Bill No. SB 121
Title "An Act authorizing capital punishment. . ."
Fiscal Note Assumptions
(Cont. p. 4)

BUDGET SUMMARY

Personal Services:		
An Attorney IV at Sitka-	66.6	
Juneau-	64.4	
Bethel-	83.6	
Palmer-	66.6	
Nome/Kotzebue-	86.6	
Three Attorney IV at Fairbanks-	219.7	
Four Attorney IV at Anchorage-	257.6	
Two Investigator III at Fairbanks-	100.8	
Two Investigator III at Anchorage	89.0	
A Legal Secretary I at Sitka-	28.2	
Bethel-	34.4	
Palmer-	28.2	
Juneau-	27.7	
Fairbanks-	30.6	
Two legal sectys. for Anchorage-	55.4	
TOTAL		1239.4
Travel:		
Based on 30 capital cases per year		
Guilt phase- 5.0		
Penalty phase- 5.0		
10.0 x 30 =		300.0
Contractual:		
Based on 30 capital cases per year		
Guilt phase- 25.0		
Penalty phase- 25.0		
50.0 x 30 = 1500.0		
Private contract for 1 case in Kodiak, Bristol Bay, Aleutians =	350.0	
Additional office space for Fairbanks and Anchorage -	56.7	
New office space for Sitka and Palmer	28.8	1935.5
Supplies:		26.0
Equipment:		45.5
TOTAL		3546.4

SENATE JUDICIARY COMMITTEE

NOTIFICATION SHEET

BILL # SB 49

DATE	NAME	PHONE NO.	TESTIFY
1/24/83	Bill Bryson 912 W. 6th Anch. 9950 1 (Ef Wing State Bar Assoc. VP & TLA)	277-8611	Yes
1/24/83	Kathy Kolkhorst (Kodiak Rep)	789-7558	Yes
1/24/83	PAUL H. GRANT (Fairbanks Bar) 181 Behrend Cir	6-2890	Yes
1/27/83	HOLLY PLOOG, ESQ ANCH 99501 701 W. 5th Ave	276-3644	
1/27/83	DELORES WEILER SRA Box 2094K ANCH. 99507 (ANCH Police Dept) FIELD DIRCT. ACLU OF AK.	344-7623	

SENATE JUDICIARY COMMITTEE

Date: 2/4/83

WITNESS REGISTER

SB 49

BILL NO.	NAME	MAILING ADDRESS	AFFILIATION
49	Dana Fabe	716 W. 4th Anchorage 99501	Public Defender
49	Tom Wagner	424 N. Franklin, Juneau	Private Cyn
49	DAN Hickey	Pouch K.C	Chief Prosecutor

CHAPTER = 11.41
SECTION = 11.41.100
TITLE = 11

HEADINGS TITLE 11.
Criminal Law.
CHAPTER 41.
Offenses Against the Person.
ARTICLE 1.
Homicide.

CITATION Sec. 11.41.100.

CATCH LINE

MURDER IN THE FIRST DEGREE.

TEXT (a) A person commits the crime of murder in the first degree if, with intent to cause the death of another person, he

(1) causes the death of any person; or

(2) compels or induces any person to commit suicide through duress or deception.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

HISTORY (Sec. 3 ch 166 SLA 1978)

CHAPTER = 22.07
SECTION = 22.07.020
TITLE = 22

HEADINGS TITLE 22.
Judiciary.
CHAPTER 07.
The Court of Appeals.

CITATION Sec. 22.07.020.

CATCH LINE
JURISDICTION.

TEXT (a) The court of appeals has appellate jurisdiction in actions and proceedings commenced in the superior court involving:

(1) criminal prosecution;
(2) post-conviction relief;
(3) children's court matters under AS 47.10.010(a)(1) including waiver of children's court jurisdiction over a minor under AS 47.10;
(4) extradition;
(5) habeas corpus;
(6) probation and parole; and
(7) bail.

(b) The court of appeals has jurisdiction to hear appeals of sentences of imprisonment imposed by the superior court on the grounds that the sentence is excessive or too lenient and, in the exercise of this jurisdiction, may modify the sentence as provided by law and the state constitution.

(c) The court of appeals has jurisdiction to review (1) a final decision of the district court in an action or proceeding involving criminal prosecution, post-conviction relief, extradition, probation and parole, habeas corpus or bail; and (2) the final decision of the district court on a sentence imposed by it. In this subsection "final decision" means a decision or order, other than dismissal by consent of all parties, that closes a matter in the district court.

(d) An appeal to the court of appeals is a matter of right in all actions and proceedings within its jurisdiction except that (1) the right of appeal to the court of appeals is waived if an appellant chooses to appeal the final decision of the district court to the superior court; and (2) the state has no right of appeal in criminal cases except to test the sufficiency of the indictment or information or to appeal a sentence on the ground that it is too lenient.

(e) The court of appeals may in its discretion (1) review a final decision of the superior court on an appeal from a district court in an action or proceeding involving criminal prosecution, post-conviction relief, extradition, probation and parole, habeas corpus or bail; (2) review the final decision of the superior court on appeal of a sentence imposed by the district court. In this subsection "final decision" means a decision or order, other than a dismissal by consent of all parties, that closes a matter in the superior court.

(f) The court of appeals may issue injunctions, writs and all other process necessary for the complete exercise of its jurisdiction.

(g) A final decision of the court of appeals is binding on the superior court and on the district court unless superseded by a decision of the supreme court.

HISTORY (Sec. 1 ch 12 SLA 1980)

JOE P. JOSEPHSON
DISTRICT G - ANCHORAGE
1526 F STREET
ANCHORAGE ALASKA 99501
(907) 277-4419

COMMITTEES
HEALTH EDUCATION & SOCIAL SERVICES (CHAIR)
JUDICIARY (VICE-CHAIR)
FINANCE
MAJORITY CAUCUS (CHAIR)

ALASKA STATE SENATE

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4907
(907) 465-4525

FOR IMMEDIATE RELEASE:
March 14, 1983

SENATE JUDICIARY COMMITTEE TO MEET

ON DEATH PENALTY FOR ALASKA

JUNEAU, AK. -- The Senate Judiciary Committee will hold a public hearing in Anchorage this Friday (March 18) on legislation (S.B. 121) which seeks to authorize the death penalty in Alaska, according to Anchorage Sen. Joe Josephson, vice-chair of the committee who will host the hearing.

The committee will begin hearing testimony at 9:30 a.m. in the fifth floor courtroom of the State Superior Court Building, located at 303 K Street.

"The issue of capital punishment is one of the most controversial in the state this year", Josephson said today. "Its ramifications can affect us and the way others view our society for years to come. Because of this, I urge every citizen with an opinion on whether or not the state should institute capital punishment to attend and participate in Friday's hearings on this critical issue".

In addition to capital punishment, S.B. 121 also seeks to classify first degree murder as a capital felony and seeks to establish preemptive sentencing procedures for other capital felonies.

-30-

For further information, contact:
Henry Lancaster, Tel.: 465-4907

031483

Alaska State Legislature
State Senate

Committee on Judiciary

Senator Bill Ray
Chairman
Senate Floor Leader

Pouch V
State Capitol
Juneau, Alaska 99811

March 14, 1983

Delores Weiler, Field Director
ACLU of Alaska
SRA Box 2094K
Anchorage, Alaska 99507

Dear Ms. Weiler:

For your information the Senate Judiciary Committee will hold a public hearing in Anchorage this Friday, March 18th on legislation pertaining to Senate Bill 121 - An Act authorizing capital punishment, classifying murder in the first degree as a capital felony, and establihing sentencing procedures for capital felonies.

The committee will begin hearing testimony at 9:30 a.m. in the fifth floor courtroom of the State Superior Court Building, Located at 303 K Street.

Attached herewith is a copy of the news release sent to the Anchorage news media.

Sincerely,

John Gabrielli

John C. Gabrielli
Counsel

jj
enclosure

Alaska State Legislature
State Senate

Committee on Judiciary

Senator Bill Ray
Chairman
Senate Floor Leader

Pouch V
State Capitol
Juneau, Alaska 99811

March 14, 1983

Bill Bryson, Esq.
Attorney at Law
912 West 6th Avenue
Anchorage, Alaska 99501

Dear Mr. Bryson:

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John C. Gabrielli
Counsel

jj
enclosure

Alaska State Legislature
State Senate

Committee on Judiciary

Senator Bill Ray
Chairman
Senate Floor Leader

Pouch V
State Capitol
Juneau, Alaska 99811

March 14, 1983

Dana Fabe, Esq
Public Defender
716 West 4th Avenue
Anchorage, Alaska 99501

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John C. Gabrielli

John C. Gabrielli
Counsel

jj
enclosure

FILE WITH SB 121

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: SB 121 Date on Bill: 2-11-83
Title: An Act authorizing captial punishment
Sponsor: Pettyjohn, etc.
Requestor: S. Judiciary

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

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

b. Revenues:

Revenue				

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

3. Assumptions:

No Fiscal Impact

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: Francis C. Allan Phone: 269-5691
Division: ~~Alaska State Troopers~~ Date: 2-16-83

Approved by Commissioner: [signature] Date: 2/25/83
Department: Public Safety

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

2/15/83

CHAPTER = 22.07
SECTION = 22.07.020
TITLE = 22

HEADINGS TITLE 22.
Judiciary.
CHAPTER 07.
The Court of Appeals.

CITATION Sec. 22.07.020.

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JURISDICTION.

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(5) habeas corpus;
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(c) The court of appeals has jurisdiction to review (1) a final decision of the district court in an action or proceeding involving criminal prosecution, post-conviction relief, extradition, probation and parole, habeas corpus or bail; and (2) the final decision of the district court on a sentence imposed by it. In this subsection "final decision" means a decision or order, other than dismissal by consent of all parties, that closes a matter in the district court.

