ALASKA LEGISLATURE COMMITTEE FILES

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Those in favor of retaining the death penalty do not accept the abolitionist argument that it is impossible to effect the reforms necessary to make capital punishment a more credible threat to the man contemplating a horrible crime. The Massachusetts Special Commission minority report comments:

> I does not seem logical to say that the death penalty should be abolished because statistics prove that it is not a deterrent. It seems more consistent to urge that every effort be made to minimize the influence on the effectiveness of the death penalty of factors extrinsic to itself, and thus to realize to the maximum its intrinsic value.... If we admit that the state has, in principle, the right to inflict it, we should admit likewise a corresponding obligation on the part of the state to make it effective and we should not urge failure to do this as proof that the death penalty itself is not necessary.1/

1/ Massachusetts Special Commission, in McClellan (ed.), op. cit., p. 77.

VII. THE RELIGIOUS ARGUMENT

The defense of capital punishment on religious grounds rests primarily on two points. First, it is argued that the death penalty is a testimony to the sacredness of life, and—in the case of the Hebrew-Christian tradition—that the Bible clearly differentiates between murder and the death penalty as a just punishment for the taking of God-given life. This argument is supported by the following passages, as well as others, from the Old Testament:

> Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man (Genesis, 9:6).
>
> He that smiteth a man, so that he die, shall be surely put to death....But if a man come presumptuously upon his neighbor to slay him with guile; thou shalt take him from mine altar, that he may die (Exodus, 21: 12, 14).
>
> Whose killeth any person, the murderer shall be put to death by the mouth of witnesses.... Moreover ye shall take no satisfaction for the life of a murderer, which is guilty of death; but he shall be surely put to death ...and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it (Numbers, 35: 30, 31, 33).

Turning to the New Testament, it is argued that the law of love preached by Jesus implies the need for the existence of a strong civil law, and that it is a misreading of the New Testament to see it as advocating leniency for criminal behavior. This argument is summed up as follows by Rev. Jacob J. Vellenga who, since 1958, has served as Associate Executive of the United Presbyterian Church in the United States:

> The law of love, also called the law of liberty, was not presented to do away with the natural laws of society, but to inaugurate a new concept of law written on the

> Church is ever to strive for superior law and order, not to advocate a lower order that makes wrongdoing less culpable...wherever and whenever God's love and mercy are rejected, as in crime, natural law and order must prevail, not as extraneous to redemption but as part of the whole scope of God's dealing with man.1/

He continues:

> The law of capital punishment must stand as a silent but powerful witness to the sacredness of God-given life. Words are not enough to show that life is sacred. Active justice must be administered when the sacredness of life is violated.2/

In addition to the Old and New Testaments, St. Thomas Aquinas is also quoted in support of capital punishment: "It is lawful to kill an evil-doer insofar as it is directed to the welfare of the whole community."3/

1/ Jacob J. Vellenga, "Christianity and the Death Penalty" (1959), in Bedau (ed.), op. cit., pp. 127-128.
2/ Ibid., p. 129.
3/ St. Thomas Aquinas, Summa Theologica. New York, Benziger Bros., 1947, II, 1467.

VIII. PUBLIC OPINION

Thirty-seven states, the District of Columbia, and the Federal Government have the death penalty. Of the thirteen states which have abolished it, only eight have done so completely. Five retain it on a limited basis, for such crimes as killing a policeman acting in the line of duty and the killing of a prison guard by an inmate who is serving a life term for murder. Jacques Barzun's assertion that his views in favor of the death penalty "are now close to unpopular" has been answered by Jerome Hathanson, a leading abolitionist, as follows:

> When I read this I wondered if he and I live in the same United States. How close is close?...A few years ago a special Massachusetts commission recommended abolition of the death penalty, whereupon the legislature promptly voted against its own commission. A few years ago Delaware abolished capital punishment. Subsequently, as has happened elsewhere, an especially outrageous crime led to a demand for its restoration. The legislature responded favorably to the demand, the Governor vetoed the measure, and it was passed again over his veto. The Governor of California is a supporter of abolition, but there is hardly the ghost of a chance, after the furor over the Chessman case, that it will be realized during his administration, even if he is elected to another term in office.... One could go on and on...After working a number of years in behalf of abolition, I have the contrary impression that the preponderance of popular sentiment is on [Mr. Barzun's] side.1/

The reason for such public support--and its importance as an argument in favor of the retention of the death penalty--is commented on by Mr. Ralph G. Murdy, Managing Director of the Baltimore Criminal Justice Commission, as follows:

> Traditionally, our people have believed capital punishment necessary to control attacks on body and life. A majority today still holds that belief despite evidence of growing hesitation and question. To fly in the face of such

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1/ "Capital Punishment"

> conviction by completely doing away with the death penalty would only serve to further weaken the faith of our citizens in the administration of justice.1/

The abolitionist argument that such popular feelings are based on emotion and prejudice rather on a knowledge of the facts is answered by the retentionists as follows:

> Abolitionists say the public is not enlightened. That argument is always used to rationalize a minority point of view; but it is no more valid in this case than in any other case where two points of view exist and the question is resolved in accordance with the democratic process.2/

1/ Mundy, op. cit., p. 13.
2/ Younger, in McClellan (ed.), op. cit., p. 17.

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COVER STORY

An Eye for an Eye

Death Row (pop. 1,137) may soon lose a lot more residents to the executioner

The chair is bolted to the floor near the back of a 12-ft. by 18-ft. room. You sit on a seat of cracked rubber secured by rows of copper tacks. Your ankles are strapped into half-moon-shaped foot cuffs lined with canvas. A 2-in.-wide greasy leather belt with 28 buckle holes and worn grooves where it has been pulled very tight many times is secured around your waist just above the hips. A cool metal cone encircles your head. You are now only moments away from death.

But you still have a few seconds left. Time becomes stretched to the outermost limits. To your right you see the mahogany floor divider that separates four brown church-type pews from the rest of the room. They look odd in this beige Zen-like chamber. There is another door at the back through which the witnesses arrive and sit in the pews. You stare up at two groups of fluorescent lights on the ceiling. They are on. The paint on the ceiling is peeling.

You fit in neat and snug. Behind the chair's back leg on your right is a cable wrapped in gray tape. It will sluice the electrical current to three other wires: two going to each of your feet, and the third to the cone on top of your head. The room is very quiet. During your brief walk here, you looked over your shoulder and saw early morning light creeping over the Berkshire Hills. Then into this silent tomb.

The air vent above your head in the ceiling begins to hum. This means the executioner has turned on the fan to suck up the smell of burning flesh. There is little time left. On your right you can see the waist-high, one-way mirror in the wall. Behind the mirror is the executioner, standing before a gray marble control panel with gauges, switches and a foot-long lever of wood and metal at hip level.

The executioner will pull this lever four times. Each time 2,000 volts will course through your body, making your eyeballs first bulge, then burst, and then broiling your brains . . .

That big old mahogany armchair is practically antique, but it still works. First used in 1890, it is the world's oldest and most prodigious electric chair: 695 convicted men and women died in its grip, nearly one a month for the better part of a century. For most of those years it was housed at Sing Sing, contributing to that place's hellhole notoriety. Now it squats on the fourth floor of Green Haven prison in New York.

But the state has killed no one since the summer of 1963, when Eddie Lee Mays was electrocuted at Sing Sing. And for some time to come, this prototypical electric chair with the flip nickname ("Old Sparky") seems likely to remain nothing more than a grim curiosity. The state's new Governor, Mario Cuomo, promises to veto any capital-punishment statute the New York legislature passes, just as his predecessor did every chance he got.

But New York is not typical of these angry times. The country's decade-long moratorium on capital punishment ended in 1977 when Gary Gilmore dared Utah to shoot him and, six years ago this week, Utah obliged. Five men have been executed since. One shared Gilmore's flashy passion for martyrdom: Jesse Bishop, who gunned down a newlywed during a casino holdup, practically volunteered for Nevada's gas chamber. Three were electrocuted: John Spenkelink in Florida, for killing a ne'er-do-well like himself; Steven Judy in Indiana, for strangling a motorist he waylaid and drowning her three children, ages two to five; and Frank Coppola in Virginia, for bludgeoning to death his robbery victim. Last month in Texas, Charlie Brooks Jr., the only black among the six, achieved a milestone when he became the first American ever executed by means of a drug overdose.

Other states seem anxious to get in step. Two weeks after Brooks was executed, Massachusetts became the 38th state with a death penalty on the books, and Oregon seems likely to become the 39th, 20 years after capital punishment was abolished there by popular vote.*

The national death-row population today is 1,137. That is 200 more than a year ago, twice as many as in 1979, and larger, moreover, than ever before. Florida alone has 189 death-row prisoners, Texas has 153, Georgia and California 118 each. The inmates include about a dozen teen-agers, 13 women (five of them in Georgia) and six soldiers. Half of the condemned are white.

The long-building public sentiment to get tough with violent criminals, to kill the killers, seems on the verge of putting the nation's 15 electric chairs, nine gas chambers, several gallows and *ad hoc* firing squads back to regular work. In addition, five states have a new and peculiarly American technique for killing, lethal anesthesia injections, which could increase public acceptance of executions. Experts on capital punishment, both pro and con, agree that as many as ten to 15 inmates could be put to death this year, a total not reached since the early 1960s. "People on death rows are simply running out of appeals," says the Rev. Joe Ingle, a prison activist and death-penalty opponent. "I fear we are heading toward a slaughter."

For years, the capital-punishment debate has been sporadic and mainly intramural—professor *vs.* professor, lawyer *vs.* lawyer—as executions took place only once or twice annually at most. Says Florida's Governor Robert Graham, who signed Spenkelink's death warrant in 1979: "We haven't enforced the death penalty much, so we've been able to avoid all the responsibilities that go with that experience."

But now an old array of tough questions—practical, legal, moral, even metaphysical—is being examined. Is the death penalty an effective, much less a necessary, deterrent to murder? Is it fair? That is, does it fall equally on the wealthy white surgeon represented by Edward Bennett Williams and the indigent black with court-appointed (and possibly perfunctory) counsel? Most fundamental, is it civilized to take a life in the name of justice?

Fear, pure and simple, is behind the new advocacy of the death penalty. Between 1960 and 1973, the U.S. homicide rate doubled, from 4.7 murders per 100,000 people to 9.4. The rate has leveled off considerably and stands at 9.8 per 100,000 today. (Other countries' rates are, by U.S. standards, amazingly low: England, 1.1, and Japan, 1.0, are typical.) No more precipitous increases are expected this century: criminologists believe that the murder spree of the '60s and early '70s was mostly the doing of World War II baby-boom children passing through their crime-prone years of adolescence and young adulthood. As it happened, the number of young people and cheap, readily available handguns burgeoned at the same time. Handguns are used in 50% of U.S. murders.

But a U.S. public that has felt terrorized by murderers and thugs is unreceptive to promises that the worst may be over and understandably finds the current level of violent crime intolerable. According to a Gallup poll last fall, 72% of Americans now favor capital punishment, up from just 42% in 1966. "People are frightened and upset about crime in the streets," says William Bailey, a Cleveland State University sociologist. "Nothing seems to be done to solve the problem, so the feeling grows that if we

*Other states now without a death penalty: Alaska, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, North Dakota, Rhode Island, West Virginia and Wisconsin.

"I Didn't Like Nobody"

On the night of June 3, 1973 a Chevrolet Caprice, driven by a woman, was forced off Interstate 57 in southern Cook County, Ill., by a car carrying four men. One of them pointed a 12-gauge pump shotgun at her, ordered her to strip and then to climb through a barbed-wire fence at the side of the road. As she begged for her life, her assailant thrust the shotgun barrel into her vagina and fired. After watching her agonies for several minutes, he finished her off with a blast to the throat. Less than an hour later, the marauding motorists stopped another car and told the man and woman inside it to get out and lie down on the shoulder of the road. The couple pleaded for mercy, saying that they were engaged to be married in six months. The man with the shotgun said, "Kiss your last kiss," then shot both of them in the back, killing them. The total take from three murders and two robberies: $54, two watches, an engagement ring and a wedding band.

The man ultimately convicted of the "I-57 murders" now sits confined in the Menard Condemned Unit, the official name for death row in the Illinois prison system. Yet Henry Brisbon Jr., 28, does not face execution for those three killings nearly ten years ago. Illinois' death penalty was invalidated in 1972 and was not restored until 1977, the year that Brisbon was finally brought to trial. At that time, the judge sentenced him to a term of 1,000 to 3,000 years in prison. It took Brisbon less than one year to kill again, this time stabbing a fellow inmate at Stateville Correctional Center with the sharpened handle of a soup ladle. At the trial for this murder, Will County State's Attorney Edward Petka described Brisbon as "a very, very terrible human being, a walking testimonial for the death penalty." The jury agreed.

Brisbon's eleven months on death row have been quiet, compared with his Stateville years, when he took part in 15 attacks on inmates and guards, instigated at least one prison riot, trashed a courtroom during a trial and hit a warden with a broom handle. "I'm no bad dude," he says, "just an antisocial individual." The third of 13 children, Brisbon thinks that his upbringing by a strict black Muslim father made him different: "I was taught to be a racist and not like whites. As I grew up, I decided I didn't like nobody."

Brisbon has 90 well-supervised minutes each day outside his small (7 ft. 7 in. by 5 ft. 10 in.) cell. He works out with weights, keeping his 155 lbs. (on a 5-ft. 9-in. frame) in shape. He complains about his confinement: "Can't take two steps in this cage. It's inhuman. And that dull-ass color blue on the walls in no way brightens my life." He has devised a novel idea about judicial reform: "All this talk about victims' rights and restitution gets me. What about my family? I'm a victim of a crooked criminal system. Isn't my family entitled to something?" The shadow of the death penalty does not faze him: "I don't see that happening to me. What would killing me solve? Isn't that just another murder? If I get to die, it's going to be of natural causes." The state of Illinois thinks otherwise. Says Michael Ficaro, who prosecuted the I-57 case: "On the day he dies in the chair at Stateville, I plan to be there to see that it's done. Nobody I've heard of deserves the death penalty more than Henry Brisbon."

can't cure murderers, something we *can* do is kill them." Jim Jablonski, 44, a Chicago steelworker, speaks for a lot of furious citizens. "Murderers got to pay," he says. For him the next sentence follows self-evidently: "I say, fry the bastards."

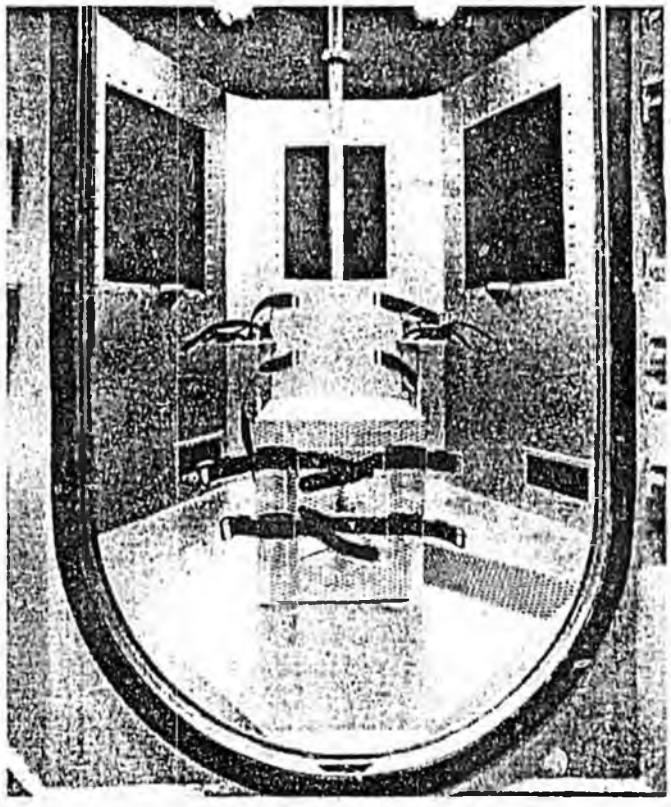
Execution by injection may be too new to have its tough-guy slang like "fry." But last month outside the prison at Huntsville, Texas, the sentiment was the same. As Charlie Brooks waited to be injected, a crowd of 300 gathered to celebrate. Some of the pro-execution revelers, mostly college students, carried placards; KILL 'EM IN VEIN, said one. "Most of the people I know are for capital punishment," declared Paula Huffman, 21, a Sam Houston State University senior at the deathwatch. "And so am I. Definitely." Nevertheless, when the moment arrived, just after midnight, she and the rest of her shivering, smiling chums suddenly turned quiet and grave.

Historically, American executions were public, the last in Kentucky in 1936. Hanging was standard for 200 years, through the 1800s. More primitive means—burnings in particular—were extreme rarities even in the 17th century. Up until 1900, nearly all executions were carried out by local jurisdictions; lynchings were as frequent as legal hangings. But by the start of the Depression, state authorities had mostly taken over the grim chore.

At that time, the U.S. was hardly less murderous than it is today. In 1933 there were 9.7 homicides per 100,000 Americans, which is just shy of the 1981 figure. The murder rate began a steady decline in 1934, but judges and juries meted out death sentences at a ferocious clip for the rest of the '30s. As many as 200 people a year were legally executed, more than ever before or since in the U.S. During the '30s, and even through the '50s, executions were so routine that they merited at most a paragraph or two in out-of-town newspapers.

Not just murderers were put to death. Rapists were executed every year in the U.S. until 1963.* After 1930, there were 455 men executed for rape, most of them in the South and 89% of them black, a majority grotesquely out of proportion to black sexual offenses. Black murderers too were executed much more frequently than white killers, a pattern that prevailed through the 1960s.

*There is still one man condemned to die for a crime other than murder: Lusious Andrews, 31, sentenced in Florida in 1981 for the "sexual battery of a child."



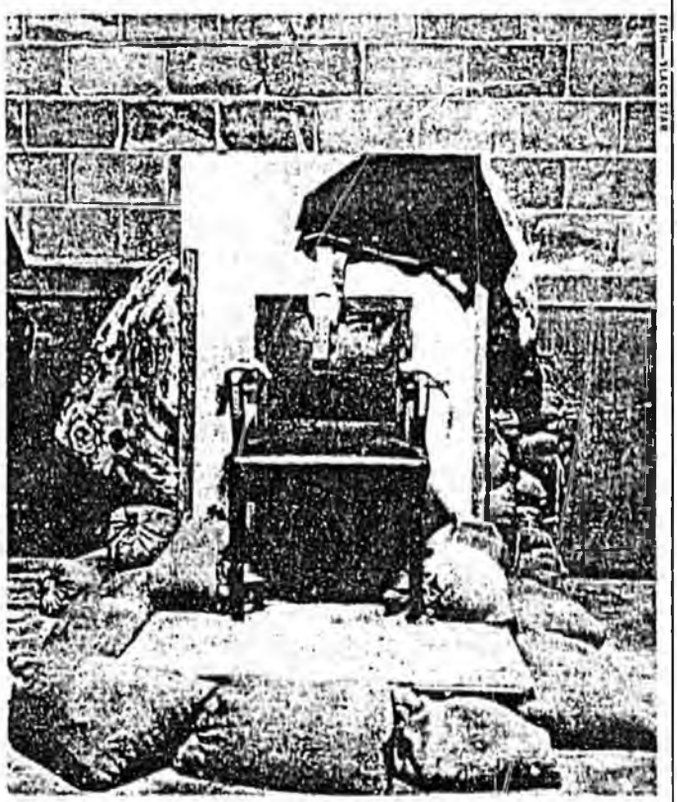
Maryland's gas chamber: 14 people wait

After World War II, executions became less popular. The reduction was steady: 82 by 1950, 49 in 1959 and finally just two in 1967, one of whom was Aaron Mitchell, a California murderer denied clemency by then Governor Ronald Reagan. The nation's chairs, gallows and gas chambers were temporarily retired partly because judicial standards became more scrupulous—often after legal battles waged by the NAACP Legal Defense Fund (L.D.F.) and the American Civil Liberties Union—and, more ineffably, as an extension of two centuries of penal reform *(see box)*. But most important, during the decade and a half after the war, the U.S. homicide rate stayed fairly constant and unalarming, never rising above 6.4 per 100,000 (in 1946). Year after year, there were roughly 8,000 killings (a third of the 1981 total), seemingly as predictable and steady as deaths from accidental drownings (5,000 a year) or falls (19,000). Americans felt unthreatened. They could afford the emotional luxury of indulging their instincts for reason. During 1964 and 1965, three states (Oregon, Iowa and West Virginia) abolished capital punishment, and Vermont narrowed its applicability mainly to those who murdered policemen or prison guards.

But in most places the retreat from capital punishment was not a formal, statutory change. At any one time no more than a third of the states have been without a death-penalty provision. It seems that Americans want it both ways, retaining the right to exterminate miscreants, as well as having the option not to exercise that awful power. It is easy and sometimes appealing to talk tough and demand mercilessness in the abstract. But to *really* "fry the bastards"? How many? Which ones? "What a person says on a public opinion poll," observes Thomas Reppetto, president of the Citizens Crime Commission of New York City, "and what they'll say on a jury, might well be two different things."

The ambivalence seemed apparent in last November's elections, when capital punishment was a potent political issue but not a decisive one. Like New York, Massachusetts this month inaugurated a Governor opposed to the death penalty. But just three weeks earlier, the legislature in Boston had once again legalized executions. Even increasingly hard-line voters in California chose an attorney general who disapproves of capital punishment.

The uneasiness with capital punishment has led this nation



Utah's rifle range: the chair in which Gary Gilmore died in 1977

"I Don't Think I'm Guilty"

Texas law-enforcement officials and Claude Wilkerson, 28, agree on one point: when the murder for which he was later tried, convicted and sentenced to death took place, Wilkerson was locked up in Houston's Harris County jail. Beyond that incontrovertible fact stretches a tangle of contradictions. Two of Wilkerson's confederates have been tried for the same murder and now face execution. A fourth man, who admitted being present at the scene of the crime, is serving a life sentence, a leniency granted for his cooperation with investigators. Says Wilkerson from his cell on Texas' death row in Huntsville: "I don't think I'm guilty of capital murder, and I don't think the court proved I was."

Wilkerson's road to extraordinary trouble began with an ordinary childhood. The son of a pipefitter, he moved with no particular distinction through his education. He recalls, with irony: "In a high school science class we took a straw poll on the subject of capital punishment. I voted in favor of it." Wilkerson dropped out of Mesa College in Colorado after one year, married, divorced and knocked about in a couple of ill-fated business schemes. He then went to work for Houston Businessman Don Fantich, who local police suspected was an operator in the penumbra of the underworld.

On Jan. 23, 1978, Fantich disappeared, along with a woman who ran a jewelry store, which Fantich owned, and an apparently innocent bystander, Dr. William Fitzpatrick. Police picked up Wilkerson for questioning. While he was in custody, all three missing persons were shot and buried about 100 miles west of Houston. From testimony pieced together from a variety of sources, police found the bodies and deduced that the victims were part of an extortion and kidnaping scheme that Wilkerson had masterminded. While Wilkerson owned up to the plot, he denied any involvement in the murders. Prosecutor Don Stricklin scoffs at this: "He could have told us earlier and saved those people's lives."

Wilkerson's first trial ended in a hung jury, but the second resulted in his conviction. [For reasons of strategy, prosecutors limited charges to the murder of the doctor.] Says Sherman Ross, now a judge, who represented Wilkerson both times: "The district attorney's office good-old-boyed him into a death penalty." For his part, Wilkerson tries to make the best of life on death row: "It takes a great deal of personal effort to not become hard within yourself and hate the free world."

A pudgy soft-spoken man, he has used his abundant time to polish his skill in drawing. Late last year a friend in New York City asked Wilkerson to send samples to be sold at a party. The prisoner netted $200 and has since sold some other artwork. He uses a typewriter in his cell for a widespread correspondence with, among others, some leaders in the American Indian movement. A grandmother of his was a Catawba Indian, and Wilkerson has grown intensely interested in this heritage and its culture. He has taken an Indian name, Ches-ne-o-na-eh, which translates as "the man who kills the wolves." Wilkerson suggests another meaning that this name could convey: "a beautiful being in a scarred world."

"I Want to Die"

"I've put life in one hand and death in the other and weighed the two. To me, death is my only route to freedom." Doris Ann Foster speaks from a small cell at the end of a third-floor hallway at the Maryland Correctional Institution for Women in Jessup, a small town midway between Baltimore and Washington. A heavy door marked "Maximum Security" isolates her not just from the outside world but from other prisoners as well. She is on death row and could become the first woman ever to be executed by the state of Maryland.

Foster says she is ready: "I have thought it out very carefully. I know what I am doing." She has sent a letter to the Maryland Court of Appeals and the U.S. Supreme Court requesting them to pay no attention to the efforts of her public defender lawyers, who have been trying to get her sentence reduced to life, with parole then a possibility after 12½ years. She does not know whether the courts will heed her request, but she dreads the prospect of a long, drawn-out appeal: "If the court says you're guilty and you're going to die, why spend all this money to fight it? Let them carry it out. They will be satisfied, and I will have peace."

Foster previously served four years in other states for robbery and passing bad checks, so she knows about prison. Continuing on death row strikes her as intolerable: "This is ruining my body and eventually would ruin my mind. I could see what I'd be like after ten years here. I don't want to be hostile. I don't want to lose my peace. I have no desire to continue on in such an inhumane existence."

Her acceptance of punishment does not exactly constitute an admission of guilt. Although she was convicted last year of stabbing a 71-year-old woman motel keeper to death with a screwdriver during a holdup, Foster now says, "I couldn't have done it. And if I did, I would not do it with a screwdriver, not to some old lady." This declaration sounds less than ringing. Moreover, it was testimony from her husband Tommy, who had checked into the motel with her, that helped convict Doris Ann. Yet she seems to bear him no grudge. He is in a different Maryland prison, where he is serving a lighter sentence for theft and obstruction of justice, and she corresponds with him regularly. She has 35 other pen pals, including some Indians on death rows elsewhere.

A thin, wide-eyed woman with long, lustrous dark hair, Foster claims to be three-quarters Cherokee (she also says she is 27; Maryland lists her as 38). The walls of her cell are decorated with bold, dark drawings of Indian faces. Books on Indian lore are piled together with other texts on Buddhism, martial arts and the occult. She is allowed half an hour out of her cell each morning for a shower and an hour of exercise later in the day, but she has felt increasingly estranged from other inmates and no longer takes a recreation period. She receives no visitors because she says her surroundings would depress relatives and friends.

She is aware of the notoriety gained by other prisoners who have asked to die, and wants no part of it: "I'm not a Gary Gilmore. I don't want anyone to write a book about me. I want to die or be free. I have a dream to go West with my people. If I got out, that's what I would do." She does not expect that to happen. Instead, she hopes to arrange for the presence of an Indian medicine man at her execution.

of tinkerers to an odd inventiveness. Elsewhere in the world where executions are still regularly carried out—among industrialized nations, only Japan, South Africa and the Soviet Union—the bullet and the noose are used exclusively. Yet in the U.S., only half a dozen states call for old-fashioned firing squads or hangings. The electric chair killed quickly and, it was thought, painlessly. It seemed, in any case, up to date, civilized. (This progressive image is somewhat at odds with the testimony of Willie Francis, 17, who survived a sublethal shock by Louisiana's portable apparatus in 1946. Francis said the experience was in all "plumb miserable." His mouth tasted "like cold peanut butter," and he saw "little blue and pink and green speckles." Added Francis: "I felt a burning in my head and my left leg, and I jumped against the straps." A year later, back in the chair, he was successfully executed.)

The electric chair caught on slowly in the U.S. and not at all abroad. During the 1920s and '30s, the cyanide-gas chamber became state-of-the-American-art. It too was popular only in the U.S. Now there are lethal injections, which are seen as still more "humane." This latest technical refinement, which the European press finds chilling and fascinating, seems sure to remain strictly a U.S. practice. Sums up Notre Dame Theology Professor Stanley Hauerwas: "This search for a humane way of killing is a bunch of sentimental secular humanism. Why do you want it to be humane? To reassure yourself?"

The dilemma of whether to kill the killers comes up in only a small fraction of all U.S. homicides. The criteria for capital murder vary from state to state and even, inevitably, from case to case. In general, there must be "aggravating circumstances." These can be as specific as the murder of a fireman or one by an inmate serving a life sentence; as common as a homicide committed along with a lesser felony, like burglary; and as vague as Florida's law citing "especially heinous, atrocious or cruel" killings. It is estimated that about 10% of U.S. homicides currently qualify, or some 2,000 murders last year. Those killings are the ones the threat of capital punishment is meant to prevent.

The idea of deterrence can be quickly reduced to very personal rudiments: *If I know I will be punished so severely, I will not commit the crime.* The logic is undeniable. Yet in the thickets of real life and real crime, deterrence, while central to practically all punishment, is often very uncertain, and its effect on prospective murderers is especially unclear. Unfortunately, public discussion usually consists of flat-out pronouncements. Capital punishment, says Conservative Commentator William F. Buckley, "is a strong, plausible deterrent." No, declares New York Governor Cuomo, "there has never been any evidence that the death penalty deters." Neither is altogether wrong, but the stick-figure oversimplifications on both sides do a disservice to a complicated question.

The scholarly evidence is not quite as unequivocal as some abolitionists claim. But it does not make much of a case for deterrence. The most persuasive research compared the homicide rates of states that did and did not prescribe the death penalty. For instance, Michigan, which abolished capital punishment in 1847, was found to have had a homicide rate identical to adjacent states, Ohio and Indiana, that were executing. Similarly, Minnesota and Rhode Island, states with no death penalty, had proportionately as many killings as their respective neighbors, Iowa and Massachusetts, which had capital punishment. In 1939 South Dakota adopted and used the death penalty, and its homicide rate fell 20% over the next decade; North Dakota got along without capital punishment for the same ten years, and homicides dropped 40%.

Similar before-and-after studies in Canada, England and other countries likewise found nothing to suggest that capital punishment had deterred murderers any better than the prospect of long prison terms. Used in Britain during the 1950s, a typical "lifer" actually served only about seven years, compared with a much tougher average U.S. "life" term today of 20 years. A comprehensive study in the U.S., by the National Academy of Sciences in 1978, also found that the death penalty had not proved its worth as a deterrent.

Were it not for the work of Economist Isaac Ehrlich, the deterrence debate would be entirely one-sided. Using econometric

modeling techniques to build a "supply-and-demand" theory of murder, Ehrlich argued in a 1975 paper that capital punishment prevents more murders than do prison sentences. Because of the 3,411 executions carried out from 1933 to 1967, Ehrlich speculates, enough potential murderers were discouraged so that some 27,000 victims' lives were saved.

That stunning conclusion drew immediate attacks. Critics, and they are legion, cite a variety of defects: Ehrlich did not compare the effectiveness of the death penalty with that of particular prison terms; his formula does not work if the years between 1965 and 1969 are omitted; and in accounting for the increase in homicides during the '60s, he neglects the possible influences of racial unrest, the Viet Nam War, a loosening of moral standards and increased handgun ownership.

To work at all, deterrence requires murderers to reckon at least roughly the probable costs of their actions. But if a killer is drunk or high on drugs, that kind of rational assessment might be impossible. Passions are often at play that make a cost-benefit analysis unlikely. Most killers are probably not lucid thinkers at their best. Henry Brisbon Jr. *(see box)* may be legally sane, but he is by ordinary standards demented enough to make a mess of any theory of deterrence. Says New York University Law Professor Anthony Amsterdam: "People who ask themselves those questions—'Am I scared of the death penalty? Would I not be deterred?'—and think rationally, do not commit murder for many, many reasons other than the death penalty."

Former Prosecutor Bernard Carey, until 1980 state's attorney for Cook County, favors capital punishment, sparingly used. Yet he says, "I don't think it's much of a deterrent because the kinds of people who commit these crimes aren't going to be deterred by the electric chair." Some might be encouraged. "For every person for whom the death penalty is a deterrent," says Stanford Psychiatry Professor Donald Lunde, "there's at least one for whom it is an incentive." Such murderers, says Amsterdam, "are attracted by the Jimmy Cagney image of 'live fast, die young and have a beautiful corpse.' "

The arguments for capital punishment are usually visceral or anecdotal. Ernest van den Haag, professor of jurisprudence and public policy at Fordham University, says flatly, "Nobody fears prison as much as death." Florida's Governor Graham, who has signed 45 death warrants, cites the case of a restaurant robbery seen by a customer. "Afterward," recounts Graham, "he was the only witness. So the two guys took him out to the Everglades and shot him in the back of the head. If they had felt that being convicted for robbery and first-degree murder was sufficiently different, they might have had second thoughts."

In a sense, death's deterrent power has never really been given a chance in the U.S. Even during the comparative execution frenzy of the 1930s, hardly one in 50 murderers was put to death, a scant 2%. Reppetto estimates that if 25% of convicted killers were executed, 100 a week or more, there might be a deterring effect. But it is unthinkable, he agrees, that the U.S. will begin dispatching its villains on such a wholesale basis. Even at a rate of 100 executions annually, an implausibly high figure given today's judicial guarantees, a killer's chances of getting caught, convicted and executed would for him still be comfortably low: 250 to 1.

Even if executions were on television, there is no guarantee that prospective ax murderers would pay heed. As Camus noted in his 1957 essay against capital punishment: "When pickpockets were punished by hanging in England, other thieves exercised their talents in the crowds surrounding the scaffold where their fellow was being hanged."

But U.S. society is not unprotected just because it lacks weekly or daily executions. "The issue is not whether we slay murderers or free them," notes University of Michigan Law Professor Richard Lempert. "It is whether we send them to their death or to prison for life." Prison is a far more manageable weapon than death, and the U.S. is not at all hesitant to put criminals behind bars: the population there has doubled since 1970, to 400,000. "One trouble with the death penalty," says Henry Schwarzschild, an A.C.L.U. official, "is that it makes 25 years seem like a light sentence."

Opponents of capital punishment feel that prison terms

"I Can't Stop Crying"

At Dunbar High School in Fort Myers, Fla., he was a triple threat: in football, an all-state wide receiver; in basketball, an all-conference playmaking guard; in track and field, a state champion in the 440-yd. run. An honors student, he went on to Edison Community College in Fort Myers but dropped out after 1½ years to enlist in the Army. He was given a medical discharge after 17 months because of attacks of grand mal epilepsy. He married, fathered a son and went back to college, this time in California. His marriage soured, and he returned to Fort Myers, where he sank into alcoholism and despair. Sometime between Oct. 13 and 15, 1973, a woman named Margaret Mears, 68, was raped and beaten to death.

Doug McCray, now 32, had been on a drinking binge and could not account for his whereabouts at the time of the crime when police arrested him for murder six weeks later. The F had matched his palm print with one found in Mears' apartment. Nearly ten years later, McCray says he still does not know whether he is guilty. He has passed two polygraph tests, which prosecutors would not permit in evidence at his trial. An eyewitness who placed McCray in the woman's neighborhood at the time of the slaying later recanted, saying police had coached and coerced him. The physical evidences of rape could not be linked to McCray.

Nevertheless, he now awaits his fate on death row in Florida State Prison at Raiford. McCray looks back in anger: "I feel victimized by the Florida Supreme Court, which waited 5½ years to rule on my case, which granted me a new trial and then abruptly took it away. [A 4-3 decision last March in McCray's favor was reversed six months later when one justice changed his vote without explanation.] I feel victimized by my clemency lawyer, who never even bothered to read the transcript of my trial. I feel victimized by a lawyer who took my mother's few dollars and never came to see me for almost eight years."

Outside observers, including New York *Times* Columnist Anthony Lewis, have rallied to McCray's defense. When a St. Petersburg attorney phoned him and volunteered to help, McCray remembers, "I started to cry. I can't stop crying in this place. It meant so much to me, after all the other things that happened, that this man cared."

McCray lives in a 6-ft. by 9-ft. cell. He and the other 194 inmates on Florida's death row each have a small black-and-white TV. He uses the light from the set to read constantly. "I've read thousands of books. Prison can be as rewarding as college if you actually have a desire to improve your mind." Yet his thoughts always wheel back to the central mystery that has brought him to this place. "The state says it's convenient for me to say I don't remember. But if it were convenient, I could have plea-bargained or made up some alibi. My girlfriend and one of my brothers say I was with them all that night. I wish I knew, even if it meant knowing that I'd done it. Who would want to live after committing such a terrible crime?" Since last fall, McCray has grown progressively more despondent. He now says he will not seek another stay of execution. "I'm tired. I hurt. I just wish to lie in peace. I will allow the state to do what it may.

"I am tired."

without parole would deter as many potential murderers as the death penalty. Says Amsterdam: "The *degree* of punishment is not necessarily a deterrent even to someone who thinks rationally. What deters people from crime is the *likelihood* of getting caught and undergoing punishment." Reppetto agrees: "I always favor something that will get tough with a lot of offenders instead of getting very tough with just a handful."

