects of deterrence variables (and these results

1. A detailed description of the data set that I utilized is contained in the memorandum, I. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, American Economic Review (June, 1975); Sources of Data, May 1975 (on file with *Yale Law Journal*). Mr. Bowers, among others, received a draft of this memorandum, which noted some errata in the published paper, and which was completed in July 1975 by Randall Mark.

2. Bowers & Pierce, *supra* note 1, at 191 n.18. They allege that one of these differences, that concerning $NPOL_{t-1}$, is due to my having used an unspecific auxiliary analysis for estimating missing values of this variable. Their allegation is false: my memorandum on data sources, *supra* note 1, at 17-19, outlines in detail the auxiliary procedure utilized. In addition, Bowers and Pierce utilize different values of P^a_{t-1} than did I for the years 1933, 1934, and 1935, because they did not choose to apply the procedure I outlined for estimating these values. Their reference to "Ehrlich's conviction rates" for the years in question is wrong. Bowers & Pierce, *supra* at 191 n.18.

3. Bowers and Pierce suggest that all regressions of mine in which PNO_{t-1} and LNO_t are used as measures of the conditional probability of execution are erroneous. Bowers & Pierce, *supra* note 1, at 195 n.21. They argue that I mistakenly utilized PNO_{t-1} and LNO_t for the effective periods 1935-1969 and 1937-1969, respectively, whereas, they claim, the absence of data on PNO_{t-1} in 1933 would require starting the effective period one year later in each case. They then speculate that an "erroneous (probably zero)" value of PNO_{t-1} must have been inserted by the computer for 1933. *Id.* Contrary to their speculation, however, PNO_{t-1} in 1933 was estimated for use in all regressions with PNO_{t-1} and LNO_t over the periods 1935-1969 and 1937-1969, respectively. The value of PNO_{t-1} in 1933 is estimated as 7.16299 (percent). The estimate is based on published UBI data for the murder rate and for the murder clearance ratio in 1932 and on an estimated conviction risk in that year.

The degrees of freedom associated with a regression are the excess of data points over the number of regression coefficients estimated.

4. The calculations I reported were computed via the Econometric Software Package, into which R.C. Fair's three-stage procedure is integrated. See J. Cooper, Description of the ESP PACKAGE (1972). Bowers and Pierce provide no documentation of their computational procedures.

5. Bowers & Pierce, *supra* note 1, at 190.

6. *Id.* at 197.

alone) by posing, in effect, the extreme argument that data limitations prior to the 1960's preclude any empirical test of the deterrence hypothesis.[10] I do not agree with this general conclusion, and, in addition, I find their analysis concerning particular variables to be superficial and not constructive.

With respect to the dependent variable, the murder rate, the figures I have used are based on the Federal Bureau of Investigation's revised estimates of annual total murders and nonnegligent manslaughters. For the purposes of the empirical investigation, the FBI data are conceptually superior to the homicide series published in the *Vital Statistics of the United States* because the FBI category is defined to include only willful felonious homicides. Law enforcement officials, not health officials, bear the responsibility and undergo training for distinguishing willful felonious homicides from other homicides.[11] Indeed, by definition, the homicide data of the *Vital Statistics* explicitly include justifiable homicides and are likely to include some negligent manslaughters as well.[12] Moreover, the revised homicide data of the FBI reflect that agency's unique opportunity to incorporate into its estimates whatever homicide data have been collected by health officials. In contrast, the homicide figures tabulated for the *Vital Statistics* are never revised after the cutoff date for data collection for a given year.[13] In addition, information on death certificates, on which the *Vital Statistics* figures are based, sometimes may reflect classification of deaths only by medical cause rather than by external cause (such as accident or homicide), especially in those instances when death from homicidal assaults occurs later than the time of assault.

Because the *Vital Statistics* category includes some nonfelonious homicides, one would expect its homicide counts to exceed the FBI estimates. Yet, in every year from 1939 through 1961, the more narrowly defined FBI revised estimates are higher, by more than 900 in some years.[14] These comparisons suggest the importance of the technical considerations cited above that may lead to a significant underestimation of the relevant number of criminal homicides in the *Vital Statistics*. Tests which I have been conducting with independent bodies of data, and which I hope to report in the near future, indicate, nevertheless, that the effects of the deterrence variables—including the conditional probability of execution—on the homicide rate as reported by the *Vital Statistics* are qualitatively the same as those found in my time series investigation.

With respect to the empirical measures of the apprehension and conviction risks, the critics raise the issue of whether the FBI data are "unrepresentative" in the earliest years of the sample period.[15] Yet I have reported results demonstrating that the basic findings of my investigation are observed even without the presence of these early years in the observation set.[16] Moreover, their inference that the conviction data in 1936 and 1937 are biased because of a particular pattern observed in 1974 is purely conjectural and not founded upon any systematic analysis. Imperfections in data notwithstanding, my qualitative results in connection with the effects of apprehension and conviction risks over my entire sample period have been observed by others using the same FBI sources.[17]

More basically, though, the critics' attempt to discredit the empirical investigation on the basis of data quality is self-defeating to their own case. As is well known, "errors of measurement," as they are termed in the econometrics literature, generally lead to underestimation of the true effects of an explanatory variable in a simple regression analysis when that variable is subject to random measurement imperfections.[18] If the true variables of interest were grossly misrepresented by their empirical counterparts, then the statistical implementation of the theory should have *failed* to demonstrate any of the effects theorized. In particular, only a remarkable coincidence could then explain the fact that, as predicted by my theory, the findings show that the probability

10. *See id.* at 187-92. This direct implication of their remarks notwithstanding, Bowers and Pierce subsequently claim that their regression results are "more adequate and consistent" when they examine only subperiods ending early in the 1960's. *Id.* at 198. Yet by their own analysis, data imperfections clearly are less important in the 1960's than in earlier periods. *Id.* at 190-92.

11. Although health officials are expected, when they can, to distinguish homicides from other violent "external" causes of death, namely accidents and suicides, they clearly experience much difficulty in drawing these distinctions. As late as 1970, for example, in which the *Vital Statistics* reports 16,848 homicides, a total of 5,381 violent deaths are classified as due to undetermined cause, *i.e.*, either accidental or purposeful. U.S. Public Health Serv., Dep't of Health, Education, and Welfare, Vital Statistics of the United States 1970, at 256.

12. Homicides inflicted through legal intervention by police are included in the homicide count reported by the *Vital Statistics*. Only beginning in 1959 can such homicides be separated from the total.

13. This failure to revise leads to an understatement of homicides pertaining to a given year [illegible] occurring in that year that were not reported by the cutoff date.

14. Bowers and Pierce's statement, *supra* note 1, at 189, that the FBI estimates differ from those of *Vital Statistics* by only about three percent for the period after 1939 is quite misleading in view of the magnitude of the year to year differences.

15. Bowers & Pierce, *supra* note 1, at 190; *see id.* at 190-92.

16. *See, e.g.*, Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 Am. Econ. Rev. 397, 410 (1975) (equation 5 of Table 3 and equation 2 of Table 4).

17. *See* W. Vandaele, The Economics of Crime: An Econometric Investigation of Auto Theft in the United States, 1975 (unpublished doctoral dissertation, Univ. of Chicago).

of arrest (measured by the FBI's clearance ratios) had a proportionally larger impact on the murder rate than the conditional probability of conviction (derived from the FBI's statistics) and that the conditional probability of execution had the least effect. The FBI's reported figures on arrest and conviction in the 1930's surely were not tailored to my theoretical predictions 30-odd years later.

III. The Effects of Deleting Observations

Curiously, Bowers and Pierce's remarks in the beginning of Part II of their paper may convey the impression that I have artificially restricted the time span of my empirical investigation to test deterrence effects. The fact is that my empirical investigation was conducted for the longest time period for which necessary data were available at the time of my study. In contrast, Bowers and Pierce conduct the bulk of their analysis over arbitrarily restricted subperiods after deleting specific observations from the complete data set. Their assertion that "Ehrlich's regression model fits the data better without them"[19] is based upon an erroneous method of inference, as I point out in Part V below. Here I shall address the consequences of discarding the information provided by the observations that they choose to omit.

Selective elimination of a sufficient number of observations from a regression analysis is a virtually foolproof method for reversing any single result derived from an original sample. Imagine, for example, a regression line verifying a negative association between the quantity demanded of corn and the price of corn. Since a majority of the data points typically will not lie on the regression line, the selective exclusion of data points can easily turn a significant negative relationship into an insignificant negative association or even a positive one. Such exclusions are particularly disturbing when the entire sample is relatively small. Indeed, the elimination of data points relating to murder in the 1960's—accounting for 17 percent or more of the full sample which I investigated—amounts to, in practice, the selective, nonrandom exclusion of observations crucial to an efficient estimation of the effects of key deterrent variables.

A. Omitting observations from the 1960's drastically reduces the variability in estimates of the conditional probability of execution and in the modified rates of change of these estimates, which are the actual regressors in the analysis. Whereas the rates of change in this variable had been quite stable for the preceding two decades, the objective (measured) risk of execution declined quite sharply starting about 1960. The sharp movements in the rates of change of the conditional risk of execution are, of course, not my invention—they accurately reflect the objective trend in the *true* risk of execution in the 1960's.[20] In addition, murder clearance ratios, used as objective estimates of the probability of arrest for murder, also exhibit little variability over specific subperiods ending in the early 1960's. Thus, variability in arrest and execution risks is particularly small between the late 1930's and the early 1960's.

It is a well known principle that a minimum amount of variability is necessary to perform a regression analysis. Indeed, an *efficient* sample designed for the purpose of estimating via a regression format the partial effects of specific explanatory variables on a dependent variable is one which maximizes the range of variability in the regressors. Imagine, again, the attempt to confirm the negative association between prices and quantities demanded of corn. The attempt would fail if the subperiod selected by a researcher for his regression analysis is one in which corn prices or their rates of change, whichever are relevant, are relatively stable. The appropriate inference, however, is not that the theory of demand fails to explain movements in corn purchases but rather that the selected subperiod cannot be utilized to estimate the partial effect of corn prices on quantities demanded. The importance of such considerations is apparent in my time series analysis not only in connection with deterrence variables but also in

20. The fact that this trend concerns only 20 states that imposed executions in 1960 has no specific relevance in connection with the estimated deterrent effect of execution, contrary to the unsystematic discussion of Bowers and Pierce, *supra* note 1, at 201. Only a subset, and typically a minority, of states enforced the death penalty in any given year. Many fewer than 20 applied the death penalty in every year from 1933 to 1967. Moreover, aggregating over states which had executions and states which did not implies that the estimated elasticity of the murder rate with respect to execution risk is likely to be biased downward relative to the true elasticity. See Ehrlich, *supra* note 15, at 408.

The inferences drawn by Bowers and Pierce, *supra* note 1, at 201-01, concerning murder rate and execution changes in particular states during the 1960's, are based on a faulty methodology. Their analysis of yearly changes in murder rates and executions in specific states over the six-year period 1962-1967 fails to control for the different trends in apprehension and conviction risks or in any other relevant determinants of murder across these states. It considers the absolute number of executions rather than the theoretically relevant conditional risk of execution in each state. It is based on comparisons of contemporaneous changes in executions and murder rates, comparisons which are not capable of identifying the relevant causal relationships in specific cases. Furthermore, the overwhelming trend in all the states compared over this subperiod was toward a complete cessation of executions. The occasional deviations from that trend in each state in a single year cannot serve as a statistically meaningful basis for the classification of states into those with increasing or decreasing executions. These fundamental shortcomings in Bowers and Pierce's independent analysis pertaining to the 1960's further underscores the importance of applying the *full* econometric framework utilized in my study over as long a period as the data permit in order to isolate the

relation to the effect of the unemployment rate on the frequency of murder. While the association between the latter two variables is found to be positive over the entire sample period, this association weakens substantially when the subperiod relating to the 1930's is excluded from the observation set. The significance of the 1930's in connection with movements in the unemployment rate is well known.

B. A related consideration is that the estimates of the objective risk of execution show a strong time trend over the subperiod ending in the early 1960's. Specifically, the graph plotting the logarithms of these estimates over the time period from the late 1930's to the early 1960's appears to be nearly a negatively sloped straight line. Over the same subperiod the murder rate in the United States also exhibits a continual, systematic negative trend. Because of the significant negative trend in estimates of both the frequency of murder and the conditional risk of execution, the estimated effect of the latter on the former over this specific subperiod may simply reflect the effect of pure time trend.

The differences between regression results based on the full sample and those based on subperiods ending in the early 1960's, including those reported by Bowers and Pierce in their appendix B,[21] are consistent with the arguments developed above. Not only does the effect of execution risk appear to become quite weak as data points are deleted, but the effect of apprehension risk also becomes weak due to lack of variability. As indicated above, the effect of unemployment is also sensitive to the deletion of specific subperiods. More importantly, the negative partial effect of the time trend on the murder rate, which was verified over the entire period considered in my study, becomes "insignificant"[22] in Bowers and Pierce's regression results for subperiods ending in the early 1960's, although over those specific subperiods the murder rate continually declined. Hence the effect of pure trend should have been found to be even more pronounced over these periods. The fact that the effects of both the risk of execution and time trend weaken suggests a high degree of competition or multicollinearity[23] between the two variables over subperiods ending in the early 1960's.

C. The absence of variability and the presence of multicollinearity

21. Bowers & Pierce, Deterrence, Brutalization, or Nonsense, 1975, at 24-26 (unpublished manuscript, Center for Applied Social Research, Northeastern Univ.) (appendix B on file with *Yale Law Journal*) [hereinafter cited as Deterrence].

22. The term "significance" here is used heuristically only to indicate relatively low standard errors. Standard tests of significance do not apply in connection with [illegible] estimation procedures.

are hardly unique to my study but occur frequently in time series regression analyses. The conventional remedy to such problems is to *extend* the sample size so that variability may be enhanced and the separate effects of highly related explanatory variables may be extricated and identified. I have pursued this procedure from the outset in my efforts to extend the sample size into the early 1930's and up to the late 1960's. Bowers and Pierce pursue just the reverse course. Following my own report of weak results obtained from subperiods ending in 1963, they go on to perform most of their independent estimations over subperiods in which little meaningful analysis can be conducted.

D. As for the unfounded claim that somehow "significant" deterrent effects of execution risk and other punishment variables are "present" only in a short span of time relating to the 1960's and are not to be found in earlier (or later) periods, I plan to demonstrate in the near future, through evidence based on state-wide data in earlier years, that the deterrent effects of certainty and severity of punishment—including punishment by execution—are not uniquely associated with a specific set of data points.[24]

IV. The Merits of the Logarithmic Format

In the empirical implementation of my general theory of participation in illegitimate activities,[25] I consistently have emphasized a logarithmic-linear specification of the relevant equations. However, as my following comments will show, while the logarithmic-linear specification appears to be preferable on analytical and experiential grounds, the qualitative results from my time series study do not depend exclusively on this functional form.

The logarithmic-linear form can be justified on practical grounds if the elasticities of a dependent variable with respect to a set of explanatory variables are assumed to be constant to the first order of approximation. A logarithmic-linear specification is a superior regression format when the magnitude of the errors in the data are thought to be proportional to the level of the variables that the data purport

24. Further independent evidence on this point is provided by J. Yunker, The Deterrent Effect of Capital Punishment: Comment, Oct. 1975 (unpublished manuscript, on file with *Yale Law Journal*). Yunker's analysis, conducted over a sample period extending through 1974, yields results indicating that the murder rate declines as the risk of execution rises. The statistical methodology he uses, however, is different from my own.

25. *See, e.g.*, Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in Economics of Crime and Punishment 68-134 (G. Becker & W. Landes eds. 1974) [hereinafter

to measure. It would be rather implausible, for example, to assume that the magnitude of underreported and misreported crime is independent of the level of reported crime. This assumption is implicitly invoked by use of the linear specification in the natural values of the variables, the functional form stressed by Bowers and Pierce.[26] More plausibly, one may assume that the magnitude of reporting errors is proportional to the level of the relevant statistics.[27] Furthermore, in the case of murder investigation, the dependent variable of interest is the rate of capital murder rather than the rate of criminal homicide, the actual measure utilized. Previous researchers have assumed that the capital murder rate and the total homicide rate are proportionally related.[28] It would be convenient at least, then, to use a logarithmic-linear specification which enables a direct estimation of elasticities. Moreover, similar considerations also apply to the observed probabilities of apprehension, conviction, and execution, each of which is based upon data relating to reported willful felonious homicides rather than the true level of capital murders. All these considerations suggest that the efficient functional form underlying the murder supply function is likely to be one that utilizes the logarithms of the dependent variable and the key independent variables. And indeed, "prior" information" accumulated through my past work on crime has led me to emphasize the logarithmic-linear regression format because of its observed relative efficiency.

Bowers and Pierce could have tested statistically for the optimal functional specification of the estimated supply-of-offenses function. In particular, they could have examined the efficiency of the logarithmic-linear specification relative to a specification that is linear in the natural values of all variables. In research now in progress, I have conducted statistical tests of optimal transformations based on a likelihood ratio method. As I plan to demonstrate, the conclusion emerging from these tests is that the logarithmic-linear format not only is decisively superior to the format using the natural values of the variables but that the former generally cannot be rejected as the optimal form within the class of single-parameter power transformations. Bowers and Pierce's demonstration that their regression results tend to deteriorate when running the regressions with natural numbers shows only that they evade the question of which of the two transformations is more appropriate. Hence they not only prefer testing the deterrence

26. Bowers & Pierce, *supra* note 1, at 199.

27. For an elaboration of this point, see Ehrlich, *Illegitimate Activities*, *supra* note 25, at Section IV, Note 1.

hypothesis for subperiods of sharply limited usefulness, but they also prefer an inferior regression format.

As I noted in my paper, the basic results from that study were found to be unaffected qualitatively by the choice of functional form. The regression equation I report below was performed with the antilogarithms (*i.e.*, the natural numbers) of the same set of variables used to derive the results reported in my published paper, and indicates that the qualitative deterrent effects of apprehension, conviction, and execution are not exclusively dependent on a specific functional form.[29] Although the specification in natural numbers appears to be clearly inefficient in view of prior information and other tests, time series regression estimates derived via that format in this equation nevertheless indicate the existence of the expected deterrent effects.[30]

V. Basic Statistical Errors in My Critics' Work

Part II of Bowers and Pierce's critique refers to "errors" in my analysis. The fact is that I have learned of no single error in either my theoretical analysis or the statistical methodology used to implement the theory. In contrast, the work by Bowers and Pierce is riddled with errors and demonstrations of misunderstanding of basic statistical principles. A few examples will illustrate.

A. The "R^2" statistic is essentially irrelevant in connection with a two-stage least squares regression analysis or the related three-round procedure used in my study. Yet, with no qualification whatever, Bowers and Pierce cite this statistic in conjunction with every estimated equation which they report.[31] More seriously, they use the "R^2" statistic as a basis for inference.

B. The "R^2" statistics, as well as standard errors of the regressions, computed for subsamples having different ending dates are relied on

29. $q^* = \underset{(3.806)}{.215} - \underset{(-3.771)}{.000891}\Delta^*P^*a - \underset{(-1.573)}{.000830}\Delta^*P^*a - \underset{(-3.021)}{.00385}\Delta^*PNO_a - \underset{(-2.170)}{.238}\Delta^*L$
$+ \underset{(2.128)}{.147}\Delta^*A + \underset{(5.501)}{.000115}\Delta^*Yp + \underset{(1.062)}{.000269}\Delta^*U - \underset{(-6.857)}{.00372}\Delta^*T.$

The estimated equation above pertains to the effective period 1935-1969. The murder rate is represented by q^*; the risks of apprehension, conviction, and execution are represented by P^*a, $P^*c|a$, and PNO_a, respectively; other symbols can be interpreted from Table 2 of my published paper, Ehrlich, *supra* note 16, at 109, and the numbers in parentheses denote ratios of estimated regression coefficients to their standard errors. The estimate for $\hat{\rho}$ is $-.419$. Not only is the direction of the effect of every variable the same as is found with the logarithmic linear specification, but the predicted ranking of the elasticities of the measures of the three deterrence variables also is observed.

30. J. Vanek, *supra* note 24, performs regressions with natural numbers only. His regression analysis also indicates the existence of a deterrent effect associated with the

by Bowers and Pierce to draw the startling inference that regression results are "more adequate and consistent for the periods with earlier ending dates."[32] Their lack of regard for, indeed their apparent lack of awareness of, the diminishing degrees of freedom associated with smaller and smaller subsamples is astonishing. Even if the regression analysis were based on the ordinary, or classical, least squares procedure, comparison of R^2 statistics and standard errors of the regressions across subsamples with successively smaller degrees of freedom would be improper: as Bowers and Pierce surely know, when the number of degrees of freedom is zero, the R^2 statistic necessarily is unity. It should be noted that the deletion of observations from the full set of observations led Bowers and Pierce to estimate regression equations in which the number of observations is as low as 22 while the number of parameters estimated in the reduced-form regression analysis is 19. They apparently fail to recognize that estimated regression coefficients based on successively smaller degrees of freedom become increasingly imprecise. In particular, estimates based upon so few degrees of freedom as those Bowers and Pierce stress are unlikely to be adequate for rejecting the hypothesis of no deterrent effects.[33]

C. At the end of their article, Bowers and Pierce report results from regressions in which they replace the conditional probability of execution—the theoretically relevant variable—with the absolute number of executions.[34] A finding of a positive association between homicide rates and the number of executions is cited as evidence of the "brutalizing" effects of capital punishment. Bowers and Pierce do not recognize, however, that the positive association may be expected on purely technical grounds. Where there are no homicides there can be no convictions or executions. In contrast, when murder rates rise, with arrest, conviction, and execution risks constant or rising, the number of convictions and executions also would rise. A positive (or zero) association between criminal homicides and the number of executions thus is hardly surprising. Indeed, more than 20 years ago this relationship was noted by Schuessler, who recognized that this correlation does not constitute a test of the deterrence hypothesis.[35]

32. Bowers & Pierce, *supra* note 1, at 190.

33. Unfortunately, on this point, as others, Baldus and Cole, *supra* note 2, at 180 & n.34, 181-85, uncritically accept the inferences drawn by Bowers and Pierce and other critics and, thus, implicitly commit the same errors. Without providing any valid grounds for their assertions, Baldus and Cole even more emphatically assert their judgment that the subperiod analysis provides estimates somehow superior to those obtained from the full sample.

For a definition of the term "degrees of freedom," see note 6 *supra*.

34. Bowers & Pierce, *supra* note 1, at 205 n.45; Bowers & Pierce, Deterrence, *supra* note 21, at 214 n.

35. Schuessler, *The Deterrent Influence of the Death Penalty*, 284 Annals 54 (1952),

D. Although I have focused in this discussion on errors contained in the Bowers and Pierce paper, I should point out that the Baldus and Cole paper also is seriously flawed. For example, Baldus and Cole criticize my study because "the second-stage regression does not hold fixed" the cluster of variables denoted as X_2 in Table 2 of my published work.[36] However, these variables serve in the role of "omitted exogenous variables" in the murder supply equation. The remark shows that Baldus and Cole do not understand the simultaneous equation estimation framework underlying my study. Exogenous variables such as those summarized under X_2 *must* not be held constant in estimating the structural murder supply function. If they were, the two-stage least squares procedure would become meaningless. Their effects, however, are integrated appropriately in the estimation procedure through their incorporation in the reduced form regression analysis. This error by Baldus and Cole betrays quite a fundamental misunderstanding of the methodology which they have undertaken to evaluate. Indeed, in their comparisons of my research with that of previous researchers, they do not note the prime benefit of utilizing the simultaneous equation framework—that it attempts to identify the direction of the causal relationship between the frequency of murder and the deterrence variables. The direction of that relationship is not self-evident. For example, in times of high murder rates, states may be more inclined to convict and execute offenders, or even reinstate the death penalty, than in times of low murder rates. The simple association between these variables thus may give the appearance that, for example, an increase in the risk of execution "leads" to an increase in the murder rate, even though the opposite is true. A simultaneous equation estimation framework is designed to identify causal relations and thus avoid potentially biased results.

VI. The Gap Between Evidence and Inference in Previous Research

Bowers and Pierce and, in greater detail, Baldus and Cole, rely heavily on previous research, especially that of Thorsten Sellin, as

as well as by Baldus and Cole, *supra* note 2, at 183 n.45, who also fail to recognize the technical association between homicide and execution rates. It might be noted that Schuessler, at 53-60, went on to attempt a test of the deterrence hypothesis by measuring the simple correlation coefficient between homicide rates and a measure of the risk of execution in 41 executing states over the period 1937-1949. Although he found the correlation coefficient to be −.526, indicating that the murder rate falls as execution risk rises, and although this negative association turns out to be significant statistically at the five percent level for a one-tail test, neither Bowers and Pierce nor Baldus and Cole mention this result.

[illegible] *supra* note *, at 182 n.41.

evidence against the deterrence hypothesis.[37] In this section I shall briefly comment on the research by Sellin and others concerning the deterrence hypothesis.

The principal shortcoming of Sellin's research and related work is that the approach taken and the methods applied do not permit a systematic test of the main implications of the general theory of deterrence, a theory which posits that potential offenders respond to incentives. The shortcoming is basic because the implications following from the *general* deterrence hypothesis are what Sellin was attempting to challenge empirically.[38] Yet his work neither develops nor tests the full range of implications following from the theory that he attempts to reject; nor is a competing theory developed and tested. In addition to implying that punishments in general, and executions in particular, may deter crime, the general deterrence hypothesis provides the testable expectation that punishments imposed only with relative infrequency will have less impact than those imposed with a high degree of certainty. The theory of deterrence predicts not only the direction of effects of, for example, equal percentage changes in the relevant apprehension, conviction, and execution risks, but also the relative order of magnitude of these effects. Although the basic premise of these and other testable implications is that, on balance, potential offenders respond to incentives, Sellin never devised an analytical framework for rejecting this general hypothesis. More significantly, to my knowledge Sellin never reported any parametric or nonparametric statistical tests that could justify his rather strong conclusions. In all, there exists a considerable gap between the limitedly useful evidence provided by Sellin and others following his methodology, and the rather emphatic inferences drawn.

Two examples may illustrate this conclusion. Sellin has compared homicide rates in "abolitionist" and "retentionist" states, as defined by the legal status of the death penalty. But Sellin never accounts for the extent of the actual enforcement of the penalty in retentionist states. Yet by his own analysis, the suggested relevant variable is the risk of execution, not merely its legal status, for "were [the death penalty] present in the law alone it would be completely robbed of its threat."[39] The point is far from being subtle. In a number of "retentionist" states whose homicide rates are compared to neighboring abolitionist states, the execution risk was negligible throughout the entire period investigated by Sellin. For example, in Vermont, New Hampshire, South Dakota, and Nebraska, the death penalty was imposed only rarely after 1920; Massachusetts had no executions after 1917. Not surprisingly, with no allowance for actual execution risks, Sellin's simple graphical comparisons of homicide rates across different states do not *appear*[40] to uncover considerable differences. But could such observations justify his inference: "The conclusion is inevitable that the presence of the death penalty—in law or practice—does not influence homicide death rates?"[41]

This deficiency is even more glaring in tests attempted by Bowers in another work to determine the effect of the moratorium on executions in the United States.[42] Following Sellin's methodology, Bowers compares the levels of murder rates in nine arbitrarily chosen mixes of neighboring states in the four years preceding and subsequent to the judicial moratorium. He reports similar patterns in most groups. However, the plain fact is that *none* of the states in eight of the nine groups had a single execution throughout the period. And in the ninth group, Bowers creates a dubious distinction between New York, classified as abolitionist, and New Jersey and Pennsylvania, classified as retentionist, although New York ceased all executions in 1963—the same year as New Jersey and one year after Pennsylvania. That such comparisons are used as a basis for inference about the deterrent effect of capital punishment taxes one's imagination.

A second general shortcoming characterizing previous research on this issue by Sellin and others is the absence of any systematic standardization of data so that the effect of execution risk can be isolated from the effects of other factors that not only may influence the murder rate but also are expected to be systematically related to the risk of execution. Clearly aware of the general problem, Sellin has emphasized the need to compare states that are "as alike as possible."[43] However, his assumption that neighboring states satisfy this prerequisite is unacceptable. Pairs of neighboring abolitionist and retentionist states, such as Illinois and Wisconsin, Michigan and Indiana, or Massachusetts and Rhode Island, differ in their economic and demographic characteristics, in their crime rates and law enforcement activity, and presumably also in their medical services available to

37. Baldus & Cole, *supra* note 2, *passim*; Bowers & Pierce, Deterrence, *supra* note 21, at [illegible] n.6, 19 n.21.

38. See, e.g., Sellin, *Capital Punishment*, 25 Fed. Probation 3, 4 (1961).

[illegible] at 70.

40. As indicated above, Sellin's observations are not supported by statistical inference tests.

41. Sellin, *Executions in the United States*, in Capital Punishment 138 (T. Sellin ed. 1967).

42. W. Bowers, Executions in America 137-63 (1974). Baldus & Cole, *supra* note 2, at 170 n.1, cite this work by Bowers as corroboration of Sellin's finding.

victims of aggravated assaults.[44] In addition, as my analysis has shown,[45] variation in the legal status of the death penalty occasionally may be a result, rather than a cause, of changes in murder rates and thus may give rise to an apparent positive association between the two variables. For these reasons, the true effect of the death penalty on the murder rate cannot readily be inferred from simple comparisons of the sort performed by Sellin and others.