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(e) The court of appeals may in its discretion (1) review a final decision of the superior court on an appeal from a district court in an action or proceeding involving criminal prosecution, post-conviction relief, extradition, probation and parole, habeas corpus or bail; (2) review the final decision of the superior court on appeal of a sentence imposed by the district court. In this subsection "final decision" means a decision or order, other than a dismissal by consent of all parties, that closes a matter in the superior court.

(f) The court of appeals may issue injunctions, writs and all other process necessary for the complete exercise of its jurisdiction.

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HISTORY (Sec. 1 ch 12 SLA 1980)

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

September 21, 1982

MEMORANDUM

TO: Representative Mitch Abood

FROM: Jonathan Sherwood
Research Staff

RE: Capital Punishment
Research Request 82-161

Carol Heros of your staff requested that we provide the following information on capital punishment:

- Which states currently have statutes authorizing capital punishment?
- Have any states reinstated capital punishment within the last five years?
- Is there statistical evidence demonstrating the effect of capital punishment on crime.
- Has Alaska ever had a capital punishment statute? If so, what is the history of the legislation and what were the reasons for its repeal?

We have contacted the National Conference of State Legislatures and the NAACP Legal Defense Fund in reponse to your questions. In addition, we have also reviewed State and Territorial statutes, the journals of the Territorial Legislature, and newspaper accounts of Alaska's abolition of capital punishment. We have obtained the following information.

Capital Punishment in Other States

Thirty-six states currently authorize the use of capital punishment. Most of these states have amended or replaced some portion of their statute in the last five years to bring them into compliance with guidelines set forth in the U.S. Supreme Court's decisions in five capital punishment cases (the laws in Florida, Georgia, and Texas were upheld; the laws in Louisiana and North Carolina were stricken).

I have attached a brief profile of the constitutional issues pertaining to capital punishment. This profile, published earlier this year by the National Conference of State Legislatures, also includes a compilation of legislative action undertaken in various states in response to the Supreme Court rulings.[1]

Reinstatement of Capital Punishment

Many states have enacted new capital punishment provisions to replace provisions affected by the 1976 Supreme Court rulings. However, according to information provided by the NAACP Defense Fund, New Jersey and South Dakota are the only states to have reinstated the death penalty in the last five years. New Jersey's capital punishment statute was declared unconstitutional in 1971; a new death penalty statute was not enacted until 1982. South Dakota repealed its death penalty in 1976 and reinstated it in 1979. In three states, New Mexico, Ohio and Oregon, new provisions pertaining to the death penalty were enacted three years after the previous provision had been declared unconstitutional.

Statistical Evidence on Deterrence

The two research methods used in studies of the deterrent effect of capital punishment appear to yield contradictory results. The method used by Thorsten Sellin and other researchers compares groups of states with similar socio-economic conditions. Each group contains at least one state which had retained the death penalty and one state which had abolished it. These studies have found no correlation between the existence of capital punishment and a reduced murder rate. However, only the legal status of capital punishment was compared; its frequency of use was not taken into account.

Isaac Ehrlich's statistical comparison of execution rates and murder rates, using data for the nation as a whole, suggests that an increase in the proportion of murder convictions punished by death leads to a decrease in the murder rate when several other factors are held constant. However, Ehrlich's critics have noted that if there is a small

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1 A list of the states which currently have capital punishment provisions is included in the profile. One additional state, New Jersey, has enacted a capital punishment statute since the list was compiled.

change in one of these other factors, such as a reduction in the conviction rate accompanying the increased use of the death penalty, the murder rate would increase.

Neither of the two research methods produce conclusive results. I am enclosing several articles addressing the statistical work done on this subject. Although much of the content focuses on technical statistical issues, the articles include useful summaries of the major studies and their critics. If you would like us to obtain any of the studies cited in the articles, we would be happy to do so.

Capital Punishment in Alaska

Alaska has not had a capital punishment statute since before statehood. The Territory of Alaska had a capital punishment provision for first degree murder and for the crime of obstructing a train or aircraft resulting in the loss of human life. The death penalty was mandatory for both of these crimes unless the jury returned a verdict of "guilty without capital punishment," in which case the penalty was life imprisonment. The 1933 edition of the Compiled Laws of Alaska (CLA) cites the 1883 CLA as the authority for the statutes. These statutes were amended by the Territorial Legislature in 1957 to eliminate the death penalty.

The Legislative Affairs Library has no record of the debate on the elimination of the death penalty. However, an Associated Press article appeared in the state's major newspapers following the bill's passage in the House on February 22, 1957. Warren Taylor, the bill's sponsor, is quoted as saying that the bill would prevent "the hideous mistake of executing an innocent man." Representative Taylor also cited a case where the death penalty could have been applied to a friend who committed murder while suffering the combined effects of cabin fever and raw alcohol.

If you have any questions, or if we can be of further assistance to you, please do not hesitate to contact us.

JS/sj

Attachments

NCSL Issue Profile: The Death Penalty
5 articles on deterrent effect of capital punishment (2 enclosures)

NCSL ISSUE PROFILE

DEATH PENALTY LAWS
****

BACKGROUND

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

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

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

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

In order for a death sentence to be imposed in GEORGIA, the sentencing body must find at least one aggravating circumstance specified by law to exist and make a recommendation that the individual be sentenced to death (GA Code Ann.

26-3102 and 27-2534.1) A history of assaultive behavoir is an example of an aggravating circumstance. Unlike Georgia, FLORIDA lists both aggravating and mitigating circumstances to be considered by the sentencing jury. The sentencing jury then submits an advisory sentence to the court (Fla. Stat. Ann. 921-141). Among the circumstances considered to be mitigating factors are the defendant's state of mind and if the defendant is of a particularily young age. When considering the appropriate sentence to be imposed, the mitigating factors can outweigh the aggravating factors. The trial judge in FLORIDA makes the final decision of what sentence to impose, life imprisonment or death.

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

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

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

RECENT LEGISLATION

To date, thirty-five states have laws to impose the death penalty for certain crimes.

(See appendix for statute citations) Only one state, MICHIGAN, has a constitutional prohibition against capital punishment (MI Constitution Art. 4, sec. 46). At least 12 states have considered new death penalty legislation within the past 3 years.

NEW MEXICO adopted a two-stage procedure by which to impose a penalty of death or life imprisonment. The sentencer must find at least one aggravating circumstance to exist before sentencing a convicted defendant to death and the

case is automatically reviewed by the state supreme court (NM Stat. Ann. 31-18-14). NEW MEXICO became the fourth state to provide lethal injection as the method of execution (NM Stat. Ann. 31-14-11). The other states are OKLAHOMA, TEXAS and IDAHO.

A similar two-tier law was adopted in SOUTH DAKOTA. Like the Georgia law, the state supreme court will review each case to determine factors specified in the law (1979SD Session Laws, Crim. Proc., Ch. 160, sect. 10). In addition, the trial judge is required to send a copy of the judgement to the governor who may investigate the case and has the power to reprieve or suspend the execution in order to complete the investigation. If the defendant appears to be mentally incompetent, the warden is to notify the governor who is to appoint a commission of physicians to examine the defendant. If the defendant is found to be incompetent, the governor is to suspend the execution (SD Session Laws, Ch. 160, sect. 20-27).

Ohio's law was declared unconstitutional in July 1978 by the U.S. Supreme Court. In LOCKET v. OHIO (98 S. Ct. 2954, at 4987), the court held that "a death penalty statute must not preclude consideration of relevant mitigating factors." The court held that death penalty laws should not be written to limit the number of mitigating factors allowed to be considered by the sentencing authority. However, 1981 legislation was enacted in OHIO to reinstate the death penalty.

After the Locket decision, the COLORADO adopted legislation which expands, but does not limit, the list of mitigating factors to be considered during the sentencing hearing. The statute permits the death penalty to be imposed upon finding that one or more aggravating factors, specified by law, exist and that no mitigating factors are found. In cases where the death sentence is imposed, the case will be automatically reviewed by the state supreme court (CRS 18-1-409).

In response to court decisions, CONNECTICUT and ALABAMA also enacted new laws in 1981. Other legislation to reinstate the death penalty was vetoed in KANSAS for the third consecutive year and in NEW YORK for the fifth consecutive year. Laws in OREGON and MASSACHUSETTS have recently been struck down but to date, revised laws have not been adopted.

Due to changing public opinion, legislative revision, and court review, the number and structure of state laws is constantly changing. Most state legislation has been patterned after the FLORIDA, GEORGIA, and TEXAS laws. However state laws continue to be challenged and new legislation is expected to be introduced in state legislatures again next year.

REPORTS AND PUBLICATIONS

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

Papp, Dennis M., "State Capital Punishment Schemes Expressly Upheld by the U.S. Supreme Court", Ohio Legislative Service Commission, April 13, 1979. (Available through NCSL's Legislative Information System.. Document RCH7903198.)

