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CAPITAL PUNISHMENT

HEARINGS

BEFORE

SUBCOMMITTEE NO. 3

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

SECOND SESSION

ON

H.R. 8414, H.R. 8483, H.R. 9486

TO SUSPEND THE DEATH PENALTY FOR TWO YEARS

H.R. 3243, H.R. 193, H.R. 11797

TO ABOLISH THE DEATH PENALTY UNDER ALL LAWS OF THE
UNITED STATES, AND FOR OTHER PURPOSES

AND

H.R. 12217

TO ABOLISH THE DEATH PENALTY UNDER ALL LAWS OF THE
UNITED STATES, AND AUTHORIZE THE IMPOSITION OF LIFE
IMPRISONMENT IN LIEU THEREOF, AND FOR OTHER
PURPOSES

MARCH 9, 15, 16, 17 AND MAY 10, 1972

Serial No. 29

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CONTENTS

	Page
Hearing dates:	
March 9, 1972-----	1
March 15-----	87
March 16-----	161
March 17-----	243
May 10-----	391
Text of bills:	
H.R. 8414-----	4
H.R. 8483-----	6
H.R. 9486-----	6
H.R. 3243-----	7
H.R. 193-----	9
H.R. 11797-----	9
H.R. 12217-----	10
Testimony:	
Amsterdam, Prof. Anthony G., Stanford Law School-----	46
Bedau, Prof. Hugo A., chairman, Department of Philosophy, Tufts University, on behalf of the American Civil Liberties Union-----	192
Carrington, Frank G., executive director, Americans for Effective Law Enforcement, Inc-----	222
Elsen, Sheldon H., chairman, Committee on Federal Legislation, Association of the Bar of the City of New York-----	87
Gill, Howard B., director, Institute of Correctional Administration; Senior Fellow, Institute for Studies in Justice and Social Behavior, Washington College of Law, American University-----	339
Gordon, Robert, executive director, International Conference of Police Associations; accompanied by James Van Norman, attorney, and Lt. Frank V. Caparelli, president, Superior Officers Association, Nassau County Police Department-----	409
Greenberg, Jack, director-counsel, NAACP Legal Defense and Educational Fund, Inc-----	69
King, Glen D., director, information service division, International Association of Chiefs of Police-----	391
Lowery, Dr. Joseph E., chairman of the board, Southern Christian Leadership Conference; accompanied by David A. Clarke, Director, Washington Bureau-----	400
Lunsford, William G., human rights secretary, Friends Committee on National Legislation and the American Friends Service Committee-----	350
Lyons, Douglas B., executive director, Citizens Against Legalized Murder, Inc-----	243
Mitchell, Clarence M., director, Washington Bureau, National Association for the Advancement of Colored People-----	69
Petersen, Hon. Henry E., Assistant Attorney General, Criminal Division, Department of Justice-----	33
Pollak, Prof. Louis H., Yale University Law School-----	134
Schmidt, Prof. Benno C., Jr., Columbia Law School; chairman, Federal Legislation Committee's Subcommittee on Capital Punishment, Association of the Bar of the City of New York-----	87
Sellin, Prof. Emeritus Thorsten, University of Pennsylvania Center for Studies in Criminology and Criminal Law-----	162
van den Haag, Dr. Ernest, adjunct professor of Social Philosophy, New York University-----	115
Wolfgang, Prof. Marvin, University of Pennsylvania Center for Studies in Criminology and Criminal Law-----	165

	Page
Statements:	
Celler, Hon. Emanuel, a U.S. Representative in Congress from the State of New York and chairman of the House Committee on the Judiciary-----	1
Additional views:	
Black, Charles L., Jr., The Crisis in Capital Punishment-----	435
National Commission on Reform of Federal Criminal Laws, Working Papers, Memorandum on the Capital Punishment Issue-----	18
Final Report, Introductory Comment to Chapter 36-----	31
Letter dated October 29, 1971, Charles L. Black, Jr., Luce Professor of Jurisprudence, Yale Law School, to Hon. Emanuel Celler, enclosing letter to Hon. Bob Eckhardt-----	417
Letter dated March 27, 1972, Prof. Louis H. Pollak, to Hon. Robert W. Kastenmeier-----	158
Washington Research Project, The Case Against Capital Punishment-----	271
Letters addressed to Senator Philip A. Hart:	
Amsterdam, Prof. Anthony G., Stanford Law School, May 3, 1971 and May 11, 1971-----	422
Bickel, Prof. Alexander M., Center for Advanced Study in Behavioral Sciences, May 6, 1971-----	426
Cox, Prof. Archibald, Law School of Harvard University, May 4, 1971-----	424
Dorsen, Prof. Norman, New York University School of Law, April 27, 1971-----	420
Freund, Prof. Paul A., Law School of Harvard University, April 29, 1971-----	422
Kadish, Prof. Sanford H., University of California School of Law, May 4, 1971-----	425
Kamisar, Prof. Yale, University of Michigan Law School, May 4, 1971-----	425
Kurland, Prof. Philip B., University of Chicago Law School, May 7, 1971-----	426
McKay, Dean Robert B., New York University School of Law, May 14, 1971-----	432
Mishkin, Prof. Paul J., University of Pennsylvania Law School, May 12, 1971-----	431
Nesson, Prof. Charles R., Law School of Harvard University, May 14, 1971-----	433
Pollak, Prof. Louis H., Yale University Law School, May 11, 1971-----	429
Sandalow, Prof. Terrance, University of Michigan Law School, April 23, 1971-----	419
Van Alstyne, Prof. William, Duke University School of Law, April 26, 1971-----	420
Wechsler, Prof. Herbert, Columbia University School of Law, May 13, 1971-----	432

CAPITAL PUNISHMENT

THURSDAY, MARCH 9, 1972

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Drinan, Railsback, Biester, Fish, and Coughlin.

Also present: Herbert Fuchs, counsel, and Samuel A. Garrison III, associate counsel.

Mr. KASTENMEIER. The hearing will come to order.

Subcommittee No. 3 meets this morning in the first of a series of public hearings on bills dealing with the subject of the death penalty. These measures include H.R. 8414, The Death Penalty Suspension Act, which would suspend the death penalty for 2 years. H.R. 8414 was introduced by Chairman Celler. Identical measures were introduced in the House by Mr. Edwards of California (H.R. 8483), and Mr. McClory (H.R. 9486), and in the other body by Senator Hart (S. 1969).

In addition, the subcommittee has before it for consideration certain measures designed to abolish the death penalty under all laws of the United States. These bills provide for the substitution of life imprisonment in place of the sentence of death; they apply only to death sentences imposed within the Federal jurisdiction, and would not affect a sentence of death imposed under the laws of a State. They were introduced by Chairman Celler (H.R. 3243), Mr. Jacobs (H.R. 193), Mr. Fauntroy (H.R. 11797), and myself (H.R. 12217).

Copies of the foregoing House bills will be placed in the record.

(A statement by Chairman Celler and the bills referred to are as follows:)

STATEMENT OF HON. EMANUEL CELLER

Mr. Chairman and distinguished Members of the Subcommittee. It is my privilege to submit this statement to you in defense of legislation that would suspend or might abolish capital punishment.

The principal measure whose enactment I propose is H.R. 8414, introduced by me last May, to suspend the death penalty for two years. The purpose of this measure is to give State authorities and the Congress more time in light of recent Supreme Court decisions to reexamine constitutional and policy issues surrounding the continued use of the death penalty. The bill would stay executions under Federal and under State law for two years.

H.R. 8414 constitutes an exercise by the Congress of its powers under Section 5 of the Fourteenth Amendment. The power is most clearly established in the

field of equal protection of the laws with respect to discriminations based in race. There is reason to believe that the death penalty has been the subject of discriminatory application. Furthermore, the bill guarantees due process of law which, as the Supreme Court has already held, incorporates the Eighth Amendment's prohibition of cruel and unusual punishment. (*Robinson v. California*, 370 U.S. 660 (1962)).

The last execution in a U.S. jurisdiction occurred in 1967. For nearly five years the imposition of the ultimate penalty has been stayed pending procedural challenges and appeals. At present there are nearly 600 condemned prisoners awaiting execution on death rows throughout the United States. In a number of cases now before the high Court the issue is presented whether the death penalty constitutes "cruel and unusual punishment" and is thus prohibited by the Constitution. A number of governors, including Mandel of Maryland, Gilligan of Ohio, and West of South Carolina, have publicly indicated that they will stay any executions of prisoners within their States pending a determination of the "cruel and unusual" character of the penalty. Concerned citizens everywhere, I believe, whether they support or oppose the death penalty, do not wish to see large numbers of condemned persons executed in a period when the courts as well as State and Federal officials are engaged in a profound reexamination of the efficacy of the death penalty.

A sampling of the opinions of constitutional scholars throughout the nation indicates that the enactment of a two-year suspension of the death penalty is well within the constitutional powers of the Congress. Moreover, I believe that enactment of a national moratorium will go far to promote a thoughtful and thorough reexamination of the constitutional and policy issues involved.

Some suggest that a death penalty suspension act such as the one I have introduced is not actually required. They say that State executives and the courts can be relied on to stay executions during any period of study and uncertainty. They may be right but the matter ought not to be left to chance. Even if the Congress or the States determine to abolish capital punishment, there can be no reparation for those who are executed in the meantime. These dead men will have suffered "irreparable injury" in the most telling sense. What is more, it has been persuasively urged that a system that leaves the matter of stays of execution to a case-to-case approach is too risky and unpredictable. Men may die for reasons having nothing to do with the merits of their constitutional claims.

I would like briefly to touch upon the constitutional bases upon which Congress would enact a nationwide stay. There is evidence that the death penalty falls in a discriminatory pattern on minorities and poor people, in violation of the equal protection clause of the Fourteenth Amendment. For example, according to statistics gathered by the Washington Research Project, of 455 men executed for rape since 1930, 405 or nearly 90 percent, have been black. Blacks constitute 76 percent of those executed for robbery, 83 percent of those executed for assault by a life prisoner, and 100 percent of those executed for burglary in the same period. Of those executed for murder since 1930, 49 percent have been black, although blacks have made up only about 10 percent of the population in that period. The rate of execution of blacks far exceeds the proportion of capital crimes committed by black defendants.

The second basis to support a congressional stay of executions is the growing view that capital punishment constitutes "cruel and unusual punishment." This view was most recently applied by the Court of Appeals for the Fourth Circuit with respect to a Maryland State rape conviction and death sentence (*Ralph v. Warden*, 438 F.2d 786 (1970)). Even more recently—on February 18—the Supreme Court of California struck down the death penalty in California as contrary to that State's constitutional prohibition against "cruel or unusual punishment" (*People v. Anderson*, — Cal. —, 1972)).

The view that capital punishment is cruel and unusual within the meaning of the Federal Constitution is based on three propositions:

First, that the penalty is cruel and disproportionately severe;

Second, that it is "unusual" in that it is rarely imposed and even more rarely carried out, so that its imposition is arbitrary and is unfair to the few who must actually suffer it, and

Third, that there is no compelling justification for it in terms of accepted goals of criminal punishment.

I urgently recommend that H.R. 8414 be given prompt and favorable consideration.

Before closing, I would like to say a word about H.R. 3243, a bill introduced by me to abolish the death penalty under all laws of the United States, and for other purposes. This measure was drafted under the previously prevailing assumption that the Congress lacked the power to deal with abolition of capital punishment except with respect to death sentences imposed under Federal jurisdiction. Accordingly, H.R. 3243 restricts itself to penalties imposed under "laws of the United States" and does not affect death penalties imposed under State law. There is no inconsistency between H.R. 8414 and H.R. 3243, but I strongly urge that enactment of the Death Penalty Suspension Act should not be delayed because of an inability to accept abolition as an immediate result. In this connection it may be noted that 578 people were in death row on February 12 of this year, but only two of them, sentenced under the laws of the District of Columbia, would be affected by H.R. 3243.

I appreciate the opportunity of presenting my views to the Subcommittee.

92^D CONGRESS
1ST SESSION

H. R. 8414 *

IN THE HOUSE OF REPRESENTATIVES

MAY 17, 1971

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

A BILL

To suspend the death penalty for two years.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Death Penalty Suspension
4 Act".

5 SEC. 2. Congress hereby finds that there exists serious
6 question—

7 (a) whether the infliction of the death penalty
8 amounts to cruel and unusual punishment in violation of
9 the eighth and fourteenth amendments to the Constitu-
10 tion; and

11 (b) whether the death penalty is inflicted discrimi-

1 natorily upon members of racial minorities, in violation
2 of the fourteenth amendment to the Constitution,
3 and, in either case, whether Congress should exercise its
4 authority under section 5 of the fourteenth amendment to
5 prohibit the use of the death penalty.

6 SEC. 3. On the basis of the above findings, and in order
7 to preserve the status quo and to prevent irreparable injury
8 pending further investigation and consideration of the above
9 questions by Congress and by the appropriate State author-
10 ities, Congress declares that, pursuant to its power to enforce
11 the fourteenth amendment to the Constitution, it is neces-
12 sary to provide an interim stay of all executions by the
13 United States or by any State or any subdivision thereof
14 for a period of two years.

15 SEC. 4. No sentence of death shall be carried out by
16 the United States or by any State or any subdivision thereof
17 for a period of two years from the date of enactment of this
18 Act.

* Identical bills:

92^D CONGRESS
1ST SESSION

H. R. 8483

A BILL

To suspend the death penalty for two years.

By Mr. EDWARDS of California

MAY 18, 1971

Referred to the Committee on the Judiciary

92^D CONGRESS
1ST SESSION

H. R. 9486

A BILL

To suspend the death penalty for two years.

By Mr. McCLORY

JUNE 29, 1971

Referred to the Committee on the Judiciary

92^D CONGRESS
1ST SESSION

H. R. 3243 *

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 2, 1971

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

A BILL

To abolish the death penalty under all laws of the United States,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled.*
3 That (a) no sentence of death shall be imposed hereafter
4 upon any person convicted of any criminal offense punish-
5 able under any provision of law of the United States, the
6 District of Columbia, the Commonwealth of Puerto Rico,
7 or any territory or possession of the United States, and no
8 unexecuted sentence of death heretofore imposed under any
9 such provision shall be carried into execution after the date
10 of enactment of this Act. Each such provision which author-
11 izes or requires the imposition of such sentence hereafter

1 shall be deemed to authorize or require the imposition of a
2 sentence to imprisonment for life, and each sentence of death
3 heretofore imposed under any such provision which remains
4 unexecuted on the date of enactment of this Act shall be
5 deemed to be a sentence to imprisonment for life.

6 (b) The Attorney General is authorized and directed
7 to transmit to the Congress at the earliest practicable time
8 his recommendations for appropriate amendments to be made
9 to all such provisions of law which by their terms provide
10 for or relate to the imposition of any sentence of death in
11 order to substitute for such sentence in all such laws a
12 sentence to imprisonment for life.

* Identical bills:

92^D CONGRESS
1ST SESSION

H. R. 193

A BILL

To abolish the death penalty under all laws of
the United States, and for other purposes.

By Mr. JACOBS

JANUARY 22, 1971

Referred to the Committee on the Judiciary

92^D CONGRESS
1ST SESSION

H. R. 11797

A BILL

To abolish the death penalty under all laws of
the United States, and for other purposes.

By Mr. FAUNTROY

NOVEMBER 16, 1971

Referred to the Committee on the Judiciary

92^D CONGRESS
1ST SESSION

H. R. 12217

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 13, 1971

MR. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To abolish the death penalty under all laws of the United States, and authorize the imposition of life imprisonment in lieu thereof, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3

GENERAL AMENDMENT

4 SECTION 1. Any law of the United States in force on the
5 effective date of this Act which authorizes the imposition of
6 the death penalty and which is not expressly amended by any
7 other provision of this Act is hereby amended to authorize
8 the imposition of a sentence of life imprisonment in lieu of
9 such death penalty.

I

1 AMENDMENTS TO TITLE 18, UNITED STATES CODE

2 SEC. 2. (a) The following sections of title 18, United
3 States Code, are amended as follows:

4 (1) section 34 is amended by striking out “to the
5 death penalty or”;

6 (2) Subsections (a) and (b) of section 794 are
7 each amended by striking out “death or by”;

8 (3) subsections (d), (f), and (i) of section 844
9 are each amended by striking out “or to the death
10 penalty”;

11 (4) the second paragraph of subsection (b) of
12 section 1111 is amended by striking out “shall suffer
13 death unless the jury qualifies its verdict by adding there-
14 to ‘without capital punishment’, in which event he”;

15 (5) subsection (a) of section 1201 is amended by
16 striking out “(1) by death if the kidnaped person has
17 not been liberated unharmed, and if the verdict of the
18 jury shall so recommend, or (2)”, and by striking out
19 “, if the death penalty is not imposed”;

20 (6) the last paragraph of section 1716 is amended
21 by striking out “to the death penalty or”;

22 (7) the fifth paragraph of section 1992 is amended
23 by striking out “to the death penalty or”;

24 (8) section 2031 is amended by striking out “death,
25 or”;

1 (9) section 2113 (e) is amended by striking out
2 “death” and inserting “life imprisonment”;

3 (10) section 2381 is amended by striking out “shall
4 suffer death, or”;

5 (11) section 3005 is amended by striking out
6 “capital crime” and inserting in lieu thereof “crime
7 punishable by life imprisonment under section 34,
8 794 (a), 794 (b), 1111 (b), 1201 (a), 1716, 1992,
9 2031, 2113 (e), or 2381, or subsection (d), (f), or
10 (i) of section 844, of this title”;

11 (12) section 3141 is amended by striking out
12 “capital cases”, and inserting in lieu thereof “in the
13 case of a crime punishable by life imprisonment under
14 section 34, 794 (a), 794 (b), 1111 (b), 1201 (a), 1716,
15 1992, 2031, 2113 (e), or 2381, or subsection (d), (f),
16 or (i) of section 844, of this title”;

17 (13) sections 3235 and 3281 are each amended by
18 striking out “death” and inserting “life imprisonment
19 under section 34, 794 (a), 794 (b), 1111 (b), 1201 (a),
20 1716, 1992, 2031, 2113 (e), or 2381, or subsection (d),
21 (f), or (i) of section 844, of this title”;

22 (14) section 3432 is amended by striking out
23 “treason or other capital offense” and inserting in lieu
24 thereof “an offense punishable by life imprisonment
25 under section 34, 794 (a), 794 (b), 1111 (b), 1201 (a),

1 1716, 1992, 2031, 2113 (e), or 2381, or subsection
 2 (d), (f), or (i) of section 844, of this title"; and
 3 (15) section 3575 (c) is amended by striking out
 4 "death or of".

5 (b) (1) Except with respect to offenses committed be-
 6 fore the date of enactment of this Act sections 753 and 754
 7 of such title are repealed.

8 (2) The analysis of chapter 35 of such title is amended
 9 by striking out

"753. Rescue to prevent execution.

"754. Rescue of body of executed offender."

10 (c) (1) Sections 3566 and 3567 of such title are
 11 repealed.

12 (2) The analysis of chapter 227 of such title is
 13 amended by striking out—

"3566. Execution of death sentence.

"3567. Death sentence may prescribe dissection."

14 AMENDMENTS TO LAWS RELATING TO THE DISTRICT
 15 OF COLUMBIA

16 SEC. 3. (a) (1) The first sentence of section 801 of
 17 the Act entitled "An Act to establish a code of law for the
 18 District of Columbia", approved March 3, 1901 (D. C. Code,
 19 sec. 22-2404) is amended to read as follows: "The punish-
 20 ment of murder in the first degree shall be imprisonment
 21 for life."

1 (2) The last two paragraphs of such section are
2 repealed.

3 (b) The first sentence of section 909 of such Act
4 (D. C. Code, sec. 22-106) is amended by striking out "any
5 crime punishable by death" and inserting "murder in the
6 first degree".

7 (c) (1) Chapter 17 of title 23 of the District of
8 Columbia Code is repealed.

9 (2) The item relating to chapter 17 in the title analysis
10 of such title 23 is repealed.

11 (d) The last sentence of subsection (a) of section 3
12 of the Act entitled "An Act to establish a Board of Inde-
13 terminate Sentence and Parole for the District of Columbia
14 and to determine its functions, and for other purposes",
15 approved July 15, 1932 (D.C. Code, sec. 24-203), is
16 repealed.

17 (e) Section 23-1321 (a) of the District of Columbia
18 Code is amended by striking out "other than an offense
19 punishable by death" and inserting in lieu thereof "other
20 than murder in the first degree".

21 (f) Section 23-1325 of the District of Columbia Code
22 is amended by striking out "an offense punishable by death"
23 and inserting in lieu thereof "murder in the first degree".

1 AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE

2 SEC. 4. The following sections of title 10, United States
3 Code, are amended as follows:

4 (1) section 818 is amended by striking out "in-
5 cluding the penalty of death when specifically author-
6 ized by this chapter" and inserting in lieu thereof "ex-
7 cept the penalty of death";

8 (2) section 819 is amended (A) in the first
9 sentence by striking out "noncapital" and inserting
10 after "chapter" the following: "other than an offense
11 punishable by life imprisonment under section 855 (c),
12 890, 894, 899, 900, 901, 902, 904, 906, 910 (a), 913,
13 918, or 920 (a)" and by striking out "capital offense"
14 and inserting in lieu thereof "such an offense punishable
15 by life imprisonment", and (B) in the second sentence
16 by striking out "death,";

17 (3) section 820 is amended (A) in the first
18 sentence by striking out "noncapital" and inserting
19 after "this chapter" the following: " , except an
20 offense punishable by life imprisonment under section
21 885 (c), 890, 894, 899, 900, 901, 902, 904, 906,
22 910 (a), 913, 918, or 920 (a)", and (B) in the third
23 sentence by striking out "death,";

24 (4) section 852 is amended by striking out the
25 first paragraphs of subsections (a) and (b), by striking

1 out "other" in subsection (a) (2), and by renumbering
2 paragraph (2) of subsection (a) as (1), and paragraphs
3 (2) and (3) of subsection (b) as (1) and (2), re-
4 spectively;

5 (5) section 871 is amended by striking out "ex-
6 tending to death or" and ", except a death sentence"
7 in subsection (a), and by striking out ", except a death
8 sentence" in subsection (d);

9 (6) section 873 is amended by striking out "death,";

10 (7) sections 885 (c), 890, 894, 899, 900, 901,
11 and 913 are each amended by striking out all that fol-
12 lows "shall be punished" and by inserting in lieu thereof
13 "by such punishment as a court-martial may direct.";

14 (8) sections 902, 904, and 910 (a) are each
15 amended by striking out "death or such other punish-
16 ment" and inserting in lieu thereof "such punishment";

17 (9) section 906 is amended by striking out "death"
18 and inserting "life imprisonment"; and

19 (10) sections 918 and 920 (a) are each amended
20 by striking out "death or".

21 AMENDMENTS TO FEDERAL AVIATION ACT OF 1958

22 SEC. 5. Section 402 (i) of the Federal Aviation Act of
23 1958 (49 U.S.C. 1472 (i)) is amended by striking out
24 "death" and inserting "life imprisonment".

1

EXISTING DEATH SENTENCES

2 SEC. 6. All persons against whom a sentence of death
3 has been entered because of conviction of violation of any
4 of the laws amended or repealed by this Act, and who have
5 not been executed before the enactment of this Act, shall
6 not suffer death, but shall be punished by life imprisonment
7 instead, in the same manner as if originally sentenced to
8 life imprisonment.

Mr. KASTENMEIER. The importance of the measures under consideration lies in the fact that the U.S. Supreme Court has under advisement four cases which directly challenge the constitutionality of the sentence of death as "cruel and unusual" within the meaning of the Eighth Amendment of the Federal Constitution. Pending judicial determination of this issue, there have been no executions in the United States since 1967. Governors and appellate courts have effected an informal moratorium, and this moratorium has survived while the constitutional issues remain unsettled. As a result, nearly 600 persons are living under death sentences whose execution has been temporarily stayed.

Should the Court reject the arguments on behalf of the condemned men in the cases now pending before it, there is great possibility that the fate of the 600 occupants of death row may be thrown into chaos. The purpose of H.R. 8414 is to ameliorate this situation by suspending the death penalty and thus giving State authorities and the Congress a period of time in which to reexamine constitutional and policy issues surrounding the use of the death penalty.

Significant, in light of a growing concern over the propriety of capital punishment, is the fact that no hearings on the subject appear to have been conducted on the House side since the 86th Congress (in May 1960, 12 years ago). The Subcommittee therefore proposes to make a thorough review of all the implications of the pending bills.

The Chair regrets that it was necessary to cancel yesterday's hearing at which congressional witnesses were to be heard. This was done at the request of the witnesses themselves. Mr. Celler was chairing important hearings on busing. Senator Hart was engaged in very important hearings relating to ITT. The Subcommittee will possibly schedule additional time for the purpose of hearing these witnesses.

Being cognizant of the excellent staff work performed for the National Commission on Reform of Federal Criminal Laws under the chairmanship of former Governor Brown (of which the Chair was a member), the Chair offers for the records Parts I through III of "Memorandum on the Capital Punishment Issue," found at pages 1347 through 1365 of Working Papers of the National Commission on Reform of Federal Criminal Laws, as well as "Introductory Comment to Chapter 36," on pages 310-11 of Final Report of the National Commission on Reform of Federal Criminal Laws. This Memorandum and this Introductory Comment merit incorporation in the record because of their excellent summarizations of the capital punishment issue.

(The materials referred to are as follows:)

WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

(Established by Congress in Public Law 89-801)

MEMORANDUM ON THE CAPITAL PUNISHMENT ISSUE

(Dean, Clarkson ; October 30, 1968)

INTRODUCTION

Mr. Justice Frankfurter once observed of journeys in the law that often "where one comes out on a case depends on where one goes in." This admonition appears to have particular relevance in discussing the issue of capital punishment. The attitudes and assumptions people bring to this controversy often color or determine

the conclusions they reach or the resolutions they propose. As one activist in the capital punishment debate once stated:¹

"Questions of this sort . . . are not settled by reason; they are settled by prejudices and sentiments or by emotion. When they are settled they do not stay settled, for the emotions change as new stimuli are applied to the machine."

This memorandum presents the capital punishment issue to the Commission. Part I sets forth a brief summary of the existing capital crimes in the Federal system. Part II sets forth a collection of the arguments for abolition and retention of capital punishment. Part III contains materials regarding public opinion on capital punishment. And part IV contains a discussion of procedures for imposition of a death penalty sentence should the Commission decide to retain or partially abolish capital punishment in the Federal system; that is, two-stage trials for capital cases.

The question before the Commission appears to be threefold:

(1) Should the Commission take any position on the capital punishment issue, since this is a highly controversial matter and can only be ultimately determined by the Congress?

(2) Should the Commission recommend retention or partial abolition and if so, which crimes should be capital and why?

(3) Should the Commission recommend total abolition and if so why?

The materials in this memorandum, while not specifically addressed to these questions, are intended to facilitate their resolution by the Commission.*

PART I. FEDERAL OFFENSES PRESENTLY PUNISHABLE BY DEATH

An examination of the United States Code (excluding the District of Columbia Code² and the Uniform Code of Military Justice³) reveals 16 statutes containing the death penalty. However, of these 16 statutes it appears that in one-half of them the death penalty provisions are inapplicable and invalid under the recent Supreme Court decision in *United States v. Jackson*, 390 U.S. 570 (1968). In *Jackson* the Court struck down as unconstitutional the death penalty provisions of the Federal Kidnapping Act, 18 U.S.C. § 1201(a).⁴ Since the death penalty under this statute is only applicable to cases of trial by jury, and not to guilty pleas or to cases of trial by a judge, the Court held that this sentencing provision placed an unconstitutional burden on the right to trial by jury. The defendant who abandons his right to trial by jury is assured that he cannot be executed; the defendant who selects a jury trial is forewarned that if the jury finds him guilty he may be executed if such is the jury's decision. The Court stated that: "[T]he inevitable effect of any such provision, is . . . to discourage assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amendment right to demand a jury trial." 390 U.S. at 581.

*Chapter 36 of the Study Draft, offered provisionally subject to decisions on the death penalty, provides that a sentence of life imprisonment or death may be imposed for certain offenses and formulates the procedure for imposition of such penalties.

¹ C. DARROW, A COMMENT ON CAPITAL PUNISHMENT, in preface to J. LAWRENCE, A HISTORY OF CAPITAL PUNISHMENT, xv (1st ed. 1963).

² In the District of Columbia the death penalty is imposed only for murder in the first degree and rape, D.C. CODE ANN. 22-2404, § 2801 (1967 ed.)

³ In the Uniform Code of Military Justice, Title 10 of the United States Code, the death penalty is imposed for the following offenses:

Section	Article	Offense
885.....	85(c).....	Desertion in time of war.
890.....	90.....	Assaulting or willfully disobeying a superior commissioned officer in time of war.
894.....	94.....	Mutiny or sedition.
899.....	99.....	Misbehavior before the enemy.
900.....	100.....	Subordinate compelling surrender.
901.....	101.....	Improper use of countersign in time of war.
902.....	102.....	Forcing a safeguard.
904.....	104.....	Aiding the enemy.
906.....	106.....	Spying in time of war.
918.....	118(1)(4).....	Murder.
920.....	120.....	Rape.

⁴ The punishment provision of 18 U.S.C. § 1201(a) reads as follows:
 . . . shall be punished (1) by death if the kidnapped has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

It will be noted that the Court struck down only the death penalty; a term of years or life is still presumably possible under the Act.

While there have been few decisions to date applying *Jackson* to other statutes,⁵ there is little doubt that the death penalty provisions of other statutes that use language very similar to the statute struck down in *Jackson* will similarly be ruled unconstitutional. Below are set forth the 16 existing capital statutes: first (a) those that appear unaffected by *Jackson* and second (b) those likely to be held unconstitutional under the *Jackson* rationale and the maximum penalty applicable should the death penalty provision be ruled invalid.⁶

(a) *Federal Statutes Retaining Valid Death Penalties:*

18 U.S.C. § 34. Destruction of motor vehicles or motor vehicle facilities where death results.

18 U.S.C. § 794. Gathering or delivering 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. § 1114. Murder of certain officers and employees 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.

49 U.S.C. § 1472(i). Aircraft piracy.

(b) *Federal Statutes With Invalid Death Penalties:*

(Remaining Penalty Noted)

18 U.S.C. § 837(b). Transporting in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to damage or destroy buildings or other real or personal property, if death results. (Imprisonment for any term of years or for life.)

18 U.S.C. § 1201(a). Federal Kidnapping Act. (Imprisonment for any term of years or for life.)

18 U.S.C. § 2113(e). Causing death of another or kidnapping while engaging in bank robbery or incidental crimes. (Imprisonment for not less than 10 years.)

21 U.S.C. § 176(b). Sale of heroin to juveniles. (\$20,000 fine or imprisonment for life or for not less than 10 years.)

42 U.S.C. § 2272. Violation of specific sections of the Atomic Energy Act. (\$20,000 fine or imprisonment for not more than 20 years or both.)

42 U.S.C. § 2274. Communication of restricted data under the Atomic Energy Act. (\$20,000 fine or imprisonment for not more than 20 years or both.)

42 U.S.C. § 2276. Tampering with restricted data under the Atomic Energy Act. (\$20,000 fine or imprisonment for not more than 20 years or both.)

It may be that the death penalty provisions of 18 U.S.C. § 1992 (causing death to another by wrecking a train) will fall also. The penalty provision of this statute is as follows:

Whoever is convicted of any such crime which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, if the court in its discretion shall so order.

This statute does not mention the possibility of a death sentence if the defendant waives his right to trial by jury and is instead tried by the court. In such cases, it may be argued, the death penalty is unconstitutional because it can be avoided by waiving a jury trial. Also it can be argued that if the court can impose the death penalty in cases of guilty pleas, it has the power to do so when the case is tried without a jury. Accordingly, the validity of the statute would seem questionable under *Jackson*.

The appendix contains other provisions found in Title 18 of the United States Code relating to capital punishment.

⁵ See e.g., *Pope v. United States*, 392 U.S. 651 (1968), in which the Court vacated a sentence of death under the Federal Bank Robbery Act (18 U.S.C. § 2113(e)), upon the concession by the Solicitor General that "this death penalty provisions 'suffers from the same constitutional infirmity' as that found in the Federal Kidnapping Act. . . ."

⁶ The conclusions for this classification are based in part on an analysis in DEPARTMENT OF JUSTICE MEMO. No. 580 (May 24, 1968).

PART II. ARGUMENTS FOR ABOLITION AND RETENTION OF CAPITAL PUNISHMENT *

As recently observed in testimony before the Senate,⁷ the abolition versus retention debate on capital punishment has remained relatively unchanged since the debate between Caesar and Cato on what to do with the Catiline conspirators. Set forth in this part of the memorandum is a summary of the principal arguments that have been advanced by the abolitionists and retentionists.

By way of background, it must be noted that to date, nine States,⁸ Puerto Rico, and the Virgin Islands have completely abolished the death penalty. Four States have partially abolished the death sentence by restricting its application.⁹ Seven States have completely or partially abolished capital punishment and subsequently restored it.¹⁰ Although the possibility of being punished by death for some crime or another exists in 41 States, as well as in Federal law, the probability of being executed is relatively minimal: the actual number of executions has been very low.¹¹ In short, it appears that while *de jure* abolition has ebbed and flowed¹² a *de facto* abolition has practically become a reality in the United States.¹³

*The staff is indebted to materials gathered in *THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY* (Bedau ed. 1967) and a Library of Congress monograph on capital punishment prepared by the Legislative Reference Service (Aug. 3, 1966).

⁷Testimony of Thorsten Sellin before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary (Mar. 21, 1968). Note: Hearings unpublished.

⁸Alaska (1957), Hawaii (1957), Iowa (1965), Maine (1887), Michigan (1963), Minnesota (1911), Oregon (1964), West Virginia (1965), and Wisconsin (1853).

⁹New York (1965): Death penalty retained for persons found guilty of killing a peace officer who is acting in line of duty, and for prisoners under a life sentence who murder a guard or inmate while in confinement or while escaping from confinement; North Dakota (1915): Death penalty retained for treason, and for first degree murder committed by a prisoner who is serving a life sentence for first degree murder; Rhode Island (1852): Death penalty retained for persons convicted of committing murder while serving a life sentence for any offense; and Vermont (1965): Death penalty retained for persons convicted of first degree murder who commit a second unrelated murder; for the first degree murder of any law enforcement officer or prison employee who is in the performance of the duties of his office; for kidnapping for ransom; and for treason.

¹⁰Note: First date is year of abolition and second date year of restoration. Arizona (1916-1918), Delaware (1958-1961), Kansas (1907-1935), Missouri (1917-1919), South Dakota (1915-1917), Tennessee (1915-1917) and Washington (1913-1919).

¹¹U.S. BUREAU OF PRISONS, DEPART' OF JUSTICE, NAT'L PRISONER STATISTICS No. 42, Table 4 at 12 (June 1968). See also Chart 3 at 6, *id.*

¹²The President's Commission on Law Enforcement and Administration of Justice noted: There has not been a uniform trend toward repeal of capital punishment laws, however. In 1961 the Delaware legislature reenacted the death penalty after having repealed it in 1958. Last year the voters in Colorado reenacted a proposed constitutional amendment which would have abolished capital punishment. In Indiana an abolition bill passed by both houses of the legislature was vetoed by the Governor. And in a number of States bills providing for repeal of the penalty have been defeated in the legislature. (TASK FORCE REPORT: THE COURTS (27 (1967))).

¹³The table below, albeit a partial listing, shows the trend of foreign nations toward *de jure* abolition.

Argentina, 1922	Iceland, ^a 1940
Australia:	Italy, 1944
New South Wales, ^a 1955	Liechtenstein, ^b 1789
Queensland, 1922	Luxembourg ^b
Austria, 1945	Mexico, ^c 1931
Belgium, ^b 1867	Netherlands, 1870
Brazil, 1889	Netherlands Antilles, 1957
Bulgaria ^b	New Zealand, 1961
Canada ^a	Nicaragua, ^a 1892
Chile ^b	Norway, ^d 1907
Colombia, 1910	Portugal, 1967
Costa Rica, 1882	Republic of San Marino, 1865
Denmark, ^a 1930	Rumania, ^a 1865
Dominican Republic, ^a 1924	Sweden, 1921
Ecuador, 1897	Switzerland, ^a 1937
Finland, ^a 1949	Uruguay, 1907
German Federal Republic, 1949	Vatican City State
Great Britain, ^e 1965	Venezuela, 1863
Greenland, 1954	

^a Death penalty retained only for certain exceptional crimes, such as treason, piracy, war crimes, killing of policemen.

^b Death penalty abolished by custom, but not by law.

^c Death penalty abolished in Federal territory and in 25 of 29 States.

^d Death penalty reinstated briefly after World War II for war crimes.

^e The death penalty for murder was temporarily abolished in 1965 and permanently abolished in 1969. The death penalty is still available (although it has not been imposed for more than a century) for the crimes of wartime treason, piracy, and arson in the royal dockyards and arsenals. N.Y. Times Dec. 19, 1969 at 9, col. 1; N.Y. Times Dec. 21, 1969, at 28, col. 3.

Sources: U.N. DEPAR'T ECON. & SOCIAL AFFAIRS, CAPITAL PUNISHMENT 7-9, U.N. Doc. ST/SOA/SD/9 (1962); 306 PARL. DEB., H.L. (No. 25) at 1120 (1969); N.Y. Times, Dec. 21, 1969 at 28, col. 3.

According to an editorial in the New York Times, Dec. 20, 1969, at 30, col. 1, with the 1969 permanent abolition by Great Britain, only the United States and France among the Western nations retain capital punishment. "In France . . . President Pompidou, a convinced abolitionist, is pledged to eliminate the guillotine. . . . More than 70 countries have not put an end to [capital punishment]."

A. THE MORAL ARGUMENT

Abolitionists argue that it is morally wrong to kill another human being whether the killing be by a private individual or by the state.¹⁴ While the moral argument, which is based on a belief in the sanctity of human life, leads some abolitionists to argue that capital punishment is wrong regardless of whether or not it benefits society, such an absolute stand is unusual. A more prevalent position recognizes that the sanctity of human life is not an absolute, but rather a highly cherished value that should give way only upon a persuasive showing that capital punishment serves a prime social purpose that cannot otherwise be served.¹⁵ Abolitionists contend there has been no such showing (a view which will be discussed in the pages immediately following) and because of the moral and practical evils inherent in the death penalty, the burden of proving its necessity must rest with its supporters.

Retentionists argue in defense of capital punishment that the state has a moral responsibility to protect its law-abiding citizens. Retentionists contend that the death penalty is a superior deterrent to long-term imprisonment for major crimes, and that it is an essential protective measure against the incorrigibly dangerous killer. The retentionists believe that because of the state's responsibility to protect its citizens, the burden rests upon the abolitionists to prove conclusively that the death penalty is ineffective as a deterrent and unnecessary as a protective measure. Those who favor retaining the death penalty find that such conclusive proof is lacking; a position which will be discussed in the pages immediately following.

B. DETERRENCE ARGUMENT

The efficacy of the death penalty as a deterrent to or preventative of crime is the major factual issue in dispute between abolitionists and retentionists.¹⁶ It will be noted, however, that this debate has principally focused on the relationship of the death penalty and the crime of murder. Abolitionists argue that the deterrence value of the death penalty is called into serious question by the available statistics, by the evidence of modern psychology, and by the manner in which the death penalty is administered. Retentionists argue, to the contrary, that the statistics are inadequate to draw any conclusions, that the psychological impact is significant, and that the evidence of practical experience attests to the efficacy of capital punishment.

1. *The Statistics*

A leading study of the deterrent impact of the death penalty was prepared by Thorsten Sellin in a report for the Model Penal Code project of the American Law Institute.¹⁷ Sellin analyzes the four ways¹⁸ in which the deterrence value of capital punishment would be statistically evident if it exists, but, in fact, the evidence is to the contrary and indicative of no measurable deterrent value. First, studies of the homicide rates in contiguous jurisdictions¹⁹ with and with-

¹⁴ M. DiSALLE, *THE POWER OF LIFE AND DEATH* 6 (1965) [hereinafter cited as DiSALLE].

¹⁵ H. Packer, *Mr. Barzun and Capital Punishment*, 31 *THE AMERICAN SCHOLAR* 440 (Summer 1962) [hereinafter cited as Packer].

¹⁶ *THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY* 260-261 (H. Bedau ed. 1967) [hereinafter cited as Bedau].

¹⁷ MODEL PENAL CODE § 201.6, Comment at 63 (Tent. Draft No. 9, 1959); T. SELLIN, *THE DEATH PENALTY* (1959) [reproduced in Model Penal Code (Tent. Draft No. 9, 1959) and hereinafter cited as SELLIN DEATH PENALTY].

¹⁸ It seems reasonable to assume that if the death penalty exercises a deterrent or preventive effect on prospective murderers, the following propositions would be true:

(a) Murders should be less frequent in States that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among States that are alike as possible in all other respects—character of population, social and economic condition, etc.—in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these States.

(b) Murders should increase when the death penalty is abolished and should decline when it is restored.

(c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crime occurred and its consequences are most strongly brought home to the population.

(d) Law enforcement officers would be safer from murderous attacks in States that have the death penalty than in those without it.

SELLIN, *DEATH PENALTY*, *supra* note 17, at 21.

¹⁹ *E.g.*, homicide death rates (1920-1955): in Maine, New Hampshire, and Vermont; in Massachusetts, Connecticut, and Rhode Island; in Minnesota, Iowa, and Wisconsin; and in Michigan, Indiana, and Ohio.

See SELLIN, *DEATH PENALTY*, *supra* note, at 25-34.

out the death penalty show that both States with and without the death penalty have virtually identical murder rates and trends.²⁰ Second, those studies conducted to determine if the homicide rate in a given jurisdiction increases with the abolition of the death penalty and decreases with its restoration show that there is no correlation between the status of the death penalty and the homicide rate.²¹ Third, on the assumption that a well-publicized execution should have the greatest deterrent effect in that locale, studies have been made to test the effect of executions on the capital crime rate in the community where the executions occurred. These studies show that there was no significant decrease (or increase) in the murder rate following an execution(s).²² Fourth, studies to determine if law enforcement and prison personnel are afforded greater protection by the death penalty show that police and prison homicides are virtually the same in abolition States as in death penalty States.²³ From these studies in the four above areas, Sellin concludes:

"Anyone who carefully examines the . . . data is bound to arrive at the conclusion that the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent."²⁴

Retentionists argue that the deterrent value of the death penalty vis-a-vis imprisonment cannot be—and has not been—determined by statistical studies. First, there is the fact that those who are deterred do not show up as statistics.²⁵ Secondly, the available statistics are inadequate. There is no exact information as to the volume of capital crime in the United States, and the homicide rate figures used by the abolitionists are imprecise.²⁶ More specifically, most of the statistical studies of the deterrent impact of the death penalty rely on the "murder and nonnegligent manslaughter" figures reported by the FBI in its uniform crime reports. These figures do not distinguish between those murders which are punishable by death (for example, first degree murders) and the lesser non-negligent criminal homicides punishable by imprisonment; instead they are all lumped together. Furthermore, the retentionists argue, it is questionable—and therefore inconclusive—to assume that the proportional relationship of capital murders to total homicide rates is relatively constant.²⁷

²⁰ SELLIN, DEATH PENALTY, *supra* note 7, at 34. Sellin notes, however, that existing statistics are something less than fully adequate but contends that:

Students of criminal statistics have examined these data with some care and have arrived at the conclusion that the homicide death rate is adequate for an estimate of the trend of murder. This conclusion is based on the assumption that the proportion of capital murders in the total of such deaths remains reasonably constant. Accepting this assumption, we shall examine the relationship between executions and the rates of death due to homicide. *Id.* at 22.

²¹ *Id.* at 34-50. See also U.N. DEPART ECON. & SOCIAL AFFAIRS, CAPITAL PUNISHMENT 54, U.N. Doc. ST/SOA/SD/9 (1962), wherein it is observed that:

All the information available appears to confirm that such a removal has, in fact, never been followed by a notable rise in the incidence of the crime no longer punishable with death. This observation, moreover, confirms the 19th century experience with respect to such offenses as theft and even robbery, forgery and counterfeiting currency, which have progressively ceased to be punishable with death: indeed, these crimes, so far from increasing, actually decreased after partial abolition.

²² R. Dann, THE DETERRENT EFFECT ON CAPITAL PUNISHMENT, THE COMMITTEE OF PHILANTHROPIC LABOR OF PHILADELPHIA YEARLY MEETING OF FRIENDS BULL. No. 29 (1935); L. Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L. C. & P.S.338-341 (Nov.-Dec. 1958).

²³ In testimony before the Senate (note 7, *supra*), Sellin presented statistical studies to show that police and prison homicides are not related to capital punishment. See Sellin *The Death Penalty and Police Safety*, 22 PARL. 2D SESS. 718-728 (1955). APPENDIX F, MINUTES OF PROCEEDINGS AND EVIDENCE No. 20. JOINT COMM. OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL PUNISHMENT, CORPORAL PUNISHMENT AND LOTTERIES (Ottawa Queen's Printer, 1955); and CAPITAL PUNISHMENT 152-160 (Sellin ed. 1967).

²⁴ SELLIN, DEATH PENALTY, *supra* note 17, at 63.

²⁵ THE FLA. SPECIAL COMM N FOR THE STUDY OF THE ABOLITION OF DEATH PENALTY IN CAPITAL CASES REPORT 13-14 (1965) [hereinafter cited as FLA. COMM'N REPORT].

Superficial consideration might lead one to conclude that this question [whether the death penalty is superior to imprisonment in deterring those persons who would otherwise commit serious crimes] might be answered by scientific and statistical studies, but such is not the case. There is no reliable method for determining who has contemplated committing a capital crime but refrained due to the fear of the death penalty as distinguished from other forms of criminal punishment. . . . It is probably impossible to subject deterrence to scientific study in any direct way. The facts cannot be ascertained so that they can be subjected to scientific analysis and interpretation.

²⁶ Bedau, *supra* note 16, at 56-57.

²⁷ *Id.* at 265-266. The Florida Special Commission comments:

Perhaps it is fortunate that the judgment of most persons who have studied them is that they do not prove much; that while they do not prove that the death penalty is a superior deterrent, they do not prove that it is not. . . . J. Edgar Hoover, Director of the Federal Bureau of Investigation, favors retention of the death penalty, but he has charged that statistical comparisons [based on inferences from homicide rates to first-degree murder rates] are completely inconclusively. (FLA. COMM'N REPORT, *supra* note 25, at 17.)

2. *The Psychology of Deterrence*

Abolitionists argue that murders are either premeditated or they are not. In the case of unpremeditated murders, no punishment can be effective as a deterrent. Abolitionists note that considerable evidence exists that a great percentage of those who commit violent crimes are likely to be suffering from some form of mental illness or have acted in a fit of passion. Therefore, they are undeterrable and it is pointless to threaten such offenders with death.

The abolitionist's argument continues. Premeditated murders are committed by people who either do or do not expect to be caught. With regard to those who expect to be caught, the threat of punishment by death will not control the behavior of such an individual. With respect to those who plan their murders on the assumption they will get away with it, a penalty is a meaningless deterrent; these persons can only be deterred by increasing the effectiveness of law enforcement and criminal justice.

Finally, there are presumably those persons who are sane and cautious enough to weigh the risk of punishment (that is, life versus death sentence) and able to decide that while the risk of death is too great in consideration of the anticipated gain from the crime, protracted imprisonment is not such a great risk. But, the abolitionists ask, how many such persons are there in the total population? The abolitionists believe:²⁸

"It would be most exceptional for a man to be insufficiently sane and normal to be deterred by the risk of a sentence of protracted imprisonment but yet sufficiently sane and normal to be deterred by the risk of his own execution, when both risks are at a level of contingency which he is doing his utmost to avoid."

Retentionists analyze the situation similarly but draw different conclusions. The fact that many murders are crimes of passion or acts of insanity is interpreted by the retentionists not as an indication of the uselessness of the death penalty as a deterrent, but rather as an indication of its success in deterring people from premeditated murder.²⁹ Retentionists contend that the psychology deterrent impact of the death penalty is most effective in preventing large numbers of potential wrongdoers from ever reaching the state of criminality where their behavior becomes uncontrollable and impulsive.³⁰

3. *Administration of the Death Penalty*

Abolitionists argue that the way in which capital punishment is administered undercuts whatever deterrent effect it might possess on those capable of exercising some degree of rationality. For punishment to have efficacy as a deterrent, the penalty must be imposed consistently, immediately and inexorably, and the general public must expect exactly this. It is argued that the practice in administering capital punishment does not satisfy any of these fundamental and requisite conditions. Only a small proportion of first degree murders are sentenced to death³¹ and even fewer are executed.³² The delay in convicting and executing capital offenders is increasing and notorious. Abolitionists conclude from these circumstances that "almost anyone who contemplates some horrible crime can see some chance in getting away with it, or at least in not having to pay the supreme penalty."³³

4. *The Evidence of Experience*

Retentionists, in rejecting the statistical arguments for abolition as inconclusive, turn to the experience of the law enforcement profession as demonstrative

²⁸ Bedau, *supra* note 16, at 272, quoting a Ceylon report on capital punishment.

²⁹ The Canadian Parliamentary Committee's 1956 Report on Capital Punishment notes (at p. 14):

One measure of its [the death penalty's] deterrent effect was afforded by an analysis of murders which indicated that a considerable proportion, probably in excess of half, are committed under the compulsion of overwhelming passion or anger where no deterrent could have been effective. This would seem to demonstrate that the death penalty, coupled with the excellent standards of law enforcement prevailing in Canada, has been successful in deterring the commission of deliberate, premeditated murders and reducing their incidence to minimum proportions. The deterrent effect may also be indicated by the widespread association of the crime of murder with the death penalty which is undoubtedly one reason why murder is regarded as such a grave and abhorrent crime.

³⁰ See MASS. SPECIAL COMM., ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS (1958); the minority report is reprinted in CAPITAL PUNISHMENT 32 (McClellan ed. 1961).

³¹ *E.g.*, over the last 5 years there has been an annual average of 10,122 murders reported in the FBI's Uniform Crime Reports. Over the same period of time, the National Prisoner Statistics indicate there has been an average of nine persons annually sentenced to death for murder.

³² See note 11 *supra*. See also Natl. Prisoner Statistics, *supra* note 31.

³³ Bedau *supra* note 16, at 270.

and supportive of the deterrent value of capital punishment. FBI Director J. Edgar Hoover speaks for most of the nation's law enforcement officers when he states:³⁴

"The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty."

In brief, law enforcement officers cite the following typical instances where the death penalty evidences its deterrent value:³⁵

(a) Criminals who have committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captor though by killing, escape seemed probable. When asked why they refrained from the homicide, quick response indicated a willingness to serve a life sentence but not to risk the death penalty.

(b) Criminals about to commit certain offenses refrained from carrying deadly weapons. Upon apprehension, answers to questions concerning absence of such weapons indicated a desire to avoid more serious punishment by carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty.

(c) Victims have been removed from a capital punishment State to a non-capital punishment State to allow the murderer opportunity for homicide without threat to his own life.³⁶ This in itself demonstrates that the death penalty is considered by some would-be killers.

C. ARGUMENTS FOR THE DEATH PENALTY AS A PROTECTIVE MEASURE

Abolitionists do not disagree with retentionists that the death penalty is an effective protective measure against incorrigibly (that is, nonreformable) dangerous criminals. The debate as to the protective aspects of death penalty turns on whether, in fact, such an extreme measure is really necessary.

Abolitionists argue that life imprisonment is a completely adequate protective measure.³⁷ First, abolitionists contend that murderers generally make the best prisoners; murderers commit a negligible percentage of the violent prison crimes.³⁸ Second, abolitionists contend that the danger of the paroled murderer is considerably exaggerated by the retentionists. There is considerable misconception in the assumption that the murderer who gets a life sentence or whose death sentence is commuted to life imprisonment can easily obtain his freedom. Furthermore, statistics indicate that the behavior of a first-degree murderer released on parole is "very good, much better than that of other prisoners who have been paroled, especially property offenders."³⁹ This is also true with those who have been pardoned.⁴⁰ Finally, abolitionists would argue that it is indeed misguided to release those who remain a danger to society, but that this indicates a need for reform of parole and pardon practices rather than a need for executions.⁴¹ Many abolitionists believe that rather than execute the incorrigibly dangerous we should be studying him to determine how we can prevent others from such behavior.⁴²

Retentionists do not accept the abolitionist position that life imprisonment is in all cases a sufficient safeguard. They argue that since some criminals are in-

³⁴ F.B.I. UNIFORM CRIME REPORTS, 14 (1959).

³⁵ 1959 ABA CRIMINAL LAW SECTION 15 (1960) [hereinafter cited as ABA CRIMINAL LAW SECTION].

³⁶ The Attorney General of Kansas testified before the British Royal Commission that:

One of the contributing factors leading to the reenactment [in the State of Kansas] of the death penalty for first-degree murder was the fact that shortly prior thereto numerous deliberate murders were committed in Kansas by persons who had previously committed murders in states surrounding Kansas, where their punishment, if captured, could have been the death penalty. Such murders in Kansas were admittedly made solely for the purpose of securing a sentence to life imprisonment in Kansas if captured.

Quoted in Bedau, *supra* note 16, at 336. More recently a letter was intercepted by the Delaware State Police in which a murderer wrote that he had known before he killed that the most he could get was 15 years. The murder occurred after Delaware had repealed capital punishment in 1958 and was a major factor in the restitution of the death penalty in that State in 1961 MD. COMM. ON CAPITAL PUNISHMENT, REPORT 30-31 (1962).

³⁷ SELLIN, DEATH PENALTY, *supra* note 17, at 78-79.

³⁸ SELLIN, DEATH PENALTY, *supra* note 17, at 72. See also Bedau, *supra* note 16, at 400-401.

³⁹ ABA CRIMINAL LAW SECTION, *supra* note 27, at 24.

⁴⁰ Bedau, *supra* note 16, at 397; see 397-399, *id.*, for State statistics.

⁴¹ R. Caldwell, *Why is the Death Penalty Retained?* THE ANNALS 48-49 (November 1952).

⁴² K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

corrigibly antisocial and will remain potential dangerous to society for the remainder of their lives, the death penalty is necessary. It must be remembered that these men constitute a danger to prison officials and to the other inmates, and there is always the chance that they may escape.

Furthermore, retentionists argue that, because the life sentence rarely means that an offender is in reality imprisoned for life, there is a serious possibility that dangerous men will be released on parole. Retentionists point out that it is impossible to be certain that a murderer has, in fact, been "cured."⁴³

The retentionist's defense of the death penalty is bottomed on the argument that there is no satisfactory alternative sentence for those criminals who clearly constitute a continuing danger to society. The obvious possible alternative is the life sentence without the possibility of parole. However, a number of penologists believe that this is a highly unsatisfactory solution. They argue that such a sentence removes all inducement to improve and thus greatly increases the difficulty and danger involved in handling the men so sentenced.

Several States which have generally abolished capital punishment have retained it for a person found guilty of murder who then murders again. The argument that the death penalty should be retained for those who murder a second time is a limited version of both the argument that the death penalty is necessary as a protective measure, and the argument that it is more effective than life imprisonment as a deterrent. Sidney Hook, professor philosophy at New York University, comments:⁴⁴

"... in a sub-class of murderers, *i.e.*, those who murder several times, there may be a special group of sane murderers who, knowing that they will not be executed, will not hesitate to kill again and again. For *them* the argument from deterrence is obviously valid. Those who say that there must be no exceptions to the abolition of capital punishment cannot rule out the existence of such cases on *a priori* grounds. If they admit that there is a reasonable probability that such murderers will murder again or attempt to murder again, a probability which usually grows with the number of repeated murders, and still insist they would *never* approve of capital punishment, I would conclude that they are indifferent to the lives of the human beings doomed, on their position, to be victims."

D. THE RETRIBUTION VERSUS VENGEANCE ARGUMENT

Abolitionists do not accept the argument that capital punishment is defensible on the grounds of retribution, apart from any benefit it may afford society either as a superior deterrent or as a necessary protective measure. According to many proponents of capital punishment, some criminals are simply unfit to live; they have committed acts so heinous that the only appropriate punishment is death. This function of the death penalty is commonly referred to on the retentionist side of retribution and on the abolitionist side as vengeance.

Abolitionists argue that the motivation behind this use of the death penalty is of the same order as the irrationality which provoked the criminal to the act for which he is being executed. As one abolitionist has commented:⁴⁵

"Yet though easy to dismiss in reasoned argument on both moral and logical grounds, the desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation or revulsion—whether the reasoning mind approves or not. This psychological fact is largely ignored in abolitionist propaganda—yet it has to be accepted as a fact. The admission that even confirmed abolitionists are not proof against occasional vindictive impulses does not mean that such impulses should be legally sanctioned by society, any more than we sanction some other unpalatable instincts of our biological inheritance. Deep inside every civilized being there lurks a tiny Stone Age man, dangling a club to rob and rape, and screaming an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the land."

In short, abolitionists believe that the purpose of the criminal law is to provide protection against man's irrationality and violence, not to furnish a means of expressing it. Abolitionists contend that the death penalty is a violation of this purpose.⁴⁶

⁴³ Barzun, as quoted in Bedau, *supra* note 16, at 159, notes:

The 'scientific' means of cure are more than uncertain. The apparatus of detention only increases the killer's antisocial animus . . . Some of these are indeed 'cured'—so long as they stay under a rule. The stress of the social free-for-all throws them back on their violent modes of self-expression. At that point I agree that society has failed—twice: it has failed the victims, whatever may be its guilt toward the killer.

⁴⁴ S. Hook, *The Death Sentence* in Bedau, *supra* note 16, at 153.

⁴⁵ A. KOESTLER, REFLECTIONS OF HANGING, 105 (1956) [hereinafter cited as KOESTLER].

⁴⁶ MD. COMM. ON CAPITAL PUNISHMENT REPORT 25 (1962).

Retentionists defend capital punishment on the argument that it satisfies a legitimate communal need for retribution aroused by particularly heinous crimes. Society's desire that a man pay with his life for a violent crime represents both society's moral condemnation of such acts and a closing of the ranks against those who violate society's laws.⁴⁷

Retentionists reject the assertion that capital punishment is a violation of the sanctity of human life. To the contrary, they contend that it recognizes that sanctity.

E. ARGUMENTS RELATING TO CAPITAL PUNISHMENT AND CRIMINAL JUSTICE

A number of the arguments against capital punishment relate to its alleged incompatibility with equitable and efficient criminal justice.

1. *The Possibility of Error*

Observing the danger that an innocent man might be executed, the Marquis de Lafayette once said: "I shall ask for the abolition of the penalty of death until I have the infallibility of human judgment demonstrated to me."⁴⁸ Thorsten Sellin writes:⁴⁹

"Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed, perhaps after many years in prisons, by the discovery of the real criminal."

Studies indicate that innocent men have been wrongly convicted in the United States⁵⁰ and several Governors confronted with final decisions on execution have confirmed the reality and seriousness of the danger of executing the innocent.⁵¹ It is reported that Maine, Rhode Island, and Wisconsin abolished the death penalty because innocent men were hanged.⁵²

Retentionists argue that the possibility of error is exaggerated by the abolitionists and it is not, in fact, a very real possibility given the precautions taken by the courts in capital cases and the corrective powers of executive clemency. There have been no known cases in which an innocent man has been executed.⁵³ However, if an error should be made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angels but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty aims to provide effective remedies.⁵⁴

2. *Inequality of Application*

Some abolitionists allege that there is a discrimination in the use of the death penalty, based primarily on race and wealth. Citing particularly statistics on executions for rape, abolitionists charge that racial prejudice is clear and evidence the unequal application of the death penalty. Other abolitionists believe that it is the "poor and friendless" who are executed because the very nature of the court system frequently makes the difference between life and death determined by the ability of the accused to provide himself with skilled legal counsel.⁵⁵

⁴⁷ Lord Justice Denning testified before the British Royal Commission on Capital Punishment that:

The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else The ultimate justification of any punishment is not that it is a deterrent, but that it is 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.

Quoted in R. Donnelly, *Capital Punishment*, CONG. REC. A6283, A6285 (daily ed. Aug. 24, 1960) [hereinafter cited as DONNELLY].

⁴⁸ Quoted in O. Pollack, *The Errors of Justice*, THE ANNALS 115 (1952).

⁴⁹ SELLIN, DEATH PENALTY, *supra* note 17, at 63.

⁵⁰ Bedau, *supra* note 16, at 436-440.

⁵¹ E.g., E. BROWN, STATEMENT ON CAPITAL PUNISHMENT 6 (California Printing Office 1963); and DiSALLE, *supra* note 14, at 6.

⁵² Bedau, *supra* note 16, at 407.

⁵³ *Id.* at 440.

⁵⁴ MASS. SPECIAL COMM'N ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS (1958); the minority report is reprinted in CAPITAL PUNISHMENT 81 (McClellan ed. 1961).

⁵⁵ DiSALLE, *supra* note 14, at 10-11.