VII. The Proper Measurement of the Restraining Effect of Capital Punishment

My critics allude to my having inappropriately or incompletely estimated the deterrent effect of capital punishment because I neglected the interdependencies among apprehension, conviction, and execution risks.[46] The fact is that I have stressed and integrated these interdependencies both in my theoretical analysis and in the empirical investigation.[47] Both pairs of authors suggest that the only proper means of estimating the deterrent effect of the death penalty is by allowing apprehension and conviction risks to "vary" with execution risk rather than by holding them "constant," thereby estimating the "total" effect of the penalty. In fact, I have treated empirically both the "partial" effect of execution risk—by controlling for the apprehension and conviction risks—and the observed "total" effect—by estimating the effect of execution risk through a reduced form regression analysis controlling only for exogenous and predetermined variables. The former procedure is without question the only proper way of verifying

44. The performance analysis of Baldus and Cole, *supra* note 2, at 177 n.30, on this point shows little appreciation of the issues involved. At Table 111 their list of data purportedly for one year is a mix of data drawn from two different years (1960 and 1980). Yet the issue on which they are leveling evidence is the extent to which Sellin "controlled for other factors" in each and every year of the 40-odd years considered in his studies. There still exists substantial variation in the variables Baldus and Cole compare within the five groupings of states they consider. They have not presented data for the sixth grouping considered by Sellin. The data sources they cite for the construction of their permanent income measures for the states are not capable of generating such statewide measures. Their inferences about the impact of specific variables on the murder rate in each state are not based on any systematic analysis. In three of their five cases, a retentionist state has the lowest homicide rate within a particular grouping—a fact they choose not to mention. By Baldus and Cole's analysis this fact might be viewed as evidence for deterrence. I am not suggesting, however, that such inference can be justified given the fragmentary nature of the analysis. More generally, I question the logical basis for preferring a statistical method that provides only indirect and incomplete control for specific variables expected to have an impact on the crime rate over a regression analysis attempting to control these variables directly.

45. Ehrlich, *supra* note 16, at 406.

46. *Id.*; *supra* note 21, at 6 n.9; Baldus & Cole, *supra* note

the hypothesized deterrent effect of execution risk, for the theory predicts that an increase in the conditional risk of execution at *given* levels of apprehension and conviction risks would have a deterrent effect on the incentive to commit murder. For the quite distinct purpose of evaluating the overall desirability of capital punishment as an instrument of policy, both estimation procedures, in principle, can provide useful guidance. Indeed, both are reported in my study. Although the "total" effects associated with a few measures of execution risk appear somewhat smaller than their estimated "partial" effects, the quantitative differences are generally small.

It should be pointed out, in this connection, that my critics misconstrue the theoretical predictions relating to the "total" deterrent impact of the risk of execution. While unwarranted movements in execution risk are expected to induce opposite movements in apprehension and conviction risks, the magnitudes of the resulting effects will not necessarily offset the effect of the initial change in execution risk. Moreover, the theory implies that no such compensatory movements[48] are expected when the initial shift in execution is viewed as *warranted*. For example, if there were universal agreement that reinstatement of capital punishment under specific conditions were socially optimal, then there is no compelling reason to expect that juries would be less inclined to convict offenders charged with capital crimes. Levels of apprehension and conviction risks could also be maintained through an appropriate allocation of resources to specific law enforcement activities. Thus estimates of "partial" effects of execution risk, as well as of apprehension and conviction risks, provide useful information from a policy viewpoint.

Concluding Remarks

The basic issue underlying my theoretical and empirical investigation of murder has not been merely the deterrent efficacy of the death penalty but the more general issue of offenders' responsiveness to incentives. My time series analysis of the trend of murder in the United

48. In reference to these possible compensatory changes in apprehension and conviction risks, both Bowers & Pierce, Deterrence, *supra* note 21, at 6 n.9, and Baldus & Cole, *supra* note 2, at 182 n.42, cite an exercise in an unpublished paper by P. Passell & J. Taylor, 'The Deterrent Effect of Capital Punishment: Another View,' Feb. 1975 (Discussion Paper No. 74-7509, Columbia Univ. Dep't of Economics) (on file with *Yale Law Journal*), as evidence that the "total" effect of execution risk on the murder rate is likely to be positive. Ironically, neither pair of authors apparently understands the exercise by Passell and Taylor which has nothing to do with the "compensatory" changes discussed above. In fact, I believe that the exercise by Passell and Taylor is internally inconsistent and irrelevant, but since their paper has not been published yet I

states should not be evaluated as an isolated experiment but rather is part of the more general research into offenders' behavior. Viewed in this more general context, the new research by myself and other social scientists in recent years has lent considerable support to the proposition that, in the aggregate, potential offenders respond to both negative and positive incentives. The growing body of new research by economists and sociologists has indicated the existence of deterrent effects of severity and certainty of punishment as well as other systematic regularities attributable to the effects of incentives.[49] These conclusions have been demonstrated in studies using data from different times and different places. My research on the deterrence effect of capital punishment has produced results compatible with this new evidence.

The bulk of my critics' analyses challenges neither the theoretical formulation of the deterrence hypothesis nor the statistical techniques used in the theory's empirical implementation. Neither Bowers and Pierce nor Baldus and Cole[50] present valid tests that reject the deterrence hypothesis. I hope that their work does not baffle the lawyer pondering the merits of using an economic approach to law or of using statistical techniques to study legal questions. The statistical methodology is quite useful and relevant when appropriately applied. Contrary to the inferences of Bowers and Pierce, their study does not present statistically meaningful evidence that the risk of execution has no deterrent effect, let alone that it has a "brutalizing" effect, on the frequency of murder in the population.

In this reply, I have elaborated upon some aspects of my research which, because of space limitations, have not been fully discussed in my published paper on the death penalty. Needless to say, my discussion here is not a substitute for the published paper. The paper discusses the analytical framework underlying the general deterrence hypothesis, which is the main issue of concern in my research. It also elaborates upon the methodology needed for meaningful tests of that hypothesis. The paper also stresses the limitations of the empirical investigation and the tentative nature of the findings. Indeed, as I stated, conclusions based on studies of historical data necessarily are qualified in view of the difficulties of measuring efficient empirical counterparts of relevant theoretical constructs and in view of intrinsic limitations of statistical inference. However, data imperfections are likely to work *against*, not in favor of, the theorized deterrent effect of punishment and the effects of incentives in general. It is thus remarkable that the evidence of my time series analysis and additional research repeatedly has proven not inconsistent with rather sharp predictions emanating from the deterrence hypothesis. I have not claimed, however, that my research settles the issue of the deterrent effect of capital punishment. Nor have I advocated the use of capital punishment. As I stressed in my paper, the issue of deterrence is but one of a myriad of issues relating to the efficiency and desirability of capital punishment as a social instrument for combatting crime. The study of the deterrent effect of capital punishment is of considerable independent importance in connection with the hypothesis that potential offenders on the whole respond to incentives. Research on this issue undoubtedly will benefit in the long run from legitimate attempts to use more efficient data and statistical techniques than those heretofore employed in studies of capital punishment.

19. *See, e.g.*, B. Peltzman, The Economics of Delinquency (1966); The Economics of Crime and Punishment (S. Rottenberg ed. 1973); A. Smigel-Leibowitz, Does Crime Pay? An Economic Analysis, 1965 (unpublished M.A. thesis; Columbia Univ.); W. Vandaele, *supra* note 17; J. Vanker, *supra* note 21; Carr-Hill & Stern, *An Econometric Model of the Supply and Control of Recorded Offenses in England and Wales*, 2 J. Pub. Econ. 289 (1973); Gibbs, *Crime, Punishment, and Deterrence*, 48 S. Soc. Sci. Q. 515 (1968); Maxwell, Phillips & Votey, *Crime, Youth, and the Labor Market*, 80 J. Pol. Econ. 491 (1972); Tittle, *Crime Rates and Legal Sanctions*, 16 Soc. Probs. 409 (1972). *See also* Ehrlich, *Illegitimate Activities*, *supra* note 25, and references therein. The preceding is only a partial list of relevant studies in this area.

50. Baldus and Cole do not present evidence of their own. They rely mainly upon Sellin's work as evidence, which I discuss briefly at pp. 221-21 *supra*. Their discussion in Section IV merely repeats other authors' inferences and judgments concerning [illegible] which may prove to be unjustified or premature. It is beyond

to organizations which, unlike the typical business corporation, do not seek profit.

In these pages we have distinguished between public service organizations—institutions which channel the largesse of some ... in the interest of others—and mutual benefit organizations, w... in purpose is to allow individuals to pool their income in order ... spend it more efficiently. Public service organizations do not produce income which can easily be assimilated to the "profit" produced by a business for the benefit of investors. Even if this inherent unsuitability of an income tax were disregarded by imposing an arbitrary concept of "income" on their financial activities, the burden of the tax would not reflect the ability to pay of the individual beneficiaries.

The activities of mutual benefit organizations that consist simply in the members' doing together what they could do separately without income tax consequences (such as buying food or operating social facilities) are not fit objects of taxation. But such organizations may also do business with nonmembers or invest in assets which produce income inuring to the benefit of their members. There is no reason to permit income of these types, which would be neither excludable nor deductible from taxable income in the hands of an individual, to escape taxation when acquired under the umbrella of an organization. Frequently, however, the investment income of mutual benefit organizations would not be taxed if it were imputed to (or realized in the first instance by) the group's members, because it is used to defray expenses which the individuals would be entitled to deduct. One example is the investment income of a labor union, used to pay expenses serving the occupational interests of its members; another is a trade association's investment income, used for business expenses or to reduce the members' dues and assessments. In both cases, if the investment income were imputed to (or realized by) the members, they would be entitled to offsetting deductions under § 162. This is why to tax such income would be in effect to penalize taxpayers for doing together what they could do separately without being taxed. In sum, mutual benefit organizations should be taxed only to the extent of their investment income if such income would not be immune from tax in the hands of their members, or to the extent they do business with nonmembers in a way that produces something akin to "profit."

Comments

The Deterrent Effect of Capital Punishment: Ehrlich and His Critics

Jon K. Peck†

Editors' Introduction

In the December issue, the *Journal* published a statistical debate on the deterrent effect of capital punishment between Professor Isaac Ehrlich and two sets of critics, Messrs. Baldus and Cole and Bowers and Pierce. Professor Ehrlich's original study of capital punishment, published last spring in the *American Economic Review*, used sophisticated statistical techniques to arrive at conclusions very different from earlier research in the field.[a] Using regression analysis and economic theory, Ehrlich formulated and tested a model of the determinants of the murder rate, and found a significant deterrent effect associated with the use of the death penalty in the United States over the period from 1935 to 1969. The earlier research of Thorsten Sellin and others had consistently found no evidence of a deterrent effect. The issue of deterrence—in particular the technical merits of the Ehrlich study—has been raised in cases pending before the Supreme Court challenging the constitutionality of capital punishment.[b]

In their critiques in the previous issue of the *Journal*, Baldus and Cole argue that Ehrlich's approach is less appropriate for testing the deterrent effect of capital punishment than are the less complex techniques used in

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a. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 Am. Econ. Rev. 397 (1975).

b. *See* Editors' Introduction, *Statistical Evidence on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 164 69 (1975). Fowler v. North Carolina, *cert. granted*, 419 U.S. 963 (1974), *argued*, 43 U.S.L.W. 3582 (U.S. Apr. 21, 1975), *restored for reargument*, 422 U.S. 1049 (1975), which involves Eighth and Fourteenth Amendment challenges to capital punishment imposed under a mandatory sentencing procedure, was argued last spring and will be set for reargument this Term. The Court has not yet scheduled the reargument in *Fowler*, but it recently granted certiorari in five other death penalty cases and scheduled them for argument on March 30. 44 U.S.L.W. 3439 (U.S. Jan. 22, 1976): Proffitt v. State, 315 So. 2d 461 (Fla. 1975), *cert. granted sub nom.* Proffitt v. Florida; Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), *cert. granted sub nom.* Gregg v. Georgia; State v. Roberts, 319 So. 2d 317 (La. 1975), *cert. granted sub nom.* Roberts v. Louisiana; State v. Woodson, 215 S.E.2d 607 (N.C. 1975), *cert. granted sub nom.* Woodson v. North Carolina; Jurek v. State, 522 S.W.2d 931 (Tex. Crim. App. 1975), *cert. granted sub nom.* ... For a discussion of the facts of each of these cases, see N.Y. Times, Jan.

earlier research;[c] Bowers and Pierce adopt Ehrlich's approach but argue that no evidence of a deterrent effect is found when his method is correctly applied.[d] Ehrlich's reply defends the findings of his original study and attacks the analysis of his critics.[e] In this issue, Professor Peck comments on the debate between Ehrlich and his critics, and Professor Ehrlich adds a brief Rejoinder.

In his study of the deterrent effect of capital punishment, Professor Ehrlich estimated a sophisticated econometric model of a type common in more traditional areas of economic analysis.[f] As in any empirical analysis, his econometric specification and choice of data require assumptions beyond those which may be derived from his theoretical analysis. These assumptions concern the functional form of the relationship between the murder rate and its determinants, the form of the remaining but unestimated equations in the overall model of the supply and (negative) demand for murder, the nature of the random disturbance term, the stability of the coefficients over time, the accuracy and appropriateness of the data, and the consequences of aggregating the behavior of individuals to the national level. The correctness of many of these assumptions depends on the correctness of others in this list. Ehrlich's assumptions have been challenged by Bowers and Pierce and by Baldus and Cole in articles in the previous issue of this *Journal*. In this Comment, I will discuss some of their criticisms of Ehrlich's analysis, suggest ways of resolving these disagreements, and point out some weaknesses of the paired-state or matching method—the approach which Baldus and Cole prefer to Ehrlich's regression technique. In addition, I will address briefly Ehrlich's reply to the two critiques of his work.[g]

I. Ehrlich's Critics

Both critiques address the issue of the proper functional form of the relationship between the murder rate and its determinants. It is claimed that evidence of a deterrent effect is found with the logarithmic form but not with the linear form, and that therefore Ehrlich's results depend critically on his choice of functional form.[h]

It is quite true that the incorrect use of a logarithmic form can cause the relatively small values for execution risk in the recent years in Ehrlich's sample to appear to be statistical aberrations which strongly influence the regression line. While the critiques point out the difficulty with using a logarithmic form for values of execution risk approaching zero,[i] there are also problems with using the linear form for these values.[j] The theoretical analysis is not much help in choosing the correct functional form, but the data are. Statistical tests applied to the data can determine the best form over a range of possibilities which includes both the linear and logarithmic forms.[k] Of course neither form is likely to be exactly right, but only an approximately correct shape for the function is needed.

The related question of whether the same model adequately covers both the earlier and later sample periods—whether there is a structural change in the underlying relationship over time—is also a testable proposition. Bowers and Pierce find that the sign of the estimated elasticity of the homicide rate with respect to execution risk changes when the most recent years are dropped from Ehrlich's time series. They reject the possibility that the effect of the death penalty changed in recent years and conclude that the negative association between execution risk and the homicide rate is merely a statistical artifact.[l] But neither Ehrlich nor these critics have rigorously tested for structural change over the sample period. One such test recently reported found evidence of a significant structural shift between the periods 1948-1962 and 1963-1969.[m] In other words, in the recent subperiod the murder rate may be determined by different factors or may be determined by the same factors in a different way. However, the evidence of what appears to be structural change may also be the result of an incorrect specification of the model for the entire time period.

c. Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975).

d. Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975).

e. Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975) [hereinafter cited as *Ehrlich Reply*].

f. An econometric model consists of equations derived from economic theory [illegible] using regression analysis. *See* Editors' Introduction, *supra* [illegible].

g. Baldus & Cole, *supra* note c, at 181; Bowers & Pierce, *supra* note d, at 199-200.

h. *See* Baldus & Cole, *supra* note c, at 175 & n.22; Bowers & Pierce, *supra* note d, at 201-02. For a general discussion of this problem, see Young & Young, *Estimation of Regression Involving Logarithmic Transformations of Zero Values in the Dependent Variable*, 29 AM. STATISTICIAN 118-20 (1975).

i. The linear form uses the natural values of all variables, including execution risk, which can never be less than zero. When execution risk approaches zero, the disturbance term cannot assume large negative values. This constraint causes the estimated regression equations to have a systematic error. *See* H. THEIL, PRINCIPLES OF ECONOMETRICS 628-32 (1971).

j. *See* Box & Cox, *An Analysis of Transformations*, 26 J. ROYAL STAT. SOC'Y 211-52 (1964).

k. Bowers & Pierce, *supra* note d, at 200.

l. P. Passell & J. Taylor, The Deterrent Effect of Capital Punishment: Another View, [illegible] Columbia Univ. Dep't of Economics (on file

2. Bowers and Pierce stress the inaccuracy in Ehrlich's crime data for the early years in his sample.[9] The seriousness of this problem is impossible to judge. However, the FBI procedure—retroactively readjusting the early data based on analysis of the effects of later increases in the coverage of the reporting network—is similar to the accepted Census Bureau method of adjusting economic time series data for the effects of seasonal variation by using adjustment factors computed in part from later data. The time series generated by the FBI procedure may be amenable to regression analysis.

The inaccuracy of the data is compounded by the inability of Bowers and Pierce to replicate Ehrlich's estimates.[10] I do not know who is correct, but the differences seem too large to attribute to small differences in the definition of the variables or to correlations among the explanatory variables.[11] Ehrlich is clearly right in suggesting that the large differences in the estimates of the serial correlation coefficient reported by him and by Bowers and Pierce raise the question of error in the computation of this and other more important coefficients.[12] Good standards of documentation require that authors spell out exactly their computational procedures and identify the computer programs used.[13]

3. As Baldus and Cole emphasize, the level of aggregation of the analysis has an important effect on the validity of the conclusions.[14] If there are substantial state or regional variations in behavior, and if arrest and punishment for homicide primarily involve the behavior of individuals and states, then estimation of the model ought to be done at the level of the state or, better, the individual. Nothing in Ehrlich's general approach precludes an application of his model to more disaggregated data.[15] However, aggregate analysis is frequently performed in conventional economic problems with reasonable effectiveness. Such an analysis will be free of a statistical bias if the additional variables which ought to be included at the disaggregate (*e.g.*, state) level of analysis are unrelated to the explanatory variables at the aggregate level. However, the omissions will reduce the ability of the aggregate model to predict the murder rate.

4. The most basic point raised by Ehrlich's critics is the challenge by Baldus and Cole to his use of economic theory and regression analysis rather than experimentally based statistical procedures. The above enumeration of the problems with Ehrlich's analysis might suggest that an econometric approach to this problem is hopeless and that the paired-state comparisons endorsed by Baldus and Cole should prevail.[16] But there are also difficulties with the latter approach, especially in a situation in which some relevant variables cannot be controlled or even measured.

Ehrlich begins with a careful economic analysis of the determinants of murder. Many researchers, including some economists, might object that his theory applies at best only to a small subset of homicides and that he has failed to identify and take into account some important causal factors. To the extent that these variables can be specified and measured, they can be tested and controlled for; to the extent they cannot be so identified, one must assume they are not related to the other explanatory variables. If this assumption is false, Ehrlich's results are biased. For some of the variables, such as the urban migration rate, which Baldus and Cole suggested should be included,[17] the assumption seems plausible; for others, such as the level of crimes against property, the assumption seems implausible.

Any analysis must proceed conditionally on the specification of the model. Ehrlich's econometric approach involves many assumptions, some of which are testable; if these assumptions are true or nearly true,[18] his method is able to use them to detect effects which might be too small to detect in a less fully specified model. No one claims that the deterrent effect of capital punishment is large, and it is consequently very important to bring the data to bear on the question as efficiently as possible. Ehrlich imposes a theoretical framework on his empirical analysis and necessarily makes more assumptions than are required in the paired comparison analysis. If these assumptions

9. Bowers & Pierce, *supra* note d, at 187-92.

10. *Compare id.* at 195 n.19 (Table III) *with* Ehrlich, *supra* note a, at 410 (Table 1), *see Ehrlich Reply*, *supra* note e, at 210-11.

11. For an explanation of why this problem—known as multicollinearity—may lead to large differences in estimated coefficients with small differences in the data sample, see R. Wonnacott & T. Wonnacott, Econometrics 59-63 (1970).

12. *Ehrlich Reply*, *supra* note e, at 211. The serial correlation coefficient measures the correlation between successive values of the disturbance term. If there are computational errors in the calculation of this coefficient, there will also be errors in the computed elasticities for the explanatory variables.

13. In his reply, Ehrlich does identify the computational procedures he used, and they appear to be reliable. *Id.* at 211 n.7.

14. Baldus & Cole, *supra* note c, at 175-77.

15. Ehrlich asserts that his new unpublished research using statewide data supports the findings of his original study. *Ehrlich Reply*, *supra* note e, at 217. Since I have not seen this work, I cannot comment on it. However, a recently published study based on a theoretical model similar to Ehrlich's found no evidence [illegible]. *Deterrent Effect of the Death Penalty: A Statistical Te[illegible]*

16. The paired state or matching method compares homicide rates in neighboring abolitionist and retentionist jurisdictions which are as alike as possible with respect to influences on the homicide rate. See Baldus & Cole, *supra* note c, at 171-72, 177.

17. *Id.* at 180.

18. *See, e.g.*, Fisher, *On The Cost of Approximate Specification in Simultaneous*

are wrong, his conclusions are wholly or partially invalid. But many of these assumptions are testable.[19]

The matching approach has its own set of difficulties. It imposes relatively little explicit structure on the problem and is perhaps less likely than the econometric approach to find effects which are weak. The fundamental problem, however, is that the data are not generated in a controlled experiment. In making matched pairwise comparisons, the choice of pairs is inevitably subjective. To ensure that states are matched on all relevant variables requires a theory just as detailed as in an econometric analysis. In a classical experimental procedure, the control states and treatment levels are assigned randomly to observations to ensure that the effects of omitted variables are not systematic. This is obviously impossible in a "social experiment" where the death penalty is the treatment variable. Even if states are correctly matched in terms of the averages of all relevant variables, other differences may be important. For example, of two states with the same average permanent income, one may have a much greater proportion of low income families than the other. If low income families were disproportionately responsible for homicides, the pairing of the two would be inappropriate.

Another difficulty is the problem of spillovers between states. If state *A* has and uses the death penalty and its paired state *B* does not, it is possible that potential murderers would migrate to state *B* to avoid the death penalty and would thereby cause state *B* to have a higher homicide rate. One could not extrapolate from this comparison to a situation where all states or no states used the death penalty, since in that situation no one could avoid the penalty by migrating to an abolitionist state. Put another way, a murderer might be determined to commit the crime, regardless of the penalty, but might choose to commit it in the state where the consequences are less costly to him. The results of this behavior would give the appearance of a deterrent effect when none is present.

A final difficulty is the possible response of punishment policies to homicide rates. For example, if high or rising homicide rates led states to institute the death penalty and low or declining rates led states to abolish the penalty, retentionist states would tend to have higher homicide rates. This relationship could cancel out a possible negative correlation which would be produced if the penalty were in fact a deterrent. The paired-comparison approach cannot adequately

19. The argument for assuming the validity of certain basis (and statistically assessable) covariate procedures in order to test more specific hypotheses is summarized in

separate these effects, and consequently could fail to yield evidence of an underlying deterrent relationship. On the other hand, the particular regression procedure used by Ehrlich specifically takes account of the possible response of punishment variables to the murder rate.[20]

Any properly executed statistical analysis must include careful diagnostic checking of the model and consideration of alternative models which might also be consistent with the data. When using aggregate time series data, a number of different specifications are usually in general accord with the evidence. Thus the choice among competing models must be based on underlying theoretical analysis and on such empirical clues as particular data points which do not fit the model, correlations among explanatory variables, and stability of the important results under alterations in untestable and weakly maintained assumptions. For the reader to understand and evaluate the author's conclusions, some summary statement of the author's examination of this evidence is vital.[21] Any sound regression analysis must provide such a statement. Diagnostic procedures may be less necessary for a paired-comparison analysis, which requires fewer assumptions, but the diagnostics should include, for example, an investigation of the sensitivity of the findings to the choice of pairings.

II. Ehrlich's Reply

1. In his original article, Ehrlich emphasized as support for his analysis that the ranking in order of magnitude of the estimated effects of his three deterrence variables conforms to his theoretical predictions.[22] In his reply, he emphasizes that Bowers and Pierce, in attempting to replicate his results, obtained the same ranking for these estimates.[23] However, he does not show that this ranking would be inconsistent with other theories of the relationship between capital punishment and the murder rate. In the absence of such a demonstration, this evidence does not provide the strong support he claims.

20. In a regression equation in which the dependent variable (here the murder rate) exerts a causal influence on an explanatory variable (here the fraction of those convicted of murder who are executed), the equation must be estimated as if embedded in a larger model which simultaneously determines both variables. Ehrlich used a procedure appropriate for simultaneous equation estimation. *See* Ehrlich, *supra* note 3, at 406; *Ehrlich Reply*, *supra* note 6, at 319 (use of three round regression procedure related to two stage least squares).

21. In his reply, Ehrlich states that the results of diagnostic tests performed in the course of his research now in progress show that the logarithmic form is optimal for estimating his equation. *Ehrlich Reply*, *supra* note 6, at 208 (likelihood ratio tests for optimal functional form within the class of single parameter power transformations).

22. Ehrlich, *supra* note 3, at 411–416

2. Ehrlich argues that the presence of errors of measurement in a variable can only weaken the variable's estimated effect and hence that improvements in the data could only strengthen his conclusions.[24] Economists are nearly always forced to use imperfect data and yet have drawn many strong empirical conclusions from them. But only the most harmless sorts of measurement error unambiguously reduce the estimated effects of a variable. If measurement errors in a variable are correlated with each other over time or are systematically related to other variables in the analysis, reducing the measurement errors will not necessarily strengthen the estimated effect. For example, when crime rates are high, the police may feel increased pressure simply to arrest someone for a crime even if that person is subsequently released. In Ehrlich's model the probability of arrest of the murderer, which is measured by the percent of murders cleared by an arrest, would then contain a measurement error correlated with the homicide rate. Because of the possibility of nonrandom measurement errors, Ehrlich should not assume that the true effects of execution risk and the other deterrence variables are systematically larger than the estimated effects.

3. Ehrlich argues that Bowers and Pierce have selectively deleted observations in order to distort his empirical findings.[25] However, examining subsets of the data to see if they are mutually consistent is an important part of validating a regression analysis. It is particularly important to examine the recent data, which in Ehrlich's analysis are most affected by the logarithmic transformation and which are in any event most relevant for policy analysis. Ehrlich correctly points out that estimation from a subset will be inefficient because of the reduced variability in the sample,[26] but he overlooks the purpose for estimating over subperiods—checking the specification of the model. When he analogizes the subperiod estimations performed by Bowers and Pierce to the selective deletion of observations in a regression analysis of the relationship between corn prices and quantities of corn demanded, he misses the point. In the terms of his example, Bowers and Pierce are asking whether the nature of the demand for corn has changed since the explosion in food prices of a few years ago; they are not trying to reverse the slope of the regression line by eliminating particular data points that give the line a negative slope.

4. Ehrlich defends his use of the logarithmic form for estimating his equation, but he does not address the problem of how to treat very small or zero values in the variables, a problem which is central to the criticisms made by Bowers and Pierce.[27]

5. Ehrlich attacks the conclusion of Bowers and Pierce that the regression results are better for samples which omit the data from the 1960's.[28] While he correctly identifies statistical errors in their discussion, their basic finding—that whether the estimated effect of execution risk on the murder rate is positive or negative depends on the ending point of the sample period—casts doubt on the stability of Ehrlich's results.

None of the studies considered here can be said to have resolved the question whether the death penalty deters murder. The regression approach can be improved by better specification, better diagnostic testing and disaggregation. The analysis should consider time series data on states in ways that to some extent bring it closer to the paired-comparison method. Thus a resolution and synthesis of these approaches may be possible. Ehrlich concludes in his reply that no statistically meaningful evidence has been presented against his analysis and that his analytical framework withstands the criticisms raised against it. Without denying the usefulness of his approach, which appears to me potentially fruitful, I believe that his particular finding of a deterrent effect rests on as yet inadequately tested assumptions and on an incompletely validated model. I shall await with considerable interest his further contributions on the questions raised in this debate without, for the moment, concluding that he has established a statistically significant deterrent effect.

Finally, I would like to note that according to Ehrlich's equations, a one percent change in per capita income or labor force participation has a much greater effect on the homicide rate than does a one percent increase in the use of capital punishment.[29] Even if the deterrent effect of capital punishment were of statistical significance, it may be so small relative to other influences on the murder rate that it is of little practical significance.

24. *Id.* at 213, 227.

25. *Id.* at 209, 211-17.

