ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 3672

2437 HJ HB 140 (FILE 2) - HB 158

TABLE 3

TWO-STAGE LEAST SQUARES (TSLS) ESTIMATES OF MURDER EQUATION

Equation/Year	$\bar{R}^2$	Constant	P	T	Execution	A	I	M	D_S
g1	.720	-4.79	-3.06	-.0162	6.53	.493	.159	1.54	2.60
1950		(-.61)	(-2.67)	(-2.18)	(.52)	(.96)	(2.97)	(1.92)	(1.60)
($\hat{E}$)									
g2	.860	-18.9	-4.71	-.0134	6.48	1.44	.122	1.92	2.41
1960		(-2.61)	(-2.76)	(-4.27)	(.30)	(3.62)	(3.41)	(3.20)	(2.65)
($\hat{E}$)									
h1	.667	-6.29	-5.70	-.0169	12.94	.704	.161	1.29	1.52
1950		(-.65)	(-2.41)	(-1.28)	(.88)	(1.15)	(2.71)	(1.37)	(.78)
($\hat{P}$, $\hat{T}$, $\hat{E}$)									
h2	.818	-8.23	-10.2	-.0157	-9.20	1.20	.0985	1.42	2.96
1960		(-1.06)	(-1.99)	(-2.07)	(-.34)	(2.46)	(2.26)	(1.84)	(2.40)
($\hat{P}$, $\hat{T}$, $\hat{E}$)									
j1	.674	1.22	-.508	-.349	.148	-.0992	.722	-.00248	
1950		(.67)	(1.99)	(-2.52)	(1.87)	(-.07)	(1.80)	(-.05)	
(10th root; $\hat{E}$)									
j2	.417	.851	-.689	-.115	.240	.336	.426	-.0239	
1960		(.34)	(-1.80)	(-2.31)	(3.47)	(.17)	(1.21)	(-.50)	
(10th root; $\hat{E}$)									

nous. As in (f1) and (f2), the coefficients of $\hat{E}$ are positive and statistically significant.

VI. An Execution Equation

Sections IV and V provide evidence that capital punishment does not act as a deterrent. Among the regressions in Tables 1–3 there are no instances in which the execution variable is negative and statistically significant. There are, however, reasons to believe that execution rates and murder rates are not entirely independently determined. Certainly the major impetus for new capital punishment legislation has been public frustration with the explosive growth of murder rates in the past decade.

Perhaps a more testable hypothesis about the relationship is that execution rates—executions per conviction—are a positive function of murder rates because of the attitudes of prosecutors, juries and judges. Given the discretion built into the system at each level it is plausible that, other things being equal, more convicted murderers will be sentenced to death the higher the perceived murder rate.

A proper statistical evaluation of the explanation of variations in the execution rate between states is beyond the scope of this paper. Among other purely econometric problems, the execution rate is a limited dependent variable. As mentioned earlier, since E is frequently equal to the bound value, the estimated coefficients will be biased. It is possible and relevant, however, to explore the issue in a tentative fashion, ignoring these difficulties.

Only a few of a number of alternative regression formulations proposed are shown here. Equations (k1) and (k2) in Table 4 show the OLS estimators for E as a linear function of murder rates lagged by one year, $(Q/N)_{-1}$, and M, the non-white migration variable. Equations (m1) and (m2) are basically the same formulation, but are estimated using TSLS with current murder rates as an endogenous variable. Neither the (k) nor (m) equations provide much insight into the sources of variation in execution rates, though in all four equations the coefficient of M, as would be expected, is significantly positive.

The addition of I, the percentage of the population below the poverty line, and Q^*, the rate of change of murders in the previous four years (estimates not shown) adds no explanatory power. Nor—in seeming contradiction to conventional wisdom—does a Southern states dummy variable. If one eliminates executions for rape and burglary, the South shows no particular propensity to execute convicted criminals.

Equations (m1) and (m2) produce a more interesting result. The TSLS estimators on the 10th roots of the variables are significant and of the ap-

TABLE 4

ESTIMATES OF EXECUTION EQUATIONS

Equation/Year	R^2	Constant	O/N	$(O/N)_{-1}$	M
k1 1950 OLS	.112	.0164 (1.43)		-.000172 (-.24)	.0164 (2.26)
k2 1960 OLS	.171	.00201 (.30)		.00144 (1.53)	.0127 (2.70)
m1 1950 TSLS	.145	.00431 (.27)	.00182 (.86)		.0263 (2.41)
m2 1960 TSLS	.154	.00344 (.49)	.00113 (1.15)		.0123 (2.59)
n1 1950 TSLS — 10th root	.360	-1.94 (-3.25)	2.04 (4.09)		.193 (2.18)
n2 1960 TSLS — 10th root	.238	-2.02 (-2.63)	2.08 (3.31)		.155 (1.44)

propriate sign. Whether or not this comes close to capturing the true relationship between E and Q/N remains to be seen. These two equations do, however, suggest why equations (f) and (j) show perversely positive and significant signs for the execution coefficient. E is not an independent variable in the determination of murder rates, but perhaps murder rates do partially determine execution rates. Hence a misspecified form like (f) or (j) may produce a spurious least-squares statistical relationship.

VII. Conclusion

The purpose of the empirical work in this Article is to test the hypothesis that capital punishment deters murder. Two important qualifications to interpretation of the research are necessary. First, statistical techniques test hypotheses only in a limited sense of the word; they can only establish the likelihood that the available evidence is consistent with the hypothesis in question. Thus one might argue—I would not—that Ehrlich confirmed that the idea that extra executions deter murders was consistent with one set of observations. Other explanations that do not include capital punishment deterrence might also be found consistent with Ehrlich's data.

Second, the techniques used here (and those employed by Ehrlich) attempt to isolate the effect of executions on murders, *holding other factors constant*. Since other factors cannot be held constant in practice—changing execution rates might result in changes in arrests, convictions, and prison sentences as well—this study answers a different question than the one generally asked. This is not due to caprice on the part of the investigator, but to a lack of information about the criminal justice system.

Our analysis accounts for as many of the major, quantifiable factors as possible that explain state-to-state variations in murder rates, then tests whether state-to-state variations in execution rates also add explanatory power to the equation. Five variables—conviction rates, average prison sentences, poverty, age, and rural-urban migration—plus a special accounting variable for Southern states, do in fact explain a great deal of these state to-state murder rate variations. Variations in execution rates, however, add no explanatory power.

Estimates derived from regression analysis have value conditional upon the fulfillment of certain assumptions about relationships underlying the behavioral model, as well as assumptions about the sources of error in the data. Since one has relatively little information upon which to base a complete model of the criminal justice system or to analyze the source of errors in the data, it becomes imperative to test the sensitivity of the results to different assumptions.

The results displayed in Tables 1 and 2 establish insensitivity to assumptions about the mathematical form of the equation and to specification of the execution variable itself. For a reasonably broad set of mathematical forms and alternative estimators of the subjective probability of execution, one finds no evidence of an execution deterrent. Section V analyzes the potential bias introduced by simultaneous determination of murder rates with other variables in the system—conviction rates, execution rates, prison sentences. Again, under a range of plausible assumptions, there is no evidence that executions act as a deterrent. Section VI explores the possibility that murder rates may systematically influence execution rates. The results presented in Table 4 support such a hypothesis.

Just how the evidence presented here should influence one's view on the issue of capital punishment deterrence depends in part on one's perspective. It cannot be proven that executions do not serve as a deterrent to murder. Proof is simply beyond the capacities of empirical social science.

At a minimum, however, students of capital punishment must look elsewhere for evidence confirming deterrence. We know of no reasonable way of interpreting the cross-section data that would lend support to the deterrence hypothesis.

It is important to observe that the economic approach to studying crime has value beyond the capital punishment issue. Simply because the threat of execution does not deter murder does not mean that either the length of sentence or certainty of punishment does not influence would-be criminals. The deterrent effect of conviction rates and sentences stands up well in the cross-section regressions published here. Nor does the failure to find statistical support for capital punishment deterrence discredit the use of econometric techniques to formulate and test rigorously hypotheses about criminal behavior. Its purpose is not merely to provide an empirical buttress for specific policy positions on crime prevention, but also to define the dimensions of knowledge about crime and suggest ways of expanding them.

The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater

Milner S. Ball*

The essay form is the fit instrument for a thinker whose chief concern is to lay bare the contending claims that seek the mediation and authority of society through law, and to give some indication, at least, of how these processes of mediation in fact operate. For the essay is tentative, reflective, suggestive, contradictory, and incomplete. It mirrors the perversities and complexities of life.[1]

The production of plays unlike the production of goods cannot be streamlined.[2] A performance of *King Lear* requires about as much time and labor now as it did in Elizabethan England. Output per man-hour could be significantly increased in the theater only by radically transforming its quality, dynamics and nature, as, for example, by abandoning the intimate medium of live performance for the quite different mass media of television or film. Productivity gains are precluded in live performance because what the performer does is an end in itself and not the means to production of some other good. Inasmuch as it is invulnerable to greater technological efficiency through mass production or speedier processes, theater cannot reduce its costs.

The same is true of the public functions of courts. Some aspects of judicial administration are undoubtedly subject to modifications which would increase its productivity, but there is little that can be done to cut the time and labor of trials and oral arguments. Their costs can only multiply. The question, which gathers urgency as court workloads and docket congestion

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1. F. Frankfurter, Felix Frankfurter on the Supreme Court 203 (P. Kurland ed. 1970), quoted from Frankfurter's book review of B. Cardozo, The Paradoxes of Legal Science (1928), 78 U. Pa. L. Rev. 436 (1929).

2. *See* W. Baumol & W. Bowen, Performing Arts—The Economic Dilemma 161–72 (1966), which explores the relationship of productivity gains and the technology of live performance. The emphasis in this opening paragraph is a pale, partial reflection of their suggestive formulation.

Statistical Evidence on the Deterrent Effect of Capital Punishment

Editors' Introduction

Sophisticated statistical evidence became important in the litigation over the constitutionality of the death penalty a decade ago. As part of its attack on capital punishment, the NAACP Legal Defense and Educational Fund sponsored a statistical study of racial discrimination in the sentences imposed for rape in the South.[1] Abolitionist lawyers have relied on evidence of discriminatory imposition of the penalty to argue that it violated the Fourteenth Amendment's guarantee of the equal protection of the laws and the Eighth Amendment's prohibition of cruel and unusual punishments.[2] Such evidence clearly influenced the decision in *Furman v. Georgia*, in which the Supreme Court, by a five-to-four margin, struck down as cruel and unusual punishment the imposition of the penalty at the discretion of the judge or jury.[3]

A more fundamental statistical attack was directed at one of the underlying legislative rationales for capital punishment—that it is a more effective deterrent to crime than life imprisonment. This attack goes to the very existence of the penalty rather than the manner in which it is imposed. The issue of deterrence received some attention in *Furman*, and is now before the Court in *Fowler v. North Carolina*,[4] which poses Eighth and Fourteenth Amendment challenges to capital punishment imposed under North Carolina's mandatory sentencing procedure.

1. The findings of this study are reported in Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in W. Bowers, Executions in America 111-29 (1974). This study confirmed earlier findings of the discriminatory imposition of the penalty reported in earlier investigations. See W. Bowers, *supra* at 18-19.

2. Brief for NAACP *et al.* as Amici Curiae at 13-22, Aikens v. California, 406 U.S. 813 (1972) (Eighth and Fourteenth Amendment challenges dismissed as moot after decision of California supreme court in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), that capital punishment violated the state constitution); Maxwell v. Bishop, 398 F.2d 138, 141-48 (8th Cir. 1968), *rev'd on other grounds*, 398 U.S. 262 (1970) (after thorough discussion, then Circuit Judge Blackmun rejected a Fourteenth Amendment challenge, based on the NAACP study of racial discrimination in rape sentencing, note 1 *supra*, to a death sentence imposed under an Arkansas rape statute); Brief for NAACP Legal Defense & Educational Fund, Inc. and National Office for the Rights of the Indigent as Amici Curiae at 51-53, Boykin v. Alabama, 395 U.S. 238 (1969) (Eighth Amendment challenge based in part on statistical evidence of racial discrimination in imposition of death penalty).

The prohibition of cruel and unusual punishments is applicable to the states through the Fourteenth Amendment. See Robinson v. California, 370 U.S. 660, 667 (1972).

3. 408 U.S. 238 (1972). Two of the five Justices who concurred in the judgment of the Court relied at least in part on statistical evidence of the racially discriminatory imposition of the penalty. *Id.* at 250 n.15 (Douglas, J., concurring), 364-65 (Marshall, J., concurring). Two of the dissenters recognized the importance of the evidence for a possible claim of denial of equal protection of the laws. *Id.* at 389-90 n.12 (Burger, C.J., dissenting) ("data of more recent vintage" essential for equal protection claim), 419 n.2 (Powell, J., dissenting). See White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 11 Duq. L. Rev. 279, 281-85 (1973).

4. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803, *cert. granted sub nom.* Fowler v. North Carolina, 419 U.S. 901 (1974), *argued*, 43 U.S.L.W. 3362 (U.S. Apr. 21, 1975), *restored for reargument*, 423 U.S. 809 (1975). See notes 17-18 *infra*.

Of the nine Justices writing separate opinions in *Furman*, Justice Marshall, who along with Justice Brennan would have found the penalty unconstitutional per se, gave the most weight to the statistical evidence on deterrence.[5] From prior cases construing the Eighth Amendment, he derived the principle that a punishment is cruel and unusual if it is "excessive and serves no valid legislative purpose."[6] Devoting more than half of his discussion of the purposes conceivably served by capital punishment to the "hotly contested issue . . . whether it is better than life imprisonment as a deterrent to crime,"[7] he stated that the deterrent effect of capital punishment rested on "logical hypotheses devoid of evidentiary support," and invoked the statistical studies of Thorsten Sellin, which for him "demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction."[8] He quoted extensively from Sellin as "one of the leading authorities on capital punishment" and included as appendixes to his opinion several of Sellin's tables comparing homicide rates in neighboring abolitionist and retentionist jurisdictions.[9] After considering and rejecting other possible purposes for capital punishment, he concluded:

> [T]he death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment. The statistical evidence is not convincing beyond all doubt, but it is persuasive. . . . [T]here is sufficient evidence available so that judges can determine, not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.[10]

The "excessive and unnecessary" standard of the Eighth Amendment is essentially equivalent to a substantive due process standard: the penalty is unconstitutional if it lacks a rational basis.[11] This due process analysis

5. 408 U.S. at 315-54 (Marshall, J., concurring). Justice Brennan stated that "the available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment." *Id.* at 301. Justice Stewart found the statistical evidence on deterrence "inconclusive." *Id.* at 307-08 & n.7. Chief Justice Burger characterized the evidence on deterrence as an "empirical stalemate." *Id.* at 395. Justice Powell observed that statistical studies "tend to support the view that the death penalty has not been proved to be a superior deterrent," but do not approach the showing required to find the penalty unconstitutional. *Id.* at 451, 456. *See* White, *supra* note 3, at 285-86.

6. 408 U.S. at 331. This principle was also put forth by Justice Brennan, *id.* at 279-80, but was sharply attacked by the dissenters, *id.* at 391-96 (Burger, C.J., dissenting), 451 (Powell, J., dissenting).

The other ground relied on by Justices Brennan and Marshall was that the penalty was "morally unacceptable to the people of the United States . . . ." *Id.* at 360 (Marshall, J., concurring); *see id.* at 295-300 (Brennan, J., concurring).

7. *Id.* at 345-54.

8. *Id.* at 347, 350.

9. *Id.* at 348-50, 373-74.

10. *Id.* at 356-59 (footnote omitted).

11. The principle that a punishment is cruel and unusual if it is excessively severe was suggested by Justice Goldberg [illegible]

requires that those challenging the death penalty overcome the "presumption of constitutionality accorded legislative acts."[12] Whereas in a traditional Brandeis brief[13] statistical evidence is used to support that presumption, in *Furman* the evidence was used to attack it.

If the Eighth Amendment does prohibit unnecessarily severe punishments, the findings of Professor Isaac Ehrlich on the deterrent effect of capital punishment, reported a year after *Furman* and published this spring,[14]

Alabama, 375 U.S. 889 (1963), and analyzed as a substantive due process standard in Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964). Justice Marshall recognized that his excessive severity principle under the Eighth Amendment "parallels in some ways" a substantive due process analysis:

> The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (*i.e.*, the right to life), . . . the State needs a compelling interest to justify it. . . . Thus stated, the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment—*i.e.*, punishment may not be more severe than is necessary to serve the legitimate interests of the State.

408 U.S. at 359-60 n.111 (Marshall, J., concurring).

12. 408 U.S. at 359 (Marshall, J., concurring).

Justice Marshall did not make entirely clear his view of the strength of the presumption of constitutionality accorded to the legislative enactment of capital punishment. On the one hand, he stated that those challenging the penalty "bear a heavy burden of demonstrating that it is excessive," *id.* at 360 n.111, and on the other, that

> [d]espite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent . . . .

Id. at 353.

In recent decades the Court has accorded a greater presumption to legislation restricting economic liberty than to that restricting noneconomic rights. *Compare* Ferguson v. Skrupa, 372 U.S. 726 (1963), Williamson v. Lee Optical Co., 348 U.S. 483 (1955), Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949), *and* G. Gunther, Cases and Materials on Constitutional Law 576-96 (9th ed. 1975) *with* Roe v. Wade, 410 U.S. 113 (1973), Griswold v. Connecticut, 381 U.S. 479 (1965), *and* G. Gunther, *supra* at 616-56. Following this double standard, the Court would apply the greater scrutiny to punishments tested for a rational basis under the Eighth Amendment. *Cf.* Comment, *The Death Penalty Cases*, 55 Cal. L. Rev. 1268, 1271-73 (1958). It has been suggested that the double standard may be justified by a theory of judicial review which accords greater deference to legislation supported by instrumental policy considerations—reasons of social utility—than to legislation supported by moral judgments. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 222 (1973). Under this analysis, the legislative purpose of deterrence for capital punishment might be subjected to less scrutiny than the other purpose most often advanced, retribution. For discussions of retribution as a justification for capital punishment, see, *e.g.*, Furman v. Georgia, 408 U.S. 238, 303-01 (Brennan, J., concurring), 308 (Stewart, J., concurring), 342-45 (Marshall, J., concurring), 391-95 (Burger, C.J., dissenting), 452-61 (Powell, J., dissenting) (1972); Packer, *supra* note 11, at 1078; Comment, *supra* at 1297-1301.

13. Before he was appointed to the Court, Louis Brandeis submitted a brief supplying extensive factual support from nonjudicial sources for an Oregon law regulating hours of work for women. His brief received favorable comment in Justice Brewer's opinion for the Court upholding the statute, Muller v. Oregon, 208 U.S. 412, 419-20 & n.1 (1908), and has become a classic example of the use of social science data in constitutional litigation. See P. Freund, On Understanding the Supreme Court 86-92 (1949).

14. I. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life or Death, 1974 (Working Paper No. 18, Center for Economic Analysis of Human Behavior [illegible] Capital Punishment: A Time

bear importantly on the question now before the Court in *Fowler*. One of the two Justices who have thus far revealed themselves willing to declare the penalty unconstitutional per se has relied in large part on the statistical research of Sellin and others who have followed his approach. Ehrlich criticized the methods used by Sellin—graphical comparisons of homicide rates in neighboring states—and used a more sophisticated technique—multiple regression analysis.[15] He found a significant deterrent effect associated with the use of the death penalty in the United States over the period from 1935 to 1969, specifically that on average for the period studied each additional execution per year resulted in seven or eight fewer murders.[16] The Solicitor General of the United States, in his amicus brief in *Fowler*, called attention to the Ehrlich study as important empirical evidence that capital punishment serves the legitimate legislative purpose of deterring murder;[17] the petitioner, in his reply brief, sharply attacked

15. Multiple regression is a statistical technique for analyzing the relationship between a dependent variable, whose behavior is to be explained, and a set of independent or explanatory variables. The analysis uses a sample of data to estimate an equation in which the dependent variable is set equal to a weighted sum of the explanatory variables. The weights or "coefficients" associated with the explanatory variables are chosen to minimize the sum of the squared differences between the actual values of the dependent variable and the values computed using the regression equation (hence the term "least squares regression"). A graphical representation of a regression equation with only one explanatory variable would be a "least squares" line drawn through the scatter of points generated by plotting the dependent variable on the vertical axis and the explanatory variable on the horizontal axis. Econometrics is concerned with the use of regression analysis to measure and test economic relationships. See B. Wonnacott & T. Wonnacott, Econometrics 1-9 (1970); Finkelstein, *Regression Models in Administrative Proceedings*, 86 Harv. L. Rev. 1442, 1444-55 (1973) [hereinafter cited as *Regression Models*].