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

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

STATE	METHOD	# OF PERSONS ON DEATH ROW
ALABAMA Act. No. 81-178, H.B. 297, Regular Session 1981, 1981 Acts p. 203	electrocution	50
ARIZONA Ariz. Const. art. 22, sec. 22 Rev. Stat. Ann. Secs. 13-703, 704.	gas	36 Ariz.
ARKANSAS Ark. Stat. Ann. secs. 41-803, 41-1351, 41-3952	electrocution	21
CALIFORNIA Calif. Penal Code Secs. 37, et. seq., 3604, 4500 (Deering)	gas	190
COLORADO Colo. Rev. Stat. 16-11-401, 18-1-105, 18-1-409	gas	1
CONNECTICUT Conn. Gen. Stat. 53A-46 revised 1981	electrocution	
DELAWARE Del. Code Ann. Tit. 11, Sec. 4209	hanging	4
FLORIDA Fla. Stat. Ann. sec. 922.10 (West)	electrocution	157
GEORGIA GA Code Ann. sec. 27-2512	electrocution	107
IDAHO Idaho Code sec. 18-11-19 (2716)	lethal injection	0
ILLINOIS Ill. Ann. Stat. Ch. 38 Secs. 119-5, 1005-1-9	electrocution	39
INDIANA Ind. Code Ann. 35-1-46-9 (Burns)	electrocution	10
KENTUCKY KY Rev. Stat. Ann. sec. 431.220 (Baldwin)	electrocution	9
LOUISIANA LA Rev. Stat. Ann. Sec 15:569 (West)	electrocution	9
MARYLAND MD Ann Code Art 27, sec. 71	gas	5

MISSISSIPPI	Miss. Code Ann. sec. 99-19-51	gas	21
MISSOURI	MO Ann. Stat. sec. 546.720 (Vernon)	gas	12
MONTANA	Mont. Rev. Codes Ann. sec. 95-2303	hanging	3
NEBRASKA	NE Rev. Stat. sec. 29-2532	electrocution	12
NEVADA	Nev. Rev. Stat. sec. 176.355	gas	11
NEW HAMPSHIRE	NH Rev. Stat. Ann. sec. 630:5	hanging	0
NEW MEXICO	NM Stat. Ann. secs. 31-14-11 et seq. 31-18-2	lethal injection	1
NORTH CAROLINA	N.C. Gen. Stat. secs. 15-187,188	gas	16
OHIO	Ohio Senate Bill 1, adopted 1981	electrocution	0
OKLAHOMA			
	OK Stat. Ann. tit. 22, sec. 1014	lethal injection	39
PENNSYLVANIA	Pa. Stat. Ann. Tit. 18, secs. 1102, 1311; 585. 19 sec. 1121 (Pardon)	electrocution	23
SOUTH CAROLINA	SC Code secs. 16-3-20, 24-3-530	electrocution	21
SOUTH DAKOTA	1979 SD Session Laws. Crim Pro. Ch. 160 sec. 10, 20-27	electrocution	0
TENNESSEE	Tenn. Code Ann. sec. 40-3117	electrocution	24
TEXAS	Tx. Code Crim. Proc. Ann. art. 43.14	lethal injection	145
UTAH	UT. Code Ann. sec. 77-36-16	firing squad	4 (recent amendment repealed hanging as an optional method)
VERMONT	VT. Stat. Ann. Tit. 13, sec. 7106	electrocution	0
VIRGINIA	Va. Code sec. 53-318	electrocution	18
WASHINGTON	Wa. Rev. Code Ann. sec. 10.70.090	hanging	5
WYOMING	WY. Stat. Sec. 7-13-405	gas	1

Information on number of persons on death row provided by ACLU

9 are women 367 are black 474 are white 40 are hispanic 5 are native American 2 are Asians 3 unknown ACLU points out that some individuals on death row are sentenced in more than one state and therefore, the numbers do not add up.

****
* NCSL STAFF CONTACT: Mary Fairchild *
* 303/623-6600 *
* REV. DATE: 01/15/82 *
****

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

November 30, 1981

MEMORANDUM

TO: Representative Randy Phillips

ATTN: Janet Seitz

FROM: Deb Pomeroy

RE: Death Penalty Statutes
Research Request 81-199

Attached is a copy of the letter sent to Cindy Bradford regarding her questions about the number of states having the death penalty and whether Alaska has ever had a death penalty statute, which Janet Seitz of your staff requested we answer.

dp

Attachment

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

November 30, 1981

Cindy Bradford
Box 110 Marcus Street
Eagle River, Alaska 99588

Dear Ms. Bradford:

Representative Phillips requested that we reply to your questions regarding the number of states that have the death penalty; how long they have been in effect; and whether or not Alaska has ever had the death penalty.

The Book of the States 1980-81 explains that the 1972 Supreme Court decision in Furman V. Georgia outlawed capital punishment, but did not explicitly establish the unconsitutionality of the death penalty. Many states interpreted the Supreme Court decision to mean that the death penalty could be mandatory rather than discretionary. In the next four years, states reinstated or extended mandatory death penalty statutes for selected crimes. In 1976, after several states' laws had been challenged, the Supreme Court struck down mandatory death penalty laws, but upheld the constitutionality of capital punishment. As a result of these two decisions, all capital punishment laws, with the exception of Vermont's[1] have been instituted or reinstituted in the last decade.

According to Mary Fairchild of the Law & Justice Department at the National Conference of State Legislatures in Denver, 36 states listed on the following page, currently have the death penalty.

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[1]Vermont is the only state that has a Pre-Furman law; however, no one has been sentenced to the death penalty since the ruling, so the law has gone unchallenged.

Alabama[2]	Idaho	Nebraska	South Carolina
Arizona	Illinois	Nevada	South Dakota
Arkansas	Indiana	New Hampshire	Tennessee
California	Kentucky	New Mexico	Texas
Colorado	Louisianna	New York[4]	Utah[6]
Connecticut[3]	Maryland	North Carolina	Vermont
Delaware	Mississippi	Ohio[5]	Virginia
Florida	Missouri	Oklahoma	Washington
Georgia	Montana	Pennsylvania	Wyoming

[2]A federal court declared the Alabama law unconstitutional in June of 1980; however, a new law was passed in 1981 reinstituting the death penalty.

[3]A state trial court declared the Connecticut law unconstitutional in 1980; the Legislature has since amended the law to satisfy the objections of the court

[4]New York capital punishment laws were declared partially unconstitutional in 1977 with the remaining statutes limited so as to make the death penalty almost non-existent. For the last 5 years, the governor has vetoed any new laws concerning capital punishment

[5]Ohio law was declared unconstitutional in 1978; a new law was passed in 1981

[6]Utah has amended the law abolishing the choice between electrocution and firing squad. The means of capital punishment is now a firing squad only.

Of the 15 states that do not currently have the death penalty, there are 3 that are considering it:

Kansas: a capital punishment law has been passed by the legislature and vetoed by the governor for the last 3 consecutive years.

Massachusetts: the law was declared unconstitutional in 1980 and a move has been made to put a constitutional amendment on the next ballot;

New Jersey is considering a capital punishment law;

In answer to your last question, Alaska, as a state, has never had a c al punishment law.

Sincerely,

Deb Pomeroy

Deb Pomeroy

cc: Representative Phillips

AMERICAN JUSTICE

Not Often Enough

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

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

The real world, where—

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

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

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

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

A Quiz of Your Legal IQ

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

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

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

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

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

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

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

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

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

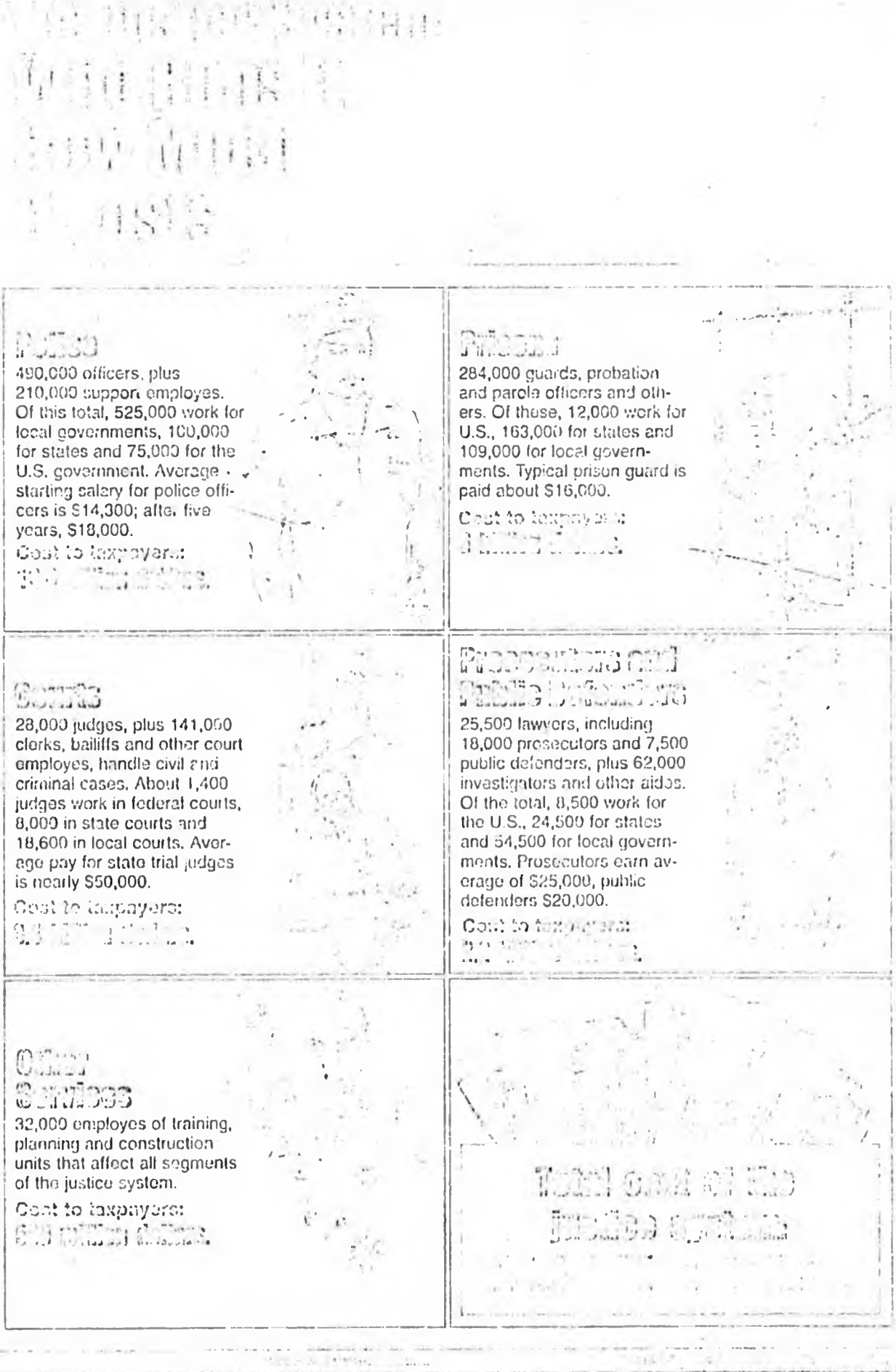
9. Junior attorneys in law firms are paid an average salary of:
A. $15,900. B. $35,200. C. $26,600.

