SENTENCING IN CAPITAL CASES

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

H.R. 13360

SENTENCING IN CAPITAL CASES

JULY 19, 1978

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ed for the use of the Committee on the Judiciary

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SENTENCING IN CAPITAL CASES

WEDNESDAY, JULY 19, 1978

U. S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:39 a.m. in room B-352 Rayburn House Office Building, Hon. James R. Mann (chairman of the subcommittee) presiding.

Present: Representatives Mann, Gudger, Evans, Wiggins, and Hyde.

Also present: Thomas W. Hutchison, counsel; Judy A. Levinthal, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. MANN. The subcommittee will come to order.

The Subcommittee on Criminal Justice today will receive testimony on H.R. 13360, a bill to amend the Federal Rules of Criminal Procedure and the Federal Rules of Appellate Procedure to provide for postconviction proceedings in certain criminal cases. This bill is an outgrowth of the subcommittee's work on the recodification of the Federal criminal laws, and it provides procedures for the imposition of the death penalty in certain cases.

The issue of capital punishment raises significant moral and legal questions. The U.S. Supreme Court has held that the death penalty is not unconstitutional per se and has recently upheld several State statutes which establish procedures for the imposition of the death penalty. H. R. 13360 was drafted in an attempt to come within these constitutional guidelines.

[A copy of H.R. 13360 follows:]

95TH CONGRESS
2D SESSION

H. R. 13360

IN THE HOUSE OF REPRESENTATIVES

JUNE 29, 1978

Mr. MANN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Federal Rules of Criminal Procedure and the Federal Rules of Appellate Procedure to provide for post-conviction proceedings in certain criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Rules of Criminal Procedure are amended by adding after title X the following new title:

"TITLE XI. SENTENCING IN CAPITAL CASES

"RULE 61. SETTING SENTENCES IN CAPITAL CASES

"A sentence of death may not be imposed under a law of the United States providing that penalty unless the standards and procedures set forth in this title have been followed

to the extent such standards and procedures apply to the particular case by the terms of this title.

"RULE 62. HEARING

"(a) Whenever a person is convicted of an offense for which death is a possible penalty under a law of the United States, there shall be a separate hearing on the question of sentencing.

"(b) (1) Such hearing shall be held before the jury that determined the defendant's guilt or by a jury impaneled for the purpose of a hearing under paragraph (2) of this subdivision.

"(2) A jury may be implemented for the purpose of a hearing pursuant to this title if—

"(A) the defendant was convicted on a plea of guilty;

"(B) the defendant was convicted after a trial without a jury;

"(C) the jury that determined the defendant's guilt has been discharged [for good cause]; or

"(D) appeal of the original sentence of death has resulted in a remand for redetermination of sentence under this title.

"(3) A jury impaneled for the purpose of a hearing pursuant to this title shall consist of 12 persons, but at any time before the conclusion of the hearing the parties may stipulate

in writing with the approval of the court that such jury shall consist of any number of persons less than 12 or that a valid recommendation may be returned by a jury of less than 12 persons should the court find it necessary to excuse one or more jurors for any just cause after the hearing commences.

"(4) The defendant may, by motion and with the approval of the court, waive the hearing before a jury.

"(c) (1) At such hearing, both the defendant and the Government may present evidence as to any matter pertaining to sentence, including the existence of any aggravating or mitigating circumstances set forth in Rules 64 and 65.

"(2) Rules of evidence governing admission of evidence at criminal trials shall apply with respect to evidence tending to show the existence of an aggravating circumstance or to negate the existence of a mitigating circumstance, but such rules shall not apply to preclude evidence tending to show the existence of a mitigating circumstance or to negate the existence of an aggravating circumstance.

"(3) The defendant and the Government shall be permitted to rebut any information received at a hearing pursuant to this title and shall be given fair opportunity to present argument as to the appropriateness of imposing a sentence of death.

"(d) The existence of any aggravating circumstance must be established by the Government beyond a reasonable

doubt, and the existence of any mitigating circumstance must be established by the defendant by a preponderance of the evidence.

"(e) Any information in a report of presentence investigation which is withheld from the defendant pursuant to the Federal Rules of Criminal Procedure shall not be considered in determining sentence under this title.

"(f) The jury, if it recommends the imposition of a sentence of death, shall designate in writing, signed by the foreman of such jury, any aggravating circumstances and any mitigating circumstances which the jury found.

"RULE 63. JURY RECOMMENDATION

"(a) After a hearing held pursuant to Rule 62, the jury shall determine whether to recommend the imposition of a sentence of death.

"(b) The jury may recommend the imposition of a sentence of death only if every member of the jury—

"(1) finds beyond a reasonable doubt that the defendant intended that the life of any person be taken and that any person did die as a direct result of the offense;

"(2) finds that an aggravating circumstance set forth in Rule 64 exists; and

"(3) determines that any aggravating circumstances found to exist, taken in conjunction with all the evidence, outweigh any mitigating circumstances found to exist.

"(c) If every member of the jury determines under subdivision (b) (3) of this Rule that any aggravating circumstances found to exist, taken in conjunction with all the evidence, outweigh any mitigating circumstances found to exist, the jury may nevertheless decline to recommend the imposition of a sentence of death.

"(d) After a hearing held pursuant to Rule 62, if every member of the jury is unable after a reasonable period of time to agree to a recommendation that a sentence of death be imposed, then it shall be deemed that the jury has recommended that the sentence of death not be imposed.

"(e) No jury recommendation shall be required if the judge, pursuant to Rule 62 (b) (4), permits the defendant to waive the hearing before a jury.

"RULE 64. AGGRAVATING CIRCUMSTANCES; STIPULATION

"(a) For the purpose of this title, aggravating circumstances are the following:

"(1) The defendant has been convicted of committing more than one offense against the United States under circumstances that would permit a sentence of death.

"(2) Wanton and intentional cruelty or depravity was shown in the course of the offense.

"(3) The defendant accepted a payment or the

promise of anything of pecuniary value from another to commit the offense.

"(4) The defendant paid another or promised another anything of pecuniary value to commit the offense.

"(5) The defendant knew that the victim of the offense was at the time of the offense a high Government official and the defendant committed the offense at least in part because of such official status of the victim. As used in this paragraph, the term 'high Government official' means the President of the United States, the President-elect, the Vice President or, if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice President-elect, any individual who is acting as President under the Constitution and laws of the United States, a Member of Congress, and a Member of Congress-elect.

"(6) The defendant, in the course of the offense, intentionally created a grave risk of serious bodily injury or death to an innocent bystander.

"(7) The offense was committed while the defendant was engaged in the commission of another offense against the United States under circumstances that would permit a sentence of death.

"(8) The offense was committed by a person with a substantial record of prior convictions for serious assaultive offenses.

"(9) The offense was committed while the defendant was in lawful custody or during the defendant's escape from lawful custody.

"(b) The attorney for the Government may stipulate that none of the aggravating circumstances described in Rule 64(a) exist. In such event, no hearing shall be held under Rule 62, the death penalty shall not be imposed, and the defendant shall be sentenced under Rule 66(c).

"RULE 65. MITIGATING CIRCUMSTANCES

"For the purpose of this title, mitigating circumstances are the following:

"(1) The youthfulness of the defendant at the time of the offense.

"(2) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform such conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to the charge.

"(3) The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution.

"(4) The defendant is punishable as a principal for aiding and abetting the offense, but the defendant's participation was relatively minor.

"(5) The defendant could not reasonably have foreseen that the defendant's conduct would cause or create a grave risk of causing serious bodily injury or death.

"(6) The defendant has not been convicted of any other offense which resulted in bodily injury to another person.

"(7) The defendant has not been convicted of any other offense for which the maximum permitted imprisonment exceeds one year, or for which the penalty is death.

"(8) The defendant cooperated with the attorney for the Government in the prosecution of the offense for which the defendant was convicted.

"(9) The victim of the offense for which the defendant was convicted was a participant in or consented to the conduct involved.

"(10) Any other circumstances deemed appropriate by the jury.

"RULE 66. IMPOSITION OF SENTENCE

"(a) After the hearing and jury recommendation pur-

suant to this title, the judge in determining sentence shall consider the recommendation of the jury as to sentence.

"(b) If the jury recommends imposition of a sentence of death, the judge may impose a sentence of death or a sentence in accordance with subdivision (c) of this Rule.

"(c) The judge shall impose a penalty provided by law for the offense, other than a sentence of death, or, if no penalty other than a sentence of death is otherwise provided, imprisonment for life or any term of years if—

"(1) the jury does not recommend imposition of a sentence of death;

"(2) the judge, upon consideration of the jury's recommendation that a sentence of death be imposed, nevertheless determines that a sentence of death would be inappropriate;

"(3) when a defendant is permitted pursuant to Rule 62 (b) (4) to waive the hearing before a jury, the judge determines that any aggravating circumstances found to exist, taken in conjunction with all the evidence, outweigh any mitigating circumstances but that a sentence of death would be inappropriate; or

"(4) a stipulation is made pursuant to Rule 64 (b) that no aggravating circumstances exist.

"RULE 67. HEARING WITHOUT A JURY

"(a) If the judge, pursuant to Rule 62 (b) (4), permits the defendant to waive the hearing before a jury, the judge shall hold a hearing on sentencing as provided in Rule 62 and make the findings and determinations required by Rule 62 in accordance with the standards set forth in that rule.

"(b) After such a hearing, if the judge finds that the defendant intended that the life of any person be taken and that any person did die as a direct result of the offense and finds that any of the aggravating circumstances set forth in Rule 64 exist, then the judge shall determine whether any aggravating circumstances found to exist, taken in conjunction with all the evidence, outweigh any mitigating circumstances found to exist.

"(c) If the judge determines that any aggravating circumstances found to exist, taken in conjunction with all the evidence, outweigh any mitigating circumstances found to exist, then the judge may impose a sentence of death. Even though the judge so determines, the judge may decide that a sentence of death would be inappropriate, in which case the judge, pursuant to Rule 66 (c), shall impose a sentence other than a sentence of death.".

SEC. 2. The table at the beginning of the Federal Rules

of Criminal Procedure is amended by adding after the items relating to title X the following:

"TITLE XI—SENTENCING IN CAPITAL CASES

"61. Setting sentences in capital cases.
"62. Hearing.
"63. Jury recommendations.
"64. Aggravating circumstances; stipulation.
"65. Mitigating circumstances.
"66. Imposition of sentence.
"67. Hearing without a jury.".

SEC. 3. The Federal Rules of Appellate Procedure are amended by adding after title VII the following new title:

"TITLE VIII—REVIEW OF A SENTENCE OF DEATH

"RULE 49. REVIEW OF A SENTENCE OF DEATH

"(a) If a judge imposes a sentence of death, the court of appeals shall review the sentence, and such review shall have priority over all other cases.

"(b) (1) The record on appeal shall consist of—

"(A) the original papers and exhibits filed in the district court;

"(B) the transcript of the proceedings;

"(C) a certified copy of the docket entries prepared by the clerk of the district court;

"(D) the written designation of the jury, pursuant to Rule 62 (f) of the Federal Rules of Criminal Proce-

dure, setting forth the aggravating circumstances and the mitigating circumstances that the jury found; and

"(E) the jury's recommendation, pursuant to Rule 63 of the Federal Rules of Criminal Procedure, as to the imposition of a sentence of death.

"(2) The record on appeal shall be transmitted to the court of appeals within 40 days after the entry of judgment.

"(c) Upon review of a sentence of death, the court of appeals shall consider—

"(1) the record on appeal;

"(2) the evidence and information submitted during the sentencing hearing held pursuant to Rule 62 of the Federal Rules of Criminal Procedure; and

"(3) the procedures employed in the sentencing hearing held pursuant to Rule 62 of the Federal Rules of Criminal Procedure.

"(d) The court of appeals, upon a review of a sentence of death, shall set the sentence aside and remand the case for resentencing if such court determines that—

"(1) the sentence is clearly unreasonable;

"(2) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"(3) the evidence did not support the jury's finding of an aggravating circumstance set forth in Rule 64 of the Federal Rules of Criminal Procedure, or a judge's

finding where a defendant waives the hearing before a jury pursuant to Rule 62 (b) (4) of the Federal Rules of Criminal Procedure.

"(4) the evidence supported the finding of a mitigating circumstance set forth in Rule 65 of the Federal Rules of Criminal Procedure and such mitigating circumstance was not found; or

"(5) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature and circumstances of the offense and the history and characteristics of the defendant.

"(e) The court of appeals shall state in writing the reasons for its disposition of the review of the sentence and shall include in its decision a reference to those similar cases which it took into consideration in determining whether the sentence of death is excessive or disproportionate.".

SEC. 4. The table at the beginning of the Federal Rules of Appellate Procedure is amended by adding after the items relating to title VII the following:

"TITLE VIII. REVIEW OF A SENTENCE OF DEATH
"49. Review of a sentence of death".

SEC. 5. The amendments made by this Act shall take effect and apply with respect to criminal cases arising on and after January 1, 1979.

Mr. MANN. The six witnesses who will testify today represent varying viewpoints. We are pleased that they have taken the time to come to testify and to assist the subcommittee in its work on this issue.

Our first witness today is Mary C. Lawton, Deputy Assistant Attorney General in the Office of Legal Counsel, U.S. Department of Justice. She has testified several times in the past or the issue of capital punishment, but this is the first time she has appeared before us.

Ms. Lawton has submitted a prepared statement on behalf of the Department of Justice and without objection, it will be made a part of our record.

Welcome to the subcommittee, Ms. Lawton. You may proceed as you wish.

[The prepared statement of Ms. Lawton follows:]

STATEMENT OF MARY C. LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Mr. Chairman and members of the subcommittee, at your request, I propose to analyze today the recent Supreme Court decisions dealing with the imposition of the death penalty and attempt to apply those decisions to the details of the bill pending before this subcommittee, H.R. 13360, comparing it, in turn to S. 1382, the Committee Print now pending before the Senate Judiciary Committee. Due to the complexity of the subject, I will divide my testimony into: (1) an analysis of *Furman* v. *Georgia*, 408 U.S. 238 (1972), *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and *Lockett* v. *Ohio*, 46 Law Week 4981 (July 3, 1978), and their companion cases dealing with fundamental constitutional concepts; (2) an analysis of *Coker* v. *Georgia*, 433 U.S. 584 (1977), dealing with the offenses to which the penalty may be applied; and (3) *Gardner* v. *Florida*, 430 U.S. 349 (1977), which relates to the use of presentence reports in the imposition of the death penalty. Having analyzed the cases, I will then offer an opinion as to how they might apply to H.R. 13360, comparing it with the Senate Bill.

I know that the Subcommittee recognizes that this analysis is necessarily speculative since none of the opinions in these cases commands a clear majority and the Supreme Court itself is unusually divided on the issues.

1. THE FURMAN DECISION

The exact scope of the Supreme Court's decision in *Furman* is unclear. The Court's decision in that case was handed down in the form of a *per curiam* opinion accompanied by nine separate opinions in which each of the justices discussed his views on the subject of capital punishment. None of the Justices constituting the majority concurred in the opinion of any other Justice. In its *per curiam* opinion, the five-justice majority held only that the imposition of and carrying out of the death penalty in the cases before the Court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Court thus did not hold that capital punishment *per se* is unconstitutional. Only two of the Justices comprising the majority were of this opinion. Of the remaining three, Justices Stewart and White explicitly stated that they had not reached the question whether the death penalty is unconstitutional under all circumstances. Rather, they concluded that, "as presently applied and administered in the United States," capital punishment constitutes a violation of the Eighth Amendment. Mr. Justice Stewart objected to the penalty being applied in "so wantonly and freakishly" a manner. Mr. Justice White objected specifically to:

"* * * the recurring practice of delegating the sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime."[1]

[1] *Furman* v. *Georgia*, *supra* at 314.

These aspects of the concurring opinions of Justices Stewart and White are analyzed by the dissenting opinion of the Chief Justice, in which Justices Blackmun, Powell and Rehnquist joined. The Chief Justice observed:

"Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioner's sentences, stop short of reaching the ultimate question. The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past.* * *"[2]

2. THE GREGG DECISION AND COMPANION CASES

The Court in *Furman* had struck down a Georgia death penalty law, written in the fashion of all present Federal death penalty provisions except the revised aircraft piracy statute. 49 U.S.C. 1472(i). The critical votes comprising the majority of the Court did so on the ground that the law permitted the sentencing judge or jury to exercise unguided discretion in determining whether the death penalty should be imposed, thus failing to guard against the "freakish" or "wanton" imposition of the death sentence. Thereafter, Georgia revised its law to provide for sentencing criteria relating to the death penalty and to ensure judicial review of death sentences to guard against uneven application.

The Supreme Court in *Gregg* reviewed the Georgia statute enacted in response to *Furman* and found it sufficient to overcome Eighth Amendment objections. Justices Stewart, Powell and Stevens found four features of the statute to be particularly important in concluding that the statute satisfied consitutional requirements: (1) the sentencer's attention was drawn to the particularized circumstances of the crime and the defendant by reference to aggravating and mitigating factors; (2) the discretion of the sentencer was controlled by clear and objective standards; (3) the sentencer was provided with all the relevant evidence during a separate sentencing hearing, while prejudice to the defendant was avoided by restricting information on aggravating circumstances to that comporting with the strict rules of evidence; and (4) there was a system of appellate review of the sentence to avoid arbitrariness, excessiveness and disproportionality, and, in a more traditional mode, to review the findings of fact necessary for the imposition of the sentence. Justices White, Burger and Rehnquist concurred in the decision. While not emphasizing the same four points, these Justices did discuss the importance of the judicial review provisions of the Georgia statute at some length. 428 U.S. at 207.

3. THE LOCKETT AND BELL DECISIONS

In *Lockett* v. *Ohio*, 46 Law Week 4811, and the companion case of *Bell* v. *Ohio*, 46 Law Week 4995, the Court again considered the constitutionality of a State statute enacted in response to *Furman*. The Ohio statute at issue set forth the aggravating and mitigating factors to be considered in the imposition of the death penalty. If the case went to trial, however, only three mitigating factors could be considered: (1) whether the victim induced or facilitated the crime, (2) whether the criminal acted under duress, coercion, or strong provocation, or (3) whether the crime was a primary product of psychosis or mental deficiency. Without one of these factors, and with a finding of an aggravating factor, imposition of the death penalty was mandatory. While the Court by a vote of seven to one found the imposition of the death penalty in this case to be unconstitutional, again there was no majority opinion.

Chief Justice Berger and Justices Stewart, Powell and Stevens found the limitation on mitigating factors which could be considered unconstitutional.

"[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record

[2] *Id.* at 396–397.

and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [Emphasis in original; footnotes omitted.] *Id.* at 4986.

They concluded that individualized sentencing is constitutionally required in capital cases.

Justice Marshall adhered to his view that the death penalty is constitutional *per se.* Justice Brennan, who shares this view, did not participate in the case.

Justice Blackmun found the statute unconstiutional for somewhat different reasons. First, he found the application of the penalty to an aider and abettor without regard to a specific *mens rea* in relation to the killing to be cruel and unusual. In his view the statute must at least allow consideration of the individual's degree of participation in the crime. Ms. Lockett, it should be noted, was outside in the get-away car at the time the murder, which may have aken place "accidentally" in the course of committing the armed robbery, occurred. Secondly, he noted that Ohio law authorized consideration of only three mitigating factors if a defendant went to trial but permitted a judge who accepted a guilty plea to avoid imposing the death penalty "in the interest of justice." This, in Justice Blackmun's view, is inconsistent with the decision in *United States* v. *Jackson,* 390 U.S. 570 (1968), which held that allowing the imposition of the death penalty in a jury trial but not in a trial by judge for the same offense is a violation of the Sixth Amendment.

Justice White reiterated his opinion in *Coker* v. *Georgia,* that a mandatory death penalty is permissible. His objection to the Ohio statute was its inclusion of an aider and abettor within the scope of the death penalty, "without a finding that the defendant possessed a purpose to cause the death of the victim." This he considered to be disproportionate to the offense within the holding of *Coker.*

Justice Rehnquist dissented suggesting that the Court return to its position in *McGautha* v. *California,* 402 U.S. 183 (1971), upholding the constitutionality of the death penalty generally.

4. THE COKER CASE

In *Coker* v. *Georgia,* the Court held that the Georgia death penalty statute, already found to be constitutional from a procedural standpoint, was unconstitutional insofar as it permitted the imposition of the death penalty to a particular crime—the rape of an adult woman when death did not result.

Speaking for the plurality, Justice White noted that the Eighth Amendment bars not only cruel punishments but those that are excessive in relation to the crime committed. Characterizing the test first enunciated in *Gregg* as (1) whether the sentence makes a measurable contribution to acceptable goals of punishment and (2) whether the sentence is grossly out of proportion to the crime, the Court concluded that the death sentence for rape, while perhaps contributing to an acceptable goal of punishment, was disproportionate to the crime. 433 U.S. at 592. In reaching this conclusion, the plurality examined the practice in other countries and the position taken by those States which had reinstated the death penalty after *Furman* and concluded that the modern approach was not to impose the death penalty for rape.

Justices Brennan and Marshall concurred separately, reiterating their views that the death penalty is unconstitutional *per se.* Justice Powell concurred that the death penalty was not appropriate in this case but dissented from that portion of the plurality opinion which suggested that the death penalty for rape would be excessive in all cases. Justices Burger and Rehnquist joined in dissent.

5. THE GARDNER CASE

While *Gardner* v. *Florida* does not address the constitutionality of the death penalty itself, it does impact directly on the producedures by which the penalty may be imposed. In that case, the Supreme Court vacated a death penalty imposed under a Florida statute, which had been upheld in *Proffitt* v. *Florida,* 428 U.S. 242 (1976), because the sentencing court had reviewed a presentence report to which the defendant did not have complete access. The Court found this to be a denial of due process in the context of a sentencing hearing on the imposition of the death penalty. While the *Gardner* case does not hold that the furnishing of a presentence report is in itself a denial of due process, it suggests that if a report is furnished to the court, *all* of it must be furnished to the defense in instances in which it may affect the imposition of the death penalty.

6. ANALYSIS OF H.R. 13360

The bill would amend the Federal Rules of Criminal Procedure and of Appellate Procedure to describe the circumstance under which the death penalty would be imposed and reviewed. It does not address the offenses for which the penalty *could* be imposed.[3]

Where the penalty is authorized, the bill provides for a bifurcated trial in which a separate hearing would be held on the existence of aggravating and mitigating factors. Aggravating factors must be proved beyond a reasonable doubt while mitigating factors could be established by a preponderance of the evidence. The jury, if used in this proceeding, could recommend for or against the death penalty. A recommendation for the death penalty would not be binding on the judge but a recommendation against imposition would be.

In order to recommend the death penalty a jury must conclude that the defendant intended that a life be taken and that a person died as a direct result of the offense. The jury must also find the presence of an aggravating factor and must determine that aggravating factors outweight any mitigating factors. A judge, sitting without a jury, would be required to make the same findings.

The imposition of the death penalty would be subject to appellate review.

Either the sentencing judge or the reviewing court could refuse the death penalty, notwithstanding the finding of aggravating factors or the absence of mitigating factors if imposition of the penalty would be "inappropriate" or in the case of an appellate court "excessive or disproportionate to the penalty imposed in similar cases."

The difficulty in analyzing legislation such as H.R. 13360 lies primarily in the lack of any clear majority on the Court. A plurality in *Furman* found excessive discretion to be constitutionally defective. A plurality in *Gregg* upheld the concept of legislatively defined aggravating and mitigating factors adequate to cure the defect. A plurality in *Coker* held that even the defined criteria were constitutionally insufficient if the penalty itself is disproportionate to the crime. And a plurality in *Lockett* found too stringent a legislative guide to sentencing unconstitutional for lack of discretion to "fit the punishment to the crime" or the criminal. The question, then, with respect to any legislative proposal is whether it allows too much or too little discretion and whether it applies to offenses to which the death penalty is "proportionate."

The procedural provisions of H.R. 13360 appear to comply with all of those found acceptable in *Gregg*. The aggravating and mitigating factors listed guide discretion, but unlike those struck down in *Lockett*, they are not so rigid as to deny an opportunity to consider circumstances unique to the defendant. Indeed, the bill specifically lists the degree of participation by an aider and abettor as a mitigating factor, a consideration lacking in *Lockett*. Moreover, it permits the death penalty to be imposed only where there is an intent to cause death which Justice White, in *Lockett*, suggests is necessary to satisfy the disproportionality problem of *Coker*. The unresolved question is whether by permitting the jury to refuse the death penalty even when aggravating factors outweigh mitigating factors and permitting the judge to find a jury's death penalty recommendation "inappropriate" the bill returns to the excessive discretion found unconstitutional in *Furman*.

As to any given defendant we doubt that the Court would find the discretion contained in H.R. 13360 excessive since the exercise of that discretion would always disfavor the death penalty. The problem would arise only in a series of cases if, for example, the judges or juries consistently exercised discretion to avoid the death penalty for all defendants in a class who would be otherwise subject to it, but declined to exercise this discretion for another class. Thus, if over a period of years discretion was exercised to avoid the death penalty for all white defendants but was never used with respect to black defendants similarly situated, the "wanton" or "freakish" pattern referred to by Justice Stewart in *Furman* could be reestablished.

[3] Presently the death penalty is an authorized sentence for a number of federal offenses although the statutory language is invalid under *Furman* with respect to all but aircraft piracy: 18 U.S.C. 34 (destruction of motor vehicles or motor vehicle facilities where death results); 18 U.S.C. 351 (assassination or kidnapping of a Member of Congress); 18 U.S.C. 794 (gathering or delivery defense information to aid a foreign government); 18 U.S.C. 1111 (murder in the first degree within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. 1716 (causing death of another by mailing injurious articles); 18 U.S.C. 1751 (Presidential and Vice Presidential murder and kidnapping); 18 U.S.C. 2031 (rape within the special maritime or territorial jurisdiction of the United States); 18 U.S.C. 2381 (treason); and 49 U.S.C. 1472 (i) (aircraft piracy).

The bill may well succeed in avoiding this problem by including in the judicial review provision a requirement that the appellate court remand for resentencing if it determines that the sentence is "disproportionate to the penalty imposed in similar cases." *Furman* did not address the question whether appellate authority to compare sentencing in like cases would provide an adequate check on otherwise discretionary sentencing. It is at least arguable, however, that this sort of appellate review strikes the necessary line between *Furman's* condemnation of full discretion and *Lockett's* criticism of too little discretion.

We note that H.R. 13360 differs from the Senate bill in that appellate review would be automatic and not dependant on the defendant taking an appeal. This may be particularly important given the increase in sentencing discretion provided by the House bill in response to *Lockett*.

Both the House and Senate bills meet Justice Blackmun's objection to the Ohio statute in *Lockett*. Since they provide the same sentencing procedure and same standards regardless of whether the conviction was by a jury, by plea, or by the court sitting without a jury, they do not run the risk condemned in *United States* v. *Jackson*, of penalizing the decision to go to trial.

Both the House and Senate bills provide for the sentencing hearing to be by a jury of twelve but permit the parties to stipulate to a jury of lesser member. While stipulation of the parties is normally adequate to avoid a claim of denial of Sixth Amendment rights, it may be that the Court would consider this inappropriate in cases in which a death sentence may be imposed. In *Williams* v. *Florida*, 399 U.S. 78, 103 (1970), the Court, while upholding the use of six-man juries in criminal cases, took pains to point out that no State provides less than twelve for a capital crime. Recently in *Ballew* v. *Georgia*, 98 Ct. 1029 (1978), the Court analyzed the importance of having a broad cross-section of the community represented on juries and struck down the use of five-man juries as retreating too far from the intent of the Sixth Amendment. While we know of no case directly holding that the use of less than twelve jurors by stipulation of the parties is constitutionally defective, given the Court's close scrutiny of procedures used to impose the death penalty, you may wish to consider whether a smaller jury is warranted.

One procedural difference between the House and Senate bills which may prove significant is the provision on presentence reports. H.R. 13360 contemplates that a presentence report will be used in sentencing but provides that any portion withheld from the defendant may not be considered in determining sentence. The Senate bill originally contained a similar provision but this was eliminated in the Committee Print which now provides that no presentence report will be submitted to the court. This was done to avoid the issue posed by *Gardner* v. *Florida*. While that case does not hold that the furnishing of a presentence report is, in itself, a denial of due process, it strongly suggests that no part of such a report may be withheld from a defendant if it may affect the imposition of the dealth penalty. You may wish to consider adopting the Senate's approach or, in the alternative, explicitly providing that the defendant will have full access to any report furnished to the judge.

The primary difference between H.R. 13360 and the Senate bill is that the former is cast as an amendment to Federal Rules and deals only with the procedures for imposition of the death penalty, while the Senate bill is cast as an amendment to Title 18 of the United States Code and deals specifically with those offenses for which the death penalty may be imposed, amending existing law to delete the discretionary language wherever it exists. The Senate bill generally confines the death penalty to offenses involving the deliberate taking of human life or those involving reckless disregard of human life which, in fact, result in death. It would, however, authorize the imposition of the death penalty for treason and certain aggravated forms of espionage even though no death is directly attributable to the offense. Thus, the Senate bill raises a question of proportionality under *Coker*. While the House bill does not specify the crimes to which the penalty would apply, it would require a finding of both intent to take life and a death as a direct result of the offense. This appears to eliminate the penalty for treason and espionage and minimize the questions of proportionality which might be raised as a result of *Coker*, although, without focusing on particular offenses, it is difficult to make that judgment.

7. CONCLUSION

Unfortunately, Mr. Chairman, I cannot state a conclusion as to whether H.R. 13360 would be viewed by the Court as constitutional. Obviously the draftsmen

have made efforts to respond to the concerns enunciated by the Court in *Furman*, *Gregg*, *Coker* and *Lockett*. These concerns, however, have never been enunciated in majority terms and, indeed, seem at times to be contradictory. I have noted two, somewhat troublesome problems in connection with the stipulation of a jury of less than twelve and the use of the presentence report. And, as I have observed, it is impossible to analyze the proportionality issues of *Coker* fully until the specific offenses to be covered by the death penalty are identified. Nevertheless, the bill evidences an intent to meet the proportionality standards of *Coker*. It is, I think, arguable that the bill treads the fine line between the excessive discretion found in *Furman* and the lack of discretion objected to in *Lockett*, while at the same time providing a check on wanton application of the penalty through the appellate review process. On balance, the bill probably satisfies the standards of the case law to date, although the question of a less-than-twelve jury and the use of a presentence report remain unresolved.

TESTIMONY OF MARY C. LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Ms. LAWTON. Thank you, Mr. Chairman.

Because the prepared statement is quite long, Mr. Chairman, I will attempt to summarize it rather than read through it all.

Mr. MANN. Very good.

Ms. LAWTON. The difficulty with analyzing the bill before the subcommittee or, indeed, any bill on capital punishment, is the diversity of the Court opinions and the fact that there are no majority opinions in the recent cases on death penalty.

Furman v. *Georgia*,[1] which struck down totally discretionary death penalty statutes, of course, was a per curiam opinion with the nine separate opinions of the Justices offering various theories as to why the totally discretionary statutes were unconstitutional.

In *Gregg* v. *Georgia*,[2] a post-Furman statute designed to direct discretion of the court was upheld along with a similar statute from Florida. But then, the Court took on a new issue in *Coker* v. *Georgia*[3] which was the question of the applicability of the death penalty to particular crimes, and, in that case, held that the application of an otherwise constitutional death penalty statute to the crime of rape of an adult woman without injury other than the rape was unconstitutional, as the plurality indicated, because it was disproportionate to the offense itself.

Most recently on July 3, the Court came down with a new opinion in the death penalty area analyzing the Ohio statute, *Lockett* v. *Ohio*.[4] Again, there is no majority opinion, only a plurality. And there are various theories offered as to why the Ohio statute which limited discretion too much in the Court's opinion was unconstitutional.

The plurality opinion suggests that the statute is unconstitutional because it does not focus enough on the offender and the circumstances of the offense.

In the fact situation of *Lockett*, of course, the individual on whom the penalty was imposed was a 21-year-old woman who was the driver of the getaway car outside the pawnshop at the time of the offenses. And there is some question whether the offense itself was a deliberate offense.

[1] 408 U.S. 238 (1972).
[2] 428 U.S. 153 (1976).
[3] 433 U.S. 584 (1977).
[4] 46 Law Week 4981 (July 3, 1978).

There is at least some evidence that the pawnbroker reached for the gun, and it discharged in the course of the armed robbery. The man holding the gun did not receive the death penalty. He pleaded guilty, testified for the State, and did not receive the death penalty, but the driver of the getaway car did.

The plurality found that bootstrapping an aider and abettor statute on top of the felony-murder rule in order to reach the death penalty for Ms. Lockett was unconstitutional.

Justice White's theory was that it was unconstitutional, but more for the reason that it was disproportionate to the crime.

Justice Blackmun found two problems. One is essentially a matter of being disproportionate to the crime, and the other is that those who plead guilty in Ohio can receive less than the death penalty even with aggravating factors. But those who go to trial do not have that possibility of escaping the death penalty. He found this inconsistent with earlier opinion in *United States* v. *Jackson*[1] because it, in effect, penalized the decision to go to trial.

We are left, then, with the question in connection with any death penalty statute of whether there is too much or too little discretion. Too much discretion, the Court said in *Furman*, is unacceptable within the eighth amendment. And in *Lockett*, the Court is saying that too little discretion is unacceptable.

There is a key difference, I think, between the bill now pending in the subcommittee H.R. 13360, and the statute struck down in *Lockett*. For one thing, H.R. 13360 specifically focuses on the aider and abettor problem and indicates that whether the individual is an aider and abettor who did not actually participate in the crime is a mitigating factor which would avoid the death penalty.

The bill also allows generalized considerations of the circumstances of the offense aside from the listed mitigating factors so that the additional discretion to avoid the penalty is there, but not additional discretion to impose the penalty.

An aggravating factor must be found to impose the penalty. That, I think, would help to satisfy some of the Court's concerns in *Lockett*.

In addition, the bill has an absolutely mandatory appellate review. It is not dependent upon the individual's taking an appeal. It is an automatic review by the appellate court which has discretion to void the death penalty even though the aggravating factors exist.

So that the bill leaves a number of opportunities to avoid the death penalty. And it provides for appellate consideration which can view the death penalty in light of similar cases in the Federal courts so that there is not the inconsistency or, in Justice Stewart's words, the "wanton and freakish application" that the Court was concerned with in *Furman*.

I think this appellate review concept is probably central to the possibility of constitutionality in this bill. No one can speak with certainty in the present state of the cases. But I do think that that appellate concept is particularly important here as are the mitigating circumstances.

There may be two problems in the bill in light of the Court's decisions. And there is, of course, no way to answer the question of

[1] 390 U.S. 570 (1968).

whether the application to particular crimes is within the proportionality holding of *Coker* because the crimes themselves are not listed here. This bill only prescribes the procedures.

But the two matters that may cause concern are the provision for a jury of less than 12 at the bifurcated sentencing hearing.

Now, this is by stipulation of the parties. And to date, the Court has not struck down less than 12 jurors when the defendant, the court, and the prosecution all agree. However, the Court has expressed concern in the past with the less than 12 jury.

As you know, the jury of 6 for civil cases was upheld, but the Court has suggested that 5 somehow drops below the constitutional requirements of the sixth and seventh amendments. And I believe that the same problem may exist here.

Given the Court's total scrutiny of death penalty statutes, there may be a problem with providing even a stipulated jury of less than 12.

The other issue in the bill, in light of recent court decisions, is the provision for a presentence report to be furnished to the court that states that the court may only use that portion of the report in a sentencing hearing that has been furnished to the defendant. But that very language suggests that some parts of the presentence report may be withheld from the defendant.

In *Gardner* v. *Florida*,[1] the Supreme Court found this to be a fatal flaw in an otherwise constitutional Florida statute. Where the death penalty is imposed, the Court felt that all of the presentence report, if it is to be used at all, must be funished to the defendant.

Now, there would be, of course, two ways around that. In the Senate, in the latest version of their bill, the presentence report is eliminated entirely on the theory, I suppose, that the bifurcated hearing will provide the same sort of information that would appear in the presentence report.

By eliminating the report entirely, the issue of *Gardner* v. *Florida* is, of course, absent.

Similarly, the bill might specify that the entire report must be furnished to the defendant.

With the exception of those two problems, it is our judgment that the bill is probably constitutional. More than that, we cannot say given the state of the law today.

And with that, I will take questions, Mr. Chairman.

Mr. MANN. Thank you so much. Not only have you very concisely analyzed the cases in your oral presentation, but your written statement was done in a very concise and professional manner.

On the question of the presentence report, what is your suggestion as to what would be the best course to follow?

Ms. LAWTON. I think, with the bifurcated sentencing hearing and the provision that mitigating evidence may be established by a preponderance and is not bound by the strict rules of evidence, that all the necessary information would be furnished in the bifurcated hearing without a separate presentence report.

And I think that there may be problems, problems of confidentality of individuals, and other problems in furnishing the presentence report and furnishing all of it to the defendant. Psychiatric material would have to be available. That might be damaging.

[1] 430 U.S. 349 (1977).

I think basically, that it would be better to do without the report.

Now, the one thing that eliminates is the probation officer's recommendation. But with the jury recommendation and the judge's ability to have all that information before him, I think that that is a minor loss.

Mr. MANN. So you would follow the Senate course of action on that?

Ms. LAWTON. Yes.

Mr. MANN. All right. I can see some problem with reference to a protracted trial and a full jury of 12, if something developed, and nobody wanted to go back and start over. But there may be a stipulation at that point. Let's assume that end point. You see a danger based on prior cases and on the gravity of the matter?

Ms. LAWTON. Yes, I do, Mr. Chairman. It is, again, almost a hunch because the Court has never ruled specifically on this issue. But given the Court's approach to death penalty cases, I think that there is a substantial risk in providing for this jury of less than 12.

And, of course, the problem you speak of could be addressed in the same way that it is addressed in the trial in chief, which is to provide for alternate jurors who sit right up to the point of recommendation. So that if one gets ill or for some reason disqualified, you still will have your core of 12.

I think that is safer. But again, there is no way to be absolutely sure. It is just that waivers are not favored in death penalty cases, and this amounts to a waiver on the part of the defendant.

Mr. MANN. Mr. Hyde, do you have any questions of Ms. Lawton?

Mr. HYDE. No; other than to compliment her on the material that has been presented. It is very concise and very helpful.

Ms. LAWTON. Thank you, sir.

Mr. MANN. Mr. Wiggins?

Mr. WIGGINS. No questions.

Mr. MANN. Thank you very much.

Ms. LAWTON. Yes, Mr. Chairman.

Mr. MANN. We will now hear from Mr. Henry Schwarzschild, director of the capital punishment project of the American Civil Liberties Union. Mr. Schwarzschild has testified on capital punishment not only before committees of the Congress, but also before committees of various State legislatures.

He has submitted a prepared statement on behalf of the American Civil Liberties Union and the National Coalition Against the Death Penalty. Without objection, it will be made a part of our record.

Welcome to the subcommittee, Mr. Schwarzschild.

You may proceed as you see fit.

[The prepared statement of Mr. Schwarzschild follows:]

STATEMENT OF HENRY SCHWARZSCHILD, DIRECTOR, CAPITAL PUNISHMENT PROJECT, AMERICAN CIVIL LIBERTIES UNION, AND DIRECTOR, NATIONAL COALITION AGAINST THE DEATH PENALTY

Mr. Chairman and members, I am Henry Schwarzschild, and I appear here at the request of the Subcommittee in my capacities of Director of the American Civil Liberties Union's Capital Punishment Project and of Director of the National Coalition Against the Death Penalty, to discuss certain aspects of the larger social and moral policy issue of whether the United States Congress should

re-enact a death-penalty statute and to examine H.R. 13360, designed to provide new death-penalty sentencing procedures in conformity with recent decisions of the United States Supreme Court.

The American Civil Liberties Union, by policy resolutions adopted by its National Board of Directors, is absolutely opposed to capital punishment under all circumstances, on the grounds (among others) that in our judgment the death penalty in principle violates the cruel-and-unusual punishment clause of the Eighth and empirically and unavoidably violates the due-process clause of the Fifth and the equal-protection-of-the-laws clause of the Fourteenth Amendments to the United States Constitution.

The National Coalition Against the Death Penalty is a coordinating agency for over fifty major national and regional organizations in the fields of religion, public-interest law, the minority communities, professional, community, and political concerns, all come together in their commitment to the abolition of capital punishment generally and to the prevention of executions in particular. Among the National Coalition's affiliated groups are the National Council of the Churches of Christ in the U.S.A., most of its major denominational constituents, such as the Episcopal Church, the United Church of Christ, the United Methodist Church, the United Presbyterian Church, the Lutheran Church in America and others, the Synagogue Council of America, the Central Conference of American Rabbis, the American Friends Service Committee, the N.A.A.C.P., the National Conference of Black Lawyers, the National Council on Crime and Delinquency, the American Orthopsychiatric Association, the American Civil Liberties Union, and many others. With your permission, I shall submit for the record of this hearing a list of the affiliated organizations of the National Coalition, together with a list of the members of its Governors' Council Against Executions, comprising over thirty incumbent and former state governors who have agreed to intercede with any sitting governor who confronts a decision about signing a death warrant to commute each and every death sentence.

Mr. Chairman: Six months ago, in December 1977, the Nobel-Peace-Prize-winning organization Amnesty International, at a conference held in Stockholm, Sweden, with the unanimous endorsement of 200 delegates and participants from over fifty countries of Asia, Africa, Europe, the Middle East, North and South America, and the Caribbean region, adopted a statement known as the Stockholm Declaration that I should like to enter into the record of this hearing and from which I want to read to you only some operative paragraphs:

The Stockholm Conference on the Abolition of the Death Penalty . . .

Recalls That the death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life; . . .

Affirms That it is the duty of the state to protect the life of all persons within its jurisdiction without exception; . . .

Declares its total and unconditional opposition to the death penalty (and) its condemnation of all executions in whatever form committed or condoned by governments, . . . (and)

"Calls upon . . . all governments to bring about the immediate and total abolition of the death penalty."

Mr. Chairman, the civilized nations of the earth have long since proceeded progressively to abolish capital punishment. None of the countries of western Europe except France and Spain has used the death penalty in the last decade, and it is a great rarity in these two nations. In most of the European countries, capital punishment has been constitutionally abolished. In Great Britain, it was abolished (except for treason) in 1971. Canada abolished it by act of Parliament in 1976. Even Israel, laboring under the pressures of wars and hostile commando raids, retains it only for the crime of genocide. Indeed, among the developed countries of the world, the United States is in the company primarily of the Soviet Union and South Africa in maintaining (indeed: reinforcing) its use of the death penalty as an ordinary component of the system of criminal justice. That is not ennobling company to keep for a nation that prides itself on its humaneness, whose Administration proclaims its devotion to human rights all over the world, and that needs desperately to reestablish its credibility in the human family as one that does not use its enormous power to the detriment of human life.

My distinguished colleague Professor Hugo Adam Bedau has already dealt with many of the central issues underlying enlightened and concerned opposition

to the death penalty. You know the classic arguments about the merits of the death penalty:

Its dubious and unproved value as a deterrent to violent crime;

The arbitrariness and mistakes inevitable in any system of justice instituted and administered by fallible human beings;

The persistent and ineradicable discrimination on grounds of race, class, and sex in its administration in our country's history (including the present time);

The degrading and hurtful impulse toward retribution and revenge that it expresses;

The barbarousness of its process (whether by burning at the stake, by hanging from the gallows, by frying in the electric chair, by suffocating in the gas chamber, by shooting at the hands of a firing squad, or by lethal injection with a technology designed to heal and save lives);

even the deeply distorting and costly effect the death penalty has upon the administration of the courts, upon law enforcement, and upon the penal institutions of the country.

Let me therefore concentrate my remarks upon a few selected issues about which much unclarity exists in the public mind, in the media, and even in many legislative chambers.

I want to discuss these issues in the context of the evident support of public opinion for the reintroduction of capital punishment in the country. Let me be candid: For the past few years, public opinion polls, whether national or regional, have tended to reflect a substantial majority of the American people affirming their support for the death penalty, to the level of between 65 percent and 75 percent—enough to make many an elected official surrender his or her religious or moral principles against capital punishment. As little as twenty years ago, the polls reflected almost precisely the opposite distribution of views in the country. It is not hard to infer what has turned the American people back toward support of so atavistic and demonstrably useless a criminal sanction. The causes are (a) the rising rate of violent crime in the past two decades. (b) the increasing panic about the rising crime rate, together with a justified (as well as exaggerated) fear for the safety of lives and property, (c) the understandable reaction to a terrible series of assassinations and attempted assassinations of our national leaders and other prominent personalities (President John Kennedy, Senator Robert Kennedy, the Rev. Dr. Martin Luther King Jr., Governor George Wallace, Malcolm X, Medger Evers, and others), (d) the rise of international terrorism, including aircraft hijackings and the murder of prominent political and business leaders as well as the random political killings of innocent victims, (e) many years of the effective discontinuation of capital punishment and the remoteness from actual experience of its horrors, and finally (f) a largely subliminal but sometimes almost articulated racism that attributes most violent criminality to the minority community, that knows quite well that the poor and the black are most often the subjects of the death penalty, and that thinks that's just the way it ought to be.

What, then, are the rational answers to this series of partly understandable and partly impermissible misconceptions in the American public?

True, violent crime has risen sharply in the past two decades, but to begin with it has been abundantly demonstrated by social research that the availability of the death penalty has no effect whatsoever upon the rate of violent crime; to the contrary, there is some scientific evidence that death sentences imposed and carried out may, for peculiar reasons of social and psychic pathology, be an incentive to further acts of violence in the society. Furthermore, while the rates of most major, violent felonies have been rising—most probably by reason of increased urbanization, social mobility, economic distress, and the like—the rate of non-negligent homicide has been rising at a rate *slower* than the other major felonies, and non-negligent homicide is, of course, the only crime for which the death penalty has been declared constitutionally permissible by the Supreme Court. The crisis in violent crime, such as it is, has therefore been least acute in the area of homicide. Indeed, in the past three years, the murder rate in this country has actually been declining. Thirdly, there is an appalling number of about 20,000 non-negligent homicides in this country per year. But we would have to return to the condition of the mid-1950's to execute as many as one hundred persons per year, and even that would constitute only one in every two hundred murderers. In other words, we have always picked quite arbitrarily a tiny handful

of people among those convicted of murder to be executed, not those who have committed the most heinous, the most revolting, the most destructive murders, but always the poor, the black, the friendless, the life's losers, those without competent, private attorneys, the illiterate, those despised or ignored by the community for reasons having nothing to do with their crime. Ninety-nine and one half percent of all murderers were never executed—and the deterrent value (which very likely does not exist at all in any case) is reduced to invisibility by the overwhelming likelihood that one will not be caught, or not be prosecuted, or not be tried on a capital charge, or not be convicted, or not be sentenced to death, or have the conviction or sentence reversed on appeal, or have one's sentence commuted.

And if we took the other course and eliminated those high chances of not being executed, but rather carried out the death penalty for every murder, then we should be executing 400 persons per week, every week of the month, every month of the year—and that, Mr. Chairman, should strike even the most ardent supporters of the death penalty as a bloodbath, not as a civilized system of criminal justice.

Assassinations and terrorism are well known to be undeterrable by the threat of the death penalty. They are acts of political desperation or political insanity, always committed by people who are at least willing, if not eager, to be martyrs to their cause. Nor would executing terrorists be a preventive against the subsequent taking of hostages for the purpose of setting political assassins or terrorists free. There would of course be a considerable interval of time between arrest and execution, at least for the purpose of trial and the accompanying processes of law, and during that time their fellow activists would have a far more urgent incentive for taking hostages, since not only the freedom but the very lives of their arrested and sentenced colleagues would be at stake. Let me only respectfully add that distinguished fellow citizens of ours who have suffered terrible sadness in their lives at the hands of assassins, such as Senator Edward Kennedy and Ms. Coretta King, are committed opponents of the death penalty.

There has been only one execution in the United States since 1967, that of Gary Mark Gilmore, by a volunteer firing squad in Utah on January 17, 1977. Gilmore's execution troubled the public conscience less than it might have otherwise because of his own determination to die. The public and perhaps the legislators of our states and in the Congress have forgotten in a decade that was virtually without executions what sort of demoralizing and brutalizing spectacle executions are. There are now enough people on death row in the country to stage one execution each and every single day for more than a year, to say nothing of the other people who are liable to be sentenced to death during that time. We will again know the details of men crazed with fear, screaming like wounded animals, being dragged from the cell, against their desperate resistance, strapped into the electric chair, voiding their bowels and bladder, being burned alive, almost breaking the restraints from the impact of the high voltage, with their eyeballs popping out of their sockets, the smell of their burning flesh in the nostrils of the witnesses. The ghastly experience of men being hanged, their heads half torn off their bodies, or of the slow strangulation in the gas chamber, or of the press sticking their fingers into the bloody bullet holes of the chair in which Gilmore sat to be executed by rifles, or the use of forcible injection by a paralyzing agent—these reports will not ennoble the image of the United States of America that wants to be the defender of human rights and decency in a world that has largely given up the death penalty as archaic.

No one in this Committee surely is guilty of that shoddiest of all impulses toward capital punishment, namely the sense that white, middle-class people, irrespective of their crime, in fact hardly ever get sentenced to death and in such an extremely rare case are virtually never executed. You, Mr. Chairman and Members, and I and probably everyone in this hearing room are in fact absolutely immune, no matter what ghastly crime we might commit, from the likelihood of being executed for it. The penalty of death is imposed almost entirely upon members of what the distinguished social psychologist Kenneth B. Clark has referred to as "the lower status elements of American society."

Blacks have always constituted a dramatically disporportionate number of persons executed in the United States, far beyond their share of capital crimes, and even as we sit here today they represent half of the more than 500 persons on the death rows of our state prisons. Indeed, not only the race of the criminal is directly proportional to the likelihood of his being sentenced to death and executed but the race of the victim of the crime as well. The large majority of criminal

homicides are still disasters between people who have some previous connection with each other (as husband and wife, parent and child, lovers, business associates, and the like), and murder is therefore still largely an intra-racial event. i.e. black on black or white on white. Yet while half the people under sentence of death right now are black (showing egregious discrimination on the grounds of the race of the murderer), about 85 percent of their victims were white.

In other words, it is far more likely to get the murderer into the electric chair or the gas chamber if he has killed a white person than if he had killed a black person, quite irrespective of his own race. (I say "he" in this context for good reason: the death penalty is also highly discriminatory on grounds of sex. Of the 380 death-row inmates in the country today, only two are women, and even they are far more likely objects of executive commutation of their death sentences than their male counterparts.)

Let me add here that, to the extent to which fear of crime and greater exposure to it, combined with inadequate police protection and more callous jurisprudence, has made the minority communities also voice increasing support for the death penalty, they have not yet fully realized that the death penalty will not protect them from what they (and all of us) rightly fear but that their support of capital punishment will only put their brothers and husbands and sons in jeopardy of being killed by the same state that has been unable properly to protect their lives, their rights, or their property to begin with.

In sum: The public is deeply uninformed about the real social facts of the death penalty and is responding to the seemingly insoluble problem of crime by a retreat to the hope that an even more severe criminal penalty will stem the tide of violence. But it will not. We do not know what will. Judges and lawyers do not know, philosophers and criminologists don't, not even civil libertarians or legislators know the answer—if any of us did, we would have long since accomplished our purpose of reducing crime to the irreducible minimum. But legislators are not therefore entitled to suborn illusory solutions merely because they would garner widespread though uninformed public approval, in order to signal to the electorate that they are "tough on crime." Capital punishment does not deal with crime in any useful fashion and in fact deludes the public into an entirely false sense of greater security about that complex social problem. The death penalty is a legislative way of avoiding rather than dealing with the problem of crime, and the American public will come to learn this very dramatically and tragically if the Congress should unwisely enact the bill before you today.

Two final words about public support for the death penalty.

There are strong indications that the public in great numbers answers in the affirmative when asked whether they support capital punishment because they want a death penalty law on the books in the hope that this threat will deter criminals from committing violent crimes. Many, perhaps most, of the people who support the enactment of the death penalty do not want executions and would be horrified at being asked to sentence a living human being to a premeditated, ceremonial, legally sanctioned killing. They want deterrence, not electrocutions; prevention, not lethal injections; safety, not firing squads. But a re-enactment by this Congress of a federal death-penalty statute will give them at best only electrocutions or lethal injections or firing squads, but neither deterrence nor crime prevention nor safety from violence.