Regression analysis is being used with increasing frequency in legal commentary. *See, e.g.*, Brantman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 Yale L.J. 483 (1973); Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941 (1973); Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 Harv. L. Rev. 293 (1975); Posner, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Tobriner-Kennedy Debate*, 63 Cal. L. Rev. 1098 (1975); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 Harv. L. Rev. 387 (1975). However there has been little discussion in legal journals of the wide range of results which regression studies of a given relationship may produce and the statistical controversies which often arise between authors of these conflicting studies. *But see Regression Models*, *supra* at 1455-75; Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 30 Law & Contemp. Probs. 217, 228 (1975) (conflicting statistical evidence on effects of racial integration and compensatory education programs on test scores of minority students). The economic literature reveals the extent of the disagreements provoked by econometric studies even of relationships on which there is considerable theoretical agreement among economists. *See, e.g.*, D. Patinkin, Money, Interest, and Prices 651-61 (2d ed. 1965); Jorgenson, *Econometric Studies of Investment Behavior: A Survey*, 9 J. Econ. Lit. 1111 (1971); Liviatan, *Tests of the Permanent-Income Hypothesis Based on a Reinterview Savings Survey*, in Readings in Economic Statistics and Econometrics 251-83 (A. Zellner ed. 1968); Friedman, *Note on Nissan Liviatan's Paper*, in *id.* at 284-87; Liviatan, *A Reply*, in *id.* at 287-90.

16. Ehrlich 1975, *supra* note 14, at 398, 414.

17. Brief for the United States as Amicus Curiae at 35-38. In the summary of his argument, the Solicitor General described the Ehrlich study in these terms:

> After performing a sophisticated regression analysis that analyzed the effects of many

HANS ZEISEL

THE DETERRENT EFFECT OF THE DEATH PENALTY: FACTS v. FAITHS

I. The Problem

Once again in the 1975 Term, the Justices of the Supreme Court found themselves unable to express a unified position on the validity of the death penalty. The problem is a complex one because of murky precedents, disputed facts, and strong emotional commitments. It is proposed here to address just one of the issues raised in the cases, the question of the data supporting or controverting the deterrent effect of the death penalty.

In one of the opinions in *Gregg v. Georgia*[1]—there was no opinion for the Court—Mr. Justice Stewart, speaking for himself and Justices Powell and Stevens, stated: "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive."[2] The Justice went on to cite with approval the position of Professor Charles L. Black, that no conclusive evidence would ever be available on the question of deterrence:[3]

Hans Zeisel is Professor Emeritus of Law and Sociology, The University of Chicago; Senior Consultant, American Bar Foundation.

[1] 96 S. Ct. 2909 (1976).

[2] *Id.* at 2930.

[3] *Id.* at 2931, quoting BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 25–26 (1974).

Please insert the following in your copy of *The Supreme Court Review*, [illegible], edited by Philip B. Kurland (University of Chicago Press, 1977):

In Hans Zeisel's article, "The Deterrent Effect of the Death Penalty," figures 5 and 8 (pp. 330 and 337) were transposed. They are given correctly below:

HB-140

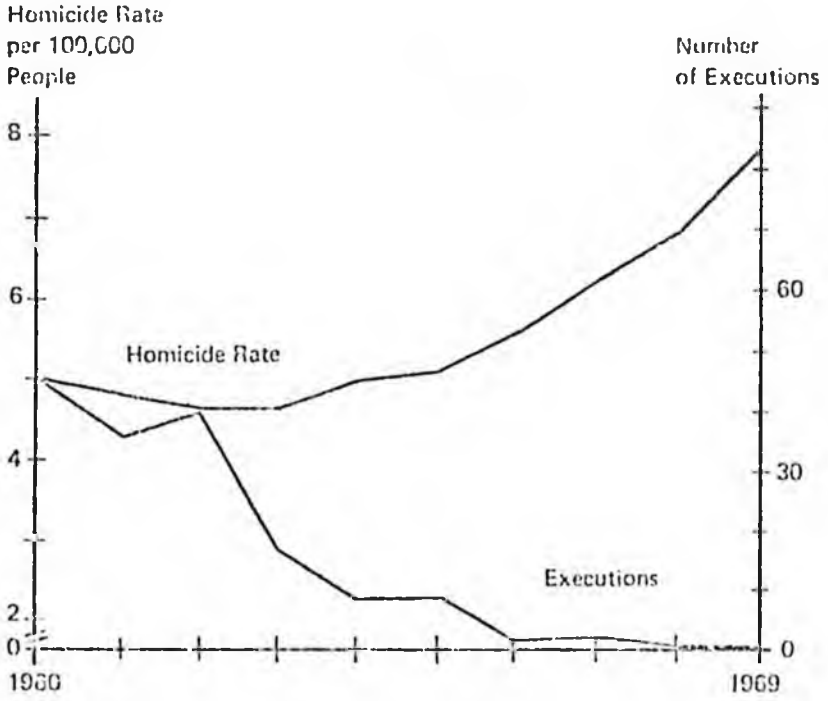
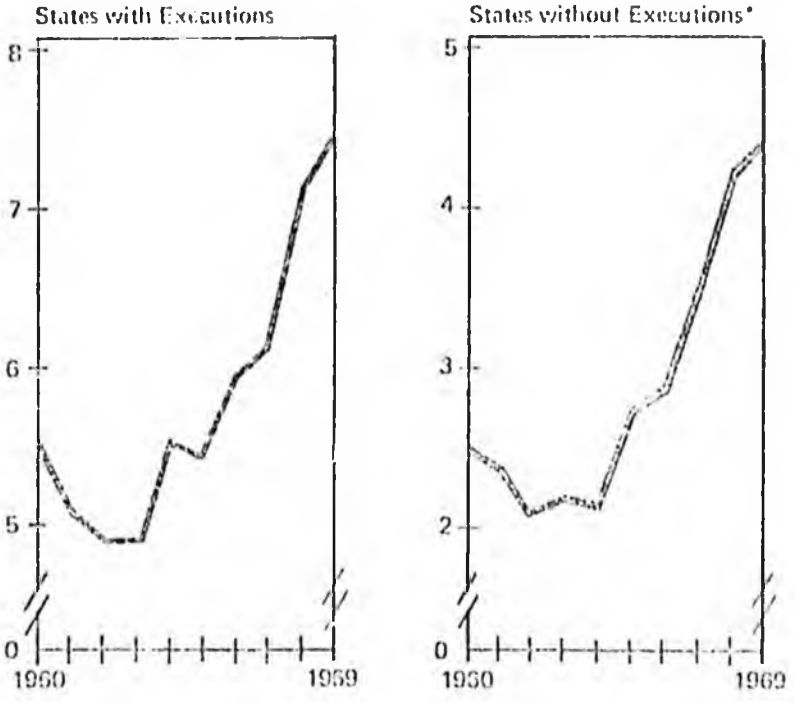


FIG. 5. United States homicide rate and number of executions, 1960–69.



* Abolition states and 6 states with no executions since 1948

FIG. 8. Homicide rates 1960–69 in states with and without executions.

> . . . after all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this "deterrent" effect may be. . . .
>
> . . . A "scientific"—that is to say, a soundly based—conclusion is simply impossible, and no methodological path out of this tangle suggests itself.

It is the purpose of this paper to show that both the Court's and Professor Black's views are wrong; that the evidence we have is quite sufficient if we ask the right question; and that the request for more proof is but the expression of an unwillingness to abandon an ancient prejudice.

II. The Structure of the Evidence

All studies that explore the possible deterrent effect of capital punishment are efforts to simulate the conditions of what is conceded to be an impossible controlled experiment. In such an experiment the population would be divided by some lottery process (randomly) into two groups. The members of one group, if convicted of a capital crime, would receive the death penalty; the members of the other group, if convicted of a capital crime, would receive a sentence of life in prison.

The random selection would assure all other conditions that could possibly affect the capital crime rate remain the same—within the calculable limits of the sampling error—in both groups, so that the "death penalty–life sentence" difference remains the only relevant difference between them.

Figure 1 shows the basic analytical structure of such an experiment. This hypothetical graph, denoting the constellation that would confirm the existence of a deterrent effect, begins with two populations of would-be murderers (X + Y + Z), equal in every respect except that the one lives under threat of the death penalty, the other does not. (X) is the number of would-be murderers in both groups deterred, even by the threat of prison; it can be read from the first bar and projected to the second. At the bottom end of each bar (Z) is the proportion of would-be murderers whom even the threat of the death penalty would not deter. It can be read from the second bar and projected to the first. The crucial test is whether a group (Y) can be found which would be deterred by the death penalty but

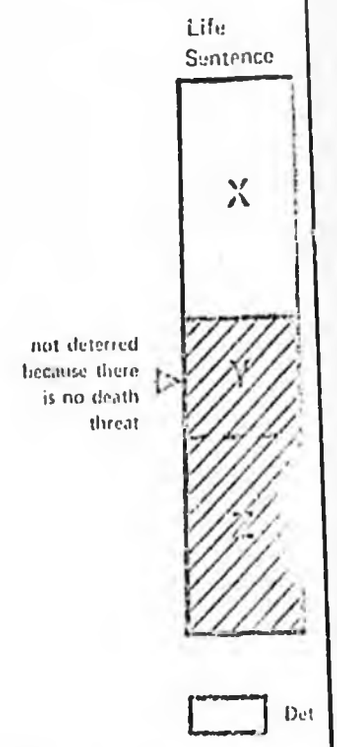


FIG. 1. Experimental paradigm
the life sentence.

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death penalty.

In principle, it should
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[1] The paradigm is limited to
Death Penalty: A Neglected Al
CAPITAL PUNISHMENT IN THE US

[2] The task of tracing the eff
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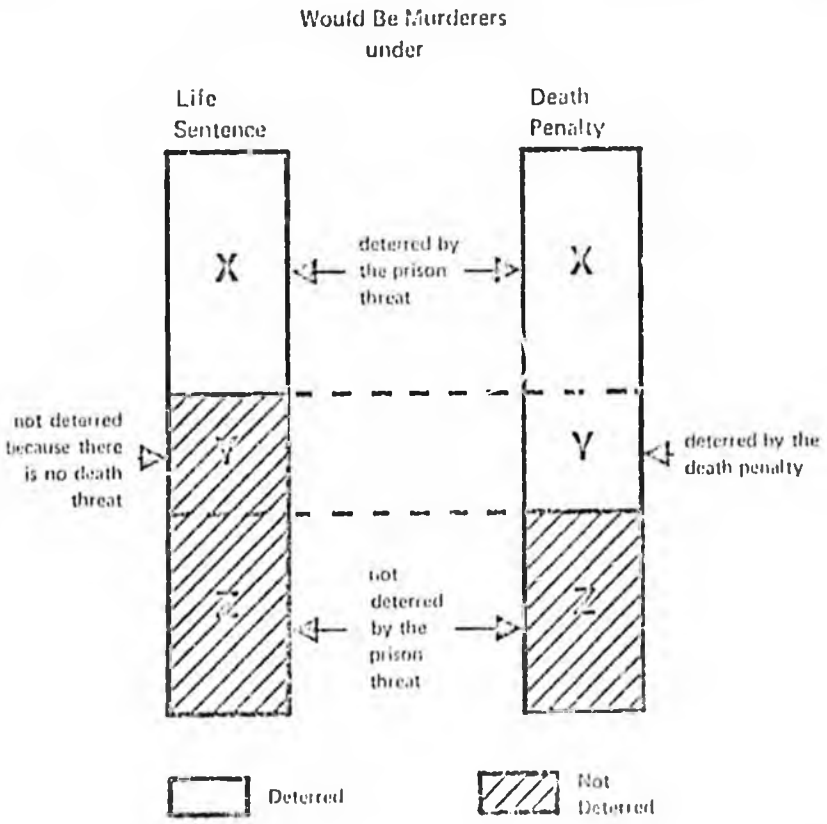

FIG. 1. Experimental paradigm showing a deterrent effect of the death penalty over the life sentence.

would not be deterred if there were only the life sentence. The statistical test that would establish the existence of group (Y) would reveal a significantly lower level of murders[1] under threat of the death penalty.

In principle, it should be possible to identify individual members in each of the three groups. As a practical matter one can identify only the murderers who have not been deterred.[2] Efforts have been

[1] The paradigm is limited to murder. See also, however, Bailey, *Rape and the Death Penalty: A Neglected Area of Deterrence Research*, in BOWERS & PIERCE eds. CAPITAL PUNISHMENT IN THE UNITED STATES 336 (1976).

[2] The task of tracing the effect of an experimental treatment through case histories of the persons who had been affected by it is less difficult if the treatment aims at a positive effect not a negative, deterrent one. See ZEISEL, SAY IT WITH FIGURES ch. II (1968 ed.).

made to identify members of the (Y) group. The Los Angeles Police Department, for instance, filed a report with the California legislature in 1960 to the effect that a number of apprehended robbers had told the police that while on their job they had used either toy guns or empty guns or simply simulated guns "rather than take a chance on killing someone and getting the gas chamber."[6] Quite apart from this being hearsay evidence reported by a very interested party, this is poor evidence, if any, on the issue. The unresolved and probably unresolvable difficulty is whether these robbers would not have minded "killing someone," if the risk had been no more than life in prison.

Figure 2 represents the paradigm diagram for proving the deterrent effect of increasing executions. Proof of deterrence would be established if groups (Y_1) and (Y_2) were found to exist.

III. The Impossible Controlled Experiment

Such diagrammed evidence would be cogent if derived from a controlled experiment. How morally and legally impossible such an experiment is can easily be seen if its details are sketched out. In one conceivable version a state would have to decree that citizens convicted of a capital crime and born on odd-numbered days of the month would be subject to the death penalty; citizens born on even-numbered days would face life in prison. A significantly lower number of capital crimes committed by persons born on uneven days would confirm the deterrent effect. The date of birth here is a device of randomly dividing the population into halves by a criterion that we will assume cannot be manipulated.[7]

The equally impossible experiment that would test the effect of differential frequencies of execution would require at least three randomly selected groups. In the first group everybody convicted of a capital crime would be executed. In the second, only every other such convict (again selected by lot) would be executed. In the third, nobody would be executed.

The data available to us for study of the deterrent effect of the death penalty are all naturally grown: none derive from a controlled

[6] Report of the California Senate on the Death Penalty 16-17 (1960).

[7] Worried, expectant mothers, of course, could demand Caesarian delivery on an even-numbered date. Such intervention, however, would affect the purity of the experiment only if these mothers were also farsighted, *i.e.*, if their artificial birth dates would comprise a higher rate of future murderers than the normal delivery

Fig. 2. Experimental paradigm executions.

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It is this impossibility o perfection of nonexperime discovering "the truth ab is unwarranted. Even in t

[*] Note 3 *supra*.

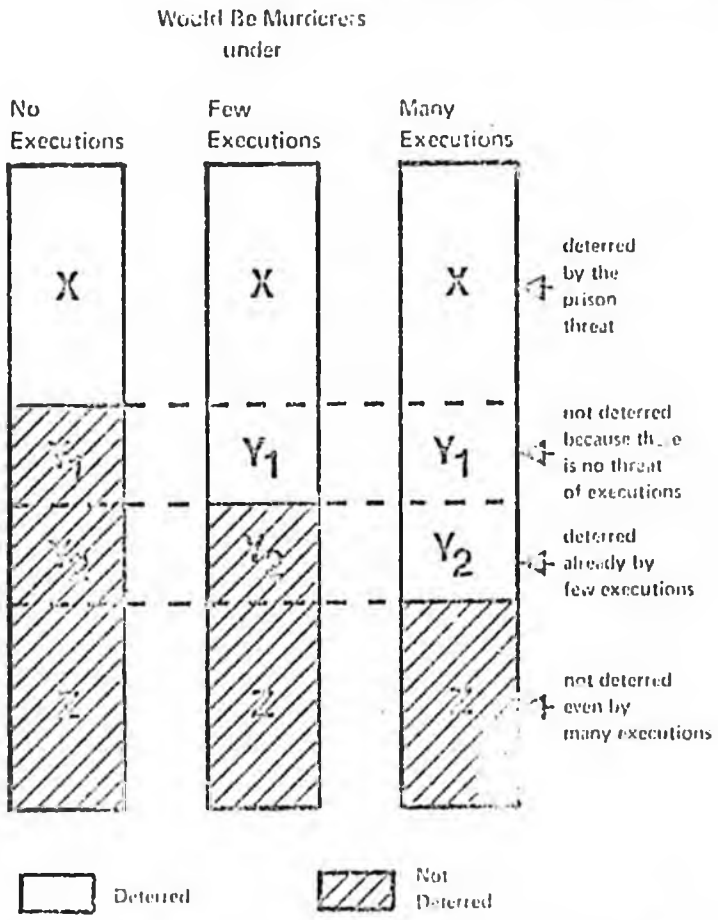

FIG. 2. Experimental paradigm showing a deterrent effect of increasing the rate of executions.

experiment. Yet they all are analyzed as if they had come from a controlled experiment. The structure of analysis is the same. What is missing is the prior randomization which insures comparability in all other respects. The analysis of naturally grown data must try to reproduce comparability by other means. Since none of these means is ever perfect, none of the studies based on naturally grown data ever completely simulates the impossible experiment.

It is this impossibility of the experiment and the unavoidable imperfection of nonexperimental data that account for despair of ever discovering "the truth about this 'deterrent' effect."[8] The despair is unwarranted. Even in the so-called natural sciences proofs that

[8] Note 3 *supra*.

are incomplete have nevertheless, for good reasons, been accepted by the scientific community.

Let us see then what proofs have been afforded by the many studies that have been done. They are stated here, not in their historical sequence, but in terms of the varying degree with which they approximate the ideal of the controlled experiment.

IV. Homicide Rates with and without the Death Penalty

The first approximation to the impossible experiment is the simple comparison of the capital crime rates in jurisdictions with and without capital punishment. The comparison could take two forms. Historically the first and most obvious comparison was made of the capital crime rate in one state before and after the abolition of the death penalty. If it showed no increase, it gave ground for the belief that the withdrawal of the death penalty had no ill effect.[9] The second form of simple comparison was between states that have the death penalty and states that do not have it.[10]

These early comparisons failed to show higher capital crime rates when there was no death penalty. But to take this as proof that the death penalty had no deterrent effect involved important assumptions. The before and after comparison implies that none of the other conditions that could have affected the capital crime rate had changed between the two periods. The state-by-state comparison implies that the states were identical with respect to the other conditions.

The first improvement on the simplistic structure of these comparisons was to put the before-and-after comparison side by side with developments in states which during that period had not changed their death penalty rule. Similarly, the comparison between

[9] The first comprehensive data on before-and-after comparison were presented by Thorsten Sellin to the Royal Commission on Capital Punishment. *The Determination of Value of Capital Punishment*, Report of the Royal Commission on Capital Punishment App. 6 (Cmd. 8932 1953). Sellin's memorandum is published in The Measures of the Expedient, 667. *Cf.* also Koestler, Reflections on Hanging, Ap. (1956); United Nations, Capital Punishment, Report (1960); Samuelson, *Was Capital Punishment Restored in Delaware?* 60 J. Crim. L.C. & P.S. 148 (1969).

[10] Sellin, *Homicides in Retentionist and Abolitionist States*, in Sellin, Capital Punishment 135 (1967); Reckless, *The Use of the Death Penalty—A Layman's Statement*, 15 Crime & Delinq. 43 (1969); Zimring & Hawkins, Deterrence (1973); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170, 171 (1975).

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Figure 3 allows several observ
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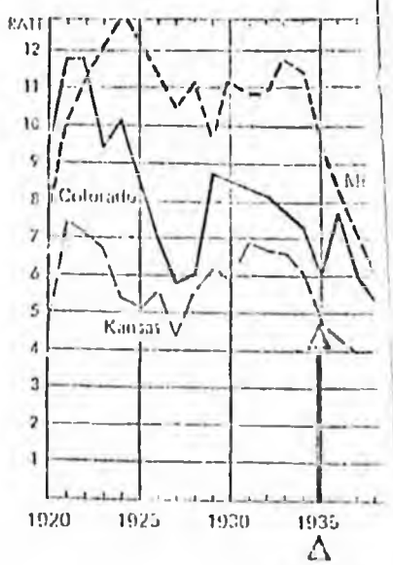

Fig. 3. Homicides per 100,000 population i

[11] Zimring & Hawkins, note 10 *supra*, at 2

[12] From Sellin, note 10 *supra*, at 137.

states was improved by limiting it to contiguous states, for which the assumption of comparability seems more justified.

Table 1 provides an example of contiguous states comparison.[11]

Only in one of the five groups is the homicide crime rate in the no-death-penalty state (Maine) higher than in the other two states. In all others it is either the same or lower. This is neither evidence of a deterrent effect of the death penalty nor clear evidence of its absence. Even contiguous states are nor strictly comparable. Over a span of sixteen years, the period covered by this table, the conditions favoring crime in those states may develop in different directions.

The state-by-state analysis becomes more convincing if averages for a long time period are replaced by the annual figures from which these averages were computed. In figure 3, the homicide rate in Kansas is compared with that of its neighbor states, Missouri and Colorado. Kansas was an abolitionist state until 1935.[12]

Figure 3 allows several observations. First, that annual rates exhibit considerable random fluctuations. It suggests that changes from one

FIG. 3. Homicides per 100,000 population in Missouri, Colorado, and Kansas, 1920–58.

[11] ZIMRING & HAWKINS, note 10 *supra*, at 265.

[12] From SELLIN, note 10 *supra*, at 137.