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

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

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

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



Police

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

Cost to taxpayers:

Prisons

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

Cost to taxpayers:

Courts

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

Cost to taxpayers:

Prosecution and Public Defenders

25,500 lawyers, including 18,000 prosecutors and 7,500 public defenders, plus 62,000 investigators and other aides. Of the total, 8,500 work for the U.S., 24,500 for states and 54,500 for local governments. Prosecutors earn average of $25,000, public defenders $20,000.

Cost to taxpayers:

Other Services

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

Cost to taxpayers:

The Complex Quest for Criminal Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

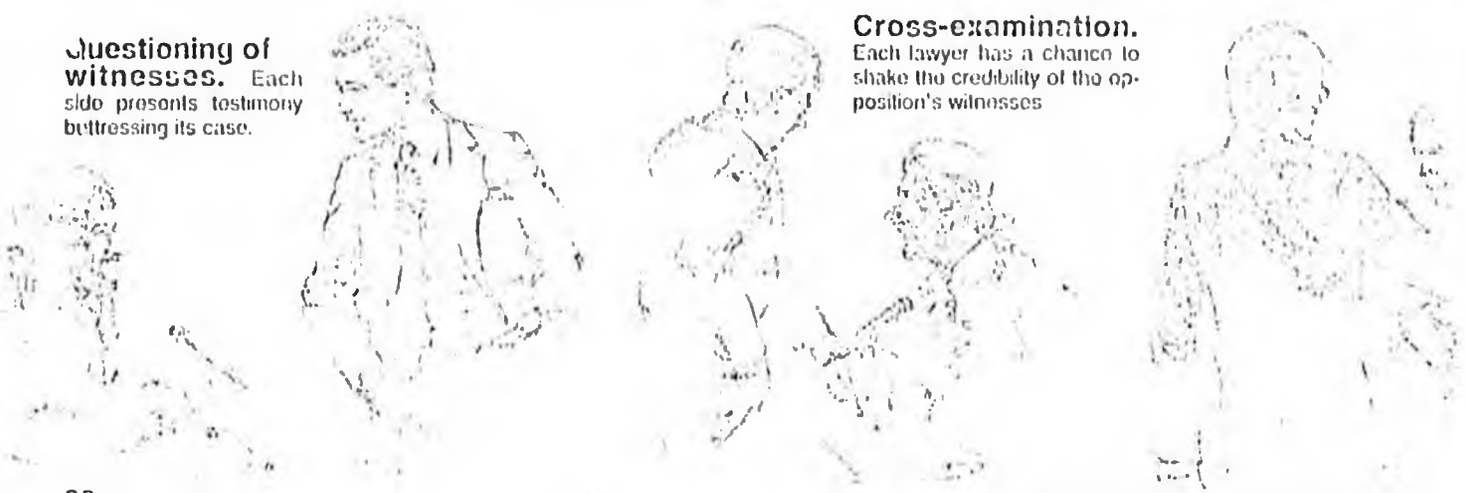
Many legal battles are fought out of the jury's presence, with both sides debating before the judge what evidence may be presented to jurors.

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

"We are obligated as lawyers to do

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

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



When Juveniles Run Afoul of the Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

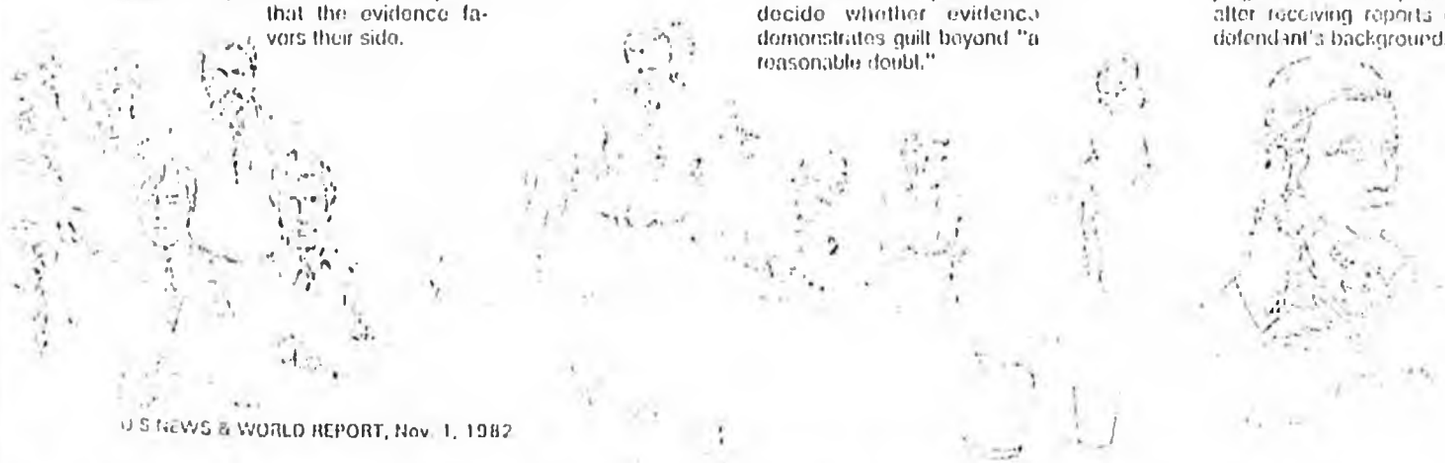
Defendants held in custody before their trials begin serving prison terms—if one is imposed—while the appeal is pending. Some of those who were out on bail before trial are locked up once the jury returns a guilty verdict, but many remain free until appeals are exhausted.

A person can seek reversal of a con-

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

Our Rights in Court: How They've Changed

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

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

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

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

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

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

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

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

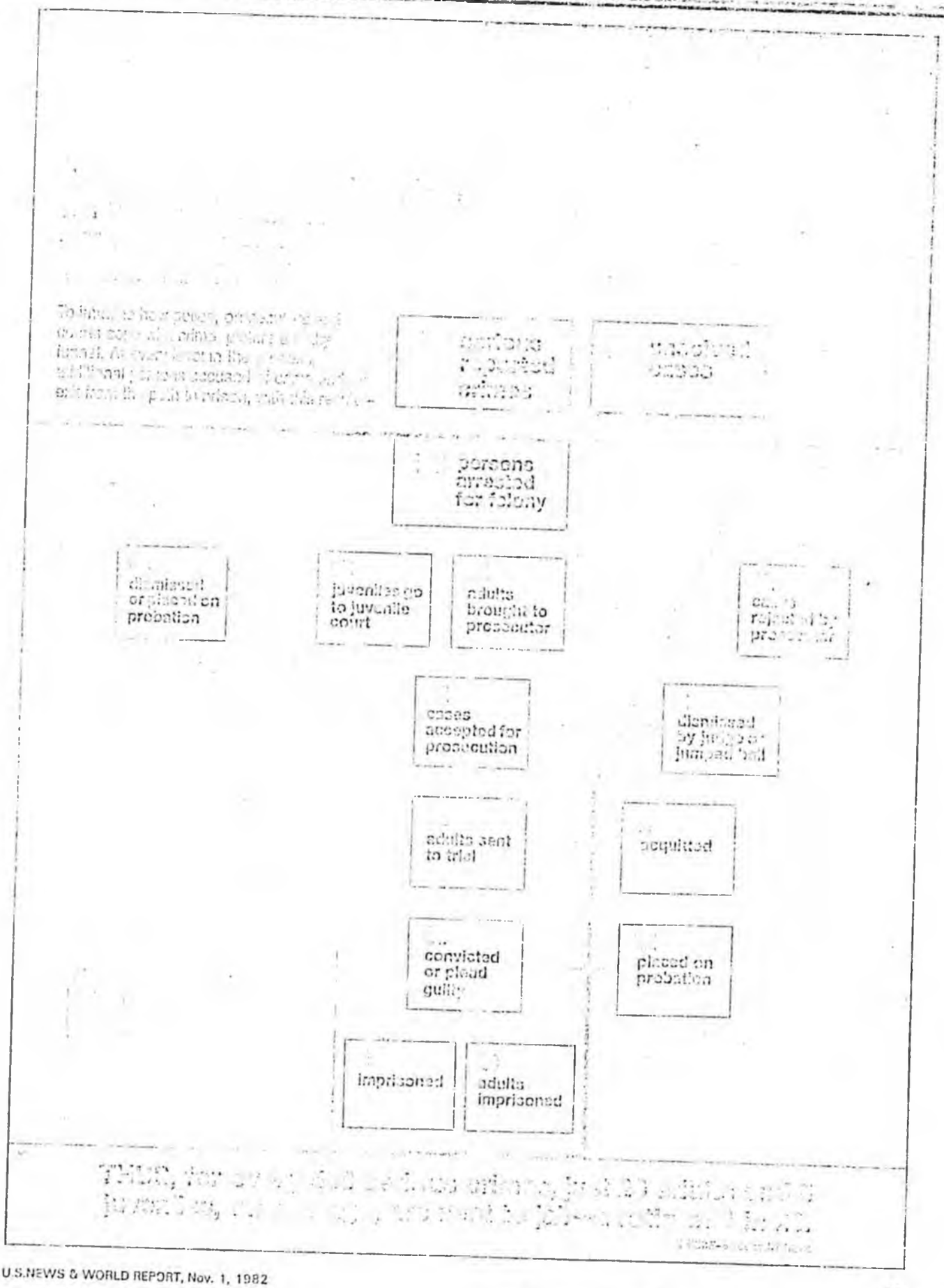
Proponents say the procedure keeps law officers from abusing persons in custody. "I wouldn't want to see the third degree come back," says one prosecutor.

