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HJ

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### **Who needs protection?**

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

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

— Edward M. Boyd

## Capital punishment

Dear Editor:

It seems our legislators forget that they represent the opinion of those who elected them. I believe the majority of their constituents favor capital punishment. It is unfortunate that those who are now battling at passage of such a bill did not voice that opinion during the election campaign.

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

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

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

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

his race or national origin, but on his own worth.

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

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

R. Wolf  
3182 Prescot

## Capital punishment

Dear Editor:

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

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

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

overcrowding in the jails.

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

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

Darryl Leiser  
6th grade student  
Tudor School

## Death Penalty

Dear Editor,

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

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

You are right when you say that the death penalty cannot be debated without emotion. I have wanted to write to the Anchorage papers to try to

counter all the emotional letters and have been unable to find an unemotional way to express my views on this subject and I have thus been afraid that anything I say would just add to the heat and probably not change any minds.

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

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

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

Sincerely,  
Garry St. John  
3322 Seppala, B  
Anchorage 99503

## What others say

# Arguments in favor of the death penalty

TIMES 3-17-83

From The Juneau Empire

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

Six McCarthy residents are gunned down in cold blood.

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

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

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

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

The death penalty cannot be debated without emotion.

In arguing against it, many people believe a "civilized society" should never take a life. They argue the "eye for an eye" tenet should never be

applied, and that the sentence is not a deterrent.

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

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

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

Neither do planned murders.

Neither does the killing of a law officer.

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

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

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## Capital punishment is no crime

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

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

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

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

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

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

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

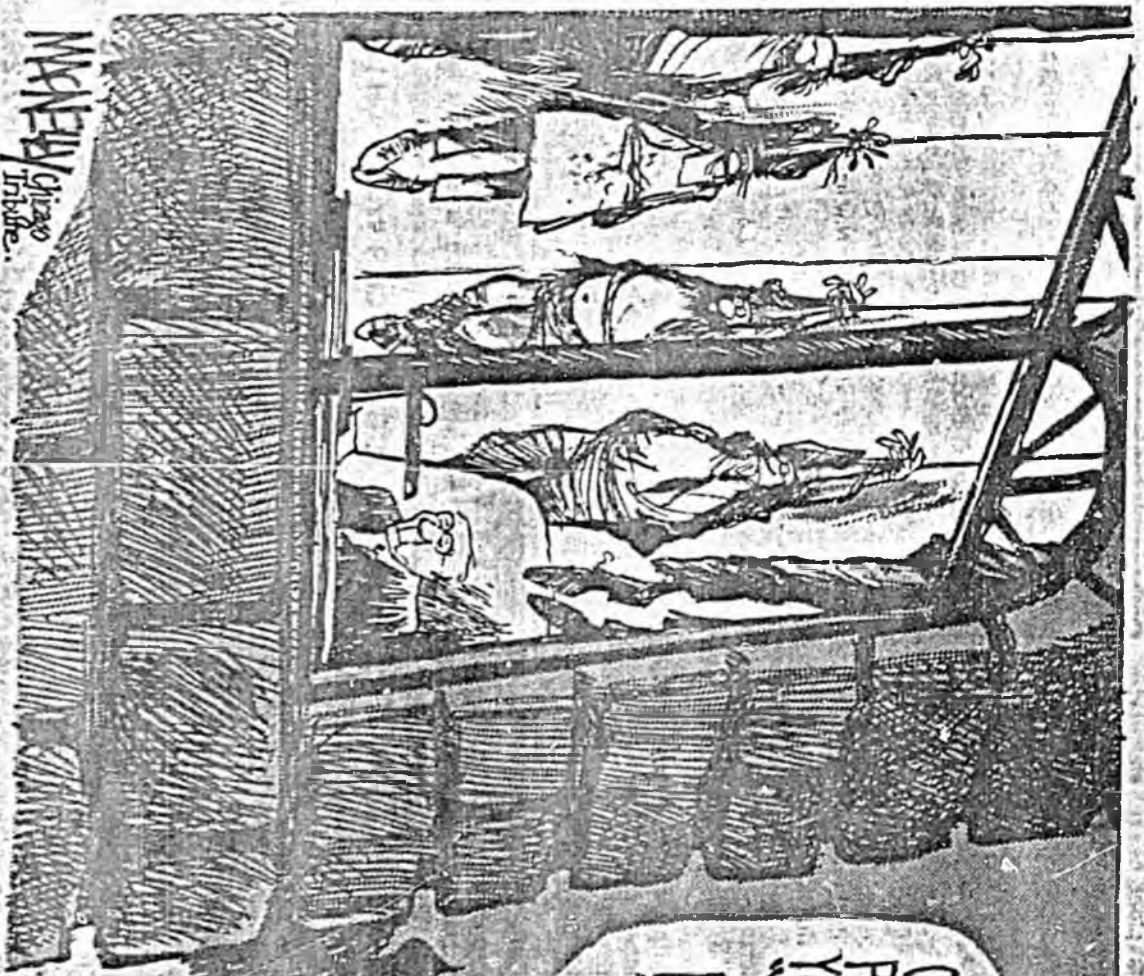
Mercy shown to a willful murderer is really cruelty to all mankind because the murderer has the potential to murder more people including you, me and our families. The murderer will find it easy to continue to kill those in society as well as in prison since he knows no worse punishment is awaiting him.

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

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

— Paul M. Anthony

McNELY  
Chicago  
Tribune.



CORRECTION IN MY PROFILE  
PIECE ON ANDROPY, CHIEF.  
YEAH, ... SEE WHERE IT SAYS,  
"HAS MANY MODERN  
PAINTINGS HANGING  
IN HIS OFFICE" ... ?



## Capital punishment *Time 3-4-53*

Dear Editor:

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

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

I do not know how many times innocent men have been executed but I do know it has

happened. Can we justify taking the life of an innocent person by mistake to punish the guilty?

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

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

Dorothy Bell  
P.O. Box 3-672

Capital punishment

TIMES  
2-26-83

Dear Editor:

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

I refer to several incidents in this community such as the high school girl killed at Eastertime two or three years ago, the

woman and her son who were killed about one and a half years ago and the most recent one at Russian Jack Springs Park less than one year ago, when four teen-agers died.

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

A. Ulen  
Soldotna

# Malone questioned on judicial challenge stand

To the editor:

An open letter to Rep. Hugh Malone:

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

When there is a new judge assigned, regardless of his attitude toward drunken driving and other crimes, this will only tell lawyers who use this law to load their pockets with taxpayers' money. Apparently Chief Justice Burke and Judge Rowland want to keep this law on the books, perhaps for the day when they topple and have to take defending drunken drivers, I am told when Judge Rowland was a visiting judge in

Homer, he apparently wasn't interested in saving taxpayers money, as he flew his own plane, landing on Lake Beluga. Another visiting judge recently, along with a district attorney and a game warden, were seen as they ran aground on the bar and he was so hard aground, he didn't show up to court till 2 p.m. the next afternoon. Judge Hornaday is a skilled navigator and keeps his ship off the bar.

If this peremptory law is so all-fired necessary, why not put our courts on a paying basis and let them pay for visiting judges, instead of having people who are able to survive the drunken drivers, as in most states one found guilty or the loser in a civil action is required to pay the cost of court. As of now, we the taxpayers are not only paying the cost, we're also paying for a public defender who apparently uses excess time with this peremptory or other laws, stalling to feather his own nest, telling

## Letters to the editor

people who want to plead guilty to plead not guilty so they can run up expense. Also, I know of one case where a man had a quite steady job on the Slope and a public defender, defending him on a criminal trespass case.

WHO is paying?

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

I hope you'll see the light.

Some questions for anyone interested in such subjects:

1. Why not breath-test equipment in all bars and places liquor is sold?
2. Why not let the people vote for all

judgeships as long as we are paying their salaries?

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

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

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

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

Calvin H. Hand,  
Anchor Point

# Capital punishment views sought

To the editor:

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

With this bill, we seem to once again pursue the information gathered on the subject and resort to the ancient eye-for-an-eye and tooth-for-a-tooth philosophy. Admittedly, our justice system needs a radical

overhaul, but the short-term solution of killing people for killing people, makes little sense to me. Many of the people who call themselves "experts" on criminology have basically come to similar conclusions, namely, the death penalty does not stop the kind of crimes it is designed to, but tends to show a lower stage of development for the societies which use it.

I'd like to again call on all those thinking people who feel other solutions should be sought in place of state-sanctioned killing, to write to our representatives on this bill. I'd like to especially appeal to my friends in the

pro-life movement and hope that their desire for consistency will compel them to speak out on this issue.

Greg Stevens  
Juneau

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

## Quotables

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

• Johnathan Edwards

# Public reassurance in a civilized way

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

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

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

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

- Homicide on behalf of the state is inconsistent with our culture's most basic respect for human life;

- The expense of trying a capital case is large, since absolutely "no stone can be left unturned" by either side when the life of a defendant is at stake;

- The extra emotional cost to all, especially jurors, encourages acquittals when the prosecution might otherwise meet its burden of proof beyond a reasonable doubt;

- The criminal justice system is not above error, but there can be no recourse if an innocent person is put to death;

- The death penalty skews the administration of justice when defendants — acutely aware that the trial process is not infallible — plead guilty to lesser offenses to avoid the threat of a death penalty;

- Imposition of the death penalty has not been without bias. A greater than representative number of illiterates, poor, minorities and political criminals have faced the death penalty in the United States; and

- Two wrongs do not make a right. The death of a murderer is only symbolic retribution, and can never bring back the victim.

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

# THE PUNISHMENT OF DEATH

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

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

Too bad it doesn't work that way.

Consider who qualifies for the death penalty.

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

Not the person who kills by accident or negligence.

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

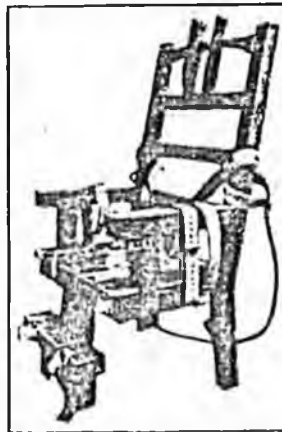
That leaves the professional and the otherwise premeditated murderer (both are statistically rare species) and the felony murderer who kills during the commission of another crime, such as robbery, burglary or home invasion.

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

Which leaves a subclass of felony murderer whom society has every right to hate and fear: the sadistic psychopath, who doesn't just kill in the course of robbing but may commit robbery as an excuse to kill, terrorize or maim. This is the fellow who holds up the mom-and-pop grocery store for \$60 and then pumps bullets into the owner pleading for his life or who takes the wallet from an unresisting victim and then sticks a knife in him.

Only the most principled humanitarian would spare these killers' lives—and maybe a few criminologists who find the threat of death not a deterrent to murderous behavior but an inducement to it.

Psychologists who specialize in violent antisocial behavior have long recognized that the most dangerously hostile, aggressive and sadistic criminals tend to be mentally deranged but legally sane individuals who are embarked on a campaign of self-destruction. Most of those criminals would laugh at that idea; and it certainly doesn't seem that way to their



innocent victims. But where the badly troubled person from the so-called upper classes tends to turn his hostility inward, sink into an abyss of depression and end his own life with a bottle or a bullet, his less introspective and socialized counterpart takes his frustration and aggression out on others until he is caught or killed.

For this person, brutality has the immediate payoff of compensating for an intolerable sense of im-

potence; the ultimate reward is to be transformed by society into a celebrity murderer, attended regally by a vengeful justice system, and then to be solemnly and ceremonially executed by the state. To "ride the lightning."

The percentage of murderers who kill in order to be killed is unknowable, but it seems likely they outnumber those who rationally weigh the prospect of execution and are deterred.

Add to that another unhappy fact of criminal behavior: The rational felon whose planned or unplanned act could cost him his life may well elect to leave no living witnesses.

And add to that a cultural effect of capital punishment that to students of violent behavior is the most worrisome of all. By performing executions in the name of justice, the state validates the idea that killing is an appropriate response to sufficiently wicked or intolerable behavior. Which happens to be the exact frame of mind that prevails in the most common of murder situations—the bedroom or barroom rage. Whether cloaked in legal pageantry or performed in a moment of white fury, the message is the same: *The son of a bitch had it coming!*

Not even the Supreme Court has suggested that the death penalty deters murder. In 1976, it took, instead, the curiously honest position that execution primarily serves a retribution function, that it fulfills an emotional need of citizens outraged and frustrated at the prevalence of crime and violence. That it certainly does. Contrary to the lofty position of the true humanitarian, the less philosophical citizen may in fact derive comfort and genuine satisfaction from bloody vengeance. But a wiser court and wiser men in public office might have considered that the transient satisfaction of a blood sacrifice may well be paid for by additional violence and suffering inspired by its lethal example.

## Death penalty debate

*juads. 2-15-55*

Legislators and onlookers in the Alaska Senate got a rueful chuckle out of committee referrals made by Senate President Jalmar Kerttula for a death penalty bill introduced last week. Sen. Kerttula sent the bill to both the Judiciary and Finance committees, noting that "it costs money" when the latter assignment drew guffaws. Sen. Joe Josephson, who chairs the Senate Health and Social Services Committee occasioned further chuckles with his observation that the bill "has certain health implications as well."

The laughter no doubt served to break the tension surrounding a very serious matter for all concerned. It is committee referrals to at least two different panels that the Senate will give the idea plenty of scrutiny before moving on any death penalty bill this session. And that scrutiny suggests a further consideration for chairmen planning committee hearings: the need for broad public participation in any decision to embrace the death penalty in our state.

The death penalty implicates every citizen in a cycle of violence the state seeks to stop. Before any death penalty bill can advance to a vote of the legislature, it must bear widespread scrutiny and debate among all Alaskans. Public hearings must be held around the state; reputable research about the death penalty and its impacts must be widely distributed and debated; the methods and circumstances of imposing capital punishment must be carefully defined; and, finally, Alaska citizens and their leaders must forthrightly confront the moral dimensions of a painful issue. Such scrutiny would be difficult at best, but it is the very least demanded of a democratic state that would adopt the authority to impose a penalty of death.