Retentionists regard the allegation as a misinterpretation of the facts. First to say that the "poor and friendless" are discriminated against is to imply deliberate discrimination by trial courts, appellate courts, and boards of pardons. This simply is not true and has never been—and cannot be—proved. Rather the facts indicate that the vast majority of all prisoners throughout our Nation's history have been the "poor and friendless." It has never been shown that those under the death sentence differ significantly from the vast majority of other criminals.⁶⁰ The fact that a higher percentage of Negroes are subjected to a death sentence is similarly indicative of the fact that a high percentage of Negroes commit capital crimes.⁶¹

3. *The Administration of Criminal Justice*

Abolitionists contend that the existence of the death penalty has an adverse impact on the administration of criminal justice.⁶² The matter of the disproportionate amount of time involved in capital cases was the subject of a study conducted by the American Bar Foundation, the research branch of the American Bar Association. This 1961 study, prompted by the Caryl Chessman case (which began in June 1948 and ended with his execution on May 2, 1960) concluded that long delays in capital trials and in executing death sentences weakens public confidence in the law.⁶³

Abolitionists further argue that the emotion aroused by a capital trial—the spectacle of a man fighting for his life—is not compatible with the just and rational administration of the law.⁶⁴ The retentionists respond to these arguments that what is needed is legal reform, not abolition, but the abolitionists in turn contend that legal reform is not answer unless the retentionists are "prepared to propose the solution that has so far eluded all students of the subject."⁶⁵ Many abolitionists believe that the death penalty is a principal factor operating against the needed reform of our criminal law.⁶⁶

As indicated above, retentionists view the problems of the death penalty in the administration of criminal law not as an argument for abolishing it but a need for reforming court and criminal procedure. A partial reform is set forth in part III of this memorandum, *infra*. Retentionists, while they have not always been specific, also call for reform in "the rules of evidence, the customs of prosecution, (and) the machinery of appeal."⁶⁷

F. THE RELIGIOUS ARGUMENT

The religious argument against the death penalty generally centers around the belief that even sinful men are the objects of God's redemptive love, and that vengeance belongs to God, not man. In the words of Bishop John Wesley Lord of the Washington, D.C. Conference of the Methodist Church:

A Christian view of punishment must look beyond correction to redemption. It is our Christian faith that redemption by the grace of God is open to every repentant sinner, and that it is the duty of every Christian to bring to others by every available means the challenge and opportunity of a new and better life. We believe that under these circumstances only God has the right to terminate life.

⁶⁰ Bedau, *supra* note 16, at 411-412.

⁶¹ Wolfgang, Kelly & Nolde, *Exceptions and Commutations in Pennsylvania* in Bedau, *supra* note 16, at 473.

⁶² The Florida Special Commission summed up the argument as follows:

When the life of an accused person is at stake, it is more difficult and takes longer to impanel juries because prospective jurors dislike such cases and are frequently disqualified because they do not believe in the death penalty. Trials become longer and more expensive and emotions are especially likely to confuse the issues. Indeed, the guilty person is more likely to escape punishment altogether because of the reluctance of the jury to convict and thereby make the death penalty a possibility. Appeals are more likely to result in reversals, and this brings on new and equally expensive trials. More are of the opinion that there would be many convictions for what are now capital crimes if life imprisonment replaced execution. (FLA. COMM'N REPORT, *supra* note 25, at 26.)

⁶³ New York Times, Jan. 29, 1961, at 60, col. 1.

⁶⁴ Mr. Justice Frankfurter, in his appearance as a witness before the British Royal Commission on Capital Punishment, stated, "When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the bar, the public, the judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life." Quoted in Donnelly, *supra* note 47, at A-6285.

⁶⁵ Packer, *supra* note 15, at 441.

⁶⁶ See Bedau, *supra* note 16, at 433. See also FED. PROB. 21 (Sept. 1961).

⁶⁷ Bedau, *supra* note 16, at 163.

Abolitionists and retentionists both argue that the Bible supports their side. Abolitionists cite Romans 12:17 in which Paul says: "Recompense to no man evil for evil . . . avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine: I will repay, saith the Lord."

In the Old Testament, the abolitionists point first to the fact that Cain was not put to death (Genesis 4:15), and then to the adjuration in Leviticus 19:18: "Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbor as thyself: I am the Lord."

More generally, those opposed to capital punishment for religious reasons argue that the whole Christian concept of love and redemption as presented in the New Testament runs counter to use of the death penalty in a system of justice. In support of this, they refer specifically to the Sermon on the Mount (Matthew 5:44, for example) and to Luke 6:35.⁶⁴

Turning to the New Testament,⁶⁵ it is argued that the law of love preached by Jesus implies the need for the existence of a strong civil law, and that it is a misreading of the New Testament to see it as advocating leniency for criminal behavior.⁶⁶

The defense of capital punishment on religious grounds rests primarily on two points. First, it is argued that the death penalty is a testimony to the sacredness of life, and—in the case of the Hebrew-Christian tradition—that the Bible clearly differentiates between murder and the death penalty as a just punishment for the taking of God-given life. Retentionists contend that this argument is supported by the following passages, as well as others, from the Old Testament:

Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made He man (Genesis 9:6).

He that smiteth a man, so that he die, shall be surely put to death . . . But if a man comes presumptuously upon his neighbor to slay him with guile; thou shalt take him from mine altar, that he may die (Exodus 21:12, 14).

Whoso killeth any person, the murder shall be put to death by the mouth of witnesses . . . Moreover ye shall take no satisfaction for the life of a murderer, which is guilty of death; but he shall be surely put to death . . . and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it (Numbers 35:30, 31, 33).

PART III. PUBLIC OPINION

Available information makes it extremely difficult to discern any clear trend in the United States toward abolition or retention of the death penalty. The imprecision of the existing indicators subject any analysis to question. Nevertheless,

⁶⁴In addition to the Old and New Testaments, abolitionists quote St. Augustine in opposition to capital punishment. The following passage is from his plea that some Donatists, a heretic African sect, who had confessed to a heinous murder of Christians, be spared the death penalty: We do not wish to have the sufferings of the servants of God avenged by the infliction of precisely similar injuries in the way of retaliation. Not, of course, that we object to the removal from these wicked men of the liberty to perpetuate further crimes, but our desire is rather that justice be satisfied without the taking of their lives or the maiming of their bodies in any particular; and that, by such coercive measures as may be in accordance with the laws, they be drawn away from their insane frenzy to the quietness of men in their sound judgment, or compelled to give up mischievous violence and betake themselves to some useful labour.

Quoted in KOESTLER, *supra* note 45, at 105.

⁶⁵In addition to the Old and New Testaments, St. Thomas Aquinas is also quoted in support of capital punishment: "It is lawful to kill an evil-doer insofar as it is directed to the welfare of the whole community." *II Aquinas, SUMMA THEOLOGICA 1467* (Benziger ed., 1947).

⁶⁶This argument is summed up as follows by Reverend Dr. Jacob J. Vellenga who, since 1958, has served as associate executive of the United Presbyterian Church in the United States:

The law of love, also called the law of liberty, was not presented to do away with the natural laws of society, but to inaugurate a new concept of law written on the heart where the mainsprings of action are born. The church is ever to strive for superior law and order, not to advocate a lower order that makes wrongdoing less culpable.

* * * * *

[W]herever and whenever God's love and mercy are rejected, as in crime, natural law and order must prevail, not as extraneous to redemption but as part of the whole scope of God's dealings with man.

* * * * *

The law of capital punishment must stand as a silent but powerful witness to the sacredness of God-given life. Words are not enough to show that life is sacred. Active justice must be administered when the sacredness of life is violated.

reviewing this information with appropriate caveats may be helpful to the Commission.

General public opinion regarding the death penalty has been measured in several Gallup polls. The four most recent Gallup poll surveys indicate a steady decrease of public support for capital punishment, but it must be noted that the survey was restricted—as most of the material in this memorandum—to capital punishment for murder. The results of the polls in which the question asked was, "Are you in favor of the death penalty for persons convicted of murder?" are set forth below:

[In percent]

	1966	1965	1960	1953
Yes.....	42	45	51	68
No.....	47	43	36	25
No opinion.....	11	12	13	7

It may be argued that this changing attitude toward capital punishment has been reflected by the fact that most of the States that have abolished or partially abolished capital punishment have done so rather recently. Another possible indication is the decrease in executions of most offenders convicted of capital crimes. These indications, however, must be balanced against the fact that capital punishment still exists in 41 States, the District of Columbia and in the Federal system. If State and Federal legislators are any reflection of public sentiment—and indeed they are—there obviously remains a substantial public resistance to abolition.

Any evaluation of public sentiment must also take cognizance of the fact that it has been the abolitionists—and not the retentionists—who have organized themselves into highly articulate lobbies and found representatives in respected public figures. Below is set forth material prepared by the Library of Congress indicating the current positions of known groups involved in the abolition versus retention debate.

A. AGAINST CAPITAL PUNISHMENT

In an article which appeared in the publication *Current History* (vol. 53, Aug. 1967, at 82-87) entitled "The Issue of Capital Punishment," Hugo Adam Bedau comments, at 84-85:

"[S]everal groups with a national constituency have taken public stands in favor of abolition. Most of the major Protestant denominations (Episcopal, Methodist, Congregational, Lutheran, Presbyterian, American Baptist) have been on record against the death penalty for several years. So have the Conference of American Rabbis and prominent Roman Catholic spokesmen, such as Richard Cardinal Cushing, of Boston. Until recently, the major civil liberties, civil rights, and correctional organizations refused to take such a stand. Within the past 2 years, however, the American Civil Liberties Union, the NAACP's legal defense fund, the National Council on Crime and Delinquency, and the American Correctional Association have publicly joined forces with the abolition movement, which has been led for 40 years by the American League to Abolish Capital Punishment."

According to the *Encyclopedia of Associations* (5th ed. 1968), the American League to Abolish Capital Punishment, to which Mr. Bedau refers, has 8,000 members, 37 State branches and 40 local branches. It was formed in 1927, is based in Brookline, Mass., and is headed by Mrs. Herbert B. Ehrman.

In 1967, 15 national organizations joined together to set up the National Committee To Abolish the Federal Death Penalty, based in Washington, D.C., and chaired by the Honorable Michael DiSalle, former Governor of Ohio. A list of the participating organizations, including those which have joined the committee since its inception, follows:

American Civil Liberties Union.

Americans for Democratic Action.

American League to Abolish Capital Punishment.

American Veterans Committee.

National Council of Catholic Women.

Department of Christian Social Relations, Executive Council, Episcopal Church.

Friends Committee on National Legislation.
 Union of American Hebrew Congregations.
 Board of Social Ministry, Lutheran Church in America.
 Board of Christian Social Concerns, The Methodist Church.
 Office of Church and Society, United Presbyterian Church, U.S.A.
 Unitarian Universalist Association.
 Department of Social Action, United Church of Christ.
 Women's International League for Peace and Freedom.
 National Board of the Young Women's Christian Association of the U.S.A.
 Department of Christian Action and Community Service, The United
 Christian Missionary Society.
 Industrial Union Dept. AFL-CIO.
 American Ethical Union.
 United Automobile Workers.
 Transport Workers Union of America.
 Synagogue Council of America.

In addition, anti-capital punishment groups from the following States are affiliated with the committee: New York, Ohio, New Jersey, Indiana, Utah, Colorado, California, Pennsylvania, Florida, North Carolina, Tennessee, and Maryland.

Several States have appointed committees to study the issue of capital punishment and make recommendations on State legislation involving the issue. The majority of the members of the following committees recommended abolition of the death penalty:

Pennsylvania General Assembly, Joint Legislative Committee on Capital Punishment (1961).

Maryland Legislative Council Committee on Capital Punishment (1962).

Massachusetts Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases (1958).

At the Federal level, speaking for the Justice Department and the administration, U.S. Attorney General Ramsey Clark urged the abolition of the death penalty for all Federal crimes, including presidential assassinations. He took this position in his appearance before a subcommittee of the Senate Judiciary Committee on July 2, 1968. Myrl E. Alexander, Director of the U.S. Bureau of Prisons, has also gone on record in opposition to the death penalty.

B. FOR CAPITAL PUNISHMENT

To the best of our knowledge, no group has been formed for the purpose of advocating retention of the death penalty, and no national group has specifically and publicly recommended its retention in recent years. A representative of the International Association of Chiefs of Police told us that a resolution passed by its annual convention in 1922 is of historical interest only. This was a resolution to the effect that this organization go on record as favoring capital punishment following speedy trials. The IACP has not taken an official stand for or against capital punishment in recent years.

Of State committees formed for the purpose of studying and making recommendations on the issue, the majority of the following recommended retention of the death penalty: Florida Special Commission for the Study of Abolition of Death Penalty in Capital Cases (1963-65); New Jersey Commission to Study Capital Punishment (1964).

The New York State Senate Committee on Codes has been holding hearings on anticrime measures, including restoration of the death penalty. John Cassese, president of the Patrolmen's Benevolent Association, and Michael J. Maye, president of the Uniformed Firemen's Association, sent statements to the committee in favor of the death penalty. Mr. Maye urged that the present law making the death penalty mandatory for the murder of a policeman on active duty be extended to include firemen.

FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

(Established by Congress in Public Law 89-801)

PROPOSED NEW FEDERAL CRIMINAL CODE—(TITLE 18 UNITED STATES CODE)

INTRODUCTORY COMMENT TO CHAPTER 36

This Chapter reflects a sharp division within the Commission on the subject of capital punishment. The principal text embodies the view of those favoring aboli-

tion of capital punishment. The bracketed provisional Chapter expresses the strongly held views of some Commissioners that capital punishment should be retained for certain grave offenses.*

It may be useful to summarize here the arguments for and against capital punishment, which are elaborated in the Working Papers at pages 1347-76. The arguments against capital punishment include the following. Studies of the deterrent effect of capital punishment do not support the view that there is an extra margin of deterrence as between the death sentence and life imprisonment. Abolition states show no higher murder rate than comparable states retaining the death penalty. The murder rate shows no significant correlation with abolition or reinstatement of capital punishment in a particular state or country. From a moral point of view, the infliction of capital punishment is intolerable because errors of justice do occur and are irremediable once the accused has been executed. The state should in any event abjure deliberate killing so as to demonstrate the supreme value which this nation places on the sanctity of life. Capital punishment falls unequally on rich and poor, black and white; and, in any event, it must operate almost by chance when only a very small number of those who commit "capital offenses" are in fact put to death. The role of chance and bias in capital punishment is underlined by the extreme difficulty of defining criteria for the imposition of the death sentence and the involvement of lay juries who, encountering the responsibility once in a lifetime, cannot give consistency to any capital punishment policy. The existence of capital punishment encourages extreme procedural safeguards against it and by extension against all major criminal sanctions, to the point where law enforcement generally is impeded and the system of criminal justice loses credibility.

The arguments in favor of retaining capital punishment include the following. Existing studies of the efficacy of capital punishment as a deterrent are inconclusive. Too many factors are present to warrant strong conclusions. The efficacy of capital punishment as a deterrent, moreover, has not really been tested in recent experience due to failure to carry out the provisions which the law does make for its use. In any event as a matter of individual experience and common sense, the death penalty is the most feared sanction, and it has served to deter at least some would-be killers, traitors, etc. Provision for capital punishment, even if rarely carried out, also serves to express the special horror of the community against the ultimate crimes, and this attitude penetrates the conscience of the community so as to create inhibitions against such conduct apart from any question of individuals directly and consciously responding to the law's threat. Furthermore the law should reflect widely-held views of the just deserts of criminality. Some crimes, particularly the deliberate homicide, deserve the highest punishment. The murderer forfeits his life to society. Any other sanction would cheapen the life intentionally taken. The failure to express these deeply held feelings will encourage resort to extra-legal retribution through vigilante groups.

It is evident that such a clash of views is only marginally amenable to resolution by statistical or other sciences, in the present state of knowledge; differences of opinion will reflect profound and not wholly articulable differences in philosophy and political outlook. The Commission has therefore thought it appropriate to present below not only the principal provision reflecting the view of the abolitionists, but also a provisional Chapter reflecting a substantial body of retentionist opinion in the Commission, together with recommendations regarding the methods of handling capital punishment if Congress chooses to retain it.

MR. KASTENMEIER. The Chair further notes the availability of hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary (under the chairmanship of Senator Hart as an author of the Death Penalty Suspension Act), in the second session of the 90th Congress (March and July 1968) on S. 1760, a bill to abolish the death penalty under all laws of the United States, and for other purposes.

The first witness this morning is the Honorable Henry E. Petersen, Assistant Attorney General, Criminal Division, who will present the views of the Department of Justice on the pending legislation.

*Senators Ervin and McClellan expressly desired to be noted as among those holding these views.

Assistant Attorney General Petersen, you are most welcome, and you may proceed. I note your statement is short. You may either read it into the record or have it entered as part of the record.

Mr. PETERSEN. Thank you, Mr. Chairman.

TESTIMONY OF HON. HENRY E. PETERSEN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. PETERSEN. By way of introduction, I am Henry E. Petersen, Assistant Attorney General, Criminal Division, Department of Justice. As part of my responsibilities, I am here to discuss pending bills before the subcommittee. I would like to commend the subcommittee for its interest in the subject matter. In my examination of the subject matter, I find it very difficult to be dogmatic with respect to the issue.

Seven bills dealing with the death penalty are currently being considered by this subcommittee. Four of the bills, H.R. 193, 3243, 11797, and 12217, seek the total abolition of the death penalty under the laws of the United States. Identical bills, H.R. 8414, 8483, and 9486, provide for a 2-year moratorium on the death penalty for both the Federal and State systems. The bills do not preclude the imposition of the death penalty, but do provide a stay of execution for all unexecuted death sentences and prohibit the carrying out of death sentences within the period prescribed. These latter bills are based on proposed findings by Congress that a "serious question" exists as to whether the death penalty is cruel and unusual punishment in violation of the eighth and 14th amendments of the U.S. Constitution, or is applied discriminatorily in violation of the 14th amendment. The purpose of the moratorium is to give Congress time to consider whether it "should exercise its authority under section 5 of the 14th amendment to prohibit the use of the death penalty."

Early this year the U.S. Supreme Court heard oral arguments addressed to the issue of whether or not the death penalty is cruel and unusual punishment under the eighth and 14th amendments of the U.S. Constitution (*Aikens v. California*, No. 68-5027; *Furman v. Georgia*, No. 69-5003; *Jackson v. Georgia*, No. 69-5030; and *Branch v. Texas*, No. 69-5031). In these cases all petitioners have grounded their eighth amendment claims, at least in part, on the allegation that the death penalty is applied in a discriminatory manner; therefore, it is likely that the Supreme Court will effectively resolve the discrimination issue as well as the cruel and unusual punishment issue.

One aspect of the capital punishment issue deserves particular emphasis. Our society has a high regard for human life * * * all life. Therefore, concern over inflicting death weighs heavily upon us. Most of those who oppose and those who support the death penalty do so because of a desire to preserve life. This fact is too often forgotten by forceful advocates of both positions. We must not lose sight of the idea that it is the life of the innocent and the guilty which is in the balance.

It is not the Department's position that the death penalty deters in all cases. However, in some situations the evidence of the deterrent value of the penalty is very strong. In a study made by the American Bar Association, law enforcement officers cited the following instances where the deterrent value of the death penalty was in evidence.¹

¹ 1959 ABA Criminal Law Section 15 (1960), quoted in Working Papers of the National Commission on Reform of Federal Criminal Laws, p. 1356.

(1) Criminals who had committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captors, even though it seemed likely that by killing they could have escaped. When these criminals were asked why they refrained from the homicide, they answered that they were willing to serve a life sentence, but not to risk the death penalty.

(2) Criminals about to commit certain offenses refrained from carrying deadly weapons. After their apprehension, these criminals were asked why they did not carry weapons. One of the reasons they refrained was to avoid use of such a weapon which would lead to imposition of the death penalty.

Similarly, the Los Angeles Police Department reported that 13 robbery suspects during the course of the year "while in conversation with the police, stated that they either: (1) used toy guns; or (2) empty guns; or (3) simulated guns in robberies rather than take a chance on killing someone and getting the gas chamber."²

Newspapers carried the story of a prison break where an escaped convict released hostages at the State line, because, as he later told police when he was recaptured, he was afraid of the death penalty for kidnaping in the neighboring State.³ In the study I mentioned previously the American Bar Association reported instances where murderers have removed their victims from capital punishment States in order to avoid the threat of the death penalty. According to testimony given by the attorney general of Kansas and others before the Great Britain Royal Commission on Capital Punishment, these last-mentioned instances of murderers crossing State lines caused both Kansas and South Dakota to reintroduce the death penalty.⁴ It is the Department's position that if the threat of the death penalty deters the killing of innocent victims even to a limited extent, its retention is justified.

Experience has led to the conclusion that there is a deterrent value in capital punishment. Former Attorney General John N. Mitchell and Acting Attorney General Richard G. Kleindienst have both stated that the death sentence has deterrent value in some situations. Former Attorney General Mitchell has several times referred to the case of the person under sentence of life imprisonment who would have a license to kill anyone he might choose in that institution if no greater sanction could be applied to him. J. Edgar Hoover, Director of the Federal Bureau of Investigation, has made the following statement:⁵

The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty.

The Department has authorized Federal prosecutors to request the death penalty where it would appear to have a deterrent function. For example, in *United States v. Greene*, tried earlier this year in the District of Columbia, the United States requested the death penalty for a defendant who fatally wounded a Deputy United States Marshal while helping his brother escape from Federal custody. The defendant in this

² California, senate report on the death penalty (1960), pp. 16-17, quoted in "The Death Penalty in America: An Anthology" (Bedeau ed. 1967), p. 267, note 11.

³ According to a speaker during the floor debate on capital punishment in the New Jersey Assembly on April 6, 1959; see the Bergen (N.J.) Evening Record, Apr. 7, 1959, p. 2, quoted in Bedeau, p. 267, note 12.

⁴ Great Britain, Royal Commission on Capital Punishment, report (1953), p. 375, quoted in Bedeau, p. 336, notes 7 and 8.

⁵ F.B.I. Uniform Crime Reports, 14 (1959).

case fired what were most likely the fatal shots while the Deputy Marshal lay helpless on the pavement.

Because we believe that the death penalty has a deterrent value, the Department opposes H.R. 193, H.R. 3243, H.R. 11797, and H.R. 12217, which would abolish capital punishment under the laws of the United States. The Department feels that if any of these bills are passed, it is the law-abiding public that will suffer.

May I depart from my statement for a moment. We are presently, in the Department of Justice, considering the whole range of Federal Criminal Statutes in connection with our review of the recommendations of the Commission on Reform of Federal Criminal Laws. As part of that review, obviously, we are examining the penalty provisions of each and every criminal statute.

We have a central group of eight men, highly skilled and competent, working on that study. We took a straw vote before I came up here, and generally speaking, the consensus of the group was that the death penalty should be restricted under Federal law, but should be retained in several specific instances. The judgments of those eight men are not final. They will eventually be passed on by a committee of Department of Justice officials. I think our eventual position will be that the death penalty should be confined to certain specific statutes.

Now, to continue with my statement.

Nor, can the Department support H.R. 8414, H.R. 8483, and H.R. 9486, which propose a 2-year moratorium on the death sentence.

It is important to keep a proper perspective on these bills. The moratorium bills contemplate the eventual enactment of legislation which would prohibit capital punishment not only in the Federal system but among the States as well. If such legislation is not eventually enacted by Congress, the moratorium will not have accomplished its purpose.

In measuring the value of the moratorium bills we must look not so much to the desirability of the proposed moratorium but rather to the desirability of the eventual prohibition of the death penalty which these bills contemplate.

Under this analysis the moratorium bills appear as undesirable as the four bills discussed previously. Even if one can find a way to justify the abolition of the death sentence at the Federal level, there are additional objections to imposing this abolition on the States.

The bill states that Congress may prohibit the death penalty for the States under section 5 of the 14th amendment upon its finding that (1) the death penalty amounts to cruel and unusual punishment under the eighth and 14th amendments; or (2) the death penalty is being applied discriminatorily in violation of the 14th amendment. As has been mentioned already, both issues are effectively before the Supreme Court. If the Supreme Court resolves these issues in favor of abolition of the death penalty, then the eventual prohibition contemplated by the moratorium bills will be beside the point. Should these issues be resolved in favor of retention of the penalty—should it be decided that the penalty is not unconstitutional on these grounds—the Court will have in effect repudiated the bill's constitutional basis as it applies to the States.

Even if Congress can constitutionally impose this prohibition on the States, should Congress do so? Resolution of such a highly controversial issue as capital punishment would appear to be better left

to the States, and the States have shown a willingness to come to grips with the issue. To our knowledge nine States have legislatively abolished the death penalty.⁶ Five States have partially abolished the penalty by restricting its application.⁷ Eight States have completely or partially abolished the death penalty and subsequently restored it.⁸ Three States have approved the death penalty by referendum.⁹ Public opinion on the penalty has drifted back and forth. The Gallup poll showed 51 percent in favor of the death penalty in 1960, only 42 percent in favor in 1966, and then 51 percent in favor in 1969.¹⁰ This would hardly appear to be the time to impose a uniform judgment on the States.

In summary, all of the bills here discussed contemplate either the present or future abolition of capital punishment. It has been the Department's experience that the death penalty has a genuine deterrent value. Consequently, we oppose these bills.

Mr. KASTENMEIER. Thank you, Mr. Petersen.

Does the death penalty have any other value than as a deterrent value, in your view, or the Department's view? For example, retribution, vengeance? Does it serve any other purpose?

Mr. PETERSEN. I think some of the writings on the issue relate those issues to the value of the death penalty. Frankly, these are concepts I don't like to think of as one who is involved in the prosecution of criminal cases. Vengeance or retribution seems to me to be beside the point. I hope we can confine ourselves to the deterrent aspects. I suppose if you put a man in jail for commission of a crime, there is a certain aspect of vengeance present, but I like to think that the primary justification of our penalties is their deterrent value.

Mr. KASTENMEIER. Would the safety of society be a factor, in your judgment? Let's say by executing individuals that might later be released into society again, you perhaps have eliminated some risk of a commission of a violent act or something which would consequently otherwise justify the death penalty?

Mr. PETERSEN. I think that is a consideration, particularly in view of enlightened parole proceedings. If there is going to be abolition of the death penalty and commutation to life imprisonment with no probation or parole provisions permitted, that is one thing. However, the release of certain individuals would contemplate a danger to society. I think that is particularly clear in connection with some of these hijacking cases we have encountered. We are most concerned about that. They lead to death in some instances, and if the people successfully plead insanity and get acquitted, they can only be committed to a mental hospital and after that may be released. We have had instances where people who were committed to a mental hospital as the result of commission of crimes, including murder, were sub-

⁶ Alaska (1957), Hawaii (1957), Iowa (1965), Maine (1887), Michigan (1963), Minnesota (1911), Oregon (1964), West Virginia (1965), and Wisconsin (1953), statistics for footnotes 6-8 from the Bureau of Prisons and the Law Enforcement Assistance Administration.

⁷ New York (1965), North Dakota (1915), Rhode Island (1852), Vermont (1965), New Mexico (1969).

⁸ States with years of abolition and restoration: Arizona (1916-1918), Delaware (1958-1961), Kansas (1907-1935), Missouri (1917-1919), South Dakota (1915-1939), Tennessee (1915-1919), Washington (1913-1919), and Colorado (1897-1901).

⁹ Colorado (1966), Massachusetts (1968), Illinois (1970), quoted in Bedeau, "The Death Penalty in America," *Federal Probation*, p. 34.

¹⁰ Gallup Polls for 1960 and 1966, quoted in *Working Papers of the National Commission on Reform of Federal Criminal Laws*, p. 1363; 1969 Gallup Poll noted in "The Death Penalty in America," p. 35.

sequently released, and later committed violent crimes. I think that is a matter of concern for all of us.

Mr. KASTENMEIER. I take it that the Department's opposition to abolition is based on the belief that the death penalty has, as you say, a deterrent value, and it isn't really based upon policy grounds, that is to say, constitutional or legal grounds?

Mr. PETERSEN. I think our position is basically that the death penalty is constitutional. Should we be wrong on that—and we are sometimes wrong, Mr. Chairman—then there is probably no need for legislation, at this point. On the other hand, if the Supreme Court upholds the penalty, I think our position becomes rather ambivalent. We don't feel we know all of the answers in this area. We feel we know enough to restrict, in all probability, the application of the death penalty under the Federal code, but we also feel that each state ought to be allowed to determine—through its regular legislative representatives—whether or not the death penalty suits the needs of its people. With the exception of the District of Columbia we, in the Federal system, do not confront the day to day crimes as frequently as do state prosecutors. In many instances our experience is not really as broad as that of the State Attorney General and the composite of state prosecutors.

Mr. KASTENMEIER. You do not think then nationally we are a sufficiently homogeneous society so that an application of a penalty such as the death penalty could apply universally?

Mr. PETERSEN. I would like to think we are sufficiently homogeneous, but I don't think we are. The variations among the States in both case law and legislative policy reflect an ambivalence on the issue that I think is generally felt not only in this country, but in all of the more enlightened countries of the world.

Mr. KASTENMEIER. Do you believe that the death penalty or capital punishment falls with equal and comparable rigor on rich and poor and black and white alike? Do you think there is any differential in terms of its application to people?

Mr. PETERSEN. I don't think it is discriminatorily applied, Mr. Chairman. There have to be certain acts before it can be brought into play which are solely the responsibility of the individual. Thereafter, the issues are determined by due process of law.

Now, it may be—I don't know what the statistical answer to this is—that the poor and under-privileged commit more crimes of violence than the well to do, simply because of need. I don't know the answers to that, but I don't really see that the death penalty is discriminatorily prescribed. In years past, its application in the South, with respect to certain crimes, particularly rape, may have supported such a conclusion, but I don't think that is true any longer.

Mr. KASTENMEIER. Does the Department acknowledge or challenge the power of Congress under section 5 of the 14th amendment, to outlaw capital punishment if Congress reasonably finds that capital punishment works a deprivation of due process of law or equal protection?

Mr. PETERSEN. I really don't know what the Department's position on that is. I am sure you are well aware of the controversial nature of that issue.

My own personal position is that the Congress has that authority. I don't have any problem with that at all as a personal position. What the consensus of the Department of Justice would be, I don't know.

Mr. KASTENMEIER. I would like to conclude my questions and just ask you to comment on a passage from the opinion of the Supreme Court of California, *People v. Anderson*, where they state, in their opinion:

We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its process. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process.

Mr. PETERSEN. I read that opinion twice, and I frankly didn't find the Court in California very persuasive, particularly on the cruelty issue. It seemed to me that the argument on that issue was a make-weight argument. The thrust of the opinion seemed to be that under California law, the death penalty need only be cruel or unusual and that based on history in California, and history generally, the imposition was so unusual as to be constitutionally prohibited under the laws of California. Even on the cruelty issue it seemed to me they were sounding in terms of the unusual. I didn't find the argument on cruelty at all persuasive. I find the taking of a human life abhorrent. I could not be an executioner under any circumstances. I would not want to be present at an execution. Maybe my position reflects a certain cowardice, if you like. I am arguing in support of the death penalty on the one hand and saying, on the other, I abhor it. It is, frankly, dirty business. It isn't pleasant to go out and catch people, prosecute them, and incarcerate them. It needs to be done. It has to be done in a professional context. I think it has a certain deterrent value. I don't think we can measure it. I am very much upset about the delays in our system. I think it is cruel to have people on death row for years, but my solution to that problem is to enact legislation requiring the expeditious disposition of capital punishment cases. When it comes to the issue of commutation by the Government or the Governor, as the case may be, it seems to me you can limit review. I think, all too often, those who have the commutation power have been reluctant to take a stand on either side and have been most cruel in their indecision. I would fix a period within which the penalty would have to be carried out while at the same time insuring that all forms of due process were observed.

Mr. KASTENMEIER. I would only observe that the question of deterrence is indeed unsettled. It depends on what sort of analysis you want to make. In your case—the part based on interviews of offenders by police officers—it makes a difference whether we go on a State by State basis. In my State of Wisconsin, we have not had the death penalty since the 1850's and offenses equivalent to capital offenses when committed in other States are probably below national average.

So we haven't in my view been hurting as a result of the lack of the death penalty.

Mr. PETERSEN. If we ever reach the point of where we can have an effective administration of justice, where cases can indeed be tried in 60 days, where the sentence and the appeal can be swiftly disposed of, then, perhaps, we might get some realistic appraisal of deterrence in all aspects of the law. However, because of the delays currently inherent in the criminal process, I don't see that the system is effective.

If you can bring a man in for robbery, try him in a month, and have the appeal concluded in 3 months, that is going to have a deterrent effect. Such an effect is nullified if the offender is allowed to wander around the streets 2 or 3 years, where he can pursue his business, lawful or unlawful and maybe never go to jail because the witnesses forget or die. I think that is where we have to move.

Mr. KASTENMEIER. That is a different or collateral question. If we have the death penalty, executing people 3 or 6 months after the offense was committed, we might make a great deal more mistakes than we have made.

Mr. PETERSEN. There is implicit in our whole process of post conviction attack a seeming lack of confidence in the due process system in the United States. I think our due process system is one of the best in the world. It doesn't seem to me that officials should be reluctant to attach finality after appropriate review by the Appellate Court, but we protract things indefinitely in a conscientious search for mistake. Such a practice seems to me to carry the system to extremes. Take the case of a political assassin who commits an assassination in plain view of hundreds of people; years later we are still worrying about whether or not he committed that crime. When this happens, there is something drastically wrong with the system.

Mr. KASTENMEIER. The Chair recognizes the gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Petersen for coming, and I have several specific questions. Has the American Bar Association any position on this question? You seem to indicate the American Bar Association supports your—

Mr. PETERSEN. I don't think that the American Bar Association has formally taken a final position on it.

Mr. DRINAN. Are there any social scientists that support your view? Thorsten Sellin is speaking here next week, and as I have read the writer over the years, all people seem to be in agreement that you cannot prove that capital punishment acts as a deterrent in the States that have it. Are there any social scientists that you can point to who support your view?

Mr. PETERSEN. I don't know.

Mr. DRINAN. I think it is important to know. Otherwise the testimony is without merit. Experience has led us to this conclusion. And then you quote the Attorney General and the new Attorney General. You can't tell us that, in the experience of the Department of Justice. As I understand all of the evidence, the social scientists are agreed that you can't prove that deterrents exist. And you do concede, "We can't measure its deterrent value." How can you say it is, in fact, a deterrent?

Mr. PETERSEN. I think there is a difference in recognizing the existence of a deterrent and coming out with a specific measurement of that deterrent. I have done a limited amount of reading on the subject, and this is my principal criticism of the materials I have read. I don't think their conclusions are necessarily valid. They may be, I don't know.

Mr. DRINAN. I am asking you for the name of a social scientist who supports your views, which I find absent in seven pages. I think we, as Members of Congress, are entitled to—

Mr. RAILSBACK. Will the gentleman yield? It has been called to my attention that Ernest van den Haag would be one person who would support the death penalty as a deterrent and he is supposed to be an expert. He is going to testify next week.

I don't mean to imply I am supporting the witness' position but I think that is one social scientist that we are going to have testify.

Mr. DRINAN. Mr. Petersen, on another question—I am wondering what else the Department of Justice is advocating to cut down on capital crime? Would you feel restrictions on handguns would eliminate a large number of capital crimes and what is the position of the Department of Justice on that?

Mr. PETERSEN. I think the Justice Department favors the introduction of additional legislation which would restrict the importation of parts from overseas that go into the manufacture of cheap handguns.

I don't know that any position has been taken with respect to further restrictions on the firearms measure.

My own personal view is that a very significant and helpful firearms bill was enacted in 1968. It was enacted amidst great controversy, and I think we ought to give it some time to take effect before we press for additional legislation. The Supreme Court has considerably restricted the Federal Government's ability to apply the statute to intrastate transactions. This poses another issue with which we must contend. I would like to have that provision amended, because I think that has been a very effective provision as far as—

Mr. DRINAN. Can we expect legislation to be proposed?

Mr. PETERSEN. I have proposed legislation. Whether or not it clears remains to be seen.

Mr. DRINAN. In all candor, I find this statement of the Department of Justice lacking in any credible evidence for the position which it takes. There is a good deal more evidence. I am certain, that could be adduced, but I find less than convincing the information you give us on page 3, where criminals are cited in their conversations with police officers, saying that they were afraid to use guns because they were afraid of capital punishment. That study of the ABA is at least 12 years old and that doesn't prove that much. If this is the statement, then I don't feel that it gives enough of a position to justify the conclusions that are reached. Furthermore, you suggested that other nations are retaining it. Is it fair to say that most of the nations of the Western Hemisphere have now abandoned capital punishment?

Mr. PETERSEN. I am not under that impression.

Mr. DRINAN. If that is so, is that a factor in suggesting we ought to at least suspend it for 2 years?

Mr. PETERSEN. I am not sure. I think we have to examine this thing within the concept of our own code. I think we have to examine it within the concepts of our own governmental system. I think we have to be mindful of our dual system—the States have some responsibility in this area—and of the force of public opinion. I think it would be preferable to have the question referred to the States as a referendum. I am not here to tell you we have all of the wisdom in this area. I find it very difficult to be dogmatic and positive, on this issue. I am not at all persuaded that the death penalty does not have a deterrent effect. There is very little reading on the issue that persuades me that it does not have a deterrent effect.

MR. DRINAN. If you want us to believe the Department of Justice, why is it that we can't have a witness for the Department of Justice come here and say, we have done a little reading, we will have an expert testify here today, and it seems to me the Department of Justice has to take a position by a thoroughly informed person—the evidence is massive, and it is not credible to say a little reading has been done, and in the experience of these individuals, and also the unnamed people, this eight-man group, they are going to turn up with a—

MR. PETERSEN. If you are telling me I am inadequate, I am quite ready to admit I am not an expert on every matter within the Criminal Justice Division. I supervise over 50,000 cases a year. We are giving our best judgment as practical people in law enforcement. I am not a social scientist, and I have a considerable amount of disagreement with those people.

MR. KASTENMEIER. We will now hear from the gentleman from Illinois, Mr. Railsback.

MR. RAILSBACK. Mr. Petersen, I have trouble with the death penalty from this standpoint: it bothers me that somebody may be able to hire a Clarence Darrow or F. Lee Bailey, in other words spend some money, and beat the death penalty, yet somebody who doesn't have the resources is more apt to be hit with the death penalty. I am sure that you share that same concern. Actually, I think it doesn't just apply to the case of capital punishment but I think you would agree that by reason of the structure of our criminal justice system, it has been almost, well, it has been impossible to hand out any kind of—to provide any kind of uniformity in sentencing. You mentioned that the Commission is about to come up with some recommendations. Is the Justice Department working right now on coming up with some kind of a more uniform sentencing recommendation?

MR. PETERSEN. That is part of the recommendation of the Commission on Reform of Federal Criminal Laws. That is certainly a major factor in the bill that we are trying to draft, based on the Commission recommendations. There will be a uniform sentence of punishment included in the bill which will include the question of the death penalty. My attitude toward the individuals who are making the study is not that they are infallible, but that they are thoroughly schooled, bright men, who are bringing the best of their experience to a very difficult job.

MR. RAILSBACK. If the Justice Department were able to do this expeditiously and make some recommendations to us, I think those of us who have been involved in the investigation of prisons by this subcommittee would credit the Justice Department with having performed one of the most important—as far as recommending legislation—achievements I have seen since I have been a Member of Congress. I think it is absolutely essential we do something in the area of providing uniformity in sentencing.

MR. PETERSEN. We have hopes of having a first draft completed by the end of this year. We are working very closely with Mr. Hoffman, who is counsel for this parent committee, as well as Mr. Blakey, who is counsel for the committee on the Senate side, and frankly, we are in constant communication with them with respect to all of the difficulties. It is my estimate that the Congress will not get to any serious consideration of a complete bill before next year.

Mr. RAILSBACK. Then, I wanted to mention that I studied criminal law under Fred Inbau, who is, I think, a very strong law enforcement man. I remember, after we conducted in our criminal law class a study of the subject—I think most of us came to the conclusion, based on the report of the Royal Commission on Capital Punishment, that there probably had been no case made for capital punishment as a deterrent.

Now, the one exception I might see, and maybe this is what you were alluding to, would be cases where somebody is in prison serving life or a very long sentence. This morning, on the radio, there was a report that a California newspaper has received a letter from an inmate on death row at San Quentin Prison, in which the convicted man claims the California Supreme Court's abolition has removed the last barrier to killing guards. People serving life sentences have nothing to lose by murdering their keepers.

As you can tell from my comments, I am inclined to want to abolish the death penalty, but, is this the kind of exception that you meant?

Mr. PETERSEN. I would certainly keep the clear cases of premeditation in first degree murder, at least, as an option. I would certainly keep it with respect to the killing of prison guards and law enforcement officers.

Mr. RAILSBACK. Can you do this, do you think, constitutionally? Could we enact a law that would make such exceptions and provide different penalties—in other words, one could receive the death penalty for killing a policeman or guard, but not for killing somebody's mother?

Mr. PETERSEN. I am inclined to think that you could. The question of whether such a law would be denying equal protection of law to those offenders would be the most important issue, and I think the argument would have to be that it is legislation directed at a class which is quite proper where the class is treated uniformly. I think, in those circumstances, we could enact legislation that would pass constitutional muster.

In clear cases of premeditation, with respect to killing of prison guards and killing of police officers, I am reasonably firm in my own personal judgments. Beyond that, I just don't know where we are going to come out.

Mr. RAILSBACK. Just one other question.

Another thing bothers me, and I would like to hear your comments about this. Take someone like Loeb or Leopold, who committed a heinous offense, hired a good attorney, and managed to beat the death penalty by getting a life sentence. Then, Leopold is paroled and every indication is that during his years in prison he was repentant, he lived a useful life, he volunteered, finally, to go down to one of the islands where he became a male nurse. If we really believe in rehabilitation, who are we to judge when somebody cannot be rehabilitated?

Mr. PETERSEN. I don't know. I think from the judge's standpoint, sentencing responsibility is very, very onerous in all instances, and the instance that you cite, you know, is classic. Whether or not it is generally applicable is really the question. I would like to think that abstract justice is universally applied, but it isn't, and I really don't know what abstract justice is. What we have to substitute in its stead is fairness, rules of procedure, uniformity of treatment, objectivity,

and professionalism. Then we hope that one comes out with some objective appraisal of the facts of a particular situation.

Now, I never know whether that is abstract justice with respect to any defendant that we prosecute, and I think the same analysis applies to the instance that you cite.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The gentleman from Pennsylvania, Mr. Biester.

Mr. BIESTER. I was interested in my colleague from Illinois' reference to the case of Leopold and Loeb, and it seems to me, as I recall the period in which that event took place, that it took place in Chicago, at the beginning of the decade which saw rushes of gangland killing, winding up with the St. Valentine's Day Massacre, and even beyond that. It seems to me that a person was always running a risk of death as a result of taking other person's lives. As I recall the history of the period, those doing the shooting one week were shot the next, and yet the killing went on. Loeb and Leopold got life imprisonment. I wonder if the kind of crime they committed also went on with the same degree of frequency and regularity during the same decade in the same community. I rather expect it did not, but I would like to nail down some areas where I think all of us here agree.

I think we all agree, and I take it from something you said that you do, that the concept of taking life by capital punishment is, on the basis of vengeance—an eye for an eye, a tooth for a tooth—is something you find inappropriate and not a good basis for capital punishment?

Mr. PETERSEN. I don't like to sanction that point of view, no.

Mr. BIESTER. The concept of retributive justice, which I think is implicit in the vengeance notion, you also agree is not a basis for capital punishment?

Mr. PETERSEN. That is right.

Mr. BIESTER. The only basis, then, would be the deterrent basis, if I am correct in following your testimony?

Mr. PETERSEN. That is correct.

Mr. BIESTER. Now, with respect to the deterrent basis, can we recognize degrees to which the deterrence may be an event in the decision-making process of potential murderers? Is capital punishment or the potential fear of capital punishment a deterrent in all instances, or in some, or what?

Mr. PETERSEN. Again, I don't know the answer to that, but I can speculate, if you will. If it were permissible, under our rule—which, of course, it is not—for every hijacker to be taken off a plane and shot, there would be a lot less aircraft hijackings. We would not advocate such a rule, because in spite of its deterrent effect, it does not take into account such things as the mental state of the defendant.

I am reasonably firm in the belief that sanctions are necessary as far as human nature is concerned. I operate under sanctions, we all do, and it seems to me we all operate better under sanctions. I don't think human nature has reached a point where we can operate without sanctions, and the sanctions, obviously, are more severe with respect to varying types of acts, such as the taking of a human life. I think it is incumbent upon us to preserve whatever sanctions we have in order to minimize such acts. We have to take into consideration the dignity of the person whose life was unlawfully taken. The life taken is no less sacred than the life of the person committing the act.

Mr. BIESTER. The life that may be taken by the next murderer committing the next murder is the life you are speaking of, is that right?

Mr. PETERSEN. Yes. We have a responsibility to that person, too. When a person is killed, we have allowed him to be deprived of his life without due process of law. We have a responsibility there, and how we discharge it seems to me to be the ultimate question. In order to discharge this responsibility, we impose sanctions and it is important to us that these sanctions have a rational basis. An eye for an eye is really not the answer. We would like to be able to show, if only to assuage our concepts of humanity, that the sanctions we apply do have some deterrent effect and that we are not simply being vengeance-minded in taking the life of the murderer.

Mr. BIESTER. Even assuming, for a moment—and it is an assumption I am not prepared to make in terms of actual fact—but assuming, for a moment, that there was a degree of deterrence in the fear of capital punishment, would not the value of that fear of deterrence have to be weighed against other criteria or balance of values, as well, such as the civilization's value in not taking a life itself?

Mr. PETERSEN. I think so, but again that brings me back to the responsibilities we owe. To whom do you owe the greater responsibility, the law-abiding citizen that may be victimized or the individual that has committed the crime? I come out in favor of the law-abiding citizen.

Mr. BIESTER. I know—we all come out in favor of the law-abiding citizen, but if what we are talking about is the next potential crime, and our responsibility to the law-abiding citizen is to take those steps we hope will see to it that the risk of that crime of taking their life is diminished, there are a number of things we could do. The gentleman from Massachusetts referred to the question of handguns and the use of handguns in killings.

Do you believe that limitations on the widespread use of handguns would have more effect on saving the lives of innocent law-abiding people than the continued retention of the death penalty?

Mr. PETERSEN. That is my personal opinion, but I have to say that we, in the Department of Justice mustered our support behind the '68 bills, and it was politically impossible to get them enacted.

Mr. BIESTER. Would you agree that efforts with respect to educational opportunities of those receiving the least share of education would also have an enormous effect on the well-being of the potential victims, by improving the disposition of those who might commit crimes of violence?

Mr. PETERSEN. I agree, but I don't see society doing very much in those areas. There is an awful lot of inadequate education. There are an awful lot of underprivileged people. It seems to me when we talk about removal of a penalty like this, it is one thing to say those remedies might be effective. It is quite another thing to see them in effect. I agree with you, if we get those things in effect, that may well change the whole picture, but I don't see that much change taking place.

Mr. BIESTER. But you do agree that changes such as those would have a far more profound impact on the well-being of potential victims of violent crime than would the deterrence which may be available out of the death penalty?

Mr. PETERSEN. Yes, but again I am not so sure how practical that would be.

Mr. BIESTER. I know we have other witnesses to hear today. I have other questions, but I prefer to pass on to my colleagues.

Mr. KASTENMEIER. The gentleman from New York, Mr. Fish.

Mr. FISH. I would like to yield my time to the gentleman from Pennsylvania, Mr. Biester.

Mr. BIESTER. I will pursue this one more question, then. In terms of deterrence, apart from the feeling that some laws enforce—have there been any figures drawn that will demonstrate there is a difference in terms of the murder rate of State A, as opposed to State B, based on whether they have capital punishment?

Mr. PETERSEN. My opinion is that those figures are inconclusive.

Mr. BIESTER. I gather, from something you said earlier, you felt you, yourself could not be an executioner.

Mr. PETERSEN. I could not.

Mr. BIESTER. And I think you spoke eloquently with respect to the responsibilities of a Judge imposing sentence?

Mr. PETERSEN. I did address myself to that subject.

Mr. BIESTER. In many States, jurors impose that sentence, do they not?

Mr. PETERSEN. Indeed so.

Mr. BIESTER. And in that sense we impose on those jurors that kind of awful decision, do we not?

Mr. PETERSEN. That is correct.

Mr. BIESTER. Do you think we have better juries by imposing that decision on them, or stronger juries, or weaker juries, or more balanced juries, or less balanced juries?

Mr. PETERSEN. That concerns me, because I think that the question we put to the jurors on voir dire may well cause those who are most conscious of their responsibility to be excused. That concerns me.

Mr. BIESTER. Parenthetically, I always had that concern trying cases, because, in the voir dire, there was always a sort of screening out process. Thank you, sir.

Mr. PETERSEN. Thank you.

Mr. KASTENMEIER. The gentleman on the end, Mr. Coughlin.

Mr. COUGHLIN. We have talked about the inappropriateness of the death penalty as a method of eliminating somebody from society and resting the case on its deterrence. Your testimony discusses some fairly limited situations in which the death penalty was indicated. Are you aware of any broad studies that indicate that kind of an effect of the death penalty?

Mr. PETERSEN. No; I am not, and I really don't see that the deterrent effect is all that measurable. I don't see how you can measure deterrence. So often a statute will be passed which, in my judgment, is not enforceable. If this seems implied criticism of Congress, I don't mean it as such. The Congress is passing it for its deterrent effect. Maybe it has a deterrent effect, I don't know, but again it is unmeasurable.

Mr. COUGHLIN. But there have been some fairly broad studies that have indicated, I take it, that the death penalty is not an effective deterrent?

Mr. PETERSEN. I guess there have. Again, at least from what I have seen, I don't find them all that conclusive. I didn't find the commentary

in the Commission's study all that persuasive. The statistical studies don't really tell whether or not it has a deterrent effect. I start out with the proposition that all criminal law has some deterrent effect. When you drive at the speed limit because you don't want to be arrested, it reveals some deterrent effect. If it weren't for the danger of life to children, you might go through the street at 70 miles an hour.

Mr. COUGHLIN. You indicated, in answer to Mr. Biester, that you are aware of no studies as a result of studies in States that have the death penalty and States that don't have the death penalty.

Mr. PETERSEN. There have been some, but it seems to me they are inconclusive.

Mr. COUGHLIN. How about countries that do or don't have the death penalty? Do you know of any studies that have been made?

Mr. PETERSEN. Not conclusive results, as far as I am concerned.

Mr. COUGHLIN. You are operating, then, on your personal conclusions formed as a law enforcement officer over the years, then. Is that correct?

Mr. PETERSEN. That is right. It is primarily for that reason I recommend we leave the question to the States. Let the people speak their minds on it. I don't feel there is that much wisdom in the area to permit us to speak for all.

Mr. KASTENMEIER. Thank you very much for your testimony this morning. It is good to see you.

Next, the Chair would like to call on Anthony G. Amsterdam, professor of law at Stanford Law School. Professor Amsterdam is at the very forefront of the opposition to capital punishment. He argued the cases now pending in the Supreme Court and also *Anderson v. California*, in which, on February 18 last the Supreme Court of that State struck down capital punishment as being both cruel and unusual, in violation of the California constitution. The committee is pleased to welcome you, Professor Amsterdam.

You have a lengthy statement. You may proceed as you wish. In any event, your statement will be received in the record.

TESTIMONY OF PROF. ANTHONY G. AMSTERDAM, STANFORD UNIVERSITY SCHOOL OF LAW

Professor AMSTERDAM. Mr. Chairman and members of the subcommittee, I am very appreciative of this opportunity to testify before you upon both of the two aspects of the capital punishment question that are now before the subcommittee—Federal abolition, and a nationwide moratorium. I have prepared this rather lengthy written statement, so that I could be as much help to the subcommittee as possible, while taking as little of its time as possible; so if I could have it entered into the record, and summarize it as I go along—

Mr. KASTENMEIER. Yes. Without objection, it will be received in the record.

Professor AMSTERDAM. Thank you very much.

(Professor Amsterdam's statement follows.)

STATEMENT OF PROFESSOR ANTHONY G. AMSTERDAM, STANFORD UNIVERSITY SCHOOL OF LAW

Mr. Chairman and members of the Subcommittee, I very much appreciate this opportunity to testify before you concerning the several pending bills which, if en-

acted by the Congress, would mark the beginning of the end of the death penalty in America.

Two sorts of bills are presented for your consideration. One (comprising H.R. 12217 and the identical bills H.R. 3243, H.R. 193 and H.R. 11797) would abolish death as the penalty for any crime under the laws of the United States or of the District of Columbia. The other (comprising identical bills H.R. 8414, 8483 and 9486) would suspend the execution of any capital sentence, under federal or state law, for a two year period, in order to permit the Congress and the cognizant state authorities to study the capital punishment question further, with a view to determining finally whether the death penalty should be terminated in this country.

These two kinds of legislation present differing issues, although united by a common theme. I should like to address them separately, after saying a few words of background about the status of the death penalty in the States, the United States and the world today.

Before I begin, however, I want to clearly point out to the Committee that I am not a disinterested observer of this subject. Since 1962 when I left my position as an Assistant United States Attorney here in the District of Columbia, I have defended numerous condemned men and men charged with capital offenses. Since 1965, I have spent the larger part of my professional life—I would estimate no less than forty hours a week, every week—representing capital defendants. Since 1967, I have been in charge of the legal program under the auspices of the N.A.A.C.P. Legal Defense and Educational Fund, which coordinates the nation-wide judicial attack upon the death penalty on constitutional grounds, and attempts to provide the assistance of counsel to every condemned man in the United States who is otherwise unable by reason of poverty to obtain legal counsel.

We are presently responsible for representing more than a hundred condemned men, and have consultative relationships with the attorneys representing about a hundred more. I have been involved in every phase of these cases: securing judicial stays of execution in state and federal courts at every level; securing executive stays, reprieves and commutations; and presenting in all courts, from state trial courts through the Supreme Court of the United States, legal arguments against sentences of death. Our Legal Defense Fund program attempts to monitor upcoming execution dates in each of the nearly forty States which retain the death penalty, in order to learn what we can about each case and—if we legally can—to prevent each man's execution.

I make this point for two reasons. First, I think I have direct, personal knowledge that may be useful to the Subcommittee concerning the extraordinary situation—which may at any day become an unprecedented national crisis—confronting this Nation, with its 582 men on condemned row. But second, I have a commitment in relation to the death penalty question which I want frankly to disclose, and which the Subcommittee must fairly take into account in evaluating my testimony. I am not neutral on this subject. I am firmly and unequivocally against capital punishment. I believe that, once the relevant facts are known, the wisdom of this Nation will put aside capital punishment. It is for that reason that I appear here today.

I. THE DEATH PENALTY IN THE UNITED STATES TODAY

As of this moment, thirty-nine American States, the federal government and the District of Columbia authorize the extinction of human life as a punishment for crime. Nine States (Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia and Wisconsin), together with Puerto Rico and the Virgin Islands, are entirely abolitionist. On January 17, 1972, the Supreme Court of New Jersey held that State's death penalty for murder unconstitutional—upon grounds, however, that would permit its legislative reenactment.¹ On February 18, 1972, the Supreme Court of California declared the death penalty under California law to be a "cruel or unusual punishment" forbidden by Article I, § 6 of the State Constitution—a decision which definitely terminates capital punishment in that State, subject only to the possibility of state constitutional amendment.²

¹ *State v. Funicello*, No. A-66-1971, decided January 17, 1972. New Jersey statutes also authorize the death penalty for three other offenses. However, two of these death-penalty provisions (those for certain forms of kidnapping and for crimes relating to assault upon the chief of state) appear to suffer from the constitutional vice condemned in *United States v. Jackson*, 390 U.S. 570 (1968); and the third (treason) appears realistically to be an impossible offense under our federal form of government.

² *People v. Anderson*, Crim. No. 13617, decided February 18, 1972.

Five States (New Mexico, New York, North Dakota, Rhode Island and Vermont) restrict the death penalty to a narrow and specialized class of homicide offenses, such as the murder of policemen and prison guards, or a second offense of murder. Several other States (for example, Massachusetts and New Hampshire) authorize the death penalty for all first-degree murders, but do not authorize it for any other crime. Most States authorize the death penalty for between three and a dozen offenses. Alabama, which retains the largest number of capital crimes upon its statute books, has seventeen, ranging from carnal knowledge and burglary to murder. The United States has thirteen capital crimes (other than offenses under the Uniform Code of Military Justice),³ while the District of Columbia has only one: first-degree murder.

Without exception, every "capital" crime in active use in the country—that is, every crime for which any person is now on death row, or under which prosecutions are realistically likely to occur—is discretionary rather than mandatory. By this I mean that death is not the penalty automatically fixed by law for the offense; but rather that, in the event of conviction for the "capital" degree of the offense, the court or jury may elect to impose a death sentence or some lesser punishment. It may also ordinarily convict for some lesser, non-capital offense, or the prosecutor may elect to charge (or to accept a defendant's plea to) such a lesser, non-capital offense. In some jurisdictions, even when the prosecutor elects to charge a capital offense, he has discretion not to ask for the death penalty; and, if he does not, it may not be imposed. In a few States, the trial judge or an appellate court may reduce a jury-fixed death sentence on account of excessiveness. And, of course, in every jurisdiction, there is some provision for commutation of death sentences by the Executive—either the Governor or another legally designated pardoning agency.

Because of these discretionary features in the administration of capital sentencing laws, the actual contemporary use of the death penalty is far, far less frequent than its authorizations on the statute books might suggest. The figures are ill-collected, often incomplete, and always difficult to interpret; but the best informed guess is that perhaps one man in twelve or fifteen convicted of the "capital" offense of first-degree murder is sentenced to death by the court; and about half of these death sentences are commuted. Many other persons subject to "capital" murder convictions and death sentences upon the facts of their cases are also spared the death penalty by verdicts or pleas of guilty of lesser degrees of homicide. And, for non-homicide offenses, the percentages of "capital" criminals sentenced to death and not commuted is even smaller. Consequent, as Professor Herbert Wechsler has pointed out:

... There is a striking contrast between the broad extent to which the penalty of death is authorized by law and the relative infrequency with which the sentence actually is imposed or carried out. . . . Despite the imperfections in the data, it is clear that capital punishment is executed only in a fraction of the cases where it can be legally imposed, a fraction that is trivial in quality and has been steadily diminishing in recent years.

...
 "The conclusion . . . is inescapable that punishment of death is inflicted in the United States on a bare sample of the culprits whose conduct makes them eligible for its imposition, a sample chosen by the agencies of prosecution in determining the charge or by the jury or the court when the extreme penalty is sought . . ." (Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. FORUM 247, 252-253 (1961).)

The manner in which this "bare sample" is indeed "steadily diminishing" appears graphically from the execution figures maintained by the Federal Bureau of Prisons since 1930. In 1935, a total of 199 persons were executed under civil authority in the United States of America. In 1940, the figure was 124; in 1945, 117; in 1950, 82; in 1955, 76; in 1960, 56; and during the years between 1961 and 1967, an average of 19 per year—one-tenth of the 1935 figure, despite our enormous national population growth during those thirty years. As the National Crime Commission observed in 1967:

"The most salient characteristic of capital punishment is that it is infrequently applied. . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." (PRESIDENT'S COMMISSION ON LAW ENFORCEMENT

³ Two of these death-penalty provisions have been held unconstitutional—those for kidnaping, in *United States v. Jackson*, 390 U.S. 570 (1968), and for certain bank robbery offenses, in *Pope v. United States*, 392 U.S. 651 (1968); and others among the federal statutes may suffer from the same constitutional infirmity.

AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), 143.)

In 1967, however, a new factor entered the capital-punishment scene. It was in that year that a nation-wide legal challenge to the constitutionality of the death penalty began in earnest, and brought with it a judicial moratorium of executions. On June 2, 1967, the State of Colorado executed Luis Jose Monge. Monge was the last man to suffer the death penalty in the United States. Since June 2, 1967, all executions have been stayed while state and federal courts considered a series of constitutional arguments which, in varying ways and to varying degrees, would have constitutionally invalidated the sentence of death.

On May 3, 1971, the Supreme Court of the United States, by a 6-3 vote, rejected two such arguments. *McGautha v. California*, 402 U.S. 183 (1971). On June 28 of the same year, it agreed to hear the third and last of the constitutional challenges to capital punishment which have been the legal basis of the four-and-a-half year moratorium since 1967. This contention, that the death penalty is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments to the federal Constitution, was heard by the Court in four cases—two murder cases and two rape cases—argued on January 17, 1972. The Court's decision in the cases may come at any time, but almost surely is to be expected before the recess of the present Court Term, this coming June.

Notwithstanding the relative infrequency of death sentences from week to week, the moratorium of four and a half years since June of 1967 has resulted in a staggering accumulation of men on death row. For this moratorium has affected not only men sentenced to die during the period between 1967 and the present; it has also affected many men sentenced in preceding years whose executions had, for one reason or another, been delayed. In most States, the present death-row population includes men who have been on the row for ten or a dozen years or more. Not merely executions but also commutations have, with very rare exceptions, come to a halt. This is so because of the almost uniform practice of Governors to refuse to consider a case for commutation until all judicial proceedings have been exhausted. The result of the court-ordered stays of recent years has been—with the exception of Governor Winthrop Rockefeller's commutation of fifteen death sentences in Arkansas in December, 1970 and a literal handful of commutations elsewhere—inevitably to stay the Governor's hand together with the executioners'.