26. [illegible] should also be noted that there are alternative estimation pro-

27. *See* p. 361 *supra*. Ehrlich also asserts that using the natural rather than logarithmic values of the variables yields evidence of a deterrent effect. As independent support for this conclusion, he cites an unpublished paper by J. Yunker, The Deterrent Effect of Capital Punishment: Comment, Oct. 1975 (unpublished manuscript, on file with *Yale Law Journal*). I believe Ehrlich would reject the analysis in that paper on grounds similar to his criticism of Sellin's work. Further, Yunker's conclusion that "the real [deterrent] effect is at least five times the size of the effect estimated by Professor Ehrlich" is unmitigated conjecture. *Id.* at 17. The paper also appears to contain technical errors.

28. *Ehrlich Reply*, *supra* note c, at 219-20.

29. *See* Ehrlich, *supra* note a, at 402-10 (Tables 2 & 3) (elasticities for labor force participation and per capita income substantially larger than for conditional probability of execution).

Rejoinder

Isaac Ehrlich†

I appreciate Professor Peck's undertaking to comment on my reply, published in the last issue of this *Journal*, to critics of my work on murder and capital punishment. I wish to address briefly only a few of his remarks.

Peck suggests that the results of my regression analysis concerning the ranking of estimated elasticities of the murder rate with respect to measures of apprehension, conviction, and execution risk could be consistent with alternative theories of crime. In principle, such a possibility never can be denied. I believe his criticism would have been more constructive had he identified what specific theories he has in mind. Unfortunately, he errs in stating that I have not examined this possibility myself. In my own study, I have addressed the issue of whether a theory of crime based upon incapacitating effects of punishment could produce the same ranking of elasticities observed in the study.[1]

I believe that Peck mistakenly ascribes to me an argument that I have not advanced. I have not argued that "errors of measurement" can *only* work against the hypothesized deterrent effect. My reference to the classical case of "errors of measurement" has been quite specific. Curiously, contrary to his own argument, Peck's example in which errors of measurement in apprehension risk are *positively* correlated with the murder rate[2] does, of course, further illustrate why "errors of measurement" are likely to work against the hypothesized deterrent effect of apprehension. My basic point has been that if the variables used in the empirical analysis grossly misrepresent the theoretical variables that they purport to measure, then there is no reason to expect findings consistent with the detailed theoretical predictions.

I am glad Peck agrees with my criticism of statistical errors committed by my critics in their inferences from regression analyses of

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1. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397, 413 11 (1975).

2. Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359, 366.

subperiods of the full sample.[3] I do not agree with him, however, that my critics' work has addressed the issue of the stability of the regression equation, since they report no tests of stability. Nor do any of the works cited by Peck provide valid tests of stability. While I could not address this technical issue directly in my reply, I did indicate what I believe are the basic reasons for the apparent weak results obtained from analysis of certain specific subperiods.

Many difficulties in research on criminal behavior should rightfully occupy the thoughts of interested scholars, and skepticism is the essence of scholarly work. I am grateful to the editors of the *Yale Law Journal* for allowing me to express my skepticism on some aspects of the work that has been conducted in this area and to elaborate upon my own research.

3 *Id.* at 367.

It may also be of some interest to note that the test of optimal transformations in connection with the form of the regression equation the Box and Cox procedure - - - Peck suggests as the way of determining the efficiency of the logarithmic-linear form is the same one to which I have already referred in my reply. *Compare id.* at 367 n.6 *with* Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209, 218 (1975). Peck does not recognize, however, that the problem of treating zero values of variables can be overcome through an appropriate transformation.

V. Conclusion

This Article concludes this four-part series on oligopolistic pricing. As has been demonstrated, contrived oligopolistic pricing suits will create many allocative and distributional benefits, particularly when they are brought in industries in which D/QV and P/MC are higher than average. Therefore, I have no doubt about the desirability of prosecuting oligopolistic pricing under the Sherman Act whenever it can be proved that explicit anticompetitive threats or promises have been communicated. In fact, although any final conclusion about this issue must await further evidence about the cost of proving illegal oligopolistic pricing whenever verbal threats or promises cannot be proved directly, I suspect that it also would prove desirable to bring (explicitly or implicitly) contrived oligopolistic pricing suits under the Sherman Act on the basis of the kind of circumstantial evidence described in Part III—at least in industries in which D/QV is not too far below average. Indeed, I even think a very good case can be made for passing new legislation that would condemn natural as well as contrived oligopolistic pricing—or at least for trying to prepare the way for such legislation by attempting to educate the business community and the general public to recognize the harmful effects of this practice and, concomitantly, the desirability of its prohibition. In any case, I believe that it would be desirable to prohibit the kind of premature announcement of prices that facilitates natural oligopolistic pricing.[38] I hope that this Article has established not only these results but also the usefulness of applying a sophisticated welfare economics framework when trying to evaluate micro-economic policies.

38. On the other hand, I doubt the desirability of prohibiting a seller from taking advantage of the fact that his rivals would not charge his customers conventional competitive prices even if he would not respond to their behavior, and I am certain that one should not preclude firms from taking advantage of their own competitive advantages. In brief, I would oppose both such prohibitions because I suspect that they would tend to result in too little QV investment being made in a world in which oligopolistic pricing was prohibited and consumer surplus was abundant. *See* Cha*hot*, *supra* note 11, at 37–38; Three Types, *supra* note 20.

The Deterrent Effect of the Death Penalty: A Statistical Test*

Peter Passell†

Any number of arguments may be brought to bear on the issue of capital punishment. One might, of course, oppose or favor the use of the death penalty on moral considerations alone. Equally reasonably, one's opinion might be shaped by how fairly the punishment is administered in practice; the penalty may be applied selectively[1] or reserved for a narrow range of crimes that resist precise legal definition.[2] For many people such arguments alone are not likely to be persuasive. Execution may be commonly viewed as a distasteful alternative to other forms of punishment, but an alternative that could be defended on pragmatic grounds, if the gains in crime prevention are sufficiently great. Thus, informed public opinion might in theory be strongly influenced by evidence of capital punishment's capacity to deter murder and other crimes. If the death penalty were shown conclusively to deter violent crime, many people with moral or legal reservations would accept the costs of the deterrent to obtain its benefits.

The deterrent effect of the death penalty is of particular interest today because courts and legislatures are in the process of redefining the circumstances under which convicted felons may be executed.[3] While the legal merits of the death penalty could be determined by arguments unrelated to

* The author is extremely grateful for the assistance of Lee Friedman, David Kennett, and John [illegible] in the preparation of this Article.

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1. Indeed, the possibility of selective application was the rationale of *Furman* v. *Georgia*, 408 U.S. 238 (1972): "[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied . . . ." *Id.* at 255. "[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an intolerable element not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Id.* at 256–57.

2. *See* C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 19 (1974) (suggesting standards defining homicide).

3. Since the holding of *Furman* that statutes allowing discretionary application of the death penalty are unconstitutional, *see* note 1 *supra*, the state legislative response has been to enact statutes mandatorily imposing the death penalty for conviction of certain crimes. Thirty states have enacted such statutes, *see* Brief for Petitioner at Appendix A, Fowler v. North Carolina, No. 73-7041 (U.S. [illegible]).

The current death penalty litigation centers on *Fowler*, a convicted murderer's challenge to the North Carolina death penalty statute. The basis of the challenge is that given *Furman*'s proscription of discretionarily applied statutes, statutes enumerating crimes for which the death penalty is mandatory are unconstitutional because they do not eliminate the discretion inherent in arrest and prosecution, where a charge becomes determinative of the crime for which one is convicted and thus in turn whether the sentence of death will be imposed. *See* Brief of Petitioner, *supra* at 16–[illegible]. Argument was heard on [illegible], 1975, but a decision was postponed and reargument was scheduled, [illegible] U.S. [illegible], No. 73-7041, [illegible].

deterrence,[4] to the extent that pragmatic concerns are influential[5] the issue could turn on current research in the area.

I. Isaac Ehrlich and His Critics

Opponents of capital punishment can point to a substantial body of empirical literature in psychology and criminology that finds little evidence of a deterrent effect.[6] Recently, however, an economist, Isaac Ehrlich, has completed what is claimed to be an objectively superior statistical test of capital punishment deterrence in the case of murder.[7] When applied to data collected for the United States over the past four decades, Ehrlich concludes that a deterrent effect is discernible.[8]

Prior to Ehrlich's study researchers attempted to test deterrence hypotheses by comparing murder rates in jurisdictions with capital punishment and those without,[9] or murder rates in the same jurisdiction before and after capital punishment was abolished.[10] Another approach has been to compare murder rates before and after death sentences were imposed, or before and after executions actually took place.[11] Under all three approaches, the goal has been to isolate the effect of the death penalty threat from other factors that might explain variations in homicide rates.

While matching culturally similar states or contiguous time periods in a single city or state may be a reasonably effective device for holding social and economic factors constant, it typically also means that very few observations will be available. This data scarcity makes rigorous statistical hypothesis testing very difficult. Hence, even were one to accept without qualification the validity of such research designs and the accuracy of the data employed, their evidence against deterrence could not be considered conclusive.

Ehrlich's approach—following from recent theoretical contributions to the explanation of illegal behavior[12]—is very different. Rather than using the legality or simple frequency of the application of the death penalty (executions per murder) as a surrogate for the subjective threat of capital punishment, Ehrlich employs executions per homicide conviction. Instead of comparing similar jurisdictions or time periods as a device for holding other explanatory variables constant, he specifies an additional set of explanatory variables (income, unemployment, age structure, etc.) and then uses the statistical technique of multivariate regression to isolate the impact of the death penalty deterrence variable. Observation points consist of annual data for the entire United States covering the time period 1935 to 1969.

Ehrlich's conclusions are as different as his technique. While Sellin and others found no evidence of deterrence, Ehrlich discovers a statistically significant trade-off between the murder rate and executions per conviction. The trade-off implies that a 1.00 percent increase in the execution rate will reduce murders by about 0.06 percent.[13] This translates into the "eight lives saved per execution" figure boasted by the Justice Department[14] and reported in the press.[15]

Ehrlich's findings have been criticized on a number of grounds.[16] These critiques find that Ehrlich's results are extremely sensitive to the choice of the time period included in the regression analysis[17] as well as to the mathematical specification of the regression model[18] and note that Ehrlich assumes the causes of murder are the same in all parts of the United States.[19]

4. *See* notes 1 & 3 *supra*.

5. While pragmatic arguments are traditionally grist only for the legislative mill, even the Supreme Court has discussed the deterrence question, although the legal issue before the Court was framed in terms of the constitutionality of discretionary application. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 345–55 (1972) (Marshall J., concurring).

6. The principal contributor to this literature is Thorsten Sellin. *See, e.g.*, T. Sellin, The Death Penalty: A Report for the Model Penal Code Project of the American Law Institute (1959); Capital Punishment (T. Sellin ed. 1967); Sellin, *Capital Punishment*, 25 Fed. Probation at 3 (Sept. 1961). *See also* W. Bowers, Executions in America (1974); P. Pan & J. Taylor, The Deterrent Effect of Capital Punishment: Another View, March 1975 (unpublished Columbia University Discussion Paper 74-7509) *reprinted in* Reply Brief for Petitioner, at Appendix E, Fowler v. North Carolina, No. 73-7031 (Oct. Term 1974); Bailey, *Murder and the Death Penalty*, 65 J. Crim. L. & C. 416 (1974).

7. Ehrlich, *The Deterrent Effect of Capital Punishment*, 65 Am. Econ. Rev. 397 (1975). *See also* I. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life or Death, Rev. ed. (National Bureau of Economic Research Working Paper No. 18) *reprinted in* Solicitor General's Brief for the United States as Amicus Curiae, Fowler v. North Carolina, No. 73-7031 (Oct. Term 1974).

8. *See* Ehrlich, *The Deterrent Effect of Capital Punishment*, 65 Am. Econ. Rev. 397, 415 (1975).

9. *See* T. Sellin, *supra* note 6, at 23–34; Capital Punishment, *supra* note 6; Sellin, *supra* note 6, at 3.

10. *See* T. Sellin, *supra* note 6, at 33–52; Sellin, *supra* note 6, at 5–6.

11. *See, e.g.*, Dann, *The Deterrent Effect of Capital Punishment* in Friends Society Service Bull. No. 29 (1935); Graves, *The Deterrent Effect of Capital Punishment in California* in The Death Penalty in America (H. Bedeau ed. 1967); Savitz, *A Study in Capital Punishment*, 49 J. Crim. L.C. & P.S. 338 (1958).

12. *See, e.g.*, The Economics of Crime and Punishment (S. Rottenberg ed. 1973).

13. Ehrlich, *supra* note 8, at 414.

14. *See* Solicitor General's Brief for the United States as Amicus Curiae, Fowler v. North Carolina, No. 73-7031 (Oct. Term 1974).

15. *See* Washington Post, April 13, 1975, § A, at 1, col. 1; Los Angeles Times, May 5, 1975, at 26.

16. Two types of critical response have been forthcoming. First, economists have found fault with Ehrlich's model. *See* P. Passell & J. Taylor, *supra* note 6. Second, scholars have questioned the use of econometric models for death penalty research, preferring instead comparative studies such as that by Sellin. *See* D. Baldus & J. Cole, A Comparative Analysis of the Empirical Work of T. Sellin and I. Ehrlich as a Basis for Inferring a Causal Relationship Between Capital Punishment and the Homicide Rate in the United States, May 1975 (unpublished paper on file at the Univ. of Iowa).

17. *See* P. Passell & J. Taylor, *supra* note 6, at 45–56.

18. *See* P. Passell & J. Taylor, *supra* note 6, at 60–70.

19. *See* D. Baldus & J. Cole, *supra* note 16, at 19. By the choice of time series observations for the United States as a whole, Ehrlich is, in certain respects, able to make best use of this data, in other respects not. For example, one might expect annual variations in U.S. unemployment rates to reflect more accurately differences in unemployment than variations in unemployment rates between states in the same year.

On the other hand, the value of aggregate United States time series data for the purpose of econometric testing is limited by the need to make a number of assumptions. First, one must assume that the structure of the system explaining murderers' behavior remains the same, or virtually the same, for the entire time period. Second, there must exist a national market for murder in the sense that a change in some national aggregate (per capita income, unemployment, etc.) must have nearly the same effect on murders no matter what the geographic location of the change. One extra execution

Ehrlich also is subject to criticism for his use of Federal Bureau of Investigation crime data.[20] Furthermore, as Ehrlich has noted himself, the trade-off derived between murders and executions depends upon holding constant all other variables in the system, including arrest and conviction rates.[21] Even a modest reduction in conviction rates associated with a rise in execution rates might reverse the impact of the deterrent; Ehrlich's work is therefore consistent with the conclusion that more executions would result in more murders.[22]

Hence, from a conservative scholarly perspective, little has been demonstrated to date about capital punishment deterrence. Opinions, pro or con, must be derived from other sources, empirical or theoretical. Nonetheless, some might argue that Ehrlich has made a prima facie case for the deterrent effect of the death penalty and therefore the burden shifts to the opposition to find contradictory evidence. However one chooses to evaluate Ehrlich's research and that which preceded it, the desirability of additional tests of the deterrence hypothesis using different data is clear. This Article presents such a test using multivariate regression analysis on cross-section state data for the United States for the census years 1950 and 1960.

II. A Model of Murder

Consider the model

(1) $\quad q/n = q(p, s, z)$,

where murders per capita (q/n) are a function of the subjective probability of punishment (p), the severity of punishment for those convicted (s), and a vector of socio-economic variables (z). At this level of generality the model differs little from crime models proposed by Becker[23] and tested by Ehrlich.[24]

Specifying the model more fully,

(2) $\quad q/n = q(p, t, e, a, i, m)$,

where p = the perceived probability of punishment,
t = the perceived prison sentence for those not executed, given conviction for murder,
e = the perceived probability of execution given conviction,
a = a demographic adjustment for otherwise unaccounted-for variations between age groups in the propensity to commit murder,
i = an economic adjustment for otherwise-unaccounted-for variations between income groups in the propensity to commit murder,
m = an adjustment for the proportion of the population which has few family or social ties in the community.

A theoretical justification of equation (2) merits little space here because the ground is covered thoroughly elsewhere.[25] The variables p, t, e are all deterrence variables in the sense that each influences the expected loss to the murderer. Variable p is the product of two variables, the subjective probability of arrest, and the probability of conviction given arrest used by Ehrlich.[26]

A demographic variable a is included to increase the efficiency of the estimators of the principal deterrence variables, since young adults are believed more prone to commit violent crimes.[27] Similarly, some adjustment i

must have an almost identical impact on total murders, whether the execution takes place in Nebraska or Louisiana.

This is more restrictive than the assumption of a similar structure in every state, since aggregation of similar non-linear systems could introduce errors on its own. Suppose for example, that doubling the number of executions from one to two would have the effect of cutting murder rates by ten percent in either Maine or Louisiana. Suppose further there are 500 murders each year in Louisiana and ten in Maine. An increase of one execution in Louisiana would reduce total murders by 50, while an increase of one execution in Maine would deter only ten murders.

In addition, the use of time series data creates purely econometric problems, introducing additional complexity to the interpretation of estimated coefficients. While the value of any econometric technique employed is dependent on a pyramid of assumptions, (1) hypothesis testing with time series estimators is conditional on a larger set of these assumptions; (2) interpretation of estimates will be more dependent upon large sample properties.

20. While use of Uniform Crime Reports as a data base for any study is subject to criticism because the index contains only *reported* crimes, Ehrlich's study is particularly infirm because he used data from the early years of the index when, due to a smaller and less representative sample, it was much less accurate than it is today. *See* Staff Report to Nat'l. Comm'n on the Causes & Prevention of Violence (1969).

21. Ehrlich, *supra* note 8, at 415.

22. *See* part V *infra*.

23. Becker, *Crime and Punishment: An Economic Approach*, 42 J. Pol. Econ. 169 (1968).

24. *See* Ehrlich, *supra* note 8; Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. Pol. Econ. 521 (1973). Note, however, that this Article argues that there exists no purely economic explanation of murder in contrast to sociological or psychological explanations. Presumably, the features that distinguish economic models in this context are assumptions of rationality--attempted maximization of perceived self-interest. Some notion of utility maximization, some consistent relationship in which individuals are influenced by their perceived self-interest does lie behind the model proposed here. At the same time the model is sociological and psychological, since some of the environmental variables considered below could easily be fitted to sociological and psychological explanations of violence.

25. *See* Ehrlich, *supra* note 8; Ehrlich, *supra* note 24; Mathieson & Passell, *Homicide and Robbery in New York City*, 5 J. Legal Studies — (forthcoming 1976).

26. This Article and Ehrlich's study both use objective probabilities as estimates for subjective probabilities in the models. State-by-state data on arrest rates, needed to separate objective arrest and conviction probabilities, are not available. Ehrlich was able to separate the two probabilities because data are available, year-by-year, for the United States as a whole. Note, however, since our theory is on states variable, the subjective probability of execution given conviction, this lack of data makes no difference.

27. This might simply be because the "price" of crime is lower for them--they may lose less income by spending time in prison; their sentences may be less harsh; they may systematically perceive

for the income of the observed population might be justified, since poor people generally commit more crimes.[28] Ehrlich included such demographic variables in another cross-section study.[29]

None of these variables, however, accounts for the individuals who are undeterred by social sanctions against murder for other reasons such as the absence of strong family ties or lack of friends and acquaintances in the community. Including such non-economic variables may be crucial if the model is to generate useful estimates of the deterrent effects. If a relevant variable is excluded from the model to be tested, estimates of the coefficients of the variables that are included may be seriously biased, as may be estimates of the standard errors.[30] The problem is quite intuitive. For example, Ehrlich's failure to control for such variables as increased racial tension and private ownership of handguns during the 1960's[31] might have led to spurious results. The decreased use of the death penalty might explain the jump in the murder rate during the period, but so might factors that created the general rise in crime.[32]

III. The Data

Data that might be used to estimate models of deterrence are largely limited to statistics collected through the agencies of the Justice Department. This study uses cross-section state data for the continental United States in 1950 and 1960, with 41 observations for the former year, 44 for the latter.[33] Although cross-section data are not subject to some of the infirmities of time series data,[34] the former have problems of their own. Many institutional sources of murder rate variation[35] cannot be controlled for. In addition, some states have only a few observations of variables, increasing possible measurement error. Despite unavoidable difficulties, estimates based on the cross-section should provide valuable counterpoint to alternative deterrence hypothesis tests.

a lower probability of arrest and conviction. However, it is not necessary to accept this economic view to believe that age composition affects murder rates; it may simply be a sociological phenomenon.

28. Again such an adjustment could be justified in opportunity-cost terms, *see* note 27 *supra*, since poor people lose less by being imprisoned, or in socio-psychological terms if poor people are more prone to violence due to frustration, fatigue, and other factors.

29. *See* Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. Pol. Econ. 521 (1973).

30. *See, e.g.*, J. Johnston, Econometric Methods (2d ed. 1972).

31. *See* Ehrlich, *supra* note 8, at 406–08, 414 n.15.

32. I am indebted to Brian Forst for this point.

33. In 1950 data were incomplete for Georgia, Idaho, Michigan, North Dakota, Rhode Island, South Dakota, Vermont; in 1960 Idaho, New Jersey, North Dakota, Vermont.

34. *See* note 19, *supra*.

35. A model utilizing cross-section data shares with models dependent upon aggregate U.S. data a hypothesized lack of homogeneity which is not captured by the included environmental variables (poverty, age distribution, migrant population). Therefore this study adds a dummy variable (D_i) in some estimated forms to allow for differences among ten Southern states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, Virginia) and the rest of the country. $D_i = 0$, not Southern; $D_i = 1$, Southern.

For convenience, observed surrogates for the model variables are printed in upper case.

Q/N = murder and non-negligent manslaughter offenses per capita reported to the FBI.[36] This statistic is an inefficient estimator for state-to-state variations in q/n because: (1) some fraction of murders is not reported to local law enforcement agencies or is misclassified; (2) some local agencies do not report crime statistics to the FBI, thereby introducing sampling error into state data; (3) manslaughter, one component of Q, is not a capital crime, and is therefore unlikely to be affected by punishments for capital crimes. If such errors are random, however, Q/N will yield unbiased estimates of variations in q/n.

$P = C/Q$ = the ratio of state prison commitments for murder and manslaughter to reported murders and non-negligent manslaughters.[37] Two factors reduce the efficiency of P as an estimate of p. First, the commitment statistic for murder and manslaughter is not an accurate measure of convictions for murder and non-negligent manslaughter: the crime categories are defined differently and commitments may not take place in the same year as convictions. Second, variations in the objective probability of conviction may not accurately reflect variations in the subjective probability of conviction. Note once more, however, that only systematic errors will introduce bias into the estimation procedure.

T = the mean (1960)[38] or median (1951)[39] number of months spent in prison by convicted murderers released that year. T is an inefficient estimator of t for the same reasons that P is inefficient for p. Additional sources of inefficiency include: (1) for some states T is based on sentences served by only a few released prisoners; (2) time spent in prison may not constitute a homogeneous punishment across states, since some prison systems treat prisoners more harshly than others; (3) sentences served by prisoners released this year but convicted years earlier reflect both current and past attitudes toward sentencing.

36. Statistics on murders and non-negligent manslaughters per 100,000 of population are based on U.S. Dep't of Justice, Fed. Bureau of Investigation, Uniform Crime Reports: Crime in the U.S. (published annually) [hereinafter cited as UCR]. UCR 1960, at 38–52, Table 3; UCR 1959, at 38–41, Table 3; UCR 1956, at 89, Table 31; UCR 1950, at 90, Table 32; UCR 1949, at 94, Table 36; UCR 1946, at 97, Table 33.

37. Statistics on commitments to state prisons for murder and manslaughter are from U.S. Dep't of Justice, Bureau of Prisons, Characteristics of State Prisoners 50–51, Table A5 (1960); U.S. Dep't of Justice, Bureau of Prisons, Prisoners in State and Fed. Institutions 73–74, Table 40, 41 (1950).

38. The source of data for this variable is U.S. Dep't of Justice, Bureau of Prisons, Prisoners Released from State and Fed. Institutions 15–18, Table 3 (1960).

39. The source of data for this variable is U.S. Dep't of Justice, Bureau of Prisons, Prisoners Released from State and Fed. Institutions 24–27, Table 5 (1951). (No data were available for 1950.)

$Ex = (X_{x-1} + \ldots X_{x+2})/4C_x$, a four-year average of executions for murder divided by current convictions.[40] A four-year average is used (1) because of long lags between sentencing and execution, (2) because of the extremely small number of executions in any given year, (3) because it seems reasonable to assume some lags in the formation of subjective expectations of execution given conviction.

A = the percentage of the resident population between the ages of 15 and 24.[41] A serves as an estimate for a, which presumably is some weighted average of the age distribution of the population. The weights are unknown because the ratio of crimes among age groups attributable to otherwise-omitted variables is unknown. Thus, the study uses the portion of the population in this high murder-prone age group.

I = the percentage of the family population below an arbitrary cash income poverty line (1950 = $2000, 1960 = $3000).[42] The use of the nominal dollar statistic clearly produces an inefficient estimate of i, but it is not apparent that the error will be systematic.

M = the ratio of net non-white migrants in the previous ten years to total population.[43] Where net migration is negative, M is set equal to zero. M is offered as an estimator for the percentage of the population that consists of the displaced and rural poor who have moved to urban areas. Net total migration would not serve this purpose, since much of the population movement of the 1940's and 1950's consisted of suburban expansion and middle-class migration to the West. The estimate is relatively crude since it does omit poor white migrants and intra-state rural-urban migrants.

IV. Ordinary Least Squares (OLS) Estimates

A. *The Deterrent Effect of the Conditional Probability of Execution*

For the equation

$$Q/N = Q(P, T, E, A, I, M) \tag{3}$$

we would by hypothesis expect $\partial Q/\partial P < 0$, $\partial Q/\partial T < 0$, $\partial Q/\partial A > 0$, $\partial Q/\partial I > 0$, $\partial Q/\partial M > 0$.[44] If capital punishment serves as a deterrent, other factors held constant, we would expect $\partial Q/\partial E < 0$. In other words, for an estimate of a linear form for equation (3), the capital deterrence hypothesis would tend to be confirmed if the coefficient of E were negative, rejected if the coefficient of E were zero or positive.

Results. Ordinary least squares estimates of the constant term (a) and the coefficients (b)[45] for the simple linear form of equation (3) for 1950 and 1960 are shown as Table 1, equations (a1) and (a2) with t statistics given in parentheses.[46] With the exception of the execution variable coefficient and the coefficient of A in [a1]), all the estimated parameters are of the hypothesized sign and are significantly different than zero at the 90 percent confidence level.[47] The estimated coefficient of E, however, takes on a perverse sign and is not significantly different than zero:[48] no capital punishment deterrent is in evidence. Note too that the statistical significance of the other parameter estimates and the percentage of variance explained is virtually unchanged when E is excluded from the regression; results are shown as equations (b1) and (b2).[49]

40. Between 1959 and 1962 statistics on executions for murder are based on U.S. Dep't of Justice, Bureau of Prisons, Nat'l Prisoner Statistics, Executions (published annually) [hereinafter cited as Exec]. Exec No. 23, Feb. 1960, at 5, Table 4; Exec No. 26, March 1961, at 5, Table 4; Exec No. 28, April 1962, at 5, Table 4; Exec No. 32, April 1963, at 5, Table 4.

Between 1919 and 1952 statistics on executions for murder are based on Exec No. 5, April 1951, at 4, Table 4; Exec No. 6, Sept. 1952, at 5, Table 4; Exec No. 8, April 1953, at 5, Table 4.

41. Data for this variable are taken from U.S. Bureau of the Census, General Characteristics of the Population, U.S. Summary 167, Table 59 (1960); *id.* at 112, Table 62 (1950).

42. The statistics on the percentage of families below the poverty line are based on U.S. Bureau of the Census, County and City Data Book [hereinafter cited as County]. For 1960 I was calculated to be equal to the percentage of families with incomes below $3000 in 1959 as reported in County 1962 at 3, table 1, vol. 23. For 1950 I was calculated to be equal to the percentage of families with incomes below $2000 in 1949 as reported in County 1952 at 3, table 1, col. 21. Price deflators by state were not available.

43. Statistics for net non-white migration during the previous ten years as a percentage of the population for both 1950 and 1960 were based on U.S. Bureau of the Census, Statistical Abstract of the U.S. 90, Table 55 (1963).

44. Readers not familiar with calculus should note that the symbol $\partial Q/\partial E$ represents the partial derivative of Q (the murder rate) with respect to E (the execution rate). A partial derivative is a mathematical expression of the relationship between changes in an independent variable (here E) and changes in a dependent variable (here Q), all other independent variables (*i.e.*, P, T, A, I, M) being held constant. The symbol $\partial Q/\partial E$ represents the change in the murder rate that would result from a small change in the execution rate. The hypothesis that $(\partial Q/\partial E) < 0$ means that the murder rate would be expected to move in the opposite direction from changes in the execution rate, *e.g.*, if the execution rate rises (falls) the murder rate would be expected to fall (rise).

45. The Greek letter α is used here to refer to the constant term to be estimated in a regression; β refers to the coefficient vector (one or more coefficients) to be estimated in a regression.

