2433 HJ HB 140 (FILE 2)

2433

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).

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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.

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(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.

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EHH:ojb
J2/034

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NATIONAL CONFERENCE OF STATE LEGISLATURES
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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

never published JB

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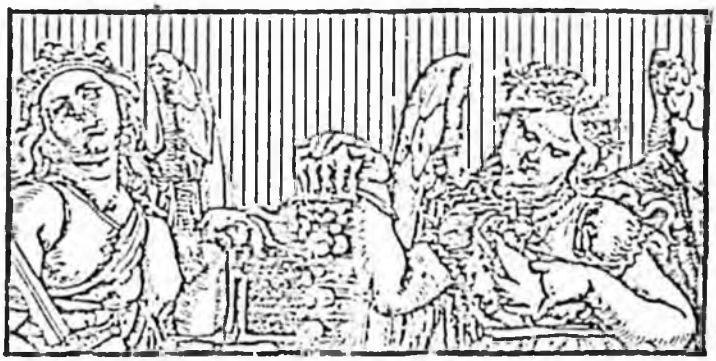
65. *See supra* note 23 and accompanying text.

Corrections
COMPENDIUM

VOL VII NO 5 KNOWLEDGE IS POWER DECEMBER 1982



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.

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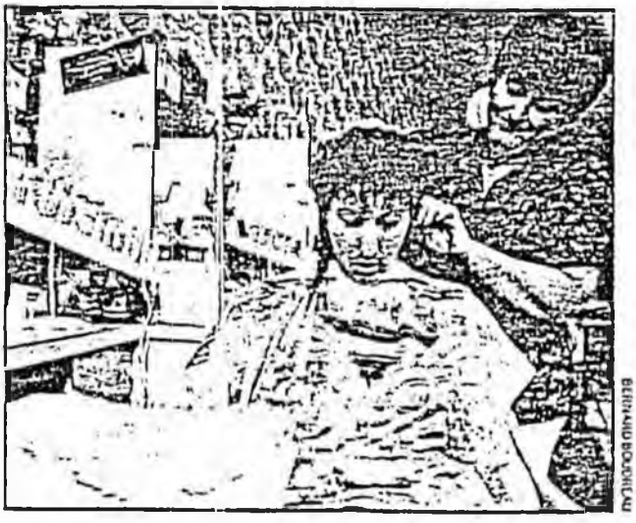
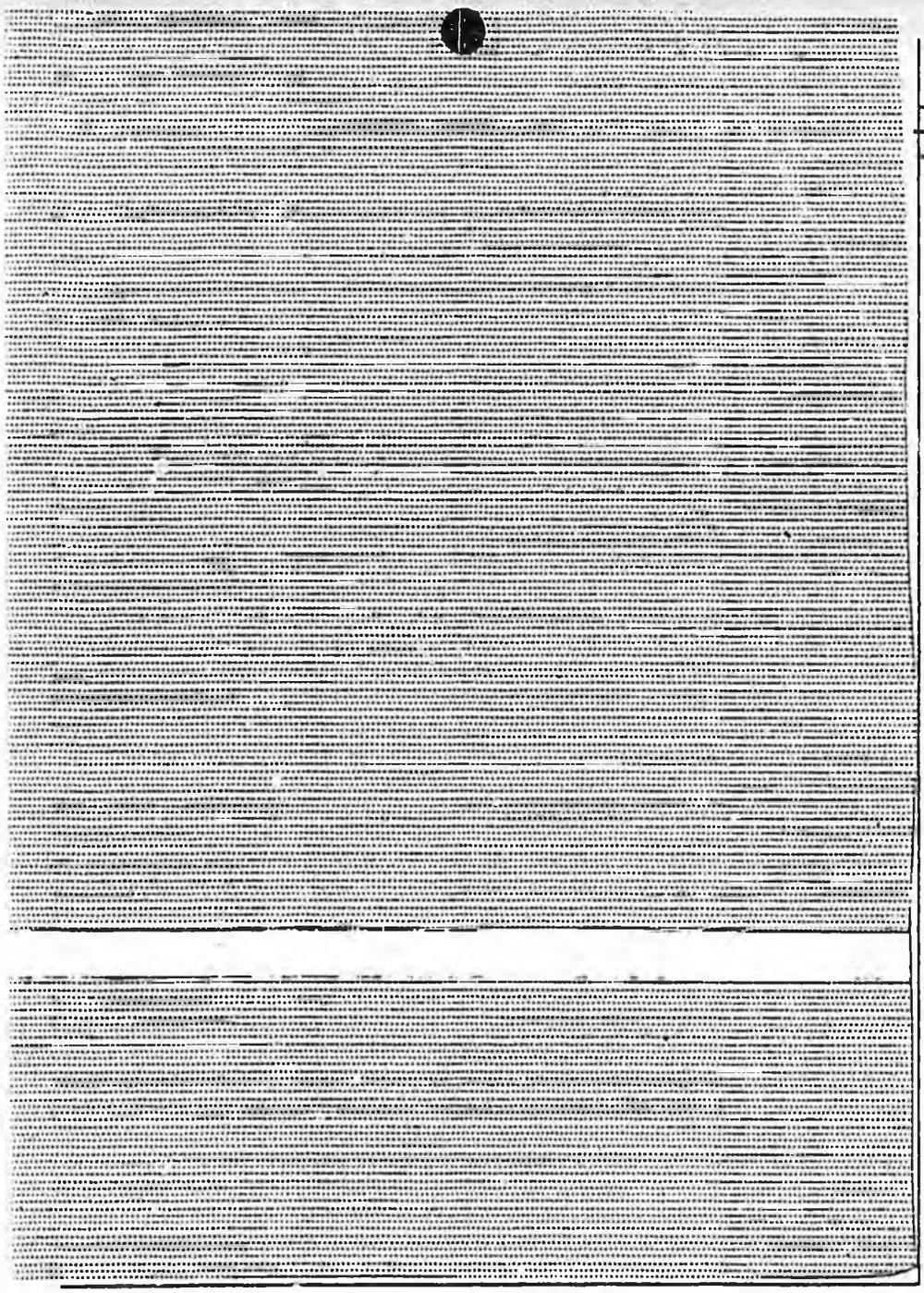