So far as I can tell, there are now 582 persons under sentence of death and awaiting execution throughout the United States. They are found in thirty-four States and the District of Columbia. Ten of these jurisdictions have fewer than five men on condemned row. Most have between a dozen and two dozen condemned men. Five have forty or more: Georgia, with 40; Louisiana, with 43; Texas, with 50; Ohio, with 56; and Florida, with 92. There are no federal prisoners under sentence of death, but there are two in the District of Columbia.

My personal experience with these men supports the descriptions given of them by Governors, corrections officials, criminologists, and other persons experienced with the condemned. They are almost universally impecunious. Most of them are poorly educated, many to the point of functional illiteracy. A surprising number of them are legally unrepresented—a point to which I shall later return. They tend to be friendless and abandoned by everyone outside the walls of their prisons. They have no resources—financial, intellectual, or human—with which to carry their cases to courts, to commutation officials, or to the public.

They are also disproportionately Southern and disproportionately black. The witnesses who follow me—Jack Greenberg and Clarence Mitchell—will develop this aspect of the capital punishment picture more fully. But, in my general description of our national death row problem, I cannot forbear giving you the raw geographic and racial figures. Of the 582 persons on death row, 373 are in Southern and border States. We do not know the race of 21. But of the remaining 561, 236 are white; 311 are black; and 14 are members of other non-white minorities.

II. A WORLD PERSPECTIVE AND SOME GENERAL OBSERVATIONS

The increasing disuse of the death penalty in America has been paralleled, but largely outstripped, by the rest of the world, to the point where death has become "the rarest of all punishments for crime." (Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT (1967), 239.) Legal abolition has been sharply on the upswing, particularly in countries which share a cultural heritage with ours. England abandoned the death penalty for murder in 1969, following a five-year moratorium period; and it now retains capital

punishment only for a few obscure and largely obsolete offenses. Canada is in the middle of a live-year moratorium. Western Europe is overwhelmingly abolitionist, with only France and Spain retaining the death penalty. So are the countries of the Western Hemisphere. Capital punishment survives only in a few of the smaller South American countries and in 3 out of the 33 Mexican jurisdictions.

More striking even than the trend to legal abolition is the trend toward practical abandonment of capital punishment. A very recent report by the Secretary-General of the United Nations concludes that "Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority." (UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, Capital Punishment (E/4947) (February 23, 1971), p. 3.) Estimates of the total number of executions under judicial process in the world must necessarily be inexact; but the whole number today probably does not much exceed the 560 executions estimated to have occurred in London and Middlesex alone each year during the mid-sixteenth century. What this means, is that if the United States, given the green light by the Supreme Court, were now to execute the 582 men upon its death rows, it would thereby become indisputably the greatest killer of human beings by legal process in the entire world—probably the killer of more men than all the rest of the world combined. Even if it were to execute only one-fifth of that number, it would replace the Republic of South Africa as the world's leading legal killer, for South Africa manages to execute only about 100 men a year—most of them black. These, I think, are sobering observations for a Nation which aspires and professes to be among the world's more enlightened peoples.

At the least, the national and world developments I have described make it plain that the capital punishment question today is a very different one than most of us have heard debated—perhaps debated ourselves in high school or college—in the past. If I may quote Herbert Wechsler again, the issue today is not "whether it is fair or just that one who takes another person's life should lose his own. Whatever you think about that proposition it is clear that we do not and cannot act upon it generally in the administration of the penal law. The problem rather is whether a small and highly random sample of people who commit murder or other comparably serious offenses ought to be despatched, while most of those convicted of such crimes are dealt with by imprisonment." (Wechsler, *supra*, at 255.) And in speaking to that problem, I venture three more specific observations that I think are compelled by the history and our present usage of the death penalty.

First, it is an evident fact that capital punishment will be abolished in the United States within relatively few years. Abolition may come in 1972 or 1980, or in the year 2000, or 2050 but, as surely as day follows night, it will come. To deny this truth is simply to turn one's back on the march of time, to refuse to see what the world's evolution and our own make undeniable. The problem that we now must solve is not therefore whether we shall retain or terminate the death penalty. It is whether, having already historically decided to terminate it, we shall have the courage to terminate it abruptly, or whether we shall insist on killing the few poor souls who remain on death row, the victims of our sloth in discarding an outgrown primitivism. Once the point of history has been reached at which the inevitable end of the death penalty is foreseeable, it is an astounding and unjustifiable atrocity to persist in killing these men. If they are executed they will die in the name of a theory in which their executioners no longer believe, killed for purposes which their killers themselves have abandoned.

Second, the fact that capital punishment today is executed upon only a few men drastically alters its character. Even before the court-ordered moratorium that began in 1967, executions in this country had dwindled to an average of 19 per year during the 1960's. The present total of 582 men on death row represents an accumulation of more than twelve years, including four-and-a-half in which both executions and commutations have essentially ceased. It is therefore a falsification to conceive of death as the penalty for murder, or for any other "capital" crime. The men who will be executed are not being put to death *because* they committed murder. Thousands of other men commit murders, and are apprehended, tried and convicted of murder every year. They are sentenced to life imprisonment, or their death sentences are commuted, although, as former San Quentin Warden Clinton Duffy points out, "their crimes were just as

atrocious, and sometimes more so, than most of those men on the row."⁴ The fashion in which the men who actually die are selected by the discretionary processes of American criminal justice reflects, in its most intense and corrosive form, the bias, arbitrariness and discrimination that infect those processes. Most who die are black; virtually all are poor and powerless, personally ugly and socially unacceptable.⁵ As capital punishment becomes increasingly rare, it inevitably becomes increasingly discriminatory. Today it is the most extreme—because the most rare and most harsh—visitation of the prejudices of a prejudiced society.

Third, capital punishment in this form cannot conceivably serve any legitimate social function. The traditional debate concerning the legitimacy of "retribution" has been made irrelevant by our contemporary inability to stomach the killing of more than a handful of our thousands of murders. Capital punishment is simply not retributive when applied to 19 men a year. As for deterrence, there no longer is any rational ground for debate. A recent, authoritative United Nations study has concluded that "[i]t is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist shows no correlation between the existence of capital punishment and lower rates of capital crime." (United Nations, *op. cit. supra* note 5, at 123.) But even this observation—made after many years of scientific inquiry—is beside the point. For, if we assume what the evidence fails to show—that capital punishment, when regularly and routinely administered as a punishment for "capital" crimes, has some greater deterrent efficacy than imprisonment—it is nonetheless perfectly obvious that any such efficacy is totally destroyed once capital punishment is not regularly and routinely administered. What prospective murderer, after all, will be deterred by a penalty whose risk is less, and less predictable, than the risk he runs driving along a crowded highway?

Economic realities lead to the same conclusion. The legal costs of executing

⁴ Testimony of Clinton T. Duffy, in Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20–21 and July 2, 1968) [hereafter cited as Hearings], 24.

⁵ Professor Marvin E. Wolfgang, who is to testify before this Subcommittee next week, will present evidence of this discrimination in detail. For my purposes it is sufficient to note:

(1) that all informed observers agree "[i]t is the poor, the sick, the ignorant, the powerless and the hated who are executed." CLARK, *CRIME IN AMERICA* (1970), 335. See DUFFY & HIRSBERG, 88 MEN AND 2 WOMEN (1962), 256–257; LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 302; LAWES, LIFE AND DEATH IN SING SING (1928), 155; WEIHOFFEN 164–165, *West, Medicine and Capital Punishment*, in *Hearings*, at 124, 125; McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION (No. 2), 11, 12 (1964); DiSalle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 7, 12–13 (1969); DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO ST. L.J. 71, 72 (1964); and Governor DiSalle's testimony, in *Hearings*, at 11–12. The characteristics of the inmates of death row are described in Bedau, *Death Sentences in New Jersey 1907–1960*, 19 RUTGERS L. REV. 1 (1964); Bedau, *Capital Punishment in Oregon, 1903–1964*, 45 ORE. L. REV. 1 (1965); Carter & Smith, *The Death Penalty in California: A Statistical and Composite Portrait*, 15 CRIME & DELINQUENCY 62 (1969); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924–1968*, 15 CRIME & DELINQUENCY 132 (1969). And see Brief for the N.A.A.C.P. Legal Defense and Education Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, 395 U.S. 238 (1969) [O.T. 1968, No. 642], p. 7, n. 8.

(2) that racial discrimination, in particular, has seemed evident to responsible commissions and individuals studying the administration of the death penalty in this country (PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143; PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 14–15; UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9–10) (1968), 32, 98; BEDAU, THE DEATH PENALTY IN AMERICA (Rev. ed. 1967), 411–413; CLARK, *CRIME IN AMERICA* (1970), 335; MATTICK, THE UNEXAMINED DEATH (1966), 5, 17; WOLFGANG & COHEN, CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS (1970), 77, 80–81, 85–86; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14–17 (1952); Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); and see Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 P.R.D. 55, 66–68 (1967), and has been borne out in a number of discrete and limited but carefully done studies (Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907–1960*, 19 RUTGERS L. REV. 1, 18–21, 52–53 (1964)). The most thorough study of racial discrimination in capital sentencing to date has been done by Professor Wolfgang, and I am sure that he will inform the Subcommittee of his conclusions.

a murderer probably now amount to upwards of a million dollars in most cases. That amount greatly exceeds the cost of trying and convicting the same murderer non-capitally, and imprisoning him for life. As capital cases become more and more unusual, they also become more and more costly to process through the legal system, because processing an unusual item always costs more. Today we maintain hundreds of criminal courts and hundreds of maximum security penal facilities whose fixed costs we must pay without regard to our "capital" cases. To run the relatively small number of "capital" cases through those courts and into those prisons would add relatively little to costs of the criminal justice system if the "capital" cases could be treated like all the others. But they cannot be treated that way, so long as they remain capital. With life at stake, lawyers cannot and will not premit any possible defensive step, however tenuous—or judges avoid the most intensive labors, however costly—that might spell a difference in the verdict. Jury selection and the trial process are far longer in capital than in equivalent non-capital cases; more motions are filed and have to be heard; incalculably more judges', lawyers', jurors' and court officials' time is required. This is so not only in the cases which end in a death verdict, but also in the twelve to fifteen times that number of "capital" cases which do not. And, once a death verdict is in, the costs of capital punishment—ranging from the elaborate security precautions surrounding condemned row to the inevitable proliferation of post-conviction proceedings, sanity proceedings and clemency proceedings—mount astronomically. The upshot is that capital punishment costs our society enormous sums of money—even when we almost never inflict it.

Only extraordinary ignorance of law enforcement needs could fail to reckon up innumerable far more profitable uses to which these scarce dollars could be put by a Nation single-mindedly but intelligently bent upon eradicating or diminishing dangerous crime. Economically, capital punishment is not merely a penal failure, but a positive impediment to effective crime control. In this aspect alone, it is a terrible symbol of our mindless penchant to resort to violence rather than to reason for the solution of our gravest social problems.

III. FEDERAL ABOLITION

The first of the two specific questions presented by the bills now pending before this Subcommittee is whether the government of the United States should turn its back upon that kind of mindless violence as an instrument of federal penal policy, and should abolish the death penalty as a punishment under our national criminal law. I believe that it should, and promptly.

The general arguments for federal abolition have been voiced in recent Senate hearings (see the *Hearing* cited in note 4 *supra*), have proved persuasive to a majority of the National Commission on Reform of Federal Criminal Laws, and will be the subject of the testimony of others before this Subcommittee. I therefore limit myself to the point that morally corrosive effect of the federal government's retention of capital punishment on the statute books far outweighs any imaginable value that may be supposed to flow from its infrequent use in practice.

Actually, "infrequent" is too mild a word. The sentence of death is almost never passed upon persons convicted of "capital" crimes under the federal criminal laws or the laws of the District of Columbia, and is still less frequently executed. To my knowledge, out of 42 persons convicted of first-degree murder in the District between 1966 and 1970, only two were sentenced to die. For the federal courts outside the District, I was able to find the figures only for the fiscal years 1961 through 1968, excluding fiscal 1964. During these seven years, there were 24 capital murder convictions, whereas for the entire nine-year period from calendar year 1961 through calendar year 1969, only one federal prisoner was received by the Bureau of Prisons under sentence of death.⁶ The last execution under federal law occurred in 1963; there were no others during the 1960's; there were only 3 federal executions between 1955 and 1959; and—as I have said—no one is now under a federal death sentence in the United States. Two persons are under sentence of death in the District of Columbia; but the District conducted no executions at all during the decade of the '60's, and only 1 between 1955 and 1959.

⁶ As is not uncommon with factual matters relating to capital punishment, this kind of awkward method of comparison is necessitated by gaps in available data. One of the purposes of the moratorium legislation to which I shall shortly turn is to enable the collection and analysis of more useful information.

This resounding repudiation of capital punishment by the operating agencies of federal criminal justice has already rendered the death penalty inoperative as a part of the working machinery of our national criminal law. So used, it is as useless as any idle threat, however savagely uttered. Plainly, there is no valid reason to retain a punishment—or an idle threat of punishment—of that sort.

But is there any reason to repeal it legislatively, rather than merely to let it lie around moribund but unburied? There are, I believe, four convincing reasons to bury it now.

First, when, with incredible rarity, a federal death sentence is executed, it is all the more senseless and indefensible. The man selected to die is the stray victim of an obviously arbitrary process that serves no purpose; it is a freak, a fortuity; and when we solemnly kill him in our national name, we perform an act as baseless and barbaric as a ritual slaughter.

Second, the retention of capital punishment on the federal statute books unwarrantedly encourages its retention by the States. Invariably, those who argue in state legislative and judicial forums that the death penalty is an indecent and uncivilized relic which should be abandoned are met with the observation and the Congress of the United States does not think so, as to thirteen federal crimes. Congress wields a potent moral influence in this regard; it is looked to as the conscience of the Nation; and its acceptance in law of what it does not and would not accept in fact puts it in the posture of the voluntary carrier of a deathful disease whose physical consequences it inflicts but does not suffer.

Third, federal acceptance of the death penalty on the statute books spreads yet another sort of moral pestilence. The ultimate lesson of capital punishment is that "a man's life ceases to be sacred when it is thought useful to kill him." (Francart, quoted in CAMUS, RESISTANCE, REBELLION AND DEATH (1961), at 229.) That is not a lesson which the government of the United States should teach in any times; but it is particularly destructive in unsettled times like ours. Violence—which I think we all profoundly want to diminish in our lifetime—is the negation of human worth; its antidote is the assertion of human worth; and it is human worth, reverence for the value of human life, that we must learn and teach now more than ever.

Finally, we should not be laggard among the nations of the world in learning or teaching that lesson. The United Nations Economic and Social Council recently resolved "that the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment might be imposed with a view to the desirability of abolishing this punishment in all countries so that the right to life, provided for in Article 3 of the Universal Declaration of Human Rights may be fully guaranteed." (UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Resolution 1574(L), *Capital Punishment*, adopted May 20, 1971 (E/RES/1574(L), May 28, 1971). Already most of the countries of Western Europe and the Western Hemisphere have joined the march of advancing civilization that is inexorably stamping out capital punishment as inconsistent with "the right to life." The United States cannot hesitate any longer without visibly forfeiting its proud role as a moral leader in the world community.

IV. A MORATORIUM UPON STATE EXECUTIONS

Congress, of course, has plenary power to provide or discontinue the death penalty as a punishment for federal crimes. Its power over the use of capital punishment by the States is much more restricted. Nevertheless, section 5 of the Fourteenth Amendment gives Congress ample authority to curtail or forbid capital punishment by the States insofar as that punishment may infringe rights guaranteed by the Due Process or Equal Protection Clauses of section 1 of the Fourteenth Amendment.

It is upon that constitutional basis—and as a limited, discreet and responsible exercise of that authority—that the moratorium bills now before the Subcommittee stand. The theory of the bills, put briefly, is: (1) that if the death penalty is a cruel and unusual punishment within the meaning of the Eighth Amendment (which the Due Process Clause of the Fourteenth applies to the States), or if it is being discriminatorily administered in violation of the Equal Protection Clause of the Fourteenth, Congress can and should prohibit its use by the States; (2) both the Cruel and Unusual Punishment and the Equal Protection issues turn upon factual questions that Congress is competent to explore and ultimately to determine; (3) upon the presently available evidence, there exists serious question as to whether the death penalty may not be both

cruel and unusual in its nature and discriminatory in its application under state laws; (4) however, a final determination of these constitutional questions ought to be based upon Congressional study and reflection, after the collection and analysis of the best available factual data; and (5) pending such study and reflection, Congress can and should stay the irremediable taking of human life—particularly at a time when, if Congress does not act, the Nation is faced with the demoralizing prospect of a blood-letting of unprecedented proportions.

The solidity of this constitutional theory has been unanimously supported by such recognized constitutional law scholars as Alexander Bickel, Archibald Cox, Paul Freund, Philip Kurland, Paul Mishkin, Louis Pollak, and Herbert Wechsler—to mention only some of those whose letters on the subject have already been put into the Congressional Record.⁷ These are not men who are heedless of the problems of federalism, or rash to sustain unwarranted exercises of federal power at the expense of the States. I understand that Professor Pollak is scheduled to appear before this Subcommittee; he will doubtless speak to the constitutional questions; so I shall not occupy the Subcommittee's time by dealing with it here.⁸

Nor shall I itemize the extent evidence which—to say the least—supports the findings that the death penalty may be cruel and unusual in character and racially discriminatory in administration. This evidence—together with available methodologies by which further factual investigation on those subjects can be reliably pursued—will be covered in testimony that the Subcommittee will hear from Professor Marvin E. Wolfgang, Professor Hugo Adam Bedau, Mr. Douglas B. Lyons, and others. What I would like to stress, rather, is the property and the imperative necessity for a Congressionally enacted moratorium of executions, precisely so that life may not be taken before these factual and legal questions are authoritatively resolved.

As I have already mentioned, the Cruel-and-Unusual-Punishment question is now under submission before the Supreme Court. If it decides that question in such a fashion as to invalidate the death penalty, of course there will be no need for congressional legislation of any sort. But if it should sustain the death penalty, then congressional action will be both proper and imminently, urgently necessary.

It will be proper because the Court's decision will not have laid the Cruel-and-Unusual-Punishment question or the Equal-Protection question to rest. The Equal-Protection question is not now before the Court at all. And its decision regarding cruel and unusual punishment must necessarily be based upon factual information that is far less ample than Congress could gather. In each of the cases before the Court, the condemned man is an indigent, and was represented by appointed counsel at the trial level. As a consequence, the records do not contain the sort of ranging factual inquiry into the cruel and unusual nature of the death penalty that defendants of adequate means might have presented. For this reason, a judicial determination that the death penalty is not cruel and unusual, upon the evidence presented to the Court, would not foreclose congressional consideration of that question. Rather, it would emphasize the vital need for such congressional consideration.

But the consideration by Congress will come too late for men already dead. And, within a year following an adverse Supreme Court decision, I would estimate that at least one hundred men—perhaps more nearly twice that number—will have been executed. Unquestionably, the only reason why there have been no executions in the United States since 1967 has been the almost continuous pendency in the Supreme Court of the successive constitutional challenges to capital punishment of which the cruel-and-unusual punishment contention is the latest.⁹ Should that contention be rejected by the Court—even though the Court's decision leaves open its renewal upon a better factual record, and even though other judicially cognizable constitutional grievances against the death

⁷ The letters were addressed to Senator Philip A. Hart in connection with S. 1969, which is identical to H.R. 8414, H.R. 8483, and H.R. 9486. They are printed at 117 Cong. Rec. S7921-S7927 (June 1, 1971).

⁸ I have set down my views upon the constitutional question in the letter to Senator Hart that is printed at 117 Cong. Rec. S7921 (June 1, 1971).

⁹ *Certiorari* was granted in *Witherspoon v. Illinois* on January 15, 1968 (389 U.S. 1035), and the case was decided on June 3, 1968. For a while thereafter, stays were obtainable on the basis of *Witherspoon* until the limitations of that decision became apparent. On December 16, 1968, *certiorari* was granted in *Maxwell v. Bishop* (393 U.S. 997) upon the issues finally decided on May 3, 1971 in *McGautha v. California* (402 U.S. 183). Then, on June 28, 1971, *certiorari* was granted in *Aikens v. California* and companion cases (403 U.S. 952) on the cruel-and-unusual punishment issue now pending.

penalty (such as equal protection claims) remain—executions will resume, and we will be unable to stop them.

I say this because, in the absence of moratorium legislation, stays of execution can be obtained only through the process of individual stay applications on behalf of each condemned man. I have been through that process countless times in the past half-dozen years—assisted, thank God, for most of the period, by the pendency of a controlling case before the Supreme Court of the United States—and I can tell you that, in 1972, with no constitutional issues relating to the death penalty still before the Court, we will simply not get the stays. For several reasons, any system which—and this could happen tomorrow—leaves the matter of stays to individual applications on behalf of 582 individual condemned men will inevitably result in many of those men dying by reason of flukes and vagaries unrelated to the justice of the constitutional claims upon which their stay applications are based.

First, large numbers of the men on death row are presently unrepresented by counsel. Lawyers cooperating with our N.A.A.C.P. Legal Defense Fund effort represent somewhat less than half of the condemned men in the country. We do not have the manpower to handle those cases adequately, and could not handle more than we now have. Yet many of the remainder have no attorneys at all; and among these unrepresented men, all are indigent and many are functionally illiterate.

In order to obtain a stay of execution, an unrepresented condemned man has to present a stay application to some court or legally empowered authority (such as the Governor in some States, the Pardon Board in others), which is sufficiently articulate to attract the attention of that court or authority. Most men on death row are incapable of doing this. Even were they highly literate—as they are not—they simply cannot know of the complex legal doctrines (such as doctrines limiting the jurisdiction of particular state courts, the exhaustion-of-state remedies doctrine in federal *habeas corpus*, the requirement in some States of a Pardon Board recommendation before the Governor may act) which may disempower the court or authority to which they apply from granting a needed stay. If a lower court should refuse a stay—as frequently happens, in my experience—the condemned man must then apply to a higher court, usually in a different city and sometimes in a different State. Mail from and to prisons is always delayed and is sometimes lost. Court clerks not infrequently return prisoners' papers for formal insufficiencies (such as failure to use required forms, or to attach pauper's affidavits), or delay submitting the matter to the judge. Uncounseled prisoners may neglect to state the dates of their scheduled executions in their stay applications, so that the clerks do not appreciate the need for haste. The judge himself may be otherwise occupied or out of town when the application arrives. Although there are only a few days or hours remaining, the condemned prisoner has no one to contact the court for him, to learn whether the stay application has been received, whether it is being considered, whether it will be acted upon in time. Under these circumstances, any fluke—a miscarriage of the mails, a clerk's mishandling of a paper, a judge's attendance at a judicial convention—can snuff out a human life.

Second, some condemned men do not even try to put stay applications before courts or other lawful authorities. These include men who are legally unrepresented but do not know it. Attorneys handling capital cases in the post-appeal stages (usually counsel who were court-appointed for the original trial or appeal and have remained in the case as uncompensated volunteers) may suddenly drop the case for many reasons—lassitude, erroneous belief that all remedies are exhausted, professional relocation, illness, death—without notice to the condemned man. In these cases, the death row inmate continues to rely for his life upon a lawyer who is no longer there.

Third, even where condemned men are represented by counsel, the situation is often almost as perilous. As I have said, most of the lawyers in these cases are uncompensated volunteers. Where they are criminal lawyers, they are often sole practitioners; they may be tied up for days or weeks in another trial, and be forced to let stay applications for a condemned client wait until the last moment, when some quirk can prove fatal even in a lawyer-handled case. (I shall say more about this in the next paragraph.) Oftentimes, counsel are not criminal lawyers, and lack the experience or knowledge necessary to present their client's claims. In 1972, one still encounters lawyers representing death-row inmates who are unaware of the 1968 Supreme Court decision in *Witherspoon v. Illinois*, 391 U.S. 510, which established that their clients' death sentences were

federally assailable. I want to make it clear that I am not faulting these attorneys, many of whom have served their clients selflessly and with dedication for years. But they are occupied with other responsibilities, unequipped with the resources necessary to handle a case in which life is at stake, and quite unable to keep abreast of legal developments in areas of law in which they do not generally practice.

Fourth, that problem is exacerbated by two others, relating to the courts:

(A) Frequently, constitutional issues in capital cases are foreclosed by decisions of the lower courts, and open only at the Supreme Court level. Lower court judges, for the most part, will not grant stays of execution on these issues; and stays must be sought in appellate courts or even in the Supreme Court of the United States. In *Maxwell v. Bishop*, 398 U.S. 262 (1970), for example, stays were refused by all lower courts and a stay was finally granted by a Supreme Court Justice only twenty-four hours before Maxwell's scheduled electrocution. You will understand that overburdened volunteer attorneys, working under the enormous time pressures of an imminent execution date, uncompensated for their time or even for their out-of-pocket expenses, hundreds or thousands of miles from Washington, D.C., and often totally unfamiliar with Supreme Court practice, simply cannot effectively pursue judicial remedies at this level.

(B) State courts, federal courts and state executive officials ordinarily have concurrent jurisdiction to stay an execution. Ironically, this seeming multiplicity of remedies itself creates a deadly trap into which the unrepresented condemned man, or inexperienced counsel representing a condemned man, may fall. When an execution date is fast approaching, it is necessary to apply to two or three courts and the Governor simultaneously for a stay. I have seen it happen often—almost routinely—that each court and the Governor then waits for the other to act first. Time and again, I have seen cases go down to the last day without a stay, despite the pendency in several courts of meritorious stay applications. In this situation, again, only experienced counsel with a healthy measure of luck can prevent an execution from occurring.

It is probably true that the very small group of attorneys with whom I work has had as much experience as any lawyers in the country at the business of securing stays of execution. Yet in case after case we have gone down to the final hours—an experience of mind-shattering cruelty to the condemned prisoner—and emerged with a stay only through incredible good fortune. One slip in any of a dozen circumstances beyond our control in any of these cases would have killed the man.

And, as I have said, we were aided most of the time during the past four-and-a-half years by the fact that the issues on which we based our stay applications were ones that the Supreme Court had agreed to hear on *certiorari*. Prior to the Supreme Court's agreement to hear these issues, it was exceedingly difficult to procure stays of execution for all condemned men in the lower courts, even though (1) the numbers of men on death row then were far smaller than the comparable number today, and (2) the constitutional issues then were more numerous. There is absolutely no doubt in my mind that, unless Congress enacts the proposed moratorium legislation, the situation of the condemned will be helpless, and there is going to be a resumption of executions in this country on a scale unknown for decades.

I therefore hope that the Subcommittee, the full Committee, and the House will give speedy and favorable consideration to both a federal abolition bill and a bill staying state executions for the two-year period necessary to consider the ultimate question of capital punishment by the States upon an adequate factual basis and mature reflection. Again, I thank the Subcommittee for its courtesy and willingness to hear my testimony this morning.

Professor AMSTERDAM. Before I come to the substance of my testimony, I think it is important to point out to the Subcommittee that I am not a disinterested observer on the subject of capital punishment. I suppose we all come with our views and predispositions; but I also come with clients, since I am now representing or connected with attorneys who represent somewhat less than half of the men on death row in this Nation. This gives me a bias that the Subcommittee must fairly appraise in listening to my testimony. It also gives me some first-hand experience of the dimension of the problem with which this Nation may momentarily be faced if the Supreme Court of the United

States should sustain the death penalty, and one of the things I think it might be useful for me to do is to portray where we stand at the moment in this country, realistically and factually, on the question of capital punishment.

The death penalty is, of course, retained on the statute books of 39 States, at the moment. There are 9 totally abolitionist States by virtue of their legislation. On January 17, 1972, the New Jersey Supreme Court overthrew that State's death penalty—upon grounds, however, that would permit its legislative reenactment. (By the way, I should say that if any member of the Subcommittee has any questions, and if it would be convenient to the Subcommittee, I certainly hope you will feel free to ask them at any point. On February 18, 1972, the Supreme Court of California overthrew that State's death penalty on grounds which, absent a State constitutional amendment, would forever forbid capital punishment in California. That adds up to 11 States that don't have capital punishment, 39 that do.

Of the 39 that do, 5 of them preserve the death penalty for limited purposes, such as the murder of policemen and prison guards, or a second offense of murder, and that sort of thing. There are a number of additional States that allow the death penalty for first-degree murder generally, but only allow it for that crime. Most States allow it for somewhere between three and a dozen offenses. Alabama, which retains the largest number of capital crimes upon its statute books, has seventeen, ranging from carnal knowledge and burglary to murder. The United States has thirteen capital crimes (other than offenses under the Uniform Code of Military Justice), while the District of Columbia has only one: first-degree murder.

The important thing to recognize about this picture is that, with regard to every operative capital offense, the death penalty is discretionary, not mandatory. There are still a few mandatory capital crimes on the statute books but they are obsolete offenses—treason against the States, perjury in a capital case, train robbery and that sort of thing. For all "capital" crimes in active use, discretion is left to the prosecutor, or left to the jury or the court to determine whether to impose the death penalty. Sometimes it is left to appellate courts to upset that sentence on grounds of excessiveness; and, of course, it is ordinarily left to the Governor, at the end of the process, to commute.

The result, as has been pointed out by everyone who has looked at the death penalty, is that there is a striking gap between the appearance of capital punishment which our society gives by the massive number of capital statutes on its books, and the extraordinary infrequency with which capital punishment is actually applied. The death penalty figures are very, very hard to estimate. If you take first degree murder, for example, the best guess I can make on the figures available to me, is that perhaps one in 15 persons convicted of first degree murder is sentenced to death. (I am going back to the period in the early 1960's, before the *de facto* moratorium of the past few years, which I shall shortly discuss.) About half of those condemned men are commuted. Many other persons subject to "capital" murder convictions and death sentences upon the facts of their cases are also spared the death penalty by verdicts or pleas of guilty of lesser degrees of homicide. And, for non-homicide offenses, the percentages of "capital" criminals sentenced to death and not commuted is even smaller.

The result of this discretion exercised by our system has been a steadily decreasing use of capital punishment. So, whereas in 1935, for example, a total of 199 persons were executed under civil authority in the United States, for the first 7 years of the decade of the 1960's, the average was 19—despite the fact there had been a tremendous population growth in that 40-year period.

This development justifies the conclusion of the President's Crime Commission in 1967 that, "The most salient characteristic of capital punishment is that it is infrequently applied." The infrequency of its application has some very real implications for what the death penalty question is today. But before I develop them, let me finish my historical narrative; and then I will come back to those implications.

In 1967, in the year of the National Crime Commission's report, a nationwide legal challenge to the constitutionality of the death penalty began in earnest, and brought with it a judicial moratorium of executions. As a result of that campaign, the last man executed in the United States died on June 2, 1967. We have now had a period of more than 4 and a half years without an execution in this country. That moratorium has been largely the product of the pendency in the Supreme Court of the United States of a succession of constitutional issues.

On May 3, 1971, the Supreme Court of the United States by a 6-3 vote, rejected two such arguments. On June 28 of the same year, it agreed to hear the third and last of the constitutional challenges to capital punishment which have been the legal basis of the four-and-a-half year moratorium since 1967. This contention—that the death penalty is a cruel and unusual punishment forbidden by the eighth and fourteenth amendments to the Federal Constitution—was heard by the Court in four cases, two murder cases and two rape cases, argued on January 17, 1972. Inasmuch as I represent the petitioners in three of those cases, together with co-counsel including Mr. Jack Greenberg who will be addressing you as well, I want to say a little about those cases, because I disagree with the Justice Department's description of them and the issues that they raise. If I may, I will defer that subject also until I get specifically to the moratorium bill and why it is important.

I simply point out now that, when and if the Supreme Court decides those cases—which it may any day now—the effect may be to subject to imminent execution a staggering, positively staggering, number of condemned men, because the effect of the 4½-year moratorium has given us an incredible back-up of men awaiting death in this country. This moratorium has affected not only men sentenced to die during the period between 1967 and the present; it has also affected many men sentenced in preceding years whose executions had, for one reason or another, been delayed. In most States, the present death-row population includes men who have been on the row for 10 or a dozen years or more. Not merely executions but also commutations have, with very rare exceptions, come to a halt. This is so because of the almost uniform practice of Governors to refuse to consider a case for commutation until all judicial proceedings have been exhausted. So long as, in effect, the Governors thought the buck might be passed to the courts, the Governors simply have not been commuting.

I have been very, very close to this scene for the past 6 years or more and I can tell you that—except for Governor Winthrop Rockefeller's

commutation of 15 death sentences in Arkansas in December 1970 and a literal handful of commutations elsewhere—the effect of the court-ordered moratorium has been inevitably to stay the Governors' hand together with the executioners'. Except for these few, there have been no commutations for the past 4½ years.

What we now have, as far as I can tell—

Mr. BIESTER. Would the witness yield a moment at this point? I think, in Pennsylvania, the Governor has dismantled the electric chair.

PROFESSOR AMSTERDAM. Mr. Biester, I would certainly defer to your judgment on the Pennsylvania scene.

If I may, though, state my recollection: My understanding of what happened was that the outgoing attorney general, Fred Speaker, issued an opinion that the death penalty in Pennsylvania was unconstitutional. When Governor Shapp took office, his attorney general, Shane Creamer, countermanded that opinion. He did, however, on another basis, order the men on death row released into the general prison population. The Governor did not countermand the Speaker order which had turned the old death row cell into an infirmary, because he thought capital punishment was so unlikely to be used—and indeed he indicated that he would not allow capital punishment to occur during his term in office—so he therefore let the order stand that had the death chair taken away. What I am pointing out is that is not a commutation. There remain 25 men condemned to die in Pennsylvania. Unless Governor Shapp commutes their sentences, those 25 men can legally be executed. Their executions have merely been postponed, not forever forbidden; and that is a part of what I was describing when I described the general back-up on death rows.

There are now 582 persons awaiting execution in the United States. They are found in 34 States and the District of Columbia. Ten of these jurisdictions have fewer than five men on the row. Most have between a dozen and about two dozen. Pennsylvania, for example has 25. Five States have 40 or more. There are no Federal prisoners under sentence of death, but there are two in the District of Columbia.

Who are these people? They have been described by corrections officials, Governors, criminologists and other persons familiar with the death-row population. My own experience conforms to theirs. The men on the row are universally without funds; they are generally poorly educated; and many have no lawyers—are totally unrepresented. They tend to be friendless and abandoned by everybody outside the walls of their prisons. They have no resources—financial, intellectual or human, with which to carry their cases to courts, to commutation officials or to the public.

They are also disproportionately Southern and disproportionately black. The witnesses who follow me, Jack Greenberg and Clarence Mitchell, will develop that aspect more fully. But I may say summarily that, of the 582 persons on death row, 373 are in Southern and border States. We do not know the race of 21. But of the remaining 561, 236 are white; 311 are black; and 14 are members of other nonwhite minorities. Three hundred eleven are black—that is, substantially more than a majority.

Now, the pattern that I described of decreasing use of the death penalty in the United States has also been the world pattern. Lately there has been an accelerating tendency toward *de jure* abolition on a

worldwide scale. The death penalty has been legally abolished in England (except for a few obsolete offenses), in Canada (for a 5-year trial period—just as in England prior to final abolition) and in all of Western Europe with the exception of France and Spain. In the countries of the Western Hemisphere, and the countries most closely tied by legal and cultural tradition to the United States, abolition is the rule and retention is the exception. But, in addition to the de jure abolition, there has been a startling decrease in the actual use of the death penalty, to such an extent that the Secretary-General of the United Nations recently reported:

“Those countries retaining the death penalty report that in practice, it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority.”

The result, I think is a rather startling observation. There are probably fewer than 500 executions under legal authority in the entire world today, including the Communist nations and the underdeveloped nations. If the Supreme Court of the United States gave the go-ahead and we Americans in fact executed the 582 men now on our death rows, we would kill more people than are killed by all of the rest of the nations in the world in a year. Even if we killed one-fourth or one-fifth of them, we would be the largest single killer on the globe; for South Africa, the present world leader, only manages to kill a hundred people a year—as in the United States, most of them black. That should be a sobering prospect to a Nation which aspires to be at the forefront of advancing civilization.

But what does this historical development imply for the questions now before the subcommittee?

I would like to make three brief general observations upon it before passing to the specific issues of Federal abolition and moratorium legislation.

The first observation is that we are realistically considering not the question whether capital punishment should be abolished, but rather only when. We would be kidding ourselves if we thought we were talking about the question whether capital punishment will be abolished. Capital punishment will be abolished. It will be abolished in 1972 or 1980, in the year 2000 or 2050; but as surely as day follows night, it is going to end. That is the trend of world history; it is the trend of the development I have described in this Nation; and to deny this truth is simply to turn one's back on the march of time, to refuse to see what the world's evolution and our own make undeniable.

The real question is whether, once we have come to the point where we can already historically perceive that the death penalty is going to be terminated by our society, we will have the guts to terminate it now, without killing the few poor remaining relics on death row, or whether, at this critical point in time—after we have had a 4½-year moratorium, and at a point where communist Russia is commuting death penalties, and fascist Spain is commuting death penalties under the pressure of world opinion—we, the United States, are going to regress and take up executions on a scale unknown in this country for decades. That is the question.

Now, in deciding whether we should regress to capital punishment today, we should certainly consider whether there is any justification in doing so. But that question also is not the traditional capital punish-

ment question. The old arguments relative to the justifications for capital punishment don't hold any more. The fact that we use the death penalty as rarely as we do changes them.

Take retribution, for example—one of the justifications that Mr. Biester asked about in questioning Mr. Petersen. Capital punishment is not even justifiable under retributive theories any more. It is not retribution to kill 19 men a year out of hundreds and hundreds of convicted murderers. These men are not being killed because they have committed murder. They are being killed because they are poor, or black, or ugly, or all of these things. As capital punishment is increasingly rarely applied, it is inevitably going to be increasingly arbitrarily applied as well. It is going to be increasingly discriminatory to fall only upon those who have no money to hire a good lawyer, who are poor and powerless, personally ugly and socially unacceptable. Everything we know about capital punishment in this country—I have collected some of those materials on page 19 of my written statement—supports the conclusion of racial discrimination and economic discrimination in the imposition and execution of the death penalty.

This, surely, is one of the major costs that Mr. Biester asked Mr. Petersen about when he asked whether you do not pay something for capital punishment? It is a particularly ugly cost that we cannot devise a system for the administration of the death penalty which does not bear harshly and discriminatorily on the poor and disadvantaged. I agree with Mr. Petersen, of course, when he answered Mr. Railsback's question by saying that the poor and disadvantaged are handicapped in every aspect of the criminal law, not just capital punishment. But that does not excuse killing them discriminatorily. Surely it makes a difference that life is at stake. Surely, life is that one commodity one must feel most concerned about when discrimination affects the criminal process. However—to return to Mr. Biester's question—the rarity of the death penalty is relevant not only because it makes the death penalty discriminatory, but because it strips capital punishment of any justification—even retribution. Killing 19 people a year at a time when the homicide rate runs at 9,000 a year and when the number of people you convict are 15 times as many—

MR. BIESTER. I hope you don't feel I was urging that?

PROFESSOR AMSTERDAM. No; I did not. I hope, when other witnesses appear before the subcommittee, what I am saying may be of some use to the subcommittee in appraising their views. I was answering your question with no thought that it expressed your view.

MR. FISH. You say 19 a year out of how many that are convicted?

PROFESSOR AMSTERDAM. We don't know the figure exactly, but all of the comparative figures we have show that there would probably be—19 times 10 would be 190—about 250 to 280 would be convicted of the capital degree of the crime. That is more than one-twelfth, maybe, one-fifteenth. Those are very approximate figures and one of the reasons for the Hart-Celler bill, the moratorium bill—I should say at this point—is that there is an awful lot we don't know about capital punishment. I must say I take very strong issue with the Justice Department's statement on page 6, which is that unless this committee and the Congress are prepared to abolish capital punishment, we shouldn't have a moratorium. If you knew in advance you were going to abolish it, you ought to abolish it, not have a moratorium. The purpose of the moratorium

is to allow time to gather the facts, to study them, and then to decide whether you ought to abolish capital punishment. Right now, we don't know many of the relevant facts. I even have to give you a rough approximation of the number of capital convictions: about 280. That doesn't tell the full story though. Some people are not being sentenced to death by other devices: copped pleas, second-degree verdicts, et cetera. So, in fact, we have an even smaller number than one out of 12 or one out of 15 actually being selected to die.

The deterrent aspect of capital punishment is also affected by this infrequency of application. All of the present studies show no relationship between retention or abolition of the death penalty and the rate of homicide. Indeed, the United Nations recently stated that it is generally agreed between the retentionists and the abolitionists that the data which now exist show no correlation—that is, no deterrent effectiveness to capital punishment. But even this observation, made after many years of scientific inquiry, is beside the point. For, if we assume what the evidence fails to show, that capital punishment, when regularly and routinely administered as a punishment for “capital” crimes, has some greater deterrent efficacy than imprisonment, it is nonetheless perfectly obvious that any such efficacy is totally destroyed once capital punishment is not regularly and routinely administered.

Classical penologists and psychologists agree that a punishment which is not relatively swift and sure is ineffective. No punishment is less swift or less sure today than capital punishment. Used in this fashion—the only fashion in which our society can tolerate it at all—how can it deter? What prospective murderer, after all, will be deterred by a penalty whose risk is less and less predictable, than the risk he runs driving to and from his crime along a crowded highway?

In addition to that, capital punishment ups court costs, takes up so much judicial time and expends so much judicial effort that other criminal penalties become less swift and sure as well. As capital punishment becomes increasingly rare and unusual, it also becomes increasingly costly to process capital cases. This is so because processing an unusual item always costs more. I don't know whether anybody would take the view that we ought to kill people because it is a cheap way to deal with the crime problem. But, in any event, it is not cheap; it is now more expensive than its alternatives. It is today much cheaper to convict a man and keep him in prison for the rest of his life than to kill him. The reason is perfectly obvious. As capital cases become more and more unusual, they also become more and more costly to process through the legal system, from end to end.

Today we maintain hundreds of criminal courts and hundreds of maximum security penal facilities whose fixed costs we must pay without regard to our capital cases. To run the relatively small number of capital cases through those courts and into those prisons would add relatively little to costs of the criminal justice system if the capital cases could be treated like all the others. But they cannot be treated that way, so long as they remain capital. To take a case and treat it as capital, with days and days of *voir dire* examination, with lawyers stipulating to nothing, fighting every inch of the way because life is at stake, involves a tremendous added cost burden. The upshot is that capital punishment costs our society enormous sums of money, even when we almost never inflict it. Only extraordinary ignorance of law

enforcement needs could fail to reckon up innumerable far more profitable uses to which these scarce dollars could be put by a nation single-mindedly but intelligently bent upon eradicating or diminishing dangerous crime.

Those general observations bring me to the two specific questions before your subcommittee. First, Federal abolition.

On the question of Federal abolition, I think that the Congress should quickly abolish the death penalty for Federal crimes.

It wouldn't be making much of a change, frankly, as a practical matter, because the death penalty is almost never used for Federal crimes now.

To my knowledge, out of 42 persons convicted of first-degree murder in the District of Columbia between 1966 and 1970, only two were sentenced to die. For the Federal courts outside the District, I was able to find the figures only for the fiscal years 1961 through 1968, excluding fiscal 1964. During these 7 years, there were 24 capital murder convictions, whereas for the entire 9-year period from calendar year 1961 through calendar year 1969, only one Federal prisoner was received by the Bureau of Prisons under sentence of death. The last Federal execution was in 1963—no others in the 60's. There were only three Federal executions between 1955 and 1959; and, as I have said, no one is now under a Federal death sentence in the United States. Two persons are under sentence of death in the District of Columbia; but the District conducted no executions at all during the decade of the 1960's, and only one between 1955 and the present.

The question I want to ask, then, and hope to answer is, Why is it important, then, to abolish the death penalty under Federal law? I think it is important for several reasons.

First, when a death sentence is executed, it is the most extraordinary and indefensible act precisely because it is so rare and arbitrary, because this fellow has been selected by an inescapably irrational process, to be a token sacrificial victim. We have already repudiated and rendered capital punishment obsolete and ineffective as a practical instrument of Federal criminal law, and yet we kill this one guy in homage to it. That is an act as baseless and barbaric as a ritual slaughter.

Second, the fact that capital punishment is on the Federal statute books needlessly encourages its retention by the States. Invariably, those who argue in State legislative and judicial forums that the death penalty is an indecent and uncivilized relic which should be abandoned are met with the observation that the Congress of the United States does not think so, as to 13 Federal crimes. Congress doesn't have to think one way or another, really, because nobody gets executed under those laws. But by being thoughtless, Congress is being one of these carriers of a deathful disease that inflict it on other people. Congress is not, in fact, accepting the death penalty since the penalty is almost never used; but by keeping it on the books Congress promotes an argument to encourage its continuation by the States. Congress is looked to for moral leadership—properly so—and as the conscience of the Nation. That imposes some responsibility, and the responsible thing to do, surely, is not to profess capital punishment without practicing it, but to take a good hard look at capital punishment and determine whether Congress thinks it ought to have the death penalty or not. . . .

MR. KASTENMEIER. Don't you feel that our colleagues in the Congress really have the basic question of whether, it being on the books, even if largely inoperative, these laws do serve? Let us say they are unconvinced the removal will not remove a form of deterrence and therefore, they are uncomfortable, particularly inasmuch as we seem to be having a crime wave in the country in the last few years, as to removing capital punishment, thinking it does serve as a deterrent, without thinking through the matter quite as fully as you and others have. Isn't it sort of normal to expect them to come to that conclusion?

PROFESSOR AMSTERDAM. I can quite understand that and the only thing it seems to me that can be done to assuage that concern is to look carefully and critically into what we know about deterrence. What we know is interesting.

I think it is fair to say, from a larger perspective, that there is no single question about the practical operation of the criminal law that we know more about than the deterrent aspect of capital punishment. It has been studied and restudied now for 40 years. If capital punishment had a deterrent effect, you would think it would show up in 40 years of studies; and, in fact, in every study ever done it does not show up. The studies use a variety of approaches. Not only are all of the States with capital punishment compared with all of the States that don't have it, but also, comparable States, neighboring States, are compared. Individual States which had it and abolished it are compared before and after. Periods right after and right before executions are compared. And every kind of analysis turns up the same result: there is no relationship between capital punishment and the incidence of the capital crimes it is supposed to deter.

I think the ingrained feeling of deterrent efficacy of capital punishment boils down to two things. It is a kind of a feeling that most of us have that death really scares us, and a harsh penalty like that would deter. There are several problems with that feeling. First of all, in order to make the case for the death penalty, you have to say it deters more than life imprisonment. If you took the death penalty away, most of us would be equally scared by life imprisonment. Second, most of us who are thinking about this subject are well adjusted, normal, non-murderers. We do not commit murder, not because of the existence of the death penalty, but because of the socialization process that has made us life-respecting and law-abiding citizens. Yet, here we are trying to psyche out minds that aren't ours. Because we feel that we would be deterred by the threat of death—we, who don't need to be deterred at all because it is against our nature to kill—we assume that prospective killers will be similarly deterred. But prospective killers are men of a different sort. Here the psychological findings go together with the sociological ones, because from what we know about the psychology of murderers, most murders are of one or another of two undeferrable kinds: crimes of passion, or crimes by persons who are so anti-socialized initially—whether you call them insane or psychopaths or whatever—that no amount of punishment could have an effect on them.

Now that is not to say—and no one can honestly say—it is impossible that in some few cases, the death penalty did deter a capital crime. The cases of deterrence, if they exist, must be very few, since they do not show up in the comparative statistical studies. But of

course scientific studies are incapable of proving that never once did someone who would have committed a capital crime if life imprisonment was all he stood against, choose not to commit the crime for fear of death. There may be such cases, but I think that they don't show up in the overall homicide rates because they are more than offset by countervailing cases. These are cases we don't talk about much, although they are well documented. They are cases where the death penalty actually causes capital crimes. These range from the fairly rational ones—like George Jackson, who is being incarcerated, for trial on a capital charge, so he tries to shoot his way out of prison, and six people are killed—to the cases like French in Oklahoma and Glatman in California and Taborsky in Connecticut, who want to commit suicide, and lack courage, and kill somebody else so that society will kill them. These are very well documented cases. Recently in San Jose we had a babysitter who killed two babies, and the court-appointed psychiatrists found that she killed them because she wanted to kill herself. She was afraid to do it, so she finally thought to herself, I will kill them and then they will kill me. Careful study by medical doctors has shown that there have been numerous incidents where people have committed homicide because of the death penalty. It isn't just one or two cases.

MR. KASTENMEIER. Unfortunately, in that respect, the Justice Department told us this morning that capital punishment does have a deterrent effect, in limited cases, and that is the thrust of their opposition. So I am only suggesting that you will have a great deal of difficulty, it seems to me, to convince the majority of our colleagues, that it doesn't have a deterrent effect.

PROFESSOR AMSTERDAM. I would hope the position of the Justice Department would be inspected fairly but critically in light of what it relies on, and that it will not simply be accepted because it is a pronouncement of the Department. Because what it relies on is in fact so unreliable as to be unworthy of credit—that is, the usual policemen's tales of arrested persons who are said to have told the police that they did not kill, or did not carry a gun, or carried a toy gun, because of their fear of the death penalty. Let me point out several things that ought to be said about these reports of what arrested people tell police. First, they assume the police are reporting those conversations reliably. I have my doubts about that. I think the police—like other people—listen and hear very much what they want to hear; and police in most States are for the death penalty. Police are usually for whatever presently exists, so in most States the Police Department is for the death penalty.

Second, even if the police are being totally level and not misled, the arrested guy will always tell the policeman what he thinks the policeman wants to hear. After conviction, experienced corrections officials like Warden Duffy of San Quentin and Warden Lawes of Sing Sing say the same people tell them, at that point, that they didn't think of the death penalty; and this comes at a time when their stories are more likely reliable because it is too late for what they say to the police to help them.

Number three, the stories about carrying toy guns and what have you ignore the fact that robbers often carry toy guns in Wisconsin and Michigan and in the other abolitionist states, too. For very good rea-

son: there are lots of people who are robbers but not murderers, and don't want to kill, in the same way that you and I don't want to kill—not because of the death penalty, but because we could not take a life just for money. And, fourth, even if you take these statements of arrested persons at face value, all they show is that a greater penalty deters more. If you had the same people who are arrested in a state where robbery was punishable by 15 years, and murder was punished by life imprisonment, they would tell you, "We did not kill because we were afraid of life imprisonment." In a state where the penalty for murder is death, they say the same thing by saying, "We were afraid of the electric chair." All that either of these statements is doing is describing what the maximum penalty is that, in fact, the law subjects them to. They are not saying you need capital punishment to frighten these men. They might just as well be frightened by life imprisonment. All of this stuff that the Department of Justice puts forward has been put forward time and time again and is totally unconvincing, if you look at it with any degree of care.

I would like to conclude, then, with this subject of deterrence as it affects the question of Federal abolition. There is one other, deeper sense in which the death penalty touches on the question of deterrence. We don't know very much about this, but I think it is fair to recognize that, inevitably, the death penalty breathes an atmosphere of violence into the society that uses it. Capital punishment stands for and teaches the moral that human life ceases to be sacred when it is thought useful to take it. That is a particularly dangerous lesson in troubled times such as ours: and if we keep a penalty on the books which says in effect, that those who believe there are pragmatic ends to be served by killing other people should be allowed to kill them—and that is the Department of Justice's position: "We think it is shocking, but it does some good, so we go ahead and use it"—then we are simply legitimating violence by anyone who thinks it will do some good.

What our time needs, however is just the opposite. It is whatever we can do to diminish the level of violence in our society. Violence is largely the product of putting too little value on the worth of life. The antidote for violence is to emphasize the worth of life. To abolish capital punishment is to emphasize the worth of life.

Let me turn now from the question of Federal abolition to the Hart-Celler or moratorium bill. The subcommittee, of course, is familiar with the constitutional theory of the bill, and I will not review it. Its purpose is to call a halt to executions—to prevent the irremediable taking of human life—during a period while Congress can gather and study the relevant facts, and can maturely decide whether capital punishment is discriminatorily applied, or is a cruel and unusual punishment, as the basis for its further decision that it constitutionally can and should outlaw capital punishment throughout the United States.

The Justice Department has said that it is undesirable to impose that kind of moratorium because of the pendency of cases in the Supreme Court of the United States, which will decide those constitutional issues. But the fact is that the question of racial and economic discrimination is not presented in those cases: and nothing the Court can decide will touch the Equal Protection question. In addition, even if the Court should decide on the record before it that the death penalty is not a cruel and unusual punishment, that would not foreclose congressional consideration of the same question.

For the cruel-and-unusual-punishment question is one that turns very largely upon facts about the present-day use of the death penalty; Congress has superior ability to unearth and examine and determine those facts; and so it will come to the cruel-and-unusual-punishment question on a different record than the Supreme Court. Please do not forget that the cases before the Supreme Court are the usual cases of indigent defendants who were represented at trial by court-appointed lawyers lacking the resources to put into the record any evidence at all concerning the facts relevant to the constitutionality of the death penalty. The Court is going to be forced to come to a constitutional judgment on the cruel-and-unusual-punishment question on the basis of essentially barren records. Congress can do a lot better; and the purpose of the moratorium would be to permit Congress to gather and review the facts thoroughly, so as to make the constitutional decision upon a fully informed bases.

Let me turn now to the practical need for the moratorium. In the concluding section of my written statement, I have tried to explain why Congress should enact the moratorium—why, if life is precious, Congress imperatively must enact the moratorium.

That is simply that, based on my experience in hundreds of capital cases over the last nine-year period, I would estimate that if the Supreme Court of the United States decides the death penalty cases against the claims of the petitioner—if it sustains capital punishment—we will see a hundred executions, probably more, within a period of a year after the Court acts. The only way to prevent that is some sort of a blanket legislative stay. The alternative is to leave the individual condemned men themselves to seek stays from courts or Governors. And the method of relying upon these individual stay applications to keep men alive will not work, for several reasons.

First, large numbers of the men on death row do not have lawyers. We try to represent as many as we can. We now represent somewhat less than half. We are working at peak load; we cannot do more; and can't possibly cover them all.

In order to obtain a stay of execution, an unrepresented condemned man has to present a stay application to some court or legally empowered authority (such as the Governor in some States, the Pardon Board in others), which is sufficiently articulate to attract the attention of that court or authority. Most men on death row are incapable of doing this. Prisoners' papers are often sent back by some court clerk because they do not comply with some formality, such as failure to use required forms, or to attach pauper's affidavits. So a man may forfeit his life because he is ignorant of a technicality. Uncounseled prisoners often neglect to state the dates of their scheduled executions in their stay application so the clerk may never know to hurry it up.

If the mail goes wrong, a man may die. If the judge is at a judicial convention, a man may die.

Second, even those men who have lawyers are sometimes not much better off. Let me be clear that most of the lawyers I have encountered handling capital cases are the most dedicated, sincere, conscientious men. But many of them are not up to the enormous burden of handling capital cases.

These lawyers may fall out of the cases for any reason. We invariably find a number of men on death row who think they are legally represented, but are not, and do not know it. Their attorney

thinks he has come to the end of the rope, he quits; or he may leave town or die without notice to the condemned man; and then the man is left counting for his life on a lawyer who is no longer there.

Third, even where condemned men are actually represented by counsel, their situation is often almost as perilous. Many of these attorneys are the original court-appointed trial counsel, who have been hanging on conscientiously through sometimes 10 and 12 years, without compensation. Where they are criminal lawyers, they are often sole practitioners; they are busy with other matters—maybe a long trial—and so they often delay and then get into trouble with a late stay application, or they simply have so much other business they have to attend to that they can't give the time to these cases. As a result of all this, although counsel is extremely conscientious, he often falls short of that kind of constant attention to a capital case which is necessary to safeguard the individual condemned man against the slip that kills him.

In addition, I will say that the very processes of the courts make it difficult to rely on the courts for stays. Trial courts and intermediate level appellate courts will ordinarily not grant stays upon legal issues unless they think that the particular issues are open questions at their level.

Time and again we have been denied stays in the lower courts upon issues that we later won in higher courts. Take the *Witherspoon* decision, handed down by the Supreme Court of the United States several years ago, holding that it was unconstitutional to death-qualify a jury by broadly excluding jurors who had conscientious qualms against capital punishment. I had been denied stays 50 times on that issue before the Supreme Court of the United States decided that. Of the 50 who did not get stays in the lower courts, about 30 have now had their sentences set aside for good. They would have died unconstitutionally but for the fact that we managed to pick up and get into those cases and carry them to other cities and states where the appellate courts are, or to the Supreme Court in Washington. How many unpaid private lawyers handling indigent condemned men's cases have the resources for that kind of follow-up?

Then there are problems that even the most capable and competent lawyer can't avoid. When an executive date gets close enough, you have to try everything to get a stay, and there are three or four courts usually that can give you a stay. What you do is to send in an application to the Governor, and to the Federal District Court, and to the State trial court; and maybe you send an application to one or two appellate courts as well. You can't afford not to; but then the courts began quite naturally to play Alphonse and Gaston with each other. What happens is all of these courts and governors are waiting for the other one to act because they don't want to assume the responsibility; and so you go down to the wire and the seconds tick off, and death gets closer and closer—this is an experience of mind-shattering cruelty to the condemned prisoner—and you emerge with a stay at the last hour only through incredible good fortune. This has happened to us again and again. We have persisted in calling back and forth between court and court, and have gotten some very lucky breaks, and eventually gotten stays, and later gotten the death sentences set aside on constitutional grounds. But that kind of luck can't last. One slip in any of

a dozen circumstances beyond our control in any of these cases would have killed the man.

Unless we have some general legislation which stops all of this—stops this country from killing for 2 years while we think and reflect on the problem, while we explore the questions of deterrence, and explore the questions of discrimination the other relevant questions—we are going to have a hundred to two hundred men dead, perhaps unconstitutionally, before we form that judgment.

I urgently ask you, therefore, that the subcommittee, the full committee, and the Congress, give swift and favorable consideration to the moratorium bill.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you for a very, very important and informative statement. I am sure the committee has some questions for you but if you will agree, out of courtesy to our following witnesses, and because Mr. Greenberg's statement is not long, I would invite him to come up and present his statement, together with Mr. Mitchell, and then the committee might ask questions of both you and Mr. Greenberg.

Professor AMSTERDAM. I would gladly agree with that.

Mr. KASTENMEIER. We will then welcome Jack Greenberg, director-counsel of the NAACP Legal Defense Fund, together with Mr. Clarence M. Mitchell, director of the Washington Bureau of the NAACP.

You are most welcome. Mr. Greenberg, I believe you have a statement?

Mr. GREENBERG. Yes, sir.

Mr. KASTENMEIER. The Chair notes that it contains a number of appendices with supporting material. Without objection it will be received and made a part of the record. Your statement is not very long. You may either read your statement or summarize it.

**TESTIMONY OF JACK GREENBERG, DIRECTOR-COUNSEL OF THE
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ACCOMPANIED BY CLARENCE M. MITCHELL, DIRECTOR, WASHINGTON BUREAU, NAACP**

Mr. GREENBERG. I think I will read my statement.

Mr. Chairman and members of the committee:

My interest in this matter stems from the fact the NAACP Legal Defense Fund is dedicated to the elimination of racial discrimination in public life, and this has been the organization which has conducted the campaign in the courts against capital punishment to which Mr. Amsterdam has directed himself.

Since 1939, when the organization was founded, the Legal Defense Fund has repeatedly been called upon to provide legal representation to indigent black defendants whose executions were imminent—often only days, and sometimes hours, away. A postcard from a condemned man, a call from a private citizen or a newspaper clipping often alerted us to the fact that a man was about to die, with little or no legal effort having been taken on his behalf. These cases often resulted in legal decisions that not only saved the lives of some defendants but created significant legal precedents protecting and preserving the rights of both indigent and black defendants in areas such as right to counsel, jury discrimination, coerced confession, and others. In many instances,

however, we were never notified in time, or appeals were unsuccessful, and hundreds were put to death.

The overriding impression of those years was that in the institutions that put men to death in this country, the most corrosive and invidious form of discrimination in existence, racial prejudice, was strongly at work. It is true that many, but not all, of those condemned to die had committed vicious crimes—and there are many documented instances of cases where people who were later released on the basis of improper procedure, or, indeed, because they were innocent—but their crimes were not unlike those of many times their number who also were convicted on capital charges but sentenced to lesser terms. It was the arbitrary and prejudicial choices which were allowed, indeed fostered, by the procedures of selecting between those who were guilty of the same crimes that produced the ghastly results. I will confine myself in these remarks to the racial discrimination aspect of the capital punishment issue, which has affected me most deeply and signifies to me most dramatically the mockery that capital punishment makes of this society's promise of true equality and humane justice.

The evidence of racial discrimination was strongly suggested by the national execution figures kept since 1930 by the United States Department of Prisons. Of the 3,859 persons executed for all crimes since 1930, 54.6 percent have been black or members of other racial minority groups. Of the 455 executed for rape alone, 89.5 percent have been nonwhite.