The last stand of supporters for the death penalty, when all the other arguments have been rebutted or met, is that of retribution or revenge, the proposition that a murderer has forfeited his life and that we should kill him as an act of abstract equity, irrespective of whether executions serve any social purpose whatsoever. We do not need to preach to each other here this morning, but it is important to have it said once more that civilized societies have instituted systems of justice precisely in order to overcome private acts of retribution and revenge and that they have done so with the understanding that social necessity and social usefulness will be the guideposts of their punishments. Since there has never been and cannot be a showing of social usefulness or social necessity for capital punishment, the virtually unanimous voices of the religious community of our land, our leading thinkers and social analysts, in unison with enlightened opinion for hundreds, perhaps thousands, of years should guide your actions on this matter. Whatever the understandable, bitter, vengeful impulses might be of any of us who suffer the disastrous tragedy of having someone we love or respect murdered by pathological or cruel killers, the society's laws are written not to gratify those impulses but to channel them into helpful, healing, and life-sustain-

ing directions. Gratifying the impulse for revenge is not the business of a government that espouses the humane and liberating ideas expressed in our Declaration of Indpendence and Constitution. It would be rather a return to the darkest instincts of mankind. It would be arrogating unto the state, unto government, either the god-like wisdom to judge who shall live and who shall die or else the totalitarian arrogance to make that judgment. We, as a nation, have foresworn that idolatry of the state that would justify either of these grounds for the legally sanctioned killing of our fellow citizens, of any human being, except perhaps in personal or national self-defense.

Mr. Chairman: The question before the country and before the Congress ultimately is whether it is the right of the state, with premeditation, with the long foreknowledge of the victim, under color of law, in the name of all of us, with great ceremony, and to the approval of many angry people in our land, to kill a fellow citizen, a fellow human being, to do that which we utterly condemn, which we utterly abhor in him for having done. What does the death penalty, after all, say to the American people and to our children? That killing is all right if the right people do it and think they have a good enough reason for doing it! That is the rationale of every pathological murderer walking the street: he thinks he is the right person to do it and has a good reason for doing his destructive deed. How can a thoughtful and sensible person justify killing people who kill people to teach that killing is wrong? How can you avert your eyes from the obvious: that the death penalty and that executions in all their bloody and terrible reality only aggravate the deplorable atmosphere of violence, the disrespect for life, and brutalization of ourselves that we need to overcome?

If the death penalty were shown, or even could be shown, to be socially necessary or even useful, I would personally still have a deep objection to it. But those who argue for its re-enactment have not and cannot meet the burden of proving its necessity or usefulness. At the very least, before you kill a human being under law, do you not have to be absolutely certain that you are doing the right thing? But how can you be sure that the criminal justice system has worked with absolute accuracy in designating this single person to be the guilty one, that this single person is the one that should be killed, that killing him is the absolutely right thing to do? You cannot be sure, because human judgment and human institutions are demonstrably fallible. And you cannot kill a man when you are not absolutely sure. You can (indeed sometimes you must) make sure that he is incapacitated from repeating his crime, and we obviously accomplish that by ways other than killing him. And while there is fallibility there also, death is different: it is final, irreversible, barbarous, brutalizing to all who come into contact with it. That is a very hurtful model for the United States to play in the world, it is a very hurtful model for a democratic and free government to play for its people.

Mr. Chairman and Members: Let me now turn briefly to H.R. 13360 and submit to you some of the reasons why we think it is a fatally deficient instrument for the purpose of re-examining, much less reinstituting, the death penalty in the federal criminal jurisdiction.

As I do so, let me remind you briefly of the essential outlines of the legal and historical developments of the past decade that must affect your judgment on whether to enact a death-penalty bill and, if so, what sort of bill it should be.

Capital punishment has a long, dishonorable and racist history in our country. (I might just indicate that the State of South Carolina between 1912 and 1962, electrocuted 238 men and 2 women of whom 195, or over 80%, were black!) Capital punishment fell increasingly into disuse in the middle decades of this century. In the 1950's, the total number of executions fell below 100 per year, by 1961 to under 50, by 1965 to under 10. In 1967, we stopped executions altogether. The moratorium on executions lasted from June 2, 1967 (the execution in the Colorado gas chamber of Luis Jose Monge) until January 17, 1977 (the execution of a Utah volunteer firing squad of Gary Mark Gilmore). It was in effect imposed by the courts, who were persuaded that no one should actually go to his (or her) death at the hands of the executioner until the United States Supreme Court would have an opportunity to declare whether the death penalty was constitutional or not.

In 1972, the Supreme Court held (in *Furman* v. *Georgia*) that the death-penalty statutes then on the books gave to the courts such arbitrary discretion to impose either the death penalty or a life sentence, that the result was not only egregious discrimination in the application of the death sentence on grounds of race and

class but that the penalty was imposed so freakishly and unpredictably, that it violated the constitutional ban against cruel and unusual punishment as well as the demands of the equal protection of the laws and the due-process clause. Thirty-five states thereupon reenacted capital punishment, with procedures designed to avoid arbitrary discretion on the part of the sentencing authority. In 1976, the Supreme Court reviewed these statutes and held that mandatory death sentences (which left no discretion at all to the sentencer) were equally as unconstitutional as arbitrarily discretionary ones. It upheld only such statutes as defined the specific aggravating and mitigating circumstances relevant to the particular crime and the specific criminal at bar, upon consideration of which the sentencer would determine whether the death penalty or life imprisonment were appropriate in this case. The Court also required the availability of appellate review of sentence as a constitutionally mandated element of a permissible death-penalty law.

In 1977, the Court held that a mandatory death penalty statute could not stand even in the case of the murder of a law-enforcement officer killed while in the performance of his duties (*Roberts* v. *Louisiana*). The Court added (in *Coker* v. *Georgia*) that the death penalty was constitutionally impermissible in the case of a non-homicidal rape of an adult female. Most recently, the Court (in *Lockett* v. *Ohio*) reviewed its *Gregg* holdings of 1976 and found that a statute that limited the mitigating circumstances to specific enumerated ones and thus made it impossible to lay others before the sentencing jury was unconstitutional.

In this welter of shifting pluralities among the nine Justices of the United States Supreme Court, it is indeed hard to arrive at any conclusion but that the Court seems to hold that the death penalty is constitutionally permissible but that every conceivable way of imposing it is constitutionally impermissible. It is perhaps impossible now to say what substantive and procedural language would meet the Court's ambivalent attitude toward capital punishment.

Mr. Chairman: This written statement was prepared last week in order to meet the subcommittee staff's thoughtful request that copies be provided by Monday, July 17 for distribution to the members. At the same time, the staff was unable to furnish me with the text of H.R. 13360 last week, and I therefore was unable to be specific in the prepared testimony about the specific language that seems to us to violate constitutional or sound criminal-justice standards. I shall attempt, at this point in my oral presentation, to comment on some of the matters that concern us.

On the basis of the earlier draft, we can say this: The present bill, H.R. 13360 specifies no substantive crimes for which the death penalty may be imposed by the procedures set forth in it. Members therefore cannot know, much less debate, the appropriateness of re-instituting capital punishment for one crime or another. For all anyone knows, these procedures, designed to conform to the principles laid down by the Supreme Court in the 1976 *Gregg* decisions, may revive the death penalty for every capital offense once in the U.S. Code, whether or not that is useful, justified, or constitutionally permissible.

Mr. Chairman, there are a great many other dispositive reasons why we believe this Subcommittee and The House of Representatives should not adopt H.R. 13360. In addition to the points made by other witnesses and the few matters I have examined here this morning, we could deal in greater detail with the arguments about the costs of lifetime incarceration as against the costs of maintaining the death penalty, which suggest strongly that even in the tawdry terms of cold, cash disbursal by the criminal justice system, capital punishment is far more expensive than even the problematic alternative of life imprisonment. We could speak at length about the reasons why every major religious denomination and group in America committedly opposes the death penalty. (With your permission, I should like to give you and to enter into the record of this hearing a booklet entitled "Capital Punishment: What the Religious Community Says," a compilation of the policy statements of all the major religious bodies of the country, recently recompiled by the National Interreligious Task Force on Criminal Justice, a body related to the National Council of Churches of Christ in the U.S.A.)

Mr. Chairman and Members, we call upon you in the interest of the good name of our country and in the cause of human decency to vote down H.R. 13360 and to defeat any attempt to re-enact legally sanctioned killing into our already troubled society.

NATIONAL COALITION AGAINST THE DEATH PENALTY—NEW YORK, N.Y.

AFFILIATES AS OF JUNE 1978

American Civil Liberties Union.
American Ethical Union.
American Friends Service Committee.
American Orthopsychiatric Association.
Catholic Committee on Urban Ministry.
Central Conference of American Rabbis.
Committee of Southern Churchmen.
Episcopal Church.
Fellowship of Reconciliation.
Fortune Society.
Friends Committee on National Legislation.
Jewish Peace Fellowship.
Law Students Civil Rights Research Council.
Legal Action Center.
Lutheran Church in America (Division for Mission in North America).
Martin Luther King, Jr., Center for Social Change.
National Alliance Against Racist & Political Oppression.
National Association for the Advancement of Colored People.
National Bar Association.
National Committee Against Repressive Legislation.
National Committee to Reopen the Rosenberg Case.
National Conference of Black Lawyers.
National Council of Churches.
National Council on Crime and Delinquency.
National Jury Project.
National Lawyers Guild.
National Legal Aid and Defender Association.
National Ministries, American Baptist Church in the U.S.A.
National Moratorium on Prison Construction.
National Urban League.
Network.
Offender Aid and Restoration, U.S.A.
Prisoner Visitation and Support Committee.
Southern Christian Leadership Conference.
Southern Coalition on Jails and Prisons.
Southern Poverty Law Center.
Southern Prison Ministry.
Team Defense Project.
Union of American Hebrew Congregation.
Unitarian Universalist Association.
United Church of Christ.
United Methodist Church (Board of Church and Society).
United Presbyterian Church in the U.S.A.
U.S. Jesuit Conference.
War Resisters League.
Women's Division of the United Methodist Board of Global Ministries.
Women's International League for Peace and Freedom.

GOVERNORS' COUNCIL AGAINST EXECUTIONS

Hon. Elmer L. Anderson, former Governor, Minnesota.
Hon. Elmer Benson, former Governor, Minnesota.
Hon. Ray Blanton, Governor, Tennessee.
Hon. Edmund G. Brown, Sr., former Governor, California.
Hon. David F. Cargo, former Governor, New Mexico.
Hon. Elbert N. Carvel, former Governor, Delaware.
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Sen. Mark O. Hatfield, former Governor, Oregon.
Hon. Philip Hoff, former Governor, Vermont.
Hon. Harold E. Hughes, former Governor, Iowa.
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Hon. Tom McCall, former Governor, Oregon.
Hon. William D. Milliken, Governor, Michigan.
Hon. Frank B. Morrison, Sr., former Governor, Nebraska.
Hon. Endicott Peabody, former Governor, Massachusetts.
Hon. Rudy Perpich, Governor, Minnesota.
Hon. Francis W. Sargent, former Governor, Nevada.
Hon. Grant Sawyer, former Governor, Nevada.
Hon. Robert Straub, Governor, Oregon.
Hon. John C. West, former Governor, South Carolina.

DECLARATION OF STOCKHOLM—December 11, 1977

The Stockholm Conference on the Abolition of the Death Penalty, composed of more than 200 delegates and participants from Asia, Africa, Europe, the Middle East, North and South America and the Caribbean region,

Recalls that: The death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life.

Considers that:

The death penalty is frequently used as an instrument of repression against opposition, racial, ethnic, religious and underprivileged groups,

Execution is an act of violence, and violence tends to provoke violence,

The imposition and infliction of the death penalty is brutalizing to all who are involved in the process,

The death penalty has never been shown to have a special deterrent effect,

The death penalty is increasingly taking the form of unexplained disappearances, extra-judicial executions and political murders,

Execution is irrevocable and can be inflicted on the innocent.

Affirms that:

It is the duty of the state to protect the life of all persons within its jurisdiction without exception,

Executions for the purposes of political coercion, whether by government agencies or others, are equally unacceptable,

Abolition of the death penalty is imperative for the achievement of declared international standards.

Declares:

Its total and unconditional opposition to the death penalty,

Its condemnation of all executions, in whatever form, committed or condoned by governments,

Its commitment to work for the universal abolition of the death penalty.

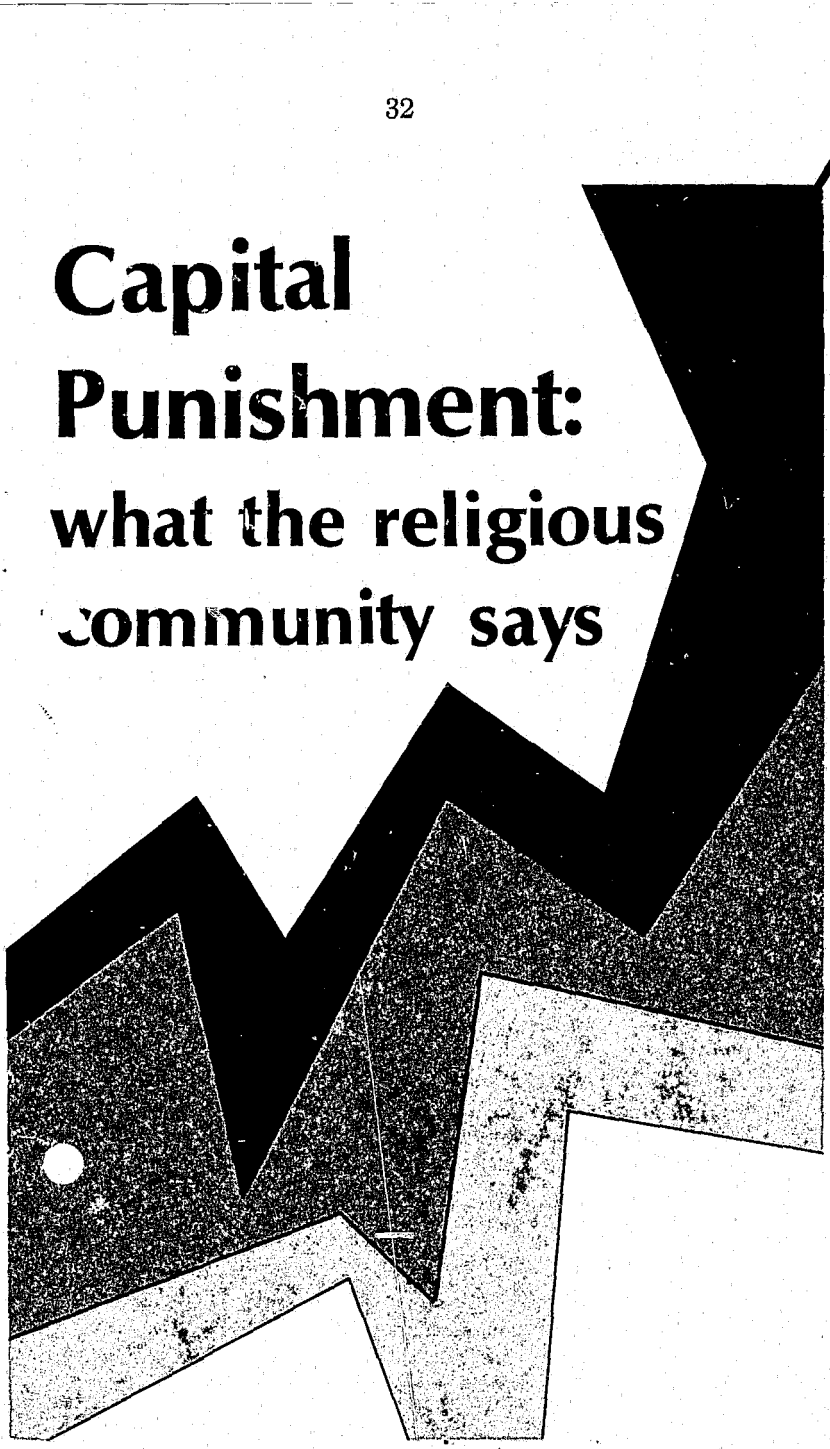
Calls upon:

Non-governmental organisations, both national and international, to work collectively and individually to provide public information materials directed towards the abolition of the death penalty,

All governments to bring about the immediate and total abolition of the death penalty,

The United Nations unambiguously to declare that the death penalty is contrary to international law.

Capital Punishment: what the religious community says



PREFACE

On June 2, 1967, Louis Jose Monge was executed in the gas chamber of the Colorado State Penitentiary. Ostensibly, a moratorium on the use of the death penalty extended for nearly ten years from that time. It was broken on January 17, 1977, when a firing squad shot Gary Mark Gilmore to death at the Utah State Prison.

During the moratorium, which resulted mainly from the constitutional challenges to the death penalty that were being made by the NAACP Legal Defense Fund at every level of the judicial system, the churches relaxed their once-vigorous efforts for the full abolition of capital punishment.

From the mid-1950's until around 1968, national church bodies took firm positions opposing the death penalty. During this precise period of time the number of executions annually in the United States diminished rapidly.

Although there is no way to determine the influence of the churches on reduction of executions, during this period of time there was a vast amount of church study and discussion on the issue of capital punishment. The arguments the churches presented were opposed to the death penalty. Significantly, no national religious body went on record in favor of capital punishment at that time.

One reason for the churches' quietness during the moratorium was their premature confidence that the trend toward abolition was strong and irreversible. They believed that the rightness of the cause was upheld in the Eighth Amendment to the Constitution of the United States and would be ultimately confirmed in a decision of the Supreme Court. Attempts to discuss the issue stirred little interest, since no gassings, hangings, or electrocutions were actually taking place.

On July 2, 1976, the Supreme Court of the United States upheld the discretionary death penalty statutes of three states. Almost immediately state legislatures rushed to pass death penalty statutes that would be in conformity with the Supreme Court rulings. Now thirty-two states have capital punishment laws.

Churches and other religious organizations must now work to overcome the view that the violence of the state is a moral response to the violence of an individual. Violence in a society cannot be overcome by increasing violence, even if legal.

Churches need to deliver a positive moral message in the critical debate over the issue of the death penalty. That message must emphasize God's gift of life. An urgent interpretation of the Gospel needs to

be made once again for the Gospel would direct us to compassion and mercy—even in the face of murder.

The Christian faith requires that we do not treat criminals less than human. Jesus said, "Love your enemies; do good to those who hate you; bless those who curse you" (Luke 6:28). His commandment to love even those who would attempt, as enemies, to destroy, means at the very least, that Christians cannot participate in dehumanizing actions toward criminals. Perfect love casts out fear.

The debate over capital punishment in the United States will surely continue. Hopefully, the churches will lead the effort to keep the issue alive. Capital punishment is a moral issue that must be discussed on moral grounds. The effort to abolish the death penalty is an issue the churches must lead now and in the future.

The National Interreligious Task
Force on Criminal Justice
Work Group on the Death Penalty
John P. Adams, Chairperson

The National Interreligious Task Force on Criminal Justice is administratively related to the Joint Strategy and Action Committee, Inc. (JSAC). It is programmatically related to and staffed by JSAC and the Division of Church and Society of the National Council of Churches of Christ in the U.S.A.

American Baptist Churches

Resolution on Capital Punishment

Passed by the General Board of the American Baptist Churches, June, 1977

Until the Gilmore case in 1977, there had been no execution in the United States in 10 years. The ritual taking of life had ceased while debate continued in the courts regarding the constitutionality of capital punishment.

Now that the death laws in some states have been upheld, over 400 persons nationwide face possible execution by hanging, firing squad, asphyxiation, or electrocution. Such punishment has been abolished in Canada and most of Europe, where it is seen as morally unacceptable and a form of cruel and unusual punishment inconsistent with religious and/or ethical traditions.

The majority of those on death row are poor, powerless, and educationally deprived. Almost 50 per cent come from minority groups. This reflects the broad inequalities within our society, and the inequity with which the ultimate is applied. This alone is sufficient reason for opposing it as immoral and unjust.

Since further legal actions to stop executions appear unpromising it is more important than ever that the religious community speak to the moral, religious and ethical implications of killing by the state. Numerous secular and religious groups have recently taken positions in opposition to capital punishment.

THEREFORE, we as American Baptists, condemn the current reinstatement of capital punishment and oppose its use under any new or old state or federal law, and call for an immediate end to planned executions throughout this country.

We urge American Baptists in every state to act as advocates against the passage of new death penalty laws, and to act individually and in concert with others to prevent executions from being carried out.

We appeal to the governors of each state where an execution is pending to act with statesmanship and courage by commuting to life imprisonment without parole all capital cases within their jurisdiction.

American Baptist Churches in the USA
Valley Forge, Pennsylvania 19481

Church of the Brethren

Statements on Capital Punishment

Annual Conference, 1957

"Because we regard human life as sacred, and because we believe that the sixth commandment has application to organized societies as well as to individuals, we stand ready to give our support to legislation, now proposed in many states, for the abolition of capital punishment."

Annual Conference, 1959

"Because the Church of the Brethren holds that the sanctity of human life and personality is a basic Christian principle which the state is also committed to uphold; and because we believe that capital punishment does not really serve the ends of justice, often resulting in tragic and irrevocable miscarriages of justice;

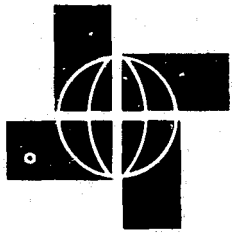
"We commend current efforts to abolish capital punishment, and call upon Brethren everywhere to use their influence and their witness against it."

Annual Conference, 1975

(The following statement is part of a much longer paper on "Criminal Justice Reform." It is included in a section of recommendations entitled, "Reforming the System.")

". . . Brethren are encouraged to work for the following changes: That the use of capital punishment be abolished."

Church of the Brethren
1451 Dundee Avenue
Elgin, Illinois 60120



U.S. Catholic Conference

Statement on Capital Punishment

Committee on Social Development and World Peace

March 1, 1978

The use of the death penalty involves deep moral and religious questions as well as political and legal issues. In 1974, out of a commitment to the value and dignity of human life, the Catholic bishops of the United States declared their opposition to capital punishment. We continue to support this position in the belief that a return to the use of the death penalty can only lead to the further erosion of respect for life in our society.

Violent crime in our society is a serious matter which should not be ignored. We do not challenge society's right to punish the serious and violent offender, nor do we wish to debate the merits of the arguments concerning this right. Past history, however, shows that the death penalty in its application has been discriminatory with respect to the disadvantaged, the indigent and the socially impoverished. Furthermore, recent data from corrections resources definitely question the effectiveness of the death penalty as a deterrent to crime.

We are deeply troubled by the legislative efforts being undertaken under the guise of humanitarian concern to permit execution by lethal injection. Such a practice merely seeks to conceal the reality of cruel and unusual punishment. We find this practice unacceptable.

The critical question for the Christian is how we can best foster respect for life, preserve the dignity of the human person and manifest the redemptive message of Christ. We do not believe that more deaths are the response to the question. We therefore have to seek methods of dealing with violent crime which are more consistent with the Gospel's vision of respect for life, and Christ's message of God's healing love. In the sight of God, correction of the offender has to take preference over punishment, for the Lord came to save and not to condemn.

U.S. Catholic Conference
Committee on Social Development and World Peace
1312 Massachusetts Avenue, NW
Washington, D.C. 20005

Concerning Capital Punishment

Approved by the General Assembly, 1973

The Situation: The Christian Church (Disciples of Christ) has on two occasions approved Assembly (International Convention) resolutions opposing capital punishment. These resolutions, passed in 1957 and 1962, were an affirmation of Christian attitudes at a time when there was a decline in the use of the death penalty in the United States. Subsequently, in June of 1972, the Supreme Court in effect invalidated capital punishment statutes as they were then written and implemented on the grounds that they constituted "cruel and unusual punishment."

As a result of the Supreme Court's decision, the Congress and the state legislatures throughout the nation were required either to abandon the practice of capital punishment or to rewrite their statutes so as to be in compliance with the ruling of the Court. Since then the legislatures in thirteen states have passed laws re-instituting capital punishment, presumably within the guidelines laid down by the Supreme Court. It would appear that this trend has not run its course.

The Court's ruling and the federal and state legislatures' reconsideration of the issue have come at a time when there is great concern in the country over rising crime rates. Crimes such as murder, assault, rape and armed robbery, as well as lesser but nevertheless serious offenses such as automobile stealing and housebreaking, have greatly multiplied, particularly in larger cities. Under such circumstances, valid concern for the rights and welfare of accused wrongdoers cannot be allowed to overshadow equally valid concern for the welfare and rights of the victims and possible victims of crime, many of whom are among the weakest, most underprivileged and vulnerable members of our society. It is understandable, therefore, that in casting about for answers to the problems of increasing crime rates that many people have urged a return to past practices of dealing with crime—including capital punishment.

However, sociological studies comparing states with and without the death penalty tend to conclude that the rate of capital crime is not affected by the existence or non-existence of capital punishment laws on the books. In short, the death penalty does not seem to serve as a deterrent to crime.

Earlier brotherhood resolutions of 1957 and 1962 have stated the ethical reasons for opposing capital punishment. In 1957 the then International Convention of Christian Churches (Disciples of Christ) said:

> "We believe that Christians can no longer justify support of the practice of capital punishment. It has become increasingly clear that the *certainty* of apprehension and conviction rather than severity of punishment is the real deterrent to crime. Under such circumstances the death sentence becomes not a real protection to society but only a crude form of vengeance or retributive justice. Christian justification of punishment is always found in the hope of rehabilitation of the offender; since dead people cannot be rehabilitated we can in no way defend capital punishment on Christian grounds.
>
> "In a very real sense also the practice of capital punishment stands in the way of more creative, redemptive and responsible treatment of crime and criminals: There is the danger that society by concentrating attention on the execution of a few criminals may mislead its members into thinking that it is dealing effectively with crime prevention. Christians must insist upon the importance of crime prevention and the rehabilitation of offenders rather than upon retribution."

In 1962 a resolution proposed by The United Christian and Baptist Church of Kalona, Iowa and approved by the International Convention requested that the brotherhood go on record as favoring a program of rehabilitation for criminal offenders rather than capital punishment." The preamble of the 1962 resolution called attention once more to the "evidence that shows the death penalty itself is unequally applied, falling mainly on the poor, the friendless, the mentally unstable, the ignorant, and minority groups, while many other criminals with means escape execution, and there is always the possibility (as had been the case) of executing the innocent . . . "

In the decade from 1962 until the Supreme Court decision the death penalty remained legal in most states but was rarely used. Its disfavor with courts and juries as a practical instrument of justice, together with the redemptive-rehabilitative stance of the religious community, seemed to indicate that capital punishment was fading into oblivion. The Supreme Court decision, however, faced the Congress and each state with the practical problem of accepting the new rule of law or revising statutes to conform with the Court's ruling.

Meanwhile the guidelines set forth in President Nixon's criminal reform bill have encouraged the use of capital punishment, permitting

the death penalty for specific crimes such as treason, sabotage, espionage when "war related," killing of law enforcement officers and prison guards, skyjacking, kidnapping or bombing of public buildings. In general these guidelines have been followed by the thirteen states which have re-instituted capital punishment, the proposed legislation in nearly 50 per cent of the other state legislatures and in the United States Senate and House of Representatives.

In reconsidering the issue of capital punishment in view of the Supreme Court ruling and subsequent developments, the Division of Homeland Ministries recognizes the legitimate concern of everyone for the rising crime rates in the United States. The division encourages all serious and carefully thought out procedures designed to provide some adequate police protection, more rapid apprehension of criminals and greater certainty of conviction, punishment and rehabilitative action for offenders. It feels, however, that the actions of the church in passing the brotherhood resolutions in 1957 and 1962 are still valid: capital punishment does not deter crime; it interferes with legitimate efforts at crime prevention; and it denies the possibility of seeking rehabilitation and redemption of persons.

THEREFORE BE IT RESOLVED, that the General Assembly of the Christian Church (Disciples of Christ) meeting at Cincinnati, Ohio, October 26-31, 1973, reaffirms its declaration of 1962 "favoring a program of rehabilitation for criminal offenders rather than capital punishment" and calls upon congregations and members of the Christian Church (Disciples of Christ) to support those state legislators and members of Congress who oppose capital punishment; and,

BE IT FURTHER RESOLVED, that the Division of Homeland Ministries be encouraged to develop an education and action program to support regional manifestations of the church and congregations in opposing capital punishment; and,

BE IT FURTHER RESOLVED, that the General Minister and President send copies of this resolution to the President of the United States, the United States Attorney General, the relevant United States Senate and House Committees; and that regional ministers be requested to send copies of this resolution to state governors and relevant committees of state legislatures; and that regional manifestations of the church consider developing programs of education and action when capital punishment is under consideration by the state legislative bodies in their areas.

Christian Church (Disciples of Christ)
222 South Downey Avenue
Indianapolis, Indiana 46219

The Episcopal Church

Statement on Capital Punishment

General Convention, 1968

WHEREAS, The conscience of many thoughtful people has been aroused by the condemnation to death of individuals who may be innocent; and

WHEREAS, There is a growing body of public opinion which believes that capital punishment is archaic and ineffective to protect society, as shown by the fact that states which have abolished it have the lowest homicide rates; and

WHEREAS, Research has demonstrated that the death penalty falls for the most part on obscure, impoverished, friendless or defective individuals and rarely on the well-to-do and educated; and

WHEREAS, The Church believes that each individual is sacred, as a child of God, and that to legalize killing of an offender is to deny the basic Christian doctrines of forgiveness of sin and the power of redemption, and that mercy is a Christian duty, and

WHEREAS, Resolutions urging abolition of the death penalty have been recently passed by Six Dioceses, one Missionary district and the Synod of the Eighth Province, therefore be it

RESOLVED, The House of Deputies concurring that this 59th General Convention of the Protestant Episcopal Church in the United States of America record its conviction that the death penalty ought to be abolished.

General Convention, 1969

WHEREAS, The General Convention of the Church in 1958 expressed opposition to capital punishment; and

WHEREAS, The Diocese of Pittsburgh in 1959 expressed similar opposition to capital punishment, and re-affirmed this stand in 1969; therefore be it

RESOLVED, That the General Convention re-affirm its opposition to capital punishment; and be it further

RESOLVED, That this position of the Church be communicated to the proper authorities in all cases of impending capital punishment.

The Episcopal Church
815 Second Avenue
New York, New York 10017

American Friends Service Committee

Statement on the Death Penalty

November, 1976

The American Friends Service Committee reaffirms its opposition to the death penalty. We base our stand on the Quaker belief that every person has value in the eyes of God and on Quaker testimonies against the taking of human life.

The US Supreme Court decisions of July, 1976, rejected the major constitutional arguments against the death penalty, which had stopped executions in the U.S.A. in the previous decade. These decisions denied that execution is cruel and unusual punishment, citing the passage of death penalty laws by a majority of the states in recent years as evidence that the public does not consider execution to be cruel and unusual. In our view, alleged public support for capital punishment does not diminish the cruelty nor warrant the taking of human life.

The Supreme Court agrees that there is no conclusive evidence that the death penalty acts as a deterrent to crime. It recognized that the continuing demand for capital punishment is in part a manifestation of a desire for retribution. We find it particularly shocking that the Supreme Court would give credence to retribution as a basis for law.

Punishment by death is inflicted most often upon the poor, and particularly upon racial minorities, who do not have the means to defend themselves that are available to wealthier offenders. A minority person convicted of a capital offense is much more likely to pay the extreme penalty than a white person convicted of the same crime. Discretion as to whether to execute continues under the Supreme Court's guidelines, and minority persons will continue to be victims of this discretion. The Supreme Court in its 1976 decision ignores this reality.

The grossly disproportionate number of nonwhites sentenced to be executed and the continuing demand for the death penalty indicate that the death penalty may constitute an outlet for unacknowledged racist attitudes. This outlet is now legally sanctioned, but it is none the less morally unacceptable.

The death penalty is especially abhorrent because it assumes an infallibility in the process of determining guilt. Persons later found to have been innocent have been executed. This will happen again when killing by the state begins anew.

It is bad enough that murder or other capital crimes are committed in the first place and our sympathies lie most strongly with the victims. But the death penalty restores no victim to life and only compounds the wrong committed in the first place.

We affirm that there is no justification for taking the life of any man or woman for any reason.

American Friends Service Committee
1501 Cherry Street
Philadelphia, Pennsylvania 19102

Friends Committee on National Legislation

Statement on Capital Punishment

(Taken from statement on Administration of Justice dated April, 1977)

We challenge the philosophy of punishment which underlies our criminal justice system. The administration of justice should be directed toward making available such services to those convicted of crimes as are needed to help them become useful members of society. It should also provide equitable prompt restitution for the victims of crime.

We also advocate: . . . abolition of capital punishment and reduction of maximum sentences.

Friends Committee on National Legislation
245 Second Street, NE
Washington, D.C. 20002

The American Lutheran Church

Statement on Capital Punishment

Sixth General Convention, October 9, 1972

1. The issue of whether capital punishment is, or is not, constitutional currently is a matter on which the courts are expected to rule. Whichever way the courts decide, the decision likely will not be popular. People disagree sharply on whether it is good, right, or necessary for the government to put guilty persons to death. Christians disagree on what they understand the Scriptures to say regarding the death penalty.

2. The Lutheran theological tradition generally has both accepted and affirmed the right of the state to impose the death penalty. It finds Scriptural support in such passages as Gen. 9:6, Num. 35:29-33, and Matt. 26:52, as well as in Rom. 13:1-7, where powers and duties of government are outlined. Based upon such Scripture passages, Luther said of the Fifth Commandment, "Therefore neither God nor the government is included in this commandment, yet their right to take human life is not abrogated. God has delegated His authority of punishing evil-doers to civil magistrates . . . . " The Augsburg Confession does not name capital punishment as such. Nevertheless, Article XVI accepts the right of Christians to "serve as princes or judges, render decisions and pass sentence according to imperial and other existing laws, punish evil-doers with the sword, engage in just wars, serve as soldiers . . . " (emphasis added).

3. Other Christian traditions emphasize other portions of Scripture and so come to different conclusions regarding the death penalty. Nevertheless, nearly all Christians agree that the basic function of government, under God, is to preserve public order, to foster justice, and to deter evildoing. As it works to assure peace, order, and tranquility, to safeguard justice and equity, and to promote the general welfare, government protects the well-being both of persons and of society as a whole.

4. Christians generally agree, too, that government must have the power and the means to fulfill its basic functions. Thus they have accorded to government powers over their purse, over their time and energies, and perhaps even over their lives. For many centuries the governing authorities have imposed the death penalty. The exercise of this penalty was felt to be necessary to preserve public order, to foster justice, and to deter evildoing. Whether capital punishment is still

needed to achieve these governmental functions is a question under vigorous debate today. It is a question which needs to be discussed openly and objectively, in light of research data and the current requirements of wise public policy.

5. A growing body of public opinion holds that the exercise of capital punishment actually hinders the state from performing its total God-given role with justice and equity. Voices for this viewpoint argue that the state should abolish capital punishment because:

a) Errors and miscarriages of justice are impossible to correct once the sentence has been executed.
b) The penalty typically is administered with a double standard of justice, weighing more heavily against nonwhite than white, poor than rich, uneducated than educated.
c) The interests of society require not vengeance and punishment but protection of the innocent and correction and rehabilitation of the offender.
d) The fear of capital punishment has no proven value as a deterrent to criminal behavior.
e) Humanity, compassion, and reconciliation are stronger values for the state to symbolize than are the inhumanity, retaliation, and rejection which capital punishment expresses.

6. There is much merit in many of these criticisms. Capital punishment often has been administered unjustly, with racism, prejudice, hostility, and vengeance. The logic by which the death penalty was decreed for certain offenses was not always clear. Mandatory punishments for specific deeds cannot take into account the circumstances under which the deeds were done, nor how the person felt about what he had done. The threat of capital punishment is far less a deterrent than is the realization that a person's offense surely will be detected and that he will quickly be brought to trial.

7. Nevertheless, is it wise or necessary for the state totally to give up its power to put persons to death? How does a society protect itself and its members against persons who repeatedly in their deeds prove their hate, their hostility, and their rejection of those basic values which protect persons and society? May there be some acts which are so evil and so destructive that the person guilty of committing them must expect to forfeit his life? If a government totally gives up the power of the sword does it perhaps weaken its ability to govern in crisis situations? If government is felt to be easy on malefactors, will its citizens begin to take private vengeance? Should not good law provide for mercy, as an element of love and justice?

8. Whichever way the courts decide on capital punishment,

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vigorous and intensive efforts should be directed to the deeper issues of crime and corrections. These efforts should be addressed to: (1) careful reconsideration and redefinition of crime so as to protect the poor, the uninformed, and the powerless against those who use the law and its power legally to exploit, to victimize, and to impoverish; (2) the improvement of the total system of criminal justice; (3) the development of more effective methods of law enforcement; (4) quick identification, early apprehension, and swift prosecution of offenders against law, order and justice; (5) the correction of conditions which contribute to crime; and (6) the search for and use of a variety of more effective ways of dealing with persons who commit hostile acts against persons and society. We urge the members of The American Lutheran Church to use their influence to bring about such salutary efforts to attack the roots of crime and to improve the handling of those found guilty of harming persons or society.

9. As Lutherans living in the final decades of the twentieth century we affirm our theological heritage which accords to the state the right to impose the death penalty. We know, however, that many Lutherans believe that the death penalty no longer should be exercised. We, therefore, welcome the debate as to whether, and under what sorts of circumstances, the state must exercise this power. We encourage members of The American Lutheran Church to join in this debate. They should listen carefully to the arguments offered, and should test the validity of these arguments against research data, tradition and practice, and common sense. The words of Amos are as true for us as for his generation, "Hate evil, and love good, and establish justice in the gate" (Amos 5:15). Much is at stake, alike for persons and for society, in the course of action which American public policy will take on the issue of capital punishment.

The American Lutheran Church
422 South Fifth Street
Minneapolis, Minnesota 55415

Lutheran Church in America

Statement on Capital Punishment

Adopted by the Third Biennial Convention, Kansas City, Missouri, June 21-29, 1966

Within recent years, there has been throughout North America a marked increase in the intensity of debate on the question of abolishing the death penalty. This situation has been accompanied by the actual abolition of capital punishment in ten states and two dependencies of the United States, qualified abolition in three states, and in six states a cessation in the use of the death penalty since 1955. Although the issue of abolition has been widely debated in Canada in recent years, a free vote in Parliament on April 5, 1966, failed to end the legality of the death sentence. However, during the last two years or more, death sentences in Canada have been consistently commuted.

These developments have been accompanied by increased attention to the social and psychological causes of crime, the search for improved methods of crime prevention and law enforcement, efforts at revising the penal code and judicial process, and pressure for more adequate methods in the rehabilitation of coinvicted criminals. There has been a concurrent concern for persons who, because of ethnic or economic status, are seriously hampered in defending themselves in criminal proceedings. It has been increasingly recognized that the socially disadvantaged are forced to bear a double burden: intolerable conditions of life which render them especially vulnerable to forces that incite to crime and the denial of equal justice through adequate defense.

In seeking to make a responsible judgment on the question of capital punishment, the following considerations must be taken into account:

1. The Right of the State to Take Life

The biblical and confessional witness asserts that the state is responsible under God for the protection of its citizens and the maintenance of justice and public order. For the exercise of its mandate, the state has been entrusted by God with the power to take human life when the failure to do so constitutes a clear danger to the civil community. The possession of this power is not, however, to be interpreted as a command from God that death shall necessarily be employed in punishment for crime.

On the other hand, a decision on the part of civil government to abolish the death penalty is not to be construed as a repudiation of the inherent power of the state to take life in the exercise of its divine mandate.

2. Human Rights and Equality Before the Law
The state is commanded by God to wield its power for the sake of freedom, order and justice. The employment of the death penalty at present is a clear misuse of this mandate because (a) it falls disproportionately upon those least able to defend themselves, (b) it makes irrevocable any miscarriage of justice, and (c) it ends the possibility of restoring the convicted person to effective and productive citizenship.

3. The Invalidity of the Deterrence Theory
Insights from both criminal psychology and the social causes of crime indicate the impossibility of demonstrating a deterrent value in capital punishment. Contemporary studies show no pronounced difference in the rate of murders and other crime of violence between states in the United States which impose capital punishment and those bordering on them which do not.

In light of the above considerations, the Lutheran Church in America:

urges the abolition of capital punishment

urges the members of its congregations in those places where capital punishment is still a legal penalty to encourage their legislatures to abolish it;

urges citizens everywhere to work with persistence for the improvement of the total system of criminal justice, concerning themselves with adequate appropriations, the improved administration of courts and sentencing practices, adequate probation and parole resources, better penal and correctional institutions, and intensified study of delinquency and crime;

urges the continued development of a massive assault on those social conditions which breed hostility toward society and disrespect for the law.

Adopted by the Sixth Biennial Convention, Dallas, Texas, June 30-July 6, 1972

In keeping with the social statement, "Capital Punishment," adopted in 1966, the church should work for abolition of capital punishment or oppose its reinstatement where it has been suspended.

Canada Section

Resolution on Capital Punishment

Adopted June, 1965

Resolutions:

Resolved, That Lutheran Church in America - Canada Section express to the Government of Canada its view that capital punishment ought to be abolished

and,

That Lutheran Church in America - Canada Section request the Synods to call upon their congregations and their members and their fellow citizens to work toward and support improved treatment facilities in our correctional institutions, additional facilities for those on probation and parole, and those preventive efforts that help reduce the incidence of deliniquency and crime.

Lutheran Church in America
231 Madison Avenue
New York, New York 10016

Mennonite General Conference

Statement on Capital Punishment

Adopted August, 1965, Kidren, Ohio

In view of the prophetic commission given to the church as set forth in two recent statements of Mennonite General Conference, *A Declaration of Christian Faith and Commitment with Respect to Peace, War, and Nonresistance* (1951), and *The Christian Witness to the State* (1961); in view of the sanctity of human life; and in view of our redemptive concern for the offender, be it

RESOLVED That we appeal to the parliament of the Dominion of Canada and to the federal and state governments of the United States, to discontinue the use of the death penalty and that we refer to our conferences and congregations for study and discussion of the paper, "A Christian Declaration on Capital Punishment," as prepared by the Peace Problems Committee.

In view of our responsibility as ministers of reconciliation, be it further

RESOLVED That we confess that we have not adequately fulfilled our obligation to the offender nor for the reduction of crime in our society. We need to be more faithful in bringing a Christian witness to persons in prison and in laboring for the reform of prison procedures, for the rehabilitation of released prisoners and for the correction of spiritual, economic, and social conditions which contribute to the making of juvenile offenders and to the spread of crime.

We pray that in our brotherhood the Spirit may deepen each member's conviction and understanding of his obligation to individual criminal offenders, to the government under which he lives, and to Christ. And we pray that God may grant us wisdom, vision, and courage that as a brotherhood we may engage in this ministry as the Holy Spirit gives us direction.

Mennonite Central Committee
21 South 12th Street
Akron, Ohio 17501

National Council of Churches of Christ in the U.S.A.

A Resolution on the Death Penalty

Adopted by the Governing Board, October 8, 1976

For nearly ten years there has been no execution in the United States. Appeals of death sentences have been taken to the Supreme Court, asking it to declare such sentences unconstitutional as "cruel and unusual punishment." As the moratorium has lengthened, so has the roll of those awaiting the outcome on "death row," not knowing whether they are finally to live or die and, if to die, when. There are more than 600 of them, of which over 60% are black, brown or red, and nearly all of them are poor, suggesting that the ultimate sanction continues to fall more heavily on minorities and those who cannot afford extensive legal defense.

The Supreme Court of the United States has at last ruled that the death penalty is not unconstitutional (*Gregg* v. *Georgia,* decided July 2, 1976), and may be justified as an expression of the outrage of society at particularly heinous crimes. Legislators have hastened to enact new statutes to legitimize the reinstatement of capital punishment. It seems only a question of time until some state will execute one of its citizens, break the moratorium, and open an avalanche of legal slaughter.

Most of the churches of the National Council of Churches have opposed the death penalty for years, and in 1968 the General Board of the NCCC adopted a policy statement entitled "Abolition of the Death Penalty." Yet the churches have not been articulate about this issue over the past few years, when they could have been helping their members to understand the moral and religious issues at stake. Instead, many church people have been drawn into the agitation for reinstatement of the death penalty.

The Governing Board of the National Council of Churches:

1) Reasserts the conviction expressed in the policy statement of 1968 that the death penalty is wrong and opposes its reinstatement;
2) Urges the churches to redouble their efforts in this cause to make up for lost time;
3) Directs that the NCCC become a member of the newly-formed National Coalition Against The Death Penalty, and

that its $1,000 membership subscription be paid from the Priority Implementation Fund;

4) Calls upon the member denominations to provide the funds necessary for the Division of Church and Society to organize effective ecumenical action against the resumption of executions;

5) Encourages contributions by denominations and individuals to the NAACP Legal Defense Fund, which has been spearheading legal action against the death penalty;

6) Urges the enlistment of volunteer lawyers to assist persons facing execution;

7) Pledges that the staff of the NCCC will initiate contacts with state councils of churches in strategic states to mobilize church people and others to resist the re-enactment and implementation of death-penalty statutes;

8) Urges the churches to put their policies opposing death penalty into more effective action, especially through their own congregations and judicatories;

9) Commits the NCCC to join with others in seeking clemency for those sentenced to die, when all remedies at law have been exhausted;

10) Calls church people to a day of protest and mourning whenever and wherever an execution may be scheduled, especially the first one.

Abolition of the Death Penalty

Adopted by the General Board, September 13, 1968

In support of current movements to abolish the death penalty, the National Council of Churches hereby declares its opposition to capital punishment. In so doing, it finds itself in substantial agreement with a number of member denominations which have already expressed opposition to the death penalty.

Reasons for taking this position include the following:

1) The belief in the worth of human life and the dignity of human personality as gifts of God;

2) A preference for rehabilitation rather than retribution in the treatment of offenders;

3) Reluctance to assume the responsibility of arbitrarily termi-

nating the life of a fellow-being solely because there has been a transgression of law;

4) Serious question that the death penalty serves as a deterrent to crime, evidenced by the fact that the homicide rate has not increased disproportionately in those states where capital punishment has been abolished;

5) The conviction that institutionalized disregard for the sanctity of human life contributes to the brutalization of society;

6) The possibility of errors in judgment and the irreversibility of the penalty which makes impossible any restitution to one who has been wrongfully executed;

7) Evidence that economically poor defendants, particularly members of racial minorities, are more likely to be executed than others because they cannot afford exhaustive legal defense;

8) The belief that not only the severity of the penalty but also its increasing infrequency and the ordinarily long delay between sentence and execution subject the condemned person to cruel, unnecessary and unusual punishment;

9) The belief that the protection of society is served as well by measures of restraint and rehabilitation, and that society may actually benefit from the contribution of the rehabilitated offender;

10) Our Christian commitment to seek the redemption and reconciliation of the wrong-doer, which are frustrated by his execution.

Seventy-five nations of the world and thirteen states of the United States have abolished the death penalty with no evident detriment to social order. It is our judgment that the remaining jurisdictions should move in the same humane direction.

In view of the foregoing, the National Council of Churches urges abolition of the death penalty under federal and state law in the United States, and urges member denominations and state and local councils of churches actively to promote the necessary legislation to secure this end, particularly in the thirty-seven states which have not yet eliminated capital punishment.

National Council of Churches of Christ in the U.S.A.
475 Riverside Drive
New York, New York 10027

Resolution on Capital Punishment

General Synod, 1965

The Christian Action Commission hereby recommends that the General Synod of the Reformed Church in America adopt a resolution opposing the retention of capital punishment as an instrument of justice within our several states.

In presenting this recommendation, we offer the following reasons to substantiate our position:

1) Capital punishment is incompatible with the spirit of Christ and the ethic of love. Although Christ is not the premise for the actions of the state, He is the premise from which the Church speaks to the state. In the light of Christ, the Church is hard-put to justify the continued use of the death penalty. As Christians we are confronted with the necessity of making the principle of love the motivating factor in our relationships with other men. The law of love does not negate justice, nor does it indulge in sentimental softness toward the wrongdoer. But it does nullify the motives of vengeance and retribution by forcing us to think in terms of redemption, rehabilitation and reclamation. The application of the death sentence puts an offending person outside the pale of human help or hope. The cold demands of abstract justice may be met, but the warm concern of love for the person is completely denied. The death penalty is a total giving up of the sinner. It cuts him off from all opportunity to face himself and his sin; it is a foreclosure on repentance and possible redemption. The Christ who refused to endorse the stoning of the woman taken in adultery would have us speak to the word of compassion, not vengeance.

2) Capital punishment is of doubtful value as a deterrent. One of the primary arguments for capital punishment rests on its supposed value of curbing homicidal tendencies and curtailing capital crimes. Practically all available documentation fails to substantiate this argument. Those states and nations which have abolished the death penalty have had no increase in the rates of homicide; indeed, many studies indicate decreases. It is of some significance to read that in England, when pocket-picking was a capital crime, the pick-pockets attended the public executions to ply their trades. Fear of punishment even of the most severe sort, has not been an effective restraint. One

reason for this is that many of those bent on a particular crime, work under the illusion that they are clever enough to get away with it.

But beyond this is the fact that most capital crimes are crimes of passion, committed in moments of anger or jealousy, with no thought or regard for the consequences. The Minority Report of the New Jersey Commission to study capital punishment states: "As a matter of fact, the nature and frequency of murder has no connection with the death penalty, but is dependent on social, political and economic conditions, and the character of populations."

3) Capital punishment results in inequities in application. The actual application of the death penalty demonstrates that it is an uneven and unfair instrument of justice. In no other area is the law pplied as unevenly as with such obvious discrimination. A Committee of the House of Representatives, Sixty-ninth Congress, considered the following testimony: "As now applied, the death penalty is nothing but an arbitrary discrimination against an occasional victim. It cannot even be said that it is reserved as a weapon of retributive justice for the most atrocious criminals. For it is not necessarily the most guilty who suffer it. Almost any criminal with wealth or influence can escape it, but the poor and friendless convict, without means or power to fight his case from court to court, or to exert pressure upon the pardoning executive, is the one singled out as a sacrifice to what is little more than tradition." Although juries do not consciously discriminate against the weak, their verdicts are affected by inadequate legal counsel or public apathy toward the outcast.

4) Capital punishment is a method open to irremediable mistakes. The attorney, Norman Redlich, advises those who endorse the death penalty to remember the injunction: "Know ye that ye may be mistaken." And mistakes are made. The innocent are sometimes executed. It is estimated that the wrong person is executed as high as five percent of the time. A report on capital punishment by the Presbyterian Church in the United States: "It is not unreasonable to ascribe infallibility to judge, juryman, witnesses, counsel, law-nforcement officers and other assistants?" . . . There are too many variables, such as vagaries of memory, erroneous recognition, fallibility of experts, faulty summing up, shortcomings of legal aid, jurors, rough police methods of obtaining evidence, sensational newspaper coverage and biased public opinion. In consideration of these all-too-human elements, no decision upon a man's life should be final.

5) Capital punishment ignores corporate and community guilt. The death penalty presupposes the total guilt of the offender, and

refuses to acknowledge society's share of the blame. A society which teaches vice through permitting pornography, glorified crime and violence through the entertainment industry, permits substandard schooling and housing through segregation has a share in the making of the offender. Emil Brunner reminds us that "In every crime the first chief criminal is society!" If expiation is to be made, then both the criminal and society must make it. In an informal paper, the Rev. Charles Wissink of New Brunswick Seminary writes, "How can both be punished? The criminal can make expiation by enforced imprisonment and the loss of freedom, by submitting to forcible education until rendered harmless. How does society offer expiation? By paying for the tremendous expenses incurred in the penal colonies under this type of arrangement, and also by trying to stamp out all those ills which contribute to the breeding of criminals, e.g., fighting unemployment, prejudice, injustice of any form, inequalities, anything which provokes criminal intent in an individual." But capital punishment is too cheap and easy a way of absolving the guilty conscience of mankind.

6) Capital punishment perpetuates the concepts of vengeance and retaliation. A society which considers itself somewhat enlightened should not resort to primitive and base instincts and methods. The family of a victim may desire vengeance by seeing the criminal executed. But it is not the function of society to satisfy such personal vengeance. As an agency of society, the state should not become an avenger for individuals; it should not presume the authority to satisfy divine justice by vengeful methods. For the state to descend to this level is to contribute to the brutalizing tone of life.

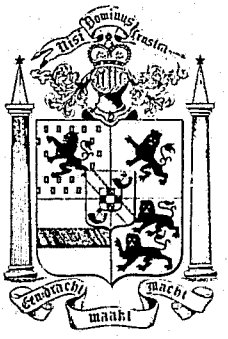
7) Capital punishment ignores the entire concept of rehabilitation. The Christian faith should be concerned not with retribution, but with redemption. Any method which closes the door to all forgiveness, and to any hope of redemption, cannot stand the test of our faith. The elimination of the death penalty would place a greater burden upon the consciences and efforts of men. But it would open the doors to hope, and it would direct energies toward the need of the person.