46. The numbers presented in Table 1 represent econometric estimates of the constant term and coefficients of the murder equation. These numbers thus represent estimates of the relationship between the murder rate (dependent variable) and the various independent variables hypothesized to influence it. Estimates with positive signs support the hypothesis of a direct relationship between the murder rate (Q) and the independent variable in whose column the estimate is listed, *e.g.*, as the independent variable rises (falls) the murder rate rises (falls). Conversely, estimates with negative signs support the hypothesis of an inverse relationship between the murder rate and the independent variable. Therefore, to verify the hypothesis that increases in the execution rate result in decreases in the murder rate, the numbers in the column marked "Execution" must have negative signs. The greater the absolute value of the estimates, the greater will be the magnitude of the indicated relationship; in other words, for a given change in the independent variable there will be a larger change in the murder rate. The t-statistics given in parentheses provide indications of the degree of confidence that each estimate is significantly different from that which would be obtained by chance.

47. From the perspective of hypothesis testing or prediction, the value of statistical estimates of coefficients depends upon one's confidence that errors in data or misspecification of the model do not seriously affect the result. Given certain technical assumptions about the data and the model, it is possible to estimate confidence intervals around point estimates, *i.e.* a range of values in which the true coefficient lies. Hence the assertion here that the estimated coefficients are significantly different from zero at the 90 percent confidence level means that the probability that the true value takes on the opposite sign is less than 10 percent. For a discussion of confidence intervals and statistical significance, see Ehrlich, *supra* note 30, at 135-52.

48. Acceptance or rejection of an hypothesis (for example, "the coefficient of E is less than zero") depends upon the statistical standard one sets. By convention and common sense, it seems appropriate to accept the hypothesis that E is less than zero unless it is statistically significantly less than zero at the 90 percent confidence level. For a discussion of hypothesis testing with statistical methods see Ehrlich, *Forecasting and Analysis with an Econometric Model*, 52 Am. Econ. Rev. 104 (1962).

49. Addition of the Southern dummy variable (D_s) to the base form, as shown in Table 1, equations (c1) and (c2), makes little difference. Estimates of the coefficient of D_s imply that, other things being equal, Southern states have about 2½ extra murders per hundred thousand population

TABLE 1

ORDINARY LEAST SQUARES ESTIMATES OF MURDER EQUATION

Equation/Year	R^2	Constant	P	T	Execution	A	I	M	D_S
a1	.698	-9.48	-3.51	-.0161	8.48	7.44	.204	1.72	
1950		(-1.27)	(-3.12)	(-2.11)	(1.04)	(1.48)	(4.38)	(2.22)	
a2	.833	-2.18	-3.82	-.0140	2.98	1.86	.169	2.27	
1960		(-4.47)	(-2.14)	(-4.13)	(0.26)	(5.35)	(5.08)	(4.43)	
b1	.689	-9.14	-3.63	-.0163		.731	.207	1.93	
1950		(-1.23)	(-3.24)	(-2.14)		(1.46)	(4.43)	(2.59)	
b2	.833	-22.14	-3.79	-.0140		1.89	.169	2.32	
1960		(-4.77)	(-2.16)	(-4.18)		(5.72)	(5.14)	(5.02)	
c1	.720	-4.86	-3.04	-.0166	7.75	.496	.159	1.51	2.59
1950		(-0.62)	(-2.67)	(-2.18)	(0.96)	(0.96)	(2.97)	(1.97)	(1.60)
c2	.860	-15.1	-4.68	-.0134	4.87	1.45	.122	1.95	2.40
1960		(-2.90)	(-2.78)	(-4.27)	(0.45)	(4.06)	(3.41)	(3.97)	(2.66)

The coefficient estimates obtained in Table 1 are for the most part not surprising, since they largely confirm earlier cross-section regression results on murder rates.[80] The deterrent effect of the likelihood of punishment and the length of prison sentences is supported, as is the influence of environmental variables that meet common sense criteria. The contrast with Ehrlich's time series confirmation of the deterrent effect of capital punishment is, however, quite striking. This highlights the importance of testing the sensitivity of our linear cross-section estimates both for different formulations of the capital punishment variable and different mathematical forms of the variables in the linear least-squares fit.

B. *Legal or* De Facto *Existence of Capital Punishment*

Suppose potential murderers are not influenced in a simple linear fashion by the frequency of execution of convicted murderers, but by the mere presence of a capital punishment statute on the books. Or, suppose that the fact that influences potential murderers is *de facto* abolition: whether executions of convicted murderers actually take place. Some states in 1950 and 1960 had death penalty statutes, but records free of executions for many years.

To test these hypothetical forms of the deterrent, dummy variables D_{s1} and D_{s2} were substituted for E. For states that did not permit capital punishment in 1949–52, 1959–62, $D_{s1} = 0$; for states that did, $D_{s1} = 1$. For states in which no executions took place 1949–52, 1959–62, $D_{s2} = 0$; for states in which they did take place, $D_{s2} = 1$.[81] Hence the deterrent hypothesis would be confirmed by statistically significant estimates of the coefficient of D_{s1} and D_{s2} less than zero.

Results. Regressions showing the alternative specifications are shown in Table 2, equations (d1), (d2), (e1), (e2).[82] Either hypothetical form for the deterrence variable must be rejected. In none of the four cases do statistically significant estimates appear.[83]

...ically. Regressions with dummy variables for two other regions (New England, Northern industrial states) were also attempted, with and without the Southern dummy. Their coefficients, however, were statistically insignificant and they did not markedly change the estimates of the other coefficients. Note, too, that the inclusion of the Southern dummy does not increase the statistical significance of the execution variable.

80. *See* Ehrlich, *supra* note 29; Mathieson & Passell, *supra* note 25.

81. Information needed to determine the states in which the death penalty is not applicable for murder, and states in which the death penalty is not applied for murder is found in Ennis, *supra* note 42. D_{s1} for 1950 and D_{s2} for 1949–52 were obtained from Ennis No. 12, April 1955, at 3–4, 14–15; D_{s1} for 1960 and D_{s2} for 1959–62 were obtained from Ennis No. 32, April 1963, at 4, Table 3.

82. Note that the Southern dummy variable (D_s) is included in equations (d1), (d2), (e1), and (e2) because, as may be inferred from Table 1, the variable explained an additional portion of the variation in murder rates. When D_s is excluded, however, the results are much the same; neither the signs nor the statistical significance of the coefficient estimates for the execution dummies are changed.

83. At the 95 percent confidence level.

TABLE 1

ORDINARY LEAST SQUARES ESTIMATES OF MURDER EQUATION

Equation/Year	R^2	Constant	P	T	Execution	A	I	M	D_S
a1 1950	.698	-9.48 (-1.27)	-3.51 (-3.12)	-.0161 (-2.11)	8.48 (1.04)	7.44 (1.48)	.204 (4.38)	1.72 (2.22)	
a2 1960	.833	-2.18 (-4.47)	-3.82 (-2.14)	-.0140 (-4.13)	2.98 (0.26)	1.86 (5.35)	.169 (5.08)	2.27 (4.43)	
b1 1950	.689	-9.14 (-1.23)	-3.63 (-3.24)	-.0163 (-2.14)		.731 (1.46)	.207 (4.43)	1.93 (2.59)	
b2 1960	.833	-22.14 (-4.77)	-3.79 (-2.16)	-.0140 (-4.18)		1.89 (5.72)	.169 (5.14)	2.32 (5.02)	
c1 1950	.720	-4.86 (-0.62)	-3.04 (-2.67)	-.0162 (-2.18)	7.76 (0.96)	.496 (0.96)	.159 (2.97)	1.51 (1.97)	2.59 (1.60)
c2 1960	.860	-15.1 (-2.90)	-4.68 (-2.78)	-.0134 (-4.27)	4.87 (0.45)	1.45 (4.06)	.122 (3.41)	1.95 (3.97)	2.40 (2.66)

The coefficient estimates obtained in Table 1 are for the most part not surprising, since they largely confirm earlier cross-section regression results on murder rates.[80] The deterrent effect of the likelihood of punishment and the length of prison sentences is supported, as is the influence of environmental variables that meet common sense criteria. The contrast with Ehrlich's time series confirmation of the deterrent effect of capital punishment is, however, quite striking. This highlights the importance of testing the sensitivity of our linear cross-section estimates both for different formulations of the capital punishment variable and different mathematical forms of the variables in the linear least-squares fit.

B. *Legal or* De Facto *Existence of Capital Punishment*

Suppose potential murderers are not influenced in a simple linear fashion by the frequency of execution of convicted murderers, but by the mere presence of a capital punishment statute on the books. Or, suppose that the fact that influences potential murderers is *de facto* abolition: whether executions of convicted murderers actually take place. Some states in 1950 and 1960 had death penalty statutes, but records free of executions for many years.

To test these hypothetical forms of the deterrent, dummy variables D_{a1} and D_{a2} were substituted for E. For states that did not permit capital punishment in 1949-52, 1959-62, $D_{a1} = 0$; for states that did, $D_{a1} = 1$. For states in which no executions took place 1949-52, 1959-62, $D_{a2} = 0$; for states in which they did take place, $D_{a2} = 1$.[81] Hence the deterrent hypothesis would be confirmed by statistically significant estimates of the coefficient of D_{a1} and D_{a2} less than zero.

Results. Regressions showing the alternative specifications are shown in Table 2, equations (d1), (d2), (e1), (e2).[82] Either hypothetical form for the deterrence variable must be rejected. In none of the four cases do statistically significant estimates appear.[83]

...ately. Regressions with dummy variables for two other regions (New England, Northern industrial states) were also attempted, with and without the Southern dummy. Their coefficients, however, were statistically insignificant and they did not markedly change the estimates of the other coefficients. Note, too, that the inclusion of the Southern dummy does not increase the statistical significance of the execution variable.

80. *See* Ehrlich, *supra* note 29; Mathieson & Passell, *supra* note 25.

81. Information needed to determine the states in which the death penalty is not applicable for murder, and states in which the death penalty is not applied for murder is found in Ehrlich, *supra* note 4, at 3. D_{a1} for 1950 and D_{a2} for 1949-52 were obtained from Exec No. 12, April 1955, at 3-4, Table 3; D_{a2} for 1960 and D_{a2} for 1959-62 were obtained from Exec No. 32, April 1963, at 4, Table 3.

82. Note that the Southern dummy variable (D_S) is included in equations (d1), (d2), (e1), and (e2) because, as may be inferred from Table 1, the variable explained an additional portion of the variation in murder rates. When D_S is excluded, however, the results are much the same; neither the signs nor the statistical significance of the coefficient estimates for the execution dummies are altered.

83. At the 95 percent confidence level.

TABLE 2

STABILITY OF ORDINARY LEAST SQUARES ESTIMATES

Equation/Year	R^2	Constant	P	T	Execution	A	I	M	D_S
d1 1950 (with E_{D1})	.714	-4.84 (-0.61)	-3.14 (-2.74)	-.0139 (-2.11)	.410 (.479)	.473 (.910)	.162 (2.98)	1.67 (2.22)	2.68 (1.64)
d2 1960 (with E_{D1})	.862	-15.1 (-2.99)	-4.84 (-2.85)	-.0140 (-4.34)	-.493 (-.73)	1.50 (4.40)	.121 (3.39)	2.05 (4.60)	2.30 (2.54)
e1 1950 (with E_{D2})	.715	-4.81 (-.61)	-3.01 (-2.58)	-.0158 (-2.10)	.548 (.59)	.470 (.91)	.157 (2.90)	1.71 (2.28)	2.73 (1.67)
e2 1960 (with E_{D2})	.861	-15.4 (-3.06)	-4.65 (-2.77)	-.0139 (-4.24)	-.256 (-.51)	1.50 (4.37)	.122 (3.40)	2.04 (4.56)	.237 (2.62)
f1 1950 (10th root)	.705	.791 (.471)	-.606 (-2.75)	-.359 (2.73)	.0832 (2.42)	.107 (.08)	.930 (2.39)	.0208 (.57)	
f2 1960 (10th root)	.597	-1.41 (-.74)	-.692 (-2.18)	-.103 (-2.49)	.105 (3.18)	1.99 (1.34)	.536 (1.85)	.00179 (.05)	

C. *Sensitivity to Alternative Mathematical Forms*

A standard alternative to the simple linear form for regressions [$Y = a + \sum_i \beta_i X_i$] where X here indicates the right-hand-side variables, is to estimate a form that is linear in the natural logarithm of the variables [$\ln Y = \ln a + \sum_i \beta_i \ln X_i$]. Ehrlich used the log form exclusively. This is not possible for our cross-section sample because a large number of observations have $E = 0$, for which the log is undefined. Another possible method of testing the sensitivity of the result, and one which is arguably more general, is to estimate an equation linear in the nth power transformation of the actual variables ($0 < n \leq 1$) [$Y^n = a + \sum_i \beta_i (X_i)^n$]. For small values of n, this will approximate the log transformation; for $n = 1$, it is just the linear form shown above.

Results. Equations (f1) and (f2) show the parameter estimates for $n = .1$ (tenth root). Similar results, incidentally, hold for $n = 0.5$ (square root). Note that β_M is greater than zero, while the signs and significance of the other variables are not radically changed. Perhaps the most striking aspect to (f1) and (f2) is that the estimates of β_M are not merely positive, but statistically significant.[34] However, this is not taken to mean that executions cause murders; a more reasonable explanation is that the equations are misspecified. It does suggest that some systematic relationship between murder rates and execution rates may exist. Perhaps high murder rates cause high execution rates. One aspect of the question, the simultaneous determination of Q/N and E_2 is explored in the next section. Another aspect, the possibility that executions in no way affect murder rates, but that murder rates affect execution rates, is explored in Section VI.

V. Two Stage Least Squares ('TSLS) Estimates

A. *Value of TSLS Estimates*

It is well known that the ordinary least squares estimates derived in the previous section will be inconsistent if murder rates are determined simultaneously with one or more of the right-hand-side variables. Risking oversimplification, the estimated coefficients will be inconsistent if the direction of causality goes from left-hand-side to right-hand-side as well as the opposite. Ehrlich very explicitly develops a theoretical simultaneous system in which potential criminals respond to deterrents and society responds to criminal behavior by adjusting the magnitude of the deterrents.[35] Thus murder rates "feed back" on execution rates and conviction rates.

34. At the 95 percent confidence level.
35. *See* Ehrlich, *supra* note 8, at 405.

TABLE 2

STABILITY OF ORDINARY LEAST SQUARES ESTIMATES

Equation/Year	R^2	Constant	P	T	Execution	A	I	M	D_S
d1	.714	-4.84	-3.14	-.0159	.410	.473	.162	1.67	2.68
1950		(-0.61)	(-2.74)	(-2.11)	(.479)	(.910)	(2.96)	(2.22)	(1.64)
(with E_{D1})									
d2	.862	-15.1	-4.84	-.0140	-.493	1.50	.121	2.05	2.30
1960		(-2.99)	(-2.85)	(-4.34)	(-.73)	(4.40)	(3.39)	(4.60)	(2.54)
(with E_{D1})									
e1	.715	-4.81	-3.01	-.0158	.548	.470	.157	1.71	2.73
1950		(-.61)	(-2.58)	(-2.10)	(.59)	(.91)	(2.90)	(2.28)	(1.67)
(with E_{D2})									
e2	.861	-15.4	-4.65	-.0139	-.256	1.50	.122	2.04	.237
1960		(-3.06)	(-2.77)	(-4.24)	(-.51)	(4.37)	(3.40)	(4.56)	(2.62)
(with E_{D2})									
f1	.705	.791	-.606	-.359	.0832	.107	.930	.0208	
1950		(.471)	(-2.75)	(2.73)	(2.42)	(.08)	(2.39)	(.57)	
(10th root)									
f2	.597	-1.41	-.682	-.103	.105	1.99	.536	.00179	
1960		(-.74)	(-2.18)	(-2.49)	(3.18)	(1.34)	(1.85)	(.05)	
(10th root)									

C. *Sensitivity to Alternative Mathematical Forms*

A standard alternative to the simple linear form for regressions [$Y = a + \Sigma_r \beta_r X_r$] where X here indicates the right-hand-side variables, is to estimate a form that is linear in the natural logarithm of the variables [$\ln Y = \ln a + \Sigma_r \beta_r \ln X_r$]. Ehrlich used the log form exclusively. This is not possible for our cross-section sample because a large number of observations have $E = 0$, for which the log is undefined. Another possible method of testing the sensitivity of the result, and one which is arguably more general, is to estimate an equation linear in the nth power transformation of the actual variables ($0 < n \leq 1$) [$Y^n = a + \Sigma_r \beta_r (X_r)^n$]. For small values of n, this will approximate the log transformation; for $n = 1$, it is just the linear form shown above.

Results. Equations (f1) and (f2) show the parameter estimates for $n = 0.1$ (10th root). Similar results, incidentally, hold for $n = 0.5$ (square root). Note that $\hat{\beta}_n$ is greater than zero, while the signs and significance of the other variables are not radically changed. Perhaps the most striking aspect to (f1) and (f2) is that the estimates of $\hat{\beta}_n$ are not merely positive, but statistically significant.[54] However, this is not taken to mean that executions cause murders; a more reasonable explanation is that the equations are misspecified. It does suggest that some systematic relationship between murder rates and execution rates may exist. Perhaps high murder rates cause high execution rates. One aspect of the question, the simultaneous determination of O/N and E, is explored in the next section. Another aspect, the possibility that executions in no way affect murder rates, but that murder rates affect execution rates, is explored in Section VI.

V. Two Stage Least Squares (TSLS) Estimates

A. *Value of TSLS Estimates*

It is well known that the ordinary least squares estimates derived in the previous section will be inconsistent if murder rates are determined simultaneously with one or more of the right-hand-side variables. Risking oversimplification, the estimated coefficients will be inconsistent if the direction of causality goes from left-hand-side to right-hand-side as well as the opposite. Ehrlich very explicitly develops a theoretical simultaneous system in which potential criminals respond to deterrents and society responds to criminal behavior by adjusting the magnitude of the deterrents.[55] Thus murder rates "feed back" on execution rates and conviction rates.

54. At the 95 percent confidence level.
55. *See* Ehrlich, *supra* note 8, at 405.

A prima facie case can certainly be made for the use of alternative estimation procedures to OLS. It is very important to keep in perspective, however, the desirability of using OLS even when some degree of simultaneity is suspected. Virtually any equation to be estimated belongs in theory to a system of simultaneous equations with feedback mechanisms. Exogeneity (determination outside the system) is a relative, not an absolute, notion. The quantitative importance of the bias built into the OLS estimators will depend upon the specific characteristics of the system in question.

Consider equation (3). Surely A, I, and M are nearly perfectly exogenous, though one could argue that high murder rates might conceivably affect migration. The cases of the three deterrence variables are ambiguous. Prison sentences served by persons currently being released might be partly influenced by current crime rates, as more plausibly might execution rates and conviction rates. Hence, the importance of the feedback is unclear.

It is also useful to remember that the commonly used simultaneous equations procedures such as two stage least squares are designed to generate only consistent and asymptotically efficient (in the limited information sense) estimates of the model parameters. Stated less technically, this means that the estimators will have the desired properties only if the sample of observations is sufficiently large. There is no absolute definition of "large," but one might suspect that a sample as small as the one here is not very large. Finally, one should note that TSLS estimators of the endogenous variable coefficients may not have even asymptotically desirable properties if the endogenous variables are inherently bounded, and the variables often have observed values near the bounds. All of the potentially endogenous variables in our model are bounded at zero, there being no meaning for example to a negative execution or conviction rate. Approximately one-fourth of the observed values have $E = 0$. Alternative procedures to TSLS do exist, but they are computationally cumbersome and not currently available as computer algorithms.[56]

B. *Results*

The basic results for the murder equation are presented in Table 3. The exogenous variables included in the system but excluded in the structural equation are:

F = median nominal family income for the previous year,[57]

V = percentage of voting age population voting in national elections,[58]

H = percentage of residents living in the same house for at least the specified time period,[59]

W = the percentage of the resident population which is white,[60]

U = unemployment rate,[61]

L = percentage of persons 14 and over in the civilian labor force,[62]

Q^* = fractional change in murder rates over the past four years.[63]

These variables were chosen because we believe that they would belong in other equations, were it possible to specify the entire system of relationships determining variations in the endogenous variables. Note that the choice of these excluded exogenous variables is potentially important to the estimation procedure. For example, many of Ehrlich's[64] results may have depended upon the inclusion of the previous year's murder rate in a system explaining this year's murder rate.

Equations (g1) and (g2) in Table 3 are identical in form to (c1) and (c2), except an instrument ($\hat{E}$) is substituted for E in the regression. In other words, only the murder rate and execution rate are considered endogenous to the system. Once again, on the basis of the estimates one must reject the hypothesis that execution deter murders. As in (c1) and (c2) the estimated execution coefficients are positive and insignificant. In fact, the TSLS procedure appears to have very little impact on the regression coefficients in general; the equation seems to be insensitive to estimation procedure as well as to mathematical form.

Equations (h1) and (h2) go a step further, preserving the specification of the model but assuming P, T, and E to be determined simultaneously with Q/N. Again, there are few surprises. The execution coefficient remains statistically indistinguishable from zero. The significance levels of the coefficients of $\hat{P}$ and $\hat{T}$ are somewhat lower, but this would be expected in any event since the TSLS estimation procedure reduces the efficiency of the estimators.

Another indication of the relative stability of the relationship is found in (j1) and (j2). Here again, as an example of the power transformation discussed above, the 10th roots of the right-hand-side variables are regressed against 10th roots of murder rates, with execution rates assumed endoge-

56. *See* Amemiya, *Multivariate Regression and Simultaneous Equation Models When the Dependent Variables are Truncated Normal*, 42 ECONOMETRICA 999 (1974).

57. Median family income for the previous year, in both 1960 and 1950, in nominal dollars is based on U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 317, Table 449 (1971).

58. Data for 1960 for this variable are from U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 475, Table 600 (1972). For 1950 the data are from U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 114, 115, Tables 107, 111 (1956).

59. The data for 1960 are from U.S. BUREAU OF THE CENSUS, *supra* note 41, at 257, Table 112; 1950 data are from *id.* 1950, at 121, Table 70.

60. The data for 1950 and 1960 are from U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 28, Table 30 (1972).

61. Data for the unemployment variable in 1960 are from COMEY, *supra* note 42, 1961 at 4, Table 1, col. 3; 1950 data are from *id.* 1952 at 4, Table 1, cols. 32, 36.

62. 1960 data are from U.S. BUREAU OF THE CENSUS, *supra* note 41, at 264, Table 119; 1950 data are from COMEY 1952, *supra* note 42, at 4, Table 1, cols. 32, 33.

63. $Q^*_{1960} = (Q_{1960} - Q_{1956})/Q_{1956}$; $Q^*_{1950} = (Q_{1950} - Q_{1946})/Q_{1946}$. Q_{1960} is from UCR 1960, at 99, Table 42; Q_{1956} is from UCR 1956, at 97, Table 33; Q_{1950} is from UCR 1960, at 98-99, Table 33; Q_{1946} is from UCR 1956, at 89, Table 31.

64. *See* Ehrlich, *supra* note 50.

TABLE 3

TWO-STAGE LEAST SQUARES (TSLS) ESTIMATES OF MURDER EQUATION

Equation/Year	$\bar{R}^2$	Constant	P	T	Execution	A	I	M	D_S
g1	.720	-4.79	-3.06	-.0162	6.53	.493	.159	1.54	2.60
1950		(-.61)	(-2.67)	(-2.18)	(.52)	(.96)	(2.97)	(1.92)	(1.60)
($\hat{E}$)									
g2	.860	-14.9	-4.71	-.0134	6.48	1.44	.122	1.92	2.41
1960		(-2.61)	(-2.76)	(-4.27)	(.30)	(3.62)	(3.41)	(3.20)	(2.65)
($\hat{E}$)									
h1	.667	-6.29	-5.70	-.0169	12.94	.704	.161	1.29	1.52
1950		(-.65)	(-2.41)	(-1.28)	(.88)	(1.15)	(2.71)	(1.37)	(.78)
($\hat{P}$, $\hat{T}$, $\hat{E}$)									
h2	.818	-8.23	-10.2	-.0157	-9.20	1.20	.0985	1.42	2.96
1960		(-1.06)	(-1.99)	(-2.07)	(-.34)	(2.46)	(2.26)	(1.84)	(2.40)
($\hat{P}$, $\hat{T}$, $\hat{E}$)									
j1	.674	1.22	-.508	-.349	.148	-.0992	.722	-.00248	
1950		(.67)	(1.99)	(-2.52)	(1.87)	(-.07)	(1.80)	(-.05)	
(10th root; $\hat{E}$)									
j2	.417	.851	-.689	-.115	.240	.336	.426	-.0239	
1960		(.34)	(-1.80)	(-2.31)	(3.47)	(.17)	(1.21)	(-.50)	
(10th root; $\hat{E}$)									

nous. As in (f1) and (f2), the coefficients of $\hat{E}$ are positive and statistically significant.

VI. An Execution Equation

Sections IV and V provide evidence that capital punishment does not act as a deterrent. Among the regressions in Tables 1–3 there are no instances in which the execution variable is negative and statistically significant. There are, however, reasons to believe that execution rates and murder rates are not entirely independently determined. Certainly the major impetus for new capital punishment legislation has been public frustration with the explosive growth of murder rates in the past decade.

Perhaps a more testable hypothesis about the relationship is that execution rates—executions per conviction—are a positive function of murder rates because of the attitudes of prosecutors, juries and judges. Given the discretion built into the system at each level it is plausible that, other things being equal, more convicted murderers will be sentenced to death the higher the perceived murder rate.

A proper statistical evaluation of the explanation of variations in the execution rate between states is beyond the scope of this paper. Among other purely econometric problems, the execution rate is a limited dependent variable. As mentioned earlier, since E is frequently equal to the bound value, the estimated coefficients will be biased. It is possible and relevant, however, to explore the issue in a tentative fashion, ignoring these difficulties.

Only a few of a number of alternative regression formulations proposed are shown here. Equations (k1) and (k2) in Table 4 show the OLS estimators for E as a linear function of murder rates lagged by one year, $(Q/N)_{-1}$, and M, the non-white migration variable. Equations (m1) and (m2) are basically the same formulation, but are estimated using TSLS with current murder rates as an endogenous variable. Neither the (k) nor (m) equations provide much insight into the sources of variation in execution rates, though in all four equations the coefficient of M, as would be expected, is significantly positive.

The addition of I, the percentage of the population below the poverty line, and Q^*, the rate of change of murders in the previous four years (estimates not shown) adds no explanatory power. Nor—in seeming contradiction to conventional wisdom—does a Southern states dummy variable. If one eliminates executions for rape and burglary, the South shows no particular propensity to execute convicted criminals.

Equations (n1) and (n2) produce a more interesting result. The TSLS estimators on the 10th roots of the variables are significant and of the ap-

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TABLE 4

ESTIMATES OF EXECUTION EQUATIONS

Equation/Year	R^2	Constant	O/N	$(O/N)_{-1}$	M
k1 1950 OLS	.112	.0164 (1.43)		-.000172 (-.24)	.0164 (2.26)
k2 1960 OLS	.171	.00201 (.30)		.00144 (1.53)	.0127 (2.70)
m1 1950 TSLS	.145	.00431 (.27)	.00182 (.86)		.0263 (2.41)
m2 1960 TSLS	.154	.00344 (.49)	.00113 (1.15)		.0123 (2.59)
n1 1950 TSLS — 10th root	.360	-1.94 (-3.25)	2.04 (4.09)		.193 (2.18)
n2 1960 TSLS — 10th root	.238	-2.02 (-2.63)	2.08 (3.31)		.155 (1.44)

propriate sign. Whether or not this comes close to capturing the true relationship between E and Q/N remains to be seen. These two equations do, however, suggest why equations (f) and (j) show perversely positive and significant signs for the execution coefficient. E is not an independent variable in the determination of murder rates, but perhaps murder rates do partially determine execution rates. Hence a misspecified form like (f) or (j) may produce a spurious least-squares statistical relationship.

VII. Conclusion

The purpose of the empirical work in this Article is to test the hypothesis that capital punishment deters murder. Two important qualifications to interpretation of the research are necessary. First, statistical techniques test hypotheses only in a limited sense of the word; they can only establish the likelihood that the available evidence is consistent with the hypothesis in question. Thus one might argue—I would not—that Ehrlich confirmed that the idea that extra executions deter murders was consistent with one set of observations. Other explanations that do not include capital punishment deterrence might also be found consistent with Ehrlich's data.

Second, the techniques used here (and those employed by Ehrlich) attempt to isolate the effect of executions on murders, *holding other factors constant*. Since other factors cannot be held constant in practice—changing execution rates might result in changes in arrests, convictions, and prison sentences as well—this study answers a different question than the one generally asked. This is not due to caprice on the part of the investigator, but to a lack of information about the criminal justice system.

Our analysis accounts for as many of the major, quantifiable factors as possible that explain state-to-state variations in murder rates, then tests whether state-to-state variations in execution rates also add explanatory power to the equation. Five variables—conviction rates, average prison sentences, poverty, age, and rural-urban migration—plus a special accounting variable for Southern states, do in fact explain a great deal of these state to-state murder rate variations. Variations in execution rates, however, add no explanatory power.