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

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

Other defendants' rights—all widely accepted:

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


persons arrested for felony
dismissed or placed on probation
juveniles go to juvenile court
adults brought to prosecutor
cases accepted for prosecution
dismissed by judge; jumped bail
adults sent to trial
acquitted
convicted or plead guilty
placed on probation
imprisoned
adults imprisoned

Police Find Themselves in Double Squeeze

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

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

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

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

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

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

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

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

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

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

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

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

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

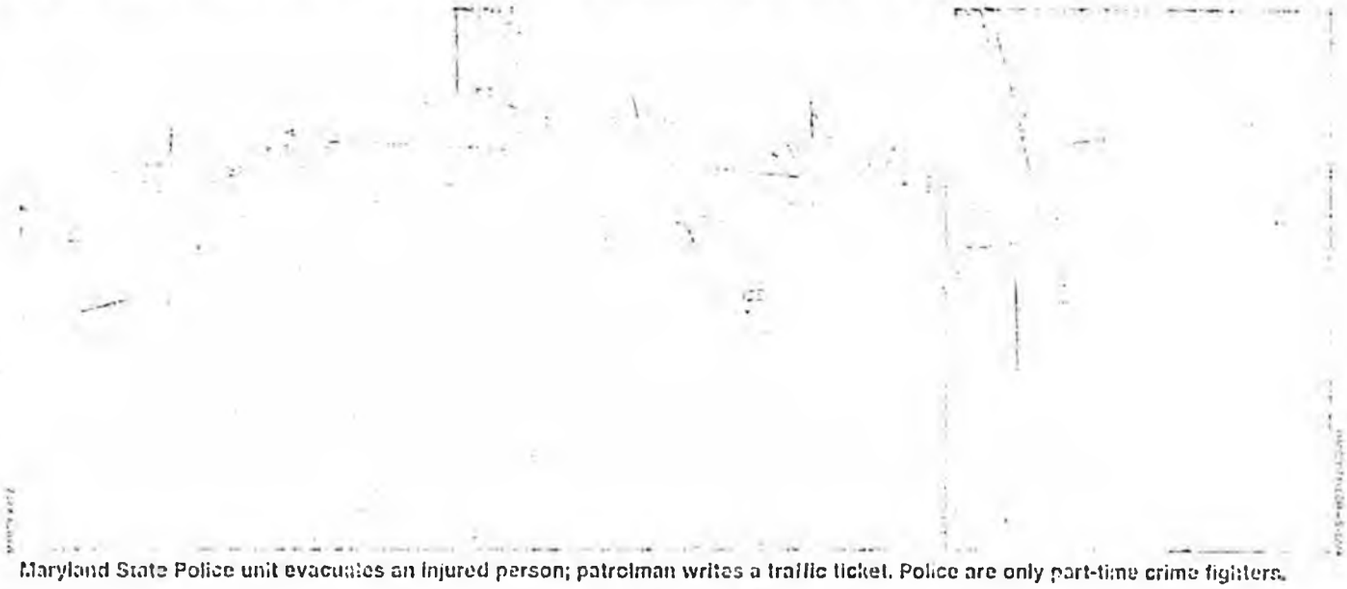
New York officer on his beat. Pressures on police are mounting.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Prosecutor—An Image And In Fact

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jury System Not Perfect, But It Works

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lawyer Robert F. Hanley says simulated opening arguments before surrogate jurors helped win a 1.3-billion-dollar antitrust judgment in 1980 for his client, MCI Communications Corporation, against AT&T. The award was the largest antitrust jury verdict in U.S. history. Hanley and associates honed their case by watching the practice jury deliberate behind a see-through mirror.

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

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

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

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

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

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

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

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

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

Picking Judges

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

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

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

In the states. Selection and duties of the 26,600 state and local judges vary widely. All states have supreme courts, 30 have intermediate appeals courts and all states have trial courts. Most cities have courts limited to city-law infractions, mostly traffic cases.

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

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

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

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

Corruption is Still a Fact of Life

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Get-Tough Approach Makes a Comeback

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

Lock 'em up and throw away the key!

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

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

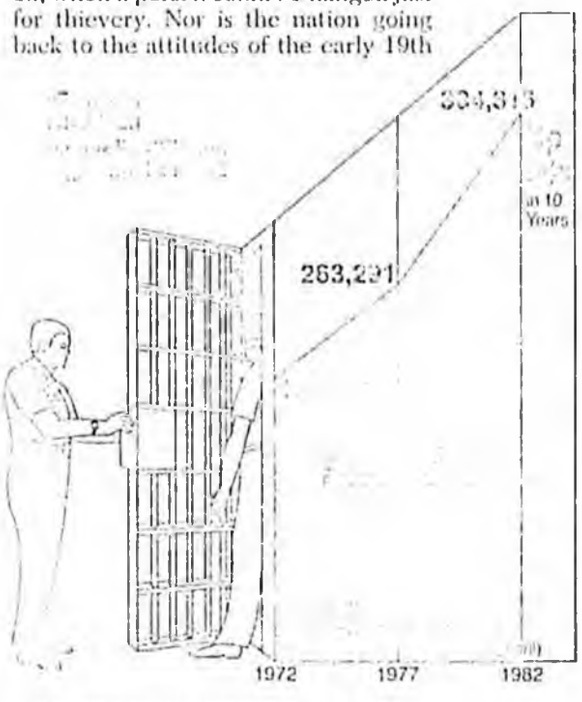
Legislators in state after state, angered by the many ex-convicts who return to crime, have been enacting mandatory prison terms. Judges are handing out longer sentences on their own. "There's a lot of pressure to make the system swift and harsh," says criminologist Sheldon Messinger of the University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

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

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

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

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



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

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

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

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

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

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

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

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

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

Polls consistently find that Ameri-

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

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

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

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

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

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

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

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

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

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

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

Louisiana's electric chair.

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

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

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

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

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

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

The Legal Logjam On Death Row

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

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

Capital punishment has had a checkered history in America, starting in colonial days when a number of crimes, ranging from murder to witchcraft were hanging offenses. In the late 1960s and early 1900s, various legislatures abolished the death penalty as being too harsh. But by the 1920s, many states had restored it, and for a time almost 200 were being executed each year.

In the 1960s, the civil-rights movement was galvanized into action by evidence that blacks were being executed more often than whites committing similar crimes. A legal attack was launched, and in 1972 the Supreme Court held that Georgia, which alone has accounted for nearly 10 percent of the 3,800 U.S. executions in the last 50 years, had violated the Constitution's ban on "cruel and unusual punishment." The ruling struck down all state death-penalty laws.

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

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

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

In Prisons, the Search Is From Bad to Worse

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

WARTBURG, Tenn.

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

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

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

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

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

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

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

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

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

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

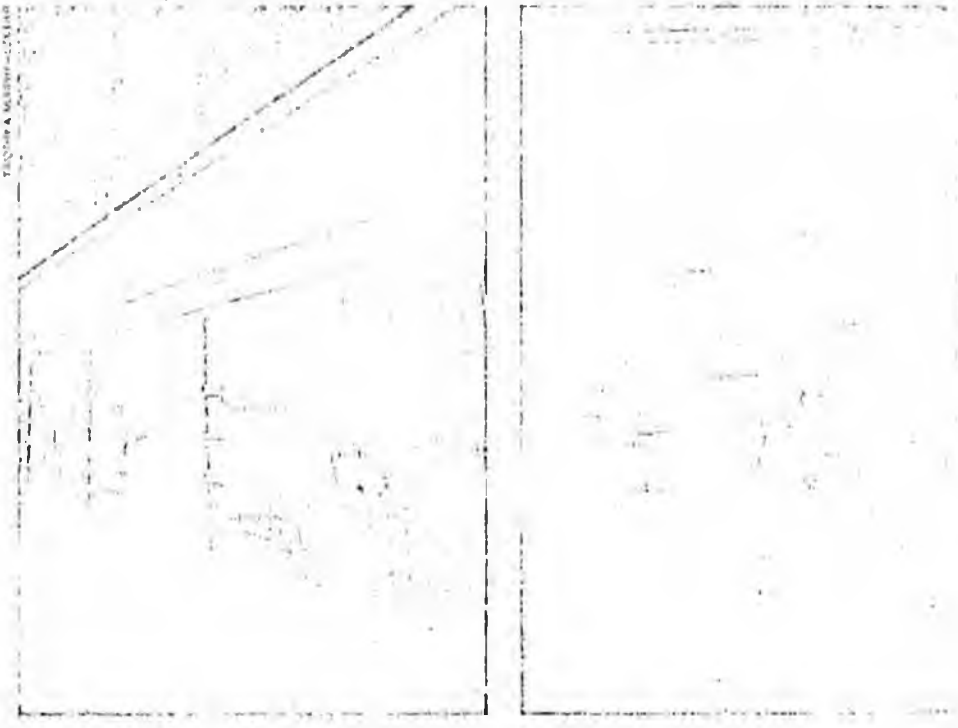
Campus life. From the road, the Morgan County prison looks like a high school with few windows. The warden, Otie Jones, likes to call it a "campus." Inside a 17-acre compound surrounded by a 10-foot-high chain-link fence and arranged in a circle are 16 dormitories that house about 25 men each. All but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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Trauma and Tedium of a Lawsuit