In asking for a resolution against capital punishment, the Christian Action Commission is not advocating that society abdicate its need and right to deal with the offender. We fully recognize that justice must be administered, the offender punished and society protected. It is our contention, however, that capital punishment does not serve the real requirements of justice within our social system. Other methods are at the disposal of men in maintaining justice and

in promoting security. Christians, guided by Biblical and humanitarian considerations, will continually speak against any system which is unjust, and will explore all creative ways and means of dealing with problems of crime in our social order.

In making the recommendation opposing capital punishment, we are aware that this is but one of many problems connected with the administration of justice in criminal affairs and that the elimination of capital punishment in itself although we hold it to be both expedient and right, will not solve all problems related to crime in society. We are troubled by the ignorance and indifference of the public in these matters of vital and social ethical concern. We recommend encouragement of forward looking study in all areas related to criminology; support of all efforts to improve our penal institutions, crime prevention agencies and police procedures; provision of adequate staff and budget for prisons, parole boards and similar institutions so that the possibilities for the rehabilitation of convicted persons may be more fully realized, and persons who, for the necessary safeguard of society, cannot presently be allowed their freedom, may be more effectively recognized and their needs provided for.

Reformed Church in America
475 Riverside Drive, 18th Floor
New York, New York 10027



United Church of Christ

Resolution on Capital Punishment Overture to General Synod

Adopted, Eleventh General Synod, July 1-5, 1977

WHEREAS, The United Church of Christ in General Synod Seven and General Synod Nine has declared its opposition to capital punishment on religious, moral, ethical and practical grounds and

WHEREAS, the July 2, 1976 Supreme Court decision declaring the death penalty to be a constitutional punishment under certain conditions has effectively halted the 10 year moratorium on executions, and

WHEREAS, officially sanctioned execution has resumed, there is an urgency for the United Church of Christ to take action to implement its previous declarations

BE IT THEREFORE RESOLVED, that the Eleventh General Synod of the United Church of Christ instruct the Executive Council to:

1. Develop strategies, coordinate the church's witness against capital punishment and provide the necessary funds;
2. Join, as a denomination, the National Coalition Against the Death Penalty.

Statement on Capital Punishment

Actions of the Seventh General Synod — June 25 and July 2, 1969

WHEREAS the Committee for Racial Justice, the Council for Christian Social Action, and the UCC Ministers for Racial and Social Justice are unalterably opposed to capital punishment and cannot remain silent regarding its continuance in our society, and

WHEREAS the human agencies of legal justice are fallible, and

WHEREAS we are concerned about the disproportionate number of black and poor who occupy death row and, white or black, are victims of an evil which decent people of our society have too long

endured and which violates categorically our Judeo-Christian ethic, and

WHEREAS this outdated and barbaric practice has been found to discriminate on the basis of skin color and economic condition, and

WHEREAS the last-minute stay of execution of 17-year-old Marie Hill in the gas chamber of North Carolina reminds us that one of the gross injustices in our judicial system is the retention of this barbaric practice,

THEREFORE BE IT RESOLVED that the United Church of Christ commit itself to join in a nationwide campaign for the abolition of capital punishment and call upon other secular and religious institutions to join in a maximum effort for the abolition of capital punishment in the following:

a) Enlisting the support of Conferences and of other denominations and agencies and cooperating with existing efforts to abolish capital punishment.

b) Developing legislative and other political action for the abolition of capital punishment.

c) Resisting efforts to reinstitute capital punishment in those states where it has been abolished.

d) Testing the constitutionality of laws permiting capital punishment.

e) Making available and assisting in the raising of funds to pursue the above.

United Church of Christ
297 Park Avenue, South
New York, New York 10010

The United Methodist Church

Resolution on Capital Punishment

Adopted by the 1976 General Conference, Portland, Oregon

There have been new calls for the use of the death penalty in the United States. Although there has been a moratorium on executions for the past several years, a rapidly rising rate of crime in the American society has generated support for the use of the death penalty for certain serious crimes. It is now being asserted, as it was often in the past, that capital punishment would deter criminals and would protect law abiding citizens.

The United Methodist Church is convinced that the rising crime rate is largely an outgrowth of unstable social conditions which stem from an increasingly urbanized and mobile population, from a long period of economic recession, from an unpopular and disruptive war, a history of unequal opportunities for a large segment of the nation's citizenry and from inadequate diagnosis and treatment of criminal behavior. The studies of the social causes of crime continue to give no substantiation to the conclusion that capital punishment has a deterrent value.

The United Methodist Church is convinced that the nation's leaders should direct attention to the improvement of the total criminal justice system and to the elimination of the social conditions which breed crime and cause disorder, rather than fostering a false confidence in the effectiveness of the death penalty. The use of the death penalty gives official sanction to a climate of violence.

The United Methodist Church declares its opposition to the retention and use of capital punishment and urges its abolition.

Social Principles

(This statement is part of a larger section on crime and rehabilitation printed in the Social Principles of the United Methodist Church. 1976)

"... we oppose capital punishment and urge its elimination from all criminal codes."

Board of Church and Society
of the United Methodist Church
100 Maryland Avenue, NE
Washington, D.C. 20002

Statement on Capital Punishment

Council of Bishops, November 19, 1976

The Bishops of the United Methodist Church reaffirm the position of the General Conference of the United Methodist Church which asserts that the use of the death penalty gives official sanction to a climate of violence. Any government undermines its moral authority when it presumes upon the prerogatives of God by taking human life in response to criminal deeds. The offense is compounded when the frequently poor and relatively defenseless are those ultimately penalized.

On the basis of the teachings of the Christian faith and the ideal of equal treatment under the law which is an integral part of our national heritage we appeal to the President, the President-elect, and all of the governors to use their power to grant clemency to those facing the death penalty.

Furthermore, we call upon all members and officials of the United Methodist Church, lay and clergy, to petition the President, President-elect, and others in authority to extend clemency to all persons facing capital punishment.

We further urge all fellow Americans to lend their support to clemency for those now facing the death penalty. As we draw to the close of this Bicentennial year we urge the American people to participate in acts of reconciliation between victims of tragic crimes and criminal offenders that we may share in the uncomparable experience of forgiveness and underscore the meaning of the phrase: "One nation under God."

Council of Bishops
Secretary, Bishop James K. Mathews
100 Maryland Avenue, NE
Washington, D.C. 20002

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United Presbyterian Church in the USA

Resolution on Capital Punishment

Whereas, the 171st General Assembly (1959) declared "that capital punishment cannot be condoned by an interpretation of the Bible based upon the revelation of God's love in Jesus Christ, that as Christians we must seek redemption of evil doers and not their death, and that the use of the death penalty tends to brutalize the society that condones it." and

Whereas, the power of the state to kill remains in conflict with humane principles, and Christians in a representative democracy cannot isolate themselves from corporate responsibility, including responsibility for every execution, as well as for every victim; and

Believing that the resumption of executions can only degrade and dehumanize all who participate in its process, that it is not necessary to any legitimate goal of the state, and that it is incompatible with the basic principles of Christian faith and practice; and

Believing that a deep reverence for human life is the best security of life and that a renewed belief and commitment to that precept can lead us to more rational and effective ways of dealing with crime and criminal offenders; and

Believing that the Christian communities of the nation are facing an opportunity now for moral leadership in dealing with the issues and problems of capital punishment;

Therefore, the 189th General Assembly (1977):

1. Calls upon judicatories and members of the United Presbyterian Church to:

a) Work to prevent the execution of persons now under sentence of death and further use of the death penalty.

b) Work against attempts to reinstate the death penalty in state and federal law, and where such laws exist, to work for their repeal;

c) Work for the improvement of the justice system to make less radical means available for dealing with persons who are a serious threat to themselves and to the safety and welfare of society.

2. Requests the agencies of the General Assembly to implement these recommendations through appropriate education and action materials and strategies, including efforts to support the enlistment of volunteer lawyers to assist persons facing execution, and including participation in and support of ecumenical and coalition programs.

The United Presbyterian Church in the USA
475 Riverside Drive
New York, New York 10027

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Unitarian Universalist Association

Statement on Capital Punishment

Adopted by the Fifth General Assembly of the Unitarian Univeralist Association, Hollywood, Florida on May 21, 1966

RESOLVED: That the Unitarian Universalist Association urges the complete abolition of capital punishment in all United States and Canadian jurisdictions; and

BE IT FURTHER RESOLVED, that the Unitarian Universalist Association seeks to encourage the governors of the states and the Canadian cabinet to pursue a policy of commuting death sentences until such time as capital punishment is abolished throughout the United States and Canada.

BE IT FURTHER RESOLVED, that the Unitarian Universalist Association urges its member churches and fellowships to work for the formation of state councils affiliated with the American League to Abolish Capital Punishment, or work with such state councils where they already exist and to support the Canadian Society for the Abolition of the Death Penalty.

Statement on Capital Punishment

Adopted at the Thirteenth General Assembly of the Unitarian Universalist Association, New York City, June 26, 1974

WHEREAS: At this time, even though there has been no execution in the United States for the past seven years, twenty-eight states have already passed legislation seeking to re-establish capital punishment, and

WHEREAS: The act of execution of the death penalty by government sets an example of violence,

BE IT RESOLVED: That the 1974 General Assembly of the Unitarian Universalist Association continues to oppose the death penalty in the United States and Canada, and urges all Unitarian Universalists and their local churches and fellowships to oppose any attempts to restore or continue it in any form.

Unitarian Universalist Association
25 Beacon Street
Boston, Massachusetts 02108

American Ethical Union

Resolution on Capital Punishment

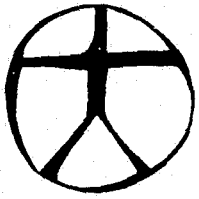
Adopted September 17, 1976

The American Ethical Union is unalterably opposed to capital punishment. The willful taking of human life is cruel and inhuman punishment and violates our belief in the intrinsic worth of every human being. It is wholly unacceptable, whether imposed to prevent repetition of a crime by an individual, as a deterrent to others, or as societal retribution.

The American Ethical Union therefore calls for the abolition of capital punishment. Where the death penalty now prevails, it urges state legislatures to enact statutes abolishing it. States which do not now impose capital punishment are strongly urged not to enact (or reenact) enabling legislation.

Further, the American Ethical Union encourages its members to work toward these ends in their own states.

American Ethical Union
2 West 64 Street
New York, New York 10023



The American Jewish Committee

Statement on Capital Punishment

Adopted at the 66th Annual Meeting, May 6, 1972

WHEREAS capital punishment degrades and brutalizes the society which practices it; and

WHEREAS those who seek to retain the death penalty have failed to establish its deterrent effect or to recognize the fallibility of criminal justice institutions; and

WHEREAS capital punishment has too often been discriminatory in its application and is increasingly being rejected by civilized peoples throughout the world; and

WHEREAS we agree that the death penalty is cruel, unjust and incompatible with the dignity and self respect of man:

NOW THEREFORE BE IT RESOLVED that the American Jewish Committee be recorded as favoring the abolition of the death penalty.

The American Jewish Committee
165 E. 56th Street
New York, New York 10022

Synagogue Council of America

Statement on Capital Punishment

On September 9, 1971, the six constituent agencies of the Synagogue Council submitted an *amicus curiae* brief to the U.S. Supreme Court asking the Court, in its consideration of four capital punishment cases then before it, to abolish the death penalty.

The SCA had previously filed similar friend-of-the-court briefs the Supreme Court in 1969 and 1970.

The position taken by the SCA in those briefs is outlined below;

"All of the *amici* are opposed as a matter of principle to the imposition of the death penalty and support its abolition. Their position is based on their judgment as to the demands of contemporary American democratic standards, but also has its roots in ancient Jewish tradition."

The brief pointed out that, contrary to the common view that Jewish law (as an outgrowth of the Torah) favored capital punishment, in reality the rabbis shunned the death penalty and almost never resorted to it. It described the requirements for imposing the death penalty in halacha: two eyewitnesses to the act who warned the criminal of punishment for his action beforehand; a *non*-unanimous Sanhedrin decision, etc. And it quoted the statement in the Talmud that a Sanhedrin which executed a criminal once in seven years (Rabbi Eliezer ben Azariah said one in *seventy*) was a "court of destroyers."

The SCA brief then dealt with the issues of the death penalty, "cruel and unusual punishment," and the effects of capital punishment. It quoted numerous studies to indicate that the death penalty has no deterrent effect on potential criminals, and then stated that even if a deterrent effect could be demonstrated, that capital punishment should *still* be unacceptable in current society:

"Those who wrote and those who adopted the Eighth Amendment undoubtedly shared the common assumption that punishment was an effective deterrent of crime and that the more severe the punishment the more effective it was likely to be as a deterrent . . . (But) they made a deliberate judgment that even deterrence of homicidal crimes may not be purchased at a price which violated what they judged to be America's standards of civilization and humaneness."

The brief also made an extensive case for the fact that the death penalty had been, and inevitably would be, imposed disproportionately on the poor and on racial minorities.

The only exception to the Synagogue Council's blanket opposition to capital punishment which was mentioned in the brief was that, in framing this policy, the agencies had not addressed themselves to "international crimes such as genocide."

Synagogue Council of America
1776 Massachusetts Avenue, NW
Washington, D.C. 20036

Union of American Hebrew Congregations

Resolution on Capital Punishment

Unanimously adopted by the 45th Biennial General Assembly, Miami Beach, Fla., Nov. 14-19, 1959

We believe it to be the task of the Jew to bring our great spiritual and ethical heritage to bear upon the moral problems of contemporary society. One such problem, which challenges all who seek to apply God's will in the affairs of men, is the practice of capital punishment. We believe that in the light of modern scientific knowledge and concepts of humanity, the resort to or continuation of capital punishment ,ther by a state or by the national government is no longer morally justifiable.

We believe there is no crime for which the taking of human life by society is justified, and that it is the obligation of society to evolve other methods in dealing with crime. We pledge ourselves to join with like-minded Americans in trying to prevent crime by removal of its causes, and to foster modern methods of rehabilitation.

Union of American Hebrew Congregations
2027 Massachusetts Avenue, NW
Washington, D.C. 20036

איחוד
ליהדות
מתקדמת
באמריקה

Declaration of Stockholm

December 11, 1977

The Stockholm Conference on the Abolition of the Death Penalty, composed of more than 200 delegates and participants from Asia, Africa, Europe, the Middle East, North and South America and the Caribbean region,

RECALLS THAT:

— The death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life.

CONSIDERS THAT:

— The death penalty is frequently used as an instrument of repression against opposition, racial, ethnic, religious and underprivileged groups,

— Execution is an act of violence, and violence tends to provoke violence,

— The imposition and infliction of the death penalty is brutalizing to all who are involved in the process,

—The death penalty has never been shown to have a special deterrent effect,

— The death penalty is increasingly taking the form of unexplained disappearances, extra-judicial executions and political murders,

— Execution is irrevocable and can be inflicted on the innocent.

AFFIRMS THAT:

— It is the duty of the state to protect the life of all persons within its jurisdiction without exception,

— Executions for the purposes of political coercion, whether by government agencies or others, are equally unacceptable,

— Abolition of the death penalty is imperative for the achievement of declared international standards.

DECLARES:

— Its total and unconditional opposition to the death penalty,

— Its condemnation of all executions, in whatever form, committed or condoned by governments,

— Its commitment to work for the universal abolition of the death penalty.

CALLS UPON:

— Non-governmental organizations, both national and international, to work collectively and individually to provide public information

materials directed towards the abolition of the death penalty,
—All governments to bring about the immediate and total abolition of the death penalty.
— The United Nations unambiguously to declare that the death penalty is contrary to international law.

This statement is included because many of the participants in the Stockholm Conference were representatives of religious bodies.

Amnesty International
10 South Hampton Street
London, WC 2E-7HF

TESTIMONY OF HENRY SCHWARZSCHILD, DIRECTOR OF THE CAPITAL PUNISHMENT PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION

Mr. SCHWARZSCHILD. Thank you, Mr. Chairman.

I shall dwell in the first instance, with your permission, more on the question that, it seems to me, confronts the subcommittee more seriously than the technicalities of whether the draftmanship in this bill conforms to recent Supreme Court holdings—namely, the question of whether the death penalty is a desirable thing for this subcommittee and this Congress to reenact into the Criminal Code.

Mr. Chairman, 6 months ago, in December 1977, the Nobel-Peace-Prize-winning organization Amnesty International, at a conference held in Stockholm, Sweden, with the unanimous endorsement of 200 delegates and participants from over 50 countries of Asia, Africa, Europe, the Middle East, North and South America, and the Caribbean region, adopted a statement known as the Stockholm declaration that I should like to enter into the record of this hearing and from which I want to read to you only some operative paragraphs:

> The Stockholm Conference on the Abolition of the Death Penalty . . . Recalls That the death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to life; * * * .
>
> Affirms That it is the duty of the state to protect the life of all persons within its jurisdiction without exception; * * * .
>
> Declares its total and unconditional opposition to the death penalty (and)
>
> Its condemnation of all executions in whatever form committed or condoned by governments, * * * (and)
>
> Calls upon * * * all governments to bring about the immediate and total abolition of the death penalty.

Mr. Chairman, the civilized nations of the Earth have long since proceeded progressively to abolish capital punishment.

Mr. HYDE. Excuse me for a minute. I want to make sure I heard you correctly. The civilized nations have abolished capital punishment? By implication, this country is not civilized?

Mr. SCHWARZSCHILD. Mr. Hyde, my language was that the civilized nations have proceeded progressively to abolish capital punishment. I do believe, in answer to the implication of your question, that the maintenance and reinstitution of the death penalty in the United States is, indeed, a sign of a less-than-fully humane and civilized——

Mr. HYDE. Less than civilized?

Mr. SCHWARZSCHILD. That's right.

Mr. HYDE. OK. I just wanted to make sure I heard you right.

Mr. SCHWARZSCHILD. You did.

Mr. HYDE. Good.

Mr. SCHWARZSCHILD. None of the countries of western Europe except France and Spain has used the death penalty in the last decade, and it is a great rarity in these two nations. In most of the European countries, capital punishment has been constitutionally abolished.

In Great Britain, it was abolished, except for treason, in 1971. Canada abolished it by act of Parliament in 1976. Even Israel, laboring under the pressures of wars and hostile commando raids, retains it only for the crime of genocide.

Indeed, among the developed countries of the world, the United States is in the company primarily of the Soviet Union and the Republic of South Africa in maintaining, indeed, reinforcing, its use of the death penalty as an ordinary component of the system of criminal justice.

I say, Mr. Hyde, with your permission, that that, indeed, is not terribly civilized company for this country to keep.

Mr. HYDE. How about the area Idi Amin is from. Do they have capital punishment there? You didn't mention that, and I wondered about Uganda.

Mr. SCHWARZSCHILD. I didn't mention that, but I said the developed and civilized countries of the world.

Mr. HYDE. Excluding South Africa?

Mr. SCHWARZSCHILD. And I leave it to your judgment whether one or another country is civilized.

I suspect if we took some of the actions with which we are familiar in the country of Uganda, indeed, we might ask very serious questions about the degree of civilization.

Mr. HYDE. Since we are into that in this discussion, is it your opinion capital punishment is OK for genocide?

Mr. SCHWARZSCHILD. No, we are opposed absolutely.

Mr. HYDE. And to that extent Israel——

Mr. SCHWARZSCHILD. I have said proceeding progressively.

Mr. HYDE. Proceeding progressively to abolish capital punishment for genocide?

Mr. SCHWARZSCHILD. It has abolished it for every crime except genocide. I think that is a long step in abolition. And if your subcommittee would recommend this action to the Congress, it would be a mark of civilization.

Mr. HYDE. And insofar as Israel does not move to abolish capital punishment for every crime as brutal and inhumane, to that extent is not moving toward full civilization?

Mr. SCHWARZSCHILD. That was not my feeling, but some of Israel's outstanding moral and political leaders, even as that statute was adopted and even at the one single time when that country has applied the death penalty—namely the *Eichman* case—voices were heard from the moral and political leadership within Israel that the death penalty should not apply.

Mr. HYDE. I take it, however, you feel abortion is a mark of extreme civilization as your organization does.

Mr. SCHWARZSCHILD. Mr. Hyde, I am not competent to deal with that at the moment. I think the questions are not by any means entirely analogous.

Mr. HYDE. I thought I heard you say "the right to life."

Mr. SCHWARZSCHILD. And I will deal with that issue at any appropriate time if the chairman would give me leave to discuss that.

Mr. HYDE. Forgive my interruptions. Continue.

Mr. SCHWARZSCHILD. That's perfectly all right.

My distinguished colleague Prof. Hugo Adam Bedau will deal with many of the central issues underlying enlightened and concerned opposition to the death penalty. You know the classic arguments about the merits of the death penalty: It is dubious and unproved

value as a deterrent to violent crime; The arbitrariness and mistakes inevitable in any system of justice instituted and administered by fallible human beings; the persistent and ineradicable discrimination on grounds of race, class, and sex in its administration in our country's history—including the present time; the degrading and hurtful impulse toward retribution and revenge that it expresses; the barbarousness of its process—whether by burning at the stake, by hanging from the gallows, by frying in the electric chair, by suffocating in the gas chamber, by shooting at the hand of a firing squad, or by lethal injection with a echnology designed to heal and save lives rather than to kill people; and even the deeply distorting and costly effect the death penalty has upon the administration of the courts, upon law enforcement, and upon the penal institutions of the country.

Let me, therefore, concentrate my remarks upon a few selected issues about which much unclarity exists in the public mind, in the media, and even in many legislative chambers.

I want to discuss these issues in the context of the evident support of public opinion for the reintroduction of capital punishment in the country. Let me be candid about that.

For the past few years, public opinion polls, whether national or regional, have tended to reflect a substantial majority of the American people affirming their support for the death penalty, to the level of between 65 percent and 75 percent—enough to make many an elected official surrender his or her religious or moral principles against capital punishment.

As little as 20 years ago, the polls reflected almost precisely the opposite distribution of views in the country. It is not hard, however, to infer what has turned the American people back toward support of so atavistic and demonstrably useless a criminal sanction.

The causes are: (a) the rising rates of violent crime in the past two decades, (b) the increasing panic about the rising crime rate, together with the justified, as well as sometimes exaggerated, fear for the safety of lives and property, (c) the understandable reaction to a terrible series of assassinations and attempted assassinations of our national leaders and other prominent personalities, (d) the rise of international terrorism, including aircraft hijackings and the murder of prominent political and business leaders as well as the random political killings of innocent victims, (e) many years of the effective discontinuation of capital punishment and the ensuing remoteness from actual experience of its horrors, and finally (f) a largely subliminal, but sometimes almost articulated, racism that attributes most violent criminality to the minority community, that knows quite well that the poor and the black are most often the subjects of the death penalty, and that thinks that's just the way it ought to be.

What, then, are the rational answers to this series of partly understandable and partly quite impermissible misconceptions in the American public?

It is true that violent crime has risen sharply in the past two decades, but to begin with, it has been abundantly demonstrated by social research that the avaliability of the death penalty has no effect whatsoever upon the rate of violent crime; to the contrary, there is some scientific evidence that death sentences imposed and carried out may,

for peculiar reasons of social and psychic pathology, be an incentive to further acts of violence in the country.

Furthermore, while the rates of most major, violent felonies have been rising—most probably by reason of increased urbanization, social mobility, economic distress, and the like—the rate of non-negligent homicide has been rising at a rate slower than that of the other major felonies, and non-negligent homicide is, of course, the only crime for which the death penalty has been declared constiutionally permissible by the Supreme Court.

The crisis in violent crime, such as it is, has therefore been least acute in the area of homicide. Indeed, in the past 3 years, the murder rate in this country has actually been declining.

Third, there is the appalling number of about 20,000 non-negligent homicides in this country per year. But we would have to return to the condition of the mid-1950's to execute as many as 100 persons per year, and even that would constitute only 1 in every 200 murderers.

In other words, we have always picked quite arbitrarily a tiny handful of people among those convicted of murder to be executed, not those who have committed the most heinous, the most revolting, the most destructive murders, but always the poor, the black, the friendless, the life's losers, those without competent, private attorneys, the illiterate, those despised or ignored by the community for reasons having nothing to do with their crime.

Of all murderers 99½ percent were never executed. And the deterrent value, which very likely does not exist at all in any case, is reduced to invisibility by the overwhelming likelihood that one will not be caught, or not be prosecuted, or not be tried on a capital charge, or not be convicted, or not be sentenced to death, or have the conviction or the sentence reversed on appeal, or have one's sentence commuted.

And if we took the other course and eliminated those high chances of not being executed, but rather carried out the death penalty for every murder, then we should be executing 400 persons per week, every week of the month, every month of the year. And that, Mr. Chairman, should strike even the most ardent supporters of the death penalty as a bloodbath, not as a civilized system of criminal justice.

On the second point, assassinations and terrorisms are well known to be underterrable by the threat of the death penalty. They are acts of political desperation or political insanity, always committed by people who are at least willing, if indeed not eager, to be martyrs to their cause. Nor would executing terrorists be a preventive against the subsequent taking of hostages for the purpose of setting political assassins or terrorists free.

Because there would, of course, be a considerable interval of time between arrest and execution, at least for the purpose of trial and the accompanying processes of law, and during that time, their fellow activitists, fellow terrorists, would have a far more urgent incentive for taking hostages, since not only the freedom, but the very lives of their arrested and sentenced colleagues would be at stake.

Let me only respectfully add that distinguished fellow citizens of ours who have suffered terrible sadness in their lives at the hands of assassins, such as Senator Edward Kennedy and Ms. Coretta King, are committe opponents of the death penalty.

On the issue of the long moratorium and an unfamiliarity of the community as to what the issues are, there has been only one execution in the United States since 1967—that of Gary Mark Gilmore—by a volunteer firing squad in Utah on January 17, 1977. Gilmore's execution troubled the public conscience less than it might have otherwise because of his own determination to die.

The public and perhaps the legislators of our States and in the Congress, have forgotten in a decade that was virtually without executions, what sort of demoralizing and brutalizing spectacle executions are. There are now enough people on death row in the country to stage one execution each and every single day for more than a year, to say nothing of the other people who are liable to be sentenced to death during that same period.

We will again know the details of men crazed with fear, screaming like wounded animals, being dragged from the cell, against their desperate resistance, strapped into the electric chair, voiding their bowels and bladder, being burned alive, almost breaking the restraints from the impact of the high voltage, with their eyeballs popping out of their sockets, the smell of their burning flesh in the nostrils of the witnesses.

Mr. HYDE. Mr. Chairman, may I ask the witness a question?

Mr. SCHWARZSCHILD. By all means.

Mr. HYDE. Do you have any recordings of the screams of the victims of the *Manson* case? Do you know that a man named Speck murdered seven nurses? What about their screams and their bleeding? You are only talking about the murderers, the killers, and the brutalizers of innocent lives. You haven't had a word to say about their victims.

Mr. SCHWARZSCHILD. No, sir, I am as conscious as you of the pain and sufferings and the tragedy of those murders.

Mr. HYDE. I didn't hear you speaking of that.

Mr. SCHWARZSCHILD. We are not speaking of the murdered, but of people convicted. That's my task.

Mr. HYDE. We are speaking of the expression of society's outrage of the ultimate crime which is the taking of innocent life brutally, and eyes popping out and blood spilling, innocent blood, not guilty blood.

Mr. SCHWARZSCHILD. And you propose to do the same thing to other human beings. And I say to you, Mr. Hyde, it is we and not you, who are concerned about the ghastliness of killing. Because you are willing to have it done under law, and we are not willing to have it done under any circumstances.

Mr. HYDE. Let me ask you a question. You mentioned a moral policy issue. Are you taking a moral stand on this issue?

Mr. SCHWARZSCHILD. Of course, I am.

Mr. HYDE. You are saying the posture, the present posture, on behalf of the American Civil Liberties Union—and I really want this written up—is on morality?

Mr. SCHWARZSCHILD. It is on morality and on constitutional law.

Mr. HYDE. That is interesting because your agency is suing in New York on the basis that those of us who think that the unborn is a human life, is a moral position and, hence, in violation of the first amendment. It is interesting to hear you use moral arguments on behalf of murderers. I think that is fascinating.

Mr. SCHWARZSCHILD. Moral views, religious views; your familiarity with our position on constitutional rights is less than complete.

Mr. HYDE. Then, you are citing all these religious groups here as a purely make weight, not religious arguments on behalf of murderers?

Mr. SCHWARZSCHILD. I am citing the support of the religious community in this country against the death penalty as evidence of the fact there are morally concerned and broad spectra in our society that agree with our position and not with yours.

Mr. HYDE. Fine. Thank you.

Mr. SCHWARZSCHILD. You're welcome.

These reports will go around the world, as did the reports of the execution of Gary Mark Gilmore last year, and will not ennoble the image of the United States of America as the defender of human rights and decency in a world that has largely given up the death penalty as archaic.

No one in this committee surely is guilty of the shoddiest of all impulses toward capital punishment—namely, the sense that white, middle-class people, irrespective of their crime, in fact hardly ever get sentenced to death and in such an extremely rare case are virtually never executed.

You, Mr. Chairman and members, and I and probably everyone in this hearing room are in fact absolutely immune, no matter what ghastly crime we might commit, from the likelihood of being executed for it. The penalty of death is imposed almost entirely upon members of what the distinguished social psychologist Kenneth B. Clark has referred to as "the lower status elements of American society."

Blacks have always constituted a dramatically disproportionate number of persons executed in the United States, far beyond their share of capital crimes. And even as we sit here today, they represent half of the more than 500 persons on the death rows of our State prisons.

Indeed, not only the race of the criminal is directly proportional to the likelihood of his being sentenced to death and executed, but the race of the victim of the crime as well.

The large majority of criminal homicides are still disasters between people who have some previous connection with each other, and murder is therefore, still largely an intraracial event—that is, black on black, or white on white.

Yet, while half the people under sentence of death right now are black, showing egregious discrimination on the grounds of the race of the murderer, about 85 percent of their victims were white.

In other words, it is far more likely to get the murderer into the electric chair or the gas chamber if he has killed a white person than if he had killed a black person, quite irrespective of his own race.

I say "he" in this context for good reason. The death penalty is also highly discriminatory on grounds of sex. Of the 380 death-row inmates in the country today, only two are women. And even they are far more likely objects of execution commutation of their death sentences than their male counterparts.

In sum, the public is deeply uninformed about the real social facts of the death penalty and is responding to the seemingly insoluble problem of crime by a retreat to the hope that an even more severe

criminal penalty will stem the tide of violence. But it will not. We do not know what will.

Judges and lawyers do not know, philosophers and criminologists don't, not even civil libertarians or legislators know the answer. If any of us did, we would have long since accomplished our purpose of reducing crime to the irreducible minimum.

But legislators are not, therefore, entitled to suborn illusory solutions merely because they would garner widespread, though uninformed public approval, in order to signal to the electorate that they are tough on crime. Capital punishment does not deal with crime in any useful fashion, and, in fact, deludes the public into an entirely false sense of greater security about that complex social problem.

The death penalty is a legislative way of avoiding, rather than dealing with, the problem of crime, and the American public will come to learn this very dramatically and tragically, if the Congress should unwisely enact the bill before you today.

Two final words about public support for the death penalty.

There are strong indications that the public in great numbers, answers in the affirmative when asked whether they support capital punishment because they want a death penalty law on the books in the hope that this threat will deter criminals from committing violent crimes.

Many, perhaps most, of the people who support the enactment of the death penalty, do not want executions and would be horrified at being asked to sentence a living human being to a premeditated, ceremonial, legally sanctioned killing.

They want deterrence, not electrocutions; prevention, not lethal injections; safety, not firing squads. But a re-enactment by this Congress of a Federal death penalty statute will give them at best only electrocutions, or lethal injections, or firing squads, but neither deterrence, nor crime prevention, nor safety from violence.

Mr. Chairman, the question before the country and before the Congress ultimately is whether it is the right of the State with premeditation, with the long foreknowledge of the victim, under color of law, in the name of all of us, with great ceremony, and to the approval of many angry people in our land, to kill a fellow citizen, a fellow human being, to do that which we utterly condemn, which we utterly abhor in him for having done?

Mr. WIGGINS. Sir, hasn't that question been independently answered?

Mr. SCHWARZSCHILD. Which question?

Mr. WIGGINS. The one you just posed. You said, "The question before the country is," and you stated the proposition. But is it not a fact that the power to do so has been definitively stated by the Supreme Court?

Mr. SCHWARZSCHILD. The Supreme Court has said that the Constitution in its view makes the death penalty under certain procedures and for certain crimes permissible, but it has neither said that this is a compelling inference from the Constitution—you are certainly not obligated to enact the death penalty statute—nor has it advised you whether that is an advisable or useful thing for the society to have.

Mr. WIGGINS. Indeed, I agree with all of those statements, but let

us proceed from the proposition on which we agree, the power to do so exists under the Constitution.

Mr. SCHARZSCHILD. Yes.

Mr. WIGGINS. As presently construed, given the proper procedures. All right.

Mr. SCHWARZSCHILD. What does the death penalty, after all, say to the American people and to our children? That killing is all right if the right people do it, and think they have a good enough reason for doing his destructive deed. That is the rationale of every pathological murderer walking the street. He thinks he is the right person to do it, and has a good reason for doing his destructive deed. How can a thoughtful and sensible person justify killing people who kill people to teach them killing is wrong? How can you avert your eyes from the obvious—that the death penalty, and that executions, in all their bloody and terrible reality only aggravate the deplorable atmosphere of violence, the disrespect for life, the brutalization of ourselves that we need to overcome?

If the death penalty were shown, or even could be shown, to be socially necessary or even useful, I would personally still have a deep objection to it. But those who argue for its re-enactment have not and cannot meet the burden or proving its necessity or usefulness.

At the very least, before you kill a human being under law, do you not have to be absolutely certain that you are doing the right thing? But how can you be sure that the criminal justice system has worked with absolute accuracy in designating this single person to be the guilty one, that this single person is the one that should be killed, that killing him is the absolutely right thing to do?

You cannot be sure because human judgment and human institutions are demonstrably fallible. And you cannot kill a man when you are not absolutely sure. You can—indeed, sometimes you must—make sure that he is incapacitated from repeating his crime, and we can obviously accomplish that by ways other than killing him.

And while there is fallibility there also—that is to say, in imprisonment—death is different. It is final, irreversible, barbarous, brutalizing to all who come into account with it. That is a very hurtful model for the United States to play in the world. It is a very hurtful model for a democratic and free Government to play for its people.

Capital punishment, Mr. Chairman, has a long, dishonorable and racist history in our country.

I might just indicate, for example. that the State of South Carolina, in the 50 years it used the electric chair, between 1912 and 1962, electrocuted 238 men and 2 women of whom 195, or over 80 percent, were black; 45 out of that, I believe, were white.

Capital punishment fell increasingly into disuse in the middle decades of this century. In the 1950's the total number of executions fell below 100 per year, by 1961 to under 50, by 1965 to under 10.

In 1967, we stopped executions altogether. The moratorium on executions lasted from June 2, 1967, until January 17, 1977, the date of the execution by a Utah volunteer firing squad of Gary Mark Gilmore. It was in effect imposed by the courts who were persuaded that no one should actually go to his or her death at the hands of the executioner

until the U.S. Supreme Court would have an opportunity to declare whether the death penalty was constitutional or not.

As Mr. Wiggins has observed, Mr. Chairman, the Supreme Court, in the sequence of cases that the previous witness adumbrated for you, has held that under certain conditions for certain crimes, it is constitutionally permissible.

Let me turn then, for a few concluding moments, to questions that arise from H.R. 13360.

To begin with, as you yourselves are aware, the present bill specifies no substantive crimes for which the death penalty may be imposed by the procedures set forth in it. And the members of your subcommittee, Mr. Chairman, cannot know the appropriateness of the institution of capital punishment for one crime or another in the Constitution of merely a procedural revision in the Rules of Criminal Procedure.

For all anyone knows, these procedures designed to conform to the principles laid down by the Supreme Court in its recent decisions may revive the death penalty for every offense in the United States Code, whether or not that is useful, justified, or constitutionally permissible.

We have a series of concerns about the language of this bill which I would like to refer to only very briefly. They are not very thoroughly prepared because we only had the opportunity since Monday morning—after this testimony was prepared—to examine the bill in detail. It had not been available to us before then.

It seems to us, for example, that in rule 63 at page 4, in subsection (b)(1), in which it is provided that the jury may recommend the imposition of the sentence of death only if every member of a jury finds beyond a reasonable doubt that the defendant intended that the life of any person be taken and that any person did die as a direct result of the offense—that that still makes possible the death sentence for a person who may have had an intent to take a life, but that particular life was not taken.

And it seems to us that the language, at least, ought to require the specific intent of the defendant at bar to take the life that ulimately was taken.

So the language, it seems to us, should read that the jury may recommend the sentence of death if it finds beyond a reasonable doubt that the defendant specifically intended that the life of the person killed be taken and that that person did die as the direct result of the offense.

Otherwise, you may have a situation in which indeed some life was taken or the defendant had the criminal intent to take a life, but the life of that person that he intended to take was not taken, and someone else took someone else's life unrelated to this defandant's actions in the general context of that felony. And that would make the death penalty then inappropriate.

It seems to me in very likely violation of some of the language of the *Lockett*[1] and *Bell*[2] decisions that the Supreme Court handed down 2 weeks ago this past Monday.

Mr. WIGGINS. You would, I take it, eliminate from the death penalty, if we are to have one—I recognize your overall postition—all of the felony murder situations in which a life may have been taken, but not specifically intended to be taken by the defendant who risks the death penalty?

[1] 46 Law Week 4981 (July 3, 1978).
[2] 46 Law Week 4995 (July 3, 1978).

Mr. SCHWARZSCHILD. Yes, sir. And there is language in the *Lockett* decision which requires mens rea; that is, the criminal intent to take life.

Mr. WIGGINS. But not in the majority opinion.

Mr. SCHWARZSCHILD. Well, there really were only plurality opinions, again, in that set of decisions, as there have been in the previous *Gregg* [3] and *Furman* [4] decisions. So, as Ms. Lawton said to you, it is at times very difficult to say precisely what the Supreme Court expects legislators to do in order to conform procedures to its intent.

Yes, it seems to us at the very least that the language of these rules ought to require that the defendant at bar intended to take the life that was taken and took that life, rather than sparing the prosecution the burden of proving intent for the homicide and laying the ground for the possibility that the death penalty may be imposed upon someone who did not intend to take the life of the person that was actually killed.

Mr. WIGGINS. I certainly share many of your reservations about the propriety of the death penalty being authorized at all, and at least in some felony murder situations where it is now authorized. And I share many of the misgivings stated by minority of the Court in *Lockett* where the defendant in *Lockett* was with a woman, I believe.

Mr. SCHWARZSCHILD. Yes, she was Sandra Lockett.

Mr. WIGGINS. Had the penalty imposed by reason of her peripheral participation in the event rather than the direct taking of life.

Mr. SCHWARZSCHILD. Yes.

Mr. WIGGINS. I worry a bit if I yield to that temptation whether or not in the kind of gross case that everybody recognizes, genocide, whether we are going to get the official who largely was in charge of it, ordered and directed the commission of mass crimes amounting to genocide, did in fact become a personal participant to the extent of taking the life.

I don't know what the record was on Eichman, for example, in terms of whether he in fact himself killed anyone. But I think it is hardly beside the point as to whether he did if you subscribe to the notion that the genocide is within the range of crimes of which the death penalty might be appropriate.

Mr. SCHWARZSCHILD. Well, it happens I don't, Mr. Wiggins, as you probably know. At the same time, it is true, of course, that we are not writing your bill to make genocide a criminal offense.

I suspect that that should be done by provisions other than changing the Rules of Criminal Procedure.

I think there is a distinction to be made in the context of felony murder between the trigger person and the non-trigger person. And there are, of course, residual problems even if one grants that the trigger person is more obviously someone upon whom a greater penalty might appropriately fall than the mere participant of a felony in which the death resulted without that person having been responsible for the killing.

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[3] *Gregg v. Georgia*, 428 U.S. 153 (1976).
[4] *Furman v. Georgia*, 408 U.S. 238 (1972).

I agree there are distinctions which one needs to analyze, but we believe in none of them is the death penalty appropriate. But the distinction you made is a significant and appropriate one.

We believe in rule 63(b)(3), there ought to be some standards of weighing the proportional weight of the aggravating and mitigating circumstances to be found. And it seems to us the jury ought to be at least required to find the outweighing of the aggravating over the mitigating circumstances beyond a reasonable doubt.

That is to say, there is no standard set forth in this bill for the process of the jury's weighing such aggravating and such mitigating circumstances. It simply says they shall determine which predominates without giving them a standard by what the degree of predominance needs to be and does not give them a requirement for making that finding beyond a reasonable doubt.

Those seem to me to be defects in the language of this bill.

In rule 64 on page 5, in the aggravating circumstances section of these rules, we have difficulty in understanding in (a)(1) at page 5, line 19 and the following, how a jury can find that the defendant has been convicted of committing more than one offense against the United States under circumstances that would permit a sentence of death. These circumstances are so sophisticatedly defined here and the jury would in effect have to relitigate those prior convictions in the light of subsequent Supreme Court decisions on the substantive crimes for which the death penalty may lie. Even assuming it was the sort of crime for which the Supreme Court has said the death penalty may be imposed, the jury would have to determine the circumstances that would permit a sentence of death under these rules.

That would seem to us to require in effect a relitigation of the aggravating and mitigating circumstances of that earlier case in the light of a record which is not before them and in the light of testimony to which they have no access.

Mr. WIGGINS. So that I understand the point you are making, which is a valid one, if the defendant before the Court had been previously convicted pre-*Furman* under a statute which would not survive pre-*Furman*, even though that State provided for the death penalty, you would say he had not been convicted under circumstances which would permit the sentence of death?

Mr. SCHWARZSCHILD. Yes, sir. In fact, I might go further. There are really two subcategories of the problem.

This language does not make clear whether the offense of which he had been previously convicted is punishable by the death penalty now or was punishable by the death penalty then. That is to say: A pre-*Coker*,[1] nonhomicidal rape for which the death penalty is now no longer constitutionally permissible, but was then—is that a previous offense against the United States of the sort that would permit the penalty of death? The language does not make that clear.

The requirement that the jury find that it was an offense against the United States "under circumstances that would permit the sentence of death," seems to us to require the reconsideration in the light of all these proposed procedures of the circumstances of that earlier crime for which he has been convicted to determine whether those were cir-

[1] *Coker* v. *Georgia*, 433 U.S. 584 (1977).

cumstances that would today permit the imposition of the sentence of death.

That seems to be a paradoxical and probably an intolerable and unmeetable burden upon the jury.

Mr. WIGGINS. But I recognize the point that you are making, and perhaps it is in the nature of a technical objection that has merit, and maybe we should deal with it.

But we shouldn't lose sight of what we are doing here. We are talking about aggravating circumstances.

Mr. SCHWARZSCHILD. Yes.

Mr. WIGGINS. And I would think that the fact that a defendant now before the court had been proven to have taken lives previously, whatever the penalty might be for that, is certainly fairly characterized as an aggravating circumstance.

Mr. SCHWARZSCHILD. It is certainly something that the court is entitled to take into consideration in sentences, yes.

Mr. WIGGINS. That's all this deals with. It allows consideration of that fact.

Mr. SCHWARZSCHILD. It seems to us at the very least, it phrases it poorly and will give rise to considerable difficulty in jury consideration of whether that particular previous Federal offense constitutes an aggrevating circumstance within the meaning of these rules.

And that is the only point for the moment that I address myself to.

Mr. MANN. Would you comment on why it should be limited to crimes against the United States?

Mr. SCHWARZSCHILD. Mr. Chairman, with your permission, I would rather not since I am, as you know, an opponent of the death penalty in all conditions. I didn't write this language, and I am not inclined to make it wider.

We are concerned about being as meticulous as we can in providing the greatest possible process for defendants.

We are concerned at page 6 also with respect to murder for hire, either by the payor or payee, in sections (3) and (4) of the aggravated circumstances elements. In section (4), page 6, line 3, where the language is "The defendant paid another or promised another anything of pecuniary value to commit the offense," this might give rise to the paradoxical situation where the payor who is here the defendant at bar—not the person who committed the crime, but the person who paid someone else to commit it—may have paid someone to commit the crime, but the crime was committed by a third party unrelated to this offense.

In other words, it seems to us the language might more carefully be drafted to say that the defendant paid or promised anything of pecuniary value to the perpetrator in order to induce him to commit the offense.

In other words, we have to establish the relationship between the payment and the inducement to commit the offense by the perpetrator rather than by someone else, which this language, it seems to us, leaves open.

If I paid X to kill Y, person V might come along and kill Y, and still I am the person who paid someone to kill the person who was ultimately killed, but did not induce that person to kill him. Someone

else took it upon himself to do so. That seems to us simply a fault in the logical analysis of the language here, not perhaps a very major element of the problem.

Section (5), which tracks some previous language in the Federal Criminal Code and is perhaps a variant of Senator McClellan's death penalty bill on the Senate side, seems to us for all that to constitute a fundamentally irrational way of determining who constitutes a high Government official and what sorts of person of what standing in the Government by the very nature of their status constitute an aggravating offense for having been killed by the defendant.

Here, you have the President and the Vice President of the United States or their successors or the elected-but-not-yet-seated officials, and any Member of Congress. But it is not an aggravating offense to kill the Chief Justice of the United States or a Member of the Supreme Court or a Member of the Federal court of appeals or district courts or Cabinet members or a whole variety of other distinguished men and women in public life.

I am not suggesting that you ought to expand this list of who constitutes high Government officials. There is no rational way of deciding that the status of the victim of a homicide inherently makes that homicide a crime more egregious than another crime.

There is no list you can come up with that would satisfy the demands of rationality and logic in the definition of aggravating circumstances. If I were a Member of Congress, I might also include myself, as you have done in the section, but it seems to me really ironic and unpersuasive to cite only the President and Vice President and Members of Congress. There are obviously a great many other officials in this Government and in public and political life, to say nothing of private life, whose lives are before man and God as valuable as those listed here.

Section 8 of this part of the aggravating circumstances on the top of page 7 says, "The offense was committed by a person with a substantial record of prior convictions for serious assaultive offenses."

That language is not limited to Federal offenses, but it does raise serious questions of a different order. What "a substantial record" is is obviously a very vague prescription. What "serious offenses" are, is perhaps almost equally as vague. They might be a history of barroom brawls which are not pleasant and perhaps ought not to go unpunished but might not appropriately lay the foundation for the imposition of the death penalty in this case.

The language is intended, one would guess, to include States' convictions for serious offenses. Yet the definition of what constitutes a serious offense in the jurisdictions of the 50 States varies enormously; defendants for such assaultive offenses, in many cases misdemeanors under State law, did not have a right to have attorneys represent them until 1972.

This language strikes us as so vague as to open up a very dangerous proclivity to cite any previous conviction for assaultive offenses as an aggravating circumstance, giving rise to the death penalty for this defendant.

The Supreme Court of Georgia in a recent case has held language very similar to this in the Georgia law unconstitutional on grounds of vagueness.

Mr. SCHWARZSCHILD. In rule 65 at page 7, the mitigating circumstances, subsection (2) at line 17, and perhaps also subsection (3) at line 22, the omission of the influence of drugs and alcohol and great emotional stress is very serious. Very commonly in criminal procedure such matters do give rise at least to the inference of diminished capacity and a kind of inner duress which ought to contitute a mitigating circumstance in a situation where the imposition of a life sentence or the death penalty depends upon that finding.

Mr. WIGGINS. Well, mitigating circumstances are open ended. We might well just substitute (10) which says, "Any other circumstances," consistent with *Lockett* and not undertake to specify any.

The omission of one is hardly fatal when it is clearly within the power of the defendant to tender it.

Mr. SCHWARZSCHILD. It could, of course, be literally fatal, but aside from that, these specifications of mitigating circumstances direct the jury's attention to certain elements in the defendant's character and history and the circumstances of the crime that they are enjoined specifically to take into account.

True, they are free to take into account other things which strike them as being in mitigation. But so long as you are taking the trouble to call the jury's attention to certain specific aspects of that defendant's character and history it seems to us both orderly and appropriate to call their attention not only to a general diminished capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law, but to specify some of the elements that go into that.

One of the reasons for urging this one is that a finding of drug addiction or alcoholism on the part of an offender or the influence of alcohol upon the commission of an act strikes some juries as being a mitigating and other juries as being an aggravating circumstance.

The intent clearly is to make mitigating circumstances relatively broad and rational and to include, for the sake of orderliness and rationality, things such as drug addiction, influence of alcohol, or great emotional stress.

Mr. WIGGINS. The penalty trial envisioned by this amendment of the rule, the jury will have to be instructed.

Mr. SCHWARZSCHILD. Yes.

Mr. WIGGINS. And I suppose that a court on its own motion might instruct the jury in the language of the statute, but I think most likely, the instructions on mitigation will track the evidence offered by the defendant, and the instructions will be probably proposed by the defendant.

In other words, there will be no attention called to conduct by the court in mitigation unless the evidence is there for the jury to consider. If there is no drug in the case, for example, I doubt whether or not an instruction relative to diminished capacity with regard to drugs would have any bearing in the case.

The only point I make, then, is you are talking about unduly calling matters to the attention of the jury because they are listed here. And I am not so sure the jury is going to have this statute or rule read to them, but rather instructions will be read which are fashioned and tailored to the evidence in the case of mitigation offered by the defendant.

Mr. SCHWARZSCHILD. Yes, sir, I would agree with that, but that there may be ambiguous or unclear evidence of the use of alcohol by the defendant prior to the commission of the crime which would make it appropriate, then, for the defense to request instructions and the court to give instructions that one of the statutory specific mitigating circumstances that the jury is entitled to take into consideration is the influence of alcohol upon the defendant in the commission of that felony.

With respect to the 10th mitigating circumstance here enumerated, we have a good deal of difficulty with the language of that very broad and welcome mitigating circumstances now evidently required by the Supreme Court in the light of the *Lockett* case. What we are talking about here, after all, is what constitutes a mitigating offense at the time of the sentencing hearing, the time of the second stage proceeding in this trial.

But to say that it shall constitute a mitigating offense——

Mr. MANN. If you will wait a minute, the subcommittee has been requested to permit coverage of the hearing by means of film. Pursuant to rule V of the Committee Rules of Procedure, permission to do so will be granted unless there is objection.

Is there objection?

Without objection, such coverage is permitted.

You may proceed.

Mr. SCHWARZSCHILD. At the stage at which these mitigating circumstances became relevant, it is after all impossible for the defense to know what will be deemed appropriate by the jury. The language of this segment reads, "Any other circumstances deemed appropriate by the jury." There might be objection, for example, from the prosecution, conceivably sustained by the court, that something submitted for the consideration of the jury as a mitigating circumstance is not to be properly received because it has not been deemed appropriate by the jury. It cannot be known at that stage of the hearing what the jury will deem appropriate.

Mr. WIGGINS. Confusing evidence and weight to be attached to evidence with the ultimate conclusion to be found by the finder of fact.

This in no way limits the defendant introduction of any evidence which he deems to be relevant on the issue of mitigation, but the ultimate determination by the jury is one made whether it is appropriate.

Indeed, the defendant can use that classic illustration that he is an orphan by reason of a homicide against his parent.

I wouldn't attach much weight to that, but there is no limitation on his right to introduce that as an argument in mitigation.

Mr. SCHWARZSCHILD. I think that is clearly the intent of this language.

Mr. WIGGINS. Yes.

Mr. SCHWARZSCHILD. I merely want to submit that it may be puzzling to defense counsel to introduce evidence in mitigation other than the ones specified in sections (1) through (9) herein.

When it comes to section (10), he is in effect expected to determine ahead of time what may be considered appropriate by the jury. And perhaps a rephrasing of this open ended mitigating circumstance might correct that problem.

You look as though I had not made myself clear. Perhaps I didn't.

If your counsel can review that, perhaps we could chat about that and maybe he will see that point.

Mr. WIGGINS. Factors which, if believed and accepted by the jury under appropriate standard are mitigating circumstances. And No. (10) is the catchall.

Now, it in no way inhibits the right of defendant's counsel to introduce evidence. I distinguish that from what may be accepted as true.

Mr. SCHWARZSCHILD. I understand that, Mr. Wiggins. Of course, we welcome that intent and, indeed, I believe that the *Lockett* decision now requires that mitigating circumstances be as open ended as that.

Mr. WIGGINS. Sure.