Estimates derived from regression analysis have value conditional upon the fulfillment of certain assumptions about relationships underlying the behavioral model, as well as assumptions about the sources of error in the data. Since one has relatively little information upon which to base a complete model of the criminal justice system or to analyze the source of errors in the data, it becomes imperative to test the sensitivity of the results to different assumptions.

The results displayed in Tables 1 and 2 establish insensitivity to assumptions about the mathematical form of the equation and to specification of the execution variable itself. For a reasonably broad set of mathematical forms and alternative estimators of the subjective probability of execution, one finds no evidence of an execution deterrent. Section V analyzes the potential bias introduced by simultaneous determination of murder rates with other variables in the system—conviction rates, execution rates, prison sentences. Again, under a range of plausible assumptions, there is no evidence that executions act as a deterrent. Section VI explores the possibility that murder rates may systematically influence execution rates. The results presented in Table 4 support such a hypothesis.

Just how the evidence presented here should influence one's view on the issue of capital punishment deterrence depends in part on one's perspective. It cannot be proven that executions do not serve as a deterrent to murder. Proof is simply beyond the capacities of empirical social science.

At a minimum, however, students of capital punishment must look elsewhere for evidence confirming deterrence. We know of no reasonable way of interpreting the cross-section data that would lend support to the deterrence hypothesis.

It is important to observe that the economic approach to studying crime has value beyond the capital punishment issue. Simply because the threat of execution does not deter murder does not mean that either the length of sentence or certainty of punishment does not influence would-be criminals. The deterrent effect of conviction rates and sentences stands up well in the cross-section regressions published here. Nor does the failure to find statistical support for capital punishment deterrence discredit the use of econometric techniques to formulate and test rigorously hypotheses about criminal behavior. Its purpose is not merely to provide an empirical buttress for specific policy positions on crime prevention, but also to define the dimensions of knowledge about crime and suggest ways of expanding them.

The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater

Milner S. Ball*

The essay form is the fit instrument for a thinker whose chief concern is to lay bare the contending claims that seek the mediation and authority of society through law, and to give some indication, at least, of how these processes of mediation in fact operate. For the essay is tentative, reflective, suggestive, contradictory, and incomplete. It mirrors the perversities and complexities of life.[1]

The production of plays unlike the production of goods cannot be streamlined.[2] A performance of *King Lear* requires about as much time and labor now as it did in Elizabethan England. Output per man-hour could be significantly increased in the theater only by radically transforming its quality, dynamics and nature, as, for example, by abandoning the intimate medium of live performance for the quite different mass media of television or film. Productivity gains are precluded in live performance because what the performer does is an end in itself and not the means to production of some other good. Inasmuch as it is invulnerable to greater technological efficiency through mass production or speedier processes, theater cannot reduce its costs.

The same is true of the public functions of courts. Some aspects of judicial administration are undoubtedly subject to modifications which would increase its productivity, but there is little that can be done to cut the time and labor of trials and oral arguments. Their costs can only multiply. The question, which gathers urgency as court workloads and docket congestion

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1. F. Frankfurter, Felix Frankfurter on the Supreme Court 203 (P. Kurland ed. 1970), quoted from Frankfurter's book review of B. Cardozo, The Paradoxes of Legal Science (1928), 78 U. Pa. L. Rev. 436 (1929).

2. *See* W. Baumol & W. Bowen, Performing Arts—The Economic Dilemma 161–72 (1966), which explores the relationship of productivity gains and the technology of live performance. The emphasis in this opening paragraph is a pale, partial reflection of their suggestive formulation.

Statistical Evidence on the Deterrent Effect of Capital Punishment

Editors' Introduction

Sophisticated statistical evidence became important in the litigation over the constitutionality of the death penalty a decade ago. As part of its attack on capital punishment, the NAACP Legal Defense and Educational Fund sponsored a statistical study of racial discrimination in the sentences imposed for rape in the South.[1] Abolitionist lawyers have relied on evidence of discriminatory imposition of the penalty to argue that it violated the Fourteenth Amendment's guarantee of the equal protection of the laws and the Eighth Amendment's prohibition of cruel and unusual punishments.[2] Such evidence clearly influenced the decision in *Furman v. Georgia*, in which the Supreme Court, by a five-to-four margin, struck down as cruel and unusual punishment the imposition of the penalty at the discretion of the judge or jury.[3]

A more fundamental statistical attack was directed at one of the underlying legislative rationales for capital punishment—that it is a more effective deterrent to crime than life imprisonment. This attack goes to the very existence of the penalty rather than the manner in which it is imposed. The issue of deterrence received some attention in *Furman*, and is now before the Court in *Fowler v. North Carolina*,[4] which poses Eighth and Fourteenth Amendment challenges to capital punishment imposed under North Carolina's mandatory sentencing procedure.

1. The findings of this study are reported in Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in W. Bowers, Executions in America 111-29 (1974). This study confirmed earlier findings of the discriminatory imposition of the penalty reported in earlier investigations. See W. Bowers, *supra* at 18-19.

2. Brief for NAACP *et al.* as Amici Curiae at 13-22, Aikens v. California, 406 U.S. 813 (1972) (Eighth and Fourteenth Amendment challenges dismissed as moot after decision of California supreme court in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), that capital punishment violated the state constitution); Maxwell v. Bishop, 398 F.2d 138, 141-48 (8th Cir. 1968), *rev'd on other grounds*, 398 U.S. 262 (1970) (after thorough discussion, then Circuit Judge Blackmun rejected a Fourteenth Amendment challenge, based on the NAACP study of racial discrimination in rape sentencing, note 1 *supra*, to a death sentence imposed under an Arkansas rape statute); Brief for NAACP Legal Defense & Educational Fund, Inc. and National Office for the Rights of the Indigent as Amici Curiae at 51-53, Boykin v. Alabama, 395 U.S. 238 (1969) (Eighth Amendment challenge based in part on statistical evidence of racial discrimination in imposition of death penalty).

The prohibition of cruel and unusual punishments is applicable to the states through the Fourteenth Amendment. See Robinson v. California, 370 U.S. 660, 667 (1972).

3. 408 U.S. 238 (1972). Two of the five Justices who concurred in the judgment of the Court relied at least in part on statistical evidence of the racially discriminatory imposition of the penalty. *Id.* at 250 n.15 (Douglas, J., concurring), 364-65 (Marshall, J., concurring). Two of the dissenters recognized the importance of the evidence for a possible claim of denial of equal protection of the laws. *Id.* at 389-90 n.12 (Burger, C.J., dissenting) ("data of more recent vintage" essential for equal protection claim), 419 n.2 (Powell, J., dissenting). See White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 11 Duq. L. Rev. 279, 281-85 (1973).

4. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803, *cert. granted sub nom.* Fowler v. North Carolina, 419 U.S. 901 (1974), *argued*, 43 U.S.L.W. 3362 (U.S. Apr. 21, 1975), *restored for reargument*, 423 U.S. 809 (1975). See notes 17-18 *infra*.

Of the nine Justices writing separate opinions in *Furman*, Justice Marshall, who along with Justice Brennan would have found the penalty unconstitutional per se, gave the most weight to the statistical evidence on deterrence.[5] From prior cases construing the Eighth Amendment, he derived the principle that a punishment is cruel and unusual if it is "excessive and serves no valid legislative purpose."[6] Devoting more than half of his discussion of the purposes conceivably served by capital punishment to the "hotly contested issue . . . whether it is better than life imprisonment as a deterrent to crime,"[7] he stated that the deterrent effect of capital punishment rested on "logical hypotheses devoid of evidentiary support," and invoked the statistical studies of Thorsten Sellin, which for him "demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction."[8] He quoted extensively from Sellin as "one of the leading authorities on capital punishment" and included as appendixes to his opinion several of Sellin's tables comparing homicide rates in neighboring abolitionist and retentionist jurisdictions.[9] After considering and rejecting other possible purposes for capital punishment, he concluded:

> [T]he death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment. The statistical evidence is not convincing beyond all doubt, but it is persuasive. . . . [T]here is sufficient evidence available so that judges can determine, not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.[10]

The "excessive and unnecessary" standard of the Eighth Amendment is essentially equivalent to a substantive due process standard: the penalty is unconstitutional if it lacks a rational basis.[11] This due process analysis

5. 408 U.S. at 315-54 (Marshall, J., concurring). Justice Brennan stated that "the available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment." *Id.* at 301. Justice Stewart found the statistical evidence on deterrence "inconclusive." *Id.* at 307-08 & n.7. Chief Justice Burger characterized the evidence on deterrence as an "empirical stalemate." *Id.* at 395. Justice Powell observed that statistical studies "tend to support the view that the death penalty has not been proved to be a superior deterrent," but do not approach the showing required to find the penalty unconstitutional. *Id.* at 451, 456. *See* White, *supra* note 3, at 285-86.

6. 408 U.S. at 331. This principle was also put forth by Justice Brennan, *id.* at 279-80, but was sharply attacked by the dissenters, *id.* at 391-96 (Burger, C.J., dissenting), 451 (Powell, J., dissenting).

The other ground relied on by Justices Brennan and Marshall was that the penalty was "morally unacceptable to the people of the United States . . . ." *Id.* at 360 (Marshall, J., concurring); *see id.* at 295-300 (Brennan, J., concurring).

7. *Id.* at 345-54.

8. *Id.* at 347, 350.

9. *Id.* at 348-50, 373-74.

10. *Id.* at 356-59 (footnote omitted).

11. The principle that a punishment is cruel and unusual if it is excessively severe was suggested by Justice Goldberg [illegible]

requires that those challenging the death penalty overcome the "presumption of constitutionality accorded legislative acts."[12] Whereas in a traditional Brandeis brief[13] statistical evidence is used to support that presumption, in *Furman* the evidence was used to attack it.

If the Eighth Amendment does prohibit unnecessarily severe punishments, the findings of Professor Isaac Ehrlich on the deterrent effect of capital punishment, reported a year after *Furman* and published this spring,[14]

Alabama, 375 U.S. 889 (1963), and analyzed as a substantive due process standard in Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964). Justice Marshall recognized that his excessive severity principle under the Eighth Amendment "parallels in some ways" a substantive due process analysis:

> The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (*i.e.*, the right to life), . . . the State needs a compelling interest to justify it. . . . Thus stated, the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment—*i.e.*, punishment may not be more severe than is necessary to serve the legitimate interests of the State.

408 U.S. at 359-60 n.111 (Marshall, J., concurring).

12. 408 U.S. at 359 (Marshall, J., concurring).

Justice Marshall did not make entirely clear his view of the strength of the presumption of constitutionality accorded to the legislative enactment of capital punishment. On the one hand, he stated that those challenging the penalty "bear a heavy burden of demonstrating that it is excessive," *id.* at 360 n.111, and on the other, that

> [d]espite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent . . . .

Id. at 353.

In recent decades the Court has accorded a greater presumption to legislation restricting economic liberty than to that restricting noneconomic rights. *Compare* Ferguson v. Skrupa, 372 U.S. 726 (1963), Williamson v. Lee Optical Co., 348 U.S. 483 (1955), Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949), *and* G. Gunther, Cases and Materials on Constitutional Law 576-96 (9th ed. 1975) *with* Roe v. Wade, 410 U.S. 113 (1973), Griswold v. Connecticut, 381 U.S. 479 (1965), *and* G. Gunther, *supra* at 616-56. Following this double standard, the Court would apply the greater scrutiny to punishments tested for a rational basis under the Eighth Amendment. *Cf.* Comment, *The Death Penalty Cases*, 55 Cal. L. Rev. 1268, 1271-73 (1958). It has been suggested that the double standard may be justified by a theory of judicial review which accords greater deference to legislation supported by instrumental policy considerations—reasons of social utility—than to legislation supported by moral judgments. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 222 (1973). Under this analysis, the legislative purpose of deterrence for capital punishment might be subjected to less scrutiny than the other purpose most often advanced, retribution. For discussions of retribution as a justification for capital punishment, see, *e.g.*, Furman v. Georgia, 408 U.S. 238, 303-01 (Brennan, J., concurring), 308 (Stewart, J., concurring), 342-45 (Marshall, J., concurring), 391-95 (Burger, C.J., dissenting), 452-61 (Powell, J., dissenting) (1972); Packer, *supra* note 11, at 1078; Comment, *supra* at 1297-1301.

13. Before he was appointed to the Court, Louis Brandeis submitted a brief supplying extensive factual support from nonjudicial sources for an Oregon law regulating hours of work for women. His brief received favorable comment in Justice Brewer's opinion for the Court upholding the statute, Muller v. Oregon, 208 U.S. 412, 419-20 & n.1 (1908), and has become a classic example of the use of social science data in constitutional litigation. See P. Freund, On Understanding the Supreme Court 86-92 (1949).

14. I. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life or Death, 1974 (Working Paper No. 18, Center for Economic Analysis of Human Behavior [illegible] Capital Punishment: A Time

bear importantly on the question now before the Court in *Fowler*. One of the two Justices who have thus far revealed themselves willing to declare the penalty unconstitutional per se has relied in large part on the statistical research of Sellin and others who have followed his approach. Ehrlich criticized the methods used by Sellin—graphical comparisons of homicide rates in neighboring states—and used a more sophisticated technique—multiple regression analysis.[15] He found a significant deterrent effect associated with the use of the death penalty in the United States over the period from 1935 to 1969, specifically that on average for the period studied each additional execution per year resulted in seven or eight fewer murders.[16] The Solicitor General of the United States, in his amicus brief in *Fowler*, called attention to the Ehrlich study as important empirical evidence that capital punishment serves the legitimate legislative purpose of deterring murder;[17] the petitioner, in his reply brief, sharply attacked

15. Multiple regression is a statistical technique for analyzing the relationship between a dependent variable, whose behavior is to be explained, and a set of independent or explanatory variables. The analysis uses a sample of data to estimate an equation in which the dependent variable is set equal to a weighted sum of the explanatory variables. The weights or "coefficients" associated with the explanatory variables are chosen to minimize the sum of the squared differences between the actual values of the dependent variable and the values computed using the regression equation (hence the term "least squares regression"). A graphical representation of a regression equation with only one explanatory variable would be a "least squares" line drawn through the scatter of points generated by plotting the dependent variable on the vertical axis and the explanatory variable on the horizontal axis. Econometrics is concerned with the use of regression analysis to measure and test economic relationships. See B. Wonnacott & T. Wonnacott, Econometrics 1-9 (1970); Finkelstein, *Regression Models in Administrative Proceedings*, 86 Harv. L. Rev. 1442, 1444-55 (1973) [hereinafter cited as *Regression Models*].

Regression analysis is being used with increasing frequency in legal commentary. *See, e.g.*, Brantman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 Yale L.J. 483 (1973); Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941 (1973); Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 Harv. L. Rev. 293 (1975); Posner, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Tobriner-Kennedy Debate*, 63 Cal. L. Rev. 1098 (1975); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 Harv. L. Rev. 387 (1975). However there has been little discussion in legal journals of the wide range of results which regression studies of a given relationship may produce and the statistical controversies which often arise between authors of these conflicting studies. *But see Regression Models*, *supra* at 1455-75; Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 30 Law & Contemp. Probs. 217, 228 (1975) (conflicting statistical evidence on effects of racial integration and compensatory education programs on test scores of minority students). The economic literature reveals the extent of the disagreements provoked by econometric studies even of relationships on which there is considerable theoretical agreement among economists. *See, e.g.*, D. Patinkin, Money, Interest, and Prices 651-61 (2d ed. 1965); Jorgenson, *Econometric Studies of Investment Behavior: A Survey*, 9 J. Econ. Lit. 1111 (1971); Liviatan, *Tests of the Permanent-Income Hypothesis Based on a Reinterview Savings Survey*, in Readings in Economic Statistics and Econometrics 251-83 (A. Zellner ed. 1968); Friedman, *Note on Nissan Liviatan's Paper*, in *id.* at 284-87; Liviatan, *A Reply*, in *id.* at 287-90.

16. Ehrlich 1975, *supra* note 14, at 398, 414.

17. Brief for the United States as Amicus Curiae at 35-38. In the summary of his argument, the Solicitor General described the Ehrlich study in these terms:

> After performing a sophisticated regression analysis that analyzed the effects of many

HANS ZEISEL

THE DETERRENT EFFECT OF THE DEATH PENALTY: FACTS v. FAITHS

I. The Problem

Once again in the 1975 Term, the Justices of the Supreme Court found themselves unable to express a unified position on the validity of the death penalty. The problem is a complex one because of murky precedents, disputed facts, and strong emotional commitments. It is proposed here to address just one of the issues raised in the cases, the question of the data supporting or controverting the deterrent effect of the death penalty.

In one of the opinions in *Gregg v. Georgia*[1]—there was no opinion for the Court—Mr. Justice Stewart, speaking for himself and Justices Powell and Stevens, stated: "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive."[2] The Justice went on to cite with approval the position of Professor Charles L. Black, that no conclusive evidence would ever be available on the question of deterrence:[3]

Hans Zeisel is Professor Emeritus of Law and Sociology, The University of Chicago; Senior Consultant, American Bar Foundation.

[1] 96 S. Ct. 2909 (1976).

[2] *Id.* at 2930.

[3] *Id.* at 2931, quoting BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 25–26 (1974).

Please insert the following in your copy of *The Supreme Court Review*, [illegible], edited by Philip B. Kurland (University of Chicago Press, 1977):

In Hans Zeisel's article, "The Deterrent Effect of the Death Penalty," figures 5 and 8 (pp. 330 and 337) were transposed. They are given correctly below:

HB-140

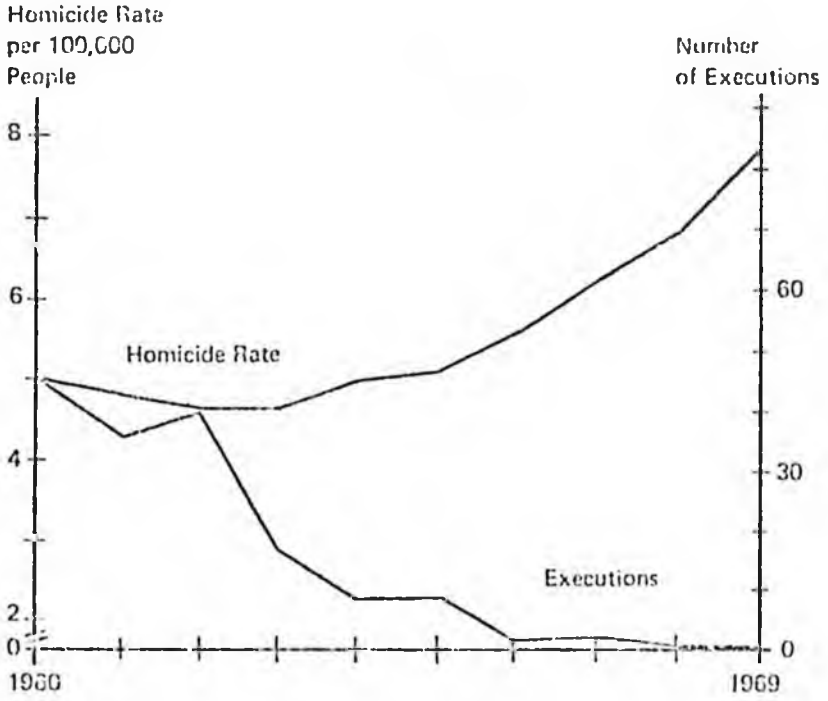
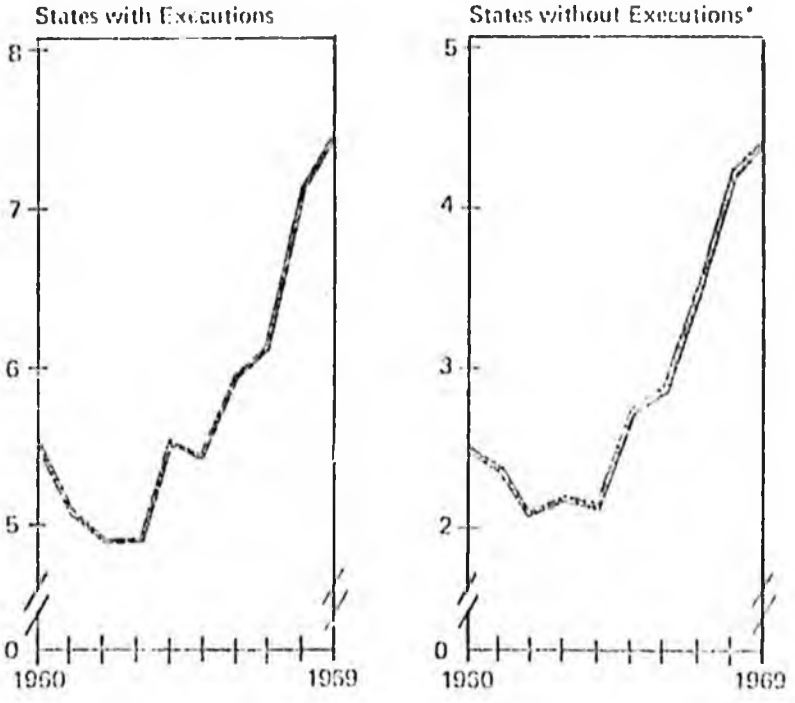


FIG. 5. United States homicide rate and number of executions, 1960–69.



* Abolition states and 6 states with no executions since 1948

FIG. 8. Homicide rates 1960–69 in states with and without executions.

> . . . after all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this "deterrent" effect may be. . . .
>
> . . . A "scientific"—that is to say, a soundly based—conclusion is simply impossible, and no methodological path out of this tangle suggests itself.

It is the purpose of this paper to show that both the Court's and Professor Black's views are wrong; that the evidence we have is quite sufficient if we ask the right question; and that the request for more proof is but the expression of an unwillingness to abandon an ancient prejudice.

II. The Structure of the Evidence

All studies that explore the possible deterrent effect of capital punishment are efforts to simulate the conditions of what is conceded to be an impossible controlled experiment. In such an experiment the population would be divided by some lottery process (randomly) into two groups. The members of one group, if convicted of a capital crime, would receive the death penalty; the members of the other group, if convicted of a capital crime, would receive a sentence of life in prison.

The random selection would assure all other conditions that could possibly affect the capital crime rate remain the same—within the calculable limits of the sampling error—in both groups, so that the "death penalty–life sentence" difference remains the only relevant difference between them.

Figure 1 shows the basic analytical structure of such an experiment. This hypothetical graph, denoting the constellation that would confirm the existence of a deterrent effect, begins with two populations of would-be murderers (X + Y + Z), equal in every respect except that the one lives under threat of the death penalty, the other does not. (X) is the number of would-be murderers in both groups deterred, even by the threat of prison; it can be read from the first bar and projected to the second. At the bottom end of each bar (Z) is the proportion of would-be murderers whom even the threat of the death penalty would not deter. It can be read from the second bar and projected to the first. The crucial test is whether a group (Y) can be found which would be deterred by the death penalty but

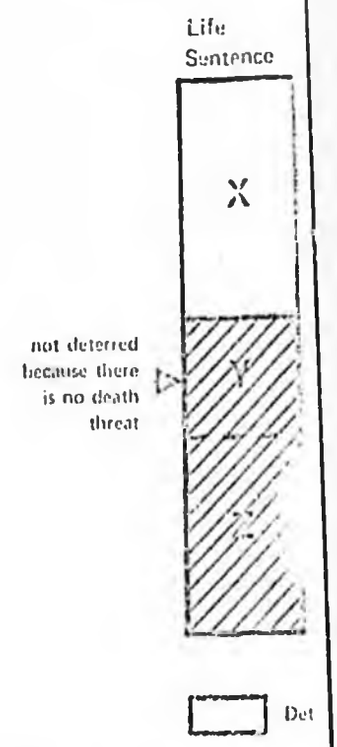


FIG. 1. Experimental paradigm
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reveal a significantly low
death penalty.

In principle, it should
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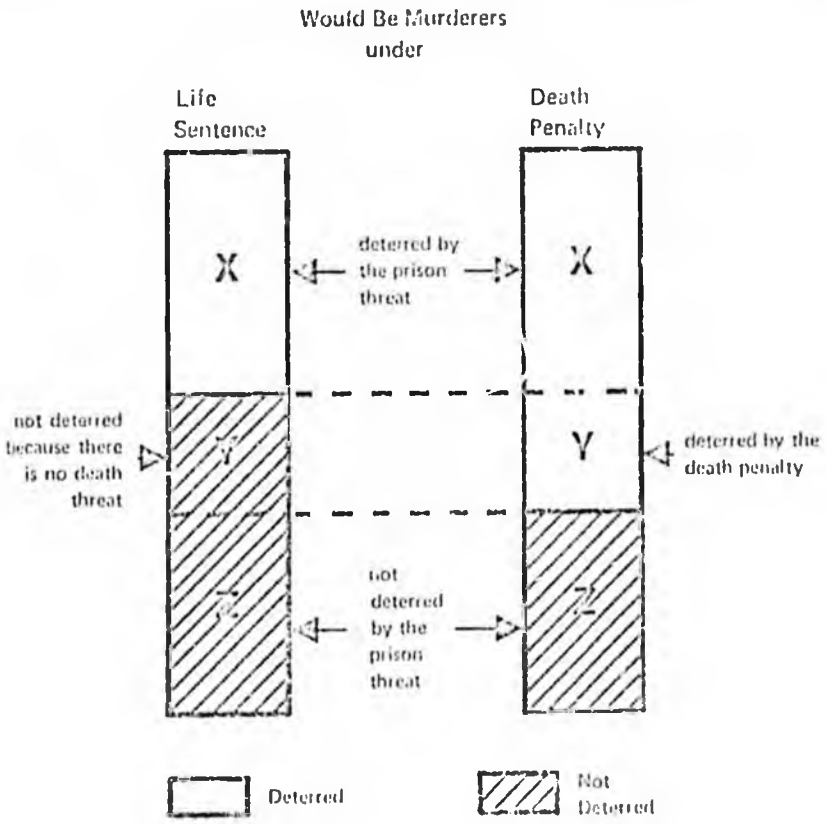


FIG. 1. Experimental paradigm showing a deterrent effect of the death penalty over the life sentence.

would not be deterred if there were only the life sentence. The statistical test that would establish the existence of group (Y) would reveal a significantly lower level of murders[1] under threat of the death penalty.

In principle, it should be possible to identify individual members in each of the three groups. As a practical matter one can identify only the murderers who have not been deterred.[2] Efforts have been

[1] The paradigm is limited to murder. See also, however, Bailey, *Rape and the Death Penalty: A Neglected Area of Deterrence Research*, in BOWERS & PIERCE eds. CAPITAL PUNISHMENT IN THE UNITED STATES 336 (1976).

[2] The task of tracing the effect of an experimental treatment through case histories of the persons who had been affected by it is less difficult if the treatment aims at a positive effect not a negative, deterrent one. See ZEISEL, SAY IT WITH FIGURES ch. II (1968 ed.).

made to identify members of the (Y) group. The Los Angeles Police Department, for instance, filed a report with the California legislature in 1960 to the effect that a number of apprehended robbers had told the police that while on their job they had used either toy guns or empty guns or simply simulated guns "rather than take a chance on killing someone and getting the gas chamber."[6] Quite apart from this being hearsay evidence reported by a very interested party, this is poor evidence, if any, on the issue. The unresolved and probably unresolvable difficulty is whether these robbers would not have minded "killing someone," if the risk had been no more than life in prison.

Figure 2 represents the paradigm diagram for proving the deterrent effect of increasing executions. Proof of deterrence would be established if groups (Y_1) and (Y_2) were found to exist.

III. The Impossible Controlled Experiment

Such diagrammed evidence would be cogent if derived from a controlled experiment. How morally and legally impossible such an experiment is can easily be seen if its details are sketched out. In one conceivable version a state would have to decree that citizens convicted of a capital crime and born on odd-numbered days of the month would be subject to the death penalty; citizens born on even-numbered days would face life in prison. A significantly lower number of capital crimes committed by persons born on uneven days would confirm the deterrent effect. The date of birth here is a device of randomly dividing the population into halves by a criterion that we will assume cannot be manipulated.[7]

The equally impossible experiment that would test the effect of differential frequencies of execution would require at least three randomly selected groups. In the first group everybody convicted of a capital crime would be executed. In the second, only every other such convict (again selected by lot) would be executed. In the third, nobody would be executed.

The data available to us for study of the deterrent effect of the death penalty are all naturally grown: none derive from a controlled

[6] Report of the California Senate on the Death Penalty 16-17 (1960).

[7] Worried, expectant mothers, of course, could demand Caesarian delivery on an even-numbered date. Such intervention, however, would affect the purity of the experiment only if these mothers were also farsighted, *i.e.*, if their artificial birth dates would comprise a higher rate of future murderers than the normal delivery



Fig. 2. Experimental paradigm executions.

experiment. Yet they all controlled experiment. T is missing is the prior ran all other respects. The an reproduce comparability is ever perfect, none of t ever completely simulates

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[*] Note 3 *supra*.