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

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

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

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

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

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

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

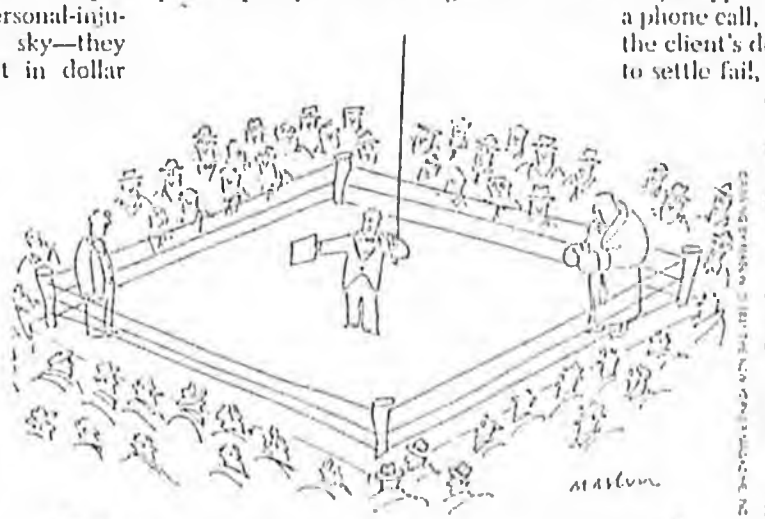
In fact, more than half of the lawyers in the United States rarely if ever set foot in a courtroom. Instead, they may advise corporate clients on tax and other business matters or negotiate sticky situations on their behalf. Many lawyers with individual clients also practice preventive law—preparing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

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

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

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

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



"In [illegible] corner, a man prone to costly and lengthy litigation."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Costly Trials? Not Every Time

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

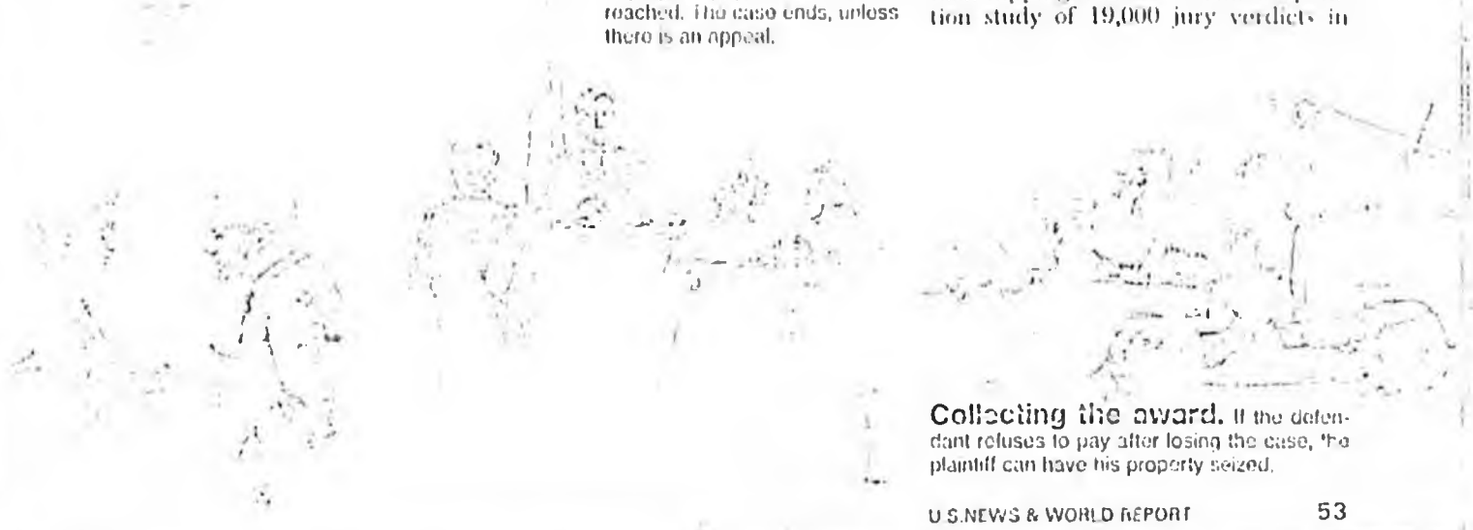
When the trial ends, 31 states do not require, as in most criminal trials, that the verdict be a unanimous one. In all states, however, the agreement of at least two thirds of the jurors—if not more—is required.

The odds of winning?

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

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

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



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

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

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

Nationally, malpractice awards against doctors and hospitals averaged $450,000 in 1981.

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

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

Hour of reform. As courts have been strained to the breaking point by the litigation explosion, reformers have sought to reduce case loads. The number of federal judges had increased from 497 in 1975 to 647 by late 1982. Yet the case load per judge actually increased 36.5 percent over the seven-year period.

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

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

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

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

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

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

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

Time of Ferment in Family Courts

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

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

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

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

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

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

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

What Happens To Little Cases

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

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

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

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

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

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

Some pointers:

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

The Pervasive Influence of Lawyers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ways to Pick A Good Attorney

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

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

The "Hidden Judiciary" And What It Does

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

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

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

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

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

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

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

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

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

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

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

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

At the National Labor Relations Board, 110 administrative-law judges in

Washington, San Francisco, New York and Atlanta hear about 1,200 unfair-labor-practice and union-representation cases a year, out of 40,000 filings. The rest are settled by NLRB bureaucrats or dismissed.

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

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

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

Special Courts For Special Cases

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

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

Court of International Trade—Set up in 1990, its nine judges review government actions dealing with imports, such as disputes over classification or valuation of goods and antidumping laws. Handled 3,207 cases in 1981. Sits in New York.

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

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

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

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

Court of Military Appeals—Established in 1950 as the final appellate tribunal to review court-martial convictions in the armed services. Three civilian judges, who serve 15-year terms as presidential appointees, decided 105 cases in 1980.

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

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

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

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

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

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

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

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

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

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

A Supreme Court With Its Back to the Wall

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

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

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

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

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

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

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

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

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

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

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

In recent decades, split opinions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Frank G. Carrington**

I. Introduction

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

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

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* Executive Director, Victims' Assistance Legal Organization (VALOR) (formerly, the Crime Victims Legal Advocacy Institute, Inc.). LL.B., 1960, University of Michigan; LL.M., 1970, Northwestern University.

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

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

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

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

II. Deterrence: A Common Sense Concept

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

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

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

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

5. *Id.* at 61.

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

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

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

By elevating a metaphorical illustration of the difficulties that

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

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

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

Id.

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

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

10. *Id.* at 440.

11. *Id.*

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

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

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

Opponents of deterrence often base a second argument on sta-

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

14. *Id.* at 175.

15. *Id.* at 175-76.

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

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

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

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

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

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

tice, "an impotent society."[20]

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

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

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

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

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

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20. Address by Chief Justice Warren E. Burger, American Bar Association Annual Convention (Feb. 8, 1981), *noted in* Bazelon, *supra* note 9, at 438.

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

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

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

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

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

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

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

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

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

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

III. Death and Deterrence: The Capital Punishment Controversy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Deterrent Effect of Capital Punishment: Another View, 85 AM. ECON. REV. 44 (1977); 4. *Symposium: Capital Punishment in the United States*, 14 CRIM. L. BULL. 5 (1978).

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

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

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

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

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

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

39. *Id.*

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

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

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

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

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

43. *Id.*

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

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

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

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

IV. Positive Deterrence Through Third Party Victims' Rights Litigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55. *Id.*

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

57. *Id.*

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

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

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

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

60. Areas other than the handling of prisoners also have utilized the concept of positive deterrence through victim lawsuits against negligent third parties. For example, victims who have been injured because of a failure of security on leased premises have successfully sued and recovered. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970); Duarte v. State, 84 Cal. App. 3d 729, 148 Cal. Rptr. 804 (1978); O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977). Likewise, innkeepers have been held liable for the failure to provide proper security for guests who were victimized. *See, e.g.*, Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp. 1210 (S.D.N.Y. 1976). Finally, owners of premises have been held liable to business invitees. *See, e.g.*, Quinn v. Smith, 57 F.2d 784 (5th Cir. 1932); Taylor v. Centennial Bowl, 65 Cal. 2d 114, 416 P.2d 793, 52 Cal. Rptr. 569 (1966); Earle v. Colonial Theater Co., 82 Mich. App. 54, 266 N.W.2d 466 (1978).