Mr. SCHWARZSCHILD. Finally, with respect to specific language, at page 13 in your proposed amendment to the Federal Rules of Appellate Procedure, page 13, rule 49, line 12, subsection (e):

> The court of appeals shall state in writing the reasons for its disposition of the review of the sentence and shall include in its decision a reference to those similar cases which it took into consideration in determining whether the sentence of death is excessive or disproportionate.

Aside from minor detail, I would suggest to you that a Court of Appeals cannot know, until there is a fairly substantial record of other capital cases built up, how it may compare similar cases with respect to the excessiveness or disproportionateness of the sentence of death. When it comes to its first review of a death penalty, what can it compare that particular case with? One of the ways that can be facilitated is the imposition of a moratorium for a period of time, 10 years, x years, or until a sufficient backlog of cases is built up so that the Court of Appeals might have a pool of cases to compare against each other with respect to excessiveness and proportionality.

I have here a good many other editorial and linguistic and to some extent legal details which I think it might be inappropriate to trouble with now. If you care to have me submit them in a memorandum to you subsequent to this hearing, I shall be glad to do.

Though let me conclude, Mr. Chairman, by saying that there are a great many dispositive reasons why we believe that this subcommittee and the House of Representatives should not adopt H.R. 13360. In addition to the points made by other witnesses and the few matters I have examined here this morning, we could deal in greater detail with the arguments about the cost of lifetime incarceration as against the costs of maintaining the death penalty. We could speak at length about the reasons why every major religious denomination and group in America committedly opposes the death penalty, and why we believe the death penalty is not useful and permissible in a humane, decent society.

We therefore, call upon you, Mr. Chairman and Members, in the interests of the good name of our country and in the cause of human decency to vote down this and other death penalty provisions and defeat any attempt legally to reenact sanctioned killing into our already troubled society.

Thank you, Mr. Chairman.

Mr. MANN. Thank you.

Mr. Wiggins, do you have a question?

Mr. WIGGINS. Just a few comments.

I never take exception to anyone who strongly holds a point of view and advocates even excessively sometimes. I think that is part of the rules of the game. And we certainly have much experience here in the House of Representatives with that.

I do think, however, personally, that your comments are excessive in indicting this society, a society that tolerates death penalty under any circumstances, as being motivated by a spirit of racism. But let's put that to one side. This is where we are at the moment.

The Federal code is replete with references to the penalty of death as being an authorized sentence. This committee didn't enact that code, but we are charged with responsibility of revising it. And the options would appear to be:

1. To remove all reference to the death penalty to, in effect, accept your position, and recommend that to the House and to the Congress.

That does not happen to represent, I think, the majority view of this subcommittee. And I think it is fair to say it probably does not represent the majority view of the Congress and would be a futile undertaking.

A second alternative is to simply reenact and track existing law in which the death penalty is mentioned, knowing fully it is an elusory penalty because there are not in place constitutional procedures for the imposition of that death penalty.

I think that is not an intellectually correct posture to take, especially by a group of lawyers charged with responsibility of making recommendations for the code. If we accept as a given for the moment that this Congress wishes to retain in the arsenal of weapons that it may deploy for certain offenses the death penalty, then I think it is incumbent upon us to see that that judgment is capable of implementation.

There has been, as you know, especially know, a revolution in the law since *Furman*. It is still evolving. I don't think we know the final answer yet on some questions given the kind of plurality of things—for example, given the most recent expression in *Lockett*.

And because of that, we may not know precisely what to do. But our effort here is insofar as we can track the law as we believe it to exist and to give meaning to this conscious judgment on the part of Congress that the death penalty should be retained.

Now, that is the task that we are doing. I recognize, and I can identify with your idea that the best way to deal with this problem is to do nothing and, therefore, leave on the books several elusory punishments. But I for one don't agree that that is intellectually honest.

We can take a position on whether there should be a death penalty, and I personally for one am prepared to say that, yes, there should be, but under the most narrow of circumstances maybe even far narrower than the Supreme Court has enunciated, but I cannot at this moment take the position that it should be withdrawn from the power of government.

I think I speak for all of the members of the committee, and I believe work, and your comments particularly with respect to efficiencies in some of the provisions are very helpful.

I think I speak for all of the members of the committee, and I believe the Congress, that we have no intention to unleash a bloodbath in this

country. And the experience of the last 10 or 15 years, I don't think is going to be significantly changed when jurors are confronted with mitigating circumstances as they should be, which will hopefully deal with some of the egregious historical circumstances that you cite in your testimony.

Mr. SCHWARZSCHILD. Mr. Wiggins, I do respect that, of course. And we, therefore, devoted a significant amount of effort and even time this morning to analyzing the specifics of this bill rather than merely inveighing against it.

If my comments were excessive, this is due to the fact that we believe the death penalty to be excessive. I am quite convinced of the honesty and integrity of your assurance that you have not intention to unleash a bloodbath. But I do submit to you, sir, that the model that the U.S. Congress plays for 50 or more other jurisdictions of this country with respect to what constitutes appropriate punishment is a very, very important one.

In fact, by and large, the death penalty has, of course, been a matter of State law. Certainly executions have been incomparably more numerous under State law than Federal law in our country. The role the Congress plays in the reenactment of the death penalty is to a large extent only a model. And in the States it may indeed come to a bloodbath.

Before the *Lockett* decision, there were in excess of 500 people under sentence of death in this country. The *Lockett* decision and some other accompanying decisions held unconstitutional the Ohio and sustained the unconstitutionality of the Arizona, Pennsylvania, and part of the New York State statutes. Now that number has been reduced to about 380 or so.

But there are people being sentenced to death every month of the year. And at some point executions may begin in far great numbers. A substantial number of executions may be in our immediate future. And as time after time someone is executed in this country, it will, indeed, appear to the world to be a sustained bloodbath in this country.

That does not make me happy, as I am sure it does not make you happy.

Mr. WIGGINS. There is no doubt when the court confronted squarely eighth amendment issues in deciding it was within the power of government under any circumstances to take the life, it had to accept the consequences of that decision that some lives would inevitably be taken. And I think that is inevitable from that decision.

Far from the Federal Government being the model, we have literally done nothing post-*Furman*, whereas many, if not most, of the States have undertaken a review of their death penalty statutes, and some adopted the grossly irrational point of view of mandatory death sentences which was brought on by estrange argument, of people-protection argument, by some who really opposed the death penalty.

But we indeed might be writing a model statute. And if in fact we do a good job, I hope it would be a model statute. But the truth is we are reacting to State experiment more than we are taking the bit and running with it here. We are looking at those statutes which have been fashioned by State legislatures and which are sustained as our model.

Mr. SCHWARZSCHILD. You quite rightly say, that the U.S. Supreme Court must be conscious of the fact that, far more than merely writing words on paper, they were, indeed, ultimately going to cause executions to take place in this country.

I would remind you of precisely the same responsibility in your hands: You are not writing abstract statutes but you are now deciding whether some fellow human being of ours is going to be put to death in our name at our hands.

Mr. MANN. Mr. Gudger?

Mr. GUDGER. Mr. Chairman, I think I will waive at this time.

Mr. MANN. Mr. Hyde?

Mr. HYDE. Thank you.

Mr. Schwarzschild, I have been reading your excellent statement, and I mean that because I am going to use this in another context. Quite often, you showed great respect for life. And you talk about arrogating God-like authority, who shall live and who shall die. And I like that.

But I also note a strong citation of religious authority in your statement. Let me read it to you.

"* * * the virtually unanimous voices of the religious community of our land should guide your actions on this matter." Do you mean that?

Mr. SCHWARZSCHILD. Would you remind me, sir, on what page?

Mr. HYDE. I am sorry, they are not numbered.

Mr. SCHWARZSCHILD. They are under the staple. I apologize for getting the staple in the wrong place.

Mr. HYDE. All right, let's see if I can find it.

Starting on the third line from the top, "the virtually unanimous voices of the religious community of our land." Then, you interject, "our leading thinkers and social analysts, in unison with enlightened opinion for hundreds, perhaps thousands, of years should guide your actions on this matter."

Now, my question is: Do you really mean that the virtually unanimous voices of the religious community of our land should guide our actions on this matter?

Mr. SCHWARZSCHILD. The introductory phrase is, "In the absence of a showing of social usefulness or necessity," which seem to us fundamental to any criminal sanction.

In the absence of these, or so long as you consider that matter unsettled or unresolved, it seems to us appropriate to say that the religious community, social analysts, philosophers, criminologists, and jurors, have for many decades, indeed for hundreds of years, argued against the appropriateness of capital punishment.

Mr. HYDE. And we should pay attention to the religious community's views on this issue? That is my question.

Mr. SCHWARZSCHILD. Yes, I think you should.

Mr. HYDE. Good. Because that is what you have said.

Now, turning to page 13, so strongly do you feel that the view of the religious community on this issue of human life, so strongly do you feel that is important, that you say, and I quote:

> We could speak at length about the reasons why every major religious denomination and group in America, I think you mean, committedly opposes the death penalty.

Then, you go farther and say:

> With your permission, I should like to give you and to enter into the record of this hearing a booklet entitled, "Capital Punishment: What the Religious Community Says," a compilation of the policy statements of all the major religious bodies of the country, recently recompiled by the National Interreligious Task Force on Criminal Justice * * *

et cetera, et cetera.

So you really strongly think that Members of Congress should pay attention to what the religious community says on this issue. And I assume on other issues, and be guided by it. Isn't that your testimony?

Mr. SCHWARZSCHILD. You do not expect me, Mr. Hyde, to be unaware of the entirely unrelated matter into which you are trying to draw my comments here.

I suggest to you that the question of women's right to abortion and the attitude of the religious community is not entirely parallel to the unanimity with which the religious community speaks to the issue of the death penalty.

Neither the Supreme Court of the United States nor the Congress nor the religious community is always necessarily right. In this instance, we believe that the policy resolutions of the major denominational bodies in our society are well founded and are worthy of your attention.

You are obviously empowered and entitled to ignore them, just as we are entitled and empowered to disagree with them in other matters.

Mr. HYDE. You know the point I am making?

Mr. SCHWARZSCHILD. Yes, I do.

Mr. HYDE. And in my humble opinion, you are dancing around it. The point is you will cite religious authority when it is with you, but you will say it is a violation of the separation of church and State when it isn't with you. And I would like the ACLU to make its mind up.

Do we listen to religion or blot it out of our mind? Is it OK in the death penalty, but where abortion is concerned, we are breeching the wall? What is your position on that issue?

Mr. SCHWARZSCHILD. Our position is that the death penalty is inappropriate on constitutional grounds and moral grounds and legal grounds.

Mr. HYDE. And religious grounds?

Mr. SCHWARZSCHILD. The religious community agrees with our judgement, agrees with the conclusion that we arrive at on the death penalty.

Mr. HYDE. That's right.

Mr. SCHWARZSCHILD. It is our position that the Congress is not empowered under the Constitution, under the first amendment, to enact laws merely in order to satisfy religious requirements.

Mr. HYDE. But on questions of human life, on questions of life and death, whether it is the death penalty or whether it is abortion, we are entitled to listen to and——

Mr. SCHWARZSCHILD. You are always entitled to listen to everybody.

Mr. HYDE. Be guided by. OK, listen to the next part of my question.

Mr. SCHWARZSCHILD. Yes, sir.

Mr. HYDE. And be influenced by. And would you urge this issue, guided by the religious community, right?

Mr. SCHWARZSCHILD. No, sir.

Mr. HYDE. Oh, no?

Mr. SCHWARZSCHILD. I think we merely request that you receive our judgment about the constitutionality and the social and legal appropriateness of enacting the death penalty. We believe there is no such appropriateness and no such usefulness. It is entirely consistent that the religious community agrees with us on that point; that we disagree with some elements in the religious community on other matters should not surprise you.

Mr. HYDE. Sir, there is a fundamental question here, and you are making a distinction between abortion and capital punishment. And I am saying to you the position your organization asserts in the district court in Brooklyn is that a religious view of the nature of human life is wrong, and it is a violation.

Well, sir, the language of your testimony is that the first of Government is being used to impose a religious view of when life begins on a secular society.

Mr. SCHWARZSCHILD. The religious community opposes murder. Do you really believe the ACLU would come to you and say, "On those grounds, you may not enact a State law against murder"?

No, sir. We say that the legislature is not entitled to enact merely religious considerations into the criminal law. And that is not the case in the opposition to the death penalty.

Mr. HYDE. I say it is a fascinating commentary on the intellectual honesty and consistency of the ACLU that you cite religious authority that you urge that we be guided by religious authority, when it is with you on this issue, but it is contrary to the Constitution to be guided by religious authority when it is against you on the issue.

I say that is a fascinating commentary on intellectual honesty.

Mr. SCHWARZSCHILD. Well, sir, I regard the intellectual honesty of the ACLU as highly as I do any member of this subcommittee.

I am not particularly a specialist in that aspect of our organization's affairs, but on the issue with which you are concerned, we say that the legislature is not entitled to enact merely religious doctrine into the Criminal Code.

That is not the question before us with respect to the death penalty. Here, we merely cite the religious community as being in support of the constitutional and moral conclusions we arrive at.

Mr. HYDE. We are entitled to listen to it, and you would say, "be guided by it." Isn't that what you say in your statement on page 9?

Mr. SCHWARZSCHILD. Yes.

Mr. HYDE. Thank you.

I have no further questions.

Mr. MANN. Mr. Evans?

Mr. EVANS. Yes, sir, Mr. Chairman, I would like to ask a couple of questions.

I notice in this pamphlet that you have given us—I wanted to find out if you agree with the statement contained on page 15, arguing against the death penalty, that the fear of capital punishment has no proven value as a deterrent to criminal behavior. Do you agree with that statement?

Mr. SCHWARZSCHILD. Sir, may I trouble you to tell me again where that is? Page 15?

Mr. EVANS. Page 15 of the Capital Punishment, arguments against it. What the religious community says.

Mr. SCHWARZSCHILD. Page 15. The first paragraph is No. 5 on that page?

Mr. EVANS. Yes. And one of the reasons listed against caiptal punishment is the fear of capital punishment has no proven value as a deterrent to criminal behavior.

Mr. SCHWARZSCHILD. Yes, sir.

Mr. EVANS. You are aware of cases in which a person kills another person, is convicted, escapes from jail and kills again. Would you agree that capital punishment is a deterrent to that particular individual?

Mr. SCHWARZSCHILD. Obviously, it has not been.

Mr. EVANS. If he were given capital punishment, then he would not be at liberty to kill again, would he?

Mr. SCHWARZSCHILD. With respect, Mr. Evans, I suggest to you in the context of someone whom we have executed, the issue of deterrence becomes not only moot but a bit of sick humor. You have incapacitated Mr. Gilmore from committing another murder, but you have hardly deterred him.

Mr. EVANS. But if the ACLU is so interested in human life, what about these individuals that go on killing, and killing, and killing again? Do they have no justice? Is there no justice for these innocent victims?

Mr. SCHWARZSCHILD. What has happened to them is an unspeakable tragedy and one which we abhor and condemn precisely as much as you do. And the way to prevent that particular person from committing the crime again, if he has the propensity and intent to do that, is to confine him in a place where he can't do that.

Mr. EVANS. What about the situations where they escape from places. We have no place on Earth—

Mr. SCHWARZSCHILD. The only way to make sure someone you have confined is not going to commit another murder is sentence every criminal to death and execute every one of them.

Mr. EVANS. Well, there might be a deterrent in that. We haven't done that.

Mr. SCHWARZSCHILD. I submit. Mr. Chairman, that humor about killing is not quite appropriate in this hearing.

Mr. EVANS. That is not humor. If this gentleman thinks I am making a joke, then he misinterprets me altogether.

Mr. MANN. Mr. Evans is from Georgia, and it is interesting to note, not as a matter of humor, but a matter of reality, that in the last 21 months, there have been nine murders in the Atlanta Penitentiary. It happened in 17 months, but I think they have been free of it 2 or 3 months. I visited there a few weeks ago just to try to understand the situation.

That raises another aspect of what punishment can deter when you have people under those situations.

Mr. SCHWARZSCHILD. Yes, it does, and a very serious one. It also raises, of course, the question of the competency of Georgia prison officials.

Mr. MANN. A Federal penitentiary.

Mr. EVANS. This is a Federal penitentiary.

I appreciate the slur on Georgia, sir.

Mr. SCHWARZSCHILD. It was not a slur on Georgia; it responds to a question which the chairman raised.

Mr. EVANS. I am very serious about whether or not we should have capital punishment. And I have been on both sides of the issue during a period of time since I have been in political life. And more and more in noticing where we are going by virtue of people getting out and committing murders, again which occurred in Virginia within the last 3 or 4 weeks.

I raise the serious question as to whether or not capital punishment is not necessary to protect the public. And that is what I am concerned with doing.

Mr. SCHWARZSCHILD. Of course, and rightly so. And so are we, Mr. Evans.

The fact is that recidivism among murderers is extremely rare. Mr. Bedau, who will testify before you later in this hearing, will address himself to the social and statistical findings in that area.

As appalling and as tragic as the incident is that you cite now, it is extremely rare historically. The only way to make sure that a prisoner will never again commit a crime is to execute everyone of them. This is something no criminal justice code and no legislature would probably entertain.

Mr. EVANS. You are an attorney?

Mr. SCHWARZSCHILD. No, I am not, sir.

Mr. EVANS. You are not; just with ACLU.

Well, my concern is this; that there are different types of cases, and there are cases in which a person is killed in a crime of passion, a family member. And I agree with you that the chances that this will occur again with that individual are highly unlikely. But there are other types of murders in which——

Mr. SCHWARZSCHILD. Of course.

Mr. EVANS [continuing]. A person deliberately with no passion involved, cold-bloodedly kills, and the commission of other crimes. And I see a distinction in those cases.

And I am wondering if you do not see the possibility of making a determination in a court of law that this person is likely to kill again if he has the opportunity?

Mr. SCHWARZSCHILD. Right. And if so, then you deprive them of their opportunity. And you have ways of doing that other than killing him.

Mr. EVANS. I don't think we do. I think we have got the situation not only in the Atlanta Federal prison, but other Federal and State prisons in which that person will kill inside the penitentiary or outside the penitentiary. And I think in those instances, there are methods of determining that that person has forfeited the right to live based upon the danger to society in the event he ever has the opportunity to kill again.

Now, do you disagree that if we can reach a standard in which we can determine which individuals are of that nature that capital punishment should be imposed?

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Mr. SCHWARZSCHILD. I do not believe social and psychological experts have arrived at a reliable way of predicting the future criminal propensities of anyone. They do that within certain limits of reliability. And they will make mistakes. And the mistakes then will come to haunt them. If a person escapes or is even paroled and commits another violent crime, their judgment is found faulty.

But I cannot believe that the Bureau of Prisons of the United States or State prison officials in Georgia or New York or elsewhere will come to you and testify that they are incapable of incapacitating from committing another murder persons who are under 24-hour supervision behind bars, in cells in which they are not in the company of other people, are at any time subject to search at will and are living under conditions in which it is easily feasible to prevent their committing another homicide.

I just cannot believe that they will testify to their own incompetence. You can hold them to those standards of competence.

Mr. EVANS. I agree, they will not testify to it, but I don't agree I will believe that they are competent to do what you say.

Mr. SCHWARZSCHILD. Sir, then you agree that my comment was not a slur on the State of Georgia, and certainly not intended as such, but merely a comment on the fact that we are entitled to hold our agents in the Bureau of Prisons or in the State prison systems to a standard of care of their prisoners which prevents their committing other homicidal crimes in their institutions.

That is not a very onerous task. That seems to be quite fundamental to their obligations.

Mr. EVANS. But I think the question I am more asking than the prison system is: Are there not certain crimes committed under certain conditions which give us a good indication that that person would commit crimes of the same nature again if he had the opportunity?

Mr. SCHWARZSCHILD. Yes.

Mr. EVANS. Now, that is the question that is the basis for which I would agree that we should have capital punishment.

Mr. SCHWARZSCHILD. That is the basis on which we would agree that you are not only entitled but obligated to take every measure short of killing that person to prevent his committing another crime.

Mr. EVANS. Well, I think we agree on the conditions; we just don't agree on the end result.

Mr. SCHWARZSCHILD. Precisely.

Mr. EVANS. Thank you, Mr. Chairman.

Mr. GUDGER. Mr. Chairman, a parliamentary inquiry now that this line of questioning has terminated. And that is this: Isn't it the function of this committee in this series of hearings to determine what is to be our statutory approach to dealing with a postconviction situation in a capital punishment case rather than to deal with the question of whether or not the committee is going to approve or disapprove capital punishment?

Mr. MANN. The bill pending before the committee is a procedural matter to determine whether or not the U.S. Criminal Code should provide for a viable method of implementing such death penalties as the Congress may determine should apply to any specific crimes.

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I don't think we can narrowly construe that function. But that is the purpose of the bill.

Mr. GUDGER. I wondered whether or not we were going to consider that it was within the scope of the committee's concerns to address the question of capital punishment per se. It seems to me the statute has already passed. The question now seems to me to be to implement it to meet the test of the recent decisions.

Mr. MANN. That's exactly correct. However, the passage of this legislation will necessarily trigger the decisions on specific crimes as to which it might apply.

Mr. GUDGER. Thank you, sir.

Mr. MANN. Thank you so much, Mr. Schwarzschild.

Mr. SCHWARZSCHILD. Thank you, Mr. Chairman.

Mr. MANN. Our next witness is the Most Reverend Ernest L. Unterkoefler, Bishop of Charleston, S.C. Bishop Unterkoefler is testifying today on behalf of the U.S. Catholic Conference. I know the Bishop and am pleased that he has taken the time to appear before us today.

Bishop Unterkoefler is accompanied by Dr. Barbara Stoltz, a member of the staff of the U.S. Catholic Conference, and by Dr. Francis Butler of the U.S. Catholic Conference staff.

Dr. Stolz has previously appeared before us on the criminal code legislation, and we are happy to welcome her back again.

Bishop Unterkoefler has submitted a prepared statement on behalf of the U.S. Catholic Conference. And without objection, it will be made a part of our record.

It is a pleasure to welcome you, Bishop, and Dr. Stolz and Dr. Butler. You may proceed as you wish.

[The prepared statement of Bishop Unterkoefler follows:]

STATEMENT OF MOST REV. ERNEST L. UNTERKOEFLER, BISHOP OF CHARLESTON, ON BEHALF OF THE U.S. CATHOLIC CONFERENCE

Mr. Chairman, members of the Subcommittee, I am Bishop Ernest Unterkoefler, Bishop of Charleston, S.C. Today, I am testifying on behalf of the United States Catholic Conference (USCC), the national level action agency of the American Catholic Bishops. With me are Msgr. Francis J. Lally and Dr. Barbara Stolz of the Conference staff. We appreciate this opportunity to appear before you in order to comment on H.R. 13360, a bill to establish procedures for the imposition of a death penalty in certain federal criminal cases.

While capital punishment remains the subject of much legal debate, we must never lose sight of the fact that it involves profound moral and religious questions. As religious leaders and pastors, we come before you today to address this issue in the context of the value and dignity of human life.

We recognize that H.R. 13360 is an attempt to create procedures for the imposition of the death penalty in cases where such punishment is already authorized by federal law, but which cannot be implemented because existing procedures for imposition do not conform to the constitutional guidelines set forth by the U.S. Supreme Court in recent cases. Yet, passage of this bill will in fact mean the reinstitution of the practice of capital punishment at the federal level. While the prevalence of violent crime in our society underscores the need for effective measures to prevent crime and to assure a swift and certain response to criminal acts, we believe that effective and humane alternatives can be developed without resorting to such simplistic and atavistic practices as capital punishment.

The Catholic Bishops of the United States have been deeply troubled by the weakening of concern for the sanctity of human life. This phenomenon is observable in the unhealthy shift in national actions and attentions from the poor, the continued acceptance of racism and sexism, the support for abortion as well

as the growing advocacy for the death penalty. In response to these societal developments and out of a commitment to social justice, the Catholic Bishops of the United States in 1974 declared their opposition to the death penalty.

Since that time, many of my fellow bishops have spoken out individually on this issue through various means, including pastoral letters, policy statements, testimony before state legislatures and before Congress. Bishops from such diverse parts of our country as Tennessee, Illinois, Maryland and Texas have testified before or communicated to state legislatures their opposition to proposed legislation to reinstitute the death penalty.

At the national level, the U.S. Catholic Conference has addressed this issue on a number of occasions. In 1977, the then President of the National Conference of Catholic Bishops, Archbishop Joseph L. Bernardin, stated that "a return to the use of capital punishment can only lead to further erosion of respect for life and to the increased brutalization of our society." *A Community Response to Crime*, a policy statement issued this year by the Bishops' Committee on Social Development and World Peace, concludes that: "The critical question for the Christian is how can we best foster respect for life, preserve the dignity of the human person and manifest the redemptive message of Christ. We do not believe that more deaths is the response to the question." During the present session of Congress, the USCC articulated its opposition to S. 1382, the death penalty bill now pending in the Senate. Most recently, Bishop J. Francis Stafford, Auxiliary of Baltimore, testifying before this Subcommittee on the proposed criminal code reform legislation, underscored our specific opposition to the death penalty provisions permitting the use of capital punishment for other offenses.

I myself have spoken out on this issue on a number of occasions. My own opposition to the death penalty has been reenforced by my personal experience as a chaplain in a Virginia prison. I accompanied six men to the electric chair. I can assure the Subcommittee that capital punishment is brutal and inhumane. It is also final. Judicial error which leads to the execution of an innocent person can never be rectified.

I firmly believe that rehabilitation, even of murderers, is possible. Our belief in Christ's message of redemption and restoration compels us to seek, even for those who have taken a life, the opportunity for the personal transaction of penitence, restoration and a new beginning which is at the heart of the Christian struggle for salvation. The death penalty eliminates this possibility.

Many legislators feel that there is growing public support for the use of capital punishment. Even if this is the case, we have a responsibility to assess all the available data and to reflect on the consequences of our actions in approaching so serious an issue. One hears it said that capital punishment is an effective deterrent to crime, but the empirical evidence leaves us with more questions than answers. Certainly, capital punishment does contribute to the level of violence in our society. There is also the question of discrimination. H.R. 13360 attempts to address the practices permitting discrimination on the basis of race and class that the Supreme Court condemned in the 1972 Furman decision. Simply altering procedures, however, cannot eradicate the discriminatory imposition of the death penalty because such technical changes cannot eradicate the root causes of discrimination. Finally, some support capital punishment as a form of retribution. Yet, executing the offender helps neither the victim nor the victim's survivors.

The question before us should be this: how do we best preserve the human life and dignity of all persons, while at the same time ensuring respect for law and the protection of society. We are at a time in our history when we have the knowledge to address more effectively many human and social problems. If we apply this expertise, tempered by compassion, to the problem of violent crime, I believe that we can find and develop an approach which is more consistent with a vision of respect for all human life. Such a response will better protect the rights of all persons.

In conclusion, I would urge the Subcommittee to oppose further action on H.R. 13360, a bill which would, in effect, reinstitute a federal death penalty. Rather, I would hope that the Subcommittee would in its efforts to address the problem of violent crime, seek alternatives which exemplify a deep commitment to the intrinsic value and sacredness of human life.

I thank you for this opportunity to appear before you and I would be happy to respond to any questions.

TESTIMONY OF BISHOP ERNEST L. UNTERKOEFLER, BISHOP OF CHARLESTON, S.C., ACCOMPANIED BY BARBARA STOLZ, PH. D., AND FRANCIS BUTLER, PH. D.

Bishop UNTERKOEFLER. Thank you very much, Congressman Mann.

Mr. Chairman and members of the subcommittee, I am Bishop Ernest Unterkoefler, bishop of Charleston, S.C. My Roman Catholic jurisdiction covers the entire State of South Carolina.

We are deeply grateful to the committee for the invitation to come to represent our thinking on this very crucial question for your committee and for the Congress.

Today, I am testifying on behalf of the U.S. Catholic Conference, popularly known as USCC, the national level action agency of the American Catholic Bishops. With me are Dr. Stolz and Dr. Frank Butler of the conference staff. We deeply appreciate this opportunity to appear before you esteemed subcommittee members in order to comment on H.R. 13360, a bill as we understand to establish procedures for the imposition of the death penalty in certain Federal criminal cases.

While capital punishment remains the subject of much legal debate, we must never lose sight of the fact that it involves profound moral and religious questions. As religious leaders and as a pastor and with my associates, we come before you today to address this issue in the context of the value and dignity of human life.

We recognize that H.R. 13360 is an attempt to create procedures for the imposition of the death penalty in cases where such punishment is already authorized by Federal law, but which cannot be implemented because existing procedures for imposition do not conform to the constitutional guidelines set forth by the U.S. Supreme Court in recent cases.

Yet, passage of the bill will, in fact, mean the reinstitution of the practice of capital punishment at the Federal level.

While the prevalence of violent crime in our society underscores the need for effective measures to prevent crime and to assure a swift and certain response to criminal acts, we believe that effective and humane alternatives can be developed without resorting to such simplistic and in our view atavistic practices as capital punishment.

The Catholic Bishops of the United States have been deeply troubled by the weakening of concern for the sanctity of human life from the womb to the tomb. This phenomenon is observable in the unhealthy shift in national actions and attentions from the poor, the continued acceptance of racism and sexism, the support for abortion as well as the growing advocacy for the death penatly.

In response to these societal developments and out of a commitment to social justice, the Catholic Bishops of the United States in 1974 declared their opposition to the death penalty.

Since that time, many of my fellow bishops have spoken out individually on this issue through various means, including pastoral letters, policy statements, testimony before State legislatures and before Congress. Bishops from such diverse parts of our country as Tennessee, Illinois, Maryland, and Texas, et cetera, have testified before or

communicated to State legislatures their opposition to proposed legislation to reinstitute the death penalty. I have done so myself in South Carolina.

At the national level, the U.S. Catholic Conference has addressed this issue on a number of occasions. In 1977, the then president of the National Conference of Catholic Bishops, Archbishop Joseph L. Bernardin, born in South Carolina—mother still there—stated that:

> A return to the use of capital punishment can only lead to further erosion of respect for life and to the increased brutalization of our society.

A community response to crime, a policy statement issued this year by the Bishops' Committee on Social Development and World Peace, concludes that:

> The critical question for the Christian is how can we best foster respect for life, preserve the dignity of the human person and manifest the redemptive message of Christ? We do not believe that more deaths is the response to the question.

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I, myself, have spoken out on this issue on a number of occasions. My own opposition to the death penalty has been reenforced by my personal experience as a chaplain in the Virginia prison for 3 years. I accompanied six men to the electric chair. I was closer to them than I am to you at this moment at that moment, the moment of their death. And I can assure the subcommittee that capital punishment is brutal in the present situation and inhumane.

It is also final. Judicial error which leads to the execution of an innocent person can never be rectified. And as far as I know, before God and my dialog with an individual, that is what happened in one instance in my experience.

I firmly believe that rehabilitation, even of murderers, is possible. Our belief in Christ's message of redemption and restoration compels us to seek, even for those who have taken a life, the opportunity for the personal transaction of penitence, restoration, and a new beginning which is at the heart of the Christian struggle for salvation. The death penalty eliminates this possibility.

Many legislators feel that there is growing public support for the use of capital punishment. Even if this is the case, we have a responsibility to assess all the available data and to reflect on the consequences of our actions in approaching so serious an issue.

One hears it said that capital punishment is an effective deterrent to crime, but the empirical evidence leaves us with more questions than answers. Certainly, capital punishment does contribute to the level of violence in our society.

There is also the question of discrimination. H.R. 13360 attempts to address the practices permitting discrimination on the basis of race and class that the Supreme Court condemned in the 1972 *Furman*

decision. Simply altering procedures, however, cannot eradicate the discriminatory imposition of the death penalty because such technical changes cannot eradicate the root causes of discrimination.

Finally, some support capital punishment as a form of retribution. Yet, executing the offender helps neither the victim nor the victim's survivors.

The question before us should be this: how do we best preserve the human life and dignity of all persons while at the same time insuring respect for law and the protection of society? We are at a time in our history when we have the knowledge to address more effectively, many human and social problems. If we apply this expertise, tempered by compassion, to the problem of violent crime, I believe that we can find and develop an approach which is more consistent with a vision of respect for all human life. Such a response will better protect the rights of all persons.

In conclusion, I would like to urge the subcommittee to oppose further action on H.R. 13360, a bill which would, in effect, reinstitute a Federal death penalty. Rather, I would hope that the subcommittee would in its efforts to address the problem of violent crime, seek alternatives which exemplify a deep commitment to the intrinsic value and sacredness of human life.

Gentlemen, esteemed Congressmen, I thank you for this opportunity to appear before you. And I would be happy to answer any questions.

Mr. MANN. Thank you, Bishop Unterkoefler.

Are there any questions?

Mr. GUDGER. Yes; just two or three very brief questions.

Bishop Unterkoefler, can you enlighten me—perhaps it is something on which you do not have special knowledge—but of the nations of Europe in which there is a high Catholic population, have we seen any movement away from capital punishment?

I would like to ask you specifically, doesn't France and Spain and Italy, don't most of these nations of Europe retain capital punishment as a form of punishment?

Bishop UNTERKOEFLER. Dr. Butler has that data on those countries. But I can tell you that the Vatican which is a State has long since removed capital punishment from its operations.

Mr. GUDGER. I realize, but, of course, I suspect the Vatican's occasion to impose capital punishment within its province would be limited. This is why I raise the question concerning these nations of Europe where the Catholic influence is strong.

Dr. BUTLER. France still employs capital punishment. The use of it there parallels pretty much the minimal use of capital punishment here in this country.

Spain also permits the use of capital punishment. But there are movements in Spain to do away with it. In fact you may recall the outcry 3 years ago when there were five convicted terrorists who were put to death. The Holy Father himself personally intervened in that case and tried to argue against their execution. He felt that there were more humane ways to satisfy the demands of justice.

Mr. GUDGER. May I ask would the others——

Bishop UNTERKOEFLER. We have countries like Argentina, we have Belgium, which has a large Catholic population, and we have Colom-

bia, South America, which it is constitutionally proscribed. And we have Canada. It was abolished in 1976 which includes Quebec which had a great influence in this situation.

The populous in Catholic countries many times is not influenced sufficiently by advanced thinking. And our position in this day is simply this: That this is no time in history with the terrorism that is going around the world to inflame the values or to denigrate the values that pertain to human life. It is a time to restrain the exercise at all levels and to put the brakes, if we can, on all levels where human life is taken to be very cheap and very expendable.

Mr. GUDGER. I would remind myself and perhaps the committee that in Muslem society, it seems there is a very, very low incidence of larceny, or theft. Some of the punishments there are very acute, such as the removal of the hand and that sort of thing, and the idea of perhaps extreme punishment having a deterrent effect seems to have some authenticity in that community.

I did not say it doesn't here. I still appreciate the fact that your comments are based upon moral principles rather than upon the argument that capital punishment has no deterrent effect.

Thank you.

Mr. MANN. Mr. Wiggins?

Mr. WIGGINS. No questions.

Mr. MANN. Mr. Evans?

Mr. EVANS. Mr. Chairman, I would like to pursue the question of recidivism and ask what recommendations you would have in situations where convictions, sentences, and later additional murders occur by the hands of the same individual.

Bishop UNTERKOEFLER. I am very grateful for that question because I am involved with the inmates council in the State penitentiary in South Carolina and am in communication with the commissioner of corrections there, Commissioner Leek.

In fact, I have to speak to the council at the end of the month. We discussed these questions among the inmates, and it seems that the enlightened people who are reflective about this and have good religious motivation think that it may go back to what actually happens when the first crime is committed—say a conviction of murder, et cetera.

There are many factors in this that do not really in the prison system or the penitentiary system in many places help the man to get better. For instance, if an 18-year-old gets into a penitentiary, and that happens, he is going to deteriorate. He is not going to, in my experience—we have not come to that point where we are going to lift him above that which made him get involved in this violent action in the first place.

So the rehabilitation process and the reorientation of this individual as an individual is one of the areas which is the burden of our society. And we have to be creative enough to find out what makes people go beyond the point of rage.

Now, in most instances, we know where the blood is closer, the fury is greater, or it is where the love is deeper.

I asked Commissioner Leek why there were 49, I think, percent of the inmates in the women's group in South Carolina were there for murder. And he said, "It is familial." And if we could get at those

issues, you see, that familiar—it is a complex burden. It is not going to be solved by procedural law.

We have got a heavier burden on our backs than we had 100 years ago.

Mr. EVANS. May I call your attention to a very recent case? A young man killed a classmate or young lady last year. Now, this is in the Washington area. Now, he is charged with committing a robbery and murder in which he killed a shopkeeper.

He didn't go to the penitentiary. He didn't go anywhere. He was tried as a juvenile and placed back after a short time in the home environment. Certainly, there could have been no adverse effect caused by our prison system in that case. And yet, now, we have got another loss of human life.

And if these people who are concerned with capital punishment are as concerned with human life as I am, what do we do about these innocent victims who keep getting killed by people who have been charged and convicted of crime and come back to kill again?

I disagree with the previous witness that there are few instances of recidivism in killing. I think there are many instances of recidivism in killing.

Bishop UNTERKOEFLER. That is a difficult question. And I am sure that they would be the exceptions. My memory tells me that recidivism for people who have been incarcerated is about 3 percent.

Is that right?

Dr. BUTLER. For murder.

Bishop UNTERKOEFLER. For murder. Whereas, it is much higher in other felonies. We have to deal with that. We don't want to discard that. And how we deal with it is the burden that we have here right now. The creative ability, the ability of the creative intiative of legislators, religious leaders, sociologists, psyhcologists, to get to the crux of this question for that group of recidivists, certainly that is an important issue in society.

But I don't think capital punishment can solve that man's problem except, you know, let God——

Mr. EVANS. Well, let me say two things. I don't want to interrupt you, but, one, I was not concerned as much about solving his problem as I was the potential victim that was next on his list. And nobody knows who that is.

Bishop UNTERKOEFLER. Nobody knows.

Mr. EVANS. I think you have to have as much concern for human life, to look after that innocent victim, as the person who commits a murder.

Bishop UNTERKOEFLER. I agree.

Mr. EVANS. So that is the crux of what I am saying. And as you know and everyone knows, Congressmen have no original thoughts, and we have witnesses who come before us to tell us the answers. And that is the reason I was asking you your suggestions.

Bishop UNTERKOEFLER. I know some very creative Congressmen, and we have one from Greenville, S.C.

Mr. EVANS. Thank you.

Thank you, Mr. Chairman.

Mr. MANN. Mr. Hyde?

Mr. HYDE. Well, Your Excellency, I am delighted that you are here. And I hope that always, we will have the opportunity and privilege of listening to clergymen speak on issues of vital interest to this Congress and the country.

I have three comments, and they are just comments. There is no penalty unless you want a dialog on them.

You made a statement that I would question. You said that the populous of Catholic countries are usually untouched by advanced thinking. I don't know if you meant to say that. Belgium, France, Quebec come to mind as Catholic countries; that is to say, communities, large communities, influenced by the Catholic Church. And I would not say they were untouched by advanced thinking, although I would like to know what you mean by advanced thinking.

Bishop UNTERKOEFLER. On this question, I should have limited it to this, Congressman.

Mr. HYDE. OK; that makes me feel better and less inferior.

Bishop UNTERKOEFLER. On this question, deeply on this question, where we have an educational task and responsibility on this question. It is in that context that I was speaking relative to capital punishment, and in no other area.

Mr. HYDE. Good. I am pleased to hear that.

Bishop UNTERKOEFLER. OK.

Mr. HYDE. You have a statement certainly capital punishment does contribute to the level of violence in our society. I submit where there has been one execution in the last 10 years under capital punishment, the opposite is just as valid a statement, that we have a violent society where human life is one of the cheapest commodities on the street where youth gang murders take place.

And I was born and raised in Chicago. And I have been in touch with a lot of this criminality and violence. And I think it is just as valid to say that the absence of an effective capital punishment deterrent contributes to the level of violence and the cheapness with which human life is considered on the street.

I also submit that it is impossible to measure how many crimes weren't commited because of an effective sense of deterrence from an effective implementation of capital punishment. There is no way to measure that.

So people who say it doesn't deter, I think we can show by the escalating cheapness of human life in our society, that the absence of implementing capital punishment may have a direct relationship to the cheapening of human life.

And lastly, you say executing the offender helps neither the victim or the victim's survivors. Quite true. And imprisoning him or her doesn't help the victim or the victim's survivors either. So it is a gratuitous statement that doesn't prove a great deal.

But I am troubled by the whole subject. I speak vehemently on one side of it, but that is my way of searching really for some foundation. I have always felt capital punishment is an expression of the reverence for life, because it is an expression of outrage at the commission of the ultimate crime. That is the taking of innocent human life. And I still believe that.

But I can see we would have great difficulty to imposing such a penalty were I a judge. So I find these hearings very useful to explore the nuance of these situations.

Bishop UNTERKOEFLER. From my personal experience, my fear is that we go beyond justice, that we get to a vindictive frame of mind. I am not talking about the law now; I am talking about what goes on in people's minds.

My experience is as a priest in this area, certainly I came to it with an open mind. But witnessing how this is done and all this sort of thing and what really happens——

Mr. HYDE. Your Excellency, may I ask you a question at this point? Would your view be different had you witnessed the crime for which the penalty was being imposed, had you seen the murder and the victim maybe pleading for mercy and the total indifference? Wouldn't that maybe color your view?

Bishop UNTERKOEFLER. I have been on the scene in situations of that kind, having to administer the sacraments where blood was spewing all over the place, and there was some kind of illicit relationships going on, and in other circumstances.

But, at the same time, I have to be moved by both. I just can't—all I am doing is making a plea to restrain the exercise of capital punishment in this time. The capital punishment situation that you mentioned, it goes in with the violence. Whether it deters or doesn't deter, I think is a moot question. You get debates on both sides.

But the fact, what I see, is this: That is does throw into the whole gambit hopper of violence another violent action. And the State says, or the Federal Government says, "We approve of this on just grounds," but it is a violent way to bring justice.

Now, how can we get, though, to another way of justice without inducing—you see, in the whole history of religion, we have too many on a refinement of this. From the Hammurabi Code, it was taken into the Old Testament, this vicious, terrible feeling against one another. And, finally, the religious society had to step in and say, "Hey, you can't kill one another; you can't take the life of your brother just because you feel he killed your relative," you know.

So we are in a development situation. And I know what your situation is with the Federal code and with the law, but all we are pleading for is restrain the exercise of this.

Mr. HYDE. I think we are all people of restraint, I hope, on this committee.

Bishop UNTERKOEFLER. The Catholic position puts it into the whole context from abortion down to genocide to capital punishment to euthanasia. This is all life, right along the spectrum.

Mr. HYDE. But I distinguish between innocent life and guilty life; don't you?

Bishop UNTERKOEFLER. We do. The life in the womb is innocent life. Absolutely.

Mr. HYDE. Thank you.

I have nothing further.

Mr. MANN. Thank you so much, Bishop Unterkoefler. I am sure that each member of the subcommittee shares your searching and desire for an alternative. And the real questions we have to answer, of course, are whether that alternative is attainable and can we wait on it?

In the meantime, does the imposition of a system of capital punishment contribute more to the brutalization of society and violence or does it truly deter? And as we search for those answers, I am certain you have made a great contribution to that effort.

Thank you very much. And thank you, Dr. Butler and Dr. Stolz.

Mr. GUDGER. Mr. Chairman, do we have statistics for developing or available on actual application by the States of capital punishment? I know there has been no application in North Carolina since 1960.

Mr. MANN. There has been none in any of the States since 1962. I am sure the statistics are available on a detailed basis prior to that time. And I am sure we can get them.

Bishop UNTERKOEFLER. If I may, I looked at the electric chair in South Carolina recently. It has all kinds of dust on it.

Mr. MANN. Well, I hesitate to inject this thought into the hearing at the moment, but the last two persons to die there were prosecuted in the circuit court of Greenville County, S.C. One was a white on white, and the other was a black on white. And the prosecutor was James R. Mann.

Thank you so much.

Bishop UNTERKOEFLER. Thank you very much.

Mr. MANN. We will now hear from Dr. Ernest van den Haag. Dr. van der Haag is visiting professor of criminal justice in the State University of New York, Albany, and author of the book entitled, "Punishing Criminals."

He has submitted a prepared statement and an article he has published. Without objection, they will be made a part of our record.

Welcome to the subcommittee, Professor van den Haag.

You may proceed.

[The prepared statement of Dr. van den Haag follows:]

PREPARED STATEMENT OF DR. ERNEST VAN DEN HAAG

I appreciate the opportunity to testify on the death penalty and on H.R. 13360. My name is Ernest van den Haag. I am currently Visiting Professor of Criminal Justice at the Graduate School for Criminal Justice, State University of New York at Albany. I am also Adjunct Professor of Law at the New York Law School, and Lecturer in Psychology and Sociology at the New School for Social Research. I have published seven books, the most recent of which is *Punishing Criminals: Concerning a Very Old and Painful Question* (Basic Books, 1975), in which two chapters deal with the death penalty. I have written articles on the death penalty, the most recent of which was published in *The Criminal Law Bulletin*, Jan-Feb 1978. I have brought with me a revised edition of that article, which I hope this Committee will attach to my testimony. In this article I deal with all major objections to the death penalty known to me. Let me here summarize briefly the arguments for it.

1. I believe that a non-mandatory death penalty for the most horrendous crimes is constitutional, provided the court has guided discretion to consider aggravating and mitigating circumstances.

2. I believe capital punishment is necessary because

(a) recent statistical investigations have shown executions to have a strong deterrent effect.

It is noteworthy that abolitionists usually deny deterrent effects, but admit that they would abolish the death penalty anyway if it were deterrent. They also insist that the death penalty would be applied in an unjustly discriminatory manner. But they admit they would abolish it anyway if it were applied equitably.

(b) I believe capital punishment is necessary, above all, to express the horror of society for the crimes so punished, and to distinguish them from other crimes punished by imprisonment. There is a discontinuity between murder and pickpocketing, which must be expressed in penalization.

3. I have found no serious evidence suggesting that capital punishment leads to barbarization, or leads people to commit murder for the sake of suffering execution.

4. I conclude that if we value human life those who take that of others should not be immune to the fate they have inflicted on their victims. The sacredness of life can be secured only by inflicting capital punishment on those who fail to respect it.

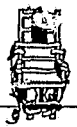
I hope you will indulge me if I comment on two aspects of the bill before you.

Rule 65(1) (p. 7, line 15) proposes as a mitigating circumstance "the youthfulness of the defendant." I urge you to eliminate that clause. If youthfulness in the opinion of the court diminishes "the defendant's capacity to appreciate the wrongfulness of his conduct," 65(2) fully takes care of this. If not, I do not see wherein age is relevant. Surely malevolent young offenders are more dangerous than malevolent older ones. Statistics show no less.

On p. 11, line 8, it appears that the bill proposes a mandatory appeal. I do not see why appeal should not be left to the discretion of the defendant and his counsel. If he and his counsel believe, as the trial court did, that the penalty is just, why is a review needed?

ERNEST VAN DEN HAAG

THE COLLAPSE OF THE CASE AGAINST Capital Punishment



THREE QUESTIONS about the death penalty so overlap that they must each be answered. I shall ask seriatim: Is the death penalty constitutional? Is it useful? Is it morally justifiable?*

I.

The Constitutional Question

The Fifth Amendment states that no one shall be "deprived of life, liberty, or property without due process of law," implying a "due process of law" to deprive persons of life. The Eighth Amendment prohibits "cruel and unusual punishment." It is unlikely that this prohibition was meant to supersede the Fifth Amendment, since the amendments were simultaneously enacted in 1791.[1]

The Fourteenth Amendment, enacted in 1868, reasserted and explicitly extended to the states the implied authority to "deprive of life, liberty, or property" by "due process of law." Thus, to regard the death penalty as unconstitutional one must believe that the standards which determine what is "cruel and unusual" have so evolved since 1868 as to prohibit now what was authorized then, and that the Constitution authorizes the courts to overrule laws in the light of *new* moral standards. What might these standards be? And what shape must their evolution take to be constitutionally decisive?

Consensus. A moral consensus, intellectual or popular, could have evolved to find execution "cruel and unusual." It did not. Intellectual opinion is divided. Polls suggest that most people would vote for the death penalty. Congress recently has legislated the death penalty for skyjacking under certain conditions. The representative assemblies of two-thirds of the states did re-enact capital punishment when previous laws were found constitutionally defective.[2]

If, however, there were a consensus against the death penalty, the Constitution expects the political process, rather than judicial decisions, to reflect it. Courts are meant to interpret the laws made by the political process and to set constitutional limits to it—not to replace it by responding to a presumed moral consensus. Surely the "cruel and unusual" phrase was not meant to authorize the courts to become legislatures.[3] Thus, neither a consensus of moral opinion nor a moral discovery by judges is meant to be disguised as a constitutional interpretation. Even when revealed by a burning bush, new moral norms were not meant to become constitutional norms by means of court decisions.[4] To be sure, the courts in the past have occasionally done away with obsolete kinds of punishment—but never in the face of legislative and popular opposition and re-enactment. Abolitionists constantly press the courts now to create rather than to confirm obsolescence. That courts are urged to do what so clearly is for voters and lawmakers to decide suggests that the absence of consensus for abolition is recognized by the opponents of capital punishment. What then can the phrase "cruel and unusual punishment" mean today?

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* This is a greatly revised version of a paper first delivered at a symposium sponsored by the Graduate School of Criminal Justice and the Criminal Justice Research Center of Albany, N.Y., in April 1977.

1. Apparently the punishment must be both—else cruel *or* unusual would have done. Historically it appears that punishments were prohibited if unusual in 1791 *and* cruel: the Framers did want to prohibit punishments, even cruel ones, only if already unusual in 1791; they did prohibit new (unusual) punishments if cruel. The Eighth Amendment was not meant to apply to the death penalty in 1791 since it was not unusual then; nor was the Eighth Amendment intended to be used against capital punishment in the future, regardless of whether it may have come to be considered cruel: it is neither a new penalty nor one unusual in 1791.

2. There may be a consensus against the death penalty among the college educated. If so, it demonstrates a) the power of indoctrination wielded by sociologists; b) the fact that those who are least threatened by violence are most inclined to do without the death penalty. College graduates are less often threatened by murder than the uneducated.

3. See Chief Justice Burger dissenting in *Furman*: "In a democratic society legislatures not courts are constituted to respond to the will and consequently the moral values of the people."

4. The First Amendment might be invoked against such sources of revelation. When specific laws do not suffice to decide a case, courts, to be sure, make decisions based on general legal principles. But the death penalty (as distinguished from applications) raises no serious legal problem.

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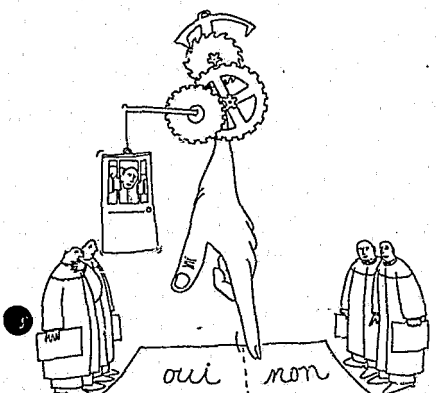
"*Cruel*" may be understood to mean excessive—punitive without, or beyond, a rational-utilitarian purpose. Since capital punishment excludes rehabilitation and is not needed for incapacitation, the remaining rational-utilitarian purpose would be deterrence, the reduction of the rate at which the crime punished is committed by others. I shall consider this reduction below. Here I wish to note that, if the criterion for the constitutionality of any punishment were an actual demonstration of its rational-utilitarian effectiveness, all legal punishments would be in as much constitutional jeopardy as the death penalty. Are fines for corporations deterrent? rehabilitative? incapacitative? Is a jail term for marijuana possession? Has it ever been established that ten years in prison are doubly as deterrent as five, or at least sufficiently more deterrent? (I don't pretend to know what "sufficiently" might mean: whether 10 per cent or 80 per cent added deterrence would warrant 100 per cent added severity.)

The Constitution certainly does not require a demonstration of rational-utilitarian effects for any punishment. Such a demonstration so far has not been available. To demand it for one penalty—however grave—and not for others, when it is known that no such demonstration is available, or has been required hitherto for any punishment, seems unjustified. Penalties have always been regarded as constitutional if they can be plausibly intended (rather than demonstrated) to be effective (useful), and if they are not grossly excessive, i.e., unjust.

Justice, a rational but non-utilitarian purpose of punishment, requires that it be proportioned to the felt gravity of the crime. Thus, constitutional justice authorizes, even calls for, a higher penalty the graver the crime. One cannot demand that this constitutionally required escalation stop short of the death penalty unless one furnishes positive proof of its irrationality by showing injustice, i.e., disproportionality (to the felt gravity of the crime punished or to other punishments of similar crimes), as well as ineffectiveness, i.e., uselessness in reducing the crime rate. There is no proof of cruelty here in either sense.