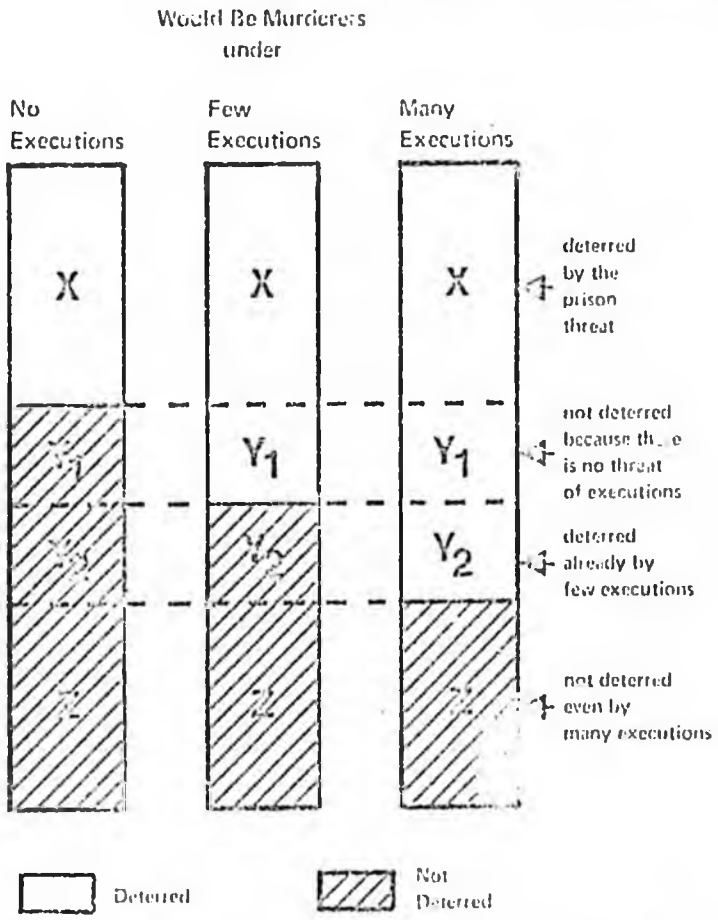


FIG. 2. Experimental paradigm showing a deterrent effect of increasing the rate of executions.

experiment. Yet they all are analyzed as if they had come from a controlled experiment. The structure of analysis is the same. What is missing is the prior randomization which insures comparability in all other respects. The analysis of naturally grown data must try to reproduce comparability by other means. Since none of these means is ever perfect, none of the studies based on naturally grown data ever completely simulates the impossible experiment.

It is this impossibility of the experiment and the unavoidable imperfection of nonexperimental data that account for despair of ever discovering "the truth about this 'deterrent' effect."[8] The despair is unwarranted. Even in the so-called natural sciences proofs that

[8] Note 3 *supra*.

are incomplete have nevertheless, for good reasons, been accepted by the scientific community.

Let us see then what proofs have been afforded by the many studies that have been done. They are stated here, not in their historical sequence, but in terms of the varying degree with which they approximate the ideal of the controlled experiment.

IV. Homicide Rates with and without the Death Penalty

The first approximation to the impossible experiment is the simple comparison of the capital crime rates in jurisdictions with and without capital punishment. The comparison could take two forms. Historically the first and most obvious comparison was made of the capital crime rate in one state before and after the abolition of the death penalty. If it showed no increase, it gave ground for the belief that the withdrawal of the death penalty had no ill effect.[9] The second form of simple comparison was between states that have the death penalty and states that do not have it.[10]

These early comparisons failed to show higher capital crime rates when there was no death penalty. But to take this as proof that the death penalty had no deterrent effect involved important assumptions. The before and after comparison implies that none of the other conditions that could have affected the capital crime rate had changed between the two periods. The state-by-state comparison implies that the states were identical with respect to the other conditions.

The first improvement on the simplistic structure of these comparisons was to put the before-and-after comparison side by side with developments in states which during that period had not changed their death penalty rule. Similarly, the comparison between

[9] The first comprehensive data on before-and-after comparison were presented by Thorsten Sellin to the Royal Commission on Capital Punishment. *The Determination of Value of Capital Punishment*, Report of the Royal Commission on Capital Punishment App. 6 (Cmd. 8932 1953). Sellin's memorandum is published in The Measures of the Expedient, 667. *Cf.* also Koestler, Reflections on Hanging, Ap. (1956); United Nations, Capital Punishment, Report (1960); Samuelson, *Was Capital Punishment Restored in Delaware?* 60 J. Crim. L.C. & P.S. 148 (1969).

[10] Sellin, *Homicides in Retentionist and Abolitionist States*, in Sellin, Capital Punishment 135 (1967); Reckless, *The Use of the Death Penalty—A Layman's Statement*, 15 Crime & Delinq. 43 (1969); Zimring & Hawkins, Deterrence (1973); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170, 171 (1975).

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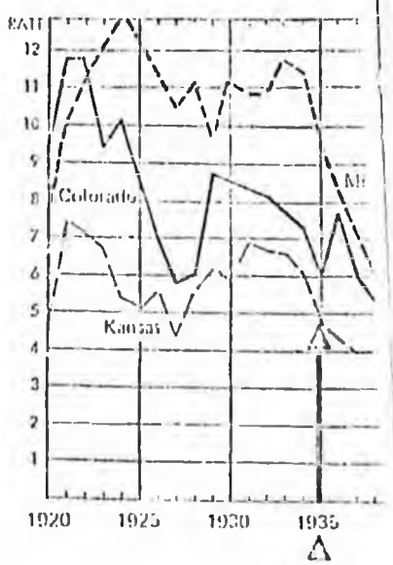


Fig. 3. Homicides per 100,000 population i

[11] Zimring & Hawkins, note 10 *supra*, at 2

[12] From Sellin, note 10 *supra*, at 137.

states was improved by limiting it to contiguous states, for which the assumption of comparability seems more justified.

Table 1 provides an example of contiguous states comparison.[11]

Only in one of the five groups is the homicide crime rate in the no-death-penalty state (Maine) higher than in the other two states. In all others it is either the same or lower. This is neither evidence of a deterrent effect of the death penalty nor clear evidence of its absence. Even contiguous states are nor strictly comparable. Over a span of sixteen years, the period covered by this table, the conditions favoring crime in those states may develop in different directions.

The state-by-state analysis becomes more convincing if averages for a long time period are replaced by the annual figures from which these averages were computed. In figure 3, the homicide rate in Kansas is compared with that of its neighbor states, Missouri and Colorado. Kansas was an abolitionist state until 1935.[12]

Figure 3 allows several observations. First, that annual rates exhibit considerable random fluctuations. It suggests that changes from one



FIG. 3. Homicides per 100,000 population in Missouri, Colorado, and Kansas, 1920–58.

[11] ZIMRING & HAWKINS, note 10 *supra*, at 265.

[12] From SELLIN, note 10 *supra*, at 137.

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TABLE 1
Homicide Death Rates in Contiguous States with[a] and without Capital Punishment, 1930-55
(Average annual rate per 100,600 population)

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

Demographic Profile of

Status of death penalty	
Homicide rate	
Probability of apprehensio	
Probability of conviction	
Labor force participation	
Unemployment rate (%)	
Population aged 15–24 (%	
Real per capita income ($	
Nonwhite population (%)	
Civilian population (000's)	
Per capita government expenditures ($)*	
Per capita police expendite	

* State and local

[18] From Bahlus & Cole, n

year to the next are unlikely to be significant. Figure 3 also shows that looking only at one state may lead to false conclusions. The Kansas homicide rate, except for the first two years, shows a sharp decline after 1935 and some early observers jumped to the conclusion that it was the restoration of the death penalty that did it. A glance at the homicide rates of Colorado and Missouri warns against this conclusion. The development of the Kansas rate does not noticeably differ from those of the two neighboring states, which had the death penalty throughout the entire span of years.

V. Improving Comparability

Comparing the development of the capital crime rate in contiguous states with and without the death penalty has been challenged on the ground that contiguity is not a sufficiently solid guaranty of likeness. Three responses to this challenge have been forthcoming. One was to show that the contiguous states were in fact alike with respect to a great variety of factors that could, if they had differed from state to state, independently affect the capital crime rate. Table 2 is an example of such efforts.[13]

TABLE 2

Demographic Profile of Contiguous States Compared in Group 1 of Table 1 (1960 data)

	Michigan	Indiana	Ohio
Status of death penalty	...	D	D
Homicide rate	4.3	4.3	3.2
Probability of apprehension	.75	.83	.85
Probability of conviction	.25	.55	.33
Labor force participation (%)	54.9	55.3	54.9
Unemployment rate (%)	6.9	4.2	5.5
Population aged 15–24 (%)	12.9	13.4	12.9
Real per capita income ($)	1,292	1,176	1,278
Nonwhite population (%)	10.4	6.2	9.8
Civilian population (000's)	7,811	4,653	9,690
Per capita government expenditures ($)*	363	289	338
Per capita police expenditures ($)*	11.3	7.6	9.0

* State and local.

[13] From Babbus & Cole, note 10 *supra*, at 178.

Michigan, the state without a death penalty, had no higher homicide rate than neighboring Indiana, even though it had a lower probability of apprehension and conviction, a higher unemployment rate, a larger proportion of blacks in the population, greater population density—all factors which should tend to increase the capital crime rate. On the other hand, it had a higher per capita police expenditure. Ohio had a lower homicide rate and a higher apprehension rate. On most of the remaining characteristics Ohio was in an intermediary position.

The second analytical device for improving comparability was to replace the comparison of entire states by comparing more homogeneous subsections of these states, such as communities of comparable size or counties of comparable income levels.[14] The third, most sophisticated response to the problem of comparability was to apply to it a tool called regression analysis. This is an instrument designed mainly to resolve problems such as this which call for separating the effect of one particular variable from the possible effect of a multitude of others.

Before discussing regression analysis in more detail, I turn to two additional efforts to sharpen the analytic approach aimed at detecting the existence of a deterrent effect for the death penalty.

VI. Sharpening the Measure of Capital Crime

If the death penalty deters murder, the rate of wilful homicides should show the effect. There are, however, grades of wilfulness and some type of homicide will have a higher likelihood of resulting in the death penalty. These types of homicide should provide a more sensitive index for detecting deterrent effect, if one exists, than the overall homicide rate.[15]

The difficulty of developing such an index, of course, is the lack of adequate data. With one exception, namely, the killing of a police officer, records are not generally separated according to the type of homicide committed. An effort has been made to obtain counts of

[14] Cf. e.g., Sutherland, *Murder and the Death Penalty*, 15 J. Crim. L.C. & P.S. 520 (1925); Campion, *Does the Death Penalty Protect the State Police?* in Bedau, ed., The Death Penalty in America 361 (1967); Vold, *Can the Death Penalty Protect Police?* 12 Prison J. 4 (1932).

[15] Zimring & Hawkins, *Deterrence and Marginal Groups*, J. Res. in Crime & Delinq. 100 (July 1968).

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Rhode Island	
Michigan*	
Minnesota	
Wisconsin	
N. Dakota	
Detroit, Mich.	

* Without Detroit.
† 1928–41.

VII. The Effect of Execu

A sentence is likely to
it engenders in the would-be

[16] Bailey, *Murder and Capital Pu*
note 4 *supra*, at 314.

[17] Sellin, *The Death Penalty and P*
144, 145.

first degree murders from the country's prisons.[16] But these numbers are affected by regionally differing apprehension and conviction rates, and indirectly also by differential standards of plea bargaining and jury nullification. Suffice it to note that this effort too failed to detect a deterrent effect of the death penalty.

Killing a policeman is a genuine "high death penalty risk" category and it is well recorded and counted. Again it was Thorsten Sellin who investigated them; table 3 summarizes his findings.[17] Even this measure, rightly thought to be more sensitive than the general homicide rate, failed to reveal any difference between the threat of the death penalty and that of life imprisonment.

TABLE 3
RATE OF MUNICIPAL POLICE KILLINGS, 1920–54
(Per 10 years and 100,000 population)

No Capital Punishment		Capital Punishment	
Maine	.00	Vermont	.00
Rhode Island	.17	New Hampshire	.14
		Massachusetts	.22
		Connecticut	.14
Michigan*	.36	Ohio	.61
		Indiana	.64
		Illinois	.31
Minnesota	.42	Iowa	.56
Wisconsin	.53		
N. Dakota	.53	S. Dakota	.00
		Montana	1.58
		New York	.25
Detroit, Mich.	.85	Chicago, Ill.†	1.54

* Without Detroit.
† 1928–44.

VII. The Effect of Executions

A sentence is likely to deter by the differential degree of fear it engenders in the would-be perpetrator. It has been argued, there-

[16] Bailey, *Murder and Capital Punishment: Some Further Evidence*, in BEDAU, note 4 *supra*, at 314.

[17] Sellin, *The Death Penalty and Police Safety*, in SELLIN, note 10 *supra*, at 138, 141, 145.

fore, that the dichotomy of jurisdictions with and without capital punishment is but a crude approximation to the reality of the threat. What matters was not the death penalty on the books but the reality of executions.

One response to this consideration was to transform the death penalty–life sentence dichotomy into the gradations provided by the number of executions carried out during any one year. I will return to this approach later. The other response was to try to find out whether publicized executions had a short-range depressing effect on the homicide rate.

Leonard Savitz recorded the homicide rates during the eight weeks before and after well-publicized executions in Philadelphia.[18] He found no depressing effect of these executions, although he used one of the potentially more sensitive measures of deterrence, the frequency of felony murders rather than the overall homicide rate.[19]

A similar effort with California data showed an effect, albeit an ambiguous one. William Graves compared homicide rates during execution weeks with non-execution weeks.[20] He had the weeks begin on Tuesday in order to keep Fridays, the execution day in California, at the midpoint. The comparison (fig. 4a) suggested a depressing effect during the days preceding the execution and an increase in homicides on the days following it. Graves was puzzled; others considered the data as proof of a counter-deterrent effect. Conceivably the data could be rearranged, as in figure 4b, with the week beginning on Friday, the execution day. The results would then suggest a reduction of homicides during the first three days following executions compensated by an increase during the rest of the week. In any event, Graves's data show, at best, a delaying rather than a deterrent effect, and the failure of the more sensitive Philadelphia data to show any effect casts doubt on the strength of the California result.

[18] Savitz, *A Study in Capital Punishment*, 49 J. Crim. L.C. & P.S. 338 (1958).

[19] A count of felony murders (for the non-lawyer: a homicide committed in the course of another felony such as robbery) can be made only with great difficulty and only in places, such as Philadelphia, where detailed police records are kept.

[20] Graves, *The Deterrent Effect of Capital Punishment in California*, in Bedau, The Death Penalty in America 322 (1967). (The rearrangement in figure 4b is not precise because the curves for Tuesdays through Thursdays will change under the redefinition.)



FIG. 4.—Homicides during week

VII. The Contributio

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[21] Ehrlich, *The Deterrent Eff*
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Am. Econ. Rev. 397 (1975).

[22] 96 S. Ct. 3212 (1976).

[23] Ehrlich, note 20, *supra*, 65 A



FIG. 4. Homicides during weeks with and without executions.

VII. THE CONTRIBUTION OF ISAAC EHRLICH

Isaac Ehrlich was the first to introduce regression analysis to efforts designed to determine whether the death penalty had a deterrent effect beyond the threat of life imprisonment.[21] This was a new, powerful way of coping with the task of isolating the death penalty effect, if it should exist, uncontaminated by other influences on the capital crime rate. Ehrlich's paper was catapulted into the center of legal attention even before it was published, when the Solicitor General of the United States cited it with lavish praise in his Amicus Curiae Brief in *Fowler v. North Carolina*,[22] and delivered copies of the study to the Court. The Solicitor General called it "important empirical support for the a priori logical belief that use of the death penalty decreases the number of murders."[23]

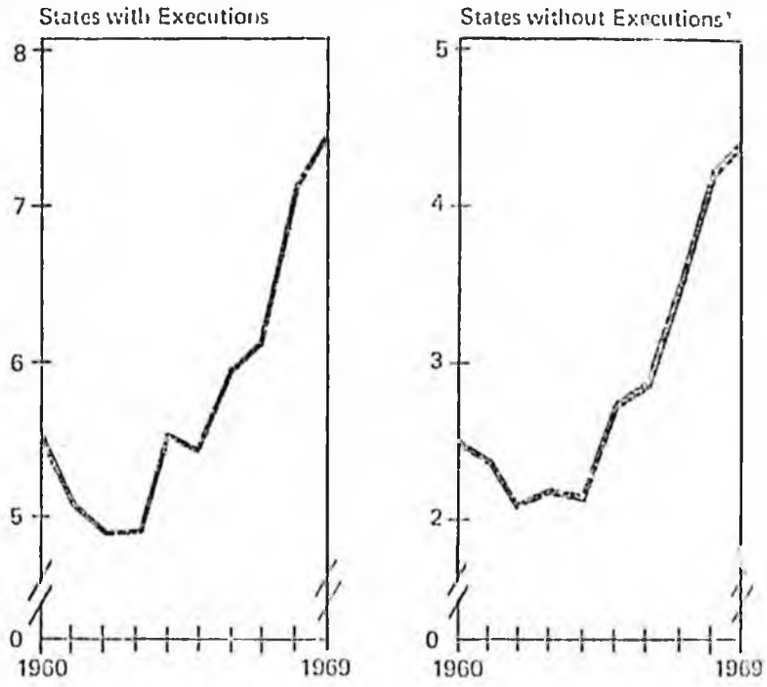
In view of the evidence available up to that time, Ehrlich's claim was indeed formidable, both in substance and precision: "[A]n additional execution per year . . . may have resulted in . . . 7 or 8 fewer murders."[24] The basic data from which he derived this conclusion were the executions and the homicide rates as recorded in the

[21] Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, Working Paper No. 18, National Bureau of Economic Research (1973). The paper was subsequently published under the same title in an abbreviated form in 65 AM. ECON. REV. 397 (1975).

[22] 96 S. Ct. 3212 (1976).

[23] Reply Brief, p. 36.

[24] Ehrlich, note 20, *supra*, 65 AM. ECON. REV. at 414.



* Abolition states and 6 states with no executions since 1938

FIG. 5. United States homicide and execution rates, 1960–69.

United States during the years 1933 to 1969, the former generally decreasing, the latter, especially during the sixties, sharply increasing.[25] Figure 5 presents the crucial divergence between 1960 and 1969. Ehrlich considered simultaneously other variables that could affect the capital crime rate through calculations I shall discuss presently.[26]

IX. Regression Analysis

Regression analysis proceeds essentially in the following manner. Suppose one knew for certain that, aside from the possible

[25] Data on murders from *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, Sources and Data, May 1975, Memorandum by I. Ehrlich. Data on executions from: National Prisoner Statistics, U.S. Bureau of Prisons.

[26] Ehrlich's analysis included the following variables: the arrest rate in murder cases; the conviction rate of arrested murder suspects; the rate of labor force participation; the unemployment rate; the fraction of the population in the age group 14 to 24; and per capita income.

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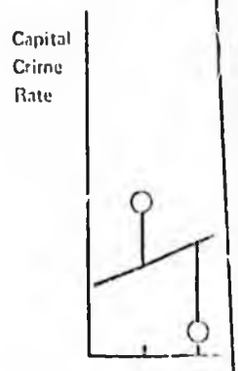


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deterrent effect of executing murderers, there was but one other factor that influenced the capital crime rate: the proportion of men between the ages of 17 and 24 in the total population. The analysis would then begin by relating the capital crime rate in the various states to the proportion of young men in those states, as in figure 6.

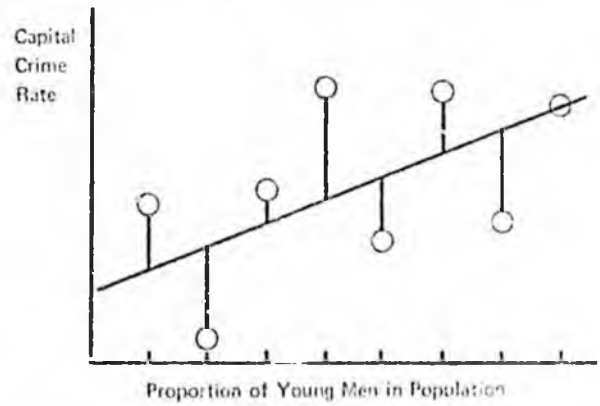


FIG. 6. Hypothetical relationship between the capital crime rate and the proportion of young men in the population.

The points in this graph may represent either different jurisdictions at one point of time, or different points of time in the same jurisdiction, or both. The straight line (the regression line) represents the best estimate of the relationship between the proportion of young men in the population and the capital crime rate. The vertical distance of each point from the regression line represents the residual part of the variations in the capital crime rate, the part that remains unexplained after the effect of the "proportion of young men" has been eliminated. One then proceeds to test whether these residuals are related to the frequency of executions, by plotting them against the number of executions in the respective states as in figure 7. If no relationship exists, a horizontal regression line will indicate that executions have no deterrent effect (a): No matter how executions vary, the capital crime rate remains the same. If a relationship exists (b), the downward slope of the regression line would indicate that as the frequency of executions increases, capital crime decreases. That graph, one will note in passing, is in appearance indistinguishable from the finding of a controlled experiment, if one could be made.

The complete apparatus of regression analysis is more compli-

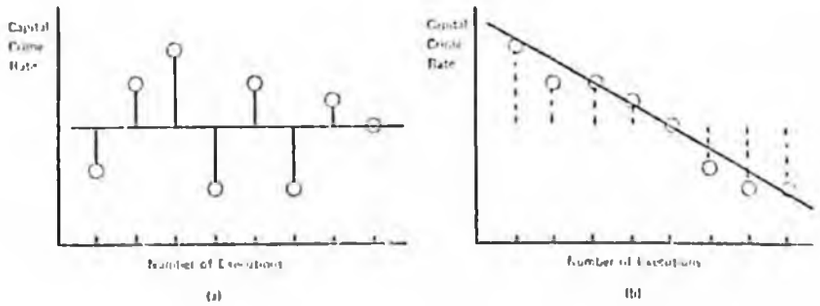


FIG. 7. Two hypothetical relationships between the frequency of executions and the residual capital crime rate.

cated, primarily by encompassing several control variables, not just one, as in our example. Many more problems must be resolved along the way. One requirement is to include all variables that affect the outcome. If one is omitted its effect could be erroneously attributed to one of the included variables. This danger of spurious correlation is particularly great if the analysis is concerned with so-called time series data, such as corresponding constellations of executions and capital crime over a series of consecutive years.

Another requirement is that the analysis account for feedback effects. Estimates of deterrent effects of punishment, for example, may be distorted if they fail to separate the simple statistical association between crime and punishment into its potential two components: the effect of punishment on crime, and the possible reverse effect of crime on punishment. For example, an increase in crime may overload the law enforcement system and thereby increase the defendant's chances of a lower sentence in the plea bargaining process.

All these and other technical refinements of the regression analysis have but one goal: to isolate, through a process of mathematical purification, the effect of any one variable upon the other, under conditions that exclude the interference from other variables. Regression analysis, thus, is but another effort to simulate with the help of nonexperimental data the experimental conditions outlined in figure 2 of this paper.[25] These examples suggest the sophistication

[25] A more elaborate effort by me to explain regression analysis to the non statistician is in preparation and will be published in the *American Bar Foundation Research Journal*.

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X. Ehrlich's Deterrence

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[28] Passell & Taylor, *The Deterrent I*
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[29] *Id.* at 6–8.

[30] Kenneth L. Avio, *Capital Punis*
Deterrent Hypothesis (mimeo. 1975).

[31] *Id.* at 22.

[32] Bowers & Pierce, *The Illusion*
Capital Punishment, 85 Yale L.J. 187

of this analytic instrument, but its sophistication is matched by a corresponding measure of delicacy. Applied to nonexperimental data, regression analysis is not a naturally robust instrument. Its results can be drastically affected by minor changes in the analytic pattern, for which the investigator has, as a rule, many options.

X. Ehrlich's Deterrence Claim Evaporates

Ehrlich's study, because it ran counter to all the hitherto available evidence except that of Graves, and because it was introduced into a litigation of historic import, received extraordinary attention from the scholarly community.

First, Peter Passell and John Taylor attempted to replicate Ehrlich's finding and found it to hold up only under an unusually restrictive set of circumstances.[28] They found, for example, that the appearance of deterrence is produced only when the regression equation is in logarithmic form; in the more conventional linear regression framework, the deterrent effect disappeared.[29] They found also that no such effect emerged when data for the years after 1962 were omitted from the analysis and only the years 1933–61 were considered.[30]

An effort to duplicate Ehrlich's findings from Canadian experience also failed.[31] Kenneth Avio of the University of Victoria, after analyzing the thirty-five-year span, concluded that "the evidence would appear to indicate that Canadian offenders over the period 1926–60 did not behave in a manner consistent with an effective deterrent effect of capital punishment."[32]

During 1975, the *Yale Law Journal* published a series of articles reviewing the evidence on the deterrent effect of capital punishment. Included in this series was a second attempt to replicate Ehrlich's result by William Bowers and Glenn Pierce.[33] In replicating Ehrlich's work, they confirmed the Passell-Taylor finding that

[28] Passell & Taylor, *The Deterrent Effect of Capital Punishment: Another View*, March 1975 (unpublished Columbia University Discussion Paper 74-7509), reprinted in Reply Brief for Petitioner, *Fowler v. North Carolina*, App. C, at 4a–6a.

[29] *Id.* at 6–8.

[30] *Id.* at 5, 6.

[31] Kenneth L. Avio, *Capital Punishment in Canada: A Time-Series Analysis of the Deterrent Hypothesis* (mimeo, 1976).

[32] *Id.* at 22.

[33] Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975).

Ehrlich's results were extremely sensitive to whether the logarithmic specification was used and whether the data for the latter part of the 1960s were included.[31] Bowers and Pierce also raised questions about Ehrlich's use of the FBI homicide data in preference to vital-statistics data.[35]

Ehrlich defended his work in this series in the *Yale Law Journal* by addressing some of the criticisms raised against his study.[36] He refuted some, but not the crucial ones. In his article he referred to a second study he made of the problem, basing it this time on a comparison by states for the years 1940 and 1950. Ehrlich claimed that the new test bolstered the original claim. But he described these findings as "tentative and inconclusive."[37] In the meantime, Passell made a state-by-state comparison for 1950 and 1960 but did not find what Ehrlich allegedly had found. Passell concluded: "We know of no reasonable way of interpreting the cross-section [*i.e.*, state-by-state] data that would lend support to the deterrence hypothesis."[38]

A particularly extensive review of Ehrlich's time series analysis was made by a team led by Lawrence Klein, president of the American Economic Association.[39] The authors found serious methodological problems with Ehrlich's analysis. They raised questions about his failure to consider the feedback effect of crime on the economic variables in his model,[40] although he did consider other feedback effects in his analysis. They found some of Ehrlich's technical manipulations to be superfluous and tending to obscure the accuracy of his estimates.[41] They, too, raised questions about variables omitted from the analysis, and the effects of these omissions on the findings.[42]

Like Passell-Taylor and Bowers-Pierce, Klein and his collaborators replicated Ehrlich's results, using Ehrlich's own data, which by

[31] *Id.* at 197–205.

[35] *Id.* at 187–89.

[36] Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975).

[37] *Id.* at 209.

[38] Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 30 STAN. L. REV. 61, 80 (1975).

[39] Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*. Paper commissioned by the Panel on Research on Deterrence, National Academy of Sciences (June 1976).

[40] *Id.* at 18, 19–24.

[42] *Id.* at 14–17.

[41] *Id.* at 14.

[1976] 317]

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[43] *Id.* at 24, 25.

[45] *Id.* at 28–30.

[47] *Id.* at 17–19.

that time he had made available.[43] As in previous replications, Ehrlich's results were found to be quite sensitive to the mathematical specification of the model and the inclusion of data at the recent end of the time series.

By this time, Ehrlich's model had been demonstrated to be peculiar enough. Klein went on to reveal further difficulties. One was that Ehrlich's deterrence finding disappeared after the introduction of a variable reflecting the factors that caused other crimes to increase during the latter part of the period of analysis.[44] The inclusion of such a variable would seem obligatory not only to substitute for the factors that had obviously been omitted but also to account for interactions between the crime rate and the demographic characteristics of the population.

Klein also found Ehrlich's results to be affected by an unusual construction of the execution rate variable, the central determinant of the analysis. Ehrlich constructed this variable by using three other variables that appear elsewhere in his regression model: the estimated homicide arrest rate, the estimated homicide conviction rate, and the estimated number of homicides. Klein showed that with this construction of the execution rate a very small error in the estimates of any of these three variables produced unusually strong spurious appearances of a deterrent effect.[45] He went on to show that the combined effect of such slight errors in all three variables was likely to be considerable, and that in view of all these considerations, Ehrlich's estimates of the deterrent effect were so weak that they "could be regarded as evidence . . . [of] a counterdeterrent effect of capital punishment."[46] In view of these serious problems with Ehrlich's analysis, Klein concluded: "[W]e see too many plausible explanations for his finding a deterrent effect other than the theory that capital punishment deters murder." And further: "Ehrlich's results cannot be used at this time to pass judgment on the use of the death penalty."[47]

The final blow came from a study by Brian Forst, one of Klein's collaborators on the earlier study. Since it had been firmly established that the Ehrlich phenomenon, if it existed, emerged from developments during the sixties, Forst concentrated on that

[43] *Id.* at 24, 25.
[44] *Id.* at 28–30.
[45] *Id.* at 17–19.
[46] *Id.* at 18.
[47] *Id.* at 33.

decade.[18] He found a rigorous way of investigating whether the ending of executions and the sharp increase in homicides during this period was causal or coincidental. The power of Forst's study derives from his having analyzed changes *both* over time and across jurisdictions. The aggregate United States time series data Ehrlich used were unable to capture important regional differences. Moreover, they did not vary as much as cross-state observations; hence they did not provide as rich an opportunity to infer the effect of changes in executions on homicides.