Two diehard proponents of the death penalty, deterrence hardly matters anyway. Declares Buckley: "If it could be absolutely determined that there was no deterrent factor, I'd still be in favor of capital punishment." Taking the lives of murderers has a zero-sum symmetry that is simple and satisfying enough to feel like human instinct: the worst possible crime deserves no less than the worst possible punishment. "An eye for an eye," says Illinois Farmer Jim Hensley. "That's what it has to be. People can't be allowed to get away with killing." Counters Amsterdam: "The answer can hardly be found in a literal application of the eye-for-an-eye formula. We do not burn down arsonists' houses." The scriptures do preach mercy as well as retribution. Last Saturday, in fact, Pope John Paul II sweetly recommended "clemency, or pardon, for those condemned to death."

The Moral Majority's Rev. Jerry Falwell relies more peculiarly on Christian authority. He claims that Jesus Christ favored the death penalty. On the Cross, Falwell says, He could have spoken up: "If ever there was a platform for our Lord to condemn capital punishment, that was it. He did not."

But was Jesus ever vengeful? Ordinary people are. "Execution is primarily a vengeance mechanism," says Notre Dame's Hauerwas, a pacifist, "but that is not necessarily a bad thing. Vengeance is a way society gestures to itself that justice has forced against injustice." A main point of criminal laws, after all, is to make private feuds unnecessary. "No society should put the burden on me to seek personal retribution," says New York University's Herbert L. London, a social historian. "The state has an obligation not to make me a killer."

During troubled times in the ancient Greek colonies, prominent men would volunteer to be scapegoats. Each was housed and well fed by the authorities, and then, after a year of comfortable

Revenge Is the Mother of Invention

Socrates was lucky. Found guilty of heresy and "corruption of the young," he was condemned to drink a cup of hemlock, a relatively honorable and painless death. By the standards of history, his execution in 399 B.C. was singularly humane.

Not until the Enlightenment, 200 years ago, did societies seriously question the states' right to kill. Until then, the only dilemma had been to find the most ingenious and cruel methods of execution. Boiling, burning, choking, beheading, dismembering, impaling, crucifying, stoning, strangling, burying alive—all were in vogue at various times. The Crucifixion of Jesus Christ was, for its day, only a routine execution.

In ancient China, an occasional penalty was "death by the thousand cuts," the slow slicing away of bits of the body. A 19th century French traveler described an excruciating method in India during the rule of the rajahs: "The culprit, bound hand and foot, is fastened by a long cord, passed round his waist, to the elephant's hind leg. The latter is urged into a rapid trot through the streets of the city, and every step gives the cord a violent jerk, which makes the body of the condemned wretch bound on the pavement . . . Then his head is placed upon a stone, and the elephant executioner crushes it beneath his enormous foot."

What kinds of crime incurred such punishments? Murder and treason have almost always ensured death. Under the Mosaic law, capital offenses ranged from gathering sticks on the Sabbath and adultery to the sacrifice of children to the god Molech. A medieval German code decreed: "Should a coiner [counterfeiter] be caught in the act, then let him be stewed in the pan or a cauldron."

Execution by elephant in 19th century India

England's response to the bewildering social evils caused by the Industrial Revolution was unique even in a world long used to such officially sanctioned slaughter as the Spanish Inquisition, when tens of thousands of convicted heretics were burned. The English meted out the death penalty for more than 200 offenses, including stealing turnips, associating with gypsies, cutting down a tree or picking pockets. "Hanging days" were public holidays, and in 1807 a crowd of 40,000 became so frenzied at an execution that nearly a hundred were trampled to death. Frequently both victims and executioner were drunk, and occasionally the job was botched, with the condemned man being hanged two or even three times. Afterward, the crowds surged toward the corpse, because it and the scaffold were believed to have curative powers.

Death sentences were often arbitrarily applied. The social standing, sex, citizenship or religion of the victims usually determined the degree of horror they would suffer. Death alone was rarely considered a sufficient penalty unless it was preceded by terror, torture and humiliation, preferably in public. One of history's most spectacular executions was that of Damiens, the unsuccessful assassin of Louis XV, in Paris in 1757. His flesh was torn with red-hot pincers, his right hand was burned with sulfur, his wounds were drenched with molten lead, his body was drawn and quartered by four horses, his parts were set afire and his ashes scattered to the winds. The execution was accomplished before a large crowd.

"The more public the punishments are, the greater the effect they will produce upon the reformation of others," declared Seneca in ancient Rome. Over the centuries, many societies came to believe otherwise. The rituals of execution, rooted perhaps in a primitive need for sacrifice, catharsis and revenge, seemed less to cast out the evils of humanity than to feed its blood lust. By the late 18th century, a reform movement had taken hold in Europe, aided by the invention of such "humane" devices as the hanging machine and the guillotine.

Today the death penalty has been abolished in Canada, at least officially in much of Latin America, and in most of Western Europe. In Eastern Europe only Albania has abandoned capital punishment, and it remains in force throughout Asia and the Islamic world. Last year, the world leader in announced executions was Iran, with more than 600.

and black killer, but only 13% when a white had killed a black.

A serious problem is the quality of legal help for murder defendants. The Texas study, conducted by the Governor's judicial council, found that three-quarters of murderers with court-appointed lawyers were sentenced to death, against about a third of those represented by private attorneys. Amsterdam, who has argued eight capital cases before the Supreme Court, contends that "great lawyering at the right time would save virtually everybody who is going to be executed." Scharlette Holdman, director of Florida's Clearinghouse on Criminal Justice, persuades volunteer lawyers to represent death-row inmates. "Every person sentenced to die comes from a case fraught with errors," she says. "If you're adequately represented you don't get death. It's that simple."

Aside from public defenders, there are only about a dozen attorneys working full time on behalf of the condemned. Court-appointed lawyers in most states are not required to stay on a murderer's case after a conviction. "Drunk lawyers, lazy lawyers, incompetent lawyers, no lawyers," says Holdman. "You can have all the correct issues for appeal, but if you don't have a good lawyer to raise them, they don't mean a damn thing." Of 2,000 death sentences imposed during the post-*Furman* decade, about half have been reversed or vacated by the courts.

The careful legal course demanded by the Supreme Court is expensive. Last year the New York State Defenders Association estimated the trial costs for a typical capital-punishment case: a defense bill of $176,000, about $845,000 for the prosecution and court costs of $300,000. The total: $1.5 million, and this before any appeal is filed. Getting a writ before the Supreme Court, just one appellate step, might cost $170,000.

It is often argued, with blithe inhumanity, that there are good fiscal reasons for executing murderers: prison is too costly. It is cheaper to send a student to Stanford for a year than it is to keep a con in nearby San Quentin ($10,000 *vs.* $20,000). But imprisoning one inmate for 50 years would require less than $1 million in New York, not bad compared with the costs of the painstaking appeal process.

Everyone seems afraid of imposing bona fide life sentences, however, and for reasons unconnected with expense. Seventeen states have laws providing for life without parole for those convicted of murdering a robbery victim. Abolitionists say such a sentence is excessive. Statistics show that fewer than 1% of freed murderers kill again after their release from prison, in part because of their advanced age. But if capital punishment is abandoned, it may make sense, politically and emotionally, to permit the public some vengeful satisfaction. Life without parole is unimaginably harsh. But it would be a way occasionally to formalize the revulsion at Charles Manson and his ilk. As it is, Manson will be eligible for parole in 1985.

On death rows, the emotional tone is stuck in some weird, high-strung limbo between hope and hopelessness. Inmates' optimism is the manic wishfulness of losing gamblers. Their fatalism is generally not wise but numb, a brute shrug.

In Illinois, death row is up on a bluff in a sandstone prison opened in 1878. The 49 current inmates have a 19th century landscape artist's view—the Mississippi River and miles of rich farmland beyond—except for the bars and razor wire. Menard Correctional Center (pop. 2,600) is the principal industry of Chester, Ill. (pop. 8,000). The inmates, two of whom are scheduled to be electrocuted this spring, are alone in their cells for at least 21 hours a day. When they are in transit, once a day to the law library and once a day to the recreation room, they are handcuffed. Four of them are "honor residents," permitted to roam unchained in the gray hallways. One of these is John Wayne Gacy, 39, the building contractor and amateur clown convicted three years ago of murdering 33 young men and boys.

Death row is about the same size in Alabama, where 55 men await the chair in Holman. Mitchell Rutledge, 23 years old, I.Q. 84, is among them. "You're just sitting there waiting for somebody to come kill you," says Rutledge of his purgatory, "just like a dog out there in the dog pound." But he does not claim innocence. No: he did kill a man two days before Christmas 1980. Rutledge was doped up and drunk with two friends. One pal brought along a gun, and with it they took off on a joyride in the van of a driver they had robbed of $20 and stashed in the back. It was decided that the victim, Gable Holloway, 28, should die. He begged for his life. But Rutledge, like a zombie, took the pistol and fired. He fired again and again, five shots in all.

On death row, Rutledge, who was orphaned as a teen-ager, is visited only by his lawyer. He seems full of remorse. "I can't make nobody feel sympathy for me for what I did," he says. "But I just want to let everybody know that I'm sorry for what I did."

Texas' needle: last month the first execution by injection

To most people the life of a foolish punk like Rutledge does not count for much. He is defective. His death would not be unbearably sad, but his destruction by the state of Alabama would be: not a large tragedy, not final proof that the U.S. is barbaric, but still better left undone. Executing Rutledge would be a waste, not so much of his diminished humanity, but of society's moral capital. The gunslinging heroes of corny adventure fiction had it right: there are guys not *worth* killing. Let Rutledge sit and stew in his 8-ft. by 5-ft. pen in Alabama. Forget him.

But then blue-eyed, kind-looking Lawrence Bittaker jerks into view, disrupting high-minded composure. Bittaker, 42, is on death row at San Quentin for kidnaping and murdering five teen-age girls. But that is not all. He and a partner raped and sodomized four of them first, for hours and days at a time, sometimes in front of a camera. But that is not all. He tortured some of the girls—pliers on nipples, ice picks in ears—and tape-recorded the screams. But that is not all. The last victim was strangled with a coat hanger, her genitals mutilated and her body tossed on a lawn so that he could watch the horror of its discovery.

If not for the Bittakers (and Judys, Gacys, Mansons, Specks and Starkweathers), the capital-punishment debate might already have been decided in the abolitionists' favor. Bittaker's prosecutor had an apt beyond-the-pale phrase for Bittaker and his partner: "mutants from hell." Can they be human? Without killers in this league, more of America's logic and instinctive sense of mercy could prevail. There might be more electorates like Michigan's and more Governors like New York's who declare that capital punishment is unworthy of a decent society.

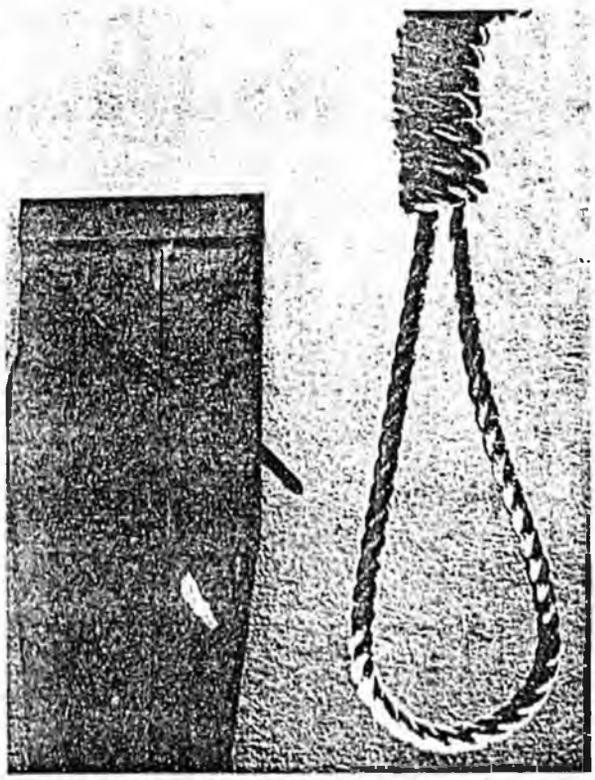
Administration of the death penalty perhaps cannot be made fair enough. As a deterrent, it is probably not necessary. But public passions are inflamed by the inevitable monsters. Civil reason is suspended in the face of what looks like evil incarnate. "It's an emotional issue. It's not a rational issue." Says who? Lawrence Bittaker, an emotional man, whose life is very hard to save. *—By Kurt Andersen. Reported by Lee Griggs/Chicago, B.J. Phillips/Atlanta and Janice C. Simpson/New York*

confinement, taken outside the city and stoned to death. In the view of some death-penalty abolitionists, contemporary executions are not really so different. Each execution is mere "spectacle," according to the A.C.L.U.'s Schwarzschild, "a dramatic, violent homicide under law." Says he: "A society that believes that the killing of a human being is a solution to any problem is deeply uncivilized." Executing murderers does not demonstrate resolute regard for the sanctity of victims' lives. "The marginally demented guy," says Schwarzschild, sees an execution as a prescription, not a threat. "He thinks, 'If the state has a quarrel with Gary Gilmore, it kills him. Then if I have a quarrel with someone, I'll kill *him*.' We say we think human life is sacred. And then to prove that, we kill somebody. That's crazy."

Capital punishment, says L.D.F. Lawyer Joel Berger "attempts to vindicate one murder by committing a second murder. And the second murder is more reprehensible because it is officially sanctioned and done with great ceremony in the name of us all." Not simply just as bad, but worse: this may be the central emotional truth for those who most passionately disapprove of executions. The cretinous killer or the seething psychopath is a loose cannon. But the well-orchestrated modern execution, careful, and thoroughly considered, is horrible because of its meticulous sanity. Executions are worse, in the abolitionists' moral scheme, because the government is always in control; it knows better, but kills anyway.

Proponents see the distinction between murder and state-sanctioned executions in a different light. "One is legal, the other is not," Van den Haag says. "If I take you and put you in a room against your will, it is called kidnaping. If I put on a uniform and put you in a room against your will, it's called arrest."

What was once perhaps the most potent argument against capital punishment arises less often these days. Yet there is a good chance that an innocent man was hanged in England in the 1950s. And in the U.S. today, as death rows swell and the pace of executions quickens, the risks of such a mistake grow. "You know there are going to be some," warns Michael Millman, a California state public defender. Abolitionist Sanford Kadish, a leading authority on criminal law, is less worried. Says he: "The chances are exceedingly remote."



Washington's gallows: only four states still prescribe hanging

Kadish puts his trust in the exhaustive system of judicial review that is now required in capital cases. Today no death-row inmate will be executed until his case has been brought to the attention of his state's highest court, a federal district court, a federal circuit court of appeals and the U.S. Supreme Court. The process is properly slow. In California it takes an average of three years after conviction for a capital case to work its way through the state court system alone. The improbably named James Free, 27, is on death row in Illinois for a double murder. Confesses Free: "I'll use every appeals route I can dream up. That will buy time, maybe five or ten more years."

In 1953, by contrast, a pair of Missouri kidnapers were executed only eleven weeks after their crime. A quarter of the people executed during the 1960s had no appeals at all, and two-thirds of their cases were never reviewed by any federal court.

The historic decision came in 1972, after five years without an execution, and just as fierce public majorities were forming in support of capital punishment. In *Furman* vs. *Georgia*, the Supreme Court nullified all 40 death-penalty statutes and the sentences of 629 death-row inmates, declaring that judges and juries had intolerably wide discretion to impose death or not. This lack of standards made the death sentence "freakishly imposed" on "a capriciously selected random handful" of murderers, wrote Justice Potter Stewart. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." Within a few years, 37 state legislatures had passed statutes designed especially to meet the court's objections.

Most of the new laws went too far, mandating death for certain murders regardless of circumstances, and were overturned by the court. But the statutes adopted by Georgia, Florida and Texas were ruled acceptable. Death is a constitutional punishment, the court decided, not cruel or unusual as long as the judge and jury have given due consideration to the murderer's character and the particulars of his crime, the "mitigating factors."* Against these are weighed the aggravating factors that distinguish capital murder from ordinary homicide.

The court's decisions since have essentially been refinements and tidying addenda. Last January in *Eddings* vs. *Oklahoma*, for instance, the Justices ruled that the judge or jury must consider any mitigating factor the convict claims. Yet to many observers, that sounds like a return toward uncontrollable discretion, the very flaw the court prohibited in 1972. Says former L.D.F. Lawyer David Kendall: "We're right back to *Furman*."

Abolitionists hope so, anyway. They are now arguing a subtle paradox. The prudence and selectivity required by the court, they say, means that executions will be carried out only rarely, and thus will remain arbitrary and freakish, a sort of death lottery. There is always caprice along the way to death row. Prosecutors have great leeway in deciding which homicides to try as capital murders. A killer can be persuaded to testify against an accomplice to save his own life. Brooks was convicted and executed; for the same murder his partner must serve only eight more years in prison.

The Supreme Court's refusal last month to stay Brooks' execution does not give abolitionists much hope for a new landmark ruling in their favor. "We've become technicians," says the L.D.F.'s Berger of his small litigious corps. "The great moral issues have been removed from the legal arena."

At the time of *Furman* it was widely recognized that the system was unquestionably stacked against black defendants, especially in the "death belt" of the South. Some of the racism has been wrung out. Yet clear bias remains, much attributable to prosecutorial choices. A recent study of homicide cases in Houston's Harris County is troubling. In cases where a black or Chicano had killed a white, 65% of defendants were tried for capital murder; only 25% of whites who killed a black or Chicano faced the death penalty. "I don't think it's overt racism," says University of Texas Law Professor Ed Sherman. But prosecutors want to win, and they "perceive that a Texas jury is more likely to give the death penalty to a black who killed a white." A similar South Carolina study found an almost identical pattern: local prosecutors over four years sought death sentences in 38% of homicides involving a white victim

*Of the nine on today's Supreme Court, only Thurgood Marshall and William Brennan believe that the death penalty itself is unconstitutional.

20, April 1981

Pro and Con

Revive the Death Penalty?

YES—"It is morally required as the only appropriate punishment for some crimes"

Interview With Professor Walter Berns

Resident Scholar, American Enterprise Institute

Q Professor Berns, why do you favor the death penalty?

A It is morally required as the only appropriate punishment for some crimes: Treason, particularly heinous forms of murder and particularly heinous rapes, such as the rape of a child or a mass rape of one victim by several individuals. I do not say it ought to be applied to every convicted murderer or even to every convicted first-degree murderer.

Q Doesn't the death penalty verge on the kind of "cruel and unusual punishment" that the Constitution prohibits?

A The men who wrote the Constitution didn't see it that way. The proof is contained in the language of the Constitution itself. The due process clauses of the Fifth and 14th Amendments both speak of the necessity to provide due process when depriving a person of life.

Q Some argue that when society itself takes away life, this undermines the sanctity of life and sets a poor example for citizens—

A On the contrary. The law and the legal community make their respect for life very clear when they threaten to punish murderers by executing them, just as they manifest their respect for property by threatening to jail or fine a person for taking property illegally.

Q Isn't there the danger of punishing the wrong person and then being unable to correct the injustice?

A That possibility always exists, and it becomes a terrible thing when you make a mistake of this sort. Maximum caution must be exercised, and the wording of the statutes ought to embody such caution. A good example is the Florida statute, which makes it absolutely clear to the court that the assessment of the death penalty is—and should be treated as—an extraordinary event.

But in this country, you will search the records in vain for a single example of the wrong person being executed. I know that this has been alleged in the case of Bruno Hauptmann, who was executed in the Lindbergh kidnapping, but I am not persuaded that he was indeed innocent. It has also been alleged in the cases of Sacco and Vanzetti, but I think the evidence clearly shows that Sacco was certainly guilty of those murders and that Vanzetti was executed because he—perhaps foolishly—stood loyally by Sacco and refused to exculpate himself.

Q Is there any real proof that capital punishment deters crime?

A The evidence on this point is inconclusive. For a long time, sociologists in this country made studies that came to the conclusion that the death penalty did not have a deterrent effect greater than that of life imprisonment. But then Isaac Ehlich, an econometrician at the University of Chica-

NO—"Terribly mixed-up people" won't be deterred by the threat of the death penalty

Interview With Patrick V. Murphy

President of the Police Foundation

Q Mr. Murphy, why do you oppose the death penalty?

A Because I don't believe it would have a significant impact on crime. It wouldn't reduce it. Look at the people we've executed recently—like Steven T. Judy, who murdered a woman and then drowned her three children. These are terribly mixed-up people. The threat of the death penalty won't deter people like that from committing murder.

Q Not any of them?

A I've been a policeman for over 35 years, and I've dealt with many of these psychos. Cops always say, "I'd much rather go up against an experienced con than against a psycho, a crazy kid who is going to kill you when you say, 'freeze.'"

When it's all over and you've got the handcuffs on them and they're under control, it turns out that most of them have had horrible lives—they were brutalized as children, their old man was an alcoholic, their mother a prostitute. You try to find out how such a psycho could have put a bullet into that old woman's head, and you find it's because that kid doesn't respect life. He never got much respect for his own life from others.

Q Are you saying that because of mitigating circumstances, that killer you have described does not deserve the death penalty?

A No, that's not what I mean. I don't want to be misunderstood as excusing or condoning crime. Never call me soft on crime. After all, I'm a policeman. What I'm saying is that this kind of person is too far gone to be deterred by the threat of execution.

Q Some argue, however, that the death penalty can have a general crime-deterring effect on everybody by increasing respect for the law—

A If you think so, why not go one step further and make the executions public, as was done in the old days? If you think it is going to deter others, why not do it in a big stadium, in front of a large crowd? I don't think anybody is seriously advocating that today.

Actually, the death penalty may well have the opposite effect of leading to an increase in crime.

Q In what way?

A Violence begets violence. I believe that many policemen lost their lives in this country in the last 10 or 15 years because the police used excessive force, including deadly force, in making arrests. By analogy, I think that when the state applies the death penalty, this supports violence in a way which tends to increase violent crimes.

Q It is often argued, though, that there was less violent crime

go, examined the question with different statistical techniques and came to the conclusion that one execution may—and I emphasize the word *may*—deter as many as eight murders. That conclusion gave rise to a tremendous controversy, and that is where matters now stand.

My argument for the death penalty is not based on the claim that it necessarily reduces the number of murders. I do think, however, that it has a general deterrent effect on crime by promoting law-abidingness.

Q How do you mean?

A Let me illustrate with an example. What is the proper punishment for someone like the Nazi war criminal Adolf Eichmann, who was hanged? You don't punish an Eichmann because you want to deter others. It would be foolish to think you could do that. You surely don't punish him because you want to rehabilitate him. You don't punish him because you want to incapacitate him. After all, he no longer represents a present danger. What that leaves is retribution, which is indeed an altogether proper purpose of punishment. It's altogether proper to pay criminals back, and how do you pay back someone like Eichmann except by putting him to death?

At the sight of crime, law-abiding citizens feel—and ought to feel—a righteous anger. That kind of anger is absolutely essential for a decent, just society. Like love, and unlike greed, for example, anger is a passion that can reach out to other people. It can be a manifestation of caring for other people. We'd all be lost if everyone reacted as people did in the case some years ago of a woman who was screaming because she was being mugged and murdered: No one even bothered to pick up the phone and call the police.

Righteous anger should be satisfied by punishing the criminal. In this way, by rewarding it, you may promote law-abidingness, which is a general deterrent to all kinds of crime. And in the case of particularly heinous crimes, the anger is rightly so intense that only punishment by death will satisfy it.

Q Could the mandatory death penalty backfire—as in the case of a kidnapper who, knowing he faces the electric chair anyway, might decide to murder the only witness to his crime?

A Yes, that could conceivably happen. On the other hand, there is the case of the inmate serving a life sentence who, knowing he cannot be executed, might decide to murder a guard or a fellow prisoner.

Q Do you think that the mandatory death penalty might sometimes make a jury unduly reluctant to convict a guilty person?

A I'm not sure that the death penalty has any more effect in this regard than another drastic form of punishment, such as life imprisonment.

Q Has there been a movement away from the death penalty in the Western World?

A Yes, but on this point there has been a split between the sophisticated intellectual and the man in the street. All the polls show that the professors want to get rid of the death penalty and the people want to keep it. The law is the embodiment of our morality, of our sense of right and wrong. And, in the last 30 years, respect for the law has declined markedly. ☐

at the time when the death penalty was being more widely applied—

A I don't buy that. It's like arguing that since there was less crime during the Depression, it follows that poverty and unemployment have nothing to do with crime. There are factors other than lack of the death penalty that account for the recent rise in crime. The easy availability of handguns—50 million of them—is at the heart of the problem. And the death penalty won't help resolve it.

Q The Bible speaks of "an eye for an eye and a tooth for a tooth," which implies that the punishment should fit the crime. In the case of particularly heinous crimes, wouldn't that call for the death penalty?

A Well, the Catholic bishops of this country have come out against the death penalty. So have the bishops of Italy. So have many Protestant leaders.

Of the Western European countries, only Spain and France still resort to executions.

Q Some argue that life imprisonment is often a more cruel form of punishment than death. Some inmates have said they would prefer death—

A Yes, I know some of these fellows have said they wanted to die. But I still would prefer not to have the state engage in executions. You know, we're all human, and sometimes we're liable to make a mistake and execute the wrong person. And that is something we can never correct.

Furthermore, if you look at the history of the death penalty in this country, you'll find that its application has been arbitrary, capricious and discriminatory.

Q In what ways?

A The poor and minorities tend to be overrepresented on death row. Blacks who kill whites are overrepresented in relation to blacks who kill blacks. That tells us something about the way the system works.

People who can afford expensive lawyers can beat the system when it comes to the death penalty as well as other kinds of punishment.

Also, I'm a bit of a cynical New York cop. I have found in the weeds the bodies of mob guys bumped off by other guys in the mob. Those are the coldest, most calculating kinds of murderers—the mob hit men. Their crimes are well planned, very hard to detect and witnesses don't talk, so those are not the people who get executed for murder.

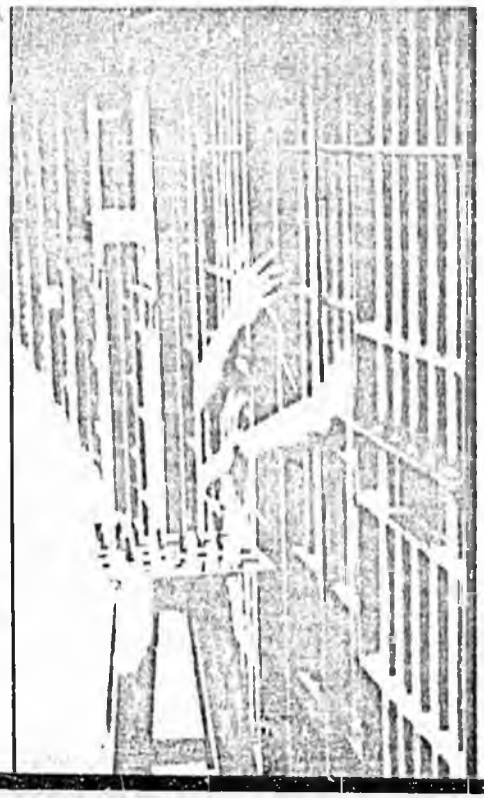
The ones who do get executed are often pathetic, mentally defective people, or are people who killed a wife, a husband, a lover in the heat of passion.

Q What about somebody who is already serving a life sentence and who murders a prison guard? Wouldn't the death penalty be the logical punishment for him?

A You're kidding yourself if you think that by executing one of those types you are going to have a peaceful prison. Those types really place no value on their own life. I'd rather concentrate on preventing that kind of occurrence through reforming our prisons, which are understaffed and overcrowded boiling pots.

How do we deal with crime? I'm looking for the right answers—but I honestly don't believe the death penalty is one of them. ☐

Death-row inmates in a Texas prison play a game of chess between their cells.



America's Inability to Resolve the Cap

COL. I COL. II COL. III

Last of a series

By Phil McCombs
Washington Post Staff Writer

When American University professor Robert Johnson decided last fall to teach a course on the death penalty, he was amazed that 75 students signed up—more than he's ever had in a class. A poll found they favored the penalty 49 to 31 percent with the rest undecided.

Johnson saw it as his job—and moral duty—to change that.

"Death should require absolute guilt on the part of the offender and absolute innocence on the part of the society," he said. "Violence is a social product. . . . Today's capital offenders are invariably drawn from the ranks of the underpriviledged and inadequate. . . . Each and every one of these persons can point to some mitigating circumstances that relieve them of some culpability for their crimes and partially implicate society in their actions."

Like Johnson, most academics and the college-educated oppose the penalty, but polls indicate that Americans as a whole strongly support it.

"Liberals generally feel guilty," said Ernest van den Haag, a Fordham University law professor and conservative theorist. "They think that somehow it's their fault that crimes are being committed. . . . Intellectuals belong to a class that is not greatly endangered by murder. . . . They can afford to be terribly humanitarian . . . People who are less educated and have less money are endangered by violent crime."

America's debate on the death penalty encompasses a wide range of moral, legal and political questions of the sort that seem calculated to raise ideological temperatures on both the left and right. Some of the issues, such as whether the penalty deters criminals, have spawned intricate scholarly analyses; others, such as why the poor are executed with disproportionate frequency, raise painful sociological questions. Finally, there is the simple, awesome question of whether it is ever right to take a human life.

Confronted with questions of such magnitude, the nation's political and judicial systems have been unwilling or unable to definitively resolve the nation's capital punishment dilemma. There is little evidence that this will change soon even though six years ago the U.S. Supreme Court declared the death penalty constitutional and 35 state legislatures passed new death statutes based on the high court guidelines.

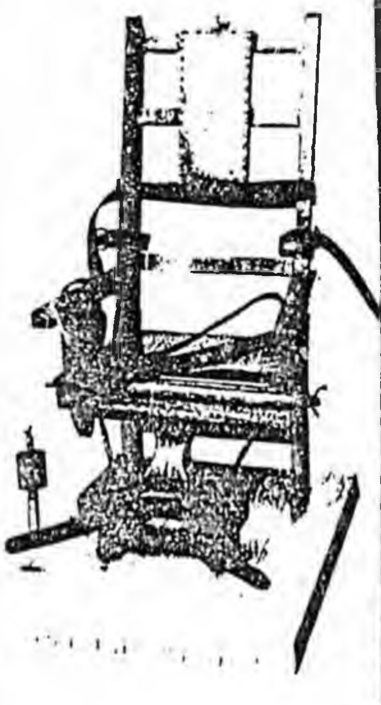
While the future of the penalty remains in limbo, its pros and cons are argued by legal scholars, philosophers, law enforcement officials and social scientists as well as ordinary citizens. The debate can be cool and intellectual, with complex arguments and empirical research, or highly emotional, drawing on deeply held feelings of right and wrong. For the most part, the debate "has been waged on moral grounds," wrote Supreme Court Justice William J. Brennan Jr. "The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death."

For Henry Schwarzschild, head of the American Civil Liberties Union capital punishment project, the answer is an emphatic no: "Society should not be in the business of killing human beings . . . God knows what [murderers] deserve. The question is not what they deserve, it is what we are entitled to do to each other . . . We have seen in the 20th century states shed torrents and rivers of blood. We create political institutions to protect and enhance human life, not to kill . . . People learn the lesson from executions that killing somebody is an acceptable answer to some problems . . . No society that believes that can consider itself civilized."

The Supreme Court and the D

1972 Decision

Justice Thurgood Marshall, citing evidence that the death penalty does not deter, wrote that it is "morally unacceptable to the people of the United States at this time in their history" . . .



share the earth with you. This is the reason, and the only reason, you must hang."

Schwarzschild called the Berns argument in favor of retribution—and by extension the Arendt argument—"deeply dangerous" and "prefascist."

"I really do take offense at that," said Berns. "Does that say the U.S. is a fascist country in its history when it executed criminals? Was Israel fascist when it executed Eichmann? . . . Was Abraham Lincoln, who signed 262 death warrants, fascist?" Berns said his support of the penalty is contingent on its being applied only to the worst criminals without racial discrimination.

"The thought that murderers are to be given as much right to live as their victims oppresses me," wrote van den Haag. "Never to execute a wrongdoer, regardless of how depraved his acts, is to proclaim . . . no human being can be wicked enough to be deprived of life. Who actually can believe that? I find it easier to believe that those who affect such a view suffer from a failure of nerve."

Johnson, the American University professor, said the ultimate penalty should be life in prison because it "leaves open the door for mercy. You can always reconsider [if there are] dramatic and enduring changes of character . . . or new evidence." And Johnson argues that the conditions on death row itself are so painful as to constitute cruel and unusual punishment.

In its 1976 landmark decision upholding the constitutionality of the death penalty for murder, the U.S. Supreme Court specifically endorsed retribution as "an expression of society's moral outrage." The lead opinion said while this "may be unappealing to many, . . . it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs. . . . The decision that capital punishment may be the appropriate sanction

curred accidentally as the offender fled during a robbery in a state where 298 of the 366 people executed since 1930 were black.

Two justices, William J. Brennan Jr. and Thurgood Marshall, declared the penalty unconstitutional under any circumstances. "The calculated killing of a human being by the state involves, by its very nature, a denial of the executed person's humanity," wrote Brennan. Marshall cited evidence that the penalty doesn't deter and said, "It is morally unacceptable to the people of the United States at this time in their history."

The decision invalidated death laws of 41 states, the District of Columbia and the federal government and took more than 600 off death row.

In response, 35 state legislatures and Congress drafted new death laws. Polls showed increasing concern with crime and support for the penalty.

In its landmark 1976 decision, the court approved, by a 7-to-2 majority, death-for-murder laws in Georgia, Florida and Texas drafted in response to its 1972 decision. The new laws provided for "guided discretion" in capital sentencing. Factors of aggravation and mitigation would be considered in special sentencing hearings and later reviewed by higher courts to safeguard against prejudice.

"It is an extreme sanction, suitable to the most extreme of crimes," said the lead opinion by Justices Stewart, Lewis F. Powell Jr. and John Paul Stevens. ". . . The concerns expressed in [the 1972 decision] can be met by a carefully drafted statute that [focuses] the jury's attention on the particularized nature of the crime and . . . individual defendant . . . In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence."

Concurring, Justices White and William H. Rehnquist and Chief Justice Warren E. Burger scolded opponents of the penalty for

Exactly the opposite, wrote Walter Berns, author of "For Capital Punishment: [illegible]e and the Morality of the Death Penalty," [illegible]e execute the worst criminals "out of moral necessity . . . We want to punish them *to pay them back* [and by doing so] we demonstrate that there are laws that bind men across generations [and] nations. . . . The criminal law must . . . be made awe-inspiring. . . . It must remind us of the moral order by which alone we can live as *human* beings. . . . To punish criminals, even to execute them, is to acknowledge their humanity . . . as responsible moral beings."

Perhaps nothing illustrates so sharply the difference between these two as their views of Ismel's capture, trial and execution in 1961 of former SS Lieutenant Colonel Adolf Eichmann, who sent millions of European Jews to their deaths. Schwarzschild, a Jew who escaped Nazi Germany at 14, adamantly opposed the execution. Berns said justice demanded it, and it was the passion of Nazi-hunter Simon Wiesenthal who made him realize the moral necessity of retribution.

In many ways, the Eichmann case is the ultimate test for an opponent of the death penalty—like asking, on a larger scale, if that opponent would still oppose the penalty for someone who had brutally raped and murdered his wife and 3-year-old daughter. Eichmann provides the "supreme justification of the death penalty," wrote Hannah Arendt in her book, "Eichmann in Jerusalem: a Report on the Banality of Evil." She argued that the justice of retribution for the crime of mass murder might have been better understood had the judges simply told Eichmann:

". . . We are concerned here only with what you did, and not with the possible non-criminal nature of your inner life and of your motives or with the criminal potentialities of those around you. You told your story in terms of a hard-luck story [but] there still remains the fact that you have carried out . . . a policy of mass murder . . . And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to want to in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

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While philosophers have struggled with the moral implications, the courts have engaged in a painstaking effort of their own to reach a consensus on capital punishment and when, if ever, it was justified.

In 1636 in New England the death penalty was imposed for idolatry, witchcraft, blasphemy, assault in sudden anger, sodomy, buggery and adultery, among others. By 1850 abolitionist sentiment was strong, and gradually laws making death mandatory for specified crimes were eliminated. Many states dropped the penalty entirely.

By the 1930s, the high point of executions in America, there were 167 executions a year, an average that dwindled to 72 a year in the 1950s. Executions ceased in 1967 as officials waited to see what the Supreme Court would do.

For years the court had avoided the issue entirely. Then in 1972, faced with the increasingly urgent need to provide some guidance, it finally spoke.

In a narrow 5-to-4 decision the court declared the penalty was being administered in an unconstitutional way because juries operating with "untrammeled discretion" were handing it out in an arbitrary, discriminatory, even "freakish" way.

Receiving a death sentence was "cruel and unusual in the same way that being struck by lightning is cruel and unusual," wrote Justice Potter Stewart. Byron R. White added, "There is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." William O. Douglas said the death laws were "pregnant with discrimination" against the black and poor. "One searches our chronicles in vain for the execution of a member of the affluent strata of this society."

