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life . . . I think maybe we have to be satisfied with that as opposed to spending $1 million to try and get them executed. . . . I think we could use (the money) better for additional penitentiary space, rehabilitation efforts, drug rehabilitation, education, (and) especially devote a lot of attention to juveniles."[31]

Vincent Perini of the Texas Bar Association, calls the death penalty a "luxury": "There's some things that a modern American city and state have got to have. You have to have police and fire and public safety protection. You have to have a criminal justice system. You do not have to have a death penalty. The death penalty in criminal justice is kind of a luxury item. It's an add-on; it's an optional item when you buy your criminal justice vehicle."[32]

Chief Criminal Judge, James Ellis, came to a similar conclusion in Oregon: "Whether you're for it or against it, I think the fact is that Oregon simply can't afford it."[33] James Exum, Chief Justice of the North Carolina Supreme Court, agrees: "I think those of us involved in prosecuting these (death penalty) cases have this uneasy notion that . . . these cases are very time-consuming and very troublesome and take a lot of resources that might be better spent on other kinds of crimes. . . ."

Efforts are under way in both Congress and the Supreme Court to reduce the avenues of appeal available to death row inmates. But most of the costs associated with the death penalty occur at the trial level.[34] Whatever effect cutting back on the writ of habeas corpus may have on the time from trial to execution, it is not clear that the changes will make the death penalty any less expensive, and they may result in the execution of innocent people. With the number of people on death row growing each year, the overall costs of the death penalty are likely to increase.

Some state appeals courts are overwhelmed with death penalty cases. The California Supreme Court, for example, spends more than half its time reviewing death cases.[35] The Florida Supreme Court also spends about half its time on death penalty cases.[36] Many governors spend a significant percentage of their time reviewing clemency petitions and more will face this task as executions spread. As John Dixon, Chief Justice (Retired) of the Louisiana Supreme Court, said: "The people have a constitutional right to the death penalty and we'll do our best to make it work rationally. But you can see what it's doing. Capital punishment is destroying the system."[37]

Alternatives for Reducing Crime

New York does not have the death penalty. In the early 1980s, the N.Y. State Defenders Association conducted a study to estimate how much the death penalty would cost if it were to be implemented in New York. The estimates were that each case

"The death penalty, however, has no place in this reform effort. It is a simplistic, arbitrary, misguided, ineffective and costly response, cloaked in the guise of a remedy to the brutalizing violence that angers and frustrates us all."

—Scott Harshbarger, Attorney General of Massachusetts

would cost the state $1.8 million, just for the trial and the first stages of appeal.[38] The majority of those costs would be borne by the local governments. New Yorkers have consistently re-elected a governor whom they know will veto any death penalty legislation which comes across his desk. Now it appears that New York may be reaping the benefit of that choice.

Significantly, no city in New York State, without the death penalty, is among the nation's top twenty-five cities in homicide rates according to statistics recently released by the FBI.[39] In particular, New York City bucked the national trend and experienced a decline in every major category of crime last year.[40] In the first four months of 1992, crime is again down across the board in New York, compared to the same period two years ago, with murders decreasing by over 11 percent.[41]

While direct causes for a decrease in crime are difficult to pinpoint, many experts have attributed New York's success to an increasingly popular concept known as community policing. Two years ago, New York had 750 foot officers on the street. Today that number is 3,000.[42] Community policing is a strategy for utilizing police officers not just as people who react to crime, but also as people who solve problems by becoming an integral part of the neighborhoods they serve.

Such programs do not come cheaply, but they do seem to be effective. In Prince George's County, Maryland, police Capt. Terry Evans said their community policing program is "the only thing I've seen in 23 years of law enforcement that's had an impact, actually turned it around."[43] Fully implemented, Prince George's community policing program will cost the county $10 million per year.

The programs apparently work best where governments can afford to add officers, rather than taking from existing numbers, leaving other work unattended. This is borne out in cities like Boston where murders dropped 23 percent in 1991, partly because of a program that put more police officers on the beat.[44] The need for more police officers is supported by a survey of Chiefs of Police from around the country, 70 percent of whom said they could no longer provide the type of crime prevention activities they did ten years ago because of too few police officers.[45]

Boston, like New York, is in a state without the death penalty, though Governor William Weld (R-Mass.) has been attempting to re-instate it. That proposal has met with opposition from the state's district attorneys. Judd Carhart, past president of the district attorneys' association said a majority of the state's district attorneys oppose capital

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punishment partially on the grounds that it is a waste of money better spent on other areas of law enforcement and incarceration.[46] Attorney General Scott Harshbarger agreed: "We need major criminal justice and court reform now to address the crisis in our criminal justice system. The death penalty, however, has no place in this reform effort. It is a simplistic, arbitrary, misguided, ineffective and costly response, cloaked in the guise of a remedy to the brutalizing violence that angers and frustrates us all."[47]

Compared to community policing and other successful programs, the death penalty, for all its cost, appears to have no effect on crime. A New York Times editorial noted recently that the number of executions in this country "constituted less than .001 percent of all murderers . . . and were only .000004 percent of all violent criminals. Even if U.S. executions were multiplied by a factor of 10 they would still constitute an infinitesimal element of criminal justice." The public seems to agree: only 13 percent of those who support capital punishment believe it deters crime.[48]

New York and Massachusetts can be contrasted with Texas which is the nation's leader in the use of the death penalty. Texas has the largest death row and has executed almost twice as many people as the next leading state. Houston alone accounts for 10% of all people executed in the United States since 1976.[49] Yet, the murder rates in three of Texas' major cities rank among the nation's top 25 cities. In all three, Houston, Dallas and Fort Worth, the number of murders increased significantly last year.[50]

Wherever the death penalty is in place, it siphons off resources which could be going to the front line in the war against crime: to police, to correctional systems, and to neighborhood programs which have proven effective. Instead, these essential services are repeatedly cut while the death penalty continues to expand. Politicians could address this crisis, but, for the most part, they either endorse executions or remain silent.

"Even if U.S. executions were multiplied by a factor of 10 they would still constitute an infinitesimal element of criminal justice."

—New York Times editorial, 1992

Political Manipulation of the Death Penalty

What drives this high spending on such an ineffective program? The answer lies partly in the promotion by politicians who hope to benefit by advocating the death penalty. Even though it fails to meet the cost-benefit test applied to other government programs, many politicians use capital punishment to distinguish themselves from their opponents. Politicians have generally not posed the death penalty as one alternative among a limited number of crime fighting initiatives which the people must ultimately pay for. Rather, the death penalty is used to play on the public's fear of crime and to create an atmosphere in which the extreme view wins. The rhetoric then becomes policy and the people pay.

The Death Penalty in National Politics

Flush with his party's convincing victory in the 1988 Presidential elections, Republican National Chairman Lee Atwater urged his fellow Republicans to capitalize on the issue of crime because "almost every Democrat out there running is opposed to the death penalty."[51] Apparently, the Democrats were listening as well since politicians of all stripes rushed to proclaim their support of capital punishment.

From Florida to California, the political races in 1990 were marked by excessive attempts by politicians to appear tougher on crime by their willingness to execute people. Ironically, those who were most demonstrative about the death penalty were defeated, though seldom by opponents of capital punishment.

In this election year, the national political debate on the death penalty is more conspicuous for its silence. The utility of the death penalty as a defining issue was lost when most of the Democratic Presidential candidates supported the death penalty. George Bush, Bill Clinton and Ross Perot are all in favor of the death penalty, though none has made it a major campaign issue.

George Bush: From Willie Horton to the Crime Bill

In the previous campaign, George Bush was able to link a furlough for convicted murderer Willie Horton with Michael Dukakis' position against the death penalty, thus portraying Dukakis as soft on crime. This time, President Bush has sought to convey a tough image by his support for a greatly expanded federal death penalty. When recent unemployment figures indicated that the economy was going to be a negative for the Bush campaign, his advisers called for a greater emphasis on crime to bolster the President's popularity.[52]

In 1990, President Bush sought to identify the Republican Party as tough on crime. He introduced a crime bill whose

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centerpiece was an expansion of the federal death penalty to over 40 new crimes. Not to be outdone, the Democrats endorsed a bill allowing the death penalty in over 50 new crimes. Despite two years of debate and attempts to expand the death penalty even further, the bill remains in political gridlock. While the bill's death penalty provisions and restrictions on federal habeas corpus appeals have received the most notice, proposals for law enforcement, prison construction, boot camps and other crime fighting provisions have received little attention.

Just prior to the last presidential election in 1988, the death penalty was also promoted as a way of appearing tough on drug crime. Legislation was passed imposing the death penalty in drug-related murders but that law has resulted in only seven prosecutions and one death sentence in almost four years. Bush's bill is designed to have a much broader application. However, some parts of the

"What they mean when they say they're 'getting tough' is simply that they are talking tough."

—Franklin Zimring, Earl Warren Legal Institute

current bill are also window dressing, having little to do with the public's concern about crime.

The crime bill would impose death sentences for such offenses as treason, espionage, murder in the act of destroying a maritime platform, murder of federal egg product inspectors, horse inspectors and poultry inspectors. These proposals will have no real impact on crime in the streets, which is the rationale for proposing such legislation. As one legal commentator put it: "What they mean when they say they're 'getting tough' is simply that they are talking tough."[53]

An expanded federal death penalty could also prove to be enormously expensive. One amendment approved by the Senate would impose the death penalty for murders involving weapons used in interstate commerce. The Congressional Budget Office estimated that this proposal would cost as much as $600 million over four years.[54]

Senator Thomas Daschle (D.-SD) described much of the talk about the death penalty on Capitol Hill as political posturing: "We debate in codes, like the death penalty as a code for toughness on crime. The whole game is a rush to acquire the code: he who gets the code first wins. . . . It denigrates the national debate."[55]

Bill Clinton: Insulating Himself from Attack

Although Clinton's pro-death penalty stance has partially neutralized Bush's use of this tactic in the current campaign, on the death penalty one can never be tough enough. For example, Vice President Dan Quayle recently attacked Clinton for being soft on capital punishment (despite having presided over four executions as Arkansas Governor) because Clinton had suggested that Gov. Mario Cuomo (D-NY) might make a good Supreme Court Justice.[56]

Bill Clinton has criticized Bush's manipulation of the death penalty issue: "President Bush has used an expansion of the death penalty as a cover for actually weakening the partnership of the federal government in the fight against crime."[57] However, Clinton bowed to the popular wisdom when he made a prominent demonstration of his support for the death penalty by leaving the primary campaign in January to preside over the execution of a brain damaged defendant in Arkansas.

Ever since he lost the Governor's race in Arkansas after serving only one term, Clinton has made clear his support for the death penalty. Clinton returned to office as Governor in 1983 and has granted no commutations to anyone on death row and has presided over all four of the state's executions in the modern era. However, as Arkansas was returning to executions, its murder rate was increasing: murders in Little Rock, alone, jumped 40 percent in the past year.[58]

The Death Penalty In State Politics

The death penalty is almost the exclusive function of the states rather than the federal government. It is not surprising, then, that some of the most blatant attempts at political manipulation of the death penalty have occurred on the level of state politics.

Florida and Texas are two states with the largest death rows and most active execution chambers. They were also the scene of recent gubernatorial races featuring candidates boasting of their ability to secure more executions than their opponent. In 1990, Florida's Governor Bob Martinez campaigned with background shots of smirking serial killer Ted Bundy, while reminding the voters how many death warrants he had signed. Martinez was defeated by Democrat Lawton Chiles who also favors the death penalty.

The Texas Campaign: "Who Can Kill the Most Texans?"

The governor's race in Texas presented a variety of candidates vying to demonstrate their greater support of the death penalty. As populist Democrat Jim Hightower put it, the race boiled down to one issue: "Who can kill the most Texans?"[59]

Former governor Mark White portrayed his toughness by walking through a display of large photos of the people executed during his term. Attorney General Jim Mattox insisted that he was the one who should be given credit for the 32 executions carried out under his watch. Meanwhile, the Republican candidate, Clayton Williams showed pictures of a simulated kidnapping of young children from a school yard and then touted his backing of a separate law to impose the death penalty for killing children. His ad ended with the slogan: "That's the way to make Texas great again."[60]

In the end, the campaigns succeeded only in gaining embarrassing notoriety for Texas as Democrat Ann Richards became the eventual winner. Richards has continued Texas' leadership in carrying out the most executions of any state. However, while Texas is spending hundreds of millions of dollars on the death penalty, it is having to release other prisoners early to avoid overcrowding. Inmates serve only an average of one-fifth of their sentences. In Harris County (Houston), arguably the death penalty capital of the country, 67 percent of those arrested are recidivists and crime is the people's number one concern.[61]

California Politics: A Case of Neglect

California's 1990 gubernatorial race also involved jockeying for the position of "death penalty candidate." Dianne Feinstein was the most outspoken, describing herself in commercials as "the only Democratic candidate for governor in favor of the death

penalty."[62] This ploy caused her Democratic rival, John Van de Kamp, to respond with ads assuring the voters that he wouldn't let his conscience get in the way of carrying out executions. Although personally opposed to the death penalty, his ads proclaimed his record as attorney general of putting or keeping almost 300 people on California's death row and featured pictures of the condemned inmates in the background.

Van de Kamp lost to Feinstein and Feinstein then lost to Republican Pete Wilson, another strident pro-death penalty candidate. This year Feinstein is running for the Senate and all 11 of the major candidates for California's two Senate seats support the death penalty.[63]

California is in the throes of an extreme financial crisis. The state paid its workers with IOUs for two months and most social services are facing major cuts. Los Angeles County alone is considering laying off 500 sheriff's deputies to cope with the loss of state funds. Such cuts are likely to have a direct effect on public safety. As one official remarked, "The public doesn't seem to have a heightened sense of urgency about this yet, and I don't think they ever will—until they become victims themselves."[64] Nevertheless, the state has been paying an estimated $90 million per year over normal costs to carry out the death penalty.[65] With over 300 people condemned to death, California has the second largest death row in the country.

The Los Angeles riots were a stark reminder of the anger which simmers as a result of social neglect. Reforms like community policing were contemplated in L.A. but were viewed skeptically by former Police Chief Daryl Gates because no funds were available: "The first problem, " Gates said in his new book, "is the need for more officers. But again, how much more can taxpayers be asked to pay?"[66] As a result, L.A.'s police force was described by one expert as "the antithesis of community policing. The department was cool, aloof, disconnected from the community."[67] The city burned.

New York Politics: Grandstanding on the Death Penalty

New York illustrates that voters are not monolithic when it comes to the death penalty. Although more executions have been carried out in New York since 1900 than in any other state, it does not have the death penalty now and has not executed anyone since 1963. For ten straight years, the state legislature has passed death penalty legislation and for ten years Governor Cuomo has vetoed the bills, continuing the tradition of Governor Hugh Carey before him. Although the majority of New Yorkers appears to support capital punishment, Cuomo has been re-elected

repeatedly. Cuomo's 1990 Republican opponent, Pierre Rinfret, built a campaign around the death penalty but failed to win voter support. Even fellow Republican and death penalty supporter Jack Kemp rejected such blatant manipulation:

"He's running on the death penalty for drug pushers. I mean, goodness gracious, if . . . that's what politics has descended into in the 1990s—who can get to the far right on the death penalty—it is a sad day. . . . I don't want to be in the Republican Party of New York if that's all they can talk about, the death penalty. I am for the death penalty, but that pales in significance to the need for a healthy economic and opportunity-oriented state, whether it is New York or the state of the economy nationally."[68]

The New York legislature has often come close to overriding Cuomo's veto. Lately, however, that movement has been losing steam. The controversy demonstrates that switching one's allegiance on the death penalty issue to join the mainstream is not always a ticket to electoral success. In the 1990 elections, three Assemblymen who once opposed the death penalty, but who had lately switched their votes, were all defeated.[69] As a result, the vote to override Cuomo's veto l by a larger margin in the next session.

The New York Daily News, long a supporter of the death penalty with such subtle headlines as FRY HIM!, has apparently become frustrated with the political games-playing surrounding the issue and now rejects the death penalty. In an editorial earlier this year, the News took particular aim at those pro-death penalty politicians who vote against the alternative sentence of life-without-parole because it would make their own death penalty bill harder to pass: "Why won't the Legislature adopt the obvious alternative—life without parole? Because pols would rather grandstand on the death penalty. It is cheap political expedience, not wise public policy."[70]

The death penalty's chief proponent in the New York Assembly, Vincent Graber from Buffalo, acknowledged the kind of manipulation the News criticized. Graber admitted that the life-without-parole bill was rejected because it interfered with the quest for capital punishment: "This being an election year," Graber said in 1990, "I don't think the Senate is in the mood to go with mandatory life, no parole. The death penalty would become less of a campaign issue and I don't think they want to do that."[71]

Politics in Other Places

Politicians are quick to capitalize on an opportunity to promote the death penalty. Massachusetts does not have the death penalty, but when Carol Stuart, a young white, pregnant woman, was brutally murdered in 1989, the city of Boston reacted in angry shock. The media and

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—Jack Kemp, Secretary of HUD

the public were misled to believe that a young black man was the attacker and the Republican Party called a press conference within hours of Stuart's death demanding a return to capital punishment.[72] After the embarrassing truth came out that Stuart was probably murdered by her own husband, the campaign fizzled.

In Arizona, state Representative Leslie Johnson (R-Mesa) called for the death penalty for child molesters after a particularly horrendous crime in Yuma. On the floor of the House, Johnson proposed the quick fix: "If we do away with these people, if we do have the death penalty and if you are a sex offender, you're just out of here — dead, gone. And if we get a few innocent people, fine and dandy with me. I'll take the percentage, folks, because I don't want to put my children at risk anymore."[73]

And in the District of Columbia, Senator Richard Shelby (D-Ala.) proposed that the death penalty be enacted for the city by Congress after one of his aides was killed on Capitol Hill. Congress responded by cutting out the Mayor's $25 million youth and anti-crime initiative while imposing a referendum on the death penalty. The hidden but inevitable costs resulting from having capital punishment were not addressed in the appropriations bill. But if the experience of other states is any indication, it will be years before any execution is carried out, after an expenditure of as much as $100 million, either from federal or DC funds.

Finally, the death penalty is manipulated by those politicians who are closest to it: the elected state attorneys and prosecutors who make the decisions on which cases to pursue the ultimate punishment. A campaign advertisement for district attorney Bob Roberts of North Carolina, for example, lists all the defendants for whom he won a death sentence. His slogan: "If one of your loved ones is murdered, who do you want to try the accused? Bob Roberts with his splendid record and experience or his inexperienced opponent."[74]

As a public defender, attorney general Grant Woods of Arizona had argued before a judge that it would be murder if the judge sentenced his innocent client to death. Now, as chief prosecutor and staunch defender of the death penalty, Woods turned on his client, Murray Hooper, saying he is guilty and deserves the death penalty. Since Hooper is still on death row, such a representation has raised questions of legal ethics and client loyalty. Woods claims he is just doing his job.[75]

A district attorney in Georgia, Joseph Briley, was also charged with numerous breaches of legal ethics in a Supreme Court amicus brief signed by 12 legal ethics professors from around the country. When the conviction of Tony Amadeo was overturned, Briley first announced that he would again

seek the death penalty. However, he later allowed the defendant to plead guilty in exchange for a life sentence after the defense proffered three expert witnesses to testify that his ethical violations should disqualify him from retrying the case. Briley's frustration at having to take the plea was summed up in his comment to one of the defense attorneys: "You've probably made me unelectable."[76]

In Kentucky, Commonwealth Attorney Ernest Jasmin made a name for himself by obtaining a death sentence against the killer of two teenagers from Trinity High School. He then campaigned as the Trinity Prosecutor, taking ads in the high school newspaper and campaigning with one of the victims' parents frequently at his side.[77]

In Nebraska, attorney general Don Stenberg took the unusual step of attaching a personal letter to his Supreme Court brief urging the execution of Harold Otey, whom he described as a "vicious killer" who "still smirks at the family of the victim...."[78] While pushing publicly for Otey's death, Stenberg also sat as one of three decision makers at Otey's clemency hearing and two of his staff presented gruesome details of the murder.

In sum, there has been a steady stream of politicians attempting to capitalize on the death penalty issue in recent years. Real solutions to crime get overshadowed in the tough talk of capital punishment. When some of these politicians are successful, the death penalty gets implemented or expanded and the people begin to pay the high costs. Somewhere down the road there may be an execution, but the crime rate continues to increase. Politicians do the people a disservice by avoiding the hard economic choices that have to be made between the death penalty and more credible methods of reducing violence.

Conclusion

The death penalty is parading through the streets of America as if it were clothed in the finest robes of criminal justice. Most politicians applaud its finery; others stare in silence, too timid to proclaim that the emperor has no clothes. Instead of confronting the twin crises of the economy and violence, politicians offer the death penalty as if it were a meaningful solution to crime. At the same time, more effective and vital services to the community are being sacrificed. Voters should be told the truth about the death penalty. They should understand that there are programs that do work in reducing crime, but the resources to pay for such programs are being diverted into show executions. Being sensible about crime is not being soft on crime. Too much is at stake to allow political manipulation to silence the truth about the death penalty in America.

Epilogue – Fall 1994

"Every dollar we spend on a capital case is a dollar we can't spend anywhere else. . . . We have to let the public know what it costs" to pursue a capital case.

—John M. Bailey, Chief State's Attorney, Connecticut

Since the publication of *Millions Misspent* in the fall of 1992, more judges, prosecutors and other state officials have joined those questioning the death penalty in light of its exorbitant costs. At a time when crime is the nation's primary concern, new data confirms the Report's earlier conclusion that the death penalty is draining state treasuries of funds which could be spent on effective crime prevention measures.

The financial burden is particularly acute in counties where administrators are being forced to choose between raising taxes and bankruptcy in order to prosecute death penalty cases. While many politicians continue to ignore these costs in using the death penalty to sound tough, some prosecutors are now deciding not to seek executions because the cases are simply too expensive.

The Duke University Study

In May, 1993, a federally funded study brought a new perspective to the cost debate.[79] This model study was prompted by an American Bar Association proposal and was conducted at Duke University's Terry Sanford Institute of Public Policy. It is one of the most comprehensive and thorough analyses on this topic.

Authors Philip Cook and Donna Slawson spent two years comparing the costs of adjudicating capital and noncapital cases in North Carolina and concluded that capital cases *cost at least an extra $2.16 million per execution*, compared to what taxpayers would have spent if defendants were tried without the death penalty and sentenced to life in prison.[80] Moreover, the bulk of those costs occur at the trial level.

Applying their figures on a national level implies that $82 million was spent just for U.S. executions in 1993, and that the national bill for the death penalty has been over $500 million since the death penalty was reinstated.[81] Yet, the national concern about crime indicates that few feel safer for all this expense.