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

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

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

62. *Id.*

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

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

V. Conclusion

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

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

COVER STORY

An Eye for an Eye

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

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

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

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

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

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

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

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

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

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

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

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

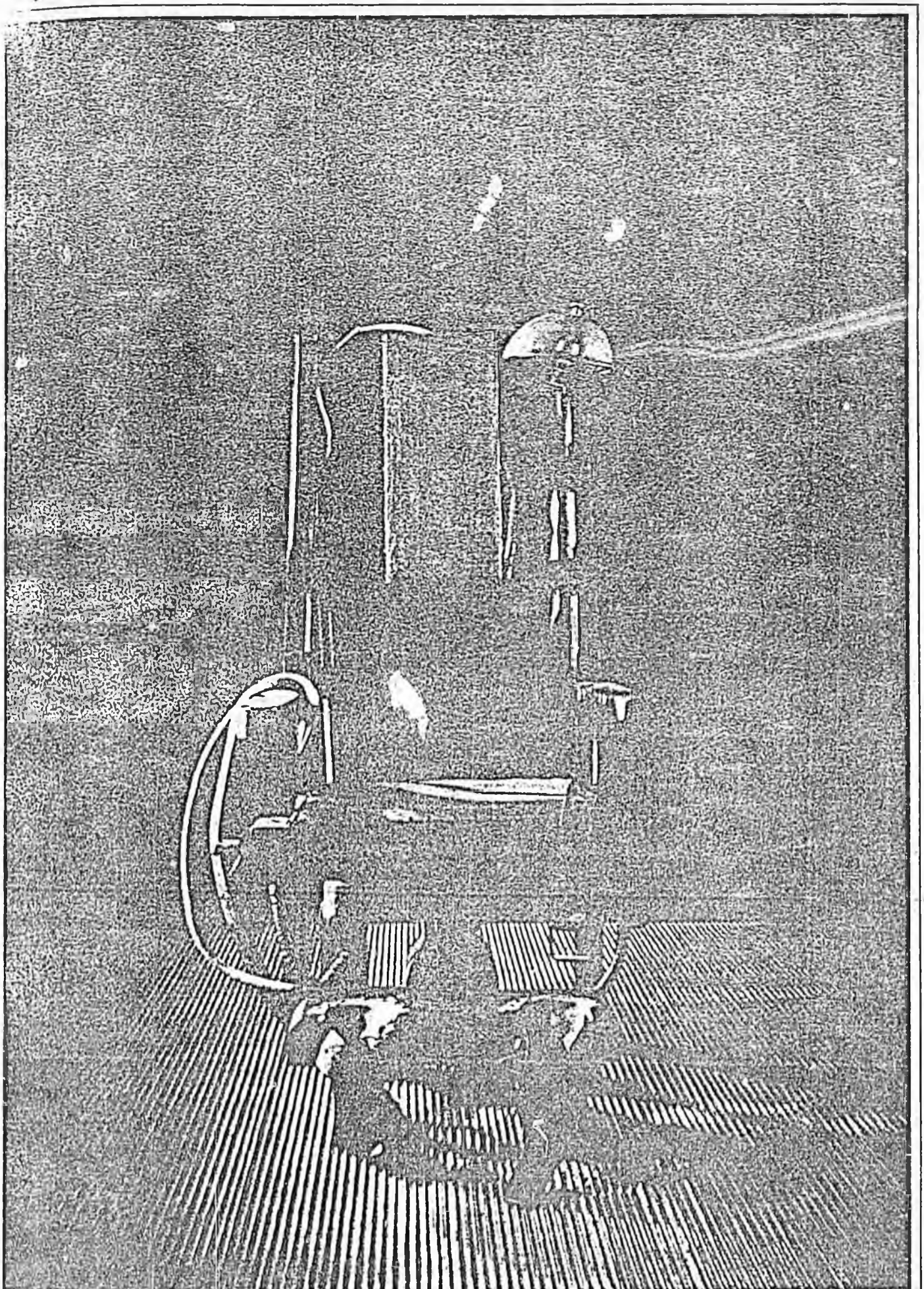
For years, the capital-punishment debate has been sporadic and mainly intramural—professor *vs.* professor, lawyer *vs.* lawyer—as executions took place only once or twice annually at most. Says Florida's Governor Robert Graham, who signed Spenkelink's death warrant in 1979: "We haven't enforced the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

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

Fear, pure and simple, is behind the new advocacy of the death penalty. Between 1960 and 1973, the U.S. homicide rate doubled, from 4.7 murders per 100,000 people to 9.4. The rate has leveled off considerably and stands at 7.8 per 100,000 today. (Other countries' rates are, by U.S. standards, amazingly low: England, 1.1, and Japan, 1.0, are typical.) No more precipitous increases are expected this century; criminologists believe that the murder spree of the '60s and early '70s was mostly the doing of World War II baby-boom children passing through their crime-prone years of adolescence and young adulthood. As it happened, the number of young people and cheap, readily available handguns burgeoned at the same time. Handguns are used in 50% of U.S. murders.

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

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



New York's electric chair: the world's first, "Old Sparky" executed its inaugural convict in 1890 and 694 others over 73 years, a record

Photographs for TIME by Eddie Adams

"I Didn't Like Nobody"

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

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

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

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

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

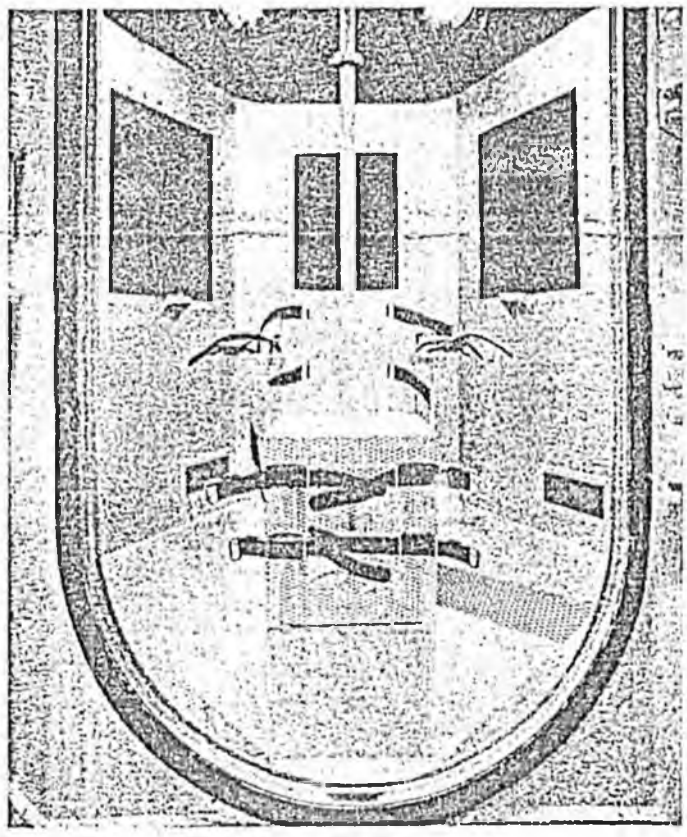
Execution by injection may be too new to have its tough-guy slang like "fry." But last month outside the prison at Huntsville, Texas, the sentiment was the same. As Charlie Brooks waited to be injected, a crowd of 300 gathered to celebrate. Some of the pro-execution revelers, mostly college students,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

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

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

Not just murderers were put to death. Rapists were executed every year in the U.S. until 1965.* After 1930, there were 455 men executed for rape, most of them in the South and 89% of them black, a majority grotesquely out of proportion to black sexual offenses. Black murderers too were executed much more frequently than white killers, a pattern that prevailed through the 1960s.

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



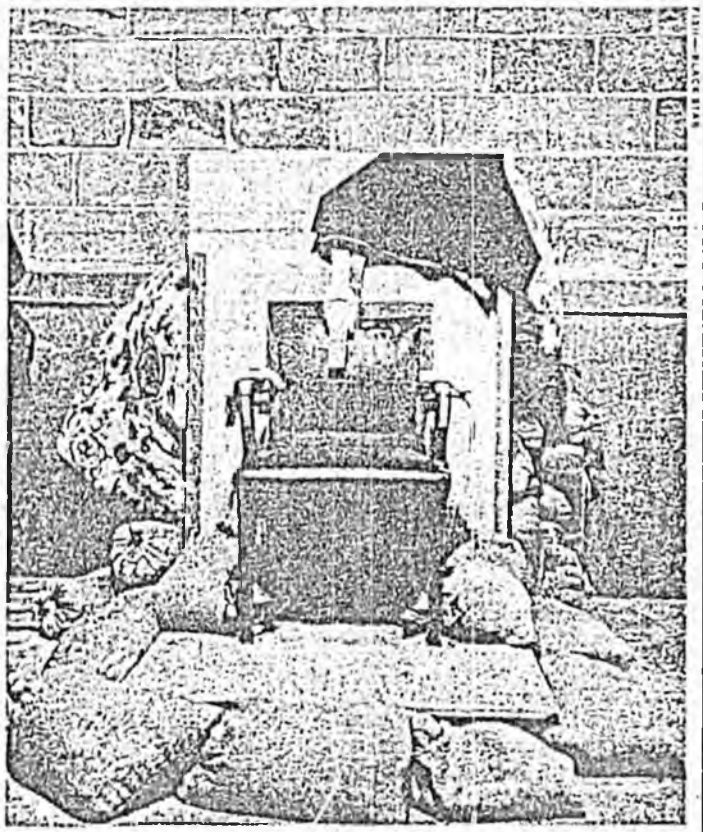
Maryland's gas chamber: 14 people wait

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

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

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

The uneasiness with capital punishment has led this nation



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

"I Don't Think I'm Guilty"

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

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

On Jan. 23, 1970, Fantich disappeared, along with a woman who ran a jewelry store, which Fantich owned, and an apparently innocent bystander, Dr. William Fitzpatrick. Police picked up Wilkerson for questioning. While he was in custody, all three missing persons were shot and buried about 100 miles west of Houston. From testimony pieced together from a variety of sources, police found the bodies and deduced that the victims were part of an extortion and kidnaping scheme that Wilkerson had masterminded. While Wilkerson owned up to the plot, he denied any involvement in the murders. Prosecutor Don Stricklin scoffs at this: "He could have told us earlier and saved those people's lives."