## Senate finds some humor in crime bill

The Associated Press

JUNEAU — Alaska senators on Friday found some light humor in a grim subject — capital punishment.

The laughter followed the introduction of a bill to authorize the execution of murderers in Alaska. A similar bill was filed in the House last month.

Senate President Jay Kerttula, D-Palmer, referred the measure to the Finance Committee, which drew guffaws from senators.

"Hey. It costs money," Kerttula said.

When the laughter subsided, Sen. Joe Josephson, D-Anchorage, rose to say "I think it has certain health implications as well," which drew another roar from the lawmakers.

The measure (SB121), sponsored by Sen. Fritz Pettyjohn, R-Anchorage and others, would provide that a person convicted of a capital felony "shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years, or shall be sentenced to death."

The bill, which also will be reviewed by the Judiciary Committee, would classify murder as a capital felony.

The measure also would require a death sentence to be approved by the Alaska Supreme Court.

A similar bill was filed in the House by Rep. Sam Pestinger, R-Anchorage. The measure (HB140) is still in the House Judiciary Committee.

TIMES 4/6/83  
**editor**

### The death penalty

Dear Editor:

Sylvia Short's "capital punishment" letter of March 26, faults Moral Majority and certain Christian organizations for favoring the death penalty because she thinks it contradicts the teachings of the Prince of Peace. She admits to being puzzled.

It might help this widespread misunderstanding by non-Christians to know that while Jesus came to provide a way of salvation, he also spoke of the destruction of sinners. In Matthew 10:34, he said, "Think not that I come to send peace on earth: I came not to send peace but a sword."

The death penalty is clearly demanded by the word of God. An accused person who was tried and condemned by his peers was led outside the city gates and stoned to death.

In suggesting the head of Moral Majority be crucified like Christ, Ms. Short recommends the very violence she claims to abhor.

Bob Clark  
P.O. Box 4-1908

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HV 8694

ED 153

CAPITAL PUNISHMENT:  
PRO AND CON ARGUMENTS

JOYCE VIALET  
Education and Public Welfare Division

August 3, 1956

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## SECTION 1

### AGAINST CAPITAL PUNISHMENT

#### I. THE STATE SHOULD NOT KILL

The central argument against capital punishment may be summarized as follows: in the absence of a clearly demonstrable benefit to society, it is morally wrong and pragmatically unsound for the State to be invested with the right to take the life of its citizens.

Abolitionists argue, first, that it is morally wrong to kill, and no less so for the State than for the private individual. Michael V. DiSalle, the former Governor of Ohio, writes:

First of all, I believe that taking a human life, even to pay for a life already taken, is immoral....Society, echoing the Ten Commandments, says: Thou shalt not kill. Then society illogically continues: Killing is wrong, and in order to prove it is wrong, we will kill you if you kill.<sup>1/</sup>

While the moral argument, based as it is on the belief in the sanctity of human life, leads some abolitionists to argue that capital punishment is wrong regardless of whether or not it benefits society, this absolute stand is unusual. The following statement by Herbert L. Packer, Professor of Law at Stanford University, is representative of the more prevalent view:

The case is not that the sanctity of human life is an absolute but rather that it is a highly cherished value that should give way only upon a persuasive showing that some other, more important end will thereby be served.... Unless it can be shown that capital punishment serves prime social purposes that cannot otherwise be served, the claims of its proponents are unconvincing.<sup>2/</sup>

<sup>1/</sup> Michael V. DiSalle, The Power of Life or Death (1965), 6.

<sup>2/</sup> Herbert L. Packer et. al., "Mr. Barzun and Capital Punishment," The American Scholar (Summer 1962), p. 440.

Abolitionists argue, secondly, that this belief in the sanctity of the individual human life is the central value of our society and should be supported by the actions of the State. They contend that, if the institution of capital punishment does not actually undermine this value, and many believe that it does, it clearly does nothing to reinforce it. Governor Edmund G. Brown of California writes:

I oppose capital punishment, too, because it brutalizes man; because a society that takes human life cannot invest its citizens with respect for human life.<sup>1/</sup>

A New York Herald Tribune editorial entitled "The State Should Not Kill" puts it more strongly:

Whenever the state takes life it cheapens life. Capital punishment panders to man's basic instincts, cloaking retribution in the mantle of the law, coloring vengeance with respectability, setting a public example for private violence.<sup>2/</sup>

Third, abolitionist argue that the State should be granted legal power to take the lives of its citizens only if this is clearly necessary for self-defense which, in the case of capital punishment, means the protection of its law-abiding citizens. In the United States, this argument takes the traditional form of the need to protect the rights of the individual against the State, and is summarized as follows by Michael V. DiSalle:

Those of us who are interested in the freedom of the individual realize that government exists only with those powers that have been delegated to it by the people, and the more restrictions we place upon government and the exercise of the powers that have been delegated to it, the more certain we are that we will have a democratic type of society where the freedom of the individual prevails. It should certainly not be the purpose of people within a society to delegate to government any more authority than that necessary to perform its functions; I feel that the delegation of the right to take away

<sup>1/</sup> Edmund G. Brown, Statement on Capital Punishment (1963), p. 2.

<sup>2/</sup> "The State Should Not Kill," New York Herald Tribune (March 27, 1960), in Capital Punishment, ed. Grant S. McClellan (1961), pp. 83-84.

life can only be justified when a certain purpose is to be served; that purpose might be the preservation of society itself against a threat from the outside or a threat from within.<sup>1/</sup>

In general, abolitionists in the United States are more willing to grant that the death penalty would be justified by its clear necessity for the protection of "society itself against a threat from the outside or a threat from within," than are, for instance European abolitionists. The latter tend to be more concerned than American abolitionists with the danger that capital punishment will be used illegitimately by the State. A representative European view on this issue is expressed as follows by the late Albert Camus:

...for 30 years crimes of state have vastly exceeded crimes of individuals. I shall not even mention wars-- general or local.... I am referring here to the number of individuals killed directly by the State, a number that has grown to astronomic proportions and infinitely exceeds that of "private" murders. There are fewer and fewer men condemned by common law, and more and more men executed for political reasons.... It is not so much against the individual killer that our society must protect itself then, as against the State. Perhaps this equation will be reversed in another thirty years. But for the present, a legitimate defense must be made against the State, before all else. Justice and the most realistic sense of our time require that the law protect the individual against a State given over to the follies of sectarianism and pride.<sup>2/</sup>

In summary, then, most American abolitionists argue that the death penalty should stand or fall on proof that it is necessary to protect society. Furthermore, because of the moral and practical evils they see as inherent in the institution of the death penalty, abolitionists argue that the burden of proof rests with its supporters.

<sup>1/</sup> American Bar Association, Section of Criminal Law, 1959 Proceedings (1960), pp. 5-6.

<sup>2/</sup> Albert Camus, "Reflections on the Guillotine", Evergreen Review (No. 3, 1957), p. 48.

It is generally agreed by both sides in the capital punishment controversy that there are two ways in which the death penalty might afford society unique protection. First, it might be a more effective deterrent against major crime than life imprisonment. The deterrent issue is defined as follows by Hugo Adam Bedau:

The only question [regarding deterrence] which must be settled is this: is long term imprisonment (on the assumptions that it is less savage and more easily administered by the judicial system than capital punishment) as good a deterrent for the major crimes currently punished by death? This formulation leaves open, as it should, the question of how close either penalty is to a completely effective deterrent; and it does not raise the further question, as it shouldn't, whether death might be a better deterrent for certain crimes (e.g., against property) that no one would think of punishing in this way. To put it another way, the real dispute over deterrence is this: how many capital crimes, if any, have been (or might be) prevented by the threat of execution, which would not have been (or would not be) prevented by the threat of imprisonment?<sup>1/</sup>

Second, the death penalty might be the only way of protecting society against the incorrigibly dangerous. The debate with regard to this second function centers around the issue of whether or not the death penalty is in fact necessary, whether this protection is not provided equally well by measures short of execution.

Abolitionists argue that the death penalty has failed as a deterrent and is unnecessary as a protective measure. They argue that it should be abolished because there is no demonstrable proof that it affords society the unique protection which alone would justify its retention.

<sup>1/</sup> The Death Penalty in America, ed. Hugo Adam Bedau (1964), p. 261.

## II. DETERRENCE

Hugo Adam Bedau defines the doctrine of deterrence and comments on its importance in the capital punishment controversy as follows:

...by far the most common way to employ a punishment as a preventative of crime is to adopt a sufficiently severe penalty, so as to compel general obedience out of fear of the consequences of disobedience--the classic doctrine of deterrence. Even though deterrence cannot override every other concern in formulating a rational penal philosophy, there is no doubt that the death penalty's efficacy as a deterrent is the major factual issue in dispute between abolitionists and retentionists.<sup>1/</sup>

Abolitionists argue that the death penalty's efficacy as a deterrent is, at the very least, called into serious question both by the available statistics and by the evidence of modern psychology.

### A. The Statistics

In a study of the death penalty which he prepared at the request of the American Law Institute, Thorsten Sellin notes:

Any one who carefully examines the... data is bound to arrive at the conclusion that the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent.<sup>2/</sup>

Sellin analyzes the four ways in which the deterrent value of the death penalty would be evident if it, in fact, existed:

It seems reasonable to assume that if the death penalty exercises a deterrent or preventive effect on prospective murderers, the following propositions would be true:

- (a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states

<sup>1/</sup> Bedau (ed.), op. cit., p. 260.

<sup>2/</sup> Thorsten Sellin, The Death Penalty (1959), p. 63.

that are as alike as possible in all other respects—character of population, social and economic condition, etc.—in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these states.

- (b) Murders should increase when the death penalty is abolished and should decline when it is restored.
- (c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crime occurred and its consequences are most strongly brought home to the population.
- (d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than in those without it.<sup>1/</sup>

In general, the various statistical studies which have been made in an attempt to test the deterrent value of capital punishment concern themselves with one or more of these four propositions.

It will be noted that the majority of the studies in this field have been conducted by Sellin. Professor Emeritus of Sociology at the University of Pennsylvania and President of the International Society of Criminology, Thorsten Sellin has been described as the "foremost statistician in the field of criminal law in the world,"<sup>2/</sup> He was the principal consultant to Great Britain's Royal Commission on Capital Punishment as well as to the majority of other official government commissions studying this subject. Bedau notes:

...[Sellin's] evidence has managed over the past decade to convince a wide variety of legislative committees throughout the English-speaking world, and not in every case were the members of these committees initially receptive to his conclusions.<sup>3/</sup>

<sup>1/</sup> Sellin, *op. cit.*, p. 21.

<sup>2/</sup> California Legislature, Senate Committee on Judiciary, *Hearing Report and Testimony...* (1960), p. 65.

<sup>3/</sup> Bedau (*ed.*), *op. cit.*, p. 265.

Contiguous Jurisdictions - Sellin's studies of the homicide rates in contiguous jurisdictions with and without the death penalty are, in Bedau's words, "the cornerstone of the case against the deterrent superiority of the death penalty over imprisonment."<sup>1/</sup> Table 1 below shows the results of four of these studies, described by Mr. Sellin as follows:

The only fair comparison is one that takes into account regional differences and therefore compares the homicide rates of an abolitionist state with that of its neighbor states. The diagrams shown... [see below] are based on such comparisons. They show the annual size of the homicide death rate per 100,000 population for the period 1920-1958 and the general trend of the rate for each set of states compared.<sup>2/</sup>

Sellin's conclusion on the basis of these studies follows:

The striking thing about these diagrams is that within each set of states the rates are so nearly the same annually and the trends so closely alike that if the lines were not identified with each specific state, no one would dare to guess which lines represented the abolition states....

It is proper to conclude that states which are similar in the character of their population, their urban and industrial development, and their mores have similar homicide rates, whether or not they have the death penalty. In other words, the presence of the death penalty for murder in a state appears to have no more influence on its homicide rates than the absence of the penalty in a comparable state has on the rates of that state. And, if our basic assumption is correct, what holds true for the homicide rates would hold true for the capital murder rates, were they obtainable.

When it once becomes generally understood that the amount and the trends of murder depend on demographic, social, economic, and political conditions, one would realize that the explanation for rises or falls in the statistics of this crime must be sought through a study

<sup>1/</sup> Bedau (ed.), op. cit., p. 263.