Of course, these suspicious figures might be explained, not by arbitrary and discriminatory administration of the death penalty, but by some extravagant hypotheses about the Negro crime rate. Thoughtful analysts have rejected such an explanation. Rather, the conclusion of discrimination has been borne out by a number of reports and studies referred to today in Professor Amsterdam's testimony before the committee. These all express in various ways the conclusion reached by the 1967 National Crime Commission Report.

The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.

The evidence of racial discrimination in the imposition of the death penalty is most clearly presented within the area of rape cases. Of the 455 persons executed for rape in the United States since 1930, 405 were black and two were from other racial minorities. All of those executed for rape since 1930 were executed in Southern or Border States or in the District of Columbia. The States of Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District have not executed a single white man for rape for over this 42-year period. Together they have executed 66 blacks. Arkansas, Delaware, Florida, Kentucky, and Missouri each executed one white man for rape since 1930. Together they have executed 71 blacks.

The Legal Defense Fund itself, in order to provide a more systematic and rigorous examination of the evidence of racial differentials in capital sentencing commissioned an extensive empirical study of sentencing patterns in rape cases which was undertaken in 1965 by Dr. Marvin E. Wolfgang, an eminent criminologist. Dr. Wolfgang will himself be testifying before the committee so I will not go into detail regarding his study. In brief, however, Dr. Wolfgang's study

covered every case of conviction for rape in 250 counties in 11 States during the 20-year period 1945-65. Inquiry was made into every possible ground that a jury might take into account in deciding whether to impose life or death, including the viciousness of the crime, prior relationship of the defendant and victim, the time of the attack, the place of the attack, the number of attackers, the type of legal representation et cetera. In those States in which statistical analysis of the information has been completed, an overwhelming showing has been made that race alone is the consistent factor distinguishing cases in which the death penalty was imposed from those in which some lesser penalty was chosen. If the defendant was black and the victim was white, the chance of the death penalty proved clear; in all other rape cases, the chance of the death penalty was slight.

A careful look at the history of capital punishment in this country makes the evidence hardly surprising. Prior to the Civil War, those States that punished rape capitally had by law separate standards for imposition of the death penalty depending upon the race and slave status of the defendant and the victim. After the black man was freed, white prosecutors and white juries were able to exercise the discretion allowed to them to the same end. It is also striking that all the States that punish rape capitally (with the exception of Nevada) are States whose statutes required or authorized racial segregation in the public schools prior to 1954.

But let me make very clear that these historical facts cannot be the basis of dismissing the evidence of discrimination as a mere historical phenomenon, reflecting practices long repudiated and customs long changed. They are the reality facing us today. In spite of color blind statutes that allow the death penalty for rape to be imposed upon blacks or whites, in spite of judicial decisions declaring an end to the racial discrimination in selection of juries, in spite of the end to legal segregation in the public schools, there are today 77 men on the death rows of 10 Southern States for rape. The race of 74 is known to us: 66 black, one Indian, one Mexican, and six white. Currently, of those under sentence of death for rape, the nonwhite population is therefore over 70 percent. Indeed, as the death penalty is imposed more rarely and with greater selectivity by juries, it would not be surprising to find that race is playing an increasingly important role in distinguishing between those who live and those who die.

Nor is the picture of racial discrimination in the imposition of capital punishment solely one of executions for rape. The nationwide rate of executions for the crime of murder, although considerably less startling is startling enough. Since 1930, half of the 3,334 executed for murder have been nonwhite. Today there are 500 persons under sentence of death for murder. We know the race of 482, and they include 254 or 53 percent who are black or of other racial minorities.

Significantly, the judicial decisions declaring an end to the death penalty in California and New Jersey, as well as legislative decisions of the past decade abolishing the death penalty in several other States, have resulted in capital punishment becoming an increasingly Southern and increasingly racial phenomenon. Of the 582 persons now under sentence of death, 373 are in Southern States. Of these 373 awaiting execution in the South, it is known that at least 230 are black as against 115 white, or two black men for every white man. In Northeastern,

Central and Western States, 209 persons are condemned, at least 85 or 41 percent are nonwhite.

I should add that practically all of these condemned persons, both black and white, are penniless, as were virtually all of those already executed.

Once we at the Legal Defense Fund became convinced that the death penalty was being applied discriminatorily upon blacks, other minority groups and the poor, and once we developed legal arguments to challenge the administration of the death penalty in this country, we vowed in 1967 to do everything we could to stop any execution and to help provide legal representation to those condemned men in need. Having developed the power to secure a stay of execution pending the courts' consideration of these arguments on behalf of any individual condemned man, we felt the moral responsibility to provide legal assistance to any condemned man who needed it. Our offer of assistance did not long go unheeded, and since June 2 of 1967 we have been successful in securing stays of execution for hundreds of condemned men in the country while the courts have considered challenges to the constitutionality of the death penalty. We have secured the reversal of over 200 death sentences and we now represent or assist in the representation of somewhat less than half of the 582 persons remaining under sentence of death.

But if the stays of execution now keeping these hundreds from the electric chairs and gas chambers are vacated, I deeply fear the consequences. I am firmly convinced that invidious racial discrimination is responsible for the fate of many of those under sentence of death, and other unacceptable arbitrary factors for most of the others.

But this committee need not reach my conclusions or those of the various studies and reports to which I have referred. For purposes of this hearing, I believe that one need draw no more from these facts than the very limited and clearly irrefutable conclusion that there exists ample evidence justifying a moratorium and Congressional inquiry—with the investigative resources available to Congress which far exceed those of the more limited studies so far concluded.

Were capital punishment to resume in this country without this minimal inquiry, the result must fairly be seen as an expression of racial genocide. We owe it to ourselves and this country to conduct a full and adequate inquiry during the proposed moratorium to avoid any possibility of that national spectacle.

MR. KASTENMEIER. Thank you very much, Mr. Greenberg. I have a number of questions to ask you. I will ask you only one right now, however.

How would you and Mr. Mitchell respond, if I were the Justice Department, and I said to you, you have made a very convincing statement—we have reviewed the matter, and assuming those seeking abolition of the death penalty before the court do not succeed, and we resumed our executions, we will put into effect a system whereby if we do execute 200 persons a year, not more than 10 or 12 percent will be black, not more than 15 percent minority groups, and that hereinafter we will not have discrimination in terms of those who are executed. How would you respond to that?

MR. GREENBERG. I am not sure how they would attempt to do that constitutionally, but it would seem to me any system which could be

corrected only by having an interracial discrimination, so to speak, in the administration of justice, is so faulty and so fundamentally unconstitutional, that neither the correction or the system ought to be permitted to stand.

Mr. KASTENMEIER. I am not sure I understand you. Let's say there were 200 executions taking place each year, but it came to pass that these were in proportionate ratio to a number of minorities within the general population.

Mr. GREENBERG. I have heard that question, not in that form, but somewhat different form, and that is, let us say, it is unconstitutional to put black men to death for the crime of rape if they have raped a white woman. If the system can be saved or the only effort to save it can be one which involves a racial discrimination against the white defendant, who does not enjoy the benefit of this, the system is so affected by racism and can be administered only by putting race factors in there—

Mr. MITCHELL. May I make a brief observation? I don't know whether any of the members of this committee, or even these distinguished gentlemen with whom I am appearing, are old enough to remember the days when nine Negroes in the Scottsboro case, were charged with rape, and sentenced to death in the State of Alabama. I had just finished college at that time and was working as a newspaper reporter. I was assigned to cover that case. I was present in the courtroom when the gentleman, who is now Judge Liebowitz, in New York, was counsel for these defendants, and he raised some question about whether the element of consent had occurred or been considered in that case. The prosecutor, who was a Mr. Thomas Knight, turned to the jury, and to the courtroom, with this rather remarkable legal observation. He said, the law of Alabama presumes that no white woman would consent to sexual intercourse with a Negro. To me, that was a kind of incredible statement, even though I was young at that time. It never occurred to me until later years that the sentiment expressed by Mr. Knight, while not written into the statute in the States that Mr. Greenberg has included in his testimony, is, in fact, the practice in these States. It is followed in dealing with crimes where the defendant is a black man and the prosecution witness is a white woman.

I would like to offer, as a kind of updating of that, a brief excerpt from a newspaper, the Baltimore News American, which appeared on February 27, 1972. It is an article written by a gentleman named Michael Olesker, and it is about a black judge, Judge Joseph Howard of the Supreme Bench of Baltimore. I happen to be a member of the Maryland bar. Judge Howard, when he was an Assistant States Attorney, pointed out that in the State of Maryland, it was the practice to discriminate against Negro defendants in rape cases involving white women by sentencing them to death in disproportionate numbers. There was a great hue and cry about the impropriety of his action. He was virtually charged with bringing disgrace upon the Maryland courts and there was a lot of talk about ousting him from his position as an Assistant Prosecutor. Subsequently, the Monumental Bar Association, which is an organization of black lawyers in Maryland, and Howard University, conducted studies which vindicated everything he said, as Mr. Greenberg has given facts to support what he has said.

Judge Howard is now, by the fact that the people have elected him, a member of the bench itself, and of course, has been vindicated by the votes.

I would just like to offer this article for the record because it states in a capsule the problem that is very real to the black people of the United States, namely, no matter what the circumstances may be, if a white woman brings a charge of rape against a black man, there are an overwhelming number of chances he will be sentenced to death because of his race. On the other hand, if a black woman, as the figures will demonstrate in the article, is the alleged victim of rape by a white man, the white man would not be sentenced to death, nor would a white man who rapes a white woman face a similar chance of being sentenced to death.

MR. KASTENMEIER. Without objection, we will receive the article in the record.

(Mr. Greenberg's statement including appendices and article submitted by Mr. Mitchell follow:)

STATEMENT OF JACK GREENBERG, DIRECTOR-COUNSEL OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. BEFORE SUB-COMMITTEE NO. 3 OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES RELATIVE TO H.R. 8414

Mr. Chairman and Members of the Committee:

I wish to express my deep appreciation to the Committee for the opportunity to testify on the Death Penalty Suspension Bill. As Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., a civil rights organization devoted to the principle of achieving true equality through law for black people, I for many years have had trying experience with the grim reality of capital punishment as enforced in this country. Since 1939, when the organization was founded, the Legal Defense Fund has repeatedly been called upon to provide legal representation to indigent black defendants whose executions were imminent—often only days, and sometimes hours, away. A postcard from a condemned man a call from a private citizen or a newspaper clipping often alerted us to the fact that a man was about to die, with little or no legal effort having been taken on his behalf. These cases often resulted in legal decisions that not only saved the lives of some defendants but created significant legal precedents protecting and preserving the rights of both indigent and black defendants in areas such as right to counsel,¹ jury discrimination,² coerced confession,³ and others. In many instances, however, we were never notified in time, or appeals were unsuccessful, and hundreds were put to death.

The overriding impression of those years was that in the institutions that put men to death in this country, the most corrosive and invidious form of discrimination in existence, racial prejudice, was strongly at work. It is true, that many—but not all—of those condemned to die had committed vicious crimes; but their crimes were not unlike those of many times their number who also were convicted on capital charges but sentenced to lesser terms. It was the arbitrary and prejudicial choices—which were allowed, indeed fostered, by the procedures for selecting between those who were guilty of the same crimes—that produced the ghastly result. I will confine myself in these remarks with this aspect of capital punishment—racial discrimination—which has affected me most deeply and signifies to me most dramatically the mockery that capital punishment makes of this society's promise of true equality and humane justice.

The evidence of racial discrimination was strongly suggested by the national execution figures kept since 1930 by the United States Department of Prisons. Of the 3859 persons executed for all crimes since 1930, 54.6% have been black or members of other racial minority groups. Of the 455 executed for rape alone,

¹ *Hamilton v. Alabama*, 368 U.S. 52 (1961).

² *Patton v. Mississippi*, 332 U.S. 463 (1947); *Shepherd v. Florida*, 341 U.S. 50 (1951).

³ *Fikes v. Alabama*, 752 U.S. 191 (1957).

89.5% have been non-white.⁴ Of course, these suspicious figures might be explained, not by arbitrary and discriminatory administration of the death penalty, but by some rather extravagant hypotheses about the Negro crime rate. Thoughtful analysts have rejected such an explanation. Rather, the conclusion of discrimination has been borne out in a number of reports and studies referred to today in Professor Amsterdam's testimony before the Committee.

These all express in various ways the conclusion reached by the 1967 National Crime Commission Report, "The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups."⁵

The evidence of racial discrimination in the imposition of the death penalty is most clearly presented within the area of rape cases. Of the 455 persons executed for rape in the United States since 1930, 405 were black and 2 were from other racial minorities. All of those executed for rape since 1930 were executed in Southern or Border States or in the District of Columbia.⁶ The States of Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District have not executed a single white man for rape over this 42 year period. Together they have executed 66 blacks. Arkansas, Delaware Florida, Kentucky, and Missouri each executed 1 white man for rape since 1930. Together they have executed 71 blacks.

The Legal Defense Fund itself, in order to provide a more systematic and rigorous examination of the evidence of racial differentials in capital sentencing commissioned an extensive empirical study of sentencing patterns in rape cases which was undertaken in 1965 by Dr. Marvin E. Wolfgang, an eminent criminologist. Dr. Wolfgang will himself be testifying before the committee so I will not go into detail regarding his study. In brief, however, Dr. Wolfgang's study covered every case of conviction for rape in 250 counties in eleven States during the twenty-year period 1945-1965. Inquiry was made into every possible ground that a jury might take into account in deciding whether to impose life or death, including the viciousness of the crime, prior relationship of the defendant and victim, the time of the attack, the place of the attack, the number of attackers, etc. In those states in which statistical analysis of the information has been completed, an overwhelming showing has been made that race alone is the consistent factor distinguishing cases in which the death penalty was imposed from those in which some lesser penalty was chosen. If the defendant was black and the victim was white, the chance of the death penalty proved clear; in all other rape cases, the chances of the death penalty was slight.

A careful look at the history of capital punishment in this country makes the evidence hardly surprising. Prior to the civil war, those states that punished rape capitally had by law separate standards for imposition of the death penalty depending upon the race and slave status of the defendant and the victim.

After the black man was freed, white prosecutors and white juries were able to exercise the discretion allowed to them to the same end. It is also striking that all the states that punish rape capitally (with the exception of Nevada) are states whose statutes required or authorized racial segregation in the public school prior to 1954.

But let me make very clear that these historical facts cannot be the basis of dismissing the evidence of discrimination as a mere historical phenomenon, reflecting practices long repudiated and customs long changed. They are the

⁴ The following are the total number of persons executed between 1930 and 1967 (3,859), broken down by offense and race, as they appear in United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin #45, Capital Punishment 1930-1968 (August 1969) at p. 7:

	Murder		Rape		Other		Total	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
White.....	1,664	49.9	43	10.5	39	55.7	1,751	45.4
Negro.....	1,630	48.9	405	89.1	31	44.3	2,066	53.5
Other.....	40	1.2	2	.4	0	0	42	1.1
Total.....	3,334	100.0	455	100.0	70	100.0	3,859	100.0

⁵ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGES OF CRIME IN A FREE SOCIETY) (1967) 143.

⁶ Appendix A to this testimony sets forth the number of executions under civil authority in the United States since 1930 by offense, by race, by state.

reality facing us today. In spite of color blind statutes that allow the death penalty for rape to be imposed upon blacks or whites, in spite of judicial decisions declaring an end to the racial discrimination in selection of juries, in spite of the end to legal segregation in the public schools, there are today 77 men on the death rows of 10 Southern States for rape. The race of 74 is known to us: 66 black, 1 Indian, 1 Mexican, and 6 white. Currently, of those under sentence of death for rape, the non-white population is therefore over 90%. Indeed, as the death penalty is imposed more rarely and with greater selectivity by juries, it would not be surprising to find that race is playing an increasingly important role in distinguishing between those who live and those who die.

Nor is the picture of racial discrimination in the imposition of capital punishment solely one of executions for rape. The nationwide rate of executions for the crime of murder although considerably less startling is startling enough. Since 1930, half of the 3334 executed for murder have been non-white. Today there are 500 persons under sentence for murder. We now the race of 482, and they include 254 or 53% who are black or of other racial minorities.

Significantly, the judicial decisions declaring an end to the death penalty in California and New Jersey, as well as legislative decisions of the past decade abolishing the death penalty in several other states, have resulted in capital punishment becoming an increasingly Southern and increasingly racial phenomenon. Of the 582 persons now under sentence of death, 373 are in Southern States.⁷ Of these 373 awaiting execution in the South, it is known that at least 230 are black as against 115 white, or two black men for every white man. In Northeastern, Central and Western States, 209 persons are condemned, at least 85 or 41% are non-white.

I should add that practically all of these condemned persons, both black and white, are penniless, as were virtually all of those already executed.

Once we at the Legal Defense Fund became convinced that the death penalty was being applied discriminatorily upon blacks, other minority groups and the poor, and once we developed legal arguments to challenge the administration of the death penalty in this country, we vowed in 1967 to do everything we could to stop any execution and to help provide legal representation to those condemned men in need. Having developed the power to secure a stay of execution pending the court's consideration of these arguments on behalf of any individual condemned man, we felt that moral responsibility to provide legal assistance to any condemned man who needed it. Our offer of assistance did not long go unheeded, and since June 2 of 1967 we have been successful in securing stays of execution for hundreds of condemned men in the country while the courts have considered challenges to the constitutionality of the death penalty. We have secured the reversal of over two hundred death sentences and we now represent or assist in the representation of a majority of the 582 persons remaining under sentence of death.

But if the stays of execution now keeping these hundreds from the electric chairs and gas chambers are vacated, I deeply fear the consequences. I am firmly convinced that invidious racial discrimination is responsible for the fate of many of those under sentence of death, and other unacceptable arbitrary factors for most of the others. But this Committee need not reach my conclusions or those of the various studies and reports to which I have referred. For purposes of this hearing, I believe that one need draw no more from these facts than the very limited and clearly irrefutable conclusion that there exists ample evidence justifying a moratorium and Congressional inquiry—with the investigative resources available to Congress which far exceed those of the more limited studies so far concluded.

Were capital punishment to resume in this country without this minimal inquiry, the result must fairly be seen as an expression of racial genocide. We owe it to ourselves and this country to conduct a full and adequate inquiry during the proposed moratorium to avoid any possibility of that national spectacle.

⁷ Appendix B sets forth a state by state listing of the number, crime and race of those presently under sentence of death.

APPENDIX A—Continued
 TABLE 3.—PRISONERS EXECUTED UNDER CIVIL AUTHORITY IN THE UNITED STATES, BY OFFENSE, RACE, AND STATE, 1930-68—Continued
 [For years 1930-59, excludes Alaska and Hawaii except for 3 Federal executions in Alaska; 1 each in 1939, 1948, and 1950]

Region and State	All offenses										Other offenses							
	Total			Murder			Rape			Total			Armed robbery		Kidnaping		Other ¹	
	White	Negro	Other	Total	White	Negro	Other	Total	White	Negro	Other	Total	White	Negro	White	Negro	White	Negro
Delaware ¹	12	5	7	8	4	4	4	4	1	3	3	4	1	3				
Maryland	68	13	44	55	7	37	4	24	6	18	3	34	3	3				
District of Columbia	40	3	37	37	3	34	3	3	3	3	3	21	21	21				
Virginia	92	17	75	71	17	54	7	21				1						
West Virginia ²	41	31	9	36	28	8	1	1				3	3	3	3			
North Carolina	263	59	199	207	55	149	3	47	4	41	2	9	9	9				9
South Carolina	162	35	127	120	30	90	5	42	5	37	6	6	6	6				
Georgia	366	68	298	268	65	234		61	3	58		1	1	1				
Florida	57	113	133	133	55	78		36	1	35		5	3	2				
Kentucky	103	51	52	88	47	41		10	5	22		2	3	2				
Tennessee	93	27	66	66	22	44		27	2	25		7	5	3				
Alabama	135	28	107	106	26	80		22	2	20		7	7	5				
Mississippi	154	30	124	130	30	100		21	1	20		3	3	3				
Arkansas	118	27	90	99	25	73	1	19	2	17		2	2	2				
Louisiana	133	30	103	116	30	86		17	1	16		2	2	1				
Oklahoma	60	42	15	54	40	11	3	4		4		3	3	3				
Texas	297	114	182	210	111	108	1	84	13	71		13	12	1				5
West	509	405	83	496	393	82	21	486	21	82		13	12	1				7
Montana	6	4	2	6	4	2		4		2		4	4	4				
Idaho	3	3		3	3			3				3	3	3				
Wyoming	7	6	1	7	6	1		6		1		7	7	7				
Colorado	47	41	5	47	41	5	1	1				1	1	1				
New Mexico	8	6	2	8	6	2		6		2		8	8	8				
Arizona	38	28	10	38	28	10		28		10		38	38	38				
Utah	13	13		13	13			13				13	13	13				
Nevada	29	27	2	29	27	2		27		2		29	29	29				
Washington	47	40	5	46	39	5	2	46		3		5	5	5				
Oregon ³	19	16	3	19	16	3		16		3		19	19	19				
California	292	221	53	280	210	52	18	280		52		12	11	1				1
Alaska	(5)	(5)	(5)	(5)	(5)	(5)		(5)		(5)		(5)	(5)	(5)				(5)
Hawaii	(5)	(5)	(5)	(5)	(5)	(5)		(5)		(5)		(5)	(5)	(5)				(5)

¹ In this category, the 8 Federal executions were for sabotage (5) and espionage (2). The 9 executions in North Carolina and the 2 in Alabama were for burglary. In California, the 6 executions were for aggravated assault committed by prisoners under a life sentence.
² Death penalty abolished by law during entire period covered by this table.
³ See table 15 for periods during which death penalty was in effect.
⁴ Alaska and Hawaii, when territories, abolished capital punishment in 1957. As States, Alaska and Hawaii are included in this series beginning Jan. 1, 1960.
 Source: U.S. Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, Capital Punishment 1930-68 (August 1969) pp. 10-11.

APPENDIX B

PEOPLE UNDER SENTENCE OF DEATH AS OF MAR. 7, 1972

[By racial breakdown]

State	Total	White	Black	Other	Unknown
ALL CRIMES					
Alabama	26	10	16		
Arizona	20	13	6	1	
Arkansas	1	1			
Colorado	2	1	1		
Connecticut	3	1	1	1	
Delaware	3	2	1		
District of Columbia	2	1	1		
Florida	92	29	63		
Georgia	40	8	29		3
Idaho	0				
Illinois	28	15	13		
Indiana	8	7		1	
Kansas	2	2			
Kentucky	20	10	10		
Louisiana	43	8	35		
Maryland	23	4	19		
Massachusetts	16	12	4		
Mississippi	9	1	7		1
Missouri	17	6	9		2
Montana	0				
Nebraska	2	1		1	
Nevada	2	7			1
New Hampshire	2	2			
New York	3	3			
North Carolina	11	4		7	
Ohio	56	27	29		
Oklahoma	17	8	7	1	1
Pennsylvania	25	11	14		
South Carolina	12	9	3		
South Dakota	0				
Tennessee	17	3	13		1
Texas	50	15	16	17	12
Utah	5	5			
Virginia	9	3	5	1	
Washington	10	7	3		
Wyoming	0				
Federal	0				
Total	582	236	311	14	21
MURDER					
Alabama	20	10	10		
Arizona	20	13	6	1	
Arkansas	1	1			
Colorado	2	1	1		
Connecticut	3	1	1	1	
Delaware	3	2	1		
District of Columbia	2	1	1		
Florida	68	26	42		
Georgia	26	6	18		2
Idaho	0				
Illinois	28	15	13		
Indiana	8	7		1	
Kansas	2	2			
Kentucky	20	10	10		
Louisiana	31	8	23		
Maryland	18	4	14		
Maryland	16	1	4		
Massachusetts	16	1	4		
Mississippi	9	1	7		1
Missouri	17	6	9		2
Montana	0				
Nebraska	2	1		1	
Nevada	8	7			1
New Hampshire	2	2			
New York	3	3			
North Carolina	9	4	5		
Ohio	56	27	29		
Oklahoma	17	8	7	1	1
Pennsylvania	25	11	14		
South Carolina	11	9	2		
South Dakota	0				
Tennessee	12	3	8		1
Texas	39	12	11	16	10
Utah	5	5			

APPENDIX B—Continued

PEOPLE UNDER SENTENCE OF DEATH AS OF MAR. 7, 1972

[By racial breakdown]

State	Total	White	Black	Other	Unknown
ALL CRIMES					
Virginia.....	7	3	3	1	
Washington.....	10	7	3		
Wyoming.....	0				
Federal.....	0				
Total.....	500	228	242	12	18
RAPE					
Alabama.....	5		5		
Arizona.....					
Arkansas.....					
Colorado.....					
Connecticut.....					
Delaware.....					
District of Columbia.....					
Florida.....	24	3	21		
Georgia.....	12	2	9		1
Idaho.....					
Illinois.....					
Indiana.....					
Kansas.....					
Kentucky.....					
Louisiana.....	12		12		
Maryland.....	5		5		
Massachusetts.....					
Mississippi.....					
Missouri.....					
Montana.....					
Nebraska.....					
Nevada.....					
New Hampshire.....					
New York.....					
North Carolina.....	2		1	1	
Ohio.....					
Oklahoma.....					
Pennsylvania.....					
South Carolina.....	1		1		
South Dakota.....					
Tennessee.....	5		5		
Texas.....	9	1	5	1	2
Utah.....					
Virginia.....	2		2		
Washington.....					
Wyoming.....					
Federal.....					
Total.....	77	6	66	2	3
CRIMES OTHER THAN MURDER AND RAPE					
Alabama—robbery.....	1		1		
Arizona.....					
Arkansas.....					
Colorado.....					
Connecticut.....					
Delaware.....					
District of Columbia.....					
Florida.....					
Georgia—armed robbery.....	2		2		
Idaho.....					
Illinois.....					
Indiana.....					
Kansas.....					
Kentucky.....					
Louisiana.....					
Maryland.....					
Massachusetts.....					
Mississippi.....					
Missouri.....					
Montana.....					
Nebraska.....					
Nevada.....					
New Hampshire.....					
New York.....					

APPENDIX B—Continued

PEOPLE UNDER SENTENCE OF DEATH AS OF MAR. 7, 1972

[By racial breakdown]

State	Total	White	Black	Other	Unknown
ALL CRIMES					
North Carolina.....					
Ohio.....					
Oklahoma.....					
Pennsylvania.....					
South Carolina.....					
South Dakota.....					
Tennessee.....					
Texas—armed robbery.....	2	2			
Utah.....					
Virginia.....					
Washington.....					
Wyoming.....					
Federal.....					
Total.....	5	2	3		

¹ Mexican.² Puerto Rican.³ Indian.

Source: Citizens Against Legalized Murder, Inc., New York, N.Y.

[The News American, Sunday, Feb. 27, 1972]

JUDGE HOWARD

Howard's charge of dual sentencing in rape cases—his first major public challenge—was issued in 1966—when he was an assistant state's attorney. The charge was quickly and hotly denied by members of the Supreme Bench and courts throughout the state, all charged with bias.

But in August, 1967, the charges were fully researched and verified, and they were released by Howard and the Monumental Bar Association.

A 32-page report including 15 statistical charts—all later distributed to legal authorities across the country—concluded:

"The rape of a white by a Negro is treated as a far more serious crime than any other racially categorized rape.

"Compared with all other defendants, Negroes convicted of rape against whites are disproportionately sentenced to death, life, and extended prison terms . . . and are disproportionately denied nominal prison terms.

"White defendants convicted of rape against Negroes are given less extended sentences than Negroes convicted of similar attacks on whites."

Those figures were based on cases from 1962 to 1966. A separate section in the report, based on cases dating from 1923, supported these conclusions, as well as noting:

All 30 offenders who were actually executed for rape had been convicted and sentenced for rape (or assault with intent to rape) of a white woman.

In Maryland, no man, white or black, has ever been executed for the rape of a black female.

Mr. BIESTER. The bells have rung for the daily exercise, so I will be very brief. I have, really, two questions.

One, a very theoretical question, and the other a more precise one.

The historical question relates to some of the vague boundaries on the edge of my recollection of my college education which had to do with—I was excited somewhat by the use of the term by Professor Amsterdam of the "sacrifice victim."

To what extent does the death penalty carry over the idea of human sacrifice? Wasn't there a time when it became common to use criminals as a victim, a ceremonial victim?

Professor AMSTERDAM. As strange as this may seem, the theoretical member of this team is Mr. Greenberg.

Mr. BIESTER. Then I will ask Mr. Greenberg.

Mr. GREENBERG. The same question occurred to me so I went and did some reading about it and I have found, while there is no necessary connection, because you can't prove these things, that at one time or another in history, every nation and tribe has had some form of ritual sacrifice and there is some deep primal urge which fortunately civilization has overcome in most places in the world, to sacrifice maidens or criminals or persons selected by lot or winning at lots or someone else to the sun or the next harvest or whatever, and little by little this has been overcome in most but not all parts of the world and it has been my sense about it, again, one of those things no one can prove—this is a last adieu victim impulse—hopefully we will remove from our society one of these days. The fact that it has existed so persistently through history has made that—

Mr. BIESTER. At one time it was by lot. In one culture it was by lot and then they thought it was more efficient to use criminals because you weren't running the risk of taking into the lot one who is constructive.

Mr. GREENBERG. It very well may be, I don't recall that, particularly. And those rare few selected are our sacrificial victims.

Mr. BIESTER. My colleague from Illinois raised a question with respect to an article in the newspaper concerning prison guards. Should any exception be made in that situation?

Mr. GREENBERG. The two exceptions that are often suggested by those who would abolish but retain for some crimes, capital punishment, are the killing of a police officer and the killing of a prison guard. As Mr. Amsterdam pointed out, the killing of a prison guard goes two ways. If somebody is sentenced to death, if he kills a prison guard, nothing worse is going to happen to him. I don't know that there is any evidence of the fact that retaining the capital penalty saved lives at the Attica rebellion. The lives of the prison guards were threatened in spite of the fact New York does retain capital punishment as far as police officers are concerned. The unfortunate fact is at least in New York where that is one of the two grounds on which capital punishment may be applied, that there have recently been the tragic killings of a number of police officers and quite deliberately, where the victims were targets of assassination, and it seems to me not to have made the slightest difference.

Professor AMSTERDAM. If I may add two very specific factual points. One, Dr. Sellin, who will appear before the committee, has studied this question quite specifically, and comments upon it in a 1964 article. It is as true of the killing of prison guards as it is of any other crime that had the death penalty, that was supposed to deter, that there is no correlation between the killing of prison guards and the death penalty. There are as few or fewer killings of prison guards in States which have abolished the death penalty as those that have not. Related to that is the observation that a very large percentage of corrections officials are abolitionists and would not preserve that exception.

Warden Duffy speaks very movingly—had himself and his mother unprotected with prisoners around them in the house—had nine murderers in that house, and felt safer with those nine murderers around them than anybody would feel out on the street. Doubtless, there are some people who will kill prison guards. There is no showing it is

the lifers that do that. The argument, you know, is that they have nothing to lose. The newspaper article is meaningless unless it is the lifers who do it.

The final or second factual point is I wouldn't put that much weight on that letter. The fellow who wrote it is a guy named Robles. There is some reason to believe Mr. Robles likes to see his name in the newspaper and I can think of very little that can put a man's name in the newspaper faster than a story like this. I just caution the committee—Mr. Robles is not unknown to us in California for his epistolary arts.

Mr. BIESTER. I thank you very much. It is always a pleasure to have Mr. Mitchell.

Mr. DRINAN. I want to thank both of you for your excellent statements, and I think there is a fantastic contrast between your comprehensiveness and what was presented by the Department of Justice. I also look forward to hearing Louis Pollak on the constitutional point. I am afraid the Department of Justice will get some alleged experts to say we don't have that power. I assume they can present some people that will do that. I want to thank you very much.

Mr. KASTENMEIER. I have just a few questions before we close, to get your views and your help on.

If you win the Supreme Court case, then I take it there is no need for H.R. 8414, as you see it?

Professor AMSTERDAM. If the Supreme Court should hold that the death penalty is, in all cases, a cruel and unusual punishment, there would be no need for H.R. 8414. If the court splits the difference, that is, for example, holds the death penalty is cruel and unusual punishment for rape, but not for murder, which it may do, or if it suggests it may be cruel and unusual punishment to sentence some murderers but not all, depending on the heinousness of the crime or something like that, then there would be a desperate need for the legislation because then those distinctions will have to be resolved in each man's case. The difficulty of getting stays while those issues are resolved will persist. I would think H.R. 8414 would be unnecessary if the court, as a blanket matter, holds that the death penalty is a cruel and unusual punishment.

Mr. KASTENMEIER. If it would do that, would there be the necessity for any Federal legislation, not only H.R. 8414, to implement the court's decision, as you see it?

Professor AMSTERDAM. I would think there would be a need for Federal legislation to implement the court's decision. We are coming away, at this point, from the question of capital punishment. I am trying to respond to the question of the Chair. There are a number of present provisions of the Federal criminal code, for example, which distinguish between capital and noncapital cases, provisions dealing with the number of peremptory challenges in a criminal case.

There are also statutory provisions which distinguish between the two. I would think that Congress would not want to leave to judicial determination what those provisions were to mean in the context of some prosecutions for what was nominally on the books but after the Supreme Court of the United States said there are no capital crimes, so I think there would definitely be a need for implementative legislation, of sort of a housekeeping nature. I think it would not be amiss for Congress, while it was doing that, to say the death penalty was

abolished. I think it could use some support. That would not be technically necessary; however, there would be some amendments to the Federal criminal code that would be technically necessary, I believe, in specific answer to the question.

Mr. KASTENMEIER. Actually, if the court turns down these cases, isn't it unlikely that there would be a statutory abolition of capital punishment? If the Supreme Court does not see fit to turn down the constitutional ground? Wouldn't that defeat whatever impetus seems to be going presently for the abolition of capital punishment? I am asking for a sort of political effect.

Mr. GREENBERG. I think there are those that might say because the court said it could be done constitutionally it is good and it is politically or morally desirable. I think there would be an effort to try to persuade people the court was somehow supporting capital punishment.

Mr. KASTENMEIER. The enactment of H.R. 8414 might be difficult in the face of what the court has done, I am suggesting, and even if enacted even at the end of those 2 years, we might have mass executions, as you indicated in your testimony.

Professor AMSTERDAM. There is certainly the possibility that might happen. However, I think the enactment of H.R. 8414 might very well countermand the exact political effect the Chair has just described.

I think the State legislative processes would, as Mr. Greenberg suggested, respond somewhat to the argument even though the Supreme Court decision would not bind them to have capital punishment per se. It might be desirable precisely because it would offset, it would be a wrong construction and wrong tendency of promoting capital punishment. We might, at the end of 2 years, find ourselves with—

Mr. KASTENMEIER. I would like to ask one other question. We have, as you know, before us, two classes of bills. One is a moratorium and the other is abolishment of the death penalty under Federal law. I assume, now, potentially, there could be a third class of bill, which would say Congress hereby finds that the death penalty constitutes a cruel and unusual punishment, and then seek to abolish the death penalty, both State and Federal. Is that a plausible bill?

Professor AMSTERDAM. I will state candidly that I hope, at the end of the 2-year moratorium period that is the bill that will be passed, that the interim studies will support that result. The constitutional theory of the moratorium will also support abolition. I, myself, think there might be enough, now, to support that, but I understand the wisdom of those who have thought that the smaller step might well precede the larger.

Mr. KASTENMEIER. In that connection, if I asked you to take an abolition bill which did not abolish all capital punishment but preserved it for certain cases, which seemed to some people to be reasonable, for example, some that have already been cited, either, as to police officers, as to treason, as to a second homicide, would you consider supporting such a small bit approach?

Professor AMSTERDAM. As a political compromise, I think it would be a desirable thing. As with all political compromises, one who believes in an absolute will say, I will take that, if it is all I can get. I don't think it is essentially—I don't think any of us here would support it in the sense that it is what we want. I don't think any of us would deny that would be a major advance. If it were all or nothing, I wouldn't

want to leave it at all or nothing. That would be a lot better than nothing.

Mr. KASTENMEIER. Would you agree, Mr. Greenberg?

Mr. GREENBERG. I agree, and I think the little exceptions typically carved out, represent no more than three or four or a handful of people on death row as of the moment. It would be pretty close to an abolition but it would not have many of the important aspects, general humanization of the law, and taking a position of life.

Mr. KASTENMEIER. I want to thank you, Professor Amsterdam, for coming so far and being of such great help to the committee. Thank you, Mr. Greenberg, and Mr. Mitchell, also. Your work in the field is particularly well known, and we are indebted to all of you this morning.

We have reached the end of the morning and the subcommittee will stand adjourned until next Wednesday, March 15, at 10 a.m. in this room, at which time we will hear, on the same subject, the Association of the Bar of the City of New York, Prof. Louis Pollak and Prof. Ernest van den Haag.

Until then the subcommittee stands adjourned.

(Whereupon, at 12:30 p.m., the subcommittee adjourned, further hearing to be held on Wednesday, March 15, 1972, at 10 a.m.).

CAPITAL PUNISHMENT

WEDNESDAY, MARCH 15, 1972

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE No. 3, OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Mikva, Drinan, Railsback, Biester, Fish, and Coughlin.

Also present: Herbert Fuchs, counsel, and Samuel A. Garrison III, associate counsel.

Mr. KASTENMEIER. The hearing will please come to order. The subcommittee is resuming its hearings on the death penalty, considering bills either suspending capital punishment for a period of 2 years or abolishing the death penalty in the Federal jurisdiction.

Our first witnesses this morning represent, and are here to present the report of, the Committee on Federal Legislation of the Association of the Bar of the City of New York on legislation to suspend capital punishment.

So, I am very pleased to welcome both Mr. Sheldon H. Elsen, who is chairman of the Committee on Federal Legislation, and Prof. Benno C. Schmidt, Jr., who is Professor of Law, Columbia Law School, and chairman of the subcommittee on the Hart-Celler bill.

Gentlemen, if you will come forward, the committee will be most pleased to hear from you. The work of your committees and of the Association is of course, well known to this committee. And indeed, your testimony is anticipated with considerable interest.

TESTIMONY OF SHELDON H. ELSÉN, CHAIRMAN, COMMITTEE ON FEDERAL LEGISLATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, ACCOMPANIED BY BENNO C. SCHMIDT, JR., PROFESSOR OF LAW, COLUMBIA LAW SCHOOL, CHAIRMAN, SUBCOMMITTEE ON HART-CELLER BILL

Mr. ELSÉN. Thank you, Mr. Kastenmeier. We have submitted to the committee copies of a 39-page report on the Hart-Celler bill. And I would like to begin by offering that report for the record.

Mr. KASTENMEIER. There are no objections. Your report will be received and printed in full in the record.

(The report referred to follows:)

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK—COMMITTEE ON FEDERAL LEGISLATION—REPORT ON LEGISLATION TO SUSPEND CAPITAL PUNISHMENT

INTRODUCTION

This report deals with proposed federal legislation to suspend for two years execution of capital sentences by the United States or by any state. The proposals, S. 1969, introduced by Senator Hart, and H.R. 8414, introduced by Congressman Celler, recite a congressional finding that capital punishment raises two constitutional questions: whether the death penalty amounts to cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution, and whether it is inflicted discriminatorily upon members of racial minorities in violation of the fourteenth amendment. Referring to Congress' power under section 5 of the fourteenth amendment to prohibit the death penalty if either of these questions should be answered affirmatively, the legislation would stay all executions for two years to give Congress an opportunity to investigate the above constitutional questions.

No capital sentences have been carried out in the United States since June 2, 1967. Since that date, executions have been suspended pending consideration by federal courts of a series of substantive and procedural challenges to capital punishment. While some procedural victories have been won by persons under sentence of death, *e.g.*, *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court has not as yet passed upon either of the major substantive issues of racial discrimination or cruel and unusual punishment. The Court has avoided decision on the race question, presumably for one or more reasons which this report will develop. The other major question—whether capital punishment constitutes cruel and unusual punishment—has been accepted for decision by the Court during the present Term.

If the Court declares capital punishment unconstitutional, the proposed legislation would be unnecessary. Accordingly, the constitutionality of federal legislation to suspend capital punishment must be assessed on the assumption that the Court will not resolve the claim that capital punishment is cruel and unusual punishment, or will reject that claim. This legislation therefore raises questions as to Congress' legislative power under section 5 of the fourteenth amendment to prohibit state action which the judicial branch has not found to be a violation of section 1 of the fourteenth amendment.

THE CONSTITUTIONALITY OF THE PROPOSED LEGISLATION

1. *Suspension of capital punishment for federal crimes.*—No constitutional problem is presented by the suspension of capital punishment for federal crimes. Congress has plenary power to determine appropriate penalties for the commission of federal crimes, subject to constitutional limitations, and Congress could eliminate entirely capital punishment as an appropriate penalty. Moreover, abolition could be retroactive, covering capital sentences imposed prior to enactment.* Congress' power to suspend capital punishment for federal crimes, rather than to eliminate it entirely, does not appear to raise any additional constitutional questions.

The bills are deficient in referring solely to the fourteenth amendment as the source of congressional power to suspend capital punishment. With respect to federal crimes, congressional power stems not from the fourteenth amendment, which deals solely with limitations on state power, but rather from the enumeration of legislative powers and the necessary and proper clause in Article I. The bills should be amended to include a reference to Article I as the source of legislative authority for suspension of capital punishment by federal authorities.

2. *Suspension of capital punishment by state authorities.*—Congress' power to prevent state denials of equal protection of deprivations of due process rests on section 5 of the fourteenth amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The race dis-

*In the event that a condemned person (spared by this legislation) should object to imprisonment, arguing that such retroactive abolition constituted an *ex post facto* law, the simple answer would be that no convicted person has a right to capital punishment, as opposed to life imprisonment, because capital punishment is not mandatory. Retroactive substitution of imprisonment, the less harsh and more likely original alternative, would not trigger the *ex post facto* clause's prohibition of increases in punishment for crimes previously committed.

crimination and cruel and unusual punishment grounds offered by these bills for questioning whether capital punishment violates the fourteenth amendment raise quite different analytical considerations with respect to corrective legislative authority.

A. CONGRESSIONAL POWER TO SUSPEND CAPITAL PUNISHMENT ON GROUNDS OF RACIAL DISCRIMINATION

As a general proposition, the fourteenth amendment prohibits infliction of different penalties on the grounds of the race of the perpetrator of a crime. If, for example, a state provided that the death penalty might be imposed in rape cases where the defendant and the victim are members of different races, but not otherwise, the equal protection clause would be violated. *McLaughlin v. Florida*, 379 U.S. 84 (1964); cf. *Loving v. Virginia*, 388 U.S. 1 (1967).

Infliction of capital punishment by the states does not present this clear-cut violation. State statutes authorizing capital punishment make no reference to race. Nor, we can assume, are references to race contained in any other explicit standards by which capital punishment is inflicted, such as jury instructions. Legislation is not needed to cure such an explicit manifestation of racial discrimination. Thus, on the face of state statutes and related sources of law and procedure in capital cases, no basis exists for Congress questioning whether some states are denying equal protection of the laws by discriminatory infliction of capital punishment upon racial minorities.

There are, on the other hand, extensive statistics about the actual imposition of capital punishment which are not inconsistent with and may even support the thesis that in some states capital punishment is inflicted disproportionately upon racial minorities. The statistics would require thorough analysis and additional investigation before one could conclude with some degree of conviction that racial discrimination is a significant factor in the imposition of the death penalty. Existing data at the very least raise a substantial suspicion that supports the need for congressional investigation.

For example, the following table relates to the 3859 persons executed in the United States between 1930, the earliest date for which statistics are available, and 1967, broken down by offense and race:

	Murder (percent)	Rape (percent)	Other (percent)	Total (percent)
White.....	1664 (49.9)	48 (10.5)	39 (55.7)	1751 (45.4)
Negro.....	1630 (48.9)	405 (89.1)	31 (44.3)	2066 (53.5)
Other.....	40 (1.2)	2 (.4)	0 (.0)	42 (1.1)
Total.....	3334 (100)	445 (100)	70 (100)	3859 (100)

Source: (National Prisoner Statistics, No. 45, p. 7 (1969).)

The geographic distribution of the 3859 executions also suggests the presence of racial factors. 33 were executed by the federal government; 608 by nine northeastern States; 403 by twelve north-central States; 509 by thirteen western States; and 2306 by sixteen southern States and the District of Columbia.

The racial breakdown of persons executed in the 16 southern States and the District of Columbia is as follows:

Rape:		
White		43
Negro		398
Robbery:		
White		4
Negro		19
Murder:		
White		585
Negro		1,231
Other:		
White		5
Negro		11
Total:		
White		637
Negro		1,659

A study of rape convictions in Arkansas concluded that the frequency with which blacks were sentenced to death for interracial rape was so high that it could not be attributed to the laws of chance to any statistically significant degree. The study is discussed in *Maxwell v. Bishop*, 257 F. Supp. 710 (E. D. Ark. 1966).

The racial proportions of all persons under sentence of death as of October 4, 1971 showed 286 whites, 341 nonwhites, and 28 whose race is unknown, out of a total of 655 condemned persons. For the crime of murder, 238 whites and 308 non-whites have been sentenced to die. Convicted rapists under sentence of death include 6 whites, 66 non-whites, with 3 unknown. All of these statistics were compiled by Citizens Against Legalized Murder, Inc.

The data is admittedly quite gross. More useful statistics would deal with the racial proportions of persons charged with and convicted of various capital crimes. The fact that such statistics are, as we understand, rare and unsystematic is itself a demonstration of the utility of a congressional study. In the absence of more careful investigation, the available statistics in non-homicide capital cases appear overwhelmingly to support the thesis that racial discrimination has played an important role. And even the homicide statistics raise substantial questions, particularly in the 16 southern States and the District of Columbia, where more than twice as many blacks than whites have been executed for murder.

Federal courts have had some opportunity to consider these statistics. Yet no federal court has concluded from them that any state's system of capital punishment should be prohibited as a denial of equal protection. In fact, no individual death sentence has been reversed because of an overall showing that capital punishment has been inflicted discriminatorily. Reversals have occurred only where evidence of racial bias appears in the record of the individual case, for example exclusion of blacks from grand or petit juries.

The Supreme Court has only three times spoken on the extent of Congress' power to prohibit, as denying equal protection, state action which the courts have not found to violate section 1 of the fourteenth amendment. All of these cases were decided within the last five years. While the opinions in these three cases reflect considerable variety and uncertainty, two factors have been given most weight in defining legislative power under the fourteenth amendment to go beyond judicial decisions: first, the ethnic or racial nature of the group to which legislative protection is being extended, and second, whether Congress is a more suitable institution than the judiciary, in terms of inherent capabilities, to decide whether the group needs protection to effectuate fourteenth amendment values. Thus, in assessing Congress' power to suspend capital punishment in the states, and assuming a negative response by the courts to the claim of racial discrimination in the imposition of the death penalty, we must consider the possible institutional grounds for such a negative response. Second, the cases construing Congress' power to enforce the fourteenth amendment must be analyzed for clues as to the Supreme Court's understanding of Congress' relatively greater institutional capabilities for dealing this kind of problem. Our analysis should shed light on whether the claim of racial discrimination in the application of the death penalty may be better resolved by the courts or Congress.

The statistics dealing with race and the infliction of capital punishment present courts with difficult problems. The judicial function is geared to decide individual cases on the basis of the factual material presented in the record. Assuming that a death sentence case contains no explicit evidence of racial prejudice in the record, such as exclusion of blacks from the jury list or discriminatory remarks by a judge or a prosecutor, reversal on account of an overall statistical suggestion of discrimination requires a court to make some uncharacteristic assumptions. For example, statistics which seem to demonstrate that capital punishment has been inflicted disproportionately upon members of racial minorities cannot demonstrate in any particular case that racial discrimination was an element in the decision to impose the death penalty. This failure, of course, need not disable the courts from remedial action if the pattern of overall application is simple and presents a truly compelling picture of racial discrimination. *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But judges are not statisticians and one can understand their skepticism about their capacity to tell whether apparent statistical demonstrations of racial discrimination negate the possibility of other decisional criteria. To give a simple example, if the death penalty is imposed disproportionately in rape cases in which the defendant and the victim are members of different races, racial prejudice may be inferred. But these cases may generally contain a dispro-

portionate degree of violence. Violence rather than racial prejudice may be the basis for the apparently disproportionate infliction of the death penalty.

Even if judges were willing to conclude from death penalty statistics that racial discrimination is operative, the problem of fashioning a remedy would challenge the most sympathetic judge's sense of self-restraint and instinct for operating under judicially manageable principles. Since only members of racial minorities, by statistical hypothesis, are victimized by prejudice, would the proper result be to reverse only death penalties of black defendants, while whites may constitutionally be sentenced to die? The asymmetry of this result has not commended itself to many judges. See *e.g.*, Judge (now Mr. Justice) Blackmun in *Maxwell v. Bishop*, 398 F. 2d 138 (C.A. 8 1968). Is a general suspension the appropriate remedy, and if so, should any suspension be nationwide? If not, what precisely is the statistical demonstration of discrimination that determines in which states capital punishment should be suspended and in which states it should be allowed to continue? Finally, what is the future scope of any remedy? Are states free to implement a system of capital punishment in the future even though in the past the infliction had been discriminatory, on the grounds that its legal institutions are capable of improvement and need not remain caught up in the errors and prejudices of the past? If the remedy of suspension is not to be perpetual, courts are not well-suited to assess when in the future a state should be permitted to attempt a non-discriminatory system of capital punishment.

Judges must also be concerned about the implication in principle of any of these remedies, if granted, for the rest of the criminal process. There is no reason to suppose that discrimination, if found as to capital punishment, does not permeate other areas of the criminal process. Other sentences should also be reviewed for statistical evidence of prejudice; moreover, there is no good reason to stop with the imposition of sentence. Discrimination in sentencing reflects in all probability a racial bias that colors the decision as to guilt or innocence. Judges might see in statistical arguments attempting to prove racial prejudice in the infliction of capital punishment implications requiring statistical analysis of every aspect of a state's criminal processes.

A final problem with expecting courts to respond to the claim of discrimination based on general statistical analysis is the unrealistic burden on litigants implied by such a source of adjudicative standards. An in-depth study of capital sentences in rape cases in one state cost more than \$35,000 and depended on the voluntary efforts of numerous law students and special experts. Few organizations, much less individual defendants, can afford to conduct such studies.

In sum, there are serious institutional limitations on the capacity of courts to respond to the statistical suggestion that the imposition of capital punishment reflects racial discrimination. Since judges are traditionally limited to the facts in the record, along with whatever general information it is appropriate to take judicial notice of, statistics not focused on the individual case under review are regarded with some skepticism. Judges have no special training or institutional habits of mind which equip them to evaluate statistical arguments, and even if judges understood what the statistics mean, problems of the proper scope of remedies confront courts in responding to them. The whole effort, moreover, presupposes unrealistic investigative and analytical resources on the part of the defendant.

The Supreme Court has indicated developing awareness of these limitations in its three decisions dealing with Congress' legislative power to extend the scope of the fourteenth amendment beyond judicial constructions. The decisions suggest that as to certain kinds of constitutional questions Congress is a more appropriate institution than the courts to make the necessary factual and remedial determinations upon which resolution of the constitutional question turns. At the same time, the opinions manifest concern for the Supreme Court's independence from congressional overruling. The decisions to date have only begun to sketch the outlines of Congress' power to go beyond the courts in enforcing the Civil War amendments to limit action of the states. Conclusions about legislative power in this area are necessarily tentative.*

*An interesting statement of the respective functions of courts and Congress in constitutional determinations appears in Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinc. L. Rev. 199 (1971). Professor Cox goes farther in upholding Congress' power to alter or extend rulings than is necessary to uphold the constitutionality of the bills which are the subject of this report.

The first of the three cases, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), focused on the extent to which Congress' remedial power exceeded the remedies available to courts. The decision upheld the Voting Rights Act of 1965, which automatically suspended the use of literacy tests and like voting qualifications in any state in which less than half the eligible voters had voted in the presidential election of 1964. South Carolina challenged the power of Congress to suspend literacy tests fair on their face as to which there had been no judicial finding of discrimination. The state also argued that Congress' enforcement power did not include widening prophylactic remedies. The court, however, concluded that the enforcement power conferred on Congress by the fifteenth amendment was comparable in scope to the power conferred by the necessary and proper clause of Article 1. In the context of the Voting Rights Act of 1965, this legislative power enabled Congress to suspend literacy tests without the need for case-by-case determinations of discriminatory application.

Two elements supporting broad legislative enforcement power were present in the *South Carolina* case which are not present in the context of capital punishment. First, although the court had upheld the constitutionality of a literacy test fair on its face when there was no proof of discriminatory application, *Lassiter v. Northampton County Board of Election*, 360 U.S. 45 (1959), numerous judicial decisions had found that literacy tests had in fact been applied discriminatorily in the South. Thus, Congress was enacting a sweeping remedy for a type of discrimination which had been found by the court to exist in numerous individual instances. Second, the Voting Rights Act of 1965 expressly gave a state or subdivision covered by the general formula of the Act an opportunity to lift the suspension if it could meet the burden of proving in court its literacy test had not been applied in a discriminatory fashion.

The second decision dealing with Congress' enforcement powers under the Civil War amendments, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), recognized in both its holding and its supporting rationale broader legislative power than that upheld in the *South Carolina* case. *Morgan* dealt with another provision of the Voting Rights Act of 1965 which provided that no person who had successfully completed the sixth grade in a school in Puerto Rico where the language of instruction was other than English should be denied the right to vote because of inability to write or read English. The primary impact of this provision was to enfranchise thousands of Spanish-speaking citizens residing in New York who had been educated in Puerto Rico, but who had been barred from voting by New York State's English literacy requirement. The court proceeded on the express assumption that it need not find the New York English literacy test a violation of equal protection in order to uphold Congress' power to prohibit the test by legislation. In language reminiscent of the upholding of broad legislative power in commerce clause cases, the majority wrote that "we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constitutes an invidious discrimination in violation of the equal protection clause." * Justices Harlan and Stewart objected in dissent that the legislative enforcement power was only appropriate to cure violations of the equal protection clause established by judicial decision. The dissenters noted that no legislative facts existed in the record to support the court's assumption that Congress might have "found" the English literacy requirement to be a violation of equal protection.

As with the *South Carolina* case, the *Morgan* decision may have reflected elements which are not so clearly present in the context of capital punishment. First, the New York English literacy requirement applied *ipso facto* only to a particular ethnic group within the class of educated residents of New York. Secondly, the type of state law involved in *Morgan* was one which the court repeatedly had found subject to discriminatory application, if not in New York at least in other states. Furthermore, the congressional enfranchisement of educated Spanish-speaking citizens occurred in the context of an act which prohibited literacy tests in a significant portion of the country based solely on evidence that a large number of eligible voters had not voted. One can understand the court's reluctance to strike down this part of the Voting Rights Act of 1965, since it reduced somewhat the apparent sectional focus of the Act.

*The other basis for the majority holding in *Morgan* was that English literacy requirement could be suspended by Congress as a means of remedying discrimination against Spanish-speaking citizens in areas other than voting. This rationale has no bearing on the capital punishment problem.

The third decision involving legislative power to enforce the fourteenth amendment produced the problematic set of opinions denying Congress' power to enfranchise persons 18 years of age or older in state elections. *Oregon v. Mitchell*, 400 U.S. 112 (1970). Congress had predicated this exercise of power on the finding that denial of the vote to persons between 18 and 21 was a denial of equal protection. Three Justices (Justice Stewart, Chief Justice Burger, and Justice Blackmun) found no legislative power because age requirements for voting did not "invidiously discriminate against any discrete and insular minority."*

These three Justices noted that *Morgan* involved congressional power to override a state law dealing with an ethnic group. Justice Harlan found Congress' power lacking for a different reason: because the legislative history of the fourteenth amendment demonstrated that the equal protection clause was not intended to deal with voting qualifications, whether discriminatory or not. Justice Harlan, however, discussed at length the question of congressional power, assuming *arguendo* that the equal protection clause covered voter qualifications. He noted that one of the justifications offered for *Morgan* was Congress' greater fact-finding capability. The dispute as to whether 18-year-olds should vote, Harlan argued, involved no complex factual issues, but rather what he called a question of values: "Are the immaturity and inexperience of the average 18-, 19-, or 20-year-old sufficiently serious to justify denying such a person a direct voice in decisions affecting his or her life?" Congressional balancing of these "incommensurate interests," Harlan argued, justified no judicial deference to superior legislative fact-finding competence.

Four Justices—Brennan, White, Marshall and Douglas—dissented from the court's judgment that Congress lacked power to enfranchise 18-year-olds in state elections. These Justices stated a sweeping rationale for Congress' legislative power under Section 5 of the fourteenth amendment. They argued that Congress had found as a legislative fact that differences in maturity and intelligence between 18-year-olds and persons over the age of 21 were too trivial to justify discrimination in the right to vote. Arguing that this finding of fact had a rational basis, as evidenced by state treatment of 18-year-olds as mature and intelligent for such purposes as criminal responsibility, permission to marry, and other privileges and responsibilities, these Justices concluded that Congress' determination should be respected by the court.

Since the court was equally divided between four Justices who supported Congress' legislative power to prohibit denial of the vote to 18-year-olds as a denial of equal protection, and four other Justices who found no warrant in the equal protection clause for this exercise of congressional power, Justice Black's position determined the court's holding. Justice Black argued that the Constitution gave Congress general supervisory authority over voting qualifications for federal elections, and therefore he upheld Congress' power to enfranchise 18-year-olds for purposes of federal elections. However, with respect to state elections, Justice Black rejected the argument that the equal protection clause empowered Congress to enfranchise persons less than 21 years old. He pointed to the pervading purpose of the fourteenth amendment to deal with racial discrimination.**

In sum, four Justices rejected congressional power to enfranchise 18-year-olds in state elections on the grounds that the state classification thereby prohibited was not a discrimination on account of race (Justice Black) nor a discrimination against a discrete and insular minority (Justice Stewart, Chief Justice Burger, and Justice Blackmun). Four other Justices believed congressional power should be upheld since there was a rational basis for deferring to Congress' judgment that discrimination against 18- to 21-year-olds as to the right to vote was unconstitutional (Justices Brennan, White, Marshall and Douglas). Justice Harlan found no basis for deferring to Congress since Congress' judgment did not rest on findings of fact, but rather on balancing of values.

*The language is an obvious allusion to Justice Stone's well-known statement attempting to justify a higher level of judicial review for cases involving the first amendment and discrimination against minorities than for cases involving economic regulation. *United States v. Carolene Products Co.*, 304 U.S. 144, n. 4 (1938).

**Although he noted that the equal protection clause had occasionally been held to prohibit discriminations other than those on account of race, Justice Black urged that the amendment "was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection." To uphold congressional power in this instance, Black believed, would grant Congress power "to strip the states of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority. . . ." 400 U.S. at 127.

The court's treatment in the same case of other provisions of the Voting Rights Act of 1970 has a bearing on the constitutionality of suspending capital punishment. In addition to granting 18-year-olds the vote, the 1970 Act also prohibited the use of literacy tests or similar devices as a condition of voting in all state and federal elections. The court unanimously upheld Congress' power to eliminate literacy tests throughout the country, recognizing the desirability of national uniformity in legislation designed to eliminate racial discrimination.*

What conclusions about congressional power to suspend or eliminate capital punishment in the states can be drawn from the welter of differing theories presented in the court's response to the Voting Rights Act of 1970? First, legislative power is most extensive when exercised to correct some alleged discrimination against a group that can be identified along racial or ethnic lines. The *South Carolina, Morgan* and *Oregon* decisions all upheld Congress power to abolish state laws which, although neutral and fair on their face, presumably were found by Congress to operate in a racially discriminatory manner. Where, on the other hand, Congress attempted to abolish a classification in state law that discriminated against a group that could not be classified on racial or ethnic lines, such as citizens from 18 to 21 years of age, the court refused to grant federal legislative power. Second, the court's deference to the legislative judgment will increase to the degree that it regards the constitutional issue as turning on resolution of questions of "fact" rather than a balancing of incommensurate "values". Granting that these labels may obscure more problems than they illuminate, the spectrum between factual and value judgments has obvious utility with respect to reasonably simple and clear-cut questions.

Suspension of capital punishment on the ground that the death penalty is inflicted discriminatorily upon racial minorities both is designed to protect a racial group and embodies a clear-cut factual judgment. As such, the suspension seems clearly within the ambit of federal legislative power defined by the holdings in these cases. Indeed, the only two grounds on which the court could invalidate a suspension statute would be (1) a disagreement with the factual judgment, or (2) that the courts must previously have had a hand in denoting the state laws displaced by congressional legislation as ones in which discriminatory application was frequent.

We believe congressional power to enforce the equal protection clause of the fourteenth amendment should not be limited to cure of state laws which the courts have found in specific instances to deny equal protection. Such a narrow reading of the enforcement power would ignore the institutional differences between the courts and Congress, as well as the nature of the questions raised by the suspicion of racial discrimination in death cases. Racial discrimination can operate in a way that is invisible in individual instances, examined one at a time, but which becomes evident when the individual instances are collected and examined as a group. The statistics on capital punishment and race raised a substantial possibility that racial discrimination is operative. The fact that limitations inherent in the judicial function in individual cases should not prevent Congress from exercising its different fact-finding capacity to examine whether racial discrimination seems operative across the board. If it so finds, Congress should be empowered to cure discrimination by appropriate legislation.