One of the court's key concerns in 1972 was possible racial discrimination. The three cases that brought on the decision—a murder and a rape in Georgia and a rape in Texas—all involved black offenders and white victims. The murder, a shooting, had occurred during a robbery.

arguing that no matter how effective the death penalty may be as a punishment, government created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law." The penalty is necessary, they said, even though "mistakes will be made and discriminations will occur."

At the same time, the court declared mandatory death laws unconstitutional because they treat "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass."

States like Virginia that had passed mandatory statutes after 1972 quickly redrafted them along "guided discretion" lines. Virginia's new law, patterned after the new Georgia law approved by the Supreme Court in 1976, went into effect in 1977, Maryland's in 1978. The District never drafted a new statute and in 1980 killed the old one. The last execution in a local jurisdiction was in Virginia in 1962.

After the 1976 decision the "capital punishment bar," as the small but devoted band of lawyer-opponents to the penalty is known, switched to delaying tactics and began filing every possible appeal in every death case. Four executions have taken place, but a de facto moratorium on executions in America now exists and the United States in effect has joined most Western nations in either dropping the penalty or letting it fall into disuse.

No one knows how long this may last. American juries continue to send 150 murderers a year to death row, where there are already 1,009 residents, according to the NAACP Legal Defense and Educational Fund Inc.

"My own armchair reading is the public feels comfortable in having [the death penalty] on the books," said Washington attorney David E. Kendall, who has handled death cases, "but there is an enormous inertia and resistance to actually executing people."

Scholars who search for the reasons behind the strong public support for the penalty believe that people are concerned by crime and that they hope the penalty will deter criminals. "I think crime in the streets and law and order have become a genuine concern to a lot of people," said Tufts Uni-

Col. I Col. II Col. III

eath Penalty

1976 Decision

Justice Potter Stewart, in the lead opinion w'in justices Lewis F. Powell Jr. and John Paul Stevens, said that the death penalty is "an extreme sanction, suitable to the most extreme of crimes" . . .

versity philosophy professor Hugo Adam Bedau, editor of "The Death Penalty in America."

Col. IV

Does the death penalty deter criminals?

Ever since the 18th century man of letters Dr. Samuel Johnson observed pickpockets at work in a crowd watching a pickpocket hang, researchers have faced the problem that it is clear when the penalty fails to deter but not when it succeeds.

Early studies by Thorsten Sellin, professor of sociology emeritus at the University of Pennsylvania, found states with the penalty had as many murders and murderous assaults on police as states without it. Murder didn't decrease when states instituted the penalty or increase when they abolished it.

Executions may even encourage murder, said William J. Bowers and Glenn L. Pierce of Northeastern University's Center for Applied Social Research. Studying a 56-year period in New York, they found two additional murders after each execution and decided executions send messages of "lethal vengeance."

But a 1975 analysis by Isaac Ehrlich found each execution in America may have saved eight lives by deterring potential murderers. While Bowers and Pierce said the study has been called into question by other research, the Supreme Court conc'ed death "undoubtedly is a significant ...erent" for "many" potential murderers.

"No other punishment deters men so effectually from committing crimes," said an early expert quoted by the Supreme Court. "This is one of those propositions which it is difficult to prove. . . . It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction."

State legislators depend on such experience in passing death laws, and Justice White wrote that their actions should not be viewed "as some form of vestigial savagery or as purely retributive [but as] solemn judgments, reasonably based, that imposition of

clearly racist in a vast majority of cases. Gary Kleck, writing in the American Sociological Review, found "huge racial differentials" in death sentences handed out to blacks and whites for rape because the penalty was used to punish blacks who raped whites in the South. There have been no executions for rape outside the South or border states since 1930, and today death for rape has virtually disappeared. Only two persons are now on death row for rape, and their victims were children. In 1978 the Supreme Court outlawed the penalty for rape of an adult woman.

Studying the racial characteristics of those who received the death penalty since 1930, Kleck found that in 25 of 38 years examined, white murderers were more likely to receive death sentences than black murderers. For the period as a whole, he put the chance of a black convicted murderer receiving a death sentence at .972 percent versus 1.043 percent for a white murderer.

In the South, however, he found blacks more likely to receive death sentences for murder—but only prior to 1950; after that, the rate was the same for both black and white murderers.

Outside the South after 1950, however, white murderers had a higher chance of being sentenced to death than black murderers.

"Every single study consistently indicating discrimination toward blacks was based on older data from southern states," he wrote. ". . . The evidence considered as a whole indicates no racial discrimination in use of the death penalty for murder outside the south [prior to 1950]."

Bowers and Pierce, the Northeastern University social scientists, studied death sentences imposed between 1972 and 1977 and found another kind of discrimination: Blacks who killed whites were far more likely to receive death sentences than killers in any other racial combination.

Writing in the journal Crime & Delinquency, they reported that in Georgia they found a black 33 times as likely to get death for murdering a white as for murdering another black. The same black murderer was also substantially more likely to get death than a white murderer, regardless of whether the white murdered a black or white.

On the other hand, a black who murdered someone of his own race was substantially less likely to get death than a white murderer regardless of the race of his victim.

Bowers and Pierce attributed their findings to the "racist tenet: that white lives are worth more than black lives," although this would not appear to explain why a white was substantially more likely than a black to get death for murdering a black.

Kleck, who also noted that blacks were "devalued" as crime victims, added that "white paternalism," or the view that blacks are "child-like creatures who were not as responsible for their actions as whites," may help explain why a white murderer would be held more accountable than a black murderer in the case where the victim was a "devalued" black.

Like Kleck's, the Bowers-Pierce overall data, if not broken down by race of victim, actually shows white murderers in Georgia taken as a whole twice as likely to be sentenced to death as black murderers.

That is because there were in Georgia almost twice as many black-on-black murders—the combination that got by far the lowest death-sentence rate—as all other murder combinations taken together.

Bowers and Pierce think the court needs to consider their research because "either discrimination by race of offender or disparities of treatment by race of victim of the magnitudes we have seen here are a direct challenge to the constitutionality of the [new] capital statutes."

Supreme Court's Death-Row Dilemma

New confusion over the death penalty spread in early October when a convicted murderer received an 11th-hour reprieve as he lay strapped on a death bed awaiting a lethal injection.

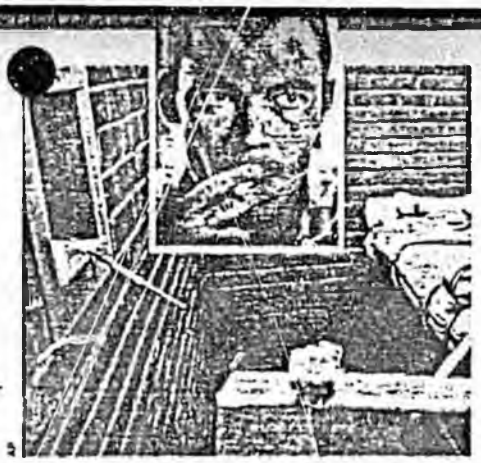
U.S. Supreme Court Justice Byron White granted the unusual stay October 5 just as a saline solution was being pumped into James Autry's veins at the Texas penitentiary in Huntsville to prepare him for execution. Only two days earlier, White was part of the Supreme Court majority that denied Autry's appeal in a 5-to-4 ruling.

The swift turnaround astonished even the condemned man's attorney, Stefan Presser of the American Civil Liberties Union, who said: "On Monday, because he didn't invoke the right words and the right theory, the Court was going to let him die. Then he said the right words, and the Court gave him life."

Autry, 29, was convicted of killing a store clerk in 1980 after she asked him to pay for a six-pack of beer.

Meanwhile, the fate of 1,230 convicts on death rows across the country remained as murky as ever, with prosecutors and defense lawyers alike puzzled over what to do next.

"I don't know how to proceed," said Alan Dershowitz, a Harvard law professor who represents three condemned inmates. He termed the Justices' handling of the Autry case a "scandalous spectacle of ineptitude."



Autry was strapped and awaiting lethal injection when reprieve came down.

Paul Richwalsky, a state prosecutor in Louisville, said: "We as prosecutors look to higher courts, especially the Supreme Court, for guidance. What kind of barometer is this?"

Justice White's switch came after Autry's new lawyers raised a fresh constitutional issue—whether a state must review each death sentence to make sure it is in line with others imposed for similar crimes. The Court hears arguments on that question—raised in a California case—on November 7.

The Justices have made numerous attempts in recent years to clarify how the death penalty can be imposed. But each time they dispose of one issue, defense lawyers raise a new one. Result: Only eight death-row inmates have been executed since 1967. □

Current Quotes

"A very keen sight and sharp pen when it comes to the power of evil and baseness of human beings."
The Nobel Committee naming Britain's William Golding, 72, author of *Lord of the Flies*, as winner of the Nobel Prize for Literature.

"Today's Moral Majority can become tomorrow's persecuted minority."
Senator Edward Kennedy (D-Mass.) reminding a Moral Majority audience of the importance of separation of church and state.

"When comfortable people, relaxing at their country clubs, deplore the alleged decline of the work ethic, they should not be taken too seriously."
AFL-CIO President Lane Kirkland addressing the labor group's convention in Hollywood, Fla.

"Instead of a mean, lean department, we've created a soft, somnolent fatso."
Senator John Danforth (R-Mo.) criticizing a proposed department of international trade and industry to replace the Commerce Department.

"News people are being asked to put 5 pounds of news in a 1-pound package. You can't do that without serious damage."
Retired CBS anchorman Walter Cronkite telling broadcasters that their news stories don't provide enough information.

"This goes a long way toward bringing St. Louis into the 20th century."
St. Louis Mayor Vincent Schoemehl on a new law letting downtown stores open on Sunday for the first time since 1825.

Grass-Roots War Over Gun Control

Firearms advocates and critics are fighting a touch-and-go battle over gun control that stretches from city halls and state legislatures to Congress and the Supreme Court.

The Justices on October 3 left intact a handgun ban in the Chicago suburb of Morton Grove, refusing to consider arguments that the measure violates the constitutional right to "keep and bear arms." The action removed a cloud over antigun measures on the books in several Illinois cities, and now towns across the country are expected to consider similar laws. Other developments cited by gun-control advocates—

- A decrease by one third in Chicago gun murders in 1982, the same year the city barred new handgun registrations.
- A new law in Washington State that lengthens a waiting period to buy a pistol and lets police seize guns from persons accused of domestic violence.
- A federal judge's ruling that gun manufacturers can be held liable for damage that results when their products fall into the wrong hands.

Opponents of gun control, led by the National Rifle Association (NRA), also claim a string of new victories headed by last fall's defeat at the polls of a handgun-registration proposition in California. On the same day, Nevada and New Hampshire approved measures guaranteeing citizens' right to own guns, and Utah residents will vote next year.

Several cities now have ordinances that require residents to own weapons, although the laws are regarded as symbolic and are not enforced.

Only hours after the Supreme Court's Morton Grove decision, trustees in the Chicago suburb of Skokie voted 4 to 3 against banning handguns. Member Frank McCabe, who voted no, said passing an ordinance "with no intent to enforce it causes contempt for the law."

The next big local skirmish is expected in Ft. Lauderdale, Fla., where county officials are considering several gun-control measures.

The U.S. Senate is studying a proposal to relax federal curbs on gun sales—a plan praised by the NRA as an aid to hunters and collectors but assailed by critics who say it would allow criminals to obtain guns by mail.

With firearms used in 60 percent of America's murders, both sides say gun control will be hotly debated in 1984 election campaigns. Said the NRA's Andrew Kendzie: "It will always be one of the country's most volatile issues." □

AMERICAN JUSTICE

In the wake of a serious crime, justice is swift: Police sift the clues and track down the culprit, the prosecutor throws the book at him; judge and jury do their duty, and the criminal slinks off to prison—a social menace no more.

Then the credits roll and the television show is over. Americans turn their attention back to the real world, where things are different.

The real world, where—

- In 4 out of 5 cases of serious crime, there is not even an arrest, let alone a conviction.
- Of the cases in which arrests do occur, some are dropped, and just about half end in guilty pleas or convictions.
- One lawbreaker might draw a stiff penalty, another a light penalty for the same offense.
- Most convicts serve only a fraction of their prison terms before being put back on the street, and many of them return to crime.

The rate of violent crime has more than quadrupled during the last two decades—creating unprecedented strains. Police and prosecutors are overworked. Courts are staggering under heavy backlogs. Prisons are bursting with surplus inmates. The result: Bitter controversy engulfs almost every method by which our society struggles to cope with lawlessness. Americans are angry. Many of them believe that the institutions of law and order somehow have come unglued, exposing them and their families to a growing risk of death, injury or property loss at the hands of thugs.

Civil proceedings are arousing fears as well. An explosion of lawsuits has made people feel more and more vulnerable to a wrathful passer-by, customer, neighbor, employe, business partner—perhaps even one's own child. The crush of litigation also has quickened concern about the fees and ethics of lawyers, whose ranks have swollen fast.

Yet how the justice system works—how it *really* works—remains a mystery to many. People's "knowledge" often boils down to a stream of half-truths and misimpressions gained from Hollywood, TV and newspapers. This prompted *U.S. News & World Report* to prepare this 24-page section to help readers understand procedures that are designed not only to punish the guilty but also to protect the innocent. □

A Quiz of Your Legal IQ

Here is a simple quiz to measure how much you know about the U.S. system of justice (the answers appear below).

1. How much time does the average police officer spend dealing with crime?
A. 75 percent. B. 15 percent. C. 40 to 50 percent.

2. The average salary of a police officer after five years on the force is:
A. $13,000. B. $22,000. C. $18,000.

3. The job of a grand jury is to:
A. Weigh the defendant's guilt or innocence. B. Determine whether inmates get parole. C. Decide whether a case goes to trial.

4. How many persons slated for trial on serious criminal charges plead guilty?
A. 60 percent. B. 10 percent. C. 80 percent.

5. The average time served in prison by a person convicted of a felony—a serious crime—is:
A. 26 months. B. 6 months. C. Between 5 and 6 years.

6. How many appeals are filed with the Supreme Court each year?
A. 750. B. 5,300. C. 1,500.

7. How may federal judges be removed from office?
A. Impeachment and conviction by Congress. B. Supreme Court order. C. Dismissal by the President, with Senate consent.

8. Which constitutional amendment protects citizens against unreasonable searches?
A. Fourth Amendment. B. First Amendment. C. Fourteenth Amendment.

9. Junior attorneys in law firms are paid an average salary of:
A. $15,900. B. $35,200. C. $26,600.

10. How many civil suits are brought annually in the United States?
A. About 1 million. B. Almost 37 million. C. More than 12 million.

11. Which side wins most often when a civil suit is tried?
A. The plaintiff—the person suing—wins 80 percent of the time. B. The defendant is victorious in 68 percent of cases. C. Each side wins about half the time.

12. The standard used by juries to decide a civil case is:
A. The preponderance of the evidence. B. Guilt beyond a reasonable doubt. C. The reasonable-man standard.

13. In most small-claims courts:
A. Lawyers are required to reduce their fees. B. Disputes under $700 are tried. C. Written evidence is excluded at all times.

ANSWERS
1. C. 2. B. 3. C. 4. C. 5. A. 6. B. 7. A. 8. A. 9. B. 10. C. 11. C. 12. A. 13. B.

[illegible]

[illegible]

490,000 officers, plus 210,000 support employes. Of this total, 525,000 work for local governments, 100,000 for states and 75,000 for the U.S. government. Average starting salary for police officers is $14,300; after five years, $18,000.

Cost to taxpayers: [illegible]

[illegible]

284,000 guards, probation and parole officers and others. Of these, 12,000 work for U.S., 163,000 for states and 109,000 for local governments. Typical prison guard is paid about $16,000.

Cost to taxpayers: [illegible]

[illegible]

28,000 judges, plus 141,000 clerks, bailiffs and other court employes, handle civil and criminal cases. About 1,400 judges work in federal courts, 8,000 in state courts and 18,600 in local courts. Average pay for state trial judges is nearly $50,000.

Cost to taxpayers: [illegible]

[illegible]

25,500 lawyers, including 10,000 prosecutors and 7,500 public defenders, plus 62,000 investigators and other aides. Of the total, 8,500 work for the U.S., 24,500 for states and 54,500 for local governments. Prosecutors earn average of $25,000, public defenders $20,000.

Cost to taxpayers: [illegible]

[illegible]

32,000 employes of training, planning and construction units that affect all segments of the justice system.

Cost to taxpayers: [illegible]

[illegible]

The Complex Maze in Criminal Courts

"Adversary justice" pits prosecution against defense in a war that is governed by intricate rules. For a guided tour of the battlefield—

When a person is arrested for a serious crime—and the handcuffs snap shut around his wrists—he enters a legal maze with many possible exits.

He may find one within hours and quickly be back on the streets. Or, if he is one of the unlucky few, he may never know freedom again.

Critics seethe with indignation over procedures that they believe give the guilty too many loopholes for escape. "It's difficult to explain to crime victims the weaknesses and inefficiencies of our system," laments Philadelphia's district attorney, Edward Rendell.

Most defenders acknowledge that the process has its flaws, which smart lawyers and jailhouse-wise hoodlums feel no compunction about exploiting. But they contend that when analyzed step by step the system makes more sense than critics admit.

After an arrest, the first milestone is a hearing to determine whether the *defendant* will be released until trial or held in the county jail. The judge may free the person on his own *recognizance*, a written pledge to appear for trial, or may require deposit of bail that is forfeited if the accused fails to show up in court.

In about half the states, the judge can deny bail altogether if the suspect has a criminal record or seems to be a danger to the community. In the rest of the states and in federal courts, the law allows denial of bail only when there is substantial doubt that the person, if freed, will return for trial. Many judges, however, faced with a defendant perceived to be a social menace, do not hesitate to set bail so high that the suspect cannot pay it.

Nearly 90 percent of those released do show up for trial—but more than 10 percent of them commit new crimes in the meantime.

The DA weighs in. Police lay out the evidence they have for the district attorney and his assistants, who decide whether to prosecute. The basic question these lawyers ask: Is there enough proof to convince a jury of guilt "beyond a reasonable doubt"—the test that prevails in criminal courts?

In a significant number of cases, the answer is "No" and the charges are dropped. Even if a case is acceptable on legal grounds, prosecutors may scuttle it because of a backlog of more-important prosecutions. The majority of law violations in the U.S. are not crimes of violence but lesser offenses such as vandalism and public drunkenness, which are often referred to social-service agencies instead of the courts.

When prosecutors decide to take a case to trial, in about half the states they file an *information* with the court stating the charges.

Defendant and his lawyer face the judge. Fully 80 percent of jury trials are averted or cut short by guilty pleas.

In the rest of the nation, serious criminal accusations are forwarded instead to a panel of six to 23 citizens chosen to sit for periods of several months as a *grand jury*. These sessions are closed to the public. The grand juries hear government lawyers present documents or testimony from major witnesses.

Unless called as a witness, the defendant never sets foot in the grand-jury room and is not permitted to offer a defense. Reason: The grand jury does not seek to determine the truth of the charges, but only whether there is enough evidence to warrant a trial.

If the answer is "Yes," the grand jury votes a *true bill*—an indictment laying out the charges. In theory, this decision is made independently. But most experts agree that with rare exceptions grand juries follow prosecutors' cues.

By this time, the accused more often than not already will have a lawyer—a right of every person charged with a crime. Three fourths of all defendants can't afford to hire an attorney. They rely on publicly paid lawyers who either work full time as public defenders or are appointed by the courts for such work part time.

While the estimated 25,000 lawyers in private criminal-law practice can select their own clients, the typical public defender is overburdened. Often young lawyers no more than a few years out of law school, they grapple with 400 cases a year, or more than one a day.

Truth on trial. The role of defense lawyers in U.S. courts is just as crucial as that of prosecutors.

In many countries, the questioning of witnesses in criminal proceedings is handled by judges or some other neutral official, and guilt and innocence are decided by a judge or panel of judges.

U.S. trial procedures are built on a different premise: That the facts are brought out best—and justice best served—by pitting opposing counsels against one another before a neutral judge and jury. This *adversary system* has defects. For one thing, the lawyers are not always equal in talent. One attorney's superior trial tactics may overshadow the substance of the case.

What's more, appeals to emotion and the withholding of evidence from the other side until the last possible moment are commonplace. Nicholas Kittrie, a professor of law at American University, says "the surprise witness, document or demonstrative evidence" often influences a jury's findings.

Still, most experts agree with Prof. Alan Dershowitz of Harvard Law School that the adversary system "generally produces accurate results" while safeguarding the rights of the accused.

However a case comes out in the end, the defense starts at a disadvantage. "The prosecution has all the police reports, laboratories and computers," says Rick Wilson of the National Legal Aid and Defender Association. "That leaves the defense in the dust."

Squaring off. A defendant's first chance to rebut the charges comes at the *preliminary hearing*, a court session held soon after an indictment. The prosecution presents evidence aimed at establishing a basis for the case to go

Arrest. After a suspect is apprehended, prosecutor and grand jury decide whether the case should go to trial.

Selection of jury. Both prosecution and defense probe the attitudes of jurors carefully before accepting them.

to trial. The defense may make a motion that evidence be excluded on grounds that it was seized unlawfully, that the suspect's rights were violated during police questioning or that some other infraction of civil liberties occurred. These basic protections are outlined in the box on page 40. Attorneys for presidential assailant John W. Hinckley, Jr., were able to bar some police testimony from his trial because his lawyer wasn't present when federal agents first questioned him.

The judge can dismiss all or some of the charges. Usually, he rules that while some evidence may be inadmissible, the case can go to trial.

Many defendants who lose this first round decide to plead guilty. Often, they can win a reduction in the severity of charges—and thus a lesser sentence—by negotiating a *plea bargain* with the prosecutor.

Although most guilty pleas come just before trial, a defendant can plead guilty at any time before the verdict is in. One Virginia man, fearful of getting the death penalty, decided to plead guilty to a reduced murder charge as the jury was deliberating over his case—only to learn later that the jurors had been prepared to acquit him.

At least 80 percent of cases end in guilty pleas. Prosecutors thus avoid costly, time-consuming trials and the risks of acquittals. Defendants get lighter sentences than they might have received had they fought to the bitter end.

Cases that do not end in plea bargains before trial rarely go to trial quickly. A survey of 32 metropolitan areas by the National Center for State Courts showed that the median time from filing of charges to trial ranged from 42 days in Portland, Oreg., to nearly a year in Buffalo.

Court backlogs are only one reason for delays. Defense lawyers often seek to postpone trials in the hope that prosecution witnesses will decide not to testify or will perhaps forget details of the crime. "The world's greatest defense attorney is Father Time," says Tulsa lawyer Patrick Williams.

Day of reckoning. Once the trial date finally arrives, the lawyers match their wits first in the empaneling of the jury. Its makeup is vital because—when the crime is serious—a unanimous vote of 12 jurors is needed to reach a verdict. Selection can take many hours and even many days as the lawyers question potential jurors on their backgrounds and beliefs.

Once the jury is chosen, the prosecutor makes an opening statement, sketchily describing the case against the accused. The defendant's attorney briefly tells the jury what line of defense will be offered.

Next, the prosecutor starts calling witnesses to build his case. When he completes his questioning of each, the defense attorney gets a chance to *cross-examine*—an interrogation often used to attack the witness's credibility. Says legal scholar David Neubauer: "In cross-examination, each side has the opportunity to examine the witnesses' truthfulness, to probe for possible biases and to test what witnesses actually know, not what they think they know."

Then comes the defense's turn to call witnesses, though it is not obliged to do so and may rely entirely on challenging prosecution evidence.

Many legal battles are fought out of the jury's presence, with both sides debating before the judge what evidence may be presented to jurors.

Although some criminal trials are over in a day or less, many take weeks or months as each side raises a string of objections to the other's evidence. Some defense lawyers make no bones that they do this partly in the hope that an appeals court later will overturn a conviction because of an erroneous ruling by the trial judge.

"We are obligated as lawyers to do

Questioning of witnesses. Each side presents testimony buttressing its case.

Cross-examination. Each lawyer has a chance to shake the credibility of the opposition's witnesses.

When Juveniles Run Afoul of the Law

The nation's juvenile-justice system, designed to shield delinquent youths from the harsh treatment given to adult criminals, is doing its job too well.

That is the view of critics of the juvenile courts, who contend that the lenient handling of youthful offenders is as much to blame as anything for the surge of violent crime by the young.

It is an issue on which public attitudes have come full circle in recent decades. When juvenile courts were created at the turn of the century, reformers believed young lawbreakers needed to be sheltered in a variety of ways, in addition to being kept apart from adult criminals.

Juvenile-court hearings and records were closed to the public. A jargon was created so delinquents would not be tainted by criminal-court terms. Youths were accused in a "petition," not an indictment, and were not locked up without bail but rather "detained in their best interests." Instead of being found guilty, they were "adjudicated delinquent" and sent not to prisons but to "training schools."

Without the trappings of the adult justice system, youths often found themselves in court with only a judge, a social worker and their parents.

Over the years, critics came to believe that this closed system—whatever the intent—did not always treat delinquents fairly. Judges' philosophies of treatment varied so much that some youths were sent to prison when they should have been sent home; others were set free when they should have been thrown behind bars.

In a noted 1967 case, *In re Gault*, the Supreme Court declared that youths have the right to a lawyer and other legal protections. Since then, juvenile-court proceedings have become more and more like adult trials, with prosecutors, defense attorneys and stricter rules of evidence. Many hearings now are open.

In recent years, 14 states have passed laws to send to adult courts certain youths under 18 charged with serious crimes. After conviction there, they may end up in adult prisons. Several other states have made it possible for even younger children—some as young as 10—to be sent to criminal court.

Nearly 500,000 youths are jailed in detention units each year, either to await trial or to serve sentences that typically run a year or less. Judges send about 65,000 annually to state training schools—youth prisons where delinquents spend one or two years, on average.

In most states, the jurisdiction of juvenile authorities ends at age 21. For this and other reasons, young offenders tend to spend less time behind bars than adults implicated in similar crimes.

But the conditions in places where juveniles are held are often so poor that critics say they encourage criminality. "The cells at Alcatraz are better than what many of those kids are sitting in today," contends Mark Soler of the San Francisco-based Youth Law Center.

It's too soon to gauge effects of the get-tough drive, analysts say. Harsher measures may keep some violent youths off the streets for longer periods, but experts predict that whether they remain in juvenile courts or are shifted to adult tribunals, delinquents will continue to be treated more leniently than adult criminals.

Says Louis McHardy, director of the National Council of Juvenile and Family Court Judges: "All we're doing is creating a new juvenile-justice system within the adult system. Young criminals require special attention, and most will continue to get it."

everything we can to assist our clients," comments John Ackerman, president of the National Association of Criminal Defense Lawyers. "If we fail to do so, we should be disbarred and can be sued for malpractice."

Once each side has presented its case, including rebuttal testimony, opposing lawyers deliver *final arguments*—perorations putting the evidence in the light they want the jury to see it.

Jury takes the driver's seat. The judge then instructs jurors on how to apply the law to the facts. For example, the jury may be told that it can find the defendant guilty of first-degree murder only if the evidence shows intent to kill and premeditation. By contrast, killing someone through negligence constitutes manslaughter, which carries a far lower penalty.

Jurors sometimes are told the range of penalties for the offenses at issue, so they have an idea what a finding of guilty will mean to the defendant. In a few states, juries recommend punishments or actually impose them. In others, the judge sets the punishment.

Nearly three fourths of trials end in guilty verdicts. Virtually all such verdicts are appealed, if for no other reason than that the courts now afford every defendant the right to an attorney for appeals as well as for trials.

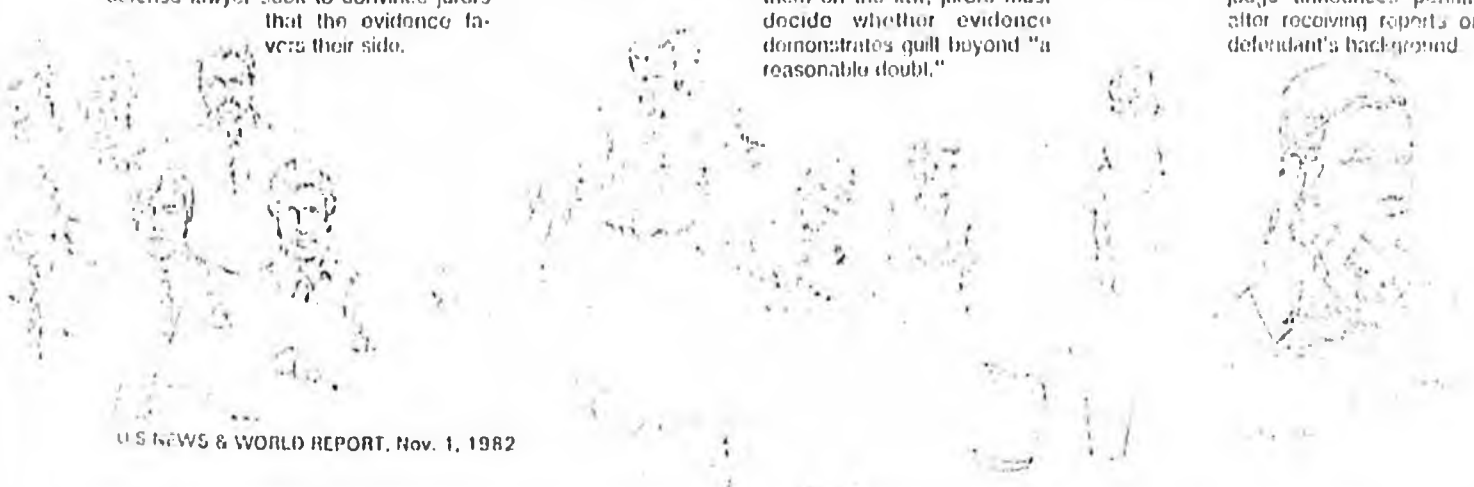
Defendants held in custody before their trials begin serving prison terms—if one is imposed—while the appeal is pending. Some of those who were out on bail before trial are locked up once the jury returns a guilty verdict, but many remain free until appeals are exhausted.

A person can seek reversal of a con-

Final arguments. Prosecutor and defense lawyer seek to convince jurors that the evidence favors their side.

Jury deliberates. After the judge instructs them on the law, jurors must decide whether evidence demonstrates guilt beyond "a reasonable doubt."

Sentencing. The judge announces penalty after receiving reports on defendant's background.



viction from the trial judge, then from an appeals court and then from the state supreme court. Separately, civil suits can be filed either in state or federal courts seeking release on the ground that a conviction was contrary to *due process of law*—a constitutional right not to be deprived of one's liberty except in accordance with fair procedures. These *habeas corpus* suits—a Latin phrase for "You have the body"—are sometimes taken all the way to the U.S. Supreme Court.

In appellate proceedings, no witnesses are called, and there is no jury. The judges simply review the transcript of the trial, read lawyers' briefs and listen to their oral arguments.

Posttrial maneuvering can drag on four or five years or even longer. A task force appointed by Atty. Gen. William French Smith reported in 1981 that "public confidence in the criminal-justice system tends to be eroded by a perception that the law allows a virtually endless stream of attacks on the conviction."

Appeals courts also come under attack for reversing criminal convictions on technical points. However, only a small percentage of guilty findings are in fact reversed.

Contours of a crackdown. Congress, state legislatures and the courts themselves have paid increasing attention in recent years to demands for criminal-justice reforms.

High on the agenda is speeding up the handling of cases. Chief Judge Lawrence H. Cooke of New York State, citing the dozen postponements that occur in the average criminal trial in New York City, has launched a crackdown on delays that he hopes will be a model for the nation.

Declares Cooke: "Judges have got to stiffen up and not give in to the 'easy come, easy go' court system favored by the lawyers."

In 1974, Congress passed a law requiring trials within 100 days of a federal indictment; most states now have similar rules. But the defendant may give up his right to a speedy trial, hoping that a delay will benefit him or her. "Speedy-trial guidelines have had little impact because they are not enforced," says Alexander Aikman of the National Center for State Courts.

Reformers also want to clamp down on appeals. Among changes being considered in Congress and some states are limiting convicts' right to file *habeas corpus* suits and putting time limits on steps in the appeal similar to the speedy-trial laws now on the books.

Others would lessen the restrictions on what is admissible as evidence.

Alaska has eliminated plea bargaining, and some local prosecutors have curtailed the practice, especially for aggravated offenses.

Says Robert Macy, district attorney of Oklahoma City: "If the defense wants to accept my recommendation, fine, but I don't bargain."

Even so, few sweeping changes are likely in what have come to be regarded as basic American rights.

"Due process of law was the weapon used against arbitrary, capricious and unreasonable acts by government officials," declares criminal-law expert Isidore Starr. "It may permit some criminals to escape their just deserts, but it also protects the innocent. The principle should not be changed lightly." □

Our Rights in Court: How They've Changed

Americans accused of crime enjoy a wide array of legal protections rooted in the U.S. Constitution and the body of common law inherited from England.

These safeguards—interpreted, reinterpreted and amended over the decades by the courts, Congress and the state legislatures—"are extended to defendants not because we sympathize with their actions but because in upholding their rights we protect our own," says Judge Damon Keith of the U.S. Court of Appeals for the Sixth Circuit.

Still, there are sharp divisions over how broad these protections should be. Some critics assert that the courts have applied them so sweepingly that the legal system now favors defendants unduly.

For a look at key criminal-law issues and the debate over them—

No unreasonable searches. Since 1961, the Supreme Court has ruled in a series of cases that evidence obtained by police in violation of the Fourth Amendment cannot be used in court. To protect people against "unreasonable searches and seizures," the Constitution requires police to get a warrant from a judge before invading privacy in pursuit of evidence. The Justices have held that warrantless searches can be made only in connection with an arrest or when an object is in plain view.

Police officers complain that the Court has not provided clear and consistent guidance. For example, the Justices ruled that officers need a warrant to search containers in an automobile, and then just a year later reversed themselves.

Critics argue that evidence gathered in good faith should be admissible even if seized in violation of court-mandated procedures. Defenders of current law say this would spur undue intrusions on privacy.

Self-incrimination ban. The Fifth Amendment provides that a person cannot be compelled "to be a witness against himself." The Supreme Court ruled in the 1966 case of *Miranda v. Arizona* that before questioning suspects, police must tell them of their rights to remain silent and to have a lawyer present. Statements obtained under coercion were declared inadmissible, and some convictions have been overturned on this basis. Asserts Chief Justice Robert Donnelly of Missouri: "The *Miranda* rule is an example of tipping the balance in favor of the accused."

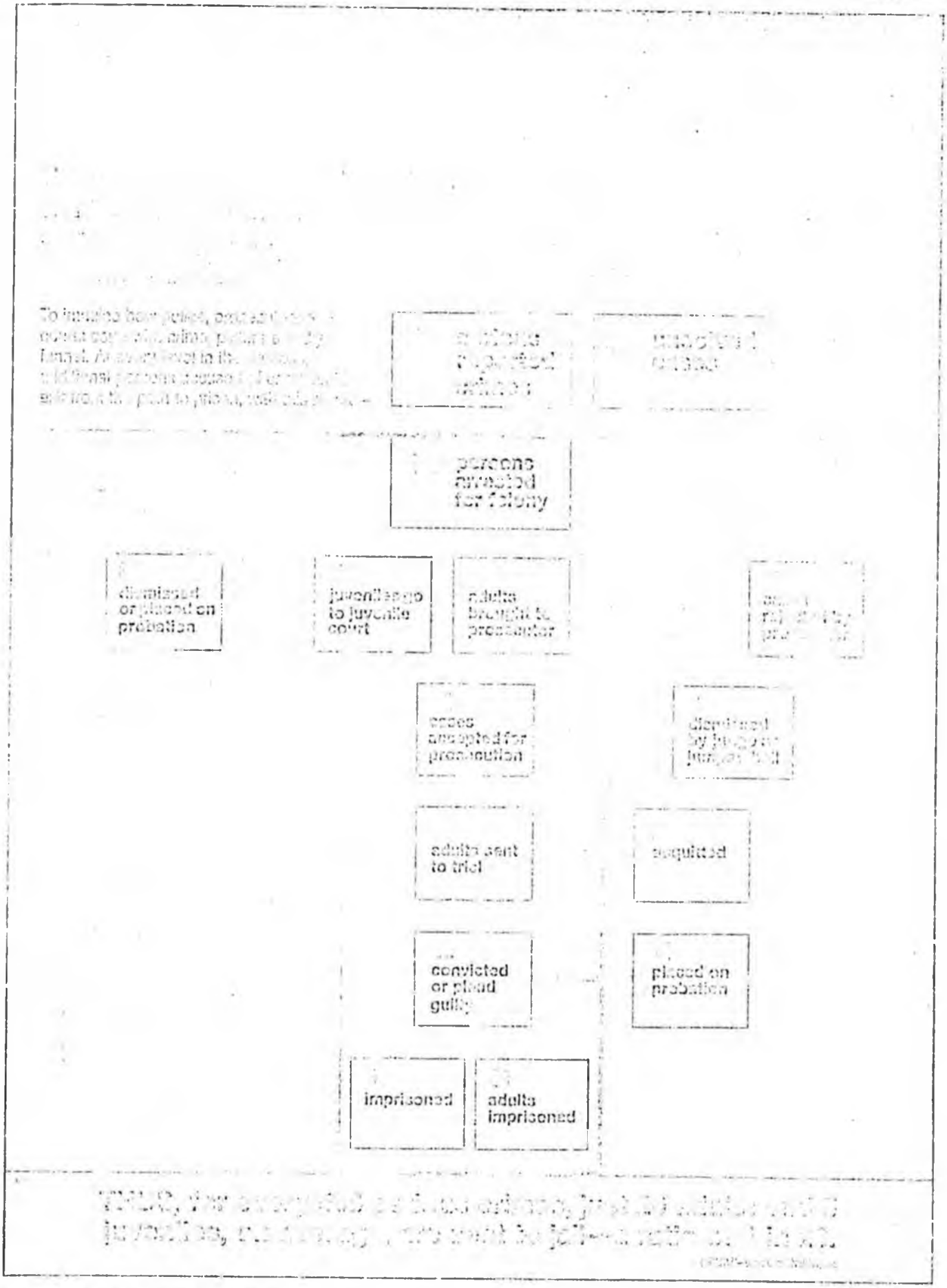
Proponents say the procedure keeps law officers from abusing persons in custody. "I wouldn't want to see the third degree come back," says one prosecutor.