<sup>2/</sup> Thornton Sellin, "Capital Punishment," Federal Probation (Sept. 1951), p. 6. See also Sellin, The Death Penalty, pp. 23-34.

of these conditions, and that through such a study alone could any possible remedy be found. To hope that this remedy could be found in the application of the death penalty or in its introduction is to grasp at a straw.<sup>1/</sup>

TABLE 1

CONTIGUOUS JURISDICTIONS: HOMICIDE DEATH RATES FOR SELECTED STATES<sup>2/</sup>

DIAGRAM I

Homicide Death Rates, per 100,000 Population, in Maine, New Hampshire, and Vermont: 1920-1958

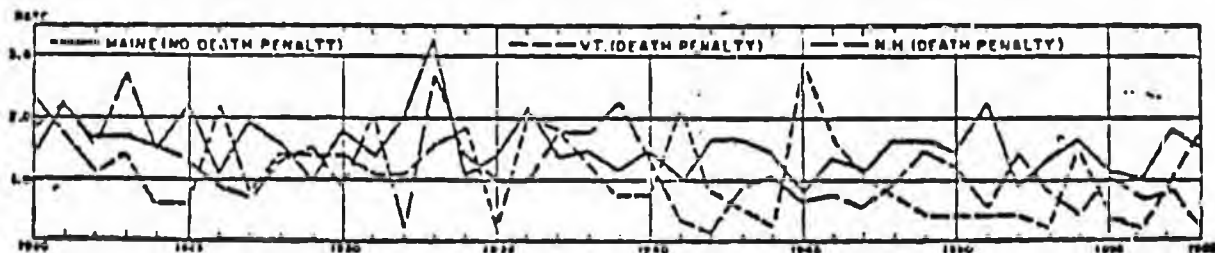


DIAGRAM II

Homicide Death Rates, per 100,000 Population, in Massachusetts, Connecticut, and Rhode Island: 1920-1958

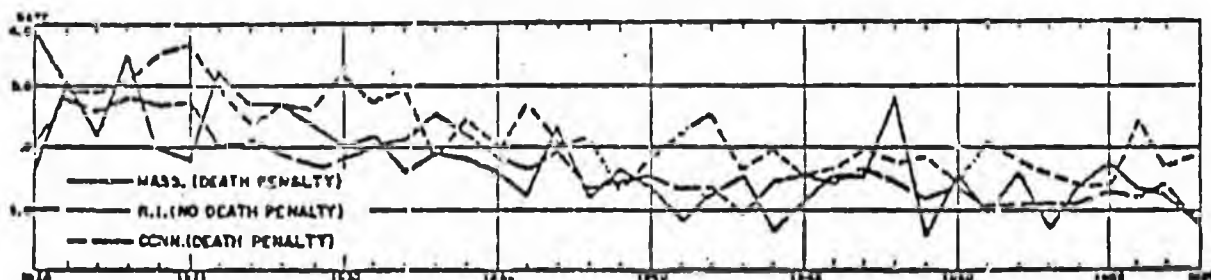
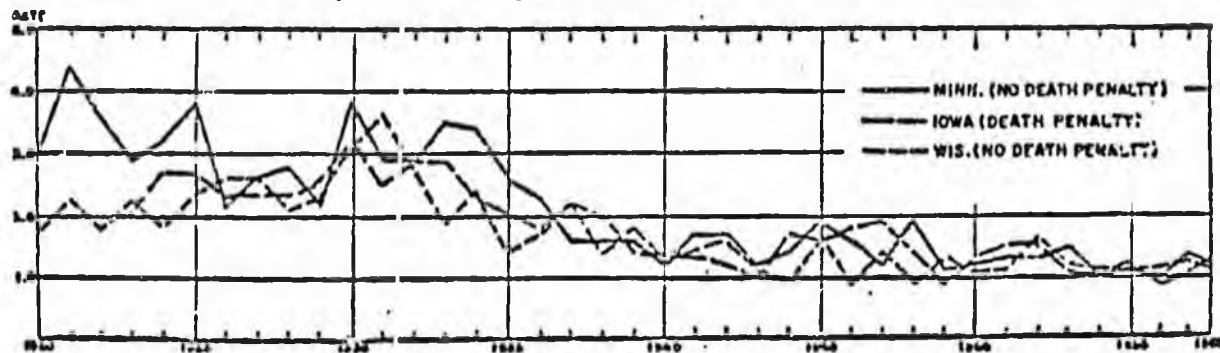


DIAGRAM III

Homicide Death Rates, per 100,000 Population, in Minnesota, Iowa, and Wisconsin: 1920-1955



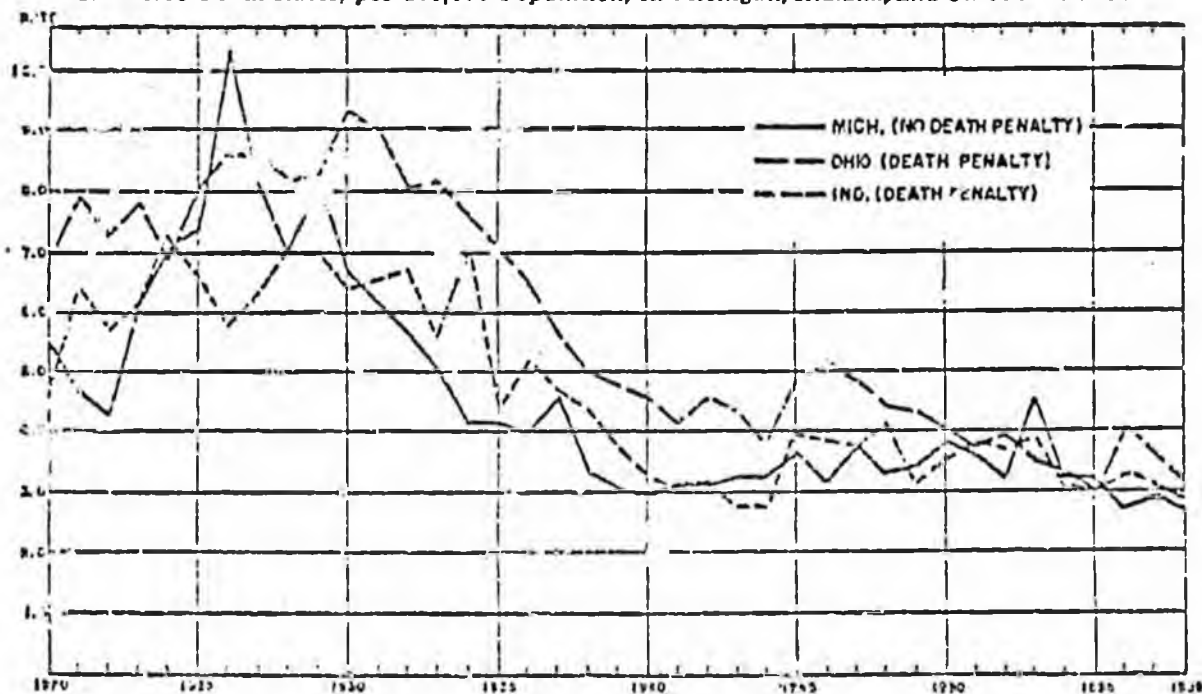
<sup>1/</sup> Sollin, "Capital Punishment," p. 6.

<sup>2/</sup> Ibid., pp. 7-11.

TABLE 1 (cont)

DIAGRAM IV

Homicide Death Rates, per 100,000 Population, in Michigan, Indiana, and Ohio: 1920-1958



Abolition and the Criminality Curve in the Same Jurisdiction -

Several studies have been made on the second assumption state above by Sellin; namely, that, if capital punishment is a deterrent to murder, the homicide rate in a given jurisdiction should increase with the abolition of the death penalty and decrease with its restoration. Sellin has conducted such a study on the basis of the statistics available from states in this country which have abolished the death penalty. In his summary of this study, Bedau writes,

The selection by Professor Sallin shows that in every abolition state, whether or not it later restored capital punishment, there is no correlation between the status of the death penalty and the homicide rate. This strongly suggests that in the ten states that abolished the death penalty and later restored it the reasons had nothing to do with the measurable effects of death vs. imprisonment as a deterrent to murder.<sup>1/</sup>

In general, the statistics available from other countries which have either partially or totally abolished capital punishment appear to follow the same pattern: abolition is not followed by an increase in crime. The United Nations report, Capital Punishment, contains the following observation on the effects of partial abolition:

All the information available appears to confirm that such a removal has, in fact, never been followed by a notable rise in the incidence of the crime no longer punishable with death. This observation, moreover, confirms the nineteenth century experience with respect to such offenses as theft and even robbery, forgery and counterfeiting currency, which have progressively ceased to be punishable with death: indeed, these crimes, so far from increasing, actually decreased after partial abolition.<sup>2/</sup>

With regard to total abolition, the U.N. report concludes that, "The same general observation can usually be made regarding the total abolition of the death penalty."<sup>3/</sup>

The Effect of Executions on a Community - Studies have been made on the effect of a series of executions on the capital crime rate in the community where the executions occurred. The reasoning behind these studies is described by Sallin as follows:

<sup>1/</sup> Bedau (ed.), op. cit., pp. 333-334.

<sup>2/</sup> United Nations, Department of Economic and Social Affairs, Capital Punishment (1952), p. 54.

<sup>3/</sup> Ibid., p. 35. See also Sallin, The Death Penalty, pp. 34-50.

If the death penalty is a deterrent, its greatest effect should be shown through executions which are well publicized. Furthermore, the effect should be most noticeable at the time and place where the offense occurred, where the trial aroused wide publicity and the offender lived among his relatives, friends and acquaintances.<sup>1/</sup>

Such a study was conducted in Philadelphia by Robert H. Damm.<sup>2/</sup> He compared the number of homicides occurring 60 days before and 60 days after five different executions. A total of 91 homicides occurred in the period preceding the executions; 113 homicides occurred in the periods following them. Nineteen of the 204 homicides resulted in a sentence of first degree murder. Of these, nine occurred in the "before" period and ten occurred in the "after" period. A similar study conducted by Leonard D. Savitz in Philadelphia a number of years later yielded similar results. Savitz concluded:

There emerges, therefore, no pattern that would indicate deterrence.... It can be said in summary, that the author is aware that the short period of time under analysis and the extremely small number of murders dealt with prevent conclusive findings, but we must conclude from the data at hand that there was no significant decrease or increase in the murder rate following the imposition of the death penalty on four separate occasions.<sup>3/</sup>

Police Safety - The two extensive studies of the comparative safety of the police in jurisdictions with and without capital punishment do not indicate that the death penalty affords the police greater protection. Sellin conducted a major study of the comparative safety of metropolitan police, described by him as follows for the American Bar

Association Section of Criminal Law:

<sup>1/</sup> Sellin, The Death Penalty, p. 50.

<sup>2/</sup> Robert Damm, The Deterrent Effect of Capital Punishment (1935); see James A. McCafferty, "Major Trends in the Use of Capital Punishment," Federal Probation (Sept. 1961), p. 20.

<sup>3/</sup> Leonard D. Savitz, "The Deterrent Effect of Capital Punishment in Philadelphia" (1958), in Bedau (ed.), op. cit., pp. 321-322. See also William F. Graves, "The Deterrent Effect of Capital Punishment in

A few years ago, I sent a questionnaire to the chiefs of police in all cities with more than 10,000 population in the six states that at that time did not have the death penalty for murder, and in the states that bordered on them--seventeen in all. I asked them to give us year by year, beginning in 1920, the number of police killed by a criminal with a lethal weapon. We got a pretty good response--47 per cent--at least from all but the big metropolitan cities; a few of these responded but not enough to really make any comparison easy. We broke the information down in groups of cities by size; there were five or six population groups, so that the large city would not distort the information gained from smaller cities. We computed rates and found to our surprise that there was no difference in the information gathered between the states that had the death penalty and those that did not have it. There were as many police killed in the states with the death penalty, considering the size of the cities involved, as in the states without the death penalty. The argument of the police on the basis of that study falls by the wayside.<sup>1/</sup>

This study indicated that the rate of police killings was in fact higher in death penalty states than in abolition states: 1.3 per 100,000 in the former, compared to 1.2 per 100,000 in the latter.<sup>2/</sup>

A comparison study of the comparative safety of state police was conducted by Donald R. Campion, S. J. Father Campion summarized his findings as follows:

...we conclude that the data available to us after a survey of half the state police forces of the United States do not lend empirical support to the claim that the existence of the death penalty in the statutes of a state provides a greater protection to the police than exists in states where that penalty has been abolished.<sup>3/</sup>

<sup>1/</sup> American Bar Association, Section of Criminal Law, op. cit., p. 23.

<sup>2/</sup> Sellin, The Death Penalty, p. 55.

<sup>3/</sup> Donald R. Campion, "Does the Death Penalty Protect State Police?" (1955), in Bedau (ed.), op. cit., pp. 314-315.

B. The Psychology of Deterrence

In the opinion of many abolitionists, the deterrent value of capital punishment has been seriously called into question by the evidence of modern psychology and penology. As the U.N. report on capital punishment notes, the majority of specialists in these fields are themselves abolitionists:

...it will be noted that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists.<sup>1/</sup>

This is substantiated by Bedau in his discussion of what Americans think about the death penalty:

...psychiatrists, penologists and possibly social scientists and social workers generally, as well as higher government officials, tend to oppose the death penalty in this country at this time.<sup>2/</sup>

In his anthology, The Death Penalty in America, Bedau summarizes what in his opinion are the two major abolitionist arguments; one of these arguments is a comprehensive statement of the abolitionist objections to the psychological validity of the death penalty as a special deterrent to murder.<sup>3/</sup> According to this argument, murders are either premeditated, or they are not. In the case of unpremeditated murders, no punishment will be effective as a deterrent. Mr. Bedau's comment here reflects the conviction held by many that

<sup>1/</sup> United Nations, op. cit., p. 62.

<sup>2/</sup> Bedau (ed.), op. cit., p. 236.

<sup>3/</sup> Ibid., pp. 270-272. See p. 16 below for a discussion of the second argument.

this category comprises a considerable percentage of those who commit violent crimes:

When one considers that most of the undeterrables are likely to be suffering from one or another form of mental illness, and that considerable evidence exists to show that murderers and condemned men generally include a large proportion who are sick, it seems pointless to threaten such offenders with death.<sup>1/</sup>

The argument continues that premeditated murders are committed by people who either do or do not expect to be caught. About the latter category, those who expect to be apprehended, Bedau comments:

In the latter case, there is nothing whatever gained (so far as controlling his behavior is concerned) by threatening to kill him as his punishment; for he is likely to try to kill himself (just as he is likely to surrender to the police right after his crime). Such cases are by no means rare.<sup>2/</sup>

Abolitionists argue that, for this type of murderer the death penalty is, in fact, more apt to be an inducement than a deterrent. Sellin has noted the existence of

...good evidence that the availability of instruments used to inflict the punishment of death has induced people of unbalanced mind to seek that punishment as a devious means of suicide.<sup>3/</sup>

In a section entitled "Capital Punishment as Cause for Murder" in the study he made for the American Law Institute, Sellin itemizes cases of people attempting to commit suicide by execution.<sup>4/</sup>

It is equally difficult to see, the argument continues, what value as a deterrent the death penalty has for those who plan their murder on

<sup>1/</sup> Bedau (ed.), op. cit., p. 271.

<sup>2/</sup> Ibid.

<sup>3/</sup> Sellin, "Capital Punishment," p. 4.