*Justice Black noted that Congress had before it a long history of discriminatory use of literacy tests to disfranchise voters on account of their race, along with evidence that voter registration and participation is consistently greater in states without literacy tests. Black also noted that Congress could take account of this country's history of discriminatory educational opportunities in both the North and the South. Conditioning political participation upon educational achievement, Black asserted, was a further basis for Congress conclusion that literacy tests violated equal protection. Justices Stewart, Blackmun and the Chief Justice agreed that Congress could ban literacy tests throughout the country because such tests handicapped "Negroes who have been deprived of the educational opportunities available to white citizens." These Justices went on to point out that racial discrimination is a national problem, and that "in the interests of uniformity, Congress may paint with a much broader brush than may this court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." Accordingly, these Justices reasoned, "the justification for extending the ban on literacy tests to the entire nation need not turn on whether literacy tests unfairly discriminate against Negroes in every state in the Union, [and] Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizens' access impact of literacy requirements on the Negro citizens' access to the ballot box. Justices Brennan, White, Marshall and Douglas upheld the ban on literacy tests by reference to Congressional findings that such tests had the effect of denying the vote to racial minorities whose illiteracy is the consequence of previous denial of equal educational opportunity.

We believe Congress has ample authority under section 5 of the fourteenth amendment to suspend capital punishment in the states on the basis of a legislative finding of discrimination.

We suggest that Congress base suspension on an initial legislative finding of discrimination, although reconsideration of this finding would be in order after thorough investigation. Congress should not rest its power to suspend capital punishment on a mere suspicion or possibility of discrimination, since it is not clear that the power to temporarily displace state law can properly rest on a constitutional foundation less than the traditional legislative finding of fact.

E. CONGRESSIONAL POWER TO SUSPEND THE DEATH PENALTY BY FINDING IT CRUEL AND UNUSUAL PUNISHMENT

Congressional power to suspend capital punishment in the states based on a legislative judgment that the death penalty constitutes cruel and unusual punishment also turns on the scope of legislative power under section 5 of the fourteenth amendment. Section 1 of the fourteenth amendment includes the command that no state shall deprive any person of life or liberty without due process of law. Congress has gone beyond judicial findings and remedies in overriding state laws under the equal protection clause, and the language of the fourteenth amendment offers no basis for denying similar legislative power to effectuate the due process clause.*

While the content of the due process clause has been a matter of continuing dispute among the Justices, it is clear that by whatever theory of due process—complete incorporation, “selective incorporation,” or reference to fundamental freedoms “implicit in the concept of ordered liberty,”—the eighth amendment injunction against cruel and unusual punishment has been incorporated into the due process clause of the fourteenth amendment and made effective against state action. *Francis v. Resweber*, 329 U.S. 459 (1947); *Robinson v. California*, 370 U.S. 660 (1962). Assuming that the Supreme Court either has not ruled one way or the other on the claim that capital punishment is cruel and unusual, or that it has rejected that claim, is Congress empowered to prohibit the death penalty as cruel and unusual punishment?

Our discussion of the *South Carolina, Morgan* and *Oregon v. Mitchell* cases suggests that Congress' authority to go farther than the courts in enforcing the fourteenth amendment is most defensible in two circumstances: where constitutional violations have been found but judicial remedies are ineffective as compared with sweeping legislative remedies, and where intelligent analysis of the constitutional question requires an across-the-board factual investigation which the legislature is inherently better capable of undertaking. Neither circumstance is obvious with respect to the question whether capital punishment should be regarded as cruel and unusual punishment.

A congressional suspension of the death penalty as cruel and unusual punishment is not an exercise of remedial power for the simple reason that we must assume the courts have not declared the death penalty to be cruel and unusual. The notion that courts should defer to a congressional suspension because the underlying issue depends on resolution of complex factual questions is complicated by the uncertain meaning of the cruel and unusual punishment provision. The question whether a given form of punishment is “cruel” seems to turn on a weighing of imponderables and value judgments. Is official, premeditated killing a proportionate response to any crime? Does capital punishment violate our notions of individual dignity and the sanctity of life? As to these and similar considerations, no particular institutional basis is apparent for judicial deference to legislative determination. The eighth amendment proscription, however, is not limited to “cruel” punishments. Institutional considerations might be different on the question of whether punishment is “unusual” in the constitutionally prohibited sense.

Petitioners in the capital cases pending in the Supreme Court argue that the “unusual” standard goes to the frequency with which a given form of punishment is imposed. Brief for petitioner in *Aikens v. California*, No. 68-5027.

*Some commentators have suggested that the logic of *Morgan* supports congressional power, under the due process clause of the fourteenth amendment, to enact comprehensive codes of criminal procedure which would displace all inconsistent provisions of state law. Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv.L.R. 97 (1966); Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 Supreme Court Review 81. It is worth noting that both these articles appeared before the Supreme Court's decision in the 18-year-old vote case.

October Term 1971. Whether "unusual" refers to infrequency or whether, if it does, it is an independent basis for prohibition, are questions that the Supreme Court has never decided.* If the rarity of a punishment is an independent basis for finding it unconstitutional under the eighth and fourteenth amendments, it can be argued by analogy to *Morgan* that Congress is better suited than the courts to find the facts and weigh the inevitable questions of degree inherent in making the constitutional judgment. Assessing the frequency of capital punishment calls for the same skills and resources necessary in investigating whether racial discrimination is operative in the application of the death penalty. On the other hand, if "unusual" is held to embody a normative rather than a quantitative standard, or if a determination of unconstitutionality requires a conjunctive finding of "cruel" as well as "unusual", the institutional justification for congressional action is attenuated.

Given the existing uncertainty as to the meaning of the cruel and unusual clause, there is reason to doubt—though not to foreclose—congressional power to abolish capital punishment under the clause. However, since a possible reading of the eighth amendment—that "unusual" is an independent standard referring to infrequency—might well lead to judicial deference to legislative determination, we see no need to delete the eighth amendment question from the bill. Firmly based legislative action under the fourteenth amendment, however, should rest on a finding of racial discrimination.

C. THE NECESSARY AND PROPER CLAUSE IN AID OF ARTICLE III

While the bills state the two most evident sources of federal legislative authority, another possible constitutional basis for suspending capital punishment may also be considered.

As we noted at the outset of this report, since June 1967 the federal courts have effectively imposed a moratorium on all state (as well as federal) executions. As a result, almost seven hundred persons are now on death row awaiting adjudication of constitutional challenges to the death penalty. If the judicial stays are lifted, as they probably would be in large part if the Supreme Court rejects the eighth amendment challenges now pending before it, the country and the world could be witness to mass execution of hundreds of prisoners. Such a concentrated blood bath would be the direct consequence of the stays issued by the federal courts pursuant to jurisdictional statutes passed by Congress and in the appropriate exercise of their Article III powers. The danger of such a catastrophe would not exist but for the intervention of federal judicial power upsetting the normal operation of state law. Since the necessary and proper clause has been construed to authorize Congress to ameliorate problems which have been caused by the exercise of federal power, including judicial power under Article III, we believe that Congress can appropriately suspend execution to prevent these concentrated executions. Suspension would allow time for state legislative, executive and judicial authorities to consider their responsibilities with respect to capital punishment.

The necessary and proper clause of Article I explicitly authorizes Congress to legislate in aid not only of the enumerated legislative powers, but also with respect to the powers vested in the executive and judicial branches:

"The Congress shall have Power . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The Supreme Court has upheld legislative power traced to Article III. The court has recognized Congress' power to enact general maritime law not derived from the commerce clause but rather from the necessary and proper clause and the grant of admiralty jurisdiction in Article III. See, e.g., *In re Garnett*, 141 U.S. 1 (1890); *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Of course, the advantages of uniform national law to govern all shipping presumably motivated the court to find plenary legislative power implicit in Article III's grant of judicial power over

*The Supreme Court of California so interpreted "unusual" in the state's constitutional prohibition of "cruel or unusual punishment". Calif. Const. Art I, sec. 6. That court held the death penalty violative of the state constitution because it was both cruel and unusual, each being an independent basis for a finding of unconstitutionality. *People v. Anderson*, Crim. 13617, opinion issued February 18, 1972. It should be noted that the California Constitution disjunctively proscribes "cruel or unusual punishment" while the eighth amendment is phrased conjunctively: ". . . nor cruel and unusual punishments inflicted".

admiralty cases. The early decisions resting on Article III did not, however, rest on an assumption that the commerce power was a coordinate source of maritime power, or that the states lacked general legislative competence over navigable intrastate waters.*

Another conclusion, non-authoritative but still weighty, that Congress can pass legislation grounded in Article III appears in the American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts*. The ALI's proposed § 1386(b) would toll state statutes of limitations with respect to any action brought in the federal courts which is ultimately dismissed for lack of federal jurisdiction. The ALI Reporters explicitly considered the problem of federal legislative power and concluded that Congress could toll state statutes in this fashion pursuant to its authority to make all laws necessary and proper for carrying into execution the judicial power conferred by Article III. See Supporting Memorandum E. p. 453 *et seq.* The tolling provision was designed to protect plaintiffs' access to the federal courts and to obviate the need to institute parallel state and federal lawsuits. While the precedents are not numerous and rather uncertain in theoretical foundation, we believe it is established that under appropriate conditions Congress can find in Article III and the necessary and proper clause a source of legislative power to implement and protect federal judicial power, or prevent injustices arising from its exercise.

Congress' authority to make laws necessary and proper for "carrying into Execution" the powers vested in the federal government includes the power to remedy or ameliorate problems which have been caused by the exercise of federal power, even though the problem requiring correction touches matters ordinarily thought to be beyond the reach of federal power. Legislation ameliorating the evils of war provides several examples. A well-known instance is *Stewart v. Kahn*, in which Congress was upheld in tolling state statutes of limitations where plaintiffs had been prevented by the Civil War from prosecuting suit. The war power, the court reasoned, includes power to remedy evils which have arisen from its exercise.**

Other examples of legislation upheld on the basis of this remedial theory of the necessary and proper clause, and which might have been regarded as of doubtful constitutionality at the time of decision, include prohibition and rent-control statutes passed as incident to the war power. *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919); *Ruppert v. Caffey*, 251 U.S. 264; *Woods v. Miller*, 333 U.S. 138 (1948).

The point we draw from the admiralty cases and the precedents under the necessary and proper clause need not be a broad one. We do not understand those decisions to suggest that Congress has plenary legislative power to enact substantive law to govern any case that could fall within the ambit of Article III judicial power. Mr. Justice Brandeis rejected the constitutionality of such a reading of Article III in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, although his constitutional interpretation has been criticized as both unnecessary to decision in the case and unwise in its sweep. In any event, despite Mr. Justice Reed's suggestion in *Erie* that Congress is empowered to enact substantive law governing all diversity cases, Congress has not attempted to enact substantive law for all Article III cases.*** Our understanding of congressional power is much narrower and need not be precisely defined. If, under certain pressing circumstances, Congress can look to Article III grants of judicial power as a basis for legislation, then legislative power to remedy specific problems which arise from the exercise of federal judicial power in its most familiar aspect—the orderly adjudication of basic constitutional questions—is an *a fortiori* case.

Since Congress is empowered under the necessary and proper clause to remedy problems caused by the exercise of federal power, and since the necessary and

*The court had expressly held intrastate shipping to be beyond the reach of the federal commerce power. *Feazie v. Moor*, 14 How. 568 (1852). It seems clear that the court understood the legislative power to enact maritime law under Article III to be unfettered by commerce clause limitations. See generally, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 Harv.L.Rev. 1214 (1954).

***[T]he [war] power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power . . . to remedy the evils which have arisen from its rise and progress. This act falls within the latter category." 11 Wall (78 U.S.) 493, 507.

**Congress has always been regarded as empowered to legislate as to procedure in federal courts, including diversity cases, and the line between procedure and substantive law is often hazy. Moreover, good argument can be made that Congress should be authorized to enact some kinds of substantive law for diversity cases, such as choice-of-law rules for cases touching more than one jurisdiction.

proper power has been held applicable to federal powers traceable to Article III, we believe Congress can legislate to remedy evils and difficulties caused by the exercise of federal judicial power. Of course, some may question whether the *amalgamation* of hundreds of prisoners on death row can properly be regarded as an evil caused by the exercise of federal power of the kind which Congress is empowered to remedy under the necessary and proper clause. Assuming that most of the prisoners would have been executed in due course, the only effect of the stays is that hundreds of executions might take place within a few months, rather than over a period of some five years. Thus, it might plausibly be argued that in a metaphysical sense mass executions are no more brutalizing or disdainful of human life than the same number of official killings spaced over a period of years. Under this line of reasoning, the stays have not created any special situation giving rise to remedial legislative power under the necessary and proper clause.

We believe this view of the matter is insensitive to the human aspects of the situation. The view does not take account of the concentrated psychological impact of mass executions, the enormous publicity that would be generated by such a grisly series of events, and the heightened sense that so large a number of dispatched persons surely include more than a few victims of injustice and prejudice. The impact of such a gruesome event on the impression of the United States held by foreign peoples and governments would be, by itself, a basis for regarding the exercise of Article III power as having created a potential catastrophe which Congress should prevent.

When the necessary and proper clause provides a basis for corrective legislation, Congress has a very large measure of discretion in selecting an appropriate remedy. *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Wickard v. Filburn*, 317 U.S. 111 (1942). Suspension is well within this measure of discretion. Such legislation might reflect Congress' recognition that political and popular concern with capital punishment has been diverted by the intervention of the federal courts. A period of legislative suspension following a decision by the Supreme Court upholding the constitutionality of the death penalty would allow time for state political processes responsibly and deliberately to determine whether capital punishment is justified and advisable.

POLICY CONSIDERATIONS RELEVANT TO SUSPENSION OF CAPITAL PUNISHMENT

In our view, the policy considerations relevant to the proposed legislation parallel the analysis of constitutional power. With respect to suspension for federal crimes, Congress may properly take into account any and all ethical and penological considerations concerning capital punishment. If Congress found racial discrimination operative in federal capital sentences, elimination of such discrimination would certainly be an appropriate policy basis for suspension. But discrimination is by no means the only appropriate basis.

The policy questions surrounding suspension in the states are more difficult. As a matter of tradition, of course, the federal system presupposes state responsibility for maintaining civil order, a function which traditionally includes general state power to define crimes and punishments. This allocation of government power reflects a judgment that law enforcement will be more responsive to the needs of the people if it is subject to local rather than federal control. While numerous defined activities have been made subject to federal prosecution, such as loan-sharking or taking part in a civil disorder, such a generalized intervention as eliminating a specific punishment from the state's law enforcement arsenal has not been characteristic.

For a century, however, racial discrimination has been regarded as an appropriate occasion for deviation from this pattern. A central purpose of the fourteenth amendment was to ensure non-discriminatory administration of state criminal laws. National suspension or abolition of capital punishment because of racial discrimination would be consistent with the constitutional tradition of the last one hundred years.

The remedy of blanket suspension is the means of enforcing the national mandate of non-discrimination which least trenches on the values of federalism. A remedy fashioned to correct discrimination on a case-by-case basis is unworkable and would cause greater resentment. Understandable friction between state and national authorities has arisen when federal courts and agencies have been required to oversee and approve the initial performance of state institutions. Thus, the supervisory mechanics of federal *habeas corpus* jurisdiction and

school desegregation efforts has led to friction quite apart from local resentment generated by the substantive changes. The proposed legislation would not create a setting which would be likely to generate such friction between state and federal institutions.

Congressional intervention in state law enforcement under the cruel and unusual punishment clause has no similar historical warrant. Traditionally, the states have been left free to decide what punishments are appropriate, so long as they are fairly imposed. However, the ultimate and terrible character of capital punishment in human terms is an entirely appropriate factor for Congress to weigh in deciding whether the discrimination claim justifies federal legislative intervention. Discrimination in some parts of the states' criminal process, however insupportable in itself, might not justify congressional response. Bias in traffic courts might not seem a compelling ground for federal legislation. Capital punishment, moreover, has significance beyond its awesome impact on those condemned. The death penalty is the ultimate symbol of the criminal process. To allow this symbol to be stained by the suspicion of race discrimination degrades our constitutional commitment to racial equality.

We believe suspension is also desirable in terms of Article III considerations. The threatened concentration of executions having been created by federal intervention, Congress can appropriately relieve the concentration by a suspension which will give time for permanent means of amelioration to be pursued.

CONCLUSION

We recommend the enactment of S. 1969 and H. R. 8414, amended to include appropriate references to Articles I and III as sources of legislative power in addition to the power of Congress to define the scope of the equal protection clause under section five of the fourteenth amendment. Statistics raise a suspicion which cannot be dismissed without further investigation that racial discrimination accounts for the seemingly undue proportion of blacks and members of other racial minorities who are condemned to die. Bias in the imposition of death sentences is not suited to correction by courts, given intrinsic fact-finding and remedial limitations of the judicial process. Congress, on the other hand, is capable of the investigative and analytical effort necessary in resolving one way or the other the suspicion of discrimination. Moreover, Congress can fashion an appropriately broad remedy should the suspicion prove well-founded.

Congress' power to suspend the death penalty as cruel and unusual punishment is less clear. At least one possible reading of the eighth amendment—that it prohibits punishments which are unusual in the sense of relatively infrequent—would embody a factual standard better suited to legislative than judicial application. Accordingly, we do not recommend that the proposals eliminate the cruel and unusual punishment issue as an additional basis for congressional power, although we recognize the uncertainty of Congress' power to suspend or abolish the death penalty in the states on this ground alone.

We believe Congress should give serious attention to Article III and the necessary and proper clause as a source of legislative power to prevent concentrated executions, a chilling potential consequence of the federal courts' appropriate exercise of Article III powers. While the precise issue is a novel one, we believe existing legislative and judicial precedents support the suspension of capital punishment as a means of remedying a situation brought about in part by the exercise of federal power.

In sum, Congress has the power to enact the legislation which has been proposed to suspend imposition of the death penalty. The legislation itself fulfills a vital need and we urge that it be enacted.

Respectfully submitted.

Sheldon H. Elsen, Chairman; Mark H. Alcott; Michael F. Armstrong; Stephen E. Banner; Donald J. Cohn; Peter M. Fishbein; Peter E. Fleming, Jr.; Robert L. Friedman; Richard A. Givens; George J. Grumbach, Jr.; Arthur M. Handler; Conrad K. Harper; Thomas V. Heyman; Charles Knapp; Arthur H. Kroll; David M. Levitan; Standish F. Medina, Jr.; Eugene H. Nickerson; William B. Pennell; Bruce Rabb; Martin F. Richman; Benno C. Schmidt, Jr.; Thomas J. Schwarz; Hon. Beatrice Shainswit; Brenda Soloff.

MR. ELSÉN. The Association of the Bar of the City of New York under its bylaws is represented by the Committee on Federal Legisla-

tion on pending legislation. We are here not only on behalf of the committee, but on behalf of the association.

As you know, the association of the bar is a group of some 10,000 lawyers. It is the major bar association of the New York City Bar and one of the leading bar associations in the country.

We made a study in some detail of this bill. We are going to talk this morning. I will begin by talking about some of the basic issues. My colleague, Prof. Benno Schmidt, who is the principal draftsman of this report and is the chairman of the subcommittee that prepared it, will analyze the issues of constitutional power that Congress has to enact such legislation.

We think that the problems that the bill addresses itself to are quite serious; that the bill itself constitutes an imaginative response to those problems; that the power of Congress is there; and we are here to urge this committee to report the bills out favorably and to have them enacted before we have a crisis on our hands. And that is what we are going to talk about at the start.

The problem begins with consideration of the fact that since June 2, 1967, the executions of prisoners in death rows in various States throughout the country have been stayed until the determination of the basic issues of capital punishment by the Federal courts, and particularly by the Supreme Court.

There are almost 700 prisoners now sitting on death rows. As you know, the Supreme Court has considered the issue under the doctrine of cruel and unusual punishment. The Court has not yet decided the case. If the Court should determine that the attack which has been made on the constitutionality of capital punishment fails, that the executions would be constitutional, we face a rather serious problem, a wave of executions in large numbers throughout the country.

Now, there is one aspect of this problem besides the numbers which is particularly troublesome. And that is that in our present state of knowledge, there is a very substantial likelihood that many of those who would be executed at this time may very well have been victims of discriminatory application of the laws.

Statistics are very thought provoking and very provoking. For example, a study was quoted in *Maxwell v. Bishop*, 257 Fed. Supp. 710. It shows that for executions in some 16 Southern States and the District of Columbia—and this is over a period of some years—the executions for rape show 43 white defendants and 398 black defendants who have been executed; for robbery, four white and 19 black defendants; for murder, 585 white and 1,231 black; for others, five white and 11 black; or a total of 637 white and 1,659 black defendants executed for those various crimes.

Now, that is well beyond the possibility under the laws of probability that this happened by chance. It is statistically significant. And I must say that the national figures, although not that extreme, are also very troublesome.

For example, between the years 1930 and 1967 of those executed for rape, almost 90 percent were black. Almost 49 percent of the murder defendants executed were black. That is well in excess of national population ratios. It is very troublesome.

Mr. KASTENMEIER. May I interrupt on that point, Mr. Elsen? If it could be shown statistically that sentences of 20 years of more also

leaned heavily statistically on blacks, would that also be a constitutional argument against such sentences?

Mr. ELSEN. Well, Mr. Kastenmeier, I would first say that they would represent different types of issues than those which are before us. What I am saying is that there are two problems that we are going to address ourselves to. And one is what Professor Schmidt is going to discuss in some detail. And that is the one of power.

One of the reasons we are going into these statistics is that they show a sufficient basis for congressional findings that a problem exists to justify the study which is contemplated by the Hart-Celler bill. And therefore, Congress would have power under section 5 of the 14th amendment to authorize a stay pending such a study.

Now, Professor Schmidt is going to develop that in some detail. But what I am saying at the outset just to present the tone of this issue is that the thought of a wave of executions involving perhaps some 700 prisoners against a background of statistics of this sort is a matter that we think would give Congress pause. This is a very serious problem, a problem which we face as a nation and indeed might have international consequences.

Now, the considerations rising from these facts really should be viewed in two lights. And that is why Professor Schmidt and I have divided the presentation. What I am suggesting is a basis for legislative concern. And Professor Schmidt is going to discuss the implications of these facts for questions of constitutional power.

He is going to make an analysis of the problem from the point of view of constitutional law. He is going to go into that somewhat more systematically. But we must start off with the facts that we have—this situation that has been created by the over 4 years of stays of executions; the vast number of prisoners who are sitting on death rows; and secondly, that these prisoners have been sentenced to death against a background of very troublesome statistics showing the imposition of sentences.

And, as I said, Professor Schmidt will talk about the implications of this both with respect to the power of Congress and to the 14th amendment and to the question of the availability of the necessary and proper clause to deal with the problem created in the Federal courts by the exercise of these very significant stays.

Now, whether Congress has power to abolish the death penalty as such absent race discrimination is not the issue presented by these bills. We think that the sponsors of these bills are to be commended for addressing themselves to the very specific and relatively narrow issue facing the country now of this situation.

And it is our view that the question of Congress' power to legislate with respect to the death penalty as such should be initially resolved upon the completion of this study, as indeed the bill contemplates. What we are urging now is that on the basis of the substantial evidence of possible racial factors in the imposition of sentences in a situation of this type that this bill, this moratorium of 2 years, be enacted.

Another type of policy consideration we want to urge you to consider is not well suited to case-by-case adjudication in the courts. In any particular case it is not necessarily relevant to ask what has happened in other cases. As a matter of fact, that is one of the things that

young lawyers are constantly told by judges. And that is the way the system works.

And, indeed, normally you don't take a look on a national basis. The litigants don't normally have the resources to make a broad study of how the death penalty is being imposed in many cases in many jurisdictions throughout the country. That is quite a burden on a defendant, particularly an indigent, but in any event, even on a wealthy defendant.

Now, the body is indeed well qualified to make such a study to which this bill would entrust the job. And that is the Congress. Again, we think that this is particularly a sound and appropriate response that Congress should stay the penalty, so that it, as the party best suited for the job, can do it.

But that consideration also has considerable implications for the question of constitutional power. And I am going to leave that again for Professor Schmidt to put in a context of a systematic analysis of the questions of power.

But just as a matter of policy, it is also important to have Congress do this job because as an institution they are well suited. Also, of course, it is better for a national legislative body to impose this type of stay and make this type of study than to have it raised case by case through habeas corpus in the Federal courts with all of the friction between the various systems that would entail. It is much cleaner.

And it is so much better from the point of view of comity between the judicial systems that this job be done by Congress. Those are the salient considerations.

Professor Schmidt, as I say, will develop the constitutional analysis. But we believe that the salient considerations are rather simple. They are also appalling. The time schedule is a short one. The Court may indeed decide this issue any day now. And we are delighted that you are holding these hearings. We urge you to complete your studies, to report these bills favorably, and then to pass them as soon as possible.

I am going to turn this over to Professor Schmidt now for the constitutional questions, if I may.

Mr. KASTENMEIER. Thank you, Mr. Elsen.

Professor Schmidt, we will be pleased to hear from you.

Professor SCHMIDT. Thank you, Mr. Kastenmeier. I should begin by saying that the only constitutional questions presented by this bill concern the power of Congress to suspend the death penalty in the States. Congress power to suspend the death penalty for Federal crimes is, of course, indisputable.

As to the power to suspend the death penalty in the States, the bills state two grounds for the exercise of that power. The first is the suspicion that Mr. Elsen has discussed, that in fact the actual application of the death penalty in this country since the 1930's, since statistics have been kept, raises at the very least a substantial suspicion that racial discrimination accounts in large part for the pattern in which the death penalty has been inflicted. I want to summarize briefly my views as to that basis for congressional power. The second basis for congressional power is the prospect of a finding by Congress that the death penalty constitutes cruel and unusual punishment. As to that power, for reasons that I will try to summarize, we believe Congress authority is doubtful, assuming as I think we must for purposes

of discussing the question of congressional power, that the Supreme Court refuses to find that the death penalty is a violation of the eighth amendment.

We would suggest that the committee give serious consideration to adding a third basis of power that we have developed in our report. And that is a source of power in article 3 and in the necessary and proper clause of article 1. I will summarize our reasons for believing that those constitutional provisions are also available sources of power for Congress to enact this legislation.

On the question of race discrimination, Mr. Elsen has mentioned the statistics. I don't propose to discuss those in detail. I would point out to the committee that the question of race discrimination arises in the following context.

By and large in this country the death penalty is administered without explicit standards. The Supreme Court has held that the absence of standards in the imposition of the death penalty is not as such a violation of the due process clause. The death penalty is in this country largely a matter of discretionary application. And I think that is highly relevant to the suspicion of race discrimination.

Second, the death penalty is imposed infrequently in a statistical sense. There are no satisfactory studies that I know of that indicate just what proportions of persons who might be given the death penalty are in fact given it. But every factual study that I know of suggests that the proportions are very small. The death penalty operates by and large without standards, and it is inflicted on a very small minority of the defendants upon whom it might be inflicted.

In these circumstances, the fact that the statistics raise a suspicion of racial discrimination is extremely troublesome, because it is obvious, I would think, that a situation where there are no standards and infrequent application presents the prime possibility for the influence of invidious factors.

Now, the statistics that we have, I believe, are quite gross in the sense that they—at least in my own view—do not conclusively make out the proposition that the death penalty has been inflicted on the basis of racial discrimination in this country.

We do not have statistics looking back into the criminal process dealing carefully with the racial breakdown of defendants who are found guilty of capital crimes. Those would be the statistics that one would need, I think, to come to a conclusive judgment that the death penalty is, in fact, imposed discriminatorily. But the statistics that we have at the very least raise a very strong suspicion that race discrimination is the only explanation for the gross disproportions between white and black persons upon whom the death penalty is inflicted.

The only careful effort to make the kind of study necessary for a conclusive finding, a study conducted by Professor Wolfgang of the University of Pennsylvania in Arkansas primarily, tends to confirm the suspicion that race discrimination has been operative, at least in that jurisdiction with respect to rape cases involving a black defendant accused of raping a white woman.

I believe that we should not rely on the courts to deal with this statistical problem. Judges are not statisticians. They have no independent investigative or statistical capability. Moreover, individual

defendants have no resources to conduct the type of study that would be necessary.

It seems to me that under these circumstances Congress is the body in our system that has the capability to resolve the question of race discrimination. As long as a substantial suspicion exists that capital punishment is imposed in a discriminatory fashion, that suspicion has a corrosive impact on a respect for the law, which depends on the sense that criminal law operates in this country in an impartial and fair way.

Mr. KASTENMEIER. Professor, on that point, I am curious as to what one might have to prove. Would it be sufficient to prove if it were the fact that the law had a disproportionate impact on poor people? Would it be enough to say that they were victims of discrimination in the application of the law? In other words, is there some sort of conscious decision with respect to racial discrimination that one would have to show? Or, could one perhaps show that the poor class in America are penalized in the application of the death penalty? Would that suffice to prove discrimination in a constitutional sense?

Professor SCHMIDT. I will respond to your question in two ways. One, a lawyer's response first, from the point of view of whether or not the Supreme Court would uphold the exercise of congressional power to abolish the death penalty or suspend it on the basis of a congressional finding that the death penalty has in fact been imposed discriminatorily. I have no doubt that the Court would give the greatest deference to Congress' fact finding. If Congress finds discriminatory application in fact, it is irrelevant whether the discrimination is found to proceed from a conscious decision by some particular individuals.

Indeed, I think it is probably not too much to say that the Court would practically accept as conclusive a judgment on the statistics. So, in terms of the prospects of judicial review, I think Congress' power would be upheld.

Now, your question goes beyond that, I take it. And that is in exercising its responsibility under the Constitution to enforce the equal protection clause, what kind of a finding need Congress make to satisfy itself? That, I believe, is a hard question to answer in the abstract. I would say, for example, that the statistics which have presently been gathered with respect to rape make out a reasonably conclusive case that racial discrimination in the states in which rape is a capital crime is an important factor.

Wolfgang's study shows, for example, that in Arkansas the probabilities of the proportion of capital defendants falling out as they did on racial grounds was less than 2 in 100. With respect to other capital crimes—the main one, of course being homicide—I think the present statistics are too gross on which to make a judgment.

They show that about half of the people who had been executed since 1930 for homicide have been black or members of other racial minorities. I would think what Congress would want to know is what has been the racial proportion of defendants charged with homicide. That would be the first step in a statistically sound study of the problem.

I am not a statistician. But my understanding is that statistical propositions are hard to prove conclusively one way or the other. I think it is inescapable that any study is going to leave to Congress

a problem of judgment of what the statistics do show. I find it difficult to be more specific.

Mr. KASTENMEIER. It seems that with respect to rape, a statistical case is clearly shown. It is not quite so clear as to other areas, although this may also be the case.

Mr. ELSEN. Congressman, may I just add that I think that Congress has a good precedent for this type of study in the study of the use of literacy tests in voter qualifications. Of course, Congress' finding, which might not necessarily have passed muster in all of the statistical journals, certainly was sustained by the Supreme Court in *South Carolina v. Katzenbach*.

And in addition to the statistics, of course, detailed studies of individual situations were made by the Civil Rights Commission. And I would think that the Congress could very well give thought to the development of such data or the handling of individual cases that would be feasible in conjunction with overall national study of the problem.

The precise mechanics that Congress sets up should be worked out. The immediate problem is to make sure that these executions don't take place while Congress cranks up for this study.

Mr. BIESTER. I am inclined to agree with the chairman. The case with respect to rape has been made out. I am inclined to agree with the witness that the case with respect to other crimes has not been made out. I am wondering what quality predicates there should be in terms of congressional findings which would enable us to go into the State field and require certain results.

My recollection is that in the Civil Rights Act we had a legislative finding that there was in fact discrimination occurring as a result of the use of literacy tests, whereas here we are saying we think, we suspect, we have a reasonable suspicion that there is a problem. And I wonder if that offers the same quality base.

Mr. ELSEN. In the Voting Rights Act of 1965 which abolished literacy tests, Congress specified certain actions that would take place upon certain statistical developments. That is, it would send in voting registrars, an action of a final nature taking place.

Now, here we have a situation where Congress is exercising its power to legislate to preserve the status quo while they are indeed making this study. And that is what we think is a very sensible solution to the problem when we don't have to have the answer. At the end of 2 years, then Congress should determine what should be done.

Now, it may be that Congress would permit some executions to go forth. Professor Schmidt is going to talk about certain situations. But what we are saying here is that you are not making a final determination. You are just preventing a bad situation from going unchecked. We don't know that these kinds of things are subject to much more precise knowledge than we have here today.

Professor SCHMIDT. May I add a word? The literacy test example is a useful one, because, of course, in the original Voting Rights Act of 1965 it reflected a congressional judgment that there were certain areas in the country in which Congress made the supposition that unfair application of literacy tests were fair on their face, but subject to discriminatory application, was the reason for low registration statistics.

In the Voting Rights Act of 1970 Congress prohibited literacy tests throughout the country. It did so not because, I believe, it felt that everywhere literacy tests were administered in an unfair manner. But given the fact that in some major areas of the country discriminatory administration was a reasonable conclusion, in the interest of uniformity and administrative convenience and not having sectional legislation, Congress decided that it makes sense to paint with a broad brush.

Now, I believe that the capital punishment situation is closely analogous. If Congress makes a study in homicide cases and finds out that there are areas in the country in which the statistics do seem to create at least a strong supposition that race discrimination is operative, then in the interest of uniformity it is clear that Congress has power to abolish the death penalty for homicide nationwide. And that would be the correct remedy.

Mr. KASTENMEIER. Would you continue, Professor?

Professor SCHMIDT. Yes. I would like, if I may, to move to the second ground for legislation that the bill mentions, namely the prospect that Congress might find the death penalty to be cruel and unusual punishment, and thereby, a violation of the eighth and fourteenth amendments.

As you know, that issue is now before the Supreme Court. The Court will decide it, I believe, at this term. Of course, if the Court upholds the claim that the death penalty is unconstitutional, this legislative issue will be moot. But if the Court decides that capital punishment is constitutional, the question is whether Congress can, in effect, substitute its judgment for that of the Court on a question such as this one, which seems not to turn on a complicated factual judgment, but rather to turn on a weighing of values and imponderables. The precedents that we now have outlining Congress power to go beyond the Court in enforcing the fourteenth amendment look very doubtful to me at least, as I read them, in supporting congressional power to decide that capital punishment is cruel and unusual.

I think this question is an important one. It seems to me that the major constitutional question which now exists about Congress power and the relationship between the judicial and legislative branches is the degree to which Congress can go beyond the Court under section 5 of the fourteenth amendment.

I would be very reluctant to find the power in Congress to go beyond the Court in this area, if in principle that implied a power in Congress to cut back on what the Court does with respect to other constitutional provisions that by and large reflect a weighing of values and imponderables.

My doubt that Congress has the power under the cruel and unusual punishment provision does not reflect any general view that Congress is not a body with very extensive legislative powers. It rather reflects a concern for the Court, and its independence in the constitutional framework.

Mr. BIESTER. Didn't Congress go to some degree beyond the Court in the 18-year-old vote matter using section 5, giving a richer reading perhaps than Katzenbach and the Court itself was willing later to do and yet achieve a uniform result, because there was a substantial Federal result which the Court did approve. And the States came along

out of the need for uniformity and efficiency. In some instances, I suppose it was not having two voting booths, one for one party and one for another.

The practical result was that while Congress went a little bit ahead of the Court applying section 5, the net practical result was a uniform conclusion.

Professor SCHMIDT. Well, I think that two things should be said about the 18-year-old vote example. First, as a practical matter, the death penalty is not a comparable case. That is to say if Congress abolishes or suspends the death penalty for Federal crimes, there is no reason of administrative convenience that would influence the States to go along. Of course, the voting question is very different as a matter of convenience, because there is joint administration of Federal and State elections.

And second, as you point out, the Court did not sustain Congress' power to enfranchise 18-year-olds with respect to State elections. Although the opinions in that case are many and hard to fathom in some respects, my own view is that the reason the Court did not sustain Congress' power was precisely because it regarded the judgment that Congress had made that 18-year-olds ought to vote as not a judgment that Congress was any better equipped to make than the Court. The judgment did not reflect Congress' better fact-finding capacity or fact-characterizing or weighing capacities. It is rather as Justice Harlan said, "purely a question of values," the weighing of immeasurable and incommensurate values: is the average immaturity of 18 to 21-year-olds a factor that is outweighed by the importance of their having a voice in decisions that affect their lives?

It seems to me that the Court felt this was not a matter as to which it should defer to Congress as a more capable institution. And I think what the Court had in mind was to guard against a principle which would not only give Congress power to ameliorate equal protection problems, but also would enable Congress to reverse decisions by the Court of all kinds.

That, after all, would change the system that we have had since *Marbury v. Madison*.

May I just say one thing further about the eighth amendment question? The prohibition is with respect to unusual punishment as well as cruel punishment. A question exists whether or not unusualness means statistical rarity as such. That is obviously a meaning that the word will bear. The Court has never held one way or the other on that question.

If the Court should find that the prohibition in the eighth amendment applies to unusual punishment in the sense of rarely imposed punishments, then it seems to me that the application of that standard presents a comparable kind of exercise as in the racial discrimination question. Congress is in a better position than the Court to figure out whether the death penalty is so infrequent statistically as to be unusual in the constitutional sense.

Those are the two grounds of power that the bill develops. I should just like to mention briefly a third that has weight with us. That is article 3 and the necessary and proper clause.

The necessary and proper clause gives Congress power to carry into execution not only the legislative powers developed in article 1, but

all of the Federal powers, executive and judicial as well. There have been instances in which Congress has legislated under the necessary and proper clause and article 3.

The stays of execution which now exist are results of Federal judicial power, and the consequence of those stays has been that hundreds of people are now collected on death row. Mass executions might be the consequence of a holding by the Court, an upholding by the Court, of capital punishment if Congress does not act.

It seems to me that Congress has power to prevent that catastrophe from occurring on the grounds that it is a situation which would not exist but for the exercise of Federal judicial power, and that the necessary and proper clause always empowers Congress to remedy evils or difficulties of any kind which result as a consequence of the exercise of Federal judicial power.

We would urge the Committee to give article 3 and the necessary and proper clause careful consideration as another basis for this legislation, a basis which proceeds, really, on the grounds of a rather more simple judgment than the complicated kind of question that the race discrimination issue presents.

That is not to say that we have any doubt about Congress' power under the 14th amendment. It is only that we believe that article 3 in the necessary and proper clause constitutes an alternative source of power.

Mr. KASTENMEIER. Thank you, Professor Schmidt. On that point, what precedent can you cite for the committee where the "necessary and proper" clause has been used to sustain the power of Congress to legislate with respect to article 3 of the Constitution?

Professor SCHMIDT. The main precedent, I am afraid, is a somewhat archaic one in the present situation. But in the mid-19th century when Congress' power under the commerce clause was not given the sweep that the Court now accords it, Congress was upheld in enacting substantive admiralty law, based on the fact that article III gives Federal courts jurisdiction over maritime cases.

And the Court made it quite clear in several cases decided in the 19th century and in the early 20th century that the source of Congress' power to enact the general admiralty law was article 3. The rationale was that because those cases came within the jurisdiction of Federal courts, there was, therefore, a need for a substantive Federal law. Congress could meet the need which arose through the exercise of judicial jurisdiction by enacting substantive law.

There are, of course, many precedents for the proposition that the necessary and proper clause is a grant of power to remedy evils or difficulties which arise because of the exercise of other constitutional powers.

One classic instance of that is the prohibition cases in World War I, where, I think, it is quite possible that the Court would not have upheld Congress' power directly to prohibit the sale of alcoholic beverages in the States. The Court might have regarded that as a matter reserved to States under the 10th amendment.

But once we were in World War I and Congress was exercising the war power for purposes of conscription and a variety of other things, the Court was willing to say that Congress had the power to enact prohibition legislation to remedy the difficulties created by the exercise of the war power.

While there are no precedents that I know of as far as this precise question is concerned, once it is granted that the exercise of Federal judicial power in these capital cases has created an evil and a potential catastrophe, mass executions being in prospect, then it seems to me the cases make it relatively clear that under the necessary and proper clause, Congress could remedy that evil.

A remedy of suspension, I think, happens to be an appropriate remedy under the circumstances, since suspension would afford an opportunity for the State legislative, executive and judicial processes to deliberately consider whether or not they want to continue to have capital punishment.

At the very least, suspension will prevent the immediate blood bath that I believe is a potential catastrophe.

Mr. ELSEN. I would like to add one more thing that I think is worth considering. And that is the Supreme Court case upholding legislation suspending State statutes of limitation with suits that plaintiff might have brought except for the fact that they were prohibited by the Civil War from bringing those suits.

Congress, which normally would not have the power to suspend State statutes of limitation, did so suspend them under the necessary and proper clause. And that exercise of power was upheld by the Supreme Court.

Mr. KASTENMEIER. Thank you. I would like to ask a couple of general questions of you, Mr. Elsen. The association has approved the report of your committee, has it not?

Mr. ELSEN. Under the bylaws of the association, the Committee on Federal Legislation is empowered to speak for the association on pending legislation.

Mr. KASTENMEIER. That is without its express approval.

Mr. ELSEN. Yes. That is because it is a representative body of the Association.

Mr. KASTENMEIER. Did your committee or any other committee consider the question of abolition of capital punishment per se, as distinguished from the suspension of capital punishment, under a moratorium concept?

Mr. ELSEN. Our jurisdiction is to deal with questions of pending legislation. And we have addressed our thinking in our study to the Hart-Celler bill. Our committee would not have jurisdiction to deal with general questions of legal principle of this sort. I do not know of any official position that has been taken on behalf of the association on the general question of capital punishment.

Mr. KASTENMEIER. That is rather interesting. There are other bills pending which propose the abolition of capital punishment, not merely a moratorium.

Mr. ELSEN. Well, we have been particularly struck by the thoughtfulness of this particular approach, because it seems to us to introduce an element of deliberate and rational thinking into this whole question which we think has to be done at this time, before we get to the point where we all come to battle over questions of value.

This is the place where Congress should be able to agree. In order to be able to agree promptly, it ought to be able to develop a basis of fact where the following decision can be as rational as possible.

Mr. KASTENMEIER. You would agree, however, that the concept of the abolition of capital punishment has been around a long time, not only in this country but elsewhere in the Western world?

Mr. ELSEN. That certainly is true.

Mr. KASTENMEIER. I am wondering. The Hart-Celler bill does two things: It presumes that the Court will rule out capital punishment on the constitutional grounds cited or, if not that, then the Hart-Celler bill anticipates legislative abolition at a later date.

Practically speaking, if it didn't do that, indeed, there is very little purpose in having the bill at all.

Mr. ELSEN. I wouldn't necessarily agree with that. Mr. Congressman. It is quite possible that after the record has been fully developed, that there will be certain special situations dealt with differently. For example, the exception that New York has drawn, capital punishment is permitted where there has been killing of correctional officers.

That was the situation where the legislature chose to retain capital punishment on the theory that there would be no other adequate deterrent for those who are in jail for life.

Now, Congress may very well choose to deal with specific situations differently after having completed this study.

Mr. KASTENMEIER. Your committee did not inquire as to the question of deterrence, I take it?

Mr. ELSEN. Do you mean the fundamental question of capital punishment? We are not yet expressing a position on the ultimate question on behalf of the association at this time. I think I would have to say that.

Regardless of what our individual, personal views might be, I would think that what would be of value to you would be what we would have to say in a representative capacity. And in that capacity, we have no position today.

Mr. KASTENMEIER. Suppose that, to avoid the massive executions, which someone called a blood bath, Congress does enact a 20-year moratorium and suppose the 2 years expire. Would we then be either called on to extend the moratorium another 2 years or indeed to wait for the blood bath that follows?

Mr. ELSEN. We don't think that Congress would do that.

Professor SCHMIDT. I don't think that would be the result if the Hart-Celler bill were enacted. Because the courts have had the issue of capital punishment before them continuously since 1967, there have been no executions in the United States since that date. The question has not seemed an immediate one for State political and, indeed, judicial processes as well. Now, the California Supreme Court decision is an important exception, obviously. But I think if the Supreme Court declines to hold that capital punishment is cruel and unusual, that in the foreseeable future that there will be no general judicial attack on the death penalty.

In those circumstances if Congress suspends executions, I think the State political processes will respond and will race up to the judgment that they have to make. I think it is clear that abolition of the death penalty is an apparent worldwide trend. And, indeed, while it has its ups and downs in this country, there is a visible trend toward abolition.

So, I don't believe that the same potential catastrophe would be presented in Congress in 2 years if this suspension were now enacted.

Mr. ELSEN. I certainly would not want my remarks to be interpreted as suggesting that Congress might not choose to abolish the

death penalty. I am simply saying that we are not at this time trying to solve the next case. We are just trying to deal with this particular problem.

Mr. KASTENMEIER. I would like to yield now to the gentleman from Massachusetts.

Mr. DRINAN. Thank you very much for coming.

Mr. KASTENMEIER. The gentleman from Illinois?

Mr. RAILSBACK. May I just ask what your feelings are about any exclusions, amendments to the bills that would provide exclusions, such as murders committed in prison. Do you think that there is any indication that it is a deterrent to provide capital punishment for somebody committing that kind of crime? Or to the killing of a police officer?

Professor SCHMIDT. Well, I believe that nobody is able to prove very much of anything about deterrents. Such statistical efforts that have been made, I think, cast a lot of doubt upon whether or not capital punishment is an effective deterrent. It is kind of an impossible question, I think, to be conclusive about, one way or the other.

Mr. RAILSBACK. Let me just mention that it seems to me that it is the only deterrent in the case of somebody who feels he has to serve the rest of his life in prison.

Professor SCHMIDT. Well, it might be an important deterrent. I think there is enough flexibility, though, and variety in prison routine that there are sanctions that can be imposed even on a person serving a life term. But I think there is an important relation between the exclusions you mentioned as a possibility and the race discrimination problem.

I started out by saying that capital punishment is by and large inflicted without standards. And it is that standardless, discretionary environment that breeds—or is conducive to—discrimination.

Now, specialized exclusions would be in effect very tight standards for the application of the death penalty. If Congress found that the life prisoners might receive capital punishment, it is very unlikely, I think, that that kind of a standard would be imposed in a racially discriminatory manner. And thus, merely putting some standards into the process, I think we have an important antidiscriminatory influence.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The gentleman from Pennsylvania, Mr. Biester?

Mr. BIESTER. Thank you, Mr. Chairman.

I was wondering if we might put at least my thinking in some series here. The feeling is, of course, that if the Court acts in a way to find that the eighth amendment and the 14th amendment solve the problem, then the issue becomes moot.

Mr. ELSEX. Yes.

Professor SCHMIDT. Yes.

Mr. BIESTER. But if the Court decides, however, against that proposition, that tends not only to have an impact on the cases which are presently awaiting disposition, but also has an impact on Congress' power or its predicate to move into the field, does it not?

Professor SCHMIDT. I believe it has an impact on Congress' power to find the death penalty cruel and unusual. It is entirely neutral, it seems to me, on Congress' power to find that it has been administered in a racially discriminatory manner.

MR. BIESTER. So that at least in a general proposition of the death penalty as a whole, it has affected Congress' power to move in the State field by finding in that fashion.

PROFESSOR SCHMIDT. Well, the Court may have foreclosed just one possible ground for abolishing it.

MR. BIESTER. All right. Now, in order for Congress to move if the Court has so found, we will have to have a different predicate, such as racial discrimination, which you have suggested, or article 3 and the necessary and proper clause of article 1, section 8. Is that right?

PROFESSOR SCHMIDT. That is—

MR. ELSÉN. I don't know about the word different. I would like to say that we are urging that those two grounds are indeed the bases upon which Congress may act and should act today. What we were saying is that the decision of the Court would really be neutral in its impact upon the basis of congressional power. The purpose of enacting the Hart-Celler bill—

MR. BIESTER. You are anticipating, perhaps, my last comment. I would like, if we could, to spell this out more clearly. I understand the discrimination predicate. But I would like to have spelled out more clearly the point about article 3 coupled with the necessary and proper clause in article 1. As I gather, what you are saying is that if the result of the Court's opinion or ruling is regarded by the Congress as evil, then the Congress has the right pursuant to article 3 to divest the court from either certain jurisdictions or because it disagrees with or finds the ruling obnoxious, to author its own result with respect to the Court's decision.

PROFESSOR SCHMIDT. I believe, Mr. Biester, that that is not our view. The evil which Congress is correcting is not the Court's judgment on the merits. The evil which Congress would be ameliorating is that which has been created already by the exercise of judicial power in merely staying all executions since 1967 pending resolutions of the various constitutional questions that have been raised.

There have been a variety of them. And in a way, this cruel and unusual question now before the court is perhaps the ultimate, the final constitutional attack, although there are other possibilities, but not so general.

It is not Congress' power under article 3 and the necessary and proper clause to perceive the Court's judgment on the merits as an evil and remedy that evil. That, after all, would constitute a general congressional power to overrule the Court. And I don't think that can be found.

MR. BIESTER. I don't think so either, if we take it seriously.

PROFESSOR SCHMIDT. No. That is not our view at all. Our view is that the stays which the courts have imposed on executions have had the consequences of collecting hundreds and hundreds of prisoners on death row. Lifting those stays all at once—

MR. BIESTER. Who lifts those stays all at once?

PROFESSOR SCHMIDT. The Federal courts. If one supposes that the Supreme Court is going to uphold the death penalty this term, then unless the lawyers for the condemned prisoners can formulate other constitutional attacks on the death penalty, the stays will automatically lift and the executions can proceed.

MR. BIESTER. The stays will automatically lift as the result of the Supreme Court decision?

Professor SCHMIDT. Unless lawyers for the prisoners or lawyers for individual prisoners can present further constitutional issues for adjudication. Then, presumably the Federal courts—well, not presumably—the Federal courts would be obligated to reimpose the stays.

But the cruel and unusual punishment attack on the death penalty is in a way the last general attack that is available. I have not really faced the question of what I would do, were I representing a prisoner on death row. But if the Supreme Court upholds the death penalty, I am not at this point able to think of another general attack on the death penalty that would get me a stay.

I am afraid that would be true of many of the prisoners now on death row. The consequence then is potentially mass executions. That is the evil which I believe Congress can ameliorate by suspension. It is an evil that has been created by the exercise of Federal power, Federal judicial power.

Mr. BIESTER. What you are saying is that if there had not been the stays granted and therefore we did not have the number of prisoners on death row that we do at the present time, if there were no additional stays, if and when the Supreme Court rules for the death penalty, then article 3, section 1 would not give the Congress power to impose this moratorium.

Professor SCHMIDT. I think there has to be an evil which Congress can perceive as having been created by the exercise of judicial power. Once such an evil is perceived and Congress decides to remedy it or ameliorate it, then the necessary and proper clause gives it ample powers to do that. But yes; it is my view that the collection as such is an evil.

Now, it can be argued that without the stays, the same number of prisoners might be executed since 1967. And in an ultimate sense, if the numbers are the same, then there is no evil. But that seems to me not responsive to the human aspects of it.

Imagine the publicity that would be given around the world to the execution within a matter of a month or two of hundreds of prisoners in the United States. It would be gruesome publicity that would accompany that kind of an event. There would be the sense among our people that—it is a psychological reaction, I suppose, in a way—that if hundreds of people are being killed, one just knows that some of them are likely to be victims, either of discrimination or other kinds of injustice. The administration of justice is not perfect. Innocent men and women sometimes are convicted and sentenced to die.

I think all of those are evils which Congress ought to recognize and try to correct. And article 3 and the necessary and proper clause are the tools.

Mr. BIESTER. All right. Is it your opinion that this committee and Congress should move or try to move before the Court rules on that fundamental question?

Professor SCHMIDT. I think it is essential, absolutely essential. Congress cannot sit back and await the Court's judgment, if it is concerned to deal with this problem. No one can get a stay on the ground that there is legislation pending or being considered. Moreover, this is an issue on which Congress ought to act. It is not an issue which Congress should leave to the courts in my judgment.

Congress has a responsibility to face up to it, I believe.

Mr. BIESTER. It may be better for Congress to face this question now before the Court has ruled, on the anticipation that the Court would find a certain way, rather than try to act after the Court has ruled on bases which may be far more fragile than the one we think we have now.

Professor SCHMIDT. I think that is definitely right.

Mr. ELSEN. As a matter of fact, I think that this concern for time or speed in congressional action is an important part of the burden of our song today as, I suppose, are the merits. The time is extraordinarily important.

Mr. KASTENMEIER. The gentleman from New York, Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman. I would like to thank our two witnesses for their constructive suggestions that we buttress our legislation with article 1 and article 3.

Congressman Biester has asked the question that I was going to ask, as to the enormous complications that you gentlemen have suggested would face us if the Court did uphold the constitutionality of capital punishment.

I do think that your position is the correct one, that Congress should act first and avoid these issues. I take it, then, that we could act on both species of legislation before us, both pieces of legislation. And this would be in your judgment the best course of action.

Mr. ELSEN. Yes. Yes, indeed.

Mr. FISH. Thank you.

Mr. KASTENMEIER. The gentleman from Pennsylvania?

Mr. COUGHLIN. I must leave and will defer questions.

Mr. KASTENMEIER. The gentleman from Illinois has one last question.

Mr. RAILSBACK. I am still having trouble following your reasoning with respect to article 3—it is probably me—but anyway, I am having the same trouble as Mr. Biester, I think, here.

You feel, as I understand it, that the “evil” is the Federal court’s actions in staying these executions and causing thereby a buildup of persons awaiting possible executions. Now, if that is your concern and that is also your basis for reference to article 3, I have trouble understanding the reference to article 3, which is the judicial article. You are supporting a moratorium. I don’t see how this justifies your support for the moratorium legislation, for one thing.

Professor SCHMIDT. I think you have asked two different questions or at least I have to respond in two parts. The evil which we see—we use that term in a constitutional sense, as meaning a situation that Congress can perceive and correct—is not an evil in any real sense. It is what the Federal courts had to do, issue those stays.

The stays were justified and the courts should have issued them. The stays are an exercise of article 3 power in its most basic sense, an aspect of the deliberate adjudication by Federal courts of constitutional questions.

The collection of prisoners and, therefore, the potential of mass executions is a result of the exercise of Federal judicial power under article 3. It is clear under the necessary and proper clause that Congress can legislate to deal with problems that are created by the exercise of the Federal power, whether it be Federal legislative power, executive power or judicial power.

Now, the second part of your question is: having perceived the evil and granting that it exists, why is suspension a remedy for the evil? I think the answer to that is one that I tried to indicate before. I think that the political processes in this country have not regarded capital punishment as a question that had to be decided since 1967, since the problem was in the hands of the Federal courts.

If the Supreme Court announces in the current pending case that the death penalty will be upheld by the Court, then I think the political processes will face up to their responsibility to deal with the question.

In order to do that they need time. And a suspension by Congress would give State legislative and executive and judicial processes a chance to consider whether or not at this point in time the death penalty is still justified as a matter of policy.

I myself believe that if that question is confronted on its merits, there will be a great deal of abolition in this country by the States. And therefore, this problem of mass executions will be headed off by suspension. That is a prediction. I have no real knowledge that this will be the case.

Mr. RAILSBACK. I understand. Now, your feeling is, I take it, that we can act using the equal protection clause of the 14th amendment in section 5 of the 14th amendment, insofar as to have application on the States.

Is it your suggestion that in order to have a like effect on the Federal Government, that we must use article I and the necessary and proper clause?

Mr. KASTENMEIER. May the Chair just urge the witnesses to conclude their answers and answer questions as briefly as possible. We have two more witnesses. The hour is getting late.

Professor SCHMIDT. Yes. Article I would be the basis for Congress' power over Federal crimes. And the 14th amendment is not a relevant source of power for that issue. Congress has plenary power over the penalties for Federal crimes.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. Thank you both very much for a most informative and helpful statement this morning. We appreciate your coming.

Mr. ELSÉN. Mr. Chairman, it is always a pleasure to be before this Committee. I always find the discussions are enlightening. And thank you very much for hearing us.

Professor SCHMIDT. Thank you.

Mr. KASTENMEIER. Next, the Chair would like to call Prof. Ernest van den Haag, who is a professor of social philosophy and is also from New York; that is, New York University.

You are most welcome, Professor van den Haag. You have a relatively brief statement, I note. Perhaps you would like to deliver it.

TESTIMONY OF ERNEST VAN DEN HAAG, ADJUNCT PROFESSOR OF SOCIAL PHILOSOPHY, NEW YORK UNIVERSITY

Professor VAN DEN HAAG. I greatly appreciate the opportunity to be heard. And with your permission, I would like to refer briefly to some of the testimony that I have just shared with you and then turn to my own views.

Let me say to begin with that I do not deny that Congress has the power claimed in the two bills pending before your committee. I deny that to exercise that power as suggested by these two bills would be wise.

There are a variety of reasons given for suspending the death penalty or finally eliminating it. One of the reasons offered in the testimony we have just heard is the undenied fact that more blacks are executed than whites. Yet this would suggest discrimination only if it could be shown that fewer whites, equally convicted, are executed. It is not enough to show that more blacks are executed. We would have to show that a higher proportion of convicted blacks are executed. I found no trace of that in the statistics presented.

But if the statistics presented did show discrimination—which I do not think they do—then, that discrimination would be in the distribution of the penalty in question, the death penalty, and would not be inherent in the nature of the penalty. Such discrimination might be equally claimed for all other penalties. The claim would be probably as true, or as false, as it is for the death penalty. It would then be up to Congress not just to suspend the death penalty, but also to suspend the penalty of imprisonment, which is equally discriminatory.

At least, if you look at the statistics, more blacks are proportionately in prisons than whites.

Finally, let me point out that I yield to no one in my esteem for Prof. Marvin Wolfgang. He became famous through his role in the Pornography Commission, the statistics of which I think are just about as bad as can be. But this was not altogether his fault. His study refers to the death penalty for rape in Arkansas not to the death penalty as such.

If he has shown that there is discriminatory application of the death penalty in rape cases in Arkansas, his study says absolutely nothing about homicide cases. If anything would flow from that study, it would be a need, perhaps, for a congressional prohibition of the death penalty in rape cases, not for a congressional prohibition of the death penalty. In rape there can be doubt whether the crime was committed. But not usually in homicide.

You were gracious enough to point out that my statement is so brief that I might as well read it. I shall do so.

I would also like, with your permission, to enter into the record a paper I wrote about the death penalty entitled "On Deterrence and the Death Penalty." May I do so?

MR. KASTENMEIER. The paper you refer to will be made part of the record.

(The paper referred to is at p. 127.)

PROFESSOR VAN DEN HAAG. It is suggested that the death penalty discrimination against the poor and the black, inasmuch as it is more often and unfairly applied to them.

If true—and I shall not deal with arguments for or against the allegation—the suggestion would be nonetheless wholly irrelevant. It concerns the unfair way in which the penalty is distributed, not the fairness or unfairness of the penalty.

Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The vice in this case is not in the penalty but in the process by which it is inflicted. It is unfair to inflict un-

equal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.

Hence, with the reasoning of the bills before you, Congress should suspend all penalties, or none. Or much more reasonably, you should try to correct the judicial processes by which, it is alleged, the penalties are unfairly inflicted on minority groups.

Mr. BIESTER. Excuse me. I wonder if I might interrupt you at that point, because it seems to me that there is a distinction in the nature of penalties between or among a fine or a period of time one spends in prison and the imposition of the death penalty.

We do live in a human society where all of our systems are somewhat flawed. And if we have to say that the death penalty is equal to fines or a brief imprisonment in terms of the degree of fairness which we should be concerned about, I just can't agree with that.

Professor VAN DEN HAAG. I cannot quite discern why you can't, sir.

Mr. BIESTER. Because this is a very final event.

Mr. VAN DEN HAAG. The death penalty is irrevocable. No penalty is reversible, of course. But the death penalty in addition to not being reversible is also irrevocable. And, of course, for this reason, we have to make particularly sure that it is inflicted both sparingly and with great discrimination.

Now, I should be in favor of entertaining any suggestion about what we can do to make sure that it be inflicted only on the guilty party. But nothing flows from what you have correctly said about the penalty itself. Anything you have said has bearing only on the particular care we should take in inflicting that penalty, since it is irrevocable, with fairness, justice, conviction of guilt beyond a reasonable doubt, and so on.

Now, there is one further point implied in what you said. With your permission I would like to return to this a little later; namely, the possibility of convicting innocent people despite every effort to avoid that. This is, of course, something we have to consider. If you will permit me, I will come to that in just a moment.

The second suggestion in the bills before you is that the death penalty is unusual within the constitutional meaning of that term. Now obviously, the writers of the Constitution did not mean to exclude the death penalty which certainly was usual in their day.

But in the last 10 years, although still imposed fairly frequently by the courts in many States, the death penalty has not been applied often, owing to judicial reviews and in some cases to the intervention of Governors. These activities have been the cause, and not the effect of the nonapplication or unusualness.

The judiciary or the political office holders who by their activities have made the death penalty "unusual" cannot thereupon turn around and use the unusualness which they have produced as an argument to ban or suspend the penalty because it has become unusual. They have made it so.