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

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

"I Want to Die"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Opponents of capital punishment feel that prison terms

"I Can't Stop Crying"

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

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

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

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

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

"I am tired."

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

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

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

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

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

Revenge Is the Mother of Invention

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

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

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

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

Execution by elephant in 19th century India

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

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

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

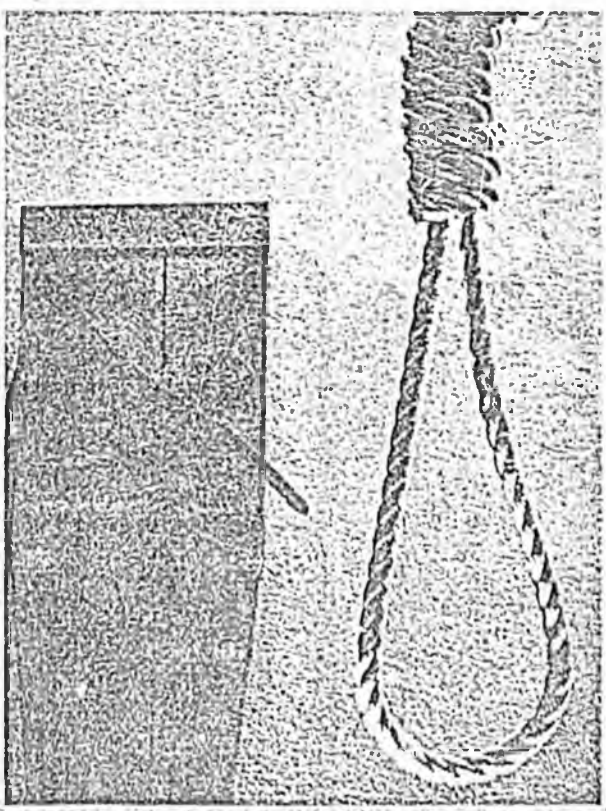
Today the death penalty has been abolished in Canada, at least officially in much of Latin America, and in most of Western Europe. In Eastern Europe only Albania has abandoned capital punishment, and it remains in force throughout Asia and the Islamic world. Last year, the world leader in announced executions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

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

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

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

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



Washington's gallows: only four states still prescribe hanging

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

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

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

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

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

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

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

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

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

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

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

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

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

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

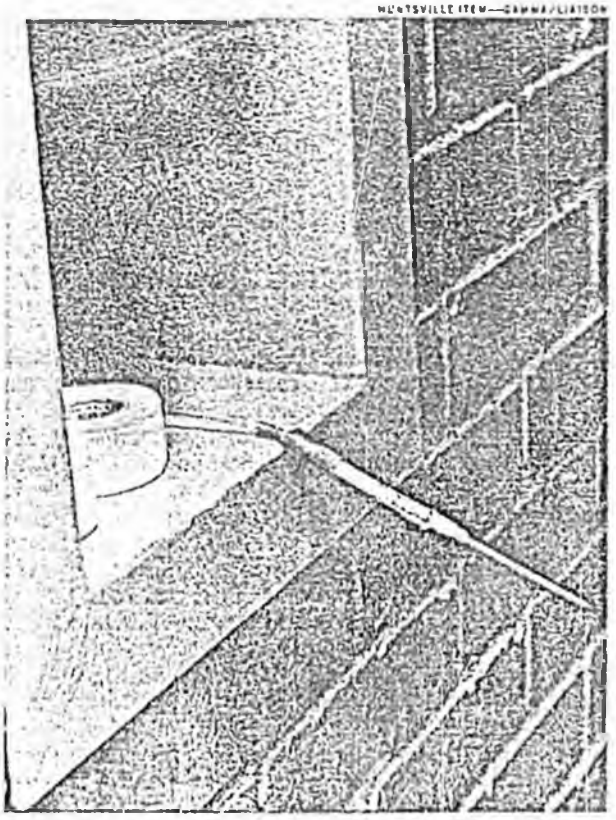
Everyone seems afraid of imposing a bona fide life sentences, however, and for reasons unconnected with expense. Seventeen states have laws providing for life without parole for those convicted of murdering a robbery victim. Abolitionists say such a sentence is excessive. Statistics show that fewer than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

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

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

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

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



Texas' needle: last month the first execution by injection

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

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

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

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

America's Inability to Resolve the Cap

COL. I COL. II COL. III

Last of a series

By Phil McCombs
Washington Post Staff Writer

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

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

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

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

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

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

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

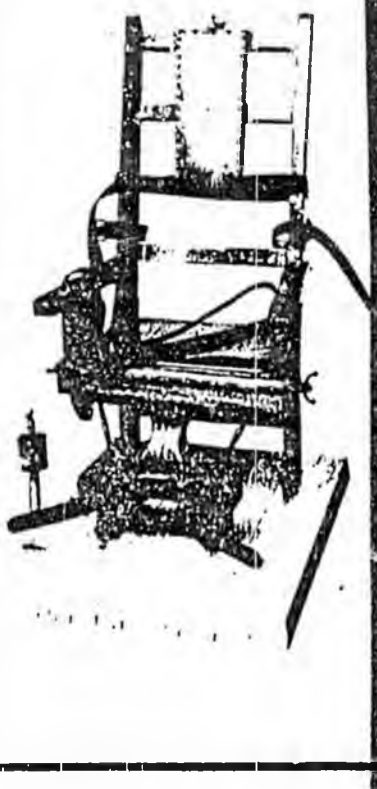
While the future of the penalty remains in limbo, its pros and cons are argued by legal scholars, philosophers, law enforcement officials and social scientists as well as ordinary citizens. The debate can be cool and intellectual, with complex arguments and empirical research, or highly emotional, drawing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

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

The Supreme Court and the D

1972 Decision

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



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

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

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

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

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

In its 1976 landmark decision upholding the constitutionality of the death penalty for murder, the U.S. Supreme Court specifically endorsed retribution as "an expression of society's moral outrage." The lead opinion said while this "may be unappealing to many, . . . it is essential in an ordered society that asks its citizens to forgo the exercise of personal vengeance. Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men."

The court said the penalty could be applied to murders that occurred accidentally as the offender fled during a robbery in a state where 298 of the 368 people executed since 1930 were black.

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

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

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

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

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

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

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

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

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

in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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tal Punishment Dilemma

eath Penalty

1976 Decision

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

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

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Does the death penalty deter criminals?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Van den Haag thinks that the burden of proof should be on opponents of the penalty. It seems morally indefensible to let convicted murderers survive at the probable—even at the merely possible—expense of the lives of innocent victims who might have been spared had the murderers been executed," he wrote.

Supporters argue death is the only possible deterrent for someone already serving a life term, and that death as a penalty for murder during a felony is needed to protect witnesses.

But Justice Brennan concluded death fails to deter because the penalty is not applied invariably or quickly. "The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great."

"If it could be shown castration was an effective way to deter rape, if maiming and blinding people were an effective way to stop overparking and embezzlement, I would be appalled at the thought," said Bedau. "The great problem from the moral point of view for deterrence is that you're leaning on a principle that will swallow you up."

Race has been a prominent factor in the imposition of the death penalty in America's history, but scholars now debate whether that is still the case. Some studies show that white murderers today are more likely to be sentenced to death than black murderers.

Forty-two percent of those on death row today are black. Of the 3,863 people executed in America since 1930, 53.5 percent were black. Of the 3,338 murderers executed, 9 percent were black; of the 455 rapists, 89 percent.

Blacks constituted only 10 percent of the population during this period, but the murder rate in the black community was four to seven times that for whites. More than 99 percent of murders involve offenders and victims of the same race.

In the past a death sentence for rape was the white murdered a black or white.

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

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

Nobody knows for sure whether or not there will be executions on a wide scale in America again. While clearly there is a certain momentum favoring it, the possible points of appeal seem limitless. "Once the door was opened [to capital punishment in 1976], so many things need to be answered that those who want capital punishment must expect some time to iron out the wrinkles," said Richard J. Bonnie, director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia, who, in cooperation with another attorney, represents on appeal Joseph Michael Giarratano, described in the first part of this series.

As things stand, the great American debate on the death penalty is likely to continue for years without clear resolution unless, of course, there is some unexpected development like the execution of a man later found to be innocent—an incident that mobilized public opinion against the penalty in England. So far there has been no such error in this country, and with the death statutes now as strict as they are there is unlikely to be one.

Legally, most states quickly reformed their death laws to meet the guidelines of the U.S. Supreme Court, yet opponents of the penalty say this reform isn't good enough, that no legal reforms can ever make up for problems inherent in the administration of the penalty. Even under the new, reformed state laws, said Schwarzschild, the penalty continues to be administered in an "arbitrary and discriminatory" way. He said that when this is finally proved to the satisfaction of the Supreme Court, the penalty will be abolished entirely as unfeasible.

At American University, Robert Johnson, the professor whose death penalty class students started out favoring the penalty by 49-31 percent, thinks he won his case. When the class was over this spring, another anonymous poll showed that 71 percent of his students said they had come to be opposed to the death penalty.

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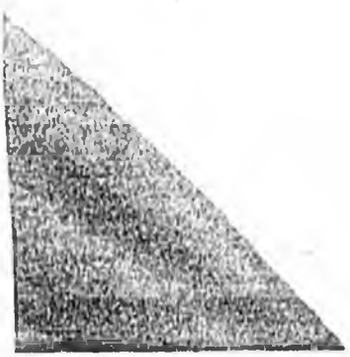

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TITLES 16 TO 21

(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