TABLE 1

HOMICIDE DEATH RATES IN CONTIGUOUS STATES WITH[16] AND WITHOUT CAPITAL PUNISHMENT, 1930-55

(Average annual rate per 100,600 population)

Midwest									
Group 1			Group 2			Group 3			
	D	D		D			D	D	
Michigan	Indiana	Ohio	Minnesota	Wisconsin	Iowa	N. Dakota	S. Dakota	Nebraska	
3.5	3.5	3.5	1.4	1.2	1.4	1.0	1.5	1.8	

New England								
Group 4				Group 5				
	D		D		D		D	
Maine	New Hampshire		Vermont	Rhode Island		Massachusetts	Connecticut	
1.5	0.9		1.0	1.3		1.2	1.7	

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DEMOGRAPHIC PROFILE OF

Status of death penalty	
Homicide rate	
Probability of apprehensi	
Probability of conviction	
Labor force participation	
Unemployment rate (%)	
Population aged 15–24 (%	
Real per capita income ($	
Nonwhite population (%	
Civilian population (000's	
Per capita government expenditures ($)*	
Per capita police expendit	

* State and local

[16] From Bailey & Cole, n

year to the next are unlikely to be significant. Figure 3 also shows that looking only at one state may lead to false conclusions. The Kansas homicide rate, except for the first two years, shows a sharp decline after 1935 and some early observers jumped to the conclusion that it was the restoration of the death penalty that did it. A glance at the homicide rates of Colorado and Missouri warns against this conclusion. The development of the Kansas rate does not noticeably differ from those of the two neighboring states, which had the death penalty throughout the entire span of years.

V. Improving Comparability

Comparing the development of the capital crime rate in contiguous states with and without the death penalty has been challenged on the ground that contiguity is not a sufficiently solid guaranty of likeness. Three responses to this challenge have been forthcoming. One was to show that the contiguous states were in fact alike with respect to a great variety of factors that could, if they had differed from state to state, independently affect the capital crime rate. Table 2 is an example of such efforts.[13]

TABLE 2

Demographic Profile of Contiguous States Compared in Group 1 of Table 1 (1960 data)

	Michigan	Indiana	Ohio
Status of death penalty	...	D	D
Homicide rate	4.3	4.3	3.2
Probability of apprehension	.75	.83	.85
Probability of conviction	.25	.55	.33
Labor force participation (%)	54.9	55.3	54.9
Unemployment rate (%)	6.9	4.2	5.5
Population aged 15–24 (%)	12.9	13.4	12.9
Real per capita income ($)	1,292	1,176	1,278
Nonwhite population (%)	10.4	6.2	9.8
Civilian population (000's)	7,811	4,653	9,690
Per capita government expenditures ($)*	363	289	338
Per capita police expenditures ($)*	11.3	7.6	9.0

* State and local.

[13] From Babbus & Cole, note 10 *supra*, at 178.

Michigan, the state without a death penalty, had no higher homicide rate than neighboring Indiana, even though it had a lower probability of apprehension and conviction, a higher unemployment rate, a larger proportion of blacks in the population, greater population density—all factors which should tend to increase the capital crime rate. On the other hand, it had a higher per capita police expenditure. Ohio had a lower homicide rate and a higher apprehension rate. On most of the remaining characteristics Ohio was in an intermediary position.

The second analytical device for improving comparability was to replace the comparison of entire states by comparing more homogeneous subsections of these states, such as communities of comparable size or counties of comparable income levels.[14] The third, most sophisticated response to the problem of comparability was to apply to it a tool called regression analysis. This is an instrument designed mainly to resolve problems such as this which call for separating the effect of one particular variable from the possible effect of a multitude of others.

Before discussing regression analysis in more detail, I turn to two additional efforts to sharpen the analytic approach aimed at detecting the existence of a deterrent effect for the death penalty.

VI. Sharpening the Measure of Capital Crime

If the death penalty deters murder, the rate of wilful homicides should show the effect. There are, however, grades of wilfulness and some type of homicide will have a higher likelihood of resulting in the death penalty. These types of homicide should provide a more sensitive index for detecting deterrent effect, if one exists, than the overall homicide rate.[15]

The difficulty of developing such an index, of course, is the lack of adequate data. With one exception, namely, the killing of a police officer, records are not generally separated according to the type of homicide committed. An effort has been made to obtain counts of

[14] Cf. e.g., Sutherland, *Murder and the Death Penalty*, 15 J. Crim. L.C. & P.S. 520 (1925); Campion, *Does the Death Penalty Protect the State Police?* in Bedau, ed., The Death Penalty in America 361 (1967); Vold, *Can the Death Penalty Protect Police?* 12 Prison J. 4 (1932).

[15] Zimring & Hawkins, *Deterrence and Marginal Groups*, J. Res. in Crime & Delinq. 100 (July 1968).

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	Rate of Murd (Per 10 yea
No Capital Punishment	
Maine	
Rhode Island	
Michigan*	
Minnesota	
Wisconsin	
N. Dakota	
Detroit, Mich.	

* Without Detroit.
† 1928–41.

VII. The Effect of Execu

A sentence is likely to
it engenders in the would-be

[16] Bailey, *Murder and Capital Pu*
note 4 *supra*, at 314.

[17] Sellin, *The Death Penalty and P*
144, 145.

first degree murders from the country's prisons.[16] But these numbers are affected by regionally differing apprehension and conviction rates, and indirectly also by differential standards of plea bargaining and jury nullification. Suffice it to note that this effort too failed to detect a deterrent effect of the death penalty.

Killing a policeman is a genuine "high death penalty risk" category and it is well recorded and counted. Again it was Thorsten Sellin who investigated them; table 3 summarizes his findings.[17] Even this measure, rightly thought to be more sensitive than the general homicide rate, failed to reveal any difference between the threat of the death penalty and that of life imprisonment.

TABLE 3
RATE OF MUNICIPAL POLICE KILLINGS, 1920–54
(Per 10 years and 100,000 population)

No Capital Punishment		Capital Punishment	
Maine	.00	Vermont	.00
Rhode Island	.17	New Hampshire	.14
		Massachusetts	.22
		Connecticut	.14
Michigan*	.36	Ohio	.61
		Indiana	.64
		Illinois	.31
Minnesota	.42	Iowa	.56
Wisconsin	.53		
N. Dakota	.53	S. Dakota	.00
		Montana	1.58
		New York	.25
Detroit, Mich.	.85	Chicago, Ill.†	1.54

* Without Detroit.
† 1928–44.

VII. The Effect of Executions

A sentence is likely to deter by the differential degree of fear it engenders in the would-be perpetrator. It has been argued, there-

[16] Bailey, *Murder and Capital Punishment: Some Further Evidence*, in BEDAU, note 4 *supra*, at 314.

[17] Sellin, *The Death Penalty and Police Safety*, in SELLIN, note 10 *supra*, at 138, 141, 145.

fore, that the dichotomy of jurisdictions with and without capital punishment is but a crude approximation to the reality of the threat. What matters was not the death penalty on the books but the reality of executions.

One response to this consideration was to transform the death penalty–life sentence dichotomy into the gradations provided by the number of executions carried out during any one year. I will return to this approach later. The other response was to try to find out whether publicized executions had a short-range depressing effect on the homicide rate.

Leonard Savitz recorded the homicide rates during the eight weeks before and after well-publicized executions in Philadelphia.[18] He found no depressing effect of these executions, although he used one of the potentially more sensitive measures of deterrence, the frequency of felony murders rather than the overall homicide rate.[19]

A similar effort with California data showed an effect, albeit an ambiguous one. William Graves compared homicide rates during execution weeks with non-execution weeks.[20] He had the weeks begin on Tuesday in order to keep Fridays, the execution day in California, at the midpoint. The comparison (fig. 4a) suggested a depressing effect during the days preceding the execution and an increase in homicides on the days following it. Graves was puzzled; others considered the data as proof of a counter-deterrent effect. Conceivably the data could be rearranged, as in figure 4b, with the week beginning on Friday, the execution day. The results would then suggest a reduction of homicides during the first three days following executions compensated by an increase during the rest of the week. In any event, Graves's data show, at best, a delaying rather than a deterrent effect, and the failure of the more sensitive Philadelphia data to show any effect casts doubt on the strength of the California result.

[18] Savitz, *A Study in Capital Punishment*, 49 J. Crim. L.C. & P.S. 338 (1958).

[19] A count of felony murders (for the non-lawyer: a homicide committed in the course of another felony such as robbery) can be made only with great difficulty and only in places, such as Philadelphia, where detailed police records are kept.

[20] Graves, *The Deterrent Effect of Capital Punishment in California*, in Bedau, The Death Penalty in America 322 (1967). (The rearrangement in figure 4b is not precise because the curves for Tuesdays through Thursdays will change under the redefinition.)

FIG. 4.—Homicides during week

VII. The Contributio

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[21] Ehrlich, *The Deterrent Eff*
Death, Working Paper No. 18,
paper was subsequently publish
Am. Econ. Rev. 397 (1975).

[22] 96 S. Ct. 3212 (1976).

[23] Ehrlich, note 20, *supra*, 65 A

FIG. 4. Homicides during weeks with and without executions.

VII. THE CONTRIBUTION OF ISAAC EHRLICH

Isaac Ehrlich was the first to introduce regression analysis to efforts designed to determine whether the death penalty had a deterrent effect beyond the threat of life imprisonment.[21] This was a new, powerful way of coping with the task of isolating the death penalty effect, if it should exist, uncontaminated by other influences on the capital crime rate. Ehrlich's paper was catapulted into the center of legal attention even before it was published, when the Solicitor General of the United States cited it with lavish praise in his Amicus Curiae Brief in *Fowler v. North Carolina*,[22] and delivered copies of the study to the Court. The Solicitor General called it "important empirical support for the a priori logical belief that use of the death penalty decreases the number of murders."[23]

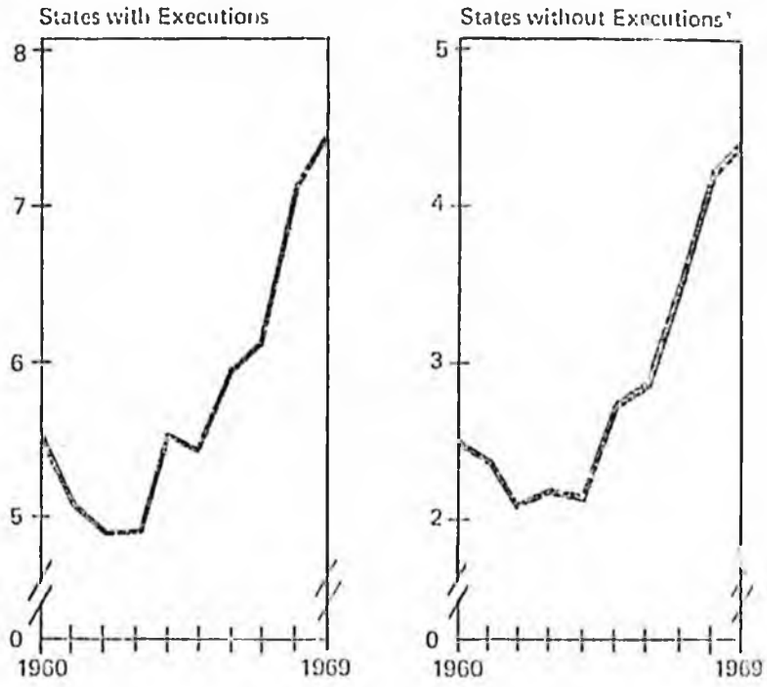
In view of the evidence available up to that time, Ehrlich's claim was indeed formidable, both in substance and precision: "[A]n additional execution per year . . . may have resulted in . . . 7 or 8 fewer murders."[24] The basic data from which he derived this conclusion were the executions and the homicide rates as recorded in the

[21] Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, Working Paper No. 18, National Bureau of Economic Research (1973). The paper was subsequently published under the same title in an abbreviated form in 65 AM. ECON. REV. 397 (1975).

[22] 96 S. Ct. 3212 (1976).

[23] Reply Brief, p. 36.

[24] Ehrlich, note 20, *supra*, 65 AM. ECON. REV. at 414.



* Abolition states and 6 states with no executions since 1938

FIG. 5. United States homicide and execution rates, 1960–69.

United States during the years 1933 to 1969, the former generally decreasing, the latter, especially during the sixties, sharply increasing.[25] Figure 5 presents the crucial divergence between 1960 and 1969. Ehrlich considered simultaneously other variables that could affect the capital crime rate through calculations I shall discuss presently.[26]

IX. Regression Analysis

Regression analysis proceeds essentially in the following manner. Suppose one knew for certain that, aside from the possible

[25] Data on murders from *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, Sources and Data, May 1975, Memorandum by I. Ehrlich. Data on executions from: National Prisoner Statistics, U.S. Bureau of Prisons.

[26] Ehrlich's analysis included the following variables: the arrest rate in murder cases; the conviction rate of arrested murder suspects; the rate of labor force participation; the unemployment rate; the fraction of the population in the age group 14 to 24; and per capita income.

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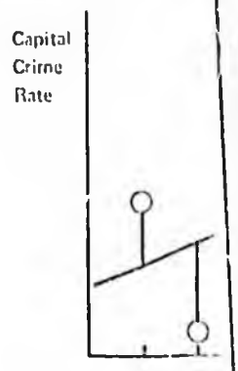

FIG. 6. Hypothetical relationship b
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deterrent effect of executing murderers, there was but one other factor that influenced the capital crime rate: the proportion of men between the ages of 17 and 24 in the total population. The analysis would then begin by relating the capital crime rate in the various states to the proportion of young men in those states, as in figure 6.

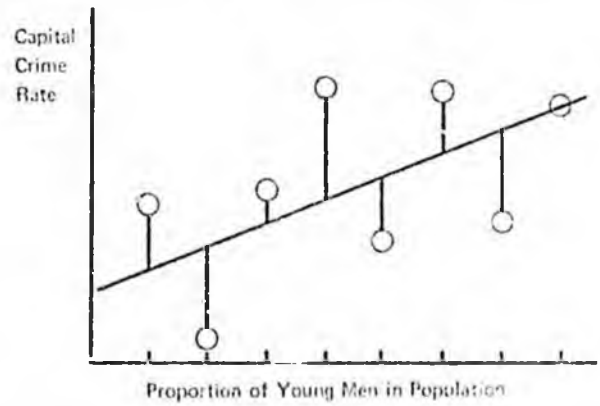

FIG. 6. Hypothetical relationship between the capital crime rate and the proportion of young men in the population.

The points in this graph may represent either different jurisdictions at one point of time, or different points of time in the same jurisdiction, or both. The straight line (the regression line) represents the best estimate of the relationship between the proportion of young men in the population and the capital crime rate. The vertical distance of each point from the regression line represents the residual part of the variations in the capital crime rate, the part that remains unexplained after the effect of the "proportion of young men" has been eliminated. One then proceeds to test whether these residuals are related to the frequency of executions, by plotting them against the number of executions in the respective states as in figure 7. If no relationship exists, a horizontal regression line will indicate that executions have no deterrent effect (a): No matter how executions vary, the capital crime rate remains the same. If a relationship exists (b), the downward slope of the regression line would indicate that as the frequency of executions increases, capital crime decreases. That graph, one will note in passing, is in appearance indistinguishable from the finding of a controlled experiment, if one could be made.

The complete apparatus of regression analysis is more compli-

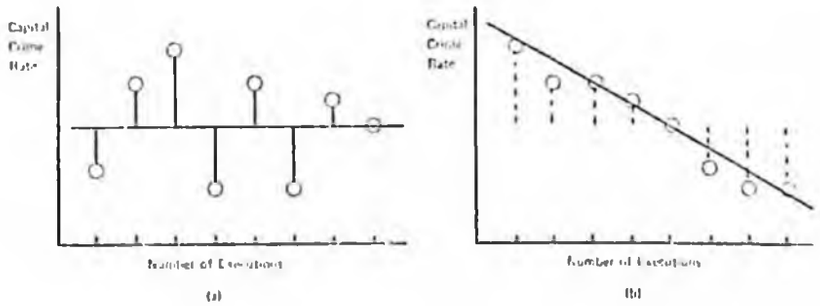

FIG. 7. Two hypothetical relationships between the frequency of executions and the residual capital crime rate.

cated, primarily by encompassing several control variables, not just one, as in our example. Many more problems must be resolved along the way. One requirement is to include all variables that affect the outcome. If one is omitted its effect could be erroneously attributed to one of the included variables. This danger of spurious correlation is particularly great if the analysis is concerned with so-called time series data, such as corresponding constellations of executions and capital crime over a series of consecutive years.

Another requirement is that the analysis account for feedback effects. Estimates of deterrent effects of punishment, for example, may be distorted if they fail to separate the simple statistical association between crime and punishment into its potential two components: the effect of punishment on crime, and the possible reverse effect of crime on punishment. For example, an increase in crime may overload the law enforcement system and thereby increase the defendant's chances of a lower sentence in the plea bargaining process.

All these and other technical refinements of the regression analysis have but one goal: to isolate, through a process of mathematical purification, the effect of any one variable upon the other, under conditions that exclude the interference from other variables. Regression analysis, thus, is but another effort to simulate with the help of nonexperimental data the experimental conditions outlined in figure 2 of this paper.[25] These examples suggest the sophistication

[25] A more elaborate effort by me to explain regression analysis to the non statistician is in preparation and will be published in the *American Bar Foundation Research Journal*.

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X. Ehrlich's Deterrence

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First, Peter Passell and
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found also that no such effect
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61 were considered."[29]

An effort to duplicate Ehrlic
also failed.[31] Kenneth Avio
analyzing the thirty-five-year
would appear to indicate that
1926–60 did not behave in a
deterrent effect of capital puni

During 1975, the *Yale L.*
articles reviewing the evidence
punishment. Included in this se
Ehrlich's result by William Bow
ing Ehrlich's work, they confir

[28] Passell & Taylor, *The Deterrent I*
March 1975 (unpublished Columbia
printed in Reply Brief for Petit

[29] *Id.* at 6–8.

[30] Kenneth L. Avio, *Capital Punis*
Deterrent Hypothesis (mimeo. 1975).

[31] *Id.* at 22.

[32] Bowers & Pierce, *The Illusion*
Capital Punishment, 85 Yale L.J. 187

of this analytic instrument, but its sophistication is matched by a corresponding measure of delicacy. Applied to nonexperimental data, regression analysis is not a naturally robust instrument. Its results can be drastically affected by minor changes in the analytic pattern, for which the investigator has, as a rule, many options.

X. Ehrlich's Deterrence Claim Evaporates

Ehrlich's study, because it ran counter to all the hitherto available evidence except that of Graves, and because it was introduced into a litigation of historic import, received extraordinary attention from the scholarly community.

First, Peter Passell and John Taylor attempted to replicate Ehrlich's finding and found it to hold up only under an unusually restrictive set of circumstances.[28] They found, for example, that the appearance of deterrence is produced only when the regression equation is in logarithmic form; in the more conventional linear regression framework, the deterrent effect disappeared.[29] They found also that no such effect emerged when data for the years after 1962 were omitted from the analysis and only the years 1933–61 were considered.[30]

An effort to duplicate Ehrlich's findings from Canadian experience also failed.[31] Kenneth Avio of the University of Victoria, after analyzing the thirty-five-year span, concluded that "the evidence would appear to indicate that Canadian offenders over the period 1926–60 did not behave in a manner consistent with an effective deterrent effect of capital punishment."[32]

During 1975, the *Yale Law Journal* published a series of articles reviewing the evidence on the deterrent effect of capital punishment. Included in this series was a second attempt to replicate Ehrlich's result by William Bowers and Glenn Pierce.[33] In replicating Ehrlich's work, they confirmed the Passell-Taylor finding that

[28] Passell & Taylor, *The Deterrent Effect of Capital Punishment: Another View*, March 1975 (unpublished Columbia University Discussion Paper 74-7509), reprinted in Reply Brief for Petitioner, *Fowler v. North Carolina*, App. C, at 4a–6a.

[29] *Id.* at 6–8.

[30] *Id.* at 5, 6.

[31] Kenneth L. Avio, *Capital Punishment in Canada: A Time-Series Analysis of the Deterrent Hypothesis* (mimeo, 1976).

[32] *Id.* at 22.

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

Ehrlich's results were extremely sensitive to whether the logarithmic specification was used and whether the data for the latter part of the 1960s were included.[31] Bowers and Pierce also raised questions about Ehrlich's use of the FBI homicide data in preference to vital-statistics data.[35]

Ehrlich defended his work in this series in the *Yale Law Journal* by addressing some of the criticisms raised against his study.[36] He refuted some, but not the crucial ones. In his article he referred to a second study he made of the problem, basing it this time on a comparison by states for the years 1940 and 1950. Ehrlich claimed that the new test bolstered the original claim. But he described these findings as "tentative and inconclusive."[37] In the meantime, Passell made a state-by-state comparison for 1950 and 1960 but did not find what Ehrlich allegedly had found. Passell concluded: "We know of no reasonable way of interpreting the cross-section [*i.e.*, state-by-state] data that would lend support to the deterrence hypothesis."[38]

A particularly extensive review of Ehrlich's time series analysis was made by a team led by Lawrence Klein, president of the American Economic Association.[39] The authors found serious methodological problems with Ehrlich's analysis. They raised questions about his failure to consider the feedback effect of crime on the economic variables in his model,[40] although he did consider other feedback effects in his analysis. They found some of Ehrlich's technical manipulations to be superfluous and tending to obscure the accuracy of his estimates.[41] They, too, raised questions about variables omitted from the analysis, and the effects of these omissions on the findings.[42]

Like Passell-Taylor and Bowers-Pierce, Klein and his collaborators replicated Ehrlich's results, using Ehrlich's own data, which by

[31] *Id.* at 197–205.