To argue thereupon that the death penalty should be suspended or abolished is clearly to parody the intent of the Constitution. That intent was to exclude penalties that an eccentric judge might impose and which would not usually be imposed for the crime involved. Or, penalties which have not been imposed by common consent for a lengthy period. I find no such common consent in this country. Or,

finally, penalties newly legislated which are contrary to our legal tradition. Certainly, this would not apply here either.

And if I may go back for a moment to the possibility of "mass executions," I would correct the previous witness. The executions in question would be many executions, not mass executions, as that term is usually understood.

As a matter of fact, if it were put to a referendum in any of the States where it has been abolished, it is my guess that the majority would be in favor of retention of the death penalty. But I certainly think it would be a good idea to have such a vote.

It is also suggested that the death penalty is cruel in the constitutional meaning of that term. Standards of cruelty vary historically. There is, however, no evidence to my knowledge that the majority of Americans now regard the death penalty as cruel.

Death, and the expectation of death are certainly natural phenomena. They cannot be regarded as cruel within the constitutional meaning of the term.

What can be regarded as cruel is a particularly painful way of inflicting death. And I take it that is what the Constitution might have had in mind, a particularly cruel way of punishing a person or a particularly undeserved death, which we usually regard as cruel.

The death penalty meets neither of these criteria and cannot be regarded as "cruel" therefore.

Let me turn from the first bill, H.R. 8414, to include now the second bill, H.R. 3243.

The general purposes of the death penalty are (1) justice. It may well be that failure to impose the death penalty will outrage the sense of justice of the community so as to weaken respect for law. If a life sentence is substituted, it would mean that the relatives of a murder victim will have to support the murderer through their taxes for the rest of his life. I can't imagine that they would welcome this.

A second general purpose of the death penalty is deterrence of others. There is a great deal of confusion on this issue. And I cannot flatter myself that I will be able in this brief appearance to clear it up. But I would like to make a few suggestions.

All penalties—including fines, prison sentences and the death penalty—are deterrent roughly in proportion to their severity, all other things being equal. Were that not the case, we would certainly not have varied penalties but might impose a uniform penalty of \$5 for any crime whatsoever. We impose penalties roughly differentiated, because we feel that crimes of different gravity deserve different punishment, both in terms of justice and in terms of their importance as deterrents.

The only question before this committee is whether the severity added by the death penalty adds enough deterrence to warrant inflicting it. In practical terms the question is whether potential murderers are deterred by the threat of the death penalty who would not be deterred by the threat of a life sentence. That is, I think, the basic and essential question.

Those who feel that the death penalty has no additional deterrent effect rest their case on two arguments.

First, they contend that statistics do not clearly show a special deterrent effect of the death penalty. I think this is correct. It must be noted,

however, that there are no statistics showing a clear deterrent effect of any penalty. Nonetheless, it is generally felt, and reasonably so, that a more severe penalty is likely to be more deterrent than a less severe one, all other things being equal. All other things seldom are equal. Therefore, a strict demonstration of deterrence is unlikely to be forthcoming.

Statistics, whether they do show a rise of capital crimes after abolition (some statistics do) or not (some statistics do not), are not helpful. If a rise of capital crimes has occurred, it may have been due to factors other than abolition. If a decline has occurred, it might have been greater had the death penalty been retained. (The same is true for any other penalty.)

The absence of proof for the additionally deterrent effect of the death penalty must not be confused with the presence of proof for the absence of this effect. On the basis of the statistics available, no logical conclusion one way or the other can be reached. It cannot be proven that the death penalty is additionally deterrent; it cannot be proven either that it is not.

With your permission I want to repeat this sentence, because it seems to me crucial to the point I am trying to make: The absence of proof, which I concede, for the additionally deterrent effect of the death penalty must not be confused with the presence of proof for the absence of this effect.

The second argument against the death penalty usually offered is that the overwhelming number of capital crimes are acts of irrational passion committed among acquaintances and relatives and are unlikely to be influenced by any threatened penalty. Many of these acts, it is suggested, are committed by somewhat irrational persons.

If the data be true the argument based on them is, nonetheless, without merit. If most capital crimes are committed by irrational persons, chances are that rational persons have been deterred so far by the death penalty, and would no longer be so deterred if it were abolished.

No penalty can deter the irrational, perhaps. But penalties do influence those who are rational enough to be influenced. In this respect the data suggest the death penalty has been very effective, precisely because very few murders are committed by rational persons.

Since we do not know for certain whether or not the death penalty adds deterrence, we have in effect the choice of two risks.

Risk 1.—If we execute convicted murderers, without thereby deterring prospective murderers beyond the deterrence that could have been obtained by life imprisonment, we may have vainly sacrificed the life of the convicted murderers.

Risk 2.—If we fail to execute a convicted murderer whose execution might have deterred an indefinite number of prospective murderers, our failure sacrifices an indefinite number of victims of future murderers. The lives of these victims could have been spared had the convicted murderer been executed.

Let me paraphrase this once more. The statistics are such that we simply are confronted with two risks. We may execute without thereby adding to deterrence and vainly sacrifice the life of the executed murderer. But if we fail to execute, we may have failed to add the deterrent that might have prevented prospective murderers from engaging in murder. We may therefore have been sacrificing the lives of victims who might have been spared, had we executed the convicted man.

If we had certainty, we would not have risks. We do not have certainty. If we have risks, and we do, I would rather risk the life of the convicted man than risk the life of an indefinite number of innocent victims who might survive if he were executed.

So, I urge you neither to suspend or to abolish the death penalty.

I will now return to your question, Mr. Biester. I think we have to assume that, since the law is administered by frail human beings, errors will be made. Therefore, possibly some innocent people will be executed. We have to ask ourselves whether the rules and penalties that lead to this, such as the death penalty, on the whole save more lives or sacrifices more innocent lives compared to alternative rules.

From the reasoning that I have just offered to you, it should be clear that I am convinced that even if some innocent persons were so executed, it leads to a gain in innocent lives, because fewer innocent victims would be executed by murderers, so to speak. The practice of surgery, or automobile traffic, often analogous, both unavoidably sacrifice some innocent lives, but lead to a net gain.

Thank you.

Mr. KASTENMEIER. Thank you, Professor van den Haag. I have some questions with respect to the latter point you make. I can see how people might differ, but we do have at least some general test. For example, my State of Wisconsin has no capital punishment and has not had for well over a century. We have a low homicide rate.

Perhaps statistically. I cannot presently justify this statement, but I believe that we will not find more rational murderers versus irrational murderers in Wisconsin by virtue of that fact that there is a jurisdiction next door with capital punishment.

So, I am not convinced at all that what seems rather logical in terms of your explanation is a matter of fact borne out by experience.

Professor VAN DEN HAAG. Mr. Chairman, I suggest that the amount of violence differs in each group, and that the penalty inflicted, be it a death penalty or any other penalty you might mention is likely to have only a marginal influence.

In a very violent society if you impose the death penalty, you are likely to reduce violence to some extent over what might have been without that penalty, but it still would be much higher than the less violent society. Factors that lead to crime are only marginally influenced by the types of penalty imposed.

My suspicion is that in Midwestern States, the homicide rates tend to be somewhat lower traditionally than, say, in the Southern States, and those in the far western States for a great variety of reasons, quite independent of the penalty imposed.

Even if you were to point out that the rate of capital crimes is lower in Wisconsin now, for instance, than it might have been before the abolition of the death penalty—which I don't know—I would have to point out that if you had kept the death penalty, the rate of capital crime might be still lower.

The death penalty would have a marginal influence on a lowering of the crime rate, which might vary due to all kinds of things. In Southern States at one time, for example, the rate of homicide was influenced by the cotton price. If the cotton price went down, the homicide rate went up, regardless of penalties. There could be many other things.

I would not be so bold as to say that in Italy the homicide rate is declining because divorce has been introduced, which does give alternative ways of dissolving a marriage. There are many, many such factors, economic and social, that will influence capital crime.

Mr. KASTENMEIER. Professor van den Haag, let me ask you a more general question, because clearly you are interested in an overview of the problem in the social sense.

One of our witnesses said as follows in his testimony :

A very recent report by the Secretary General of the United Nations concludes that those countries which retained the death penalty report that in practice that is only exceptionally now applied. And frequently the persons condemned are later pardoned.

It goes on to say :

Legal abolitions have been sharply on the upswing, particularly in countries which share inheritance with our own. England abandoned the death penalty for murder in 1969, following a 5-year moratorium period, and now maintains capital punishment only for a few obscure defenseless crimes. Canada is in the middle with a 5-year moratorium. Western Europe is overwhelmingly abolitionist, with only France and Spain retaining the death penalty.

And he concludes :

It is an evident fact that capital punishment will be abolished in the United States within relatively a few years. Abolition may come in the year 1972 or 1980 or the year 2000 or 2050. But as surely as day follows night, it will come.

He says that it is foolish to turn one's back on the march of time and refuse to see what the world's evolution and our own make undeniable. What is your comment on that? What do you think of it as a cultural, historical concept?

PROFESSOR VAN DEN HAAG. It seems very typical coming from the source from which it comes. It is a totally fallacious argument. Suppose the Secretary General of the United Nations reported Nazism is the way of the future, that everywhere Jews are being killed, and that it is therefore unavoidable that they will be killed in the United States, too. Had he correctly made this prediction and had he correctly described the trend of the times, that would not in any way have affected my moral conviction that it is wrong to kill Jews, nor would it lead you to introduce legislation to do so.

Similarly, the prediction of the Secretary General and his statement of fact—by the way it is not quite correct, but we will let that go—that the death penalty is in many places being abolished, does in no way affect my convictions that we should retain it; it seems irrelevant.

Mr. KASTENMEIER. I am going to yield to the gentleman from Massachusetts.

Mr. DRINAN. I have just one short question, because we do want to hear Dean Pollak.

In the event, professor, that it was shown statistically that capital punishment did not deter, would you still be in favor of it?

PROFESSOR VAN DEN HAAG. May I answer that in two parts? In that event I would have to say that the argument in favor of the death penalty flowing from deterrence has been—

Mr. DRINAN. Therefore, you would be against it.

PROFESSOR VAN DEN HAAG. Wait just a minute. I did not offer another argument, because I thought that it was not necessary and didn't want

you to spend time on it. There is another argument in favor of the death penalty from the viewpoint of justice, which would not be affected by any reasoning of the deterrence. You see, it seems to me that it would be—let me briefly explain what I mean. Penalties are inflicted for a variety of reasons. But deterrence and justice are two independent reasons. Let me explain that they are independent by giving you the following analogy.

If I were to show that we could achieve the deterrent effect of all penalties by not punishing the guilty person, but by punishing an innocent bystander, that this would be from a deterrent viewpoint more effective than punishing the guilty person, I don't think that either you or I would agree to punish the innocent bystander. It follows that our infliction of penalties does not just intend the utilitarian purpose of deterring others, but also intends to punish the guilty and not the innocent and to punish the guilty relative to the gravity of the crime.

Hence, if we disregard the deterrent effects, I would still have to consider the case for the death penalty in terms of justice. I thought that this committee was more interested in deterrence. That is why I didn't mention this.

MR. DRINAN. You have a different conception of justice than I might have. But thank you very much, Professor.

PROFESSOR VAN DEN HAAG. I am not sure. I would hate to have a different conception of justice from yours. So, may I ask you, would you be in favor, if from a utilitarian viewpoint it can be justified that it would be more effective in terms of deterrence? Would you be in favor of inflicting pain or punishment on innocent persons?

MR. DRINAN. I am not prepared to answer that right now.

PROFESSOR VAN DEN HAAG. If you are not, then we have the same conception of justice. If you are, then we do have different conceptions.

MR. KASTENMIER. The gentleman from Illinois.

MR. RAILSBACK. I want to welcome Dr. van den Haag. He may not remember this, but he and I attended the public affairs conference at Kenyon College about a year ago, which I enjoyed very much. It was very interesting.

You indicate that—or you seem to indicate that—you recognize there might be discriminatory applications of not just the death penalty, but also of other penalties, which I am concerned about, too. I think that right now there is some work being done to try to make more uniform our sentencing procedures and so forth.

But I am troubled very much by what some of the statistics seem to indicate, for instance, concerning people who have been found guilty of rape. You look at the figures and you see that, as for the death penalty for something like that, between 80 and 90 percent of the people who have been executed have been black.

To me it seems that those statistics are almost per se indicative of the unequal application of the death penalty. My own feeling is that I don't see how we can wait to clear up this very awkward and bad system of sentencing, when we know that it is being applied discriminatorily.

How do you feel about that? Maybe you didn't know that.

PROFESSOR VAN DEN HAAG. I should be in favor—I did not go into this, but I should be in favor of applying the death penalty exclusively to homicide and not to any other crime. I do agree with you,

although I think the statistical proof is lacking. Nonetheless, the evidence that we have certainly suggests that the death penalty in rape cases is applied quite unequally.

Now, I think even if it were applied equally, I still should oppose it. It seems to me that the death penalty is an appropriate penalty only in the case of homicide. So, if the Congress wishes to try to legislate a bill to correct this and limit the death penalty to capital crimes, I certainly would support that. There may be cases of discrimination in noncapital crimes, but not so much in capital crimes.

Mr. RAILSBACK. Does it trouble you that a Loeb and Leopold can hire a Clarence Darrow and maybe beat the death penalty, when you have some either poor white or poor black who isn't able to get that type of representation and, as a result, is executed?

Professor VAN DEN HAAG. It would trouble me if ever I find a person executed that shouldn't be. I am not sufficiently conversant in the *Loeb* and *Leopold* case to know whether they should have been executed or not. But I do not think that at this time legal representation of people charged with capital crimes is as bad as you seem to think. In fact, the representation here is much better than in lesser crimes.

A poor man, or a black man, charged with a lesser crime may not be legally well represented. If he is charged with a capital crime these days, I think he gets excellent legal talent. And I don't think that the legal talent available to him and the avenues of appeal available to him are any less good than that of a richer person.

Mr. RAILSBACK. I think we disagree on that.

Professor VAN DEN HAAG. May I make one suggestion? If you do disagree—and perhaps you know more about the facts than I do in this case—let me suggest that the solution would be to pass legislation to make sure of better legal representation for the poor and the black. It has nothing to do, once more, with the penalty inflicted, but merely with whether it might be unjustly inflicted.

And if you think it is unjustly inflicted because the poor and the black are not represented by good legal talent, then I think that it should be possible to pass legislation to make that legal talent available.

Mr. RAILSBACK. Let me say that your arguments would be much more persuasive on me if we were able overnight to achieve the necessary remedies to our criminal justice system. But I think that is, unfortunately, absolutely impossible. This is just one aspect of it.

I see the problems of uniformity in sentencing, which we live with. In other words, I think that we have to attack all of these other problems that you are also concerned with. And it is going to take time. It bothers me that we may be executing people in the meantime on a very uneven, discriminatory basis.

Professor VAN DEN HAAG. I wonder why you have so little confidence both in the State legislatures and in the Governors, who will ultimately be able, if they feel as you do, to suspend any penalties they wish.

Mr. RAILSBACK. I think, Doctor, that the American people have been extremely apathetic. I think I am to blame. I think all of us are to blame. But it is a fact of life that this is true. We don't care about our prisons. We don't care about the people in them. I really believe that.

Mr. KASTENMEIER. The gentleman from Pennsylvania.

Mr. BIESTER. I wonder if I might ask a question which maybe does not go to deterrence, but may go to the question of the death penalty

as an institution. To what extent is the death penalty a survival of atavistic ritual sacrifice which man has engaged in over a long span of time for the purpose of purgative or cathartic results?

PROFESSOR VAN DEN HAAG. I do think it has some such effect. Think if, say, an Eichmann could not have been executed, the psychological effect on those who felt justly injured by his actions would have been very bad. So, I think that it was for the sake of the Jewish community that he had to be executed, although there was, in my opinion, no precedent in law for trying him. At the time it was *ex post facto* law.

In any case I would justify that there is a basis in the need for social solidarity: and the psychological factors that you mentioned are valid, I cannot say to what extent. There is no way of quantitative determination there. But I do say that one of the rationales for any penalization, particularly the death penalty, is the feeling that we all have that a man who committed a crime, who violated a rule that we, too, might have been tempted to violate at some time, should suffer for it. Otherwise, we would have to say, "Why do we keep to the rule, when he gets away with not keeping it."

In fact, in a very general sense, one of the bad things about the criminal justice system at the present time is that very few crimes are being punished, no more than about 3 percent of all crimes committed. And they are very often punished considerably more leniently than the law requires because of plea bargaining and so on.

MR. BIESTER. My poetics are a bit rusty. But I think that Aristotle tells us that tragedy is more cathartic the more we are excited to pity and fear. In other words, therefore, the catharsis might be more complete if we discovered that the victim that we sacrificed was innocent.

PROFESSOR VAN DEN HAAG. It might be a good esthetic argument for executing innocent people. But I think that it needs no argument. We do so unavoidably whether we like it or not.

MR. BIESTER. I wouldn't urge it at all.

PROFESSOR VAN DEN HAAG. Let me point out that the excitement of pity and fear occurs in any case. The old saying, "There but for the grace of God go I," said about the convicted man, remains true.

I am a psychoanalyst in private practice. But I will not rely on what confidence I have in this. Yet we all have in us impulses that may lead us to commit crimes. We all have to struggle in one way or the other with the help of society to restrain these impulses. And part of our ability to restrain these impulses lies in the penalization imposed by society on those convicted of crimes. It seems to me that if the crime consisted of the taking of a life, the appropriate penalty is the loss of life.

MR. KASTENMEIER. The gentleman from New York.

MR. FISH. Doctor, in your prepared testimony you get to objection No. 3 to the death penalty. As to what can be regarded as cruel, you say "(b) a particularly undeserved death." The word that bothers me is "undeserved." I take it that this stems from your concept of justice, rather than deterrence as the basis for this. Could you elaborate on that word for us?

PROFESSOR VAN DEN HAAG. Yes. I think it was a badly chosen word. I should have said that the general sentiment is that "cruel" is either unexpected or undeserved. We will say, for instance, that if a young man dies of an accident or sudden illness, that the death was particu-

larly cruel. But we may not say of an elderly man who lived a full 80 years.

Now, both men may dislike leaving life. But what you mean by cruel is that it was unexpected. And in a way, one feels that it was undeserved. Since it was unexpected, one does not understand why it happened. We also feel, of course, that a death is cruel if a man is innocent. He has committed no particular crime that we feel deserves punishment. He is punished. The punishment is the same when inflicted on a person regarded as innocent. Then it is regarded as cruel.

I am mainly trying to express the ways that "cruel" is usually used. It is used; that is, to mean the infliction of pain that is regarded as undeserved or unexpected. And I tried to point out here that in the case of the death penalty, since a person who commits homicide can expect to be so punished and since he is generally felt to deserve that, we cannot speak of cruel in the commonsense of the word.

Mr. FISH. Doctor, you are saying that if most capital crimes are committed by irrational persons, the chances are the rational persons have been deterred by the death penalty and would no longer be so deterred if it were abolished. This has been brought out by other witnesses.

Part of the reason for the moratorium is to give time to go into such questions as alternative deterrents. And since we are talking here about rational people, do you have any views as to alternative deterrents to rational people, other than the death penalty?

PROFESSOR VAN DEN HAAG. It seems to me that the very fact that some people feel deeply upset about the death penalty indicates that it is generally regarded as a penalty of a different and stronger order than any deterrent that we could think of. And I so regard it myself.

As you pointed out before, the death penalty is the only irrevocable penalty. If you sentence a man to life, whatever you mean by that, even if you mean literally life, nonetheless that man enters the prison and being in prison, still retains a hope of sometime being released. As long as there is life, there is hope.

He expects the unexpected will happen. He will be released. If a man faces death, he knows that absolutely nothing can release him from that penalty. Therefore, the threat of that penalty is far more severe than that of any other. And I do not really think that there is an alternative.

Let me point out that our penalties, generally speaking, have neither decreased nor increased in severity. But as you are certainly all aware, the amount of violence, and particularly, the amount of violent crime being committed has steadily increased. Let me also point out, for instance, that in England, in which the death penalty has been abolished—and I wouldn't say that this is a result—but nonetheless coincidentally, since abolition of the death penalty, the amount of violent crimes, such as armed robbery, homicide, and shooting of policemen, has considerably increased.

The statistics on this matter have been very slightly cooked, I think, by the home office. But I think if you analyze them carefully, this is the inescapable conclusion. And I should be delighted to systematically present it to this committee if you wish.

Now, I would not say that we could conclude from this that the abolition of the death penalty was the cause of that. We can never say that unfortunately, because there are too many variables that may

play a role also. But I would look with a great deal of skepticism to any alternative for the death penalty. I do not think any other penalty that we could conceivably inflict could have the deterrent effect of the death penalty.

Mr. FISH. Doctor, I think the thing you just expressed is part of the rationale for your "risk 2," that our failure to maintain the death penalty may result in an invitation to the death of several others.

We have received testimony that only one person out of 12 or 15 convicted of a capital crime actually was executed. It would seem to me that "Risk Two" would be a lot more valid if we were executing everybody who was found guilty or who was convicted of a capital offense. But we are not. So, the odds favor you; in other words, even if you are convicted, you probably won't be executed.

How does that—

Professor VAN DEN HAAG. I think you are suggesting that criminals are to some extent gamblers and consider the odds. You are quite correct. Nonetheless, let me point out that there is a great difference between the murderer facing the risk of the death penalty and the murderer being entirely sure that there will be no death penalty.

Now, you may be quite right that the death penalty would be more effectively deterrent if a greater proportion of convicted murderers were actually executed. But the mere fact that some are executed means that the man who contemplates murder knows that he faces that possibility. Whereas, were it abolished, he would know for certain that the most he can face is life imprisonment.

Mr. FISH. Thank you. I have no further questions.

Mr. KASTENMEIER. Thank you, Professor van den Haag, for a most interesting and provocative discussion of this whole question. We are grateful to you for your appearance today.

Professor VAN DEN HAAG. Thank you very much for the opportunity of being here.

(Professor van den Haag's paper "On Deterrence and the Death Penalty" follows:)

ON DETERRENCE AND THE DEATH PENALTY

ERNEST VAN DEN HAAG

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(This article is a revision of one which appeared originally in *Ethics*.)

I

If rehabilitation and the protection of society from unrehabilitated offenders were the only purposes of legal punishment the death penalty could be abolished: it cannot attain the first end, and is not needed for the second. No case for the death penalty can be made unless "doing justice," or "detering others," are among our penal aims.¹ Each of these purposes can justify capital punishment by itself; opponents, therefore, must show that neither actually does, while proponents can rest their case on either.

Although the argument from justice is intellectually more interesting, and, in my view, decisive enough, utilitarian arguments have more appeal: the claim that capital punishment is useless because it does not deter others, is most persuasive. I shall, therefore, focus on this claim. Lest the argument be thought to be unduly narrow, I shall show, nonetheless, that some claims of injustice rest on premises which the claimants reject when arguments for capital punishment are derived therefrom; while other claims of injustice have no independent standing: their weight depends on the weight given to deterrence.

¹ Social solidarity of "community feeling" (here to be ignored) might be dealt with as a form of deterrence.

II

Capital punishment is regarded as unjust because it may lead to the execution of innocents, or because the guilty poor (or disadvantaged) are more likely to be executed than the guilty rich.

Regardless of merit, these claims are relevant only if "doing justice" is one purpose of punishment. Unless one regards it as good, or, at least, better, that the guilty be punished rather than the innocent, and that the equally guilty be punished equally,² unless, that is, one wants penalties to be just, one cannot object to them because they are not. However, if one does include justice among the purposes of punishment, it becomes possible to justify any one punishment—even death—on grounds of justice. Yet, those who object to the death penalty because of its alleged injustice, usually deny not only the merits, or the sufficiency, of specific arguments based on justice, but the propriety of justice as an argument: they exclude "doing justice" as a purpose of legal punishment. If justice is not a purpose of penalties, injustice cannot be an objection to the death penalty, or to any other; if it is, justice cannot be ruled out as an argument for any penalty.

² Certainly a major meaning of *summum iusque tribue*.

Consider the claim of injustice on its merits now. A convicted man may be found to have been innocent; if he was executed, the penalty cannot be reversed. Except for fines, penalties never can be reversed. Time spent in prison cannot be returned. However a prison sentence may be remitted once the prisoner serving it is found innocent; and he can be compensated for the time served (although compensation ordinarily cannot repair the harm). Thus, though (nearly) all penalties are irreversible, the death penalty, unlike others, is irrevocable as well.

Despite all precautions, errors will occur in judicial proceedings: the innocent may be found guilty;³ or the guilty rich may more easily escape conviction, or receive lesser penalties than the guilty poor. However, these injustices do not reside in the penalties inflicted but in their maldistribution. It is not the penalty—whether death or prison—which is unjust when inflicted on the innocent, but its imposition on the innocent. Inequity between poor and rich also involves distribution, not the penalty distributed.⁴ Thus injustice is not an objection to the death penalty but to the distributive process—the trial. Trials are more likely to be fair when life is at stake—the death penalty is probably less often unjustly inflicted than others. It requires special consideration not because it is more, or more often, unjust than other penalties, but because it is always irrevocable.

Can any amount of deterrence justify the possibility of irrevocable injustice? Surely injustice is unjustifiable in each actual individual case; it must be objected to whenever it occurs. But we are concerned here with the process that may produce injustice, and with the penalty that would make it irrevocable—not with the actual individual cases produced, but with the general rules which may produce them. To consider objections to a general rule (the provision of any penalties by law) we must compare the likely net result of alternative rules and select the rule (or penalty) likely to produce the least injustice. For however one defines justice, to support it cannot mean less than to favor the least injustice. If the death of innocents because of judicial error is unjust, so is the death of innocents by murder. If some

³ I am not concerned here with the converse injustice, which I regard as no less grave.

⁴ Such inequity, though likely, has not been demonstrated. Note that, since there are more poor than rich, there are likely to be more guilty poor; and, if poverty contributes to crime, the proportion of the poor who are criminals also should be higher than that of the rich.

murders could be avoided by a penalty conceivably more deterrent than others—such as the death penalty—then the question becomes: which penalty will minimize the number of innocents killed (by crime and by punishment)? It follows that the irrevocable injustice, sometimes inflicted by the death penalty would not significantly militate against it, if capital punishment deters enough murders to reduce the total number of innocents killed so that fewer are lost than would be lost without it.

In general, the possibility of injustice argues against penalization of any kind only if the expected usefulness of penalization is less important than the probable harm (particularly to innocents) and the probable inequities. The possibility of injustice argues against the death penalty only inasmuch as the added usefulness (deterrence) expected from irrevocability is thought less important than the added harm. (Were my argument specifically concerned with justice, I could compare the injustice inflicted by the courts with the injustice—outside the courts—avoided by the judicial process. *I.e.*, “important” here may be used to include everything to which importance is attached.)

We must briefly examine now the general use and effectiveness of deterrence to decide whether the death penalty could add enough deterrence to be warranted.

III

Does any punishment “deter others” at all? Doubts have been thrown on this effect because it is thought to depend on the incorrect rationalistic psychology of some of its 18th and 19th century proponents. Actually deterrence does not depend on rational calculation, on rationality or even on capacity for it; nor do arguments for it depend on rationalistic psychology. Deterrence depends on the likelihood and on the regularity—not on the rationality—of human responses to danger; and further on the possibility of reinforcing internal controls by vicarious external experiences.

Responsiveness to danger is generally found in human behavior; the danger can, but need not, come from the law or from society; nor need it be explicitly verbalized. Unless intent on suicide, people do not jump from high mountain cliffs, however tempted to fly through the air; and they take precautions against falling. The mere risk of injury often restrains us from doing what is

otherwise attractive; we refrain even when we have no direct experience, and usually without explicit computation of probabilities, let alone conscious weighing of expected pleasure against possible pain. One abstains from dangerous acts because of vague, inchoate, habitual and, above all, pre-conscious fears. Risks and rewards are more often felt than calculated; one abstains without accounting to oneself, because "it isn't done," or because one literally does not conceive of the action one refrains from. Animals as well refrain from painful or injurious experiences presumably without calculation; and the threat of punishment can be used to regulate their conduct.

Unlike natural dangers, legal threats are constructed deliberately by legislators to restrain actions which may impair the social order. Thus legislation transforms social into individual dangers. Most people further transform external into internal danger: they acquire a sense of moral obligation, a conscience, which threatens them, should they do what is wrong. Arising originally from the external authority of rulers and rules, conscience is internalized and becomes independent of external forces. However, conscience is constantly reinforced in those whom it controls by the coercive imposition of external authority on recalcitrants and on those who have not acquired it. Most people refrain from offenses because they feel an obligation to behave lawfully. But this obligation would scarcely be felt if those who do not feel or follow it were not to suffer punishment.

Although the legislators may calculate their threats and the responses to be produced, the effectiveness of the threats neither requires nor depends on calculations by those responding. The predictor (or producer) of effects must calculate; those whose responses are predicted (or produced) need not. Hence, although legislation (and legislators) should be rational, subjects, to be deterred as intended, need not be: they need only be responsive.

Punishments deter those who have not violated the law for the same reasons—and in the same degrees (apart from internalization: moral obligation) as do natural dangers. Often natural dangers—all dangers not deliberately created by legislation (e.g., injury of the criminal inflicted by the crime victim) are insufficient. Thus, the fear of injury (natural danger) does not suffice to control city traffic; it must be reinforced by the legal

punishment meted out to those who violate the rules. These punishments keep most people observing the regulations. However, where (in the absence of natural danger) the threatened punishment is so light that the advantage of violating rules tends to exceed the disadvantage of being punished (divided by the risk), the rule is violated (*i.e.*, parking fines are too light). In this case the feeling of obligation tends to vanish as well. Elsewhere punishment deters.

To be sure, not everybody responds to threatened punishment. Non-responsive persons may be a) self-destructive or b) incapable of responding to threats, or even of grasping them. Increases in the size, or certainty, of penalties would not affect these two groups. A third group c) might respond to more certain or more severe penalties.⁵ If the punishment threatened for burglary, robbery, or rape were a \$5 fine in North Carolina, and 5 years in prison in South Carolina, I have no doubt that the North Carolina treasury would become quite opulent until vigilante justice would provide the deterrence not provided by law. Whether to increase penalties (or improve enforcement), depends on the importance of the rule to society, the size and likely reaction of the group that did not respond before, and the acceptance of the added punishment and enforcement required to deter it. Observation would have to locate the points—likely to differ in different times and places—at which diminishing, zero, and negative returns set in. There is no reason to believe that all present and future offenders belong to the *a priori* non-responsive groups, or that all penalties have reached the point of diminishing, let alone zero returns.

IV

Even though its effectiveness seems obvious, punishment as a deterrent has fallen into disrepute. Some ideas which help explain this progressive heedlessness were uttered by Lester Pearson, then Prime Minister of Canada, when, in opposing the death penalty, he proposed that instead "the

⁵ I neglect those motivated by civil disobedience or, generally, moral or political passion. Detering them depends less on penalties than on the moral support they receive, though penalties play a role. I also neglect those who may belong to all three groups listed, some successively, some even simultaneously, such as drug addicts. Finally, I must altogether omit the far from negligible role problems of apprehension and conviction play in deterrence—beyond saying that by reducing the government's ability to apprehend and convict, courts are able to reduce the risks of offenders.

state seek to eradicate the causes of crime—slums, ghettos and personality disorders.”⁶

“Slums, ghettos and personality disorders” have not been shown, singly or collectively, to be “the causes” of crime.

(1) The crime rate in the slums is indeed higher than elsewhere; but so is the death rate in hospitals. Slums are no more “causes” of crime, than hospitals are of death; they are locations of crime, as hospitals are of death. Slums and hospitals attract people selectively; neither is the “cause” of the condition (disease in hospitals, poverty in slums) that leads to the selective attraction.

As for poverty which draws people into slums, and, sometimes, into crime, any relative disadvantage may lead to ambition, frustration, resentment and, if insufficiently restrained, to crime. Not all relative disadvantages can be eliminated; indeed very few can be, and their elimination increases the resentment generated by the remaining ones; not even relative poverty can be removed altogether. (Absolute poverty—whatever that may be—hardly affects crime.) However, though contributory, relative disadvantages are not a necessary or sufficient cause of crime: most poor people do not commit crimes, and some rich people do. Hence, “eradication of poverty” would, at most, remove one (doubtful) cause of crime.

In the United States, the decline of poverty has not been associated with a reduction of crime. Poverty measured in dollars of constant purchasing power, according to present government standards and statistics, was the condition of $\frac{1}{2}$ of all our families in 1920; of $\frac{1}{4}$ th in 1962; and of less than $\frac{1}{6}$ in 1966. In 1967, 5.3 million families out of 49.8 million were poor— $\frac{1}{4}$ of all families in the United States. If crime has been reduced in a similar manner, it is a well kept secret.

Those who regard poverty as a cause of crime often draw a wrong inference from a true proposition: the rich will not commit certain crimes—Rockefeller never riots; nor does he steal. (He mugs, but only on T.V.) Yet while wealth may be the cause of not committing (certain) crimes, it does not follow that poverty (absence of wealth) is the cause of committing them. Water extinguishes or prevents fire; but its absence is not the cause of fire. Thus, if poverty could be abolished,

⁶ *N.Y. Times*, Nov. 24, 1967, at 22. The actual psychological and other factors which bear on the disrepute—as distinguished from the rationalizations—cannot be examined here.

if everybody had all “necessities” (I don’t pretend to know what this would mean), crime would remain, for, in the words of Aristoteles “the greatest crimes are committed not for the sake of basic necessities but for the sake of superfluities.” Superfluities cannot be provided by the government; they would be what the government does not provide.

(2) Negro ghettos have a high, Chinese ghettos have a low crime rate. Ethnic separation, voluntary or forced, obviously has little to do with crime; I can think of no reason why it should.⁷

(3) I cannot see how the state could “eradicate” personality disorders even if all causes and cures were known and available. (They are not.) Further, the known incidence of personality disorders within the prison population does not exceed the known incidence outside—though our knowledge of both is tenuous. Nor are personality disorders necessary, or sufficient causes for criminal offenses, unless these be identified by means of (moral, not clinical) definition with personality disorders. In this case, Mr. Pearson would have proposed to “eradicate” crime by eradicating crime—certainly a sound, but not a helpful idea.

Mr. Pearson’s views are part as well of the mental furniture of the former U.S. Attorney General, Ramsey Clark, who told a congressional committee that “. . . only the elimination of the causes of crime can make a significant and lasting difference in the incidence of crime.” Uncharitably interpreted, Mr. Clark revealed that only the elimination of causes eliminates effects—a sleazy cliché and wrong to boot. Given the benefit of the doubt, Mr. Clark probably meant that the causes of crime are social; and that therefore crime can be reduced “only” by non-penal (social) measures.

This view suggests a fireman who declines fire-fighting apparatus by pointing out that “in the long run only the elimination of the causes” of fire “can make a significant and lasting difference in the incidence” of fire, and that fire-fighting equipment does not eliminate “the causes”—except that such a fireman would probably not rise to fire chief. Actually, whether fires are checked, depends on equipment and on the efforts of the firemen using it no less than on the presence of

⁷ Mixed areas, incidentally, have higher crime rates than segregated ones. See, e.g., ROSS & VAN DEN HAAG, *THE FABRIC OF SOCIETY*, 102-4 (1957). Because slums are bad (morally) and crime is, many people seem to reason that “slums spawn crime”—which confuses some sort of moral with a causal relation.

"the causes": inflammable materials. So with crimes. Laws, courts and police actions are no less important in restraining them, than "the causes" are in impelling them. If firemen (or attorneys general) pass the buck and refuse to use the means available, we may all be burned while waiting for "the long run" and "the elimination of the causes."

Whether any activity—be it lawful or unlawful—takes place depends on whether the desire for it, or for whatever is to be secured by it, is stronger than the desire to avoid the costs involved. Accordingly people work, attend college, commit crimes, go to the movies—or refrain from any of these activities. Attendance at a theatre may be high because the show is entertaining and because the price of admission is low. Obviously the attendance depends on both—on the combination of expected gratification and cost. The wish, motive or impulse for doing anything—the experienced, or expected, gratification—is the cause of doing it; the wish to avoid the cost is the cause of not doing it. One is no more and no less "cause" than the other. (Common speech supports this use of "cause" no less than logic: "Why did you go to Jamaica?" "Because it is such a beautiful place." "Why didn't you go to Jamaica?" "Because it is too expensive."—"Why do you buy this?" "Because it is so cheap." "Why don't you buy that?" "Because it is too expensive.") Penalties (costs) are causes of lawfulness, or (if too low or uncertain) of unlawfulness, of crime. People do commit crimes because, given their conditions, the desire for the satisfaction sought prevails. They refrain if the desire to avoid the cost prevails. Given the desire, low cost (penalty) causes the action, and high cost restraint. Given the cost, desire becomes the causal variable. Neither is intrinsically more causal than the other. The crime rate increases if the cost is reduced or the desire raised. It can be decreased by raising the cost or by reducing the desire.

The cost of crime is more easily and swiftly changed than the conditions producing the inclination to it. Further, the costs are very largely within the power of the government to change, whereas the conditions producing propensity to crime are often only indirectly affected by government action, and some are altogether beyond the control of the government. Our unilateral emphasis on these conditions and our undue neglect of costs

may contribute to an unnecessarily high crime rate.

V

The foregoing suggests the question posed by the death penalty: is the deterrence added (return) sufficiently above zero to warrant irrevocability (or other, less clear, disadvantages)? The question is not only whether the penalty deters, but whether it deters more than alternatives and whether the difference exceeds the cost of irrevocability. (I shall assume that the alternative is actual life imprisonment so as to exclude the complication produced by the release of the unrehabilitated.)

In some fairly infrequent but important circumstances the death penalty is the only possible deterrent. Thus, in case of acute *coups d'état*, or of acute substantial attempts to overthrow the government, prospective rebels would altogether discount the threat of any prison sentence. They would not be deterred because they believe the swift victory of the revolution will invalidate a prison sentence and turn it into an advantage. Execution would be the only deterrent because, unlike prison sentences, it cannot be revoked by victorious rebels. The same reasoning applies to deterring spies or traitors in wartime. Finally, men who, by virtue of past acts, are already serving, or are threatened, by a life sentence, could be deterred from further offenses only by the threat of the death penalty.⁸

What about criminals who do not fall into any of these (often ignored) classes? Prof. Thorsten Sellin has made a careful study of the available statistics: he concluded that they do not yield evidence for the deterring effect of the death penalty.⁹ Somewhat surprisingly, Prof. Sellin seems to think that this lack of evidence for deterrence is evidence for the lack of deterrence. It is not. It means that deterrence has not been demonstrated statistically—not that non-deterrence has been.

It is entirely possible, indeed likely (as Prof. Sellin appears willing to concede), that the statis-

⁸ Cautious revolutionaries, uncertain of final victory, might be impressed by prison sentences—but not in the acute stage, when faith in victory is high. And one can increase even the severity of a life sentence in prison. Finally, harsh punishment of rebels can intensify rebellious impulses. These points, though they qualify it, hardly impair the force of the argument.

⁹ Prof. Sellin considered mainly homicide statistics. His work may be found in his *CAPITAL PUNISHMENT* (1967), or, most conveniently, in *BEDAUF, THE DEATH PENALTY IN AMERICA* (1964), which also offers other material, mainly against the death penalty.

tics used, though the best available, are nonetheless too slender a reed to rest conclusions on. They indicate that the homicide rate does not vary greatly between similar areas with or without the death penalty, and in the same area before and after abolition. However, the similar areas are not similar enough; the periods are not long enough; many social differences and changes, other than the abolition of the death penalty, may account for the variation (or lack of) in homicide rates with and without, before and after abolition; some of these social differences and changes are likely to have affected homicide rates. I am unaware of any statistical analysis which adjusts for such changes and differences. And logically, it is quite consistent with the postulated deterrent effect of capital punishment that there be less homicide after abolition: with retention there might have been still less.

Homicide rates do not depend exclusively on penalties any more than do other crime rates. A number of conditions which influence the propensity to crime, demographic, economic or generally social, changes or differences—even such matters as changes of the divorce laws or of the cotton price—may influence the homicide rate. Therefore variation or constancy cannot be attributed to variations or constancy of the penalties, unless we know that no other factor influencing the homicide rate has changed. Usually we don't. To believe the death penalty deterrent does not require one to believe that the death penalty, or any other, is the only, or the decisive causal variable; this would be as absurd as the converse mistake that "social causes" are the only, or always the decisive factor. To favor capital punishment, the efficacy of neither variable need be denied. It is enough to affirm that the severity of the penalty may influence some potential criminals, and that the added severity of the death penalty adds to deterrence, or may do so. It is quite possible that such a deterrent effect may be offset (or intensified) by non-penal factors which affect propensity; its presence of absence therefore may be hard, and perhaps impossible to demonstrate.

Contrary to what Prof. Sellin *et al.* seem to presume, I doubt that offenders are aware of the absence of presence of the death penalty state by state or period by period. Such unawareness argues against the assumption of a calculating murderer. However, unawareness does not argue against the death penalty if by deterrence we mean a pre-

conscious, general response to a severe, but not necessarily specifically and explicitly apprehended, or calculated threat. A constant homicide rate, despite abolition, may occur because of unawareness and not because of lack of deterrence: people remain deterred for a lengthy interval by the severity of the penalty in the past, or by the severity of penalties used in similar circumstances nearby.

I do not argue for a version of deterrence which would require me to believe that an individual shuns murder while in North Dakota, because of the death penalty, and merrily goes to it in South Dakota since it has been abolished there; or that he will start the murderous career from which he had hitherto refrained, after abolition. I hold that the generalized threat of the death penalty may be a deterrent, and the more so, the more generally applied. Deterrence will not cease in the particular areas of abolition or at the particular times of abolition. Rather, general deterrence will be somewhat weakened, through local (partial) abolition. Even such weakening will be hard to detect owing to changes in many offsetting, or reinforcing, factors.

For all of these reasons, I doubt that the presence or absence of a deterrent effect of the death penalty is likely to be demonstrable by statistical means. The statistics presented by Prof. Sellin *et al.* show only that there is no statistical proof for the deterrent effect of the death penalty. But they do not show that there is no deterrent effect. Not to demonstrate presence of the effect is not the same as to demonstrate its absence; certainly not when there are plausible explanations for the non-demonstrability of the effect.

It is on our uncertainty that the case for deterrence must rest.¹⁰

VI

If we do not know whether the death penalty will deter others, we are confronted with two uncertainties. If we impose the death penalty, and achieve no deterrent effect thereby, the life of a

¹⁰ In view of the strong emotions aroused (itself an indication of effectiveness to me: might murderers not be as upset over the death penalty as those who wish to spare them?) and because I believe penalties must reflect community feeling to be effective, I oppose mandatory death sentences and favor optional recommendations by juries after their finding of guilt. The opposite course risks the non-conviction of guilty defendants by juries who do not want to see them executed.

convicted murderer has been expended in vain (from a deterrent viewpoint). There is a net loss. If we impose the death sentence and thereby deter some future murderers, we spared the lives of some future victims (the prospective murderers gain too; they are spared punishment because they were deterred). In this case, the death penalty has led to a net gain, unless the life of a convicted murderer is valued more highly than that of the unknown victim, or victims (and the non-imprisonment of the deterred non-murderer).

The calculation can be turned around, of course. The absence of the death penalty may harm no one and therefore produce a gain—the life of the convicted murderer. Or it may kill future victims of murderers who could have been deterred, and thus produce a loss—their life.

To be sure, we must risk something certain—the death (or life) of the convicted man, for something uncertain—the death (or life) of the victims of murderers who may be deterred. This is in the nature of uncertainty—when we invest, or gamble, we risk the money we have for an uncertain gain. Many human actions, most commitments—including marriage and crime—share this characteristic with the deterrent purpose of any penalization, and with its rehabilitative purpose (and even with the protective).

More proof is demanded for the deterrent effect of the death penalty than is demanded for the deterrent effect of other penalties. This is not justified by the absence of other utilitarian purposes such as protection and rehabilitation; they involve no less uncertainty than deterrence.¹¹

¹¹ Rehabilitation or protection are of minor importance in our actual penal system (though not in our theory). We confine many people who do not need rehabilitation and against whom we do not need protection (e.g., the exasperated husband who killed his wife); we release many unrehabilitated offenders

Irrevocability may support a demand for some reason to expect more deterrence than revocable penalties might produce, but not a demand for more proof of deterrence, as has been pointed out above. The reason for expecting more deterrence lies in the greater severity, the terrifying effect inherent in finality. Since it seems more important to spare victims than to spare murderers, the burden of proving that the greater severity inherent in irrevocability adds nothing to deterrence lies on those who oppose capital punishment. Proponents of the death penalty need show only that there is no more uncertainty about it than about greater severity in general.

The demand that the death penalty be proved more deterrent than alternatives can not be satisfied any more than the demand that six years in prison be proved to be more deterrent than three. But the uncertainty which confronts us favors the death penalty as long as by imposing it we might save future victims of murder. This effect is as plausible as the general idea that penalties have deterrent effects which increase with their severity. Though we have no proof of the positive deterrence of the penalty, we also have no proof of zero, or negative effectiveness. I believe we have no right to risk additional future victims of murder for the sake of sparing convicted murderers; on the contrary, our moral obligation is to risk the possible ineffectiveness of executions. However rationalized, the opposite view appears to be motivated by the simple fact that executions are more subjected to social control than murder. However, this applies to all penalties and does not argue for the abolition of any.

against whom protection is needed. Certainly rehabilitation and protection are not, and deterrence is, the main actual function of legal punishment, if we disregard non-utilitarian purposes.

MR. KASTENMEIER. It is a pleasure now for the Chair to call Dean Louis H. Pollak of the Yale Law School. Mr. Pollak served on the Advisory Committee of the National Commission on Reform of Federal Criminal Laws and in many other respects has served his Government in various capacities in the administration of criminal justice.

You are most welcome, Mr. Pollak.

TESTIMONY OF LOUIS H. POLLAK, PROFESSOR OF LAW, YALE UNIVERSITY LAW SCHOOL

PROFESSOR POLLAK. Thank you, Mr. Chairman. I suppose because I have a fellow alumnus from the school here, Professor Schmidt, who has just testified, I had better make the record straight. I am no longer the dean of our law school. I am a professor there. The term "dean" seems to be one of those stigmatic terms that stays with one. I owe it to the record, and Congressman Drinan will understand what I mean, when I say that the institution no longer has that albatross around its neck. But I remain on the faculty at Yale.

And I think the record should also contain the fact that I am a vice president of the NAACP Legal Defense Fund, which as the committee knows, has played a substantial role in the representation of many hundreds of the death sentence cases which have been before the courts raising these very, very troublesome issues.

I owe the committee an apology for not having presented you with a prepared statement in advance. That would have been hard for me, because I am really not here at all this year. I have been in London on sabbatical leave, an institution which I recommend to all Congressmen. There is no reason why it should be reserved for low orders of people like academics.

And I just came from London yesterday. So, I wasn't really able before this appearance to get you a statement in advance. But much of what I am going to say today tracks some of the testimony which you have already heard. And some will anticipate testimony which I think you will also be hearing from social scientists really versed in these matters hereafter.

MR. KASTENMEIER. Incidentally, Professor Pollak, we do have a letter of last year, May 11 of last year, from you to Senator Hart with respect to his bill. It is a five-page letter discussing this general issue in some depth. And that has been made available to members of the subcommittee. It can be received and made part of the record. So, there is a form of prepared statement which is already assembled.

PROFESSOR POLLAK. Thank you.

(The letter referred to follows:)

YALE UNIVERSITY LAW SCHOOL,
New Haven, Conn., May 11, 1971.

HON. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: By letter of April 19 you were good enough to send me a copy of the draft bill entitled "Death Penalty Suspension Act of 1971," inviting my comment on the bill:

1. I favor the bill and I hope you will submit it. The bill is, in my judgment, a thoughtful and courageous approach to a tragically difficult national problem. To provide two years' time within which Congress and state legislatures would have the opportunity (and correlative responsibility) to examine the constitutional and other issues presented by the continued use

of the death sentence seems to me both "necessary and proper." With hundreds awaiting execution in prisons throughout the country, legislators can no longer responsibly avoid confronting these issues.

2. I am persuaded that Congress is constitutionally empowered to pass a law staying all executions, federal and state alike, for two years. I believe Congress is thus empowered because I think there is a substantial likelihood that extended Congressional investigation would yield data supporting at least one of the two hypotheses tendered by the bill—(a) that the death sentence is (at least as to most offenses¹ a "cruel and unusual punishment"; (b) that the death sentence is imposed, in a grossly disproportionate number of instances, on blacks and others customarily subject to racial discrimination. Either such finding would provide a rational basis for Congress to pass a law abolishing the death sentence.² Given a reasonable possibility that two years of investigation by Congress would be persuasive to Congress that it should and constitutionally could legislate to end the death sentence, Congress would appear to be fully empowered to declare a two-year moratorium on executions and thereby prevent massive and unutterably calamitous frustration of what Congress may two years hence determine to be in the nation's best interest.

With respect to the power of Congress to ban the death sentence, on the basis of findings of the sort referred to above, I would add these brief comments:

A. The power of Congress to end the use of the death sentence for any and all federal crimes would not appear to require argument, since Congress has plenary power (within constitutional limitations) to define and declare the punishment for all offenses against the United States. With this in mind, I should point out that the draft bill places entire reliance on Congressional power to enforce the Fourteenth Amendment; since this power is irrelevant to federal crimes and punishments, appropriate language relating to Congressional power over the federal criminal process should be added to the draft bill.

B. Whatever power Congress has to end the use of the death sentence in the states flows from the power of Congress, acting under Section 5 of the Fourteenth Amendment, to enforce the guarantees of due process of law and the equal protection of the laws contained in Section 1 of the Amendment. A Congressional finding that the death sentence is a cruel and unusual punishment would call into play Congressional power to promote due process of law. A Congressional finding that the death sentence falls within disproportionate impact on racial minorities would call into play Congressional power to promote the equal protection of the laws.

C. Up to now there has, of course, been no determination by the Supreme Court that the death sentence is cruel and unusual (and hence in contravention of due process) or that it denies equal protection. Per contra, the Court has not, in its recent history (including the *McGautha* and *Crampton* decisions, on May 3, 1971), taken occasion to consider and reject either of these constitutional challenges to the death sentence. But even if the Court's recent occasional affirmances of death sentences, as in *McGautha* and *Crampton*, were viewed as implied rejections of these constitutional contentions (a reading of the Court's opinions which I would not regard as faithful to the Court's limited disposition of the limited questions presented), it would still appear that Congress retains some *legislative* authority to fashion its own more protective definition of the constitutional norms of due process of law and the equal protection of the laws. This would appear to be the teaching of *Katzenbach v. Morgan*.

D. I do not pretend to be able to formulate with confidence the scope of the Congressional power, declared by *Katzenbach v. Morgan*, to go beyond the Court in giving content to Fourteenth Amendment guarantees.³ For immediate purposes, however, it would seem sufficient to make three points in this connection:

¹ One could conceivably conclude, for example, that the death sentence was a not inappropriate punishment for the single gravest crime—the federal crime of treason—but was barbarous in any other context.

² Or permitting it, as was suggested in footnote 1, only in cases of treason.

³ I tend to take a rather narrower view of *Katzenbach v. Morgan* than many other constitutional lawyers do. For example, I thought (and said) a year ago that the doctrine of *Katzenbach v. Morgan* was insufficient to sustain federal legislation lowering the voting age to eighteen.

(1) Deference to a legislative extension of constitutional guarantees would seem most appropriate where the predicate of such legislative action is the sort of detailed inquiry into a vast array of institutional practices which Congress is peculiarly well fitted—and courts are peculiarly unfitted—to make. Both of the inquiries which Congress would be expected to undertake, pursuant to the draft bill, would seem to be of this nature.

(2) The propriety of Congressional inquiry into, and legislation protective of, due process rights draws support from Chief Justice Warren's invitation to Congress (and indeed the states as well) in *Miranda v. Arizona*, "to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws," presumably as supplements and/or alternatives to judicially formulated rules.

(3) With respect to the equal protection challenge to the continued use of the death sentence, it seems particularly appropriate to note that *Katzenbach v. Morgan* was a case in which Congress legislated against arrangements which it found to foster racial discrimination. That is to say, it would appear a fair inference that the legislative power sustained in *Katzenbach v. Morgan* is at its greatest when Congress is legislating with respect to discrimination against racial minorities, most especially blacks, since that evil was the chief target of the Fourteenth Amendment. It is in this setting that special weight attaches to the following observations, made by my distinguished colleague, Professor Charles L. Black, Jr., one year ago:

No one can now say how far we may go with the use by Congress, in application to racial problems, of the very same spaciousness of interpretation that is elsewhere applied to Congressional powers. I will only mention what to many of us now is a possibility of prime moral importance. It has been pretty generally assumed that capital punishment can be abolished in the United States only through action by 50 state legislatures. But suppose Congress were to conclude—as I think statistics would force it to conclude—that capital punishment had been administered for a long time in a manner discriminatory against blacks and other minority groups.⁶⁴ Suppose Congress were to judge from this long experience, that this discriminatory administration was likely to continue or to recur. Could these judgments be faulted? If so, how? If not, then why could not Congress abolish capital punishment for the entire nation? Congress could beyond doubt make unlawful a practice whose adverse impact on interstate commerce was far less well attested than is the inequality, past and predictable, in capital punishment as actually administered. . . .

I am grateful to you for the opportunity to comment on the profoundly important issues presented by the draft bill. I hope that (subject to the modest emendation suggested in paragraph 2A of this letter) you submit the bill. And I hope it is enacted into law: the lives of hundreds of Americans, and also the integrity of the American legal process, are at stake.

Sincerely yours,

LOUIS H. POLLAK.

Professor POLLAK. Let me say once that I count it a great privilege to be with you to help you if I can in the deliberations which I hope will play a part in leading to reform; namely, the ultimate abolition of capital punishment in the United States, which I submit would go very far toward civilizing the administration of criminal justice in the United States.

I use the adjective "civilizing" advisedly. The statement, Mr. Chairman, which you read to the prior witness, Dr. van den Haag, from the

⁶⁴ A very old phenomenon, in one form or another; "Ye poor and miserable were hanged, but ye more substantial escaped." 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 508 (1924). (The reference is to executions following Monmouth's rebellion—Black, *The Unfinished Business of the Warren Court*, 46 WASH. LAW REV. 3, 19 (1970).)

United Nations Secretary General makes it very plain that the free nations of the world—that is to say—

Mr. KASTENMEIER. If I may interrupt you one more time, actually, most of what I read is a statement taken from Professor Amsterdam's submission. There was a reference to a point made by the United Nations, but the balance was taken from his own statement.

Professor POLLAK. I see. I am as happy to adopt Professor Amsterdam's statement. Whatever evaluations may be put on it, it is a fact that the nations with whom we generally identify ourselves, those which put principal premium on the sanctity and the dignity of the individual, have taken the lead in a dramatic move to abolish the death penalty. And the countries which by and large have retained it include, at least in disproportionate number, countries with which I think we have very little philosophic tie, the great despotisms, Russia and China, and the small despotisms that emulate them, such as South Africa.

Let me say at this point, since I have mentioned the fact that I have just come from England, that in one respect I think it might be appropriate to qualify the testimony which you have just heard from Dr. van den Haag. The English experience is hard to evaluate yet. Nobody pretends to know enough to be sure.

But what Dr. van den Haag took as an unmistakable link between the abolition of capital punishment and the rise of violent crime is not viewed so unmistakably by other experts. And I would refer the committee, if you can get a hold of it, to a very, very interesting interview with probably the leading English criminologist, Sir Leon Radzinoviez, of Cambridge University, which appeared in the Sunday Times for September 21, 1969, reviewing what the implications were of the figures up to that point.

I may say that specifically if one focuses on murder as such, that is to say the category of homicide, which was capital, prior to the abolition of the death sentence in England, one does not find a rise in that category of crime. There is a substantial rise in the lesser orders of homicide which were not capital—namely, manslaughter—which I think does suggest—although, again, I don't pretend to be a statistician and I certainly don't pretend to be very versed in these figures—it does suggest a correlation with the more general phenomenon of an increase in violent crime in England as in other countries.

But it is interesting that the figures on murder alone—and these have been collected up through 1970 by Dr. J. E. Hall-Williams of the London School of Economics Law Faculty—suggest a constant rate. Going back to 1957, at that time the ratio of murders per million of population in England and Wales was 3. And the figure has moved slightly up and down from that norm to 1970, when it was 2.8.

So, I would treat with some caution the inferences which Dr. van den Haag urged on you.

But I now must emerge from parentheses, because my assignment was not really to talk about data of this kind at all, at least my self-assumed assignment. I am not a social scientist in any respect. I am only a lawyer. And my function today as I perceive it is to address myself to the issues of constitutional power which your committee confronts.

And I would say that with respect to both of the kinds of proposals which are pending before you, those which deal with the abolition of

the death sentence as a Federal penalty, and those which call for a 2-year moratorium on Federal and State death sentences.

With respect to the first group, let me say simply that your bill, Mr. Chairman, and the kindred bills calling for the abolition of the Federal death sentence, seem to me to pose no constitutional questions whatsoever. It clearly is within the power of Congress, as it always has been, not only to define, but to set the penalties for Federal crimes.

The only conceivable question, and I think it is very easily solved, is whether it is in any sense inappropriate for Congress to legislate a translation of pending death sentences into life imprisonment, which, as I understand it, your bill would contemplate, Mr. Chairman, and the others would. The simple answer is that I think there is no doubt about Congress' power to do that at all.

And I would cite you for that purpose to a passage from Professor Freund's letter of last spring addressed to Senator Hart, which although the letter was addressed to the death sentence suspension act, contains language which is actually apposite precisely to this point as well.

Professor Freund says this: "Since the proposed measure would be general in application, not singling out particular death sentences, there should be no objection on the score of separation of powers between the legislative and judicial branches. Amelioration of penalties can, of course, be made retroactive without infringing on the judicial function."

This seems to me to take care of all possible questions that you would have with respect to your power to abolish the death sentence as a Federal sentence prospectively and retrospectively.

Now, as to the death sentence suspension bill, Mr. Chairman, that bill makes findings of two "serious" questions. They are, if you will, provisional findings or statements of prima facie serious questions of a constitutional dimension.

One is whether the death sentence is cruel and unusual within the meaning of the eighth amendment and by incorporation within the meaning of the 14th amendment.

And the second so-called serious question is, of course, whether in the language of the draft bill the death sentence is "inflicted discriminatorily upon members of racial minorities in violation of the 14th amendment."

And then, of course, section 3 follows with a suspension of all death sentences for a 2-year period while Congress explores those serious questions.

I take it in addressing myself to the questions of power that we have, as a predicate, data, some of which the committee doubtless already has, but a good deal that you probably will be hearing, most particularly from Dr. Wolfgang and Mr. Bedau very soon, I think. You will be hearing a summary of what evidence there is bearing on the problems of discriminatory application and on cruel and unusual punishment. And, of course, you also have the data submitted this morning by the bar association of the city of New York.

I am delighted on hearing that submission that I am still a member of that august, professional body.

I think that Professor Schmidt has already said much that I would agree with. And I will try to abbreviate my own presentation in order

to indicate where my analysis differs in some measure from his, although I am in most matters quite in accord with him.

First of all, with respect to the suspension of Federal death sentences, that is something you can do if you can abolish the Federal death sentences. So, the real constitutional question goes to the suspension—for a 2-year period of inquiry—of State death sentences.

Now, may I point out, Mr. Chairman, before we leave the matter, that though there is no question in my mind of your power to suspend Federal death sentences, the draft bill seems to concentrate on the State problem to a point where I think a little improvement in the drafting would help. That is to say, I would suggest a change in the portion of section 2, which now reads, "whether the death penalty is inflicted discriminatorily upon members of racial minorities, in violation of the 14th amendment to the Constitution, and in either case, whether Congress should exercise its authority under section 5 of the 14th amendment to prohibit the use of the death penalty."

We should make that read "in violation of the fifth and 14th amendments to the Constitution," and "exercise its authority to enforce the fifth, eighth and 14th amendments to prohibit the use of the death penalty," in order to take in the question of the impact of Federal death sentences. And the corollary, of course, would be in section 3, where in line 11 the phrase appears "the 14th amendment," where we want to have, I think, "the fifth, eighth, and 14th amendments to the Constitution," to make clear what your enforcement power is.

Now, I may add that although I hadn't expected Dr. van den Haag to turn out to be a witness supportive of this legislation, his testimony was very helpful to me in supplying an additional constitutional basis for this legislation, indeed, an additional Constitution challenge to the death sentence, which I hadn't really fastened on before, I am candid to say, as a separate constitutional matter.

Dr. van den Haag was scrupulous to say that as far as we know the data we have so far won't show you a deterrent effect and won't show you a nondeterrent effect in the use of the death sentence. In saying that incidentally, he, from my point of view, practically made the case for a period of inquiry, because surely this is an enormously important matter as to which Congress is precisely able, as courts are not, to take testimony and to gather further data.

But if it is to be the present concession or the results of future inquiry that one cannot demonstrate that the death sentence operates as a deterrent in the generality of cases as to the generality of offenses—if we assume that, then I suggest that there is an independent, constitutional infirmity of the death sentence.

