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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

MEMORANDUM FOR THE DIRECTOR

DATE: 4/19/88

TO: SAC, [illegible]

FROM: SA, [illegible]

SUBJECT: [illegible]

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CAPITAL PUNISHMENT

INTRODUCTION

Capital punishment is an issue that is continually discussed, disputed, and challenged. Since the United States Supreme Court decision in 1972 striking down existing death penalty statutes, much attention has centered on capital punishment. The rise in capital crimes during the seventies (approximately 2,000 premeditated and willful killings per year) also contributed to the increase in attention to capital punishment issues. In the past few years several states have considered new death penalty legislation and federal and state courts are constantly hearing appeals concerning death sentences.

There are more than 1,700 inmates presently living under a sentence of death as a result of capital offenses in the United States. Although a great many of these residents on death row were convicted and sentenced several years ago, many are now exhausting their legal appeals. This, in turn, has led to an increase in the number of executions. Statistics recently released by the NAACP Legal Defense and Educational Fund, Inc., found that of fifty-six people to die under the death penalty since the United States Supreme Court lifted its ban on such punishment in 1976, five were executed in 1983, twenty-one in 1984, and eighteen in 1985. As of April, six people have been executed in 1986. The twenty-one executions in 1984 represent the highest rate in twenty years.¹

Thus, the stage has been set for much controversy and debate on the capital punishment issue. While acknowledging that any subject dealing with life and death is an emotional one, this paper will present a brief history of the subject, as well as major arguments both for and against the death penalty.

HISTORY

Execution was a common form of punishment in ancient times. Throughout the ages, people have been condemned to death for a number of crimes, with the form of death carried out in many ways. Socrates was found guilty of heresy and corruption of youth and made to drink hemlock poison in 399 B.C. In the Bible, Mosaic law called for death as punishment for a number of offenses ranging from working on the Sabbath to adultery and human sacrifice. The forms of capital punishment in ancient China were varied and ran the gamut from boiling and burning to beheading and burying alive. By the late 18th century, however, a reform movement took place in Europe. Along with the industrial revolution and the invention of mechanical means of performing necessary, though time consuming tasks, came the questioning of standard methods and ideals. Publications like "Essay on Crimes and Punishment", written in 1764 by C. B. Beccaria, sparked interest and conflict in the minds of many citizens, originating a debate that is still argued throughout the world more than 200 years later.

Today the death penalty has been abolished in Canada, Australia, and most of Western Europe. In Eastern Europe, however, only Albania has abandoned capital punishment and it remains enforced throughout Asia, most of Africa, and the Islamic world.

Capital Punishment in the United States

During colonial times in America, capital punishment was enforced for a dozen or more different crimes. After the eighth amendment to the Constitution of the United States of America was adopted, limiting "cruel and unusual" punishments, the widespread use of a sentence of death for a number of crimes was limited to a smaller number of severe crimes, notably ones which involved murder or rape. Due to changing public opinion, a reflection of the same reform that had previously swept Europe, the laws gradually changed. There was a high number of executions in 1935, 199, which went down to one in 1966 and two in 1967. In the next few years, federal and state courts were still sentencing criminals in capital cases to death, but because of the appeals of several sentences, no executions were carried out.

In 1972, the United States Supreme Court decided in a landmark case, Furman v Georgia, 92 S Ct 2726 (1972), that capital punishment in the United States was cruel and unusual because of the randomness of its sentencing. The high court decided, 5-4, that all existing state death penalty laws violated the constitution because they gave judges and juries too much discretion in deciding which offenders should live and which should die. This decision automatically made capital punishment statutes in the United States unconstitutional and all 629 residents of death row received new sentences of life in prison.

After this monumental decision, many states passed new capital punishment laws to meet the requirements of the United States Supreme Court. Laws were reinstated in a set of five rulings in July of 1976 (Gregg v Georgia, 96 S Ct 2909

(1976); Proffitt v Florida, 96 S Ct 2960 (1976); Jurek v Texas, 96 S Ct 2950 (1976); Woodson v North Carolina, 96 S Ct 2978 (1976); Roberts v Louisiana, 96 S Ct 3001 (1976)). These precedent-setting cases provided states with basic guidelines for framing constitutional death penalty laws. Although not decided in any one particular case, the consensus of the decisions was that death penalty statutes were constitutional if 1) guilt and punishment are decided separately, 2) aggravating and mitigating factors are statutorily mandated and considered, and 3) there is appellate review of death sentences. The court held that such guided discretion and review prevented the punishment from being arbitrary or capricious.