Presumption of innocence. Under English common law, accused persons are presumed innocent until they plead guilty or are tried and convicted. Traditionally, they were seen as entitled to release until trial unless there were grounds to believe they would flee.

Because many criminals often commit crimes while on bail, however, the trend in the U.S. has been to give judges the power to deny bail to suspects considered dangerous to the community. Civil libertarians oppose such "preventive detention" as contrary to the presumption-of-innocence principle.

Other defendants' rights—all widely accepted:

- The Sixth Amendment gives defendants the right to a trial "by an impartial jury."
- The Fifth Amendment prohibits double jeopardy—being tried more than once on the same charge.
- Under a traditional doctrine of adversary justice, witnesses may testify only to what they know first hand. Hearsay—secondhand information—is inadmissible because the other side cannot cross-examine the source.
- The self-incrimination ban also bars disclosing a defendant's criminal record to jurors unless he chooses to testify in his own defense.


persons arrested for felony
dismissed or placed on probation
juvenile age to juvenile court
adults brought to prosecutor
cases accepted for prosecution
adults sent to trial
acquitted
convicted or plead guilty
plead on probation
imprisoned
adults imprisoned

Police Find Themselves in Double Squeeze

It's no wonder the forces in blue don't catch more crooks. Their budgets continue to get tighter and society keeps giving them extra chores.

For America's police, the rise of violent crime during most of the last two decades is only headache No. 1.

Police officers are expected not only to collar lawbreakers but perform a wide array of other community roles as well, from argument settler to dogcatcher. They are what one chief calls with pride, "do-everything guys."

Yet declining revenues and new federal priorities have caused many police forces to shrink even as population, crime volume and paper work swelled.

"Police work used to be a very comfortable world in which we did pretty much what we pleased," says Minneapolis Police Chief Anthony Bouza, a 29-year veteran of law enforcement. "But the pressure of street crime has changed all that and created heavy demands for improved performance."

To meet the challenge, a new breed of cop has emerged, far better trained than his predecessor of only 10 years ago. The language of police chiefs now includes such business-school terms as "cost analysis" and "managing by objective." The computer is becoming as standard a piece of police equipment as the .38 special.

The modern management techniques and new technology have been grafted onto what is probably the most decentralized law-enforcement network in the world, a jumble of overlapping jurisdictions.

Since the first full-time professional foot patrolman was assigned his beat in Manhattan in 1845, five levels of authority have grown up: Municipal forces, ranging from New York City's 23,351 sworn officers to any number of one-constable hamlets; county sheriff's units; state police forces, often dubbed "the highway patrol"; national-government agencies, of which the Federal Bureau of Investigation is only the best known, and many independent, specialized police units such as housing, transit and park police.

Illustrating the potential for chaos in such a system, an Encyclopaedia Britannica writer created a hypothetical European who is studying in California, picks up a young woman in Nevada, brings her back to campus and murders her. The investigation could involve university police, town police, a county sheriff's office, the FBI because the criminal crossed state lines, immigration authorities because the suspect is a foreigner and, if the woman used drugs, narcotics agents.

The sheer numbers of police units in the U.S. boggle the mind. The FBI receives annual crime reports from more than 15,000 units large enough to keep such data. In addition, there may be as many as 3,000 smaller forces. At the federal level, there are armed law-enforcement and investigative officers operating in more than 100 agencies.

Where most Americans live and work, though, the backbone of law enforcement is the local cop, who represents the overwhelming majority of the estimated 490,000 sworn full-time peace officers on duty nationwide. Affirmative-action efforts have brought women into law enforcement in recent years, but 95 percent of U.S. police officers are male.

Many people think of police work as highly dangerous, and there is no doubt that it can be fatal—about 100 police officers die each year in work-related incidents. Still, the law-enforcement death rate is about half that among construction workers, miners, farm laborers and firefighters.

Police careers would be riskier if officers spent all their time patrolling the streets and answering crime-in-progress reports. In all forces except the smallest, however, there are other specialties to be staffed, among them traffic control, detective work, bomb disposal, SWAT commando-type operations, juvenile delinquency, records and communications.

New York officer on his beat. Pressures on police are mounting.

The Washington-based Police Executive Research Forum has found that, as a nationwide average in towns of 50,000 population or more only 45 officers are actually on patrol in the streets out of every 100 on duty at a given time.

Crime time. Other studies have shown that police officers now spend only about 15 percent of their time dealing with crime. Rival demands vary from filling out reports to handling complaints about uncollected trash and answering medical-emergency calls.

Police always have had to juggle such diverse duties. But only recently have they had to contend with the shrinkage of budgets that has come with economic recession, reduced federal aid—including abolition of the federal Law Enforcement Assistance Administration—and, in some instances, voter-demanded cuts in property taxes.

New York City's force declined from 27,632 sworn officers to 23,351 over five

Maryland State Police unit evacuates an injured person; patrolman writes a traffic ticket. Police are only part-time crime fighters.

years. Philadelphia, Los Angeles and Boston have all lost personnel, while ever sprawling Dallas has 1,990 officers, only 22 more than in 1977.

The average-sized U.S. force decreased by nearly 8 percent between 1978 and 1981—from 130 to 120 employes. The rate of serious crime rose by 22 percent in approximately the same period.

The upshot: Hassled cops made arrests in only 19 percent of the 13 million-plus incidents of violent crime and serious property theft last year. In 4 out of 5 cases, the culprits never encountered a prosecutor, let alone a jury or a jail. The wheels of justice had no chance to grind.

Although serious crime dropped by 5 percent in the first half of 1982, the rate remains so high that in high-crime urban areas most reports of lesser offenses are filed and forgotten. There aren't enough officers to investigate them all.

What's more, prosecutors throw out a substantial number of arrests for lack of evidence. Traditionally, police officers have been rated on the number of "collars" they make—not on whether the charges can be made to stick.

Assembling a prosecutable case takes skill and perseverance that not every officer has. Studies have shown that 15 percent of the typical force makes more than half of the arrests that lead to convictions.

New breed. Despite the array of problems facing them, police leaders in many areas are upbeat about the future.

One reason for the optimism, says Chief Kenneth Medeiros of Bismarck, N.D., a 22-year police veteran, is that "the level of intelligence, education and professionalism has risen in the police community. And the screening process has improved. Gone is the day when you'd line up the applicants, look for the biggest, meanest one and give the badge and gun to him."

In 1969, only 10 states required even minimum training for police recruits. Today, all do so, with at least 120 hours of basic training mandatory everywhere and much more in some states. Course topics showcase the changing demands of police work: Crisis-intervention methods, criminal law and job-stress problems.

Even newer is a drive to make high-quality work uniform throughout the country by offering a seal of accreditation to forces that qualify. Sponsored by top police-leadership groups, the Washington-based Commission on Accreditation of Law Enforcement Agencies is field testing about 1,000 procedures. The guidelines deal with subjects such as collective bargaining with increasingly militant police unions, working with prosecutors and the courts, and minimizing use of deadly force.

The police-brutality issue is a source of strain in many departments. The Justice Department gets more than 10,000 complaints annually of officers killing or beating someone without sufficient cause, of which as many as 100 are serious enough to warrant federal prosecution. Others are charged in local courts or named in lawsuits that at times lead to big damage verdicts.

Law-enforcement leaders insist that the brutality problem is waning. Whether this is true or not, a warier breed of cop clearly has come on the scene. In Passaic Township, N.J., for example, police videotape booking procedures—and let the suspect know it. Several officers record all potentially tense street encounters with pocket tape recorders. "In many places," comments Passaic Chief Howard Runyon, "people sue the police for just no reason. In our area, the police are starting to sue such people back."

Police work is being strengthened by use of computers for paper work and by division-of-labor cooperation among neighboring outfits. A small-town unit might patrol on its own but use the sheriff's computer and ambulances.

Above all, however, law officers are striving to revive the police-community working partnership that preceded the crumbling of the inner cities and the shift from foot patrols to squad cars that occurred in the 1950s and 1960s.

"Not our job alone." In towns small and large, citizens are being asked to be the eyes and ears of the law—individually or through watch groups—and to look out for each other as well. One example is the growth of telephone networks among senior citizens. Says Bismarck's Medeiros: "We're going back to the public and saying, 'Look, folks, this is not our job alone. We're the professionals, but you've got to help.'"

Police are seeking to re-establish themselves in community life, aiming, as Houston's Chief Lee Brown puts it, "to utilize the concept of the foot patrol in a motorized way." Houston, like some other municipalities, is decentralizing its force, giving patrol officers long-term assignments to particular neighborhoods and requiring them to bone up on local problems and build a network of contacts.

Leaders of law enforcement say a start has been made toward blending new techniques and old-time enthusiasms.

Yet the outlook remains uncertain as the modern cop struggles to be crime-fighter, watchman, psychologist and "Mr. Fix-It" all wrapped into one—while the police share of public revenues grows smaller and smaller. □

The Prosecutor in Action Behind the Scenes

Most district attorneys are the courtroom crusaders they are depicted to be. But the job has another side that the public knows much less about.

The nation's prosecutors, stung by charges that they bargain justice away in the back rooms of the courthouse, are experimenting with new ways to crack down on criminals.

These 18,000 lawyers perform one of the most powerful, but least visible, roles in the justice system. As Prof. James Vorenberg of Harvard Law School puts it: "The fate of most of those accused of crime is determined by prosecutors, but typically this takes place out of public view."

Although the arrests police make and the sentences judges impose get most of the attention, it is the prosecutor who decides which cases go to court and what law violations are cited.

Grand juries—citizen panels that review criminal cases before they are filed—evolved centuries ago as a check on prosecutors' authority. But they rarely have served that purpose well and nowadays are used routinely in only half the states.

Violations of federal law range from such white-collar crimes as tax evasion, fraud and bank embezzlement to drug peddling, kidnapping and racketeering. These infractions are prosecuted by 94 U.S. attorneys around the country—appointed by the President—and by 1,900 assistant U.S. attorneys and nearly 400 Justice Department lawyers, who are based in Washington, D.C.

But most offenses, from murder and other violent crimes to shoplifting, are prosecuted in state courts by state's or district attorneys, who are elected by the voters.

DA's are the most political figures in law enforcement. The job sometimes is a springboard to higher office and just as often is fought over by rival political factions determined to prevent investigations of themselves or their allies. "The biggest myth about prosecutors is that they charge people for malicious reasons," according to Dean John Jay Douglass of the National College of District Attorneys. "I'm more concerned about what they don't do—by failing to investigate or dismissing cases—than what they do."

Of the some 2 million serious criminal cases filed each year, not 1 case in 5 actually goes to trial. The others end in dismissals or guilty pleas. Critics charge that prosecutors all too often settle for pleas to lesser charges than the offense warrants.

Typical case: A mugger gravely injures his victim and is charged with both robbery and assault. A prosecutor agrees to drop the assault count if the suspect pleads guilty to robbery. That avoids a trial but also reduces the maximum penalty—a result that may anger crime victims and others.

For their part, many prosecutors assert that the large volume of cases leaves them no choice but to plea bargain in many instances. Other DA's say plea bargaining is appropriate only if a prosecutor discovers that he can't prove an initial charge. "The public has the notion that prosecutors are giving away the store, but it's not true," says District Attorney Edwin Miller of San Diego. "And if anyone does go too far, he must answer to the voters."

The public image of prosecutors is largely shaped by television programs and the movies, in which they are portrayed battling defense lawyers in court. That is part of their job, but most of their work is behind the scenes, overseeing the gathering of evidence.

In the past, district attorneys often waited for police to come to them with proof of wrongdoing. Then they reached a decision on whether a case was worth taking to court.

Today, prosecutors increasingly instruct detectives on what evidence is needed to win in court. In complex cases, they supplement police with their own investigators. Says Los Angeles County prosecutor John Van de Kamp: "We can't rely totally on police. We end up picking up the ball in many cases."

Target: The hard core. Simultaneously, district attorneys are stepping up their efforts against "career criminals"—those with long records who commit numerous crimes.

It used to be that chronic criminals often were out on bail committing new offenses while their cases moved slowly through the courts. This still happens sometimes, but prosecutors these days tend to assign such cases to their best aides, with instructions to handle them promptly. "We're getting these cases to trial within two months," says District Attorney Harry Connick of New Orleans, who adds that the pursuit of repeaters is prompting judges to impose stiffer penalties.

Prosecutors also are addressing the long-neglected problems of victims and witnesses. As cases are delayed time and again—often on the day they are scheduled for trial—witnesses and victims who have dutifully reported to court sometimes become frustrated and refuse to participate further.

To avert this, many prosecutors have set up units to inform those interested in a case of its progress. Some DA's also listen to the victim's version of a crime before making a plea agreement with a suspect. "Prosecutors are becoming champions of victims' rights, and our image is improving," says Louisville prosecutor David Armstrong.

While these and other techniques are making life tougher for criminals, prosecutors are sure to remain under fire.

Comments State's Attorney Andrew Sonner of Montgomery County, Md.: "In this job, your enemies accumulate. You investigate someone; you refuse to fix parking tickets; police object when you charge them with brutality. Prosecutors will always be under pressure." □

ILLUSTRATIONS BY JEAN PALMS

A big part of prosecutors' work is outside court, supervising gathering of evidence.

Jury System Not Perfect, But It Works

The ordinary citizens who decide guilt or innocence get high marks from most experts. Still, they're being put under closer scrutiny than ever.

Despite scientific "proof" that it cannot fly, the bumblebee does. So, too, the jury system: By logic, it shouldn't deliver justice, but it usually does.

"Why should anyone think," asks former U.S. Solicitor General Erwin Griswold, "that 12 persons brought in from the street, selected, in various ways, for their lack of general ability, should have any special capacity to decide controversies between persons?"

Yet much more often than not, most observers agree, when jurors are left to apply their experiences and common sense to the evidence presented to them, they render as impartial a brand of justice as is humanly possible.

Trial by jury is guaranteed by the Sixth and Seventh Amendments to the Constitution. But the system isn't frozen in an 18th-century mold.

A growing reform movement is easing many strains, helping to bring "12 good men and true" into the modern era.

Jury service can be an ordeal. Jurors must endure a tedious and intrusive selection process, sit bemused by lawyers' legerdemain and benumbed by judges' hocus-pocus, and then somehow sift the facts and return what may well be an unpopular verdict.

More than 3 million citizens a year are summoned for jury service. Some are on duty for several months, but the trend is toward the so-called one-day, one-trial system: Jurors who aren't selected go home after one day; those who are chosen serve for just one trial.

The old key-man system of calling only community leaders has been largely abandoned in favor of random lists compiled from voter and tax rolls, telephone books and car registrations. Many potential-juror lists are computerized, but some counties still draw numbers out of a barrel.

Not always a dozen. The number 12 is no longer sacrosanct in civil cases. As few as six jurors now are used in many trials, and 31 states allow less-than-unanimous verdicts.

The citizens summoned are, in a sense, on trial, not for any crime but for their attitudes and prejudices. In what is known as voir dire—old French for "to say the truth"—jurors not accepted by the prosecution or the defense are excused either for cause, or without explanation, up to a limit.

In these choices, lawyers long have relied on ethnic stereotypes and seat-of-the-pants hunches to a degree. Today, however, the emphasis is on more-sophisticated selection techniques.

Firms that specialize in jury research for lawyers use such tools as "micromomentaries," fleeting changes of expression that indicate whether a potential juror is telling the truth; "alpha factors," which indicate juror assertiveness, and trick questions to spot hidden biases.

Elaborate shadow juries, chosen for their similarity to the real jury, observe the trial and each night feed back their impressions to the lawyers trying the case.

Lawyer Robert F. Hanley says simulated opening arguments before surrogate jurors helped win a 1.8-billion-dollar antitrust judgment in 1980 for his client, MCI Communications Corporation, against AT&T. The award was the largest antitrust jury verdict in U.S. history. Hanley and associates honed their case by watching the practice jury deliberate behind a see-through mirror.

Research for the rich? Many lawyers see jury research as just another aid to winning cases.

But critics say all the psychological poking into jurors' backgrounds invades privacy, smacks of unconstitutional manipulation of the justice system and, because of the costliness of such a process, tends to favor the richer side in a dispute.

What's more, jury selection now can take almost as long as the trial itself. In one California murder trial of three defendants, it took five months to question more than 250 potential jurors in a screening that filled more than 18,000 pages of transcript. The trial took seven months.

Jurors' ability in complicated cases to understand the issues and render intelligent and impartial verdicts is increasingly being called into question. In England—the birthplace of the jury in the Middle Ages—and in many other countries juries have been abolished in most civil cases for this reason.

The Supreme Court so far has refused to decide whether some cases are too complex to be decided by a jury. But Chief Justice Warren Burger has commented that "it borders on cruelty to draft people to sit for long periods trying to cope with issues largely beyond their grasp."

Other experts are not so sure. "We currently know little about the capacity of juries to evaluate rationally the evidence in complex cases or about the capacity of judges to do the same," says Richard Lempert of the University of Michigan.

In their classic study, *The American Jury*, Harry Kalven, Jr., and Hans Zeisel of the University of Chicago found that in about 80 percent of the criminal and civil cases examined, judges agreed with jury verdicts. In civil cases, juries were only slightly more generous with damage awards than judges.

Unpopular jury verdicts, such as the insanity acquittal of John W. Hinckley, Jr., President Reagan's assailant, fuel critical scrutiny of the system by the public and press. Nonetheless, an abiding, almost mystical faith in a jury of one's peers is deeply rooted in America. In the words of the late Judge Frank W. Wilson of the U.S. district court in Chattanooga:

"For centuries now, the institution of the jury has helped assure English-speaking people all over the world that they got the kind of justice they wanted, and not just the sort of justice that the experts thought was good for them." □

Getting Onto the Bench

Judges, who serve as the conscience of the justice system—setting its tone and shaping its ground rules—typically reach the bench with a helping hand from politicians. But once installed, they are hard to dislodge.

At the federal level, the 132 appeals and 515 district-court trial judges are nominated by the President and must be confirmed by the Senate. Most are recommended by home state senators, who if they are of the President's party have what amounts to a veto over nominees.

After clearing these hurdles, a federal judge acquires unique job security. Only impeachment and conviction by Congress can remove him—a rare event that has not occurred since 1936. A 1980 law increased the judiciary's power to discipline its members through such steps as suspending a judge's right to hear cases. The power of federal judges is broad: The Supreme Court reviews fewer than 1 percent of their rulings.

In the states. Selection and duties of the 26,000 state and local judges vary widely. All states have supreme courts, 30 have intermediate appeals courts and all states have trial courts. Most cities have courts limited to city-law infractions, mostly traffic cases.

When the nation was founded, most state judges were chosen by governors or legislatures. But by the 1830s, says Larry Berkson of the American Judicature Society, "people resented that property owners controlled the judiciary."

In the decades that followed, most states made judgeships elective and many judges soon came under fire as "political machine" candidates. States then began shifting to merit systems in which judges are chosen by governors but go before voters periodically for a yes-or-no vote.

Today, judges are elected in about two thirds of the states, and appointed in the remainder.

Although all states have agencies to discipline misbehaving judges and recommend removal in extreme cases, it usually takes blatant or repeated wrongdoing before a judge is ousted.

Corruption Is Still a Fact of Life

A cop on the beat palms an apple from a grocer's bin. A prosecutor snares a campaign donation by ignoring evidence of a politician's crime. A judge pockets a bribe to let a defendant off easily.

Despite the rectitude maintained by the majority of public servants, corruption small and large does reach into the justice system at times.

Police. From every sign, the problem is greatest with the police. Patrol officers and detectives come into daily contact with the seamy underside of society, where the itch to make a fast buck can be contagious.

A drug dealer caught with his merchandise, for example, might offer officers valuable narcotics under the table not to book him. More often, the effort is to buy permanent insurance against arrest. The Mafia and other organized-crime elements try to shield their gambling, drug-selling and prostitution rackets by putting cops "on the pad" for regular payments.

This type of police corruption—an old story in the big cities of the East and Midwest—now is a growing concern in the Southeast, where a flood of illicit drugs is coming into the country.

In perhaps the most thorough probe of police wrongdoing ever, conducted a decade ago in New York, the so-called Knapp Commission found "corruption to be widespread." The panel described two kinds of violators: "Meat eaters," who "aggressively misuse their police powers for personal gain," and "grass eaters," who "simply accept the payoffs that the happenstances of police work throw their way."

In a Yale University study of police officers in Boston, Chicago and Washington, D.C., about 20 percent were seen breaking the law or admitted that they do so. Typical offenses: Accepting money or goods from a business in exchange for better protection and overlooking minor infractions; taking bribes to void traffic tickets.

Judges. Like the police, judges can use their power for personal gain. In one recent case, a Washington, D.C., judge was found guilty of accepting free moving services from a firm after dropping hundreds of traffic tickets the company had accumulated.

Peter Coruzzi, a New Jersey trial judge, recently was convicted of receiving $22,000 in bribes for releasing one convict from prison and giving another probation instead of a jail term. Coruzzi was sentenced to five years in prison after the verdict, which he is appealing.

Improper influences can creep into judges' lesser duties, too. State judges often must run for re-election, and much of their campaign aid comes from lawyers who expect in return such favors as allowing them delays in filing court papers.

Prosecutors. State's or district attorneys, themselves elected officials, also can be tempted to breach the law for money or political favors. They have wide discretion in pressing—or dropping—investigations, and most of the decisions they make are not put on the public record.

How common abuses of this power are, no one knows, because prosecutors' decisions are seldom probed. Occasionally, wrongdoing comes to light. In one case, a Michigan prosecutor was convicted of embezzling money allocated for paying informers and using it to buy a house.

Corrections officials. Prison guards and probation and parole officers are subject to bribery attempts by inmates and others wanting special privileges. In Westchester County, N.Y., two state-prison employes pleaded guilty in mid-1982 to taking bribes for permitting drugs behind bars.

Law-enforcement authorities have stepped up efforts in recent years to clean up corruption within their own ranks. A special staff of the New York state attorney general's office has successfully prosecuted several hundred police officers and other justice officials. The U.S. Justice Department's public-integrity section has pursued charges of corruption in law enforcement around the country since 1976.

The result: Most experts believe there is less crookedness in law enforcement today than in the past. Yet with power spread so widely, corruption will never be stamped out entirely. □

Get-Tough Approach Makes a Comeback

Judges are handing out stiffer jail terms these days, but that is no panacea: Prisons already are overflowing and there is no relief in sight.

Lock 'em up and throw away the key!

Crudely put, that increasingly is the rallying cry in an America fed up with violent crime.

The idea that criminals can be reformed into law-abiding citizens is waning after holding sway for almost a century. Edging it out is the urge to punish for the sake of punishment.

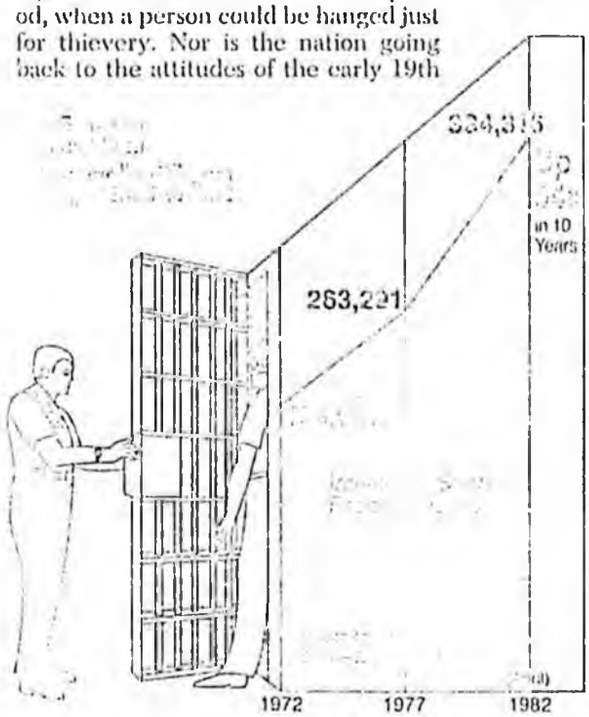
Legislators in state after state, angered by the many ex-convicts who return to crime, have been enacting mandatory prison terms. Judges are handing out longer sentences on their own. "There's a lot of pressure to make the system swift and harsh," says criminologist Sheldon Messinger of the University of California.

The result: America's prisons are bulging with nearly 400,000 convicts, double the total of a decade ago. The U.S.—with one of the world's highest rates of violent crime—also has one of the highest incarceration rates.

No one suggests the country is returning to the harshness of the colonial period, when a person could be hanged just for thievery. Nor is the nation going back to the attitudes of the early 19th century, when Americans invented the penitentiary and, in the words of Thomas Murton, a former Arkansas prison warden, "It was assumed that there was an equation between sin and crime. . . . Inmates were isolated to reflect on their evil deeds until they became converted."

Still, the mood today has more in common with the 1700s and 1800s than with the first two thirds of the 20th century, when "rehabilitation" was the gospel of penologists. That school became entrenched between 1900 and 1920 as most states created systems of probation and parole. Even now, despite the crackdown, these systems supervise three fourths of the 2 million persons under a judge's sentence.

Instead of serving time behind bars, offenders on probation or parole hold jobs or go to school while reporting periodically to a court official. The reasoning is that this helps them adjust to society's pressures and makes them less likely to return to crime than would spending idle time in prison with hardened criminals.



Probationers avoid prison altogether. Parolees are released early; to ease their transition to normal life, many live for a while in halfway houses in residential neighborhoods. Those caught breaking the law or associating with ex-convicts usually are sent back to jail, and may forfeit a chance for such special treatment again.

Studies show that up to 25 percent of probationers and parolees are arrested for new crimes. Defenders of the rehabilitation concept see that as a tolerable success ratio. Critics see it as proof the system is still too lenient.

As for lawbreakers who do considerable jail time, only a small fraction get much job training or education while behind bars. Most prisons do not provide much of either, and many prisoners are not interested in conventional forms of self-improvement, anyway.

Many inmates are in no sense rehabilitated when they leave prison. Recidivism—crime by former convicts—cannot be measured precisely, but it is substantial. The New York-based Criminal Justice Institute reports that about one third of prisoners have served time previously. But some experts believe the true rate of repeat criminality may be 70 percent or more. What the official figures do not show is how many persons return to crime after one conviction but are never caught again.

Arkansas inmates on the "hoe line." Rehabilitation is giving way to punishment more and more.

Increasingly, the view of many judges and other experts is that the best way to cope with recidivism is simply to keep criminals in prison—and off the streets—longer.

Yet there continue to be widespread disparities in sentences. Because each of the country's 28,000 judges has his own idea of justice, of 3 persons committing similar offenses, 1 may be put on probation, another may get a short prison stint and the third a long stay in custody.

In many states, stretches in prison vary by location. In a city where robberies are common, a judge might send an armed robber away for 10 years; the same crime occurring rarely in a rural area might bring 35 years.

Such apparent inequities feed public cynicism and exacerbate prisoners' feelings that the world is stacked against them—feelings that can explode in more antisocial acts later on.

Polls consistently find that Ameri-

cans believe the courts are too lenient in imposing sentences. Judges respond that the public typically knows only the facts of a crime and that jurists, in setting a penalty, must also take into account reports prepared by court officials on defendants' backgrounds.

Propelled by public indignation, many state legislatures in recent years have narrowed the discretion permitted judges and parole boards. Nine states have adopted so-called determinate sentences, which specify in advance the amount of time to be served and bar early release. Another approach, sentence "enhancement," used in 46 states, requires judges to give longer terms to repeat offenders. In some jurisdictions, an extra penalty also attaches to the use of a gun in a crime.

Two states, Minnesota and Pennsylvania, have adopted sentencing guidelines that tell judges what penalty to impose based on facts about the crime and the defendant.

Nationwide, partly as a result of such laws, the average time that convicted felons spend behind bars has risen to 26 months. That average would be longer if more cells were available. But lengthened sentences and stepped-up prosecutions have crammed prisons to overflowing. Parole boards must serve as a "safety valve" at times—releasing inmates early just to make room for new prisoners.

Accordingly, most inmates do far less prison time than what is announced by judges. In many states, one third of a term is routinely chopped off if a prisoner commits no serious infractions while in custody. When other credits are taken into account—such as subtracting time spent in jail awaiting trial—a person with a "life sentence" can be free in less than 10 years.

Bed check. About 90 percent of today's 400,000 prison inmates are in state institutions; the remainder are in federal lockups. Based on the view of corrections experts that inmates should have 60 square feet of space each, the nation's prisons are overcrowded by more than 100,000 persons.

That doesn't even count the 90,000 inmates serving one year or less in local jails and some 70,000 suspects housed there while awaiting trial.

Congestion and other poor conditions have prompted courts in 31 states to order prison improvements. But efforts to keep up with the inmate surge are falling short.

The 90,000 cells either under construction or on the drawing boards will not be enough to accommodate newly arrived prisoners, let alone to reduce overcrowding. Occupancy in what one defense lawyer calls "the crossbar hotel" jumped in 1981 by 40,000—more than 12 percent.

Providing adequate prison space would cost several billion dollars, and there's no sign that either legislators or the voters are willing to foot the bill. A Gallup Poll shows that 57 percent of Americans think their states need more prisons, yet only 49 percent would raise taxes to pay for them.

Fingering "heavy hitters." Many experts doubt that the answer to the crime wave is more prisons, anyway. They say what is needed is a more coherent sorting out of who should be sent to prison and who should not be. "We must make sure that the heavy hitters go to prison but that the lightweights get probation," declares Brad Smith of the National Council on Crime and Delinquency.

Louisiana's electric chair.

Some criminologists believe the stiffest sentences ought to go to persons who have the earmarks of "career criminals." Such things as a history of drug abuse, juvenile delinquency and a poor employment record suggest a likelihood of future lawbreaking, they say.

Criminals who were considered to be better bets for rehabilitation would be placed on probation, which costs only one tenth of the more than $10,000 needed to house a prison inmate for a year.

Critics of this approach argue that no one can accurately predict a person's behavior and that to base sentences on sociological theory is unjust. They contend that respect for the law is undermined unless people are punished evenhandedly for their infractions.

Rehabilitation efforts have not been abandoned. Prison-industry programs are being expanded so that at least some inmates can repay more of the costs of their care and possibly provide restitution to their victims. Even so, many convicts emerge from the penitentiary more disposed than ever to commit crime.

Experts predict that the moves toward more punitive sentences and better rehabilitation opportunities will continue simultaneously, limited by the tax money available.

"Legislators are coming up with patchwork solutions to sentencing," says Robert Cushman of the Sacramento-based American Justice Institute. "They want to banish criminals, but they don't want to pay for it." □

The Legal Logjam On Death Row

Opinion polls show a majority of Americans believe that murderers—in extreme cases—ought to be given a dose of their own medicine.

Yet few of the more than 1,000 persons under sentence of death are likely to be executed soon. Because of fierce legal wrangling, no more than five death-row inmates have been put to death since 1967.

Capital punishment has had a checkered history in America, starting in colonial days when a number of crimes ranging from murder to witchcraft were hanging offenses. In the late 1960s and early 1970s, various legislatures abolished the death penalty as being too harsh. But by the 1980s, many states had restored it, and for a time almost 200 were being executed each year.

In the 1960s, the civil-rights movement was galvanized into action by evidence that blacks were being executed more often than whites committing similar crimes. A legal attack was launched, and in 1972 the Supreme Court held that Georgia, which alone has accounted for nearly 10 percent of the 3,530 U.S. executions in the last 50 years, had violated the Constitution's ban on "cruel and unusual punishment." The ruling struck down all state death-penalty laws.

Though the justices split in this and later cases, the majority holds that the death penalty is constitutional if imposed in a consistent and nondiscriminatory manner for truly heinous crimes.

At present, there is no federal death statute, but since the Court's ruling, 37 states have adopted new laws allowing capital punishment for murder. Some also permit it for aggravated rape or kidnapping.

Death-row inmates seek to prove that even the revised statutes are unfair. Many prisoners' appeals, however, are expected to be exhausted in a few years—perhaps unleashing the biggest round of executions in a half century.

In Prisons, the Pendulum Is Even Headed Worse

Loss of freedom, overcrowding, bad food and dangers behind bars make convicts angry at society. But a close-up look at two prisons shows how improvement of conditions can dampen resentments.

WARTBURG, Tenn.

The man who murdered four people in what he calls "a small reign of terror" has a key to his own cell.

The man who blew off his neighbor's foot and then bashed him in the face with a shotgun butt is treated with respect by his guards.

The man who burgled pharmacies to get drugs can gripe about prison life, and the warden listens.

Here, in a green valley hugged by the high hills of East Tennessee, is the Morgan County Regional Correctional Facility. If there could be such a thing, this would be a prisoner's paradise.

Hell is on the other side of the mountain, a fortress of stone and steel called Brushy Mountain State Prison. The two penitentiaries are just 2 miles apart as the crow flies, 9 miles by winding country road and half a century in terms of how criminals are treated.

There are murderers, rapists, thieves and child molesters in both facilities. Yet one offers a modicum of hope that some criminals can be rehabilitated. The other is simply a place for punishment.

"Brushy," as the convicts call it in tones of awe, looks, smells and feels like a zoo for humans. Behind its 20-foot-high stone walls, topped with guard turrets, concertina wire and 2,300 volts of electricity, are cells in use that, though soon to be improved, have been ruled unfit for human habitation by a state judge. A visitor is led under close escort through cellblocks, shoes crunching scraps of food that the prisoners have tossed onto the corridor through their steel-barred doors. Kept paired in narrow cells stacked four high on each floor and reached by catwalks, men bear the marks of close confinement—nearly every one has a black eye or a puffed lip, cuts, bandaged hands or crude jailhouse tattoos. They look at the passing entourage in the manner of caged creatures, with flat, blank stares or sidelong glances. Their silence is palpable.

Plotting in solitary. Only in the solitary block do the inmates show spirit. Here, seven men call out jeers about their starchy dinner: Grilled cheese on white bread, corn bread, beans and slaw. An escort says that these men, all white, got a pistol into the prison and shot two black inmates to death last February. How they managed to get a weapon into a maximum-security prison is unknown. An official shrugs: "They've got hours and hours to sit there and outthink you."

Still, there has never been a successful escape in the seven years that Brushy Mountain has been a maximum-security prison. James Earl Ray, the assassin of the Rev. Martin Luther King, Jr., somehow got over the walls in 1977 and again in 1979 but was recaptured and finally transferred to the main state prison in Nashville. There are only a few ways out of Brushy: Die, do the time or do good.

With a record of good behavior, even a murderer in Tennessee may win transfer to a medium-security prison such as Morgan County, where most inmates are young first offenders serving time for nonviolent crimes.