It is a very serious question as to whether the death sentence can stand up against a due process attack, since the State has not demonstrated any compelling interest in this drastic, irrevocable penalty, if it concedes that its use does not deter further crime of this character.

It is not for me to put words in Congressman Drinan's mouth, but I believe that must be one of the constitutional inferences to be drawn from the exchange between Congressman Drinan and the previous witness. And I am grateful to both the witness and Congressman Drinan for focusing on what seems to me an independent and very important due process issue presented here.

I think I would submit, and I will be prepared to argue to any court, that neither the United States nor any State has the constitu-

tional authority to inflict the death sentence for any offense, failing a showing of some deterrent impact. And for Dr. van den Haag to say that justice is the countervailing, State interest, I think, would not stand up under analysis.

Now, the real constitutional question is whether Congress on the basis of what substantial data is now available and will come forward before this committee—data which is substantial but not yet complete—is authorized to suspend that sentence for a 2-year period of legislative inquiry and reflection.

I take it those who would argue that Congress does not have that power would take a stand on the proposition that the State criminal processes are simply outside the ambit of the powers delegated to Congress.

By contrast those like myself believe the pending legislation is constitutional and would argue that in the implementation of any explicitly granted congressional power—and here we are talking primarily about the power to enforce the 14th amendment—Congress, whose valid laws are, of course, part of the supreme law of the land, can regulate the State criminal process and, indeed, most other aspects of the State governmental process.

The States are, if you will, sovereignties, but as against the United States, they are only limited sovereignties. And, of course, our history shows that Congress has been in the business of regulating, qualifying in one way or another, the State criminal process from the beginning.

In 1789 one of your first pieces of legislation was the Judiciary Act of 1789, section 25 of which provided for review by the Supreme Court of appeals by State courts where Federal questions were presented. And as Chief Justice Marshall decided in *Cohen v. Virginia*, State criminal cases fell within the ambit of section 25 and of the constitutional power of the Supreme Court to review State criminal cases.

Congress has been in the business of limiting the State criminal process ever since it started passing statutes—of which the first Supreme Court example was the establishment of the Second Bank of the United States, sustained in *McCulloch v. Maryland*—where the preemptive effect of Federal legislation is to block out an area in which the State criminal law cannot operate at all.

To take an entirely different example, of course, the U.S. Congress is limiting the State criminal process when it directs by legislation that State law-enforcement officers may not tap wires or engage in other forms of electronic surveillance.

To take an example which is of direct relevance here in enforcement of the 14th amendment, it was almost 100 years ago that Congress in 1875 made it a Federal crime for any State official to use racial criteria in the selection of members of a jury. And in 1880 the Supreme Court sustained an indictment under the 1875 act in which it made it very plain that Congress could in enforcement of the 14th amendment limit and qualify and regulate the State criminal process.

I will refer the committee without reading it to the long and very succinct discussion by Justice Strong, which appears on pages 345 and 346 of volume 100 of the U.S. Reports *Ex parte Commonwealth of Virginia*.

Now, I suppose it will be argued, however, that in this instance the intervention which is proposed is a far more pervasive one cutting

directly at the form of punishment imposed by the State; moreover, that it does so with respect not merely to those to be convicted and sentenced in the future, but those already under sentence. To this I would respectfully respond that the Congress indeed has already gone a lot farther than what is now proposed.

What is now proposed is to defer the execution of sentences. It is not to preclude their execution if and when Congress at the end of the 2-year period decided to do nothing further. This simply proposes to preserve a status quo.

I suggest that Congress went much farther very recently. Many of you gentlemen participated in this in the enactment of title II of the 1964 Civil Rights Act. The public accommodations section, as you will recall, of the 1964 Civil Rights Act among other things was read by the Supreme Court as being intended to abate State criminal prosecutions for trespass, disorderly conduct, and the like on the part of persons who had gone into restaurants and lunch counters looking for an integrated hamburger and coffee in the early 1960's before the date of the 1964 act.

The Supreme Court read title II as intending to abate those previous offenses. And on that construction the Supreme Court sustained your powers so to direct. That was the wiping out of completed crimes, if you will, crimes that were over before Congress acted. And Congress was found to have that power.

I shall try to formulate—in order to respond to—hypothetical constitutional objections to the proposed bill. But I would say in passing that I do not know who the hypothetical constitutional objectors are. Certainly the letters which Senator Hart put in the Congressional Record last June 1 showed a surprising degree of unanimity as to the constitutionality of the proposed legislation among the trade union of constitutional lawyers to which Congressman Drinan and I belong.

I may say, Mr. Chairman, that I am not shaken by that unanimity. I think that this is an instance in which we are right. But I do think it is important that scholars as distinguished as Professors Freund, Wechsler, Bickel, and Cox, the former Solicitor General, and others, are united on these matters.

What would the possible constitutional objections be? First, that Congress would be acting not on the basis of a firm legislative conclusion that the 14th amendment has been violated, but merely on the basis of a kind of a tentative or prima facie determination.

Second, I think the objections would relate to the issue which, indeed, has already, I think, been tendered, and properly tendered, by you, Mr. Biester, that some of these constitutional claims are appropriate for judicial resolution and that indeed the cruel and unusual aspect of the matter is now before the Supreme Court.

I think if I understand how an opponent of this legislation on constitutional grounds would argue the matter, he would say, if the judicial claim succeeds, Congress doesn't need to act. The matter is taken care of by the judicial determination. And if it fails in the Supreme Court, then the matter is foreclosed—for that would be the constitutional determination and there would be no occasion for further argument or inquiry.

If I may take those two issues, because I think they are related, they are really the central issues.

As to the first objection—that Congress surely cannot restrain State processes until Congress itself is satisfied that these processes are unconstitutional—I think it is to be noted that here we have a tentative congressional determination of serious questions presented which is matched by an exactly tentative restraint on the State process. That is to say the intervention with the State sentences is exactly proportioned to the tentativeness of the congressional finding.

If the congressional tentative finding is not vindicated, then the suspension will lapse and the States will be able to go ahead with executions qualified by their own State commutative processes, of course.

Now, as to the second objection that in some sense it would be assuming a judicial role, where issues are really before the courts, I think the objection is an important one. And I think it is an ultimately fallacious one. And I want to come to grips directly with it.

I hope, Mr. Chairman, I am not going beyond your allotted time. I know it is late. I will try to push myself forward. I don't want to trespass on what must be your lunch hour.

Mr. KASTENMEIER. We do have a quorum call. But we can keep on for 5 or 10 minutes.

Mr. BIESTER. Mr. Chairman, would you yield on that point? I think this is extremely important and interesting testimony. I wonder if we could all come back and resume without pressure of the quorum hanging over us.

Mr. KASTENMEIER. Let us go off the record.

(Discussion held off the record.)

Mr. KASTENMEIER. I think at this point we can recess until 2. That will give us a chance for lunch and the quorum call.

Thank you Professor Pollak. We will now interrupt your testimony for a recess. The subcommittee will resume hearing you at 2 this afternoon in this room.

(Whereupon, at 12:30 p.m. the hearing recessed, to reconvene at 2 p.m. in the same room.)

AFTER RECESS

(The subcommittee reconvened at 2 p.m., Hon. Robert W. Kastemeier, chairman of the subcommittee, presiding.)

Mr. KASTENMEIER. Subcommittee No. 3 will come to order for the purpose of continuing our hearing on a number of bills relating to the moratorium on capital punishment and the abolition of capital punishment.

When we recessed this noon, the committee was hearing from our witness, Prof. Louis Pollak. Professor Pollak, please resume your testimony where we left off at noon.

Professor POLLAK. Thank you, Mr. Chairman.

When we recessed, I was, as I recall, about to address myself to what seems to me to be really the central problem confronting the subcommittee with respect to its power to propose to the Congress and have the Congress adopt a suspension of the death sentence for a 2-year period of further and intensive legislative inquiry.

I have suggested that the central problem poses conceptually an issue which this subcommittee and proponents of legislation of this kind must be responsive to.

I think that problem is essentially this. If some at least of the constitutional issues described in the pending bill as serious questions are issues which are susceptible to judicial inquiry and are indeed now pending before the Supreme Court in those cases which raise the cruel and unusual punishment questions, then the problem arises what role if any can Congress play in suggesting that there is also a legislative inquiry which is appropriate.

As I suggested before our recess, I can understand, though I disagree with, the syllogism which says if the court decides that this is cruel and unusual punishment, that ends the matter, or if the court decides it is not, then that also ends the matter, because it is not a function of the Congress to review and conceivably overrule judicial determinations.

But I think that misconceives the proposal, as I understand the proposal before the subcommittee. I think that misconceives; that is to say, what the situation would be if—and I hypothesize if—the Supreme Court were to conclude in the pending cases that they were not persuaded that the death sentence in its impact in those cases was cruel and unusual within the meaning of the eighth and 14th amendments.

I take it that that would be a decision in those cases and on the basis of the record properly made in a judicial inquiry, but a record which I suggest is far narrower than the kind of inquiry which can be made legislatively as a predicate for congressional action.

In short, I think what we are faced with here is a very different function, and hence a very different scope of legislative and judicial inquiry. Now, let me put it this way. Whatever weight the members of this subcommittee feel inclined to assign to the statistical data—a little of which I believe you already have in your record and more of which will be presented by the social scientists who will appear tomorrow and perhaps thereafter, as, for example, it affects the issue of discriminatory application of the death sentence or per contra, cruelty and unusualness—whatever weight that may be—and I for one would anticipate that you would find it substantial—the one thing that I think there can be no dissent from is the proposition that the kind of data which we are dealing with is far more susceptible of legislative than of judicial collection, sifting and evaluation.

Mr. KASTENMEIER. In that regard I would like to interrupt. In that respect you tend to disagree with the first witness today, who as I read him suggested that in the case of cruel and unusual punishment, it is doubtful whether there could be a different legislative determination after a Supreme Court determination that capital punishment is constitutional.

But he did feel that in terms of discrimination clearly revolving around the Voting Rights Act and similar matters, a legislative determination differing from that, made by the Court on the basis of the case presented to it would be sustainable.

Professor POLLAK. Yes. I agree half way with Professor Schmidt on that. I fully agree with him that further inquiry is open with respect to the discriminatory application of the death sentence. But I also am persuaded, as I tried to suggest a moment ago, that even if the Supreme Court has moved to reject the cruel and unusual determination, that in the nature of things can only be a provisional judgment for the Court to make on the basis of the record before it.

It disposes of that case or those cases. That is the nature of adjudication. It does not purport—and I don't think any judge would claim that it would purport—to settle as a general matter what must be the impact of the death sentence overall in national application or with regional differences taken into mind.

MR. KASTENMEIER. I do not know the nature of the cases presented by Mr. Amsterdam and others, but I assume that they were presented on a very broad gage basis. At least from the testimony given us, I assume that they had the very broadest ramifications socially that were drawn from the several cases presented to the Court.

PROFESSOR POLLAK. May I put it to you, Mr. Charmain, that if we suppose the Supreme Court of the United States in the cases coming to it, which it is now considering, rejects the cruel and unusual argument, that is a decision that would have to be weighed against the fact that only last month the California Supreme Court, construing its cognate constitutional provision—it is not identical, to be sure; it is in the terminology of "cruel or unusual"—and reviewing its penal practices, came to the conclusion that the death sentence in California is (1) cruel and (2) unusual. It made both determinations.

Now, I am not concerned for the moment with the fact that the California decision was a construction of the California constitution, while the U.S. Supreme Court is construing the national Constitution. That is, of course, obvious—obvious to lawyers, although it makes no sense to those who are not members of our special guild.

In effect it seems to me that this differentiation of finding with respect to conceptually the same problems illustrates my feelings with respect to the adverse decision of the U.S. Supreme Court that we are hypothesizing—namely, the Justices are not going to decide as a generalization that the death sentence is across the board free of any taint of cruel and unusualness. They may decide on the basis on the general material adduced thus far, that they are not persuaded that the death sentence is cruel and unusual across the board; or they may decide that cruelty and unusualness have not been demonstrated in the particular instances before the Court. But that doesn't invalidate the California decision with respect to the history in California. And, indeed, it would seem to me that such a variety of judicial views would invite Congress to take its own look at the data—data which I think the social scientists will tell us are thus far really quite incomplete—and make its own detailed, systematic examination of what the death sentence is used for in jurisdiction after jurisdiction after jurisdiction; who was sentenced to death and who ultimately dies; after what circumstances; after what time delays; by what methods.

MR. MIKVA. Would the witness yield at that point?

There is one kind of question which legally, judges—and particularly appellate court judges—would be most qualified to talk about. But since it is not a legislative question, they would not want to discuss it, at least not too much in any decisions.

And that, of course, is the impact on the appellate process. The Highest Court in the land grinds to a halt every time an application comes in. They sit there and pore over every page, almost looking for reasons to reverse. And some of the real legal sports in criminal law come in as a result of capital cases.

How do you get that kind of input before this committee? I suppose most appellate judges would be very comfortable coming in to

talk about the subject matter, since they all have cases pending and since in part, we are almost asking them for a theory that does not exist: that is, their subjective attitudes about cases.

But is it not a valid kind of input we ought to have in addition to this sociological data? I notice that it isn't just what it does to the jury, it is what it does to the distortion of demonstration of criminal justice and what it does at the appellate level.

Professor POLLAK. I think you are entirely right about that, Congressman Mikva. I am trying to figure how one could pursue the matter.

Mr. MIKVA. You are a former law clerk.

Professor POLLAK. I did run across one sort of stray example, one sort of reflection, just recently, which was a sequel to that unspeakable—I mean in the literal sense unspeakable—case of *Francis v. Resweber*, which you remember was decided in 1947.

That was the case in which Louisiana undertook to execute, by electrocution, a man named Willy Francis. And the electrocution failed. And then they decided to execute him again. A proceeding in the nature of prohibition was brought in the Louisiana courts—unsuccessfully. The Louisiana courts said the matter was one for Executive clemency, not a judicial matter.

It was brought to the Supreme Court by a lawyer named J. Skelly Wright—the lawyer who is today so distinguished a judge of the U.S. Court of Appeals for the District of Columbia. If you remember, in that case the Supreme Court divided five to four, sustaining Louisiana's intention to go ahead and execute Francis the second time.

Let me say parenthetically that that case is itself a piece of datum on the cruelty and unusualness of the execution process. Of course, this was not before the present Supreme Court.

Willy Francis had an interview in which he told a reporter for the Herald Tribune his published account of what happened when he was electrocuted the first time. And one can build on that to think about what he was thinking about, approaching death the second time.

But the point I was going to make is that after that decision, about 2 years later, Justice Frankfurter was in England and was called as a witness by the Royal Commission, which was then investigating the death sentence in England. It was the work of that commission which, I guess, appeared in 1959 or thereabouts, which was the predicate for England's ultimate abolition of the death sentence.

Justice Frankfurter was asked as an expert American witness what the experience was with electrocution and gas in the United States. Had it worked pretty well? And Justice Frankfurter in reply narrated the *Willy Francis* case and then described this as a case which had told on him terribly. He found himself very upset at the prospect of this reexecution. But he ultimately concluded that that was not a judicially cognizable factor entering into the justice's conception of due process. And his was a deciding vote. He was one of the five majority judges. He wrote a separate concurring opinion. Justice Frankfurter's testimony before the Royal Commission is one piece of direct testimony stating how a judge is bent under that intolerable burden.

Certainly, retired judges would be able to speak to this without any impropriety at all. I can't help but think that is the case. And I wonder

furthermore—take California or New Jersey, States where there has now been a judicial removal of the State from the death sentence category—there, I should think, judges might be willing to discuss what the administration of that process has meant to them at trial and at the appellate level.

I think I was trying to suggest the further range of legislative inquiry as against judicial inquiry. As I say, I think it would be a far larger sweep in the cruel and unusual punishment area. And I am sure the lawyers who presented those cases, Professor Amsterdam and his colleagues, would feel that there is a vast amount of material that they would want to bring before a body like this that couldn't possibly be introduced even by way of footnotes into their extraordinary Supreme Court brief—although there is a lot in this brief.

So, that is why—and, as I say, I used this California Supreme Court decision as an example—that is why the fact that there could be differential judgments, when one looks jurisdiction after jurisdiction into the matter, itself seems to me persuasive that in no sense could a judicial declaration with respect to the record before it foreclose further legislative examination, I would even wager—

Mr. FISH. May I interrupt at this time? I know it is important, Mr. Chairman. It was my understanding from the first witnesses that we had this morning, Mr. Elsen and Professor Schmidt, that if the Supreme Court did decide that capital punishment in the cases before it on grounds of cruel and unusual punishment was constitutional, it would seriously affect our being able to legislate, using as an underpinning cruel and unusual punishment.

We would go ahead and suggest other constitutional bases. But I gather that you are contradicting this. And your judgment, as you have stated very clearly, is that this would in no way preclude us, based on a far greater scope and so forth, from relying on this basis in legislating.

Professor POLLAK. I am quite confident of that, Congressman Fish. I think the history of litigation and then legislation in the field of literacy tests for voting is quite instructive. I think it will show—and I will come to this in a moment—one very important instance in which a judicial determination one way was found by Congress not to conclude the matter. And Congress acted in a way which was then sustained by the Court.

Having said so much, I will even venture the suggestion that judges not only would not regard legislative examination of these matters as an intrusion, but would welcome the sharing of responsibility with the legislative branch with respect to constitutional issues.

So, here I would suggest that it ill becomes us as a Government to think that judges should be required to sweat out in isolation the enforcement of a Constitution, which I may say, all of you are bound by oath to look to the enforcement of.

Perhaps what I am saying is at least as well illustrated when we turn to the racially discriminatory side of the equation. I think that if any of us who is familiar with the problem of showing discrimination in jury selection thinks about the matter for a while, you will know that it is one thing to make a general analysis of how juries are picked in a county or in a State and quite another thing to persuade a Federal court within the meaning of the very rigid standards which

the Supreme Court has established that in the particular case, there has been a demonstration of discrimination, such as to void the conviction.

I think one can think of jurisdiction after jurisdiction in which it is perfectly evident to everybody including the Supreme Court that the history has been a discriminatory one.

But the judicial question remains, in the particular case, can you demonstrate it? And if you take the reverse situation—to find an isolated case in which there has been discrimination in jury selection or, if you will, there has been discrimination in the sentencing process, does it work back to indict the whole process?

There are different inquiries with respect to the problem of differential sentencing. The dialog between the witness who preceded me and some of you I found very interesting. Dr. van den Haag seemed to think that the information available on the subject of sentencing either was unpersuasive or inadequate.

If that is so, that again places him as a witness, I think, on the side of this legislation. It shows that we need to know an awful lot more. We need to know about sentencing patterns. Who gets sentenced? And who ultimately gets executed? We also need to know an awful lot more about deterrents.

But what do we know? We know that in the field of rape, nine-tenths of the people who have actually been executed for rape since 1930 are black. If you look precisely at Georgia, you know again from the national prisoner statistics that in Georgia, three whites have been executed for rape in that period of time and 58 blacks, a margin in the neighborhood of 20 to 1.

In some of the questions which Congressman Railsback was raising before we recessed, I think they bear on what sort of inferences does one draw from that. As a preliminary matter, one wants to know a lot more, sure.

I would venture that if one penetrated the Georgia statistics, one would discover that the offense of a white man raping a black woman almost hadn't been regarded as an offense under Georgia law. That is to say people almost didn't get prosecuted. Certainly, nobody ever was executed for it.

Now, let us assume that that is the showing with respect to rape in Georgia and that there is a more generalized pattern, 90 percent of those executed for rape in all of our States are black. That certainly is suggestive of a discriminatory pattern. But one needs to know more.

One finds out, of course, pretty quickly that rape has been a capital offense where—only in Southern States. This, I doubt, is a coincidental fact but one with a cultural history. If you generalize the figures more, I gather again from the national prisoner statistics that over all for all categories of crimes which people have been sentenced for since 1930, approximately 48 or 49 percent of those executed have been black.

The difference between those and the general population figures are perfectly plain. And it is likely that a disproportionate number of black people get charged with crimes and charged with violent crimes.

I take that to be true. But to refine those figures—to get behind the figures and into the process enough to make any serious statement

about whether there is discriminatory application either regionally or generally—one has to do far more work than, I think, anybody has yet begun to do.

Mr. MIKVA. Along those lines, Professor, I recall, many years ago, trying to get some statistics on the rape category. One of the problems is that you don't get a fair index when you just take all the rape cases that have been brought. The white man and the black woman is not brought as a rape case. If it is brought at all, it is brought as contributing to the delinquency of a minor.

You don't get a fair ratio. I think that is true of most other categories of crime in the North as well as the South. It has to do with the lawyers and their representation. You don't get the full impact of how discriminatory capital punishment has been even by looking at how many people get the death penalty for rape where the number of those who are black is compared to the number of those who are white.

Professor POLLAK. That is right. I fully agree.

Mr. KASTENMEIER. Would you also agree with Dr. van den Haag's statement which stresses the unfair way in which the penalty is distributed, not the fairness or the unfairness of the penalty itself. According to him, it is a question of whether any of these penalties—confinement in prison or the death penalty—are unfairly or unjustly applied to people, not what the penalty is, but how it is applied, and how thoroughly or uniformly it is applied.

Professor POLLAK. I think that may be the way we are phrasing the question. But I don't think it avoids the constitutional issue which presses upon us. I had a feeling that I wasn't quite sure I followed his argument there. But it seemed to me that he was trying to draw a circle around the death sentence and say that the sentence is not impugned. It is the way it is used. I don't think our constitutional law works in such hermetically sealed compartments, nor could we survive if it did.

An integral part of the administration of the death sentence, as we learned from the cases that the Supreme Court decided last year, the *McGautha* and *Crampton* cases, is that for the most part the decision as to who shall be sentenced to death, let alone the subsequent decisions as to which among those who are sentenced will, in fact, die—clemency and all the rest—that the initial decision of who shall be sentenced to death is a decision customarily determined by a jury uninstructed as to standards.

It is an almost unique form of administration of the law. One searches all of our areas of Governmental control, whether we pay a tax or whether we are entitled to put up a shed within six feet of our boundary, whether our child is eligible for a state educational loan, whether one qualifies for social security or veterans' benefits. All of these are matters which are administered by standards.

We think of this as the center of our legal structure, but it is not so as to this most fateful of all decisions. In the administration of that discretion to impose the death sentence no standards at all appear. And so we invite—we so define the sentence as to invite—exactly the kind of misapplication which *prima facie* seems to operate.

Whether it operates more with respect to some offenses than with others; in some parts of the country more than others; or in some forms of sentencing practice than others—these are matters to be explored by this Committee. But in suggesting these differential inquiries, I do

want to fully subscribe to the thrust of some of the questions that have come from you gentlemen this afternoon.

I think these are national issues. I don't mean, for example, in exemplifying the problem with reference to the rape issue, to be understood as saying, well, the witness is just saying that in the Southern States, they still administer the criminal law badly.

I think one of the facts about our national life is that our problems of discrimination are nationwide problems. I think that underlines much of your legislation in many fields. And this inquiry is part of that.

I hope that I have said enough in trying to distinguish between the legislative and judicial functions and inviting Congress to inquire further, whatever the Court may decide with respect to the pending cases. And indeed, I may add whether or not Congress can act before the Supreme Court acts. I appreciate the desirability of action. I think it would be fine if Congress could pass this bill now. But I am not so innocent of your legislative processes as to think that the subcommittee has at its command the power for instant legislation.

If the Supreme Court decides these cases and decides them adversely to the constitutional claim before your subcommittee and your two full chambers have had a chance to act on this legislation, I think you should pursue it in any event.

Mr. KASTENMEIER. On that point, Professor Pollak, it has been suggested, not publicly but at least privately, that possibly these hearings may be ill-timed, inasmuch as the Court is considering cases involving these issues. What we do here might even unintentionally affect the Court's decision in some respect. And in that regard, the suggestion goes, these hearings are ill-timed.

Do you have any feeling about that whatsoever?

Professor POLLAK. Mr. Chairman, I think that they are ill-timed only in that they are late. Congress should have been working at these problems last year or the year before and 20 years before that. The only thing that can make them more ill-timed is to delay them any further.

Our Supreme Court is always going to be faced with these problems in one form or another. And the one thing that I am absolutely confident of—and I think all of us who know our Federal judges know this to be true—is that the fact of pending concurrent legislative inquiry into the same sorts of problems can't conceivably affect in any denigrating sense the quality of the judicial process.

The Court will do its work and do it very vigorously and strongly. And it will be delighted to know that there are people elsewhere in this city who are also concerned with major issues of law reform. Nothing done here in any sense can undercut the judicial process.

I have tried to draw the distinction between what I think is the appropriate role of Congress and that of the Court. But I haven't offered you thus far any substantial doctrinal basis for why I believe that this approach is right. I want to start by rejecting one doctrinal theory, which I would imagine if I don't flatly reject it or marginally reject it, I will be assumed to be arguing from.

In positing the Nation that the Congress might on the basis of inquiry come to a determination of constitutional issues different from or in advance of the Court and then ask for judicial ratification of that

differential constitutional determination, I am not arguing from the Court's decision in *Katzenbach vs. Morgan*. I stress that I am not arguing from that case, because that case has been much relied on both in this area and in other areas in which Congress has been asked to enforce the 14th amendment recently.

And I want to make clear why I am not and why, stripping away *Katzenbach vs. Morgan*, I think the precedents clearly support the pending proposal. *Katzenbach vs. Morgan*, you will recall, of course, was the case in which the Supreme Court sustained that provision of the 1965 Voting Rights Act which in effect knocked out the New York requirement, both constitutional and statutory, of literacy in English as a requisite for voting and substituted for it a Federal standard of 4 or 6 years in a school with an American flag over it, a standard which made several hundred thousand citizens of Puerto Rican ancestry and education eligible to vote in New York.

The Supreme Court's decision sustaining that statute can be read as meaning—there are certainly phrases in it which sound as if the Court is saying—notwithstanding that we might see no constitutional objection whatsoever to the New York requirement of literacy in English standing by itself, Congress has a rational basis for thinking that is a bad idea under the 14th amendment, discriminatory against people of Puerto Rican background. And we therefore sustain the Federal requirement.

I don't pretend to understand fully what *Katzenbach v. Morgan* meant. But whatever it meant, I am sure that its impact is greatest when it is operating in the area of genuine racial differentiation. And it is an enforcement of the equal protection clause.

And in that sense, it might be argued to be of some use with respect to the racial discrimination aspect of the bill before you.

When you come to the cruel and unusual punishment side of the bill, I do think that this Congress does have the authority to explore and to legislate with respect to issues affecting due process of law. I would not look to *Katzenbach v. Morgan* for that demonstration. I would look, for example, not merely to the general course of your legislation governing the criminal process, but to the invitation from Chief Justice Warren to the Congress and to the State legislatures in his *Miranda* decision.

I refer to the *Miranda* opinion not with regard to whether you agree or disagree with his determination there, but with regard to his explicit invitation to legislators to concern themselves with issues of due process of law with a view to shaping legislative proposals that could supplement or alternate with judicial rules. And in the same vein Chief Justice Burger, in a separate opinion in the *Bivins* case last year dealing with the Mapp exclusionary rule, includes an explicit and elaborate invitation to Congress to explore legislative substitutes for the Mapp exclusionary rule where evidence is taken in violation of the fourth amendment.

But more particularly, as I said before, I look not to *Katzenbach v. Morgan* as principal reliance, but to *South Carolina v. Katzenbach*. In that judicial and legislative history I am persuaded that the strongest argument in favor of your bill as it now stands on *South Carolina v. Katzenbach*. And I am led to this initially by seeing that my colleague, Professor Bickel, in his letter to Senator Hart, reprinted in the Con-

gressional Record last June 1, cited *South Carolina v. Katzenbach* as a compelling citation.

Now, why isn't that terribly relevant, indeed? I hope you will permit me to remind you of a few details of the history of *South Carolina v. Katzenbach*. Of course, Professor Schmidt has talked to you about it. But I ask your permission to refresh your recollections on that sequence.

That decision sustained, as appropriate enforcement of the 15th amendment, legislation which suspended State literacy requirements in those parts of States where, under a complicated formula, participation in the franchise fell below what Congress felt to be the lawful norm—suspended the literacy tests for a 5-year period, and, to be sure, with avenues through which the States could come out from under this limitation.

Now, I ask you to remember that the Court sustained that sort of legislative enforcement of the 15th amendment. And I take it that Congress power to enforce the 15th amendment is comparable to the 14th amendment. The wording is the same. It is the same kind of provision.

The Court sustained that exercise of power in *South Carolina v. Katzenbach* against the background of the fact that some 7 years before in the *Lassiter* case, it had sustained literacy requirements as constitutional kinds of qualifications for voting. That is to say it had sustained as a generalization that kind of qualification, but subsequently supported Congress when the Congress made findings that in many, many situations literacy tests did operate in a discriminatory way.

I think nothing could better illustrate the difference between the judicial and the legislative inquiry than that sequence. When Congress made a responsible inquiry building on the accumulated information and could make the statement that in operation the literacy test frequency had this unconstitutional incidence, the Court was bound to responsibly recognize that legislative determination and enforce it, notwithstanding its prior determination that, on a per se level, the literacy requirement was not unconstitutional. So, too, I suggest with the cruel and unusual punishment question, as we have hypothesized it in assuming an adverse judgment from the Supreme Court.

Now, I am strengthened in my understanding of what the Court did in *South Carolina v. Katzenbach* by what happened in 1970 when the Court dealt with *Oregon v. Mitchell*, the case testing many of the provisions of the 1970 Voting Rights Act.

Because of my jaundiced view of *Katzenbach v. Morgan*, a view shared by my colleague, Professor Bickel, we were among the minority of constitutional lawyers—but I am happy to say that we were joined by Senator Thurmond—we were among the constitutional lawyers who thought with all respect that you gentlemen did not have constitutional power to lower the voting age to 18.

MR. MIKVA. That is known as an "I told you so."

Professor POLLAK. If it appears in the record, it will appear, Congressman, that you said so.

On the other hand, I cannot claim for Professor Bickel and myself that we were so perceptive as to see in fact what the disposition was that the Court made through Justice Black's Solomon-like disposition

of the problem. That problem has become academic—which means that only people who have nothing better to do than Professor Bickel and I need bother about it—because you amended the Constitution.

Mr. BIESTER. If the witness would yield, it did turn out all right.

Professor POLLAK. Yes. It did turn out all right. I am delighted. But the fact that you had to resort to amending the Constitution may also have an application here. The immediate point I want to make here is this. Look at how the Court—not all the justices, I won't burden you with all of that, but key justices—dealt with the prior precedents, not on the lowering of the voting age part of the 1970 act, but on section 201 in which you dealt again with the literacy test problem.

You will remember in section 201 you built upon the 1965 voting rights provision by adding a further 5 years in which literacy tests were suspended nationally, except with respect to those areas already covered by the 1965 act. So, you expanded the literacy test ban. And that section of the 1970 act is the only section of that act which was sustained by all nine of the justices in *Oregon v. Mitchell*.

Even Justice Harlan—who thought that every other provision which was tested in *Oregon v. Mitchell* was unconstitutional—even Justice Harlan thought that the section 201 provision was a valid exercise of Congress' power to enforce the 15th amendment.

Now, I will read to you what Justice Harlan said. Before reading to you, I would call to your mind that Justice Harlan dissented in *Katzenbach v. Morgan*.

“Despite the lack of evidence of specific instances of discriminatory application or effect”—note that language—“Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of section 1 of the 15th amendment was sufficient to authorize the exercise of congressional power under section 2.

“Whether to engage,” Justice Harlan went on, “in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make. The fact that the suspension is only for 5 years will require Congress to re-evaluate at the close of that period. While a less sweeping approach in this delicate area might well have been appropriate, the choice which Congress made was within the range of the reasonable.”

Thus spoke Justice Harlan.

And I remind you that he was there dealing as you were there dealing with an area as much within exclusive State purview, voter qualifications, as is the administration of the State criminal law. I submit that fully consistent with Justice Harlan's analysis of the literacy test issue in *Oregon v. Mitchell* was the analysis made by Justice Stewart.

I recall to you that Justice Stewart also dissented in *Katzenbach v. Morgan*. In *Oregon v. Mitchell*, Justice Stewart filed an opinion which was joined in by the Chief Justice and by Justice Blackmun. And Justice Stewart had this to say:

Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against

Negroes in every State in the Union, Congress was not required to make State-by-State findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records. Cf. *Lussiter v. North Hampton Election Board*

A citation making, I submit, precisely the point which I made, the distinction between the particular judicial finding that the literacy test was not unconstitutional in the particular case, and the judicial finding that Congress could make a generalized finding and could ask the Court to enforce that finding. Now back to Justice Stewart.

"The findings that Congress made when it enacted the Voting Rights Act of 1965"—mark this—"would have supported a nationwide ban on literacy tests. Experienced gained under the 1965 act has now led Congress to conclude that it should go the whole distance. This approach to the problem is a rational one; consequently, it is within the constitutional power of Congress under section 2 of the 15th amendment."

I submit to the subcommittee that Justices Harlan and Stewart were the justices least hospitable to the decision in *Katzenbach v. Morgan*. Their approval of the literacy test provisions of the 1970 act and the words in which they—and I remind you that Chief Justice Burger and Justice Blackmun joined Justice Stewart—couched their approval, seem to me to be of high significance for this subcommittee's purposes.

The 2-year Death Suspension Act is, like the 1965 and 1970 literacy tests provisions, a temporary Federal intervention in matters normally within State control. But the 2-year death suspension is, to use Justice Harlan's phrase, "less sweeping" than the 5-year suspension of literacy tests—less sweeping in time and effect. The suspension of a sentence simply postpones its execution, whereas suspension of a voting qualification is intended to and presumably does affect the elections which take place during the suspension period.

Consider also what Justice Stewart, supported by the Chief Justice and Justice Blackmun, said about the sequence of Congressional measures which they approved—namely, that the limited suspension of literacy tests under the 1965 act, followed by the nationwide suspension under the 1970 act, was a reasonable approach.

But consider what Justice Stewart also said: "The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy tests."

May it not be, I ask you gentlemen, that Congress, when reading the data which will come before this subcommittee now, could find that the legislative case is already made, not just for a suspension of the death sentence, but for its abolition, its general abolition, either on the ground of its being cruel and unusual or being racially discriminatory in its application?

And would not the quoted words of Justice Stewart suggest that such data could already support a more general ban? I suggest that that is possible. And yet I point out to you that what you are actually considering is not anything as radical as that. You are considering a far more modest intervention, because the proposal made to you is

not to act on the data before you now or that can be presented to you in these hearings, but invites you to get further data.

I think that the social scientists will tell you that the data they themselves have to present are not yet apt for the kind of judgment that you would want to have before you made a permanent decision.

Mr. BIESTER. Would the witness yield on just that one point? But we are asked to act on the basis of some data.

Professor POLLAK. That is correct.

Mr. BIESTER. It would seem to me that there would have to be some data available now to warrant the kind of action that we are talking about taking. It may not be so complete. But certainly there should be sufficient data to establish a prima facie case of discrimination or cruel and unusualness or some other aspect.

Professor POLLAK. And that data I think you have or will have by the time these hearings are over. I suggest to you that the data I read to you before with respect to racial patterns in sentencing, both as to rape and as to murder generally, suggests a prima facie pattern.

The concession from the witness before me, and I take it this was reflected in all of what the current literature says, that we simply don't know of any persuasive evidence that the death sentence has a deterrent effect, is itself a datum, which I suggest to you raises an independent due process basis for legislating. And I would hope that that independent due process base might be included as an added basis for the bill.

And finally, as to unusualness of the penalty and its cruelty, the kind of inquiry which the California court began to make and which was sufficient for its judicial determination on the California record, I think, begins to present to you a prima facie basis for saying yes; there is far more to this than can be examined judicially.

Mr. Chairman, I have trespassed on your time too long in order to offer you the legal rationale. I hope you will permit me in closing to urge upon you that it is a matter of the highest constitutional prudence for Congress to enter this area and share the responsibility for resolving public issues of enormous moment.

I think the country is owed this, not alone because of the gravity of these issues, but also, if I may say so, Mr. Chairman, because one of the political facts which needs general attention is that Congress has been quiescent with respect to major issues in our public life in this past generation.

It was a decade after the school segregation decisions before Congress in any serious sense entered the field with the 1964 Civil Rights Act. The prior legislation was a tepid introduction. For years both the executive branch of the Government and the legislature left the courts to struggle with those matters alone.

And I would suggest the irony, perhaps impertinently, Mr. Chairman, that at the very point when Congress began seriously and responsibly dealing with civil rights matters, it abdicated the field with respect to the other great set of issues confronting this country. And those are the issues of peace and war.

For those who recall that ours is a tripartite form of government and that Congress is established and given power to act by the first article in the Constitution, it seems important for Congress to play its full role on major issues. This is such an issue.

I feel the more strongly about this, Mr. Chairman, because for the last several months, I have been residing in a country where parliament is sovereign and the judiciary is kind of a minor auxiliary agent. It is an extraordinary constitutional apparatus.

Frankly, I find ours more congenial. And I would say that it is apter for the process of protecting fundamental human rights. This is a very short visit back home for me. But it is a very important one in many ways in terms of reminding me of the values and structure of our society and our way of doing things.

But I must say that the British Parliament exemplifies a legislature which has dealt seriously and intensively and at great length with these issues which I think are now up to you to deal with. Some of your colleagues may be troubled about the amount of time which the kind of inquiry that these bills call for will take from all of your official lives. The same factor of time may come in as some of your colleagues concern themselves with the imposition on the State processes, asking them for 2 years' more delay.

When you think about those issues of time, I hope I may commend to you one anecdote which comes to me out of my own reading of the parliamentary debates in 1965 when the House of Commons and the House of Lords finally voted the 5-year suspension of the death sentence, which ultimately 4 years later was to be made permanent.

The 1965 bill was a private bill—it was not a party matter, nor was it a Government matter; it was a private bill acquiesced in by the Labor Government. And I may add, now that England has a conservative government in power, this Government has just rejected, with opposition support, an attempt made only 3 days ago to reintroduce capital punishment. The two parties are now as one on this issue.

In the very early days of the 1965 debate, a former Home Secretary, Mr. Brook, got up to express his support for the proposal. He told his colleagues in the House of Commons that in the office of the Home Secretary there was a frame within which were listed the names of those who were under sentence of death, a list which was vital to the Home Secretary's responsibility, because he was the one, while the death sentence existed, who had to make the decisions as to what recommendation would be made to the Queen on requests for mercy.

Mr. Brook, the former Home Secretary, described this framed list that was there in the very office of the Home Secretary as a list of those who were currently under sentence. He said that on the frame there was the following slogan written in Latin, which he kindly translated for his colleagues. It is a motto which I would urge you gentlemen to regard as a caption for your work.

The Latin is, "Nulla unquam de morte hominis cunctatio longa est." And Mr. Brook's translation was, "No pause for thought is too long where the death of a man is concerned."

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Professor Pollak, for a most thorough and professional evaluation, particularly as to constitutional aspects and the decisions affecting them.

I especially appreciate your bold and compelling call for congressional action in the field. I think we need to be spurred into action from time to time.

My only question is a rather broad one, inasmuch as we have several options in terms of legislation. One would be inaction. One would be the Celler-Hart bill for a 2-year moratorium. Another would be abolition of the death penalty in the Federal system. And still another, a fourth alternative, might be total abolition, both State and Federal.

You have spoken really to the second alternative today, which in the total context of what may be possible is at least a modest step. I am wondering whether the temporary nature of the congressional action cited by you is more plausible, particularly to conservative members of the Court, and whether there is some political evaluation also in the settling on the Hart bill as a solution.

This step seems to be more plausible politically, as well as for other reasons, in light of what some members of the Court might have said in similar cases.

Professor POLLAK. I think I would agree, taking it politically as I am sure you meant it in a very large sense of what kind of policy advance is consistent with our traditions and with the pace at which we move with the allocation of responsibility, not only between Court and Congress, but also between the Nation and the States.

I think the Hart-Celler suspension proposal is the right kind of compromise move at this time. I think it is arguable that there are already sufficient data to justify Congress legislating a nationwide ban at this time. Though I think that case is arguable, I think it is only arguable in that if we are told by the social scientists that there are really many more issues which should be conscientiously probed, that is a judgment that the Congress ought to listen to.

And instead of going the whole way of legislating now, Congress should sponsor the further inquiry and legislate the suspension attendant on that inquiry.

Now I would see that going on coincident with your enacting at the Federal level an abolition of the death sentence as an instrument of Federal criminal policy. I see no inconsistency there at all. It seems to me to be entirely right for you to do that.

The one other step which might be taken at this time, of which there has been no mention this morning or this afternoon, of course, is that Congress, while it is conducting its inquiry might also be contemplating a constitutional amendment abolishing capital punishment throughout the Nation.

And it seems to me that initiative would be an almost necessary response, I think, in any event if all judicial and legislative amelioration of the death sentence seems unsatisfactory. Certainly the fact that such a sentence may be regarded as minimally constitutional doesn't mean that we wouldn't consider amending the Constitution.

It seems to me that inquiry into the desirability of a constitutional amendment could responsibly go forward in the halls of Congress at the same time. It bears further on the suspension issue in the sense that, as I think Professor Bickel noted in his letter to Senator Hart, if Congress were to propose an amendment to the States, that would be an entirely different, totally independent basis for saying while the States are considering an amendment, let us suspend the death penalty, so that we will not have the unutterable horror of an amendment passed with deaths accumulating in the meanwhile.

That is not a necessary auxiliary of the proposal before your committee. It is an independent basis for arguing the desirability of the

suspension. But I think that possibility should be in the subcommittee's mind. And I am reminding myself that Professor Bickel did indicate that in his letter to Senator Hart.

As an immediate matter, I certainly hope that your subcommittee would favorably report both the suspension and your own bill, or one of the other bills, Mr. Chairman, calling for the abolition of the death sentence at the Federal level. I think both of those processes should go forward with more than deliberate speed—with all possible urgency.

Mr. KASTENMEIER. Thank you.

The gentleman from Illinois?

Mr. MIKVA. I have no questions. It is nice to have you back.

Professor POLLAK. Thank you, Congressman.

Mr. KASTENMEIER. The gentleman from Pennsylvania?

Mr. BIESTER. I just have one or two. First of all, Mr. Fish had to leave. He asked me if I would inquire as to whether you felt that 2 years would be long enough, since the British took 4, programed 5. Do you think 2 years are enough?

Professor POLLAK. I think on that, Congressman Biester, I would be guided by what the social scientists have to say as to the scope of the inquiry to be made. The very fact that the British took as long as they did means that we already have more data than the British had available and so forth. So, I would like to see a time period—I don't have any special preference for two rather than something else—but a time period which would give Congress responsible leeway and would be consistent with intervening as little as possible in the State processes.

Mr. BIESTER. I think it is implicit in some of what you said, but I would like just for my own clarification to inquire as to your thoughts with respect to the proposition that we had advanced this morning that there was a constitutional predicate for our actions rising out of a combination of the pending cases which result from stays in 1967.

Coupled with article 3, I think the last section of the last phrase in section 8 of article 1 is the necessary and proper clause, giving us the power to do this, even if we did not have the cruel and unusual punishment ground to rely on or any other basis that you spoke of.

Professor POLLAK. Well, I think there is a tenable basis for congressional movement there. I think really, looked at from that perspective, the agenda ought to be enlarged a bit. That is to say, the workings of the Federal appellate and habeas corpus process, in which I so strongly believe, their proper workings have brought about a situation which poses very real issues for those responsible for law enforcement.

In that sense among the things that Congress should legitimately concern itself with are what are the problems of readjustment for State judges, State prosecutors, Governors, or all of the paraphernalia of State penology. What are those problems of adjustment with which the Federal Government could in some way help, since it is Federal intervention that has been responsible in some measure for the accumulation of problems that they now would bear?

It is a kind of separate inquiry from an inquiry into the nature of the sentences which have been imposed and how they are arrived at. I think it is entirely proper as a matter of congressional concern for judicial administration. Congress could look into that, too.

And, as I say, it is not far afield from what seems to me a recurrent call from the two Chief Justices in succession for legislators,

both at the national and at the State level, to worry about issues of due process of law. The very issues which judges make rules about, they seek legislative alternatives to.

Mr. BIESTER. Yes. I find myself somewhat concerned about the distinction which was made by one of the witnesses this morning about values. It seemed in his mind to be more the province of the Court than that of Congress. It seems to me that values are the fundamental business of legislatures, not only the province of the courts.

I just want to thank you for your testimony. You have been very, very helpful to me. And Mr. Fish also asked me to make the same comment for him.

Professor POLLAK. Thank you. And please thank Congressman Fish for his kind thoughts.

Mr. KASTENMEIER. Speaking for myself and all of the committee, we, too, would like to express our gratitude to you for coming today from a very long distance, to speak on this crucial piece of legislation.

Thank you again for appearing today.

Professor POLLAK. May I say a word in response, Congressman? I thank you for what you have said. I mean it in more than a courtesy sense. I regard myself as privileged to have participated in the proceedings. I have attended many congressional hearings. But I can recall very, very few that have come close to the level of concern and informed inquiry that I felt on the part of you and all of your colleagues today.

Maybe it is just the sentimental maunderings of an American who has been away from home for several months. But I feel very much that when I return to London tonight, I will be able to tell my British lawyer friends first hand that there is a process of legislative government going on in the United States which is worthy of examination and emulation by Parliament.

Mr. KASTENMEIER. We will heed your call to congressional action, as I characterized your concluding remarks. Thank you again, Professor Pollak.

(Subsequently the following letter was received from Professor Pollak:)

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE,
UNIVERSITY OF LONDON,
London, England, March 27, 1972.

HON. ROBERT W. KASTENMEIER,
*House of Representatives,
Committee on the Judiciary.*

DEAR CONGRESSMAN KASTENMEIER: On March 15 I was privileged to appear as a witness before your Subcommittee Number 3, which was considering pending bills relating to the death sentence. In the course of my testimony I made some drafting suggestions with respect to H.R. 8414, the proposed "Death Penalty Suspension Act", which I strongly support. The purpose of this letter is to reduce those suggestions to paper in coherent form:

1. My principal suggestion is that Section 2 of H.R. 8414 be expanded to add a third "serious question." This third question would be, in substance, whether the death penalty can be shown to have any significant deterrent effect. The constitutional thrust of this question is that, if no substantial deterrence flows from use of the death penalty, it would appear doubtful that the penalty can be said to serve any legitimate and compelling state interest (I submit that mere vengeance would not and should not be regarded as a constitutionally sufficient state interest), from which it would follow that the death sentence would be a deprivation of "life . . . without due process of law" in contravention of the fifth and fourteenth amendments. The inclusion of this third "serious question"

would enlarge the scope of the inquiry to be conducted by Congress pursuant to Section 3 of the bill. At the same time, the inclusion of this third question would furnish additional constitutional foundation for the two-year suspension of the death sentence mandated by Section 4 of the bill. A suggested form of words for this additional question is:

(c) whether the death penalty is not a substantial deterrent to the commission of crimes, hence serving no compelling state interest, and therefore depriving those executed of life without due process of law in contravention of the fifth and fourteenth amendments.

If it is agreed that a third "serious question" should be included in Section 2 of the bill, the phrase "in either case" (page 2, line 3 of the bill) should be changed to read "in any of these cases."

2. Although the bill is addressed to the federal death penalty as well as state death penalties, the bill does not in its present form uniformly refer to the sources of Congressional authority (and correlative obligation) to enforce those constitutional mandates which relate directly to the federal criminal process. I would suggest the following:

(A) In line 2, page 2, of the bill, substitute "of the fifth and fourteenth amendments" for "of the fourteenth amendment".

(B) On page 2 of the bill, delete lines 4 and 5 and insert the following: authority under (i) the "necessary and proper" clause of Article I, Section 8, of the Constitution, supplementing the fifth and/or the eighth amendment, and (ii) section 5 of the fourteenth amendment, to prohibit the use of the death penalty.

(C) In line 11, page 2, of the bill, substitute "the fifth, eighth and fourteenth amendments" for "the fourteenth amendment".

On the enclosed sheet of letter-paper I have set forth proposed revisions of Sections 2 and 3 of H.R. 8414 which incorporate the several suggestions set out above.

Sincerely yours,

LOUIS H. POLLAK.

PROPOSED REVISION OF SECTIONS 2 AND 3 OF H.R. 8414

Sec. 2. Congress hereby finds that there exists serious question—

(a) whether the infliction of the death penalty amounts to cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution; and

(b) whether the death penalty is inflicted discriminatorily upon members of racial minorities, in violation of the fifth and fourteenth amendments to the Constitution; and

(c) whether the death penalty is not a substantial deterrent to the commission of crimes, hence serving no compelling state interest, and therefore depriving those executed of life without due process of law in contravention of the fifth and fourteenth amendments.

and, in any of these cases, whether Congress should exercise its authority under (i) the "necessary and proper" clause of Article I, Section 8, of the Constitution, supplementing the fifth and/or the eighth amendment, and (ii) section 5 of the fourteenth amendment, to prohibit the use of the death penalty.

Sec. 3. On the basis of the above findings, and in order to preserve the status quo and to prevent irreparable injury pending further investigation and consideration of the above questions by Congress and by the appropriate State authorities, Congress declares that, pursuant to its power to enforce the fifth eighth and fourteenth amendments to the Constitution, it is necessary to provide an interim stay of all executions by the United States or by any State or any subdivision thereof for a period of two years.

Mr. KASTENMEIER. This concludes this day's hearings. We will resume hearings in this room tomorrow at 10 a.m. on legislation affecting the death penalty in America. The committee stands adjourned.

(Whereupon, the committee adjourned at 3:30 p.m., to reconvene Thursday, March 16, 1972, at 10 a.m. in the same room.)



CAPITAL PUNISHMENT

THURSDAY, MARCH 16, 1972

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Conyers, Railsback, Biester, and Fish.

Also present: Herbert Fuchs, counsel, and Samuel A. Garrison III, associate counsel.

Mr. KASTENMEIER. The hearing will come to order.

This morning we resume consideration of legislative proposals to suspend or abolish capital punishment in America. I might add that the House goes into session at 11 o'clock this morning, so we will want to proceed as expeditiously as we can.

Before we proceed to our first witness this morning, who is Professor Marvin E. Wolfgang, I would like to call upon our very distinguished colleague, the gentleman from Illinois, Congressman Philip Crane, to introduce another witness we will hear from this morning. Congressman Crane, you are most welcome here.

Mr. CRANE. Thank you, Mr. Chairman. I am pleased to introduce to this subcommittee one of my constituents who has been invited to testify today, Mr. Frank Carrington, executive director of Americans for Effective Law Enforcement. Mr. Carrington appears here today as one well qualified professionally, academically, and by experience to testify on matters pertaining to the criminal justice system.

He is an attorney and graduated from the University of Michigan Law School. He has been awarded a master of law degree in criminal law from Northwestern University Law School, and has extensive legal experience, having served as a U.S. Treasury agent and as a police legal adviser to the Chicago and Denver police departments.

Americans for Effective Law Enforcement (AELE) is a national nonprofit citizens organization, the purpose of which is to give a voice to the law-abiding citizens in our criminal justice systems. I have been on AELE's mailing list almost from its inception, and I am impressed with its objectives and accomplishments.

I might add that AELE is totally nonpartisan, as indicated by the fact that it has received the enthusiastic endorsement of former Attorney General John Mitchell and of Senator John L. McClellan.

This subcommittee is holding hearings upon a matter of the greatest importance, whether capital punishment is to be retained. I believe that AELE can aid the subcommittee in its deliberations.

Mr. KASTENMEIER. Thank you very much, Congressman Crane.

Mr. Carrington, you are most welcome. Your background is very impressive, and we are pleased to have that introduction by Congressman Crane. We look forward to calling on you as the morning progresses.

Mr. CARRINGTON. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Our first scheduled witness had been the very distinguished Thorsten Sellin, who, we are advised, is snowbound in New Hampshire. We regret that we will not have the opportunity to meet and hear him. Happily, however, his statement was phoned in and will be referred to by our next witness, Prof. Marvin E. Wolfgang, who is professor of sociology at the University of Pennsylvania, and did, at one time, as I recall, work with the Advisory Committee to the National Commission on Reform of Federal Criminal Laws.

It is a pleasure to greet Professor Wolfgang. His national reputation is truly an exceptional one. The subcommittee is looking forward to hearing from you, Professor, and vicariously, hearing from Professor Sellin as well. You may proceed as you wish.

TESTIMONY OF PROF. EMERITUS THORSTEN SELLIN, UNIVERSITY OF PENNSYLVANIA CENTER FOR STUDIES IN CRIMINOLOGY AND CRIMINAL LAW, PRESENTED BY PROF. MARVIN E. WOLFGANG

Professor WOLFGANG. Thank you, Mr. Chairman. I appreciate the opportunity to be here, and I would like to have entered into the record, with your permission, the testimony of Professor Sellin. I will summarize it briefly, with your permission by indicating that he very forcefully states that the existence of the death penalty has no demonstrable effect on homicide rates in the United States.

He indicates that the death penalty gives no special protection to police who are killed by criminals who are suspects, as demonstrated in the abolitionist States. He also argues that the existence of the death penalty provides no protection to guards of prisons, or inmates of prisons, because, again, such phenomena exist in relatively equal proportions in the abolitionist and retentionist States.

In general, he concludes by asserting that the dignity of man needs to be upheld, and that the United States is one of the very few democratic countries in Western society which still maintains the death penalty, and calls for its abolition, both on the basis of scientific research and as a citizen of this country.

Mr. KASTENMEIER. Does Professor Sellin have a printed statement?

Professor WOLFGANG. Yes, I have copies of the statement, which I thought had been distributed.

(Professor Sellin's prepared statement follows:)

STATEMENT OF PROF. EMERITUS THORSTEN SELLIN OF THE UNIVERSITY OF PENNSYLVANIA CENTER FOR STUDIES IN CRIMINOLOGY AND CRIMINAL LAW

I appreciate your invitation because it gives me the opportunity to urge you and your colleagues to support any and all legislation that will hasten or achieve the abolition of the death penalty. We have already consigned the ducking stool, the pillory, the whipping post, and the stake to the museum of legal antiquities.

The gallows, the gas chamber, and the electric chair also belong there as curious mementos of a by-gone age.

To those of us who have spent a considerable part of our professional lives in the study of the social and psychological aspects of the history of punishment, the survival of the custom of executing criminals is not surprising. It was common when historical events began to be recorded. It has persisted, and, like other venerable customs, has gained such authority that those who challenge its utility and the validity of the beliefs that support it are regarded by the faithful as disturbers of the established order.

One of these beliefs appears to be dominant, namely, that the execution of criminals is a supremely powerful means of reducing the frequency of the kind of crimes for which they suffered death. This is only a conspicuous part of a general belief that punishment deters those punished from committing crimes in the future and deters their fellow men from imitating them. It assumes that the fear of punishment makes people obey the law. It has always existed and has rarely been disputed. It is accepted as so obviously true by most people, that to doubt it is almost like doubting that the moon circles the earth. Therefore, when the death penalty is questioned, firm believers in deterrence are irritated, see no need for subjecting the matter to scientific studies, and regard the findings of such studies as trivial.

Doubts of the deterrent value of capital punishment had often been expressed by legal philosophers, but they had no effect until 1764, when Beccaria published his essay, "On Crimes and Punishment". He held that deterrence was achieved by the certainty and not the severity of punishment, and he advocated the abolition of the death penalty because it was inadequate in that respect. His ideas won wide acceptance because the political climate of Europe was changing. Democratic and libertarian forces were soon to produce both revolutions and the reform of criminal laws. During the 19th century many countries abolished capital punishment and corporal punishment or reduced the number of offenses punishable by death. The movement was supported by many scholars who, in numerous treatises, took advantage of the growing wealth of information and statistical data produced by administrators of criminal justice and published in official reports. With rare exceptions, they concluded that if the death penalty was to be preserved, its merit did not lie in any power to act as a deterrent to crime.

The debate was carried on in the United States too; but the lack of statistical data until the last few decades made it well-nigh impossible to test the validity of claims traditionally made for the use of capital punishment. Accurate national statistics, by state, on executions are only forty years old. Statistics of death due to homicide have been available in only a few states for much longer periods; and statistics of non-negligent homicides known to the police and collected since 1930 have become reasonably adequate only within the last decade or so. These sources of information, especially the first two mentioned, and many special studies have made it possible for the present generation of researchers to examine the claims that the death penalty has deterrent value.

The main conclusions arrived at through these researches can be stated very briefly. They are: first, that capital executions have no demonstrable effect on homicide rates in the given jurisdiction and over a long period of time; second, that the death penalty gives no special protection to police; they are killed by criminals or suspects as frequently in death penalty states as in abolitionist states, and parenthetically we may observe that when New York abolished the death penalty a few years ago except for the murder of policemen, such killings have been increasing since then; third, that the abolition or the restoration of the death penalty in a given state has no demonstrable effect on the rate of subsequent homicides; fourth, that homicides committed in prisons by inmates are not prevented any better in states with the death penalty than in abolitionist states.

These conclusions have been accepted as persuasive by the Parliament who abolished the death penalty in England and Canada, by advocates of abolition in the United States, and most recently by the Supreme Court of California in its opinion declaring the death penalty unconstitutional. Supporters of this punishment reject them, but they offer no proof that they are wrong. They say that the effectiveness of deterrence can never be convincingly shown by statistical analysis. They blandly state that the conclusions listed above are "unsubstantiated"; but they are unable or unwilling to suggest ways of disproving them. Intuition cannot supply the answer unless backed by facts. The only hard data so far accumulated point to the fact that the death penalty plays no deterrent

role so far as the population at large is concerned. That fear of execution may have stayed the hand of a potential murderer in isolated cases is possibly true. It is certainly true that in isolated cases a person bent on self-destruction, but unwilling to commit suicide, has committed murder in order to assure his execution. That temptation is absent in abolitionist states.

The retention of the death penalty is undoubtedly favored for more than one reason, because when deterrence is attributed to it, it is evident that this effect is expected to result from the actual administration of the penalty in the gas chamber, in the electric chair, on the gallows or by a firing squad. These instruments must not be idle, it is said, but paradoxical as it may seem, the staunchest defenders of capital punishment do not advocate public executions which would be a most effective way of exhibiting the consequence of murder. Nor do they wish all murders executed. To use this punishment sparingly, however, would seem to reduce or eliminate the deterrent power they attribute to it.

As a matter of fact, we are discussing a moribund institution which, despite all last minute efforts to save it, is headed for limbo. It has vanished from all democratic countries in western Europe, except France where it is fading away. In the United States, the first symptom of its infirmity appeared in 1846 when Michigan abolished capital punishment, and our largest states, at about the same time, prohibited public executions. Gradually the number of statutory prescriptions of the death penalty were reduced until in nearly all states today executions threaten only those convicted of first-degree murder. Where only half a dozen states were in the abolitionist rank before the Second World War, today between a quarter and a third are found there.

The ultimate end of the death penalty is also evidenced by our statistics of execution. There were 1,667 of them in the 1930's. They steadily declined in number in the following decades to 191 in 1960's. The decline was especially rapid during the last decade, with 56 executions in 1960 and none since 1967. I know that this break has come largely through the intervention of appellate courts attentive to the protection of due process and the civil rights of prisoners, but I see no reason for assuming that the trend in the number of executions during the earlier years of the decade would not have continued without such intervention. Whatever may have been the factors contributing to the general decline in the use of capital punishment, it is obvious that when we consider the annual number of offenders who could be sentenced to death and executed executions have become so haphazard and rare that the system is more like a lottery in which the grand prize is death. The system has clearly become unworkable.

I doubt that any legislative assembly would eliminate the death penalty because of a demonstration of its lack of deterrence, no matter how conclusive such a finding might be. More fundamental motives must be present. The arise in concepts of the ethics and morality of punishment and of justice, the dignity of man, and the honor of the state. They are reflected in the recent decision of the Supreme Court of California, quite divorced from any reference to the role of deterrence. "The dignity of man, the individual and society as a whole", said the Court, "is today demeaned by our continued practice of capital punishment. . . . We are fully aware that many condemned prisoners have committed crimes of the utmost cruelty and depravity, and that such persons are not entitled to the slightest sympathy from society in the administration of justice or otherwise. Nevertheless, it is incompatible with the dignity of an enlightened society to attempt to justify the taking of life for purposes of vengeance".

I hope that such principles will be the guides of future legislatures which regard themselves, in this field, as they already do in many other fields of their activities, as molders of an enlightened public opinion. I hope that they will be considered worthy of adoption by the United States Supreme Court, when it deliberates the constitutionality of capital punishment. An adverse decision by that Court would not stop the trend toward abolition, but it would unnecessarily prolong the inequities and abuses inherent in the application of the death penalty. I also hope that when Congress takes up the bills which are the subject of these hearings, it will decide that the time has come to join other civilized countries who have already outlawed this punishment.

Thank you.

Mr. KASTENMEIER, We look forward to hearing from you, Professor Wolfgang. You have an extensive statement together with supporting materials, and you may proceed as you wish. The entire statement will be received with its supporting materials and charts.