[35] *Id.* at 187–89.

[36] Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975).

[37] *Id.* at 209.

[38] Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 30 STAN. L. REV. 61, 80 (1975).

[39] Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*. Paper commissioned by the Panel on Research on Deterrence, National Academy of Sciences (June 1976).

[40] *Id.* at 18, 19–24.

[42] *Id.* at 14–17.

[41] *Id.* at 14.

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[43] *Id.* at 24, 25.

[45] *Id.* at 28–30.

[47] *Id.* at 17–19.

that time he had made available.[43] As in previous replications, Ehrlich's results were found to be quite sensitive to the mathematical specification of the model and the inclusion of data at the recent end of the time series.

By this time, Ehrlich's model had been demonstrated to be peculiar enough. Klein went on to reveal further difficulties. One was that Ehrlich's deterrence finding disappeared after the introduction of a variable reflecting the factors that caused other crimes to increase during the latter part of the period of analysis.[44] The inclusion of such a variable would seem obligatory not only to substitute for the factors that had obviously been omitted but also to account for interactions between the crime rate and the demographic characteristics of the population.

Klein also found Ehrlich's results to be affected by an unusual construction of the execution rate variable, the central determinant of the analysis. Ehrlich constructed this variable by using three other variables that appear elsewhere in his regression model: the estimated homicide arrest rate, the estimated homicide conviction rate, and the estimated number of homicides. Klein showed that with this construction of the execution rate a very small error in the estimates of any of these three variables produced unusually strong spurious appearances of a deterrent effect.[45] He went on to show that the combined effect of such slight errors in all three variables was likely to be considerable, and that in view of all these considerations, Ehrlich's estimates of the deterrent effect were so weak that they "could be regarded as evidence . . . [of] a counterdeterrent effect of capital punishment."[46] In view of these serious problems with Ehrlich's analysis, Klein concluded: "[W]e see too many plausible explanations for his finding a deterrent effect other than the theory that capital punishment deters murder." And further: "Ehrlich's results cannot be used at this time to pass judgment on the use of the death penalty."[47]

The final blow came from a study by Brian Forst, one of Klein's collaborators on the earlier study. Since it had been firmly established that the Ehrlich phenomenon, if it existed, emerged from developments during the sixties, Forst concentrated on that

[43] *Id.* at 24, 25.
[44] *Id.* at 28–30.
[45] *Id.* at 17–19.
[46] *Id.* at 18.
[47] *Id.* at 33.

decade.[18] He found a rigorous way of investigating whether the ending of executions and the sharp increase in homicides during this period was causal or coincidental. The power of Forst's study derives from his having analyzed changes *both* over time and across jurisdictions. The aggregate United States time series data Ehrlich used were unable to capture important regional differences. Moreover, they did not vary as much as cross-state observations; hence they did not provide as rich an opportunity to infer the effect of changes in executions on homicides.

Forst's analysis is superior to Ehrlich's in four major respects: (1) It focuses exclusively on a period of substantial variation in the factors of central interest. (2) Its results are shown to be insensitive to alternative assumptions about the mathematical form of the relationship between homicides and executions. The results were also invariant to several alternative methods of constructing the execution rate, to alternative assumptions about the nature of the relationships between homicides, and other offenses, executions, and convictions and sentences, and to alternative technical assumptions. (3) By not requiring conversion of the data to logarithms, Forst's model does not require that false values be used when the true values of the execution are zero. (4) It incorporates more control variables.

Forst's study led to a conclusion that went beyond that of Klein: "The findings give no support to the hypothesis that capital punishment deters homicide."[19] "Our finding that capital punishment . . . does not deter homicide is remarkably robust with respect to a wide range of alternative constructions."[20]

XI. The Overlooked Natural Experiment

Forst saw that Ehrlich, by using aggregate data for the United States as a whole, was forced to disregard the differences between states that had capital punishment and executions, and states that had either abolished the death penalty or at least had ceased to carry it out. Ehrlich's model thus could not evaluate the natural experiment which legislative history had built into the data. If Ehrlich's thesis—that it was the reduction of executions during the

[18] Forst, *The Deterrent Effect of Capital Punishment: A Cross State Analysis of the 1960s* (September 1976, mimeograph).

[19] *Id.* at 27. [20] *Id.* at 29.

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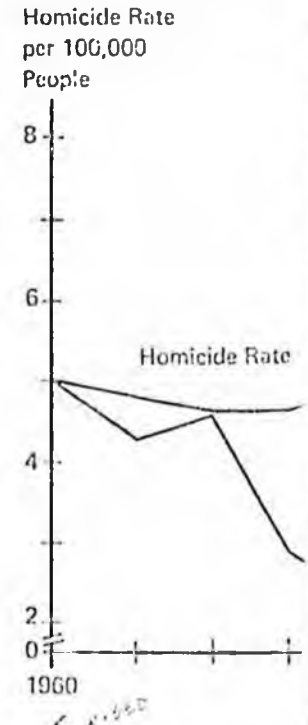

Fig. 8. United States homicide

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sixties that made the capital crime rate grow—were correct, then no such growth should obtain in the states in which there could be no reduction in executions because there had been none to begin with. Yet as figure 8 shows, the growth of the capital crime rate during the crucial sixties was as large in the states without executions as in states with executions.

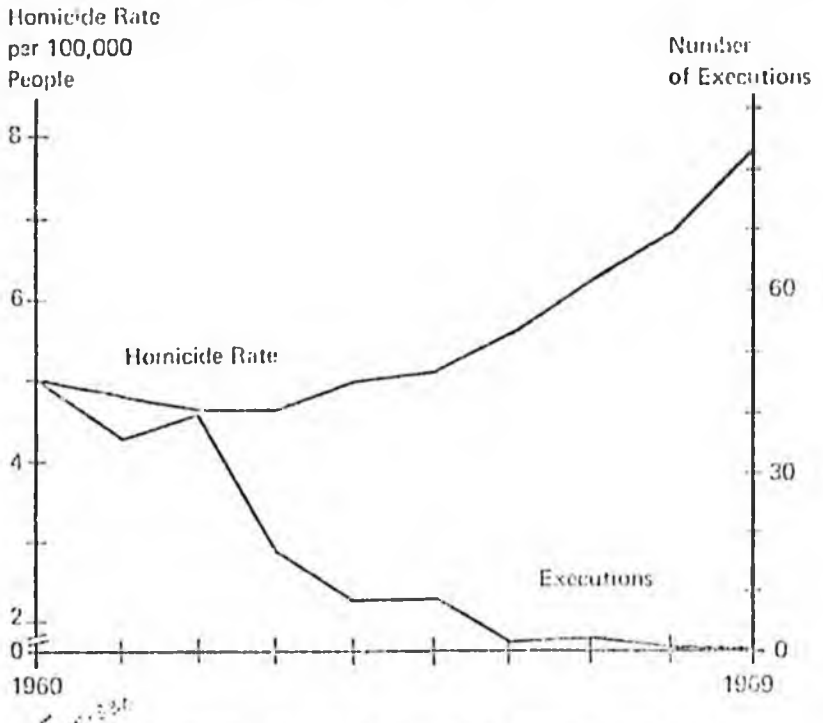

FIG. 8.—United States homicide rate and number of executions, 1960–69.

XII. Evidence versus Ancient Sentiment

The evidence on whether the threat of the death penalty has a deterrent effect beyond the threat of the life sentence, its normal substitute, is overwhelmingly on one side. None of the efforts to sharpen the measurement yardstick by replacing the overall homicide rate through more sensitive measures succeeded in discovering a deterrent effect. Nor did any effort to sharpen the analytical instruments of analysis help. Even regression analysis, the most sophisticated of these instruments, after careful application by the scholarly community failed to detect a deterrent effect.

This then is the proper summary of the evidence on the deterrent effect of the death penalty: If there is one, it can only be minute, since not one of the many research approaches—from the simplest to the most sophisticated—was able to find it.[51] The proper question, therefore, is whether an effect that is at best so small that nobody has been able to detect it, justifies the awesome moral costs of the death penalty.

I can only speculate why the question concerning the deterrent effect of the death penalty has always been posed in its unanswerable form: whether or not it has such an effect. I suspect that at the root of the resistance to the evidence is the very ancient and deeply held belief that the death penalty is the ultimate deterrent.

The Solicitor General has called it a "logical a priori" belief. The logic probably runs as follows: If punishment has any deterrent effect (and surely it often has) then the most severe punishment should deter more than all others. Confronted with the failure to detect such an effect, those who share the belief have narrowed the claim. Only certain types of capital crime, they say, not all, are likely to be deterred. The Court in *Gregg v. Georgia* gave two examples, the hired killer and the "free murder" by a life prisoner:[52]

> We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

If these are the best examples, the others must be poor indeed. The murderer for hire, knowing himself fairly safe from detection, is not likely to be concerned over the difference between death and prison

[50] The one exception pointing in the other direction, the dubious California finding that executions appear to postpone some homicides for a few days, is of small import. An effort to duplicate the finding in Philadelphia failed. See text *supra* at notes 18 and 20.

[52] 96 S. Ct. at 2951. Further examples are afforded in a footnote: "Other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, the extortion murder of hostages or kidnap victims, and the execution-style killing of witnesses to a crime." *Id.* at n.33.

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[55] 96 S. Ct. at 2930, quoting

for life. The "cold calculus" that moves the hired killer must surely tell him how small the probability is that he will be caught.[58] A good part of his careful contemplation goes to avoiding traces.

The life prisoner who kills is even a more interesting example. At first glance, the argument seems so irrefutable, that this type of homicide is occasionally the last capital crime on the statute books before the death penalty is abolished. It is a prize example because on "logical a priori" grounds his is by definition the "free murder" under the law. Again it is useful to look at the facts which Sellin was the first to illuminate. He found that, in 1965, the year for which he collected the data, sixteen prison homicides had been committed by men convicted of murder. Since not all murderers in prison are there with a life sentence, the true number of these "free murders" is likely to be even smaller.[59] In fact, of course, the "free murder" is probably altogether a figment because most life prisoners have some hope of being released before the end of their natural life, a hope that would be destroyed by a second murder. A prison, moreover, has ways of its own of punishing such a double murderer.

It is only fair, however, to take these examples of the Court for what they are, efforts to bolster with reasons the unwillingness to abandon the ancient sentiment. In that sentiment, the belief in deterrence plays but a small part. It is the belief in retributive justice that makes the death penalty attractive, especially when clothed in a functional rationalization. The belief has ancient roots, even if the rationale is modern. The Court in *Gregg* approvingly cites *Furman v. Georgia*:[60]

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose. . . . When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy.

[58] An interview comes to mind with a former warden of the Cook County Jail who did not believe in the death penalty. The interviewer asked him, "You mean, you would even hesitate to execute a hired killer?" The warden's answer, as I remember it was: "I shall cross that bridge when I come to it. In my many years here in the Cook County Jail, I have yet to meet the first hired killer. They are never caught, although Chicago would be a good place to catch them."

[59] Sellin, *Prison Homicides*, in SELLIN, note 10 *supra*, at 154, 156; see also Butler, *Prison Killings and Death Penalty Legislation*, 53 Prison J. 11 (1974).

[60] 96 S. Ct. at 2930, quoting 408 U.S. 238, 308 (1972).

The depth of this feeling was revealed in a strange interchange during oral argument between Mr. Justice Powell and Professor Anthony Amsterdam, counsel for the petitioners:[56]

> *Mr. Justice Powell:*
>
> Let me put a case to you. You've heard about Buchenwald, one of the camps in Germany in which thousands of Jewish citizens were exterminated. . . . If we had had jurisdiction over the commandant of Buchenwald, would you have thought capital punishment was an appropriate response to what that man or woman was responsible for?
>
> *Mr. Amsterdam:*
>
> . . . We all have an instinctive reaction that says, "Kill him." . . . But I think the answer to the question that your Honor is raising, . . . [to] be consistent with the 8th Amendment to the Constitution . . . my answer would be, "No."

Mr. Justice Powell asked the same question again, this time about a man who might destroy New York City with a hydrogen bomb. Amsterdam's answer, of course, was again no.

Significantly, both examples went to the issue of retribution, not deterrence. It is hard to think of any crime that would be less deterred by the difference between the death penalty and life imprisonment, for instance, in Spandau prison. The sentiment in favor of the death penalty does not stem from the belief in its deterrence and perhaps we overestimate altogether the importance of that issue.

Nowhere was the worldwide decline of the death penalty significantly connected with arguments about its effectiveness or the lack thereof. In some countries abolition became simply the logical end-point of a gradual decline in executions, probably accompanied by a parallel change in moral sentiments.

In other countries, abolition was clearly an expression of moral sentiment. The first de jure abolition of executions in czarist Russia goes back to A.D. 1020. Capital punishment reappeared in the fourteenth century but was again abolished when Elizabeth ascended the throne in 1742. On both occasions, the issue was one of morality not expediency.[57] In Germany, the 1946 Constitution abolished the death

[56] The colloquy occurred during argument in *Woodson & Wanton v. North Carolina*; transcribed record No. 75-5491, at 20.

[57] "Do not kill anyone, either guilty or not . . . . Do not destroy a Christian soul, even in case death is well deserved." Testament of the Grand Prince of Kiev,

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penalty as a deliberate act of repudiation of the Hitler era, when the death penalty, legally or illegally imposed, claimed millions of lives. In Great Britain, after a century of controversy, the abolitionists won when a man, protected by all the vaunted safeguards of British justice, was executed for a crime that he had not committed.

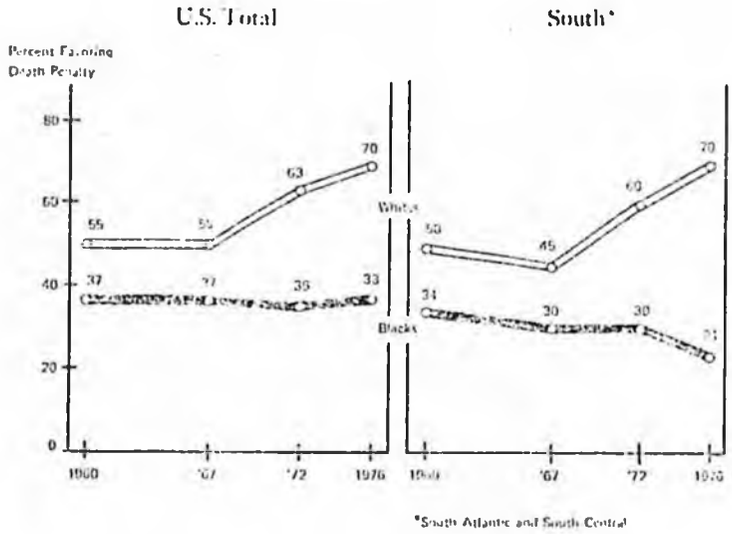
Ceylon abolished the death penalty when it acquired its independence, as an act of Buddhist faith. In Austria, the movement toward abolition reflected primarily moral sentiments. The parliament of the first Austrian republic unanimously abolished capital punishment as a renunciation of the monarchical past. In 1933, a semi-fascist chancellor restored the death penalty primarily as a political threat to the underground opposition. The second republic again abolished the death penalty, first in ordinary criminal cases and then also for cases triable under martial law, last used against the socialist political opposition in the civil war of 1934.

Abolition of the death penalty thus has reflected in the main a change in cultural sentiments, if not of the people, so at least of its legislators or its government. In the United States also capital punishment will end only when our cultural sentiments change. The people, a majority of whom now favor the death penalty, will be the last to change. The legislators will probably change before them; and our Supreme Court Justices conceivably may change even earlier.

Sentiment for the death penalty in the United States has grown during the last decade, stimulated by the unprecedented rise in violent crime during the second half of the sixties. In such times the demand for the death penalty grows because it is so easy to believe it will make law enforcement more effective. It is interesting to analyze the growth of this popular sentiment. In figure 9, four Gallup polls on the death penalty spanning sixteen years are analyzed. Sentiment for the death penalty did not rise until 1967, and then only among the white population. Black sentiment for the death penalty, always far below the corresponding figures for whites, remained unchanged. In the South, sentiment for the death penalty among whites and blacks has traditionally been below the average for the country. For the blacks, this is still true; their propor-

1135 AD. Elizabeth purportedly promised God that if she were selected she would take no life. Adams, *Capital Punishment in Imperial and Soviet Criminal Law*, 18 VAND. J. COMP. L. 575, 576 (1970).

tion favoring the death penalty has been declining, reaching in 1976 a new low of 24 percent. Among the whites, sentiment in the South has caught up with that of the country as a whole, at 70 percent.



* South Atlantic and South Central.

FIG. 9. Proportion of whites and blacks favoring the death penalty, 1960-76 (Gallup Poll).

The petitioners in *Gregg* all came from the South. In the last analysis the Court held that it had no power to override legislation that was grounded in a belief that even some of the Justices must have shared.

Still, one must not give up hope. The realization that the deterrent effect, if it exists at all,[58] can be only minute, should force us to look

[58] Two of the best studies—those of Forst and Bassell—showed even a counter-deterrent balance for the death penalty. In both studies it was statistically insignificant. The possibility of a counterdeterrent effect does not come as a total surprise. It has theoretical support of long standing. There is the suicide through-murder theory advanced first by STEKEL & ALEXANDER, THE CRIMINAL, THE JUDGE, AND THE PUBLIC: A PSYCHOLOGICAL ANALYSIS (1931); see also H. von Weber, *Selbstmord als Mordmotiv*, MONATSSCHRIFT FÜR KRIMINALBIOLOGIE UND STRAFRECHTSREFORM 161 (1937). Then there is concern over the generally brutalizing effect of the death penalty which just adds one more killing in cold blood. Also, as long as some states still consider crimes other than murder (e.g., rape) to be capital offenses, the old argument that killing the victim-witness may somehow "improve" the

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The conclusion that play a decisive role is str Massachusetts Supreme *O'Neal*,[60] which held a m for rape-murder to be an the deterrence issue the United States Supreme C sachusetts court accepted the death sentence to de deprived the government the death penalty.

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criminal's situation is still valid the case of Gary Gilmore, the the first person executed in the p. 1.

[59] Chief Justice Warren, writi (1958).

[60] 339 N.E.2d 676 (Mass. 1975)

once more at the balance sheet, and weigh against the, at best, minimal benefit, the awesome costs of the death penalty: the inhumanity of the act, the ever present danger of error, the ultimate impossibility to make a fair decision as to who is to die and who is to live.

For the committed who believe that there should be more search for the elusive deterrent effect, a new opportunity has arisen. By the grace of the Court we are in the midst of a new natural experiment. After a number of years during which, through *Furman*, the death penalty was held in abeyance throughout the land, some of our states will resume executions. There is thus another opportunity to see whether the capital crime rate in these states will decline compared to the states that still have no executions.

In the end one must remain skeptical as to the power of evidence to change ancient beliefs and sentiments. The greater hope lies in the expectation that with better times our sentiments will reach the "standards of decency that mark the progress of a maturing society."[59] Justices Brennan and Marshall thought—wrongly it appears—that we had already sufficiently matured.

The conclusion that the personal sentiments of the judges play a decisive role is strengthened by reading the decision of the Massachusetts Supreme Judicial Court in *Commonwealth v. O'Neal*,[60] which held a mandatory death sentence upon a conviction for rape-murder to be unconstitutional. That court had before it on the deterrence issue the very same evidence that was before the United States Supreme Court in *Gregg*. Yet the majority of the Massachusetts court accepted the evidence as proof of the inability of the death sentence to deter. The lack of proof of deterrent effect deprived the government of a "compelling state interest" to justify the death penalty.

Why did the Supreme Court and the Massachusetts court arrive at a different decision? The decisive factor was the simple fact that in the United States Supreme Court only two of the nine Justices felt that "the standard of decency" required abolition while on the Massachusetts court five out of seven felt that way.

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criminal's situation is still valid. *Cf.* Bowe, *supra* note 20, at 264 n.7. Consider also the case of Gary Gilmore, the Utah convict who succeeded in his objective to be the first person executed in the post *Furman* period. See N.Y. Times, 18 Jan. 1977, p. 1.

[59] Chief Justice Warren, writing for the Court, in Trop v. Dulles, 356 U.S. 86, 101 (1958).

[60] 339 N.E.2d 676 (Mass. 1975).

(2) To develop additional programs whereby the offenders may be afforded the opportunity to contribute to society and the support of their families through restitution programs; and

(3) To develop pilot programs of counseling, training and job placement whereby restitution may be accomplished; such programs may be residential or nonresidential as appropriate. (Acts 1980, No. 80-588, p. 928, § 13.)

Article 5.

Death Penalty.

§ 15-18-81. Confinement until execution; certain persons may visit condemned person.

Code commissioner's note. — Acts 1979, No. 79-426, p. 667, effective October 1, 1979, abolished the board of corrections and vested all its rights, duties, power, property, etc., in the governor, and authorized him to exercise such functions and duties himself or through designated administrators. See §§ 14-1-15 through 14-1-17, and also Acts 1979, No. 79-154, p. 253.

§ 15-18-82. Execution by electrocution; where and by whom executions conducted.

Code commissioner's note. — Acts 1979, No. 79-426, p. 667, effective October 1, 1979, abolished the board of corrections and vested all its rights, duties, power, property, etc., in the governor, and authorized him to exercise such functions and duties himself or through designated administrators. See §§ 14-1-15 through 14-1-17, and also Acts 1979, No. 79-154, p. 253.