<sup>4/</sup> Sellin, The Death Penalty, pp. 65-69.

the assumption that they will get away with it. Bedau comments:

Gangland killings, kidnappings for ransom, and a large proportion of all serious crimes are committed by those who think they will never be caught. The obvious, and probably the only, way to deter such persons is by increasing the effectiveness of law enforcement and criminal prosecution in the courts.<sup>1/</sup>

This category of murderers, including as it does the gangland killer, is of considerable importance. It would seem that the deterrent theory should be applicable here, if anywhere: the gangster, murdering as a means to an end, would seem to be capable of rationally considering other possible ends of his action--for instance, his own death. However, the facts seem to justify the conviction of those engaged in organized crime that they have virtually no reason to fear the death penalty. Sellin testified as follows before the New Jersey Commission to Study Capital Punishment:

Defenders of the death penalty would probably feel that if anybody deserved this punishment, it will be the hired killer in organized crime. It's a well-established fact that such murderers enjoy almost complete immunity, that the instances in which even a conviction has been secured are extremely rare, and that deterrence plays no role in this connection.<sup>2/</sup>

This leaves one final category: "those who are sane and cautious enough to weigh the risk of punishment against the anticipated gain from crime, and who would decide that the risk is too great if the threatened punishment is death, but not great enough to deter them if it is only imprisonment."<sup>3/</sup> Bedau quotes the following passage

<sup>1/</sup> Bedau (ed.), op. cit., p. 271.

<sup>2/</sup> New Jersey Commission to Study Capital Punishment, Report (1964), p. 13. See also Sellin, "Capital Punishment," p. 5.

<sup>3/</sup> Bedau (ed.), op. cit., p. 272.

from the Ceylon Report on Capital Punishment as the answer to the question, "How many such persons are there in the total population?":

It would be most exceptional for a man to be insufficiently sane and normal to be deterred by the risk of a sentence of protracted imprisonment but yet sufficiently sane and normal to be deterred by the risk of his own execution, when both risks are at a level of contingency which he is doing his utmost to avoid.<sup>1/</sup>

C. The Administration of the Death Penalty

Those opposed to the death penalty argue that the very way in which it is necessarily administered undercuts whatever deterrent effect it might have for those capable of exercising some degree of rationality. Bedau considers this to be one of the two major abolitionist arguments, and discusses it in some detail:

Since the time of Beccaria, Bentham, Rush and Livingston, most penologists have agreed that for any punishment to have optimum efficacy as a deterrent, the penalty must be imposed consistently, immediately and inexorably; that is, on all offenders, promptly after their crime, and in such a way that the general public expects exactly this. But in practice, not one of these conditions is satisfied by the way capital punishment is administered. Only a small proportion of first degree murderers are sentenced to death and even fewer are executed. The delay in convicting and executing those who do get a death sentence is increasing and notorious. So, almost anyone who contemplates some horrible crime can see some chance in getting away with it, or at least in not having to pay the supreme penalty. If, in practice, the death penalty is no more effective a deterrent for murder, rape and kidnapping than imprisonment is, this may be the reason. One must either admit it, and keep capital punishment on other grounds, in the knowledge that it cannot be made a better deterrent than it is; or else abandon the jury system, the right of appeal, and deprive the accused of most of his basic constitutional rights in all capital cases, in the hopes of improving the deterrent efficacy of the death penalty; or else get rid of the death penalty itself in the confidence that imprisonment is on the evidence as good a deterrent and considerably simpler to administer.<sup>2/</sup>

<sup>1/</sup> Quoted by Bedau (ed.), op. cit., p. 272.

<sup>2/</sup> Bedau (ed.), op. cit., p. 270.

### III. THE DEATH PENALTY AS A PROTECTIVE MEASURE

Most abolitionists agree that the institution of the death penalty would be justified by its necessity as a protective measure against the incorrigibly dangerous. The debate here differs from the debate about deterrence in that there is clearly no question about the effectiveness of capital punishment as a protective measure. The argument turns on the issue of whether or not the death penalty is, in fact, necessary. In so far as there actually is a danger to society from those found guilty of capital crimes, is it possible to provide protection by some means short of their death? Abolitionists argue that this danger is considerably exaggerated by retentionists and, more importantly, that life imprisonment is a completely adequate protective measure. Sellin comments:

In the last analysis, the argument that the life sentence does not offer an adequate safeguard against further homicidal criminality by a murderer who is not executed appears untenable. Basically, those who advance it probably feel that the life sentence, in practice, is not an adequate punishment for murder.<sup>1/</sup>

The abolitionist arguments on the issue of incapacitation are summed up as follows by the late Lewis F. Laes, the warden for many years of Sing Sing Prison:

Murderers make the best prisoners.. They are least troublesome to any warden, and often they accomplish a great deal behind bars. I know of none released during my wardenship at Sing Sing who reverted to crime. Furthermore, it is not true—at least in New York State—that a murderer whose death sentence is commuted to life imprisonment can easily obtain his freedom. The average period of incarceration among those who receive the second commutation is about twenty years. Granted that other states are too lenient,

<sup>1/</sup> Sellin, The Death Penalty, pp. 78-79,

that would be an argument for a better administration of justice, not for putting people to death.<sup>1/</sup>

A. "Murderers Make the Best Prisoners"

It is generally agreed that murderers do, in fact, make the best prisoners and that the percentage of violent crime committed by them in prison is negligible. A survey conducted in 1950 by the International Penal and Penitentiary Commission comparing the behavior of prisoners serving sentences for murder with the behavior of those serving sentences for other offenses clearly indicated this to be the case in countries abroad. Sellin discusses the results of this survey and continues:

The same views as those...expressed by prison administrations in many European countries are held by American wardens and superintendents of correctional institutions. Lifers are generally considered to be among the best behaved prisoners. It would be unnatural were they not at times involved in disciplinary violations, and examples are known when some lifer has committed an assault in prison and even a homicide, but these appear to be very rare exceptions. Generally speaking, such murderous offenses are committed by prisoners serving sentences for other crimes than murder.<sup>2/</sup>

B. The Danger from Released Murderers

Statistics indicate that the behavior of first degree murderers released on parole is, in the words of Sellin, "very good, much better than that of other prisoners who have been paroled, especially property offenders."<sup>3/</sup> This is equally true of those who have been

pardoned. Bedau comments:

<sup>1/</sup> Lewis E. Lawes, "Capital Punishment," Encyclopedia of Criminology, ed. Vernon C. Brannan and Samuel B. Kutanh (1949), p. 44.

<sup>2/</sup> Sellin, The Death Penalty, p. 72. See also Bedau (ed.), op. cit., pp. 400-401.

<sup>3/</sup> American Bar Association, Section of Criminal Law, op. cit., p. 24.

The general position of American penologists on the matter of pardoning (or paroling) murderers was stated succinctly a decade ago by the retired Director of the Federal Bureau of Prisons, Sanford Bates, when he informed the Royal Commission on Capital Punishment: "Cases of murder committed by persons pardoned from the death penalty are rare if not almost unknown." This is almost as true of all murderers, whether sentenced to death and commuted by the governor or sentenced to life imprisonment by the jury, and whether kept in prison or released....1/

Abolitionists are generally agreed that the misguided release of those who remain a danger to society indicates a need for the reform of a state's parole practices, rather than for retention or reinstatement of capital punishment. In the words of Robert G. Caldwell, a lawyer and noted criminologist:

For example, it is clear that the possibility of releasing dangerous prisoners into the community could be reduced by improving the rehabilitative facilities of our correctional institutions and by strengthening our pardon and parole procedures. An execution, it is true, absolutely eliminates this possibility; but since it is to be prescribed as punishment for a crime, one can hardly maintain that in a given case it should be used not so much because a certain offense has been committed but because we are too lenient and inefficient in the operation of our correctional systems.2/

Moreover, abolitionists argue that the low rate of recidivism among paroled murderers indicates that in general dangerous prisoners are not being released, and that the danger of such releases is greatly exaggerated.

Finally, the abolitionist position on the alleged lack of a satisfactory alternative penalty is summed up as follows by Donal E. J.

1/ Bedau (ed.), op. cit., p. 397; see pp. 397-399 for state statistics.

2/ Robert G. Caldwell, "Why is the Death Penalty Retained?", The Annals (Nov. 1952), pp. 48-49. For statistics and a discussion of the actual length of life sentences in various states, see Sallin, The Death Penalty, pp. 72-76.

MacNamara, Dean of the New York Institute of Criminology:

The record in abolition jurisdictions, some without the death penalty for more than one hundred years, both in the United States and abroad, in which imprisonment for indeterminate or stated terms has been substituted for the penalty of death, is a clear demonstration that alternative penalties are of equal or greater protective value to society than is capital punishment.<sup>1/</sup>

<sup>1/</sup> Donal E. J. MacNamara, "The Case Against Capital Punishment," Social Action (April 1961), p. 12.

#### IV. RETRIBUTION VS. VENGEANCE

Abolitionists do not accept the argument that capital punishment is defensible on the grounds of retribution, apart from any benefit it may afford society either as a superior deterrent or as a necessary protective measure. According to many proponents of capital punishment, some criminals are simply unfit to live; they have committed acts so heinous that the only appropriate punishment is death. This function of the death penalty is commonly referred to on the retentionist side as retribution and on the abolitionist side as vengeance.

Abolitionists argue that the motivation behind this use of the death penalty is of the same order as the irrationality which provoked the criminal to the act for which he is being executed. Arthur Koestler comments:

Yet though easy to dismiss in reasoned argument on both moral and logical grounds, the desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation or revulsion--whether the reasoning mind approves or not. This psychological fact is largely ignored in abolitionist propaganda--yet it has to be accepted as a fact. The admission that even confirmed abolitionists are not proof against occasional vindictive impulses does not mean that such impulses should be legally sanctioned by society, any more than we sanction some other unpalatable instincts of our biological inheritance. Deep inside every civilized being there lurks a tiny Stone Age man, dangling a club to rob and rape, and screaming an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the land.<sup>1/</sup>

The purpose of the criminal law is to provide protection against man's irrationality and violence, not to furnish a means of expressing it. Abolitionists contend that the death penalty is a violation of  
<sup>1/</sup> Arthur Koestler, Reflections on Hanging (1957), p. 100.

this purpose. In the words of Theodore McKeldin, former Governor of Maryland:

The function of the criminal law is to protect the law-abiding, not to sate society's lust for revenge. Only as a protector of the lives and property of honest men does it deserve the respect and support of honest men. Hence anything that tends to associate it with the idea of vengeance impairs its dignity and subtracts from the respect that intelligent people accord it. The argument that the death penalty is needed to allay public excitement is an argument against capital punishment, not in its favor.<sup>1/</sup>

In summary, then, of the central argument against capital punishment, those who oppose the penalty believe that it does not deter would-be murderers more effectively than life imprisonment, and that life imprisonment is a fully adequate safeguard against those who have committed murder. In the words of Thorsten Sellin:

The belief that the death penalty is a unique instrument for the protection of society against murder and superior to life imprisonment in this respect is not supported by any credible evidence now available to us.<sup>2/</sup>

In the absence of "credible evidence" that the death penalty is necessary to protect society, abolitionists argue that its only purpose is to satisfy man's desire for vengeance. The acceptance of vengeance as a legitimate goal of the criminal law of a civilized state is, according to abolitionists, morally wrong and pragmatically dangerous.

<sup>1/</sup> Maryland Committee on Capital Punishment, Report (1962), p. 25.

<sup>2/</sup> Sellin, "Capital Punishment," p. 9.

## V. THE DEATH PENALTY AND CRIMINAL JUSTICE

A number of the arguments against capital punishment relate to its alleged incompatibility with equitable and efficient criminal justice. The following statement by Herbert L. Packer of Stanford Law School is representative of the opinion of many, particularly in the legal profession, who oppose capital punishment:

The case for abolition rests most securely, I think, on pragmatic considerations. Very simply, capital punishment is more trouble than it is worth. Criteria for its even-handed application are totally lacking; its effect on the administration of justice is malign and pervasive; it brings the law into disrepute.<sup>1/</sup>

### A. The Possibility of Error

A major argument in this area is the danger that an innocent man will be executed. The Marquis de Lafayette once said, "I shall ask for the abolition of the penalty of death until I have the infallibility of human judgment demonstrated to me."<sup>2/</sup> The argument remains the same today. Sellin writes:

Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed, perhaps after many years in prison, by the discovery of the real criminal.<sup>3/</sup>

In The Death Penalty in America, Bedau abstracts "seventy-four cases

occurring in the United States since 1893, in which a wrongful conviction

<sup>1/</sup> Packer, op. cit., p. 441.

<sup>2/</sup> Quoted by Otto Pollak, "The Errors of Justice," The Annals (Nov. 1952), p. 115.

<sup>3/</sup> Sellin, The Death Penalty, p. 63.

of criminal homicide has been alleged and, in most cases, proved beyond doubt."<sup>1/</sup> These cases resulted in the following penalties:<sup>2/</sup>

Death sentence executed.....	8
Death sentence not executed.....	23
Life sentence.....	30
Less than life sentence.....	10
Conviction averted.....	3
Total	<u>74</u>

Bedau comments that while there is some doubt whether the right men executed were innocent, "no doubt, however, attaches to the fact that nearly two dozen men have been sentenced to death for crimes they demonstrably did not commit."<sup>2/</sup> He also points out that 11 of the 30 life sentences occurred in abolition states.

Had the death penalty not been abolished in these states, it is likely that at least some of these eleven men would have received a death sentence and been executed.<sup>4/</sup>

Several governors who have had to make the final decisions on executions have been particularly emphatic about the reality and seriousness of the danger of executing the innocent. Both Governor Edmund Brown of California<sup>5/</sup> and Michael V. DiSalle, former Governor of Ohio,<sup>6/</sup> recount incidents which illustrate this danger. Bedau points out that, reputedly, the States of Maine, Rhode Island, and Wisconsin abolished the death penalty during this century because of the hanging of innocent men.<sup>7/</sup>

<sup>1/</sup> Bedau (ed.), op. cit., p. 436; see pp. 434-452.

<sup>2/</sup> Ibid., p. 438.

<sup>3/</sup> Ibid., p. 440.

<sup>4/</sup> Ibid., p. 438.

<sup>5/</sup> Brown, op. cit., p. 6.

<sup>6/</sup> DiSalle, op. cit., p. 6.

<sup>7/</sup> Bedau (ed.), op. cit., p. 107.