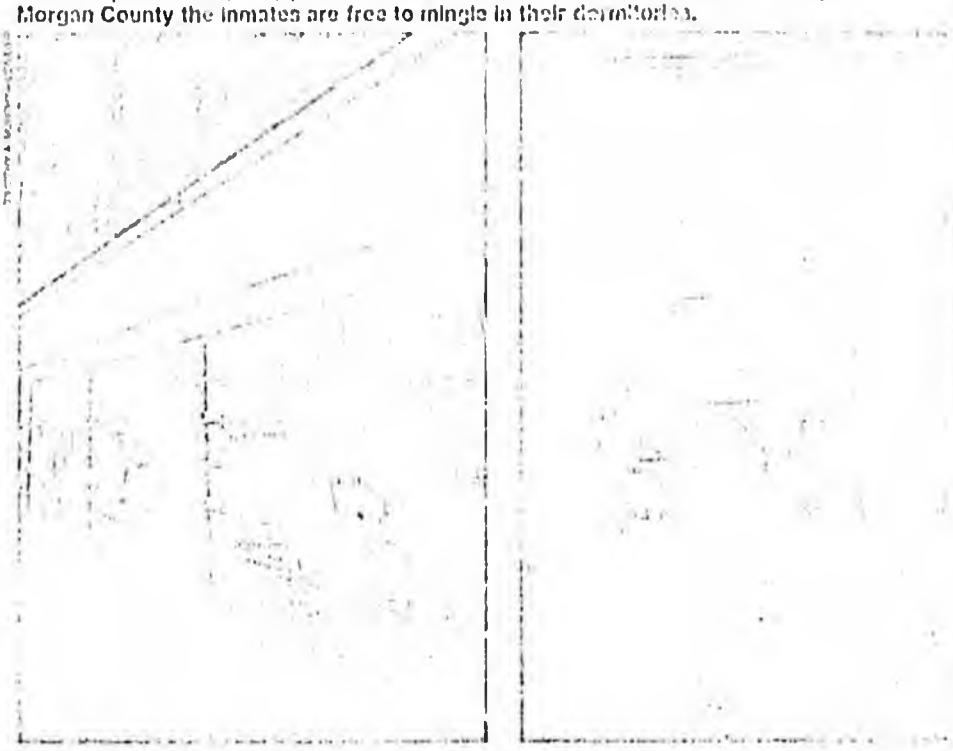
Campus life. From the road, the Morgan County prison looks like a high school with few windows. The warden, Otie Jones, likes to call it a "campus." Inside a 17-acre compound surrounded by a 10-foot-high chain-link fence and arranged in a circle are 16 dormitories that house about 25 men each. All but a few inmates have private rooms with toilet, washbasin, desk, wardrobe and bunk. They can lock their own rooms during daylight hours.

A man can better himself here—if he's ambitious and lacking in basic skills. There are classes that lead to a high-school-equivalency diploma. Also offered are state vocational-school certificates in welding, masonry, small-engine repair, building trades, plumbing and electricity, woodworking and food services. Correction Department officials say they have a good record of finding jobs for those who earn the certificates.

Still, the atmosphere of this institution reeks of servitude, not scholarship. To be inside the compound is to feel less than a man. The prisoners' rooms are hardly bigger than closets—7 by 12 feet—with bare concrete floors and cinderblock walls. At the dining hall, prisoners are given plastic forks with which to eat slabs of tough, unidentifiable meat. There are no plastic knives, the warden says, "because they just take them to their rooms to eat peanut butter."

Four times a day the men must stand like children for a head count, and be prepared to submit to a frisking at any time. There is a correctional officer for every four prisoners. Around the perimeter are three guard towers, each manned by an officer with shotgun, rifle and pistol. Outside

At Brushy Mountain, left, prisoners are locked two to a cell, while at nearby Morgan County the inmates are free to mingle in their dormitories.



the fence is a kennel with four bloodhounds. Most of the inmates pass their days at hard labor under armed guard, tending crops or chopping wood on the prison's surrounding 1,600 acres of farm and forest.

The effect of such a life is evident in the men's manner. And it is odd. Here are 421 hardened men, whose standing among fellow prisoners is based in part on dangerous misdeeds they committed on the outside and on their willingness and ability to fight for themselves on the inside. But faced with a visitor from what they call "the free world," they are diffident, uncertain, even shy. Handshakes are quick and soft; eye contact is brief.

Medium-security convicts at Morgan County work under armed guard to build a shed at kennels of bloodhounds used to track escapees.

Look at reality. To go among them is to lose some notions absorbed from TV cop shows and old James Cagney prison films. At this facility there is a degree of courtesy between guards and convicts, who sometimes exchange greetings and smiles. Convicts questioned say they accept responsibility for being jailed. Only once does an inmate approach a visitor with a tale of innocence: "Got me in here for six years for car theft and forgery, and that forgery charge is wrong because I can't read or write," says a wispy-thin youth with tears in his eyes. Then he adds, "I get out of here tomorrow. They're sending me to the nut house."

More common is the response of French Price, who says, "I should have gotten something for what I did." Price is serving a three-to-five-year term for what he did after, he says, a man tried to lure his daughters—then age 8 and 9—into a car. "I took matters into my own hands," says Price. "I went to his house and he opened the door and I shot him with a double-barrel shotgun. Blew his right foot off. His left calf, too. I wasn't drinking, wasn't trying to kill. I wanted him to suffer. He lay there on the porch and I smashed his face with the gun butt. His folks came out crying, and I said, 'Shut up or I'll shoot him again.' After he cried for a while, I told them, 'O.K., now you can call the ambulance.' Then I sat and waited for police."

In a stunned silence that meets this account, Price searches his cell for a petition for parole that he says has been signed by all the guards. It describes him as "mature, respectful and of a good nature. He does not cause any type of trouble and is not easily provoked."

Plenty of room. Violence, in fact, is rare at Morgan County because, inmates and the warden agree, it is not overcrowded. Designed to house 400 men, it seldom has more than 30 above that limit. In the two years it has been open, officials say, there has never been a knife fight. In early September a woman counselor here was held hostage for 6 hours by a prisoner armed with a sharpened nail fixed to a toothbrush handle. She was freed when tactical-squad officers burst into her office and overpowered the man, who is serving 20 years for murdering a little girl. A week later, the other prisoners were still gritting teeth over the incident: The counselor is popular, and baby killers and child molesters are outcasts in prison society. "We'd have stomped him," said one convict. The inmates say racial tensions are low and homosexual rapes just don't happen. "It's because there are no blind spots in this layout where they can grab you," says an inmate. "It's because I can put my thumb on the bullies," says Warden Jones.

The warden monitors prisoners' complaints through monthly meetings of the inmates' council, made up of one prisoner from each dormitory chosen by his peers. "But the most important things are ignored," claims a former council secretary, W. David Smithe. Among his gripes: TV reception is poor because the prison's antenna is too short to pull in signals over the surrounding mountains; prisoners suffer from gastrointestinal disorders because food trays are often dirty. The warden says he is trying to get cable TV, and a dishwasher will be used soon when a venting system can be installed.

"You want to know what it's like here?" asks Smithe, a burglar doing 10 to 18 years. "It's to become totally dependent again now you are an adult. From when and why you get up in the morning to when and what you eat, decision making is denied. You can't control your own health, your diet. In broad terms you are reduced to nothing.

"Not a moment here you don't feel some tension—a word, a glare, a move. You've got some primitive individuals here. Even if they're young, they're dangerous. It's a lie that prisons are schools for criminals, that a youth going in is learning to crack a safe. But what does occur is a learned willingness to commit crimes that were beyond you before prison. It's a state of mind that's learned. That's what makes people here dangerous."

The man with the most dangerous record here is Jim, who says, "I was an animal. I should have been executed."

Anonymity plea. Jim doesn't want to be further identified "because a certain community would scream if they knew I wasn't doing hard time." Kidnapping, armed robbery and two double murders in 1970 got him a 318-year sentence. With time off for good behavior, he jokes, "I'll get out in year 2121."

But Jim now is a model prisoner, cited by the warden as an example of how one with the right attitude can rehabilitate himself. While doing his time, he has accrued three years of college credits with a 4.0 average. He is writing a novel, working here as a teacher's aide and using his considerable wit to hold his classes' attention. Instead of teaching illiterates to read, "See Dick and Jane run," he offers lines like, "See Trigger Bates kick the warden."

His years behind bars have made him a jailspun penologist with an insider's view of how to rehabilitate criminals.

"Do contract sentencing," he argues. "Set goals for a prisoner when he comes in, that he will earn time off for getting so many years of education, for working in Alcoholics Anonymous, for self-improvement programs. Now you get good time for nothing, just for not making trouble. There's no incentive.

"We don't have prisons run by sadists," he says. "What we have are prisons run by people who are totally apathetic. The public must remember that 97 percent of all men who enter pens return to the free world. If we have guards calling us names, bad food, poor medical treatment, there's nothing we can do about it here. So when we get out, some innocent member of society suffers for the anger we bottle up in the pen. I came out of prisons in Indiana and Kansas truly vicious. I hated everybody and myself. I took off on a small reign of terror. That's why the free world should care about what happens here. Their lives will depend on it." □

The Nature and Pattern of a Lawsuit

For a look at a fast-growing American pastime: How litigation starts, what it costs, the tortuous trail it follows, the odds of winning—

"As a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."

The [illegible] fear that the revered Judge Learned Hand expressed 60 years ago is felt more keenly by Americans today than ever before—and no wonder.

The flood of lawsuits has swelled to a tidal wave in recent decades—more than 12 million suits now are brought each year. Awards in big personal-injury cases are scraping the sky—they jumped almost 25 percent in dollar volume in a recent 12-month period.

Some lawsuits involve billions of dollars; others, goals on which no one could put a price, such as custody of a child. Some suits seek damages for breach of a cut-and-dried contract; others attempt to salve wounded pride.

Lawsuits, fortunately, do not erupt every time someone gets mad. The vast majority of disputes are prevented, settled or resolved out of court.

Moreover, pressure is growing to minimize use of the courts for solving disputes, particularly those that once were settled through church, school and family.

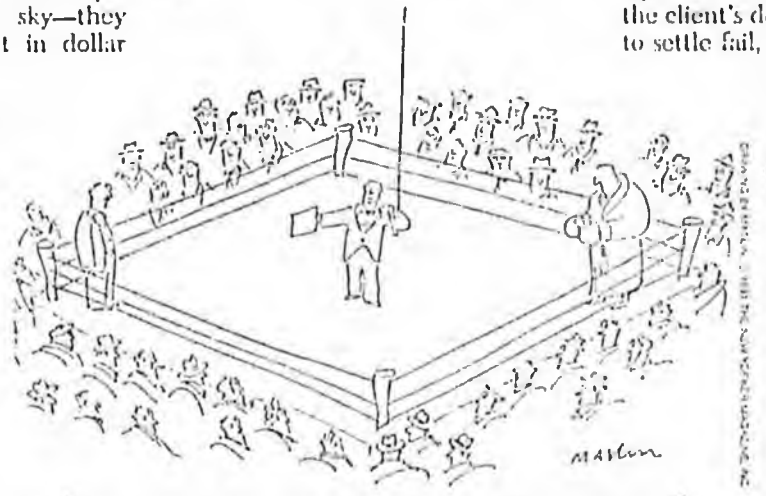
In fact, more than half of the lawyers in the United States rarely if ever set foot in a courtroom. Instead, they may advise corporate clients on tax and other business matters or negotiate sticky situations on their behalf. Many lawyers with individual clients also practice preventive law—preparing wills, trust and estate plans, and advising on financial strategies.

Yet many disputes cannot be prevented by wise planning or tightly written agreements. Planes crash, buildings collapse, and food spoils and poisons people.

New legal hot spots develop in response to changing times: The "palimony" suit against actor Lee Marvin a few years ago triggered similar suits by women who felt jilted by their live-in partners. Corporate marriages have spawned a "takeover bar" that thrives on the Byzantine intricacies of mergers and acquisitions.

Suits in the name of "the public interest" have made the courts a forum for solving a welter of social problems from discrimination to pollution.

"The litigation process was not originally designed to decide broad political questions [or] delicate balances in the allocation of scarce public money," notes Richard Neely, a justice of West Virginia's Supreme Court. He contends that courts often end up making public policy because legislators and bureaucrats all too often duck tough issues.



"In this corner, a man prone to costly and lengthy litigation."

Add to this burden the seemingly limitless spate of "silly suits"—by a schoolboy against the maker of a cookie that was hurled like a discus into his eye, by a wife against her husband for not shoveling snow off the sidewalk, by football fans against a referee's call.

A cause is born. Most lawsuits have their formal beginnings when a person goes to see a lawyer. Ethical standards bar lawyers from actively seeking out clients—so-called ambulance chasing. Lawyers who do so are subject to discipline by the courts, but advertising bans largely have been lifted, making it easier for a person with a legal problem to find a lawyer.

The lawyer either takes the case, explains why there may be no remedy or recommends another lawyer. A lawyer who passes a case on to another often receives a referral fee.

For many persons, the most painful topic during that first interview is not the private details that might have to be discussed—legally protected from disclosure by the doctrine of lawyer-client privilege—but the lawyer's fee.

Veteran practitioners typically demand $100 an hour on average. A day in court costs clients—for the lawyer alone—from $672 in the Northeast to $795 in California.

If the case involves a personal-injury claim, the lawyer will want a contingent-fee arrangement: One fifth to one half of the total money award off the top to him. If no money is received, no fee is paid. But costs of the suit, such as for investigators and expert witnesses and transcribing of testimony, must be paid by the person suing—usually on a pay-as-you-go basis.

Before a case is taken to court, a lawyer typically sends a letter or makes a phone call, vowing legal action unless the client's demands are met. If efforts to settle fail, the case enters the more costly litigation phase.

Most civil suits are filed in state courts. Cases go to federal court only when an issue involving the U.S. Constitution is at stake; when the federal courts are legally bound to take the case, such as with patents or bankruptcies; or when the dispute is between citizens or companies from different states.

First blood. The *plaintiff*, the party bringing the suit, makes allegations in a complaint filed with the court. To give a *defendant* notice and a fair chance to defend himself, a copy must be delivered to each defendant along with a summons, an order to appear in court.

A few states require that the summons be delivered in person. Others allow service by registered mail or legal notice in newspapers. *Long-arm statutes* allow a plaintiff who suffered a legal wrong in his home state to bring his case there rather than in the state of the defendant.

In that first volley, the plaintiff alleges that certain facts are true—for example, that the defendant's auto sideswiped his, injured him and kept him from work for two weeks—and asks for damages to pay for repairs and medical costs not covered by insurance.

In a *class-action suit*, a complaint is filed by one or a small group of persons on behalf of scores or even thousands of

prisoners, stockholders, bank customers or other classes of people with the same grievance.

For instance, 33 makers of corrugated-cardboard containers, who were sued in a flurry of class-action suits a few years back, agreed out of court to pay 325 million dollars. Their opponents, purchasers of their products, claimed they had conspired to fix prices. One firm that held out, Mead Corporation, was found liable and agreed to pay 45 million dollars.

The target of a suit has between 10 and 60 days, depending on the jurisdiction, to file an answer. Failing to do so probably will result in a victory for the plaintiff by default. The defendant also can allege new facts as defenses—for instance, that the plaintiff's speeding actually caused the accident.

In what is called *discovery*, the second stage of a lawsuit, the defendant has a chance to get even. The idea is to turn the contest from blindman's buff into a closer determination of the truth by giving both sides equal access to all of the facts in the case.

The discovery process often promotes out-of-court settlements because it lets parties assess the strengths and weaknesses of their case. Still, some lawyers play legal hardball with pretrial maneuvering, using it to shake their opponents' resolve.

Even in routine cases, there may be much out-of-court testimony. One side—or its witnesses—accompanied by lawyers, goes to the opposing lawyer's office, there to face a barrage of questions that can go on for days. A court stenographer and attorneys' objections to opponents' questions add to the tense courtlike atmosphere as these *depositions* are taken.

In addition, each side peppers the other with *interrogatories*—written questions—or requests for other evidence, such as documents or photos. Here, too, the timing and the scope of the inquiries can be used to tactical advantage.

As a rule, lawyers take the discovery process seriously and turn over even documents that might prove fatal to their case. They know that if they fail to do so, a court may fine or even jail their clients for contempt of court, dismiss a suit or declare a victory for the other side.

Pretrial discovery may take weeks, months or even years, and can add significantly to the length and expense of a lawsuit.

Courtroom crush. There were 205,000 civil cases pending in federal district courts in late 1982, or 399 per federal trial judge, while the median disposition time was 19 months for cases going to trial.

Litigation is even slower in the states. In only two of 32 courts studied by the National Center for State Courts did the median time from filing to jury trial take less than a year. Cases typically took much longer, up to a median time of four years and 135 days in Providence, R.I.

"When it takes four years to get to trial in a civil case, something is radically wrong," says California legal scholar B. E. Witkin. "No one who understands the system can say that it is operating in an efficient manner."

In both state and federal courts, some civil cases jump to the head of the line. Persons seeking emergency action to save a historic building or a rare tree from destruction, or prevent a board of directors from holding a meeting, or allow an election to proceed, ask the court to issue a *temporary restraining order* or an *injunction*. A court will grant the emergency relief if it is convinced that irreparable injury will occur otherwise and that any mon-

Only Trials? Not Every Time

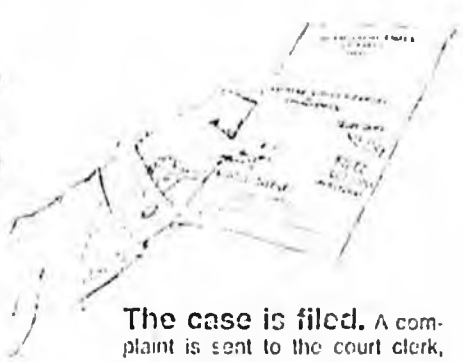
Athenian elders in the time of Pericles, 2,500 years ago, arbitrated civil disputes. Today, clogged courts and widespread vexation over the expense and quality of the judicial system are prompting a second look at arbitration, mediation and other means of settlement.

In more than 180 programs in 50 states, trained mediators or ordinary people help fellow citizens solve their problems. Many issues are picayune, but others involve large sums.

The Community Board in San Francisco trains and supports citizens' panels in several of the city's polyglot neighborhoods. Operating by consensus, the groups mediate neighbors' disputes, simple-assault cases, landlord-tenant issues and the like. The goal, says Director Ray Shonholtz, is to let

Seeing a lawyer. The client explains the problem. The lawyer takes the case, and they agree on a fee.

Getting tough. The lawyer explains his client's position to the other side in an effort to resolve the matter.



The case is filed. A complaint is sent to the court clerk, setting out the allegations, and the document is recorded.

Discovery. Before the trial, each side gathers facts and testimony from the other in transcribed sessions.

"Those who have the greatest stake in a case become directly involved in resolving it."

When a coalition of Colorado environmentalists challenged Homestake Mining Company's plan to mine uranium in Gunnison National Forest, long and costly litigation was avoided. Using the services of the Seattle-based Institute for Environmental Mediation, the two sides hammered out an accord.

In Cleveland, Chief Police Prosecutor José Feliciano set up a mediation program that is expected to handle up to 14,000 complaints a year in hearings conducted by specially trained law students. The program is aimed at the type of complaint that often is dropped by police because it does not meet legal standards or involves friction between close relatives.

New York State Chief Judge Lawrence H. Cooke notes that citizens believe there is more fairness in mediated cases than in adjudicated ones. In one study, 90 percent of defendants in mediated cases said they had a chance to tell their side of the story, compared with 40 percent in court cases, which are governed by much stricter rules of procedure.

Arbitration, a more formal method of dispute resolution in which the arbitrators' decision is binding, is gaining adherents. Chief Justice Warren Burger says arbitration "can cope more effectively with complex business contracts, economic and accounting evidence and financial statements."

Some federal courts have experimented with mandatory arbitration in certain cases in which damages sought are less than $100,000—an approach that Burger asserts "may reduce by as much as half the number of such cases that would otherwise go to trial."

Going private. Shaken by the high costs of litigation, corporations are turning to companies such as Endispute, Inc., to keep them out of court. The Washington, D.C., firm offers "dispute management" services.

One such method: A privately held minitrial, pioneered in 1978 in a dispute between TRW, Inc., and Telecredit, Inc. Lawyers for both sides presented a short version of the case before senior executives of both firms, who then settled their differences.

Another way to skirt clogged courts has been called "rent a judge"—paying a retired judge to hold a full-dress trial, the results of which can be appealed. Los Angeles lawyer Seth Hufstedler resurrected a long-forgotten state law allowing such jurists to hear cases with the consent of both parties. Other litigants have used the same law.

The practice has drawn sharp criticism. Robert Gnaizda, a partner in Public Advocates, Inc., a leading public-interest law firm in San Francisco, calls it "legal apartheid" that allows only wealthy litigants to buy a speedy—and private—solution.

ey that might be awarded if the suit is successful would not compensate for the damage.

At any time before trial, or even during or after trial, the parties to a civil lawsuit can settle. In recent years, *structured settlements* have become the vogue in personal-injury cases—a cash nest egg for the injured victim and attorney fees up front, then periodic payments for life, rather than just one lump-sum payment.

In one such case, parents of a 2-year-old girl who suffered extensive brain damage an hour after birth at Stanford University Hospital agreed in September, 1982, to what at the time was the largest malpractice settlement in U.S. history. Anna Cunningham will never walk, crawl, sit or feed herself, says her lawyer, James Bostwick, but if she reaches 78, her normal life expectancy, she will have received 122 million dollars in annual payments.

Only about 10 percent of cases that enter the litigation phase are tried. The others are dropped, dismissed or settled.

At last: The trial. Civil trials are similar to criminal trials. Prospective jurors are questioned, and six to 12 jurors plus alternates are empaneled. The plaintiff presents his case, with each witness being subject to cross-examination by the opposing attorney. Then the defendant does the same, both sides sum up their cases, and the jury deliberates after getting legal instructions from the judge.

As with criminal prosecutions, rules of evidence can play a large role in shaping the civil case, limiting the evidence to the best, most reliable and relevant information.

Although most civil trials last no more than a day or two, some drag on for many months, straining the stamina and the resources of the litigants and the ability of the judge and jury to sift out the truth.

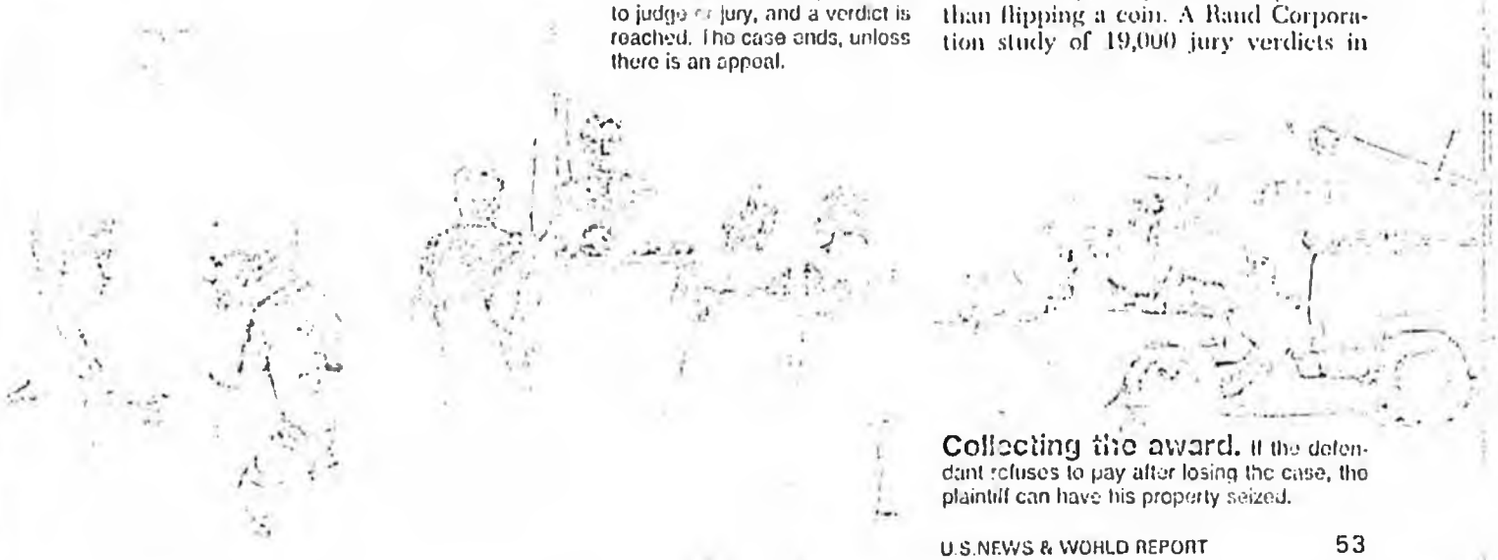
When the trial ends, 31 states do not require, as in most criminal trials, that the verdict be a unanimous one. In all states, however, the agreement of at least two thirds of the jurors—if not more—is required.

The odds of winning?

Statistically, they are hardly better than flipping a coin. A Rand Corporation study of 19,000 jury verdicts in

Settlement talks. With a costly trial approaching, the lawyers make at least one more attempt to resolve the dispute out of court.

Trial. Evidence is presented to judge or jury, and a verdict is reached. The case ends, unless there is an appeal.



Collecting the award. If the defendant refuses to pay after losing the case, the plaintiff can have his property seized.

Cook County, Ill., over a 20-year span, found that plaintiffs won 51 percent of them.

Nevertheless, the same study found that the average damage award, in 1979 dollars, had more than doubled from $30,600 to $69,000 in the previous two decades.

Nationally, malpractice awards against doctors and hospitals averaged $451,000 in 1981.

Infrequently, a judge will overrule the jury or reduce a damage award when it appears that the jury did not act on the basis of "the preponderance of the evidence"—the test applied in civil cases.

The case still may not be over. Either side can appeal to higher courts. If the defendant refuses to pay, the plaintiff might have to get a court order directing the sheriff to seize his property and sell it to satisfy the judgment. Even here, bankruptcy may foil the quest for payment.

Hour of reform. As courts have been strained to the breaking point by the litigation explosion, reformers have sought to reduce case loads. The number of federal judges had increased from 397 in 1975 to 647 by late 1982. Yet the case load per judge actually increased 36.5 percent over the seven-year period.

A study by the National Center for State Courts says the problem is that each of the legal professionals in a suit—the lawyers for both sides and the judge—expects the others to move slowly, so they all move slowly.

The key to ending the logjam, the center says, is "case management" by the judge—setting time standards for each step of the trial and firm trial dates, riding herd on laggards and granting delays only for good cause.

Four judges in Phoenix who tried case management disposed of 39.1 percent more cases than the rest of the court, and 44.7 percent more trials.

Proposed changes in the Federal Rules of Civil Procedure would give judges the power for the first time to control pretrial discovery, preventing its use to "wage a war of attrition or to coerce a party." Lawyers would be penalized for filing frivolous motions.

Suits filed by persons—prisoners, mainly—on their own behalf make up one fourth of the U.S. District Court's case load in Washington, D.C. Screening catches most of the worthless cases, yet too fine a mesh may prevent a case with merit from being heard.

Videotaping evidence, even whole trials, and pretrial telephone conferences are among some of the technological timesaving innovations that have been used successfully in several states.

Yet no such finite solutions exist for reducing American litigiousness—a way of life that shows no signs of abating. The trauma of the lawsuit may never disappear either, but someday it may be over sooner. □

New Patterns in Family Courts

Reflecting deep, wide currents of social change, family courts are in great ferment. No longer is the husband and father the paterfamilias, the absolute ruler of wife and child. Family courts today are busy aligning the new, more evenhanded order of things.

While not long ago these courts were concerned with breaches of promises to marry and with narrow grounds for divorce, today they must tackle thornier issues.

Family courts establish paternity with complex blood tests and deal with artificial insemination and test-tube babies. Unwed fathers, formerly ignored in custody and adoption proceedings, now have rights of notice.

The "best interests of the child" are taken into account in determining custody and visitation rights. Joint custody is allowed in 28 states, and courts no longer automatically assume that the mother is best at caring for children.

All states but Illinois and South Dakota allow no-fault divorces in which couples dissolve their bonds without accusing each other of adultery or mental cruelty. Simplified procedures permit legal clinics to handle divorces for a modest fee.

Dividing the apple. Financial-support arrangements reflect women's new economic independence. The courts are beginning to give financial recognition to the wife's contributions in the home, while also granting alimony to husbands when their ex-wives earn more. All-but-wed partners, now separated, are demanding that courts grant them support, and some are getting it.

"Virtually no tradition or precedent is secure. There is a real conflict of interests," say family-law experts Henry H. Foster and Doris Jonas Freed. "Everyone in the family is entitled to do his or her thing; and like the members of the Swiss Navy, they are all admirals."

What Happens In Little Cases

Criminal cases and big-money lawsuits grab the headlines, but the largest number of people who go to court are involved in traffic offenses or minor disputes.

Traffic court. Driving cases come before a variety of judges ranging from rural, part-time justices of the peace to full-time jurists in metropolitan areas.

Most of the nation's 59 million traffic violations each year are settled when a motorist simply mails in a fine.

To contest a charge, you must be in court on the date listed on the ticket. Experts advise that you bring witnesses and photographs, if appropriate. If your defense is plausible, you may have a good chance of winning.

You probably don't need a lawyer, since most traffic courts operate informally. But if the charge is drunk or reckless driving, which could bring a jail term, legal assistance may be helpful.

Small-claims court. About 3.5 million times each year, people with gripes against local merchants, neighbors or others turn to small-claims court to resolve the matter simply and quickly. A judge or arbitrator hears both sides, then decides the issue either on the spot or in a short time.

Some pointers:

- Monetary damages are limited—$700 maximum on average.
- Special forms to file a complaint are usually provided at the courthouse. A small fee—$2 to $20—is required, and a waiting period of two weeks is common.
- Be sure to show up for the trial on time, although you may have to wait until your case is called. Many small-claims courts are open evenings or weekends.
- Bring papers, receipts, photos and other items that will help prove your case. Witnesses may help if they appear to be reliable.
- In some states, lawyers may not argue a client's case in small-claims court because that would give the client an unfair advantage. But consider retaining one if the other side will have one.
- Don't be concerned about legal niceties, and avoid long-winded explanations. Just state your case as succinctly as you can.

The Pervasive Influence of Lawyers

The ranks of a multitude for whom the law is a profession grow more numerous by the day—as do the controversies over fees, ethics, training.

Little in this country today remains untouched by lawyers. They abound at every turn, from the fight for life's necessities such as air, water, food and shelter to the quest for liberty and the pursuit of happiness. They advocate, regulate, and—their critics say—often obfuscate.

Richly rewarded for interpreting the sacred entrails of the law, lawyers nonetheless pay a steep price for living off the conflicts with which society is riven: Low public esteem in polls that sometimes rank them with used-car salesmen and garbage collectors.

The contemporary tongue-in-cheek comment about St. Ives, a 13th-century lawyer, still brings knowing chuckles: "He was a lawyer, yet not a rascal, and the people were astonished."

The U.S. has 610,000 lawyers, two thirds of the world's total and almost three times as many as in 1951. About 70 percent are in private practice. Half of the rest work for the government.

The growth of the profession's ranks has been so rapid that a glut exists in many urban areas. Recession and deregulation have put a crimp in the once booming law business in Washington, D.C.—home base for some 27,000 lawyers.

Still, eye-popping salaries and hourly fees show no sign of declining. In law firms, partners' "draws" or earnings average $90,000. Some "rainmakers"—well-connected lawyers who bring in the business—such as Washington lawyer Joseph A. Califano, Jr., pull in between a half-million and a million dollars a year. San Francisco antitrust lawyer Moses Lasky won a million-dollar fee from Telex Corporation for filing just one brief at a critical point in its suit against IBM.

Associates—salaried lawyers who are striving to become partners—average $35,200, but young lawyers at a few New York firms start at $43,000 a year. Fees for lawyers with four or five years of experience average $74 per hour, while beribboned veterans such as the legendary Louis Nizer may charge up to $350 per hour.

Some lawyers, denounced as "greedy swashbucklers" by consumer advocate Ralph Nader, are becoming increasingly bold in charging their clients more as the stakes get larger.

In 1981, law practices took in 24.1 billion dollars, or 0.9 percent of the gross national product, more than the air-transport industry and one fifth as much as the health-services economy.

That claim on the GNP might be smaller were it not for laws in all of the states prohibiting nonlawyers from providing legal services. Although wills often are drafted in law offices by paralegals or unlicensed legal assistants, a nonlawyer who sells advice to the public on how to write the same document can be prosecuted.

Bar groups say this monopoly helps protect the public from charlatans, but the closed society that lawyers constitute has come under increasing antitrust scrutiny in recent years. A ban on lawyer advertising, enforced by the bar for decades, was struck down by the Supreme Court in 1977.

Since then, a flowering of storefront legal clinics that offer low, standardized fees in a Spartan setting has occurred. "The Lawyers at Dart Drug" advertise uncontested divorces at $195 next to panty hose at $2.49. This kind of mass marketing offends the traditional sense of propriety felt by many attorneys, but it is making legal services more accessible to the nonaffluent.

Hiring a famed courtroom practitioner such as Louis Nizer of New York can cost $350 an hour.

Ways to Pick A Good Attorney

Legal experts offer the following tips on finding a lawyer competent to deal with your problems—

- Begin by asking friends or others you trust for a recommendation. Get a consensus if you can.
- Bar-association referral services can help, but they list lawyers without evaluating them.
- For a simple will, real-estate closing or some other routine legal need, a low-cost legal clinic may well fill the bill.
- Consider consulting a certified specialist in complex areas such as tax, trusts or trial work.
- Visit the lawyer and see how you get along. Expect to pay for this consultation.
- Don't be shy in asking about the attorney's credentials. The *Martindale-Hubbell Law Directory*, found at your public library, rates lawyers' abilities and notes key clients.
- Check with your state's lawyer-discipline agency to find out whether the lawyer has had an ethics violation.
- Pin down *fees* and costs in writing. Is there a retainer fee to be paid in advance? Will there be an hourly charge or will your lawyer get a percentage of your recovery in a damage suit?

The elastic ethics and the ineptness of some lawyers and the downright dishonesty of others have hurt the reputation of lawyers even more than high fees, and triggered demands for reform from lawyers themselves.

The American Bar Association, which represents half the nation's lawyers, is putting the finishing touches on a new code of professional responsibility that would strengthen the hand of clients who think they have been cheated. Disciplinary procedures, often lengthy and lenient, are being beefed up. And law schools are teaching more ethics and emphasizing "real life" situations more in training.

Even so, lawyers will never be popular, says New York lawyer Eugene C. Gerhart: "They cannot expect to be liked by those they oppose. They can only hope to be respected for their courage, their competence, their integrity and their loyalty to the eternal ideal of justice." □

The "Hidden Judiciary" And What It Does

They are called ALJ's, and you will find their fingerprints on many of the actions taken by bureaucrats both in Washington and in the states.

Bring up the subject of how an individual's legal rights are determined, and most people picture a black-robed judge perched high on his bench in a marble-paneled courtroom.

Yet the average citizen is touched far more often by rulings made in a less august judicial arena, by what some have called the hidden judiciary.

It consists of a special tier of judges who act as checks on state and federal agencies that make millions of administrative decisions each year—dealing with everything from the issuance of drivers' licenses and the payment of jobless benefits and Social Security pensions to the regulation of utility rates and television stations.

The vast majority of these determinations are not challenged. But hundreds of thousands of them annually are appealed to the 1,153 administrative-law judges (ALJ's) employed by federal agencies or to similar judges at the state level.

In addition, when regulations are being written—whether the subject is surface mining, building design for the handicapped, mechanically deboned meat or one of the myriad other areas in which government intervenes—ALJ's preside over the hearings.

While bureaucrats carry out policies through rules and regulations, the job of ALJ's or hearing examiners is to make sure there is due process, that agency decisions are legal and fair.

No jurors. In appeals of agency decisions, they function much like trial judges in nonjury cases. Parties are represented by lawyers in formal hearings, evidence is submitted, witnesses are heard. In most cases, an ALJ renders a written opinion, which is appealable to agency administrators or commissioners, then to the courts.

Most appeals of agency decisions touch on only one person or one firm, but ALJ rulings at times affect citizens and businesses nationwide. A decision by ALJ Chester Naumowicz at the Federal Communications Commission in 1976 opened up the telephone industry to greater competition.

It is ALJ's who initially try the civil suits filed by regulatory agencies. At the Federal Trade Commission, they decide, among other things, whether corporate activities conflict with antitrust laws or FTC guidelines.

In a case involving General Foods' Maxwell House coffee, for example, an administrative-law judge ruled against the FTC staff, holding that the firm had not used unfair methods of competition to dominate the coffee market.

The agency's staff had filed an antitrust suit against General Foods. After losing the first round, bureaucrats of the FTC appealed to their five-member commission.

At the National Labor Relations Board, 110 administrative-law judges in Washington, San Francisco, New York and Atlanta hear about 1,200 unfair-labor-practice and union-representation cases a year, out of 40,000 filings. The rest are settled by NLRB bureaucrats or dismissed.

More than two thirds of the federal ALJ's work for the Social Security Administration in 125 field offices. They hear more than 250,000 cases a year, determining eligibility for benefit payments. Such hearings are short and relatively simple, taking a matter of hours in most instances.

Outside of Social Security, however, administrative hearings often drag on for many months. The so-called American Telephone & Telegraph basic-rate case at the FCC in the mid-1970's spawned a 16,437-page transcript—plus 15,864 additional pages of exhibits—during 103 days of hearings.