§ 15-18-85. Return of execution warrant, certificate and statements; payment for transportation of body.

Code commissioner's note. — Acts 1979, No. 79-426, p. 667, effective October 1, 1979, abolished the board of corrections and vested all its rights, duties, power, property, etc., in the governor, and authorized him to exercise such functions and duties himself or through designated administrators. See §§ 14-1-15 through 14-1-17, and also Acts 1979, No. 79-154, p. 253.

CHAPTER 19.

YOUTHFUL OFFENDERS.

Nothing in the constitution or this chapter guarantees youthful offender treatment to all defendants under 21 years of age. Thompson v. State, 354 So. 2d 1128 (Ala.), rev'd on other grounds, 354 So. 2d 1132 (Ala. 1977).

Duty is upon trial judge, etc.

In accord with bound volume. See Rainer v. State, 398 So. 2d 771 (Ala. Crim. App. 1981); Bledsoe v. State, 409 So. 2d 924 (Ala. Crim. App. 1981).

Duty is upon the trial judge to call the Youthful Offender Act to the attention of the youthful offender, just as much as it is the duty of the trial judge to explain to a defendant his constitutional rights when he enters a plea of guilty. Logan v. State, 56 Ala. App. 425, 322 So. 2d 108 (1975).

Supreme court has placed the burden on the trial judge to call the benefits of the Youthful Offender Act to the attention of an eligible defendant, and has analogized that burden and duty to the duty of a trial judge to explain a defendant's constitutional rights before accepting his guilty plea. Whitfield v. State, 56 Ala. App. 653, 324 So. 2d 793, cert. quashed, 295 Ala. 428, 324 So. 2d 796 (1975); Thompson

426, p. 667, § 5, effective October 1,

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tions and duties himself or through such administrative divisions or such officers or employees as he may designate. See §§ 14-1-15 through 14-1-17.

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tions and duties himself or through such administrative divisions or such officers or employees as he may designate. See §§ 14-1-15 through 14-1-17.

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tions, and vested all its rights, duties, power, etc., in the governor, and authorized him to exercise such functions and duties himself or through such administrative divisions or such

officers or employees as he may designate. See §§ 14-1-15 through 14-1-17.

§ 14-1-15. Duties, authority, property, rights, etc., of board of corrections vested in governor.

All duties, responsibilities, authority, power, assets, liabilities, property, funds, appropriations, contractual rights and obligations, property rights and personnel, whether accruing or vested, by operation or by law and which are not in conflict with §§ 14-1-15 through 14-1-17 and which are presently vested in the board of corrections under Title 14, chapters 1 through 12, as amended, and by any other laws or parts of laws of this state, are hereby vested in the governor of the state of Alabama. (Acts 1979, No. 79-426, p. 667, § 1.)

This section and §§ 14-1-16 through 14-1-18 vest responsibility for the state prison system in the governor to represent the state's interests for judicial purposes. Graddick v. Newman, — U.S. —, 102 S. Ct. 4, 69 L. Ed. 2d 1025 (1981).

§ 14-1-16. Board of corrections abolished; rights, duties, powers, property, etc., vested in governor.

Effective October 1, 1979, the board of corrections of the state of Alabama is hereby abolished and all rights, all duties, responsibilities, powers, assets, liabilities, contractual rights and obligations and property rights, whether accruing or vested in the abolished agency, are hereby vested in the governor of the state of Alabama. (Acts 1979, No. 79-426, p. 667, § 2.)

Sections 14-1-15 through 14-1-18 vest responsibility for the state prison system in the governor who thereby represents the state's interests for judicial purposes. Graddick v. Newman, — U.S. —, 102 S. Ct. 4, 69 L. Ed. 2d 1025 (1981).

Cited in Mixon v. State, 407 So. 2d 588 (Ala. Crim. App. 1981).

§ 14-1-17. Governor authorized to exercise functions, designate administrator, set salary and designate duties.

All functions and duties of the department shall be exercised by the governor, acting by himself or by and through such administrative divisions or such officers or employees or individuals as he may designate. The governor is hereby further authorized to set the salary of such individual or individuals and make one such person responsible to him as administrator of the corrections institutions throughout this state. The governor is further authorized to set the salary of such administrator at the same level of any cabinet officer or at a reasonable level in excess thereof. Any administrator shall have the authority and the duties which the governor may designate and all of the power and authority incident to carrying out the functions and duties assigned. (Acts 1979, No. 79-426, p. 667, § 3.)

Colorado Revised Statutes 1973

1982 CUMULATIVE SUPPLEMENT

VOLUME 8

1978 REPLACEMENT VOLUME

CRIMINAL JUSTICE AND CHILDREN'S CODE

This volume of the 1982 Cumulative Supplement contains all the laws of a general and permanent nature enacted or amended by the Fifty-first General Assembly at its First Regular Session in 1977 by House Bill No. 1589, effective July 1, 1978, and as amended by House Bill No. 1001, effective April 1, 1979, enacted by the Fifty-first General Assembly at its First Extraordinary Session in 1978 and by Senate Bill No. 101, effective July 1, 1979, enacted by the Fifty-first General Assembly at its Second Regular Session in 1978, by the Fifty-second General Assembly at its First Regular Session in 1979, by the Fifty-second General Assembly at its Second Regular Session in 1980, by the Fifty-third General Assembly at its First Regular Session in 1981, and by the Fifty-third General Assembly at its Second Regular Session in 1982, pertaining to Titles 16, 17, 18, 19, 20, and 21 of Colorado Revised Statutes 1973.

Edited, Collated, and Revised
Under the Supervision and Direction of the
COMMITTEE ON LEGAL SERVICES
by
DOUGLAS G. BROWN, OF THE COLORADO BAR,
REVISOR OF STATUTES
AND THE
OFFICE OF REVISOR OF STATUTES

Completely Annotated and Indexed
by the
Editorial Staff of The Michie Company

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To be Recnacted by the General Assembly of the State of Colorado as the Statutory Law of Colorado of a General and P...

ance with subsection (2) of this section but submitted only a general verdict form on the violent offender count, the enhanced punishment imposed for having committed a violent crime was improper. People v. Stroup, ___ Colo. App. ___, 624 P.2d 913 (1980).

Requirement of specific findings not applied retroactively. Where defense counsel did not object to the verdict forms and there is no showing of harm from the form of the verdict, the requirement that the court submit special interrogatories to the jury will not be applied retroactively. People v. Swanson, ___ Colo. ___, 638 P.2d 45 (1981).

Penalty for first-degree assault committed in "heat of passion". Where a defendant charged with first-degree assault can establish that he acted in the "heat of passion", he cannot constitutionally receive a greater penalty than he would have received had he been convicted of manslaughter. People v. Grable, 43 Colo. App. 518, 611 P.2d 588 (1979).

Verdict of not guilty of "crime of violence" not inconsistent with guilty verdicts on other charges. Guilty verdicts on the charges of first-degree sexual assault, sexual assault on a child, and aggravated incest are not inconsistent as a matter of law with a jury finding of not guilty on a charge of "crime of violence". People v. Fierro, 199 Colo. 215, 606 P.2d 1291 (1980).

Fifteen to 20-year sentence was not excessive for aggravated robbery and a "crime of violence". People v. Colasanti, ___ Colo. ___, 626 P.2d 1136 (1981).

Applied in People v. Smith, 195 Colo. 404, 579 P.2d 1129 (1978); People v. Warren, 196 Colo. 75, 582 P.2d 663 (1978); People v. Girard, 196 Colo. 68, 582 P.2d 666 (1978); People v. Vigil, 43 Colo. App. 121, 602 P.2d 884 (1979); People v. Swain, 43 Colo. App. 343, 607 P.2d 396 (1979); People in Interest of R.R., 43 Colo. App. 208, 607 P.2d 1013 (1979); People v. Martinez, 43 Colo. App. 419, 603 P.2d 359 (1979); Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980); People v. Hardin, 199 Colo. 229, 607 P.2d 1291 (1980); People v. Cabral, ___ Colo. ___, 629 P.2d 575 (1981); People v. Lichtenstein, ___ Colo. ___, 630 P.2d 70 (1981); People v. Francis, ___ Colo. ___, 630 P.2d 82 (1981); People v. Valencia, ___ Colo. ___, 630 P.2d 85 (1981); People v. Jones, ___ Colo. ___, 631 P.2d 1132 (1981).

ion. Except as provided in section 7 of elating to the power of the governor to cerated person shall be unconditionally piration of his sentence, less the deduc 17, C.R.S. 1973.

; R & RE, L. 79, p. 666, § 10.

PART 4

DEATH PENALTY - EXECUTION

16-11-402. Appliances - sentence executed by executive director. The exec tive director of the department of corrections, at the expense of the sta of Colorado, shall provide a suitable and efficient room or place, enclos from public view, within the walls of the correctional facilities at Canon C and therein construct and at all times have in preparation all necessary app ances requisite for carrying into execution the death penalty by means the administration of lethal gas. The punishment of death in each case death sentence pronounced in this state shall be inflicted by the executi director or his designee in the room or place and with the appliances provid for inflicting the punishment of death by the administration of lethal gas.

Source: Amended, L. 79, p. 682, § 11.

16-11-403. Week of execution - warrant. When a person is convicted of class 1 felony, the punishment for which is death, and the convicted pers is sentenced to suffer the penalty of death, the judge passing such senten shall appoint and designate in the warrant of conviction a week of time with which the sentence must be executed; the end of such week so appoint shall be not less than ninety days nor more than one hundred twenty da from the day of passing the sentence. Said warrant shall be directed to t executive director of the department of corrections or his designee comman ing said executive director or his designee to execute the sentence impos upon some day within the week of time designated in the warrant and sh be delivered to the sheriff of the county in which such conviction is ha who, within three days thereafter, shall proceed to the correctional faciliti at Canon City and deliver the convicted person, together with the warra to said executive director or his designee, who shall keep the convict in co finement until infliction of the death penalty. No person shall be allow access to said convict, except his attendants, counsel, and physician, a spi tual adviser of his own selection, and members of his family, and then on in accordance with prison regulations.

Source: Amended, L. 79, p. 682, § 12.

16-11-404. Execution - witnesses. The particular day and hour of the exec tion of said sentence within the week specified in said warrant shall be fix by the executive director of the department of corrections or his design but shall not be made public by him, and he shall be present thereat or sh appoint some other representative among the officials or officers of the co rectional facilities at Canon City to be present in his place and stead. The shall also be present a physician and such guards, attendants, and other pe sons as the executive director or his designee in his discretion deems desi able, not to exceed fifteen persons. The executive director or his design shall notify the governor of the day and hour for the execution as soon it has been fixed.

Source: Amended, L. 79, p. 682, § 13.

(5) The jury, or the court if no jury trial is had, in any such case shall make a specific finding as to whether the accused did or did not use, or possessed and threatened to use, a deadly weapon during the commission of such crime or whether such serious bodily injury or death was caused by the accused. If the jury or court finds that the accused used, or possessed and threatened the use of, such deadly weapon or that such injury or death was caused by the accused, the penalty provisions of this section shall be applicable.

Source: L. 76, p. 547, § 5; L. 77, pp. 865, 888, 902, § § 11, 78, 4.

Editor's note: Amendments made to this section by House Bill No. 1589 of the 1977 Session, effective April 1, 1979, are contained in the supplement to this volume.

Cross reference. As to classification of felonies and the penalities for such, see § 18-1-105.

The general assembly intended that this section define sentencing standards rather than create a substantive offense by its placement in the criminal code among other sections relating to sentencing, in the article entitled "Imposition of Sentence". Brown v. District Court, ____ Colo. ____, 569 P.2d 1390 (1977).

No preliminary hearing is required for a charge under this section. Brown v. District Court, ____ Colo. ____, 569 P.2d 1390 (1977).

PART 4

DEATH PENALTY - EXECUTION

16-11-401. Death penalty inflicted by lethal gas. The manner of inflicting the punishment of death shall be by the administration of lethal gas within the time prescribed in this part 4, unless for good cause the court or governor may prolong the time.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-401.

Am. Jur. See 21 Am. Jur.2d, Criminal Law, § 598; 40 Am. Jur.2d, Homicide, § § 552, 557.

C.J.S. See 24B C.J.S., Criminal Law, § § 2001-2003.

Law review. For article, "Criminal Procedure in Colorado — A Summary, and Recommendations for Improvement", see 22 Rocky Mt. L. Rev. 221 (1950).

16-11-402. Appliances - sentence executed by superintendent. The governing authority of the state penitentiary, at the expense of the state of Colorado, shall provide a suitable and efficient room or place, enclosed from public view, within the walls of the state penitentiary and therein construct and at all times have in preparation all necessary appliances requisite for carrying into execution the death penalty by means of the administration of lethal gas. The punishment of death in each case of death sentence pronounced in this state shall be inflicted by the superintendent of the state penitentiary maximum security unit in the room or place and with the appliances provided for inflicting the punishment of death by the administration of lethal gas.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-402; L. 76, p. 530, § 3.

16-11-403. Week of execution - warrant. When a person is convicted of

a class 1 felony, the punishment for which is death, and the convicted person is sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which the sentence must be executed; the end of such week so appointed shall be not less than ninety days nor more than one hundred twenty days from the day of passing the sentence. Said warrant shall be directed to the superintendent of the state penitentiary maximum security unit commanding said superintendent to execute the sentence imposed upon some day within the week of time designated in the warrant and shall be delivered to the sheriff of the county in which such conviction is had, who, within three days thereafter, shall proceed to the state penitentiary and deliver the convicted person, together with the warrant, to said superintendent, who shall keep the convict in confinement until infliction of the death penalty. No person shall be allowed access to said convict, except his attendants, counsel, and physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-403; L. 76, p. 531, § 4.

Am. Jur. See 21 Am. Jur.2d, Criminal Law, § 403.

C.J.S. See 24B C.J.S., Criminal Law, § 2002.

Annotator's note. Since § 16-11-403 is similar to repealed § 39-11-3, C.R.S. 1963, CSA, C. 48, § 538, and laws antecedent thereto, relevant cases construing these provisions have been included in the annotations to § 16-11-403.

Meaning of "week of time". The week of time which is required by this section to be appointed and designated in capital cases within which the sentence must be executed, is a period of time extending from 12 midnight Saturday until 12 midnight the following Saturday, but an error in the designation of the week is rendered immaterial when the execution is stayed by the supreme court pending review. Mora v. People, 19 Colo. 255, 35 P. 179 (1893).

Court fixes date of execution following stay. The court has authority to fix the date of execution in cases of affirmance, where the execution has been stayed upon appeal or supersedeas. Mora v. People, 19 Colo. 255, 35 P. 179 (1893).

But definite date set in order granting stay did not deny due process. The fact that the state supreme court set a definite execution date pending determination of post-conviction relief was not "suggestion of predetermination" in violation of due process and did not constitute an implied direction to deny petitioner relief. Bell v. Patterson, 279 F. Supp. 760 (D. Colo. 1968), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed. 2d 865 (1971).

Procedure of delivery of prisoner by sheriff held not improper. See Agnes v. People, 104 Colo. 527, 93 P.2d 891 (1939).

Applied in Medley, Petitioner, 134 U.S. 160, 10 S. Ct. 384, 33 L. Ed. 835 (1890).

16-11-404. Execution - witnesses. The particular day and hour of the execution of said sentence within the week specified in said warrant shall be fixed by the superintendent but shall not be made public by him, and he shall be present thereat or shall appoint the deputy superintendent of the maximum security unit or some other representative among the officials or officers of the state penitentiary to be present in his place and stead. There shall also be present a physician and such guards, attendants, and other persons as the superintendent in his discretion deems desirable, not to exceed fifteen persons. The superintendent shall notify the governor of the day and hour for the execution as soon as it has been fixed.

Source: R & RE, L. 72, p. 250, § 1; C.R.S. 1963, § 39-11-404; L. 76, p. 531, § 5.

GENERAL STATUTES

OF

CONNECTICUT

VOLUME IX

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pending appeal. 84 C. 566. Cited. 132 C. 303.

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Sec. 54-99. Period within which death penalty inflicted. Unless a reprieve or stay of execution is granted by competent authority, the penalty of death shall be inflicted within a period of not less than one month nor more than six months after conviction and sentence. All executions of the death penalty shall take place according to the provisions of this section and section 54-100 on the day, or within five days after the day, designated by the judge passing sentence.

(1949 Rev., S. 8815.)
Cited. 121 C. 197.

Sec. 54-100. Electrocution. The method of inflicting the punishment of death shall be by electrocution. The warden of the Connecticut Correctional Institution, Somers, is directed to appoint a suitable person to perform the duty of executing sentences of the court requiring the infliction of the death penalty. Such person shall receive, for such duty, such compensation as is determined by the directors of the Connecticut Correctional Institution, Somers. When any person is sentenced by any court of this state having competent jurisdiction to be electrocuted, he shall, within twenty days after final sentence, be conveyed to the Connecticut Correctional Institution, Somers, and such punishment shall be inflicted only within the walls of said institution in Somers, within an enclosure to be prepared for that purpose under direction of the warden of the Connecticut Correctional Institution, Somers, and the board of directors thereof, which enclosure shall be so constructed as to exclude public view. Besides the warden or deputy warden and such number of guards as he thinks necessary, the following persons may be present at the execution, but no others: The sheriff of the county in which the prisoner was tried and convicted, the board of directors, the physician of the Connecticut Correctional Institution, Somers, the clergyman in attendance upon the prisoner and such other adults, as the prisoner may designate, not exceeding three in number, representatives of not more than five newspapers in the county where the crime was committed, and one reporter for each of the daily newspapers published in the city of Hartford.

(1949 Rev., S. 8816; 1953, P.A. 28, S. 6; P.A. 74-84.)

Cited. 121 C. 197. Death penalty does not constitute cruel and unusual punishment and courts will not vitiate legislative determination of punishment for crimes. 158 C. 341.

Sec. 54-101. Disposition of person becoming insane after death sentence. When any person detained at the Connecticut Correctional Institution, Somers, awaiting execution of a sentence of death appears to the warden thereof to be insane, the warden may make application to the superior court for the judicial district of Tolland having either civil or criminal jurisdiction or, if said court is not in session, to any judge of the superior court, and, after hearing upon such application, notice thereof having been given to the state's attorney for the county or judicial district wherein such person was convicted, said court or such judge may, if it appears advisable, appoint three reputable physicians to examine as to the mental condition of the person so committed. Upon return to said court or such judge of a certificate by such physicians, or a majority of them, stating that such person is insane, said court or such judge shall order the sentence of execution to be stayed and such person to be transferred to any state hospital for mental illness for confinement, support and treatment until he recovers his sanity, and shall cause a mittimus to be issued to the sheriff of Tolland county, or either of his deputies, for such commitment. If at any time thereafter, the superintendent of the state hospital to which such person has been committed is

1982
CUMULATIVE POCKET SUPPLEMENT

IDAHO CODE

Compiled Under the Supervision of the
Idaho Code Commission

PHILLIP M. BARBER
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COMMISSIONERS

VOLUME 4

For your convenience in reporting any errors in these supplements or suggested improvements or additions you will find pages immediately following the title page of Volume 12 of these supplements.

Place this supplement in the pocket of the corresponding volume of the set

By
THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA

CHAPTER 27
EXECUTION

SECTION.

19-2701. Authority for execution of judgment.

Cross-ref. Stay of execution, I.C.R. 38.

19-2703. Execution of judgment of imprisonment.

Putting Affairs in Order.

If the trial courts intend to give a defendant time to get his affairs in order prior to commencing serving his sentence, the court should delay the imposition of that sentence until the end of the period of time that the defendant is allowed free to get his affairs in order. State v. Johnson, 101 Idaho 581, 618 P.2d 759 (1980).

19-2705. Death warrant and confinement thereunder.

Cross-ref. Procedure where death penalty authorized, I.C.R. 33.1, 33.2.

19-2706. Conviction of murder — Transmission of statement to governor.

Cited in: State v. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978).

19-2708. Suspension of judgment of death.

Cross-ref. Stay of execution, I.C.R. 38.

19-2716. Infliction of death penalty. — The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-short-acting barbituate in combination with a chemical paralytic agent until death is pronounced by a physician licensed under the provisions of chapter 18, title 54, Idaho Code, in accordance with accepted medical standards. The director of the department of corrections shall determine the substance or substances to be used and the procedures to be used in any execution; provided, however, that, in any case where the director finds it to be impractical to carry out the punishment of death by administration of the required lethal substance or substances for the reason that it is not reasonably possible to obtain expert technical assistance, should such be necessary to assure that infliction of death by administration of such substance or substances can be carried out in a manner which causes death without unnecessary suffering, the sentence of death may be carried out by firing squad, the number of members of which shall be determined by the director; and provided further, that any infliction of the punishment of death by

administration of the required lethal substance or substances in the manner required by this section shall not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the director or his designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. This act shall apply to all executions carried out on and after the effective date [March 31, 1982] of this enactment, irrespective of the date sentence was imposed. [Cr. Prac. 1864, § 467; R.S., R.C., & C.L., § 8020; C.S., § 9063; I.C.A., § 19-2616; am. 1978, ch. 70, § 1, p. 140; am. 1982, ch. 257, § 1, p. 668.]