Time Is Money

Death penalty cases are so expensive because they take longer at every stage and require vast resources for both the prosecution and the defense. The authors of the North Carolina study identified 24 principal areas in which a death penalty case would likely be more expensive than if the case were tried non-capitally.[82] These areas included:

- More investigative work by both law enforcement officials and the defense team
- More pre-trial motions

"A little rural county in Kentucky just can't deal with (death penalty) bills like that."

—Michael Mager, Executive Director of the Kentucky County Judge-Executives Association

- More questioning concerning individual jurors' views on capital punishment and more peremptory challenges to jurors at jury selection
- The appointment of two defense attorneys
- A longer and more complex trial
- A separate penalty phase conducted in front of a jury
- A more thorough review of the case on direct appeal
- More post-trial motions
- Greater likelihood that counsel will be appointed for a federal habeas corpus petition
- Greater likelihood that there will be full briefing and argument on federal review
- More preparation for, and a longer clemency proceeding.

The North Carolina study estimated that a death penalty trial takes about four times longer than a non-capital murder trial. And, of course, not every death penalty trial results in a death sentence. Based on the experience in North Carolina, the authors found that less than a third of capital trials resulted in a death sentence.[83] Nevertheless, each of the these trials had the extra expense associated with death penalty proceedings. The trial costs alone were about $200,000 *more for each death penalty imposed* than if no death penalty was involved.[84]

The authors computed the costs of appealing a death penalty case and subtracted the savings which accrue to the state when an execution finally occurs. The "savings," which are due to the inmate no longer being kept at [illegible] expense, only occur when an [illegible]cution is actually carried out. As with the trial level, there is a "failure" rate resulting from the fact that many inmates who are sentenced to death will never be executed. Many cases will be overturned on appeal, some inmates will commit suicide, others will die of natural causes. Again, based on the experience in North Carolina, the authors estimated that only one inmate would likely be executed for every ten who are sentenced to death.[85] This is actually higher than the national rate where only about one in every eleven cases which have been resolved has resulted in an execution.[86]

Bulk Of Costs at Trial Level

The importance of accounting for this failure rate is critical for two reasons. First, it represents a truer picture of what it is actually costing the state to achieve an execution. It is not just the cost of a single person's trial and appeals. That would be comparable to saying that the cost of landing a man on the moon was the cost of fuel for the one rocket which brought him there. The state has to pay more for all the trials and appeals which start out as death penalty cases but for which there will never be the "saving" associated with an execution.

Second, the per execution costs reveal that the bulk of death penalty costs occur at the *trial* level. Often those who acknowledge the high costs of the death

penalty believe that the expense is due to "endless appeals." By taking into account the capital cases which will never result in an execution, the North Carolina study makes clear that the *trials* produce the largest share of death penalty costs[87] and these costs will not be substantially lessened by tinkering with the opportunities that death row inmates have to appeal. A significant financial corollary of this finding is that taxpayers must pay death penalty expenses up front, whereas the costs of a life sentence are meted out gradually over many years, making that alternative even less expensive.

Evidence from Other States

There have been numerous indications from other areas of the country that the death penalty is straining the budgets of state and local governments and that the financial drain is getting worse. Some counties have been brought to the brink of bankruptcy because of death penalty cases. More county commissioners have risked going to jail for balking at paying for capital prosecutions,[88] while others reluctantly raise taxes to pay the costs of even one capital case.

- In San Diego, California, the prosecution costs alone (not counting defense costs or appeals) for three capital cases averaged over half a million dollars each.[89] One estimate puts the total California death penalty expense bill at $1 billion since 1977.[90] California has executed two people during that time, one of whom refused to appeal his case.
- In Jasper County, Mississippi, the Circuit Judge and the District Attorney had to address the county supervisors to get more money for death penalty prosecutions. The only solution was to raise county taxes. "It's going to be a fairly substantial increase," said the board president, John Sims. "I hope the taxpayers understand...."[91]
- In Connecticut, a state with only a handful of death row inmates, *The Connecticut Law Tribune* was unable to calculate the total costs of capital punishment but concluded that the "costs are staggering."[92] State's attorney Mark Solak said he spent between 1,000 and 1,500 hours preparing one capital prosecution.[93] The defense attorney in the case noted that if his client had been given an offer of life in prison without parole he would have accepted it "in a heartbeat." "The case," he said, "would have been over in 15 minutes. . . . No one would have spent a penny."[94]
- Other items from *The Connecticut Law Tribune*'s report:
  - ✓ Jury selection in death cases can take eight weeks.[95]
  - ✓ One state's attorney in one case spent about 7 months distilling a 10,000 page trial transcript, and three other attorneys assisted him, putting in a total of 15

"It's going to be a fairly substantial (tax) increase. I hope the taxpayers understand."

—John Sims, Jasper County (Miss.) Board President, on death penalty prosecution costs

"Life without parole could save millions of dollars. In other words, it's cheaper to lock 'em up and throw away the key. . . . As violent crime continues to escalate, it's something to consider."

—Jim Mattox, former Texas Attorney General

"We're running the county out of money."

——Judge Miron Love, Harris County (TX), reflecting on a projected $60 million expense for pending death penalty cases in that county alone.

"When the law changed so defendants can be sentenced to 40 years flat time, and when you start taking into account what the taxpayers are getting for their money, it seems like some defendants should be tried... without the death penalty."

—Judge Doug Shaver, Harris County (TX)

months' work.[96]

✓ The state's public defender office spends about $138 defending an average criminal case. Death penalty cases, however, have cost over $200,000 *each* to defend.[97]

- In South Carolina, *The Sun News* reported that the bills for death penalty cases are "skyrocketing" because of a state supreme court ruling that attorneys in death penalty cases deserve reasonable fees. Before the decision, attorneys received no more than $2,500 for each death penalty case.[98]
- It took six years to extradite Charles Ng from Canada to California mainly because Canada resisted the prospect of sending someone to a possible death sentence. Since coming to California, the case has cost Calaveras County $3.2 million, an amount which would have bankrupt the county except for the fact that the state agreed to reimburse the county until 1995. Now it looks as though the bailout will have to last until the year 2000, with millions more in expenses yet to come.[99]
- In Harris County, Texas, there are 135 pending death penalty cases. State Judge Miron Love estimated that if the death penalty is assessed in just 20 percent of these cases, it will cost the taxpayers a minimum of $60 million. Judge Love, who oversees the county's courts, remarked: "We're running the county out of money."[100]

Reactions to the High Costs

There have been many similar reactions from state and local officials who wonder about the wisdom of spending such exorbitant sums on such unpredictable and isolated cases. In Tennessee, the number of people sentenced to death has dropped because prosecutors say death penalty cases cost too much.[101]

In Texas, Judge Doug Shaver from Houston was also concerned about the high costs of so many capital cases: "I can't figure out why our county is prosecuting so many more (death) cases than comparably large counties around Texas. When the law changed so defendants can be sentenced to 40 years flat time (as an alternative to death), and when you start taking into account what the taxpayers are getting for their money, it seems like some defendants should be tried ... without the death penalty."[102]

Former Texas Attorney General Jim Mattox agrees: "Life without parole could save millions of dollars." "In other words," he wrote, "it's cheaper to lock 'em up and throw away the key .... As violent crime continues to escalate, it's something to consider."[103]

California has been hit particularly hard by natural disasters and the economic recession. Many social programs have had to be cut. Yet the state continues to spend hundreds of millions of dollars on the death

penalty which has resulted in two executions in seventeen years. Even supporters of the death penalty recognize that it is a financial loser. In financially strapped Orange County, Vanda Bresnan, who manages the criminal courts, remarked: "Even though I do believe in the death penalty, I wonder how long the state or county can afford it,"[104] she said. Defense attorney, Gary Proctor, who practices in the same county, believes that the solution will be found by cutting other services: "What I see happening is that other services provided to the taxpayer — such as libraries and parks — will be cut back. Certain people are not aware of the tradeoffs." He added: "Strong beliefs are easy enough to hold if you don't think they're coming out of your pocket."[105]

In rural Kentucky, tax bases are small and budgets are already stretched. When an expensive capital case is about to be heard in court, the state and county often argue for weeks about who will pay. As Michael Mager, executive director of the Kentucky County Judge-Executives Association, points out, "A little rural county in Kentucky just can't deal with bills like that."[106]

And in Connecticut, the Chief State's Attorney, John M. Bailey, echoed similar concerns: "Every dollar we spend on a capital case is a dollar we can't spend anywhere else. . . . We have to let the public know what it costs" to pursue a capital case.[107]

Political Manipulation of the Death Penalty

Despite the overwhelming weight of evidence pointing to the unmanageable and growing costs of imposing capital punishment, politicians continue to ignore these costs in using the death penalty to appear tough on crime. This hypocrisy reached new heights with the passage of the federal crime bill. Every time this legislation was considered, the number of new death penalty crimes grew. While debate immediately before the bill's passage centered on whether the proposed crime prevention measures were too expensive, little was said about the costs that these new death penalties would bring or whether they were likely to do any good.

Ultimately, funding for crime prevention programs was cut back but the 60 new federal death penalty crimes were left intact. Unfortunately, the legacy of the death penalty will probably outlast all the other provisions of the legislation. Federal funding for new police, prisons and programs like midnight basketball will be phased out in a few years but the costs of expanding the death penalty will last for decades. Federal prosecutions in death penalty cases are likely to be even more expensive than in the states. Thousands of offenses will now be eligible for the federal death penalty. Even if only a small fraction of these cases are pursued, the costs of additional federal prosecutors, additional federal public defenders and judges will be draining.

"Even though I do believe in the death penalty, I wonder how long the state or county can afford it."

—Vanda Bresnan, Manager of the Criminal Courts, Orange County (CA)

"I know of no law-enforcement professional who believes that all the death penalty provisions and new Federal crimes would affect public safety in the slightest."

—Robert Morgenthau, Manhattan (NY) District Attorney

The federal government will be joining the states in spending millions of dollars for an occasional execution, with no effect on the real problem of crime.

Some Representatives and Senators voted in conscience against the crime bill because of its death penalty provisions. But, for the most part, politics prevailed. Philip Heymann, the former U.S. Deputy Attorney General who recently resigned from the Justice Department, commented that the entire crime debate was "so mired in politics and ideology that no one in the Government dared speak the truth about the subject." The truth, as he saw it, was that the crime bill was a deeply flawed quick fix that sounded great "for the first 15 seconds," the perfect length for a campaign ad sound bite.[108]

Robert Morgenthau, the District Attorney for Manhattan, similarly castigated the politics behind expansion of the federal death penalty: "I know of no law-enforcement professional who believes that all the death penalty provisions and new Federal crimes would affect public safety in the slightest." The bill, he noted, "would provide no new Federal judges, prosecutors or courtrooms. That isn't surprising: the new crimes and death sentences are window dressing."[109]

"Like a black hole, the death penalty absorbs vast quantities of resources but emanates no light."

Conclusion

Recent studies of death penalty costs reinforce the existing evidence that the death penalty is becoming unmanageably expensive. Like a black hole, it absorbs vast quantities of resources but emanates no light. Nevertheless, politicians and much of the public are drawn to it in the hope of finding a quick fix to the crime problem. But as the actual costs of capital punishment become clearer, the public should be in a better position to judge the death penalty as they would other programs. If a program is highly cost intensive, given to years of litigious expense, focused on only a few individuals, and produces no measurable results, then it should be replaced by better alternatives.

Amanda Smith assisted in the preparation of this Epilogue.

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The Death Penalty Information Center is a non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment. The Center prepares in-depth reports, issues press releases, conducts briefings for journalists, and serves as a resource to those working on this issue. The Center is a project of the J. Roderick MacArthur Foundation.

Innocence and the Death Penalty

Assessing The Danger of Mistaken Executions

Staff Report by the Subcommittee on
Civil and Constitutional Rights
Committee on the Judiciary
One Hundred Third Congress, First Session

INNOCENCE AND THE DEATH PENALTY:

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Staff Report issued on October 21, 1993 by the

Subcommittee on Civil and Constitutional Rights

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Chairman Don Edwards of the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights directed the subcommittee majority staff to prepare this report. This report has not been reviewed or approved by other members of the subcommittee.

INNOCENCE AND THE DEATH PENALTY:

ASSESSING THE DANGER OF MISTAKEN EXECUTIONS

"No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some." Furman v. Georgia, 408 U.S. 238, 367-68 (1972) (Marshall, J., concurring).

I. INTRODUCTION

In 1972, when the Supreme Court ruled in Furman v. Georgia that the death penalty as then applied was arbitrary and capricious and therefore unconstitutional, a majority of the Justices expected that the adoption of narrowly crafted sentencing procedures would protect against innocent persons being sentenced to death. Yet the promise of Furman has not been fulfilled: innocent persons are still being sentenced to death, and the chances are high that innocent persons have been or will be executed.

No issue posed by capital punishment is more disturbing to the public than the prospect that the government might execute an innocent person. A recent national poll found that the number one concern raising doubts among voters regarding the death penalty is the danger of a mistaken execution.[1] Fifty-eight percent of voters are disturbed that the death penalty might allow an innocent person to be executed.

Earlier this year, the Subcommittee on Civil and Constitutional Rights heard testimony from four men who were released from prison after serving years on death row -- living proof that innocent people are sentenced to death.[2] The hearing raised two questions: (1) just how frequently are innocent persons convicted and sentenced to death; and (2) what flaws in the system allow these injustices to occur? In order to answer these questions, Subcommittee Chairman Don Edwards called upon the Death Penalty Information Center to compile information on cases in the past twenty years where inmates had been released from death row after their innocence had been acknowledged. This staff report is based on the research of the Center.

Section II of the report briefly describes each of the 48 cases in the past twenty years where a convicted person has been released from death row because of innocence. Sections III and IV examine why the system of trials, appeals, and executive clemency fails to offer sufficient safeguards in protecting the innocent from execution. The role of current legal

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[1] See *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty* 6, Death Penalty Information Center (April, 1993)

[2] Hearings on innocence and the death penalty were also held before the Senate Judiciary Committee on April 1, 1993

protections is addressed by looking closely at a few of the cases where death row inmates were later found to be innocent or were executed with their guilt still in doubt. The report concludes that there is a real danger of innocent people being executed in the United States.

II. RECENT CASES INVOLVING INNOCENT PERSONS SENTENCED TO DEATH

The most conclusive evidence that innocent people are condemned to death under modern death sentencing procedures comes from the surprisingly large number of people whose convictions have been overturned and who have been freed from death row. Four former death row inmates have been released from prison just this year after their innocence became apparent: Kirk Bloodsworth, Federico Macias, Walter McMillian, and Gregory Wilhoit.

At least 48 people have been released from prison after serving time on death row since 1973 with significant evidence of their innocence.[1] In 43 of these cases, the defendant was subsequently acquitted, pardoned, or charges were dropped. In three of the cases, a compromise was reached and the defendants were immediately released upon pleading to a lesser offense. In the remaining two cases, one defendant was released when the parole board became convinced of his innocence, and the other was acquitted at a retrial of the capital charge but convicted of lesser related charges. These five cases are indicated with an asterisk (*).

YEAR OF RELEASE

1973

1. David Keaton	Florida	Conviction: 1971

Sentenced to death for murdering an off-duty deputy sheriff during a robbery. Charges were dropped and Keaton was released after the actual killer was convicted.

1975

2. Wilber Lee	Florida	Conviction: 1963
3. Freddie Pitts	Florida	Conviction: 1963

Lee and Pitts were convicted of a double murder and sentenced to death. They were released when they received a full pardon from Governor Askew because of their innocence. Another man had confessed to the killings.

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[1] The principal sources for this information are news articles. M. Radelet, H. Bedau, & C. Putnam, *In Spite of Innocence* (1992), H. Bedau & M. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stanford L. Rev. 21 (1987), and the files of the National Coalition to Abolish the Death Penalty.

1976

4. Thomas Gladish New Mexico Conviction: 1974
5. Richard Greer New Mexico Conviction: 1974
6. Ronald Keine New Mexico Conviction: 1974
5. Clarence Smith New Mexico Conviction: 1974

The four were convicted of murder, kidnapping, sodomy, and rape and were sentenced to death. They were released after a drifter admitted to the killings and a newspaper investigation uncovered lies by the prosecution's star witness.

1977

8. Delbert Tibbs Florida Conviction: 1974

Sentenced to death for the rape of a sixteen-year-old and the murder of her companion. The conviction was overturned by the Florida Supreme Court because the verdict was not supported by the weight of the evidence. Tibbs' former prosecutor said that the original investigation had been tainted from the beginning.

1978

9. Earl Charles Georgia Conviction: 1975

Convicted on two counts of murder and sentenced to death. Charles was released when evidence was found that substantiated his alibi. After an investigation, the district attorney announced that he would not retry the case. Charles won a substantial settlement from city officials for misconduct in the original investigation.

10. Jonathan Treadway Arizona Conviction: 1975

Convicted of sodomy and first degree murder of a six-year-old and sentenced to death. He was acquitted of all charges at retrial by the jury after 5 pathologists testified that the victim probably died of natural causes and that there was no evidence of sodomy.

1979

11. Gary Beeman Ohio Conviction: 1976

Convicted of aggravated murder and sentenced to death. Acquitted at the retrial when evidence showed that the true killer was the main prosecution witness at the first trial.

1980

12. Jerry Banks Georgia Conviction: 1975

Sentenced to death for two counts of murder. The conviction was overturned because the prosecution knowingly withheld exculpatory evidence. Banks committed suicide after his wife divorced him. His estate won a settlement from the county for the benefit of his children.

13. Larry Hicks Indiana Conviction: 1978
Convicted on two counts of murder and sentenced to death, Hicks was acquitted at the retrial when witnesses confirmed his alibi and when the eyewitness testimony at the first trial was proved to have been perjured. The Playboy Foundation supplied funds for the reinvestigation.

1981

14. Charles Ray Giddens Oklahoma Conviction: 1978
Conviction and death sentence reversed by the Oklahoma Court of Criminal Appeals on the grounds of insufficient evidence. Thereafter, the charges were dropped.

15. Michael Linder South Carolina Conviction: 1979
Linder was acquitted at retrial on the grounds of self-defense.

16. Johnny Ross Louisiana Conviction: 1975
Sentenced to death for rape, Ross was released when his blood type was found to be inconsistent with that of the rapist's.

1982

17. Anibal Jarramillo Florida Conviction: 1981
Sentenced to death for two counts of first degree murder; released when the Florida Supreme Court ruled the evidence did not sustain the conviction.

18. Lawyer Johnson Massachusetts Conviction: 1971
Sentenced to death for first degree murder. The charges were dropped when a previously silent eyewitness came forward and implicated the state's chief witness as the actual killer.

1986

19. Anthony Brown Florida Conviction: 1983
Convicted of first degree murder and sentenced to death. At the retrial, the state's chief witness admitted that his testimony at the first trial had been perjured and Brown was acquitted.

20. Neil Ferber Pennsylvania Conviction: 1982
Convicted of first degree murder and sentenced to death. He was released at the request of the state's attorney when new evidence showed that the conviction was based on the perjured testimony of a jail-house informant.

1987

21. Joseph Green Brown (Shabaka Waglini) Florida Conviction: 1974
Charges were dropped after the 11th Circuit Court of Appeals ruled that the prosecution had knowingly allowed false testimony to be introduced at trial. At one point, Brown came within 13 hours of execution.

22. Perry Cobb Illinois Conviction: 1979
23. Darby Williams Illinois Conviction: 1979
Cobb and Williams were convicted and sentenced to death for a double murder. They were acquitted at retrial when an assistant state attorney came forward and destroyed the credibility of the state's chief witness.

24. Henry Drake* Georgia Conviction: 1977
Drake was resentenced to a life sentence at his second retrial. Six months later, the parole board freed him, convinced he was exonerated by his alleged accomplice and by testimony from the medical examiner.

25. John Henry Knapp* Arizona Conviction: 1974
Knapp was originally sentenced to death for the arson murder of his two children. He was released in 1987 after new evidence about the cause of the fire prompted a judge to order a new trial. In 1991, his third trial resulted in a hung jury. Knapp was again released in 1992 after an agreement with the prosecutors in which he pleaded no contest to second degree murder. He has steadfastly maintained his innocence.

26. Vernon McManus Texas Conviction: 1977
After a new trial was ordered, the prosecution dropped the charges when a key prosecution witness refused to testify.

27. Anthony Ray Peek Florida Conviction: 1978
Convicted of murder and sentenced to death. His conviction was overturned when expert testimony was shown to be false. He was acquitted at his second retrial.

28. Juan Ramos Florida Conviction: 1983
Sentenced to death for rape and murder. The decision was vacated by the Florida Supreme Court because of improper use of evidence. At his retrial, he was acquitted.

29. Robert Wallace Georgia Conviction: 1980
Sentenced to death for the slaying of a police officer. The 11th Circuit ordered a retrial because Wallace had not been competent to stand trial. He was acquitted at the retrial because it was found that the shooting was accidental.

1988

30. Jerry Bigelow California Conviction: 1980
Convicted of murder and sentenced to death after acting as his own attorney. His conviction was overturned by the California Supreme Court and he was acquitted at the retrial.

31. Willie Brown Florida Conviction: 1983
32. Larry Troy Florida Conviction: 1983
Originally sentenced to death after being accused of stabbing a fellow prisoner, Brown and Troy were released when the evidence showed that the main witness at the trial had perjured himself.

33. William Jent* Florida Conviction: 1980
34. Earnest Miller* Florida Conviction: 1980
A federal district court ordered a new trial because of suppression of exculpatory evidence. Jent and Miller were released immediately after agreeing to plead guilty to second degree murder. They repudiated their plea upon leaving the courtroom and were later awarded compensation by the Pasco County Sheriff's Dept. because of official errors.

1989

35. Randall Dale Adams Texas Conviction: 1977
Adams was ordered to be released pending a new trial by the Texas Court of Appeals. The prosecutors did not seek a new trial due to substantial evidence of Adam's innocence. Subject of the movie, *The Thin Blue Line*.

36. Jesse Keith Brown* South Carolina Conviction: 1983
The conviction was reversed twice by the state Supreme Court. At the third trial, Brown was acquitted of the capital charge but convicted of related robbery charges.

37. Robert Cox Florida Conviction: 1988
Released by a unanimous decision of the Florida Supreme Court on the basis of insufficient evidence.

38. Timothy Hennis North Carolina Conviction: 1986
Convicted of three counts of murder and sentenced to death. The State Supreme Court granted a retrial because of the use of inflammatory evidence. At the retrial, Hennis was acquitted.

39. James Richardson Florida Conviction: 1968
Released after reexamination of the case by prosecutor Janet Reno, who concluded Richardson was innocent.