B. Inequality of Application

Opponents of the death penalty are universal in their denunciation of the injustice with which this penalty is enforced. Mr. Bedau speaks for abolitionists in general in his comment that, "The whole pattern of treatment of capital convictions by the higher courts seems devoid of rhyme or reason."<sup>1/</sup>

Abolitionists charge that racial prejudice, particularly against Negroes, is a major factor in the unequal application of the death penalty. They cite particularly statistics on executions for rape. The Federal Bureau of Prisons, in its 1965 national prisoner statistics bulletin on executions, indicates that during the period 1930-1964, nine-tenths of all executions for rape have been of non-white males.<sup>2/</sup> On this subject, Bedau notes:

...as National Prisoner Statistics shows, of the nineteen jurisdictions that have executed men for rape since 1930, a third of them have executed only Negroes. In those six states, the very existence of rape as a crime with an optional death penalty is, in the light of the way it has been used, strong evidence of an original intent to discriminate against non-whites. This was probably the purpose behind the decision in Tennessee in 1915 to abolish capital punishment for murder and treason, but to retain it for rape.<sup>3/</sup>

According to abolitionists, a second factor in the inequitable use of the death penalty is reflected in the fact that with few exceptions, it is the "poor and friendless" who are executed. Because of the very nature of our law courts, the difference between life and death is frequently determined by the ability of the accused to provide himself with skilled legal counsel. Former <sup>1/</sup> Bedau (ed.), op. cit., p. 410.

Governor DiSalle writes:

I have never seen a person of means go to the chair. It is the well-heeled gangster, the professional killer who can afford the best legal talent to defend him, who gets off with a lesser sentence. It is the poor, the illiterate, the underprivileged, the member of the minority group—the man who because he is without means is defended by a court-appointed attorney—who becomes society's blood sacrifice.

The court-appointed defender, diligent though he may be, is always handicapped. Sometimes he is inept—there is no criterion of experience in criminal law to guide a court appointment—and always he lacks the staff and funds available to the prosecution. Without funds and personnel to investigate the background of jurors and witnesses, to check alibis and examine the evidence before trial, the court-appointed attorney and his client have two strikes against them before they even enter a plea.1/

Abolitionists argue that the inequalities involved in the actual use of the death penalty undermine the justification of it on the basis of the protection it may offer society. They maintain the facts indicate that, far from serving a rational, legitimate purpose, the death penalty is an instrument of class and racial prejudice and a test of expensive legal ingenuity.

Abolitionist argue further that the way in which the death penalty is actually used completely invalidates any possible defense of it on the grounds of society's right to retribution. They state for instance, that it is difficult to defend the position that Negro rapists merit death while white rapists, for the most part, do not. Sellin comments:

...If I were an adherent of the view of retributive justice, I might—if my emotions did not deprive me of my reason—wish to find out if retributive justice is efficiently and properly administered....

If only about 4 percent of those who actually commit murders in the first degree [are executed], a figure based on what we conservatively estimate to be the

number of capital murders committed annually in the United States and the accurate knowledge we have of the number of executions, it is obvious that, whatever the elements may be that produce the attrition, retribution is but rarely achieved and in no equitable manner. Therefore, just as the death penalty has proved to fail as a special means of social protection, so it has failed as an instrument of retributive justice.<sup>1/</sup>

C. The Administration of Criminal Justice

Abolitionists contend that the existence of the death penalty has a bad effect on the administration of criminal justice. This point of view is summed up as follows in the report of the Florida Special Commission for the Study of the Abolition of Death Penalty in Capital

Cases:

When the life of an accused person is at stake, it is more difficult and takes longer to impanel juries because prospective jurors dislike such cases and are frequently disqualified because they do not believe in the death penalty. Trials become longer and more expensive and emotions are especially likely to confuse the issues. Indeed, the guilty person is more likely to escape punishment altogether because of the reluctance of the jury to convict and thereby make the death penalty a possibility. Appeals are more likely to result in reversals, and this brings on new and equally expensive trials. More are of the opinion that there would be many convictions for what are now capital crimes if life imprisonment replaced execution.<sup>2/</sup>

The issue of the disproportionate amount of time involved in capital cases was the subject of a study conducted in 1961 by the American Bar Foundation, the research branch of the American Bar Association. The Foundation concluded that that the long delays in capital trials and in the carrying out of death sentences weakened public confidence in the

law.<sup>3/</sup> The study was prompted by the Caryl Chessman case, which began  
<sup>1/</sup> Scelin, "Capital Punishment," *op. cit.*, p. 10.  
<sup>2/</sup> Florida Special Commission for the Study of the Abolition of Death Penalty in Capital Cases. Report (1965). p. 26.

in June 1948 and ended with his execution on May 2, 1960. Abolitionists argue that, while this case is an extreme, it is not an anomaly. In 1957, two prisoners were executed in California after seven years of appeals and trials.

As the report of the Florida Special Commission indicates, another major objection in this area is that the emotion aroused by the spectacle of a man fighting for his life is not compatible with the just and rational administration of the law. Governor Edmund G. Brown of California has referred to the capital trial as "our modern equivalent of the Roman Circus."<sup>1/</sup> The effect of this emotion on the trial itself is seen by many eminent lawyers to be deplorable. Mr. Justice Frankfurter, in his appearance as a witness before the British Royal Commission, said:

When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the bar, the public, the judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life.<sup>2/</sup>

The retentionist response to this category of arguments is that they indicate the need for legal reform, not the abolition of capital punishment.<sup>3/</sup> Those opposed to the death penalty reply that recommending legal reform is no answer unless retentionists are, to quote Herbert L. Packer, "prepared to propose the solution that has so far eluded all students of the subject."<sup>4/</sup> In fact, many abolitionists argue that the death penalty is a major factor operat

<sup>1/</sup> Brown, *op. cit.*, p. 5.

<sup>2/</sup> Quoted by Richard C. Donnelly, "Capital Punishment," *Congressional Record*, Aug. 24, 1960, p. A6285.

<sup>3/</sup> See below, pages 61-65.

reform of our criminal law. The late Professor Sam Bass Warner of Harvard Law School said that "the existence of the death penalty for first degree murder is one of the principal reasons, if not the main reason, why it is extremely difficult to get judges and legislators to remove procedural barnacles from our law."<sup>1/</sup> Dr. Sheldon Glueck, a professor at Harvard Law School and an eminent sociologist, comments that the death penalty "bedevils the administration of criminal justice all the way down the line and is the stumbling block in the path of general reform."<sup>2/</sup>

D. Technicalities of the Law

In the majority of jurisdictions which retain capital punishment, a person convicted of murder can only be sentenced to death if he is found to be legally sane and guilty of murder in the first degree. A number of eminent lawyers have argued that many of the abuses surrounding the death penalty stem directly from the inadequacy of the legal definition of sanity and the vagueness of what Herbert Ehrmann refers to as the "metaphysical" distinction between first and second degree murder.<sup>3/</sup>

Mr. Justice Cardozo commented as follows on the distinction between first and second degree murder:

I think the distinction is much too vague to be continued in our law.... The statute is framed along the lines of a defective and unreal psychology.... The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand

<sup>1/</sup> Quoted by Herbert B. Ehrmann, "The Death Penalty and the Administration of Justice" (1952), in Bedau (ed.), op. cit., p. 433.

<sup>2/</sup> Quoted by James A. McCafferty, "Major Trends in the Use of Capital Punishment," Federal Probation (September 1961), p. 21.

<sup>3/</sup> Ehrmann, op. cit., p. 429. For a discussion of the distinction between first and second degree murder and its historical development,

it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its mystifying psychology, scores of men have gone to their deaths.<sup>1/</sup>

Professor Packer of Stanford Law School points out that the arbitrariness with which the death penalty is used is directly related to the lack of guidance afforded by the law in this area:

All students of the subject agree that the grading of murder into degrees, characteristic of most American penal codes, is hopelessly inept. Tacit recognition that this is so underlies the fact that in most jurisdictions the grading of murder has been reinforced by conferring discretion on the jury to decide whether persons convicted of first degree murder shall be executed or imprisoned. The result is that in practice the selection of those to be executed is the result of arbitrary, whimsical and uninformed choice. At this most crucial point in the administration of even-handed justice, law abdicates completely. The choice of life or death reflects mainly the strains and tensions of our society, most notably in the Southern states, but throughout the country as well.<sup>2/</sup>

The stand taken by abolitionists on the issue of legal sanity in capital trials centers around their objection to the M'Naghten Rule, the test of sanity in most jurisdictions. This rule is based on a decision handed down in 1843 and states, in essence, that a person is legally sane if, at the time of the commission of his crime, he was capable of distinguishing between right and wrong. The abolitionist view of the effect of this ruling on criminal justice is summed up as follows in the report of the Florida Special Commission:

Many feel that the death penalty makes the issue of insanity as a defense to a charge of capital crime a thorn in the side of the administration of criminal justice. Insanity of the accused is often in issue, but the law's test of ability to distinguish between right and wrong is hard

<sup>1/</sup> Quoted by Ehrmann, op. cit., p. 429.  
<sup>2/</sup> Packer, op. cit., p. 441.

to apply because modern medicine does not even recognize this type of "insanity" as a clinical entity. As a result, the expert medical witnesses often testify that the accused is suffering from mental disease, but then the judge tells the jury, in effect, that this is not the "insanity" recognized by the criminal law.<sup>1/</sup>

A prominent San Francisco psychiatrist, Dr. Bernard L. Diamond, testified before the California Legislative Subcommittee on Capital Punishment that "Only a driveling idiot has no conception of right and wrong." He went on to describe the consequences of the M'Naghten rule as follows:

The result is that a given psychiatrist will answer, as to the knowledge of right and wrong, on the part of an accused person, in accordance with his own prejudices, or (worse yet) with the wishes of the side that hired him. The conclusion is, therefore, unescapable that the right and wrong test satisfies the requirements of neither psychology nor medicine, nor, indeed, of the law itself.<sup>2/</sup>

In summary, then, many, particularly in the legal profession, argue that our present laws on who shall and shall not be sentenced to death are inadequate. Furthermore, it is argued that these laws, particularly with regards to the issue of legal sanity, are essentially inaccessible to reform within the framework of the law as it now stands. In the opinion of many, it is no accident that the law relating to capital punishment has not been reformed along the lines of a more realistic view of psychology. This would mean opening the doors to a deterministic view of individual responsibility which is essentially incompatible with the assumptions underlying our system of law. Arthur

Koestler writes in his book, Reflections on Hanging:

<sup>1/</sup> Florida Special Commission, op. cit., p. 26.

<sup>2/</sup> Quoted by Eugene B. Block, And May God Have Mercy (1962), p. 80.

The reason why the law relating to capital punishment cannot be reformed is basically simple. It could only be reformed at the price of undermining the concept of criminal responsibility by such deterministic notions as "irresistible impulse" or "diminished responsibility"-- that is, by making determinism statutory, as it were. This necessity does not arise in the case of other offenses, because the sentence is elastic.... To sum up. The deficiencies of the capital law are irremediable because the death-penalty is based on a philosophical concept of criminal responsibility which does not admit the compromises with the determinist view practiced in other courts. Regarding all other offences, the administration of the law is elastic; the death-penalty, by its nature, excludes gradings of culpability. This rigidity and finality, which is the very essence of the capital law, is at the same time the reason of its attractiveness and symbolic value for the anti-progressive forces in society.<sup>1/</sup>

Furthermore, abolitionists argue that it is essentially impossible to determine the degree to which an individual is responsible for his behavior with sufficient certainty to base a life and death decision on it. Koestler comments on this point:

Yet even by revolutionizing the basic concepts of Common Law for the sole purpose of making capital law a little less barbaric, its self-contradictions would remain. Since the frontiers between "responsible" and "irresponsible" are fluid, problematical and bedevilled by metaphysical problems, any drawing of the line by legal definition would be arbitrary. And since it is impossible to define when a man acted freely and ought to die, or when he acted under compulsion and ought to live, the only solution is to bring capital law into line with the remaining body of the Common law by eliminating the unique, fixed, all-or-nothing penalty which admits of no gradations.<sup>2/</sup>

Abolitionists tend to see the difficulty of determining individual responsibility as relevant only to the death penalty, not to lesser sentences, or to penology in general. Many retentionists regard

abolition of capital punishment as a triumph for the view that

<sup>1/</sup> Arthur Koestler, Reflections on Hanging (1957), pp. 102-104.

<sup>2/</sup> Ibid., p. 103.

criminal behavior is an illness which should be cured, not punished—  
a step in the transition, prophesied by Jacques Barzun, from law  
to social work.<sup>1/</sup> Abolitionists argue that precisely the opposite  
is true, that it is the existence of the death penalty which has  
forced criminal justice to become embroiled in the issue of psychological  
determinism. Packer writes:

But what...has been primarily responsible for the  
extremist position that criminals should all be  
regarded as sick rather than bad? Demonstrably,  
it has been capital punishment. This is the spur  
and this is the rallying point for the attack upon  
law. The polemic battle that has enlisted so much  
psychiatric talent has been waged almost entirely  
with reference to capital punishment. It is in the  
murder trial that the issue of the extent to which  
the mental condition of the defendant should excuse  
or mitigate has been most often and most acrimoniously  
litigated. As Chief Justice Weintraub of N.J. said:  
"For all practical purposes the furor...is confined  
to the disposition of offenders convicted of murder.  
It is the death penalty that sparks the quarrel."<sup>2/</sup>

<sup>1/</sup> Jacques Barzun, "In Favor of Capital Punishment" (1962), in Bedau  
(ed.), op. cit., p. 157. See page 37 below.

<sup>2/</sup> Packer, op. cit., p. 442.

## V. THE RELIGIOUS ARGUMENT

Many Protestant churches have taken an official stand against capital punishment. While the Roman Catholic Church has not taken a stand on either side, according to the recent U.N. study it has in recent years been moving more towards the view that the death penalty should be abolished.<sup>1/</sup> Most Jewish organizations are officially opposed to the death penalty.