Compiler's notes. Section 2 of S.L. 1982, ch. 257 declared an emergency. Approved March 31, 1982.

Delegation of Power.

The legislature did not improperly delegate the power to inflict the death penalty to the board of corrections under this section since the standards formulated for guidance, although general, are capable of reasonable application and it cannot be assumed that the director of the department of corrections will act in other than a reasonable manner. State v. Osborn, — Idaho —, 631 P.2d 187 (1981).

CHAPTER 28

APPEALS TO SUPREME COURT

19-2801. Criminal judgments and orders appealable — Time for taking appeals.

Cross-ref. Juvenile proceeded against as an adult, bail, § 16-1806A.

Cited in: State v. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978).

19-2804. Criminal judgments and orders appealable — Time for taking appeals.

The Supreme Court had authority, under Art. 5, § 9, to review the decision of the district court which granted defendant's motion to dismiss criminal charges, even though an order granting a motion to dismiss was not listed in this section as one of the six orders or rulings from which appeal could be taken by the state. State v. Lewis, 96 Idaho 743, 536 P.2d 738 (1975), overruling State v. Ridenbaugh, 5 Idaho 710, 51 P. 750 (1897).

19-2827. Review of death sentences — Preservation of records.

Sec. to sec. ref. This section is referred to in I.C.R. 33.2.

Cited in: State v. Lindquist, 99 Idaho 766, 589 P.2d 101 (1979).

Failure to Object.

Where the defendant in a sentencing hearing following a guilty plea to a first-degree murder charge, acquiesced without objection to the use of the transcript of the preliminary hearing instead of introducing live witness testimony, such failure to object did not preclude the Supreme Court from considering an alleged error in using the transcript since this section mandates that the court examine not only the death sentence but also the procedure followed in imposing that sentence regardless of whether an appeal is even taken, and since the gravity of a death sentence and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below. State v. Osborn, — Idaho —, 631 P.2d 187 (1981).

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MONTANA CODE ANNOTATED

ANNOTATIONS

issues arise. The courts have recognized the infirmity of imposing a fine as a sentence and then converting it into a jail term simply because the defendant is indigent and cannot forthwith pay the fine in full. 38 A.G. Op. 61 (1980).

Collateral References

Fines ⇦ 6.

36 C.J.S. Fines § 9.

21 Am. Jur. 2d Criminal Law § 599, et seq.

46-19-103. Execution of death.

Commission Notes

Source: [R.C.M. 1947, sections 94-8007, 94-8016 through 94-8018.]

This section does not change the law in any way but merely combines into one provision separate statutes dealing with execution of the death sentence. It should be noted that the commission has not considered the propriety of capital punishment, but has redrafted a law in conformity with what appears to be the present public policy of this state.

Cross-References

Execution of death sentence justified, 45-3-109.

Case Notes

Hanging Not Cruel and Unusual Punishment: There is no evidence that shows that death from hanging, when properly carried out, is anything other than swift and immediate or that hanging results in any more suffering than that associated with other modes of execution. The Supreme Court has no power to change the legislatively settled provisions of the sentence in the absence of constitutional violation. St. v. Coleman, ____M____, 605 P2d 1000 (1979).

Collateral References

Criminal Law ⇦ 1219.

24 C.J.S. Criminal Law §§ 1613 through 1615; 24B C.J.S. Criminal Law §§ 2001 through 2003.

21 Am. Jur. 2d Criminal Law § 595, et seq.

Manner of inflicting death sentence as cruel or unusual punishment. 40 ALR 1118; 30 ALR 1452.

Effect of permitting day fixed for execution to pass without carrying out sentence. 34 ALR 314.

Part 2

Suspension of Execution of Death

46-19-201. When and how mental fitness of defendant determined.

Commission Comments

Source: New.

This provision will replace R.C.M. 1947, sections 94-8009 and 94-8010 which set forth a special procedure for determining the sanity of the defendant. This special procedure is no longer necessary because the chapter dealing with competency of the accused provides for this determination.

Collateral References

Criminal Law ⇦ 981(2).

24 C.J.S. Criminal Law §§ 1569, 1619.

Remedy of one convicted of crime while insane. 121 ALR 267; 10 ALR 213.

that an illegal arrest could be resisted lawfully. That rule encouraged resistance and breaches of the peace. This section requires submission to arrest. If the arrest is illegal (a determination which few citizens can make while being arrested), the arrestee should pursue civil and criminal remedies rather than resort to self-help. In applying this section a number of caveats are in order: First, the section has no application to persons fleeing from a possible arrest or from a stop under the new Stop and Frisk statute (MCA, 46-5-401, 46-5-402). Second, the arresting officer must identify himself to the arrestee. If the arrestee does not know that the person making the arrest is authorized to do so, he may justifiably defend himself. Third, the section has been interpreted by the Illinois courts as not preventing an arrestee from protecting himself from unlawful and excessive force by the arresting officer. The wording for this section is identical to the Illinois source.

Cross-References

Use of force in defense of person, 45-3-102.
Resisting arrest, 45-7-301.
Method of arrest, 46-6-104.
Manner of arrest without a warrant, 46-6-106.

Case Notes

Prosecutor's Quasi-Judicial Immunity From Prosecution: Plaintiff's civil action against a County Attorney, based upon alleged unlawful arrest by certain policemen and challenging the legality of the criminal prosecution against him, must be dismissed because the County Attorney enjoys absolute immunity for prosecutorial actions done in a quasi-judicial capacity. Hall v. Lympus, 478 F. Supp. 644 (D.C. Mont. 1979).

In General: When a person is known to be a policeman in the performance of his lawful duties, it is the duty of persons being arrested by him to submit peacefully. People v. Gnatz, 8 Ill. App.3d 396, 290 N.E.2d 392, 395 (1972). Even if a probable cause for arrest is lacking, the arrestee has no right to resist. People v. Suriwha, 2 Ill. App.3d 384, 276 N.E.2d 490, 496 (1971). See also People v. Carroll, 133 Ill. App.2d 78, 272 N.E.2d 822 (1971); People v. Franks, 108 Ill. App.2d 438, 247 N.E.2d 811 (1969); People v. Fort, 91 Ill. App.2d 212, 234 N.E.2d 384 (1968), certiorari denied 393 US 1014 (1969); People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

Instructions: Refusal of an instruction on use of force in making an arrest is proper where such an instruction is not accompanied by an instruction on use of force in defense of person. People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

Burden of Proof: To sustain a charge of resisting arrest, the prosecution must show that the defendant knowingly resisted performance of an authorized act by a person known to the defendant to be a peace officer acting within his official capacity. People v. Royer, 101 Ill. App.2d 44, 242 N.E.2d 288, 290 (1968).

Law Review Articles

The Uniform Arrest Act, Warner, 28 Va. L. Rev. 316 (1942).
Some inadequacies in the law of arrest, Waite, 29 Mich. L. Rev. 448 (1931).

Collateral References

Assault and Battery ⇦ 67; Homicide ⇦ 116; Obstructing Justice ⇦ 8.
6A C.J.S. Assault and Battery § 92; 40 C.J.S. Homicide § 137; 67 C.J.S. Obstructing Justice § 16.

45-3-109. Execution of death sentence.

Criminal Law Commission Comments

Source: Ill. C. C. 1961, Chapter 38, § 7-10.

This section states an obvious aspect of justification for homicide. It is included for the sake of completeness, and because it is one of the more commonly described statutory instances of justification. Section 94-3-109 [now MCA, 45-3-109] is intended to state the essentials of the prior provision in language similar to that of the other sections of this chapter. However, in view of the deliberate nature of the homicide, the explicit legal instructions concerning the execution and the much more relaxed time element involved in an execution as compared with self-defense, arrest, or escape, no need exists for recognizing a reasonable but mistaken belief of the executioner as to his authority for or method of performing his duty.

Compiler's Comments

Annotator's Note [see preface to Title 45 for origin]: This section preserves the former Montana provision listed above. The wording is identical to the Illinois source.

Cross-References

Death penalty, 46-18-301 through 46-18-310.
Execution of death, 46-19-103.

Law Review Articles

Comment. Congressional rebirth of the death penalty: Guiding the jury past Furman v. Georgia. 68 NW. U. L. Rev. 893 (1973).

The Proposed Federal Criminal Codes: A Prosecutor's Point of View, Connelly, 68 NW. U. L. Rev. 826, 835 (1973).

Justification for Injury, Beale, 41 Harv. L. Rev. 553 (1928).

Collateral References

Homicide ⇦ 104.
40 C.J.S. Homicide §§ 106, 137.

45-3-115. Affirmative defense.

Criminal Law Commission Comments

Source: Ill. C. C., 1961, Chapter 38, § 7-14.

A defense based upon any of the provisions of this chapter is an affirmative defense, and if not put in issue by the prosecution's evidence, the defendant, to raise it as an issue, must present some evidence thereon.

Compiler's Comments

Annotator's Note [see preface to Title 45 for origin]: Montana law requires that the prosecution prove the defendant guilty of each element of the offense charged beyond all reasonable doubt (MCA, 46-16-601). But, the prosecution is not required to negate in the first instance all possible defenses which might be raised by the defendant. After the prosecution has developed a prima facie case, the defense has the burden of going forward with evidence to raise doubt as to the defendant's guilt. The amount of evidence which the defendant must submit in raising an affirmative defense is not stated in this section. Relatively recent Montana case law makes it clear that the Legislature can determine the amount of evidence required to raise a particular affirmative defense, whether only a "reasonable doubt" or a "preponderance of the evidence". The statutory burden imposed under the former insanity defense statute (former MCA, 46-14-201(1), repealed, L. 1979) was a "preponderance of the evidence. St. v. McKenzie, ___M___, 608 P2d 428 (1980). Where the Legislature is silent, the court can, and in some instances has, determined the extent of the defendant's burden of going forward with the evidence in establishing an affirmative defense. The defendant need only raise a reasonable doubt where the affirmative defense offered is self-defense (St. v. Grady, 166 M 168, 531 P2d 681 (1975)), but

the minimum mandatory sentence. St. v. Nelson, ___M___, 603 P2d 1050 (1979).

46-18-223. Hearing to determine application of exceptions.

Cross-References

Duty of court to advise at initial appearance, 46-7-102.
Right to counsel, 46-8-101.
Court to advise defendant of rights, 46-12-202.
Right to counsel — parole hearing, 46-23-204.
Court to advise defendant of rights — extradition proceedings, 46-30-217.

Case Notes

Finding of No Mitigating Factors Supported in Record — Alcohol and Sexual Problems: Where the trial court considered defendant's drinking and sexual problems but concluded that those conditions did not excuse defendant from accountability for his acts, and the evidence presented at the hearing and in the presentence investigation report supported the trial court's conclusion, there was no abuse of discretion in sentencing defendant as a persistent felony offender. St. v. Metz, ___M___, 604 P2d 102 (1979).

Part 3

Death Penalty

Part Case Notes

Constitutionality of Former Death Sentence Statute: Section 94-5-105, R.C.M. 1947 (now repealed), which provided a procedure for the imposition of a sentence of death for a conviction of deliberate homicide, was constitutional on its face. St. v. Fitzpatrick, ___M___, 606 P2d 1343 (1980).

Increase of Sentence After New Trial — Due Process: The defendant, who had been sentenced to 100 years' imprisonment for deliberate homicide, was not denied due process of law when, after a new trial on the same charge, he was sentenced to death. The due process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of vindictiveness. When the District Court Judge was replaced for the new trial and sentencing and the new judge stated his reasons for imposing the death penalty with clarity, the threat of vindictiveness was not a realistic likelihood. St. v. Fitzpatrick, ___M___, 606 P2d 1343 (1980).

Sentencing Under Statutes Amended After Date of Crime: The sentencing of the defendant to death for a conviction of aggravated kidnapping under statutes amended after section 94-5-304, R.C.M. 1947 (now repealed), was declared unconstitutional did not violate the constitutional prohibition against ex post facto laws. The amendments were ameliorative in nature and did not deprive defendant of a substantial right or immunity that he possessed at the time the crime was committed. St. v. Fitzpatrick, ___M___, 606 P2d 1343 (1980).

Review of Death Sentence — Disproportionate Application: The Supreme Court, in reviewing a death sentence to determine whether it is disproportionate, reviews the circumstances of the crime of which the defendant is accused and in light of those circumstances, the judgment and the sentence thereupon imposed. It examines cases involving similar crimes, for the single purpose, making certain that as far as the defendant in this particular case is concerned, there has been no discriminatory action on the part of the sentencing judge and no abuse of discretion by the sentencing judge and that the sentencing judge has considered and applied fairly and without discrimination the applicable law. The Supreme Court looks for the even-handed application of death sentences without regard to sex, color, creed, or race or any

other discriminating consideration. When this has occurred, as here, the death sentence must be upheld. St. v. Coleman, ____M____, 605 P2d 1000 (1979).

Retroactive Application of Death Penalty Provisions — No Ex Post Facto Violation: Where after the commission of the crime of homicide, the U.S. Supreme Court found the death penalty statute unconstitutional and the state Legislature took only the procedural step of redefining the punishment, not the crime, there is no ex post facto violation in upholding the previous death penalty imposed, since the defendant had "fair warning" of the consequences of homicide. St. v. Coleman, ____M____, 605 P2d 1000 (1979).

Constitutionality:

Montana's statutory scheme for imposing the death penalty meets the standards established by the U.S. Supreme Court. The penalty is not cruel and unusual simply because Montana's criminal statutes allow its imposition in this case for the crime of aggravated kidnapping but not for the crime, as committed here, of deliberate homicide. St. v. Coleman, ____M____, ____P2d____, 36 St. Rep. 1134 (1979).

In light of recent U.S. Supreme Court decisions (Woodson v. N. Carolina, 428 US 280 (1976); Coker v. Georgia, 433 US 584, 97 S Ct 2861, 53 L Ed 2d 982 (1977); Roberts v. Louisiana, 431 US 633, 97 S Ct 1993, 52 L Ed 2d 637 (1977)), section 94-5-304, R.C.M. 1947 (since repealed), as it existed at the time of the defendant's trial, was unconstitutional on its face as a mandatory death penalty statute. St. v. Coleman, ____M____, 579 P2d 732 (1978).

While the statutes did not provide for the jury in the bifurcated sentencing procedure, they were within the constitutional boundaries of recent U.S. Supreme Court cases. The sentence of death in this case was rested on a narrowly defined type of murder or kidnapping. The former statute provided for the sentencing judge to consider mitigating circumstances. In addition, appellate judicial review and other sentence review was provided. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

By an earlier decision of the U.S. Supreme Court, statutes allowing the sentencer discretion as to whether to impose the death penalty were unconstitutional; although the conviction would be upheld, a sentence of death made at the discretion of the court under a former statute was unconstitutional and would be commuted to life imprisonment. St. v. Rhodes, 164 M 455, 524 P2d 1095 (1974).

Requisites of a Valid Death Penalty: The U.S. Supreme Court seems to have established three general criteria that are requisite to a valid death penalty statutory scheme: (1) there must be at least one statutory aggravating circumstance before a death sentence may be considered; (2) the defense must be afforded the opportunity to bring before the sentencing body at a separate sentencing hearing any mitigating circumstances relating to the individual defendant; and (3) there must be available prompt judicial review of the sentencing decision by a court of statewide jurisdiction. The statutory scheme in existence at the time of commission of the crimes charged in the instant case met the above criteria. St. v. McKenzie, ____M____, 581 P2d 1205 (1978).

Prospective Juror's View of Death Penalty: Two prospective jurors were properly excluded under the exception to the general rule of Witherspoon v. Illinois, 391 US 510 (1968), because they were irrevocably committed to voting against conviction because of the possibility of a death penalty. St. v. Coleman, ____M____, 579 P2d 732 (1978).

Part Law Review Articles

Montana's Death Penalty After State v. McKenzie, Tweeten, 38 Mont. L. Rev. 209 (1977).

West's

REVISED CODE OF WASHINGTON ANNOTATED

Under Official Allocation and Numbering

Title 10

Chapters 10.67 to End
Appendix of Rules

Cumulative Annual Pocket Part

For Use In 1982

Replacing prior Pocket Part in back of volume

Includes
Laws through the 1981 Regular and First Extraordinary Sessions
Amendments to Criminal Rules

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TITLE 10

CRIMINAL PROCEDURE

CHAPTER 10.70—COMMITMENTS AND EXECUTIONS

Cross References

Execution of death sentence, see § 10.95.010 et seq.

10.70.020 Mittimus upon sentence to imprisonment

1. In general

Superintendent of correctional institution is required by § 72.13.150 to receive all male persons convicted of a felony, unless local jurisdictions agree to house such prisoners; department of social and health services has duty to take charge of felon when conviction is entered, and transfer is not to be delayed beyond 40 days after conviction even where appeal is pending. Kanekoa v. Washington State Dept. of Social & Health Services (1981) 95 Wash.2d 446, 626 P.2d 6.

10.70.040 to 10.70.130 Repealed by Laws 1981, ch 138, § 24, eff. May 24, 1981

Annotations Under Repealed Sections

[SECTION 10.70.050]

United States Supreme Court

Due process; sentence of death may not be imposed where jury is not permitted to consider lesser included noncapital offense supported by the evidence, see Beck v. Alabama (1980) 100 S.Ct. 2382, 447 U.S. 625, 65 L.Ed.2d 392.

Equal protection; statute interpreted to permit death sentence for murder that was outrageously or wantonly vile, horrible, or inhuman, provided inadequate guidance and thereby allowed arbitrary and capricious infliction of the death penalty, see Godfrey v. Georgia (1980) 100 S.Ct. 1759, 446 U.S. 420, 64 L.Ed.2d 398.

2. Constitutionality of death penalty

Statutory procedure under § 10.94.010 et seq. (repealed; see, now, § 10.95.010 et seq.) for imposing death penalty was unconstitutional, whether defendant pleaded guilty or was found guilty by jury. State v. Frampton (1981) 95 Wash.2d 469, 627 P.2d 922.

HB

157

BILL SHEFFIELD, GOVERNOR

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

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February 23, 1983

POSITION PAPER

RE: HB 157

SPONSOR: Representative Adams

Program Effects of Bill

Expands right to petition for a local option election to include unincorporated communities with municipal boundaries.

Comments

No comments

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: HB 157 Date on Bill: 2/4/83
Title: Expand the right to petition for local option election
Sponsor: Representative Adams
Requestor: House Community & Regional Affairs Committee

1. Estimated fiscal impacts on: Department of Community & Regional Affairs

a. Expenditures:

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86		
Capital				-0-	-0-	-0-		
Operating				-0-	-0-	-0-		
Total				-0-	-0-	-0-		

b. Revenues:

Revenue								

2. Source of funds to offset fiscal impact of bill:

3. Assumptions:

Expansion of the right to petition for a local option election to include unincorportated communities within municipal boundaries. Will have no fiscal impact on this Department.

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor. It therefore does not represent the final estimate of fiscal impact.

Prepared By: Richard Rainery RR Phone: 465-4703
Division: Commissioner's Office Date: 2/23/83

Approved by Commissioner: [signature] Date: 2/23/83
Department: Community & Regional Affairs

5. Distribution:
Original to Legislative Finance
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2/15/83

Alaska State Legislature

House of Representatives

Al Adams
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Official Business

February 21, 1983

MEMORANDUM

TO: Representative Barbara Lacher, Chair
Community and Regional Affairs Committee

FROM: Representative Al Adams AA

SUBJECT: House Bill 157 - An Act to expand the right to petition for a local option election

House Bill 157 amends the General Provisions Chapter of Title 4, Alcholic Beverages, by expanding the definition of "established village".

In 1981, the Legislature enacted legislation clarifying provisions in Title 4 so that alcohol local option elections could be held. As a result of these changes a municipality, as well as an established village, could hold an election.

In spite of the Legislature's best efforts to clarify the law, a question has arisen as to the ability of an unincorporated community within a borough to conduct an election. Three communities, Point Lay, Karluk and Tyonek, wanted to hold an election, but were unable to due to this defect in the law. HB 157 clarifies the language to ensure that all communities, regardless of status, may conduct an election.

Additional background information is attached.

I. INTRODUCTION

On June 19, 1981, Governor Hammond signed Senate Bill 65, which cleared up difficulties with the 1980 Title 4 alcohol local option law, AS 04.11.490-04.11.506. Pursuant to the statute "municipalities" may conduct their own alcohol local option elections. "Established villages" may also request alcohol local option elections. These latter elections are conducted by the lieutenant governor.

Under the law, municipality is defined as "an incorporated city, an organized borough, or a unified municipality established under AS 29.68." AS 04.21.080(b)(11). A Municipalit may hold a special election and vote upon one of the following four options:

1. Prohibition of the sale of alcoholic beverages. AS 04.11.490.

2. Community liquor license. AS 04.11.492.

3. Prohibition of the sale and importation of alcoholic beverages. AS 04.11.496.

4. Prohibition of the sale of alcoholic beverages except by selected licenses. AS 04.11.500.

An "established village" is defined under the statute as "an unincorporated area that

(A) is within the circumference of a circle described by drawing a five-mile radius around a post office station;

(B) has 25 or more permanent residents."