1990

40. Clarence Brandley Texas Conviction: 1980
Awarded a new trial when evidence showed prosecutorial suppression of exculpatory evidence and perjury by prosecution witnesses. All charges were dropped. Brandley is the subject of the book *White Lies* by Nick Davies.

41. Patrick Croy California Conviction: 1979
Conviction overturned by state Supreme Court because of improper jury instructions. Acquitted at retrial after arguing self-defense.

42. John C. Skelton Texas Conviction: 1982
Convicted of killing a man by exploding dynamite in his pickup truck. The conviction was overturned by the Texas Court of Criminal Appeals due to insufficient evidence.

1991

43. Gary Nelson Georgia Conviction: 1980
Nelson was released after a review of the prosecutor's files revealed that material information had been improperly withheld from the defense. The district attorney acknowledged: "There is no material element of the state's case in the original trial which has not subsequently been determined to be impeached or contradicted."

44. Bradley P. Scott Florida Conviction: 1988
Convicted of murder ten years after the crime. On appeal, he was released by the Florida Supreme Court because of insufficiency of the evidence.

1993

45. Kirk Bloodsworth Maryland Conviction: 1984
Convicted and sentenced to death for the rape and murder of a young girl. Bloodsworth was granted a new trial and given a life sentence. He was released after subsequent DNA testing confirmed his innocence.

46. Federico M. Macias Texas Conviction: 1984
Convicted of murder, Macias was granted a federal writ of habeas corpus because of ineffective assistance of counsel and possible innocence. A grand jury refused to reindict because of lack of evidence.

47. Walter McMillian Alabama Conviction: 1988
McMillian's conviction was overturned by the Alabama Court of Criminal Appeals and he was freed after three witnesses recanted their testimony and prosecutors agreed case had been mishandled.

48. Gregory R. Wilhoit Oklahoma Conviction: 1987
Wilhoit was convicted of killing his estranged wife while she slept. He was acquitted at a retrial after 11 forensic experts testified that a bite mark found on his dead wife did not belong to him.

III. WHERE DID THE SYSTEM BREAK DOWN?

These 48 cases illustrate the flaws inherent in the death sentencing systems used in the states. Some of these men were convicted on the basis of perjured testimony or because the prosecutor improperly withheld exculpatory evidence. In other cases, racial prejudice was a determining factor. In others, defense counsel failed to conduct the necessary investigation that would have disclosed exculpatory information.

Racial Prejudice: Clarence Brandley

> "The court unequivocally concludes that the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution of him." Judge Perry Pickett.

Sometimes racial prejudice propels an innocent person into the role of despicable convict. In 1980, a 16 year-old white girl named Cheryl Dee Ferguson was raped and murdered at a Texas high school. Suspicion turned to the school's five janitors. One of the janitors later testified that the police looked at Clarence Brandley, the only black in the group, and said, "Since you're the nigger, you're elected."[7]

Brandley was convicted and sentenced to death by an all-white jury after two trials. The prosecutor used his peremptory strikes to eliminate all blacks in the jury pool.[8] Eleven months after the conviction, Brandley's attorneys learned that 166 of the 309 exhibits used at trial, many of which offered grounds for appeal, had vanished.

After six years of fruitless appeals and civil rights demonstrations in support of Brandley, the Texas Court of Criminal Appeals ordered an evidentiary hearing to investigate all the allegations that had come to light. The presiding judge wrote a stinging condemnation of the procedures used in Brandley's case, and stated that "The court unequivocally concludes that the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the

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[7] M. Radelet, H. Bedau, & C. Putnam, *In Spite of Innocence* 121 (1992).

[8] *Id.* at 124-25. The juries at both trials were all-white.

State's capital prosecution of him."[9] Brandley was eventually released in 1990 and all charges were dismissed.[10]

It took many years and a tremendous effort by outside counsel, civil rights organizers, special investigators, and the media to save Brandley's life. For others on death row, it is nearly impossible to even get a hearing on a claim of innocence.

The Pressure to Prosecute: Walter McMillian

> "I was wrenched from my family, from my children, from my grandchildren, from my friends, from my work that I loved, and was placed in an isolation cell, the size of a shoe box, with no sunlight, no companionship, and no work for nearly six years. Every minute of every day, I knew I was innocent...." Walter McMillian, Written testimony at Subcommittee Hearing, July 23, 1993.

In 1986, in the small town of Monroeville, Alabama, an 18-year-old white woman was shot to death in the dry cleaners around 10 AM. Although the town was shocked by the murder, no one was arrested for eight months. Johnny D. (Walter) McMillian was a black man who lived in the next town. He had been dating a white woman and his son had married a white woman, none of which made McMillian popular in Monroeville.[11]

On the day of the murder, McMillian was at a fish fry with his friends and relatives. Many of these people gave testimony at trial that McMillian could not have committed the murder of Ronda Morrison because he was with them all day. Nevertheless, he was arrested, tried and convicted of the murder. Indeed, McMillian was placed on death row upon his *arrest*, well before his trial. No physical evidence linked him to the crime but three people testifying at his trial connected him with the murder. All three witnesses received favors from the state for their incriminating testimony.[12] All three later recanted their testimony, including the only "eyewitness," who stated that he was pressured by the prosecutors to implicate McMillian in the crime.

The jury in the trial recommended a life sentence for McMillian but the judge overruled this recommendation and sentenced him to death. His case went through four rounds of appeal, all of which were denied. New attorneys, not paid by the State of Alabama, voluntarily took over the case and eventually found that the prosecutors had illegally withheld evidence which

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9 *Id.* at 134.

10 See also Davies, *White Lies: Rape, Murder, and Justice Texas Style* (1991).

11 See P. Applebome, *Black Man Freed After Years on Death Row in Alabama*, The New York Times, Mar. 3, 1993, at A1.

12 See *Five Years on Death Row*, The Washington Post, Mar. 6, 1993, at A20.

would have pointed to McMillian's innocence. A story about the case appeared on CBS-TV's program, *60 Minutes*, on Nov. 22, 1992. Finally, the State agreed to investigate its earlier handling of the case and then admitted that a grave mistake had been made.[13] Mr. McMillian was freed into the welcoming arms of his family and friends on March 3, 1993.

Inadequate Counsel: Federico Macias

Federico Macias' court-appointed lawyer did virtually nothing to prepare the case for trial. Macias was sentenced to death in Texas in 1984. Two days before his scheduled execution, Macias received a stay. New counsel from the large Skadden, Arps law firm had entered the case and devoted to it the firm's considerable resources and expertise. Mr. Macias' conviction was overturned via a federal writ of habeas corpus, which was upheld by a unanimous panel of the U. S. Court of Appeals for the Fifth Circuit in December, 1992. The court found that not only was Macias' original counsel grossly ineffective, but also that he had missed considerable evidence pointing to Macias' innocence. The court concluded:

> We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for.[14]

Thereafter, Macias was freed when the grand jury, which now had access to the evidence developed by the Skadden, Arps attorneys, refused to re-indict him.

There are many similar stories of defendants who have spent years on death row, some coming within hours of their execution, only to be released by the courts with all charges dropped.[15] What is noteworthy about the cases outlined above is that they are very recent examples which illustrate that mistaken death sentences are not a relic of the past.

Official Misconduct: Chance and Powell

While Clarence Chance and Benny Powell were not sentenced to death, their convictions for murder illustrate the dangers of overzealous police work. They were released from prison last year after Jim McCloskey of Centurion Ministries took on their case and demonstrated their innocence. The City of Los Angeles awarded them $7 million and the judge termed the police

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13 See P. Applebome, note 11 above, at B11.

14 Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992).

15 For a list of death row inmates who were reprieved with 72 hours of their scheduled executions, see Bedau & Radelet, at 72.

department's conduct "reprehensible" while apologizing for the "gross injustices" that occurred.[16]

IV. ARE THE PROTECTIONS IN THE LEGAL SYSTEM ADEQUATE TO PREVENT EXECUTING INNOCENT PERSONS?

To some degree, the cases discussed in Section III illustrate the inherent fallibility of the criminal justice system. (Sensational murder cases often tend, however, to amplify the flaws of the system.) Mistakes and even occasional misconduct are to be expected. The cases outlined above might convey a reassuring impression that, although mistakes are made, the system of appeals and reviews will ferret out such cases prior to execution. In one sense, that is occasionally true: the system of appeals sometimes allows for correction of factual errors.

But there is another sense in which these cases illustrate the inadequacies of the system. These men were found innocent *despite the system* and only as a result of extraordinary efforts not generally available to death row defendants.

Indeed, in some cases, these men were found innocent as a result of sheer luck. In the case of Walter McMillian, his volunteer outside counsel had obtained from the prosecutors an audio tape of one of the key witnesses' statements incriminating Mr. McMillian. After listening to the statement, the attorney flipped the tape over to see if anything was on the other side. It was only then that he heard the same witness complaining that he was being pressured to frame Mr. McMillian.[17] With that fortuitous break, the whole case against McMillian began to fall apart.

Similarly, proving the innocence of Kirk Bloodsworth was more a matter of chance than the orderly working of the appeals' process. Only a scientific breakthrough, and an appellate lawyer's initiative in trying it, after years of failed appeals, allowed Bloodsworth to prove his innocence. And even then, the prosecutor was not bound under Maryland law to admit this new evidence.[18]

Furthermore, not every death row inmate is afforded, after conviction, the quality of counsel and resources which Walter McMillian and Federico Macias were fortunate to have during their post-conviction proceedings. Many of those on death row go for years without any attorney at all.

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16 M. Lacey & S. Hubler, *L.A. Awards 2 Freed Inmates $7 Million*, Los Angeles Times, Jan. 27, 1993, at B1.

17 C. Carmody, *The Brady Rule — Is it Working*, The National Law Journal, May 17, 1993, at 1.

18 See, e.g., S. Shannon, *New DNA Testing Provides Hope for Some Inmates*, The Los Angeles Times, July 4, 1993, at A26 (Maryland's time limit for admitting new evidence is one year after the judgment becomes final).

Most of the releases from death row over the past twenty years came only after many years and many failed appeals. The average length of time between conviction and release was almost 7 years for the 48 death row inmates released since 1970.

Innocence Is Not Generally Reviewed

To often, the reviews afforded death row inmates on appeal and habeas corpus simply do not offer a meaningful opportunity to present claims of innocence. As will be discussed more fully below, in many states there simply is no formal procedure for hearing new evidence of a defendant's innocence prior to his execution date. After trial, the legal system becomes locked in a battle over procedural issues rather than a reexamination of guilt or innocence. The all-night struggle to stay the execution of Leonel Herrera in 1992, even *after* the U.S. Supreme Court had agreed to hear his constitutional challenge, is an example of how much pressure is exerted to proceed with executions.[19]

Accounts which report that a particular case has been appealed numerous times before many judges may be misleading. In fact, most often, procedural issues, rather than the defendant's innocence are being argued and reviewed in these appeals. For example, when Roger Keith Coleman was executed in Virginia last year, it was reported that his last appeal to the Supreme Court "was Coleman's 16th round in court."[20] However, the Supreme Court had earlier declared that Coleman's constitutional claims were barred from any review in federal court because his prior attorneys had filed an appeal too late in 1986.[21] His evidence was similarly excluded from review in state court as well. Instead, Coleman's innocence was debated only in the news media and considerable doubt concerning his guilt went with him to his execution.[22]

This section will examine some of the means, both extra-judicial and within the system, by which the cases of innocence are uncovered. But first, it is necessary to clarify what is meant in this report by the term "innocent."

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19 See R. Marcus, *Execution Stalled on 11th-Hour Claim of Innocence*, The Washington Post, Feb. 25, 1992, at A3. "Lawyers for the state of Texas and a death row prisoner engaged in a last-minute sprint through the federal court system over the execution, which had been scheduled to take place before sunrise." The execution did not take place that night because a Texas state court decided to issue a stay. Herrera's case was argued before the Supreme Court on Oct. 7, 1992. The Court decided Herrera was not entitled to a hearing on his innocence claims, and he was executed in May, 1993.

20 M. Allen, *Coleman is Electrocuted*, Richmond Times-Dispatch, May 21, 1992 at A11.

21 Coleman v. Thompson, 111 S. Ct. 2546 (1991).

22 See, e.g., J. Smolowe, *Must This Man Die?*, Time Magazine, May 18, 1992, at 41 (cover story).

Meaning of "Innocent"

In the criminal justice system, defendants are presumed to be innocent until proven guilty beyond a reasonable doubt. Thus, a person is fully entitled to a claim of innocence if charges are not brought against him or if the charges brought are not proven. A person may be guilty of other crimes or there may be some who still insist he is guilty, but with respect to the charge in question, he is innocent.

In some cases, the investigative process does conclusively determine innocence. A piece of evidence may demonstrate that a suspect or defendant could not have been the perpetrator, or someone else confesses, eliminating other suspects. Under the law, there is no distinction between the definitively innocent and those found innocent after a trial but about whom there may remain a lingering doubt.

Extra-Judicial Redress

In the absence of adequate legal mechanisms, the most serious errors in the criminal justice system are sometimes uncovered as a result of such extra-judicial factors as the media and the development of new scientific techniques. These following cases illustrate the randomness of how the legal system works.

Role of the Media: Randall Dale Adams

One unpredictable element that can affect whether an innocent person is released is the involvement of the media. In Randall Dale Adams' case, film producer Errol Morris went to Texas to make a documentary on Dr. James Grigson, the notorious "Dr. Death."[23] Grigson would claim 100% certainty for his courtroom predictions that a particular defendant would kill again, and he made such a prediction about Randall Adams.

In the course of his investigation of Grigson, Morris became interested in Adams' plight and helped unearth layers of prosecutorial misconduct in that case. He also obtained on tape a virtual confession by another person. Morris' movie, *The Thin Blue Line*, told Randall Adams' story in a way no one had seen before. The movie was released in 1988 and Adams was freed the following year.

Role of the Media: Other Cases

Similarly, all charges and death sentences against Thomas Gladish, Richard Greer, Ronald Keine, and Clarence Smith were dropped in 1976 thanks, in part, to the *Detroit News* investigation of lies told by the prosecution's star witness.[24]

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[23] See Bedau et al., *supra*, at 68

[24] *Id.* at 56-57

Walter McMillian's case was featured on *60 Minutes* shortly before his release. So was the case of Clarence Brandley. Brandley was also aided by the civil rights community, which organized opposition to his execution. Supporters were able to raise $80,000 for his defense.[25] Obviously, these advantages are not available to everyone on death row who may have been wrongly convicted.

Unpredictable Emergence of New Scientific Tests: Kirk Bloodsworth

In 1984, a 9-year-old girl named Dawn Hamilton was raped and murdered in Baltimore County, Maryland. Two young boys and one adult said they had seen Dawn with a man prior to her death. They thought that Kirk Bloodsworth looked like the man who had been with her. Again, no physical evidence linked Bloodsworth to the crime. He was convicted and sentenced to death because he looked like someone who might have committed the crime.[26]

There was some evidence taken from the crime scene, but it gave the police no clue as to who the killer was. Tests were conducted on the girl's underwear, but the tests were not sophisticated enough at that time to detect and identify DNA material from the likely assailant. Fortunately for Mr. Bloodsworth, he was granted a new trial when a judge ruled that the state had withheld evidence from the defense attorneys about another suspect. This time he received a life sentence. Bloodsworth, however, continued to maintain his innocence and the life sentence gave him the time to prove it.[27]

When a new volunteer lawyer agreed to look into Bloodsworth's case, he decided to try one more time to have the evidence in the case tested. He sent the underwear to a laboratory in California that used newly developed DNA techniques. The defense attorney was astonished when he learned that there was testable DNA material. The tests showed that the semen stain on the underwear could not possibly have come from Mr. Bloodsworth. The prosecution then agreed that if these results could be duplicated by the FBI's crime laboratory, it would consent to Mr. Bloodsworth's release. On Friday, June 25, the FBI's results affirmed what Bloodsworth had been saying all along: he was innocent of all charges. On June 28, he was released by order of the court from the Maryland State Correctional facility in Jessup, after 9 years in prison -- two of which were on death row.

The next section of the report will look at the traditional avenues which an innocent defendant can use to prevent or overturn a sentence of death.

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25 *Id.* at 128

26 See G. Small, *Nine-year Prison 'Nightmare' Comes to an End as Accused Killer is Exonerated*, The Baltimore Sun, June 29, 1993, at 1A

27 See also P. Valentine, *Jailed for Murder, Freed by DNA*, The Washington Post, June 29, 1993, at A1.

Trial Is Critical, but often Hampered by Poor Legal Representation

The trial is obviously the critical time for the defendant to make his or her case for innocence. Unfortunately, the manner in which defense counsel are selected and compensated for death penalty trials does not always protect the defendant's rights at this pivotal time. Most defendants facing the death penalty cannot afford to hire their own attorney and so the state is required to provide them with one. Some states have public defender offices staffed by attorneys trained to handle such cases. In other states, attorneys are appointed from the local community and the quality of representation is spotty.[28]

Federico Macias is certainly not alone with respect to ineffective counsel. The stories regarding deficient representation in death penalty cases are rampant.[29] The Subcommittee has held several hearings documenting this problem.[30] Although death penalty law is a highly specialized and complex form of litigation, there is no guarantee that the attorney appointed to this critical role will have the necessary expertise. There is no independent appointing authority to select only qualified counsel for these cases and attorneys are frequently underpaid and understaffed, with few resources for this critical undertaking.

Proving Innocence After Trial: Defendant's Burden

Before trial, the arrested defendant need do nothing to prove his innocence. The burden is completely on the prosecution to prove that the individual is guilty of the crimes charged beyond a reasonable doubt. However, *after* someone has been found guilty, the presumption shifts in favor of the state. The burden is now on the defendant to prove to a court that something went wrong in arriving at the determination of guilt. It is no longer enough to raise a reasonable doubt. To overturn a conviction, the evidence must be compelling, and violations of Constitutional rights by the state will be forgiven as long as they were "harmless."[31]

The Appellate Process

If an innocent defendant is convicted, he generally has little time to collect and present new evidence which might reverse his conviction. In Texas, for example, a defendant has only 30 days after his conviction to present new evidence, and the state strictly adheres to that rule.

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[28] See *A Study of Representation in Capital Cases in Texas*, The Spangenberg Group (1993), at vi ("the rate of compensation provided to court-appointed attorneys in capital cases is absurdly low and does not cover the cost of providing representation")

[29] See, e.g., S. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 Missouri L. Rev. 849 (1992)

[30] See Subcommittee hearings May 22, June 27, and July 17, 1991.

[31] See, e.g., Brecht v. Abrahamson, 123 L. Ed 2d 353 (1992) (relaxing the standard in federal habeas for finding error to be harmless)

Sixteen other states also require that a new trial motion based on new evidence be filed within 60 days of judgment.[32] Eighteen jurisdictions have time limits between 1 and 3 years, and only 9 states have no time limits.[33]

Thus, even a compelling claim of innocence, such as a videotape of someone else committing the crime (as recently hypothesized by Justice Anthony Kennedy in oral arguments of Herrera,[34] discussed below), does not guarantee a review in state or federal court.

All death row inmates are assured representation to make one direct appeal in their state courts. If that appeal is denied, representation is no longer assured.[35] In states like Texas and California with large death rows, many defendants sentenced to death are not currently being represented by any attorney.[36] Obviously, such a defendant's opportunity to uncover evidence to prove his innocence is greatly reduced, even assuming a court would hear the evidence if it was found.

Habeas Corpus: The Great Writ

When someone has been unjustly convicted under circumstances similar to those described above, he can challenge that conviction in federal court through the writ of habeas corpus. Although numerous legislative proposals to limit habeas corpus in the past few years have failed, the opportunity for using this writ has already been stringently narrowed by recent Supreme Court decisions. The following cases illustrate some of the barriers erected by the Court to claims of innocence in habeas cases.

Leonel Herrera

The Supreme Court has denied habeas review of claims from prisoners on death row with persuasive, newly discovered evidence of their innocence. Leonel Herrera presented affidavits

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32 See Herrera v. Collins, slip op. No. 91-7328 (Jan. 25, 1993), at 19, n. 8.

33 *Id.* at 19-20, n. 9-11.

34 See D. Savage, *Court Urged to OK Execution Despite Evidence*, Los Angeles Times, Oct. 8, 1992, at A1: "'Let's say you have a videotape which conclusively shows the suspect is innocent,' said Justice Anthony M. Kennedy, addressing the state's attorney. 'Is it a federal constitutional violation to execute that person?'

'No. It would not be violative of the Constitution,' replied Texas Assistant Attorney Gen. Margaret P. Griffey."

35 See Murray v. Giarratano, 492 U.S. 1 (1989) (states not required to provide counsel to indigent death row prisoners after direct appeal). Once a case moves into federal habeas litigation, federal law allows for the appointment of counsel but crucial issues may have been waived before then.

36 See R. Smothers, *A Shortage of Lawyers to Help the Condemned*, The New York Times, June 4, 1993, at A21; see also H. Chiang, *Judge Sees 'Time Bomb' on Death Row*, San Francisco Chronicle, Aug. 18, 1993 (105 of the 370 Calif. death row inmates have no attorneys).

and positive polygraph results from a variety of witnesses, including an eyewitness to the murder and a former Texas state judge, both of whom stated that someone else had committed the crime. However, the Supreme Court ruled that Herrera was not entitled to a federal hearing on this evidence and was told that his only recourse was the clemency process of the state of Texas.[37] Herrera was executed in May of this year.

Gary Graham

Death row inmates who claim their innocence are therefore often forced to rely on procedural claims. But those, too, are being foreclosed by the Supreme Court.

For example, Gary Graham's case has gained national attention because he nas made a substantial claim of innocence. However, the barriers to getting such new evidence before the courts has necessitated that the defense pursue other claims which only affect his sentence. Death penalty attorneys realize that proving their client innocent after he is executed is of no value to him.

But when Gary Graham claimed that the Texas death penalty procedures did not allow consideration of his youth at the time of the crime, the U. S. Supreme Court refused to even consider the question. The Court said that even if he was right in his claim, ruling in his favor would create a "new rule" of law and no such rule could apply retroactively to his case.[38]

Another recent narrowing of the writ requires federal courts to reject all claims if the proper procedures were not followed by the defendant in state court. Roger Coleman, for example, filed his Virginia state appeal three days late and this error *by his attorneys* barred any consideration of his federal constitutional claims.[39] Coleman was executed without a federal court hearing his claim. Similarly, if a claim is not raised on a defendant's first habeas petition, the claim (with rare exceptions) is automatically rejected, even if the government withheld the very evidence the defendant would have needed to raise the claim in his first petition.[40]

Clemency

For the innocent defendant, the last avenue of relief is clemency from the executive branch. All death penalty states have some form of pardon power vested either in the governor

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[37] See *Herrera*, supra, at 20

[38] Graham v. Collins, 122 L. Ed 2d 260 (1993)

[39] Coleman v. Thompson, 111 S. Ct. 2546 (1991)

[40] See McCleskey v. Zant, 111 S. Ct. 1454 (1991)

or in a board of review.[41] However, clemencies in death penalty cases are extremely rare. Since the death penalty was re-instated in 1976, 4,800 death sentences have been imposed but less than three dozen clemencies have been granted on defendants' petitions.[42] In Texas, the state with the greatest number of executions, no clemencies have been granted.