"*Unusual*" is generally interpreted to mean either randomly capricious and therefore unconstitutional, or capricious in a biased, discriminatory way, so as particularly to burden specifiable groups, and therefore unconstitutional. (Random arbitrariness might violate the Eighth, biased arbitrariness the Fourteenth Amendment, which promises "the equal protection of the laws.") Apart from the historical interpretation noted above (Footnote 1), "unusual" seems to mean "unequal" then. The dictionary equivalent—"rare"—seems to be regarded as relevant only inasmuch as it implies "unequal." Indeed it is hard to see why rarity should be objectionable otherwise.

For the sake of argument, let me grant that either or both forms of capriciousness prevail[5] and that they are less tolerable with respect to the death penalty than with respect to milder penalties—which certainly are not meted out less capriciously. However prevalent, neither form of capriciousness would argue for abolishing the death penalty. Capriciousness is not inherent in that penalty, or in any penalty, but occurs in its distribution. Therefore, the remedy lies in changing the laws and procedures which distribute the penalty. It is the process of distribution which is capable of discriminating, not that which it distributes.

Unavoidable capriciousness. If capricious distribution places some convicts, or groups of convicts, at an unwarranted disadvantage,[6] can it be remedied enough to satisfy the Eighth and Fourteenth Amendments? Some capriciousness is unavoidable because decisions of the criminal justice system necessarily rest on accidental factors at many points, such as the presence or absence of witnesses to an act; or the cleverness or clumsiness of police officers who exercise their discretion in arresting suspects and seizing evidence. All court decisions must rest on the available and admissible evidence for, rather than the actuality of, guilt. Availability of evidence is necessarily accidental to the actuality of whatever it is that the evidence is needed for. Accident is the capriciousness of fate.

Now, if possible without loss of other desiderata, accident and human capriciousness should be minimized. But, obviously, discretionary judgments cannot be avoided altogether. The Framers of the Constitution were certainly aware of the unavoidable elements of discretion which affect all human decisions, including those of police officers, of prosecutors, and of the courts. Because it always was unavoidable, discretion no more speaks against the constitutionality of the criminal justice system or of any of its penalties now than it did when the Constitution was written —unless something has evolved since, to make unavoidable discretion, tolerable before, intolerable now, at least for the death penalty. I know of no such evolution; and I would

5. Attention should be drawn to John Hagan's "Extralegal Attributes and Criminal Sentencing" (*Law and Society Review*, Spring 1974), which throws doubt on much of the discrimination which sociologists have found.

6. I am referring throughout to discrimination among those already convicted of capital crimes. That discrimination can be tested. However, the fact that a higher proportion of blacks, or poor people, than of whites, or rich people, are found guilty of capital crimes does not *ipso facto* indicate discrimination, any more than does the fact that a comparatively high proportion of blacks or poor people become professional baseball players or boxers.

think it was up to the legislative branch of government to register it had it occurred.

The Constitution, though it enjoins us to minimize capriciousness, does not enjoin a standard of unattainable perfection or exclude penalties because that standard has not been attained.[7] Actually, modern legislative trends hitherto have favored enlargement of discretion in the judicial process. I have always thought that enlargement to be excessive, immoral, irrational, and possibly unconstitutional—even when not abused for purposes of discrimination. Yet, though we should not enlarge it *praeter necessitatem*, some discretion is unavoidable and even desirable, and no reason for giving up any punishment.

Avoidable capriciousness. Capriciousness should be prevented by abolishing penalties capriciously distributed only in one case: when it is so unavoidable and so excessive that penalties are randomly distributed between the guilty and the innocent. When that is not the case, the abuses of discretion which lead to discrimination against particular groups of defendants or convicts certainly require correction, but not abolition of the penalty abused by maldistribution.

II.

Preliminary Moral Issues

Justice and equality. Regardless of constitutional interpretation, the morality and legitimacy of the abolitionist argument from capriciousness, or discretion, or discrimination, would be more persuasive if it were alleged that those selectively executed are not guilty. But the argument merely maintains that some other guilty but more favored persons, or groups, escape the death penalty. This is hardly sufficient for letting anyone else found guilty escape the penalty. On the contrary, that some guilty persons or groups elude it argues for extending the death penalty to them. Surely "due process of law" is meant to do justice; and "the equal protection of the law" is meant to extend justice equally to all. Nor do I read the Constitution to command us to prefer equality to justice. When we clamor for "equal justice for all" it is justice which is to be equalized and extended, and which therefore is the prior desideratum, not to be forsaken and replaced by equality but rather to be extended.

Justice requires punishing the guilty—as many of the guilty as possible, even if only some can be punished—and sparing the innocent—as many of the innocent as possible, even if not all are spared. Morally, justice must always be preferred to equality. It would surely be wrong to treat everybody with equal injustice in preference to meting out justice at least to some. Justice then cannot ever permit sparing some guilty persons, or punishing some innocent ones, for the sake of equality—because others have been unjustly spared or punished. In practice, penalties never could be applied if we insisted that they cannot be inflicted on any guilty person unless we can make sure that they are equally applied to all other guilty persons. Anyone familiar with law enforcement knows that punishments can be inflicted only on an unavoidably capricious, at best a random, selection of the guilty. I see no more merit in the attempt to persuade the courts to let all capital-crime defendants go free of capital punishment because some have wrongly escaped it than I see in an attempt to persuade the courts to let all burglars go because some have wrongly escaped imprisonment.

ALTHOUGH it hardly warrants serious discussion, the argument from capriciousness looms large in briefs and decisions because for the last seventy years courts have tried—unproductively—to prevent errors of procedure, or of evidence collection, or of decision-making, by the paradoxical method of letting defendants go free as a punishment, or warning, or deterrent, to errant law enforcers. The strategy admittedly never has prevented the errors it was designed to prevent—although it has released countless guilty persons. But however ineffective it be, the strategy had a rational purpose. The rationality, on the other hand, of arguing that a penalty must be abolished because of allegations that some guilty persons escape it, is hard to fathom—even though the argument was accepted by some Justices of the Supreme Court.

The essential moral question. Is the death penalty morally just and/or useful? This is the essential moral, as distinguished from constitutional, question. Discrimination is irrelevant to this moral question. If the death penalty were distributed quite equally and uncapriciously and with superhuman perfection to all the guilty, but was morally unjust, it would remain unjust in each case. Contrariwise, if the death penalty is morally just, however discriminatorily applied to only some of the guilty, it does remain just in each case in which it is applied. Thus, if it were applied exclusively to guilty males, and never to guilty females, the death penalty, though unequally applied, would remain just. For justice consists in punishing the guilty and sparing the innocent, and its equal extension, though desirable, is not part of it. It is part of equality, not of justice (or injustice), which is what equality equalizes. The same consideration would apply if some benefit were distributed only to males but not equally to deserving females. The inequality would not argue against the benefit, or against distribution to deserving males, but rather for distribution to equally deserving females. Analogously, the nondistribution of the death penalty to guilty females would argue for applying it to them as well, and not against applying it to guilty males.

The utilitarian (political) effects of unequal justice may well be detrimental to the social fabric because they outrage our passion for equality, particularly for equality before the law. Unequal justice is also morally repellent. Nonetheless unequal justice is justice still. What is repellent is the incompleteness, the inequality, not the justice. The guilty do not become innocent or less deserving of punishment because others escaped it. Nor does any innocent deserve punishment because others suffer it. Justice remains just, however

(Continues on page 402)

7. Although this is the burden of Charles Black's *Capital Punishment: The Inevitability of Caprice and Mistake* (Norton, 1974). *Codex ipsus loquitur.*

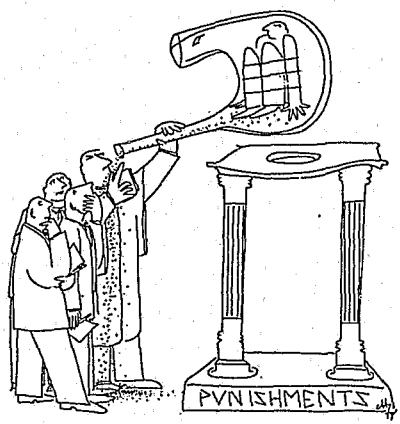
VAN DEN HAAG
(Continued from page 397)

unequal, while injustice remains unjust, however equal. However much each is desired, justice and equality are not identical. Equality before the law should be extended and enforced, then—but not at the expense of justice.

Maldistribution among the guilty: a sham argument. Capriciousness, at any rate, is used as a sham argument against capital punishment by all abolitionists I have ever known. They would oppose the death penalty if it could be meted out without any discretion whatsoever. They would oppose the death penalty in a homogeneous country without racial discrimination. And they would oppose the death penalty if the incomes of those executed and of those spared were the same. Abolitionists oppose the death penalty, not its possible maldistribution. They should have the courage of their convictions.

Maldistribution between the guilty and the innocent: another sham argument. What about persons executed in error? The objection here is not that some of the guilty get away, but that some of the innocent do not—a matter far more serious than discrimination among the guilty. Yet, when urged by abolitionists, this too is a sham argument, as are all distributional arguments. For abolitionists are opposed to the death penalty for the guilty as much as for the innocent. Hence, the question of guilt, if at all relevant to their position, cannot be decisive for them. Guilt is decisive only to those who urge the death penalty for the guilty. They must worry about distribution—part of the justice they seek.

Miscarriages of justice. The execution of innocents believed guilty is a miscarriage of justice which must be opposed whenever detected. But such miscarriages of justice do not warrant abolition of the death penalty. Unless the moral drawbacks of an activity or practice, which include the possible death of innocent bystanders, outweigh the moral advantages, which include the innocent lives that might be saved by it, the activity is warranted. Most human activities—construction, manufacturing, automobile and air traffic, sports, not to speak of wars and revolutions—cause the death of some innocent bystanders. Nevertheless, if the advantages sufficiently outweigh the disadvantages, human activities, including those of the penal system with all its punishments, are morally justified. Consider now the advantages in question.



III.

Deterrence

New evidence. Is there evidence for the usefulness of the death penalty in securing the life of the citizens? Researchers in the past found no statistical evidence for the effects sought: i.e., marginal deterrent effects, deterrent effects over and above those of alternative sanctions. However, in the last few years new and more sophisticated research has led, for instance, Professor Isaac Ehrlich to conclude that over the period 1933-1969, "an additional execution per year . . . may have resulted on the average in seven or eight fewer murders."[8] Other investigators have confirmed Ehrlich's tentative results. Not surprisingly, refutations have been attempted, and Professor Ehrlich has answered them. He has also published a new cross-sectional analysis of the data which confirms the conclusions of his original (time-series) study.[9] The matter will remain controversial for some time,[10] but two tentative conclusions can be drawn with some confidence by now. First, Ehrlich has shown that previous investigations, which did not find deterrent effects of the death penalty, suffer from fatal defects. Second, there is now some likelihood—much more than hitherto—of demonstrating marginal deterrent effects statistically.

The choice. Thus, with respect to deterrence, we must choose 1) to trade the certain shortening of the life of a convicted murderer for the survival of between seven and eight innocent victims whose future murder by others may be less likely if the convicted murderer is executed. Or 2) to trade the certain lengthening of the life of a convicted murderer for the possible loss of the lives of between seven and eight innocent victims, who may be more likely to be

8. "The Deterrent Effect of Capital Punishment: A Question of Life and Death." *American Economic Review*, June 1975. In the period studied capital punishment was already infrequent and uncertain. Its deterrent effect might be greater when more frequently imposed for capital crimes, so that a prospective offender would feel more certain of it.

9. See *Journal of Legal Studies*, January 1977; *Journal of Political Economy*, June 1977; and (this is the cross-sectional analysis) *American Economic Review*, June 1977.

10. *Per contra* see Brian Forst in *Minnesota Law Review*, May 1977, and *Deterrence and Incapacitation* (National Academy of Sciences, Washington, D.C., 1978). By now statistical analyses of the effects of the death penalty have become a veritable cottage industry. This has happened since Ehrlich found deterrent effects. No one much bothered when Thorsten Sellin found none. Still, it is too early for more than tentative conclusions. The two papers mentioned above are replied to, more than adequately in my view, in Isaac Ehrlich's "Fear of Deterrence," *Journal of Legal Studies*, June 1977.

murdered by others because of our failure to execute the convicted murderer.[11]

If we were certain that executions have a zero marginal effect, they could not be justified in deterrent terms. But even the pre-Ehrlich investigations never did demonstrate this. They merely found that an above-zero effect cannot be demonstrated statistically. While we do not know at present the degree of confidence with which we can assign an above-zero marginal deterrent effect to executions, we can be more confident than in the past. It seems morally indefensible to let convicted murderers survive at the probable —even at the merely possible—expense of the lives of innocent victims who might have been spared had the murderers been executed.

Non-deterrence as a sham argument. Most of the studies purporting to show that capital punishment produces no added deterrence, or that it cannot be shown to do so, were made by abolitionists, such as Professor Thorsten Sellin. They were used to show the futility of the death penalty. Relying on their intuition as well as on these studies, many abolitionists still are convinced that the death penalty is no more deterrent than life imprisonment. And they sincerely believe that the failure of capital punishment to produce additional deterrence argues for abolishing it. However, the more passionate and committed abolitionists use the asserted ineffectiveness of the death penalty as a deterrent as a sham argument—just as they use alleged capriciousness and maldistribution in application. They use the argument for debating purposes—but actually would abolish the death penalty even if it were an effective deterrent, just as they would abolish the death penalty if it were neither discriminatorily nor otherwise maldistributed.

PROFESSORS CHARLES BLACK (Yale Law School) and Hugo Adam Bedau (Tufts, Philosophy) are both well known for their public commitment to abolition of the death penalty, attested to by numerous writings. At a symposium held on October 15, 1977 at the Arizona State University at Tempe, Arizona, they were asked to entertain the hypothesis —whether or not contrary to fact—that the death penalty is strongly deterrent over and above alternative penalties: Would they favor abolition in the face of conclusive proof of a strong deterrent effect over and above that of alternative penalties? Both gentlemen answered affirmatively. They were asked whether they would still abolish the death penalty if they knew that abolition (and replacement by life imprisonment) would increase the homicide rate by 10 per cent, 20 per cent, 50 per cent, 100 per cent, or 1,000 per cent. Both gentlemen continued to answer affirmatively.

I am forced to conclude that Professors Black and Bedau think the lives of convicted murderers (however small their number) are more worth preserving than the lives of an indefinite number of innocent victims (however great their number). Or, the principle of abolition is more important to them than the lives of any number of innocent murder victims who would be spared if convicted murderers were executed.

I have had occasion subsequently to ask former Attorney General Ramsey Clark the same questions; he answered as Professors Black and Bedau did, stressing that nothing could persuade him to favor the death penalty—however deterrent it might be. (Mr. Clark has kindly permitted me to quote his view here.)

Now, Professors Black and Bedau and Mr. Clark do *not* believe that the death penalty adds deterrence. They do not believe therefore—regardless of the evidence—that abolition would cause an increase in the homicide rate. But the question they were asked, and which—after some dodging—they answered forthrightly, had nothing to do with the acceptance or rejection of the deterrent effect of the death penalty. It was a hypothetical question: If it were deterrent, would you still abolish the death penalty? Would you still abolish it if it were very deterrent, so that abolition would lead to a quantum jump in the murder rate? They answered affirmatively.

These totally committed abolitionists, then, are not interested in deterrence. They claim that the death penalty does not add to deterrence only as a sham argument. Actually, whether or not the death penalty deters is, to them, irrelevant. The intransigence of these committed humanitarians is puzzling as well as inhumane. Passionate ideological commitments have been known to have such effects. These otherwise kind and occasionally reasonable persons do not want to see murderers executed ever—however many innocent lives can be saved thereby. *Fiat justitia, pereat humanitas.*

Experiments? In principle one could experiment to test the deterrent effect of capital punishment. The most direct way would be to legislate the death penalty for certain kinds of murder if committed on weekdays, but never on Sunday. Or, on Monday, Wednesday, and Friday, and not on other days; on other days, life imprisonment would be the maximum sentence. (The days could be changed around every few years to avoid possible bias.) I am convinced there will be fewer murders on death-penalty than on life-imprisonment days. Unfortunately the experiment faces formidable obstacles.[12]

The burden of proof of usefulness. Let me add a common-sense remark. Our penal system rests on the proposition that more severe penalties are more deterrent than less severe penalties. We assume, rightly, I believe, that a $5 fine deters rape less than a $500 fine, and that the threat of five years in prison will deter more than either fine.[13] This as-

11. I thought that prudence as well as morality commanded us to choose the first alternative even when I believed that the degree of probability and the extent of deterrent effects might remain unknown. (See my "On Deterrence and the Death Penalty," *Journal of Criminal Law, Criminology, and Police Science*, June 1969.) That probability is more likely to become known now and to be greater than was apparent a few years ago.

12. Though it would isolate deterrent effects of the punishment from incapacitating effects, and also from the effect of Durkheimian "normative validation" when it does not depend on threats. Still, it is not acceptable to our sense of justice that people guilty of the same crime would deliberately get different punishments and that the difference would be made to depend deliberately on a factor irrelevant to the nature of the crime or of the criminal.

13. As indicated before, demonstrations are not available for the exact addition to deterrence of each added degree of severity in various circumstances, and with respect to various acts. We have coasted so far on a sea of plausible assumptions. (It is not contended, of course, that the degree of severity alone determines deterrent effects. Other factors may reinforce or offset the effect of severity, be it on the motivational [incentive] side, or as added costs and risks.)

sumption of the penal system rests on the common experience that, once aware of them, people learn to avoid natural dangers the more likely these are to be injurious and the more severe the likely injuries. Else the survival of the human race would be hard to explain. People endowed with ordinary common sense (a class that includes a modest but significant number of sociologists) have found no reason why behavior with respect to legal dangers should differ from behavior with respect to natural dangers. Indeed, it doesn't. Hence, all legal systems proportion threatened penalties to the gravity of crimes, both to do justice and to achieve deterrence in proportion to that gravity.

But if, *ceteris paribus*, the more severe the penalty the greater the deterrent effect, then the most severe available penalty—the death penalty—would have the greatest deterrent effect. Arguments to the contrary assume either that capital crimes never are deterrable (sometimes merely because not all capital crimes have been deterred), or that, beyond life imprisonment, the deterrent effect of added severity is necessarily zero. Perhaps. But the burden of proof must be borne by those who presume to have located the point of zero marginal returns before the death penalty.

The threat of death needed in special circumstances. Another common-sense observation. Without the death penalty, we necessarily confer immunity on just those persons most likely to be in need of deterrent threats: thus, prisoners serving life sentences can kill fellow prisoners or guards with impunity. Prison wardens are unlikely to be able to prevent violence in prisons as long as they give humane treatment to inmates and have no serious threats of additional punishment available for the murderers among them who are already serving life sentences. I cannot see the moral or utilitarian reasons for giving permanent immunity to homicidal life prisoners, thereby endangering the other prisoners and the guards, in effect preferring the life prisoners to their victims who *could* be punished if they murdered.

Outside prison an offender who expects a life sentence for his offense may murder his victim, or witnesses, or the arresting officer, to improve his chances of escaping. He could not be threatened with an additional penalty for his additional crime—an open invitation. Only the death penalty could deter in such cases.[14] If there is but a possibility that it will, we should retain it. But I believe there is a *probability* that the threat of the death penalty will deter.

Reserved for the worst crimes. However, effective deterrence requires that the threat of the ultimate penalty be reserved for the worst crime from which the offender may be deterred by that threat. Hence, the extreme punishment should not be prescribed when the offender, because already threatened by it, might feel he can add further crimes with impunity. Thus, rape, or kidnapping, should not incur the death penalty, while killing the victim of either crime should.[15] (The death penalty for rape may actually function as an incentive to murder the victim/witness.) This may not stop an Eichmann after his first murder; but it will stop most people before. To be sure, an offender not deterred from murdering one victim by the threat of execution is unlikely to be deterred from additional murders by further threats. The range of effective punishments is not infinite; on the contrary, it is necessarily more restricted than the range of possible crimes. Some offenders cannot be deterred by any threat. But most people can be; and most people respond to the size of the threat addressed to them. Since death is the ultimate penalty—the greatest threat available—it must be reserved for the ultimate crime even though it cannot always prevent it.

14. Particularly since he, unlike the person already in custody, may have much to gain from his additional crime (see Footnote 18).

15. The Supreme Court has decided that capital punishment for rape (at least of adults) is "cruel and unusual" (*Coker* v. *Georgia*, 1977). For the reasons stated in the text, I welcome the decision—but not the justification given by the Supreme Court. The penalty may indeed be as excessive as the court feels it is, but not in the constitutional sense of being irrationally or extravagantly so, and thus contrary to the Eighth Amendment. The seriousness of the crime of rape and the appropriateness of the death penalty for it are matters for political rather than judicial institutions to decide. I should vote against the death penalty for rape—and not only for the reasons stated in the text above; but the Court should have left the matter to the vote of the citizens.

The charge of racially discriminatory application was most often justified when the penalty was inflicted for rape. Yet I doubt that the charge will be dropped, or that the agitation against the death penalty will stop, once it is no longer inflicted for rape. Discrimination never was more than a pretext used by abolitionists.

16. There is a good argument here against unnecessary public displays of violence. (See my "What to Do about TV Violence," *The Alternative*, August/September 1976).

IV.

Some Popular Arguments

Consider now some popular arguments against capital punishment.

Barbarization. According to Beccaria, with the death penalty the "laws which punish homicide . . . themselves commit it," thus giving "an example of barbarity." Those who speak of "legalized murder" use an oxymoronic phrase to echo this allegation. However, punishments—fines, incarcerations, or executions—although often physically identical to the crimes punished, are neither crimes, nor their moral equivalent. The difference between crimes and lawful acts, including punishments, is not physical, but legal: crimes differ from other acts by being unlawful. Driving a stolen car is a crime, though not physically distinguishable from driving a car lawfully owned. Unlawful imprisonment and kidnapping need not differ physically from the lawful arrest and incarceration used to punish unlawful imprisonment and kidnapping. Finally, whether a lawful punishment gives an "example of barbarity" depends on how the moral difference between crime and punishment is perceived. To suggest that its physical quality, *ipso facto*, morally disqualifies the punishment is to assume what is to be shown.

It is quite possible that all displays of violence, criminal or punitive, influence people to engage in unlawful imitations. This seems one good reason not to have public executions. But it does not argue against executions. Objections to displaying on TV the process of violently subduing a resistant offender do not argue against actually subduing him.[16] Arguments against the public display of vivisections,

or of the effects of painful medications, do not argue against either. Arguments against the public display of sexual activity do, not argue against sexual activity. Arguments against public executions, then, do not argue against executions.[17] The deterrent effect of punishments depends on their being known. But it does not depend on punishments' being carried out publicly. The threat of imprisonment deters, but incarcerated persons are not on public display.

Crimes of passion. Abolitionists often maintain that most capital crimes are "acts of passion" which a) could not be restrained by the threat of the death penalty, and b) do not deserve it morally even if other crimes might. It is not clear to me why a crime motivated by, say, sexual passion is morally less deserving of punishment than one motivated by passion for money. Is the sexual passion morally more respectable than others? or more gripping? or just more popular? Generally, is violence in personal conflicts morally more excusable than violence among people who do not know each other? A precarious case might be made for such a view, but I shall not attempt to make it.

Perhaps it is true, however, that many murders are irrational "acts of passion" which cannot be deterred by the threat of the death penalty. Either for this reason or because "crimes of passion" are thought less blameworthy than other homicides, most "crimes of passion" are not punishable by death now.[18]

But if most murders are irrational acts, it would therefore seem that the traditional threat of the death penalty has succeeded in deterring most rational people, or most people when rational, from committing murder, and that the fear of the penalty continues to deter all but those who are so irrational that they cannot be deterred by any threat. Hardly a reason for abolishing the death penalty. Indeed, that capital crimes are committed mostly by irrational persons and only by some rational ones would suggest that more rational persons might commit these crimes if the penalty were lower. This hardly argues against capital punishment. Else we would have to abolish penalties whenever they succeed in deterring people. Yet abolitionists urge that capital punishment be abolished because capital crimes are most often committed by the irrational—as though deterring the rational is not quite enough.

Samuel Johnson. Finally, some observations on an anecdote reported by Boswell and repeated ever since *ad nauseam*. Dr. Johnson found pickpockets active in a crowd assembled to see one of their number hanged. He concluded that executions do not deter. His conclusion does not follow from his observation.

1. Since the penalty Johnson witnessed was what pickpockets had expected all along, they had no reason to reduce their activities. Deterrence is expected to increase (i.e., crime is expected to decrease) only when penalties do. It is unreasonable to expect people who entered a criminal occupation—e.g., that of pickpocket—fully aware of the risks, to be subsequently deterred by those risks if they are not increased. They will not be deterred unless the penalty becomes more severe, or is inflicted more often.

2. At most, a public execution could have had the deterrent effect on pickpockets expected by Dr. Johnson because of its visibility. But visibility may also have had a contrary effect: the spectacle of execution was probably more fascinating to the crowd than other spectacles; it distracted attention from the activities of pickpockets and thereby increased their opportunities more than other spectacles would. Hence, an execution crowd might have been more inviting to pickpockets than other crowds. (As mentioned before, deterrence depends on knowledge, but does not require visibility.)

3. Even when the penalty is greatly increased, let alone when it is unchanged, the deterrent effect of penalties is usually slight with respect to those already engaged in criminal activities.[19] Deterrence is effective in the main by restraining people not as yet committed to a criminal occupation from entering it. This point bears some expansion.

THE RISK OF PENALTY is the cost of crime offenders expect. When this cost (the penalty multiplied by the risk of suffering it) is high enough, relative to the benefit the crime is expected to yield, the cost will deter a considerable number of people who would have entered a criminal occupation had the cost been lower. When the net benefit is very low, only those who have no other opportunities at all, or are irrationally attracted to it, will want to engage in an illegal activity such as picking pockets. In this respect the effects of the cost of crime are not different from the effects of the cost of automobiles or movie tickets, or from the effects of the cost (effort, risks, and other disadvantages) of any activity relative to its benefits. When (comparative) net benefits decrease because of cost increases, so does the flow of new entrants. But those already in the occupation usually continue. *Habits, law-abiding or criminal, are less influenced by costs than habit formation is.* That is as true for the risk of penalties as for any other cost.

Most deterrence studies disregard the fact that the major effect of the legal threat system is on habit formation rather than on habits formed. It is a long- rather than a short-run effect. By measuring only the short-run effects (on habits already formed) rather than the far more important long-run (habit-forming) effects of the threat system, such studies underrate the effectiveness of the deterrence.

4. Finally, Dr. Johnson did not actually address the question of the deterrent effect of execution in any respect whatever. To do so he would have had to compare the number of pocket-picking episodes in the crowd assembled to witness the execution with the number of such episodes in a similar crowd assembled for some other purpose. He did not do so, probably because he thought that a deterrent effect occurs only if the crime is altogether eliminated.

17. It may be noted that in Beccaria's time executions were regarded as public entertainments. *Tempora mutantur et nos mutamur in illis.*

18. I have reservations on both these counts, being convinced that many crimes among relatives, friends, and associates are as blameworthy and as deterrable as crimes among strangers. Thus, major heroin dealers in New York are threatened with life imprisonment. In the absence of the death penalty they find it advantageous to have witnesses killed. Such murders surely are not acts of passion in the classical sense, though they occur among associates. They are, in practice, encouraged by the present penal law in New York.

19. The high degree of uncertainty and arbitrariness of penalization in Johnson's time may also have weakened deterrent effects. Witnessing an execution cannot correct this defect.

That is a common misunderstanding. But crime can only be reduced, not eliminated. However harsh the penalties there are always non-deterrables. Many, perhaps most, people can be deterred, but never all.

V.

Final Moral Considerations

The motive of revenge. One objection to capital punishment is that it gratifies the desire for revenge, regarded as morally unworthy. The Bible has the Lord declare: "Vengeance is mine" (Romans 12:19). He thus legitimized vengeance and reserved it to Himself, probably because it would otherwise be disruptive. But He did not deprecate the desire for vengeance.

Indeed Romans 12:19 barely precedes Romans 13:4, which tells us that the ruler "beareth not the sword in vain, for he is the minister of God, a revenger to execute wrath upon him that doeth evil." It is not unreasonable to interpret Romans 12:19 to suggest that revenge is to be delegated by the injured to the ruler, "the minister of God" who is "to execute wrath." The Bible also enjoins, "the murderer shall surely be put to death" (Numbers 35:16-18), recognizing that the death penalty can be warranted —whatever the motive. Religious tradition certainly suggests no less. However, since religion expects justice and vengeance in the world to come, the faithful may dispense with either in this world, and with any particular penalties —though they seldom have. But a secular state must do justice here and now—it cannot assume that another power, elsewhere, will do justice where its courts did not.

The motives for the death penalty may indeed include vengeance. Vengeance is a compensatory and psychologically reparatory satisfaction for an injured party, group, or society. I do not see wherein it is morally blameworthy. When regulated and controlled by law, vengeance is also socially useful: legal vengeance solidifies social solidarity against lawbreakers and probably is the only alternative to the disruptive private revenge of those who feel harmed. Abolitionists want to promise murderers that what they did to their victims will never be done to them. That promise strikes most people as psychologically incongruous. It is.

At any rate, vengeance is irrelevant to the function of the death penalty. It must be justified independently, by its purpose, whatever the motive. An action, a rule, or a penalty cannot be justified or discredited by the motive for it. No rule should be discarded or regarded as morally wrong (or right) because of the motive of those who support it. Actions, rules, or penalties are justified not by the motives of supporters but by their purpose and by their effectiveness in achieving it without excessively impairing other objectives.[20] Capital punishment is warranted if it achieves its purpose—doing justice and deterring crime—regardless of whether or not it is motivated by vengeful feelings.

20. Different motives (the reason why something is done) may generate the same action (what is done), purpose, or intent, just as the same motive may lead to different actions.

Characteristics. Before turning to its purely moral aspects, we must examine some specific characteristics of capital punishment. It is feared above all punishments because 1) it is not merely irreversible, as most other penalties are, but also irrevocable; 2) it hastens an event which, unlike pain, deprivation, or injury, is unique in every life and never has been reported on by anyone. Death is an experience that cannot actually be experienced and that ends all experience. Actually, being dead is no different from not being born—a (non)experience we all had before being born. But death is not so perceived. The process of dying, a quite different matter, is confused with it. In turn, dying is feared mainly because death is anticipated—even though death is feared because confused with dying. At any rate, the fear of death is universal and is often attached to the penalty that hastens it—as though without that penalty death would not come. 3) However, the penalty is feared for another reason as well. When death is imposed as a deliberate punishment by one's fellow men, it signifies a complete severing of human solidarity. The convict is explicitly and dramatically rejected by his fellow humans, found unworthy of their society, of sharing life with them. The rejection exacerbates the natural separation anxiety of those who expect imminent death, the fear of final annihilation. Inchoate as these characteristics are in most minds, the specific deterrent effect of executions depends on them, and the moral justification of the death penalty, above and beyond the deterrent effect, does no less.

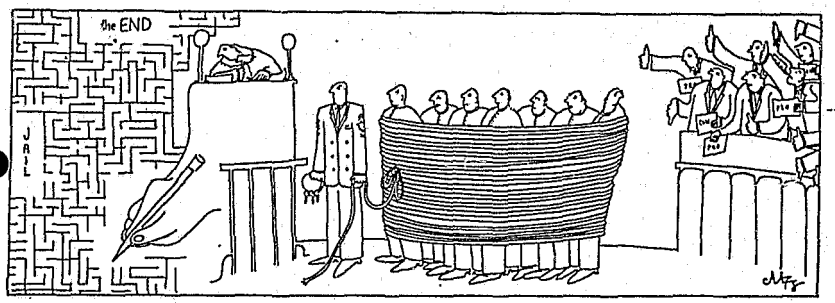
Methodological aside. Hitherto I have relied on logic and fact. Without relinquishing either, I must appeal to plausibility as well, as I turn to questions of morality unalloyed by other issues. For, whatever ancillary service facts and logic can render, what one is persuaded to accept as morally right or wrong depends on what appears to be plausible in the end. Outside the realm of morals one relies on plausibility only in the beginning.

The value of life. If there is nothing for the sake of which one may be put to death, can there ever be anything worth risking one's life for? If there is nothing worth dying for, is there any moral value worth living for? Is a life that cannot be transcended by—and given up, or taken, for—anything beyond itself more valuable than one that can be transcended? Can it be that existence, life itself, is the highest moral value, never to be given up, or taken, for the sake of anything? And, psychologically, does a social value system in which life itself, however it is lived, becomes the highest of goods enhance the value of human life or cheapen it? I shall content myself here with raising these questions.[21]

Homo homini res sacra. "The life of each man should be sacred to each other man," the ancients tell us. They unflinchingly executed murderers.[22] They realized it is not enough to proclaim the sacredness and inviolability of human life. It must be secured as well, by threatening with the loss of their own life those who violate what has been

21. Insofar as these questions are psychological, empirical evidence would not be irrelevant. But it is likely to be evaluated in terms depending on moral views.

22. Not always. On the disastrous consequences of periodic failure to do so, Sir Henry Maine waxes eloquent with sorrow in his *Ancient Law* (pp. 408-9).



proclaimed as inviolable—the right of innocents to live. Else the inviolability of human life is neither credibly proclaimed nor actually protected. No society can profess that the lives of its members are secure if those who did not allow innocent others to continue living are themselves allowed to continue living—at the expense of the community. To punish a murderer by incarcerating him as one does a pickpocket cannot but cheapen human life. Murder differs in quality from other crimes and deserves, therefore, a punishment that differs in quality from other punishments. There is a discontinuity. It should be underlined, not blurred.

If it were shown that no punishment is more deterrent than a trivial fine, capital punishment for murder would remain just, even if not useful. For murder is not a trifling offense. Punishment must be proportioned to the gravity of the crime, if only to denounce it and to vindicate the importance of the norm violated. Wherefore all penal systems proportion punishments to crimes. The worse the crime the higher the penalty deserved. Why not then the highest penalty—death—for the worst crime—wanton murder? Those rejecting the death penalty have the burden of showing that no crime ever deserves capital punishment[23] —a burden which they have not so far been willing to bear.

Abolitionists insist that we all have an imprescriptible right to live to our natural term; if the innocent victim had a right to live, so does the murderer. That takes egalitarianism too far for my taste. The crime sets victim and murderer apart; if the victim did, the murderer does not deserve to live. If innocents are to be secure in their lives murderers cannot be. The thought that murderers are to be given as much right to live as their victims oppresses me. So does the thought that a Stalin, a Hitler, an Idi Amin should have as much right to live as their victims did.

Failure of nerve. Never to execute a wrongdoer, regardless of how depraved his acts, is to proclaim that no act can be so irredeemably vicious as to deserve death—that no human being can be wicked enough to be deprived of life. Who actually can believe that? I find it easier to believe that those who affect such a view suffer from a failure of nerve. They do not think themselves—and therefore anyone else—competent to decide questions of life and death. Aware of human frailty, they shudder at the gravity of the decision and refuse to make it. The irrevocability of a verdict of death is contrary to the modern spirit that likes to pretend that nothing ever is definitive, that everything is open-ended, that doubts must always be entertained and revisions must always remain possible. Such an attitude may be helpful to the reflections of inquiring philosophers and scientists; but it is not proper for courts. They must make final judgments beyond a reasonable doubt. They must decide. They can evade decisions on life and death only by giving up their paramount duties: to do justice, to secure the lives of the citizens, and to vindicate the norms society holds inviolable.

ONE MAY OBJECT that the death penalty either cannot actually achieve the vindication of violated norms, or is not needed for it. If so, failure to inflict death on the criminal does not belittle the crime, or imply that the life of the criminal is of greater importance than the moral value he violated or the harm he did to his victim. But it is not so. In all societies the degree of social disapproval of wicked acts is expressed in the degree of punishment threatened.[24] Thus, punishments both proclaim and enforce social values according to the importance given to them. There is no other way for society to affirm its values. There is no other effective way of denouncing socially disapproved acts. To refuse to punish any crime with death is to suggest that the negative value of a crime can never exceed the positive value of the life of the person who committed it. I find that proposition quite implausible. □

23. One may argue that some crimes deserve more than execution and that the above reasoning would justify punitive torture as well. Perhaps. But torture, unlike death, is generally rejected. Therefore penalties have been reduced to a few kinds—fines, confinement, and execution. The issue is academic because, unlike the death penalty, torture has become repulsive to us. (Some reasons for this public revulsion are listed in Chapter 17 of my *Punishing Criminals*, Basic Books, 1975.) As was noted above (p. 404) the range of punishments is bound to be more limited than the range of crimes. We do not accept some punishments, however much deserved they may be.

24. Social approval is usually not unanimous, and the system of rewards reflects it less.

TESTIMONY OF ERNEST VAN DEN HAAG, VISITING PROFESSOR OF CRIMINAL JUSTICE, STATE UNIVERSITY OF NEW YORK, ALBANY

Professor VAN DEN HAAG. With your permission, I would like to make a few points on the bill actually before you, H.R. 13360, and then make a few general comments on the death penalty.

Mr. MANN. Very good, sir.

Professor VAN DEN HAAG. Rule 65 (1) on page 7, line 15 of the bill before you, proposes as a mitigating circumstance "the youthfulness of the offender." I would like to urge you to eliminate this clause if the youthfulness of the offender in the opinion of the court diminishes, and I quote "the defendant's capacity to appreciate the wrongfulness of his conduct," then, 65 (2) fully takes care of it.

If, on the other hand, the youthfulness of the offender does not diminish his capacity to appreciate the wrongfulness of his act, then I do not think it is relevant at all. Therefore, I urge you to eliminate this mitigating circumstance.

I am certainly in favor of regarding it as mitigating if a defendant in the opinion of the court was not able, or under circumstances did not fully appreciate the wrongfulness of his act, but that seems to me quite independent of his age. Young people are just as capable in my opinion, just as they are just as capable to murder, of appreciating the wrongfulness of murder. And if not, if in the opinion of their counsel, they are not, their counsel certainly will make that present, and the court would certainly be able to appreciate the counsel's argument.

Mr. WIGGINS. If you will permit me, Mr. Chairman, to interrupt on the relevancy of youth, your argument goes it is irrelevant with respect to mental capacity to appreciate the wrongfulness of the act, and I think the case certainly can be made.

Do you believe that it is irrelevant on the question of the potential for rehabilitation?

Professor VAN DEN HAAG. There is very little evidence for rehabilitation with respect to the kind of murder that is being contemplated by the present bill, which does not contemplate the death penalty for an act of passion. You may say generally there is no evidence for rehabilitation in general for most people.

Let me put it this way: People go out of prison the way they came in. Probably not worse and probably not better. What statistical evidence we have is that no program of rehabilitation of any kind undertaken either in the United States, or for that matter, in such countries as Sweden has managed to influence the rate of rehabilitation at all.

Now, you perhaps imply that young people are more easily rehabilitated. There is no evidence of that, I am sorry to say.

Mr. WIGGINS. Well, if that is true, then it is true across the board with respect to all crimes.

Professor VAN DEN HAAG. I agree with you.

Mr. WIGGINS. And I would like to think that, and I do not have the impirical evidence which you do not have either, but I would like to think that if we forget for a moment about the death case and are simply talking about crime in general, that there is time with respect to a particularly youthful offender for society to work on that person and perhaps to change that person into noncriminal pursuits.

And I would like to think that there is some evidence of a great number in our society who have committed acts in their youth, yet have grown to become useful members of society. In fact, I suppose if you search your own history, you might find some excesses in your youth. And it wouldn't be hard for anybody in this audience to do that.

You see, I think what I am trying to say is there may be some relevance to it for some consideration. And your argument is it is an irrelevant factor.

Professor VAN DEN HAAG. Well, let me point out that if in some ways youthfulness is regarded as relevant in dealing with the appreciation of the wrongfulness of the act, that would be retained if my view is accepted. I would like to think as you do, Mr. Wiggins, but the evidence that we have does simply not bear out that our effort of rehabilitation are successful.

Age, however, if I may add, does play a role. Generally speaking, we find people after the age of 40 whether exposed to rehabilitation efforts or not, are likely not to commit violent crimes.

The question really before you in this case is a philosophical question—namely, do you wish to consider in punishment what a man will do in the future or do you think that the punishment is imposed for what he has done in the past?

Generally speaking, the criminal law does not consider what a man will do in the future, else there would be no point in ascertaining his guilt. All we would need is to ask a psychiatrist to predict the future behavior of the person, whether he has committed a crime or not.

We do punish people not for what they will do in the future; we punish them for what they have done in the past.

Mr. WIGGINS. I think it is an error for anyone to settle upon one basis of punishment for crime. It is a mixed bag. In fact, there is no agreement among penologists and in society where we do all these things, but a feeling several facts bear upon it, one of which is the gravity of the offense; how we treat that person deals with some factors relative to capacity to rehabilitate.

We recognize that there is a degree of vengence involved. I think it is futile to attempt to settle upon one and then to say that the punishment has to fit that model. It is a mixed bag of consideration.

Professor VAN DEN HAAG. I cerainly agree with you, Mr. Wiggins. There are at least 2 major considerations. (1) retribution for what he has done in the past and (2) the effect of the size of punishment carried out on the deterrence of others.

I am not at all convinced of the relevance of rehabilitation for the very simple reason we have no evidence that it has worked anywhere.

Mr. WIGGINS. Well, I have interrupted, so I am going to ask two more questions. Then, we won't have to ask at the end.

Do you believe it is constitutionally permissible, given the present state of the law, to impose the death penalty in any case in which a death did not occur?

Professor VAN DEN HAAG. It is not altogether clear because, as you know, the Supreme Court has recently excluded the death penalty for rape of an adult. I do not know what it would say for rape of a child.

My own feeling, and it is a guess, certainly no better than yours, that the Court is very unlikely to regard as constitutional the death

penalty for any, but the gravest crimes. Rape apparently is not included in the Court's opinion.

And I doubt greatly that anything but some form of killing would be included.

Mr. WIGGINS. Well, I was thinking of two offenses when I asked that question because both of which are normally Federal death cases now.

We have a rape situation in the present Federal Code authorizing the penalty of death. And I doubt whether it would stand constitutional muster as drafted.

The other area, however, is treason in which death is not an inevitable consequence of treason.

And I just wonder if you would have a view as to whether we could impose the death penalty for treason.

Professor VAN DEN HAAG. I think in the case of treason, nobody knows what the Court will decide. I myself think there is no harm in trying to impose it. I would myself leave it to the Court to exclude it if the Court so feels.

As for rape, let me point out that I tend to agree with the conclusion of the Court, but let me point out that it is in my opinion irrational to impose the death penalty. To do so is to invite the rapist to kill his victim so as to, without additional cost to himself, remove a possible witness to his crime.

Mr. WIGGINS. That would be so if we had a mandatory penalty. But I will tell you that is——

Professor VAN DEN HAAG. Even if it is not mandatory, and it certainly cannot be under present circumstances, it seems to me that whenever the death penalty is imposed, it gives a temptation to the offender to commit an additional crime since no further penalty can be imposed.

So I would be very sparing. And on the whole, I would not wish to impose it for rape because I'd reserve it for rape murder. But treason is a very different matter.

Mr. WIGGINS. How about kidnaping when some sort of harm occurred to the victim?

Professor VAN DEN HAAG. Again, it seems to me if the purpose, and it should be the purpose, is to spare the victim, protect the possible victims, I wonder whether when you impose the death penalty for bodily harm during the kidnaping, you do not really tempt the kidnaper to kill the victim which would remove a witness and would not increase his penalty since you can't go beyond death.

So I would be very reluctant to do that.

Mr. WIGGINS. Do you think the conclusion one can draw with respect to kinds of offenses which death penalties would prompt the Supreme Court, suggesting to tolerate the death penalty only for the most extreme crimes, and it hasn't yet given us a list of those crimes, but it has said that rape is not on the list, at least when the victim is an adult?

Professor VAN DEN HAAG. Yes.

Mr. WIGGINS. And it is an open question with respect to——

Professor VAN DEN HAAG. It is an open question. My own guess is that the chances are that unless a person is killed, with the exception possibly of treason which has a long history of being regarded as a

very special sort of crime, the Court is likely to not regard the death penalty as constitutional.

I am here predicting; I am not agreeing with the reasoning of the Court. To my mind, this is a matter for the legislature to decide and not a matter for the Court to decide what is regarded by today's standard as cruel and unusual.

Today's standards are what Congressmen are there to interpret, and not courts. But anyway, we can't overrule the Supreme Court.

Mr. WIGGINS. All of this, of course, is relevant to our bill because the death penalty under the bill can only be imposed on the threshhold finding someone died. And we perhaps would be excluding, I hope not accidentally, but consciously treason from our list of punishable offenses by death if we were to enact without change the legislation before us.

Professor VAN DEN HAAG. I have not, I must say, made a sufficient study to find out from this bill whether treason would be excluded.

Mr. WIGGINS. Well, of course, it is probable to prove that death did occur, but the threshhold finding for the jury and panel under our bill is find beyond a reasonable doubt the defendant intended that the life of any person be taken. That is first.

And second, that any person did die as a direct result of that offense.

If you read those two necessary findings in the context of treason, you are faced with an impossible burden.

Professor VAN DEN HAAG. Yes, sir.

Mr. WIGGINS. Please proceed.

Professor VAN DEN HAAG. There is one other point on the bill before you that I would like to make. And that refers to page 11, line 8, to the bill. If I understand correctly, it proposes a mandatory appeal. And I must say I wonder why an appeal should not be left to the discretion of the defendant and his counsel.

If the defendant and his counsel believe, as the trial court did, that the penalty is just, why should there be an appeal? If they do not believe the penalty to be just, they will appeal indeed. Why then make the appeal mandatory? Yet if I understand the bill correctly, that is what you are proposing.

Let me now proceed, if I may, to a few general statements about the death penalty. The most important thing that I would suggest to keep in mind is the death penalty under the bill that you propose will affect only very few people.

One may wonder why go to such lengths when only so few people are affected? I think, however, that one should keep in mind that the symbolic value of the death penalty far exceeds the material value.

To have the death penalty, and to actually carry it out, today is to signal to the country as a whole and particularly to those tempted to commit crimes that we are serious, and we are serious in the protection of human life, that we do not regard the taking of the human life on the same level as picking someone's pocket, that we regard it as a horrendous crime, totally discontinuous with any other crime, and that we are willing to impose a horrendous penalty accordingly.

I think it is the symbolic value is one that is most important about the death penalty.

Now, I would like with your permission to make just a few points. Many people have questioned the morality and legitimacy of the death penalty, pointing out that it has, in the past at least, been used mainly against those who are poor or black that is with improper discrimination.

Statistics on that matter, in my opinion, are very controversial. But we will let that go for a moment. I want to make a more general argument.

If it were true that those who were mainly punished with the death penalty happened to be more often black and poor than other persons white perhaps and affluent, who were not punished with the death penalty, I do not think this is a very serious argument against the death penalty.

First, let me point out the statistics are usually based on the number of people under the death penalty. But a proper comparison compares whether people condemned to death when white are not executed, are imprisoned and when black are executed. The number generally speaking, of black and poor criminals is totally out of proportion to their number in the population.

And the reason for that is very simply, that in all societies, those who are most poor and in some cases most oppressed, are likely to commit the highest proportion of crimes. Generally speaking, when you are a millionaire, you can get what you want without committing at least violent crimes. Thus when you are poor, you are much more tempted to commit crimes.

So that sort of comparison doesn't make any sense. When you take more sensible comparison, then the argument maintains that some people are as guilty as those to be punished with death, but are somehow more favored, escape the death penalty.

This seems to me hardly sufficient for letting anyone else found guilty escape the penalty. On the contrary, that some guilty persons or groups eluded it argues for extending the death penalty to them.

Due process of law is meant to do justice—the equal protection of the law is meant to extent justice equally to all. I don't think the Constitution commands us to prefer equality to justice. When we clamor for equal justice for all, it is justice which is to be equalized and extended and which is not to be forsaken and replaced by equality. Justice requires punishing the guilty, as many of the guilty as possible, even if only some can be punished. No criminal justice system ever has succeeded in punishing all the guilty, courts are trying to find truth. But, in fact, they can only find evidence. And evidence, as you know, is always largely subject to accident. We cannot punish all the guilty. We can only punish those guilty that we can prove to be guilty.

And justice also consists of sparing the innocent. As many innocent as possible, even if all are not spared because justice certainly could make mistakes. It would surely be wrong to treat everybody with equal injustice in preference to meeting out justice at least to some.

Then, it seems to me justice cannot ever permit sparing some guilty persons or punishing some innocent ones for the sake of equality because others have been unjustly spared or unjustly punished.

Further, it seems to me that the argument from discrimination has not so much to do with the penalty, but merely with the way it is im-

posed or distributed. It is totally mistaken unless it is maintained those under the death penalty are innocent, but it is only that we maintain other guilty persons have escaped. Then, our effort should be to try to find these other guilty persons and subject them to the same penalty.

But the essential question which I think has been raised by previous witnesses and which I would like to briefly, at least, dwell upon is a moral question. Is the death penalty morally just? And is it useful?

If it is morally just, then discrimination is wholly irrelevant to that question for if it were distributed with total equality, but were morally unjust, it would remain morally unjust regardless of the lack of discrimination.

So the question is one of moral justice. There are two aspects to this.

One is a utilitarian one—namely, does it help us protect other victims by deterrence?

And the other is a moral one. Let me briefly dwell on both.

The deterrence question is an interesting one because it is usually raised by those who oppose the death penalty, they maintain that it has not been shown to be deterrent. In my opinion, it has been shown to be in the last 10 years. And those who feel it has not been shown have simply not kept up with recent scientific investigations.

But I have had the privilege of being present and participating in a symposium with one of your future witnesses, Professor Bedau, and also with Prof. Charles Black, both of whom wish to abolish the death penalty. They were asked in the symposium: Suppose it were shown—not that you have to grant that it has been shown, but suppose that it were shown—that the death penalty is deterrent. And suppose we show, for instance, that for each executed murderer 10 victims are spared because of deterrence. Would you favor imposing the death penalty?

The answer was a resounding no.

We, in questioning, increased the number and said, "Suppose by executing, we could diminish the murder rate by 50 percent or by non-executing, we would multiply it by 100 percent," and so on. And the answer was always no.

However deterrent the death penalty would be, we would never favor it.

That seems to me to indicate that those who favor the abolition of the death penalty, in answering this hypothetical question, indicated that they are more interested in sparing the life of a single murderer than they are interested in sparing the life of any number of future victims.

The morality of that choice quite escapes me. But your witnesses—you no doubt will have a chance to as them, and they will tell you why they think as they do.

Generally speaking, though, let me point out that in our criminal justice system, we impose penalties without ever asking whether the deterrent effect of these penalties can be shown. You sentence a pick-pocket to 2 years in jail or you sentence someone committing a more grave crime to 4 years in jail. As far as I know, nobody has ever shown that 2 years in jail deters and that 4 years in jail deters double as much or more of anything of the sort.

Basically, we impose penalties in view of the gravity of the crime. Partly we do so out of ignorance, because we know very little about

deterrence. We do know, however, that if we investigate our own actions, yours as well as mine, we are generally speaking deterred by the expectation, or the threat of danger.

You will not—at least you have not so far—jump from the 60th floor of a skyscraper. You will normally take the elevator. You will not go out of the window, although going out of the window would be faster.

The reason, it seems to me, that you don't go out of the window is that you realize there is some danger to your bodily integrity if you do that. That deters you from going out of the window. And generally speaking, I think it would be very hard to understand how the human race has survived if we don't admit that based on experience and sometimes indirect experience, we tend to avoid things that are dangerous to us. We tend to avoid them in relation, in proportion, to the likelihood of the danger and to the gravity, the seriousness of the danger.

But if that is true for people in general, why should it not be true for those people who attempt to commit crimes? Why should the artificial danger provided by the law—namely, if you do such and such, this will happen to you—not influence people just as the natural danger of the law of gravity influences you and me when we do not jump out of the window on the 60th floor?

It does. The more serious the punishment, the more deterrent the effect.

Now, deterrence is as has been pointed out one consideration only. Clearly, we could avoid all parking violations if we were to impose a very high penalty, not even execution, but merely $5,000, say, for any parking violation. We don't do that, although it would be very effective because we regard it as unjust.

And by justice, we mean that the penalty must correspond to the perceived gravity of the crime and not just be effective in terms of deterrence.