Forst's analysis is superior to Ehrlich's in four major respects: (1) It focuses exclusively on a period of substantial variation in the factors of central interest. (2) Its results are shown to be insensitive to alternative assumptions about the mathematical form of the relationship between homicides and executions. The results were also invariant to several alternative methods of constructing the execution rate, to alternative assumptions about the nature of the relationships between homicides, and other offenses, executions, and convictions and sentences, and to alternative technical assumptions. (3) By not requiring conversion of the data to logarithms, Forst's model does not require that false values be used when the true values of the execution are zero. (4) It incorporates more control variables.

Forst's study led to a conclusion that went beyond that of Klein: "The findings give no support to the hypothesis that capital punishment deters homicide."[19] "Our finding that capital punishment . . . does not deter homicide is remarkably robust with respect to a wide range of alternative constructions."[20]

XI. The Overlooked Natural Experiment

Forst saw that Ehrlich, by using aggregate data for the United States as a whole, was forced to disregard the differences between states that had capital punishment and executions, and states that had either abolished the death penalty or at least had ceased to carry it out. Ehrlich's model thus could not evaluate the natural experiment which legislative history had built into the data. If Ehrlich's thesis—that it was the reduction of executions during the

[18] Forst, *The Deterrent Effect of Capital Punishment: A Cross State Analysis of the 1960s* (September 1976, mimeograph).

[19] *Id.* at 27. [20] *Id.* at 29.

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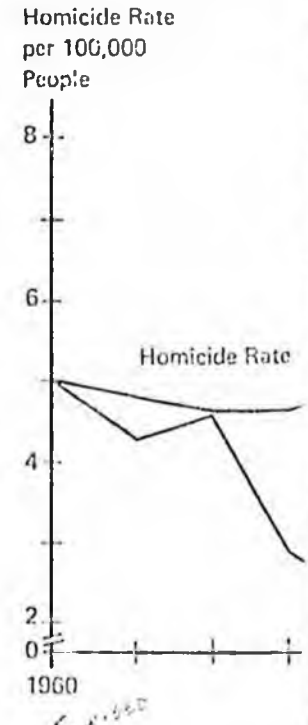


Fig. 8. United States homicide

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sixties that made the capital crime rate grow—were correct, then no such growth should obtain in the states in which there could be no reduction in executions because there had been none to begin with. Yet as figure 8 shows, the growth of the capital crime rate during the crucial sixties was as large in the states without executions as in states with executions.

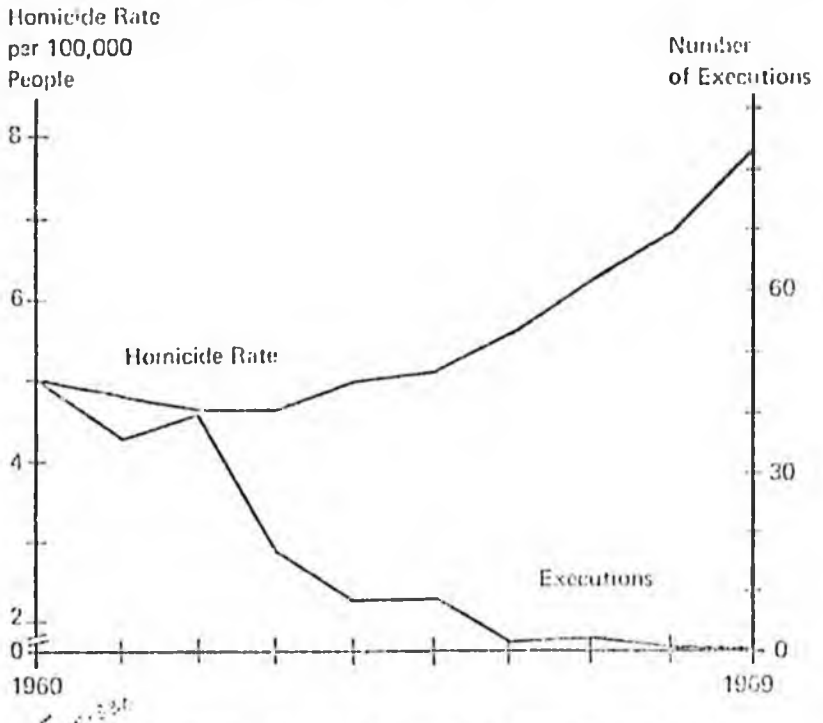


FIG. 8.—United States homicide rate and number of executions, 1960–69.

XII. Evidence versus Ancient Sentiment

The evidence on whether the threat of the death penalty has a deterrent effect beyond the threat of the life sentence, its normal substitute, is overwhelmingly on one side. None of the efforts to sharpen the measurement yardstick by replacing the overall homicide rate through more sensitive measures succeeded in discovering a deterrent effect. Nor did any effort to sharpen the analytical instruments of analysis help. Even regression analysis, the most sophisticated of these instruments, after careful application by the scholarly community failed to detect a deterrent effect.

This then is the proper summary of the evidence on the deterrent effect of the death penalty: If there is one, it can only be minute, since not one of the many research approaches—from the simplest to the most sophisticated—was able to find it.[51] The proper question, therefore, is whether an effect that is at best so small that nobody has been able to detect it, justifies the awesome moral costs of the death penalty.

I can only speculate why the question concerning the deterrent effect of the death penalty has always been posed in its unanswerable form: whether or not it has such an effect. I suspect that at the root of the resistance to the evidence is the very ancient and deeply held belief that the death penalty is the ultimate deterrent.

The Solicitor General has called it a "logical a priori" belief. The logic probably runs as follows: If punishment has any deterrent effect (and surely it often has) then the most severe punishment should deter more than all others. Confronted with the failure to detect such an effect, those who share the belief have narrowed the claim. Only certain types of capital crime, they say, not all, are likely to be deterred. The Court in *Gregg v. Georgia* gave two examples, the hired killer and the "free murder" by a life prisoner:[52]

> We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

If these are the best examples, the others must be poor indeed. The murderer for hire, knowing himself fairly safe from detection, is not likely to be concerned over the difference between death and prison

[50] The one exception pointing in the other direction, the dubious California finding that executions appear to postpone some homicides for a few days, is of small import. An effort to duplicate the finding in Philadelphia failed. See text *supra* at notes 18 and 20.

[52] 96 S. Ct. at 2951. Further examples are afforded in a footnote: "Other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, the extortion murder of hostages or kidnap victims, and the execution-style killing of witnesses to a crime." *Id.* at n.33.

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[4] Sellin, *Prison Homicid*
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[55] 96 S. Ct. at 2930, quoting

for life. The "cold calculus" that moves the hired killer must surely tell him how small the probability is that he will be caught.[58] A good part of his careful contemplation goes to avoiding traces.

The life prisoner who kills is even a more interesting example. At first glance, the argument seems so irrefutable, that this type of homicide is occasionally the last capital crime on the statute books before the death penalty is abolished. It is a prize example because on "logical a priori" grounds his is by definition the "free murder" under the law. Again it is useful to look at the facts which Sellin was the first to illuminate. He found that, in 1965, the year for which he collected the data, sixteen prison homicides had been committed by men convicted of murder. Since not all murderers in prison are there with a life sentence, the true number of these "free murders" is likely to be even smaller.[59] In fact, of course, the "free murder" is probably altogether a figment because most life prisoners have some hope of being released before the end of their natural life, a hope that would be destroyed by a second murder. A prison, moreover, has ways of its own of punishing such a double murderer.

It is only fair, however, to take these examples of the Court for what they are, efforts to bolster with reasons the unwillingness to abandon the ancient sentiment. In that sentiment, the belief in deterrence plays but a small part. It is the belief in retributive justice that makes the death penalty attractive, especially when clothed in a functional rationalization. The belief has ancient roots, even if the rationale is modern. The Court in *Gregg* approvingly cites *Furman v. Georgia*:[60]

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose. . . . When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy.

[58] An interview comes to mind with a former warden of the Cook County Jail who did not believe in the death penalty. The interviewer asked him, "You mean, you would even hesitate to execute a hired killer?" The warden's answer, as I remember it was: "I shall cross that bridge when I come to it. In my many years here in the Cook County Jail, I have yet to meet the first hired killer. They are never caught, although Chicago would be a good place to catch them."

[59] Sellin, *Prison Homicides*, in SELLIN, note 10 *supra*, at 154, 156; see also Butler, *Prison Killings and Death Penalty Legislation*, 53 Prison J. 11 (1974).

[60] 96 S. Ct. at 2930, quoting 408 U.S. 238, 308 (1972).

The depth of this feeling was revealed in a strange interchange during oral argument between Mr. Justice Powell and Professor Anthony Amsterdam, counsel for the petitioners:[56]

> *Mr. Justice Powell:*
>
> Let me put a case to you. You've heard about Buchenwald, one of the camps in Germany in which thousands of Jewish citizens were exterminated. . . . If we had had jurisdiction over the commandant of Buchenwald, would you have thought capital punishment was an appropriate response to what that man or woman was responsible for?
>
> *Mr. Amsterdam:*
>
> . . . We all have an instinctive reaction that says, "Kill him." . . . But I think the answer to the question that your Honor is raising, . . . [to] be consistent with the 8th Amendment to the Constitution . . . my answer would be, "No."

Mr. Justice Powell asked the same question again, this time about a man who might destroy New York City with a hydrogen bomb. Amsterdam's answer, of course, was again no.

Significantly, both examples went to the issue of retribution, not deterrence. It is hard to think of any crime that would be less deterred by the difference between the death penalty and life imprisonment, for instance, in Spandau prison. The sentiment in favor of the death penalty does not stem from the belief in its deterrence and perhaps we overestimate altogether the importance of that issue.

Nowhere was the worldwide decline of the death penalty significantly connected with arguments about its effectiveness or the lack thereof. In some countries abolition became simply the logical end-point of a gradual decline in executions, probably accompanied by a parallel change in moral sentiments.

In other countries, abolition was clearly an expression of moral sentiment. The first de jure abolition of executions in czarist Russia goes back to A.D. 1020. Capital punishment reappeared in the fourteenth century but was again abolished when Elizabeth ascended the throne in 1742. On both occasions, the issue was one of morality not expediency.[57] In Germany, the 1946 Constitution abolished the death

[56] The colloquy occurred during argument in *Woodson & Wanton v. North Carolina*; transcribed record No. 75-5491, at 20.

[57] "Do not kill anyone, either guilty or not . . . . Do not destroy a Christian soul, even in case death is well deserved." Testament of the Grand Prince of Kiev,

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In Great Britain, after a centu
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Sentiment for the death pena
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1125 A.D. Elizabeth purportedly promised
take no life. Adams, *Capital Punishment*
Am. J. Comp. L. 575, 576 (1970).

penalty as a deliberate act of repudiation of the Hitler era, when the death penalty, legally or illegally imposed, claimed millions of lives. In Great Britain, after a century of controversy, the abolitionists won when a man, protected by all the vaunted safeguards of British justice, was executed for a crime that he had not committed.

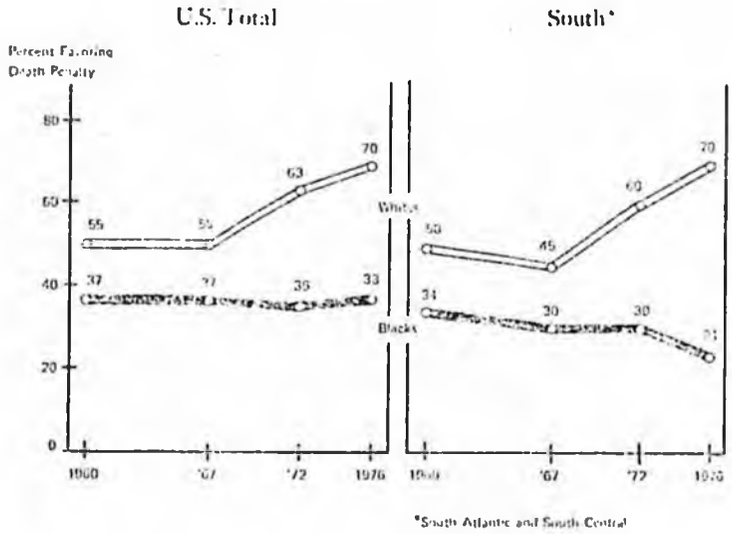
Ceylon abolished the death penalty when it acquired its independence, as an act of Buddhist faith. In Austria, the movement toward abolition reflected primarily moral sentiments. The parliament of the first Austrian republic unanimously abolished capital punishment as a renunciation of the monarchical past. In 1933, a semi-fascist chancellor restored the death penalty primarily as a political threat to the underground opposition. The second republic again abolished the death penalty, first in ordinary criminal cases and then also for cases triable under martial law, last used against the socialist political opposition in the civil war of 1934.

Abolition of the death penalty thus has reflected in the main a change in cultural sentiments, if not of the people, so at least of its legislators or its government. In the United States also capital punishment will end only when our cultural sentiments change. The people, a majority of whom now favor the death penalty, will be the last to change. The legislators will probably change before them; and our Supreme Court Justices conceivably may change even earlier.

Sentiment for the death penalty in the United States has grown during the last decade, stimulated by the unprecedented rise in violent crime during the second half of the sixties. In such times the demand for the death penalty grows because it is so easy to believe it will make law enforcement more effective. It is interesting to analyze the growth of this popular sentiment. In figure 9, four Gallup polls on the death penalty spanning sixteen years are analyzed. Sentiment for the death penalty did not rise until 1967, and then only among the white population. Black sentiment for the death penalty, always far below the corresponding figures for whites, remained unchanged. In the South, sentiment for the death penalty among whites and blacks has traditionally been below the average for the country. For the blacks, this is still true; their propor-

1135 AD. Elizabeth purportedly promised God that if she were selected she would take no life. Adams, *Capital Punishment in Imperial and Soviet Criminal Law*, 18 VAND. J. COMP. L. 575, 576 (1970).

tion favoring the death penalty has been declining, reaching in 1976 a new low of 24 percent. Among the whites, sentiment in the South has caught up with that of the country as a whole, at 70 percent.



* South Atlantic and South Central.

FIG. 9. Proportion of whites and blacks favoring the death penalty, 1960-76 (Gallup Poll).

The petitioners in *Gregg* all came from the South. In the last analysis the Court held that it had no power to override legislation that was grounded in a belief that even some of the Justices must have shared.

Still, one must not give up hope. The realization that the deterrent effect, if it exists at all,[58] can be only minute, should force us to look

[58] Two of the best studies—those of Forst and Bassell—showed even a counter-deterrent balance for the death penalty. In both studies it was statistically insignificant. The possibility of a counterdeterrent effect does not come as a total surprise. It has theoretical support of long standing. There is the suicide through-murder theory advanced first by STEKEL & ALEXANDER, THE CRIMINAL, THE JUDGE, AND THE PUBLIC: A PSYCHOLOGICAL ANALYSIS (1931); see also H. von Weber, *Selbstmord als Mordmotiv*, MONATSSCHRIFT FÜR KRIMINALBIOLOGIE UND STRAFRECHTSREFORM 161 (1937). Then there is concern over the generally brutalizing effect of the death penalty which just adds one more killing in cold blood. Also, as long as some states still consider crimes other than murder (e.g., rape) to be capital offenses, the old argument that killing the victim-witness may somehow "improve" the

once more at the balance mal benefit, the awesome of the act, the ever preser to make a fair decision a

For the committed wl for the elusive deterrent grace of the Court we ar After a number of years penalty was held in abe states will resume execut see whether the capital pared to the states that st

In the end one must re to change ancient beliefs the expectation that with "standards of decency ciety."[59] Justices Brenna pears—that we had alread

The conclusion that play a decisive role is str Massachusetts Supreme *O'Neal*,[60] which held a m for rape-murder to be an the deterrence issue the United States Supreme C sachusetts court accepted the death sentence to de deprived the government the death penalty.

Why did the Supreme at a different decision? T in the United States Sup felt that "the standard of Massachusetts court five

criminal's situation is still valid the case of Gary Gilmore, the the first person executed in the p. 1.

[59] Chief Justice Warren, writi (1958).

[60] 339 N.E.2d 676 (Mass. 1975)

once more at the balance sheet, and weigh against the, at best, minimal benefit, the awesome costs of the death penalty: the inhumanity of the act, the ever present danger of error, the ultimate impossibility to make a fair decision as to who is to die and who is to live.

For the committed who believe that there should be more search for the elusive deterrent effect, a new opportunity has arisen. By the grace of the Court we are in the midst of a new natural experiment. After a number of years during which, through *Furman*, the death penalty was held in abeyance throughout the land, some of our states will resume executions. There is thus another opportunity to see whether the capital crime rate in these states will decline compared to the states that still have no executions.

In the end one must remain skeptical as to the power of evidence to change ancient beliefs and sentiments. The greater hope lies in the expectation that with better times our sentiments will reach the "standards of decency that mark the progress of a maturing society."[59] Justices Brennan and Marshall thought—wrongly it appears—that we had already sufficiently matured.

The conclusion that the personal sentiments of the judges play a decisive role is strengthened by reading the decision of the Massachusetts Supreme Judicial Court in *Commonwealth v. O'Neal*,[60] which held a mandatory death sentence upon a conviction for rape-murder to be unconstitutional. That court had before it on the deterrence issue the very same evidence that was before the United States Supreme Court in *Gregg*. Yet the majority of the Massachusetts court accepted the evidence as proof of the inability of the death sentence to deter. The lack of proof of deterrent effect deprived the government of a "compelling state interest" to justify the death penalty.

Why did the Supreme Court and the Massachusetts court arrive at a different decision? The decisive factor was the simple fact that in the United States Supreme Court only two of the nine Justices felt that "the standard of decency" required abolition while on the Massachusetts court five out of seven felt that way.

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criminal's situation is still valid. *Cf.* Bowe, *supra* note 20, at 264 n.7. Consider also the case of Gary Gilmore, the Utah convict who succeeded in his objective to be the first person executed in the post *Furman* period. See N.Y. Times, 18 Jan. 1977, p. 1.

[59] Chief Justice Warren, writing for the Court, in Trop v. Dulles, 356 U.S. 86, 101 (1958).

[60] 339 N.E.2d 676 (Mass. 1975).

(2) To develop additional programs whereby the offenders may be afforded the opportunity to contribute to society and the support of their families through restitution programs; and

(3) To develop pilot programs of counseling, training and job placement whereby restitution may be accomplished; such programs may be residential or nonresidential as appropriate. (Acts 1980, No. 80-588, p. 928, § 13.)

Article 5.

Death Penalty.

§ 15-18-81. Confinement until execution; certain persons may visit condemned person.

Code commissioner's note. — Acts 1979, No. 79-426, p. 667, effective October 1, 1979, abolished the board of corrections and vested all its rights, duties, power, property, etc., in the governor, and authorized him to exercise such functions and duties himself or through designated administrators. See §§ 14-1-15 through 14-1-17, and also Acts 1979, No. 79-154, p. 253.

§ 15-18-82. Execution by electrocution; where and by whom executions conducted.

Code commissioner's note. — Acts 1979, No. 79-426, p. 667, effective October 1, 1979, abolished the board of corrections and vested all its rights, duties, power, property, etc., in the governor, and authorized him to exercise such functions and duties himself or through designated administrators. See §§ 14-1-15 through 14-1-17, and also Acts 1979, No. 79-154, p. 253.

§ 15-18-85. Return of execution warrant, certificate and statements; payment for transportation of body.

Code commissioner's note. — Acts 1979, No. 79-426, p. 667, effective October 1, 1979, abolished the board of corrections and vested all its rights, duties, power, property, etc., in the governor, and authorized him to exercise such functions and duties himself or through designated administrators. See §§ 14-1-15 through 14-1-17, and also Acts 1979, No. 79-154, p. 253.

CHAPTER 19.

YOUTHFUL OFFENDERS.

Nothing in the constitution or this chapter guarantees youthful offender treatment to all defendants under 21 years of age. Thompson v. State, 354 So. 2d 1128 (Ala.), rev'd on other grounds, 354 So. 2d 1132 (Ala. 1977).

Duty is upon trial judge, etc.

In accord with bound volume. See Rainer v. State, 398 So. 2d 771 (Ala. Crim. App. 1981); Bledsoe v. State, 409 So. 2d 924 (Ala. Crim. App. 1981).

Duty is upon the trial judge to call the Youthful Offender Act to the attention of the youthful offender, just as much as it is the duty of the trial judge to explain to a defendant his constitutional rights when he enters a plea of guilty. Logan v. State, 56 Ala. App. 425, 322 So. 2d 108 (1975).

Supreme court has placed the burden on the trial judge to call the benefits of the Youthful Offender Act to the attention of an eligible defendant, and has analogized that burden and duty to the duty of a trial judge to explain a defendant's constitutional rights before accepting his guilty plea. Whitfield v. State, 56 Ala. App. 653, 324 So. 2d 793, cert. quashed, 295 Ala. 428, 324 So. 2d 796 (1975); Thompson

426, p. 667, § 5, effective October 1,

lict with the act are repealed. Since this section ppears to be inconsistent with or in conflict with the act, it is treated as repealed. See § 14-1-15 through 14-1-17.

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overnor and the legislature in matters tions, pardons and paroles and related ernor and the legislature at least 30 ruction of permanent facilities or any No. 91, p. 118; Code 1940, T. 45, § 8; s 1978, No. 595, p. 717, § 3.)

tions and duties himself or through such administrative divisions or such officers or employees as he may designate. See §§ 14-1-15 through 14-1-17.

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tions and duties himself or through such administrative divisions or such officers or employees as he may designate. See §§ 14-1-15 through 14-1-17.

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tions, and vested all its rights, duties, power, etc., in the governor, and authorized him to exercise such functions and duties himself or through such administrative divisions or such

officers or employees as he may designate. See §§ 14-1-15 through 14-1-17.

§ 14-1-15. Duties, authority, property, rights, etc., of board of corrections vested in governor.

All duties, responsibilities, authority, power, assets, liabilities, property, funds, appropriations, contractual rights and obligations, property rights and personnel, whether accruing or vested, by operation or by law and which are not in conflict with §§ 14-1-15 through 14-1-17 and which are presently vested in the board of corrections under Title 14, chapters 1 through 12, as amended, and by any other laws or parts of laws of this state, are hereby vested in the governor of the state of Alabama. (Acts 1979, No. 79-426, p. 667, § 1.)

This section and §§ 14-1-16 through 14-1-18 vest responsibility for the state prison system in the governor to represent the state's interests for judicial purposes. Graddick v. Newman, — U.S. —, 102 S. Ct. 4, 69 L. Ed. 2d 1025 (1981).

§ 14-1-16. Board of corrections abolished; rights, duties, powers, property, etc., vested in governor.

Effective October 1, 1979, the board of corrections of the state of Alabama is hereby abolished and all rights, all duties, responsibilities, powers, assets, liabilities, contractual rights and obligations and property rights, whether accruing or vested in the abolished agency, are hereby vested in the governor of the state of Alabama. (Acts 1979, No. 79-426, p. 667, § 2.)

Sections 14-1-15 through 14-1-18 vest responsibility for the state prison system in the governor who thereby represents the state's interests for judicial purposes. Graddick v. Newman, — U.S. —, 102 S. Ct. 4, 69 L. Ed. 2d 1025 (1981).

Cited in Mixon v. State, 407 So. 2d 588 (Ala. Crim. App. 1981).

§ 14-1-17. Governor authorized to exercise functions, designate administrator, set salary and designate duties.

All functions and duties of the department shall be exercised by the governor, acting by himself or by and through such administrative divisions or such officers or employees or individuals as he may designate. The governor is hereby further authorized to set the salary of such individual or individuals and make one such person responsible to him as administrator of the corrections institutions throughout this state. The governor is further authorized to set the salary of such administrator at the same level of any cabinet officer or at a reasonable level in excess thereof. Any administrator shall have the authority and the duties which the governor may designate and all of the power and authority incident to carrying out the functions and duties assigned. (Acts 1979, No. 79-426, p. 667, § 3.)

Colorado Revised Statutes 1973

1982 CUMULATIVE SUPPLEMENT

VOLUME 8

1978 REPLACEMENT VOLUME

CRIMINAL JUSTICE AND CHILDREN'S CODE

This volume of the 1982 Cumulative Supplement contains all the laws of a general and permanent nature enacted or amended by the Fifty-first General Assembly at its First Regular Session in 1977 by House Bill No. 1589, effective July 1, 1978, and as amended by House Bill No. 1001, effective April 1, 1979, enacted by the Fifty-first General Assembly at its First Extraordinary Session in 1978 and by Senate Bill No. 101, effective July 1, 1979, enacted by the Fifty-first General Assembly at its Second Regular Session in 1978, by the Fifty-second General Assembly at its First Regular Session in 1979, by the Fifty-second General Assembly at its Second Regular Session in 1980, by the Fifty-third General Assembly at its First Regular Session in 1981, and by the Fifty-third General Assembly at its Second Regular Session in 1982, pertaining to Titles 16, 17, 18, 19, 20, and 21 of Colorado Revised Statutes 1973.

Edited, Collated, and Revised
Under the Supervision and Direction of the
COMMITTEE ON LEGAL SERVICES
by
DOUGLAS G. BROWN, OF THE COLORADO BAR,
REVISOR OF STATUTES
AND THE
OFFICE OF REVISOR OF STATUTES

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To be Recnacted by the General Assembly of the State of Colorado as the Statutory Law of Colorado of a General and P...

ance with subsection (2) of this section but submitted only a general verdict form on the violent offender count, the enhanced punishment imposed for having committed a violent crime was improper. People v. Stroup, ___ Colo. App. ___, 624 P.2d 913 (1980).

Requirement of specific findings not applied retroactively. Where defense counsel did not object to the verdict forms and there is no showing of harm from the form of the verdict, the requirement that the court submit special interrogatories to the jury will not be applied retroactively. People v. Swanson, ___ Colo. ___, 638 P.2d 45 (1981).

Penalty for first-degree assault committed in "heat of passion". Where a defendant charged with first-degree assault can establish that he acted in the "heat of passion", he cannot constitutionally receive a greater penalty than he would have received had he been convicted of manslaughter. People v. Grable, 43 Colo. App. 518, 611 P.2d 588 (1979).

Verdict of not guilty of "crime of violence" not inconsistent with guilty verdicts on other charges. Guilty verdicts on the charges of first-degree sexual assault, sexual assault on a child, and aggravated incest are not inconsistent as a matter of law with a jury finding of not guilty on a charge of "crime of violence". People v. Fierro, 199 Colo. 215, 606 P.2d 1291 (1980).

Fifteen to 20-year sentence was not excessive for aggravated robbery and a "crime of violence". People v. Colasanti, ___ Colo. ___, 626 P.2d 1136 (1981).

Applied in People v. Smith, 195 Colo. 404, 579 P.2d 1129 (1978); People v. Warren, 196 Colo. 75, 582 P.2d 663 (1978); People v. Girard, 196 Colo. 68, 582 P.2d 666 (1978); People v. Vigil, 43 Colo. App. 121, 602 P.2d 884 (1979); People v. Swain, 43 Colo. App. 343, 607 P.2d 396 (1979); People in Interest of R.R., 43 Colo. App. 208, 607 P.2d 1013 (1979); People v. Martinez, 43 Colo. App. 419, 603 P.2d 359 (1979); Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980); People v. Hardin, 199 Colo. 229, 607 P.2d 1291 (1980); People v. Cabral, ___ Colo. ___, 629 P.2d 575 (1981); People v. Lichtenstein, ___ Colo. ___, 630 P.2d 70 (1981); People v. Francis, ___ Colo. ___, 630 P.2d 82 (1981); People v. Valencia, ___ Colo. ___, 630 P.2d 85 (1981); People v. Jones, ___ Colo. ___, 631 P.2d 1132 (1981).

ion. Except as provided in section 7 of elating to the power of the governor to cerated person shall be unconditionally piration of his sentence, less the deduc 17, C.R.S. 1973.

; R & RE, L. 79, p. 666, § 10.

PART 4

DEATH PENALTY - EXECUTION

16-11-402. Appliances - sentence executed by executive director. The exec tive director of the department of corrections, at the expense of the sta of Colorado, shall provide a suitable and efficient room or place, enclos from public view, within the walls of the correctional facilities at Canon C and therein construct and at all times have in preparation all necessary app ances requisite for carrying into execution the death penalty by means the administration of lethal gas. The punishment of death in each case death sentence pronounced in this state shall be inflicted by the executi director or his designee in the room or place and with the appliances provid for inflicting the punishment of death by the administration of lethal gas.

Source: Amended, L. 79, p. 682, § 11.