Even after the hearings are over, it can be a long time before a case is wrapped up. Several years ago, the General Accounting Office, the audit-

Special Courts For Special Cases

Within the federal system are a number of specialized courts that handle cases in some complicated or technical areas. These courts, most of which are in Washington, D.C., include:

U.S. Claims Court—Established October 1 to replace old U.S. Court of Claims. Its 16 judges handle every type of money claim against the United States except those involving personal injury.

Court of International Trade—Set up in 1980, its nine judges review government actions dealing with imports, such as disputes over classification or valuation of goods and antidumping laws. Handled 3,207 cases in 1981. Sits in New York.

Bankruptcy Court—Established in 1978, ordered reorganized by Supreme Court in 1982. Some 241 judges in 91 district courts across the country handled a record 527,811 filings in year ended June 30, 1982. Under the U.S. Constitution, all personal and corporate bankruptcies and reorganizations are heard by federal courts.

Court of Appeals for the Federal Circuit—Established October 1 to replace old Court of Customs and Patent Appeals. Handles appeals from Claims Court and Court of International Trade plus patent appeals and patent-infringement cases. Its 12 judges sit in three-judge panels.

Foreign Intelligence Surveillance Court—Set up in 1978 to review applications for electronic surveillance by the government of foreign powers and their agents. Seven district judges, serving part time on the court, approved all 431 requests in 1981.

Tax Court—In this agency, established in 1924, 19 judges have about 30,000 cases pending involving deficiencies or overpayments in income, estate and gift taxes. Ten other special trial judges hear "small tax cases," where the tax due is less than $5,000.

Court of Military Appeals—Established in 1950 as the final appellate tribunal to review court-martial convictions in the armed services. Three civilian judges, who serve 15-year terms as presidential appointees, decided 153 cases in 1980.

ing arm of Congress, studied four agencies it considered typical and found the median time from hearing to final agency decision was 352 days.

The delays often draw complaints from Capitol Hill and private citizens. ALJ's bristle at any suggestion that they are to blame, saying it is the bureaucrats who use up most of the time—a contention borne out by the GAO study.

As little known as they are to many Americans, administrative-law judges date to the days of George Washington, when customs officers were appointed to figure the duties payable on imports and to determine which soldiers were disabled. In time, the system lost public respect because agency actions were often merely rubber-stamped.

Congress tried to correct that problem in 1946 by passing the Administrative Procedure Act, which established the autonomy that ALJ's enjoy today.

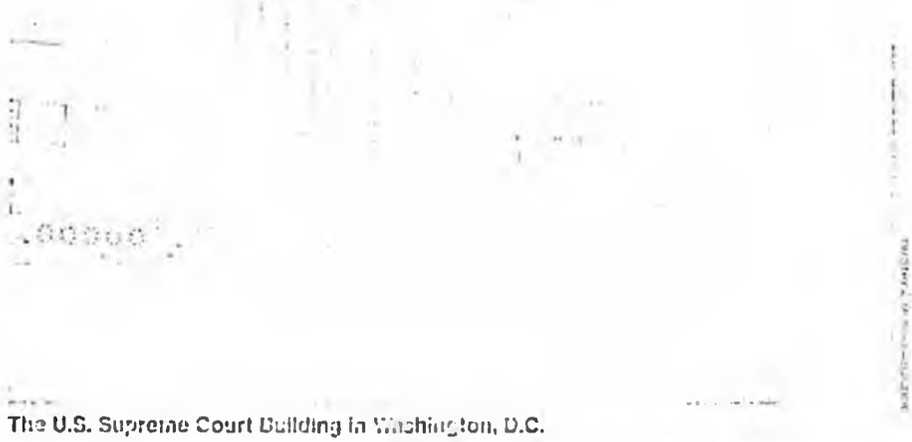
They are still employes of the various agencies, as previously, but their pay—about $57,000 for most—now is controlled by the Office of Personnel Management. They are assigned cases on a rotating basis and may not be supervised by any official who performs investigative or prosecutory functions.

It is not a job for burned-out legal hacks looking for an easy berth in government. ALJ's are selected through a rigorous merit program, and 70 percent of applicants are rejected. A former chief justice of a state supreme court was among those recently chosen.

Guarding the turf. The issue of their independence is at the core of a burgeoning controversy over a Reagan administration attempt to clean up the disability rolls. State agencies, working with new Social Security Administration (SSA) guidelines, cut off benefits for some 245,000 of the 2.7 million people on the rolls. But about three fifths of those who have appealed have been reinstated by ALJ's using looser standards developed by the U.S. courts.

Alarmed by the high reversal rate, the SSA has been overruling some decisions—and riling many ALJ's. They say the agency wants them to act more as bureaucrats implementing regulations than as independent judicial officers.

One method of assuring greater independence is a corps or central panel of ALJ's, not tied to any agency, that provides trial services on demand. New Jersey, one of eight states with such a pool, also has reported substantial cost savings. Judge Irving Sommer, chairman of the National Conference of Administrative Law Judges of the American Bar Association, sees an intangible plus: "People know they're getting a fair shake because the judge isn't attached to any particular agency." □



The U.S. Supreme Court Building in Washington, D.C.

A Supreme Court Under Pressure Is Back in the Spotlight

Overwork and ideological divisions, authorities say, are sapping the effectiveness of the nine Justices who sit at the apex of the judicial system.

The U.S. Supreme Court, deluged with cases and split philosophically, is working under the greatest strains it has faced in its 193-year history.

The Court's nine members, among the world's most prestigious judges, are finding it harder and harder to perform their historic dual role—to insure justice for individual Americans while guiding the nation on the meaning of its laws.

The volume of appeals has reached flood stage, with the result that a citizen today has only a slim chance of having a case heard by the Court.

At the same time, sharp and shifting divisions among the Justices over abortion, racial discrimination, prisoners' rights and many other questions often produce murky decisions that confuse lawyers and judges alike and inspire still more lawsuits. The Justices—five of whom are 73 or older—were besieged in 1981-82 with 5,311 appeals from state and federal courts. When the 1982-83 term began, the docket was already two-thirds full.

Today's Supreme Court is far different from the six-member bench set up in 1789. In the early days, almost every case presented was heard. Now, the 200 cases per year that the Court is able to review in detail make up fewer than 5 percent of the appeals filed. Says former U.S. Solicitor General Erwin Griswold, "All you can do is knock on the door and ask to be let in."

Hotly contested issues involving such subjects as taxes, labor rules and other government regulations can remain unresolved for years. On many such questions, some of the 12 federal appeals courts have ruled in opposite ways.

About one third of the Supreme Court's case load is set by law. Included: Lower-court decisions striking down federal laws, state-supreme-court rulings interpreting the U.S. Constitution and boundary disputes between states.

As for the remainder, the votes of four Justices are needed to grant a full hearing. Beyond that, "there are no rules," says Eugene Gressman, University of North Carolina law professor. "Each Justice votes to grant review of cases he or she thinks are important enough to warrant the Court's attention."

A milestone. Since the famed 1803 case of *Marbury v. Madison*, the Court has claimed the power to strike down laws it decides conflict with the Constitution. Virtually no one challenges that doctrine today.

Yet debate rages over the extent to which Justices can broaden past interpretations of constitutional rights, fill in gaps they perceive in laws, or supervise public institutions. Typifying the criticism of "judicial activism" is the charge of former Senator Sam Ervin, Jr. (D-N.C.) that "the people of our land are being ruled by the transitory personal notions of Justices who occupy for a fleeting moment of history seats on the Supreme Court."

In recent decades, split opinions

Justice Stevens at work with law clerks, whose role at the Court has grown.

have guaranteed women broad rights to have abortions, barred prayer from public schools, given wide rights to criminal suspects, ordered schools desegregated and set minimum standards in prisons and mental hospitals.

The Justices became increasingly willing to strike down U.S., state and local statutes, voiding more since 1920 —761—than the 386 ruled unconstitutional in the previous 130 years, says legal scholar Bruce Fein. Activism reached its peak during the 1950s and 1960s under Chief Justice Earl Warren.

All current Justices have joined activist rulings at least on occasion, but William Brennan, Jr., the Court's senior member, and Thurgood Marshall have done so most often.

On the other end of the spectrum, Chief Justice Warren Burger and Justices William Rehnquist and Sandra Day O'Connor, advocates of "judicial restraint," tend to defer to the legislative and executive branches of government. The other Justices—Harry Blackmun, Lewis Powell, Jr., John Paul Stevens and Byron White—swing from one camp to the other, depending on the issue.

In the 1981-82 term, 33 cases—nearly one fifth of the opinions issued—were decided by a one-vote margin, twice as many as in 1980-81. Justices also are more likely nowadays to issue opinions stating their individual views.

No moot points. Justices have ways of rationing the use of their power. For one thing, no matter how important the issue, they refuse to take a case unless it is a real dispute affecting litigants, not a hypothetical question.

As quarrelsome as they may sometimes seem, the Justices try to resolve differences privately. Once or twice during each week of oral arguments, they gather with no aides present, shake hands with each other, discuss the cases they've heard and take a preliminary vote on their decisions. If the Chief Justice is in the majority, he decides who will write the explanation of the Court's reasoning; otherwise, the senior Justice makes the assignment.

Opinion writing can take months. First, drafts are circulated among Court members who voted together. The Justices may sign the proposed opinion, try to persuade the drafter to alter it, or write their own versions. Occasionally, Justices reverse their initial votes after reading other members' drafts. Wade McCree, Jr., U.S. solicitor general from early 1977 to mid-1981 and at one time a federal appeals judge, describes the give-and-take this way: "Justices fight for language they prefer, but to get others to concur, they may soften their positions. That's what a collegial court is all about."

Policy disagreements on the Court will never end, but reformers have proposed several ways to cope with the increasing case load.

One idea, endorsed by four Justices, is creation of a "National Court of Appeals" to which the High Court could refer cases requiring attention but not raising crucial national issues. Justice Stevens has proposed a new court to decide which cases the Supreme Court should hear. In addition, all of the Justices have asked lawmakers to eliminate the requirement that they hear certain categories of cases.

Justice Powell has called, too, for dividing among the Court members the job of screening appeals, eliminating the tradition that "each Justice has to vote on every doggone petition."

Others would curb or abolish oral arguments, the hour-long sessions in which Justices pepper lawyers with questions about their cases.

Reformers are split over the role of law clerks, young law-school graduates who serve as research aides. As recently as 1950, Justices each had only one clerk; now, most have four.

Some analysts believe the Court needs more clerks to help screen cases; others complain that the longer, more difficult-to-understand opinions being issued today are partly due to the proliferation of the clerks who draft them.

Flak from the right. Many critics would actually narrow the Court's power. Among ideas being pushed by some conservatives: Taking away the authority of federal courts to hear cases on such subjects as abortion and school prayer and forcing federal judges—all of whom are now appointed for life—to run for office periodically. Opponents assert that such measures would dangerously undermine the independence of the nation's judiciary—a vital element in the American system.

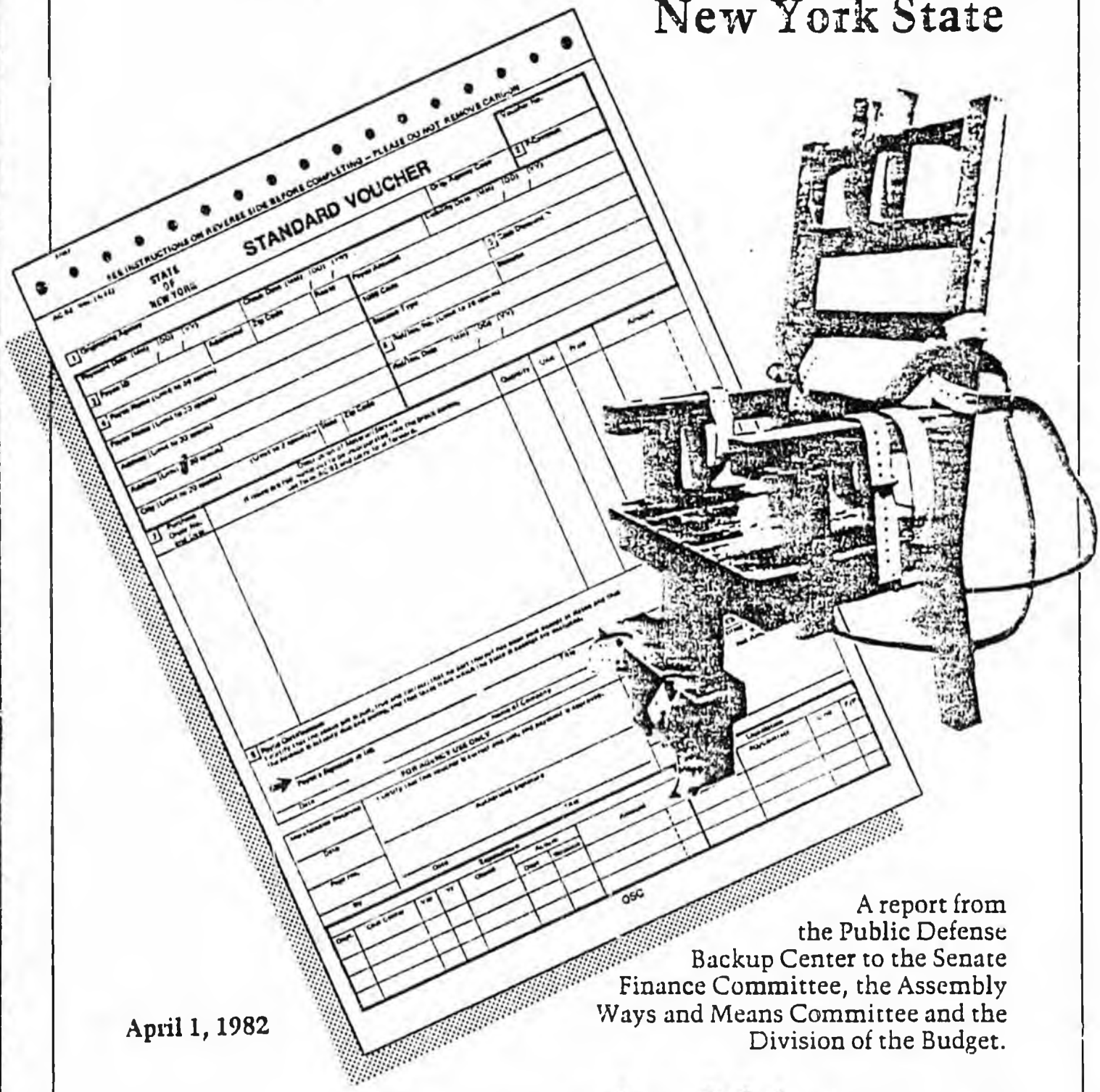
Supreme Court Justices themselves have studiously avoided taking a stand on the court-curbing proposals because they would likely decide the constitutionality of any such measure passed by Congress.

The Court has tempered its activism a bit in recent years—a change some analysts attribute to the wave of criticism being leveled at judges.

Over all, however, experts see little chance that a philosophical majority capable of steering a consistent path will reappear at any time soon. The intellectual ferment and doubts that the Justices reflect run deep throughout American society.

Then, too, observes Potter Stewart, who retired in 1981 after 23 years as a Justice: "Unlike any institution in the world, there is no boss of the Court. Your only boss is the Constitution and the law. Nobody can tell another Justice what to do or what not to do." □

Capital Losses: The Price of the Death Penalty for New York State



A report from the Public Defense Backup Center to the Senate Finance Committee, the Assembly Ways and Means Committee and the Division of the Budget.

April 1, 1982

New York State Defenders Association, Inc.
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TABLE OF CONTENTS

PREFACE

Under its contractual obligation with the state of New York to review, assess and analyze the public defense system, the New York State Defenders Association periodically publishes reports to the Legislature, the Governor, the Judiciary and other appropriate instrumentalities. The report which follows preliminarily examines the costs of capital litigation and the fiscal impact of the death penalty on New York State. This report is directed to those who have a legal responsibility to analyze that fiscal impact.

INTRODUCTION

In the last five years, efforts in both houses of the Legislature have pushed New York closer and closer to the passage of a death penalty. During this time, shrill voices have argued every major proposition with reference to the death penalty except one—its actual cost. The floor debates during this period of time provide little hard cost data, but, as will be seen, they make clear that the death penalty will call for the most irrational and disproportionate expenditure of energy and money in the history of criminal justice in this state.[1]

Despite this reality, one searches in vain for legislative information on the subject of actual cost. The memorandum in support of this year's death penalty bill (S.7600/A.9379), as in the past, states that there are "no fiscal implications." Yet, as late as the end of March 1982, the Senate sponsor of the bill reportedly did not know the fiscal implications of the death penalty.[2] The Senate Research Service states in its death penalty briefing paper, "Insofar as the fiscal implications of the death penalty are concerned, the costs of its imposition and the related appeals process are uncertain."[3] Likewise, though the New York State Department of Correctional Services has recognized the issue,[4] it has not projected costs under a death penalty statute.[5]

At a time when New York State is under tremendous fiscal constraint in its efforts to deliver basic human services, it is ironic that no one in government has attempted to assess and project the actual cost of a death penalty here.

Conventional wisdom suggests that it is less expensive to execute a person than to imprison a person for life. Conventional wisdom is wrong. As Mr. Justice Marshall stated in *Furman v. Georgia*, 408 U.S. 238, 357-8 (1972):

> "As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if

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[1] The New York State Defenders Association opposes the death penalty for any crime because it is immoral, discriminatory, and inevitably capricious. The penalty provides, and will always provide, the opportunity for masking racism and prejudice. Its history marches in step with the history of genocide; its cadence is the cadence of expediency; its failure, the failure of humankind. The death penalty is obscene violence. There is no excuse for its existence, and someday it will be abolished.

We do not by this paper retreat from these positions.

In the course of this paper, we will comment on sections of the death penalty bill, and, in particular, on those sections dealing with publicly supported defense representation for the poor. Nothing we say here should be read as approval of the bill or an appraisal of its ultimate constitutionality. We are reporting cost data, and that is the purpose of this paper. It is important for state officials and the public to know the price tag which is attached to capital punishment. The costs outlined here are the bottom line. Because death has been held constitutionally to require greater procedural protections, *Gardner v. Florida*, 430 U.S. 349 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976), legally required procedures and their attendant costs will continue to escalate.

[2] *Legislative Gazette*, March 29, 1982, at 8, col. 1.

[3] SENATE RESEARCH SERVICE, ISSUES IN FOCUS, No. 82-48, DEATH PENALTY 4 (Jan. 28, 1982).

[4] In July 1978, New York's Department of Correctional Services reported, but did not evaluate the anti-death penalty position that, "... capital punishment is more costly from an economic viewpoint than other alternatives if all costs are counted, including court, prosecution, defense and correctional." DEPARTMENT OF CORRECTIONAL SERVICES, DIV. OF PROGRAM PLANNING, EVALUATION AND RESEARCH, OVERVIEW OF DEATH PENALTY AND REVIEW OF ARGUMENTS FOR AND AGAINST ITS USE 9 (July 1978).

[5] Significantly, states with a death penalty cannot afford the "luxury" of non-examination. The Legislature of Florida knows full well the projection of costs made by Louie L. Wainwright, Director, Florida Division of Corrections. Florida projects an expenditure (absent inflation) of more than $57 million by the year 2000 just to maintain the death row population. BUREAU OF PLANNING, RESEARCH AND STATISTICS, STATISTICAL FACTS, No. SF-80-9, FLORIDA DEP'T. OF CORRECTIONS—DEATH ROW ANALYSIS 2 (Aug. 29, 1980).

true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases.

"At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

"During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the state. There are also continual assertions that the condemned prisoner has gone insane. Because there is a formally established policy of not executing insane persons, great sums of money may be spent on detecting and curing mental illness in order to perform the execution. Since no one wants the responsibility for the execution, the condemned man is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball. The entire process is very costly.

"*When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.*" [Footnotes omitted.] (Emphasis supplied.)

The authority of Mr. Justice Marshall's assertions,[6] as well as other recent work,[7] indicate in general terms, but without contradiction, that a criminal justice system with the death penalty is inordinately more expensive than a criminal justice system without the death penalty.

Seventeen years ago, the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, in its report recommending the abolition of the death penalty in New York State, said:

". . . [O]wing to their importance, capital cases take longer to litigate at the trial level and obstruct the general administration of criminal justice accordingly; . . . the appellate ramifications are intricate and extensive; . . . the pursuit of other post-judgment remedies leads to many courts, both state and federal, involving substantial segments of the judiciary; . . . the battle to save the 'doomed' man reaches into the executive branch of the government; and, in general, . . . capital cases are disruptive of the orderly process of criminal justice. . . . [W]hatever aspect of the death penalty one examines, one finds nothing but

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[6] T. THOMAS, THIS LIFE WE TAKE 20 (3d ed. 1965); B. ESHELMAN AND F. RILEY, DEATH ROW CHAPLAIN 226 (1962); Caldwell, *Why Is the Death Penalty Retained*, 284 ANNALS 45, 48 (Nov. 1952); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION, No. 2, at 11, 13-14 (June 1964); Sellin, *Capital Punishment*, 25 FED. PROBATION, No. 3, at 3 (Sept. 1961); Slovenko, *And the Penalty Is (Sometimes) Death*, 24 ANTIOCH REVIEW 351, 363 (1964); Bailey, *Rehabilitation on Death Row*, in BEDAU, THE DEATH PENALTY IN AMERICA 556 (1967 rev. ed.); T. ARNOLD, THE SYMBOLS OF GOVERNMENT 10-13 (1935). See also: *Stein v. New York*, 346 U.S. 156, 196, 73 S.Ct. 1077, 1098, 97 L.Ed. 1522 (1953) (Jackson, J.); cf. *Reid v. Covert*, 354 U.S. 1, 77, 77 S.Ct. 1222, 1261-1262, 1 L.Ed.2d 1148 (1957) (Harlan, J., concurring in result); *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Carnativo v. California*, 357 U.S. 549, 78 S.Ct. 1263, 2 L.Ed.2d 1531 (1958).

[7] Nakel, *The Cost of the Death Penalty*, 14 CRIM. L. BULL., No. 1, at 69 (Jan. 1978). See also the newly revised BEDAU, THE DEATH PENALTY IN AMERICA (3rd ed. 1982).

obstruction, confusion and waste."[8]

The Commission saw early on the direction of capital litigation in the United States and, accepting the inevitable consequences of the then developing moratorium on executions,[9] rejected the death penalty as an inappropriate adjunct to the administration of criminal justice. Since 1955, while we have lived with and without a death penalty in New York State, and in recent years while we have vigorously debated its reemergence, there has been no systematic effort to identify and compute costs. This paper is a preliminary examination of those costs.

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[8] STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, FOURTH INTERIM REPORT: SPECIAL REPORT ON CAPITAL PUNISHMENT, LEG. DOC. NO. 25, at 97 (1965).

[9] From 1967 until 1977, executions in the United States were suspended by litigation in the federal courts seeking the resolution of constitutional challenges to the death penalty. The United States Supreme Court, in a plurality opinion, declared in *Furman v. Georgia*, 408 U.S. 238 (1972), that discretionary death penalty statutes then in effect constituted cruel and unusual punishment because death was imposed infrequently and in the absence of clear standards. The rare, unpredictable, discretionary use of the sanction of death was deemed to violate the Eighth and 14th Amendments to the United States Constitution. State legislatures responded to *Furman* by enacting either mandatory death statutes or "guided discretion statutes" which utilized bifurcated trial procedures to determine guilt and then punishment. In 1976, the Supreme Court ruled in *Woodson v. North Carolina*, 428 U.S. 280, 310 (1976), that the mandatory death penalty for first degree murder was unconstitutional because it treated all convicted persons not as "... uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." On the same day, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld "guided discretion" statutes which required objective standards to guide, regularize, and make rationally reviewable the process of imposing death. Since *Gregg*, more than a dozen substantial procedural issues have been decided on behalf of defendants by the United States Supreme Court. Capital litigation routinely raises those and other constitutional questions at every stage of review.

PART I:
THE NATURE OF DEFENSE SERVICES UNDER THE PROPOSED DEATH PENALTY BILL

One of the great concerns of the New York State Defenders Association concerning the implementation of the death penalty in New York is whether or not the representation of the poor in death cases will be adequate. The current delivery mechanism for public defense services is clearly inadequate to a death penalty. The County Law leaves to each county responsibility for the development of its own system of defense services. The result is that a crazy quilt of county defender systems exists in the state. The services are insulated, autonomous and unregulated. Resources differ from county to county. It follows that the adequacy of defense representation differs from county to county as well.[10]

The problems of the system have not gone unnoticed in the legislative debate concerning the death penalty in New York. Some representative comments from the Assembly and Senate floor debates follow:

> "The fact is, ladies and gentlemen, we will look at the defense capability. Throughout New York State today there are 20 counties that have . . . no . . . investigators to help in any case, much less a capital case . . . Nine counties have one investigator available, four of them have two and four have three. *Forty-one of our counties—over two-thirds, do not have the investigative capability that the defense attorney needs to defend his client.*" [Emphasis supplied.][11]

> "We are talking in many instances of assigned counsels who are paid very little money by any contemporary standard. *We are talking about a system where the defense really doesn't have the ability to investigate* . . . ***that's the question you are asking yourself, and that's the question each of us has to ask ourselves before we vote on this bill. . . ." [Emphasis supplied.][12]

> "Forty-six counties have asked the New York State Public (sic) Defenders Association for help in doing appeals, the appeal work for the felony criminal matters. *What kind of justice is that, where 46 counties say, after the trial, 'We don't have the expertise and the ability to deal with the appeal process.'* That is the fair trial we are talking about, with an irrevocable penalty." [Emphasis supplied.][13]

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[10] Article 18-B of the County Law requires each county to adopt a systematic plan for furnishing counsel to indigent defendants. The counties may choose: 1)representation by a public defender; 2)representation by contract with a legal aid society; 3) representation by counsel furnished pursuant to an assigned counsel plan of a bar association; or 4) a combination of these. In the greater part of the state, public defense is a part-time job. Training is not a mandatory part of the statutory scheme. Assigned counsel plans are shrinking as a result of the very low fees paid to public defense attorneys. Nationally, New York ranks 45th with the lowest reimbursement rate at the trial and appellate level. There are 76 distinct defender systems in this state. The common thread that binds them together is underfunding at the county level, a lack of standards for their operation, and the unpopularity of the clients they serve.

[11] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Hevesi), at 875.

[12] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Miller), at 1020.

[13] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Hevesi), at 875-876.

"Who is going to get the death penalty? The poor defendant, the defendant with the poor lawyer more likely. I'll tell you one thing, if there is one certainty—if there is one certainty in what you're about to do—it is that, if you pass the bill and it goes into effect, I am certain that no millionaire will ever burn, that no rich person will ever have the sentence carried out, and that's a fact, and I think we all acknowledge that that's a fact. *The victim of this, the person upon whom this penalty will be carried out, will be the poor unfortunate, the person with the lawyer of less skill or experience than others.*" (Emphasis supplied.)[14]

"When you look at the kinds of people who have been convicted and sentenced to death, they invariably are people from the low income bracket and *there are those of us who believe . . . that if you're poor, you do not necessarily get the kind of legal representation that you would if you had the money to afford the right kind of attorney.* I know you will say that that's not the case, and that there is equitable provision under the law and that there is a fair share, and everyone else will get their day in court, but I think the real world proves that poor people generally carry the brunt when they are charged with murder, particularly if there is a difference in ethnicity." (Emphasis supplied.)[15]

All of these comments reflect upon a defense system that is basically inadequate. Three critical aspects are identified. First, there is no set of experiential standards to be met for the representation of defendants in felony cases in this state. Second, there is county-based disparity in the financing of the public defense system such that certain counties are without the resources to provide adequate representation. Third, there are exceedingly low fees for attorneys, experts, investigators, and other necessary auxiliary services.

The Volker/Graber bill (S.7600/A.9379) responds directly to these issues by: a) removing the burden from counties and making the cost of defense services a state charge; b) attempting to create experiential standards for the representation of defendants in capital cases; and c) creating a standard whereby attorneys, experts, investigators and others will be paid the customary fee for similar privately retained representation or services. In pertinent part, the bill states:

§722-g. Assignment of counsel and related services in criminal actions in which the death sentence may be imposed. 1. *Notwithstanding any other provision of law to the contrary*, in every criminal action in which a defendant is charged with an offense defined in section 125.27 of the penal law, *a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert or other reasonably necessary services at any time either* (a) *prior to judgment*, or (b) *after the entry of a judgment imposing a sentence of death but before the execution of that judgment; shall be entitled to the appointment of one or more attorneys and the furnishing of such other services* in accordance with the remaining provisions of this section.

2. If the appointment is made prior to judgment, at least one attorney so appointed must have been admitted to practice in the courts of this

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[14] RECORD OF PROCEEDINGS, SENATE, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Senator Connor), at 145.

[15] RECORD OF PROCEEDINGS, SENATE, STATE OF NEW YORK (Monday, March 23, 1981) (statement of Senator Bogues), at 1279-1280.

state for not less than five years, and must have had not less than three years' experience in the actual trial of felony cases in this state.

3. If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the courts of this state for not less than five years, and must have had not less than three years' experience in the handling of appeals in felony cases.

4. Upon a finding in an ex parte proceeding that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore pursuant to the provisions of subdivision five hereof. Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement.

5. *Notwithstanding the rates and maximum limits generally applicable* to criminal cases and any other provision of law to the contrary, *the court shall fix the compensation to be paid to attorneys* appointed pursuant to this section *and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services* authorized pursuant to subdivision four of this section *at such rates or amounts* as the court determines to be appropriate *in order to provide such defendant with representation by counsel and other services as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal.*

6. Any compensation, fee or expense to be paid pursuant to this section *shall be a state charge* payable on vouchers approved by the court which fixed the same, after audit by and on the warrant of the comptroller. [Emphasis supplied.]

The bill is an effort to overcome a defective statutory scheme. It is designed to assure equality of service for the poor. Under its terms, the state must appoint and pay for counsel for those unable to afford a lawyer both prior to judgment and at any time up until the actual imposition of the sentence of death.

Investigative, expert and other auxiliary defense services, as well as counsel fees, will be paid on the basis of customary rates for the services in amounts which will provide the defendant with representation and other services " . . . as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal."

The meaning of this language and the full scope and extent of what the Volker/Graber bill means is made crystal clear by a review of statements made by the bill's sponsors in debate on the floor of the Legislature. Referring to §722-g(5), Assemblyman Graber stated in 1978:

" . . . [A]nd I surmise today, as this debate progresses, we are going to hear, and hear loud and clear, from those who will say this bill is an attack at minorities, that they cannot get a fair trial, they cannot obtain good counsel, and to those of you who are going to make comment on that particular issue, please read page 9, line 10, section 5 of the bill—

and I would like it read into the record: 'Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provisions of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed pursuant to this section, and the fees and expenses to be paid for investigative, expert and other reasonably necessary services authorized pursuant to Subdivision 4 hereof, at such rates or amounts as the court determines to be appropriate in order to provide such defendant with representation by counsel and other services as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal.'

"I think that says a lot, for it is in that section we are *guaranteeing to those minorities, those indigent people who in the past have not been able to afford good expert counsel; we here, in the State, are going to pay the bill to make sure that they do get the counsel that they need.*" [Emphasis supplied.][16]

Again in 1980, in moving A.8431, Assemblyman Graber stated:

"I am sure later today we will hear that indigent people are unable to get adequate defense counsel because they cannot afford same. ***[Referring again to proposed §722-g[5]] I think that's brand new as far as this state is concerned, that we provide for adequate defense counsel at state cost *to make it absolutely certain that anyone charged with a capital offense . . . would, in fact, have adequate defense.*" [Emphasis supplied.][17]

Last year, on February 17, 1981, referring again to the same section, Assemblyman Graber stated:

"It provides for the appointment of attorneys with experience of three years, if the defendant is unable to employ such an attorney. I am sure later today we will hear that indigent people are often unable to afford adequate defense counsel, because they cannot afford it. *** [722-g[5]] is a first for New York, I believe. *I don't know of any other state that incorporated that into the text of their law.*" [Emphasis supplied.][18]

Thus, a reading of the Assembly debates makes clear that the intent of the sponsors has been to pass a death penalty bill in New York distinctly different and more extensive than any other such bill in America.

Those who are familiar with New York's defense system may find it anomalous that while New York continues to rank 45th in its assigned counsel fee structure for non-capital cases, its Legislature has declared that it shall pay whatever is necessary in death penalty cases. Any doubt regarding this legislative intent, however, is laid to rest by a review of the remarks of the bill's co-sponsors. In 1980, Assemblyman George Friedman stated:

" . . . [N]ever before, never before in the history of any country operating under a system like we operate in the United States of America,

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[16] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, March 20, 1978) (statement of Assemblyman Graber), at 2040-2041.

[17] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Graber), at 60.

[18] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Graber), at 854.

have rights of accused individuals been protected as they are in this bill. This bill doesn't say you have a right to counsel; it doesn't say just that the State will give you counsel, *it says that the State will pay the going rate for counsel competent to represent you. That is that under this bill you have the right to get somebody like Percy Foreman to represent you and the State is going to foot the bill. Under no other system do you have that right. . . .*" [Emphasis supplied.][19]

Last year in responding to Assemblyman Hevesi's remarks concerning the inadequacy of counsel and investigative services (*supra* n.11), Assemblyman Friedman stated:

"The bill does not say that investigative services will be provided only where investigators exist or work in the county where the trial is held. No, not at all.

"This bill says that investigative services will be supplied, period, whether it is Onondaga County or Bronx County. If you need investigators for the defense of this accused person, you will get them no matter what county he is in. . . .

"***Any fair-minded person would have to say, yes, it is possible an innocent person might be convicted. But I ask you to consider the other side of it. *This happens to be the most humane and fairest capital punishment bill ever passed in any house of any legislature in any state, and probably any country in the world.*

"*This bill provides . . . for the best lawyers to represent the poor Blacks that you were talking about.* You are right, Blacks in the past, and *minority people in the past, have suffered under capital punishment bills because they have not been able to get the best kind of legal representation. But under this bill, they could, because the bill requires that the State pay the equivalent rate for lawyers in that field. . . .*

***[If] I were accused of a capital crime, I could not hire a lawyer like the fellow now representing Jean Harris down in Westchester County, because he charges some $100 to $150 an hour, and if he was going to put in 100 or 200 hours for my defense, I could not afford it or pay for it. I would have to get one of my friends from Bronx County.

"But a poor person . . . under this bill . . . could go hire Joel Arnou now defending Mrs. Harris; F. Lee Bailey, if he feels like coming in; Mr. Edelstein from Brooklyn, you name it. Under this bill the poor person is going to have that lawyer representing him. It is not just the lawyer, it is the investigative services.

"You know the guys that were found, after their convictions, to have actually been innocent, were found to be innocent because somehow they managed, over the years, to get investigators working for them to dig into the facts and find out what actually happened, and uncover the real truth of the cases. This bill says you are going to have those investigative services at the very beginning. *Whatever is necessary, whatever is needed, if an army is necessary, you can hire them under this bill,* and you can prepare a defense if a defense is necessary." [Emphasis supplied.][20]

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[19] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Friedman), at 99-100.

[20] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Friedman), at 881-890.

In 1980, Assemblyman Clark Wemple, another Assembly co-sponsor, stated:

> "This bill is as carefully constructed a piece of legislation that has ever come before this house. There is not a single provision in our Penal Law, our Code of Criminal Procedure, absolutely nothing that comes within shouting distance of this particular bill in terms of its attention to the rights of the accused. ***Any defendant under this bill can have *unlimited funds* to hire the top attorney in his community, in his state, in the Nation, to defend him. ***You can get not just competent counsel under this bill, *you can get the best counsel.* That is the point of distinction." [Emphasis supplied.][21]

And again last year, during the debate on this bill, Assemblyman Wemple stated:

> ". . . [T]*his bill goes far beyond anything we have ever had in this State or in the country in terms of providing those constitutional rights and extra-constitutional rights* that you don't generally find." [Emphasis supplied.][22]

Assemblyman Morahan, speaking in 1981 on the floor of the Legislature, stated:

> ". . . [A]nd they have provided adequate money for defense, and I am not talking about the average public defender brand of defense, but *defense equal to those who would have money.*" [Emphasis supplied.][23]

It is apparent that the supporters of the Volker/Graber death penalty bill recognize the inadequacies of the current system for providing public defense services. It is also absolutely clear that the legislative intent of §722-g(5) is to respond to those inadequacies by supplying "unlimited funds" to the defense in capital cases. In what follows, the price of that response and other costs of capital litigation are detailed.

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[21] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Wemple), at 86-87.

[22] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Wemple), at 908.

[23] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Morahan), at 997.