The years that followed these high court decisions saw a number of refinements added to the established standards. In 1977, the death sentence was found to be a disproportionate punishment for the rape of an adult woman. In July of 1983, the Supreme Court refused to grant a stay of execution, thereby setting new guidelines for lower federal courts concerning last minute appeals. The Supreme Court upheld in February of 1986 (Gray v Mississippi, 85 S Ct 5454 -1986)) that opponents of the death penalty may be excluded from juries in capital cases.

As of May, 1986, as shown in the following table, thirty-seven states have instituted the death penalty under such guidelines. Among these states the types of punishment vary as do the number of people who are presently residing on death row.

Table 12

Capital Punishment: The Method of Execution and the Number of People on Death Row.

STATE	METHOD	DEATH ROW POPULATION
Alabama	electrocution	82
Arizona	gas	64
Arkansas	lethal injection	29
California	gas	177
Colorado	gas	1
Connecticut	electrocution	0
Delaware	hanging	5
Florida	electrocution	231
Georgia	electrocution	107
Idaho	lethal injection or firing squad	13
Illinois	lethal injection	89
Indiana	electrocution	35
Kentucky	electrocution	26
Louisiana	electrocution	47
Maryland	gas	20
Mississippi	gas or lethal injection	46

Missouri	gas	41
Montana	hanging or lethal injection	5
Nebraska	electrocution	13
Nevada	lethal injection	32
New Hampshire	hanging	0
New Jersey	lethal injection	20
New Mexico	lethal injection	5
North Carolina	gas or lethal injection	58
Ohio	electrocution	66
Oklahoma	lethal injection or firing squad	57
Oregon	lethal injection	1
Pennsylvania	electrocution	83
South Carolina	electrocution	42
South Dakota	electrocution	0
Tennessee	electrocution	57
Texas	lethal injection	221
Utah	firing squad or lethal injection	7
Vermont	electrocution	0
Virginia	electrocution	30
Washington	hanging or lethal injection	7
Wyoming	lethal injection	3

While there are federal laws which carry the death penalty as punishment, most have not yet had their constitutionality tested. However, measures are presently before the United States Congress which would establish procedures for imposing the death penalty in certain federal cases involving homicide, treason, espionage, attempts to assassinate the president, terrorism, and other criminal offenses.

Capital Punishment in Michigan

Since it became a state in 1837, the State of Michigan has never executed anyone. However, approximately twelve known executions have taken place in the territory that became Michigan. The last of these executions (until a federal case in 1938 when a man was convicted of treason) took place on September 24, 1830, when Stephen Simmons was hanged for murder. Public reaction to this hanging, as well as the reaction to a hanging in nearby Ontario of which the convicted murderer was later found to be innocent, are thought to be strong reasons for Michigan's early abolition movement.³

The State of Michigan became the first English-speaking jurisdiction in the world to legislate against the death penalty. The abolition of capital punishment became part of Michigan law when it was voted upon in 1846, nine years after Michigan became a state. In 1961-1962, when the constitutional convention was held, delegates voted to include the prohibition of the death penalty as part

of our state constitution. As a result, Article IV, Section 46 of the Constitution of the State of Michigan of 1963 states "No law shall be enacted providing for the penalty of death."

Since 1846, there have been numerous attempts by the State Legislature to reinstate the death penalty in Michigan. The two legislative endeavors which came the closest to restoring capital punishment in Michigan occurred in 1929 and 1931. In 1929 a capital punishment bill passed both houses of the Legislature, but was vetoed by Governor Fred W. Green. In 1931 a bill providing for the death penalty passed both houses and was signed by Governor Wilber M. Brucker, with the provision that a referendum be held. The people of Michigan defeated the referendum proposal by a vote of 352,000 to 269,000.

More recently, several joint resolutions were introduced in the Legislature during 1977 which proposed the imposition of the death penalty for specific offenses. None of these resolutions were passed. A petition campaign attempting to put the question of the death penalty before the citizens of Michigan in the form of a ballot proposal was launched in 1978. This measure also did not succeed in reaching the ballot. A similar petition drive in 1986 was unsuccessful. During the 1985-86 Michigan legislative session, three constitutional amendments were introduced. Senate Joint Resolution B would repeal the constitutional prohibition and was referred to the Committee on Judiciary in January of 1985. House Joint Resolution D would repeal the constitutional prohibition and was referred to the Committee on Judiciary on January 31, 1985. Senate Joint Resolution H would have established capital punishment for first degree murder and was defeated by the Senate on June 11, 1985.