To prepare for the next round of their battle to keep their daughter's killer in jail, Sam and Louise LaCorte continue to collect petitions (*top, left*). Behind them, in the living room of their Arcadia, Calif., home is a portrait of their late daughter, Cathy. At right, Louise at work in her neighborhood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



KEEP KILLERS IN JAIL

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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."

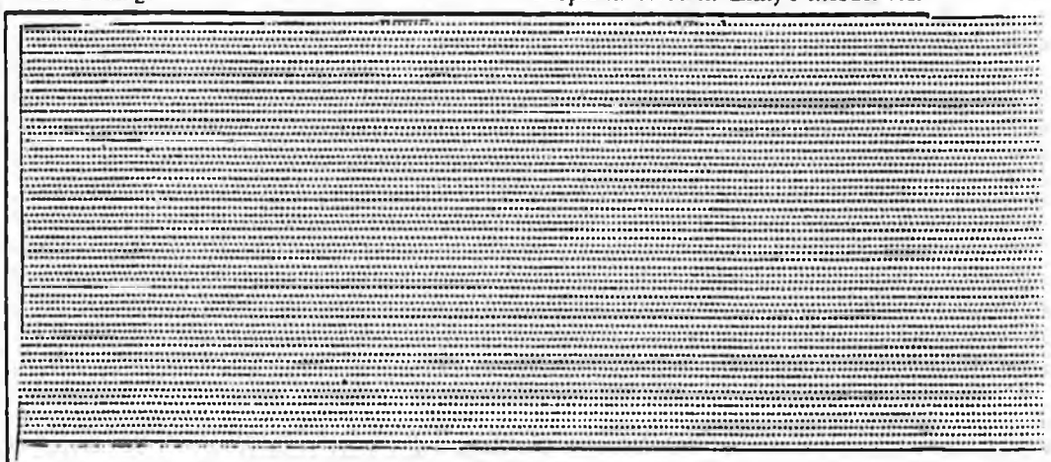
That's when Louise went back to the media. The local CBS station picked it up first. Then, with Mancino's help, Louise and Sam held a press conference that was covered by virtually every TV station and newspaper in the area, including the prestigious *Los Angeles Times*. At the same time, Louise was 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."

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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.