AS 04.11.080(b)(8). An established village may in a special election conducted for that purpose by the lieutenant governor, vote upon one of the following three options:

1. Prohibition of the sale of alcoholic beverages. AS 04.11.490.

2. Prohibition of the sale and importation of alcoholic beverages. AS 04.11.496.

3. Prohibition of the sale of alcoholic beverages except by selected licenses. AS 04.11.500.

Alcohol abuse constitutes a very serious problem in Alaska. The state Title 4 alcohol local option law, AS 04.11.490-04.11.506, has allowed individual communities to deal with the problem on a local level and thus choose a legal remedy which fits the local problem. The results have been largely successful both as a means of controlling alcohol abuse and as an experiment in pure democracy. As of this writing, forty-one communities have held alcohol local option elections and ten more are currently waiting to hold them. Moreover, over twenty other communities have expressed interest in holding alcohol local option elections to the Alaska Legal Services Corporation Alcohol Project. Of the forty-one communities which have already voted, thirty-seven have voted to prohibit the sale and importation of alcoholic beverages.

II. THE PROBLEM

Simply put, the problem is that communities within organized boroughs cannot utilize the state Title 4 alcohol local option law unless separately incorporated because the power of legislation in those communities rests

with virtual exclusivity in the borough government. AS 04.11.080(b)(8) defines "established village" as "an unincorporated area." Since a borough is incorporated, a village lying within a borough cannot be an unincorporated area.

Boroughs exercise certain powers, such as operating a school system and planning, platting, and zoning on an areawide basis, both inside and outside cities within the borough boundaries. AS 29.33.010-29.33.290. Pursuant to AS 29.38.020, second-class boroughs exercise certain municipal powers in areas of the borough outside the cities. These include such things as regulating fireworks, providing water pollution control, constructing local roads, etc. Boroughs can also acquire other powers outside cities by an election of the voters outside cities.

AS 29.48.035 gives municipalities certain regulatory powers. AS 29.48.035(10) provides that a municipality may regulate "alcoholic beverages as provided by 4.15.070." AS 4.15.070 is now repealed but there is a cross-reference to 4.21.010 "for present provisions concerning municipal regulation." AS 4.21.010(a) allows a municipality to adopt ordinances governing barter, sale, consumption of alcoholic beverages as necessary for orderly selling of alcohol within the municipality. AS 4.21.010(b) allows a municipality to adopt an ordinance making sale or importation a misdemeanor after a valid election on the option to prohibit the sale and importation of alcoholic beverages has been held.

The above provisions of Title 29, along with the definition of established village in Title 4, suggest that power to regulate alcohol in a borough in the area outside the borough's cities is given to the borough.

Nonetheless, at least one village, Karluk, in the Kodiak Island Borough, has evinced a desire to hold a local option election and cannot under present law.

An organized borough generally contains more than one community and often contains several. At the time of this writing, no organized borough has yet held an alcohol local option election. The difficulties involved in a multi-community election of this sort are evident. Should a borough hold an alcohol local option election, a strong vote for prohibition in the outlying villages and municipalities could impose that measure upon communities with no desire or need to embrace so draconian a resolution. Conversely, a strong vote to maintain the privilege of buying and consuming alcohol in the larger communities could prevent other communities within the borough from taking effective action to deal with a chronic local problem.

A preferable arrangement would allow the voters of each community in an organized borough to decide for that community and that community alone how the state Title 4 alcohol local option law can best be used. Voters in a community will probably be better informed as to local conditions than they will be to borough-wide conditions. A better informed electorate will naturally make more intelligent decisions at the polls. More importantly, their decision will only affect local conditions and not conditions in other communities within the borough of which they are much less likely to be adequately informed.

III. THE SOLUTION

The proposed legislation will allow villages within organized boroughs to hold an alcohol local option election subject to the same conditions

imposed upon villages outside organized boroughs. The proposed legislation accomplishes this essentially by enlarging the definition of "established village" to include those villages lying within organized boroughs.

The proposed legislation is designed to enlarge the powers of villages within organized boroughs only as regards to their ability to hold local option elections. Section 2 of the proposed legislation expressly limits itself to those purposes. Alaska already has a well established and complex municipal code by which the respective powers of various types of communities are delegated. The proposed legislation will have only a strictly limited effect on the municipal code. It is designed and intended only to allow communities not separately incorporated which lie within organized boroughs to hold alcohol local option elections pursuant to AS 04.11.490-04.11.506. No other impact upon the respective powers of the state, organized boroughs, organized communities, or unorganized communities is foreseen or intended.

LAW OFFICES OF

ALASKA LEGAL SERVICES CORPORATION

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TELEPHONE (907) 272-9431

MEMORANDUM

TO: Persons Interested in the Current Status of Rural Communities With Respect to the State Title 4 Alcohol Local Option Law

FROM: Alaska Legal Services Corporation Alcohol Project

RE: Statewide Village Status Report

DATE: January 14, 1983

The ALSC Alcohol Project was funded by the State Office on Alcoholism and Drug Abuse ("SOADA") to provide statewide on-site community legal education and technical legal assistance on the state Title 4 alcohol local option law. During its existence, the ALSC Alcohol Project worked closely with rural communities throughout Alaska. The ALSC Alcohol Project has terminated.

Approximately 130 rural communities were visited and 50 other rural communities were assisted in some fashion. "Assistance" means a community either requested a petition form, cover letter, and memorandum explaining the law, or a legal opinion of their local village ordinance concerning alcohol control. This Statewide Village Status Report from the ALSC Alcohol Project is a final attempt to provide an adequate profile of individual rural community activity with respect to the state Title 4 alcohol local option law.

Presently, 74 alcohol local option elections have been held. Some communities have now held two elections, with differing results. The present tally is: 1 community has voted for a community liquor license, 51 communities have voted to forbid the sale and importation of alcoholic beverages, 10 communities have defeated the sale and importation option, 2 communities approved and 1 defeated the no sale option, and 1 community defeated the private liquor license option. Several more elections are presently scheduled and many other petitions are being circulated.

If you have any additional information or questions on specific communities, please contact Vivian Kortie at the Alcoholic Beverage Control Board, 201 East 9th Avenue, Anchorage, Alaska, 99501, or call (907) 277-8638.

STATEWIDE VILLAGE STATUS REPORT

Village (Municipality or Village)	Petition Sent (ALSC Visit*)	Option Considered or Voted Upon	Election Results (yes/no[2])	Effective Dates	Notes
ALEUTIAN/PRIBOLOF REGION					
Atka (EV)	11/10/82	--	--	--	Petitions sent 10/10/82.
St. Paul (M)	5/10/82*	Ban Sale & Import (V)	47/141	--	ALOL[3] did not pass.
ANCHORAGE/MATNA REGION					
Chitina (V)	3/03/82*	Ban Sale & Import (C)	--	--	Petition invalid 10/14/8
Copper Center (V)	3/27/82*	--	--	--	new petitions sent 12/23
Mentasta (V)	10/05/82*	--	--	--	
BRISTOL BAY REGION					
Aleknagik (M)	4/08/82*	Ban Sale & Import (V)	26/23	--	Many questioned ballots; majority vote.
Ekwok (M)	11/29/82	Ban Sale & Import (V)	20/03	7/1/82	
Iliamna (V)	11/24/81*	Ban Sale (V)	35/24	--	Liquor license(s) revoke
Egegik (V)	11/10/82	Ban Sale & Import (C)	--	--	Election scheduled by DC
Manokotak (M)	11/23/81*	Ban Sale & Import (C)	--	--	Petitions sent 1/13/83.
Newhalen (M)	11/02/82*	Ban Sale & Import (V)	6/22	--	ALOL[3] did not pass.
Portage Creek (V)	12/01/82*	Ban Sale (C)	--	--	Petitions sent 11/30/82.
Togiak (M)	11/24/81*	Ban Sale & Import (V)	93/23	6/1/82	
Twin Hills (V)	12/22/81*	Ban Sale & Import (C)	--	--	Election being considere
Nondalton (M)	12/17/81*	--	--	--	
FAIRBANKS/DOYON REGION					
Arctic Village (V)	7/23/81	Ban Sale & Import (C)	--	--	
Chalkyitsik (V)	7/15/82*	Ban Sale & Import (V)	21/02	8/1/82	

Village (Municipality or Village)	Petition Sent (ALSC Visit*)	Option Considered or Voted Upon	Election Results (yes/no[2])	Effective Dates	Notes
Dot Lake (V)	10/01/82*	Ban Sale (C)	--	--	
Eagle (V)	9/30/82*	--	--	--	
Fort Yukon (M)	12/01/81	Ban Sale & Import (C)	--	--	
Huslia (M)	3/02/82*	Ban Sale & Import (V)	40/53	12/1/82	Second election; changed v
Kaltag (M)	11/11/82*	Ban Sale & Import (V)	50/27	1/3/83	Second election; same vote
Mentasta (V)	10/05/82*	--	--	--	
Minto (V)	6/23/81*	--	--	--	
Northway (V)	9/29/82*	Ban Sale & Import (C)	--	--	
Nulato (M)	1/07/82	--	--	--	Petitions sent 1/7/82.
Ruby (M)	8/02/82	--	--	--	Petitions sent 8/2/82.
Stevens Village (V)	4/28/82*	Ban Sale & Import (C)	--	--	Petitions sent 4/28/82.
Tanacross (V)	9/28/82*	--	--	--	
Tanana (M)	9/23/82*	Community Liquor Store (V)	90/15	--	Applying for a liquor lice
Tetlin (V)	10/04/82*	Ban Sale & Import (V)	54/7	1/1/83	
JUNEAU/SEALASKA REGION					
Angoon (M)	4/06/82*	Ban Sale & Import (V)	72/94	--	ALOL[3] did not pass.
Hydaburg (M)	2/24/82*	Selected Liquor Lic. (V)	43/63	--	ALOL[3] did not pass.
Klawock (M)	10/20/82*	Community Liquor Store (C)	--	--	
Metlakatla (Reservation)	2/14/81*	--	--	--	ALOL[3] not applicable.
Thorne Bay (M)	12/01/82	Ban Sale (V)	--	--	Election improprieties; selected liquor license ap plied for in January, 198
KODIAK REGION					
Larsen Bay (M)	7/19/82*	Ban Sale & Import (V)	17/38	--	ALOL[3] did not pass.
Old Harbor (M)	6/19/81*	--	--	--	Emergency ordinance to ba sale and import, 7/20/82.

Village (Municipality or Village)	Petition Sent (ALSC Visit*)	Option Considered or Voted Upon	Election Results (yes/no[2])	Effective Dates	Notes
KOTZEBUE/NANA REGION					
Ambler (M)	11/23/81*	Ban Sale & Import (V)	29/21	1/1/82	May schedule new electio
Buckland (M)	10/02/81*	Ban Sale & Import (V)	52/06	6/1/82	No special election ordi
Deering (M)	11/24/81*	Ban Sale & Import (V)	32/24	6/1/82	
Kiana (M)	2/03/82*	Ban Sale & Import (V)	80/60	12/1/82	Second election -- same results.
Kivalina (M)	9/29/81*	Ban Sale & Import (V)	65/27	5/1/82	
Kobuk (M)	11/18/82*	--	--	--	Petitions sent 11/12/82.
Noatak (V)	6/10/82*	Ban Sale & Import (V)	69/53	1/1/83	
Noorvik (M)	5/29/81*	Ban Sale & Import (V)	95/46	5/1/82	
Selawik (M)	11/23/81*	Ban Sale & Import (V)	67/66	1/1/82	
Shungnak (M)	11/24/81*	Ban Sale & Import (V)	59/23	4/1/82	
NOME/BERING STRAITS REGION					
Diomede (M)	9/07/81*	Ban Sale & Import (V)	27/12	10/1/81	
Elim (M)	6/18/81*	Ban Sale & Import (V)	47/17	9/1/81	
Gambell (M)	7/22/81*	Ban Sale & Import (V)	79/10	9/1/81	
Golovin (M)	9/16/81*	Ban Sale & Import (V)	26/19	7/1/81	
Koyuk (M)	7/13/81*	Ban Sale & Import (V)	57/08	9/1/81	
St. Michael (M)	10/14/82*	Ban Sale & Import (V)	—	--	1/83 special election ord
Savoonga (M)	8/20/81*	Ban Sale & Import (V)	103/81	11/1/81	nance enacted, new sale a
Shaktoolik (M)	9/14/81*	Ban Sale & Import (V)	30/23	11/1/81	importation petition beir circulated; election cont
Shishmaref (M)	10/12/82*	Ban Sale & Import (V)	82/47	2/1/83	plated.
Stebbins (M)	6/26/81*	Ban Sale & Import (V)	49/07	8/1/81	
Teller (M)	10/11/82*	--	--	--	
Unalakleet (M)	9/10/81*	--	--	--	

Village (Municipality or Village)	Petition Sent (ALSC Visit*)	Option Considered or Voted Upon	Election Results[2] (yes/no)	Effective Dates	Notes
Wales (M)	7/05/81*	Ban Sale & Import (V)	29/21	9/1/81	
White Mountain (M)	7/16/81*	Ban Sale & Import (V)	29/16	4/1/82	Not officially recorded.
NORTH SLOPE REGION					
Anaktuvuk Pass (M)	11/11/81*	Ban Sale & Import (V)	78/11	1/1/83	
Point Hope (M)	9/15/81*	Ban Sale & Import (V)	62/39	8/1/82	
Point Lay (V)	2/09/82*	--	--	--	Within incorporated borough; ALOL[3] not applicable.
Wainwright (M)	6/11/81	Ban Sale & Import (V)	61/42	8/1/82	
YUKON/KUSKOKWIM REGION					
Akiachak (M)	2/02/82*	--	--	--	
Akiak (M)	2/02/82	Ban Sale & Import (V)	--	--	Election improprieties.
Akolmiut (M)	--	Ban Sale & Import (V)	106/35	10/1/81	Not assisted by ALSC.
Alakanuk (M)	3/25/82	Ban Sale & Import (V)	92/24	8/1/81	
Aniak (M)	7/22/82*	Ban Sale & Import (V)	42/129	--	ALOL[3] did not pass.
Atmautluak (M)	9/01/81*	Ban Sale & Import (V)	60/12	6/1/82	
Brevig Mission	8/26/82	--	--	--	Petitions sent 12/82.
Chefornak (M)	9/08/82*	Ban Sale & Import (V)	48/29	11/1/82	Second election.
Chevak (M)	--	Ban Sale & Import (V)	--	--	Election improprieties.
Chuathbaluk (M)	10/08/81*	Ban Sale & Import (C)	--	--	
Crooked Creek (V)	12/09/81*	--	--	--	
Eek (M)	10/19/81*	Ban Sale & Import (V)	90/15	12/1/82	
Emmonak (M)	9/03/81	Ban Sale & Import (V)	54/12	11/1/81	
Goodnews Bay (M)	4/21/82	--	--	--	
Grayling (M)	12/02/81	Ban Sale & Import (V)	34/34	--	ALOL[3] did not pass; needs majority.

Village (Municipality or Village)	Petition Sent (ALSC Visit*)	Option Considered or Voted Upon	Election Results (yes/no[2])	Effective Dates	Notes
Holy Cross (M)	7/10/81*	Ban Sale & Import (V)	50/60	--	Election results never ce
Hooper Bay (M)	10/28/82*	Ban Sale & Import (C)	--	--	Election planned for mid-February.
Kipnuk (V)	9/20/81*	Ban Sale & Import (V)	82/07	11/1/82	
Kongiganak (V)	9/17/81*	Ban Sale & Import (V)	50/09	8/1/82	
Kotlik (M)	3/09/81*	Ban Sale & Import (V)	63/15	10/1/81	
Kwethluk (M)	10/12/81*	Ban Sale & Import (V)	82/30	3/1/82	
Lime Village (V)	1/21/82*	--	--	--	
Lower Kalskag (M)	1/15/82*	Ban Sale & Import (C)	--	--	Petition died.
Marshall (M)	--	Ban Sale & Import (V)	42/16	8/1/81	Not assisted by ALSC.
Mekoryuk (M)	5/21/81*	Ban Sale & Import (V)	48/10	10/1/81	
Mountain Village (M)	5/21/81*	--	--	--	
Napakiak (M)	10/02/81*	Ban Sale & Import (V)	54/14	4/1/82	
Napaskiak (M)	9/08/82*	Ban Sale & Import (V)	55/04	12/1/82	
Newtok (M)	11/26/82	--	--	--	Petition received 11/26/8
Nightmute (M)	9/08/82*	Ban Sale (V)	39/03	1/1/83	Second election expected.
Nunapitchuk (EV)	7/10/81*	--	--	--	Using emergency ordinance
Pilot Station (M)	7/10/81*	--	--	--	Using emergency ordinance
Platinum (M)	--	Ban Sale & Import (V)	11/08	2/1/82	CRA[3] assisted with electi
Quinhagak (M)	9/14/81*	Ban Sale & Import (V)	79/26	11/1/81	
Red Devil (V)	1/21/82	Ban Sale (V)	12/22	--	ALOL[3] did not pass.
St. Mary's (M)	9/01/81*	Ban Sale & Import (V)	63/48	10/1/81	
Scammon Bay (M)	11/09/81*	Ban Sale & Import (V)	57/10	1/1/82	
Shageluk (M)	6/22/82*	Ban Sale & Import (V)	--	--	ALOL[3] did not pass.

Village (Municipality or Village)	Petition Sent (ALSC Visit*)	Option Considered or Voted Upon	Election Results (yes/no[2])	Effective Dates	Notes
Sheldon Point (M)	9/03/81*	--	--	--	
Sleetmute (V)	8/10/82*	Ban Sale & Import (V)	23/20	8/1/82	
Stony River (V)	8/12/82*	--	--	--	
Toksook Bay (M)	10/03/81*	Ban Sale & Import (V)	78/32	12/1/81	
Tuluksak (M)	9/09/82*	Ban Sale & Import (V)	61/16	11/1/82	
Tununak (M)	5/21/81*	Ban Sale & Import (V)	90/11	9/1/81	
Tuntutuliak (V)	12/01/81*	Ban Sale & Import (V)	47/20	9/1/82	
Upper Kalskag (M)	1/15/82*	--	--	--	

NOTE[1]: The four option choices for municipalities (first and second-class and homerule cities) are:

1. Selected liquor license;
2. Community liquor license;
3. Banning the sale of alcoholic beverages;
4. Banning the sale and importation of alcoholic beverages.

Established villages may choose option 1, 3, or 4.

NOTE[2]: For those villages which have chosen the option to ban sale and importation, a "yes" vote means that a voter wishes to stop the sale and importation of alcoholic beverages. A "no" vote means that a voter does not wish to stop the sale and importation of alcoholic beverages under the state alcohol local option law.

NOTE[3]: ALOL -- Alcohol Local Option Law.
ALOE -- Alcohol Local Option Election.
CRA -- Community and Regional Affairs; Division of Local Government Assistance.

NOTE[4]: As of May 18, 1982, the United States Department of Justice approved the Alaska State Title 4 alcohol local option law submission under Section 5 of the Voting Rights Act. The state of Alaska is a "Voting

Rights Act State," which means that when there is any "change in the standard practice or procedure" in voting, the state or other appropriate agency is required to obtain approval from the United States Department of Justice.

This approval means that the alcohol local option law elections already held by municipalities in the state of Alaska are valid. This approval also means that the established villages can hold alcohol local option law elections with the assistance of the Division of Elections.

This approval means that no objection under the Voting Rights Act can be raised with respect to the alcohol local option law elections held unless someone has actually been denied his or her right to vote, thus prejudicing the election.

NOTE[5]: After receiving encouragement from many rural Alaskan priests, religious organizations and residents, the Alaska House of Representatives and Senate passed a law, Senate Bill 765, dealing with the sacramental wine exception to the state Title 4 alcohol local option law.

The new law changed A.S. 04.11.496 (b), which is the law allowing communities to vote to prohibit the sale and importation of alcoholic beverages. The amendment of A.S. 04.11.496 (b) stated that if a majority of the people in a community vote to prohibit the sale and importation of alcoholic beverages, a person "may not knowingly send, transport, or bring an alcoholic beverage into the municipality or established village, unless the alcoholic beverage is sacramental wine to be used for bona fide religious purposes based on tenets or teachings of a church, is limited in quantity to the amount necessary for religious purposes, and is dispensed only for religious purposes by a person authorized by the church or religious body to dispense sacramental wine."

This language means that the only alcoholic beverages which can come legally into a community which has voted to stop sale and importation of alcoholic beverages is wine to be used only in a religious service. The wine is to be an amount to be used only in religious service. Only a priest or someone authorized by the priest can receive the wine and give it to people in a religious ceremony.