16-11-403. Week of execution - warrant. When a person is convicted of class 1 felony, the punishment for which is death, and the convicted pers is sentenced to suffer the penalty of death, the judge passing such senten shall appoint and designate in the warrant of conviction a week of time with which the sentence must be executed; the end of such week so appoint shall be not less than ninety days nor more than one hundred twenty da from the day of passing the sentence. Said warrant shall be directed to t executive director of the department of corrections or his designee comman ing said executive director or his designee to execute the sentence impos upon some day within the week of time designated in the warrant and sh be delivered to the sheriff of the county in which such conviction is ha who, within three days thereafter, shall proceed to the correctional faciliti at Canon City and deliver the convicted person, together with the warra to said executive director or his designee, who shall keep the convict in co finement until infliction of the death penalty. No person shall be allow access to said convict, except his attendants, counsel, and physician, a spi tual adviser of his own selection, and members of his family, and then on in accordance with prison regulations.

Source: Amended, L. 79, p. 682, § 12.

16-11-404. Execution - witnesses. The particular day and hour of the exec tion of said sentence within the week specified in said warrant shall be fix by the executive director of the department of corrections or his design but shall not be made public by him, and he shall be present thereat or sh appoint some other representative among the officials or officers of the co rectional facilities at Canon City to be present in his place and stead. The shall also be present a physician and such guards, attendants, and other pe sons as the executive director or his designee in his discretion deems desi able, not to exceed fifteen persons. The executive director or his design shall notify the governor of the day and hour for the execution as soon it has been fixed.

Source: Amended, L. 79, p. 682, § 13.

(5) The jury, or the court if no jury trial is had, in any such case shall make a specific finding as to whether the accused did or did not use, or possessed and threatened to use, a deadly weapon during the commission of such crime or whether such serious bodily injury or death was caused by the accused. If the jury or court finds that the accused used, or possessed and threatened the use of, such deadly weapon or that such injury or death was caused by the accused, the penalty provisions of this section shall be applicable.

Source: L. 76, p. 547, § 5; L. 77, pp. 865, 888, 902, § § 11, 78, 4.

Editor's note: Amendments made to this section by House Bill No. 1589 of the 1977 Session, effective April 1, 1979, are contained in the supplement to this volume.

Cross reference. As to classification of felonies and the penalities for such, see § 18-1-105.

The general assembly intended that this section define sentencing standards rather than create a substantive offense by its placement in the criminal code among other sections relating to sentencing, in the article entitled "Imposition of Sentence". Brown v. District Court, ____ Colo. ____, 569 P.2d 1390 (1977).

No preliminary hearing is required for a charge under this section. Brown v. District Court, ____ Colo. ____, 569 P.2d 1390 (1977).

PART 4

DEATH PENALTY - EXECUTION

16-11-401. Death penalty inflicted by lethal gas. The manner of inflicting the punishment of death shall be by the administration of lethal gas within the time prescribed in this part 4, unless for good cause the court or governor may prolong the time.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-401.

Am. Jur. See 21 Am. Jur.2d, Criminal Law, § 598; 40 Am. Jur.2d, Homicide, § § 552, 557.

C.J.S. See 24B C.J.S., Criminal Law, § § 2001-2003.

Law review. For article, "Criminal Procedure in Colorado — A Summary, and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950).

16-11-402. Appliances - sentence executed by superintendent. The governing authority of the state penitentiary, at the expense of the state of Colorado, shall provide a suitable and efficient room or place, enclosed from public view, within the walls of the state penitentiary and therein construct and at all times have in preparation all necessary appliances requisite for carrying into execution the death penalty by means of the administration of lethal gas. The punishment of death in each case of death sentence pronounced in this state shall be inflicted by the superintendent of the state penitentiary maximum security unit in the room or place and with the appliances provided for inflicting the punishment of death by the administration of lethal gas.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-402; L. 76, p. 530, § 3.

16-11-403. Week of execution - warrant. When a person is convicted of

a class 1 felony, the punishment for which is death, and the convicted person is sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which the sentence must be executed; the end of such week so appointed shall be not less than ninety days nor more than one hundred twenty days from the day of passing the sentence. Said warrant shall be directed to the superintendent of the state penitentiary maximum security unit commanding said superintendent to execute the sentence imposed upon some day within the week of time designated in the warrant and shall be delivered to the sheriff of the county in which such conviction is had, who, within three days thereafter, shall proceed to the state penitentiary and deliver the convicted person, together with the warrant, to said superintendent, who shall keep the convict in confinement until infliction of the death penalty. No person shall be allowed access to said convict, except his attendants, counsel, and physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-403; L. 76, p. 531, § 4.

Am. Jur. See 21 Am. Jur.2d, Criminal Law, § 403.

C.J.S. See 24B C.J.S., Criminal Law, § 2002.

Annotator's note. Since § 16-11-403 is similar to repealed § 39-11-3, C.R.S. 1963, CSA, C. 48, § 538, and laws antecedent thereto, relevant cases construing these provisions have been included in the annotations to § 16-11-403.

Meaning of "week of time". The week of time which is required by this section to be appointed and designated in capital cases within which the sentence must be executed, is a period of time extending from 12 midnight Saturday until 12 midnight the following Saturday, but an error in the designation of the week is rendered immaterial when the execution is stayed by the supreme court pending review. Mora v. People, 19 Colo. 255, 35 P. 179 (1893).

Court fixes date of execution following stay. The court has authority to fix the date of execution in cases of affirmance, where the execution has been stayed upon appeal or supersedeas. Mora v. People, 19 Colo. 255, 35 P. 179 (1893).

But definite date set in order granting stay did not deny due process. The fact that the state supreme court set a definite execution date pending determination of post-conviction relief was not "suggestion of predetermination" in violation of due process and did not constitute an implied direction to deny petitioner relief. Bell v. Patterson, 279 F. Supp. 760 (D. Colo. 1968), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed. 2d 865 (1971).

Procedure of delivery of prisoner by sheriff held not improper. See Agnes v. People, 104 Colo. 527, 93 P.2d 891 (1939).

Applied in Medley, Petitioner, 134 U.S. 160, 10 S. Ct. 384, 33 L. Ed. 835 (1890).

16-11-404. Execution - witnesses. The particular day and hour of the execution of said sentence within the week specified in said warrant shall be fixed by the superintendent but shall not be made public by him, and he shall be present thereat or shall appoint the deputy superintendent of the maximum security unit or some other representative among the officials or officers of the state penitentiary to be present in his place and stead. There shall also be present a physician and such guards, attendants, and other persons as the superintendent in his discretion deems desirable, not to exceed fifteen persons. The superintendent shall notify the governor of the day and hour for the execution as soon as it has been fixed.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-404; L. 76, p. 531, § 5.

GENERAL STATUTES

OF

CONNECTICUT

VOLUME IX

TITLES

51 Courts

52 Civil Actions

53 Crimes

53a Penal Code

54 Criminal Procedure

55 Concluding Provisions

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642, S. 75; P.A. 80-313, S. 49.)

gs of habeas corpus, sheriff is proper party
lified; a mittimus, valid on its face, seems a
adjournment of court. 67 C. 359. All persons
pending appeal. 84 C. 566. Cited. 132 C. 303.

mitment to Connecticut
cute each mittimus for the
nal Institution, Somers, by
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minal cases.

Sec. 54-99. Period within which death penalty inflicted. Unless a reprieve or stay of execution is granted by competent authority, the penalty of death shall be inflicted within a period of not less than one month nor more than six months after conviction and sentence. All executions of the death penalty shall take place according to the provisions of this section and section 54-100 on the day, or within five days after the day, designated by the judge passing sentence.

(1949 Rev., S. 8815.)
Cited. 121 C. 197.

Sec. 54-100. Electrocution. The method of inflicting the punishment of death shall be by electrocution. The warden of the Connecticut Correctional Institution, Somers, is directed to appoint a suitable person to perform the duty of executing sentences of the court requiring the infliction of the death penalty. Such person shall receive, for such duty, such compensation as is determined by the directors of the Connecticut Correctional Institution, Somers. When any person is sentenced by any court of this state having competent jurisdiction to be electrocuted, he shall, within twenty days after final sentence, be conveyed to the Connecticut Correctional Institution, Somers, and such punishment shall be inflicted only within the walls of said institution in Somers, within an enclosure to be prepared for that purpose under direction of the warden of the Connecticut Correctional Institution, Somers, and the board of directors thereof, which enclosure shall be so constructed as to exclude public view. Besides the warden or deputy warden and such number of guards as he thinks necessary, the following persons may be present at the execution, but no others: The sheriff of the county in which the prisoner was tried and convicted, the board of directors, the physician of the Connecticut Correctional Institution, Somers, the clergyman in attendance upon the prisoner and such other adults, as the prisoner may designate, not exceeding three in number, representatives of not more than five newspapers in the county where the crime was committed, and one reporter for each of the daily newspapers published in the city of Hartford.

(1949 Rev., S. 8816; 1953, P.A. 28, S. 6; P.A. 74-84.)

Cited. 121 C. 197. Death penalty does not constitute cruel and unusual punishment and courts will not vitiate legislative determination of punishment for crimes. 158 C. 341.

Sec. 54-101. Disposition of person becoming insane after death sentence. When any person detained at the Connecticut Correctional Institution, Somers, awaiting execution of a sentence of death appears to the warden thereof to be insane, the warden may make application to the superior court for the judicial district of Tolland having either civil or criminal jurisdiction or, if said court is not in session, to any judge of the superior court, and, after hearing upon such application, notice thereof having been given to the state's attorney for the county or judicial district wherein such person was convicted, said court or such judge may, if it appears advisable, appoint three reputable physicians to examine as to the mental condition of the person so committed. Upon return to said court or such judge of a certificate by such physicians, or a majority of them, stating that such person is insane, said court or such judge shall order the sentence of execution to be stayed and such person to be transferred to any state hospital for mental illness for confinement, support and treatment until he recovers his sanity, and shall cause a mittimus to be issued to the sheriff of Tolland county, or either of his deputies, for such commitment. If at any time thereafter, the superintendent of the state hospital to which such person has been committed is

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COMMISSIONERS

VOLUME 4

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CHAPTER 27
EXECUTION

SECTION.
19-2716. Infliction of death penalty.

19-2701. Authority for execution of judgment.

Cross-ref. Stay of execution, I.C.R. 38.

19-2703. Execution of judgment of imprisonment.

Putting Affairs in Order.

If the trial courts intend to give a defendant time to get his affairs in order prior to commencing serving his sentence, the court should delay the imposition of that sentence until the end of the period of time that the defendant is allowed free to get his affairs in order. State v. Johnson, 101 Idaho 581, 618 P.2d 759 (1980).

19-2705. Death warrant and confinement thereunder.

Cross-ref. Procedure where death penalty authorized, I.C.R. 33.1, 33.2.

19-2706. Conviction of murder — Transmission of statement to governor.

Cited in: State v. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978).

19-2708. Suspension of judgment of death.

Cross-ref. Stay of execution, I.C.R. 38.

19-2716. Infliction of death penalty. — The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-short-acting barbituate in combination with a chemical paralytic agent until death is pronounced by a physician licensed under the provisions of chapter 18, title 54, Idaho Code, in accordance with accepted medical standards. The director of the department of corrections shall determine the substance or substances to be used and the procedures to be used in any execution; provided, however, that, in any case where the director finds it to be impractical to carry out the punishment of death by administration of the required lethal substance or substances for the reason that it is not reasonably possible to obtain expert technical assistance, should such be necessary to assure that infliction of death by administration of such substance or substances can be carried out in a manner which causes death without unnecessary suffering, the sentence of death may be carried out by firing squad, the number of members of which shall be determined by the director; and provided further, that any infliction of the punishment of death by

administration of the required lethal substance or substances in the manner required by this section shall not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the director or his designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. This act shall apply to all executions carried out on and after the effective date [March 31, 1982] of this enactment, irrespective of the date sentence was imposed. [Cr. Prac. 1864, § 467; R.S., R.C., & C.L., § 8020; C.S., § 9063; I.C.A., § 19-2616; am. 1978, ch. 70, § 1, p. 140; am. 1982, ch. 257, § 1, p. 668.]

Compiler's notes. Section 2 of S.L. 1982, ch. 257 declared an emergency. Approved March 31, 1982.

Delegation of Power.

The legislature did not improperly delegate the power to inflict the death penalty to the board of corrections under this section since the standards formulated for guidance, although general, are capable of reasonable application and it cannot be assumed that the director of the department of corrections will act in other than a reasonable manner. State v. Osborn, — Idaho —, 631 P.2d 187 (1981).

CHAPTER 28

APPEALS TO SUPREME COURT

19-2801. Criminal judgments and orders appealable — Time for taking appeals.

Cross-ref. Juvenile proceeded against as an adult, bail, § 16-1806A.

Cited in: State v. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978).

19-2804. Criminal judgments and orders appealable — Time for taking appeals.

The Supreme Court had authority, under Art. 5, § 9, to review the decision of the district court which granted defendant's motion to dismiss criminal charges, even though an order granting a motion to dismiss was not listed in this section as one of the six orders or rulings from which appeal could be taken by the state. State v. Lewis, 96 Idaho 743, 536 P.2d 738 (1975), overruling State v. Ridenbaugh, 5 Idaho 710, 51 P. 750 (1897).

19-2827. Review of death sentences — Preservation of records.

Sec. to sec. ref. This section is referred to in I.C.R. 33.2.

Cited in: State v. Lindquist, 99 Idaho 766, 589 P.2d 101 (1979).

Failure to Object.

Where the defendant in a sentencing hearing following a guilty plea to a first-degree murder charge, acquiesced without objection to the use of the transcript of the preliminary hearing instead of introducing live witness testimony, such failure to object did not preclude the Supreme Court from considering an alleged error in using the transcript since this section mandates that the court examine not only the death sentence but also the procedure followed in imposing that sentence regardless of whether an appeal is even taken, and since the gravity of a death sentence and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below. State v. Osborn, — Idaho —, 631 P.2d 187 (1981).

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MONTANA CODE ANNOTATED



ANNOTATIONS

issues arise. The courts have recognized the infirmity of imposing a fine as a sentence and then converting it into a jail term simply because the defendant is indigent and cannot forthwith pay the fine in full. 38 A.G. Op. 61 (1980).

Collateral References

Fines ⇦ 6.

36 C.J.S. Fines § 9.

21 Am. Jur. 2d Criminal Law § 599, et seq.

46-19-103. Execution of death.

Commission Notes

Source: [R.C.M. 1947, sections 94-8007, 94-8016 through 94-8018.]

This section does not change the law in any way but merely combines into one provision separate statutes dealing with execution of the death sentence. It should be noted that the commission has not considered the propriety of capital punishment, but has redrafted a law in conformity with what appears to be the present public policy of this state.

Cross-References

Execution of death sentence justified, 45-3-109.

Case Notes

Hanging Not Cruel and Unusual Punishment: There is no evidence that shows that death from hanging, when properly carried out, is anything other than swift and immediate or that hanging results in any more suffering than that associated with other modes of execution. The Supreme Court has no power to change the legislatively settled provisions of the sentence in the absence of constitutional violation. St. v. Coleman, ____M____, 605 P2d 1000 (1979).

Collateral References

Criminal Law ⇦ 1219.

24 C.J.S. Criminal Law §§ 1613 through 1615; 24B C.J.S. Criminal Law §§ 2001 through 2003.

21 Am. Jur. 2d Criminal Law § 595, et seq.

Manner of inflicting death sentence as cruel or unusual punishment. 40 ALR 1118; 30 ALR 1452.

Effect of permitting day fixed for execution to pass without carrying out sentence. 34 ALR 314.

Part 2

Suspension of Execution of Death

46-19-201. When and how mental fitness of defendant determined.

Commission Comments

Source: New.

This provision will replace R.C.M. 1947, sections 94-8009 and 94-8010 which set forth a special procedure for determining the sanity of the defendant. This special procedure is no longer necessary because the chapter dealing with competency of the accused provides for this determination.

Collateral References

Criminal Law ⇦ 981(2).

24 C.J.S. Criminal Law §§ 1569, 1619.

Remedy of one convicted of crime while insane. 121 ALR 267; 10 ALR 213.

that an illegal arrest could be resisted lawfully. That rule encouraged resistance and breaches of the peace. This section requires submission to arrest. If the arrest is illegal (a determination which few citizens can make while being arrested), the arrestee should pursue civil and criminal remedies rather than resort to self-help. In applying this section a number of caveats are in order: First, the section has no application to persons fleeing from a possible arrest or from a stop under the new Stop and Frisk statute (MCA, 46-5-401, 46-5-402). Second, the arresting officer must identify himself to the arrestee. If the arrestee does not know that the person making the arrest is authorized to do so, he may justifiably defend himself. Third, the section has been interpreted by the Illinois courts as not preventing an arrestee from protecting himself from unlawful and excessive force by the arresting officer. The wording for this section is identical to the Illinois source.

Cross-References

Use of force in defense of person, 45-3-102.
Resisting arrest, 45-7-301.
Method of arrest, 46-6-104.
Manner of arrest without a warrant, 46-6-106.

Case Notes

Prosecutor's Quasi-Judicial Immunity From Prosecution: Plaintiff's civil action against a County Attorney, based upon alleged unlawful arrest by certain policemen and challenging the legality of the criminal prosecution against him, must be dismissed because the County Attorney enjoys absolute immunity for prosecutorial actions done in a quasi-judicial capacity. Hall v. Lympus, 478 F. Supp. 644 (D.C. Mont. 1979).

In General: When a person is known to be a policeman in the performance of his lawful duties, it is the duty of persons being arrested by him to submit peacefully. People v. Gnatz, 8 Ill. App.3d 396, 290 N.E.2d 392, 395 (1972). Even if a probable cause for arrest is lacking, the arrestee has no right to resist. People v. Suriwha, 2 Ill. App.3d 384, 276 N.E.2d 490, 496 (1971). See also People v. Carroll, 133 Ill. App.2d 78, 272 N.E.2d 822 (1971); People v. Franks, 108 Ill. App.2d 438, 247 N.E.2d 811 (1969); People v. Fort, 91 Ill. App.2d 212, 234 N.E.2d 384 (1968), certiorari denied 393 US 1014 (1969); People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

Instructions: Refusal of an instruction on use of force in making an arrest is proper where such an instruction is not accompanied by an instruction on use of force in defense of person. People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

Burden of Proof: To sustain a charge of resisting arrest, the prosecution must show that the defendant knowingly resisted performance of an authorized act by a person known to the defendant to be a peace officer acting within his official capacity. People v. Royer, 101 Ill. App.2d 44, 242 N.E.2d 288, 290 (1968).

Law Review Articles

The Uniform Arrest Act, Warner, 28 Va. L. Rev. 316 (1942).
Some inadequacies in the law of arrest, Waite, 29 Mich. L. Rev. 448 (1931).

Collateral References

Assault and Battery ⇦ 67; Homicide ⇦ 116; Obstructing Justice ⇦ 8.
6A C.J.S. Assault and Battery § 92; 40 C.J.S. Homicide § 137; 67 C.J.S. Obstructing Justice § 16.

45-3-109. Execution of death sentence.

Criminal Law Commission Comments

Source: Ill. C. C. 1961, Chapter 38, § 7-10.

This section states an obvious aspect of justification for homicide. It is included for the sake of completeness, and because it is one of the more commonly described statutory instances of justification. Section 94-3-109 [now MCA, 45-3-109] is intended to state the essentials of the prior provision in language similar to that of the other sections of this chapter. However, in view of the deliberate nature of the homicide, the explicit legal instructions concerning the execution and the much more relaxed time element involved in an execution as compared with self-defense, arrest, or escape, no need exists for recognizing a reasonable but mistaken belief of the executioner as to his authority for or method of performing his duty.

Compiler's Comments

Annotator's Note [see preface to Title 45 for origin]: This section preserves the former Montana provision listed above. The wording is identical to the Illinois source.

Cross-References

Death penalty, 46-18-301 through 46-18-310.
Execution of death, 46-19-103.

Law Review Articles

Comment. Congressional rebirth of the death penalty: Guiding the jury past Furman v. Georgia. 68 NW. U. L. Rev. 893 (1973).

The Proposed Federal Criminal Codes: A Prosecutor's Point of View, Connelly, 68 NW. U. L. Rev. 826, 835 (1973).

Justification for Injury, Beale, 41 Harv. L. Rev. 553 (1928).

Collateral References

Homicide ⇦ 104.
40 C.J.S. Homicide §§ 106, 137.

45-3-115. Affirmative defense.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 7-14.

A defense based upon any of the provisions of this chapter is an affirmative defense, and if not put in issue by the prosecution's evidence, the defendant, to raise it as an issue, must present some evidence thereon.

Compiler's Comments

Annotator's Note [see preface to Title 45 for origin]: Montana law requires that the prosecution prove the defendant guilty of each element of the offense charged beyond all reasonable doubt (MCA, 46-16-601). But, the prosecution is not required to negate in the first instance all possible defenses which might be raised by the defendant. After the prosecution has developed a prima facie case, the defense has the burden of going forward with evidence to raise doubt as to the defendant's guilt. The amount of evidence which the defendant must submit in raising an affirmative defense is not stated in this section. Relatively recent Montana case law makes it clear that the Legislature can determine the amount of evidence required to raise a particular affirmative defense, whether only a "reasonable doubt" or a "preponderance of the evidence". The statutory burden imposed under the former insanity defense statute (former MCA, 46-14-201(1), repealed, L. 1979) was a "preponderance of the evidence. St. v. McKenzie, ___M___, 608 P2d 428 (1980). Where the Legislature is silent, the court can, and in some instances has, determined the extent of the defendant's burden of going forward with the evidence in establishing an affirmative defense. The defendant need only raise a reasonable doubt where the affirmative defense offered is self-defense (St. v. Grady, 166 M 168, 531 P2d 681 (1975)), but

the minimum mandatory sentence. St. v. Nelson, ___M___, 603 P2d 1050 (1979).

46-18-223. Hearing to determine application of exceptions.

Cross-References

Duty of court to advise at initial appearance, 46-7-102.
Right to counsel, 46-8-101.
Court to advise defendant of rights, 46-12-202.
Right to counsel — parole hearing, 46-23-204.
Court to advise defendant of rights — extradition proceedings, 46-30-217.

Case Notes

Finding of No Mitigating Factors Supported in Record — Alcohol and Sexual Problems: Where the trial court considered defendant's drinking and sexual problems but concluded that those conditions did not excuse defendant from accountability for his acts, and the evidence presented at the hearing and in the presentence investigation report supported the trial court's conclusion, there was no abuse of discretion in sentencing defendant as a persistent felony offender. St. v. Metz, ___M___, 604 P2d 102 (1979).

Part 3

Death Penalty

Part Case Notes

Constitutionality of Former Death Sentence Statute: Section 94-5-105, R.C.M. 1947 (now repealed), which provided a procedure for the imposition of a sentence of death for a conviction of deliberate homicide, was constitutional on its face. St. v. Fitzpatrick, ___M___, 606 P2d 1343 (1980).

Increase of Sentence After New Trial — Due Process: The defendant, who had been sentenced to 100 years' imprisonment for deliberate homicide, was not denied due process of law when, after a new trial on the same charge, he was sentenced to death. The due process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of vindictiveness. When the District Court Judge was replaced for the new trial and sentencing and the new judge stated his reasons for imposing the death penalty with clarity, the threat of vindictiveness was not a realistic likelihood. St. v. Fitzpatrick, ___M___, 606 P2d 1343 (1980).

Sentencing Under Statutes Amended After Date of Crime: The sentencing of the defendant to death for a conviction of aggravated kidnapping under statutes amended after section 94-5-304, R.C.M. 1947 (now repealed), was declared unconstitutional did not violate the constitutional prohibition against ex post facto laws. The amendments were ameliorative in nature and did not deprive defendant of a substantial right or immunity that he possessed at the time the crime was committed. St. v. Fitzpatrick, ___M___, 606 P2d 1343 (1980).

Review of Death Sentence — Disproportionate Application: The Supreme Court, in reviewing a death sentence to determine whether it is disproportionate, reviews the circumstances of the crime of which the defendant is accused and in light of those circumstances, the judgment and the sentence thereupon imposed. It examines cases involving similar crimes, for the single purpose, making certain that as far as the defendant in this particular case is concerned, there has been no discriminatory action on the part of the sentencing judge and no abuse of discretion by the sentencing judge and that the sentencing judge has considered and applied fairly and without discrimination the applicable law. The Supreme Court looks for the even-handed application of death sentences without regard to sex, color, creed, or race or any

other discriminating consideration. When this has occurred, as here, the death sentence must be upheld. St. v. Coleman, ____M____, 605 P2d 1000 (1979).

Retroactive Application of Death Penalty Provisions — No Ex Post Facto Violation: Where after the commission of the crime of homicide, the U.S. Supreme Court found the death penalty statute unconstitutional and the state Legislature took only the procedural step of redefining the punishment, not the crime, there is no ex post facto violation in upholding the previous death penalty imposed, since the defendant had "fair warning" of the consequences of homicide. St. v. Coleman, ____M____, 605 P2d 1000 (1979).

Constitutionality:

Montana's statutory scheme for imposing the death penalty meets the standards established by the U.S. Supreme Court. The penalty is not cruel and unusual simply because Montana's criminal statutes allow its imposition in this case for the crime of aggravated kidnapping but not for the crime, as committed here, of deliberate homicide. St. v. Coleman, ____M____, ____P2d____, 36 St. Rep. 1134 (1979).

In light of recent U.S. Supreme Court decisions (Woodson v. N. Carolina, 428 US 280 (1976); Coker v. Georgia, 433 US 584, 97 S Ct 2861, 53 L Ed 2d 982 (1977); Roberts v. Louisiana, 431 US 633, 97 S Ct 1993, 52 L Ed 2d 637 (1977)), section 94-5-304, R.C.M. 1947 (since repealed), as it existed at the time of the defendant's trial, was unconstitutional on its face as a mandatory death penalty statute. St. v. Coleman, ____M____, 579 P2d 732 (1978).

While the statutes did not provide for the jury in the bifurcated sentencing procedure, they were within the constitutional boundaries of recent U.S. Supreme Court cases. The sentence of death in this case was rested on a narrowly defined type of murder or kidnapping. The former statute provided for the sentencing judge to consider mitigating circumstances. In addition, appellate judicial review and other sentence review was provided. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

By an earlier decision of the U.S. Supreme Court, statutes allowing the sentencer discretion as to whether to impose the death penalty were unconstitutional; although the conviction would be upheld, a sentence of death made at the discretion of the court under a former statute was unconstitutional and would be commuted to life imprisonment. St. v. Rhodes, 164 M 455, 524 P2d 1095 (1974).

Requisites of a Valid Death Penalty: The U.S. Supreme Court seems to have established three general criteria that are requisite to a valid death penalty statutory scheme: (1) there must be at least one statutory aggravating circumstance before a death sentence may be considered; (2) the defense must be afforded the opportunity to bring before the sentencing body at a separate sentencing hearing any mitigating circumstances relating to the individual defendant; and (3) there must be available prompt judicial review of the sentencing decision by a court of statewide jurisdiction. The statutory scheme in existence at the time of commission of the crimes charged in the instant case met the above criteria. St. v. McKenzie, ____M____, 581 P2d 1205 (1978).

Prospective Juror's View of Death Penalty: Two prospective jurors were properly excluded under the exception to the general rule of Witherspoon v. Illinois, 391 US 510 (1968), because they were irrevocably committed to voting against conviction because of the possibility of a death penalty. St. v. Coleman, ____M____, 579 P2d 732 (1978).

Part Law Review Articles

Montana's Death Penalty After State v. McKenzie, Tweeten, 38 Mont. L. Rev. 209 (1977).

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TITLE 10

CRIMINAL PROCEDURE

CHAPTER 10.70—COMMITMENTS AND EXECUTIONS

Cross References

Execution of death sentence, see § 10.95.010 et seq.

10.70.020 Mittimus upon sentence to imprisonment

1. In general

Superintendent of correctional institution is required by § 72.13.150 to receive all male persons convicted of a felony, unless local jurisdictions agree to house such prisoners; department of social and health services has duty to take charge of felon when conviction is entered, and transfer is not to be delayed beyond 40 days after conviction even where appeal is pending. Kanekoa v. Washington State Dept. of Social & Health Services (1981) 95 Wash.2d 446, 626 P.2d 6.

10.70.040 to 10.70.130 Repealed by Laws 1981, ch 138, § 24, eff. May 24, 1981

Annotations Under Repealed Sections

[SECTION 10.70.050]

United States Supreme Court

Due process; sentence of death may not be imposed where jury is not permitted to consider lesser included noncapital offense supported by the evidence, see Beck v. Alabama (1980) 100 S.Ct. 2382, 447 U.S. 625, 65 L.Ed.2d 392.

Equal protection; statute interpreted to permit death sentence for murder that was outrageously or wantonly vile, horrible, or inhuman, provided inadequate guidance and thereby allowed arbitrary and capricious infliction of the death penalty, see Godfrey v. Georgia (1980) 100 S.Ct. 1759, 446 U.S. 420, 64 L.Ed.2d 398.

2. Constitutionality of death penalty

Statutory procedure under § 10.94.010 et seq. (repealed; see, now, § 10.95.010 et seq.) for imposing death penalty was unconstitutional, whether defendant pleaded guilty or was found guilty by jury. State v. Frampton (1981) 95 Wash.2d 469, 627 P.2d 922.