The procedures for clemency are as varied as the states. In many states the governor has the final say on granting a commutation of a death sentence. Since the governor is an elected official and since there is virtually no review of his or her decision, there is the danger that political motivations can influence the decisions.[43] Many of the commutations which have been granted in the past 20 years were granted by governors only as they were leaving office.

Other arrangements are also subject to political pressures. In Texas, a board must first recommend a clemency to the governor. However, the board is appointed by the governor and is not required to meet or hear testimony to review a case. Recently, a judge in Texas held that this lack of process violated Gary Graham's constitutional rights and ordered a hearing to review his claims of innocence.[44]

In Nebraska, Nevada and Florida, the chief state prosecutor sits on the clemency review board.[45] And generally, there are no procedural guarantees to assure that a claim of innocence which has been barred review by the courts will be fully aired for clemency. As Justice Blackmun recently pointed out:

> "Whatever procedures a State might adopt to hear actual innocence claims, one thing is certain: The possibility of executive clemency is *not* sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments."[46]

Thus, the prospect of clemency provides only the thinnest thread of hope and is certainly no guarantee against the execution of an innocent individual.

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[41] See *Herrera*, supra, at 23, n.14.

[42] *See Clemency - Fail-safe System or Political Football?*, The Oakland Tribune, June 27, 1993 (41 additional clemencies have been granted for judicial expediency, to save time and expense after court rulings requiring a new sentencing).

[43] See, e.g., J. Berry, *Governors Shy Away From Death Row Pardons*, The Dallas Morning News, Aug. 15, 1993, at 1J.

[44] See *New Turns in Case of a Texan Scheduled to Die*, The New York Times, Aug. 13, 1993 (stay was ordered pending appeal of judge's order).

[45] B. Reeves, *Execution Stay Upheld*, The Lincoln (Nebraska) Star, Aug. 6, 1992, at 1.

[46] Herrera v. Collins, slip op. No. 91-7328-Dissent (Jan. 25, 1993) (emphasis in original), at 11.

IV. CONCLUSION

It is an inescapable fact of our criminal justice system that innocent people are too often convicted of crimes. Sometimes only many years later, in the course of a defendant's appeals, or as a result of extra-legal developments, new evidence will emerge which clearly demonstrates that the wrong person was prosecuted and convicted of a crime.

Americans are justifiably concerned about the possibility that an innocent person may be executed. Capital punishment in the United States today provides no reliable safeguards against this danger. Errors can and have been made repeatedly in the trial of death penalty cases because of poor representation, racial prejudice, prosecutorial misconduct, or simply the presentation of erroneous evidence. Once convicted, a death row inmate faces serious obstacles in convincing any tribunal that he is innocent.

The cases discussed in this report are the ones in which innocence was uncovered before execution. Once an execution occurs, the small group of lawyers who handle post-conviction proceedings in death penalty cases in the United States move on to the next crisis. Investigation of innocence ends after execution. If an innocent person was among the 222 people executed in the United States since Furman, nobody in the legal system is any longer paying attention.

Many death penalty convictions and sentences are overturned on appeal, but too frequently the discovery of error is the result of finding expert appellate counsel, a sympathetic judge willing to waive procedural barriers, and a compelling set of facts which can overcome the presumption of guilt. Not all of the convicted death row inmates are likely to have these opportunities.

Judging by past experience, a substantial number of death row inmates are indeed innocent and there is a high risk that some of them will be executed. The danger is inherent in the punishment itself and the fallibility of human nature. The danger is enhanced by the failure to provide adequate counsel and the narrowing of the opportunities to raise the issue of innocence on appeal. Once an execution occurs, the error is final.

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Capital Punishment in Territorial Alaska: A brief summary of research undertaken in connection with an oral and documentary history of three executions in Juneau, Alaska, between 1939 and 1950.

by: Averil Lerman

October 1995
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This article summarizes research completed to date on three separate executions which took place in Juneau, Alaska between 1939 and 1950. This article is a report on a work in progress.

The ultimate goal of this history is to record the story of capital punishment in Territorial Alaska, from as many points of view as possible, including those of the family and friends of the murder victims, the defendants, trial witnesses, jurors, policemen, jailers, and anyone else who was affected by the execution processes. More than 50 people have been interviewed. Many interviews were conducted by telephone, some of which were tape-recorded. Others were conducted in person, in Seattle, Juneau, Anchorage, and Maine.[1]

Documentary research is also ongoing. Relevant materials have been located with the invaluable aid of archivists and librarians at the Alaska State Archives, the National Archives, the Loussac Library, the University of Alaska/Anchorage library, and the Alaska Historical Library.

Brief Overview: The Death Penalty in Territorial Alaska

Until it was abolished by the Territorial Legislature in 1957, Alaska had a death penalty. Between 1900 and 1957, eight men were executed in the Territory by force of law, each of them convicted of murder. Although most of the murders in the Territory were committed by white men,[2] most of the men who hanged were non-white. Only two of the men hanged during this period were white. Fred Hardy, executed in Nome in 1902, and Homer Bird, executed in Sitka in 1903. After 1904, all of the men hanged in the Territory were non-white or of minority status. Three were Alaska Natives, two were African-American, and one was a foreigner from Montenegro, viewed as a minority by the citizens who tried him.[3]

In 1957, the territorial legislature abolished the death penalty in Alaska, after a prolonged

debate and an impassioned speech by abolition sponsor Warren Taylor. According to Vic Fischer, who was the junior sponsor of the abolition bill, one of the factors motivating abolition was concern about the apparent race bias in the application of the death penalty.[4]

This project focuses on the last three hangings, each of which was in Juneau, Alaska, between 1939 and 1950. Through interviewing people who were involved in or affected by the capital trials and the executions, and through consulting documentary sources, the goal is to better understand a number of questions related to capital punishment in Alaska: Why was the death penalty so rarely applied? Is it simply coincidence that there was a single decade in Fairbanks in which the penalty was exacted, and then a single decade in Juneau in which hangings occurred, or was that related to social stresses, or to a particular judge or prosecutor, or to some other factor? How did race factor into application of the death penalty, and at what stage or stages of the process of arrest, trial, sentence, or post-conviction venues did the specter of race influence the eventual outcome? How did the death penalty impact the people who came into contact with it, whether as government workers or as persons connected with the murder victim or the man convicted of the murder? And finally, why was the death penalty abolished, when it was so rarely used?

These goals are ambitious, and answers to these questions are certainly beyond the scope of this particular brief paper, but this list of questions sets the context for the discussion below. What follows is a brief overview of the story of the last three hangings in Alaska, gleaned both from interviews and from documentary sources (principally court records and newspaper articles).

Nelson Charles

The first person hanged in Juneau was Nelson Charles, a Ketchikan fisherman. Charles, described in the newspaper accounts as "an Indian" perhaps from the Puget Sound area, had been tried and convicted in Ketchikan of the 1938 murder and assault of his mother-in-law. The crime was committed when both he and his victim had been drinking heavily.

Charles was represented at trial by well-known Ketchikan lawyer A.H. Ziegler, who was appointed by the court on behalf of the indigent defendant. The defense called no witnesses at the trial, but, after the verdict was received, tried to submit the affidavit of a retired marshal, stating that Charles was a peaceable man who was rendered almost insane by drink. The

evidence was too little, too late. Charles was sentenced to hang.

Three of the witnesses to the execution of Nelson Charles were interviewed for this article: John Gaffney, George Sundborg, and Al Anderson. Each had been a journalist at the time of the execution, and each had a vivid recollection of the hanging, even though the interviews took place in 1994, 55 years after the hanging. John Gaffney provided, in addition, a remarkable essay that he had written shortly after the event, detailing his thoughts and feelings as a witness to the execution.

Like most of the men hanged in Alaska, Nelson Charles had no money, and thus could not afford to bring any appeal from his conviction. Efforts for clemency were made on his behalf by the Alaska Native Brotherhood, through a petition to President Roosevelt.

While Charles was attempting to avoid the scaffold, the U.S. marshal's office in Juneau was trying to figure out how to build a scaffold. Execution by hanging is not as simple a matter as it might at first appear to be. The weight of the prisoner and the length of his fall must be carefully calculated, and a smooth and stretched rope must be used.

The U. S. marshal in Juneau in 1939 was William Mahoney. Mahoney, like the others in his position during Territorial times, was a political appointee. Mahoney's second-in-command, Walter Hellan, was often delegated important tasks. George Sundborg, who was in 1939 a young reporter for a local weekly called *The Juneau Independent*, was responsible for making a daily visit to the marshal's office in search of news. He recalls seeing the marshal and his deputies pore through the manuals in order to learn their new duty.

> Several weeks ahead of the date of the hanging, the office of the U.S. marshal was making preparations there for it.... They of course had never conducted a hanging, and I think they got a few books out of libraries somewhere, probably from the U.S. Marshal Service, to tell them how a hanging was to be set up and carried through. And I know that they had done some dry runs with the trap that they built, and had carefully calculated the weight of the victim -- of the accused, so that he wouldn't be dropped so far as to behead him, which sometimes happens in a hanging, I learned at that time.[3]

Like men on a firing squad, one of whom has a blank cartridge in his rifle, the marshal's deputies were to be insulated from individual responsibility for the act of executing Nelson

Charles Sundborg explained:

> And so Walter Hellan, who was in charge of all of this, had told me that, so that the person who actually sprung the trap would not know that he had done it, they set up several, I think four, different ropes that would pull a pin that dropped the trap. And three of them would be false, and one would be the one that actually did it. And so the four men, all of whom were deputy marshals -- the one who did it would not know that it was he who had pulled the one that actually caused this man's death. And I know that after I wrote that in my story of the execution, Walter Helen admonished me the next day and said, 'You shouldn't have said that, because we didn't want it to [be known] who pulled the strings....'

The scaffold was constructed in a stairwell of the building which housed both the Federal Jail and the marshal's residence. The building had at one time been the Territorial capital, and still displayed its initial purpose with a colonnaded entrance and a small, latinate cupola at its peak. But the inside of the building had never been updated, and was so decrepit that it was regularly the source of grand jury reports suggesting renovation.[6] Instead of building a gallows, the marshal decided to make use of the architecture of the building itself. Sundborg described the Federal jail and the plan worked out by Mahoney:

> It was a large building which previously had been the capitol. And it was a wooden building but very large, and quite attractive. But it had grown old and it had been supplanted by the federal building, which was across the street from it. It had outside stairways, that is, one was out in the open when going from the second floor to the third floor, and so on. And [the marshal's office] had decided that they would do the hanging under one of these stairways because there was an open space there with quite a drop. And so we went in and they had set up a floor in the place with a trap in the middle of it.

The plan was to permit a drop of four and one-half feet below the level of the trapdoor. Construction of the scaffold was started on Nov. 7, 1939.[7]

Charles faced his imminent death calmly. According to the local newspaper, Charles left behind 13 letters of farewell, one of which was addressed to Marshal Mahoney, stating that the marshal "had treated him kindly and that he did not hold Mahoney in any way to blame for what was about to happen to him."[8] The paper also reported on Charles' condition on the night before his death, almost as if to reassure the public about a hospital patient recovering from some serious illness. "Nelson Charles was calm throughout the night, jailers said, and ate a hearty breakfast. He slept about an hour and a half."[9]

The law required the execution to take place in front of 12 witnesses selected by the marshal. Mahoney approached this issue with solemnity. Invited witnesses received printed invitations, looking almost like engraved wedding invitations (according to George Sundborg), printed on blue paper tickets. The invitations were sought after. Al Anderson, a writer for *The Alaska Daily Press* and a stringer for the United Press Service,, was given an invitation by Mahoney. More than 50 years later, he still remembered with astonishment the extent to which others envied him for it:

> There were some people who wanted to witness a hanging. One gal, in particular, told me to influence my boss to get her a ticket. And she cried because she couldn't get one. Can you imagine that?[10]

The people who had been invited by Marshal Mahoney to witness the execution included three journalists, a priest, a minister, two doctors, men from the marshal's office, and several others who had no professional connection to the process (including one man who worked for the Internal Revenue Service). The scaffold was set up underneath a tall staircase on the outside of the jail building. A trapdoor had been placed under the large staircase that led from the ground up to the second floor. A second set of stairs descended to the basement level. A rope had been hung from the bottom of the second floor landing to the trapdoor structure that had been built over the excavated area into which the lower stair descended. Two small benches had been placed on the wooden platform, ten feet from the trapdoor that would open into the pit below.

The witnesses were seated on benches beneath the ascending staircase. The marshal came out of the door, and told everyone that there was to be no talking once Nelson Charles came out. Then he left again. There were only a few remarks from the witnesses assembled, waiting. Al Anderson recalled hearing someone say, "Jesus Christ, what a way to make a living."

Nelson Charles was brought out of the jail by Mahoney and a deputy. He was a small, dark-skinned man, wearing blue serge trousers, a white shirt, a carefully knotted necktie, and black shoes. Charles's arms and hands were bound tightly to his sides with white straps. As the witnesses watched, Mahoney took another strap and bound Charles's legs together.

In his essay, John Gaffney recorded the final exchange between the marshal and his

prisoner:

> As [Mahoney] finished his task, he stepped back a little; is there anything you'd like to say, Nelson? he asked. We listened as we had never thought a man could listen, listened till our ears would burst, listened while we expected him to say nothing, but hoped he would; we expected a brief negative nod of the dark head. But he spoke, his voice a half-sob, whispering, barely more: I am innocent of killing my mother-in-law, he murmured. I don't want to hang; I still say I am innocent. His head was bowed forward, you could feel if not see the hot tears in his eyes, you could feel his trembling in your own body.

Mahoney pulled a black knit hood over Charles's head, and then took the noose off a peg on the wall, and placed it over Charles' hooded head. Then he stepped back a step, and raised his arm, and softly said, "OK."

John Gaffney recorded his own thoughts at that moment:

> Had I any thought of a man, a criminal, about to pay for his crime? Any thought of a disreputable and dangerous killer about to give his life for one he had taken? No, nothing like that. Only that a man was about to die, that there, almost within reach, was a man, a man like ourselves, a young man who somewhere had a wife, who had once slept an untroubled sleep, had only the day before laughed and hoped for life. I was aware of some feeling as I sat there then, some unusual feeling that was strange to me; then it was vague, and there was not time to fathom it. But now I know; it was the certainty, the sureness of it. I knew for the only time in my life that within minutes this man who now lived as I lived would be dead, a stone, lifeless, cold and stiff. Men have been stricken with fatal diseases and we have known they will die; we have held our buddies in our arms at the front and watched the last breaths spend themselves; but even then there has been hope, and when not hope, the awareness that death might stay away yet awhile. Would it come now, or later, perhaps? But none of that now, nothing less than a miracle can save this fellow, and there are no miracles in this life; we know no other. Soon he will be a stone.

Deputy Marshal Walter Heilan flipped a switch on the wall next to him. Gaffney stated:

> The deputy reached somewhere toward the back wall and at once a clicking noise commenced. It was loud in the quiet, widely spaced clicks, which seemed second apart, loud yet muffled, un-mechanical sounding clicks, the water near me dripped on, drip, drip, click, click, drip, click, drip, click.
>
> Then, the clicking stopped with the louder sound of the trap's springing. There it was, the square of wood on which he stood fell away and he fell toward the pit, fell then swung. Not a movement, just swung, turning, turning, now right, now left, like a stone on a string, a bit of paper on a cord, held in the air for a kitten to leap at.

After the drop, Charles neither moved nor made any sound, according to the witnesses. The marshal walked off the platform and went downstairs to help the doctors climb up a pile of boxes from the floor below to determine whether or not Nelson Charles was still alive. "Dead," was all the second doctor said. The witnesses left. As they walked through the jail gate, a black hearse pulled through the gate towards the jail. One of the newspapers reported that the body was recovered not by cutting the noose from the rope, but instead by pulling it back up through the trap.

Al Anderson remembered what happened after the hanging, dropping his voice to quote Mahoney.

> And afterwards, I'll never forget, the United States marshal congratulating Walter Hellan on the '... smooth job, well done.' And I think after that, I went downtown to a bar and had a good stiff drink, then came back to my office at the Alaska Daily Press, wrote the story, and everybody stayed away from me because they knew I had enough on my mind.

George Sundborg recalled emerging after the execution from the dark jail into the rainy daylight, and recalled a "... very striking scene, one of the greatest, most striking scenes of my life." He recalls seeing a ring of several hundred people around the jail.

> I was dumbstruck to see that the entire ring -- it was on a hillside, and every point of vantage where a person could stand was filled with a Native Alaskan, an Indian. You've probably seen the movies in the old days where the wagon trains are going through a valley, and all of a sudden an Indian will appear on the horizon, and then there would be nothing but Indians all the way around. Well, that was the way it was on the day of the execution.

Sundborg did not know whether these witnesses were there in support of Nelson Charles or if they were memorializing Cecilia Johnson, the woman killed by Charles. The crowd was "absolutely silent."

Nelson Charles had asked that any funeral be conducted by the Salvation Army. He was buried in an unmarked grave in Evergreen Cemetery. His wife was in Ketchikan at the time of the hanging. According to the newspaper, she was serving time on a charge of being drunk and disorderly. He left behind a young daughter as well.

AUSTIN NELSON AND EUGENE LAMOORE

Austin Nelson and Eugene LaMoore, the last two men hanged in the Alaska Territory, were separately convicted of the 1946 murder of a Juneau convenience store owner named Jim Ellen. Both Nelson and LaMoore were African-American. Jim Ellen was white. Nelson was tried in 1947, and hanged in 1948. LaMoore was tried in 1948, and hanged in 1950.

Jim Ellen owned a small grocery and liquor store on Willoughby Avenue, in the rougher area of Juneau. Not unlike modern convenience stores, half of the store sold only groceries, and the other half sold only liquor. The two stores had separate entrances, but had a small opening in-between them through which Ellen could pass in order to service customers in either location. He was available even after regular business hours, and "often opened his store to make sales to customers at odd hours," according to the Juneau newspaper.[11]

Ellen lived in the back room of the store premises. A 52 year-old bachelor, he was, according to the newspaper account, a Greek immigrant, who had come to the United States as a child in 1909, and had been in Juneau since about 1930. He spoke English with a Greek accent, according to the recollection of John Gaffney, who worked for Ellen as a shop boy during high school. Ellen was a veteran of World War I, and a member of the American Legion and the Juneau Elks Lodge. Gaffney recalled:

> He was a bachelor and he was reasonably tall and very rugged and strong, and he wasn't a talker much but he had a few friends around here where he used to go on Sunday and socialize a bit. He was a fine man so far as I know.[12]

Ellen was a hardy man, and powerful. Stores like his were then, as they are now, a common target of thieves.[13] The local newspaper reported several previous robberies of Ellen's store in 1937, 1938, and 1944. In one of those instances, Ellen had successfully resisted two armed robbers, who he chased away after a struggle.[14] As Gaffney remembered: "Jim wouldn't have given up an ant hill for money. He was a very, very strong man. A simple man, but a good man. And, he would have either fought back or done something, however unwise it was, and that's what happened I guess."[15]

The murder of Jim Ellen hit a nerve in post-war Juneau. One woman recalled anxiety in

the town

> It seemed to me that even the year before that there had been another murder, Clarence [Campbell], and the body was found right in the area where we were building our new house So when Jim Ellen was murdered, it was this other feeling of, 'God, what's this town coming to with these random murders going on?' It was just after the war, you know, and there had been a lot of unsettled feeling in Juneau because there were many strangers, many people who had worked various construction jobs during the war, were drifting in and out [16]

Ellen's body was found on the floor of his store, on the morning of December 22, 1946 His throat had been cut Merchandise was scattered around the store, indicating a struggle had taken place All of the paper money from the cash register was gone, with one exception The robber had left on the store counter a check, signed over to Jim Ellen by one "Austin Nelson." Austin Nelson was a 24 year-old black man, who had worked at various odd jobs around Juneau Nelson was immediately arrested on suspicion of murder

Trial was set for April 10, 1947 In early April, the Court held a hearing to appoint counsel to represent Nelson, who was indigent Because it was a capital case, the court could appoint two defense lawyers The first appointment was Henry Roden, who was one of the grand old men of Alaska Law, who had himself served as the compiler of law in the Territory At 73, however, Roden was somewhat past his prime, too frail, by one report, to walk up the steep hill to the jail to see his client Roden told the Court that eight days would be long enough for him to prepare his client's defense, but asked that the court appoint someone to assist him Joseph A McLean, who had just passed the bar exam just two months earlier, was appointed as his co-counsel McLean had studied for the bar by serving for a period of years as an intern to Bert Faulkner, a preeminent attorney in Juneau

Nelson's trial began on April 14, 1947, with the picking of the jury Seven of the twelve jurors who were chosen for the trial had just served together on another murder jury the week before Argument by the United States Attorney and introduction of evidence began on the next day, and consumed a total of four days Henry Roden made no opening argument on behalf of his client After four hours of deliberation on Friday, April 18, the jury returned with a verdict of guilty As required by law, the jury was also charged with deciding whether Nelson should be sentenced to life in prison or sentenced to hang The jury's verdict was death

The main evidence against Nelson was the testimony of a woman named Marguerite "Dolly" Silvers Silvers had, in fact, been held in jail for a month before the Nelson trial on a high bond, on the grounds that she was a material witness Such an arrest was extremely unusual, according to one former territorial prosecutor [17] The basis for it in this case is not known Silvers testified at Nelson's trial that she had seen Austin Nelson in Ellen's shop late on the night of the murder, when she was walking back home after the bars had closed

Other witnesses testified that Nelson had once owned a straight-edged razor, that a case for a razor had been found in his rented room, that he had small bloodstains on his clothes, and that he had been seen on Willoughby Avenue on the night of the killing The government submitted as evidence for the jury's examination a photograph of Ellen lying in a pool of his own blood with his throat cut, a photograph of Ellen lying in the morgue, the blood soaked shirt and pants that Ellen had died in, and a glass vial containing Ellen's blood

Nelson put forward an alibi defense, to the effect that, although he had been downtown that Saturday night, and had been walking on Willoughby Avenue, he had nothing to do with Ellen's death One of the witnesses gave highly persuasive testimony in support of Nelson's alibi He stated that Nelson had been with him for much of the evening, spending some time at a downtown bar, and visiting friends for a drink at a local hotel, and walking down the Avenue to try to collect a debt from a friend That witness was Eugene LaMoore, a black, 42 year-old fisherman married to a Juneau Tlingit woman, the father of two young children As remembered by one of the jurors at Nelson's trial, LaMoore's testimony was detailed and credible

> "He made a tremendous witness He was just straightforward Looked at everybody, looked the prosecuting attorney right in the eye, straightforward answers, no hesitation, very sincere You couldn't help but believe him" [18]

But LaMoore's credibility with the jury was short-lived Without advance notice, the prosecutor asked LaMoore if, twenty years before, he had been convicted of a felony in California Obviously unprepared for this inquiry, LaMoore denied it The next morning, LaMoore returned to the courtroom and corrected his testimony of the previous day, admitting to the 1927 conviction As a young man, LaMoore had, in fact, been convicted of robbery there

LaMoore's failure to admit the conviction, however, destroyed his credibility with the jury regarding everything else he had said about Austin Nelson Even 50 years later, the scene was

vivid in the mind of one of the men who served on Nelson's jury

> As far as LaMoore was concerned, I think the rest of the jury felt like I did They were stunned when [United States Attorney] Gilmore brought him back in because I think we believed the guy when he testified the first time around He was just -- if anybody could have saved this guy's neck, it was [LaMoore]

On that same day, Eugene LaMoore was arrested by the U S marshall He was charged with committing perjury by the local F B I agent The fact that he had retracted that statement on the following day was disregarded Bond on the perjury charge was set at $10,000, a very high bond in 1947 [19]

Nelson's lawyers argued to the jury that the case against Nelson was purely circumstantial, that the Government had never explained the fact that none of the money taken from the store was found, that no murder weapon had been found, and that the murderer's bloody footprints, which had been found on the linoleum floor of the store, and cut out by the police, had never been introduced by the prosecutor But those arguments made no impression A guilty verdict was returned by the jury, without the recommendation for mercy which would have required the judge to impose a life sentence

Sentencing was held on Tuesday, April 22, 1947 Before imposing sentence, Judge Pratt asked Austin Nelson if he had anything to say on the subject Nelson's answer was transcribed by the court reporter

> Yes I have, your Honor Your honor, I was prosecuted and condemned for a crime I have not committed I haven't the least idea of what it is all about I knew nothing about it I guess I have been prosecuted for somebody else I am innocent That is all "

Nelson continued

> If it is possible for a new trial, there is an attorney I can get to take the trial He isn't here, but I am positive he will take it to prove my innocence, because I absolutely don't know anything about it

Forced to respond to this disconcerting dialogue, Judge Pratt answered

> The jury has found you guilty, Mr Nelson, and they made that finding without the

recommendation that you were guilty without capital punishment. Having so found you guilty, there is only one sentence the Court can pronounce, and that is the sentence of death.