MAJOR ARGUMENTS IN FAVOR OF CAPITAL PUNISHMENT

Deterrence - An argument in favor of capital punishment is that it will prevent further violent crimes. In 1975 Professor Isaac Ehrlich acquired national prominence when he published a doctoral dissertation which established a statistical equation based on information culled from the study of homicides and executions in the United States. His final results found that each execution may deter eight murders.⁴ A study of violent criminals conducted by the Los Angeles Police Department in 1970-71 showed that fear of the death penalty did, in fact, affect the severity of their crime.⁵

Cost - Proponents of capital punishment feel that an execution is a more cost-effective alternative than maintaining a criminal for a term of life in prison at taxpayer expense.

Parole - The average time in prison for life-sentenced criminals is twenty-five years. Some individuals who have committed murder are paroled. Advocates of capital punishment maintain that too many people are released to commit further crimes.

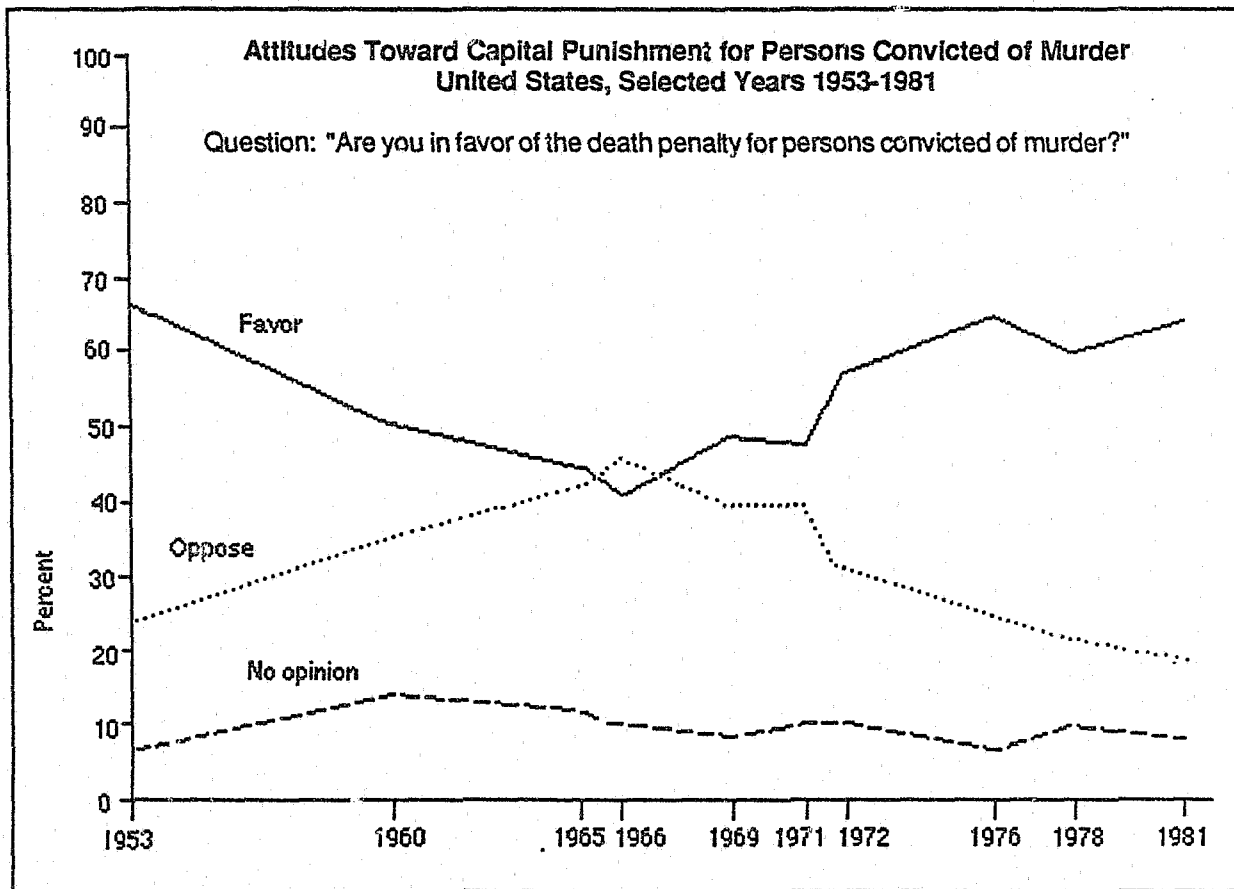
Due Process of Law - A code of law without the death penalty leaves the public with a sense of insecurity which undermines respect for governmental and legal processes.