(2) the use of the premises for storage is authorized by local zoning ordinances; and

(3) the premises are accessible for inspection as provided in AS 04.11.630. (§ 4 ch 131 SLA 1980)

Sec. 04.21.070. Enforcement. Peace officers shall investigate and report to the board violations of this title. (§ 4 ch 131 SLA 1980)

Sec. 04.21.080. Definitions. (a) In this title

(1) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when he is aware that his conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes it does not exist; a person who is unaware of conduct or a circumstance of which he would have been aware had he not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which he would have been aware had he not been intoxicated acts recklessly with respect to that risk

(b) In this title

(1) "alcoholic beverage" includes, but is not limited to, whiskey, brandy, rum, gin, wine, ale, porter, beer, and all other spirituous, vinous, malt and other fermented or distilled liquors intended for human consumption and containing more than one percent alcohol by volume;

(2) "board" means the Alcoholic Beverage Control Board;

(3) "bottling" means to put into a bottle, can, or other container;

(4) "designated premises" means any or all designated portions of a building or structure, rooms or enclosures in the building or structure, or real estate leased, used, controlled, or operated by a licensee for the

(5) "director" means the director of the Alcoholic Beverage Control Board;

(6) "distributing point" means a location where alcoholic beverages are distributed from a warehouse;

(7) "drunken person" means a person whose physical or mental conduct is substantially impaired as a result of the introduction of an alcoholic beverage into his body and who exhibits those plain and easily observed or discovered outward manifestations of behavior commonly known to be produced by the overconsumption of alcoholic beverages;

(8) "established village" means an unincorporated area that

(A) is within the circumference of a circle described by drawing a five-mile radius around a post office station;

(B) has 25 or more permanent residents;

(9) "licensed premises" means any or all designated portions of a building or structure, rooms or enclosures in the building or structure, or real estate leased, used, controlled, or operated by a licensee in the conduct of business for which he is licensed by the board at the specific address for which the license is issued;

(10) "local governing body" means, as appropriate, a city council, a borough assembly, or a traditional village council, but does not include a corporation established under the Alaska Native Claims Settlement Act;

(11) "municipality" means an incorporated city, an organized borough, or a unified municipality established under AS 29.68. (§ 4 ch 131 SLA 1980)

Am. Jur. 2d and C.J.S. references. — 45 Am. Jur. 2d Intoxicating Liquors §§ 4-21.

48 C.J.S. Intoxicating Liquors §§ 1-19.

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No. HB 157 Date on Bill: 2/4/83
Title: An act to expand the right to petition for a local option election"
Sponsor: Adams
Requestor: House Community and Regional Affairs Committee

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

			FY 83	FY 84	FY 85	FY 86		
Capital								
Operating								
Total				-0-	-0-	-0-		

b. Revenues:

Revenue							

2. Source of funds to offset fiscal impact of bill:

3. Assumptions: The Division does not expect an upsurge of petitions for local option elections as a result of this legislation, as it appears that the end of the "Alcohol Project" by Alaska Legal Services has contributed to a decrease of petition activity.

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor. It do not represent the policy of the Sheffield Administration or the final estimate of fis impact.

Prepared By: TPThoma Phone: 4611
Division: Elections Date: 2/23/83

Approved by Commissioner: Date:
Department:

5. Distribution:
Original to Legislative Finance
Copy to OMB
Copy to Sponsor

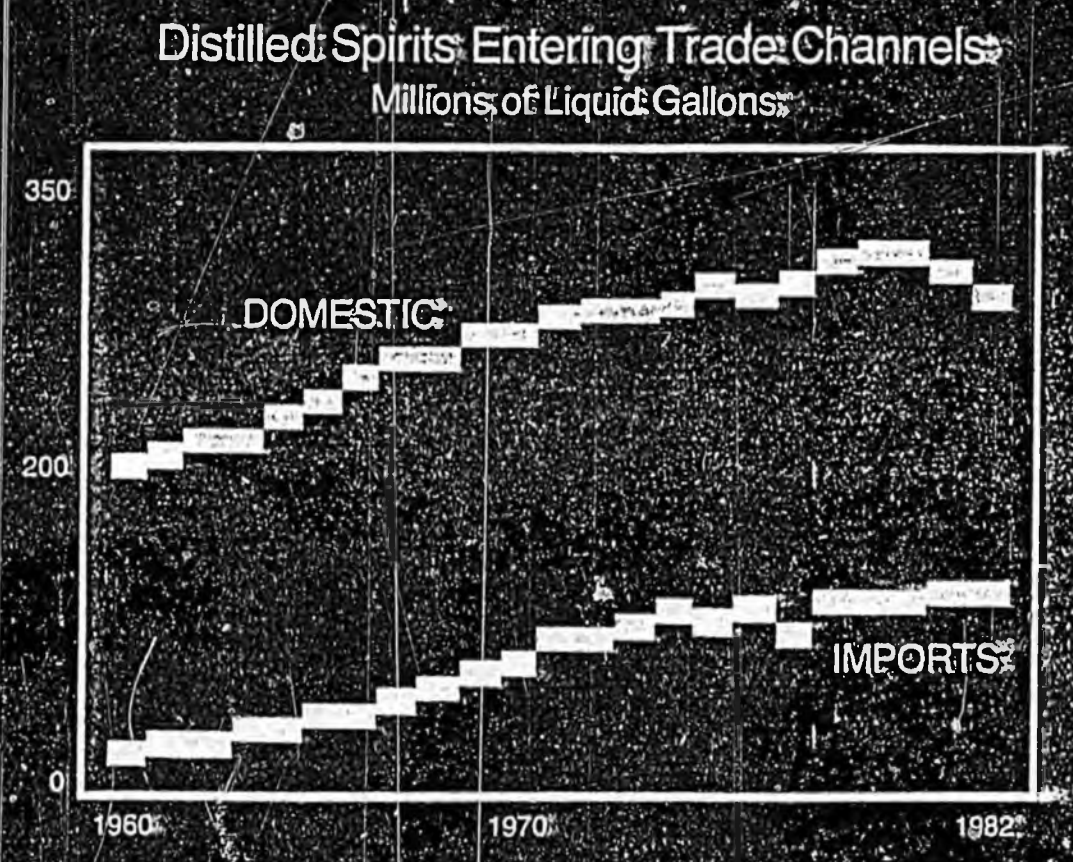
HB

158

City	Population 12/31/82	Pop Estimated 12/31/83	Liquor Licenses	Package Store	Restaurant Eating Pl	Clubs	Total
Anchorage	204,216	230,846	146	124	129	17	416
Cordova	2241	2307	6	6	—	2	14
Fairbanks	25747	27103	44	24	18	6	92
Haines	1049	1079	5	3	1	2	11
Homer	2897	3237	10	7	2	1	20
Juneau	22836	27519	27	16	16	2	61
Kenai	5231	5721	11	4	4	4	23
Ketchikan	7777	8414	21	15	15	6	57
Kodiak	5873	6072	13	6	4	2	25
McGrath	497	535	2	3	1	—	5
Nome	3430	3620	8	4	3	1	16
Palmer	2524	2738	6	3	2	2	13
Petersburg	3040	3046	4	5	2	2	13
Valdez	3694	3687	9	5	3	2	19
Wasilla	2386	2944	6	2	2	1	11
Wrangell	2376	2376	5	6	—	1	12
Seward	1828	1828	10	4	2	2	18

Annual Statistical Review 1982

DISTILLED SPIRITS INDUSTRY



DISTILLED SPIRITS COUNCIL OF THE UNITED STATES

City	Present # of on Premise Barlicenses	present Population	Population needed for 1 license for 1500	Population needed for Bill 1 for 2500
anchorage	145	230,000	(217,000)	362,500
Craig	4	907	6,000	10,000
Soldotna	7	3300	10,500	17,500
Kenai	11	5500	16,500	27,500
Fairbanks	44	27,000	66,000	110,000
Seward	10	1800	15,000	25,000
Homer	10	3200	15,000	25,000
Cordova	6	2300	7,500	15,000
Ketchikan	22	14,300	33,000	55,000
Sitka	11	8,200	16,500	27,500
Juneau	27	27,500	40,500	67,500
Wrangel	5	2300	7,500	12,500

anchorage is the only city where more licenses could be granted under 1 license per 1500 population

Table 40. Adult[a] Per Capita Consumption of Distilled Spirits, Wine, and Beer, by State, 1982

(Wine or Liquid Gallons)

State	Distilled Spirits	Wine	Beer	Adult Population[b] (000)
LICENSE STATES				
Alaska	4.64	4.80	42.75	297
Arizona	2.78	3.42	42.17	2,049
Arkansas	1.67	1.05	25.02	1,642
California	2.99	6.03	33.47	18,239
Colorado	3.11	3.87	37.76	2,219
Connecticut	3.19	3.84	25.52	2,370
Delaware	3.50	2.85	37.09	443
District of Columbia	7.09	8.67	35.10	494
Florida	3.29	3.34	37.17	7,987
Georgia	2.74	1.81	28.50	4,011
Hawaii	3.01	4.02	43.50	716
Illinois	2.82	3.02	34.20	8,310
Indiana	2.01	1.57	31.37	3,926
Kansas	1.77	1.11	29.26	1,761
Kentucky	2.01	0.99	27.76	2,625
Louisiana	2.67	2.53	36.44	3,020
Maryland	3.33	2.98	33.55	3,154
Massachusetts	3.23	4.17	41.05	4,366
Minnesota	2.94	2.31	33.04	2,993
Missouri	1.72	1.80	33.27	3,629
Nebraska	2.20	1.73	36.40	1,145
Nevada	6.59	6.45	47.79	651
New Jersey	3.01	4.41	29.47	5,534
New Mexico	2.30	2.94	40.83	937
New York	2.88	4.02	30.43	13,151
North Dakota	2.99	1.50	37.29	477
Oklahoma	2.20	1.38	28.63	2,296
Rhode Island	2.74	4.64	32.32	725
South Carolina	2.66	1.73	30.16	2,278
South Dakota	2.59	1.52	31.30	490
Tennessee	1.85	1.17	27.26	3,390
Texas	2.23	2.22	44.24	10,751
Wisconsin	3.04	2.56	46.92	3,451
License States	**2.77**	**3.34**	**34.16**	**119,527**
CONTROL STATES				
Alabama	1.92	1.49	24.23	2,812
Idaho	2.07	2.60	35.71	655
Iowa	1.73	1.09	33.63	2,109
Maine	2.71	2.58	31.92	824
Michigan	2.63	2.39	32.88	6,530
Mississippi	2.19	0.94	29.10	1,752
Montana	2.71	2.74	44.21	570
New Hampshire	6.21	4.93	45.91	697
North Carolina	2.24	1.80	25.94	4,402
Ohio	1.74	1.87	31.47	7,818
Oregon	2.32	4.41	32.01	1,938
Pennsylvania	1.82	1.93	34.71	8,876
Utah	1.47	1.26	24.83	974
Vermont	3.31	4.27	36.04	376
Virginia	2.31	2.26	30.00	4,053
Washington	2.62	4.41	32.05	3,105
West Virginia	1.46	1.19	26.90	1,405
Wyoming	3.21	2.01	43.38	347
Control States	**2.17**	**2.21**	**31.55**	**49,243**
United States	**2.59**	**3.01**	**33.57**	**168,769**

NOTE: Because of rounding, detail may not add to total.

[a] "Adult" is defined as persons 18 years of age and older.

[b] Adult population as of July 1, 1982.

Sources: Distilled Spirits Council of the United States, Inc.; Wine Institute; United States Brewers Association; Bureau of the Census, U.S. Department of Commerce.

Table 52. Number of Retail Outlets or Licenses Issued for the Sale of Distilled Spirits, Number of Outlets/Licenses per 1,000 Population, and Number of Persons per Outlet/License, 1982

State	Number of Outlets/Licenses				Total Population July 1, 1982 (000)	Number of Outlets/Licenses per 1,000 Population				Number of Persons per Outlet/License			
	On Premise	Off Premise	On and Off Premise	Total Licenses		On Premise	Off Premise	On and Off Premise	Total Licenses	On Premise	Off Premise	On and Off Premise	Total Licenses
LICENSE STATES													
Alaska	759	446	—	1,205	438	1.73	1.01	—	2.75	577	982	—	364
Arizona	1,275	1,361	1,523	4,159	2,860	0.45	0.48	0.53	1.45	2,243	2,101	1,878	688
Arkansas	553	676	—	1,229	2,291	0.24	0.30	—	0.54	4,143	3,389	—	1,864
California	14,274	11,416	—	25,690	24,724	0.58	0.46	—	1.04	1,732	2,166	—	962
Colorado	3,687	1,373	—	5,060	3,045	1.21	0.45	—	1.66	826	2,218	—	602
Connecticut	3,341	1,869	—	5,210	3,153	1.06	0.59	—	1.65	944	1,687	—	605
Delaware	456	293	177	926	602	0.76	0.49	0.29	1.54	1,320	2,055	3,401	650
District of Columbia	821	347	—	1,168	631	1.30	0.55	—	1.85	769	1,818	—	540
Florida	1,311	568	6,284	8,163	10,416	0.13	0.05	0.60	0.78	7,945	18,338	1,658	1,276
Georgia	1,773	1,586	—	3,359	5,639	0.31	0.28	—	0.60	3,180	3,555	—	1,679
Hawaii	1,071	769	—	1,840	994	1.08	0.77	—	1.85	928	1,293	—	540
Illinois	—	—	19,932	19,932	11,448	—	—	1.74	1.74	—	—	574	574
Indiana	1,193	1,704	3,495	6,392	5,471	0.22	0.31	0.64	1.17	4,586	3,211	1,565	856
Kansas	1,182	1,114	—	2,296	2,408	0.49	0.46	—	0.95	2,037	2,162	—	1,049
Kentucky	1,217	904	88	2,209	3,667	0.33	0.25	0.02	0.60	3,013	4,056	41,670	1,660
Louisiana	6,747	2,742	—	9,489	4,362	1.55	0.63	—	2.18	647	1,591	—	460
Maryland	554	1,065	3,261	4,880	4,265	0.13	0.25	0.76	1.14	7,699	4,005	1,308	874
Massachusetts	6,214	1,790	—	8,004	5,781	1.07	0.31	—	1.38	930	3,230	—	722
Minnesota	2,375	700	1,112	4,187	4,133	0.57	0.17	0.27	1.01	1,740	5,904	3,717	987
Missouri	—	4,110	4,295	8,405	4,951	—	0.83	0.87	1.70	—	1,205	1,153	589
Nebraska	430	564	2,058	3,052	1,586	0.27	0.36	1.30	1.92	3,688	2,812	771	520
Nevada	926	599	839	2,364	881	1.05	0.63	0.95	2.68	951	1,471	1,050	373
New Jersey	1,460	1,947	8,109	11,516	7,438	0.20	0.26	1.09	1.55	5,095	3,820	917	646
New Mexico	217	79	1,308	1,604	1,359	0.16	0.06	0.96	1.18	6,263	17,203	1,039	847
New York*	23,672	4,098	—	27,770	17,659	1.34	0.23	—	1.57	746	4,309	—	636
North Dakota	77	91	1,065	1,233	670	0.11	0.14	1.59	1.84	8,701	7,363	629	543
Oklahoma	—	831	—	831	3,177	—	0.26	—	0.26	—	3,823	—	3,823
Rhode Island	1,448	311	—	1,759	958	1.51	0.32	—	1.84	662	3,080	—	545
South Carolina	1,542	1,151	—	2,693	3,203	0.48	0.36	—	0.84	2,077	2,783	—	1,189
South Dakota	886	585	—	1,471	691	1.28	0.85	—	2.13	780	1,181	—	470
Tennessee	954	572	—	1,526	4,651	0.21	0.12	—	0.33	4,875	8,131	—	3,048
Texas	7,813	3,458	—	11,271	15,280	0.51	0.23	—	0.74	1,956	4,419	—	1,356
Wisconsin	12,699	1,763	—	14,462	4,765	2.67	0.37	—	3.04	375	2,703	—	329
Subtotal License States	100,927	50,882	53,546	205,355	163,597	0.62	0.31	0.33	1.26	1,621	3,215	3,055	797
CONTROL STATES													
Alabama	2,090	136	—	2,226	3,943	0.53	0.03	—	0.56	1,887	28,993	—	1,771
Idaho	885	132	—	1,017	965	0.92	0.14	—	1.05	1,090	7,311	—	949
Iowa	4,610	212	—	4,822	2,905	1.59	0.07	—	1.66	630	13,703	—	602
Maine	1,168	130	—	1,298	1,133	1.03	0.11	—	1.15	970	8,715	—	873
Michigan	9,217	3,883	—	13,100	9,109	1.01	0.43	—	1.44	988	2,346	—	695
Mississippi	584	677	—	1,261	2,551	0.23	0.27	—	0.49	4,368	3,768	—	2,023
Montana	—	145	1,528	1,673	801	—	0.18	1.91	2.09	—	5,524	524	479
New Hampshire	1,014	70	—	1,084	951	1.07	0.07	—	1.14	938	13,586	—	877
North Carolina	1,143	385	—	1,528	6,019	0.19	0.06	—	0.25	5,266	15,634	—	3,939
Ohio	11,867	427	—	12,294	10,791	1.10	0.04	—	1.14	909	25,272	—	878
Oregon	1,531	231	—	1,762	2,649	0.58	0.09	—	0.67	1,730	11,468	—	1,503
Pennsylvania	4,030	726	15,032	19,788	11,865	0.34	0.06	1.27	1.67	2,944	16,366	789	600
Utah	164	113	163	440	1,554	0.11	0.07	0.10	0.28	9,476	13,752	9,534	3,532
Vermont	1,069	63	—	1,132	516	2.07	0.12	—	2.19	483	8,190	—	456
Virginia	1,855	245	—	2,100	5,491	0.34	0.04	—	0.38	2,960	22,412	—	2,615
Washington	2,481	376	—	2,857	4,245	0.58	0.09	—	0.67	1,711	11,290	—	1,486
West Virginia	1,229	157	—	1,386	1,948	0.63	0.08	—	0.71	1,585	12,408	—	1,405
Wyoming	684	96	178	958	502	1.36	0.19	0.35	1.91	734	5,229	2,820	524
Subtotal Control States	45,621	8,204	16,901	70,726	67,938	0.57	0.12	0.25	1.04	1,489	8,282	4,020	961
TOTAL UNITED STATES	146,548	59,086	70,447	276,081	231,535	0.63	0.26	0.30	1.19	1,580	3,919	3,287	839

NOTE: Because of rounding, detail may not add to total.
*New York outlet data are for 1981.

FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT
P.O. Box 1250, Fairbanks, Alaska 99707-1250 (907) 452-2000

KENNETH STEPHEN BURNLEY
Superintendent of Schools

October 6, 1983

Mr. Richard Loeb
Alaska Distributors Co.
P. O. Box 549
Fairbanks, Alaska 99707

Dear Mr. Loeb:

On behalf of the Board of Education, I want to express my appreciation for your generous gift to the School District. "Preventing Alcohol Abuse" will be a vital curriculum resource for those developing classroom lessons on this important subject.

As I reviewed the brochure provided, I was very impressed by the emphasis on factual, nonjudgmental information. Moreover, the tailoring of learning units to specific age groups will greatly facilitate the use of the teaching materials.

Altogether, your contribution demonstrates the best traditions of corporate social consciousness and community involvement. Please accept my personal gratitude for this outstanding gift, and for your keen sense of public commitment.

Sincerely,

Kenneth S. Burnley
Superintendent

KSB:M
c Board of Education

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 28, 1984

SUBJECT: Liquor licenses (HB 158)

TO: Representative Charlie Bussell
Chairman, House Judiciary Committee

FROM: Russ Josephson
Legislative Counsel

In the committee discussions of CSHB 158(C&RA), there has been a fair amount of confusion about the language of AS 04.11.400, the statute setting population limitations for liquor licenses. In an attempt to clarify this section and, thus, the bill, I have rewritten this section in part. Although the concepts in this section remain complicated, I think that this rewrite is an improvement.

Please note that in this new draft subsection (k) has been eliminated, replaced by additional language inserted into subsections (a) and (b). Another change in this draft concerns the transfers of liquor licenses. There has been some confusion about transfers of licenses because there are two types, transfers of ownership and transfers of location. To clarify this distinction, I have changed the word "transfer" to "relocation" when referring to a transfer of the location of licensed premises. (If this change is acceptable, the references to transfers of this type throughout the title would be changed, as well, to read "relocation" rather than "transfer".)

Please let me know what you think of the following version of AS 04.11.400(a) and (b) and whether you would like a substitute bill drafted along these lines.

(a) Except as provided in (g)(2), (h), and (i) of this section, a new license may not be issued, and licensed premises may not be relocated, if the premises for the new license or if the relocated licensed premises would be located

(1) outside an incorporated city, a unified municipality, or an established village and, after the issuance or relocation, there would be within a radius of five miles of the licensed premises or location of premises sought to be licensed more than one beverage dispensary license and one package store license for each 3,000 population or fraction of 3,000 population and one license of each other type for each 1,500 population or fraction of 1,500 population; in determining the maximum number of a type of license allowed in a given area under this paragraph, the board shall include in its calculations the number of licenses of that type issued under (g) and (h) of this section for premises in that area;

(2) inside an incorporated city, a unified municipality, or an established village and, after the issuance or relocation, there would be inside the boundaries of the city, municipality or village more than one beverage dispensary license and one package store license for each 3,000 population or fraction of 3,000 population and one license of each other type for each 1,500 population or fraction of 1,500 population; in determining the maximum number of a type of license allowed in a given area under this paragraph, the board shall include in its calculations the number of licenses of that type issued under (g) or (h) of this section for premises in that area.

(b) If an application for a new license or for relocation of licensed premises is for premises to be located outside of an incorporated city, unified municipality, or established village and the radius described in (a)(1) of this section encompasses all of the city, municipality, or village and the population residing within the radius is less than

(1) 3,000, the board may deny the

(A) issuance of a beverage dispensary license or package store license;

(B) relocation of premises licensed as a beverage dispensary or package store;

(2) 1,500, the board may deny the issuance of any license or the relocation of any licensed premises.

If you have any questions or comments, please do not hesitate to call.

RJ:ojb
J4/013