PART II:
THE COST OF CAPITAL LITIGATION (TEN LEVELS AND BEYOND)

It is now clear that a permanent and indispensible feature of capital litigation involves the review of constitutional, statutory and discretionary questions at a minimum of ten state and federal judicial levels. These include, but are not limited to:

1. the guilt and penalty phases of trial;
2. review by the highest state court of a sentence of death and the underlying conviction;
3. writ of *certiorari* to the United States Supreme Court;
4. post conviction proceedings including evidentiary hearings to vacate judgment or set aside sentence or both;
5. review by the highest state court of adverse determinations in such post-conviction proceedings;
6. writ of *certiorari* to the United States Supreme Court;
7. petition for writ of *habeas corpus* to the United States District Court;
8. appeal of a negative determination of a writ of *habeas corpus* to the Federal Court of Appeals for the circuit encompassing the district wherein the writ was brought;
9. a petition for rehearing *en banc* from a negative determination of the Court of Appeals;
10. a writ of *certiorari* to the United States Supreme Court to review a negative determination of either the Court of Appeals or a rehearing *en banc*.

After final judicial review, commutation applications directed to the executive branch are conducted. Stays at each level or stage of litigation are routine. A litigation process lasting eight to ten years is the norm.[24]

These levels of judicial review are the mandatory daily fare of capital litigation even in states where death penalty statutes, unlike the Volker/Graber bill, fail to provide representation beyond the highest state court.

There is a nationwide network of lawyers, legal workers and organizations routinely seeing to it that lawyers are supplied in the post-conviction stages of capital cases everywhere in the country.[25]

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[24] While nostalgic longing for simpler times may be appealing, it will not change the course or the length of capital litigation in the United States. The most recent death case before the Supreme Court, *Eddings v. Oklahoma*, __U.S.__, 102 S.Ct. 869 (1982), vacated a sentence of death and remanded for resentencing. The decision handed down January 19, 1982, concerned a shooting which occurred April 4, 1977. If *Eddings* is resentenced to death, the appeal process will begin again. This time-consuming judicial resolution of complex legal questions is something to be proud of. It is one of the indicia which distinguishes the United States of America from a host of "overnight republics" which dot the globe. Furthermore, litigation delay is by no means unique in or limited to death cases. *United States v. IBM*, 615 F2d 923 (2d Cir. 1980) was an antitrust suit brought by the Justice Department in 1969. The suit alleged that IBM had, *inter alia*, monopolized the electronic digital computer market. Discovery lasted from approximately 1969 to 1975. In that year the government's direct case commenced. It lasted for almost three years. From 1972 to 1980, IBM appealed at least five orders from the District Court, two of which were appealed to the Supreme Court. The IBM defense began in 1978. In January of 1982 the lawsuit was discontinued. As of 1979, 90,000 pages of testimony had been transcribed, several hundred witnesses had been deposed and 70 trial witnesses had been called.

[25] This network, partially the outgrowth of the death penalty moratorium strategy, is now in permanent place throughout the country. Thus, even in states which do not provide for representation beyond the highest state court, litigation still takes place and generates all the costs of responding to petitions for writs of *certiorari*, *habeas corpus* and other forms of state and federal post-conviction relief. More importantly, the

By an examination of these ten levels of judicial review, it is possible to actually chart the costs of capital litigation (see Table 1).

TABLE 1[26]
A Model Charting System for Projecting Capital Litigation Cost

STATE I

TRIAL						1.
PENALTY PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						
GUILT PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

[illegible]AL						2.
COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						3.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

extent to which capital litigants are entitled to counsel in seeking state and federal post-conviction review (in states failing to provide it) is, itself, a question raised in capital litigation. It is clear that, from an ethical point of view, a lawyer cannot just "drop a capital case." Furthermore, canon 2 of the CODE OF PROFESSIONAL RESPONSIBILITY (DR2-110[A][2]) can be read to require the lawyer in a capital case to pursue the matter in federal court independent of the state's statutory scheme. See also *In Re Anderson*, 69 Cal. 2d 613 (1968). A strong argument that counsel should be required constitutionally to pursue the case into federal court is developing. Sevilla, *Do Court Appointed Counsel In Capital Cases Have A Duty To Pursue The Case In Federal Court?*, 1 DEATH PENALTY REPORTER, No. 9, at 1 (May 1981). It is reasonable to assume that eventually in capital cases a right to counsel for *all* levels of review, similar to the New York State statute, will be constitutionally mandated. The cost of the death penalty in those states that have failed to provide counsel will, at that time, be geometrically increased since such a ruling will no doubt be given retroactive effect.

[26] This chart depicts three channels of review in which capital litigation takes place: "State I," "State II" and "Federal." The stages are numbered in the theoretical order in which a "model" case would proceed. In reality, remands, evidentiary hearings, stays, and certain concurrent proceedings would both alter and add to the numbering system. The boxes represent in graphic form a means to allocate state and county costs across the ten levels of judicial review for defense, prosecution, courts, corrections, and other miscellaneous categories. In our model, "State I" is the first channel of litigation and includes the state trial court proceeding,

STATE II

POST-CONVICTION PROCEEDING						4.
	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						5.
COURT OF APPEALS	Defense	Prosecution	Court	Corrections	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						6.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

FEDERAL

PETITION FOR WRIT OF HABEAS CORPUS						7.
DISTRICT COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						8.
U.S. COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

REHEARING						9.
U.S. COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						10.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

EXECUTIVE

COMMUTATION APPLICATION						11.
	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

In what follows, we discuss "State I"—the first three stages of capital litigation. We will trace a death penalty case through trial, appeal, and United States Supreme Court review. To the extent possible, we allocate and chart the costs for defense,[27] prosecution,[28] corrections,[29] courts,[30] and other miscellaneous categories.

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direct appeal to the Court of Appeals, and federal relief in the form of *certiorari* to the United States Supreme Court. In the event that relief is denied in this channel, litigation in "State II" (the state's post-conviction remedy channel) commences. Post-conviction proceedings at the trial level, direct review by the Court of Appeals, and again a writ of *certiorari* to the Supreme Court are envisioned. The "Federal" channel includes *habeas corpus* relief in the U.S. District Court, review of adverse decisions by the U.S. Court of Appeals, discretionary relief by rehearing *en banc* in the U.S. Court of Appeals, and again a writ of *certiorari* for Supreme Court review. The eleventh level of this review process includes executive clemency. It should be noted that the statutory apparatus for clemency in the state of New York does not appear to be procedurally sufficient for death cases. See N.Y. CORRECT. LAW ARTICLE 11 (McKinney 1968).

[27] In addition to other authority cited throughout this paper, in February and March of 1982, the New York State Defenders Association conducted a telephone survey of public defender offices, private attorneys, expert witnesses, investigators, correctional personnel, and others in order to determine costs involved in litigating death penalty cases.

[28] Throughout the remainder of this paper, we apply a uniform formula to estimate capital prosecution costs. This formula is based on existing average statewide disparity rates between prosecution and defense. For the purposes of the estimates, we use the baseline defense costs and apply three prosecution to defense ratios. The first, a 2 to 1 ratio, is applied to counsel costs in the guilt and penalty phases. The second, a 3 to 1 ratio, is applied to expert witness and investigation costs in the guilt and penalty phases. The third, a 1 to 1 ratio, is applied to the cost of appeals to the New York Court of Appeals and the United States Supreme Court. These ratios are a reflection of actual experience based on defense/prosecution cost data. As applied, they will consistently yield what we believe are uniformly conservative dollar amounts. Actual prosecution/defense disparity is much greater than 2 to 1 or 3 to 1. In some jurisdictions, disparity runs as high as 8 or 10 to 1. The reader can thus take the prosecution costs reported hereinafter as the minimum cost of capital prosecution, resting precariously upon the assurance that these costs will be no less than what is reported, and will probably be much more. While we hesitate to say how much more, if recent experience is the bellwether, counties will assuredly go bankrupt as they pay for the cost of prosecution in capital cases. Under the capital litigation scheme envisioned for New York by the Volker/Graber bill, prosecution costs will remain a county charge.

[29] We do not yet know the correctional costs generated by the death penalty at the local level. There will be higher security costs attached to capital incarceration in the areas of housing, monitoring, maintenance, transportation, and feeding. Most local jails will be hard pressed to achieve adequate capital case security. We do not, herein, estimate local correctional costs generated by the death penalty. In the state system (post-verdict), capital incarceration takes a tremendous and distinctly identifiable toll. We discuss certain costs associated with state level incarceration infra at PART III.

[30] The difficulty of retrieving useful data for the purpose of projecting court costs in New York State has previously been recognized. NATIONAL CENTER FOR STATE COURTS, NEW YORK STATE BUDGET REVIEW MANUAL: A REPORT OF THE SENATE SELECT TASK FORCE ON COURT REORGANIZATION (1978). For this reason, in this report we rely on survey data from other states.

THE GUILT AND PENALTY PHASES

A. Death Is Different

The United States Supreme Court has recognized that death penalty cases require greater due process procedural safeguards than do non-capital cases. In *Gardner v. Florida*, 430 U.S. 349, 357 (1977), the Court stated:

> ". . . [F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. [Citations omitted.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

The Legislature's intent to have the state pay the defense bill no doubt arises from court decisions like *Gardner* which establish that death cases require greater procedural protection.[31]

In recognizing this constitutional principle, the Legislature has declared its commitment to this new brand of equal protection. It has stated that where the state seeks the irrevocable sanction of death, inability to pay for the best counsel and auxiliary services will not be a bar to receiving them. Under the Legislature's view of due process, in such cases, the state will pay for representation, no matter what it costs.

In the ordinary criminal case in which the appointment of counsel is made for a person unable to afford counsel, the court will appoint counsel. The legislative debates indicate, however, that, although it is not a requirement of our present statutory scheme and has not yet been recognized as an element of the Sixth Amendment,[32] an indigent defendant facing the death penalty in New York State will have the opportunity to choose the lawyer to be appointed. Additionally, although the mechanism for this process of appointment has not been made clear by the Legislature, the Legislature has explicitly pointed out that this will not just be competent counsel but will be the best counsel money can buy:

> ". . . [W]hat we are saying is that whatever the fees are that F. Lee Bailey and the best attorneys, the best criminal attorneys get, are the kind of fees that the State is going to provide for the defense of accused persons who may come under the restrictions of this bill."[33]

While the use of the name F. Lee Bailey may be somewhat symbolic, there is no

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[31] See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). Mr. Justice Harlan, concurring in *Reid v. Covert*, 354 U.S. 1, 77 (1957), stated: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case." *Gardner* makes clear that a majority of the Court accepted this position.

[32] The U.S. Court of Appeals for the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel is violated when a trial court judge fails to accord appropriate weight to an existing attorney/client relationship in determining whether to grant a continuance founded on the temporary unavailability of the defendant's particular attorney. *Slappy v. Morris*, 649 F.2d 718 (9th Cir. 1981). On March 29, 1982, the United States Supreme Court agreed to review the case. *Morris v. Slappy*, 81-1095. See also *N.Y.L.J.*, March 30, 1982, at 1, col. 4. Thus the question of whether or not a defendant has a federal constitutional right under certain circumstances to "counsel of choice" may soon be resolved.

[33] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, March 20, 1978) (statement of Assemblyman Friedman), at 2079-2080.

question that his fee structure is real. If New York is prepared to pay for the "best" counsel with taxpayers money, it can begin with his law offices in Boston. Bailey's office reported that in serious felony (non-capital) cases, it requires an initial retainer of $50,000. This does not include expenses or per diem trial costs.[14]

Norris Gelman, a Pennsylvania attorney with much trial experience in death penalty cases, stated that an appropriate retainer in a capital case runs anywhere from $25,000 to $50,000 depending on the fact pattern.

Ken Rose, an attorney with Team Defense in Atlanta, an organization that specializes in defending death penalty cases, reported that private attorneys in the Atlanta area require initial retainers ranging from $15,000 to $40,000. The Southern Poverty Law Center similarly found that private attorneys in Alabama require retainers of not less than $25,000.

Fees thereafter will be based on hourly and daily (trial) rates. Fees ranging from $100 to $200 per hour will not be uncommon. The bill provides for the appointment of "one or more attorneys" and it is reasonable to assume that the appointment of two or more attorneys will be the rule, not the exception.[15]

The natural result of the death penalty statute will be that jury trials will be conducted in all capital murder cases. The jury trials will be longer and more expensive than in non-capital cases. Long before the jury is empaneled, however, there will be very high pretrial costs. These include motion practice, investigations, and the use of expert witnesses. A discussion of these follows.

B. Motion Practice

Pretrial motions play an important role in *most* criminal cases. However, a death penalty trial is strikingly different than other felony trials because of the length of each procedural stage and its overall importance to the ultimate objective—preventing the imposition of the sanction of death. Extensive pretrial motions play, therefore, a crucial role in *every* death penalty case.

Motions request specific legal relief or action; they help to educate the trial court and appellate courts as to the standards of extra-special due process that have to be applied to each procedural question in a death case. Motions create a record and set a course of strategy upon which the entire litigation effort in a capital case is patterned.

The usual number of pretrial motions in non-capital cases vary between five and seven. In death penalty cases, every motion will be critical, requiring substantially more time to prepare. Experienced attorneys state that the typical capital case requires the filing of between 10 and 25 trial motions.[16] Many pretrial motions will relate solely to the unique aspects of the defendant's underlying criminal case. Others will be specifically a function of there being a death penalty statute in existence.

Thoroughly researched constitutional attacks on the death statute, motions directed at insulating the jury from ourside influences, and in-depth motions for discovery and the right to inspect and test evidence will be routine. Ordinary motions in criminal

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[14] Significantly, F. Lee Bailey reportedly spent $350,000 for his own defense against charges of conspiracy to defraud investors arising from his involvement with Glenn Turner (*Time*, Feb. 16, 1976, at 50.) Nor is he alone. John Ehrlichman is reported to have spent $400,000 on his defense. (*Time*, Jan. 13, 1975, at 14.)

[15] Unlike the proposed Volker/Graber bill, the California death statute is silent on the number of lawyers to be appointed in capital cases. Nevertheless, the California Supreme Court has held that a court should presumptively appoint a second attorney if such an attorney "... may lend important assistance in preparing for trial or presenting the case." *Keenan v. The Superior Court of the City and County of San Francisco*, 30 Cal. 3d_____ (Feb. 8, 1982).

[16] *Motions for Capital Cases*, Southern Poverty Law Center, 1981, p. 2.

cases take on a different meaning in death cases. Thus, motions to suppress physical evidence or suggestive identification procedures, motions to dismiss the indictment, or motions to contravert search warrants, the routine matter of any criminal case, are longer, more complicated and more heavily litigated in death cases.

In capital cases, motions for the appointment of expert witnesses, the employment of investigators, the utilization of private psychiatrists for trial and sentencing and special motions to increase the court's consciousness of the requirements of "super due process" are not only routine but required as an element of the effective assistance of counsel.

In virtually every death penalty case, the defense will file motions for change of venue, individual *voir dire*, sequestration of jurors during *voir dire*, and sequestration of a petit jury. The motions are essential to offset prejudicial pretrial publicity and to ensure the defendant an impartial jury.[37] There are reported cases of individual examination of potential jurors that have lasted two to four weeks. The cost of sequestering the jury in a trial that, on the average, lasts from four to six weeks in a capital case, is also substantial.[38]

Professor Robert Buckhout, a professor of psychology at Brooklyn College, Brooklyn, New York, has testified in over 80 death penalty cases. His expertise involves the sufficiency of eyewitness identifications as well as conducting juristic psychological surveys. Juristic psychological surveys involve consulting with the attorneys and preparation of sample questionnaires to assist in targeting special jurors during *voir dire*. At times, he has even assisted attorneys in the actual conduct of *voir dire*. Professor Buckhout's fee for the surveys is $500 per day for in-courtroom testimony with a consulting fee of $100 per hour. In 1977, Professor Buckhout submitted a $25,000 bill in a death penalty trial for a juristic psychological survey.

C. Investigators

Once an attorney appears in a death penalty case, and ordinarily before many of the aforementioned pretrial motions are brought, there arises the need for auxiliary defense services. Foremost among these is the need for an investigator.

Investigators' fees, in our survey, range from $500 to $1500 per day. Hourly rates for experienced investigators were reported to range between $75 and $200. The Office of the State Public Defender in California has found the cost for investigators at trial in some death penalty cases to have been in excess of $40,000. Similar amounts were reported by private attorneys. The National College for Criminal Defense in Houston found that the bare minimum needed for investigation is $10,000, and this figure only represents the investigation required for the trial phase. This figure, by New York standards, is concededly low.[39]

The Sixth Amendment right to the effective assistance of counsel in both federal and state courts requires thorough investigations in all criminal cases. Apparently, this has not gone unnoticed by the Legislature. The legislative debate on what would be paid for investigators included a comment by Assemblyman Friedman about defendants who, years after conviction, were able to secure their freedom with "late" investigative

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[37] *Motions for Capital Cases*, Southern Poverty Law Center, 1981, pp. 43-44, 78-83.

[38] This cost is not detailed nor estimated herein. It will, however, be a substantial charge.

[39] In *People v. Gravdon*, 43 A.D.2d 842 (1974), a non-capital murder case involving a shooting in a social club, the American Service Bureau, the private investigation firm on the case, found and interviewed more than 35 witnesses. The work in that non-capital matter included the investigation of each complaining witness and the retrieval of statements. The cost of this alone exceeded $25,000.

help. Referring to this issue he stated, *supra*, at n. 20, "This bill says you are going to have those investigative services at the very beginning."

"Up front" investigative services have been shown to be essential. In the recent case of Johnny Ross, imprisoned in Louisiana at 15 and sentenced at 16 to die for a rape he didn't commit, investigative services set him free. These investigative services should have been available pretrial, but were not supplied until the Southern Poverty Law Center brought a *habeas corpus* petition (in the "Federal" or third litigation channel).

The Southern Poverty Law Center received a letter from Johnny Ross in 1975 pleading his innocence. Ross was 16 at the time—the youngest person on death row in America—and the Center took his case. Ross's 1975 trial had lasted less than one day despite the fact that it was a capital case in which his life was at stake.

Among numerous other things, the Southern Poverty Law Center hired Gary Eldredge, a private investigator from New Orleans, to complete the investigation in the Johnny Ross case:

> "Eldredge read the trial transcript and began tracking down alibi witnesses, interviewing investigating officers and pursuing other leads. In reading the transcript, he noticed that the prosecutor had introduced, through the testimony of a criminalist, the rapist's blood type, as determined from a semen sample taken from the rape scene, but the prosecutor had never tied this piece of evidence to Ross.
>
> "For the sake of thoroughness, Eldredge decided to check it out and contacted Ross to see if he knew his blood type. The rapist's was the 'B' group. Ross didn't know his, but told Eldredge he had donated blood a number of times since he'd been imprisoned. So Eldredge contacted the blood bank that served the prison.
>
> "Each of the numerous times Ross had donated, his blood had been typed, and each time it had come up 'O +.' But these were the results of testing by technicians, not physicians, so after informing [the Southern Poverty Law Center] of his findings, Eldredge arranged for a prominent university doctor to test Ross, and his tests produced exactly the same results. ***[The Southern Poverty Law Center] took the evidence to the district attorney's office. Soon thereafter, Ross was released. He is now living with his sister in Denver."[40]

The price of the Gary Eldredge investigation in the Johnny Ross case was $3500. It took place, however, years later than it should have, in conjunction with a federal *habeas corpus* petition. The waste of taxpayer dollars that ensued from unnecessary litigation is nothing compared to the abuse of Johnny Ross's liberty—a deprivation of freedom arising directly from poverty.

A typical criminal case investigation, obviously heightened in a death case, involves searching for and interviewing every potential favorable and adverse witness. It includes crime scene investigations, photographs, the search for and retention of experts, and the review of testimony presented at pretrial hearings and other evidentiary proceedings. The investigator retrieves evidence, follows leads, and develops factual theories. Frequently, the investigator is deeply involved in surveys to test for prejudice within a community and among potential jury veniremen. In a system which requires the marshalling of facts before they are applied to law, the investigator is a crucial and vital part of the defense team.

Nor should it be forgotten that the sentencing phase of the bifurcated trial process is

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[40] *Poverty Law Report*, Vol. 10, No. 1, Jan./Feb. 1982, at 3.

a co-equal part of capital litigation at the trial level. Thus, the marshalling of facts on the issue of guilt is but 50 percent of the work that a good private investigator will be doing in a capital case.

D. Experts and Auxiliary Services

Experts, such as forensic scientists, juristic psychologists, psychiatrists, crime scene reconstructionists, criminalists, polygraph experts and others contacted in our survey, reported fees ranging from $500 to $1,000 a day for their services. These people are critically necessary to the defense team. While any particular case may require a different configuration of the experts required, all cases will require the extensive use of numerous experts. The fees reported below are exclusive of the expenses required for travel.

Judith Bunker, a technical specialist to the medical examiner in Atlanta, and one of the top crime scene reconstructionists and blood stain analysts in the country, has advised NYSDA that the going rate for such services ranges from $700 to $1,000 per day.

In many capital cases, difficult issues, such as the insanity defense, are often raised. Psychological Evaluations, Inc., in Atlanta, has performed psychiatric and psychological evaluations in death penalty cases throughout the country. Although the individual fees vary, Dr. Anthony Stone, a psychologist, reports the average fee is approximately $700 a day exclusive of expenses.

Our office interviewed Mr. Robbie Robertson of W.A. Robertson and Associates from Atlanta, Georgia. Mr. Robertson is an expert in the administration and analysis of polygraph examinations. He has participated in approximately 25 capital murder cases in which his testimony and analysis were used at pretrial proceedings, and trial and sentencing phases of the bifurcated capital process. His present fee is $200 per day for courtroom testimony. In addition, he charges $150 for the administration of the polygraph examination with the average bill approximating $500 plus expenses.

As stated earlier, Professor Robert Buckhout has appeared in his capacity as an expert witness regarding eyewitness identifications. His courtroom fee is $500 per day. His consulting fee, once again, $100 per hour.

Dr. George Jurow of New York, New York, has been involved in approximately 25 death penalty cases. His expertise centers on *Witherspoon* issues.[41] His research concludes that the exclusion of jurors opposed to the death penalty at trial results in biased juries. His services include consulting with the attorney and sometimes testimony at the pretrial stage. Frequently, he is a witness in support of defense motions to empanel a separate jury for the sentencing phase. His fee is $100 per hour for consulting as well as testimony.

Dr. David Rothstein, of the Michael Reese Medical Center, Chicago, Illinois, is a psychiatrist. Dr. Rothstein has testified in several capital cases in both the trial and penalty phases. His fee is $125 per hour for in-court testimony and $110 per hour for analysis. This fee is exclusive of expenses.

Dr. Seymour Halleck, of the School of Psychiatry at the University of North Carolina at Chapel Hill, has testified in both the trial and penalty phases of capital trials. With a standard fee of $150 per hour, he approximated his average bill to be $2500 for both phases.

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[41] *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), held that a death sentence may not be "... carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

A typical death case will use these experts or others just like them. A hypothetical case can easily be designed. Let us assume a case in which three days of crime scene reconstruction, a juristic psychological survey and a polygraph examination are required. Let us further assume a *Witherspoon* jury challenge that takes three days of work and four hours of testimony and the use of one psychiatrist who has conducted a five hour exam and testifies for two hours. This relatively modest use of experts will run up a bill for the state of more than $30,000 in just the guilt phase of a capital case. These costs are real. They will be paid by the state. They will be present in every capital trial.

E. Sentencing in the Penalty Phase

Any aspect of the defendant's character or record and any other circumstance offered in mitigation of punishment must be considered by the jury in the penalty phase of a capital trial. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). *Lockett* followed on the heels of *Woodson v. North Carolina*, 428 U.S. 280 (1976). In *Woodson*, the Supreme Court, in defining the requirements of capital sentencing procedures, stated that courts must consider the:

> "character and record of the individual offender and the circumstances of the particular offense *as a constitutionally indispensible part of the process of inflicting the penalty of death.*" (Emphasis supplied.) *Id.*, at 304.

In *Gardner v. Florida*, 430 U.S. 349, 358 (1977), the Court held that:

> "[I]t is now clear that *the sentencing process*, as well as the trial itself, *must satisfy the requirements of the Due Process Clause* ***[*T*]*he sentencing is a critical stage of the criminal proceeding at which* [*the defendant*] *is entitled to the effective assistance of counsel.* ***The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence. . . ." (Citations omitted.) (Emphasis supplied.)

At this critical stage of the proceeding, the defense may use many of the socio-psychiatric witnesses employed during the trial phase. However, this stage additionally requires the investigation of the defendant's family, friends, neighbors, school personnel, and social workers.

The investigation at the sentencing phase requires a complete retrospective analysis of every positive aspect of the defendant's life from the day of birth to the date of sentence. The witnesses called to this proceeding, vital to establishing evidence in mitigation of sentence, must be made available to testify, requiring, in many cases, the reimbursement of travel expenses and accommodations. Military, school, work, and other records must be designated, located and retrieved.

The Volker/Graber bill will permit the court, upon a showing of prejudice, to discharge the trial jury and empanel a new sentencing jury.[42] Hence, defense counsel will undoubtedly make the same motion as was made at trial for individual *voir dire* at the sentencing phase and for sequestration of the sentencing jury. Here again, a lengthy process of individual *voir dire* is, in many cases, the only possible remedy to empanel a fair and impartial jury on the question of sanction. The main reason courts have granted individual *voir dire* is that it is uniquely suited to capital cases.

Death cases ordinarily are accompanied by tremendous publicity and notoriety. Infection of the jury panel by this kind of publicity, and its resultant effect on jury fact-finding, creates reversible error. Therefore, it is in the interest of the court system to

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[42] Proposed CRIM. PROC. LAW §400.27(2), S.7600/A.9379 §8 (1982).

permit individual *voir dire* and sequestration of jurors during *voir dire*. Such *voir dire* enables the defense to delve into the area of prejudice without fear that the answers of one juror will taint the entire panel. Such taint preserves an issue for later litigation.

Three of the mitigating factors described in the proposed death bill for New York require the sentencing jury to consider whether ". . . [t]he murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug . . . ,"[43] whether ". . . [t]he defendant was under unusual and substantial duress or under the domination of another person . . . ,"[44] and whether ". . . [t]he defendant's mental capacity . . . or his ability to conform his conduct to the requirements of law was significantly impaired. . . ."[45] These circumstances clearly contemplate a situation where the defense will be called upon to present extensive testimony of psychologists and psychiatrists. The previously discussed costs of such services will *again* be incurred by the state. They will probably be higher in the penalty phase of the capital trial since the importance of such testimony is magnified by the omnipresence of death.

Furthermore, since 1978, it has been constitutionally explicit that:

> ". . . [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[46]

The requirements which permit relevant evidence in mitigation also result in the defense calling witnesses to establish the cruelty of the death penalty. Former death row inmates, theologians and witnesses to prior executions are the type of non-traditional expert witnesses that now, under rules laid down by the Supreme Court, testify in the penalty phase of capital litigation. The expense of these experts at the sentencing proceeding will be considerable. Little, if any, of this evidence can be legally excluded from the sentencing phase of a capital trial in the United States.

Mr. Lloyd McClendon, Deputy Administrator, Ohio Penal Industries, Columbus, Ohio, is an ex-death row inmate, having spent two years on death row. He has been certified as an expert witness in approximately six death penalty trials throughout the country. His testimony is used at the sentencing stage to rebut the deterrent effect of the death penalty and to support mitigating factors such as the defendant's positive potential. Mr. McClendon's fee is presently $500 a day for in-court testimony. In a recent case in the state of Florida, he submitted a bill to the public defender's office for approximately $2000.

The array of expert witnesses, including social psychiatrists, criminologists, and counselors, whose testimony will bear on the inadequacy of the death penalty as a sanction, requires preparation for a full blown evidentiary, adversarial proceeding. Experts to testify on the death penalty as it is applied in a particular state, professors to testify on the philosophical question of capital punishment, social scientists to resolve jury doubts, and many others are called as witnesses in the penalty phase. Testimony on the inefficacy of the death penalty as a deterrent, on attitudes toward the

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[43] Proposed CRIM. PROC. LAW §400.27 (8)(f), S.7600/A.9379 §8 (1982).

[44] Proposed CRIM. PROC. LAW §400.27(8)(c), S.7600/A.9379 §8 (1982).

[45] Proposed CRIM. PROC. LAW §400.27(8)(b), S.7600/A.9379 §8 (1982).

[46] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

death penalty, on racial prejudice, and on every imaginable issue that can prevent the execution of a human being is permissible and systematically used in the sentencing phase of a capital case.[47]

THE COST OF THE GUILT AND PENALTY PHASES

The first stage of "State I" has been seen to be expensive. We recap costs here.

Defense: Charges for the defense will conservatively total $352,700. One hundred seventy six thousand, three hundred fifty dollars ($176,350) is allocated for each phase (guilt and penalty)[48] as follows:

Attorneys	$106,350
Investigators	40,000
Experts	30,000
	$176,350

Prosecution: Our estimate of prosecution costs at the trial level for the guilt and penalty phase of the average capital case in New York is $845,400.[49]

Court: As previously stated,[50] court data is difficult to retrieve for the purpose of capital litigation cost modeling. We do, however, have a guidepost and, in the absence of hard data, we use it. John Ackerman, dean of the National College for Criminal Defense, reports that a local Texas judge, counting only court-time, employees time and jury sequestration, estimated the county cost of a recent death penalty case at over $300,000. This amount did not include appeal, and the defendant in that case did not receive a sentence of death. In fact, the case is now on appeal.

Correctional Cost: As previously stated,[51] we do not estimate or allocate local jail capital incarceration costs.

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[47] It should be noted that the only experiential competence statutorially required under the Volker/Graber bill is in the *trial* of felony cases (three years). However, the two stages of the bifurcated capital process require experiential competence in both the guilt phase (trial) and the penalty phase (sentencing). The art of sentencing advocacy is a new and developing area. Experience in New York felony court representation, absent more, is not sufficient experience for the sentencing phase of a capital case. Additionally, in New York, experiential competence in similar sentencing proceedings would be virtually impossible to acquire. Although Article 400 of the Criminal Procedure Law presently provides for presentence conferences, summary hearings, and other specified hearing procedures, these proceedings do not approach the complexity or importance of penalty phase proceedings in death cases. Furthermore, the CPL proceedings can only be held before a judge [CPL §§400.10; 400.15(7)(a); 400.16(2); 400.20(a); 400.21(7)(a); 400.30; 400.40(5)] while penalty phase proceedings are held before juries. Although the Volker/Graber bill clearly permits hiring special counsel to assist in penalty phase procedures, including post-trial, presentence motion practice, presentence investigations, hearing preparation and the sentencing hearing itself, we do not independently calculate these fees.

[48] This assumes a concededly low model four week trial of 120 trial hours, exclusive of motions. It assumes two trial lawyers, one investigator, and the expert costs detailed *supra* at D. One hundred twenty five (125) hours of motion work are allocated to the guilt phase, and 344 hours of lawyer time to investigation and preparation (research, witness preparation, client interviews).

[49] See n. 28, *supra*.

[50] See n. 30, *supra*.

[51] See n. 29, *supra*.

We can now allocate and chart some of the costs arising in the first stage of capital litigation—the guilt and penalty phases. (See Table 2 below.)

TABLE 2
COST OF THE GUILT AND PENALTY PHASES

TRIAL						
PENALTY PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$176,350	—0—	$150,000	—0—	?	$326,350
County Charge	—0—	$422,700	—0—	?	?	$422,700
GUILT PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$176,350	—0—	$150,000	—0—	?	$326,350
County Charge	—0—	$422,700	—0—	?	?	$422,700

STATE $652,700
COUNTY $845,400
TOTAL $1,498,100

Under the Volker/Graber bill, it will cost New York State and its counties more than $1.4 million to bring a capital case to the point of a death sentence. However, the drain of taxpayers' money will have just begun. The costs associated with the ensuing nine levels of appellate review are substantial.[52] The first two stages of the appellate process within "State I" are detailed below.

DIRECT APPEAL TO THE COURT OF APPEALS

The Volker/Graber bill authorizes a direct appeal to the Court of Appeals from judgment of conviction and sentence of death. The Court of Appeals will review the law and the facts. It will examine the presence of passion, prejudice, or arbitrariness in the sentence. It will review statewide sentencing patterns and determine whether the sentence of death is disproportionate or excessive. The appellate process will increase the total cost of the death penalty procedure by: 1) being more expensive than non-capital appeals; and 2) regenerating the costs of the trial process when cases are remanded for trial. The latter result is not infrequent in death penalty appeals.

The California Office of the State Public Defender reports that nine out of the first 11 death judgment appeals under California's death penalty statute resulted in either

[52] It bears repeating that the proposed bill does not limit the reimbursement of appellate defense counsel to the state appellate forum. Indeed, it requires the appointment of appellate counsel for the federal as well as the state level. The costs associated with "State II" and the "Federal" litigation channel (see Table 1, *supra*) (post-conviction proceedings, appeals, writs of *certiorari*, federal *habeas corpus* petition, federal appeals, rehearings, and writs of *certiorari*) are not detailed in this paper. Furthermore, the Attorney General will represent the state as respondent at each application for a writ of *habeas corpus* and other federal relief. The weighty state costs associated with this representation at three federal stages of litigation are also not detailed herein.

reversals or retrials. That office also reports the cost of a death penalty appeal on the state level to be in excess of $30,000 per case.

The proposed New York bill would require appellate counsel to perfect two appeals at once, i.e., the sentence review[53] and the direct appeal. The expense of this procedure will also be felt by the state and county as they attempt to defend the conviction. The constitutionality of a death penalty statute is almost always attacked on appeal. In New York, this will require the Attorney General's office to appear and defend the constitutionality of this statute.[54]

In our survey on appellate death penalty costs, F. Lee Bailey's office reported a minimum cost of $25,000 to take a non-capital felony appeal. Again, this figure is exclusive of expenses.

The Southern Poverty Law Center reported the cost of an appeal to range from $20,000 to $30,000. Under the New York statute, the costs will be higher.

In order to accurately quantify time involved in a capital case, we examined jurisdictions which have objectified the appellate process by the development of workload standards. In California and Michigan, the state defender offices have quantified non-capital appellate work into work units. By calculating the number of hours to prepare one brief from 300 pages of transcript, the Michigan Appellate Defender Office has developed an "an appellate unit"—a work unit equal to 55 hours of attorney time. Under this formula, a minor non-capital case directly appealed to the highest state court would require 3.7 work units or approximately 203½ hours. This includes an application to appeal, an appellate brief, oral argument, and motion for rehearing. It does not cover reply briefs, client visits, or expenses. The standards for California are substantially similar.

Significantly, the Appellate Section of the National Legal Aid and Defender Association[55] has developed capital case appellate standards and has also done so on the basis of work units. Under these standards, which can permissibly be met under the express provisions of the Volker/Graber bill, 30 work units are the standard work load for one appellate attorney for one year. A direct appeal of a death case to the New York Court of Appeals would constitute 14 work units under these standards.

This figure, which may be somewhat low considering the extensive research and innovation that will be required in the first onslaught of constitutional challenges to the Volker/Graber bill, translates into about five months work or between 800 and 900 billable hours. At the rates charged by the "best" counsel, *supra*, at n. 33, this will translate into defense costs of $80,000.

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[53] The costs associated with the constitutionally required disproportionality review have not been assessed. The death penalty statute will require the arresting police officer, the prosecuting attorney, the defendant's attorney, and the trial judge to file reports with the Court of Appeals in every case where a defendant is indicted for first degree murder. These reports will have to be filed with the Court of Appeals within 30 days of a disposition by a superior court. They will also have to be separately analyzed in conjunction with each death penalty sentence appeal. The contents of the reports will be designed by rule of the Court of Appeals. They are obviously, therefore, not detailed in the bill. It is, however, clear that, independent of other increased capital case judicial costs, the judicial system will need significant additional resources just to carry out disproportionality review.

[54] N.Y. EXEC. LAW, §71 (McKinney 1972).

[55] The workload standards reported here were presented at the National Appellate Defender Conference conducted by the National Legal Aid and Defender Association, April 10-12, 1981, in Indianapolis, Indiana. The capital case workload standards of 30 work units define a capital brief as 10 units, and a petition for *certiorari* as four.

A direct appeal of a capital case to the New York State Court of Appeals will, therefore, cost New York taxpayers no less than $160,000[56] exclusive of correctional and court costs, as indicated in Table 3 below.

TABLE 3
COST OF DIRECT APPEAL TO THE NEW YORK STATE COURT OF APPEALS

APPEAL						
COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$80,000	—0—	?	?	?	$80,000
County Charge	—0—	$80,000	—0—	—0—	?	$80,000

STATE $80,000
COUNTY $80,000
TOTAL $160,000

SUPREME COURT REVIEW

Final judgments of the Court of Appeals rendered in death penalty cases are next reviewable by the United States Supreme Court by writ of *certiorari*. Bringing such petitions is routine capital practice. Preparation of the petition and the brief on the merits involve complete review of, and familiarity with, the entire trial transcript and all state court proceedings. The transcripts to be reviewed frequently contain thousands and thousands of pages.