But if that is what influences you not to impose a very high penalty on traffic violations, then that is also what should influence you to impose the highest possible penalty on murder. If the penalties are to be proportioned to the gravity of the crime, then certainly the death penalty is deserved for murder.

There is no crime I can imagine that is worse, and there is no punishment I can imagine that is more severe.

And let me point out it is in the nature of the death penalty, that it does have an extra deterrent effect that no other penalty has. For all other penalties are revokable. In our system, they tend to be revoked. Only the death penalty cannot be.

But even if they were not, where there is life, there is hope. No one as long as he lives will not in some way hope if he is in prison to be liberated. As a matter of fact, I saw some time ago and perhaps some of you did, too, a program on television called 60 Minutes, in which Mr. Wallace and his associates interviewed a number of life prisoners in a Federal prison, special high security Federal prison. The name now escapes me.

Each of them, each of the prisoners interviewed, told Mr. Wallace: "you will not find me here next year." Each of them in effect said, "Whatever my sentence—and they were all sentenced to life—without parole, I will find a way of escaping."

Where there is life, there is hope. All of them, by the way, are still there. None of them did manage to escape.

But I think the deterrent effect of a penalty is very largely dependent on how it is perceived. We all know that death is the end. None of us regards life imprisonment as the end.

Let me turn briefly to some final moral considerations. It is often felt that the death penalty is somehow based on a motive of revenge. I want to make two points on that.

First, I don't know whether that is true, but, second, I have no objection to revenge. I think revenge has a very bad reputation, partly due to the misreading of Biblical passages, particularly in Romans 12, verse 19, the Lord is quoted as saying, "Vengeance is mine."

Let me point out the Lord doesn't say vengeance is bad. In fact, if he thought it was bad, he wouldn't have said it is mine. He said merely, it is mine.

And if you read just a little further in this, you will find again in Romans, 3 verses after that: the Ruler "beareth not the sword in vain; for he is the minister of God, a revenger to execute wrath upon him that doeth evil."

I am quoting from the New Testament to make it quite clear that in my opinion, the idea that the New Testament is altogether opposed to vengeance, is wrong. It is opposed to personal vengeance. And all legal systems are opposed to personal vengeance for reasons that I think I need not detail to you. But it is not opposed to retribution.

At any rate, let me point out even if the motives for the death penalty were to include vengance, that would not be very relevant. The death penalty must be justified not by what motivates one to ask for it, but by the effects one expects from it.

Here, it seems to me, if capital punishment achieves its purpose, doing justice and deterring crime, it matters not whether people advocate it because they are in favor of vengance or whether they advocate it despite their opposition to vengeance.

It seems to me that if there is nothing for the sake of which one may be put to death, there also can be nothing worth living for. There can be hardly any moral value worth living for. Is a life that cannot be transcended, given up, or taken, for anything more valuable than life itself, is such a life worth living?

Can it be that existence, life itself, is the highest moral value never to be given up, or taken, for the sake of anything? The Romans said that the life of each man should be sacred to each other man. But, of course, they meant by that precisely that he who violates that norm of sacredness will suffer the loss of his own life. And the Romans did impose the death penalty.

And for that matter, the Christian tradition has imposed it until very recent times. And the death penalty has been retained in many Christian countries.

Abolitionists insist that we have an imprescriptible right to live to our natural term; that if the innocent victim had a right to live, so does the murderer. That does take egalitarianism farther than I would like. The crime, murder, itself sets victim and murderer apart.

If the victim did, then it seems to me the murderer does not deserve to live. If innocents are to be secure in their lives, then murderers

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cannot be. And to tell murderers—as we would if we did not have the death penalty—that what they did to their victims never can be done to them is, in my opinion, a way of inviting murder.

I shall be delighted to answer whatever questions you have.

Mr. MANN. Thank you very much.

Mr. Wiggins?

Mr. WIGGINS. Nothing.

Mr. MANN. Mr. Evans?

Mr. EVANS. No questions.

Mr. MANN. Well, you have given us a lot of food for thought. Thank you. We appreciate your testimony.

Our next witness is Prof. Hugo Adam Bedau, the Austin Fletcher professor of philosophy at Tufts University. Professor Bedau has written and spoken widely on the issue of capital punishment.

He has submitted a prepared statement and without objection, it will be made a part of our record.

Welcome, Professor Bedau. You may proceed as you see fit.

[The complete statement of Professor Bedau follows:]

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STATEMENT OF HUGO ADAM BEDAU, AUSTIN FLETCHER PROFESSOR OF PHILOSOPHY, TUFTS UNIVERSITY, MEDFORD, MASS.

Although the question of the death penalty under federal law raises many important legal, moral, and empirical questions, my remarks here are confined to only three of these questions. One is: What role should retribution play in our thinking about capital punishment? The second is: How strong is the evidence that the death penalty is administered with racially discriminatory impact? Finally, I shall consider the question: What is the recidivism record of those persons who might have been sentenced to death and executed but who were, instead, imprisoned and subsequently released?

I. RETRIBUTION

Some critics of the death penalty denounce it on the very ground on which others defend it: its retributive character. Some think that since the death penalty is retributive, and retribution is an illegitimate purpose for punishment, therefore the death penalty cannot be justified. Others believe that retribution is the chief function of punishment, and that a refusal to punish murderers and other heinous criminals with death is a failure to provide adequate retribution. This controversy is worth resolving, if for no other reason, than that both the Solicitor General[1] and the Supreme Court[2] have appealed to retribution in their recent arguments against the unconstitutionality of capital punishment.

My own view—and I think it is the dominant one today among philosophers and other students of the theory of punishment—is that justified punishments have some retributive features, but that the death penalty is not the only way to achieve them.[3]

There seem to be several retributive features of punishment, all of which are built around the idea that a proper punishment "pays back" to the offender something like what he inflicted on the victim: (1) crime must be punished because it is unfair to the law abiding and to the innocent victim not to do so (the principle of fairness); (2) punishment must be an infliction of hardship, suffering, or deprivation on the offender (the principle of deprivation); (3) the severity of punishments must be proportional to the gravity of the offense (the principle of proportionality); and (4) only a severe penalty for a grave crime can adequately express society's abhorrence at the offense (the principle of denunciation).

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[1] Brief for the United States as Amicus Curiae, *Fowler* v. *North Carolina*, O.T. 1974, No. 73–7031, at 41 note 15; also Brief for the United States as Amicus Curiae, *Gregg* v. *Georgia*, et al., O.T. 1975, No. 74–6257, etc., at 47 note 25.

[2] *Gregg* v. *Georgia*, 428 U.S. 153, 183–184 (1976).

[3] See Hart, *Punishment and Responsibility* (1967); *The Philosophy of Punishment* (ed. Action, 1969); Honderich, *Punishment: The Supposed Justifications* (1969); *Justice and Punishment* (ed. Cederblom and Bilzek, 1977); Richards, *The Moral Criticism of Law* (1977).

Opponents and defenders of the death penalty need not dispute any of these principles. Obviously, both sides agree on principle (1); only those who reject punishment altogether would disagree. Likewise with principles (2) and (4); long-term imprisonment (with or without eventual release) is certainly a deprivation and a severe one. A defense of the death penalty on retributive grounds thus very quickly reduces to the view that principle (3), the principle of proportionality, requires capital punishment. Let us look at this claim more closely.

Traditionally, the principle of proportionality has been understood in terms of the doctrine of retaliation in kind, *lex talionis*. However, on this interpretation, as it has often been pointed out, (a) no crime other than criminal homicide can justifiably be punished by death on retributive grounds, and (b) all inexcusable and unjustifiable homicides will require the death penalty. Furthermore, reflection will show that (c) current legal methods of inflicting the death penalty are bound to be inadequately retributive in some cases. All these conclusions should be as troublesome for defenders of the death penalty as they are for its opponents.

(a) *The punishment of crimes other than murder.*—First, the biblical world did not limit the death penalty to the punishment of murder. Many other non-homicidal crimes also carried this penalty (e.g., kidnapping, witchcraft, cursing one's parents).[4] In our own recent history, persons have been executed for aggravated assault, rape, kidnapping, armed robbery, sabotage, and espionage.[5] It is not possible to defend any of these executions (not to mention some of the more bizarre capital statutes, like the one in Georgia prior to 1966 that provided an optional death penalty for desecration of a grave) on grounds of just retribution. This entails that either such executions are not justified or that they are justified on some ground other than retribution. In actual practice, few defenders of the death penalty have ever been willing to rest their case entirely on the moral principle of just retribution as formulated in terms of "a life for a life." (The philosopher Immanuel Kant seems to be the only conspicuous exception.) Most defenders of the death penalty have implied by their willingness to use executions for non-homicidal crimes that they did not place much value on the lives of criminals when compared to the value of property belonging to innocent citizens.

(b) *The punishment of criminal homicide.*—Our society for several centuries has endeavored to apply the death penalty only to some, not to all, criminal homicides. (Even Kant took a surprisingly casual attitude toward a mother's killing of her illegitimate child. "A child born into the world outside marriage is outside the law. . ., and consequently it is also outside the protection of the law.")[6] In this country, the development nearly two hundred years ago of the distinction between first- and second-degree murder was an attempt to narrow the class of criminal homicides deserving the death penalty.[7] Yet those dead owing to manslaughter, or to any kind of unintentional, accidental, unpremeditated, unavoidable, unmalicious killing are just as dead as the victims of the most ghastly murder.

Both the law in practice and moral reflection show how difficult it is to identify all and only those criminal homicides that are appropriately punished by death (assuming that any are). Individual judges and juries differ in the conclusions they reach. This history of capital punishment for homicides reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die.

Benjamin Cardozo, a Justice of the United States Supreme Court fifty years ago, said of the distinction between degrees of murder that it was

"* * * So obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death."[8]

Similar scepticism has been registered on the reliability and rationality of death penalty statutes that give the trial court the discretion to sentence to prison or to death.

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[4] See Kazis, "Judaism and the Death Penalty," in *The Death Penalty in America* (ed. Bedau, 1967).

[5] National Prisoner Statistics, "Capital Punishment 1976," Table 1, p. 13.

[6] Kant, *The Metaphysical Elements of Justice* (tr. Ladd), p. 106.

[7] Keedy, "History of the Pennsylvania Statute Creating Degrees of Murder," 97 U. Pa. L. Rev. 759 (1949).

[8] Cardozo, "What Medicine Can Do for Law," in *Selected Writings of Benjamin Nathan Cardozo* (ed. Hall, 1947), at 204.

As Justice Marshall Harlan of the Supreme Court observed a decade ago:

"Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history * * *. To identify before the fact those characteristics in the language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[9]

The abstract principle that the punishment of death best fits the crime of murder, despite its initial self-evidence, turns out to be extremely difficult to interpret and apply.

If we look at the matter from the standpoint of the actual practice of criminal justice, we can only conclude that "a life for a life" plays little or no role whatever. Plea bargaining, even where murder is concerned, is widespread. Studies of criminal justice reveal that what the courts (trial or appellate) decide on a given day is first-degree murder suitably punished by death in a given jurisdiction could just as well be decided in a neighboring jurisdiction on another day either as second-degree murder or as first-degree murder but not warranting the death penalty.[10] The factors that influence prosecutors in determining the charge under which they will prosecute go far beyond the simple principle of "a life for a life." Nor can it be objected that these facts show that our society does not care about justice. To put it succinctly, either justice in punishment does not consist solely of retribution, because there are other principles of justice; or there are other moral considerations besides justice which must be honored; or retributive justice is not adequately expressed in the idea of "a life for a life."

(c) *The death penalty as insufficiently retributive.*—Given the reality of horrible and vicious crimes, one must consider whether there is not a quality of unthinking arbitrariness in advocating capital punishment for murder as the retributively just punishment. Why is death in the electric chair or the gas chamber or before a firing squad or on a gallows the *exact* requirement of retributive justice? When one thinks of the savage, brutal, wanton character of so many murders, how can retributive justice be served by anything less than equally savage methods of execution for the murderer? From a retributive point of view, the oft-heard complaint, "Death is too good for him!" has a certain truth. Yet few defenders of the death penalty are willing to embrace this consequence of their own doctrine.

The reason they do not and should not is that, if they did, they would be stooping to the methods and thus to the squalor of the murderer. Where criminals set the limits of just methods of punishment, as they will do if we attempt to give exact and literal implementation to *lex talionis*, society will find itself descending to the cruelties and savagery that criminals employ. For a society to do this would be especially reprehensible, because society would be deliberately authorizing such acts, in the cool light of reason, and not (as is often true of vicious criminals) impulsively or in hatred and anger or with an insane or unbalanced mind. Moral restraints, in short, prohibit us from trying to make executions perfectly retributive. Once we grant the role of these restaints, the principle of "a life for a life" itself has been qualified to a point where it no longer suffices to justify the execution of murderers.

Other considerations take us in a different direction. Few murders, outside television and movie scripts, involve anything like an execution. An execution, after all, begins with a solemn pronouncement of death sentence from a judge, followed by long detention in maximuum security awaiting the date of execution, various appeals, perhaps a final sanity hearing, and then "the last mile" to the execution chamber itself. As the French writer Albert Camus has remarked:

"For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which we would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."[11]

Most popular discussions of the death penalty and retribution are spoiled by a failure to understand the role of the principle of proportionality. This happens whenever it is asserted that murderers deserve death, as though this were a self-evident truth. It is not. If murderers deserve to die, then it is because a general principle of proportionality in punishment leads to this conclusion. *Lex talionis* is such a general principle, but, as we have seen, it has objectionable consequences

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[9] McGautha v. California, 402 U.S. 183 (1971), at 204.

[10] See, e.g., Zimring, Eigen, and O'Malley, "Punishing Homicide in Philadelphia: Perspectives on the Death Penalty," 43 U. Chicago L. Rev. 227 (1976); and Bedau, "Felony Murder Rape and the Mandatory Death Penalty: A Study in Discretionary Justice," 10 Suffolk U. L. Rev. 493 (1976).

[11] Camus, *Resistance, Rebellion, and Death* (1961), at 199.

if taken literally and applied uniformly throughout the construction of a penalty schedule. The only rational response, therefore, is to swallow these undesirable consequences out of respect for consistency, or to reject *lex talionis* and find some other way to interpret the principle of proportionality, even if it turns out that one can no longer insist that murderers deserve to die.

A few words are perhaps appropriate here regarding principle (4), the principle of denunciation. The most famous recent expression of this view we owe to an English judge, Lord Justice Denning, when he said:

"The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty." [12]

The difficulty, however, is that actual executions do not always have this sobering and admonitory effect. Instead, other effects triumph, as the recent novel about executions in Florida, James McLendon's *Deathwork* (1977), vividly illustrates. Disgust, fear, horror, terror, nausea, revulsion, stupefaction, shame, self-loathing—these are emotions and feelings inspired in those who witness modern executions, if we may believe the testimony of most observers.[13] In an earlier day, equally inappropriate reactions were generated among those present at public executions. (See the revealing account by Michel Foucault, in *Discipline and Punish* (1977).) These effects so thorough defeat the purpose of punishment as denunciation that we must either abandon principle (4) or adopt methods of punshment less savage than gas chambers, electric chairs, and firing squads.

What, then, emerges from our examination of retributive justice and the death penalty? If retributive justice is thought to require *lex talionis*, all one can say is that this principle has never exercised more than a crude and indirect effect on the actual punishments meted out. Other principles interfere with a literal and singleminded application of this one. Some murders seem improperly punished by death at all; other murders would require methods of execution too horrible to inflict; in still other cases any possible execution is too deliberate and monstrous given the nature of the motivation culminating in the murder. Furthermore, proponents of the death penalty rarely confine themselves to supportng the death penalty only for all murders.

Of course, one may reject the principle of *lex talionis* as too crude and still embrace the retributive principle of proportional severity of punishments to the gravity of the offense. Even though one need not claim that life imprisonment (or any kind of punishment other than death) "fits" the crime of murder, one can claim that this punishment is the proper one for murder. To do this, the schedule of punishments accepted by society must be arranged so that this mode of imprisonment is the most severe penalty used. Opponents of the death penalty need not reject the principle of proportionality, just as defenders of the death penalty need not accept *lex talionis*.

In recent years, there has been a considerable upsurge of interest in retributive principles of punishment among those who have given serious thought to the injustices done in the name of deterrence and rehabilitation. Perhaps the leading contributions have been by Andrew von Hirsch, in *Doing Justice* (1976), and the Twentieth Century Fund Task Force, in *Fair and Certain Punishment* (1976). It is all the more important, therefore, to notice that none of these "new retributivists" supports the death penalty. None believes that justice in punishment requires society to have recourse to capital punishment for any crimes. I concur with this conclusion.

There are several reasons why this conclusion is all but inevitable. The most important is the belief that justice—which is the sole source of whatever is legitimate in retribution—is also the source of other moral principles that are in practice incompatible with capital punishment. Chief among these principles is the requirement of equal treatment, and the more so as the severity of punishments increases. Our Constitution itself recognizes the priority in justice of equality over retribution, for it contains no explicit references to retributive punishment, whereas the Fourteenth Amendment specifically requires "equal protection of the laws."

I conclude from this examination that it is virtually impossible to construct a reasonable defense of the death penalty on the ground that it is a requirement of either justice or just retribution.

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[12] Royal Commission on Capital Punishment, *Report* (1953), ¶53.

[13] Reid, *Eyewitness: I Saw 189 Men Die in the Electric Chair* (1973); Duffy and Hirshberg, *88 Men and 2 Women* (1962); Lofland, "The Dramaturgy of State Executions," in *State Executions Viewed Historically and Sociologically* (1977), 275–325.

II. RACIAL DISCRIMINATION

The major complaint against the death penalty in the United States during the past generation, both in litigation before the federal courts and in all other forums, has been the objection that this penalty as administered is either *arbitrary* or *discriminatory*, or both, and thus an indefensible violation of equal justice.

Chief among its discriminatory features has been the fact that capital punishment falls with an unfairly high probability upon members of racial minorities, primarily black Americans of African descent. Some of this evidence has already been made directly available to Congress,[14] and the federal courts[15] on earlier occasions. Some of it appears annually in *Capital Punishment*, the bulletin published by the Department of Justice in its series, *National Prisoner Statistics*. Some of it has been presented to scholarly audiences,[17] and there is new evidence available here for the first time.

(1) *Race of Persons Unlawfully Executed.*—The legal system in a community is not likely to perform in ways markedly out of step with prevailing moral sentiments, and the racist aspects of the death penalty are foreshadowed in the ugly history of lynching. From records kept by the Tuskegee Institute, we learn that between 1882 and 1964, a total of 4,743 persons were illegally executed by lynching in the United States. Of these, 3,446 involved black victims.[18] Although more whites than blacks by a wide margin were lynched in a few states (e.g., in Oregon 20 whites have been lynched, only 1 black; in California, 41 whites and 2 blacks), and the same small number of each race in a few states (New York and New Jersey each lynched 1 white and 1 black), in all the Southern states the overwhelming preponderance of lynch victims was black. (See Table I) Happily, lynching is virtually a thing of the past, but it shows better than anything else the special vulnerability of blacks to racial injustice as a historic phenomenon.

TABLE I.—VICTIMS OF LYNCHING IN THE SOUTH, 1882–1964

State	Race of victim	
	White	Black
Alabama	48	299
Arkansas	58	226
Florida	25	257
Georgia	39	492
Louisiana	56	335
Mississippi	42	539
North Carolina	15	86
South Carolina	4	156
Tennessee	47	204
Texas	141	352
Virgina	17	83
Total	492	3,029

Source: A. D. Grimshaw, ed., Racial Violence in the United States (1969), p. 57.

(2) *Race and the Death Penalty for Rape.*—The death penalty for rape was declared unconstitutional in 1977,[19] and no one is under death sentence for this

[14] See "To Establish Constitutional Procedures for the Imposition of Capital Punishment," Hearing Before the Subcommittee on Criminal Laws and Procedures, Committee of the Judiciary, U.S. Senate, 94th Congress, 1st Session, on S. 1382, May 18, 1977; "Imposition of Capital Punishment," Hearings Before the Subcommittee on Criminal Laws and Procedures, Committee of the Judiciary, U.S. Senate, 93d Congress, 1st session, on S. 1, S. 1400, and S. 1401, February–July, 1973; "To Abolish the Death Penalty," Hearings Before the Subcommittee on Criminal Laws and Procedures Committee of the Judiciary, U.S. Senate, 90th Congress, 2d session, on S. 1760, March–July 1968.

[15] "Capital Punishment," Hearings Before Subcommittee No. 3, Committee of the Judiciary, H.R. —, 92d Congress, 2d session on H.R. 8414 etc., and H.R. 12217, March–May 1972.

[16] Brief for Petitioner, Maxell v. Bishop, O.T. 1968, No. 622; Brief for NAACP Legal Defense and Educational Fund as Amici Curiae, Boykin v. Alabama, O.T. 1968, No. 642; Briefs for Petitioners, Aikens v. California, Furman v. Georgia, Jackson v. Georgia, Nos. 68–5027, 69–5003, 69–5030; Brief for Petitioner, Fowler v. North Carolina, O.T. 1974, No. 73–7031: Brief for Petitioner, Jurek v. Texas, O.T. 1975, No. 53–94.

[17] See *Capital Punishment in the United States* (eds. Bedau and Pierce, 1976), and sources cited *infra* notes 31–32.

[18] *Racial Violence in the United States* 56–57 (ed Grimshaw, 1969); and Daniel T. Williams, "The Lynching Record at Tuskegee Institute" (memorandum, 1969).

[19] Coker v. Georgia, 97, S. Ct. 2861 (1977).

crime. Nevertheless, it is instructive to examine the tremendous differential impact this penalty had for black and white offenders, particularly because several states re-enacted capital statutes for rape between 1972 and 1977 after the earlier statutes had been invalidated by *Furman* v. *Georgia* in 1972, and because it introduces us to the special role that the status of the victim has in determining who gets sentenced to death.

Since 1930, 455 persons have been executed for the crime of rape. Of these, 48 (10.5%) were white; 405 (89%) were black; and 2 (0.5%) were of other races.[20] These figures are much more significant and alarming when they are related to the race of the victim. A study of six states (Arkansas, Florida, Georgia, Louisiana, South Carolina, Texas) from 1945 through 1965 showed that a black male defendant convicted of raping a white female victim was the most likely to be sentenced to death. More than a third (113 out of 317) of the blacks convicted of raping a white were sentenced to death, whereas only one in fifty of the others—blacks who raped blacks, and whites who raped blacks or whites—were sentenced to death. (See Table II) Yet inter-racial rape of white victims by black offenders constituted only about a quarter of all the rapes examined (317 out of 1,230).[21]

(3) *Race of Persons Legally Executed.*—Under federal law since 1930, 33 persons have been executed, including 28 whites and 3 blacks. The last federal execution was in 1963.[22] These numbers are perhaps too small to be significant. The vast proportion of all persons executed are sentenced under state law, and here race is a significant factor.

TABLE II.—RACIAL COMBINATIONS OF CONVICTED RAPE OFFENDER AND VICTIM BY TYPE OF SENTENCE: ARKANSAS, FLORIDA, GEORGIA, LOUISIANA, SOUTH CAROLINA, TENNESSEE—1945–65

	Death sentence		Other sentence		Total	
	Number	Percent	Number	Percent	Number	Percent
Black offender/white victim	113	36	204	64	317	100
Other racial combinations of offender and victim	19	2	902	98	921	100
Total	132		1,106		1,238	

Note: $X^2=275.72$; $p<0.001$.

Source: The Annals, May 1973 table 2, p. 129.

Although only one person has been executed in the past thirteen years, and he was white (Gary Gilmore, Utah, January 1977), since 1930 a total of 3,860 have been lawfully executed. Of these 1,752 were white offenders and 2,066 were black. Black offenders thus constitute 54% of all persons executed, whites 45%, and other races 1%.[23]

During the past century, among nearly 6,000 recorded executions under state authority, we find that "blacks were executed for less serious crimes and crimes less often receiving the death penalty * * * than whites, * * * blacks were often younger on the average than whites, whatever their offenses and whether or not they had appeals; and * * * blacks were more often executed without appeal, whatever their offense and age at execution."[24]

(4) *Race of Persons Sentenced to Death.*—The latest unofficial figures for persons currently under sentence of death show that as of mid-April 1978, there are 493 persons on "death row" in 25 states. Of these, 235 (48%) are black, 240 (49%) are white, and the remaining 3% are American Indian and Hispanic.[25]

These figures are of interest when compared with those available for two recent prior dates, mid-1978, when *Furman* v. *Georgia* brought to an end several years of litigation on the constitutionality of the death penalty; and mid-1976, when early four years of mandatory death penalties enacted in the wake of *Furman* were declared unconstitutional by the ruling in *Woodson* v. *North Caro-*

[20] National Prisoner Statistics. "Capital Punishment 1976", Table 1, p. 13.
[21] Wolfgang and Riedel. "Race, Judicial Discretion, and the Death Penalty," 407 The Annals 119 (1973), at 129.
[22] National Prisoner Statistics, "Capital Punishment 1976," Table 27, p. 59.
[23] Op cit., Table 1, p. 13.
[24] Bowers, *Executions in America* (1974), at 102.
[25] National Coalition to Abolish the Death Penalty, "Death Row Census," April 11, 1978 (news release).

lina (Table III). As these data show, the only time in the past six years when the proportion of whites on "death row" significantly exceeded the proportion of blacks was under the short-lived mandatory death penalties of the mid-1970's. Discretionary death sentencing, whether of the older "unguided" variety prior to *Furman*, or the new "guided discretion" authorized under the rulings of *Gregg* v. *Georgia*, *Jurek* v. *Texas*, and *Proffit* v. *Florida*, seems to allow the proportion of blacks on "death row" to increase.

TABLE III.—PERSONS UNDER DEATH SENTENCE IN THE UNITED STATES, 1972–78

Date	Race of persons on death row						
	White		Black		Other		
	Number	Percent	Number	Percent	Number	Percent	Total
June 29, 1972	267	42.0	351	56.0	13	2	[1] 631
July 2, 1976	214	51.0	179	42.0	[2] 30	7	[3] 423
Apr. 15, 1978	240	49.0	235	48.0	18	3	[4] 493
Total	721	46.6	765	49.4	61	4	1,547

[1] CALM newsletter, October 1972.
[2] Includes 9 for whom race is unknown.
[3] NAACP legal defense fund memorandum, "Death Row Inmates," Nov. 11, 1976.
[4] NCADP release, "Death Row Census," Apr. 15, 1978.

(5) *Homicide Rates Among Blacks and Among Whites.*—Criminologists uniformly report that for "* * * homicide and other assaultive crimes in the United States * * * Negroes have rates between four and ten times higher than whites." [26] This fact is occasionally cited in the attempt to explain away the high proportion of blacks on "death row" during recent years, as well as the historically greater number of blacks who have been legally executed, as though racism itself played no role.

Most of these victims of homicide are themselves black if the offender is black, and white if the offender is white; inter-racial homicide is much rarer than the intra-racial variety.[27] (The most recent reports indicate that in New York, for instance, "78.7 percent of all homicides involved persons of the same racial background." [28]) Since blacks constitute no more than 10 to 15 percent of all Americans, the differential impact of the death penalty on blacks cannot be explained solely by reference to their higher homicide rates. The generally greater poverty among blacks than among whites nationally is also, no doubt, a factor in the equation that explains the high incidence of blacks on "death row" [29] Still, it seems likely that the factor of race also plays a direct role.

(6) *Current Death Sentences and Race of Victim and Offender.*—The possibility that race is a factor is confirmed by the most recent studies being conducted under the direction of Dr. William Bowers of the Center for Applied Social Research at Northeastern University.[30] Bowers, author of the important volume *Executions in America* (1974), and his associates have under continuous examination all death sentences in Florida, Georgia, and Texas, the three states whose post-*Furman* capital statutes for murder were upheld by the Supreme Court in 1976 and where (as of April 15, 1978) 225 persons are currently on "death row." By examining all possible racial combinations of victims and offenders, we can see a significant tendency toward racial discrimination where the death penalty is concerned. (See Table IV). The distribution as reported in Table IV is virtually identical with that reported in an earlier study by a different investigator studying the same phenomenon in 1976.[31]

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[26] *Studies in Homicide* (ed Wolfgang, 1967), 8; cf. op. cit., pp. 118, 225.
[27] See Garfinkel, "Inter- and Intra-racial Homicides," in *Studies in Homicide* (ed. Wolfgang, 1967), 45–65.
[28] New York Times, August 28, 1977, pp. 1, 34.
[29] See "A Study of the California Penalty Jury in First-Degree-Murder Cases," 21 Stanford L. Rev. 1302 (1969) at 1419.
[30] New York Times, March 6, 1978; Southern Poverty Law Report, Spring, 1978.
[31] Riedel, "Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-*Furman*, and Post-*Furman*," 49 Temple L. Q. 261 (1976). Table II, at 286.

The data reported by Bowers for persons currently under death sentence for murder in three southern states is also strikingly parallel to the data reported by other investigators for persons sentenced to death for rape in six southern states a generation ago (recall Table II). Bowers' data are even more disturbing when seen in conjunction with the arrest-for-homicide data for the same states and covering the same period (see Table IV). Whereas only four percent of all arrests for criminal homicide are of black offenders charged with killing white victims, 36 percent of all persons on "death row" are blacks convicted of killing whites. Whereas half of all those arrested for criminal homicide are blacks charged with killing other blacks, less than one in ten of those of "death row" is a black who killed a black. One of the few whites on "death row" who killed a black also killed several whites.[32] The conclusion is inescapable that the death penalty is reserved almost exclusively for those who kill whites; the criminal justice system in these states apparently does not put the same value on the life of a black person as it does on the life of a white.

Justice Powell, writing in 1973, observed that "the possibility of racial bias in the trial and sentencing process has diminished . . . [and] discriminatory imposition of capital punishment is far less likely today than in the past." [33] If true, it is owing primarily to the increased participation of black Americans in many aspects of the criminal justice system in their communities throughout the nation. In the context of his remarks, Justice Powell seemed to imply that the disgraceful record of racial discrimination where the death penalty was concerned depended upon the untrammelled sentencing discretion afforded the trial courts by the then prevailing systems of capital sentencing, and that with the end of that system (an achievement of the ruling in *Furman*,[33] from which, however, Justice Powell disduring 1973, this shameful record would not be repeated.

As yet, we have had no thorough study of the flow of criminal homicide cases from arrest to final disposition in any jurisdiction where the post-*Furman* "guided discretion" capital statutes have been operating. Consequently we have no assurance that the diminished racial bias that Justice Powell predicted six years ago accurately characterizes the present system. What evidence we do have, reviewed above, suggests that very little has changed. As one investigator put it, "There is no evidence to suggest that the post-*Furman* statutes have been successful in reducing the discrimination which leads to a disproportionate number of nonwhite offenders being sentenced to death." [34]

TABLE IV.—ARRESTS AND SENTENCES FOR CRIMINAL HOMICIDE BY RACE OF VICTIM AND OFFENDER: FLORIDA, GEORGIA, TEXAS—1976–78

	Arrested for criminal homicide [1]		Under sentence of death [2]	
	Number	Percent	Percent	Number
Black offender/black victim	1,099	49	7	16
White offender/white victim	1,013	45	56	125
Black offender/white victim	92	4	36	82
White offender/black victim	38	2	1	2
Total	2,242	100	100	[3] 225

[1] Uniform Crime Reports, supplementary homicide report, 1976 only.
[2] Florida (as of May 8, 1978), 101 persons; Georgia (as of Apr. 28, 1978), 65 persons; Texas (as of Aug. 1977), 61 persons.
[3] Excludes 2 cases where more than 1 victim was involved not of the same race.

Source: Center for Applied Social Research, Northeastern University, Boston, Mass.

[32] Lewis and Mannle, "Race and the Death Penalty: The Victim's Influence," 41 LAE Journal of Amer. Crim. Justice Assn. (Winter-Spring 1978); also Lewis and Peoples, *The Supreme Court and the Criminal Process: Cases and Comments* (1978).
[33] Furman v. Georgia, 408 U.S. 238, 450 (1972).
[34] Riedel, *supra* note 17, at 282.

TABLE V.—ARRESTS AND SENTENCES FOR FELONY-TYPE MURDER BY RACE OF VICTIM AND OFFENDER: FLORIDA, GEORGIA, TEXAS—1976–78

	Arrested for felony-type murder[1]		Under sentence of death	
	Number	Percent	Percent	Number
Black offender/black victim	64	29	5	8
White offender/white victim	112	51	54	80
Black offender/white victim	37	17	40	59
White offender/black victim	6	3	1	2
Total	219	100	100	149

[1] Uniform Crime Reports, supplementary homicide report, 1976 only.

Source: Center for Applied Social Research, Northeastern University, Boston, Mass.

The explanation of this fact and the virtual guarantee that nothing will change in the future is provided by the fact that the "guided discretion" statutes really offer very little constraint on choice of sentence. Every such statute uses language broad and vague enough to permit the community's racial prejudice to determine the sentence. Moreover, the "guided discretion" statutes do nothing to affect the great scope of discretion lodged in the police, prosecution, and courts at every phase of a criminal homicide case prior to actual sentencing. This deplorable feature of the post-*Furman* capital statutes has been discussed at length in persuasive and vivid manner by Professor Charles L. Black, Jr.,[35] and there is no need for me to dilate upon it here. What has proved to be true in the several states—that the new "guided discretion" statutes yield results not less arbitrary and discriminatory than the old "unguided discretion" statutes—has not been circumvented by the proposed federal legislation to which this hearing is addressed.

III. LONG-TERM IMPRISONMENT AND RECIDIVISM

Michigan abolished the death penalty for murder in 1847, and has never reinstated it. Since that date, other states in the West, North Central, and New England regions have also completely abolished capital punishment. In 1964, the voters in Oregon went so far as to rewrite their state constitution to repeal the death penalty for all crimes. Since *Furman*, a few states have failed to reenact any capital statutes and thus have backed into a policy of total abolition that direct legislative reform probably could not have achieved. As a result, we have considerable experience with penal sytems that execute no one.

From time immemorial, beginning with God's judgment upon Cain, the first murderer (Genesis 4:11–16), the traditional alternative to the death penalty has been banishment. In the past century in this country, banishment took the form of life imprisonment without possibility of release. During the past generation, however, most opponents of the death penalty have opposed this harsh alternative, and instead have favored a policy of punishment for the gravest crimes of imprisonment of indefinite duration, with eligibility for release upon favorable recommendation by the adult authority or parole board after serving a fixed minimum time. The result is that in all but a few cases release eventually is granted. This has for some time been the policy followed in all jurisdictions with most convicted offenders convicted of murder and other grave crimes against the person.

To some extent, the merits of abolishing the death penalty are tied in with the adequacy of the alternative. How adequate, on moral and empirical grounds, is an alternative such as the one described above?

Great publicity is given to the occasional convicted murderer who returns to crime, like Edgar Smith, who served 14 years on "death row" in New Jersey and eventually was released in 1971 after a pro forma confession of guilt, only to be returned to prison in California after he committed a new crime of attempted murder.[36] Public opposition to the very idea of release from prison of such no-

[35] Black, *Capital Punishment: The Inevitability of Caprice and Mistake* (1974); Black, "Due Process for Death: Jurek v. Texas and Companion Cases," 26 Catholic U. L. Rev. 1 (1976); Black, "The Death Penalty Now," 51 Tulane L. Rev. 429 (1977).

[36] See Bernstein, "Neither Dead nor Alive: The Protracted Litigation of Edgar Smith," N.J. State Bar J., Summer 1969, 312–315; New York Times, December 7, 1971, p. 1; New York Times, November 14, 1976, p. 37; Smith, *Brief Against Death* (1968).

torious offenders as Charles Manson and Richard Speck, no matter how much time they serve, is a matter of common knowledge. But are these cases representative? Do they show that it is wrong and dangerous to adopt a policy of complete abolition?

Let us notice first that once the mandatory death penalty has been put aside by the legislature or the courts—and it appears that a mandatory death penalty for any crime is now unconsitutional[37]—incarceration of all offenders becomes a theoretical possibility. It must be assumed that it is a manageable one as well. Every jurisdiction in the United States at present has adopted such a policy, so it cannot be argued in defense of the death penalty that executions are necessary because some offenders cannot be incarcerated or released. The discretionary death penalty already shows that the legislature contemplates the possibility that trial courts will sentence no one to death.

Second, if we turn to retribution, and assume that it is a legitimate goal of a system of punishment, then we must also conclude that our legislatures and the constitution tacitly assume tha long-term incarceration is retributive enough. This again follows from the fact that mandatory death penalties are now unconstitutional, and that very few jurisdicions attempted to re-enact mandatory death penalties in any case.

Third, apart from new statutes like the one in Texas, in which the sentencing court must make a judgment on the future dangerousness of the convicted murderer in order to recommend either a life or a death sentence,[38] it has not been the practice in this country to attempt to choose between a life and a death sentence for a convicted felon on the basis of any evidence concerning his likely future behavior. There is absolutely no evidence whatever that the thousands of those sentenced to death by trial courts in this century have been so sentenced because the sentencing authority knew, or had evidence to believe, that these persons were more dangerous, more likely to assault and kill in prison or after release, than the many thousands of other convicts guilty of similar crimes but never sentenced to death. Nor is this likely to be a development in the law, since prediction of future dangerousness is virtually impossible, given our present knowledge and techniques.[39]

From the standpoint of social defense, we can try to measure the differential effects between imprisonment and the death penalty in each of three areas: General deterrence, incitement to crime (counter deterrence) and prevention through incapacitation.

(1) *Incapacitation.*—It would seem likely that executions must prevent crime more effectively than imprisonment. This is not strictly correct, however. Executions *prevent crimes* only if the persons executed would have committed further crimes had they been imprisoned instead. Executions *incapacitate persons*, of course, whether or not they would have committed any further crimes, and they incapacitate more effectively than prison does. Whether we can infer that executions prevent crimes through incapacitation depends upon what we can infer from the evidence regarding the crimes, especially the felonies—including criminal homicide—that are committed by capital offenders who were not executed but instead imprisond and subsequently released.

(a) *Recidivism after release.*—Such evidence as I have been able to collect from various sources is indicative but far from conclusive (Tables VI and VII). Table VI shows that among 1,910 murderers released in eleven states during the years 1900 through 1976, 54 were returned for conviction of a subsequent felony and 14 were returned for conviction of a subsequent criminal homicide. Table VII is based on data released by the National Council on Crime and Delinquency in the Uniform Parole Reports. It shows that, nationwide, between the years 1965 and 1974, of 11,406 persons originally convicted of "willful homicide" and subsequently released from prison, 170 were returned during the first year for commission of a felony and 34 were returned during the first year for a subsequent criminal

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[37] Woodson v. North Carolina 428 U.S. 280 (1976); Roberts v. Louisiana, 45 L.W. 4584 (1977).

[38] Texas Code Crim. Proc., Art. 37.071(b) (Supp. 1975–1976).

[39] Von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," 21 Buffalo L. Rev. 717 (1972); Morris and Hawkins, *The Honest Politician's Guide to Crime Control (1970)* (* * * "all available prediction methods have relatively low predictive power * * *" (p. 244)).

homicide. Both with regard to the commission of felonies generally and the crime of homicide, no other class of offender has such a low rate of recidivism.[40]

TABLE VI.—RECIDIVISM OF MURDERERS RELEASED IN SELECTED STATES, 1900–76

State and years	Murderers released	Subsequent conviction of criminal homicide	Subsequent other felony conviction
California: 1945–54 [1]	342	1	1
Connecticut: 1947–60 [2]	60	0	7
Georgia:			
1943–65 [3]	50	0	1
1973–76 [4]	164	8	21
Maryland: 1936–51 [5]	41	0	3
Massachusetts: 1900–58 [6]	10	0	0
Michigan: 1938–72 [7]	432	0	1
New Jersey: 1907–60 [8]	31	0	1
New York:			
1930–61 [9 10]	63	2	1
1945–61 [9 11]	514	3	15
Ohio: 1945–60 [12]	169	0	2
Oregon: 1939–64 [13]	15	0	1
Rhode Island: 1915–58 [14]	19	0	([15])
Total	1,910	14	54

[1] California Assembly Report on the Death Penalty (1957), pp. 12–13.
[2] Connecticut Bar Journal, March 1961, pp. 50–51.
[3] Georgia Journal of Corrections, August 1974, p. 48.
[4] Journal of Criminal Law & Criminology, 1978, pp. 110–113.
[5] Maryland Report on Capital Punishment (1962), p. 15.
[6] Massachusetts Report on the Death Penalty (1958), pp. 29, 118–120.
[7] Ohio Report on Capital Punishment (1961), p. 82; and Michigan State U. Office of Human Relations, occasional paper, June 26, 1973.
[8] Rutgers Law Review, fall 1954, pp. 47–48.
[9] Crime and Delinquency, January 1969, pp. 150–151.
[10] Convicted of 1st degree murder.
[11] Convicted of 2d degree murder.
[12] Ohio Report on Capital Punishment (1961), pp. 81–82.
[13] Oregon Law Review, December 1965, pp. 31–34.
[14] Massachusetts Report on the Death Penalty (1958), p. 32.
[15] No information.

TABLE VII.—RECIDIVISM DURING 1ST YEAR AFTER RELEASE, CONVICTED MURDERERS IN THE UNITED STATES BY TYPE OF SUBSEQUENT OFFENSE—1965–75

Year of release	Number of murderers released	Subsequent conviction of willful homicide		Subsequent other major violation	
		Number	Percent	Number	Percent
1965–67 [1]	1,303	3	0.2	15	1.2
1967–69 [2]	5,603	18	.3	86	1.5
1974 [3]	1,601	5	.3	22	1.4
1975 [4]	2,897	8	.3	[5] 47	1.6
Total	11,406	34	.3	170	1.5

[1] UPR, December 1967.
[2] UPR, December 1972.
[3] UPR, September 1976; males only.
[4] UPR, level II, individual data, detailed study, 1978 forthcoming; males only.
[5] Calculated from a base of 2,867 released murderers.

Source: National Council of Crime and Delinquency, Uniform Parole Reports.

[40] "* * * [P]aroled murderers actually present some of the best parole risks" (NCCD Newsletter, Uniform Parole Reports, December, 1972, p. 2); "* * * [C]ompared with other groups, murderers are actually the best parole risks" (Stanton, "Murderers on Parole." 15 Crime and Delinquency 149 (1969)); also Monahan, "The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus," in Blumstein, Cohen, and Nagin, eds., *Deterrence and Incapacitation* (1978), 244–269. Some doubt has been cast on this generalization, as well as on the assumption that most parole failures occur within the first year after release. See Heilbrun, Heilbrun, and Heilbrun, "Impulsive and Premeditated Homicide: An Analysis of Subsequent Parole Risk of the Murderer," 69 J. Crim. L. & Criminology 108 (1968).

These data are not complete, of course, but they are encouraging. They prove that the popular belief is true, murderers do sometimes kill again, even after years of imprisonment. The data also show that the number of such repeaters is very small. This leaves us with clear alternatives. If we cannot improve release on parole procedures so as to turn loose no one who will commit a further felony, then we have three choices. We can either undertake to execute every convicted murderer, or we can undertake to release none of them, or we can reconcile ourselves to the fact that parole procedures, like all other human institutions, are not infallible.

The moral cost of a policy of mandatory capital punishment is simply impossible to bear, and there is much evidence that no one really favors this alternative at all. The economic cost of abandoning parole release, or fixed terms short of natural life (say, ten years), is more than the public seems willing to pay. So the only alternative is the third, which in fact is already being practiced in all jurisdictions with all prisoners except for the handful sentenced to death.

(b) *Homicide and assault within prison.*—Very little evidence and none that is recent seems to be available to show whether murderers can be safely incarcerated. The best study was done a decade ago by Professor Thorsten Sellin, for the year 1965 (see Table VIII). Sellin reported 61 homicides in United States prisons during 1965, committed by 59 different persons, sixteen of whom had originally been sentenced to death. Only two of these were by persons sentenced to death in states that had no death penalty; the other fourteen were committed by persons despite the fact that in doing so they risked being sentenced to death and executed.[41] Of course, since we do not know the total number of murderers incarcerated in abolition and non-abolition jurisdictions during 1965, we cannot tell from Sellin's data whether the death penalty is or is not a more effective deterrent of homicide in prison than imprisonment. What we can say is that imprisoned murderers committed a higher proportion of all within-prison homicides in death penalty states in 1965 than in abolition states.[42]

TABLE VIII.—HOMICIDES IN U.S. PRISONS BY TYPE OF JURISDICTION—1965

[Number of offenses in parenthesis]

Offense	Jurisdictions [1]		
	Death penalty for murder	No death penalty for murder	Total
No fatal assaults	17	6	23
Fatal assaults	(53) 20	(8) 4	[2] (61) 24
No data	4	1	5
Total	41	11	[2] (61) 52

[1] Includes 50 States, District of Columbia, and Federal.
[2] Includes 8 staff members and 53 inmates.

Source: Capital Punishment (ed. Sellin, 1967), pp. 154–160.

(b) *Incitement.*—When the death penalty and imprisonment are compared for their incitive effects, a complex picture emerges. For over a century, there has been evidence that the death penalty may lead some persons to commit murder. Sometimes this takes the form of the suicide-murder syndrome, in which a person who wants to take his own life but fears to do so commits a murder so that society, using its power of capital punishment, will put him to death. There is also the executioner syndrome, in which persons become the self-appointed ministers of death to avenge real or fancied wrongs.[43] Thus, the power of the death penalty to incite murder must be seriously weighed against any alleged deterrent effect that it may have.

[41] Sellin, "Prison Homicides," in *Capital Punishment* (ed. Sellin, 1967), 154–160.
[42] See also Buffum, "Prison Killings and Death Penalty Legislation," 53 The Prison J. 49 (1973).
[43] See Sellin, *The Death Penalty* 65–69 (1959); *The Death Penalty in America* 264 (ed. Bedau, 1967); *Capital Punishment in the United States* 419–457 (eds. Bedau and Pierce, 1976).

There seems to be no evidence that failing to execute a convicted murderer and placing him in prison incites or otherwise invites others to commit murder. Lately, we have heard of an alleged exception to this in the new forms of international terrorism. As this crime category of crime is especially relevant to the federal death penalty, it is desirable to examine the situation more closely.

There have been a number of cases recently in Europe, Africa, and Asia, in which terrorists have hijacked an airliner or taken hostages in order to blackmail the authorities into releasing imprisoned comrades. In some cases, the hostages have been murdered. It has been argued that if the imprisoned terrorists had been executed in the first place, such hostage-taking and subsequent murders would not have occurred. Such a view is open to at least two objections. First, this line of reasoning is not really a defense of the death penalty but of summary execution for captured terrorists, because any delay in executing them gives rise to hostage-taking opportunities by their unarrested colleagues. Second, terrorists willing to take hostages in order to blackmail authorities into freeing their imprisoned colleagues are likely to be quite willing to commit reprisals against the innocent if the authorities were to abandon prison in favor of executions for all arrested terrorists. In short, escalation of violence is a strategy both sides can use. No sensible penal policy for coping with international terrorism can be predicated on the assumption that the current tactics of terrorists are vulnerable to a systematic policy of summary execution for arrested terrorists or of capital punishment for convicted terrorists.[44]

(3) *General deterrence.*—I cannot enter here into the vast area of general deterrence and the death penalty, except to say that recent research by Professor Isaac Ehrlich purports to show that the death penalty is a measurably better deterrent than imprisonment.[45] This conclusion has been attacked root and branch by many different investigators, and most recently, after close examination, by a panel from the National Academy of Sciences. Their conclusion is that these "findings * * * simply are not sufficiently powerful, robust, or tested at this stage * * *, they are too uncertain and must, at best, be interpreted as tentative * * * The deterrent effect of capital punishment is definitely not a settled matter, and this is the strongest social scientific conclusion that can be reached at this time."[46] When all relevant factors of social defense are weighed together, therefore, the policy of abolition is surely as plausible as any retention of the death penalty.

An enlarged cost/benefit comparison of the death penalty and incarceration might well lead to the same conclusions. While it may be cheap to hang, gas, or electrocute convicts, it is extremely expensive to support the "death row" system of special custody in prison and the time-consuming ordeal of trial and appellate litigation that the death penalty entails. Accurate and extensive cost/benefit studies of abolition and its alternatives have never been conducted, but preliminary examinations have led some observers to conclude that the relative costs and benefits dictate a rational preference for abolition and imprisonment, not executions.[47]

In conclusion, I would prefer to strike a different note. What is wrong with capital punishment, in the end, is what is wrong with its historically allied techniques of social control: Torture, mutilation, flogging, and branding. Each is an affront to human dignity. It is undignified to inflict such things on another person, undignified to undergo them, and undignified to witness their infliction or to participate in a system that allows them. No justification can exist for placing at the disposal of government methods such as these, which violate our most fundamental ideals. The same decision must be made regarding the death penalty. Ending it would be taking a small but definite and positive step toward enhanced respect for human life. Doing away with capital punishment would do away with the gravest abuses and injustices that can occur in the course of lawful punishment. The strongest moral objection traditionally directed against the death penalty is its irrevocale and irreparable nature. Erroneous

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[44] See Thornton, "Terrorism and the Death Penalty," *America*, December 11, 1976, pp. 410–412.

[45] Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," 63 Amer. Economic Rev. 521 (1973), and subsequent publications.

[46] *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (eds. Blumstein, Cohen, and Nagin, 1978), at 358, 359.

[47] See letter to the New York Times, August 29, 1977, by Hans Zeisel; Nakell, "The Cost of the Death Penalty," 14 Crim. L. Bull. 69 (1978).

infliction of death cannot be corrected, and there is no remedy or compensation for its undeserved infliction. The value, dignity, and sanctity of human life are put in jeopardy and violated when it is permissible to punish some prisoners by putting them to death. The function of government in a just society is to protect and enhance human life and the lives of all its members. It is indefensible for government to use its immense power and authority to sanction the deaths of any persons where no duty or necessity demands doing so and where no benefit is uniquely conferred by it.

TEESTIMONY OF HUGO ADAM BEDAU, AUSTIN FLETCHER, PROFESSOR OF PHILOSOPHY, TUFTS UNIVERSITY

Professor BEDAU. Thank you, Mr. Chairman.

My prepared testimony deals with an arbitrarily small selection of issues that are relevant primarily to the substantive law that I realize is not directly under review in the bill before the committee. House 13360, as has been made quite clear during earlier testimony today, deals with the procedures for a constitutionally sound Federal death penalty and not with any of the crimes that might constitutionally carry this punishment.

Nevertheless, my testimony that has been prepared addresses itself primarily to questions that bear upon what those substantive crimes might me. And I want to turn to review it and summarize it briefly in a moment, particularly because it touches on questions that have been asked today by you and your colleagues, as well as by other witnesses, where the factual record on matters concerning recidivism and the racist effect of the death penalty and retribution, I think, are all relevant for your consideration.

But I would like to comment informally and ad lib on one important feature in my opinion of the proposed legislation. I would have included this in my prepared testimony had I seen the proposed legislation prior to 48 hours ago, but I did not, so I could not.

I am referring particularly to the features of this bill beginning on page 5, line 5, and appearing at several subsequent points which I shall itemize that touch on, I think, one of the most important aspects of current death penalty legislation.

On page 5, line 5, the bill would empower the jury, having found aggravating circumstances and having found that they outweigh mitigating circumstances, neverthless to decline to recommend the imposition of a sentence of death. That is an unusual, though I can't say unique, but it may well be a unique feature in death penalty procedures. And certainly to my knowledge, it has not been proposed prior to this time in any bill before the Senate or the House. So this, I think, is a novel feature certainly of Federal death penalty legislation.

Of course, the reason why I draw attention to it is because it empowers the jury to exercise sentencing discretion in a very significant way. I will elaborate on that in a moment.

The next passage I draw your attention to appears on page 9 in line 4 and line 14, and then at subsequent passages. And in these lines, we read about the power of the judge. On page 9, line 4, the judge who may impose a sentence of death or not even where the jury has recommended the imposition of the death penalty.

So now we have a second specific citation of judicial sentencing discretion upon a recommendation from the jury of the death sentence.

And the last passage I would refer to is on page 10 where under the rule 67, concerning hearing without a jury, page 10, line 7 and line 18, where the judge now is allotted this very same power that we have seen earlier, first where the jury when its finds there are aggrevating circumstances and that they outweigh the mitigating circumstances, nevertheless, the jury need not bring in a death sentence; and where we have seen that the judge, having a recommendation of the death sentence from the jury, need not bring in a death sentence.

Now, the judge hearing alone without a jury according to line 17, finds that the mitigating circumstances are outweighed, and we are then told in line 18 that the judge "may" impose a death sentence, but, of course, that means he need not.