Therefore, it is the sentence and judgment of the Court that you suffer the death penalty by hanging by the neck until dead, upon the 1st day of July, 1947. Please sit down.

Nelson persisted:

Your honor, is there no way for me to get a new trial whatsoever?

The Judge told him to ask his attorney, and, again, to sit down.

Nelson's conviction was not appealed. Like most of the men hanged in Alaska, Nelson had no money with which to pay for an appeal, and there was no provision for a public lawyer for appeal.

Meanwhile, LaMoore was now incarcerated in the federal jail, in a cell by himself, shackled in leg irons - a short length of chain with iron bracelets on each side which were locked around each of his ankles, and later shackled in a ball and chain. He was repeatedly interviewed by the FBI agent and by local law enforcement authorities, not about the perjury charge for which he had been charged and imprisoned, but about the murder of Jim Ellen. LaMoore denied any involvement.

But something happened. LaMoore changed his tune. On July 1, 1947, the day that Austin Nelson was supposed to die, Eugene LaMoore signed a typed confession stating that he, too, had been participated in the robbery of Jim Ellen, and that, during the robbery, Nelson had killed Ellen, although LaMoore had begged him not to.

Nelson's hanging was held off. The Government said that he was now a necessary and material witness against LaMoore, who was now charged with first degree murder. A grand jury indicted LaMoore for murder on January 6, 1948, nine months after he had been jailed on the perjury complaint. On January 12, Henry Roden and Joe McLean were appointed to represent LaMoore, the same two lawyers who had represented Austin Nelson. LaMoore's trial began two weeks later, on February 2, 1947.

The government's case against LaMoore hinged completely on the confession LaMoore had

given at the federal jail. Aside from the confession, there was almost no evidence suggesting that LaMoore was involved in the Ellen murder. No murder weapon was introduced. No money from the robbery was found. A number of witnesses testified that they had seen LaMoore out on the town that Saturday night, sometimes in the company of his wife, and sometimes in the company of Austin Nelson, but this was consistent with LaMoore's own testimony, the same testimony he gave at Nelson's trial, of spending the evening socializing with friends and with his wife, and walking with Nelson to collect a debt. Two witnesses testified that, on the night of Ellen's murder, LaMoore was wearing a coat that he didn't have any longer. One policeman testified that there had been bloody footprints on the floor of Ellen's store, which looked to be about the same size as LaMoore's feet. But the linoleum flooring with those footprints that had been cut out by the police on the day of the murder was never introduced by the government, and there was no explanation offered for its absence.

The only potentially significant evidence against LaMoore was the confession. At his trial, LaMoore retracted his confession. He said that he had only confessed to postpone the death of Austin Nelson, after Nelson had been, for the first time, brought in to see him, and had begged LaMoore to help save his life. LaMoore also said that he had been persuaded to issue the confession by a lawyer, a lawyer who had told LaMoore that he would advise him, but who now denied that he had done anything except type up what LaMoore wanted to say.

LaMoore's attorneys, then, had two attacks on the confession. The first was that it was involuntary, and the second implied argument was that it was obtained only by luring LaMoore to issue a statement with the hope of getting a good lawyer to assist him.

Testimony at the trial, and court papers in the trial file, show that, in the last days before his hanging, Nelson for the first time implicated LaMoore in the Ellen murder. LaMoore testified that Nelson had been brought to see him, and burst into tears, and apologized for telling lies, and begged for his life:

> [Nelson] would not sit down. He stood behind his chair and cried and called himself many dirty names. He told me to forgive him, 'but help me save my life.' It hurts me to say this. He said, 'Help me save my life. It will come out all right.'[20]

LaMoore said that he decided to help Nelson. At trial, he testified in response to the questions of his attorney :

Q: Is that what induced your alleged confession?

A: Yes. The man would have hung.[21]

During cross-examination by the prosecutor, LaMoore was uncowed, often reversing the questions asked by the prosecutor. He stated that he had refused to swear to his confession, because he knew he had lied in dictating it. In response to questioning by the prosecutor about whether or not his confession was true, the following exchange took place

A: That was untrue.

Q: You told [Deputy U. S Marshal Hellan] a lie, did you?

A: That was a lie. He asked me to swear to it, and I refused.

Q: Did you mean to lie to him?

A: To help that boy save his life if possible.

Q: And your admitting to Mr. Hellan that you participated with him in the robbery and the murder, you thought you helped Austin Nelson by that?

A: He is alive, isn't he?

Q: Well, yes.

A: It undoubtedly helped.

Q: Your making that statement got him a stay of execution?

A: That man was framed, and you know it.

Q: Just answer the questions.[22]

Then the prosecutor asked:

Q: Didn't you think you were taking a chance to help?

A: I take a chance walking across the streets.

Q: You were willing to take that chance?

A: I have took chances before.[23]

LaMoore also claimed that his confession was obtained by using a famous lawyer who told him to make the statement. His defense attorneys put forth uncontroverted evidence that LaMoore's confession was only obtained after Hellan called on one of the most prominent lawyers in Juneau to come down to the jail, and talk to LaMoore, who had had no lawyer, in

connection with the unfiled murder charge. That lawyer was Herbert L. "Bert" Faulkner. Bert Faulkner met with LaMoore privately, and then they called in Hellan, and Bert Faulkner sat down with LaMoore and typed the statement that LaMoore dictated.

LaMoore testified that he had believed Faulkner to be his attorney, and that when Faulkner told him to give the statement, he did so. Faulkner testified that he told LaMoore he would not be his attorney, but that he was just coming to see him because he had been requested to do so.

LaMoore's junior attorney, Joe McLean, had expected that Henry Roden would take on the venerable Mr. Faulkner, since Faulkner was a close friend of McLean's as well as his teacher and mentor. But when the time came, Roden refused to do it, to the chagrin of McLean. McLean asked a few questions of his teacher, and sat down.[24] He never got before the jury the fact that Faulkner was a close friend of deputy marshal Walter Hellan, and that Faulkner had close ties with the marshal's office from his own early years as a deputy marshal, or that Faulkner had close ties with the prosecutor's office even then.

Dolly Silvers, the witness who had been jailed for a month before the Nelson trial to make sure she was available, was called by LaMoore's attorney to testify. She stated that she had walked down Willoughby Avenue on that night, and had seen into the lighted windows of Jim Ellen's store, where she saw Jim Ellen with only one other man, Austin Nelson. No one else was there, she said. This was the same thing she had stated at the request of the prosecutor at Nelson's trial. Now, however, the same testimony was unwelcomed by the prosecutor. He attacked her, suggesting that she was a drunk and unreliable as to events or when they occurred.

Austin Nelson had been kept alive at the request of the prosecutor on the grounds that "... it would be impossible to prove a murder charge against LaMoore without the testimony of said Austin Nelson." [25] He was expected to be "the Government's star witness" by the Juneau newspaper, in its first report of the LaMoore trial.[26] Although he was alive in the federal jail across the street from the courthouse in which LaMoore's trial was held, Nelson was never called to testify at the trial by the government.[27]

The trial of Eugene LaMoore took three days total. The jury was selected on February 2, 1948. Presentation of evidence began on the next day, and was completed by lunchtime of the following day, when the jury began its deliberations. The jury sent the judge a note asking whether or not the judge could decide on the punishment. Judge Folta responded with a note

stating that the jury had to do that. The court file suggests that, for a period of time, the jury was deadlocked. After the judge sent the jurors back to deliberate, asking them to reach a verdict, a death verdict was returned five hours later. On hearing the verdict, Eugene LaMoore burst into tears.[28]

On February 10, less than a week after the end of the LaMoore trial, the court scheduled the execution of Austin Nelson for March 1.

Nelson was hanged in the federal jail at 5:40 on the morning of March 1, 1948. He fought all the way from his cell to the scaffold, according to witnesses, and blacked the eye of Deputy U.S. Marshal Sidney Thompson. Walt Sinn, a city policeman who assisted with the execution, recalled how Thompson was behind Nelson, and leaned forward when Nelson leaned forward, and then was surprised by Nelson's suddenly throwing his head backward, to strike Thompson in the face. He remembered the mechanism constructed for the execution in great detail, almost 50 years after the event.

> The scaffold was built over a stairway going down into the basement. And the trap door was of course over the cavity there. As I remember, the scaffold was constructed of two half doors, that had hinges for each half door on the opposite side of the opening that the person would drop through, and that they were held together by a bolt mechanism. To insure a rapid drop, a rapid opening of that scaffold, as I remember there were big heavy eyescrews screwed into each half near the opening end, and a line was put through that and ran over to an adjacent wall where there was a pulley, and the line was run through the pulley, and of course at the bottom was a sandbag attached. And each half was equipped in the same way. In other words, when the mechanism would trip to permit that scaffold to open, and the sandbags would certainly enhance its ability to open that real fast. So there was a weighted system to pull the pins out quicker.

After Nelson was put on the scaffold, Sinn descended into the basement, below the scaffold. He waited for Marshal Mahoney to touch a switch above him, which illuminated a light bulb below. At that signal, Sinn was to pull the rope opening the trapdoor. He recalled:

> So I watched for the light, and I could hear what went on up above. A Catholic priest was there talking to the, Nelson... Nelson was mostly listening to the priest, I think, who was administering some type of rites I believe.

When the light bulb flashed, Sinn tripped the trapdoor. He recalled that Nelson dropped down right in front of him.

There was no reflex action whatsoever, except I can remember hearing fluid hit the floor, and it turned out of course that he was .... urinating. It was very quiet except for that.

Sinn accepted his execution duties without anxiety.

I didn't feel .... I felt the man had been tried, and that he'd gotten a fair trial, and this was the decision of the court, or of Judge Folta, I believe was the judge at the trial, and so I had no reservations. I certainly wasn't emotionally disturbed. I felt no hostility towards the man except that this was part of the law, the way it is.

He remembered being surprised at how long it took before Nelson's heart stopped beating.

A doctor, I can't remember if it was Doctor Whitehead or another of the local doctors was there with a stethoscope and remained there, and as I remember, the heart beat for quite some time it seems to me, eleven minutes or something? I was surprised at what good condition that man was, he was a strong and young man, so possibly that was why.

Mr. Sinn was able to answer a great many detailed questions during our telephone interview. When asked how he accounted for the vividness of his memory, he laughed, and said, "I have no idea."[29]

One woman, a young social worker in Juneau at the time, whose husband would later be one of the first State Troopers in Alaska, remembered the day on which Nelson was hanged.

I remember that day. To me, it seemed that the hanging cast a pall over the whole town. I remember it was not a nice day. There was a feeling of malaise, or dourness, or maybe the best word is the German word, *angst*. That was my impression at the time.[30]

Nelson was buried in an unmarked grave in Evergreen cemetery. One man, now a hundred years old, remembers the burial.

I was pallbearer for both of those boys [Nelson and LaMoore]. The funeral was right out there in that little cemetery in Juneau. There was a priest or a minister. Nelson he was Catholic. Eugene LaMoore, I don't know what religion he was. But they buried him out there.

We didn't take the Catholic in church. When we goes up there, my car was taking the pallbearers. The hearse had the body. The priest said, "There's no need taking

them in the church, nobody's there except the hearse driver.' We gets in my car and goes out there, and the father puts cross on his grave. And that's the truth.[31]

An unsuccessful appeal was brought from Eugene LaMoore's conviction by Joe McLean, who received no fee or reimbursement of the cost of travelling to argue the case to San Francisco.

LaMoore was hanged in the federal jail on April 14, 1950, just after 5:00 a.m. Two of the men who assisted in the hanging were drafted from the Juneau city police beat that they usually walked at night. When contacted recently, one of those men reported dryly that he had witnessed "half a hanging." He explained that both he and his partner had done only what they had to do to assist in taking LaMoore to the scaffold. They had taken LaMoore out of the "dilly coop," a cage within a cell, in which he was kept at the federal jail. LaMoore was wearing a ball and chain, bracketed to one ankle. U.S. Deputy Marshal Sidney Thompson, whose eye had been blacked by Nelson, was nervous. His hands shook as he tried to remove the shackle, and he couldn't get it off. He said to LaMoore, "Gene, you're always messing with this. How do you get it off?" LaMoore reached down and removed the shackle, which he had successfully corroded over the three years he spent in the jail, by regularly working sugar and other substances into the hinge. He had carried that ball in a sling made of a towel looped over his shoulders, but he had been able to remove it at will when no one was looking.

"Was LaMoore trembling?" I asked the former patrolman. He answered, "Not any more than the rest of us." Even Marshal Mahoney looked shaken up, he said. Once LaMoore was standing on the scaffold, the two city patrolman both retreated down the corridor to the furthest point from the actual execution, unwilling witnesses to the final act.[32] The widow of the other patrolman who had been there that night recounted how disturbing the whole thing had been to her husband. She asked, "Doesn't anyone think about the people who have to do these things?"[33]

After the hanging of Eugene LaMoore, the U.S. marshal's office made arrangements with the State of Washington. If there were to be any more executions, they would be done there, and not in Juneau. The marshal's office had had enough.[34]

Like Nelson Charles and Austin Nelson, Eugene LaMoore was buried in an unmarked grave in Evergreen Cemetery. LaMoore's wife put their son and their daughter into an orphanage. Her family in Juneau would have nothing to do with them. She died young, perhaps of alcohol-related

complications.

Between 1939, when Nelson Charles was hanged, and 1950, when Eugene LaMoore was hanged, there were many other homicides in Juneau and in Southeast Alaska. None of the other wrongdoers, however, was executed. Forrest Smith was sentenced in 1939 to serve 20 years for the murder of T.O. Colling in a dispute related to Smith's wife. Guy Prince, a man who lived off the income of a trust fund set up for him by his wealthy California family, got 20 years for strangling his wife with a nylon stocking in 1946. George Meeks, convicted of the robbery and murder of a construction worker, was sentenced to life in prison (1948). All of these men were white. Robert Boochever, now a senior judge on the Ninth Circuit Court of Appeals, was U. S. Attorney Pat Gilmore's assistant on the trials of Austin Nelson, Eugene LaMoore, and George Meeks. In a recent conversation, he stated that he believed that, if George Meeks had been black, he would have been sentenced to hang like the Nelson and LaMoore. Instead, he was sent to the penitentiary.[15]

There were no more hangings in the Juneau or anywhere else in the Territory, even during the seven year period before the death penalty was abolished by the Legislature in 1957.

1. This project would not have been possible without the generous support from The Alaska Humanities Forum, The National Endowment for the Humanities, and the Alaska Native Justice Center. Significant assistance has also been provided by Judge Thomas Stewart, Professor Steve Haycox, Bruce Merrell, Kimberly Martus, Vicki Otte, the Alaska Civil Liberties Union Foundation, Alaskans Against the Death Penalty, and many others, including several Anchorage law firms that provided transcription assistance. Donna Bucy generously loaned me the clipping scrapbook assembled by Walter Hellan, who was in the U.S. marshal's office in Juneau throughout the period studied, and who participated in each of these executions.

Thanks in particular should go to the more than 50 people who agreed to be interviewed for this project, and spoke to me about events, thoughts, and emotions which are rarely discussed with others. Special thanks go to John Gaffney, whose brilliant essay, "Thoughts Inspired by an Execution," written by him shortly after witnessing the hanging of Nelson Charles in 1939, gives depth and immediacy to the whole of this history.

2. Kermit S. Kynell. A Different Frontier: Alaska Criminal Justice, 1935-1965. University Press of America, Lanham, MD, 1991.

3. After the executions of Hardy and Bird, three men were hanged in Fairbanks. Mailo Segura, in 1921, "John Doe" Hamilton in 1921, and Constantine Beaver, in 1929. After that date, there were no more hangings in Fairbanks. Three hangings took place thereafter in Juneau, those of Nelson Charles in 1939, Austin Nelson in 1948, and Eugene LaMoore in 1950. Nobody was hanged after 1950, although the death penalty was not abolished until 1957.

4. Telephone interview with Vic Fischer, March 1994.

5. Interview with George Sundborg, in Seattle, June 1994.

6. The poor condition of the jail in 1914 was well-detailed in the highly readable reminiscences of Hjalmar Rutzebeck, in Alaska Man's Luck, (Capra Press, 1985) and was not much changed 30 years later. In January of 1948, the grand jury reported that the jail was in an "obsolete condition," badly overcrowded, and in need of paint, lighting, water fountains, and soap. Grand Jury Report, filed January 9, 1948.

7 *The Daily Alaska Empire*, November 7, 1939.

8. *The Daily Alaska Empire*, November 10, 1939.

9. *The Daily Alaska Empire*, November 10, 1939, p. 1.

10. Al Anderson was interviewed at his home in Sudden Valley, Washington, in June, 1994.

11. *The Daily Alaska Empire*, December 23, 1946.

12. Telephone interview with John Gaffney, in July 1994.

13. Tony Simin, the owner of a similar store in Douglas, was killed in 1942 during an apparent burglary. A Native man, William Paddy, was convicted of murdering Simin, and was sentenced to hang by the trial jury. His death sentence was commuted to life after a successful request for clemency in March of 1945.

14. *The Daily Alaska Empire*, November 26, 1937.

15. Telephone interview with John Gaffney, in July, 1994.

16. Isabelle McLean, interviewed in Seattle, Washington in June, 1994.

17. Telephone interview with Judge Seaborn Buckalew, September 1995.

18. Interview with Curtis Shattuck, October, 1994.

19. By contrast, bond was set at $3500 when a perjury charge was brought against Deputy U.S. Marshal Sidney Thompson in 1953. Thompson was charged and convicted for lying to a

grand jury investigating corruption in Ketchikan. U.S. Attorney Pat Gilmore, Jr., the prosecutor who obtained death verdicts against Nelson and LaMoore, was barred from participating in the grand jury investigation by Federal Judge George Folta. Gilmore left the U.S. Attorney's Office shortly thereafter, and returned to his home in Ketchikan. Interview with Judge James Fitzgerald, June, 1994

20. Testimony of Eugene LaMoore,transcript of trial of Eugene LaMoore, Case No. 2472-B, p. 122

21. Trial transcript, p. 122

22. Trial transcript, p. 126

23. Trial transcript, p. 125.

24. Interview with Joseph A. McLean, June 1994 at his home in Seattle, Washington

25. Affidavit of U.S. Attorney Pat Gilmore, Jr., filed on June 30, 1947 in connection with the motion to stay the execution of Austin Nelson

26. *The Daily Alaska Empire* February 2, 1948

27. The reasons for the decision not to call Nelson are not known. It could be speculated, however, that the prosecutor was not sure what Nelson would say, since the only time that Nelson had ever admitted any involvement in Ellen's murder was immediately preceding the day first scheduled for his execution. At all other times, including the day on which he was in fact hanged, Nelson claimed he was innocent. Such a witness might not further the government's case against LaMoore, especially where there was a confession already signed by LaMoore

28. *The Daily Alaska Empire*, February 5, 1948, p.1.

29. Telephone interview with Walt Sinn, November 1994

30. Interview by telephone with Harriet Botelho, in October, 1994

31. Telephone interview, Jasper Frambough, in February, 1995.

32. Interview with P. C., in October, 1994

33. Telephone interview with Gladyss Byington, in Anchorage, October 1994

34. Interview with Hartley "Pete" Crosby, at his home in Juneau, October 7, 1994

35. Telephone interview with Robert Boochever, July, 1994

amnesty international

The Death Penalty:

This briefing is part of Amnesty International's worldwide campaign for the international protection of human rights.

Throughout the world thousands of people are in prison because of their beliefs. Many are held without charge or trial. Torture and executions are widespread. In many countries men, women and children have "disappeared" after being taken into official custody. Still others have been put to death without any pretence of legality: selected and killed by governments and their agents.

These abuses—taking place in countries of widely differing ideologies—demand an international response. The protection of human rights is a universal responsibility, transcending the boundaries of nation, race and belief. This is the fundamental principle upon which the work of Amnesty International is based.

Amnesty International is a worldwide movement independent of any government, political persuasion or religious creed. It plays a specific role in the international protection of human rights:

- —it seeks the *release* of *prisoners of conscience*. These are people detained for their beliefs, colour, sex, ethnic origin, language or religion who have not used or advocated violence;
- —it works for *fair and prompt trials* for all *political prisoners*;
- —it opposes the *death penalty* and *torture* or other cruel, inhuman or degrading treatment or punishment of *all prisoners* without reservation.