The religious argument against the death penalty generally centers around the belief that even sinful men are the objects of God's redemptive love, and that vengeance belongs to God, not man. In the words of Bishop John Wesley Lord of the Washington, D.C. Conference of the Methodist Church:

A Christian view of punishment must look beyond correction to redemption. It is our Christian faith that redemption by the grace of God is open to every repentant sinner, and that it is the duty of every Christian to bring to others by every available means the challenge and opportunity of a new and better life. We believe that under these circumstances only God has the right to terminate life.<sup>2/</sup>

Similarly, the following resolution was adopted in 1958 at the General Convention of the Episcopal Church:

Inasmuch as the individual life is of infinite worth in the sight of Almighty God; and  
Whereas the taking of human life falls within the providence of Almighty God and not within the right of man; Therefore be it Resolved, That the General Convention goes on record as opposed to capital punishment.<sup>3/</sup>

The Bible is used by both sides in the capital punishment controversy.

Abolitionists cite Romans, XII, 17, in which Paul says:

<sup>1/</sup> United Nations, op. cit., p. 64.

<sup>2/</sup> Maryland Committee, op. cit., p. 24.

<sup>3/</sup> Quoted by Florida Special Commission, op. cit., p. 24.

Recompense to no man evil for evil....avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord.

In the Old Testament, they point, first, to the fact that Cain was not put to death (Genesis IV, 15), and to the adjuration in Leviticus, XIX, 18:

Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbor as thyself: I am the Lord.

More generally, those opposed to capital punishment for religious reasons argue that the whole Christian concept of love and redemption as presented in the New Testament runs counter to use of the death penalty in a system of justice. In support of this, they refer specifically to the Sermon on the Mount (e.g., Matthew V, 44) and to Luke VI, 35.

In addition to the Old and New Testaments, abolitionists quote St. Augustine in opposition to capital punishment. The following passage is from a plea that some Donatists, a heretic African sect, who had confessed to the heinous murder of Christians, be spared the death penalty:

We do not wish to have the sufferings of the servants of God avenged by the infliction of precisely similar injuries in the way of retaliation. Not, of course, that we object to the removal from these wicked men of the liberty to perpetrate further crimes, but our desire is rather that justice be satisfied without the taking of their lives or the maiming of their bodies in any particular; and that, by such coercive measures as may be in accordance with the laws, they be drawn away from their insane frenzy to the quietness of men in their sound judgment, or compelled to give up mischievous violence and betake themselves to some useful labour.<sup>1/</sup>

<sup>1/</sup> Quoted by Koestler, op. cit., p. 100.

VII. PUBLIC OPINION

The four most recent Gallup Poll surveys indicate a steady decrease of public support for the death penalty. In each case, the question asked was, "Are you in favor of the death penalty for persons convicted of murder?" The results of the four polls are shown below:<sup>1/</sup>

	1966	1965	1960	1953
Yes	242	245	251	268
No	47	43	36	25
No Opinion	11	12	13	7

The waning public support for the death penalty is reflected on the state level by the fact that in 1965 alone four states abolished it.<sup>2/</sup> On the federal level, 1965 saw the Justice Department's break with its previous official position of neutrality on the issue. Deputy Attorney General Ramsey S. Clark wrote in a letter to the House District Committee:

We favor the abolition of the death penalty....  
This nation is too great in its resources and  
too good in its purposes to engage in the light  
of present understanding in the deliberate taking  
of human life as either a punishment or a deterrent  
to domestic crime.<sup>3/</sup>

A number of sociologists have commented on the extent to which the retention or abolition of capital punishment depends on the public attitude toward it,<sup>4/</sup> and have predicted that the current trend of increasing opposition will culminate in the abolition of the death penalty in this country, at least in practice if not in law. After itemizing

1/ Washington Post, July 2, 1966, p. A3.

2/ Iowa and West Virginia abolished it completely; New York and Vermont abolished it except for special crimes (e.g., killing a policeman acting in the line of duty).

3/ New York Times, July 24, 1965, p. 1.

4/ Bedau (ed.), op. cit., pp. 231-232.

various factors that have contributed to the decline of public support,

Sellin concludes that:

...it is not difficult to explain the rapid downward trend in the number of executions annually from a high of 199 in 1935 to 57 in 1960. And this trend is likely to continue, barring unforeseen social crises, until executions will become a much greater rarity than today and will ultimately be abandoned.1/

There were seven executions in 1965, an all-time low in the history of this country.

SECTION 2

IN FAVOR OF CAPITAL PUNISHMENT

I. THE STATE SHOULD PROTECT THE LAW-ABIDING CITIZEN

The central argument in defense of capital punishment is that the first responsibility of the State, and thus of the criminal law, is the protection of the law-abiding. As long as there is substantial reason to believe that capital punishment serves this function, it should be retained. This argument is expressed as follows in the majority report of the New Jersey Commission to Study Capital Punishment:

This Commission has an obligation to the people of the State of New Jersey. Our citizens deserve the maximum degree of protection from injury both to their persons and to their property. In case of doubt as to which method will create the most likely optimum of protection, this Commission is bound to retain the type of punishment which throughout history has proved to be the most severe. ... It seems clear that those who seek the abolition of capital punishment are concerned with the saving of the lives of those convicted of the crimes in question. ... Yet most, if not all of those seeking abolition would, the Commission is certain, retain the death penalty if they were satisfied that it would save innocent lives. One abolitionist witness thought that the saving of a single life would not be enough. The Commission, however, in its obligation to the people of this State, is not justified in gambling the life of a single citizen.<sup>1/</sup>

Retentionists argue that if this goal of providing the law-abiding citizen optimum protection conflicts with the welfare of the criminal, then it is the criminal who must be sacrificed:

<sup>1/</sup> New Jersey Commission to Study Capital Punishment, Report (1964), pp. 7-8.

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Retentionists assert that the death penalty affords the law-abiding unique protection in two ways. It is, they argue, superior to life imprisonment as a deterrent to would-be murderers, and it is necessary as a protective measure against the incorrigibly dangerous. Furthermore, those in favor of capital punishment contend that because of the responsibility of the State to protect its citizens, the burden of proof rests with the abolitionists. Those opposed to capital punishment must, according to retentionists, prove conclusively that the death penalty is ineffective as a deterrent and unnecessary as a protective measure before abolition can be seriously considered.

## II. DETERRENCE

### A. The Evidence of Experience

The case for retaining the death penalty has the support of a majority of the law enforcement profession. Ralph G. Murdy, Managing Director of the Baltimore Criminal Justice Commission, writes,

There is no question that a large majority of law-enforcement officers throughout the country favor capital punishment. The June 1960 issue of the official publication of the International Association of Chiefs of Police was entirely devoted to capital punishment without any expression from a police administrator encountered who favored its abolition. Occasionally an endorsement will be seen from a police administrator in a noncapital punishment state. However, only a few are active in presenting a case against capital punishment.<sup>1/</sup>

Sheriff Peter Pitchess of Los Angeles County testified as follows before the California Senate Committee on the Judiciary,

But I can tell you that the overwhelming majority of people in law enforcement--the ones who are dealing with these criminals, the ones who are seeing them not as statistics but real live human beings, and who are studying their human behavior--are overwhelmingly convinced that capital punishment is a deterrent.<sup>2/</sup>

J. Edgar Hoover, Director of the Federal Bureau of Investigation since 1925, is unqualifiedly opposed to the abolition of capital punishment.

The 1959 issue of The Uniform Crime Reports for the United States contains the following statement by Mr. Hoover:

The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty.... For the law enforcement officer: the

<sup>1/</sup> Ralph G. Murdy, "A Moderate View of Capital Punishment," Federal Probation (Sept. 1961), p. 13.

<sup>2/</sup> California Legislature, Senate Committee on Judiciary, Hearing Report and Testimony... (1960), p. 150.

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time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessary ingredient.<sup>1/</sup>

The importance of the support of the death penalty by members of the law enforcement profession is evidenced by the weight placed on it in the following passage from the New Jersey Commission majority report:

The Commission is convinced that capital punishment does deter some potential murderers from committing capital crimes. More particularly, it is believed that the deterrence is most significant in the area of felony murder and in the area of a truly premeditated crime. While the statistical information presently available does not indicate a significant difference in the homicide rates between abolition states and capital punishment states, even when adjoining, this statistical information was admittedly not restricted to capital crimes, did not include the incidence of felony murders, the relationship of aggravated assaults to homicides, or the relationship of Police wounding. Those presenting only raw homicide figures admitted that these were as yet the best available, and for the purpose of further analysis they would like to have available the additional information set forth above. On the other hand, those most intimately concerned with law enforcement gave evidence and their conclusions that capital punishment is a deterrent in some cases.<sup>2/</sup>

The conclusion that capital punishment has a deterrent value "in the area of felony murder and in the area of a truly premeditated crime" is emphasized and backed with evidence in the majority of the defenses of capital punishment. The following is the introductory paragraph of a report from the Los Angeles Police Department presented as evidence at hearings before the California Senate Committee on

Judiciary:

1/ Federal Bureau of Investigation, The Uniform Crime Reports of the United States (1959), p. 14.

2/ New Jersey Commission, op. cit., pp. 8-9.

"The following defendants in conversations with reporting officers stated that they either: (1) used toy guns; or (2) empty guns or (3) simulated guns in robberies rather than take a chance on killing someone and getting the gun chamber."<sup>1/</sup>

The report then discusses 13 defendants who had been involved in a total of 28 felonies, with 28 potential victims.

In his statement before the American Bar Association Section of Criminal Law in 1959, Richard E. Gerstein, as State's Attorney of the Eleventh Judicial Circuit of Florida, cited the following instances from testimony given by law enforcement officers concerning the deterrent value of the death penalty:

(1) Criminals who have committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captor though by killing, escape seemed probable. When asked why they refrained from the homicide, quick responses indicated a willingness to serve a life sentence but not to risk the death penalty.

(2) Criminals about to commit certain offenses refrained from carrying deadly weapons. Upon apprehension, answers to questions concerning absence of such weapons indicated a desire to avoid more serious punishment by carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty.

(3) Victims have been removed from a capital punishment state to a non-capital punishment state to allow the murderer opportunity for homicide without threat to his own life. This in itself demonstrates that the death penalty is considered by some would-be killers. Statistics cannot tell us how many lives have thus been saved.

In several cases, the indication of the clear awareness and consideration on the part of the criminal of the capital laws of different states have led abolition states to reinstitute the death penalty. Thorsten Sellin testified before the British Royal Commission as follows:

<sup>1/</sup> Quoted by California Senate Committee, op. cit., p. 17.

<sup>2/</sup> American Bar Association, Section of Criminal Law, 1959 Proceedings (1960), p. 15.

South Dakota reintroduced the death penalty because a couple of Illinois convicts, who had finished serving their terms, tramped across the state and killed a couple of filling-station attendants, if I remember correctly—they were robbery murders.<sup>1/</sup>

The Attorney General of Kansas testified before the British Royal Commission that:

One of the contributing factors leading to the re-enactment [in the State of Kansas] of the death penalty for first degree murder was the fact that shortly prior thereto numerous deliberate murders were committed in Kansas by persons who had previously committed murders in states surrounding Kansas, where their punishment, if captured, could have been the death penalty. Such murders in Kansas were admittedly made solely for the purpose of securing a sentence to life imprisonment in Kansas if captured.<sup>2/</sup>

More recently, a letter was intercepted by the Delaware State Police in which a murderer wrote that he had known before he killed that the most he could get was 15 years. The murder occurred after Delaware had repealed capital punishment in 1958 and was a major factor in the reinstatement of the death penalty in that state in 1961.<sup>3/</sup>

B. The Psychology of Deterrence

The majority report of the New Jersey Commission noted:

No punishment would be a deterrent for a crime of passion, or a crime committed by one who is insane. These are not the persons who generally receive the death penalty.<sup>4/</sup>

The fact that many murders appear to be either crimes of passion or acts of insanity is interpreted by retentionists not as an indication of the death penalty's uselessness as a deterrent, but of its success in

<sup>1/</sup> Quoted by Hugo Adam Bedau (ed.), The Death Penalty in America (1964), p. 336.

<sup>2/</sup> Ibid.

<sup>3/</sup> Maryland Committee on Capital Punishment, Report (1962), pp. 30-31.

<sup>4/</sup> New Jersey Commission, op. cit., p. .

detering people from premeditated murder. The following is from the Canadian Parliamentary Committee's Report on Capital Punishment:

One measure of its [the death penalty's] deterrent effect was afforded by an analysis of murders which indicated that a considerable proportion, probably in excess of half, are committed under the compulsion of overwhelming passion or anger where no deterrent could have been effective. This would seem to demonstrate that the death penalty, coupled with the excellent standards of law enforcement prevailing in Canada, has been successful in deterring the commission of deliberate, premeditated murders and reducing their incidence to minimum proportions. The deterrent effect may also be indicated by the widespread association of the crime of murder with the death penalty which is undoubtedly one reason why murder is regarded as such a grave and abhorrent crime.1/

The minority report of the Massachusetts Special Commission contains a related observation:

...we believe that the death penalty threat is effective in preventing large numbers of wrongdoers from ever allowing themselves to reach that stage of criminality where they become victims of uncontrollable impulses and subjects of murder commissions. It is in this early grey zone of murder premeditation that the death penalty threat is most apt to be operative and effective.2/

As indicated in the passage from the Canada report quoted above, retentionists also believe that the death penalty is effective as a deterrent in the broadest sense, by reinforcing the public abhorrence of murder. It is argued that the death penalty reinforces the public's belief in the sanctity of human life by associating this abstract moral concept with the strong instinctive fear of one's own death.

Richard Gerstein comments on this point as follows:

- 1/ Quoted by Bedau (ed.), op. cit., p. 268.
- 2/ Massachusetts Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases, Report and Recommendations (1958); the minority report is reprinted in Capital Punishment, ed. Grant S. McClellan (1961), p. 82.