Now, what is important about these passages, it seems to me, is with this legislation the committee would move, and if it is enacted the Congress would move the Federal death penalty, functionally though not strictly, into the era prior to that governed by *Furman*. I can cite no better authority to this conclusion that the remarks of Justice White as they appear in the slip opinion in the *Lockett*[1] decision. I want to read a few remarks from pages 2 and 3 of Justice White's remarks because I think they are utterly pertinent. It is all the more remarkable that this legislation was filed just a few days before this opinion was written because, in effect, it is open, I think, to the comment that Justice White made.

Justice White in the slip opinion says the following:

> I greatly fear that the effect of the Court's decision today will be to constitutionally compel a restoration of the state of affairs at the time *Furman* was decided where the death penalty is imposed so irradically and the effect of security is so attenuated for even the most atrocious murder, its imposition would then be pointless and needless extension of life with only marginal contributions to any discernible or social public purpose.
>
> By requiring as a matter of consitutional law that sentencing authorities must be permitted to consider and in their discretion to act upon any and all mitigating circumstances, the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime. This invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has less consideration.

I should add, of course, that the clause inserted on page 9 at the end of rule 65, clause 10 at lines 21 and 22, each very firmly in a confirmation of the remarks I have just read from Justice White's opinion.

So as I look at the proposed legislation now, purely, in its procedural aspects that are before the committee and in light of the features of it that I have drawn to your attention, and in light of the comment that I have read to you from Justice White, I can only view this with a certain irony.

It seems to me the committee has labored nobly and diligently to introduce so far as it can rational considerations in aggravation and mitigation of an offense pertinent to applying or withholding the the death sentence. The committee has tried to introduce reasonable procedures for judge and jury in their intercession to weigh what each deems as relevant to making that decision. And it has come up with an outcome that some of us might have predicted years ago. I think it has really brought us 360 degrees back to where we were when juries and

[1] 46 Law Week 4981 (July 3, 1978).

courts at the trial level had the untrammeled and unguided power to sentence to life or death.

The language of guidance, more elaborate in this bill than in any that I have seen enacted anywhere in law, nevertheless functionally—and I would stress that word functionally—I think returns us to the virtually untrammeled exercise of discretion by judge and jury.

Mr. WIGGINS. Professor, at that point, the point you are making is a valid one, if we weigh the imposition of the death penalty with the concept of withholding the death penalty. Pre-*Furman* was broad discretion to impose, and the Court at White found that offensive.

Now, we are at the point of imposing discretion to withhold the death penalty, but to guide discretion on its imposition.

And we haven't come 360 degrees because we are not back at the same point. The difference, I think, is an important one, and frankly about where I think the law to be.

Professor BEDAU. I chose to stress the word "functionally" in my interpretation because I realize that the point that you are making could be made. I don't wish to endeavor to help the committee to improve upon this legislation partly because I view it as the devil's work, and I will leave that to be implemented by those who want to accomplish the imposition of the death penalty. And I do not.

I also think the committee's efforts, as I said a moment ago, constitute a significant step forward in the attempt to meet the generally shared objections, certainly those that the Supreme Court has ratified against unguided discretionary imposition of the death penalty.

But I do think, Mr. Wiggins, that functionally, the result may very well be the same. I don't see a way around the comment that Justice White has made. I certainly can see the difference in the legislation as it would stand in the statutes. But I do not, I think, see the difference as it is going to operate in the sentencing task, the sentencing acts of judge and of jury. That is what I am concerned with.

Much of what I have come to conclude about the death penalty has been as a consequence of trying to study in various jurisdictions in this country how it functions in the criminal justice system. And a crucial aspect of that, of course, is how the court, judge or jury or both together, understand the law to accomplish what they believe is fitting and proper in the circumstances.

And we know that judges and juries and courts have often thought that what was fitting in the circumstances was from another point of view unfair or arbitrary or indefensible. But the jury or the judge or the court thought that it was sound.

So I think that the introduction of a set of procedures of the sort that have been designed in this bill, while constituting a noble and sincere effort to meet the mandate to repair deficiencies in the criminal code, functionally will provide results not unlike those that occurred prior to 1972.

Mr. EVANS. Would the gentleman yield?

Mr. WIGGINS. Yes.

Mr. EVANS. Do you feel that this discretion, if you will, on the part of the judge and jury would return us to the same objections that were existent in the laws prior to——

Professor BEDAU. I think it is very likely when we look at the features of those persons sentenced to death in courts under this rule, if it were enacted, we would find a freakish, aberrant quality in those defendants, tohse condemned persons, as opposed to all of the others that the courts under this legislation had not sentenced to death.

That, after all, was the main point on which the plurality agreed in *Furman*. The one thing that it would appear you can distill from the several opinions of the Justices in the 1972 *Furman* decision was the freakish and aberrant quality of the death penalty as then imposed. It is why Justice White's remarks in *Lockett* in this vein, I think, are so telling because he was in that majority, but has rarely been in that majority since 1972 in the overturn of death penalty cases.

And here, Justice White again agrees in the conclusion to overturn the death penalty for Sandra Lockett, but does not agree in the reasoning that the plurality opinion sketches. The context of his remarks from which I have extracted my quotation is a context in which he indicates that because of the reasons that I quoted to you, he cannot go with the plurality opinion on this issue because he sees it as an effective return to the situation pre-*Furman*.

I quoted out of context because it serves my purposes, but I don't think I quoted unfairly at all in that vein. I think Justice White and I, if I may hazard the judgment, would agree in the feature of the proposed legislation that I have commented on.

Mr. EVANS. I am concerned about the constitutionality of the statute, and I have doubts as you do about whether or not we are not getting to a point that we are getting into an unconstitutional area by giving discretion back even though a jury may find under the guidelines that are set up that the lack of mitigating circumstances and the existence of aggravating circumstances which would bring about the death penalty.

And I think that that discretion that we give once those things are found may make this statute subject to the same objections as the previous statutes prior to *Furman*.

Do you disagree with that?

Professor BEDAU. I join all of my predecessors here before you this morning in agreeing that I cannot divine the next Supreme Court's ruling on the death penalty issue because I cannot, any more than others, explain in a feasible rational way the sequence of decisions that it has reached since 1972.

I find it a very checkered pattern. I do think that the *Lockett* decision requires the proposed clause 10 to rule 65, the clause that reads, "Any other circumstances deemed appropriate by the jury," as a catch-all mitigating clause. I think that is virtually mandated now. So I don't think you have to worry about that clause of the proposed legislation resulting in a judgment of unconstitutionality.

As for other language in the bill before the committee, I draw attention first to the way the jury is empowered to override its judgment of the superior weight of the aggravating versus the mitigating circumstances by not bringing in a death penalty. That is, I think, more conjectural as to its constitutionality. I think it is that kind of feature I had reference to.

Mr. EVANS. Would the gentleman agree that would allow the jurors to go back and impose the death penalty on those who are the least protected of our society?

Professor BEDAU. I think it is certainly possible. I don't think it is necessary. But I think it is likely. As I said, I think that is the kind of result that we might very well expect juries to reach.

Mr. WIGGINS. The only power the jury has is not to impose the death penalty. How do you think it is apt to do so?

Professor BEDAU. By excluding from the reach of the death penalty cases that one might say, "Well, if anybody should be sentenced to death, that person should be sentenced to death." I'm supposing there will be cases like that.

Mr. WIGGINS. But you proved too much. You really are arguing for a mandatory death penalty decision taking discretion out of it. And many felt that is what *Furman* meant. And surely I did not—and any thinking person, and you are in that category, would have to reject that.

Professor BEDAU. Mr. Wiggins, I am not arguing for a mandatory death penalty; I am not arguing for these procedures. I am only attempting to draw to your attention what I regard as an ironic feature of the undertaking before you.

Mr. WIGGIN. Hardly novel. The Court has always been the thirteenth juror. The Court has always had the power to upset the determination of the jury.

And in the context of the judges, it is more than a manifestation of that traditional power.

Professor BEDAU. And the Governor is the fourteenth juror, if you will, by the exercise of clemency. He can do the same thing.

I think the point I am trying to make can be seen in just the setting in which you asked me to illustrate it by the language of these procedures which would authorize judge or jury, working together or separately, to withhold the death penalty. That sheds light, it seems to me, on who it is from whom the death penalty is not withheld in the judgment of the trial court. And my prediction is that we will see that we could match any given person who is allowed to get the death penalty under this procedure with one or more others whose crime was just as grave or offensive, but from whom the death penalty was withheld. That is the claim.

Mr. WIGGINS. Do you feel that after the fact, statistical studies would demonstrate that the white and affluent and those in that category would not be—discretion would be exercised in their favor, but not in favor of the poor and black?

Professor BEDAU. Crudely, yes. That is the kind of prediction I am making, that people such as you and I who may commit the gravest crime imaginable, the gravest form of murder imaginable, will not be sentenced to death. To illustrate the thing that bothers me, let me cite a pre-*Furman* case, and it will illustrate what is on my mind. I draw it to your attention particularly because you, as I, were Californians at the time, at the very time, Caryl Chessman was being tried 22 years ago. At the same time there was the *Finch-Tregoff* case in Los Angeles. I can think of no greater crime than when a wealthy, educated man chooses to kill his wife to avoid divorce, expensive property settle-

ments, and sizable alimony payments, in order to marry his mistress. That is what Dr. Finch did. But Dr. Finch is a free man today, and so is his paramour, Carol Tregoff. I dare say the Caryl Chessmans of the world, as of 22 years ago in Los Angeles, will probably be sentenced to death by future courts, and the Finches and the Tregoffs will probably not.

This legislation, it seems to me, provides ample room for that result to be reached. How jurors and judges will mask even from themselves their bias in favor of the affluent, the intelligent, the educated, the cooperative, is a matter for poets and dramatists, not for philosophers, to comment on. That it will take place, I think, is unquestionable. That is why many of us in my position have said to those who favor the death penalty, "Bite the bullet or unload the weapon. Either demand a mandatory death penalty and enforce it or give it up." I think what we are watching in our society is the progressive understanding of that dilemma.

Mr. WIGGINS. I think I return to where I was a moment ago. There is fundamentally something different from the power to impose for freakish reasons the death penalty and the power to withhold it for perhaps freakish reasons. Because I have always believed that the essence of real justice is not that should be imposed fungibly upon defendants, that everyone should be treated alike, but that it calls for the most discriminating discretion on a very personal basis.

And as long as that discretion can be exercised only to free and not to condemn, then I think to the extent that it is freakish, it is a reasonable price for society to pay.

Professor BEDAU. Well, I respect the judgments and the principles that guide the legislation that we have before us as you have just expressed it. I am skeptical, based upon my study of how things have been in the past, that the results will be significantly different in the future were such proposed legislation as we have here to become law.

My basis for that is in part what we see that has happened in the period since *Furman* under the various attempts. And I leave apart the mandatory death penalty experiments, but draw attention only to what we see if we look at the attempts to apply the guided discretion that the Georgia and other statutes have given us.

And at this point, if I may, I would return to my prepared testimony because it is precisely in point.

If you have it before you, may I ask you to turn to——

Mr. EVANS. Would you address one other question while you are on that please, sir? And that is the Supreme Court decision in *Roberts*[1] which struck down the Louisiana statute which required mandatory death penalty in first degree murder. Would you address that also?

We are talking about the flexibility.

Professor BEDAU. Well, I have two comments only, I think, on the mandatory death penalty. Perhaps they are reduced to one. And that is that there is no evidence that any jurisdiction in this country that has had a mandatory death penalty has in fact used it in a discretionless manner. The mandatory death penalty, after all, eliminates discretion in only a superficially manifest way, not very much functionally at all. The charging powers of the district attorney are unimpaired

[1] *Roberts* v. *Louisiana*, 431 U.S. 633 (1977).

given, in the case we are talking about, a mandatory death penalty for murder as in the *Roberts* case. The distinction between degrees of murder very often provides—historically, it certainly has provided—a way for the jury to nullify the mandatory penalty by bringing in a conviction of second degree murder.

So it seems to me apart from the judgment the Supreme Court might make on the constitutionality of a mandatory death penalty, that if we look at how it functions in a standard adjudicatory system, it seems to me it is something of an illusion in that it is supposed to guarantee equal justice to all.

Mr. EVANS. You say a distinction for mandatory death penalty for first degree murder, and this bill with the sections that you have referred to taken out, the discretionary function after the finding of the aggravating circumstances and the absence of mitigating circumstances, you see a distinction between this statute and the statute in application on mandatory sentences?

Professor BEDAU. I see a distinction, but I don't think the Supreme Court is going to see a distinction. And I say this advisedly.

The plurality opinion in *Lockett* written by the Chief Justice argued if you have a finite list of 3 or 4 or 5 mitigating circumstances and none is an open-ended one like your proposed No. 10, then in effect you have got a mandatory death penalty. And, therefore, that rule of law is unconstitutional under *Woodson*.[1] This amazed Justice Rehnquist; Justice White was not pleased either.

I think that is an amazing argument, too. I can see and share to some extent the reasoning of the Chief Justice that leads him to advance it. But I do think it is reaching at straws.

From my point of view, I am not in favor of a mandatory death penalty; I am not in favor of a discretionary death penalty with untrammeled discretion; I am not even in favor of a guided discretionary death penalty. I wouldn't want any member of the committee to be in any doubt about my view of substantive merit of capital punishment. I am categorically opposed to it.

But in the course of that judgment which I render, I am also capable of rendering some judgment on the merits of various legislation to enforce the death penalty. And in that regard, I admire this legislation. I am not contemptuous of it at all. I think it is the best that probably can be done.

I say this taking into account the suggested revisions that were made earlier by Mr. Schwarzschild with which I sympathize, although not all of which I would propose.

In my view, I think it is a magnificent effort, but I think it is doomed to fail in the way I indicated. Not through want of intention or through obscurity in draftsmanship or anything of that sort, but simply because of the way in which I believe it will function. That is to say, I want the committee, I would like to help the committee, to try to share my view of how the death penalty under our law in fact functions in the United States in the present, in the recent past and, therefore, how it is likely to function in the future.

I think it functions in a way that is inherently discriminatory, inherently unfair. I think that is its overriding purpose in a society such

[1] *Woodson v. North Carolina*, 428 U.S. 280 (1976).

as ours. We do not want a death penalty that reaches out to men and women alike, to black and white alike, to the rich and the poor alike, to the dangerous and harmless alike. We don't really want a death penalty that cuts across those kinds of differences.

We want a death penalty that is highly sensitive. The very language that Mr. Wiggins used earlier to characterize his interpretation of justice, language, I think, that I cannot improve upon, nevertheless, has the effect in some communities of guaranteeing that those who are unacceptable in that community shall be sentenced to death. They are not going to be excused from the farthest reach of the severity of the criminal law because they are different, they are different in various ways. And those differences change to some extent over time.

This is why in my prepared testimony I have set my comments, which I am not going to review here now, concerning the racial impact of the death penalty against the background of lynching because the history of lynching throughout the United States, but primarily in the South, is the best evidence of how the community thought the death penalty was insufficiently just, insufficiently firm, insufficiently prompt.

That is what lynching signifies in a community; that there is a sizable body of the community, not just an angry and dissident minority, but a sizable body, particularly where lynching goes on decade after decade, that considers the procedures of the criminal justice system as insufficiently severe, insufficiently prompt, and above all insufficiently certain.

There has never been a lynch mob that advertised itself as agents of injustice, as deliberately setting about to undertake an unfair application of the law. They were simply trying to repair the befuddlement and the fence-sitting practices of the criminal justice system. And that, I think, is the heritage of capital punishment where grave crimes that have outraged the community are concerned. That is the setting historically against which we have to understand what we do today in writing new procedures in the criminal law that carries the death penalty.

I am not suggesting our future is ruled by the dead hand of the past; I am suggesting that the hand of the past is also to some extent the hand of the present. I don't think we live in a society free of racial bias and of economic anger, hostility, and resentment.

I think that the supreme sanctions is highly sensitive to those judgments. And that is what troubles me. It troubles me not just about the South which is predominantly the part of the country in which the history of lynching is to be told. It troubles me about Massachusetts where I have lived for the last 15 years. It troubles me about Oregon where I have lived, and New Jersey where I have lived, and California where I was reared.

I see no difference in these States with respect to the record that has been etched in the South so vividly. Elsewhere, it is just more obscure. It is less manifest in California and in Massachusetts than in the Carolinas or Florida.

If I may turn to my prepared testimony, I would ask you to look at table IV which comes after page 13, and also table V which is the immediately following page. Here, you have information about the racial impact of the present death sentence in three States, the only

three States of which the U.S. Supreme Court has said that their death penalty statutes will not be overturned, at least not yet.

Table IV gives you information about arrests and sentences for criminal homicide by the race of the victim and offender. This is following page 13.

In these three States, as the footnotes to the table show, the data brings us up to the past spring and in the one case of Texas to the end of last summer. So the data are quite recent; I think no one has more recent data. I hasten to add these are not data that I have collected, but they have been collected by Dr. William Bowers at the Center for Applied Social Research at Northeastern University in Boston. Dr. Bowers has generously made these data available to me so that I could make them available to you. I think they are extremely instructive.

If you look to the far left column of table IV, you will see that there have been over 2,000 arrests for criminal homicide in these three States during the 2 or more years under question. About one-half of them—49 percent—have been arrests of black offenders who were charged with killing black victims.

But if you look at the number of those persons and the percentage who are on death row in those States, it virtually is infinitesimal—7 percent. One-half or 49 percent of all arrests are for offenders whose victims are black, offenders are black, but only 7 percent of those on death row are from that group of arrestees.

But if you look at those who killed whites and who are themselves white, not quite one-half—45 percent—of all arrests are for that crime and over one-half of all death sentences—56 percent—go to that group.

If you then look at the offenses where a black person killed a white person, you see that a very small percentage is interracial homicide of that sort—4 percent. But over one-third of all death sentences are that group—36 percent.

And finally, if you look at the cases where whites have killed blacks, you see that also is a very small portion of the total arrests. Only 2 percent of criminal homicide arrests are for that category of offenses and a comparably small number have been sentenced to death—1 percent.

I think the important data in this table are in the third row in relation to the first two rows. As I said in my prepared testimony, I read these data taken in their entirety as giving us a picture that was quite like the picture that we would have had in those States prior to *Furman*.

I don't have data for you in a comparable tabular array for that period because nobody has ever studied the question prior to *Furman* in quite this form. We couldn't in fact without a great deal of effort construct tables to give you comparable information. But my conjecture is that this is not unlike what we would have found prior to *Furman*. I think it shows that even now in these States, the practice, the function, of the death penalty under the guided discretion statutes that the Supreme Court has not overturned in Florida, Georgia, and Texas, the life of a black person, a victim, a black victim—we have heard earlier that we should show concern for the victims—is not as important to the community as the life of a white victim.

Look at what happens to those whose victims are black. A very small percentage of them get sentenced to death in these States. Yet, 51 percent of all those who are victims of criminal homicide as measured by arrest statistics are themselves black. Kill a white person in Florida, Georgia, or Texas, and you have a very strong likelihood of being sentenced to death. Kill a black person, and you don't. It is just that simple.

Mr. EVANS. That's whether you are black or white.

Professor BEDAU. That's whether you are black or white, as an offender. We are talking about how much weight society attaches to the life of the victim.

The one thing that is constantly said is those who are against the death penalty do not speak to the thing I am trying to speak to right now—the value that society, as measured by the way the criminal justice system functions, attaches to the lives of the victims. And I ask you, do not these data suggest the generalization I have made, that the value of the life of a black victim today is not as great in Florida, Georgia, and Texas under these new statutes as is that of a white victim?

Mr. EVANS. The answer to that is to have more blacks on your juries, more blacks involved in the jury system.

Professor BEDAU. There may be any number of answers to it. I can only report how the guided discretion statutes, of which this legislation we are discussing today is an example, in these States where the Supreme Court has not overturned—I don't say "upheld," I say "not overturned" because I foresee the day the data of the sort you are looking at now will also be before the Supreme Court in litigation and will persuade the Supreme Court that as counsel in *Gregg* [1] and *Jurek* [2] and *Proffit* [3] argued that the new statutes really achieved only a cosmetic change with the past— actually function and the way the system operates.

Mr. WIGGINS. You certainly wouldn't want to confront the problem directly and add to the list of aggravating or mitigating circumstances the race of the offender of the victim because that would directly deal with it and ask that the jury give consideration to that issue. But it would be patently unconstitutional to do so.

The notion that discretion when exercised honestly should always produce the same result is not consistent with human nature, is it?

Professor BEDAU. Well, put in those strong terms, no. But I think that is a bit of a strawman. I ask you whether as you contemplate the data on table IV, you don't find it a plausible hypothesis to consider that race is functioning in some way or other in the minds of those who manage the criminal justice system, whether it is the jury or the trial judge, as Mr. Evans has suggested, or whether it is the district attorneys. Perhaps we ought to have more black district attorneys in South Carolina, Georgia, Texas, and Florida. I am not a close enough student of the criminal justice system in its functional details in these States to have anything useful to say to you on such possibilities. Whatever the explanation may be, it seems to me that a scientist looking at these data would surely consider the hypothesis that race of the victim is playing a role.

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[1] 428 U.S. 238 (1970).
[2] 428 U.S. 262 (1976).
[3] 428 U.S. 242 (1976).

I am not offering this as a conclusion; I have no proof. That would be presumptuous and preposterous. I am simply asking you to be scientific for the moment and consider the hypothesis that I infer from these data.

Mr. WIGGINS. May I proceed with this chart for a moment, starting with the first line?

There are 1,099 black persons arrested. Is that total number of arrests, black persons arrested, for killing of a black victim? Is that what the——

Professor BEDAU. 1,099, as I understand it, is the total number of black persons arrested where the charging authorities or the arresting authorities, the police, knew or registered in their dockets that the victim was black. These are arrest statistics.

Mr. WIGGINS. That represents 49 percent of the total homicide arrests regardless of the race of the offender or victim?

Professor BEDAU. Right.

Mr. WIGGINS. You go on and find that 7 percent of something—7 percent of those who have been arrested?

Professor BEDAU. No, 7 percent of all of those under sentence of death.

Mr. WIGGINS. Involve black?

Professor BEDAU. Were from that group of 1,099.

Mr. WIGGINS. The gross number is 16?

Professor BEDAU. Right.

Mr. WIGGINS. Since seven is a relatively low number, the implication is that juries do not view with the same gravity a black killing a black.

Professor BEDAU. Or district attorneys do not charge first degree murder.

Mr. WIGGINS. These are all charged or it wouldn't be in the statistics.

Professor BEDAU. No, I'm sorry. On the left-hand side, we have arrest statistics which are not statistics on indictments at all. And that is a crucial factor in helping to explain how we could get the bizarre discrepancy between the left-hand column and the right-hand column. We are not dealing here with charging or indictment statistics.

Mr. WIGGINS. We move down to the second line and find that approximately the same number of whites were charged with killing whites. The percentage is 45 as distinguished from 49. We are in the same ball park. And yet, 56 percent of those whites accused of killing whites find themselves under sentence.

Professor BEDAU. I'm sorry, 56 percent of those on the death sentence were from that group of 1,013. We are talking about 125 persons which is about 12 percent of those arrested.

Mr. WIGGINS. Well, now, the conclusion drawn would be that juries view harshly the idea of whites killing whites.

Professor BEDAU. I think they take a harsh view of anybody killing a white; look at the next column.

Mr. WIGGINS. At least killing a white and are prepared to impose a serious penalty for it.

Go to the next one, and we have blacks killing whites and only going to the percentage column 36, one would conclude, I think, that jurists view slightly less the gravity of a black killing a white than a white killing a white.

Professor BEDAU. That is true. That is a fair inference.

Mr. WIGGINS. Well, it is racist, I suppose, but in a perverse sort of way.

Now, we get down to the last where a white kills a black. And I take it that is the context of extreme racism. And there is only 1 percent here.

Now, this is your big message. Because that, I think, is the message you are trying to convey—that if a white kills a black, he is less apt to be treated seriously by the system.

Professor BEDAU. Not quite. My message is that whoever kills a black, whoever kills a white, doesn't matter; the criminal justice system as these data suggest is most senstive to the race of the victim, not to the race of the offender. I am not now making the usual racial criticism against the death penalty that has been made and that can be made and that I have made myself in other settings. This is a different criticism, and I think a more interesting one than the one that is usually made.

Mr. Wiggins, what I would draw to your attention is the relationship between the first and the fourth row, that 7 percent and 1 percent, in our next to the right-hand column and the two middle rows which give us 56 and 36 percent. Those are the percentages that tell us about the relationship between the death sentence in these three States and the race of the victim as opposed to whatever the race may be of the offender.

Mr. WIGGINS. I go on to the next chart.

Professor BEDAU. The next chart, of course, differs only in that we are now talking about a special class of murder, felony murder, which is interesting to look at.

Mr. WIGGINS. I think the last line, the last row, where we have a white defendant, and a black victim, the percent in terms of the total is minor, but I notice that the number is 2 which is one-third of the number arrested. A very high percentage.

Professor BEDAU. Very high percentage.

Mr. WIGGINS. And out of synch with the numbers at least the implications we are trying to draw from these.

Professor BEDAU. I am not able to give an account of that figure, though I would draw your attention to the text of my testimony on page 13. There, I point out that one of the whites on death row who killed a black also killed several whites. I don't myself know whether it is one of the 2 on table IV or one of the 2 on table V. In any case, it is one of those persons. And the reason I draw it to your attention is that, again, it may be the race of those other victims that the offender also took that is a controlling factor.

Mr. Wiggins, I don't think any table that I or anybody else can put before you on the racial or any other aspect of the death penalty is going to prove beyond reasonable doubt one rather than another hypothesis. What I am concerned to have you ponder on the strength of these data is whether or not the guided discretion statutes that have been given a qualified imprimatur by the Supreme Court show a significant change in the administration of criminal justice in a part of the country—and I say this without, I think, unfairness—which has had a long history of conspicuous racial use of the death penalty. I em-

phasize the word "conspicuous" because I have said I think in a little less conspicuous way much the same can be said about other parts of the country.

The conclusion that I draw from the information before you as a whole, not from any one number of any one row or column of the data, is that the criminal justice system, whether it is the juries, whether it is the district attorneys, whether it is the impaneling of grand juries, whatever it may be, functions in a racially sensitive fashion.

The statute is racially blind. The statute on its face is immune from criticism. I am not trying to draw attention to features in the statutory language in these three States that are vulnerable to a criticism of racist effect. I am only trying to show that the function of this statute when it intersects with the whole system leads to results that suggest to me, as I have said before, that the race of the victim is a significant factor in the sentence of the offender where the crime is murder.

Mr. EVANS. Where are your statistics which would point out how many of these homicides were committed within family members? Because I think that is probably the most essential part that you have left out in composing this hypothesis about black victims. Because, in fact, most of the homicides that are committed among blacks in the South are committed within the family unit.

When you take that, you leave out the aggravating circumstances resulting in no opposition, no imposition of the death penalty. And I think without those statistics, you cannot draw any conclusions which would point out any racist nature in the imposition of the death penalty in these three States because, as a matter of fact, that is the way it is.

Professor BEDAU. With respect, Mr. Evans, that is precisely why table V is here. Table V eliminates all of the kinds of familial homicides that you are concerned with. Table V which comes immediately after table IV deals with felony murder and, therefore, cannot include any of the kinds of crimes that you have drawn our attention to.

Mr. EVANS. But here, you don't have any examples of the white on black. You have got one or two. That indicates to me that whites don't kill blacks. That is the biggest conclusion that I can draw from your figures that whites don't kill blacks in the South. And maybe they do in other areas.

Professor BEDAU. Whites don't kill very many blacks; you are quite right. But that is not the inference I draw from the figures. If you will look in table V at the arrest statistics, you can see the percentages here differ rather significantly. Not many blacks who kill blacks—29 percent—are arrested for felony murder or felony-type murder. But half of the whites who kill whites and a small percentage of the blacks who kill whites are so arrested.

But now look over under the death sentence. You will see that the percentage of those on death row having committed this kind of crime is virtually identical with the percentage of all as shown on the previous page in table IV. In other words, run down that next to the right-hand column of percentages on the two tables, and the numbers are almost identical.

Once again, what that shows is that where a white person is the victim, whether it is family homicide, felony murder, or any other

kind of homicide you please, where a white person is the victim, the courts of these three States in the last 2 or 3 years are highly disposed to sentencing that person to death.

Where the victim is a black, there is only 6 percent on table V and 8 percent on table IV. It is the race of the victim not the race of the offender that I want to emphasize, as these tables show, to be the revealing factor.

Table V, I think, deals directly with what is legitimately on your mind, which is carving away all the large numbers of homicides that occur in the family on the weekend. The criminologists have pointed out the most dangerous place in America is the kitchen and the bathroom. That is where husbands and wives and parents and children assault and kill one another. And those data are eliminated from Table V, but the results in terms of the pattern of death sentences is virtually unchanged by the elimination of that kind of offense. That, I think, shows not conclusively, but tends to show that there is some constant factor independent of the kind of offense that is operating.

We want to try to explain the relative uniformity in the percentages with regard to race of the persons under sentence of death despite the fact that the homicides they have committed are widely different and that is where I think the race of the victim again is a factor.

It may not be the only factor. A table of this sort cannot claim to show that any one thing is the decisive factor, but it certainly can claim to suggest that this is the hypothesis we seriously ought to consider.

Mr. EVANS. But as far as the accused is concerned, he certainly is not discriminated against. These data do not shown that there is any discrimination against the accused.

And that is the purpose. If we accept the answers or the conclusions that you have come to, we would still have to say that as far as the person being tried that he is not discriminated against under the law.

Professor BEDAU. I have not tried to show data here that would confirm the claim that the offender is directly being discriminated against as a consequence of these laws. One might say, however, in the light of these data that if you are planning on committing an offense and you are going to do it in Florida, Georgia, or Texas, and somebody may be killed, you would be well advised to make sure that the victim isn't white because you are going to increase the likelihood of your being on death row as a result of whatever kind of crime you commit. Don't let your victim be white, whoever you are, white or black.

Mr. EVANS. In view of the statistics you have shown us, it is very unlikely a white is going to kill a black anyway. So we want to make sure the blacks take into consideration when they are whites or blacks.

Professor BEDAU. I can't vouch for the validity of the arrest statistics so far as the fit between crimes and arrests. I am prepared to accept the data at face value and assume that there is a relatively stable proportions of crimes that result in arrests in these jurisdictions, whatever the police may believe to be the race of the victim, or the race of the offender.

I still think these data show a very significant aspect of the racial impact of guided discretion death penalty statutes. I think there is more, no doubt, that can be shown, and should be studied. If the committee is so minded, it might very well invite Dr. Bowers to come down and add further testimony based upon his other researches beyond what I have tried to give you today.

Mr. EVANS. Aren't you basically saying there is no way to construct a statute which will take racial prejudices, or other prejudices, out of the law or out of the practical application of the law?

Professor BEDAU. I think perhaps I am saying this: If there is no way to construct a death penalty statute that would take the racial effect out of its administration, then, I would say that death is too severe a penalty to apply in a society with a history of that inability and, therefore, should be withdrawn.

I am quite prepared to believe that the next most severe sanction after death being life imprisonment may also reflect severe racist effects. I am prepared to believe that.

Mr. EVANS. Then, as soon as we do away with the death penalty, we will be besieged with people who want to do away with life in prison. And when we get that taken care of, then it will do away with imprisonment at all.

Professor BEDAU. I don't think that the evidence that I am giving today and that of others who are against the death penalty should be construed as the camel's nose under the tent, where the tent, in fact, is intended to encompass no punishment whatsoever. That is not my purpose this afternoon, Mr. Evans. And I am sure you don't believe that it is.

I think that, as the Supreme Court itself has said, and as your efforts in this legislation show that you believe, too, death is different. Death is not just another increment in penalty severity the way in which one more year is an increment in penalty severity if it is added on to 5 years.

The difference between 5 and 6 years is not like the difference between a life sentence and a death penalty. We all know that. It may be there are strong arguments against a life sentence. That is not pertinent, it seems to me, to the issues before this committee, at least it is not part of any testimony that I am prepared to give today. Maybe in some future meetings of this subcommittee, that will be the agenda. In any case, where the question is the death penalty, I think that we cannot administer it in a racially unbiased fashion with statutes such as these that are being discussed here or these that I have been reporting about in operation in Florida, Georgia, and Texas, which are racially blind. I don't think those statutes were drawn up in a cynical way to allow racial discrimination to proceed apace.

Mr. EVANS. I can assure you since I was involved in the Georgia statute, they were not drawn up that way, but drawn up with an intent to try to make them as fair and equally applicable as possible.

And you're saying it can't be done.

Mr. MANN. There is a vote on the floor. The subcommittee will suspend until 2:30.

[Whereupon, at 1:25 p.m., the subcommittee recessed, to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

Mr. MANN. The subcommittee will come to order. I apologize for the delay in resuming, but there was activity on the floor requiring our attention.

Our final witness is Mr. Delton Franz of the Mennonite Central Committee. We have a written statement submitted by Mr. Franz, and without objection, it will be made a part of the record.

We are delighted to have you, sir, and you may proceed as you wish.

TESTIMONY OF DELTON FRANZ, MENNONITE CENTRAL COMMITTEE, WASHINGTON, D.C.

Mr. FRANZ. Thank you, Mr. Chairman. I appreciate the opportunity to participate in these hearings. I will be reading excerpts from the statement, rather than the total script there.

Mr. MANN. That is good.

Mr. FRANZ. I do not pretend to speak for all Mennonites. However, the observations and experiences shared here do reflect the current and historic convictions of a large proportion of our membership.

I wish to focus on several existential situations that have been a part of our experience as a religious community.

These brief case studies raise in our judgment several questions relevant to, but not resolved entirely by the legislation before the committee. The two brief case studies cited in our statement originate in extremely different circumstances in the Mennonite community, one rural, one inner city, one involving a conservative close-knit Mennonite community, the other in a Mennonite family in the midst of the urban turmoil of our complex society. They represent both the wide diversity of our denomination's religious body, and also the commonality of our convictions regarding the taking of life and the response of our people to the perpetrators of capital crime.

So I would like to begin by reading excerpts beginning at the bottom of page 2 from this first brief study.

It was on October 2, 1973, that Evelyn Wagler, a 24-year-old, German-born Swiss immigrant was set upon by several teenage youths in a ghetto of Boston, where she had moved only a week earlier. Carrying a can of gasoline to start her stalled car, she was accosted by the youths who dragged her into an alley, forced her to pour the gasoline over her body, threw a match and she turned into a human torch.

The police at her bedside attempted, through a taped interview, to obtain some evidence that would enable them to apprehend the youths. Evelyn's last request was, nevertheless, that retribution not be made against the youths.

Evelyn and Mark, her husband, had experienced a real and sobering exposure to the poverty, desperation and injustice experienced by blacks in the ghetto during their participation in a Mennonite youth service project on Chicago's south side. They understood why black youth would tell whites to get out of our neighborhood as Evelyn's assailants had on the night of her death. It is not unreasonable to believe that Evelyn became a surrogate victim in Boston's Roxbury area, for the oppressors, the ghetto victims were really trying to get at, Mr. Charlie.

An article in the November 11, 1973, New York Times Magazine, indicated that investigative officers, based on a rash of equally barbarous crimes in Boston within a 3-day period, linked the manner in

which Evelyn was killed to the film "Fuzz". It was shown on ABC–TV in Boston just 2 days before her death, portraying delinquent youth on the Boston waterfront dousing tramps with gasoline and setting them on fire.

Commenting on the loss of his wife, Mark said "She had been killed by the system that creates ghettos and racial hatred. That's the way Evelyn would have looked at it too. The last thing she would have wanted was for her death to be used to incite people" [to retribution].

I would like to turn now to several observations that I believe are applicable to the bill before this committee.

Not surprisingly, the kind of capital crime that inevitably arouses the public's cry for the death penalty is the one that is typified here by the experience of Evelyn Wagler. And I can understand this response. Evelyn and her husband, Mark, were married in the inner-city congregation that I pastored, and they had a leading role in our community youth programs. Being very close to them as the pastor who married them, and having supervised their work in our ghetto community in Chicago, I could feel some of the inner anger that I think is not an unusal response to this kind of crime.

Boston Mayor Kevin White, in a press conference following Evelyn's death, said: "This is one of the most horrible crimes in our history." For quite obvious reasons, the national news media cited the crime as a heinous act. This incident would appear to explicitly portray aggravating circumstance No. 2 in H.R. 13360: "Wanton and intentional cruelty or depravity was shown in the course of the offense."

Yet under H.R. 13360, "Mitigating Circumstances", No. 1, "youthfulness of the defendant," and No. 2, "the defendant's capacity to appreciate the wrongfulness of the conduct," might also have a bearing when a jury would weigh the pros and cons in this kind of crime.

While the aggravating circumstances are very compelling in the Wagler death, an 11-year involvement in an impoverished, densely populated inner-city ghetto also compels one to weigh heavily the impact of mitigating circumstances on those who took Evelyn's life. Consequently, I must ask: Can a jury be expected to adequately perceive and weigh the many mitigating factors relevant to such a tragedy? How might high unemployment, inferior educational opportunity, and overcrowding slum housing have contributed to the lack of a positive self-image, the reinforcements of failure, and eventually, violent, antisocial behavior?

Numerous scientific and physcological studies have been done to examine the relationship of these conditions to crimes of violence.

A common momentary escape for those living in such conditions has been television. What then is the impact of television violence on youth and adult defendants convicited of violent crimes? The U.S. Surgeon General as long ago as 1972 said, after delivering to Congress one of the most exhaustive research projects ever undertaken by social scientists:

> There comes a time when the data are sufficient to justify action. The overwhelming consensus is that televised violence does have an adverse effect on certain members of society.

A concluding question: Can juries adequately take into account the extent to which the pervasive influence of television violence has be-

come a significant influence in a defendant's crime of violence, and thereby adequately decide for or against the death penalty?

Then I would move to a second illustration that grows out of one of our conservative branches, the Amish community.

It was in 1957, that a 19-year-old shot and fatally wounded Paul Coblentz, a young Holmes County, Ohio, farmer. Coblentz was an Old Order Amish Mennonite, whose death stirred Holmes County, one of the major centers of Amish population.

Over 20 Amish residents of Holmes County were summoned for jury duty, but all were dismissed as possible jurors because of their unwillingness to inflict the death penalty. As the trial proceeded, many Amish families invited the parents of the slayer into their homes. After the death penalty was handed down by the jury, large numbers of Amish families signed petitions and wrote the Governor of Ohio, requesting a commutation of the sentence. Seven hours before the scheduled execution of Cleo Peters, the Governor granted commutation.

Two ministers visited Peters in the Ohio Penitentiary shortly after, learning that Peters had become a Christian several months earlier, deeply appreciative of the letters he had received from Amish people, among them the widow of his victim.

Now it is generally assumed that the public response to the perpetrator of a capital crime will be a cry for his or her execution. But I think there are numerous instances in which the family and friends of the victim, and sometimes the larger community, have asked that revenge not be taken and that help be sought to rehabilitate the defendant.

Such, at least, was the response of the Coblentz family, their fellow church and community members. Their redemptive attitude had a positive impact on the defendant resulting ultimately in the commutation of his execution.

The question: Should not such ameliorative responses to a violent crime be considered a mitigating circumstance?

Does not the attitude of those in the community from which a defendant comes and to which, if rehabilitated, he or she may hopefully return, have a bearing on jury deliberations?

Furthermore, would the jury's weighing of aggravating and mitigating circumstances as outlined in the procedures of H.R. 13360, allow for the possibility of repentence, that is, turning in a new direction by the defendant?

While a repentant defendant and a redemptive community may sound like irrelevant theological rhetoric, we would suggest that these terms can be much more than theological abstractions. Criminals often do change from violent to constructive human beings when acceptance and understanding are offered. Perhaps these contingencies do not conform with the procedures outlined in the present legislation before this committee, but we are convinced that the potential of the redemptive community in relating to the potentially repentant defendant is a profound dimension that should not be overlooked by our criminal justice system.

In conclusion, the procedures in the bill before you, while in many respect an improvement over the more arbitrary course followed presently in our judicial proceedings, cannot in our opinion adequately

alleviate the prejudicial influences within our society affecting prosecutors, jurors, and trial judges—in short, all of those involved in the criminal justice system.

We are further concerned that the preponderance of the evidence submitted by counsel for the defense, as required to establish mitigating circumstances, can, at best, be limited to the evidence readily accessible. We believe that the evidence available would in many cases be far too limited to adequately inform the jury to make a judgment so final, so all encompassing as the sentence of death.

If indeed, counsel for the defense could adequately know, understand, and present to the jury all of the factors contributing to the defendants' crime, and the jury could, in turn, truly weigh the relationship of these mitigating circumstances to the aggravating circumstances, we might concede that theoroetically the jury would then be sufficiently knowledgeable and wise to sit in judgment over the life of the defendant.

However, such wise and perfect judgment has not, we believe, been given to the created human order, but continues to remain within the province of the Creator, who alone can be the perfect giver and taker of life.

With that, I would conclude my remarks and welcome any questions you may have.

[The complete statement of Mr. Franz follows:]

SUMMARY STATEMENT ON H.R. 13360, DEATH PENALTY PROCEEDINGS

(By Delton Franz, Washington Office, Mennonite Central Committee)

(1) Several brief "case studies" of capital crimes involving individuals and the Mennonite church community are cited in our full statement illustrating the historic position of the Mennonite churches (an historic peace church) both in respect to our opposition to capital punishment by the State and our response to defendants who have taken the life of another (including members of our church).

(2) With respect to the post-conviction proceedings outlined in H.R. 13360, the "mitigating" and "aggravating" circumstances provides, we believe, more helpful criteria than has been available to date for assessing the culpability of the convicted defendant. If there *must* be a death penalty—and we are opposed to the same—these guidelines bring our criminal justice system a step beyond the inequitable judicial process our society has known in the past.

(3) However, we do not believe that either counsel or the jury can sufficiently uncover or comprehend the complex, interlocking "mitigating" and "aggravating" circumstances to possess the necessary wisdom to impose a sentence of death. For that reason, from both a sociological perspective and on theological grounds, the mitigating circumstances must always outweigh the aggravating circumstances. Man's Creator alone is wise enough to pass judgment on a life.

(4) We ask whether the "mitigating" circumstances would allow for and include the responsiveness of a *redemptive community* taking the initiative to receive and offer support for the convicted defendant. The church has much to offer the criminal justice system in this area. And does the bill before the committee allow for a *repentant* defendant?

STATEMENT ON THE DEATH PENALTY BY DALTON FRANZ, DIRECTOR, WASHINGTON OFFICE OF MENNONITE CENTRAL COMMITTEE FOR OHIO AND EASTERN CONFERENCE (THE MENNONITE CHURCH), CENTRAL DISTRICT CONFERENCE (GENERAL CONFERENCE MENNONITE), MENNONITE CENTRAL COMMITTEE, PEACE SECTION

As representatives of the Mennonite church, we appreciate the opportunity to present this statement for the House Judiciary Committee's considerations, as

you weigh the direction that legislation should take regarding this nation's use of the death penalty within the criminal jsutice system.

While we do no pretend to speak for all Mennonites, the observations and experiences shared here do, we believe, reflect the current and historic convictions of a large proportion of our membership.

From the sixteenth century to the present, many Mennonites have witnessed against capital punishment. One of the charges against Felix Manz, the first Anabaptist (Mennonite) martyr, was that he had rejected capital punishment.

In 1910 Daniel Kauffman, Mennonite leader, said: "The taking of human life, whether upon the field of battle, on the gallows or in the electric chair, or in a conflict between individuals, belongs to uncivilized nations." C. Henry Smith, Mennonite historian, said in 1932: "Human life to the Mennonites is sacred, and not to be snuffed out for any reason whatsoever, individually or collectively, * * * to appease the demand for public justice * * *."

We turn now to an overview of our nation's entrapment in violence, in the hope that her people might heed the words of the prophet: "As I live, says the Lord, I take pleasure not in the death of the wicked, but in the turning back of the wicked who change their ways to win life." (Ezekiel 33:11)

OUR NATION'S PROCLIVITY FOR VIOLENCE

More than seventy nations have acted to reduce human violence by abolishing the death penalty. Among advanced nations, the United States remains the chief advocate of death as a punishment for crime. We are characterized in the eyes of millions as much by our executions as by the general violence of our heavily armed population. Indeed the two phenomena blur into one.

Our emotions may cry for vengeance in the wake of a horrible crime, but we know that killing the criminal cannot undo the crime, will not prevent similar crimes by others, does not benefit the victim, destroys human life and brutalizes society. If we are to still violence, we must cherish life. Executions cheapen life.

A humane and generous concern for every individual, for his safety, health and fulfillment, will do more to soothe the savage heart than the fear of state-inflicted death. So long as government takes the life of its citizens, the sixth commandment from the Law of Moses, "Thou shalt not kill", the foundation of Judaic Law and Christian ethics, will lose influence we have claimed Mosaic law has had upon our own legal system. The spiral of violence and retribution must be halted. George Bernard Shaw said: "Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind."

Our society *imprisons* the ghetto teenager who pulls a gun on the corner grocer, *awards* medals to soldiers who kill sons of the enemy in war, and posthumously *honors* generals who give orders to pilots to incinerate thousands of innocent civilians with bombs from 20,000 feet altitude. The blame diminishes as the violence increases. Can a society that teaches its sons that mas killing in war are honorable while the single face-to-face act is criminal, expect to cultivate a true reverence for life?

The time is long overdue in our country to *begin the process of reversing* violence by eliminating it within our criminal justice system. We can begin by curbing the proliferation of weapons through over-the-counter sales, establishing alternatives to our archaic prison system—a system that exacerbates the crime problem—and finally by eradicating that most futile of all responses to crime * * * the gas chambers, the electric chairs, the gallows, and the firing squads.

In our judgment, the only meaningful response to capital crimes is to work for the removal and alleviation of the causes of violence. And while violence will never be eradicated, the State's response with still further violence (capital punishment) is neither morally defensible nor proven to be scientifically or sociologically effective as a deterrent.

We do not mean to suggest that any neat or simple answers to violence are available from the religious community. Often ot the shame of the churches, we have tolerated violence and indeed perpetrated it by our silence and consent to the actions of the State in the taking of life. It is, therefore, important that from our religious tradition we lift up for ourselves, our children and our government—those unheralded but significant and courageous witnesses that have been made to honor the sanctity of life. Only when more of us are inspired to preserving life, can the frightening spiral of death be abated.

A youth worker's death in the ghetto

Our conscience on violence and retribution continues to find expression in the younger generation. The real guidelines for how public officials, private individuals and the Christian community respond to violent acts must emerge from deep moral principles grounded in real life situations.

On October 2, 1973, Evelyn Wagler, a 24-year-old, German-born Swiss immigrant was set upon by several teenage youth in a ghetto of Boston, where she had moved only a week earlier. Carrying a can of gasoline to start her stalled car, she was accosted by the youths who dragged her into an alley, forced her to pour the gasoline over her body, threw a match and she turned into a human torch.

After taping her last words, before her death in Boston City Hospital five hours later, the police called her husband Mark, a Mennonite whom she first met in her native Switzerland, informing him and their four-year old Jorg Thoreau (names after an early 16th century Anabaptist Mennonite leader and the American writer and naturalist) that their wife and mother had been murdered.

The police at her bedside, attempted through a taped interview to obtain some evidence that would enable them to apprehend the youth. Evelyn's last request was, nevertheless, that retribution not be made against the youth.

Evelyn and Mark had experienced a real and sobering exposure to the poverty, desperation and injustices experienced by blacks in the ghetto during their participation in a Mennonite youth service project on Chicago's south side. They understood why black youth would tell whites "to get out of our neighborhood" as Evelyn's assailants had on the night of her death. It is not unreasonable to believe that Evelyn became a surrogate victim in Boston's Roxbury area, for the oppressors the ghetto victims were really trying to get at, "Mr. Charlie".

An article in the November 11, 1973 *New York Times Magazine*, indicated that investigative officers, based on a rash of equally barbarous crimes in Boston within a three-day period, linked the manner in which Evelyn was killed to the film "Fuzz". It was shown on ABC TV in Boston just two days bfore her death, portraying delinquent youth on the Boston waterfront dousing tramps with gasolin and setting them on fire.

Commenting on the loss of his wife, Mark said, "she had been killed by the system that creates ghettos and racial hatred. That's the way Evelyn would have looked at it too. The last thing she would have wanted was for her death to be used to incite people" (to retribution). In life and even in death, Evelyn and Mark sought to break the cycle of violence. Mark said the one thought that kept recurring in his mind and freed him from a spirit of retribution was a biblical passage: "Vengence is mine, I will repay, says the Lord."

Application to H.R. 13360

Not surprisingly, *this* is the kind of capital crime that inevitably arouses the public's cry for the death penalty. I can understand this response. Evelyn and her husband Mark were married in the inner city congregation I pastored and they had a leading role in our community youth programs.

Boston mayor Kevin White, in a press conference following Evelyn's death, said: "This is one of the most horrible crimes in our history." For quite obvious reasons the national news media cited the crime as a heinous act. This incident would appear to explicitly portray aggravating circumstances No. 2 in H.R. 13360: "Wanton and intentional cruelty or depravity was shown in the course of the offense."

Yet undr H.R. 13360, "Mitigating Circumstances" No. 1—"youthfulness of the defendant(s)") and No. 2 ("the defendant's capacity to appreciate the wrongfulness of the * * * conduct * * *") might have a bearing as well.

While the aggravating circumstances are very compelling in the Wagler death, an eleven-year involvement in an improverished, densely populated inner city ghetto also compells one to weigh heavily the impact of "mitigating circumstances" on those who took Evelyn's life. Consequently, I must ask: Can a jury be expected to adequately perceive and weigh the many mitigating factors relevant to such a tragedy? How might high unemployment, inferior education opportunity, and overcrowded slum housing have contributed to the lack of a positive self-image, the reinforcement of failure and eventually violent, antisocial behavior? Numerous scientific and psychological studies have been done to examine the relationship of these conditions to crimes of violence.

A common, momentary escape for those living in such conditions has been television. What then is the impact of television violence on youth and adult defendants convicted of violent crimes? After hundreds of formal scientific studies and decades of contentious debate, reasonable people are obliged to agree that televised violence does indeed have harmful effects on human character and attitudes.

The U.S. Surgeon General, as long ago as 1972, said after delivering to Congress one of the most exhaustive ($1 million, three-year) research projects ever undertaken by social scientists:

"There comes a time when the data are sufficient to justify action. The overwhelming consensus (is) that televised violence does have an adverse affect on certain members of society."

In the six years since that declaration by the Surgeon General, TV watchers have been treated to uncounted thousands of brutal homicides, rapes, robberies, muggings and all-out mayhem. One scientist estimates that by the age of 15, the average child will have witnessed 13,400 televised killings. In 1973, 74, violence occurred in 73 percent of all TV programs, according to the Violence Profile published by the Annenberg School of Communications at the University of Pennsylvania.

Can juries adequately take into account the extent to which the pervasive influence of TV violence has become a significant influence in a defendant's crime of violence, and thereby adequately decide for or against the death penalty?

Response of Amish community breaks spiral of violence

In 1957, a 19-year-old youth shot and fatally wounded Paul Coblentz, a young Holmes County Ohio farmer. Coblentz was an Old Order Amish Mennonite whose death stirred Holmes County, one of the major centers of Amish population in the country, in an unusual way. Their reaction to the brutal act of this intruder from outside their community surprised the people of eastern Ohio.

Over twenty Amish residents of Holmes County were summoned for jury duty, but all were dismissed as possible jurors because of their unwillingness to inflict the death penalty. As the trial proceeded, many Amish families invited the parents of the slayer into their homes. After the death penalty was handed down by the jury, large numbers of Amish families signed petitions and wrote the Governor of Ohio, requesting a commutation of the sentence. Seven hours before the scheduled execution of Cleo Peters, the Governor granted commutation.

Two ministers visited Peters in the Ohio penitentiary shortly after, learning that Peters had become a Christian several months earlier, deeply appreciative of the letters he had received from Amish people, among them the widow of his victim.

Application to H.R. 13360

It is generally assumed that the public response to the perpetrator of a capital crime will be a cry for his or her execution. But there are numerous instances in which the family and friends of the victim have asked that revenge not be taken and that help be sought to rehabilitate the defendant. Such was the response of the Coblentz family, their fellow church and community members. Their redemptive attitude had a postive impact on the defendant resulting ultimately in the commutation of his execution.

Question: Should not such ameliorative responses to a violence crime be considered a mitigating circumstance? Does not the attitude of those in the community from which a defendant comes and to which, if rehabilitated, he/she may hopefully return, have a bearing on jury deliberations? This question must be addressed to all of us who are affiliated with the church, as well as to you the members of Congress, but we believe the untapped community resources for a redemptive rather than simply a retributive response are present in our society. These people-resources could be utilized to a much greater degree.