Amnesty International is impartial. It does not support or oppose any government or political system, nor does it support or oppose the views of the prisoners whose rights it seeks to protect. It is concerned solely with the protection of the human rights involved in each case, regardless of the ideology of the government or the beliefs of its victims.

Amnesty International, as a matter of principle, condemns the torture and execution of prisoners by anyone, including opposition groups. Governments have the responsibility for dealing with such abuses, acting in conformity with international standards for the protection of human rights.

Amnesty International does not grade governments according to their record on human rights; instead of attempting comparisons it concentrates on trying to end the specific violations of human rights in each case.

Amnesty International has an active worldwide membership, open to anyone who supports its goals. Through its network of members and supporters Amnesty International takes up individual cases, mobilizes public opinion and seeks improved international standards for the protection of prisoners.

Information about prisoners and human rights violations emanates from Amnesty International's Research Department in London. No section, group or member is expected to provide information on their own country, and no section, group or member has any responsibility for action taken or statements issued by the international organization concerning their own country.

Amnesty International's work is based on the United Nations Universal Declaration of Human Rights. The organization has formal relations with the United Nations, (ECOSOC), UNESCO, the Council of Europe, the Organization of African Unity and the Organization of American States.

WHEN THE STATE KILLS...

The death penalty: a human rights issue

amnesty international briefing

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When the state kills ...
The death penalty: a human rights issue

The death penalty is irrevocable. It sends innocent people to their deaths. It has no special power to prevent crime. It is a particularly cruel, calculated and cold-blooded form of killing, the ultimate inhuman and degrading punishment. It is imposed to punish prisoners for their political beliefs and when inflicted for criminal offences it often becomes a judicial lottery.

The time has come to abolish the death penalty worldwide. The case for abolition becomes more compelling with each passing year. Everywhere experience shows that executions brutalize those who are involved in the process. Nowhere has it been shown that the death penalty has any special power to reduce crime or political violence. In country after country, it is used disproportionately against the poor or against racial or ethnic minorities. It is often used as a tool of political repression. It is imposed and inflicted arbitrarily. It is an irrevocable punishment, resulting inevitably in the death of people innocent of any crime. It is a violation of fundamental human rights.

Over the past decade, an average of at least one country a year has abolished the death penalty, affirming respect for human life and dignity. Yet too many governments still believe that they can solve urgent social or political problems by executing prisoners. Too many citizens in too many countries are still unaware that the death penalty offers society not further protection but further brutalization. Abolition is gaining ground, but not fast enough.

The death penalty is the premeditated and cold-blooded killing of a human being by the state. The state can exercise no greater power over a person than by deliberately depriving him or her of life. At the heart of the case for abolition, therefore, is the question of whether states should have this right.

When the world's nations came together four decades ago to found the United Nations, few reminders were needed of what could happen when a state believed that there was no limit to what it might do to a human being. The staggering extent of state brutality and terror during the 1930s and 1940s was still unfolding in December 1948, when the United Nations General Assembly adopted without dissent the Universal Declaration of Human Rights.

Protest against the execution of John Spenkelink in the USA in May 1979. Over the past decade an average of one country every year has abolished the death penalty, affirming respect for human life and dignity.

The Universal Declaration is a pledge among nations to promote fundamental rights as the foundation of freedom, justice and peace. These are rights, rights which belong to each and every individual, young and old. They are not privileges that may be granted by governments for good behaviour and they may not be withdrawn for bad behaviour. Fundamental human rights limit what a state may do to any individual — man, woman or child.

No matter what reason a government gives for killing prisoners and what method of execution is used, the death penalty cannot be divorced from the issue of human rights. The movement for abolition cannot be detached from the movement for human rights.

Article 3 of the Universal Declaration proclaims that "Everyone has the right to life". Article 5 categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Amnesty International believes that the death penalty violates these rights.

There can never be a justification for torture or for cruel, inhuman or degrading treatment or punishment. The cruelty of the death penalty is evident. Like torture, an execution constitutes an extreme physical and mental assault on a person already rendered helpless by government authorities.

Like killings which take place outside the law, the death penalty denies the value of human life. By violating the right to life, it removes the foundation of all the rights enshrined in the Universal Declaration.

The death penalty may also encompass other human rights violations. When a state jails people solely because of their beliefs, it violates the right to freedom of belief and expression. The death penalty finally and unalterably severs a person's right to hold opinions and to speak freely because it takes that person's life.

When a state convicts prisoners without affording them a fair trial, it denies the right to justice and equality before the law. The irrevocable punishment of death removes not only the victim's right to seek legal redress for wrongful conviction, but also the state's capacity to correct its errors.

Many governments have recognized that the death penalty cannot be reconciled with respect for human rights. The United Nations has declared itself in favour of abolition. Today 35 countries have abolished the death penalty for all crimes. Another 18 have abolished the punishment for all but exceptional offences such as wartime crimes. Another 27 countries and territories may be considered abolitionist in practice — they no longer carry out executions. Eighty countries,

therefore — over 40 per cent of all countries in the world — have abolished the death penalty in law or in practice.

Yet 100 countries retain and use the death penalty. Many countries, while retaining the death penalty in law, only rarely carry out executions. In some countries, however, the death penalty is far from exceptional. Each year a very few countries account for most of the executions recorded by Amnesty International. Of the 3,399 executions recorded by Amnesty International worldwide between 1985 and mid-1988, 2,219 — 65 per cent — were carried out in just four countries.

Those governments that impose the death penalty do not so much deny its cruelty as attempt to justify its use. The most common justification offered is that, terrible as it is, the death penalty is necessary. In some countries the penalty is considered a legitimate means of preventing or punishing the crime of murder. Elsewhere it may be deemed indispensable to stop drug-trafficking, acts of political terror, economic corruption or adultery. In yet other countries, it is used to eliminate those seen as posing a political threat to the authorities.

Whatever purpose is cited, the idea that a government can justify a punishment as cruel as death conflicts with the very concept of human rights. The significance of human rights is precisely that some means may never be used to protect society because their use violates the very values which make society worth protecting.

The practice of extrajudicial execution

This briefing does not deal with the practice of some governments of executing their real or perceived opponents without invoking the death penalty as provided by law. Hundreds if not thousands of people each year are victims of extrajudicial executions — unlawful and deliberate killings carried out by order of a government or with its acquiescence, outside the judicial process and in violation of international standards which prohibit the arbitrary deprivation of life. Amnesty International regularly appeals to the authorities concerned to stop these abuses and to ensure that all complaints and reports of extrajudicial executions are impartially and effectively investigated. Information on these and other human rights violations of concern to the organization may be found in the annual *Amnesty International Report* and in Amnesty International publications on the countries concerned.

Herbert Ernesto Anaya (above), the head of the El Salvador Human Rights Committee, was assassinated by a "death squad" in October 1987. Tens of thousands of people have been the victims of extrajudicial executions — unlawful and deliberate killings by governments — in the 1980s

Executing people violates the very values which make society worth protecting

Countless men and women have been executed on the assumption that their deaths will deter others from crime, especially the crime of murder. Yet study after study in diverse countries has failed to find convincing evidence that the death penalty has any unique capacity to deter others from committing particular crimes.

The death penalty, by permanently incapacitating a prisoner, obviously prevents that person from repeating the crime. But there is no way to be sure that the prisoner would have repeated the crime if allowed to live nor is there any need to take the prisoner's life for the purpose of incapacitation: dangerous offenders can be kept safely from the public without resorting to execution, as shown by the experience of many abolitionist countries.

When the arguments of deterrence and incapacitation fall away, one is left with a more deep-seated justification for the death penalty: that of just retribution for the particular crime committed. According to this argument, certain people deserve to be killed as repayment for the evil done: there are crimes so offensive that killing the offender is the only just response.

It is an emotionally powerful argument. It is also one which, if valid, would invalidate the basis for human rights. Central to fundamental human rights is that they are inalienable. They may not be taken away even if a person has committed the most atrocious of crimes. Human rights apply to the worst of us as well as the best of us, which is why they protect all of us.

Every society seeks protection from crime. Far from being a solution, the death penalty gives the erroneous impression that "firm measures" are being taken against crime. It diverts attention from the more complex measures which are really needed.

The practice of the death penalty highlights the risks of unfairness and error which exist in all criminal justice systems. No criminal justice system is, or conceivably could be, capable of deciding fairly, consistently and infallibly who should live and who should die.

The reality of the death penalty is that who is executed and who is spared is often determined not only by the nature of the crime but also by the ethnic and social background, the financial means or the political opinions of the defendant. The death penalty is used disproportionately against the poor, the powerless, the marginalized or those whom repressive governments deem it expedient to eliminate.

When used to crush political dissent, the death penalty is abhorrent. When invoked as a way to protect society from crime, it is illusory. Wherever used, it brutalizes those involved in the process and conveys to the public a sense that killing a prisoner already rendered defenceless is acceptable.

The death penalty is a symbol of terror and, to that extent, a confession of weakness. It is always a violation of the most fundamental human rights.

Each society and each of its citizens has a choice about the sort of world people want and will work to achieve: a world in which the state is permitted to kill as a legal punishment or a world based on respect for human life and human rights — a world without executions. □

The cruelty of the death penalty

International law states that torture or cruel, inhuman or degrading treatment or punishment can never be justified. The cruelty of the death penalty is evident. Like torture, an execution constitutes an extreme physical and mental assault on a person already rendered helpless by government authorities.

If hanging a woman by her arms until she experiences excruciating pain is rightly condemned as torture, how does one describe hanging her by the neck until she is dead? If administering 100 volts of electricity to the most sensitive parts of a man's body evokes disgust, what is the appropriate reaction to the administration of 2,000 volts to his body in order to kill him? Does using the legal process to impose these cruelties make their inhumanity justifiable?

Hanging and shooting are the most common methods of execution in use today. Death by electrocution, poisonous gas and lethal injection of poison are used in the USA alone. Under Islamic law, beheading is prescribed in five countries and stoning in seven countries. Occasionally there are reports of other methods being used. Three prisoners were executed by being pushed off a cliff, according to a report in the Iranian press in October 1987; they were said to have chosen this method in preference to being crushed to death or beheaded.

If hanging a woman by her arms until she experiences excruciating pain is condemned as torture, how does one describe hanging her by the neck until dead?

But, whatever the method of execution used, prisoners can suffer anguished deaths.

A Thai construction worker hanged in Kuwait in 1981 took more than nine minutes to die because, as medical reports revealed afterwards, his slight weight did not suffice to break his neck. He died of strangulation. As he stood on the gallows beforehand, facing the crowd, the *Arab Times* reported, "for a moment his face expressed all the incomprehension, anguish and desperation". Another Thai, executed with him, broke down in tears and protested his innocence before being led to the gallows.

James Autry was executed by lethal injection in Texas on 14 March 1984. The US news magazine *Newsweek* reported that he "took at least ten minutes to die and throughout much of that time was conscious, moving about and complaining of pain". A prison doctor, who was present at the execution, was later reported to have said that the catheter needle may have become clogged, slowing down the execution.

Efforts have been made to minimize the suffering caused to a prisoner who is executed. That is why electrocution was introduced in the USA in 1889 — it was considered more humane than hanging — and why prisoners facing the electric chair in the Philippines before the death penalty was abolished in 1987 could choose to be anaesthetized first.

In other countries, however, the pain of execution has been deliberately increased. In Nigeria execution — usually by firing-squad in public — is the mandatory punishment for prisoners convicted of armed robbery. In July 1986 the

The 1980 public execution in Mauritania of Sidi Ould Matoila, who had been convicted of murder. Shooting by firing squad does not necessarily result in immediate death. The squad may have been told to aim at the body rather than the head (it is an easier target), and may be shooting from a considerable distance. In Taiwan, for example, a prisoner was found to be breathing over an hour after the first two volleys had been fired. In 1953 a British Royal Commission reported shooting by firing squad as it does "not possess even the first requisite of an efficient method, the certainty of immediate death".

Two death row inmates play chess between cells in Louisiana's Angola State Penitentiary. US death row inmates do not serve prison sentences but are merely housed in prison until execution. The conditions in which condemned prisoners are kept can increase the inherently cruel, inhuman and degrading experience of being under sentence of death.

Executions brutalize

Executions brutalize all who are involved in the process. They were resumed in the United States, after a 10-year moratorium, in 1979 when John Spenkelink met his death in Florida's electric chair.

John Spenkelink

These words began a morning radio show in May 1979 in Florida. It was 24 hours before John Spenkelink went to the electric chair.

"Hey, Spenkelink, you maggot, you listening this morning, Spenkelink? Just think, in just over 24 hours, Spenkelink, you're going to fry, maggot! You're going to fry! And there's nothing those bleeding hearts can do to save you. Get used to the sound, Spenkelink, think of yourself... convulsing."

Two years later, in South Africa, tear gas was used to force four terrified men out of their cells and to the gallows.

In 1984 an Iraqi doctor testified that he had witnessed and was forced to participate in bleeding condemned prisoners to death. Their blood was sent to the Iraqi blood bank. This doctor testified that he knew of approximately 1,000 such operations having taken place during 1982 and 1983, directly controlled by Security Headquarters in Baghdad.

Military Governor of Niger State ordered that people convicted of armed robbery should be executed slowly, by successive volleys of bullets fired at intervals, starting with shots aimed at the ankles. In response to protests about this particularly cruel method of execution, a state official said that the aim had been to cause suffering to the condemned men and to deter other criminals, and that two people had been executed in this way.

Stoning to death is one of the methods of execution practised in Iran. The procedure is designed to ensure that death does not come quickly from a single blow. The Islamic Penal Code of Iran stipulates: "In the punishment of stoning to death, the stones should not be so large that the person dies on being hit by one or two of them; they should not be so small either that they could not be defined as stones". A report allegedly from an eye-witness to a stoning reads: "The lorry deposited a large number of stones and pebbles beside the waste ground, and then two women were led to the spot wearing white and with sacks over their heads... [they] were enveloped in a shower of stones and transformed into two red sacks... The wounded women fell to the ground and Revolutionary Guards smashed their heads in with a shovel to make sure that they were dead."

The cruelty of execution is not restricted to the prisoner's death agonies. Its unique pain — which developing more humane methods of killing cannot reduce — lies in the grief and terror with which many of the victims approach their deaths.

From the moment sentence is pronounced the prisoner is forced to contemplate the prospect of being put to death at an appointed time. The mental suffering this causes cannot be quantified. Why else is the

Valery Dalgov, sentenced to death for murder in 1988, is prepared for his condemned cell in Latvia after his head is shaved and his moustache cut off. He will put on the uniform of a condemned prisoner.

Secret Executions

One hundred countries retain and use the death penalty. In many countries executions are announced in advance and in some they are carried out in public. In others executions are carried out in secret.

Hundreds of executions are reported in Iraq every year, but the government only publishes the names of a small number of those executed for criminal offences. Political trials and executions are often carried out in secret.

Sayed Muhammad Hassan al-Hakim, executed in Iraq in 1985.

Statistics about the death penalty in the USSR have been an official secret since 1934. Some information is published by the press, and to judge from these reports death sentences are regularly imposed and carried out. In October 1987 the official news agency TASS published a selection of crime statistics, the first such official information to be made public in almost 50 years. The report stated that 4,862 people had been convicted of intentional homicide between January and June 1987, but it did not state how many had received death sentences.

threat of execution one of the most powerful weapons in the armour of the torturer? Whether a death sentence is carried out six minutes after a summary trial, six weeks after a mass trial or 16 years after lengthy legal proceedings, the person executed is subjected to uniquely cruel, inhuman and degrading treatment and punishment.

A prisoner in Jamaica, Nathan Foster, under sentence of death for seven and a half years, went into a state of panic when an official read him the warrant for execution in

The threat of execution is one of the torturer's most powerful weapons

February 1988. During the ensuing struggle with prison guards his arm was broken. The plastered arm was strapped behind his back as prison guards brought him to the gallows to be hanged 10 days later.

The abbot of a Buddhist monastery in Thailand, who had given the last sermon to over 200 prisoners before execution between 1967 and 1985, described the agony manifested by many of them: "When the time for their execution came, they would not be able to stand on their feet and had to be helped to the execution stake. This happened similarly to Chinese people convicted of narcotics offences. They usually lost self-control and cried out wildly".

Prisoners sentenced to death are treated as men and women without a future. Often they are separated from the general prison population and held in special places, known in some countries as "death row". There they may be subjected to prolonged isolation and enforced idleness which adds to the torment of waiting to be executed.

The conditions in which condemned prisoners are kept can increase the inherently cruel, inhuman and degrading experience of being under sentence of death.

A prisoner sentenced to death in Pakistan in 1982 described sharing a death cell measuring about 7ft by 6ft with six other men. "There was no fan, no toilet facilities and no water in the cell. We had only a dirty mat and a flea-ridden blanket to sleep under... There was one window with an iron grille which looked out onto the prison yard. We were not allowed to talk to the other prisoners...

"Sometimes the jail authorities would march the condemned prisoners who were about to be executed in front of our cells, just before they went to the gallows. Although we couldn't see the executions taking place, we could hear the sound of the lever on the gallows being pulled and so we knew what was happening. This was a very traumatic experience for us. We could also hear the

Beheading by sword is provided as a method of execution in at least five countries, including the Yemen Arab Republic (shown here). Several blows are sometimes needed to sever the head, depending on the weight of the sword and the strength and accuracy of the executioner.

'She didn't go well...'

"... They brought the woman through as the lights came on. Into the silence and darkness outside our windows there was a sudden whimpering and crying, deep sobs of crying moving across the yard.

"A woman, a young woman it sounded like, gulping deep whoops of weeping. I thought at first I was asleep, dreaming the nightmare cries, then I turned in my tight-drawn blankets and saw the black polished floor and the light bright in the ceiling and I lay puzzled, listening, then cold with horror as I realized where I was and what it was, and I followed the cries past my window in the yard below and round the corner, disappearing inside. And I lay, cold still, imagining how she walked up the iron stairs and along the passage, and then through the two heavy doors leading into the gallows.

"They had to bring her through, said the [prison warder] later, strapped up in a straitjacket. She was an African who had smothered her child. She had hysterics when they hanged her, he said. She didn't go well."

Extract from *Bandiet: Seven Years in a South African Prison*, by Hugh Lewin.

Shahida Parveen was sentenced to death by stoning after being convicted, in November 1987, of the offence of adultery. She had divorced her first husband and married Mohammad Sarwar, who was also sentenced to death. The divorce papers had been signed by the couple before a magistrate, but the first husband had failed to register them with the local council. He then filed a complaint which resulted in the couple's trial and sentence. The couple were finally acquitted in August 1988.

painful crying of the relatives of the condemned prisoners who would come to say goodbye to their loved ones."

For some prisoners the torment of waiting to be executed stretches over many years. It was nearly 17 years after he was arrested, early one morning in May 1985, when Mohammad Munir was secretly executed by firing-squad on a deserted island near Jakarta, Indonesia's capital.

Mohammad Munir was a trade unionist, founding an Indonesian carworkers' union and another for shipyard workers before going on to head a trade union federation led by the banned Indonesian Communist Party (PKI). The party, which Mohammad Munir represented in the Indonesian parliament, was blamed by the authorities for an attempted coup in 1965. He was one of thousands arrested in the years afterwards. He was charged with rebellion, convicted in 1973 and sentenced to death. He and his family were given only four days' notice of the execution and allowed to meet for three hours on the day he was killed.

Such executions, of prisoners who had spent years as condemned men, have since continued in Indonesia and the number executed for political offences has risen steeply. Ten of the 13 prisoners executed in 1986 and 1987 had spent over 18 years in jail. Most had been convicted of subversion. In October 1988, two former members of the Indonesian presidential guard were executed for involvement in the 1965 coup attempt. They had spent more than 20 years under sentence of death.

The execution of a prisoner is the ultimate cruel, inhuman and degrading punishment. The assertion that the death penalty is cruel cannot be challenged; it is borne out not only because of the horror of it, but because it is impossible to argue logically on the one hand that to kill a prisoner in cold blood is not cruel, while at the same time maintaining that for one person to kill another is so cruel that execution is the only appropriate punishment. □

The last hours of James Terry Roach

James Terry Roach was executed in South Carolina on 10 January 1986. In 1977, when he was 17 years old, he had pleaded guilty to the murders of two white teenagers and to additional charges, including sexual assault and kidnapping.

He was sentenced to death despite a finding by the trial judge that he had acted under the domination of an older man, was mentally retarded and had a personality disorder.

One of his lawyers stayed with him on the night of his execution and gave the following account of those last hours.

"Although Terry was twenty-five years old by the time of his death, he seemed very childlike. In general, his demeanor and his reactions to the people around him appeared to me to comport with the finding, made at his last psychological evaluation, that his IQ was 70 — a score which placed his intellectual functioning at about the level of a twelve-year-old child. When his family minister showed him some prayers from the Bible that they would read together, Terry asked him which ones he thought would be especially likely to help him into heaven: his questions about this seemed based on the childish assumption that one prayer was likely to 'work' better than another, and that he just needed some advice about which ones would work best.

"Terry was a very passive young man,

James Terry Roach

and that showed all through the night. Although he was obviously very frightened, he was as cooperative as possible with the guards, and he tried to pretend that all of the ritual preparation — the shaving of his head and right leg, the prolonged rubbing in of electrical conducting gel — was all a normal sort of thing to have happen. He wanted the approval of those around him, and he seemed well aware that this night he could gain everyone's approval by being brave and keeping his fear at bay.

"Still, when the warden appeared in the cell door at 5.00am and read the death warrant, while Terry stood, each wrist immobilized in a manacle known as a 'claw', his left leg began to shake in large, involuntary movements. After that, everything happened quickly. I walked to the chair with him, and talked to him as much as I could. After he had read [his final statement] we had a couple of last words... I left him and walked to the witness area, where I gave him a "thumbs-up" sign. He signalled back with his fingers, as much as the straps permitted...

"A few seconds later the current hit. Terry's body snapped back and held frozen for the whole time that the current ran through his body. After a few seconds, steam began to rise from his body, and the skin on his thigh just above the electrode began to distend and blister. His fists were clenched and very white. His body slumped when the current was turned off, and jerked erect again when it was resumed. When he was declared dead, several guards wrestled his body out of the chair and onto a stretcher, while taking care to conceal his face (no longer covered by the mask) from the view of the witnesses and me by covering it with a sheet. I left the death house at about this time in the company of the warden. As we stepped out of the building, I heard the whoops of a crowd of about 150 or 200 demonstrators who had apparently come to celebrate the execution, yelling and cheering outside the prison gates."