Edward Nowak, Public Defender of Monroe County and an able appellate lawyer who successfully argued the landmark case of *Dunaway v. New York*, 99 S.Ct. 2248 (1979), before the Supreme Court, estimates that the amount of time to adequately prepare a non-capital case for Supreme Court review averages between 150 and 200 hours. Seventy to 100 of these hours cover the preparation of the petition for *certiorari*. Once the petition is granted, however, fine points have to be honed and final briefs have to be prepared. Six lawyer weeks is not an unusual amount of time in non-capital cases.

In capital cases, far more is involved. The record is longer, the issues more complex, the stakes higher. More importantly, the constitutional principles involved have frequently only recently been enunciated and are subject to precise case by case refinement. During this process of review, while the cost of defense services will be a state charge, the cost of prosecutorial time will be a county charge.

The Supreme Court does not look at a *certiorari* petition to do justice to an individual litigant. Despite its reputation, the Supreme Court does not sit as a "court of last resort." Rather, in exercising its *certiorari* jurisdiction, the court seeks to either refine existing propositions of law, explore potential areas for applying settled principles of law, or to resolve constitutional conflicts among the state or federal circuits. In death cases, these principles heighten the existing pressure to find novel issues for Supreme Court reversal.

In the most recent case before the Court, *Eddings v. Oklahoma*, ____U.S.____, 102 S. Ct. 869 (1982), the question presented was whether or not the infliction of the death penalty on a minor who was 16 at the time of the crime constituted cruel and unusual

[56] Prosecution costs are calculated at a ratio of 1 to 1 with defense. See n. 28, *supra*.

punishment under the Eighth and 14th Amendments to the Constitution of the United States. A second question was whether or not the Supreme Court should address the plain error committed by the trial court when it refused to consider relevant mitigating evidence. The petition for *certiorari* was 26 pages long. The state's opposition brief, 20 pages long. The brief on the merits, filed for the petitioner, was 68 pages long. It argued three points of law, cited 81 cases, and discussed 95 domestic statutes. It reviewed the statutes of 11 countries. Seventy-seven other authorities were cited in the brief. Five appendices containing in-depth social research were filed.

The *Eddings* case is not an unusual effort on behalf of a capital defendant. It involved hundreds and hundreds of attorney hours to research, prepare and present the case.[57]

Applying the Michigan work unit formula, a non-capital petition for *certiorari*, brief and argument before the United States Supreme Court requires four units or 220 hours of attorney work. The California formula, applied to Supreme Court review in a non-capital case, would require three appellate work units and approximately 200 hours of attorney time for research, preparation, brief writing, and oral argument. Applying the NLADA Appellate Section standards, a petition for *certiorari* in a capital case would require approximately 256 hours of preparation. Supreme Court review itself, including legal research, preparation, *certiorari* petition, briefs, and oral argument would be equal to or surpass 46 percent of an attorney's work year. This is billable at approximately 883 hours.

Under the provisions of the Volker/Graber bill, which provides fees at the rates charged by the "best attorneys," *supra*, at n. 33, this will translate into defense costs of $85,000.

Supreme Court review of a New York capital case will, therefore, cost New York taxpayers no less than $170,000[58] exclusive of correctional costs as indicated in Table 4 below.

TABLE 4
COST OF SUPREME COURT REVIEW

WRIT OF CERTIORARI						
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$85,000	—0—	?	?	?	$85,000
County Charge	—0—	$85,000	—0—	?	?	$85,000

STATE $85,000
COUNTY $85,000
TOTAL $170,000

[57] Significantly, the Supreme Court decided the narrower of the two questions in *Eddings*. The constitutionality of imposing the death penalty on a 16-year-old thus remains an open question. The case is now in Oklahoma awaiting a resentencing procedure. NYSDA has been informed that a motion has been made seeking the appointment of a new sentencing judge. This will, of necessity, have to be decided before the case can proceed.

[58] Prosecution costs are calculated at a rate of 1 to 1 with defense. See n. 28, *supra*.

PART III:
A NOTE ON THE COST OF THE "CORRECTIONAL" PROCESS

The fiscal wastefulness of a criminal justice system with a death penalty is epitomized by the cost of incarceration. Since 1976, when the death penalty was held not to be unconstitutional *per se* by the Supreme Court, four people have been executed in the United States.[59] The vast majority of capital defendants do not get executed; rather, ultimately, after enormous agony and squandering of the public treasury, they are sentenced to life imprisonment. It will be the same in New York State. New Yorkers will not only pay for the cost of trial, appeal, and nine levels of review, but also for the incarceration of the inmate during the process and most probably for the rest of his life. It would, in the eyes of some, be better at the outset to offer life imprisonment as the only sanction for first degree murder.

The annual cost of maintaining an inmate in a New York State prison was calculated at $15,050 in 1978.[60] Assuming that the average age of persons convicted of first degree murder is 30,[61] and that they will live until age 70, the cost of life imprisonment for 40 years would be $602,000. At a cost of $1.4 million, a death penalty trial alone will exceed the cost of life imprisonment.

For the defendant facing capital punishment, the cost of special death row security must be added to the annual charges above. Thus, according to representatives of the Florida Clearinghouse on Criminal Justice, during the eight to ten years involved in post-conviction appellate review, an additional $15,000 per year for each inmate will probably be required. This security cost reflects the need to deal with the death row inmate individually, to maintain an individual cell, and to separate the inmate from the general population. This issue is certainly not new to correctional administrators.[62]

Richard McGee, then Administrator of the California Youth and Adult Corrections Agency, stated 18 years ago:

> "There is also the argument of cost. Why support some murderer for the rest of his life when we could execute him and save all that money, the argument goes.
>
> "Like so many arguments favoring the death penalty, this does not

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[59] Note that of the four, three—Gary Gilmore (1977); Jesse Bishop (1979); and Steven Judy (1981)—all desired execution. Only John Spenkelink did not wish to die. He is thus the only person to be executed against his will since 1967. Since 1976, eight persons on death row have, however, committed suicide.

[60] D. McDONALD, THE PRICE OF PUNISHMENT: PUBLIC SPENDING FOR CORRECTIONS IN NEW YORK 13 (1980).

[61] Florida reports the average age at admission to its death row is 30.8 years. BUREAU OF PLANNING, RESEARCH AND STATISTICS, FLORIDA DEP'T. OF CORRECTIONS—DEATH ROW ANALYSIS 1, STATISTICAL FACTS (Aug. 29, 1980).

[62] Thorsten Sellin, writing in 1961, said: "It has . . . been claimed that [the death penalty] is an economical way of disposing of criminals who, otherwise, would have to be supported at public expense—perhaps for the rest of their lives. Those who employ this cynical argument may be ignorant of the sometimes mountainous costs of the administration of justice in capital cases and they certainly have no knowledge of the realities of prison administration. It is no doubt true that some prisoners, including some lifers, do not make adequate returns to the state—measured in dollars and cents—for some of them are mentally or physically incapable of doing so. But most lifers work in prison. They perform domestic services, they work in prison shops, they do clerical work. If they were paid a wage commensurate with their services, they would be able to pay the costs of their maintenance, but since they are paid little or nothing, it is easy to forget that they are a source of financial profit to the institution in one way or another. Any prison warden will testify to the fact that it is from the group of lifers that he draws a considerable number of trusted inmate employees." *Capital Punishment*, 25 FED. PROBATION, No. 3, at 3 (Sept. 1961).

hold up under factual analysis. The actual costs of execution, the cost of operating the super-maximum security condemned unit, the years spent by some inmates in condemned status, and a pro-rata share of top level prison official's time spent in administering the unit add up to a cost substantially greater than the cost to retain them in prison the rest of their lives.

"Furthermore, perhaps half of those condemned could make highly useful prisoners. It is a common experience that many long-term prisoners settle down to responsible jobs in the prison community which could conservatively be valued at a minimum of half the salary of an employee in industrial, maintenance, clerical and other roles. This would more than pay for both their own keep and that of the other half.

"*Thus, our studies indicate that just on the basis of prison costs alone, it would actually be cheaper to do away with the death penalty.* When the other costs of death penalty cases are added—the longer trials, the sanity proceedings, the automatic and other appeals, the time of the Governor and his staff—then there seems no question but that economy is on the side of abolition."[63] (Emphasis supplied.)

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[63] McGee, *Capital Punishment as Seen By a Correctional Administrator*, 28 FED. PROBATION, No. 2, at 13-14 (June 1964).

CONCLUSION

Throughout this paper we have suggested the existence of certain indirect costs or made reference to specific costs we do not calculate.[64] These include court costs, jury sequestration, security costs for local correctional facilities, the cost of hiring special penalty phase counsel, and millions of dollars that will be associated with state and federal post-conviction review.

It should by now be clear that government has failed to look at the actual costs of defending and prosecuting capital cases. It has failed to examine the impact of the death penalty on the state's correctional system. It has no idea what the price tag for capital litigation by the Attorney General's office will be.

While prosecution costs in capital cases will probably bankrupt some counties, local governments, already caught in a quagmire over a jail crisis, have yet to examine the impact of capital case security requirements on local correctional facilities.

All these issues must be confronted without appeal to bloodlust. Bloodlust in the name of the public good is a political lie.

And the public? The public is concerned with security on the streets, in homes, at school, in offices. The public is, at best, overlooked by a government's death-bent myopia and, at worst, disregarded.

Crime and justice need to wear a common yoke. The death penalty permanently disengages them one from the other. There can be no murder in the name of justice.

Capital cases do not need to exist. The expenditures outlined in this paper are not necessary. Millions of dollars directly attributable to a death penalty and capital litigation can be instantly saved and redirected by not reinstituting capital punishment in New York State. This is not a choice ordinarily posed to voters or those others who live petrified and diminished by the fear of crime.

Political rhetoric, however, should not be permitted to obscure the true pain of the families of homicide victims. They need closure. For capital defendants, delay and legal review mean life. For the families of homicide victims, delay and legal review mean pain. For both, the process is agonizing.

While many have voiced concern over victims or perpetrators, few seem to know the true agony of either—the agony that comes from the notoriety of five or six appeals, from two or three reviews by the Supreme Court, from being dragged, alone, through the cruel and unusual punishment of waiting.

For the victim's family, it is the seemingly endless grief, memories of the morgue, recounting the report of death, refeeling aloneness.

The death penalty perpetuates victim pain. It also eats at the innards of the accused. Death row:

> ". . . is set up with one thing in mind: to hold a person until execution. None of the programs of education or rehabilitation available to others in even the strictest of prisons are available to death row inmates. The prison is required only to house, feed and then kill the inmate. This makes life on death row far more depressing and meaningless than life normally is in prison. . . . [D]eath row, . . . a ghastly zoo organized and wholly devoted to carrying out the most sordid act imaginable ***is just barely living. It is instinctive existence where the days are stitched together by a thin thread of hope that either the laws under which the penalty was decreed will be ruled unconstitutional or one's conviction will be reversed for some reason. The effects of years of isolation and deprivation, the lack of human contact, touch, and

** See nn. 25, 26, 29, 30, 38, 47, 52, 53, 54, *supra*, and text accompanying them.

sexuality builds unrelievable pressures. The constant possibility of execution added to those pressures makes for a grinding, withering life that is all but intolerable—a 'slow coming dark.' "[65]

The debate on the death penalty has become sordid and loud. It has diminished us all. We have come very far down the road from morality. Too far. The distance is shamefully represented by the theme of this paper—cost. Capital litigation and the costs of the death penalty, however, will not go away until the death penalty is abolished.

As can be seen from Table 5 below, some of the costs of the first three stages of capital litigation will total no less than $1,828,100.

TABLE 5
COST OF STATE I
(Trial, Appeal, Supreme Court)

	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$517,700	—0—	$300,000	?	?	$817,700
County Charge	—0—	$1,010,400	—0—	?	?	$1,010,400

STATE $817,700
COUNTY $1,010,400
TOTAL $1,828,100

By the time the first 40 New York death cases have been tried to verdict, over $59 million will have been expended. By the time the first 21 New York death cases have reached the United States Supreme Court, New York State and its counties will have expended as much as the Governor, in his February crime message, deemed appropriate for the entire statewide Major Offense Prosecution Program. An amount exceeding the Legislature's fiscal year 1982-83 local criminal justice assistance budget will rapidly be spent to pay for the death penalty in New York.

A recent analysis of the criminal justice system[66] indicates that the cost of the system has increased by 120 percent every five years since the early 1900's, while the rate of inflation has only increased by 40 percent every five years. A capital case, therefore, that necessarily taps resources from all facets of the criminal justice system, can be estimated to increase in cost at a similar rate. If 20 percent of the murder cases in New York (251 convictions in 1980)[67] are prosecuted through three stages of litigation as capital offenses at an average cost of $1.5 million, then in current dollars the death penalty will generate costs of approximately $75,000,000. If we assume that the cost will grow in proportion to the cost of the criminal justice system as indicated by the study, then in the year 2000 A.D., the death penalty will cost $1,075,000,000 annually. Perhaps that is what the Temporary Commission on Revision of the Penal Law meant

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[65] D. MAGEE, SLOW COMING DARK: INTERVIEWS ON DEATH ROW 5, 6 (1980).

[66] Sepler, *The Next Twenty-Five Years Facing the Criminal Justice System: Using Standard Celeration Charting for Systems Analyses*, 6 AM. J. CRIM. LAW 47 (1979).

[67] *Annual Report '80—Crime and Justice*, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, at 224.

in 1965 when, regarding the death penalty, it found "nothing but obstruction, confusion and waste."[68]

We have not detailed the costs of an actual execution. They singularly generate inordinate, almost uncontrollable, expense. The state of Georgia, which executes by electrocution, spent more than $250,000 solely for the anticipated, but aborted, execution of Jack Howard Potts in 1980.[69]

Special telephone lines running from the prison to the United States Supreme Court and to the Governor's office are necessary. The cost of extra police personnel for crowd control, helicopter security and the shutdown of federal air space over the prison are but a few items of the irrational cost that will be generated in the rare handful of cases that ever reach the execution stage.

It is our hope that a rational discussion of the costs of the death penalty will lead New York State to a rational conclusion. ■

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[68] See n. 8, *supra*.

[69] *Atlanta Journal*, Feb. 11, 1982, at 1, col. 1.

FOR MORE INFORMATION CONTACT:
Connie Kastelnik 212-887-4060

FOR IMMEDIATE RELEASE
FEBRUARY 13, 1983
PLEASE CREDIT "ABC NEWS"

One out of five Americans has been a crime victim in the past year, according to a new ABC News poll, and 13 percent of the adult population - nearly 22 million people - have been victims of violent crime.

The results of a special ABC News crime poll on the perceptions and realities of crime will be broadcast nationally during two weeks of special ABC News programming on "Crime in America," beginning Sunday, February 13.

The poll also revealed that three out of 10 Americans living in cities were victims of crime last year, along with nearly one quarter of all suburbanites and about one in seven Americans living in small towns and rural areas.

The ABC News poll also found that:

- Blacks are two-and-one-half times more likely than whites to be confronted by violent criminals. Twenty-six percent of all Blacks say they have been violent crime victims, compared to 10 percent of all whites.

- One in 12 Americans has had a close relative murdered, and one in eight knew someone in their neighborhood who was slain. Blacks are more than three times as likely as whites to have had a relative murdered. Twenty percent of blacks have had a relative slain, compared to six percent of whites.

- Twenty-six percent of those surveyed said they worried at least a "good deal of the time" about being murdered. Forty-three percent of victims of crime worry about being murdered, compared to 23 percent of people who never have been victims of violent crime.

- Nearly half of the women polled - 46 percent - said they worry about rape either a good deal or a great amount. Three percent report that they have been raped.

MORE MORE MORE

- Fifty-eight percent of those polled said unemployment, poverty, and related problems are the factors more responsible for crime in the U.S. Eighteen percent blamed drugs and 15 percent blamed breakdowns in family, society, morals, etc.

- A majority of 56 percent feels most judges have more sympathy for criminals than for their victims. Nearly two-thirds think judges have been giving shorter sentences in the last few years, and 88 percent said that is not the way they want it.

- Seventy-six percent want the death penalty for murderers. Seventy percent approve of building more prisons so that longer sentences can be given to criminals and 88 percent of these people are willing to have their taxes raised to pay for the new prisons.

- Seventy percent felt prisons mainly should be places that "teach criminals how to be useful, law-abiding citizens when they get out" rather than places to "punish criminals."

- Most people - 65 percent - disagree that armed citizen patrols are the only way to solve the crime problem. Forty-seven percent believe the best protection against crime is a strong police department.

- More than two-thirds of the gun owners polled said they would use their firearms if a burglar broke into their home. Nearly half of the American households - 47 percent - have firearms.

- Eighty percent said there would be less crime if more parents strictly disciplined their children. Exactly half of those polled said juveniles between the ages of 14 and 18 should be punished as adults if they commit a crime, and 46 percent said they should not be punished as adults.

Some 2,500 people were interviewed for the ABC News poll between December 7 and 18. The margin of error is plus or minus three percent.

(EDITOR'S NOTE: ABC News' two-week programming effort on "Crime in America" will focus on the myths and realities of crime, law enforcement, criminal justice and the prison system in the U.S. It will begin Sunday, February 13 with a special edition of "This Week with David Brinkley," with guests William Webster, FBI Director and William French Smith, Attorney General. The two weeks of programming (February 13 to February 25) will continue on "World News This Morning," "Good Morning America," World News Tonight," "Nightline," "20/20," "The Last Word" and "Viewpoint."

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U.S. Department of Justice
Bureau of Justice Statistics

Bureau of Justice Statistics
Bulletin

Capital Punishment 1982

July 1983

The capital punishment series began in 1930 with an annual report of the number of executions in each State. Several significant additions to the series have been made over the years. Beginning in 1953, statistics were published on the death-row population at yearend. In subsequent years, the series was expanded to include the number and characteristics of persons sentenced to death each year including age, sex, race, marital status, and education. Statistics were also published on the offender's previous homicide or other felony convictions and on whether the offender was in prison, on probation, or on parole at the time of the capital offense. The frequency of judicial and legislative action on capital punishment in the 1970's led to the annual collection of information on the legal status of the death penalty in each State. More recently, the Bureau of Justice Statistics began collecting information on those States that subject each death sentence to automatic appeal and on the minimum age at which an offender may be sentenced to death.

The complete series of capital punishment statistics is published in an annual report that may be obtained by request from the Bureau of Justice Statistics.

Steven R. Schlesinger
Director

Two persons were executed during 1982, one each in Virginia and Texas, bringing to six the total executed since 1967. All six took place after the last major U.S. Supreme Court rulings on the death penalty in 1976.[1] By year's end, the number of inmates under sentence of death stood at 1,050, the largest ever recorded in the Nation.[2] The number of persons sentenced to death during the year was 264—higher than in any other year except 1975—while departures from death row by means other than execution fell to 68, one of the smallest totals in recent history.

The large number of persons on death row at the end of 1982 reflected both an increase in the number of death sentences handed down over the years and lengthened stays because of long appeals. The 264 persons sentenced to death in 1982 represented an increase of 8% over the number condemned in 1981. Twenty-eight of the 37 States with death penalty laws sentenced inmates during 1982. The largest number of sentences were handed down in California and Florida, each with 39 persons, followed by Texas[3] with 28 and Alabama with 20. Ohio and Wyoming were the only States that sentenced persons during 1982 but not 1981. A new death penalty law was passed in Ohio during 1981.

Since 1976, the number of removals from death row has dropped each year with the exception of 1980, when 42 persons were relieved of the death sentence in Alabama as the result of a major court decision. The relationship between removals and additions has varied from year to year, but by 1982 about four persons received the death sentence for every one relieved of it.

During 1982, only 16 States had departures from death row, 5 fewer than in 1981. The largest number of removals occurred in Texas (24) and Florida (13); each of the remaining 13 States granted 6 or fewer removals (departures prompted by legislative or judicial action).

About half of the 64 persons who left death row by means other than death had both their convictions and their sentences vacated, while the next largest group, 31%, had only their sentences vacated. Six deaths occurred among the condemned population, including two executions, three murders, and one suicide. The total number of persons who have died on death row since 1972 is 32, including the six who were executed.

The 1,050 persons awaiting the death penalty at yearend 1982 was almost double the record high on death row at the time of Furman v. Georgia, 408 U.S. 238, in 1972, and 2-1/2 times the number on death row at the end of 1976, the year from which most of the current laws date. More than two-thirds of the 1982 total were held in Southern States. Only one Northeastern State, Pennsylvania, held prisoners on death row. The largest numbers were under sentence in Florida (189), Texas (148), California (120), and Georgia (100). In all, 31 of the 37 States with the death penalty held at least one condemned prisoner at yearend.

About 40% of those under sentence

[1] A seventh person was executed in Alabama on April 22, 1983. All of the seven were men.

[2] The 1982 figures exclude 6 men with military death sentences held under Armed Forces jurisdiction.

[3] The figures for Texas and Georgia on the table on page 2 exclude condemned inmates still held in county jails but will be revised to include them as they enter the State correctional system.

Status of death penalty statutes and prisoners under sentence of death, by region and State, 1982

Region and State	Death penalty in force as of 12/31/82	Prisoners under sentence of death 12/31/81	Changes during 1982			Prisoners under sentence of death 12/31/82
			Received under death sentence	Removed from death row	Executed	
United States	---	856	264	68[1]	2	1050
Male	---	845	262	66	2	1037
Female	---	11	4	2	0	13
Federal[2]	Yes	0	0	0	0	0
State	---	856	264	68	2	1050
Northeast	---	15	9	0	0	25
Maine	No	0	0	0	0	0
New Hampshire	Yes	0	0	0	0	0
Vermont	Yes	0	0	0	0	0
Massachusetts	No	0	0	0	0	0
Rhode Island	No	0	0	0	0	0
Connecticut	Yes	0	0	0	0	0
New York	Yes	0	0	0	0	0
New Jersey[3]	Yes	0	0	0	0	0
Pennsylvania	Yes	16	9	0	0	25
North Central	---	77	26	3	0	100
Ohio	Yes	0	3	0	0	3
Indiana	Yes	10	5	0	0	15
Illinois	Yes	41	10	2	0	49
Michigan	No	0	0	0	0	0
Wisconsin	No	0	0	0	0	0
Minnesota	No	0	0	0	0	0
Iowa	No	0	0	0	0	0
Missouri	Yes	14	8	1	0	21
North Dakota	No	0	0	0	0	0
South Dakota	Yes	0	0	0	0	0
Nebraska	Yes	12	0	0	0	12
Kansas	No	0	0	0	0	0
South	---	617	157	61	2	711
Delaware	Yes	4	1	0	0	5
Maryland	Yes	8	7	1	0	14
District of Columbia	No	0	0	0	0	0
Virginia	Yes	17	4	1	1	19
West Virginia	No	0	0	0	0	0
North Carolina	Yes	17	12	1	0	28
South Carolina	Yes	21	2	6	0	17
Georgia	Yes	95	8	3	0	100
Florida	Yes	163	39	13	0	189
Kentucky	Yes	9	6	2	0	13
Tennessee	Yes	22	8	1	0	29
Alabama	Yes	16	20	0	0	36
Mississippi	Yes	27	10	0	0	37
Arkansas	Yes	23	3	2	0	24
Louisiana	Yes	14	1	2	0	13
Oklahoma	Yes	36	8	5	0	39
Texas	Yes	145	28	24	1	148
West	---	140	72	4	0	214
Montana	Yes	3	0	0	0	3
Idaho	Yes	2	5	0	0	7
Wyoming	Yes	0	3	0	0	3
Colorado	Yes	1	1	0	0	2
New Mexico	Yes	3	2	0	0	5
Arizona	Yes	38	15	2	0	51
Utah	Yes	3	0	0	0	3
Nevada	Yes	12	5	0	0	17
Washington	Yes	1	2	0	0	3
Oregon	No	0	0	0	0	0
California	Yes	83	39	2	0	120
Alaska	No	0	0	0	0	0
Hawaii	No	0	0	0	0	0

NOTE: Some of the figures for yearend 1981 are revised from those shown in Capital Punishment 1981 (final report), December 1982, NCJ-86484. These figures exclude 5 inmates in Texas who were relieved of the death sentence before December 31,1981, and 1 in Pennsylvania who was reported twice—first in 1979 and again in 1981, and include 24 inmates (6 in Pennsylvania, 6 in Texas, 4 in Georgia, 4 in Louisiana, 2 in Florida, 1 in Tennessee, and 1 in Washington) who, although sentenced to death before the end of 1981, were either reported late to the NPS program or were not in the custody of State correctional authorities by December 31, 1981.

[1]Includes one Maryland inmate who committed suicide and three inmates (one each in Arizona, Oklahoma, and South Carolina) who were murdered by another inmate.

[2]Excludes six prisoners held under Armed Forces jurisdiction.

[3]The death penalty was in effect in New Jersey as of August 6, 1982.

were blacks, roughly the same proportion as in recent years. Twelve members of other races were under sentence—seven American Indians and five Asians.

Twelve States, the largest number since data became available in 1978, held a total of 59 Hispanic inmates under sentence of death. During the 1978-83 period, the number of Hispanics increased more rapidly than the death-row population as a whole—3-1/2 times versus 2.

There were 13 women on death row in eight States, including 4 in Georgia. The number was the highest since data on women have been available. Since 1972, 12 States have sentenced 31 women to death, but 24 women, including 6 sentenced before 1972, have had their capital sentences lifted.

The number of persons on death row was more than double that in 1968, when a sharp increase began because of an informal moratorium on executions. The moratorium allowed the courts to scrutinize the many challenges to the death penalty then being raised at all levels, culminating in the landmark Furman v. Georgia decision in June 1972. In that decision, the High Court held that death penalty statutes as they currently existed were in violation of the Eighth Amendment's protection against cruel and unusual punishment. While the more than 600 persons then on death row waited to have the new ruling applied to them individually, the States began to revise their laws to withstand the Court's scrutiny.

Inasmuch as the Furman decision provided little in the way of guidelines for new legislation, the years that immediately followed it saw a number of attempts and failures by the States to meet standards acceptable to the Supreme Court. These standards emerged gradually through a series of rulings by the Court, mainly in 1976 and 1977. Most current capital punishment legislation, in fact, dates from 1976, modeled after the laws of Georgia, Florida, and Texas that were upheld in rulings during that year.[4]

Today's death penalty laws provide the death sentence only for specific types of murder, for example, murder committed during a felony, murder of a law enforcement officer, and murder for hire.[5] They also provide for

[4]Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. [illegible], 428 U.S. 262 (1976).

[5]In addition to specific types of murder, each of the following crimes, most of which have not passed tests of constitutionality at the U.S. Supreme Court level, is a capital offense in at least one State: aircraft piracy resulting in death, armed robbery resulting in death of the (continued on page 3)

"guided discretion," laying down specific guidelines to assist the sentencing judge or jury in weighing both aggravating and mitigating circumstances to the crime. Thus the Court struck a balance between the wide discretion allowed before Furman and the rigidity of mandatory death penalty laws passed in response to Furman but found unconstitutional in several rulings during 1976.

The years that followed the 1976 Supreme Court decisions saw a number of refinements added to the established standards. In 1977, the death sentence was found to be a disproportionate penalty for the rape of an adult woman. Other rulings have held that the capital prisoner is to be afforded every possible legal right, such as the right to have all mitigating circumstances to the crime considered at the time of sentencing.

By the end of 1982, 37 States and the Federal government provided for the death penalty. During the year, New Jersey was added to the list when it enacted a new death penalty law; its previous law had been declared unconstitutional in 1972. For the first time since the Furman ruling, no State's death penalty law had been overturned.

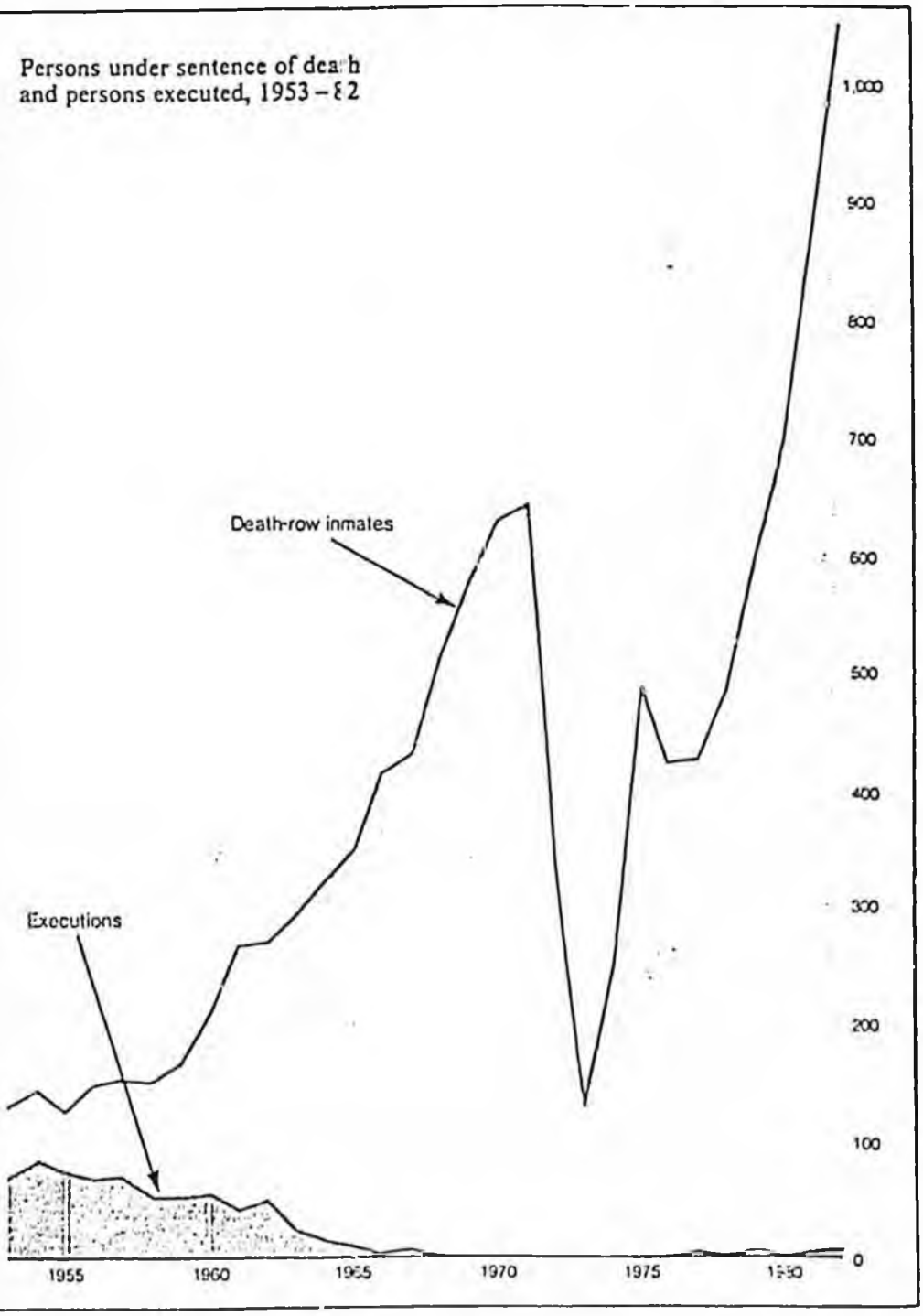
Seven other States made either substantive or procedural changes in their statutes. Arizona provided for a separate sentencing hearing. Idaho added death by a firing squad as an alternative to lethal injection. Nebraska limited the death penalty to those age 18 or older at the time of the crime. Oklahoma further specified the types of murder that constituted capital offenses. South Dakota refined the section of its death penalty law on aggravating and mitigating circumstances. In Utah, revisions were made to the sections dealing with the sentencing hearing and the nature of the jury for that hearing. Virginia made its law more specific by revising the language on murder committed by an inmate confined in a State or local correctional facility.

In addition to legislative actions, a number of court decisions at both the State and Federal level had some impact on the death penalty situation.

In January 1982, the California Supreme Court ruled in California v. Ramos that the required instruction to sentencing juries that a life sentence without parole could be commuted by

[5] (Continued from page 2) victim, assault by a life prisoner resulting in death, hindering preparation for war causing death, kidnaping resulting in severe injury, kidnaping resulting in death, murder by a life prisoner, murder by an inmate of a correctional facility, omitting to note defects in articles of war resulting in death, perjury resulting in the death penalty, rape of a child under age 12, and rape of a child under age 14.

Persons under sentence of death and persons executed, 1953–82



Number of women on death row, yearend 1972–82

late	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982
United States	4	3	3	8	7	6	5	7	9	11	13
Alabama	-	-	-	-	-	-	1	1	-	1	1
California	3	-	-	1	2	-	-	-	-	-	-
Florida	-	-	-	-	1	1	1	1	1	-	-
Georgia	1	2	1	1	1	1	1	2	3	4	4
Kentucky	-	-	-	-	-	-	-	-	1	1	-
Maryland	-	-	-	-	-	-	-	-	-	1	2
Mississippi	-	-	-	-	-	-	-	-	-	-	1
Nevada	-	-	-	-	-	-	-	-	-	-	1
North Carolina	-	1	2	3	-	-	2	1	1	1	1
Ohio	-	-	-	2	3	4	-	-	-	-	-
Oklahoma	-	-	-	1	-	-	-	1	1	1	1
Texas	-	-	-	-	-	-	-	1	2	2	2

the Governor was unconstitutional. However, removal of potentially affected prisoners from death row was suspended pending a review by the U.S. Supreme Court.

In Eddings v. Oklahoma, the U.S. Supreme Court determined that the failure of the State court to consider as a mitigating circumstance a 16-year-old's emotional disturbance and turbulent family history was unconstitutional. The Supreme Court stipulated that sentencing and reviewing courts may determine the weight to be given relevant mitigating circumstances, but that they may not exclude such evidence totally.

In State v. Logan, South Carolina's Supreme Court decided that the State could not try a defendant for capital murder under death penalty statutes that had been declared unconstitutional before the date of the crime. The State had contended that, since only procedural changes were needed to render the old death penalty statutes constitutionally acceptable, the substantive provisions of the law should be considered as if in effect at the time of the murder. The South Carolina Supreme Court, however, held that the death penalty statute in existence when the crime was committed could not be enforced, and that to try the defendant under such circumstances would violate constitutional guarantees against the application of ex post facto laws.

At the end of 1982, Arkansas, New Jersey, New York, and the Federal system were the only jurisdictions whose death penalty statutes did not require an automatic appeal. Some State laws provide for a review of the sentence, while others require a review of both conviction and sentence.

In most States, the youngest age at which a person can be sentenced to death is the age at which they can be tried as an adult. Since in many States this age standard can be waived, the theoretical minimum age for the imposition of the death penalty ranges from age 10 (Indiana) to age 18. Sixteen States reported no minimum age for the imposition of the death penalty.

Bureau of Justice Statistics Bulletins are prepared by the staff of the bureau. Carol B. Kalish, chief of data analysis, edits the bulletins. Marilyn Marbrook, bureau publications chief, administers their publication, assisted by Julie A. Ferguson. The author of this bulletin is Mimi Cantwell of the U.S. Bureau of the Census.

July 1983, NCJ-89395

Methodological note

Data on persons under sentence of death are collected annually for the Bureau of Justice Statistics by the U.S. Bureau of the Census as part of the National Prisoner Statistics (NPS) program. Data are obtained from the departments of corrections in each of the 50 States and the District of Columbia. The Bureau of Justice Statistics gratefully acknowledges the cooperation of State officials whose generous assistance and unfailing patience make National Prisoner Statistics possible.

Statistics in this series may vary from other death-row counts for any of the following reasons:

- Inmates are not added to the NPS death-row counts at the time the court hands down sentence, but at the time they are admitted to a State or Federal correctional facility.
- Inmates sentenced to death under statutory provisions later found unconstitutional are removed from the death-row count on the date of the relevant court finding rather than on the dates the finding is applied to individual cases. Thus, persons who are technically under sentence of death, but who are no longer at risk, are not counted.
- NPS death-row counts are always as of the last day of the calendar year and will therefore differ from estimates made for more recent periods.

Further reading

A final report on the death-row population in 1982 will be published in late 1983. To obtain the final 1982 report, Capital Punishment 1982, or be added to the bulletin mailing list, write to the National Criminal Justice Reference Service, Box 6000, Rockville, Md. 20850 (301/251-5500). Other National Prisoner Statistics Bulletins include—

- Veterans in Prison, October 1981, NCJ-79232;
- Prisons and Prisoners, January 1982, NCJ-80697;
- Death-row Prisoners 1981, July 1982, NCJ-83191;
- Prisoners 1925-81, December 1982, NCJ-85861;
- Prisoners and Alcohol, January 1983, NCJ-86223;
- Jail Inmates 1982, February 1983, NCJ-87161;
- Prisoners and Drugs, March 1983, NCJ-87575;
- Prisoners in 1982, April 1983, NCJ-87933.

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