Furthermore, would the jury's weighing of aggravating and mitigating circumstances as outlined in the procedures of H.R. 13360 allow for the possibility of repentance—turning in a new direction—by the defendant? While a repentant defendant and a redemptive community may sound like irrelevant theological rhetoric, we would suggest that these terms can be much more than theological abstractions. Criminals often do change from violent to constructive human beings when acceptance and understanding are offered. Perhaps these contingencies do not conform with the procedures outlined in the present legislation before this

committee, but we are convinced that the potential of the redemptive community in relating to the potentially repentant defendant is a profound dimension that should not be overlooked by our criminal justice system.

Conclusion: God, not man, final judge

The procedures in H.R. 13360, while in many respects an improvement over the more arbitrary course followed presently in our judicial proceedings, cannot, in our opinion adequately alleviate the prejudicial influences within our society, affecting prosecutors, jurors and trial judges—in short, all those involved in the criminal justice system. We are further concerned that the "preponderance of the evidence" submitted by counsel for the defense—as required to establish the mitigating circumstances—can, at best, be limited to the evidence readily accessible. We believe that the evidence available would in many cases be far too limited to adequately inform the jury to make a judgment so final, so all encompassing as the sentence of death.

If indeed, counsel for the defense could adequately know, understand and present to the jury all of the factors contributing to the defendant's crime—and the jury could, in turn, truly weigh the relationship of these mitigating circumstances to the aggravating circumstances—we might concede that theoretically the jury would then be sufficiently knowledgeable and wise to sit in judgment over the life of the defendant. However, such wise and perfect judgment has not, we believe, been given to the created human order, but continues to remain within the province of the Creator, who alone can be the perfect giver and taker of life.

The critical question is how we—the church and the state—can best foster respect for life and preserve the dignity of the human person. We do not believe that more deaths are the answer. We therefore have to seek methods of dealing with violent crime that will protect society without destroying the offender. In the sight of God, correction of the offender has to take preference over punishment for it is God's will that humanity be saved, not condemned.

The final arbiter and judge over the "Cains" who have been slain by their brothers "Abel" will be God the Creator, not man * * * not government. While government must maintain an ordered and just society—bringing offenders to a fair trail—these cases, we believe, cannot morally be consummated with the killing of the offender.

When Cain had slain his brother Abel, the Lord put a mark on Cain, "lest any who came upon him should kill him."

In the ancient Biblical understanding of civilized social order—"cities of refuge" were established to which those guilty of violence could retreat until the passion of revenge by their neighbors had subsided. These "cities of refuge" marked significant progress from primitivism toward civilization. Our society by sanctioning the killing of offenders, would take a step backward toward primitivism.

Mr. MANN. Thank you very much. Let's assume that we are confronted with a defendant who has the propensity for taking human life, and for whom rehabilitation is impossible. You would still find an alternative way to deal with him?

Mr. FRANZ. I would, Mr. Chairman, then I think have to come back to a point that was made at least once this morning by previous witnesses; namely, that we would still prefer an alternative to a death sentence for that perpetrator of the crime.

That would be on our moral and religious conviction that man is not really in a position to take a life, but, second, I think there is always reason to hope that somehow with more creative efforts within the criminal justice system, people can be turned in a new direction.

Mr. MANN. Well, creative efforts are certainly in demand because the corrections community generally has concluded that rehabilitation is hardly worth the effort. Thus this subcommittee received from the U.S. Senate a bill based on the premise that rehabilitation was serving no purpose and recommending a sentencing system that discounted the possibility of rehabilitation virtually 100 percent.

Now this subcommittee took a different position. We have retained the power of the parole board to recognize and grant parole for rehabilitation, change, or whatever. But the preponderance of the corrections community in the last 6 or 7 years has given up the old idea upon which we have been living for 50 or 60 years, and spending a lot of money on—that rehabilitation is really possible.

They cite statistics which show that we are going to have 75- or 80-percent recidivism—I think that figure is close—no matter what we do, no matter what we have done.

I share your desire that creative rehabilitation be accomplished. I don't really think that gets to the meat of this issue. Because you are all one way, no matter whether rehabilitation works or not, you have the desire to improve rehabilitation techniques, and to use hope as a basis for reinforcing that. But as a practical matter, it hasn't worked. I don't argue with the figures, either, that murderers are the least of the recidivists. The statistics are dominated by those in for other things.

When we get into the other category, as Dr. Bedau provided a chart, with felony-murder types, I think we find recidivism is a substantially higher figure.

I don't really have a question, because I asked it to start with, but rehabilitation notwithstanding, you would not impose the ultimate penalty?

Mr. FRANZ. That is right.

Mr. MANN. Mr. Hall.

Mr. HALL. I have maybe one question, Mr. Franz. I read with interest the case of Evelyn Wagler that you mentioned being killed in the manner in which she was, and it happening in a ghetto of Boston.

I notice on page 5 of your conclusion you state that:

> If juries could consider all of the factors contributing to the defendant's crime, and the jury could, in turn, truly weigh the relationship of these mitigating circumstances, et cetera.

Is it your understanding that the fact that a person lived in a ghetto such as in Evelyn's case, under the facts as you have set them out here, should be mitigating circumstances in the event that the person had been brought to trial for that murder?

Mr. FRANZ. I would not automatically assume that, because in our 11 years living in a ghetto situation in Chicago, where Evelyn spent most of her time during our acquaintance, there were families who somehow were able to maintain the kind of setting for their children, their growing youth, that made it possible for them to not be as affected as so many were by all of the adverse conditions.

But it does seem to me that at the very least the counsel for the defense and the jury would have to consider as thoroughly as they possibly could the kind of factors that are so rife in the ghetto situation, such as I have suggested here.

Mr. HALL. But you are not saying that that in itself, the fact that the person lived in the ghetto, would be mitigating to the extent of it being a defense to what has occurred?

Mr. FRANZ. Here is where I think things become very complex, because how can one really determine to what extent being exposed to a terrible educational situation in an overcrowded ghetto school has created within young people the kind of outlook on life that causes them to later take it out on their fellow man?

Mr. HALL. And pour gasoline on some woman and set her afire?

Mr. FRANZ. I think it is entirely possible that that could be a contributing factor, that the repeated failures, the lack of adequate attention and understanding by teachers with overcrowded classrooms and so on could be just one factor.

Mr. HALL. Thank you. I yield back the balance of my time, Mr. Chairman.

Mr. MANN. I think you are probably right; a judge would permit evidence of the ghetto existence, as I think a judge would permit perhaps evidence of the television violence under item 10 of our mitigating list.

You have reminded me of the TV study made by the Surgeon General. I wonder if you could tell me what has been done about it?

Mr. FRANZ. It is my understanding that the only—I could be wrong on this—the only concrete outgrowth of that $1 million study was the family time on TV, 1 night a week, that is not to include violence programs.

Mr. MANN. Yes, and that was a voluntary action.

Mr. FRANZ. Yes, that depended on the networks' response.

So in fact to my knowledge very little change occurred as a result of that rather exhaustive study.

Mr. MANN. Of course we all read about the Florida case in which it was not allowed, or was not held to be a defense. But even then I am sure there might have been mitigating circumstances. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman. Do you know what ultimately happened to the person who poured the gasoline on this woman and set fire to her? Do you know what the penalty was?

Mr. FRANZ. That was the same question that went through our minds as we prepared this statement. We called the Boston Police Department last week to inquire and they said—they immediately recognized the case and called us back within a couple of hours to indicate that the youth had not yet been apprehended. The case was still open, but that leaves us with less of the data than we hoped for to see what that might mean in this case study, unfortunately.

Mr. HYDE. Does your church believe in personal guilt, the doctrine of sin?

Mr. FRANZ. Yes, sir.

Mr. HYDE. Supposing—this is pretty hypothetical, because we don't know anything about it. I was going to ask what your recommendation would be for an appropriate penalty for this person who set fire to Evelyn. But I suppose it would be hard to tell unless we knew a lot about the person, what his mental capacity was, that sort of thing, his ability to know right from wrong, and what the factors forming his judgments and values were.

Mr. FRANZ. Let me try to respond to that, Mr. Congressman. I had a long conversation last week with one of our Mennonite social workers, a trained social worker with a graduate degree, who is a counselor to prisoners in a youth prison in northern Maryland. And this counselor is a strong believer in the need for prisons for at least a significant number of people who have gone afoul of the law. He at the same time believes that with the discipline and the rather shocking difference that life in prison makes when a youth is jolted out of a community and into

a confined situation, need not be looked at as punishment in a totally negative sense, but more as a penalty and as a discipline. If accompanied by adequate understanding, very personal relationships through counseling, those young people can be brought to a new self-respect. He has apparently had a very significant ratio of those with whom he counsels turn in a new direction, because they found that someone really did care for them in a personal way.

Now this also relates, I think, to your earlier questions, Mr. Chairman. It does seem to me that we have, in spite of all of that money spent, not spent very much of it on personnel who are oriented to a philosophy that really believes not only, to use religious language, in a personal doctrine of sin, or doctrine of personal sin, but also in the possibility that caring, that understanding, that acceptance, that love can bring people into a new kind of self-respect and direction.

Mr. HYDE. One new frontier, or old frontier that is as yet untouched is what you are talking about, what to do with people who must go to prison and how to do something positive for them and for society. Call it reform or whatever. We haven't begun to scratch the surface on that. And I guess we don't have the constituency for it, that is the sad thing. I agree.

Mr. FRANZ. And here is where, of course, as a representative for the church I feel very strongly that not only do we need to address our concern to those of you who are the lawmakers, but of course to our people in the religious community as well.

I do think, however, that there is a strong reservoir of possibilities and potential for a much greater redemptive relationship to people, even those who have commited the most brutal crimes.

Mr. HYDE. Religion plays a great role in this, doesn't it?

Mr. FRANZ. Yes, it does. I think that it is not limited to that. I think there are some professionals who simply understand the psychological dynamics of this, that have been missing in the lives of a lot of people.

Mr. HALL. Mr. Chairman, if I could correct a statement Mr. Hyde just made, maybe we don't have a constituency for this sort of thing, I sometimes think maybe we do, and I am thinking of a personal illustration in my home town, Marshal, Tex., where the church of which I am a member a month ago started a campaign to combat TV violence, with placards, and all the like. It started out as a relatively small affair, but in the last 30 days, over 25,000 people from that particular area have already put up signs in their front yards, and I think we have a constituency in this area that we may not know about.

Mr. HYDE. It just takes leadership.

Mr. HALL. Yes, someone to tap it, right.

Mr. MANN. I was going to assert a similar idea, because I thought his primary reference was to the institutional counseling. I think we do have a constituency for it. We have spent a whole lot of money, but, just haven't found the combination and as I indicated earlier, the correctional community has tended to throw up their hands.

I don't think it has ever closed the doors to the religious approach. So we just don't have the right combination here.

Let me make one more remark, then I think we have to quit, because we have a vote on the floor.

I think we have to proceed on the assumption that there is going to be a death penalty in the United States, for one or more crimes, and there is probably no better agency to make that determination in a specific situation than a jury.

Now I don't share your suggestion that juries are incapable of judging these aggravating and mitigating circumstances. I would acknowledge that some of them are not very sophisticated, that is true. But they will have the assistance of counsel on both sides of the case, and I think that, although not perfect, it is going to be the best system we develop.

Since I think that this is a pretty good premise for us to operate on, if you have any suggestion as to how we can improve the procedure that we have proposed in this bill with reference to how to get that before a jury, then we would be delighted to hear it.

Mr. FRANZ. Well, I am not sure that I have the needed wisdom here, but I restate my concern, I think that surely we need juries and I think they can function in a constructive way. But it does seem to me that becaus of the fallibilities, because of the unfortunately often prejudicial manner in which——

Mr. MANN. I agree. There could be other safeguards—for example, you didn't mean to, but you implied that we need to think about venue, where the trial should be, what the local attitudes are, and so forth. All of those things are involved.

Well, thank you so much. The committee will stand in recess subject to the call of the chair.

[Thereupon, at 3:50 p.m. the hearing was concluded.]

ADDITIONAL MATERIAL

FRIENDS COMMITTEE ON NATIONAL LEGISLATION,
Washington, D.C., July 17, 1978.

To: The House Judiciary Subcommittee on Criminal Justice James R. Mann, Chairman.

The Friends Committee on National Legislation opposes H.R. 13360, or any other bill that would reintroduce capital punishment at the federal level, because:

1. We believe that all men and women have value in the sight of God and that capital punishment violates this value;
2. Capital punishment, when used as retribution for violent crime, only begets more hatred and violence;
3. Capital punishment has often been arbitrarily and discriminately imposed on poor and racial minority persons;
4. Capital punishment has not been shown to be an effective deterrent to violent crime;
5. Capital punishment is irreversible, which is especially deplorable in cases in which an executed person has later been found to be wrongly convicted.

Further information, at FCNL:

DON REEVES,
Legislative Secretary.
JOHN HANNAY,
Research Intern.

Attachment.

STATEMENT ON H.R. 13360 (CAPITAL PUNISHMENT)

We oppose H.R. 13360, or any other legislation that would provide for capital punishment. We base our position on the Quaker belief that every person has value in the sight of God and on Quaker testimonies against the taking of human life.[1] In our judgment, the divine commandment, "Thou shalt not kill," applies equally to relationships among individuals and between the individual and the state. Opposition to capital punishment has been a long and deeply held conviction of Friends. In 1699, John Bellers, a British Quaker, called executions "a blot upon religion."

In expressing the belief of divinity within each person, Elizabeth Fry, a 19th century Quaker prison reformer, put it succinctly:

"But is it for man [or woman] to take the prerogative of the Almighty into his [or her] own hands? Is it not his [or her] place rather to endeavor to reform such or to restrain them from the commission of further evil? At least to afford poor erring fellow mortals, whatever may be their offenses, an opportunity of proving their repentance by amendment of life?"[2]

Fortunately, those people, including Friends, who called for the abolition of capital punishment in the past, are no longer lone voices crying out in the wilderness. The United States religious community now expresses overwhelming opposition to the death penalty with strongly worded statements: The death penalty violates "the belief in the worth of human life and the dignity of the human personality as gifts of God" (U.S. Catholic Conference); "A return to the use of the death penalty can only lead to the further erosion of respect for life in our society" (National Council of Churches); "The continuation of capital punishment, either by a state or by the national government, is no longer morally justifiable" (Union of American Hebrew Congregations).[3]

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[1] American Friends Service Committee, "Statement on the Death Penalty," Nov. 1976. Friends Committee on National Legislation, "The Administration of Justice," *Statement of Legislative Policy*, April, 1977.

[2] Quoted in Fellowship of Reconciliation, "Aid to Homily on the Death Penalty."

[3] National Interreligious Taskforce on Criminal Justice, "Capital Punishment: What the Religious Community Says," 1978.

In light of the religious community's consensus that the death penalty is an immoral violation of human life, we are saddened by the recent Supreme Court's endorsement of the retributive value of capital punishment, as a possibly appropriate expression of "society's moral outrage at a particularly offensive conduct" (*Gregg* v. *Georgia*, 428 U.S. 153 at 183). We hope that Congress does not follow the Court's lead. We urge Congress to act according to a different moral standard—that the deliberate, premeditated killing of any human being in the United States, whether by another individual *or by the government*, is wrong!

Despite the strong chorus of religious, ethical, and moral objections now being raised against the death penalty, government-sponsored taking of human lives (mostly poor persons found guilty of murder) still finds support among many Americans—largely because of a desire for retribution. We hope the Committee will resist this emotional response by many who are rightly concerned about crime victims and their families. Capital punishment does not help these people. What is essential is adequate victim compensation and greater community support for persons who are victimized by crime. Violent forms of retribution, such as capital punishment, merely beget more hatred and violence. They do *not* bring healing and reconciliation, as recognized by some victims' families.

In a letter to the *St. Petersburg Times* (Florida), Roy Persons, whose wife Carol was murdered, protested against the death sentence which her convicted murderer, Willie Rivers, received. "Carol's death was a tragedy to all of those who loved her so dearly * * * but it is even more tragic that her death will, by sentencing Willie Rivers to death, reinforce and perpetuate feelings of vengeance, hate, and further human evil." [4]

In addition to these two fundamental reasons (the life of every human being has value, and retribution, in the violent form of capital punishment, merely begets more hatred and violence), we oppose the death penalty because:

1. The death penalty has been arbitrarily and discriminately imposed on the poor (because of their inability to pay for or otherwise secure effective counsel) and racial minority persons convicted of killing white people. Of 493 persons on death row, 253 (51.3%) are black, Spanish speaking, or Native American; 240 are white. A recent survey of three states that use the death penalty (Florida, Georgia, and Texas shows that 50% of those persons on death row are whites who killed whites; 45% are blacks who killed whites; 5% are blacks who killed blacks. No white persons who killed blacks are on death rows in any of these states. In these states, 46% of all murder victims were black.[5]

2. The death penalty seems not to "deter" violent crime. All studies which are methodologically sound have not been able to detect any deterrent effect of capital punishment. Recent testimony before the Senate Judiciary Committee by Dr. Hans Zeisel (University of Chicago indicated that the death penalty may actually be a counter-deterrent.

3. The death penalty is irreversible. If an innocent person is wrongly convicted of a capital crime and a death sentence is carried out, there can be no correction of the mistake.

In summary, the Friends Committee on National Legislation does not support the use of violence (in the form of capital punishment) in our nations criminal justice system. We oppose H.R. 13360. For religious and moral reasons, we urge that it *not* be reported by your Committee. Our preference is for Congress to pass legislation (such as H.R. 848 which would altogether abolish capital punishment at both federal and state levels. We also urge a program of more aid to victims, through either restitution by offenders to victims or compensation to victims from general revenue. It is time that the United States decide that capital punishment is inconsistent with the rights and dignity of human beings and therefore is no longer tolerable for civilized society.

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[4] Fellowship of Reconciliation, *op cit.*

[5] Wayne King, "Few on Three Death Rows are There for Killing Blacks," *New York Times*, Mar. 6, 1978. The study is being conducted by Dr. William Bowers of Northeastern University.

Chicago, Ill., July 15, 1978.

Hon. JAMES R. MANN,
Chairman, House Judiciary Subcommittee on Criminal Justice,
Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN MANN: As Coordinator of the Illinois Coalition Against the Death Penalty I wish to present testimony against H.R. 13360, the bill to provide for a sentence of death under certain circumstances in the United States.

We are a coalition of 61 organizations including Catholic, Jewish, Lutheran, Methodist, Quaker, Unitarian, Ethical Humanist, lawyer, voter, peace, labor, civil rights, political, scientific, and prisoner's rights groups. We are diverse in our backgrounds and interests but united in our opposition to capital punishment.

We acknowledge and share the fear of citizens because of the spread of violent crime. We believe the government must protect society from those who murder. But the presence of capital punishment legislation only deceives us into thinking that we have solved the problem. It is essential that citizens have confidence in the law, in the ability of the legal system to protect them from the lawless. Instead of passing death penalty legislation it would be far better to work on ways to support the police, judiciously strengthen their ability to prevent and solve crime, see that our methods of selection guarantees us high caliber judges and prosecutors, eliminate a lot of the discretion which exists throughout the judicial process, better our prison conditions, establish some kind of gun control.

Resort to the ultimate vengeance of execution will not make us a better people. On the contrary violence begets violence and a society which adopts it as a weapon to combat violence lowers and hardens itself. As the Fellowship of Reconciliation lapel button says, "Why do we kill people who kill people to show that killing people is wrong"?

The reason heard most frequently from those who favor the death penalty is that it will deter further murder. Capital punishment has never been proved to be a deterrent. The studies of Thorsten Sellin and others show that the presence or absence of the death penalty on the books in contiguous states makes no difference in the rate of homicide and that the adoption or abolishment of capital punishment in a state does not change the homicide rate. There are no less murders in cities either just before or after an execution has taken place in that city. The rate at which police officers are shot and killed is the same in states with a death penalty as in states where it has been abolished. The same is true of fatal assaults on prison guards by lifers. To attempt to prove deterrence we would have to experiment with human life and respect for human life is vital to our rights and freedom.

The application itself of the death penalty is disturbing. It is used in a discriminatory manner, visited almost exclusively on the poor, the uneducated, the minorities. William Bowers's study now is bringing to light that the race of the victim plays a large part. A very small percentage of those on death row are there for killing blacks while the rate of arrest for those who actually kill blacks is high indeed.

Discretion plays a part in the charge, the choice of attorney, of jury, in the sentencing, in commutation. This threatens equal protection under the law as guaranteed by our Bill of Rights.

Finally, we are never free from the possibility of human error. Innocent persons have been executed. Execution is irrevocable.

We urge that the Judiciary Subcommittee on Criminal Justice to vote no on H.R. 13360.

Sincerely yours,

MARY ALICE RANKIN,
Coordinator, Illinois
Coalition Against the Death Penalty.

LUTHERAN COUNCIL IN THE U.S.A.,
Washington, D.C., July 14, 1978.

Hon. JAMES R. MANN,
Chairman, Subcommittee on Criminal Justice,
House Judiciary Committee,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: As the Washington representative for the Lutheran Church in America, I request that this statement of opposition be entered into the

record of hearings held by the House Judiciary Criminal Justice Subcommittee on H.R. 13360, a bill to provide post-conviction proceedings in capital cases. The Lutheran Church in America, with headquarters in New York, New York, has 2,900,000 U.S. members.

Many of the most grievous problems of our system of criminal justice are reflected in the application of the death penalty, which has been notoriously uneven. Those who are executed are usually the poor, the neglected, the uneducated, the mentally ill, the mentally retarded, and persons of minority status—those least able to defend themselves. Capital punishment makes irrevocable any miscarriage of justice and ends the possibility of restoring the convicted person to effective and productive citizenship.

Systematic research has failed to produce evidence that the abolition of capital punishment leads to an increase in the homicide rate or that capital punishment actually deters crime. The security of society will not be increased by continued use of the death penalty.

Having weighed these and other considerations, the Lutheran Church in America urges the abolition of capital punishment and opposes H.R. 13360, which could allow capital punishment to become a frequently used criminal sanction.

Please enter into the record of hearings on H.R. 13360 the enclosed social statement "Capital Punishment," adopted in convention in 1966, which represents the official policy position of the Lutheran Church in America on this issue. Thank you very much for your consideration.

Sincerely,

CHARLES V. BERGSTROM,
Executive Director,
Office for Governmental Affairs.

SOCIAL STATEMENTS OF THE LUTHERAN CHURCH IN AMERICA

CAPITAL PUNISHMENT

(Adopted by the Third Biennial Convention, Kansas City, Missouri, June 21–29, 1966)

Within recent years, there has been throughout North America a marked increase in the intensity of debate on the question of abolishing the death penalty. This situation has been accompanied by the actual abolition of capital punishment in ten states and two dependencies of the United States, qualified abolition in three states, and in six states a cessation in the use of the death penalty since 1955. Although the issue of abolition has been widely debated in Canada in recent years, a free vote in Parliament on April 5, 1966, failed to end the legality of the death sentence. However, during the last two years or more, death sentences in Canada have been consistently commuted.

These developments have been accompanied by increased attention to the social and psychological causes of crime, the search for improved methods of crime prevention and law enforcement efforts at revising the penal code and judicial process, and pressure for more adequate methods in the rehabilitation of convicted criminals. There has been a concurrent concern for persons who, because of ethnic or economic status, are seriously hampered in defending themselves in criminal proceedings. It has been increasingly recognized that the socially disadvantaged are forced to bear a double burden; intolerable conditions of life which render them especially vulnerable to forces that incite to crime, and the denial of equal justice through adequate defense.

In seeking to make a responsible judgment on the question of capital punishment, the following considerations must be taken into account:

1. The Right of the State to Take Life

The biblical and confessional witness asserts that the state is responsible under God for the protection of its citizens and the maintenance of justice and public order. For the exercise of its mandate, the state has been entrusted by God with the power to take human life when the failure to do so constitutes a clear danger to the civil community. The possession of this power is not, however, to be interpreted as a command from God that death shall necessarily be employed in punishment for crime. On the other hand, a decision on the part

of civil government to abolish the death penalty is not to be construed as a repudiation of the inherent power of the state to take life in the exercise of its divine mandate.

2. Human Rights and Equality Before the Law

The state is commanded by God to wield its power for the sake of freedom, order and justice. The employment of the death penalty at present is a clear misuse of this mandate because (a) it falls disproportionately upon those least able to defend themselves, (b) it makes irrevocable any miscarriage of justice, and (c) it ends the possibility of restoring the convicted person to effective and productive citizenship.

3. The Invalidity of the Deterrence Theory

Insights from both criminal psychology and the social causes of crime indicate the impossibility of demonstrating a deterrent value in capital punishment. Contemporary studies show no pronounced difference in the rate of murders and other crime of violence between states in the United States which impose capital punishment and those bordering on them which do not.

In the light of the above considerations, the Lutheran Church in America:

Urges the abolition of capital punishment;

Urges the members of its congregations in those places where capital punishment is still a legal penalty to encourage their legislatures to abolish it;

Urges citizens everywhere to work with persistence for the improvement of the total system of criminal justice, concerning themselves with adequate appropriations, the improved administration of courts and sentencing practices, adequate probation and parole resources, better penal and correctional institutions, and intensified study of delinquency and crime;

Urges the continued development of a massive assault on those social conditions which breed hostility toward society and disrespect for the law.

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.,
Washington, D.C., July 20, 1978.

HON. JAMES R. MANN,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.
(Attention of Thomas W. Hutchison, Counsel).

DEAR MR. MANN: The National Council of Churches appreciates being offered the opportunity to testify during the hearings on H.R. 13360. We regret that a combination of scheduling conflicts and shortness of time prevented our presenting a witness before the Subcommittee.

We oppose H.R. 13360 because its enactment would allow our courts to impose the death penalty as the punishment for certain crimes. The National Council of Churches has long sought an end to capital punishment. We declared our opposition to it in a 1968 Policy Statement entitled "Abolition of the Death Penalty" and reaffirmed our position eight years later in a Resolution (a copy of each of these documents is enclosed).

We believe that every human life has value and dignity, including that of the convicted felon, and we are committed to seeking the rehabilitation and redemption of offenders. Beyond this concern, we are convinced that the possibility of a misjudgment and execution of an innocent person far outweighs any deterrent effect that execution might have.

We appreciate the care and thoroughness which have gone into the preparation of this bill, and we recognize that you have made substantial efforts to protect the rights of defendants. Nonetheless, the National Council of Churches must oppose any legislation which would allow the use of the death penalty. We ask that you consider our opposition to capital punishment as you conduct your hearings on H.R. 13360, and we request that this letter and the enclosed Policy Statement and Resolution be printed in the record of those hearings.

Sincerely yours,

JAMES A. HAMILTON.

A Policy Statement of the National Council of the Churches in the U.S.A.

Abolition of the Death Penalty

(Adopted by the General Board September 13, 1968)

In support of current movements to abolish the death penalty, the National Council of Churches hereby declares its opposition to capital punishment. In so doing, it finds itself in substantial agreement with a number of member denominations which have already expressed opposition to the death penalty.

Reasons for taking this position include the following:

(1) The belief in the worth of human life and the dignity of human personality as gifts of God;

(2) A preference for rehabilitation rather than retribution in the treatment of offenders;

(3) Reluctance to assume the responsibility of arbitrarily terminating the life of a fellow-being solely because there has been a transgression of law;

(4) Serious question that the death penalty serves as a deterrent to crime, evidenced by the fact that the homiced rate has not increased disproportionally in those states where capital punishment has been abolished;

(5) The conviction that institutionalized disregard for the sanctity of human life contributes to the brutalization of society;

(6) The possibility of errors in judgment and the irreversibility of the penalty which make impossible any restitution to one who has been wrongfully executed;

(7) Evidence that economically poor defendants, particularly members of racial minorities, are more likely to be executed than others because they cannot afford exhaustive legal defenses;

(8) The belief that not only the severity of the penalty but also its increasing infrequency and the ordinarily long delay between sentence and execution subject the condemned person to cruel, unnecessary and unusual punishment;

(9) The belief that the protection of society is served as well by measures of restraint and rehabilitation, and that society may actually benefit from the contribution of the rehabilitated offender;

(10) Our Christian commitment to seek the redemption and reconciliation of the wrong-doer, which are frustrated by his execution.

Seventy-five nations of the world and thirteen states of the United States have abolished the death penalty with no evident detriment to social order. It is our judgment that the remaining jurisdictions should move in the same humane direction.

In view of the foregoing, the National Council of Churches urges abolition of the death penalty under federal and state law in the United States, and urges member denominations and state and local councils of churches actively to promote the necessary legislation to secure this end, particularly in the thirty-seven states which have not yet eliminated capital punishment.

103 For,
0 Against,
0 Abstentions.

A Resolution on the Death Penalty

(Adopted by the Governing Board NCCC, USA, October 8, 1976)

For nearly ten years there has been no execution in the United States. Appeals of death sentences have been taken to the Supreme Court, asking it to declare such sentences unconstitutional as "cruel and unusual punishment." As the moratorium has lengthened, so has the roll of those awaiting the outcome on "death row," not knowing whether they are finally to live or die and, if to die, when. There are more than 600 of them, of which over 60% are black, brown or red, and nearly all of them are poor, suggesting that the ultimate sanction continues to fall more heavily on minorities and those who cannot afford extensive legal defense.

The Supreme Court of the United States has at last ruled that the death penalty is not unconstitutional (*Gregg* v. *Georgia*, decided July 2, 1976), and may be jusified as an expression of the outrage of society at particularly heinous crimes. Legislators have hastened to enact new statutes to legitimize the reinstatement of capital punishment. It seems only a question of time until some state will execute one of its citizens, break the moratorium, and open an avalanche of legal slaughter.

Most of the churches of the National Council of Churches have opposed the death penalty for years, and in 1968 the General Board of the NCCC adopted a policy statement entitled "Abolition of the Death Penalty." Yet the churches have not been articulate about this issue over the past few years, when they could have been helping their members to understand the moral and religious issues at stake. Instead, many church people have been drawn into the agitation for reinstatement of the death penalty.

The Governing Board of the National Council of Churches:

(1) Reasserts the conviction expressed in the policy statement of 1968 that the death penalty is wrong and opposes its reinstatement;

(2) Urges the churches to redouble their efforts in this cause to make up for lost time;

(3) Directs that NCCC become a member of the newly-formed National Coalition Against the Death Penalty, and that its $1000 membership subscription be paid from the Priority Implementation Fund;

(4) Calls upon the member denominations to provide the funds necessary for the Division of Church and Society to organize effective ecumenical action against the resumption of executions;

(5) Encourages contributions by denominations and individuals to the NAACP Legal Defense Fund, which has been spearheading legal action against the death penalty.

(6) Urges the enlistment of volunteer lawyers to assist persons facing executions;

(7) Pledges that the staff of the NCCC will initiate contacts with state councils of churches in stategic states to mobilize church people and others to resist the re-enactment and implementation of death-penalty statutes;

(8) Urges the churches to put their policies opposing the death penalty into more effective action, especially through their own congregations and judicatories.

(9) Commits the NCCC to join with others in seeking clemency for those sentenced to die, when all remedies at law have been exhausted;

(10) Calls church people to a day of protest and mourning whenever and wherever an execution may be scheduled, especially the first one.

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

HANS ZEISEL

PROFESSOR EMERITUS OF LAW AND SOCIOLOGY, THE UNIVERSITY OF CHICAGO; SENIOR CONSULTANT, AMERICAN BAR FOUNDATION; RESEARCH ASSOCIATE, CENTER FOR CRIMINAL JUSTICE

Reprinted from *The Supreme Court Review*, 1976, edited by Philip B. Kurland, published by the University of Chicago Press.

I. The Problem

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

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

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

[2] *Id.* at 2930.

[3] *Id.* at 2931, quoting Black, Capital Punishment: The Inevitability of Caprice and Mistake 25–26 (1974).

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

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

II. The Structure of the Evidence

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

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

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

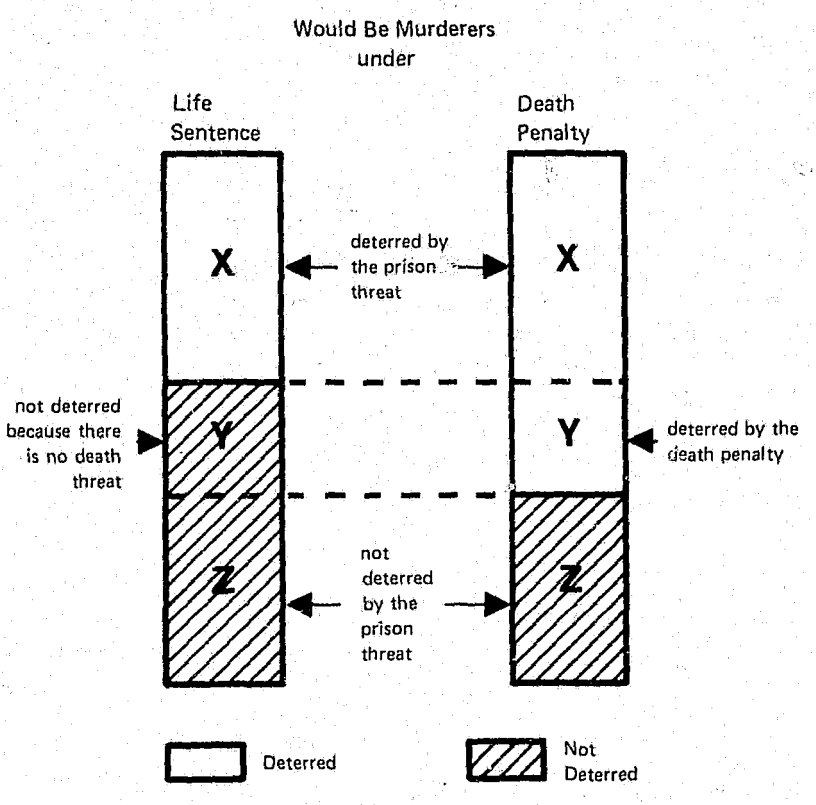

FIG. 1. Experimental paradigm showing a deterrent effect of the death penalty over the life sentence.

would not be deterred if there were only the life sentence. The statistical test that would establish the existence of group (Y) would reveal a significantly lower level of murders[4] under threat of the death penalty.

In principle, it should be possible to identify individual members in each of the three groups. As a practical matter one can identify only the murderers who have not been deterred.[5] Efforts have been

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

[5] The task of tracing the effect of an experimental treatment through case histories of the persons who had been affected by it is less difficult if the treatment aims at a positive effect, not a negative, deterrent one. See ZEISEL, SAY IT WITH FIGURES ch. 11 (1965 ed.).

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

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

III. The Impossible Controlled Experiment

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

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

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

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

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

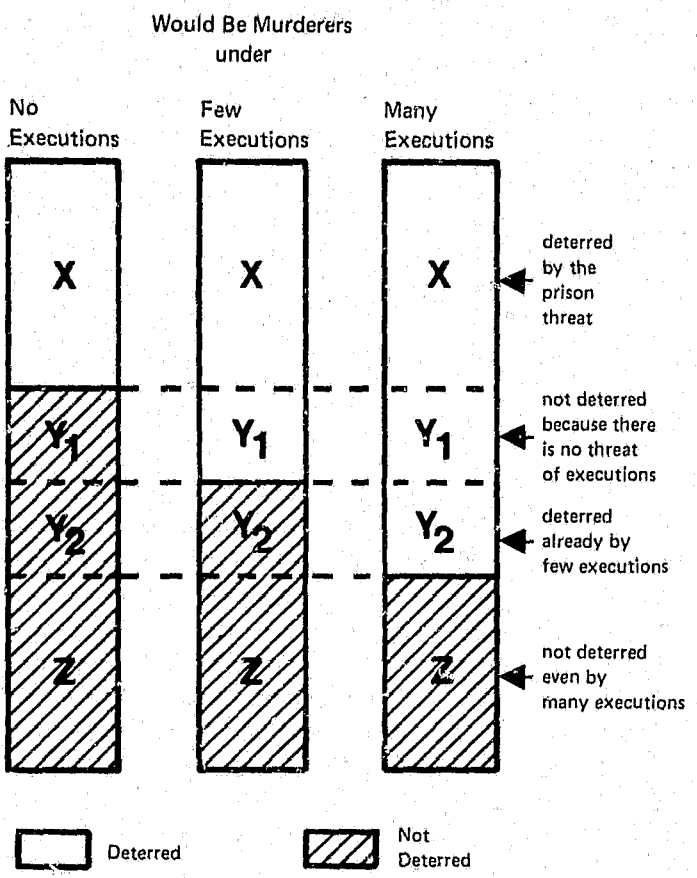

FIG. 2. Experimental paradigm showing a deterrent effect of increasing the rate of executions.

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

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

[8] Note 3 *supra*.

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

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

IV. Homicide Rates with and without the Death Penalty

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

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

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

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[9] The first comprehensive data on before-and-after comparison were presented by Thorsten Sellin to the Royal Commission on Capital Punishment. *The Deterrent Value of Capital Punishment*, Report of the Royal Commission on Capital Punishment App. 6 (Cmd. 8932 1953). Sellin's memorandum is published in the Minutes of the Evidence, 647. *Cf.* also Koestler, Reflections on Hanging App. (1956); United Nations, Capital Punishment, Report (1960); Samuelson, *Why Was Capital Punishment Restored in Delaware?* 60 J. Crim. L.C. & P.S. 148 (1969).

[10] Sellin, *Homicides in Retentionist and Abolitionist States*, in Sellin, ed., Capital Punishment 135 (1967); Reckless, *The Use of the Death Penalty—a Factual Statement*, 15 Crime & Delinq. 43 (1969); Zimring & Hawkins, Deterrence 265 (1973); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170, 171 (1976).

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

Table 1 provides an example of contiguous states comparison.[11] Only in one of the five groups is the homicide crime rate in the no-death-penalty state (Maine) higher than in the other two states. In all others it is either the same or lower. This is neither evidence of a deterrent effect of the death penalty nor clear evidence of its absence. Even contiguous states are not strictly comparable. Over a span of sixteen years, the period covered by this table, the conditions favoring crime in those states may develop in different directions.

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

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

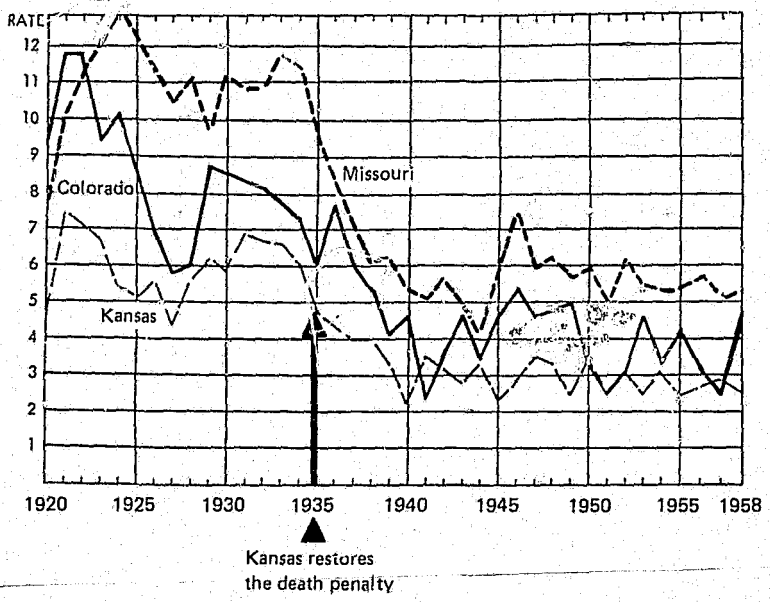

FIG. 3. Homicides per 100,000 population in Missouri, Colorado, and Kansas, 1920–58.

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

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

TABLE 1

HOMICIDE DEATH RATES IN CONTIGUOUS STATES WITH[D] AND WITHOUT CAPITAL PUNISHMENT, 1940–55

(Average annual rate per 100,000 population)

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

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

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

V. Improving Comparability

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

TABLE 2

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

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

* State and local.

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

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

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

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

VI. Sharpening the Measure of Capital Crime

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

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

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

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

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

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

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

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

* Without Detroit.
† 1928–44.

VII. THE EFFECT OF EXECUTIONS

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

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

[17] Sellin, *The Death Penalty and Police Safety*, in SELLIN, note 10 *supra*, at 138, 144, 145.

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

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

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

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

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

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

[20] Graves, *The Deterrent Effect of Capital Punishment in California*, in BEDAU, THE DEATH PENALTY IN AMERICA 322 (1967). (The rearrangement in figure 4b is not precise because the curves for Tuesdays through Thursdays will change under the redefinition.)

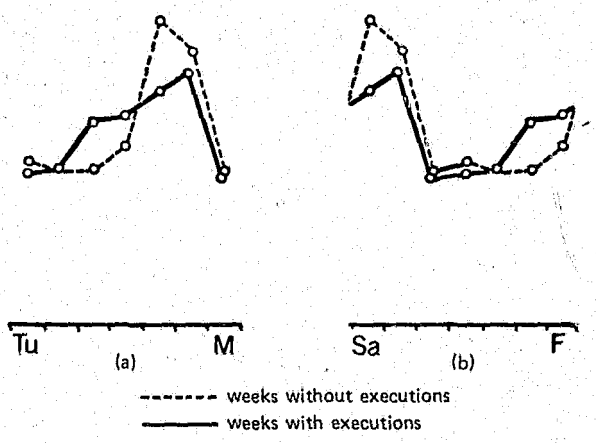

FIG. 4. Homicides during weeks with and without executions.

VII. THE CONTRIBUTION OF ISAAC EHRLICH

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

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

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

[22] 96 S. Ct. 3212 (1976). [23] Reply Brief, p. 36.

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

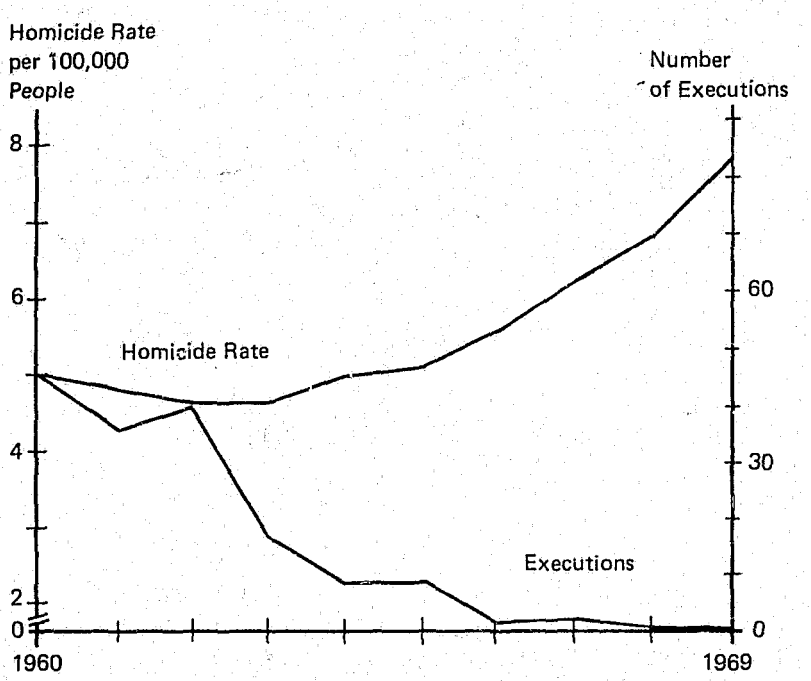

FIG. 5. United States homicide rate and number of executions, 1960–69.

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

IX. Regression Analysis

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

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

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

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

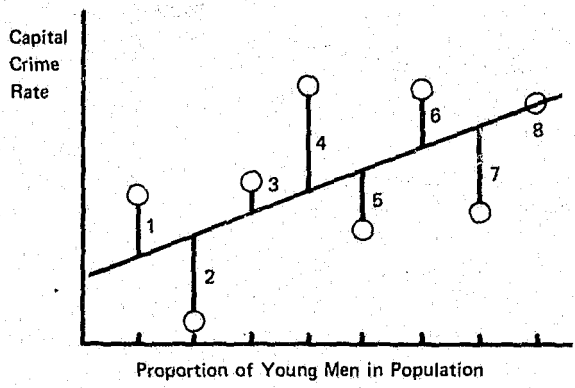

FIG. 6. Hypothetical relationship between the capital crime rate and the proportion of young men in the population.

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

The complete apparatus of regression analysis is more compli-

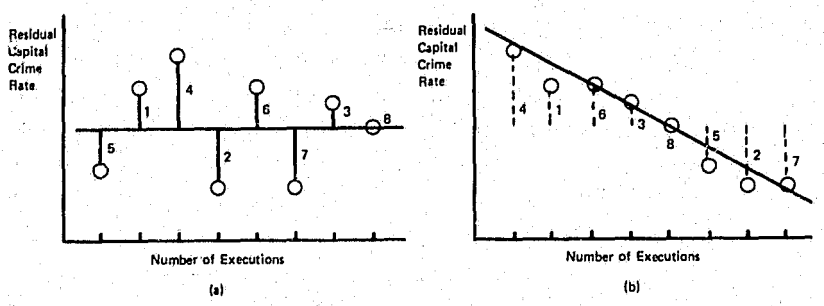

FIG. 7. Two hypothetical relationships between the frequency of executions and the residual capital crime rate.

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

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

All these and other technical refinements of the regression analysis have but one goal: to isolate, through a process of mathematical purification, the effect of any one variable upon the other, under conditions that exclude the interference from other variables. Regression analysis, thus, is but another effort to simulate with the help of nonexperimental data the experimental conditions outlined in figure 2 of this paper.[27] These examples suggest the sophistication

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

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

X. Ehrlich's Deterrence Claim Evaporates

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

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

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

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

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

[29] *Id.* at 6–8.

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

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

[32] *Id.* at 22.

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

Ehrlich's results were extremely sensitive to whether the logarithmic specification was used and whether the data for the latter part of the 1960s were included.[34] Bowers and Pierce also raised questions about Ehrlich's use of the FBI homicide data in preference to vital statistics data.[35]

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

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

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

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[34] *Id.* at 197–205.

[35] *Id.* at 187–89.

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

[37] *Id.* at 209.

[38] Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61, 80 (1975).

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

[40] *Id.* at 18, 19–24.

[41] *Id.* at 14.

[42] *Id.* at 14–17.

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2 OF 3

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

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

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

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

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

[44] *Id.* at 28–30.

[45] *Id.* at 17–19.

[46] *Id.* at 18.

[47] *Id.* at 33.

decade.[48] He found a rigorous way of investigating whether the ending of executions and the sharp increase in homicides during this period was causal or coincidental. The power of Forst's study derives from his having analyzed changes *both* over time and across jurisdictions. The aggregate United States time series data Ehrlich used were unable to capture important regional differences. Moreover, they did not vary as much as cross-state observations; hence they did not provide as rich an opportunity to infer the effect of changes in executions on homicides.

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

Forst's study led to a conclusion that went beyond that of Klein: "The findings give no support to the hypothesis that capital punishment deters homicide."[49] "Our finding that capital punishment . . . does not deter homicide is remarkably robust with respect to a wide range of alternative constructions."[50]

XI. The Overlooked Natural Experiment

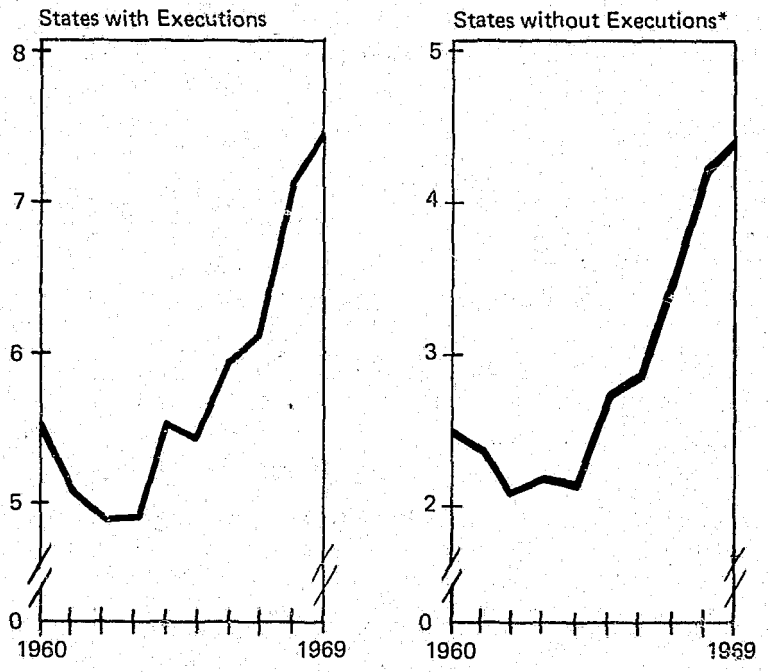
Forst saw that Ehrlich, by using aggregate data for the United States as a whole, was forced to disregard the differences between states that had capital punishment and executions, and states that had either abolished the death penalty or at least had ceased to carry it out. Ehrlich's model thus could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

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

[49] *Id.* at 27.

[50] *Id.* at 29.

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



* Abolition states and 6 states with no executions since 1948

FIG. 8. Homicide Rates 1960–1969 in States With and Without Executions

XII. Evidence versus Ancient Sentiment

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

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

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

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

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

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

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

[52] 96 S. Ct. at 2931. Further examples are afforded in a footnote: "Other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, the extortion murder of hostages or kidnap victims, and the execution-style killing of witnesses to a crime." *Id.* at n.33.

for life. The "cold calculus" that moves the hired killer must surely tell him how small the probability is that he will be caught.[53] A good part of his careful contemplation goes to avoiding traces.

The life prisoner who kills is even a more interesting example. At first glance, the argument seems so irrefutable, that this type of homicide is occasionally the last capital crime on the statute books before the death penalty is abolished. It is a prize example because on "logical a priori" grounds his is by definition the "free murder" under the law. Again, it is useful to look at the facts, which Sellin was the first to illuminate. He found that, in 1965, the year for which he collected the data, sixteen prison homicides had been committed by men convicted of murder. Since not all murderers in prison are there with a life sentence, the true number of these "free murders" is likely to be even smaller.[54] In fact, of course, the "free murder" is probably altogether a figment because most life prisoners have some hope of being released before the end of their natural life, a hope that would be destroyed by a second murder. A prison, moreover, has ways of its own of punishing such a double murderer.

It is only fair, however, to take these examples of the Court for what they are, efforts to bolster with reasons the unwillingness to abandon the ancient sentiment. In that sentiment, the belief in deterrence plays but a small part. It is the belief in retributive justice that makes the death penalty attractive, especially when clothed in a functional rationalization. The belief has ancient roots, even if the rationale is modern. The Court in *Gregg* approvingly cites *Furman v. Georgia*:[55]

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

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

[54] Sellin, *Prison Homicides*, in SELLIN, note 10 *supra*, at 154, 157; see also Buffin, *Prison Killings and Death Penalty Legislation*, 53 PRISON J. (1974).

[55] 96 S. Ct. at 2930, quoting 408 U.S. 238, 308 (1972).

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

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

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

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

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

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

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

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

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

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

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

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

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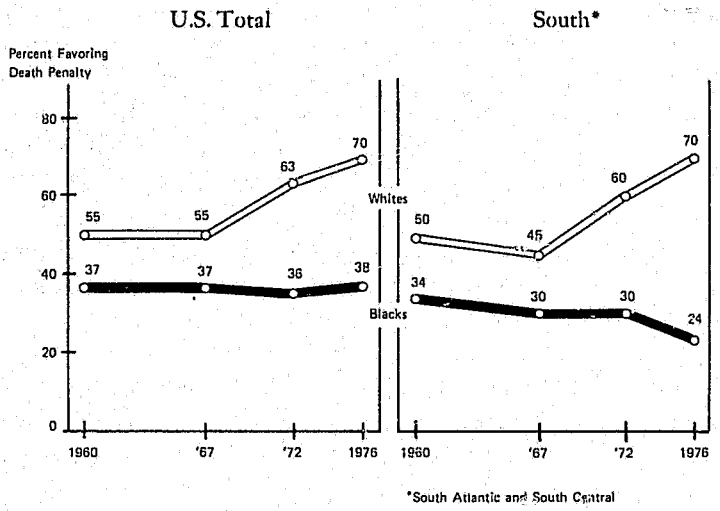
1125 A.D. Elizabeth purportedly promised God that if she were selected she would take no life. Adams, *Capital Punishment in Imperial and Soviet Criminal Law*, 18 AM. J. COMP. L. 575, 576 (1970).

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



° South Atlantic and South Central.

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

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

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

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

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

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

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

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

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

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

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

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

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