Furthermore, as the Royal Commission [of Great Britain] opined, the death penalty helps to educate the conscience of the whole community, and it arouses among many people a quasi-religious sense of awe. In the mind of the public there remains a strong association between murder and the penalty of death. Certainly one of the factors which restrains some people from murder is fear of punishment and surely, since people fear death more than anything else, the death penalty is the most effective deterrent.<sup>1/</sup>

C. The Statistics<sup>2/</sup>

Those in favor of capital punishment assert that the question of the superior deterrent value of the death penalty to life imprisonment most probably cannot be—and certainly has not been—definitively answered by statistical studies. This argument is supported by the following passage from the Florida Special Commission's report on capital punishment:

Superficial consideration might lead one to conclude that this question [whether the death penalty is superior to imprisonment in deterring those persons who would otherwise commit serious crimes] might be answered by scientific and statistical studies, but such is not the case. There is no reliable method for determining who has contemplated committing a capital crime but refrained due to the fear of the death penalty as distinguished from other forms of criminal punishment.... It is probably impossible to subject deterrence to scientific study in any direct way. The facts cannot be ascertained so that they can be subjected to scientific analysis and interpretation.<sup>3/</sup>

<sup>1/</sup> American Bar Association, Section of Criminal Law, op. cit., p. 17.

<sup>2/</sup> The statistical studies of the deterrent effect of the death penalty are discussed in detail in Section 1, pp. 5-12 above. The following comment from the State of Florida's Report of the Special Commission for the Study of Abolition of Death Penalty in Capital Cases is relevant here:

One caution is appropriate at this point: it is those opposed to the death penalty who have been active in research and who are responsible for the statistical studies discussed herein (p. 19).

<sup>3/</sup> Florida Special Commission for the Study of the Abolition of Death Penalty in Capital Cases, Report (1965), pp. 13-14.

First, as the Florida report indicates, there is the obvious point that those who are deterred do not show up as statistics. Secondly, both abolitionists and retentionists agree that the available statistics are inadequate. Hugo Adam Bedau, an abolitionist, writes in The Death Penalty in America:

In a word, there is no exact information anywhere as to the volume of capital crimes in the United States. Difficult as it is to specify the capital laws for the nation as a whole, it is impossible with the present sort of criminal statistics to specify the exact amount of capital crimes for even one jurisdiction in even one year for even one crime! Ten years ago, George B. Vold complained, "There are no general statistics available as to the number of offenses committed per year for which death is the required penalty." Nothing has changed in the interim.<sup>1/</sup>

The major difficulty is that the only murder figure available for use in attempting to gauge the effect of capital punishment on the murder rate is the "murder and non-negligent manslaughter" figure reported by the Federal Bureau of Investigation in its annual publication, Uniform Crime Reports for the United States. As Mr. Bedau points out:

Since some states have no death penalty for murder, the national totals of "murder and non-negligent manslaughter" will exceed the number of homicides punishable by death. What is even more important, the F.B.I. does not distinguish between total murders (or first degree murders), which alone carry the death penalty, and all lesser forms of non-negligent criminal homicide, in particular second degree murder and voluntary manslaughter, crimes usually punished by imprisonment. Instead, all voluntary or non-negligent criminal homicides are lumped together in Uniform Crime Reports under the title, "murder and non-negligent manslaughter"... What one wants to know, of course, is what fraction of the totals entered in this fashion are murders; and what fraction of this fraction are capitalily punishable homicides, i.e., murders where a normal adult (not a child, juvenile, or lunatic) is the

<sup>1/</sup> Bedau (ed.), op. cit., pp. 56-57.

criminals and where a capital indictment might issue (excluding, therefore, those cases where the murderer commits suicide). It is impossible to supply this information at present.<sup>1/</sup>

Mr. Bedau comments as follows on the validity of this "murder and non-negligent manslaughter" figure for the purpose of capital punishment statistics:

One of the first criminologists to discuss the statistical relationship between general homicides and capitally punishable homicides was the late Professor Edwin H. Sutherland. In 1923, he pointed out that although (a) the number of homicides far exceeded the number of first degree murders (and, by inference, the number of capitally punishable homicides), (b) the ratio of the two was sufficiently constant to use the former as a guide to the latter.... there is no doubt that [(a)]...is true. But what about (b)? It is extremely difficult to determine what evidence it is based on. Sutherland himself offered none, but advanced it as a plausible assumption. In the intervening generation, no criminologist has done any better.<sup>2/</sup>

Mr. Bedau subsequently analyzes in some detail one specific difficulty involved in relying on inferences from homicide rates to capitally punishable murder rates:

We have already seen...how sketchy the known connection is between the two rates. To whatever degree the former is an unreliable guide to the latter -- which we have no way of directly measuring at all -- to that degree all the studies... [relying on it] are unreliable at the crucial point: is the death penalty an effective deterrent for those kinds of homicides punishable by death? Here is one kind of difficulty that arises when one expects homicide statistics to provide a conclusive answer to this question. Data reported [in an article by Thorsten Sellin]...show that the ten-year average of annual homicide rates in Ohio fell during the 1920's from 7.9 per 100,000 of population to 3.8 in the 1930's. Yet if the death penalty had been abolished in Ohio at the beginning of this period and if (let us suppose) abolition had been followed by a dozen or so more murders each year thereafter, the general homicide rate would have decreased almost exactly as

<sup>1/</sup> Bedau (ed.), op. cit., p. 61.  
<sup>2/</sup> Ibid., pp. 68-69.

in fact it has, and at no time would the rate for any given year be more than a tenth of one per cent greater than it has been. Thus, while we could truthfully say that the abolition of the death penalty in Ohio had been followed by a decrease in the general homicide rate, it would also have been true that abolition resulted in an increase in the total number of murders, and this despite the constancy of the ratio of total homicides to murders (except in the first year after abolition). For all we know, this is exactly what has happened in all the abolition states, which without exception show a steadily declining general homicide rate over the past several decades. The number of crimes at stake here is so small that they would never be noticed by anyone who relies on the ordinary vital and criminal statistics of homicide.<sup>1/</sup>

The report of the Florida Special Commission contains the following comment on the inadequacy of statistical comparisons based on the F.B.I. murder and non-negligent manslaughter figure:

Perhaps it is fortunate that the judgment of most persons who have studied them is that they do not prove much; that while they do not prove that the death penalty is a superior deterrent, they do not prove that it is not .... J. Edgar Hoover, Director of the Federal Bureau of Investigation, favors retention of the death penalty, -- but he has charged that statistical comparisons [based on inferences from homicide rates to first degree murder rates] are "completely inconclusive."<sup>2/</sup>

D. The Need to Protect the Police

The defense of the death penalty on the grounds that it is necessary for police protection is a special case of the argument that its deterrent value is superior to that of the penalty of life imprisonment. It might be noted that two of the thirteen states which have generally abolished capital punishment have retained it for the offense of killing a policeman acting in the line of duty.

<sup>1/</sup> Bedau (ed.), op. cit., pp. 265-266.

<sup>2/</sup> Florida Special Commission, op. cit., p. 17.

Members of the law enforcement profession are generally convinced that the death penalty protects the police. The minority report of the Massachusetts Special Commission comments:

We have been impressed by the urgent demands of large numbers of law-enforcement officers that the death penalty be retained. These men have not made the speculative study of the problem with which they are confronted that would enable them to present their conclusions in compelling statistical form. Their point of view is not, however, for this reason to be taken lightly, especially in view of their insistence that their own lives are endangered by their efforts to protect the lives and property of their fellow men....<sup>1/</sup>

<sup>1/</sup> Massachusetts Special Commission, in McClellan (ed.), *op. cit.*, p. 79.

### III. THE DEATH PENALTY AS A NECESSARY PROTECTIVE MEASURE

Those in favor of the death penalty argue that the second way in which it affords society unique protection is by guaranteeing that certain criminals who have committed particularly heinous crimes will not have the opportunity to do so again. Jacques Barzun, Provost of Columbia University, defends the death penalty on these grounds as follows:

The uncontrollable brute whom I want put out of the way is not to be punished for his misdeeds, nor used as an example or a warning; he is to be killed for the protection of others, like the wolf that escaped not long ago in a Connecticut suburb. No anger, vindictiveness or moral conceit need preside over the removal of such dangers. But a man's inability to control his violent impulses or to imagine the fatal consequences of his acts should be a presumptive reason for his elimination from society.<sup>1/</sup>

Retentionists do not accept the abolitionist position that life imprisonment is in all cases a sufficient safeguard. They argue that some criminals are incorrigibly anti-social and will remain potentially dangerous to society for the remainder of their lives. These men constitute a danger to prison officials and to the other inmates, and there is always the chance that they may escape.

Furthermore, retentionists argue that, because the life sentence rarely means that an offender is in reality imprisoned for life, there is a serious possibility that dangerous men will be released on parole. Mr. Barzun points out that it is impossible to be certain that a murderer has, in fact, been "cured":

<sup>1/</sup> Jacques Barzun, "In Favor of Capital Punishment" (1962), in Bedau (ed.), op. cit., pp. 155-156.

The "scientific" means of cure are more than uncertain. The apparatus of detention only increases the killer's anti-social animus.... Some of these are indeed "cured"—so long as they stay under a rule. The stress of the social free-for-all throws them back on their violent modes of self-expression. At that point I agree that society has failed—twice: it has twice failed the victims, whatever may be its guilt toward the killer.1/

The defense of the death penalty on the grounds that it is a necessary protective measure is directly related to the argument that there is no satisfactory alternative sentence for those criminals who clearly constitute a continuing danger to society. The obvious possible alternative is the life sentence without the possibility of parole. However, a number of penologists believe that this is a highly unsatisfactory solution. They argue that such a sentence removes all inducement to improve and thus greatly increases the difficulty and danger involved in handling the man so sentenced. The Maryland report noted the reaction of Ralph G. Murdy, the Managing Director of the Baltimore Criminal Justice Commission, to such a suggestion as follows:

...Mr. Murdy observed that many penal experts believe the no-parole sentence for life-terms creates a hard core of incorrigibles in prisons who fear no authority because they can never be set free. They are robbed of the incentive to behave, he said.2/

Thorsten Sellin comments on the absolute life sentence as follows:

Recent legislation in some states and proposed in others, depriving a person sentenced to life for murder of that hope [of future release], may prove to be most inadvisable.3/

The former Director of the Maryland Department of Parole and Probation, Mr. Wallace Reidt, indicated to the Maryland Commission that

1/ Barzun, in Bedau (ed.), op. cit., p. 159.

2/ Maryland Committee, op. cit., p. 20.

3/ Thorsten Sellin, The Death Penalty (1959), p. 72.

the possibility of the no-parole life sentence replacing the death penalty was a major reason for his opposition to the repeal of capital punishment in that state:

If capital punishment is abolished, there will be considerable pressure to prevent parole in life terms and there will be removed what I believe is a great deterrent in the handling of prisoners in institutions.

Most persons connected with institutions feel that unless there is some fear of punishment or hope of reward that a good many life-tenners would cause a great deal of trouble in the institutions and make the work of prison officials much more dangerous than it now is.<sup>2/</sup>

A. The Second-Time Murderer

Several states which have generally abolished capital punishment have retained it for a person found guilty of murder who then murders again. The argument that the death penalty should be retained for those who murder a second time is a limited version of both the argument that the death penalty is necessary as a protective measure, and the argument that it is more effective than life imprisonment as a deterrent. Sidney Hook, Professor of Philosophy at New York University, comments:

...in a sub-class of murderers, i.e., those who murder several times, there may be a special group of same murderers who, knowing that they will not be executed, will not hesitate to kill again and again. For them the argument from deterrence is obviously valid. Those who say that there must be no exceptions to the abolition of capital punishment cannot rule out the existence of such cases on a priori grounds. If they admit that there is a reasonable probability that such murderers will murder again or attempt to murder again, a probability which usually grows with the number of repeated murders, and still insist

<sup>1/</sup> Maryland Committee, op. cit., p. 23.

they would never approve of capital punishment, I would conclude that they are indifferent to the lives of the human beings doomed, on their position, to be victims.<sup>1/</sup>

Of the thirteen states which have generally abolished capital punishment, four of them retain it for some type of second-time murder, as follows:

New York: Killing a peace officer acting in the line of duty; and murder committed by a prisoner acting under sentence of life imprisonment.

North Dakota: Murder in the first degree committed by a prisoner already serving a sentence for murder in the first degree.

Rhode Island: Murder committed by a prisoner under sentence of life imprisonment.

Vermont: Second conviction of murder, at discretion of jury, provided the two cases are not related; and first-degree murder of a police officer or prison guard who is on duty.

<sup>1/</sup> Sidney Hook, "The Death Sentence" (1961), in Bedau (ed.), op. cit., p. 153.

#### IV. RETRIBUTION AND THE SANCTITY OF HUMAN LIFE

Capital punishment is defended by some on the grounds that it satisfies a legitimate communal need for retribution aroused by particularly heinous crimes. Society's desire that a man pay with his life for a violent crime represents both society's moral condemnation of such acts, and the closing of the ranks against those who violate society's laws. Thus, Lord Justice Denning testified before the British Royal Commission on Capital Punishment that:

The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent, reformative or preventive and nothing else.... The ultimate justification on any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime; and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.<sup>1/</sup>

Closely related to the defense of the death penalty on the grounds that it satisfies the legitimate public demand for retribution is the argument that capital punishment is, in fact, a public and official testimony to the belief in the sanctity of human life. This argument was stated as follows by Roy A. Gustafson, District Attorney of Ventura County, before the California Senate Committee on the Judiciary:

Capital punishment...is based upon our concept of the high value placed upon life. We consider life to be the most precious possession and, therefore, when the crime is the most heinous and most grave of all crimes, then we make the man forfeit the thing that is most precious to him, namely, life.<sup>2/</sup>

<sup>1/</sup> Quoted by Richard C. Donnelly, "Capital Punishment," in Congressional Record, Aug. 24, 1960, p. A6284.

<sup>2/</sup> California Legislature, Senate Committee on Judiciary, op. cit., p. 103.