Cruelty of Life in Prison - Some say that life imprisonment is a more tortuous form of punishment than execution. Some prisoners prefer death.

Retribution - Another argument for capital punishment is that it is morally right to be angry at criminals and to express that anger officially, publicly, and in a reciprocal manner. In this regard, the Bible speaks of "an eye for an eye, a tooth for a tooth". It is felt by many that execution is a fitting and just punishment for heinous crimes and that righteous anger is absolutely essential for a decent, just society.

Increased support - Proponents argue that most citizens do, in fact, favor capital punishment. The following table demonstrates popular public opinion in the United States.

Table II



source: "The Sourcebook of Criminal Justice Statistics-1981" 6

In Michigan, a poll was taken by Market Opinion Research for the Michigan Commission on Criminal Justice in 1980 which included a survey question concerning capital punishment. The findings of this survey, as reported in "Public Opinion on Crime and Criminal Justice," showed that 62% of the people who participated in the survey favored amending the Michigan Constitution to implement the death penalty for certain crimes. The Detroit News completed a survey of 656 Michigan residents and published results in July 1985 demonstrating a 75% approval rate for the death penalty.

MAJOR ARGUMENTS AGAINST CAPITAL PUNISHMENT

Does not Deter Crime - Studies which compare homicide rates in states which have the death penalty with those which have abolished it indicate that capital punishment does not lower the homicide rate. In fact, evidence shows that immediately after an execution, the crime rate does not lower, but actually rises.⁷ Publicized executions may stimulate, rather than deter, potential murderers. It is also pointed out that a murder is often a crime of passion, in which case the criminal may not consider the possibility of being executed.

Random and Capricious - Those who oppose the death penalty indicate many capital convicts are of limited mental capacity and education, are of a racial minority, or are otherwise poor or disadvantaged. The question of potential racial bias in sentencing was acknowledged by the United States Supreme Court when it granted a stay of execution to a prisoner in Georgia so the issue of discrimination in Georgia's sentencing could be studied.

Conviction of Innocent - There is always the possibility of wrongfully convicting innocent citizens. There are well documented cases of people convicted of murder who were later proved to be innocent.

Cost - The cost of a capital trial with its subsequent appeals and maintaining the prisoner on death row is more expensive than life imprisonment. Furthermore, "lifers" obtain special skills in prison and their work actually saves taxpayers' money.

Parole - The "lifer" is often the best prison inmate. In Michigan, the sentence for murder is life in prison with no parole. In special cases this may be commuted by the governor. However, most people who are sentenced to life in prison actually die in prison.

Obstruction of Justice - Juries are often reluctant to convict when they know that the crime is a capital offense.

Moral - Many people simply feel that killing is morally wrong and that retribution is not justice but revenge.

SUMMARY

When so much is at stake, the arguments, both for and against capital punishment, should be weighed closely and carefully. There are obviously many questions and points to consider. Is justice served by the use of the death penalty? For the most part, the answer will remain a value judgment depending upon religious and philosophical viewpoints. Strong beliefs, one way or another, will be common and there will be many who cannot decide. With the increasing number of people who are presently facing execution in our country, it is a question that will need to be addressed soon by judges, law enforcement officials, and the citizenry. As former Director of the Michigan Department of Corrections Mr. Perry Johnson states in a paper concerning capital punishment, "...This is a decision which the citizens of this state, each of us individually and alone, will make..."⁸

1. NAACP Legal Defense and Educational Fund, Inc., "Death Row, U.S.A.," NAACP LDF, New York, NY, 1986.
2. NAACP Legal Defense and Educational Fund, Inc., "Death Row, U.S.A.," NAACP LDF, New York, NY, 1986.
3. Edward W. Bennett, "The Reasons for Michigan's Abolition of Capital Punishment," Michigan History, November/December 1978, pp. 42-55.
4. Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death." American Economic Review, June 1975, pp. 397-417.
5. A list is cited in the brief of the State of California in Aikens v California, No. 68-5027, October Term 1971, United States Supreme Court.
6. Criminal Justice Research Center, "The Sourcebook of Criminal Justice Statistics—1981," (constructed of figures from: George H. Gallup, "The Gallup Poll," Princeton, N.J., Mar. 1, 1981.), Bureau of Justice Statistics, Albany, New York, p. 209.
7. Thorston Sellen, Capital Punishment, New York, Harper and Row, 1967, pp. 135-138.
8. Perry M. Johnson, "Capital Punishment: A Futile Act," Michigan Department of Corrections, Lansing, Michigan, January, 1980.

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