The cruelty of execution is not restricted to the prisoner's death agonies. Its unique pain — which developing more "humane" methods of killing cannot reduce — lies in the grief and terror with which many of the condemned approach their deaths. (Above) a prisoner in Nigeria is prepared for execution by firing squad. (Below) a prisoner is led from a Cairo court after hearing that he will die on the gallows for rape.

The death penalty in practice

The death penalty is applied selectively. It is imposed disproportionately on the poor, racial minorities, social and political minorities and on political prisoners.

Even if the effects of racial discrimination or economic inequality could be eliminated, other possible sources of error and inconsistency would remain in any criminal justice system devised and administered by fallible human beings. Arbitrary decisions which deprive people of their liberty are unacceptable and should be corrected. Arbitrary decisions which deprive people of life are intolerable and without remedy.

One of the most compelling reasons for abolishing the death penalty is the risk of executing the innocent. A study published in 1987 concluded that 23 innocent people are known to have been executed in the USA alone this century.

It is impossible to determine the exact number of innocent people who have been put to death. Judicial reviews or investigations of cases rarely occur once a prisoner has died. What is certain is that abolition is the only way to ensure that such mistakes do not occur.

Cases in which incompetence, corruption and duress led to innocent people being sentenced to death have recently been exposed by news media in the USSR, as part of an emerging debate on the merits of abolishing the death penalty.

Vladimir Tousev, a villager from the Belorussian republic of the USSR, was sentenced to death for murdering his wife after he had reported her missing. He spent 18 months awaiting execution before his sentence was commuted, but was only released in 1987 after spending over 14 years in prison. According to the press, investigators had extracted a confession from him during night-time interrogations and beaten his 15-year-old brother to obtain corroborative evidence. When the real culprit emerged, some years later, they suppressed the information to conceal what they had done.

A similar case was brought to light in the Belorussian republic with the execution, in 1988, of Gennady Mikhasevich on charges of multiple murder, rape and robbery. The case received wide public attention because 14 people had already been convicted of these crimes, one of whom had been executed. Newspapers said the 14 were beaten and tortured until they confessed to the crimes. One of the 14 had gone blind in prison and another had been released with apologies after serving a 10-year term.

In Japan, Sakae Menda was sentenced to death in March 1950 for a murder committed in 1948. Thirty-three years later, in 1983, he was found not guilty and released. For over three decades he had lived with the prospect of execution. He had applied for a retrial five times before his request was granted in 1979. Sakae Menda had originally confessed to the crime, but later retracted his confession and said that he was innocent. Other evidence presented at the original trial was questioned and an alibi was produced for the time of the murder. He was acquitted after the retrial court accepted his alibi and decided that his original confession was not credible.

Edward Earl Johnson was executed in the USA in May 1987. There are serious doubts about his guilt of the crime for

'I shall ask for the abolition of the death penalty until I have the infallibility of human judgment demonstrated to me.' Marquis de Lafayette

One of the most compelling reasons for abolishing the death penalty is the risk that innocent people will be executed. Willie Darden (above) went to Florida's electric chair for murder despite evidence that might have proved his innocence. He survived an unprecedented six death warrants and spent over 14 years on death row before his execution in March 1988.

which he convulsed to death in Mississippi's gas chamber.

Edward Johnson was arrested in 1979, when he was 18 years old, and convicted the following year of murdering a white police officer. Edward Johnson was black. He was tried by a jury of 10 white and two black jurors in a county with a population that is 45 per cent black.

The police officer had been killed when he tried to arrest a black man who was allegedly attempting to assault a woman. In the struggle the police officer was shot and the assailant fled.

Edward Johnson was arrested with other black men in the area and brought before the only eye-witness to the crime — a white woman outside whose house the shooting occurred. The woman had known him all his life and stated that he was not the murderer. She said the man she had seen was heavily built with a full beard. Edward Johnson was slim and had never had a beard.

Abolishing the death penalty is the only way to ensure that innocent people are not executed

Two days later he was re-arrested and taken away alone by the police. He later testified that they had taken him to some woods, and threatened to shoot him unless he confessed to the crime. He signed the confession because "I was scared. I was convicted before I even went to trial". He did not see a lawyer until after he had been brought to court to be charged.

Edward Johnson recanted his confession at the first opportunity. However, the eye-witness to the crime, who initially said he was not her assailant, had changed her story on hearing of his confession and identified him as the black man who had tried to attack her. As a result Edward Johnson was convicted of murder and sentenced to death.

Before his trial the prosecution offered Edward Johnson a life sentence in return for his pleading guilty to the crime. However, his trial lawyers apparently advised him, wrongly, that he would be sentenced to life-without-parole if he accepted the offer. Had he done so, however, Edward Johnson would have been eligible for parole in 1986, the year before he was executed.

According to the lawyers who took over the last stages of his case his many earlier appeals had been unsuccessful partly because of legal mistakes made by their predecessors. His final lawyer was brought in on the case only three weeks before his scheduled execution, when there was little time left for detailed investigations. Edward Johnson died proclaiming his innocence.

A week after the execution, his new lawyer located a woman whom Edward Johnson had always claimed he had been with, in a pool hall, when the crime was committed. None of his previous lawyers had attempted to find her or to persuade a court to hear her testimony. She

Youth is no protection

The notion that young people should not suffer the death penalty stems from the recognition that they are not fully mature — hence, not fully responsible — and that they are more likely to be rehabilitated.

This notion has been incorporated into international human rights texts dealing with the death penalty. The United Nations Economic and Security Council (ECOSOC) safeguards and other international instruments stipulate that offenders under the age of 18 at the time of the crime should not be sentenced to death.

At least 72 countries currently have laws specifically setting a minimum age of 18 below which the death penalty may not be used. A further 12 countries may be presumed to exclude the use of the death penalty against offenders under 18 because of their accession to international human rights treaties. This has not prevented juvenile offenders being sentenced to death and sometimes executed.

The USA, Bangladesh, Pakistan, Barbados, Iran and Iraq have all executed prisoners for crimes committed when they were under 18. In August 1988, 28 of the 2,110 prisoners on death row in the USA were there because of crimes they had committed when they were juveniles.

Mohammad Selim was hanged in Dhaka Central Jail, in Bangladesh, when he was reportedly just 17 (although the government later said he was older). He had been convicted of a murder committed in February 1985, the month after his sixteenth birthday.

Mohammad Selim was tried by one of the military courts established in March 1982 when martial law was declared in Bangladesh. There was no judicial appeal for those convicted by martial law courts and the president refused Mohammad Selim's petition for clemency.

In Barbados courts may sentence to death people who were under 18 at the time of the offence. Two such prisoners are currently on death row and another was hanged in 1982.

The two juvenile offenders currently on death row are Patrick Greaves and Michael Taylor who were convicted jointly of a murder committed in March 1984 when both were aged 17. They were sentenced to death in October 1984 and their sentences were upheld by the Barbados Court of Appeal in November 1986. Another juvenile offender, Martin Marsh, also aged 17 at the time of the crime, was hanged in September 1982.

Mohammad Selim, executed in Bangladesh in 1986

The death penalty has been widely used by governments to eliminate their political opponents. After the 1979 foundation of the Islamic Republic of Iran thousands of political prisoners were executed. (Above) condemned Kurdish opponents of the government face the firing-squad.

said that she had gone to the courthouse to testify at the trial, but was told by a white police officer to go home and mind her own business.

The death penalty has also been widely used for political purposes. Rulers have executed their political rivals, or have tried to use the threat of the death penalty to silence their opponents. Members of opposition parties have been eliminated as a matter of political expediency. The death penalty has been used to consolidate power after coups and attempted coups. Death sentences have been imposed after coups in at least 14 countries during the past decade and executions carried out in at least 12 of these countries.

Mahmoud Mohamed Taha, the 76-year-old leader of the Republican Brothers Movement in the Sudan, was prepared to die for his beliefs. A persistent critic of President Gaffar Nimeiri's government, he was arrested with four other members of the movement on 5 January 1985. The movement advocated a new approach to Islam and had engaged in non-violent political activities. On 7 January the five prisoners went on trial, charged with "undermining or subverting the constitution", a capital offence. They admitted distributing leaflets calling for the repeal of Islamic laws introduced in 1983, appealing for a peaceful political solution to the conflict in southern Sudan and advocating an Islamic revival.

The five prisoners were found guilty of subversion the next day and sentenced to death. On 16 January the Court of Appeal confirmed the sentences, ruling that the five men were also guilty of "heresy" by advocating an unacceptable form of Islam, an offence they had not been charged with. The court gave the defendants one month in which to "repent or die". On 17 January President Nimeiri confirmed the sentences and cut the deadline for repentance to three days.

Mahmoud Mohamed Taha refused to repent. He was hanged before a large crowd in Kober Prison in Khartoum North on 18 January, less than two weeks after his arrest. He was executed despite a provision in the country's laws excluding people over 70 from being sentenced to death. The four men convicted with him were spared. After being ▷page 12

The death penalty has also been used to consolidate power after coups and attempted coups. (Above) the bodies of some of those executed after an April 1980 coup in Liberia are buried in a mass grave.

Executed to reduce prison overcrowding

States which retain the death penalty impose it for a wide range of offences. Since 1985 prisoners have been sent to their deaths to punish them for their political or religious beliefs and for a wide range of criminal offences: murder, forgery, rape, drug-trafficking, adultery, theft, corruption, running a brothel, kidnapping — crimes which may or may not involve the loss of life.

In Nigeria prisoners under sentence of death have been executed to reduce prison overcrowding.

Disturbances at Benin City Prison in January 1988 were followed by the public execution of 12 prisoners; officials told the press that the executions had been carried out to reduce overcrowding, one of the causes of unrest inside the prison. In November 1984, a Nigerian government official had reportedly said that 55 prisoners in Anambra State were executed to reduce prison overcrowding.

Public execution on Libreville beach, Gabon, in December 1982.

Public executions

Public execution is the most brutal expression of the logic that the death penalty deters would-be criminals. It brings the reality of the death penalty to a wide audience because public executions are well-attended events. In Nigeria, where many prisoners have been publicly shot, thousands have come to witness the spectacle. There have been similar spectacles during the past decade in the People's Republic of China, although public executions are prohibited by law. In Pakistan, where public executions were reintroduced in January 1988 after a 10-year respite, thousands flocked to see two men hang in Punjab State.

Wholesale public executions were resumed in Nigeria in 1984, after a military government seized power, in an effort to curb the increase in armed robbery. A decree was passed setting up Robbery and Firearms Tribunals empowered to impose mandatory death sentences for armed robbery, without any right of appeal against conviction.

The executions have since continued on a large scale. According to government figures, 355 death sentences were carried out in 1984 and 301 in 1985. Although Amnesty International knows of some 200 executions in the three years to the end of 1988, the true figure was undoubtedly higher. Most of these executions were carried out in public by firing-squad and some were attended by thousands of people, including children.

There is, however, no evidence that public executions have reduced the number of armed robberies. In Lagos alone there were 352 cases of armed robbery in 1984, when public executions began again, as against 247 in 1983.

A.A. Adeyemi, Professor of Law and Criminology at the University of Lagos in Nigeria, compared statistics on the annual number of murders and executions between 1967 and 1985, and found that "murder incidents have consistently increased for most of this time" even though murder had been punishable by death and almost everyone knew this.

Armed robbery, too, had increased after it became a capital offence throughout Nigeria in 1970. Professor Adeyemi found that between 1967 and 1970 an average of 994 armed robberies were committed each year, but that the annual average rose to 1,500 between 1971 and 1985. He concluded that studies on murder and armed robbery "demonstrated clearly that no efficacy can be shown for the operation of the death penalty for these offences".

Some reports claim that public executions have had an adverse effect in brutalizing society and in transforming the victims into objects of public esteem.

Public executions have been carried out in China this decade. In 1983 a nationwide anti-crime campaign was launched to curb the rising crime rate. New legislation was introduced to speed up the procedures for trying and executing "criminals who seriously endanger public security". Defendants were denied the right to receive a copy of the indictment before trial, and the time limit for appeals was reduced from 10 to three days.

During 1983 several thousand executions were carried out, some in public. One mass public execution was observed by Liu Fong Da, a teacher, who later co-wrote an account of what he had seen, under the title "Execution day in Zhengzhou". The following is an extract from his article, which was published in the *American Spectator* in December 1986.

Prisoners on their way to the public execution site in Xian, China. The large Chinese characters on the side of the truck say "Death sentence". Although illegal, several public executions were staged during a 1983-1984 official anti-crime campaign.

"The morning of September 23, 1983 was clear and warm in north China. I could see by the number of expectant people pouring onto the streets that for some time the peasants and workers, the cadres and students and small children of Zhengzhou had known: an execution day was coming.

"I estimated later that close to half the city's population — about a million people — must have left their jobs and classrooms. People crowded into every available place — along the sidewalks, on steps, jammed in doorways.

"A shout went up the four-lane main street: 'It's coming!' At once everyone froze, still and silent. People stood on tiptoe and small children sat on shoulders...

"The main attraction followed immediately: 45 flatbed trucks, one after another, rolled by at no more than five miles per hour... At the front of each truck bed, just behind the cab, stood a condemned man bound with heavy rope... holding in place a tall narrow sign. On the top half of each sign was an accusation: 'Thief', 'Murderer', 'Rapist'. On the bottom half was the accused's name, marked through with a large red 'X'...

"Three miles outside the city a dry creekbed widens out in a cornfield. Corn the height of a man grows on the banks, up to their edges. The horde following the parade swept onto the site, flattening the corn on the banks. I followed along in the crowds, wondering 'Why are we trampling food to watch people killed?'...

"Three flares suddenly shot high into the sky from the road somewhere behind the prisoners... the accused were now marched rapidly down the ramp, the signs still tied behind them. Some had lost the use of their legs from fear. These the policemen dragged to their places...

"Three yellow flares went up. The two escorting policemen caught each man behind the knee, forcing him to a kneeling position, and then separated to each side. In unison [45] green-uniformed policemen stepped forward and put rifle barrels within 10 inches of the backs of the accuseds' heads.

"The 45 shots rang out in one voice. Together, the bodies jerked forward and splayed out in different ways on the grass... Suddenly, the people surged down from the banks and closed in, shouting. The front rows broke through the police line to where the bodies lay, and stopped short in horror as they got near enough to make out the details. But the pressure behind them was too great; many were pushed ahead and forced to trample the bodies. Some fell sprawling over them. One man beside me was pushed out of his shoes. Kids screamed at the sight of blood and pieces of skull. Some blood got on my shoes. To protect the bodies, a policeman pulled out one of the numbered stakes, scooped up some brains on the circular sign, and held the people at bay with it. They reared back 10 or 15 feet in a circle around him...

"This one performance was finished. Across China that September and October there were many shows. This one in Zhengzhou ran twice again... Inside China many have guessed at the number killed during that golden autumn of 1983. Some put it at 80,000. Some at 150,000. But this is only guesswork."

A father takes leave of his son, convicted of armed robbery and about to face the firing squad in Nigeria. Death is the mandatory sentence for armed robbery and execution is usually in public.

Although public executions now appear to have stopped in China, executions are still widely publicized in the national and local media, and "mass sentencing rallies" attended by thousands of people are held to publicly parade condemned prisoners beforehand.

In 1984 and 1985 official reports claimed that the anti-crime campaign had resulted in a drop in the crime rate. However, recent official reports show that violent and major crimes are on the increase, despite the extensive use of the death penalty in recent years and the wide publicity given to executions. □

Public beheading in Saudi Arabia. The corpses of those executed by beheading are displayed for 45 minutes. Public executions are often staged as a deterrent against crime but research carried out in the USA suggests that executions may have a "brutalizing" effect on society, resulting in more violence.

One of hundreds of political prisoners executed in Iran in the second half of 1988. The body was unearthed by relatives searching for their dead. It was lying in an unmarked grave in Jadeh Khavaran Cemetery, Tehran. The executions took place in secret, in prisons throughout Iran. Some of those killed had been tried and were serving prison terms. Others had been detained without trial.

forced to watch the hanging they "repented" on television.

In August 1986, Eugenio Abeso Mondu was executed by firing-squad in Equatorial Guinea.

Eugenio Abeso was a former military officer and a member of parliament. He was executed for allegedly leading an unsuccessful plot to overthrow the government of President Obiang Nguema Mbasogo in July 1986. Opposition sources claimed that the alleged plot was a pretext for arresting hundreds of real or suspected political opponents of the government.

He was tried under the "most summary" proceedings in Equatorial Guinean military law. His trial was televised. Although he pleaded guilty and confessed to the charges, little evidence was produced to corroborate his confession. He was convicted barely one month after the unsuccessful coup was alleged to have taken place and was executed one day later.

In political cases, the death penalty is often applied after summary trials or other unfair proceedings. Defendants on trial for their lives must obviously be afforded scrupulously fair trials. When accepted standards for a fair trial are ignored or set aside the death penalty becomes open to political abuse and the risk of executing the innocent is increased.

Despite the undisputed acceptance at the international level of safeguards for fair trials in all death penalty cases, thousands of prisoners have been executed after procedures which were manifestly unfair. Cases have been heard in secret, without adequate legal representation for the defendant and sometimes no legal representation at all, and before judges who are not always competent or independent. Proceedings have been speeded up, leaving insufficient time to prepare a defence. Defendants have been denied the right to appeal against conviction and sentence.

At least 37 countries have special or military courts empowered to pass death sentences without affording full fair trial safeguards or without the right to appeal. These courts have often supplanted the regular criminal courts and removed safeguards the criminal courts provided.

Often such courts are set up in times of political tension, during periods of civil unrest or after coup attempts. Often they operate in a highly-charged political atmosphere which militates against a defendant receiving a fair trial. Executions have been carried out within hours or even minutes of sentencing, leaving no time for those condemned to appeal or ask for clemency.

In the 10 years since the foundation of the Islamic

The right to a fair trial

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) spells out standards for a fair trial. Anyone facing a criminal charge has a right to:

- **a fair and public hearing by a competent, independent and impartial tribunal;**
- **be presumed innocent until proved guilty;**
- **be informed promptly of the nature and cause of the crimes with which the defendant is charged;**
- **have adequate time and facilities for the preparation of a defence;**
- **communicate with counsel of the defendant's choosing;**
- **free legal assistance for defendants unable to pay for it;**
- **examine witnesses for the prosecution and to present witnesses for the defence;**
- **have conviction and sentence reviewed by a higher tribunal.**

'A life spent without a cause is a curse...'

The best known political execution of recent times is that of Zulfikar Ali Bhutto, Pakistan's former Prime Minister, who was sent to his death in 1979. General Zia ul-Haq, the military leader who had deposed him in a coup, rejected appeals for clemency from the UN Secretary-General, Pope John Paul II and leaders of most European and Arab countries as well as the USA.

Less well publicized was the hanging, two years later, of Abdul Hameed Baluch. The government claimed his was not a political case, but Abdul Hameed believed he was dying for a political cause.

In one of the last letters he wrote, in the death cell of Central Jail, Mach, in June 1981, Abdul Hameed begins:

"Now, as I write, there are armed men around, who watch my every action. I have eight hours to live. After these eight hours I shall be taken to the gallows. I do not regret nor do I think that I should get more time. For life spent without a cause and in captivity is a curse."

Abdul Hameed was a 21-year-old student president of the Baluch Student Organization. He was convicted of murder and sentenced to death by a special military court in Pakistan, the conduct of which did not conform to international standards for fair trial. The name of his alleged victim was changed twice during his trial, both times because the man previously named was found to be alive.

The confusion over the victim's identity prompted the Baluchistan High Court to stay the execution and order that Abdul Hameed be retried by an ordinary criminal court. Three months later the Constitution was amended and new martial law provisions removed defendants' right to appeal to a higher tribunal against conviction by a military court. The same amendment removed two of the Baluchistan High Court judges.

Abdul Hameed appealed to the Supreme Court, but was executed before his appeal could be heard. He went to the gallows on 11 June 1981, amid widespread protests.

Abdul Hameed Baluch

Former government official Reginald Townsend, on trial for his life before a special military tribunal in Liberia in 1980. He was not allowed a lawyer and when he attempted to speak in his own defence he was ordered to "keep it short". He was executed shortly afterwards.

Republic of Iran in 1979, Amnesty International does not know of one instance where a political prisoner facing the death penalty has been defended by a lawyer.

After 1979 special courts, known as Islamic Revolutionary Courts, were set up to try people charged with a series of offences including crimes against state security and the Islamic offence of "corruption on earth" and being "at enmity with God", a broad term which could be applied to political opponents of the government. Thousands of political prisoners tried by these courts have been executed.

Often executions were carried out so soon after sentencing as to leave no time to appeal or petition for clemency. In some cases a presumption of the guilt of the accused meant that the trial lasted a matter of minutes and consisted only of the reading out of the charge and the passing of sentence. Many prisoners were tried and executed in secret for their non-violent political opposition to the government and some are reported to have been executed for their religious beliefs.

Towards the end of 1988, Amnesty International received reports of a new wave of political executions in Iran, believed to be the largest number carried out since the early 1980s. Between mid-July and late October, family visits to political prisoners were banned and it was impossible to obtain precise information about the prisoners. At the same time reports began to circulate that mass executions were taking place in secret. Amnesty International received reports that the bodies of executed prisoners were being buried in shallow mass graves. When the ban on prison visits was lifted only some visitors were able to see their relatives. Some were informed that the prisoners had been executed. They were given the prisoners' wills and belongings and informed where they had been buried. Others were given no information.

In political cases executions are often carried out after unfair trials

Most of the victims were associated with political organizations opposed to the government. Some had already been tried and were serving prison sentences. Others had been imprisoned but never tried. They included an unknown number of prisoners of conscience.

Senior Iranian authorities made statements apparently defending the summary execution of political prisoners. In August 1988 the Iranian Chief Justice was reported to have said that public opinion favoured summary executions of some political prisoners. He was quoted as saying: "The judiciary is under very strong pressure from the public opinion asking why we even put them on trial, why some of them are jailed, and why all are not executed. The people say they should all be executed without exception".

Some of those executed were convicted on the basis of confessions extracted under torture. Iran is not the only country in which prisoners have been condemned to death on

The courtroom in Amasaya, Turkey, filled with some 750 defendants from the town of Tatsa. They were charged with setting up a left-wing administration in the town. Eight of the defendants were sentenced to death in August 1988. The main evidence against them is contained in their "confessions", made under torture. Most of the 700 prisoners sentenced to death in Turkey since 1980 were convicted on evidence obtained under torture.

This photograph of the 1985 public execution of 10 convicted armed robbers in Calabar, Nigeria, was on sale in the town shortly afterwards. Many of those convicted by Nigeria's Robbery and Firearms Tribunals cannot afford defence lawyers and very low fees are paid to the lawyers the tribunals appoint to act for them. This frequently results in an inadequate defence.

evidence obtained under torture. In late 1986 Amnesty International received reports that at least two of 11 members of Kurdish opposition groups executed in Iraq between August and November had been tortured. Mahdi Ibrahim Muhammad and 'Abed Taha Ibrahim were said to have had their finger nails extracted and their eyes gouged out.