In answer to the abolitionist assertion that capital punishment is, in fact, a violation of the sanctity of human life, retentionists argue as follows:

There is too much loose talk about the sacredness of human life. A life is sacred only when it makes itself sacred; when it respects the lives and rights of others.... A cold-blooded murderer, having cunning intelligence without moral restraint, is infinitely more dangerous than any other animal on earth.<sup>1/</sup>

J. Edgar Hoover characterizes as "maudlin" the view that "the most wanton slayer [is] 'a child of God' who should not be executed," and continues, commenting on a crime committed recently in California:

Was not this small, blonde six-year-old girl a child of God? She was choked, beaten, and raped by a sex fiend whose pregnant wife reportedly helped him lure the innocent child into his car and who sat and watched the assault on the screaming youngster. And when he completed his inhuman deed, the wife, herself bringing a life into the world, allegedly killed the child with several savage blows with a tire iron. The husband has been sentenced to death. Words and words and words may be written, but no pleas in favor of the death penalty can be more horribly eloquent than the sight of the battered, sexually assaulted body of this child, truly a "child of God."<sup>2/</sup>

<sup>1/</sup> Euelle J. Younger, "A Sharp Medicine Reconsidered" (1956), in McClellan (ed.), op. cit., p. 16.

<sup>2/</sup> J. Edgar Hoover, "Statements in Favor of the Death Penalty" (1961), in Bedau (ed.), op. cit., p. 133.

V. THE ABOLITION MOVEMENT AND MODERN LIBERALISM

There is a strong feeling among those in favor of capital punishment that the abolition movement of today is in many respects a corollary of the permissive, deterministic view of individual behavior which characterizes much modern psychology and is reflected in the thinking of many liberal intellectuals. With regard to penology, this view is characterized—so the retentionist argument goes—by a belief that society is responsible, and thus to blame, for the ills of its misfits, and by a preference for the black sheep over the white. Retentionists point to such passages as the following to illustrate their case:

By the establishment of a motive, an understanding of the crime, at least in the legal sense, is achieved, and no more official effort is extended from or charged to the authorities to go beyond and find a deeper insight into the true motivation of the mind of the man who kills.

Acceptance in legal procedures of the motive at large is based on the presumption that, unless it is proved otherwise through the intricacies and formalities of the court trial, the individual [murderer] is like any other person, who could exercise at pleasure any function he chose. There is no recognition of the fact that if he had been in possession of such perfect powers of reasoning and such ideal forces of will, he could have prevented the occurrence of the fatal act. In reality, he is in his predicament for the very reason that he was incapable of behaving like a complete man, the master of himself. However, people in general refuse to look upon him as an invalid, and find considerable gratification in obtaining for society a maximum security and protection by imposing a maximum retribution.<sup>1/</sup>

The distance between this approach and that of many retentionists may be seen by contrasting the above passage with the following statement by Jacques Barzun, Provost of Columbia University:

<sup>1/</sup> Ralph S. Banay, "Study in Murder," The Annals (Nov. 1952), p. 33.

I happen to think that if a person of adult body has not been endowed with adequate controls against irrationally taking the life of another, that person must be judicially, painlessly, regretfully killed before that mindless body's horrible automation repeats.<sup>1/</sup>

Barzun sums up the general viewpoint discussed above as follows:

Social science tends steadily to mark a preference for the troubled, the abnormal, the problem case. Whether it is poverty, mental disorder, delinquency or crime, the "patient material" monopolizes the interest of increasing groups of people among the most generous and learned. Psychiatry and moral liberalism go together; the application of law as we have known it is thus coming to be regarded as an historic prelude to social work, which may replace it entirely. Modern literature makes the most of this same outlook, caring only for the disturbed spirit, scorning as bourgeois those who pay their way and do not stab their friends. All the while the determinism of natural science reinforces the assumption that society causes its own evils. A French jurist, for example, says that in order to understand crime, we must first brush aside all ideas of responsibility. He means the criminal's and takes for granted that of society. The murderer kills because reared in a broken home or, conversely, because at an early age he witnessed his parents making love. Out of such cases, which make pathetic reading in the literature of modern criminology, is born the abolitionist's state of mind: we dare not kill those we are beginning to understand so well.<sup>2/</sup>

Generally speaking, retentionists argue that, regardless of the developments of the day in the field of psychology, law and order cannot exist unless people are held individually responsible for their actions and thus subject to the control of punishment if they fail to obey the law. Those in favor of capital punishment argue that it reflects, both pragmatically and symbolically, this fundamental tenet of our society, and that its abolition could well be seen as an endorsement of the kind of liberalism described by Mr. Barzun—a view which,

<sup>1/</sup> Barzun, in Bedau (ed.), *op. cit.*, p. 159.

<sup>2/</sup> *Ibid.*, pp. 157-158.

if incorporated into our laws, would lead to social anarchy. Richard Gerstein commented on this point as follows before the American Bar Association:

Society must also consider what effect the abolition of capital punishment could have upon the philosophy of the youth of our country. Many of them might very well look upon the criminal code, including that part of it forbidding murder, as a mere convention of society which advanced thinking and progressive social theories permit them to set aside as a matter of no consequence. This theory leads to the belief that each is a law unto himself; that each may choose the laws which he will obey, and that he may violate the rest. This type of thinking would eventually lead us into virtual anarchy.<sup>1/</sup>

More specifically, retentionists argue that the concern of abolitionists for the criminal has led them to place far too much emphasis on rehabilitation, as opposed to deterrence and protection, as the purpose of punishment. Richard Gerstein comments that, "we must not forget that reformation is an enjoyable by-product, not the sole goal of punishment."<sup>2/</sup> The minority report of the Massachusetts Special Commission notes,

...it might be well here to point out that it is the opinion of the minority that the majority report lays too great stress on the welfare of the individual criminal subject to a sentence of execution. It is not our intent to deprive the criminal of every consideration which may be afforded to him by the executive powers of the state subsequent to his sentencing to execution. However, the urge that this one could be rehabilitated or that one could be given psychiatric treatment and therefore they all are salvable does not solve the problem of suppressing potential murderers. If one becomes convinced that the drastic measure of execution is the effective deterrent, then it must logically follow that the innocent lives saved thereby

<sup>1/</sup> American Bar Association, Section on Criminal Law, op. cit., p. 18.

<sup>2/</sup> Ibid.

are of far greater import than the criminal life sacrificed. This method of thinking must of necessity divorce itself from any thought of the rehabilitation of the properly condemned criminal.<sup>1/</sup>

The New Jersey Commission majority report comments in a similar vein,

The great increase of crime in this State has coincided with a greater tendency to emphasize the rehabilitation factor in criminology as against the punishment or retributive and deterrent aspects of criminology. The Commission cannot conclude that easing the lot of the murderer will cause less crime or fewer criminal homicides.<sup>2/</sup>

The supporters of capital punishment contend that this misplaced emphasis on rehabilitation as well as the general willingness to "brush aside all ideas of Responsibility" is a corollary of the fact that many abolitionists argue from theory rather than from a direct experience with the realities of crime and law enforcement. J. Edgar Hoover comments,

As a representative of law enforcement, it is my belief that a great many of the most vociferous cries for abolition of capital punishment emanate from those areas of our society which have been insulated against the horrors man can and does perpetrate against his fellow beings.<sup>3/</sup>

Direct experience with law enforcement has led most members of this profession to support the death penalty. Sheriff Pitchess of Los Angeles County testified as follows before the California Senate Committee investigating capital punishment:

...When I was in law school, I remember that I prepared a paper supporting the abolition of capital punishment. I changed my mind. I went directly from law school into the F.B.I. I can't tell you whether it was within a year or two years, but it wasn't long after I had been in the active field of investigating that I changed my mind, and I have become progressively more convinced.

<sup>1/</sup> Massachusetts Special Commission, in McClellan (ed.), op. cit., p. 78.

<sup>2/</sup> New Jersey Commission, op. cit., p. 7.

<sup>3/</sup> Hoover, in Bedau (ed.), op. cit., p. 130.

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I wish I could be as positive and as certain as the proponents of abolition—I wish I could be. I am as certain as I can be, after searching my own conscience, that it is a deterrent, but my change—and I am not ashamed to admit that I did change my mind—was based on my direct contact with the criminals, who convinced me that it was a deterrent to them.<sup>1/</sup>

<sup>1/</sup> California Legislature, Senate Committee on Judiciary, op. cit., pp. 150-151.

## VI. THE DEATH PENALTY AND CRIMINAL JUSTICE

With regard to the complex of arguments relating to capital punishment and criminal justice (see pp. 23-33), retentionists contend, first, that the institution of capital punishment should stand or fall on the issue of whether or not it provides maximum security for the law-abiding, and not on the fact that certain abuses exist in its use, or that it is time-consuming and expensive to administer. Secondly, they argue that many of the abuses alleged by abolitionists either do not actually exist or are remediable through a reform of the courts. Supporters of the death penalty point out that its efficacy as a deterrent is itself undermined by the inequalities and inefficiencies in the administration of criminal justice; what is indicated here is not the need to abolish the death penalty, but the need to reform criminal procedure.

### A. The Possibility of Error

A major issue in this area is the alleged danger of executing the innocent. First, there are those who argue that this is not, in fact, a real possibility, given the precautions taken by the courts in capital cases. Judge Learned Hand commented,

Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream.<sup>1/</sup>

There have been no known cases of the execution of an innocent man in this country.<sup>2/</sup>

<sup>1/</sup> Quoted by Florida Special Commission, op. cit., p. 29.

<sup>2/</sup> Bedau (ed.), op. cit., p. 440; see pp. 23-24 above.

The position of those retentionists who admit that the possibility of error does exist is summed up by the Florida report as follows:

Proponents of capital punishment who admit that the possibility of convicting an innocent man is present maintain that such a possibility is extremely remote today due to the painstaking care that the courts take and the many avenues for correcting trial error. The task of conducting capital punishment trials is carried out with every possible precaution in favor of an accused thereby making the chance of a miscarriage of justice infinitely small.<sup>1/</sup>

Those who support the death penalty argue that, insofar as there is a risk that an innocent man will be executed, it is justified by the protection afforded to society by the death penalty. This argument is stated as follows by the minority report of the Massachusetts Special Commission:

We do not feel, however, that the mere possibility of error, which can never be completely ruled out, can be urged as a reason why the right of the state to inflict the death penalty can be questioned in principle.... All that can be expected of [human authorities] is that they take every reasonable precaution against the danger of error. When this is done by those who are charged with the application of the law, the likelihood that errors will be made descends to an irreducible minimum. If errors are then made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angels but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty aims to provide effective remedies.<sup>2/</sup>

<sup>1/</sup> Florida Special Commission, op. cit., p. 29.

<sup>2/</sup> Massachusetts Special Commission, in McClellan (ed.), op. cit., p. 61.

B. The Alleged Inequality of Application

Abolitionists allege that there is a discrimination in the use of the death penalty, based primarily on race, wealth, and legal counsel. The retentionist answer to this allegation is well stated as follows by Hugo Adam Bedau, himself an abolitionist:

One of the contentions of abolitionists in this country, popularized by the late Warden Lawes, is that "only the poor, the friendless and the foreign-born" are sentenced to death and executed. As a description of the class of persons executed, this is probably fairly accurate (though, with the virtual curtailment of immigration, the place of the foreign-born has been taken by native non-whites). But if it is meant to imply deliberate discrimination by trial courts, appellate courts and boards of pardons, it remains unproved. The vast majority of all prisoners throughout our country's history have been the poor, the friendless and the foreign-born (or non-white). It has yet to be shown that murderers or prisoners under death sentence differ significantly in these respects from other criminals.<sup>1/</sup>

On the specific issue of the high percentage of Negroes sentenced to death, it has been noted:

Much previous research in criminal homicide, which includes murder in the first degree, has demonstrated the fact that a disproportionate contribution to the homicide rate is made by Negroes. It is no surprise, therefore, that as many as thirty-six per cent of persons placed on death row are Negro. Consistent with independent research and the Uniform Crime Reports, Negroes comprise between three and four times more of the criminal homicide cases (either as offenders or as victims) than they do of the general population.<sup>2/</sup>

<sup>1/</sup> Bedau (ed.), op. cit., pp. 411-412. For statistics which substantiate Bedau's argument, see California Legislature, Senate Committee on Judiciary, op. cit., pp. 106-108.

<sup>2/</sup> Marvin E. Wolfgang, Arlene Kelly, and Hans C. Mohde, "Executions and Commutation in Pennsylvania" (1962), in Bedau (ed.), op. cit., p. 473.

C. The Need for Reform

As indicated above, retentionists view the existence of abuses in the administration of the death penalty not as an argument for abolishing the death penalty, but for reforming the courts and the criminal procedure. Mr. Barzun's comment on the danger of executing the innocent is generally relevant here:

...what is at fault in our present system is not the sentence [of death] but the fallible procedure.... What the miscarriages point to is the need for reforming the jury system, the rules of evidence, the customs of prosecution, the machinery of appeal.<sup>1/</sup>

Retentionists contend that if the death penalty is a less effective deterrent than it might be, a major reason is the rarity of its use. A number of abolitionists concur. Thorsten Sellin comments:

We arrive then at the conclusion that if the death penalty is to have any restraining effect there must be an adequate threat of execution, but no one has ventured to calculate how great the risk of possible execution must be in order to constitute an adequate threat.<sup>2/</sup>

Bedau develops this argument at some length:

Since the time of Beccaria, Bentham, Rush and Livingston, most penologists have agreed that for any punishment to have optimum efficacy as a deterrent, the penalty must be imposed consistently, immediately and inexorably; that is, on all offenders, promptly after their crime, and in such a way that the general public expects exactly this. But in practice, not one of these conditions is satisfied by the way capital punishment is administered. Only a small proportion of first degree murderers are sentenced to death and even fewer are executed. The delay in convicting and executing those who do get a death sentence is increasing and notorious. So, almost anyone who contemplates some horrible crime can see some chance of getting away with it, or at least in not having to pay the supreme penalty. If, in practice, the death penalty is no more effective a deterrent for murder, rape and kidnapping than imprisonment is, this may be the reason.<sup>3/</sup>

<sup>1/</sup> Barzun, in Bedau (ed.), op. cit., p. 163.

<sup>2/</sup> Sellin, The Death Penalty, pp. 20-21:

<sup>3/</sup> Bedau (ed.), op. cit., p. 270.