Iraq is another country where prisoners on trial for their lives cannot expect a fair hearing. Most death sentences are imposed by permanent or temporary special courts. Access to a government-appointed lawyer is severely restricted (in some instances confined to the day of the trial), and confessions extracted under torture are frequently used as a basis for conviction. Defendants charged with capital offences are frequently denied the right to call witnesses on their behalf or to submit evidence refuting the charges.

Prisoners' relatives have consistently testified over a number of years that they remained unaware of the fate and whereabouts of their relatives until they had either been released or executed. Thirteen members of the Kurdistan Popular Democratic Party were executed on 31 March 1985 although they had been sentenced to 15 years' imprisonment. Their relatives were only informed of the executions three days later, after the bodies were returned to them with instructions not to hold public mourning. Some families have been asked to make payments on receiving the bodies of their executed relatives to cover state expenses such as the cost of coffins and the bullets used to shoot them.

Amnesty International has also received reports of dozens of prisoners being executed after summary trials, and sometimes no trials at all. In one case 15 school and university students were reported to have been arrested and summarily executed in public in Arbil, northern Iraq. The incident took place shortly after an attempt on the life of the Governor of Arbil in late March 1986.

More summary executions were reported at the beginning of 1987. In one case, the 29 victims were young people, aged between 17 and 23. Their bodies were returned to their families at the end of January. Some had had their eyes gouged out and bore the marks of torture.

The 29 were among 300 youths and children reported arrested in September and October 1985 in Sulaimaniya, northern Iraq. The government has denied that the incident occurred, maintaining that "All children in the Iraqi province of Kurdistan enjoy the same care and protection without any discrimination as all other Iraqi children". However, the fate and whereabouts of all but the 29 remain unknown.

When the death penalty is inflicted for other than political reasons it often becomes a lottery. Who lives and who dies is determined not only by the nature of the crime, but also by factors such as defendants' ethnic origin, political beliefs, financial means, or their value as objects of exemplary punishment. No criminal justice system has shown itself capable of consistently and fairly selecting who should live and who should die.

However elaborate are the procedures to try death penalty cases fairly, however many safeguards are included to ensure that no mistakes are made, they are worthless to a defendant whose lack of financial resources puts them beyond his or her reach.

Edward Earl Johnson died in Mississippi's gas chamber in May 1987. Lawyers who took over the final stages of his case said that his many appeals had been unsuccessful partly because of earlier legal mistakes.

In country after country it is the most vulnerable members of society, the poorest or otherwise disadvantaged, the least able to defend themselves, who pay the harshest price the state can exact. In Malaysia it is usually the small traders, the waitresses, the cobblers and the crabsellers who go to the gallows for drugs offences, while the drugs barons remain at liberty.

In South Africa death

Execution of the mentally ill

It is generally accepted that people who are not of sound mind should not be held criminally responsible for their acts. A related principle is that a prisoner under sentence of death who is of unsound mind should not be executed, on the grounds that such a person is incapable of understanding the nature of the punishment.

However there is no general agreement on how to diagnose insanity, or on the extent to which "diminished responsibility" should apply to lesser forms of mental illness or other abnormalities such as very low intelligence. In view of the scarcity of facilities for diagnosing mental illness in many parts of the world, it is likely that a substantial number of mentally incapacitated people are sentenced to death and executed.

In the USA, the evidence suggests that many prisoners under sentence of death may be mentally handicapped or suffer from mental illness. Since 1984 at least six people diagnosed as mentally handicapped or as borderline cases and at least five prisoners suffering from mental illness have been executed.

In Jamaica a number of prisoners are reported to have developed signs of mental illness while on death row and at least one mentally ill prisoner has been executed. Stafford Pyne was hanged on 28 June 1983 in St Catherine's Prison, Spanish Town, despite an opinion given by a psychiatrist five days earlier that he was suffering from schizophrenic illness. He had had a history of mental illness both in prison and before his arrest, for which he had received treatment as early as the age of 14.

Mamike Moloise, supported by relatives, walks to Pretoria Central Prison, South Africa, on the day of her son's execution. Benjamin Moloise was hanged in October 1985, despite appeals by the United Nations Security Council and many governments. He was convicted of killing a security police officer. He denied the charge and claimed that he had confessed to it under duress.

sentences are imposed disproportionately on black defendants by an almost entirely white judiciary. Most black defendants are too poor to hire their own lawyers. If they are on trial for their lives the court will in practice appoint a defence lawyer to act for them, although it is not legally required to do so. However, court-appointed lawyers are usually the most junior members of the bar and are paid much less than those hired by defendants themselves. Their fees allow little time for consulting with defendants before the trial and no money is available for preparing other aspects of the case such as interviewing witnesses, or investigating alibi or forensic evidence.

No criminal justice system has shown itself capable of consistently and fairly selecting who should live and who should die

In 1988 Amnesty International analysed the circumstances of more than 120 prisoners on death row in Jamaica. Most of them came from the very poorest sectors of the community and poverty had forced most of them to leave school at an early age. When arrested most were either unemployed, or employed in semi-skilled or unskilled work; some were small farmers.

Most prisoners in Jamaica are too poor to pay for private legal representation. They are represented by court-appointed legal aid lawyers at their trials and their first appeals against conviction and sentence to the Court of Appeal of Jamaica, but there is no financial aid for prisoners to take their cases to the final court of appeal, the Judicial Committee of the Privy Council in England.

The legal aid fees paid to lawyers in Jamaica are extremely low, many times less than the minimum fee charged by a privately retained lawyer. As few experienced lawyers are prepared to take on such cases, they tend to be assigned to newly qualified, inexperienced lawyers. The very low level of funding means that the lawyers spend little time preparing the cases.

Prisoners and their families sometimes go to great lengths, selling their possessions or seeking help from relatives abroad, to try to raise money for private legal representation. In a number of cases the lawyers have withdrawn before the proceedings are over because their fees have not been paid in full. Several prisoners have been unrepresented at both their trials and their appeals, due to difficulties in raising or settling fees.

Doctors and the death penalty

Doctors are members of a profession whose aim is to preserve life. Many consider participation in an execution to be unethical and abhorrent.

Although in some countries the role of doctors is confined to certifying death, in others doctors take part in executions by examining prisoners before execution, monitoring the execution, and advising executioners whether to continue the process of killing.

The World Medical Association has declared "that it is unethical for physicians to participate in capital punishment, although this does not preclude physicians certifying death". The WMA resolution was passed in 1981. Medical organizations in over 20 countries are now on record as opposing the participation of doctors in execution.

Safeguards and restrictions on the death penalty

Although the community of nations has not yet decided to prohibit the death penalty outright, they have over the years agreed on a series of restrictions and safeguards relating to its use. Many of these measures have been included in the ICCPR and other human rights treaties. In 1984 the main measures were brought together in a list of safeguards on the application of the death penalty adopted by the United Nations Economic and Social Council. These safeguards were endorsed by the UN General Assembly later that year.

The ECOSOC safeguards stipulate that the death penalty must only be imposed for the most serious crimes "with lethal or other extremely grave consequences", and must not be imposed retroactively. Prisoners must not be sentenced to death unless there is "clear and convincing evidence" of their guilt. They must be afforded "all possible safeguards to ensure a fair trial", at least equal to the safeguards contained in Article 14 of the ICCPR. Everyone sentenced to death must have the right to appeal to a higher court and the right to seek pardon or commutation of sentence. Executions must not be carried out while any appeal or petition for clemency is pending.

Under these safeguards no one may be sentenced to death for a crime committed when they were under 18 years old. Death sentences must not be carried out on pregnant women, new mothers or people who have become insane.

In the USA the quality of legal representation can be crucial in determining whether or not a death sentence is imposed. Here too, most defendants on capital charges cannot afford to retain private defence lawyers and are assigned court-appointed lawyers to represent them at trial. It is estimated that over 90 per cent of all prisoners sentenced to death in the USA have no financial resources of their own.

Court-appointed lawyers in the USA are paid far less than privately retained lawyers. Many have little or no experience in criminal law and lack the resources to conduct an adequate defence. At least four prisoners who had inadequate legal assistance were executed during 1987. The previous year Supreme Court Justice Thurgood Marshall urged his colleagues to require that experienced criminal lawyers be appointed to defend prisoners on capital charges. He expressed the view that "Capital defendants do not have a fair opportunity to defend their lives in the courtroom... death penalty litigation has become a specialized field of practice and even the most well-intentioned attorneys often are unable to recognize, preserve and defend their clients' rights."

Most US prisoners on capital charges cannot afford private lawyers

Capital defendants in the USA receive no aid for legal appeals beyond the confirmation of their sentences by the first appeal court. Prisoners who wish to appeal against conviction or sentence on constitutional grounds have to seek "volunteer" lawyers prepared to work without payment.

There is an exception to this. In Florida, which has one of the highest rates of execution, the state funds lawyers to take cases past the automatic first appeal stage, through a state office known as the Capital Collateral Representative.

This office was established in 1985 and currently employs 10 lawyers and several investigators. As a result of their efforts 50 per cent of death sentences have been reversed because of prosecutorial misconduct, ineffective defence counsel at trial or the discovery of new evidence. One prisoner had his conviction overturned and was released after spending 13 years on death row.

These results give an example of what can be achieved when expert criminal lawyers act for death row inmates. They also highlight the arbitrary nature of the death penalty. □

Why states kill

One of the most common justifications given for executing prisoners is that the death penalty is a valuable deterrent against crime.

The evidence, however, does not support the argument that the death penalty is a more effective deterrent against crime than other punishments. It is wrong to assume that all those who commit such a serious crime as murder do so after rationally calculating the consequences. Murders are often committed in moments of passion, when extreme emotion overcomes reason. They are also committed under the influence of alcohol or drugs, or in moments of panic when the perpetrator is caught in the act of stealing. Some murderers are highly unstable or mentally ill. In none of these cases can fear of the death penalty be expected to act as a deterrent.

Murders are often committed in moments of passion, when extreme emotion overcomes reason

Dr Sadataka Kogi, a Japanese prison psychiatrist, studied 145 convicted murderers between 1955 and 1957. He could find none who remembered thinking they might be sentenced to death before committing the crime. "Despite their knowledge of the existence of the death penalty", he concluded, all the prisoners had been "incapable, because of their impulsiveness and their inability to live except in the present, of being inhibited by the thought of capital punishment".

This is echoed in a speech made to the parliament of Papua New Guinea in 1980, by its then Minister of Justice. He said that most killings in the country were committed "under the sway of a violent emotion such as anger, the desire for revenge or fear of a sorcerer"; the death penalty was unlikely to be a deterrent "for those unplanned killings as a result of sudden outburst of emotion".

There is another flaw in the

In Cairo, prison officials prepare to execute Samiha Abdul-Hamid, convicted of murdering her husband. The death penalty is often described as an important deterrent against crime, but it is wrong to assume that those who commit serious crimes do so after rationally calculating the consequences.

argument that the death penalty deters would-be criminals. People who plan serious crimes in a calculated manner may decide to proceed despite the risk in the belief that they will not be caught. Criminologists have long argued that the way to deter such people is not to increase the severity of punishment but to increase the likelihood of detection and conviction.

The death penalty may even have the reverse effect to that intended. Someone who knows that they risk death for the crime they are committing may be more likely to kill witnesses or others who could identify and incriminate them.

If the death penalty did deter potential offenders more effectively than other punishments, one would expect to find that in countries with similar legal systems, those which have the death penalty for a particular crime would have a lower rate of that crime than those which do not. Similarly, a rise in the rate of crimes hitherto punishable by death would be expected in states which abolish the penalty, and a decline in crime rates would be expected among states which introduce the punishment for those crimes.

However, recent crime figures from abolitionist countries fail to show that abolition of the death penalty produces a rise in the crime rate. In Canada, the homicide rate per 100,000 population fell from a peak of 3.09 in 1975, the year before the abolition of the death penalty for murder, to 2.74 in 1983, and in 1986 it reached its lowest level in 15 years.

Australian Nolah Blake, on her way to the Thai court where she and Thai national Supoj Kittidejdaunkern were sentenced to death for drug-trafficking in 1988. The death penalty is most often introduced today for drug offences.

The offences for which the death penalty is most often introduced today are drug offences. Of the more than 20 countries which have introduced the death penalty for drug-related offences, 10 have done so in the past decade.

There are wide disparities in the way drug offences are punished. Some countries have not sentenced anyone to death, while others regularly carry out executions. Some national statutes restrict the death penalty to trafficking in poppy-based drugs; others include cocaine and even cannabis, a drug whose use in some countries is treated as a minor offence or is not even criminalized. Some statutes attempt to limit the death penalty to the most serious offences by restricting it to cases involving more than a specified amount of drugs; some have no minimum amount or an amount so low that addicts can be punished by death with no specific evidence that they have engaged in trafficking.

In Malaysia the death penalty has been mandatory since 1983 for possessing drugs above a

Incapacitation

The death penalty, by permanently incapacitating a prisoner, obviously prevents that person from repeating the crime. But there is no way of assessing the likelihood of the prisoner repeating the crime if allowed to live nor is there any need to take the prisoner's life for the purpose of incapacitation: dangerous offenders can be kept safely from the public without resorting to execution, as shown by the experience of many abolitionist countries.

A recent study of 239 men released on parole at various times in the 1960s and 1970s after serving some part of a sentence of life imprisonment in Great Britain found that out of the 192 men who had been convicted of murder, two had murdered again after release. Investigation of both cases revealed possible errors of judgment, either in the decision to release the men or in their subsequent supervision. Both men were back in prison, where they were likely to remain for the rest of their lives. In contrast, most of the other men released "settled back into the community quite well".

Incarceration in prisons and other institutions which isolate offenders from society has one great advantage over the death penalty as a means of incapacitation: the mistakes which result from fallible judicial systems can be corrected at least partially. But the death penalty takes the lives of offenders who might have been rehabilitated as well as the lives of the innocent.

Mihaly Nyiri, sentenced to death in Budapest and executed in 1983 for the murder of a nine-year-old child. Execution obviously prevents a prisoner from repeating the crime. But there is no way of knowing that the prisoner would have done so were he or she allowed to live.

certain amount. An increasing number of people have been sentenced to death, more than 59 in 1988. For many years the government has been waging a highly publicized campaign against drug abuse. Posters are prominently displayed in ports, airports and in the streets drawing public attention to the mandatory death penalty. The Deputy Prime Minister has stated that "drug abuse is a threat to national security on a par with Communism". Many have been hanged, including a 68-year-old Chinese grandmother.

In spite of the executions carried out in Malaysia and elsewhere, there is no evidence of a decline in drug-trafficking which could be clearly attributed to the threat or use of the death penalty.

Death was the penalty for the illicit manufacture and sale of narcotics in the Philippines between 1972 and 1987. In a debate before its abolition, one of the men instrumental in introducing the death penalty for drugs offences explained why he had changed his mind. Commissioner Teodulo Natividad had written the Dangerous Drugs Act which, from 1972, provided the death penalty for manufacturers and sellers of narcotics. He said: "I remember the one who was executed, Lim Seng, and I hoped by his death there [would] be less narcotic addiction in our country, but today we have more. There is now a Narcotics Command, a whole Command to deal with narcotics addictions. So therefore the life of that man that was snuffed out to discourage drug addiction had been lost in vain..."

It is sometimes said that the death penalty is a useful tool in the state's efforts to deal with political violence — that the prospect of execution will deter violent political opposition.

Relatives of Kehar Singh are stopped outside Tihar Central Jail, New Delhi. Kehar Singh and Satwant Singh were hanged for the murder of former Indian Prime Minister Indira Gandhi. The assassination of public officials and other acts of political violence often lead to calls for the perpetrators to be killed in revenge. But such executions frequently lead to reprisal killings. After Kehar Singh and Satwant Singh were executed, Sikh opponents of the government lynched several Hindus.

Bombings, kidnappings, assassinations of public officials, aircraft hijackings and other politically-motivated acts of violence often kill or maim not only the intended targets of attack but bystanders as well. They often lead to calls for revenge, for the perpetrators to be punished with death. But, as public officials responsible for fighting such crimes have repeatedly pointed out, executions are as likely to increase acts of terror as to stop them.

British authorities ruling Palestine in the 1940s hanged several members of the underground Zionist Irgun organization who had been convicted of charges of bombings and other violent attacks. Menachem Begin, former Irgun leader and later Prime Minister of Israel, told a former British government minister that executions had "galvanized" his group, which subsequently hanged several British soldiers in retaliation. Menachem Begin was reported to have said: "[the hangings] got us the recruits that we wanted and made us more efficient and dedicated to the cause... you were not sentencing our terrorists to death, you were sentencing a lot of your own people and we decided how many".

In Angola in 1980 nine members of the opposition group UNITA were convicted of organizing a bombing campaign. The nine were executed on 22 August, the day after sentencing. On 23 August UNITA "sentenced" and immediately executed 15 people described as government soldiers.

The first major report on the death penalty prepared for the United Nations, published in 1962, concluded that "All the information available appears to confirm that [removing various offences from the list of capital crimes] has, in fact, never been followed by a notable rise in the incidence of the crime no longer punishable with death".

Over 20 years later, that conclusion has not changed. The most recent study of research findings on the relationship between the death penalty and homicide rates, conducted for the United Nations Committee on Crime Prevention and Control in 1988, has concluded that "this research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis".

School students in China witness a prisoner being sentenced to death. Mass sentencing rallies attended by hundreds of people are held to publicly parade condemned prisoners before execution. However, official reports show that violent crime is rising despite the extensive use of the death penalty.

Retribution

When the arguments for deterrence and incapacitation are discounted, there is a more deep-seated justification for the death penalty: that of just retribution for the particular crime committed. Execution is deemed to be a repayment for an evil deed — by killing the prisoner society shows its condemnation of the crime.

Basing the death penalty on retribution makes impossible demands on the criminal justice system. Demand for the death penalty as a matter of justice runs up against the injustice and arbitrariness of the penalty in practice. A society's restraints on using the death penalty in certain cases, along with the biases inherent in all legal systems and the sheer fallibility of human judgment, preclude the possibility of creating a system which can mete out death in a fair way.

In the USA Thorsten Sellin examined statistics on prosecutions, convictions and executions for murder and concluded that "retributive capital justice is tainted by bias and by the influence of factors beyond the control of courts of justice, such as the poverty of the defendant, which prevents him from engaging competent counsel skilled in the art of criminal defence".

He noted that relatively few killers were executed. In California, for example, of 7,053 people imprisoned between 1950 and 1973 for felonious homicide, 61 per cent were sentenced to death and only 1.5 per cent were executed. More recent figures show a similarly stark contrast: although 25 prisoners were executed in the USA in 1987, the Federal Bureau of Investigation reported 20,100 murders and non-negligent manslaughters during the same year. The wide gap between the number of executions and murders in the USA indicated to Thorsten Sellin "an actual, if not philosophical, repudiation of retribution by death... we seem to be torn between a desire to see murderers suffer the ultimate penalty and a reluctance to exact it. Even those who ardently advocate retribution by death often paradoxically stress that it should be used sparingly, for fear that otherwise it would dull our moral sensitivity and lose its terrifying force".

Such analysts suggest a sacrificial element in the use of the death penalty. Since it is impossible to follow through fully the logic of the retribution argument, a token number of prisoners are executed to satisfy popular demand.

Even a decision to execute everyone convicted of a particular crime would fail to meet the fundamental requirement of fairness. By ruling out mitigating circumstances and refusing to consider the limitations of any attempt to define crimes precisely, mandatory death sentences render judicial fairness even more difficult to achieve. They may create an arbitrary threshold for deciding who lives and who dies. In Singapore and Malaysia, for example, the death penalty is mandatory for possession of more than 15 grams of heroin: only a tiny difference in the amount found on a person can mean the difference between life and death.

In Beirut, Lebanon, in 1983, Ibrahim Tarraf fought his execution to the last, presuming his innocence. He had been convicted of murder. One justification often cited for the death penalty is that by killing the prisoner society shows its condemnation of the crime. But execution can never be a condemnation of killing – it is killing.

> 'As one whose husband and mother-in-law have both died the victims of murder assassination, I stand unequivocally opposed to the death penalty... An evil deed is not redeemed by an evil deed of retaliation.' Coretta Scott King, widow of Martin Luther King, Jr

In its simplest form the argument for retribution is often no more than a desire for vengeance masked as a principle of justice. The desire for vengeance can be understood and acknowledged but the exercise of vengeance must be resisted. The history of the endeavour to establish the rule of law is a history of the progressive restriction, in public policy and legal codes, of personal vengeance.

Billboard in Malaysia warning that drug traffickers will hang. The same message is printed on the country's stamps.

Towards a world without executions

Amnesty International opposes the death penalty in all cases. In Amnesty International's view, the death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life. Amnesty International calls

Joyce Mokgosi hears the news that her brother Francis has been saved from South Africa's gallows. Francis Dan Mokgosi is one of the Sharpeville Six—six black prisoners who were convicted of murder on the grounds that they shared a "common purpose" with the actual killers of a black town councillor. The case provoked an international campaign to save their lives and their death sentences were commuted in November 1988.

on all countries which retain the death penalty to:

■ stop all executions immediately;

■ commute all outstanding death sentences;

■ abolish the death penalty in law.

The United Nations has endorsed the goal of abolition. In 1977 the UN General Assembly reaffirmed its main objective of "progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment."

Restrictions and safeguards on the application of the death penalty, which must be observed in all cases, have been adopted at international and regional levels. In accordance with internationally agreed upon human rights standards, governments which have not yet abolished the death penalty are obliged to ensure that:

■ every prisoner accused of an offence punishable by death is afforded all facilities for a fair trial in accordance with international standards before an independent, competent and impartial tribunal;

■ everyone sentenced to death has the right to appeal to a court of higher jurisdiction;

■ everyone sentenced to death has the right to seek pardon or commutation of sentence;

■ the death penalty is not used against people who were under 18 years old at the time of their offence;

■ the death penalty is not used against people who are not of sound mind;

■ the scope of the death penalty does not extend beyond the "most serious crimes"—those with lethal or other extremely grave consequences.

The death penalty has been abolished in practice in over 40 per cent of the world's countries. In others, governments have taken various measures to restrict the use of the death penalty. Amnesty International welcomes any measures which save the lives of prisoners who would otherwise have been executed and which bring closer the goal of worldwide abolition. Such measures include:

■ increased use of clemency in death penalty cases;

International public opinion generates pressure to stop executions. Lawyer Vera Chirwa and her husband, a former Minister of Justice, were sentenced to death in Malawi in 1983. Their sentences were commuted in 1984 after international appeals.