**TESTIMONY OF PROF. MARVIN E. WOLFGANG OF THE UNIVERSITY
OF PENNSYLVANIA CENTER FOR STUDIES IN CRIMINOLOGY AND
CRIMINAL LAW**

Professor WOLFGANG. Thank you. In view of the time limit, I will simply cut across some of the major items in the written testimony. As a criminologist, I am at this time most concerned with training in the field. I have been interested in capital punishment from a scientific point of view, rather than as an advocate of abolition or retention.

In my own review, and in the review of other scholars in this field, I have been convinced that there is credible and persuasive evidence to show that the penalty of death does not function as a deterrent to reduce criminal homicide rates, or murder in particular.

I have also been persuaded that there is credible evidence to show that the sentencing of criminals to death, and the administration of the death penalty, are both done in a racially discriminatory way. Because the subcommittee has heard testimony, or will hear testimony, from others regarding other issues of the death penalty, the main thrust of my concern is with the issue of racial discrimination.

You have all read of the 3,859 persons who have been executed since 1950. About 55 percent of these have been black. Of the 455 persons who have been executed for rape, 90 percent of these were nonwhite. All have been members of minority groups. The point is that these statistics alone do not indicate directly any judicial bias in the administration of the criminal law.

It is well recognized that blacks in American society have a criminal homicide rate that is anywhere from 4 to 10 times higher than that of whites. I am not raising any issue about that at the present time, or about differential arrest practices, or the evidentiary material that a higher proportion of blacks will be indicted or convicted.

The important issue is whether among persons who have been convicted of criminal homicide, it is a significantly, statistically higher proportion of blacks than whites, all other things being equal, are sentenced to death. That is a phrase to which I wish to draw some attention. It should be pointed out that we have no national judicial statistics in this country. We had them up to the middle 1940's, but they were in such confused and chaotic condition, that it was impossible to draw any conclusions from them.

They were not standardized, and as a result, we are one of the few countries that has no national judicial statistics. Consequently, we do not know, except from localized studies' fragmentary evidence, what proportion of all criminal homicides in the United States are indeed murder, first degree murder, or capital crimes.

This is an issue that really needs to be further explored if we are to get on with the business of understanding the influence of the death penalty.

In a study that I did in Philadelphia covering 588 criminal homicides between 1948 and 1952, I discovered that there were about 15 percent of the persons who were brought to trial who were convicted of first degree murder. I suspect that this is a proportion that is fairly uniform throughout the country.

It is interesting to point out that in that particular study, which is one of the very few to indicate the proportion of first degree murders or capital homicides, that slightly more whites than blacks were convicted. That is, 21 percent of whites were convicted of first degree murder, and 19 percent of blacks.

It might also be of further interest to note that of the 77 persons convicted and sentenced for first degree murder, seven were sentenced to death, of whom six were black and one was white. Now, there has been a considerable amount of research, but again fragmentary about the issue of racial discrimination and the sentencing to death.

I have concluded in the written testimony rather elaborate statements from the studies that have been made, and I shall only allude to them here. One of the first that I mentioned is Gunnar Myrdal's book, "An American Dilemma," in 1944, in which he reported on something over 1,500 cases of persons sentenced to death in seven States over varying periods of time. He was one of the first to indicate that among those actually executed, about 61 percent were black compared to 48 percent white. From Gunnar Myrdal's book up to the present time, we have had a variety of studies, mostly in the South, where the racial discrimination issue has been very carefully documented.

It is with consistent regularity that all of the studies—the ones by Guy B. Johnson, by Harold Garfinkel, by Allredge, and other scholars—have indicated that a statistically significantly higher proportion of blacks are regularly sentenced to death and executed. These percentages run proportionately around 37 percent of blacks executed compared to something like 1 or 2 percent of whites. These proportions are among those who are convicted.

It is interesting, perhaps, to raise a question also about what happens to those who are on death row. There have been only a couple of studies about commutation to life imprisonment. One of these I did with the assistance of two students several years ago. We did this from the records of 439 persons on death row in Pennsylvania between 1914 and 1958. One of our chief interests was examining the racial issue.

On the basis of our information, we found that of the 147 blacks on death row during that period, only 11 percent had their sentences commuted to life. Whereas, of the 263 whites, 20 percent had their sentences commuted to life. One could raise the issue, as we did at that time, that it might be that a higher proportion of blacks committed felony murder and, therefore, had little reason to have their sentences commuted to life.

When we looked at that issue, we found that there was no significant difference between proportion of black felony murderers and white felony murderers. But there was a difference in the proportion who were executed. As usual a higher proportion of blacks were executed. We looked also, in that particular study of death row in Pennsylvania, at the issue of court-appointed versus privately retained counsel.

Ordinarily it has been shown that if one has a private counsel he has a higher probability of not receiving the death sentence, or if getting a death sentence, having it commuted to life. This is true in the study from 1914 to 1958 in Pennsylvania.

And, as one might suspect, a higher proportion of blacks had court-appointed counsel. When we looked at the court-appointed cases and spread that particular set of information open, comparing whites and

blacks, again we found a statistically higher proportion of blacks were sentenced to death and were executed, compared to whites, even among the court-appointed counsel group. It is probably with respect to that rate that racial discrimination is most blatant and is most obvious.

Again, let me just pull one or two instances out of the written testimony. In Florida, a study was made between 1940 and 1964 of cases where the race of the offender and victim were examined. One of the problems that we have with general statistics is that we do not have enough information about the race of the victim and of the offender.

In the Florida study, it was found that when blacks raped blacks, or when whites raped whites, the proportion sentenced to death was approximately equal, or about 5 percent. But, if a black raped a white, a significant difference occurred. Of the 84 Negroes convicted of raping white women in the Florida study between 1940 and 1964, 54 percent received the death penalty. Not one of the eight white offenders who raped a black victim was sentenced to death.

It might also be parenthetically noted that rarely does the case of a white raping a black get to the official attention of the court. Usually, in the procedures of the administration of law, the case is dropped before then. We know that more blacks commit rape than whites according to official police statistics. But the issue is among those who have been convicted and the proportion sentenced to death.

Now, it cannot be said that simply because a higher proportion of blacks are sentenced to death than whites, that this fact alone indicates discriminatory behavior on the part of the court. That is why it was necessary to dig more deeply into refined data about characteristics of the offense, the offender, and the victim.

In the summer of 1965, a unique study was initiated to examine in detail the relationship between rape and sentencing for rape in 11 Southern and border States, for which rape is a capital crime. The study was suggested by the NAACP legal defense fund, and Professor Amsterdam and I worked together in the planning preparation of data in this field.

In that study performed by the center for studies in criminology and criminal law at the University of Pennsylvania, we conducted a statistical analysis of seven States for inclusion as testimony in Federal district courts where analysis was presented as evidence showing racial discrimination.

We made a random sample of all the counties in the 11 Southern States, and used 250 counties altogether. We collected over 3,000 cases of rape convictions between the years 1945 and 1965. These counties were carefully selected.

The data were collected by approximately 30 law students working 10 weeks in the South. There was a 28-page interview schedule for data collection, and an objective, nonjudgmental, standardized recording characterized the whole data collection process.

The main purpose of this study was to determine whether race was associated with the imposition of the death penalty for persons convicted of rape. More than this, we were interested in determining whether there were any nonracial factors that could account for the fact that a statistically higher proportion of blacks were systematically sentenced to death in comparison with whites.

We collected information about such factors as whether the offender used more force, used a deadly weapon, had an accomplice, committed contemporaneous offenses such as robbery or burglary, impregnated the victim, whether there was any strange or prior relationship between the victim and offender, the length of the trial, the plea, the consent of defense, and so forth.

We inquired into all of these factors because we believed they might possibly affect or be related to the choice of sentence in the rape case. One might call these aggravating or mitigating circumstances that the jury or judge might use in pronouncing sentence.

I can summarize these by saying that there were approximately 28 nonracial factors in the counties that I just mentioned that we carefully and individually analyzed over seven States in which we have thus far done analysis. None of the nonracial factors emerges as statistically significant, or capable of accounting for the fact that a higher proportion of blacks are sentenced to death than whites.

So we were able to understand the residual impact of the racial factors as racial factors alone. I have drawn together a composite analysis of these States in which we have done separate analyses. There are 1,265 cases involved altogether, in which we knew the race of the victim and the race of the defendant.

Seven times as many blacks were sentenced to death as whites. But particularly important is the fact that when the defendant is black and the victim is white, in comparison with all other racial combinations of defendant and victim, the disproportionate sentencing to death of blacks is most dramatic.

There are 317 defendants in these States who were black and the victims were white. Of these, 113 or 36 percent, were sentenced to death. There were 921 defendants involved in all other racial combinations of defendant and victim. In other words, white/white and black/black. Only 19, or 2 percent, were sentenced to death. Now, the difference between these two proportions is what we call statistically significant, and reaches a level that could not have occurred by chance alone, less than once in 1,000 times.

So overwhelming is this probability that something unfair is occurring in the disposition of the death sentence that we cannot say this is a random or chance distribution.

If I have time, let me take just one example of the nonracial factor. To indicate the procedure we used, I shall take that of a contemporaneous offense, such as robbery or burglary, along with the commission of the rape. In short, of the 1,148 cases in the six States for which information was available, 236 involved a contemporaneous offense, like robbery or burglary. Twenty-two percent of these cases in which there was a contemporaneous offense resulted: in the death penalty. Now, it is true that a higher proportion of blacks were involved in this factor than were whites. Therefore, it was necessary in our procedure to do a separate analysis on all cases in which there was a contemporaneous offense. We found that when the defendant was black and the victim was white, 38 percent were sentenced to death. Only 2½ percent were sentenced to death if there was some other racial combination.

We then took those cases in which there was no contemporaneous offense, and again found, that if the defendant was black and the vic-

tim was white, 39 percent were sentenced to death, but in any other racial combination, only 1.9 percent were sentenced to death.

Again, this finding reaches a probability level of once out of 1,000 cases that it could have occurred by chance. In sum, taking all of the 28 nonracial factors into account, we found that none of them was capable of explaining the statistically significantly higher proportion of death sentences meted out to blacks in comparison to whites.

The only thing that remained as a significant variable capable of explaining the higher death sentences for blacks was the fact that the defendant was black, and particularly if the defendant was black and the victim was white.

Now this conclusion of racial discrimination, I think, is critically relevant to the large number of persons currently under sentence of death. Of the 582 persons who are now on death row across the country, 333 are located in Southern States, ranging from one in Arkansas to 92 in Florida. Of these 333, 212 are black.

So I am particularly concerned about these, because even if racial discrimination in the administration of justice and capital crime were eliminated, I submit that the 311 blacks now on death row, and more particularly the 212 in the Southern States on death row, represent a residual, biased, nonrandomly selected group based upon previous discriminatory practices in the imposition of the death penalty. They stand in jeopardy of being executed in an unequal use of the death sentence.

Finally, one brief note, if I may, on criminal homicide rates today. Because I mean to testify on behalf of a moratorium on the death penalty, it is appropriate to ask whether such a legislative moratorium would indeed deleteriously affect the body politic by causing an increase in homicide rates. Or, contrarywise, whether the retention of the death penalty in Federal and State practice would cause a decrease, or a stabilization of the homicide rates.

Based upon research testimony, such as Professor Sellin has submitted, my answer is that the presence or absence of a moratorium would have no effect one way or the other upon the murder or homicide rates. The absence of a moratorium, however, would continue racially discriminatory, and cruel and unusual sentencing in the application of the death penalty.

All major crimes in the United States have been increasing during the past decade. When I say "major" crimes, I am referring to the uniform crime reports of the FBI: criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny over \$50, auto theft.

The concern is whether the rate increase in homicide has grown since the judicial moratorium of June 1967. I examined homicide rates during 4 years prior to the judicial moratorium and 4 years since then. In general, since 1967 to 1970, the criminal homicide rate has increased at a lower pace than any of the other major seven crimes in the crime index.

That is, these seven crimes have increased about 43 percent in the last 4-year period. From 1967 to 1970, homicides increased only 27 percent. Moreover, the increase in homicide rates was higher in the 4 years preceding the judicial moratorium. It went up 35 percent. In the 4 years since the judicial moratorium, it went up only 27 percent. In

short, the homicide rate has been less prior to than after the judicial moratorium.

I think it is instructive to look at the five States that currently have 40 or more persons on death row. They are Florida, Georgia, Louisiana, Ohio and Texas. Together they contain 225 persons on death row out of the 582 in the country. In the 4 years preceding the judicial moratorium, that is 1963 to 1966, the homicide rate increased 33 percent in those States.

Whereas, in the 4 years since the judicial moratorium, the homicide rate has increased by 26 percent.

Finally, I have appended to this testimony six graphs that show changes in the homicide rates between 1963 and 1970 for several abolition and retention States. I followed the usual practice of taking an abolitionist State and comparing it with a geographically contiguous one that retains the death penalty and has similar population and socially economic characteristics.

These graphs indicate that the rates of homicide are substantially the same between the retentionist and abolitionist States. The abolitionist States generally have a lower rate. In sum, there is no evidence to indicate that a moratorium by legislative enactment would have any untoward effect on the homicide rate.

Now, I shall quickly conclude with a firm statement. There is presently available evidence to examine whether the sentence of death and its application are racially discriminatory. This evidence is credible and persuasive in showing such discrimination and for requesting the Congress of the United States to declare a moratorium for at least 2 years on further use of the death penalty. There is also evidence to indicate that such a moratorium would have no effect on current homicide rates.

In order to determine whether the credible and persuasive evidence can be transformed into compelling evidence to result in final abolition of the death penalty, further studies should be conducted with all of the tools of analysis that previous studies and available research methods indicate are appropriate. Social scientists know how to perform these studies and the proper data for analysis could be requested and obtained. What remains needed is more time.

Although I personally believe the evidence is already sufficiently compelling to indicate that the death penalty is cruel and unusual, racially discriminatory, and fails to deter, I quite understand the desire of many people to request further research and analysis. I hope that this subcommittee, the full committee and the House will give speedy and favorable consideration to a Federal abolition bill and a bill staying executions for a 2-year period.

Mr. KASTENMEIER. Thank you, Professor Wolfgang, for a most thorough and enlightening statement.

The statistics you cite seem so impressive that one wonders whether the thrust of your testimony contradicts the suggestion that further evidence and further data in this instance are necessary.

Already, there has been monumental work done, and you cite much of it in your own testimony. How would you answer the proposition put yesterday by one witness, Prof. van den Haag? He said that if there is discrimination in the application of this penalty, the answer is not to do away with the death penalty but, to apply it equally and

evenly, and justly. That is to say, if there is discrimination in the application of the penalty, we ought not to abolish the penalty, but rather end discrimination. How would you answer that?

Professor WOLFGANG. One way to answer it is that it is extremely difficult to provide the kinds of guidelines for having that kind of equation in all cases of capital crimes. The history of the absence standards is determining the difference between a death and a life sentence is already evident, and the courts have failed to provide guidelines to determine when the death sentence should be given.

Furthermore, if we have any cutoff point at all in that decision to give the death penalty equally and without racial discrimination. I would suggest that there would be such a moribund phenomenon in our society, there would be so many executions, perhaps, required, that it would offend our sense of justice in quite a different way.

Even if there were a relatively small number of persons, let's say just 10 persons executed a year or five persons executed a year, and this were done without racial discrimination, then the thrust of this argument would be lost. I quite readily agree.

But the determination of all those factors that would make for equality in the sentencing would become such a heavy burden, it would seem to me, that the courts would find great difficulty in equating one case with another.

Mr. FISH. Mr. Chairman, may I pursue that?

Mr. KASTENMEIER. Yes.

Mr. FISH. Just this particular point, Professor Wolfgang. Would not an answer to this question also be that we would be putting the 212 blacks currently on death row in the seven States in jeopardy, because they were convicted when the system was blatantly discriminatory, even if it were cleaned up today?

Professor WOLFGANG. Yes. Thank you for reminding me of that point, which I indicated before. I think not only the fact that there was some racial discrimination involved in the sentence of death, but there was considerable evidence which I did not refer to in this testimony regarding conviction itself. That is much more difficult to capture, that is, the variations that occur in the process of conviction versus acquittal. That is why most of the research that I have been involved in thus far has taken for granted the fact that the persons were guilty and we accepted the conviction. I would suggest that there is a whole variety of other practices that are also discriminatory.

Mr. KASTENMEIER. Is it not likely that if we made statistical inquiry, we would find that the life sentence also falls uncommonly heavily on the black American or the minority American?

Professor WOLFGANG. Yes, there is some evidence regarding that. In the studies that I have referred to, most have data on the number of persons who have been sentenced to life as well. I simply did not mention it here, but life sentences, in comparison to lower sentences, are significantly more frequently given to blacks.

Mr. KASTENMEIER. The reason I raised this is that looking into the future, might there not be arguments made against long prison terms, or life imprisonment, on the basis of the same objection; namely, that these sentences are imposed in a discriminatory fashion, and that blacks or other minority Americans are victims of injustice? If we are to abolish the death penalty, ought we not also abolish long terms of imprisonment and the life sentence?

Professor WOLFGANG. I can only say that for misdemeanors or felonies or sentences less than life, wherever there is racial discrimination, or there is evidence sufficient to support an inference of racial discrimination in sentencing practices in the administration of justice, that practice should be corrected.

Whether sentence should be reduced is perhaps less important than making sure that we have equal justice. In the case of the death penalty, since it is an irreversible practice, and irrevocable, and since it is certain, we here particularly find that discriminatory practices require elimination of the death penalty, rather than trying to administer it equally.

Mr. KASTENMEIER. You would distinguish, then, between the death penalty and, perhaps, terms of imprisonment? You would abolish one, but you would try to correct the application of the other?

Professor WOLFGANG. That is correct. Because the sentence of life or long-term imprisonment does not have all of the other accoutrements of effectiveness that the death penalty has. All the arguments about the death penalty stand in a particular posture, different from those regarding the length of confinement.

Mr. KASTENMEIER. I have one further question raised by your testimony. You stressed statistics on the crime of rape, from which conclusions can be drawn that the death penalty is applied on the basis of racial discrimination. This is more difficult to prove with respect to homicides. Rather than to abolish capital punishment completely, might we abolish it in areas where we can prove without question that there was discrimination as appears to be the case with respect to rape?

Professor WOLFGANG. I think that the evidentiary material we have regarding this particular issue of racial discrimination is, for me, as credible and persuasive, if not compelling, in the case of homicide as it is with rape. It is simply that rape is more dramatic.

The statistics reach a higher level of disparity than in homicides, but the case can be made out equally well for homicides. Thus, I do not think eliminating rape as a capital crime would resolve the problem of racial discrimination.

STATEMENT OF PROF. MARVIN E. WOLFGANG OF THE UNIVERSITY OF PENNSYLVANIA
CENTER FOR STUDIES IN CRIMINOLOGY AND CRIMINAL LAW

[The witness wishes to acknowledge with appreciation the assistance of Terence P. Thornberry, Sheila O'Malley, Neil Weiner, David Teacher, Selma Blumenfield, Vasiliky Vournas and Esther L. Zatz in the preparation of material for this testimony.]

Mr. Chairman and members of the Subcommittee, I appreciate this opportunity to testify before you concerning the several bills which, if enacted by the Congress, would contribute toward our understanding of the reasons for abolishing the death penalty in America.

As a criminologist whose time is spent mostly engaged in research and training in the field, I have long been interested from a scientific viewpoint in capital punishment. It the capacity of a social scientist I have spent considerable time examining the phenomenon of criminal homicide and issues connected with the administration of criminal justice, with particular emphasis on capital crime. This examination has been in the form of testing empirical and operational hypotheses rather than from the viewpoint of an advocate of abolition or retention. A review of research done by other scholars as well as my own efforts to examine homicide and the death penalty have convinced me that there is

credible and persuasive evidence to show that the penalty of death does not function as a deterrent to reduce the criminal homicide rates in general, nor murder rates in particular, throughout this nation. Neither the existence of the death penalty in statutes nor its administration functions to affect the crime rate of the capital crimes now existing in state or federal statutes. Moreover, there is credible and persuasive evidence to show that the sentencing of defendants to death and the administration of the death penalty are both done in a racially discriminatory way, in violation of the Fourteenth Amendment due process and equal protection clause.

Because this Subcommittee has heard and will hear testimony from other persons who have emphasized constitutional issues and have examined the issue of deterrence, the major thrust of my own testimony concerns the issue of racial discrimination. This committee has already been informed that a much higher proportion of black than of white persons convicted of capital crime has been executed in the United States. However, I should like to repeat some of our basic national statistics because of the importance which they bear on the race issue. Of the 3,859 persons executed for all crimes since 1930, 54.6 per cent have been black or members of other racial minority groups. Of the 455 executed for rape alone, 89.5 per cent have been non-white.¹ As our census data clearly reveal, blacks in American society have consistently represented approximately ten per cent of the United States population, and the category non-white, in general, approximately twelve per cent.

These statistics alone, of course, do not reveal elements of judicial bias in the administration of criminal law. It is also well recognized that Negroes in American society, with variations in time and place, have a criminal homicide rate that is between four and ten times greater than that of whites. Age, sex, and regional variations within the country are regularly taken into account when studies of homicide are made. There can be little argument about the fact that official police arrest and court adjudication records show a higher proportion of blacks than of whites arrested and convicted for criminal homicide. I am not at this time raising questions about the process of differential arrest of blacks compared to whites nor the issue of varying degrees of evidentiary material for indictment of blacks compared with whites in these cases. What is at issue is whether, among persons who have been convicted of criminal homicide, a statistically significantly higher proportion of blacks than of whites, all other things being relatively equal, are differentially sentenced to death. One of the important phrases in this statement is "relatively equal", for we need to know much more than is currently available about the circumstances of the crime, the previous record of the defendant and the relationship between the victim and the offender before assertions of racial discrimination and bias can be made with utmost validity. However, as I shall attempt to show, so credible and persuasive is the existing evidence about differential sentencing patterns in places where studies have been made, that inferences of racial discrimination and bias are entirely warranted.

In this introductory statement I should like to make clear the fact that criminal homicide is a phrase that covers both capital homicide, or murder, usually first degree murder, that is subject to the statutory provisions on the death penalty, as well as second degree murder, voluntary manslaughter and involuntary manslaughter. There are no national statistics and very few state statistics available on the rate of capital homicide, or murder in the first degree, that would be subject to a possible death penalty. Consequently, when we use the phrase "criminal homicide" or "homicide" we should keep in mind that more than murder or capital homicide is being included.

On the basis of my own investigation of 588 criminal homicides in Philadelphia, Pennsylvania between 1948 and 1952, and based on a few other selected regional studies, it appears that only approximately fifteen per cent of all cases involving offenders available for prosecution and for whom the degree of homicide was reported, involved first degree or capital murder. The Philadelphia study was one of the few reporting on the degrees of homicide committed by Negroes and whites. It may be of interest to point out that more whites than Negroes were convicted of first degree murder. Twenty-one point six per cent of the whites convicted of criminal homicide committed first degree murder while 19.6 per cent of Negroes who were convicted of criminal homicide committed first degree murder. It is of

¹ Arthur Raper, "Race and Class Pressures", unpublished manuscript prepared for Myrdal's study (1940), p. 181.

further interest to note that of the seventy-seven persons convicted and sentenced for first degree murder in this five year study in Philadelphia, seven were sentenced to death, of whom six were Negro and one white. Approximately three-fourths of those persons convicted of murder in either the first or second degree had a previous arrest record. Of those convicted, a larger proportion of whites than of Negroes had an arrest record. Of 264 Negro males convicted and sentenced, 192 or 73 per cent, had a previous record; of sixty white males convicted, forty-nine or 82 percent, had a record. I mention previous arrest record at this point because of the relevance it may have in disposition of the convicted murderer. Despite the fact that more whites than blacks had a previous arrest record among those convicted, blacks were overwhelmingly sentenced to death, as I earlier indicated. Still, there are many other variables that should be taken into consideration in the analysis of whether there is differential sentencing of blacks and whites upon conviction for capital crimes.

1. A BRIEF SUMMARY OF RESEARCH ON RACIAL DISCRIMINATION IN THE SENTENCING OF DEATH

Research on the relationship between race and sentencing of death has been somewhat hampered by the absence of national judicial statistics. Consequently, the empirical evidence that tests out hypotheses of differential sentencing to death on the basis of race disparities has been, albeit convincing, somewhat fragmentary over the years and localized in particular states and county jurisdictions. Statements in the literature and research findings have consistently been in the same direction; namely, that there is evidence of differential disposition of blacks compared to whites in being sentenced to death. As I shall indicate later, the evidence is maximally sufficient for some observers to justify immediate abolition of the death penalty and minimally to justify a moratorium for purposes of further investigation.

Gunnar Myrdal, in his classic *An American Dilemma* (1944), reported that "The South makes the widest application of the death penalty, and Negro criminals come in for much more of their share of the executions. Although no conclusive evidence can be adduced, it would seem that Negro criminals serve longer terms for crimes against whites and are pardoned and paroled much less frequently than white criminals in comparable circumstances."² Myrdal also cites information about ten southern states for varying periods of time in which 975 Negroes and 464 whites were sentenced to death. As he indicates, "The Negro constitutes less than thirty per cent of the population in these states, but has more than twice as many death sentences imposed. Actual executions make the racial differential still greater, for 60.9 per cent of the Negro death sentences were carried out as compared with 48.7 of the white. The figures for life terms, by race, who actually die in prison are not available, but would most probably show the same race bias. For the Negro is given a more stern sentence and for the same reason is the less likely to have his sentence reduced."³

In one of the early significant researches on the topic of race and capital punishment, Guy B. Johnson studied 220 homicide cases in Richmond, Virginia from 1930 to 1939 and 330 homicides in five counties of North Carolina from 1930 to 1940. The author asserted that because crime statistics "take into account only the race of the *offender*", an important dimension of the relationship between the victim and the offender is lost and needs to be examined. He suggested that the mores of southern communities would rank seriousness of victim-offender categories: (1) Negro vs white, (2) white vs white, (3) Negro vs Negro, (4) white vs Negro.⁴ There were five cases of whites killing Negroes, but not a single

² Gunnar Myrdal, *An American Dilemma* (New York, 1944), p. 545.

³ Rapier, p. 166.

⁴ Guy B. Johnson, "The Negro and Crime", *The Annals of the American Academy of Political and Social Science* (September, 1941) 271: 93-104. The author's explicit statement on this topic is as follows: "Our hypothesis is simply that differentials in the treatment of Negro offenders in southern courts do exist but are obscured by the fact that conventional crime statistics take into account only the race of the *offender*. If caste values and attitudes mean anything at all, they mean that offenses by or against Negroes will be defined not so much in terms of their intrinsic seriousness as in terms of their importance in the eyes of the dominant group. Obviously the murder of a white person by a Negro and the murder of a Negro by a Negro are not at all the same kind of murder from the standpoint of the upper caste's scale of values, yet in crime statistics they are thrown together. Therefore, instead of two categories of offenders, Negro and white, we really need four offender-victim categories, and they would probably rank in seriousness from high to low as follows: (1) Negro versus white, (2) white versus white, (3) Negro

conviction, and twenty-four cases of Negroes killing whites, of which twenty-two resulted in conviction, Johnson also noted that of the 141 Negro-Negro homicides, not one resulted in the death penalty and only eight in life imprisonment; but of the twenty-two cases with Negro offenders and white victims, six concluded with a death sentence and seven with life imprisonment. In sum, eighty-one per cent of Negro-white persons convicted for murder were executed, compared to sixty-eight per cent white-white and sixty-four per cent Negro-Negro. As the author concludes, "The data presented here point toward a partial confirmation of our hypothesis, at least insofar as the crime of murder is concerned. Certainly they point toward a fruitful area for further research, and they suggest very strongly that judicial statistics would be far more interesting as well as more useful if a number of courts could be persuaded to experiment with racial offender-victim records."⁵

In an equally useful research on this topic, Harold Garfinkel examined 821 homicides in ten counties of North Carolina between 1930 and 1940. He concluded that proportionately fewest indictments were made when whites killed Negroes; most were made (94%) when Negroes killed whites. Of those charged with first degree murder, twenty-eight per cent of the whites who killed Negroes, but only fifteen per cent of the Negroes who killed whites, were acquitted. Of those convicted, none of the whites who killed Negroes received life imprisonment, but ten per cent of the Negroes who killed whites did; and none of the whites who killed a Negro was sentenced to death, contrasted with thirty-seven per cent of the Negroes who killed whites. The author concluded that the general attitude of the courts was that the slaying of a white by a Negro was almost *prima facie* evidence of guilt, a white killing another white required "objective administration of justice": a Negro killing another Negro was just a routine affair deserving only moderate attention; and the slaying of a Negro by a white probably involved some mitigating circumstances like provocation.⁶

Although evidence was not presented about the administration of the death penalty, E. P. Allredge⁷ reported in a study of Negro-white differentials in criminal homicide in seven sections of the South, 1940-41, that like Philadelphia, two-thirds of all persons indicted were convicted. The conviction percentages varied, however, according to the intra- or interracial nature of the homicide. When Negroes killed whites, eighty-nine per cent were convicted; when Negroes killed Negroes only sixty-seven per cent were convicted; when whites killed whites, sixty-four per cent were convicted; and whites killed Negroes only forty-three per cent were convicted. On the contrary, acquittals were more frequent for whites: w-N, 29%; w-w, 28%; N-N, 21%; and N-w, 7%.

A more recent report issued by the Ohio State Legislature Research Commission⁸ found that during 1950 blacks accounted for thirty-seven per cent of all death sentences, although they made up only 6.5 per cent of the state's population. Moreover, of those sentenced to death, whites more frequently than blacks had their sentences commuted to life imprisonment.

Relative to the issue of execution and commutation among persons who have been sentenced to death, several years ago I, with the assistance of two students, collected data from the case records of 439 persons sentenced to death for first degree murder and detailed under custody on death row between 1914 and 1958 in Pennsylvania. Among other things, one of our chief concerns was to test hypotheses about race, execution and commutation. On the basis of the information available to us, we determined that of 147 Negroes on death row during that time period, only eleven per cent had their sentences of death commuted to life imprisonment, whereas of 263 whites, twenty per cent had their sentences commuted. The statistical association between being executed and being Negro

versus Negro, (4) white versus Negro. It is our contention that, in the South at least, the Negro versus Negro offenses are treated with undue leniency, while the Negro versus white offenses are treated with undue severity. There are complicating factors, of course, such as sex, age, "goodness" or "badness" of the Negro offender, and the interest of white persons for or against the offender, but on the whole, if our hypothesis is correct, the differentials which we have suggested would show up in mass statistics based on offender-victim categories."

⁵ *Ibid.*, p. 151.

⁶ Harold Garfinkel, "Research Note on Inter- and Intra-Racial Homicides", *Social Forces* (May, 1949) 27: 4: 369-381. In an earlier study by H. C. Brearly (*Homicides in the United States*, Chapel Hill: University of North Carolina Press, 1932), Brearly found in 407 homicides in South Carolina between 1920 and 1926 that 52 per cent of those tried were convicted. Those who were Negroes were found guilty in 64 per cent of the verdicts, while white persons accused were convicted in only 32 per cent of the cases.

⁷ E. P. Allredge, "Why the South Leads the Nation in Murder and Manslaughter", *The Quarterly Review*, Nashville, Tennessee (April-May-June, 1942) 2: 123-134.

⁸ Ohio State Legislature Research Commission, *Capital Punishment*. Staff Research Report Number 46, Columbus, Ohio, The Commission, January, 1961.

reached a level that statisticians refer to as significant (chi-square=4.33; probability less than .05). As was asserted, "something more than chance has operated over the years to produce this racial difference. . . . because the Negro/high-execution association is statistically present, some suspicion of racial discrimination can hardly be avoided. If such a relationship had not appeared, this kind of suspicion could have been allayed; the existence of the relationship, although not 'proving' differential bias by the Pardon Boards over the years since 1914, strongly suggest that such bias has existed".⁹ We also noted in this study, published in 1962, that there was no significant difference between race and the commission of felony murder. That is, the proportion of Negroes and whites who had committed felony murder was not statistically different, yet ninety-four per cent of Negro felony murderers were executed compared to eighty-three per cent of white felony murderers. This latter was a statistically significant difference, indicating that among offenders who had been sentenced to death and who had committed felony murder, Negroes are executed more and commuted less than whites. Finally, we examined the relationship between race of the murderer and type of counsel, relative to execution and commutation. Although it was noted in general that offenders with court-appointed counsel were more likely to be executed, and offenders with private counsel more likely to be commuted to life imprisonment, even among the court-appointed counsel, a statistically significantly higher proportion of Negroes was executed than whites (chi-square=4.04; p less than .05). We felt required, on the basis of the findings from this Pennsylvania study, to conclude as follows:

Thus, although differences in the disposition of capital offenders probably function to the greatest extent before sentencing, differences may be found even after offenders have been committed to death. This study of the Pennsylvania data has discovered nothing new; Johnson's analysis in North Carolina has many similarities and also used death row data. But any empirical verification of previously assumed differences among persons who received society's ultimate sanction should be of value in understanding the operation of our legal principles. That race is one of these significant differences constitutes a social and political violation of the principle of equal justice and is an obvious argument for those who favor abolition of the death penalty.¹⁰

Far more often than whites, blacks who are found guilty of rape receive death sentences and are executed. According to the Federal Bureau of Prisons, seven men convicted of rape were executed in the United States in 1958—all of them were black.¹¹ In 1960, all eight persons executed for rape were black.¹² Whites charged with rape generally receive more lenient treatment, detailed studies by states reveal. In Florida, sentences meted out for rape during the years 1940 to 1964 were examined by race of the offender and victim. Of the 125 white males who raped white females, 6, or about 5 per cent received death penalties (4 of the latter involved attacks on children). Similarly, of the 68 black males who raped black females, 3—or about 4 per cent—received death sentences (two of these involved attacks on juveniles). But of the 84 Negroes convicted of raping white women, 45 or 54 per cent received the death penalty (only one involved an attack on a juvenile). Not one of the 8 white offenders who raped a black victim was sentenced to death.¹³

Among prisoners sentenced to death for rape in North Carolina from 1909 to 1954, 56 per cent of blacks compared to 43 per cent of whites were actually executed. Of all offenders committed to death row for burglary, 26.6 per cent of the blacks, but none of the whites, were executed.¹⁴

⁹ Marvin E. Wolfgang, Arlene Kelly, and Hans C. Nolde, "Comparisons of the Executed and the Commuted Among Admissions to Death Row", *The Journal of Criminal Law, Criminology, and Police Science* (September, 1962), 53: 3: 301-311.

¹⁰ *Ibid.*, p. 311.

¹¹ *National Prisoners Statistics*, Number 20, Executions, 1958, Washington, D. C.: Federal Bureau of Prisons, February, 1959.

¹² Hugo Adam Bedau (ed.), *The Death Penalty in America* (New York, 1964), p. 511.

¹³ Florida Civil Liberties Union, *Rape: Selective Electrocution Based on Race*, Miami, 1964.

¹⁴ Elmer H. Johnson, "Executions and Commutations in North Carolina" in Bedau, *op. cit.*, p. 462. C. S. Magnum, who has studied the statistics and executions for all offenses in other southern states, reports: "For Florida, from August, 1928 to December, 1938, 56 per cent of the whites and 74 per cent of the Negroes sentenced to death were executed. Comparable percentages for Kentucky, from 1928 to 1938, amounted to 59 for whites and 64 for Negroes; Missouri in 1938, 75 and 83; North Carolina from 1909 to 1938, 39 and 52; South Carolina from 1912 to 1938, 75 and 83; North Carolina from 1938 to 1935, 35 and 67; Texas from 1924 to 1938, 79 and 83; and in Virginia, from 1928 to 1938, 42 per cent of the whites and 61 per cent of the Negroes sentenced to death were subsequently executed". (C. S. Magnum, *The Legal Status of the Negro* [Chapel Hill: University of North Carolina Press, 1940].)

The existence of racial discrimination appears to be most clear in cases of death sentences for rape. Since 1930, in the United States, 455 persons have been executed for rape, of whom 405 were black and two were from other racial minorities. All of those executed for rape since 1930 occurred in southern or border states, or in the District of Columbia.¹⁵ As Mr. Greenberg testified last week, the Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia have not executed a single white man for rape over this 42 year period, from 1930 to 1972. Together they have executed 66 blacks. Arkansas, Delaware, Florida, Kentucky and Missouri each executed one white man for rape since 1930, but together have executed 71 blacks.¹⁶

Fortunately, there are new data on the relationship between race, rape and capital punishment from which more conclusive evidence about racial discrimination in the sentencing of death can now be made. The Bureau of Prisons' statistics on executions for rape have long given us crude data leading to suspicions of racial discrimination. More refined analysis, now available from an independent research, permit us to examine the suspicion with testable hypotheses and to conclude that Negroes are disproportionately sentenced to death. These statistics are so overwhelmingly consistent and significant that my scientific conclusion can only be that racial discrimination has systematically functioned, for a long period of time in the administration of justice, by imposing the death penalty more frequently on blacks than on whites in the South.

II. RACIAL DISCRIMINATION IN THE IMPOSITION OF THE DEATH PENALTY FOR RAPE IN THE SOUTH, 1915-1965

In the summer of 1965 a unique survey was initiated to examine in refined detail the relationship between race and sentencing for rape in 11 southern and border states, in which rape is a capital crime.¹⁷ The study was suggested by the NAACP Legal Defense and Educational Fund Incorporated, and Professor Anthony Amsterdam and I worked together in the planning and preparation for the data collection in the field. At the Center for Studies in Criminology and Criminal Law at the University of Pennsylvania, I, with the help of the staff, conducted the statistical analyses of six states for inclusion as testimony in federal district courts where the analyses were presented as evidence to support the contention of racial discrimination in the imposition of the death penalty.

For approximately ten weeks between June and August, 1965, about 30 law students, carefully selected from around the country, collected data on over 3000 cases of convictions for rape in 250 counties in the 11 southern states. The counties were selected by careful statistical procedures to represent the urban-rural and black-white demographic distributions of all the 11 states. A 28-page schedule of information was used for data collection, on which information was recorded from court transcripts, prison records, and other data sources available. Objective, nonjudgmental standardized recording characterized the data collection process. For purpose of this testimony, I can only report briefly on the major purpose, methods and findings of this study.

The main purpose of the study was to determine whether race was associated with the imposition of the death penalty for persons convicted of rape. But more than this, we were interested in determining whether non-racial factors could account for the expectedly higher proportion of blacks sentenced to death. Variables that were examined, other than race defendant, race of victim, and sentence, included those concerning the circumstances of the offense (for example, what degree of force was used and what amount of injury done the victim by the defendant; whether the offense was committed in the course of a burglary or unlawful entry into a building and whether the rape was accompanied by some other contemporaneous offense, such as robbery), the character of the defendant (age, marital status, occupation, prior criminal record, etc.), the character of the victim (age, marital status, dependent children, reputation for chastity, etc.), the nature of the relations between the defendant and victim (prior acquaintance, prior sexual relations, etc.) and the circumstances of the trial leading to a defendant's conviction (length of trial, plea, consent defense, etc.). We inquired

¹⁵ United States Department of Justice, Bureau of Prisons, *National Prisoner Statistics*, Bulletin Number 45, Capital Punishment, 1930-1968 (August, 1969), pp. 10-11.

¹⁶ Testimony of Jack Greenberg, director-counsel of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., before Subcommittee Number 3 of the Committee on the Judiciary of the House of Representatives relative to H.R. 8414, March 9, 1972.

¹⁷ These states included Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

about these factors because it was believed that they might possibly affect, or be related to, the choice of sentence in a rape case. One might call them aggravating or mitigating circumstances, or the jury might perceive them as such. In our study, an attempt was made to gather data concerning all the factors that might expectedly affect sentencing in particular cases to the extent that data were believed available and reliably measurable.

The importance of these non-racial factors lies in the possibility that they may affect the observed relationship between race of the defendant, race of the victim and sentence. Analysis of the racial variables in the 6 states in which computer analysis has been made, led to the conclusion that Negroes convicted of rape are disproportionately frequently sentenced to death compared with whites, and that Negroes convicted of raping white victims, particularly, are disproportionately frequently sentenced to death compared with all rape defendants involved in all other racial combinations of defendant and victim. These conclusions may suggest, but do not alone establish, that racial factors are operating selectively in the imposition of the death sentence for rape, or that discrimination by reason of race influences the choice of death as a punishment. There exist plausible non-racial explanations for the racial disproportion.

Suppose, for example, Negro defendants as a class used more force on their victims than did whites. Suppose that defendants who used more force were more frequently sentenced to death than those who used less force. To assert that Negro defendants were being selectively sentenced to death more frequently than whites by reason of race, would, therefore, not be proper without further analysis. It might well be that the association between Negroes and the death sentence could be explained simply as a consequence of the concomitant operation of a non-racial factor, specifically, the degree of force used in the rapes.

The way in which the influence of racial factors which we wanted primarily to examine could be isolated from the influence of non-racial factors in selection of the death penalty for rape, was to examine the influence of the non-racial factors themselves, in order to "control" them—that is, to neutralize them by taking account of their relationships to the racial factors and to the sentence. In short, we were required to analyze statistically the impact of non-racial factors in order to understand the *residual* impact of the racial factors as racial factors.

More specifically, among the factors relating to the circumstances of the offense, there were: date of the offense, place of the offense (indoors or outdoors), type of entry by defendant into place of the offense (authorized or unauthorized or unenclosed area), several items relating to the means used by the defendant to force the victim to submit (whether the defendant carried a weapon, displayed a weapon, threatened the victim, used force on the victim), the degree of injury inflicted on the victim, whether only one or multiple offenders were involved in the rape, and whether the victim was made pregnant by the rape.

I have already mentioned those factors relating to the character of the defendant and the victim. Among factors relating to the circumstances of the trial were: length of trial, defendant's plea (guilty or not guilty), plea of insanity, defense of consent, whether the defendant testified in his own behalf, and whether he had an appointed or retained counsel.

Standard statistical procedures for determining the meaning of "statistical significance" were employed throughout the analyses that were made in Alabama, Arkansas, Florida, Georgia, Louisiana, South Carolina and Tennessee.¹⁸ Computer analysis was employed to test statistical significance and the results have been recorded in depositions for direct testimony in the states mentioned. For purposes of testifying before this Subcommittee, I have drawn together into a composite analysis some of the findings based on the data available in the states that have previously been individually analyzed. The total number of cases varies by the particular factor analyzed because of differences in the availability of information over the twenty-year period in each of the states. I am submitting as appendix material to this testimony several illustrative tables which indicate the character of the research that has been done.

¹⁸ The chi-square test of statistical significance was used in 2×2 tables throughout the analysis. A p (probability) value of .05 was used as a determinant of statistical significance. That is, $p < .05$ signifies that the particular distribution of cases could have occurred by chance less than 5 times in 100. Thus, 2 factors analyzed in a 2×2 table for presence and absence would indicate, with a $p < .05$, that there is statistical significance between the two factors, because they could not have occurred by chance in < 5 times out of 100. Quite commonly, the p value was $< .01$ or $< .001$, meaning < 1 in 100 or < 1 in 1000 by chance alone.

Relative to the findings of our analyses, for purposes of this testimony I can only generalize. May it suffice to say that of over two dozen possibly aggravating non-racial variables that could account for the higher proportion of Negroes sentenced to death upon conviction for rape, not one of these non-racial factors has withstood the tests of statistical significance. That is to say, in none of the seven states carefully analyzed, can it be said that any of the non-racial factors account for the statistically significant and disproportionate number of Negroes sentenced to death upon conviction for rape. This is a striking conclusion based upon individual state analysis, as well as clustering the six states of Arkansas, Florida, Georgia, Louisiana, Tennessee and South Carolina together. We are now prepared to assert that a significantly higher proportion of blacks are sentenced to death upon conviction for rape in these states because they are black, or, more particularly, because they are black and the victims were white. In no way can it be said that Negroes are sentenced to death because they have a longer prior criminal record, because they used more force on the victim, because they committed a robbery or burglary, because they entered premises without authorization, because they used a weapon or threatened the victim with a weapon, because they had an accomplice in the commission of the rape, because they impregnated the victim, because they more frequently attacked persons under age sixteen, et cetera. In the language of my discipline, all the non-racial factors in each of the states analyzed "wash out" as having any bearing on the imposition of the death penalty in disproportionate numbers upon blacks. The only variable of statistical significance that remains is race.

Among 1,265 cases in which the race of the defendant and the sentence are known—in these states between 1945 and 1965—nearly seven times as many Negroes were sentenced to death than were whites. This statistic has no bearing on the fact that more Negroes may or may not have committed rapes than whites; it concerns only those who were convicted of rape. Among the 823 Negroes convicted of rape, 110 were sentenced to death; among the 442 whites convicted of rape, only nine were sentenced to death. The statistical probability that such a disproportionate number of Negroes could be sentenced to death is less than one out of 1000 occurring by chance alone, thus indicating some racial factor in the disproportion of sentencing of death. I can state this assertively because all the non-racial factors to which I have earlier alluded have no bearing on the greater proportion of Negroes sentenced to death. More particularly, a statistically significantly higher proportion of Negro defendants whose victims were white were sentenced to death. From a total of 1238 convicted rape defendants, 317 were Negro defendants with white victims and 921 were all other racial combinations of defendant and victim (including Negro-Negro, white-white, and white-Negro). Of the 317 Negro defendants whose victims were white, 113 or approximately 36 per cent were sentenced to death. Of the 921 defendants involved in all other racial combinations of defendant and victim, only 19 or 2.1 per cent were sentenced to death. These data come from a combination of rape convictions from 1945 to 1965 in the states of Arkansas, Florida, Georgia, Louisiana, South Carolina and Tennessee. Again, the probability of such a distribution, or such a relationship between the sentence of death and Negro defendants with white victims, is, by chance alone, less than one out of 1000. Such a chance probability signifies that the racial factor is the only contributory one producing a death sentence for Negro defendants. In short, Negro defendants whose victims were white were sentenced to death approximately 18 times more frequently than defendants in any other racial combination of defendant and victim.

As I earlier indicated, all non-racial factors emerged as irrelevant in the court's decisions to impose a death sentence on blacks more frequently than on whites. I'm submitting appendix tables to amplify this conclusion, but should like to illustrate briefly in this oral testimony some of the data and concepts used to arrive at this conclusion.

In general, among the states separately analyzed, all 28 non-racial variables were examined procedurally in similar style.

Let us take as an example the presence of the commission of an offense like robbery or burglary along with the commission of the rape. We have called these contemporaneous offenses. It can generally be asserted that the commission of an additional offense to rape is a further aggravating circumstance and could be responsible for a disposition of death. Among the 1148 cases from which information was available in six states (Arkansas, Florida, Georgia, Louisiana, South Carolina and Tennessee), 236 involved a contemporaneous offense. A significant association exists between commission of rape with a contemporaneous offense

and imposition of the death penalty, for 22.4 per cent of the 236 cases with contemporaneous offenses resulted in the death penalty, whereas only 7.9 per cent of the 912 cases having rape only and no contemporaneous offense resulted in the death penalty. We also noted that among Negro defendants, 26 per cent had committed contemporaneous offenses, whereas among white defendants, 15 per cent had committed contemporaneous offenses. Moreover, a higher proportion of cases of Negro defendants with white victims had committed contemporaneous offenses (40%) in comparison with all other racial combinations of defendant and victim (14%). Could it then be that this non-racial factor of committing an offense like robbery or burglary in addition to the rape is really the major contributory factor producing a more frequent imposition of the death penalty for blacks, particularly those who raped white victims? A negative answer to this question comes from a further step in the analysis. We constructed a table involving only those cases in which defendants committed a contemporaneous offense, and proceeded to examine within this set the relationship between type of sentence (death and any sentence less than death) and the racial combinations of defendant and victim (Negro defendant and white victim/all other racial combinations of defendant and victim). A statistically significant association exists between the sentence of death when the defendant is Negro and the victim is white. Within this racial combination and among those who committed a contemporaneous offense, 38 per cent received the death penalty; among all other racial combinations of defendant and victim in which the defendant committed a contemporaneous offense, only 2.5 per cent received the death penalty. Furthermore, another table was constructed involving those cases in which the defendant committed only rape, and hence no contemporaneous offense. Within this set, and among Negro defendants with white victims, 38.6 per cent received the death penalty, whereas among defendants involved in any other racial combination of defendant and victim, only 1.9 per cent received the death penalty. Thus, with this kind of refined analysis it becomes clear that it is not the non-racial factor of contemporaneous offense that affects the decision to impose the death penalty. Rather, it is the racial factor of the relationship between the defendant and victim that results in the penalty of death. Whether or not a contemporaneous offense has been committed, if the defendant is black and the victim is white, the defendant is about 18 times more likely to receive the death penalty than the defendant in any other racial combination of defendant and victim. This is a statistically significant difference, for the association between the penalty of death and race could not occur by chance alone in less than once out of 1000 cases.¹⁹

In summary to this section of my testimony, we have found that during the twenty year period from 1945 to 1965 in seven southern states, Negro defendants convicted of rape were disproportionately frequently sentenced to death. Negro defendants convicted of rape of white victims were also disproportionately frequently sentenced to death, compared with all other defendants. In less than one time in 1000 could these associations have occurred by the operation of chance factors alone. We examined many non-racial variables connected with the offense, the defendant, the victim and the trial for the purpose of determining whether any of these variables, rather than the race of the defendant or race of the victim alone, could be responsible for the recorded fact that Negro defendants in significantly higher proportion than white defendants have customarily been sentenced to death. After careful statistical examination of all of the variables for which analysis could be made, I find that none of the non-racial variables—contemporaneous offense, prior criminal record of the defendant, a stranger relationship with the victim, display of a weapon, the use of force or the infliction of serious injury, et cetera—explains this sentencing differential. I therefore conclude that over at least a twenty year period there has been a systematic, differential sentencing practice of imposing the death penalty on Negroes and, most specifically, when the defendants are Negro and their victims are white.

¹⁹ A similar finding was recorded by Edwin D. Wolf, Appendix II, "Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey: 1937-1961", to the article by Hugo G. Bedau, "Death Sentences in New Jersey, 1907-1960", *Rutgers Law Review* (Fall, 1964), 19:1:1-64. Wolf states: "... while it is true that some death sentences are given for felony-murders, [analysis] shows that Negroes who commit felony-murders get almost 50 per cent more death sentences than whites; on the other hand, Negroes who commit non-felony-murders received only 25 per cent more death sentences than whites. Again, for Negro defendants, there is a large difference between death for felony-murder and death for non-felony murder, while for whites, the difference is much less. All of these data support the conclusion that type of crime is not an independent variable which is related to the death sentence; rather in felony-murder cases, race appears to be determinative more often than in non-felony-murder cases". Wolf, pp. 61-62.

This conclusion of racial discrimination in the imposition of the death penalty upon conviction of rape in the South is directly and critically relevant to the current large number of persons under sentence of death. Of the 582 persons on death row today in the United States, 333 are located in the southern states that were encompassed by our study of rape and capital punishment, ranging from one in Arkansas to 92 in Florida. Although it has been shown that blacks have been disproportionately sentenced to death in some northern states as well,²⁰ the sheer number and the clear evidence of discrimination of persons sentenced to death in the southern and border states should cause alarm and should be sufficient reason for declaring a moratorium while further investigations are pursued. Of the 333 persons currently on death row in the southern states, 212 are black; 311 are black out of the total 582 across the nation. Even if racial discrimination in the administration of justice and capital crime were eliminated as of today, I submit that the 311 blacks on death row, and more particularly the 212 in the southern states on death row, represent a residual, biased, non-randomly selected group based upon discriminatory practices in the imposition of the death penalty. They stand in jeopardy of being executed through an unequal use of the death sentence.

III. A BRIEF NOTE ON CURRENT HOMICIDE RATES

Because I am testifying on behalf of a moratorium of the death penalty, it is appropriate to ask whether two years of a legislative moratorium would have a serious affect on the body politic by causing an increase in criminal homicides; or, contrariwise, whether the retention of the death penalty in current federal and state practice would cause a decrease or stabilization of homicide rates. Based upon the research literature on deterrence, which Professor Sellin and others present before this Subcommittee, my answer is that the presence or absence of a moratorium would probably have no effect, one way or the other, on murder or homicide rates. The absence of a moratorium would, however continue racially discriminatory and cruel and unusual sentencing and application of the death penalty.

All major crimes have been increasing in the United States during the past decade. A critical concern is whether the increase in homicide rates has grown since the judicial moratorium on the death penalty in June 1967. We have examined homicide rates in the United States four years prior to the judicial moratorium and four years subsequent to it. In general, during the past four years, the criminal homicide rate has increased at a lower pace than any of the seven major crimes in the crime index, according to the Uniform Crime Reports of the F.B.I. For all serious crimes (homicide, rape, robbery, aggravated assault and battery (burglary, larceny, auto theft) there was a 42.6 per cent increase between 1967-1970, but for criminal homicide there was only a 27.8 increase. Moreover, the increase in the homicide rate from 1963 (4.5 per 100,000) to 1967 (6.1) was 35.5 per cent; while the increase from 1967 (6.1) to 1970 (7.8) was lower, or 27.8 per cent. In short, the rate of the incline of homicide was less in the four years since the judicial moratorium than before the judicial moratorium.²¹

It may be instructive to look at the five states that currently have forty or more persons on death row. These are Florida, Georgia, Louisiana, Ohio and Texas, and together contain 225 persons on death row out of the 582 across the country. In the four years preceding the judicial moratorium (1963-66) the homicide rate increased 33 per cent. In the four years since the judicial moratorium (1967-70) the homicide rate increased but 26 per cent.

Finally, in his brief analysis, appended to this testimony are six graphs showing the changes in homicide rates between 1963 and 1970 for several abolition and retention states. Following the usual practice, an abolition state is compared with a geographically contiguous state that retains the death penalty and, to all intents and purposes, has similar population and social-economic characteristics. As the graphs indicate, rates of change in homicide are substantially the same between abolition and retention states, with abolition states generally having lower rates throughout the eight year period.

In sum, there is no evidence to indicate that an additional two year moratorium by legislative enactment would have any untoward effect on the homicide rate.

²⁰ See Wolfgang, Kelly, and Nolde, *op. cit.* and Badau and Wolf, *op. cit.*

²¹ These rates and percentage changes over time were obtained and calculated from the *Uniform Crime Reports, 1962-70*. The chief source was *Uniform Crime Reports, 1970*, Table 2, Department of Justice: Federal Bureau of Investigation, Washington, D.C.

IV. CONCLUSION

There is presently available evidence to examine whether the sentence of death and its application are racially discriminatory. This evidence is credible and persuasive in showing such discrimination and for requesting the Congress of the United States to declare a moratorium for at least two years on further use of the death penalty. There is also evidence to indicate that such a moratorium would have no effect on current homicide rates.

In order to determine whether the credible and persuasive evidence can be transformed into compelling evidence to result in final abolition of the death penalty, further studies should be conducted with all of the tools of analysis that previous studies and available research methods indicate are appropriate. Social scientists know how to perform these studies and the proper data for analysis could be requested and obtained. What remains needed is more time.

Although I personally believe the evidence is already sufficiently compelling to indicate that the death penalty is cruel and unusual, racially discriminatory, and fails to deter, I quite understand the desire of many people to request further research and analysis. I hope that this Subcommittee, the full Committee and the House will give speedy and favorable consideration to a federal abolition bill and a bill staying executions for a two year period.

APPENDIX A—SEVEN TABLES ILLUSTRATING STATISTICAL ANALYSIS OF THE RAPE-CAPITAL PUNISHMENT STUDY IN SEVERAL SOUTHERN STATES

TABLE I.—RACE OF DEFENDANT BY TYPE OF SENTENCE

	Death	Other	Total
Negro.....	110	713	823
White.....	9	433	442
Total.....	119	1,146	1,265

Note: States included: Florida, Georgia, Louisiana, South Carolina, Tennessee.
 $X^2=41.9924$; $P<.001$.

TABLE II.—RACIAL COMBINATIONS OF DEFENDANT AND VICTIM BY TYPE OF SENTENCE

	Death	Other	Total
Negro defendant and white victim.....	113	204	317
All other racial combinations of defendant and victim.....	19	902	921
Total.....	132	1,106	1,238

Note: States include: Arkansas, Florida, Georgia, Louisiana, South Carolina, Tennessee.
 $X^2=275.7192$; $P<.001$.

TABLE III.—CONTEMPORANEOUS OFFENSE BY TYPE OF SENTENCE

	Death	Other	Total
Contemporaneous offense.....	53	133	236
No contemporaneous offense.....	92	840	912
Total.....	125	1,023	1,148

Note: States include: Arkansas, Florida, Georgia, Louisiana, South Carolina, Tennessee.
 $X^2=39.4915$; $P<.001$.

TABLE IV.—CONTEMPORANEOUS OFFENSE BY RACE OF DEFENDANT

	Negro	White	Total
Contemporaneous offense.....	150	45	195
No contemporaneous offense.....	422	264	686
Total.....	572	309	881

Note: States include: Arkansas, Florida, Georgia, Louisiana, Tennessee.
 $X^2=15.1583$; $P<.001$

TABLE V.—CONTEMPORANEOUS OFFENSE BY RACIAL COMBINATIONS OF DEFENDANT AND VICTIM

	Negro defendant and white victim	All other racial com- binations of defendant/ victim	Total
Contemporaneous offense.....	58	81	139
No contemporaneous offense.....	88	480	568
Total.....	146	561	707

Note: States include: Florida, Georgia, Tennessee.

$X^2=45.3139$; $P<.001$

TABLE VI.—RACIAL COMBINATIONS OF DEFENDANT/VICTIM BY TYPE OF SENTENCE AMONG ALL CASES IN WHICH DEFENDANT COMMITTED A CONTEMPORANEOUS OFFENSE

	Death	Other	Total
Negro defendant and white victim.....	22	36	58
All other racial combinations of defendant/victim.....	2	79	81
Total.....	24	115	139

Note: States included: Florida, Georgia, Tennessee.

$X^2=27.3231$; $P<.001$

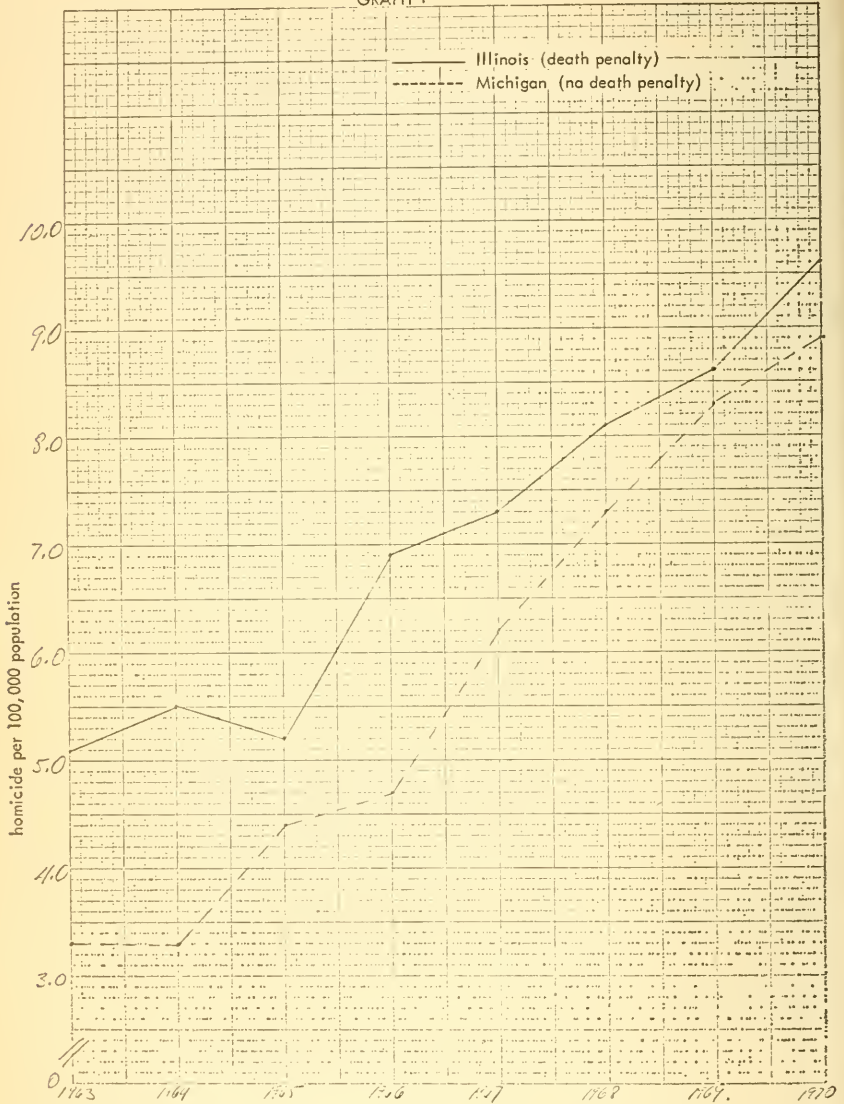
TABLE VII.—RACIAL COMBINATIONS OF DEFENDANT/VICTIM BY TYPE OF SENTENCE AMONG ALL CASES IN WHICH DEFENDANT COMMITTED NO CONTEMPORANEOUS OFFENSE

	Death	Other	Total
Negro defendant and white victim.....	34	54	88
All other racial combinations of defendant/victim.....	9	471	480
Total.....	43	525	568

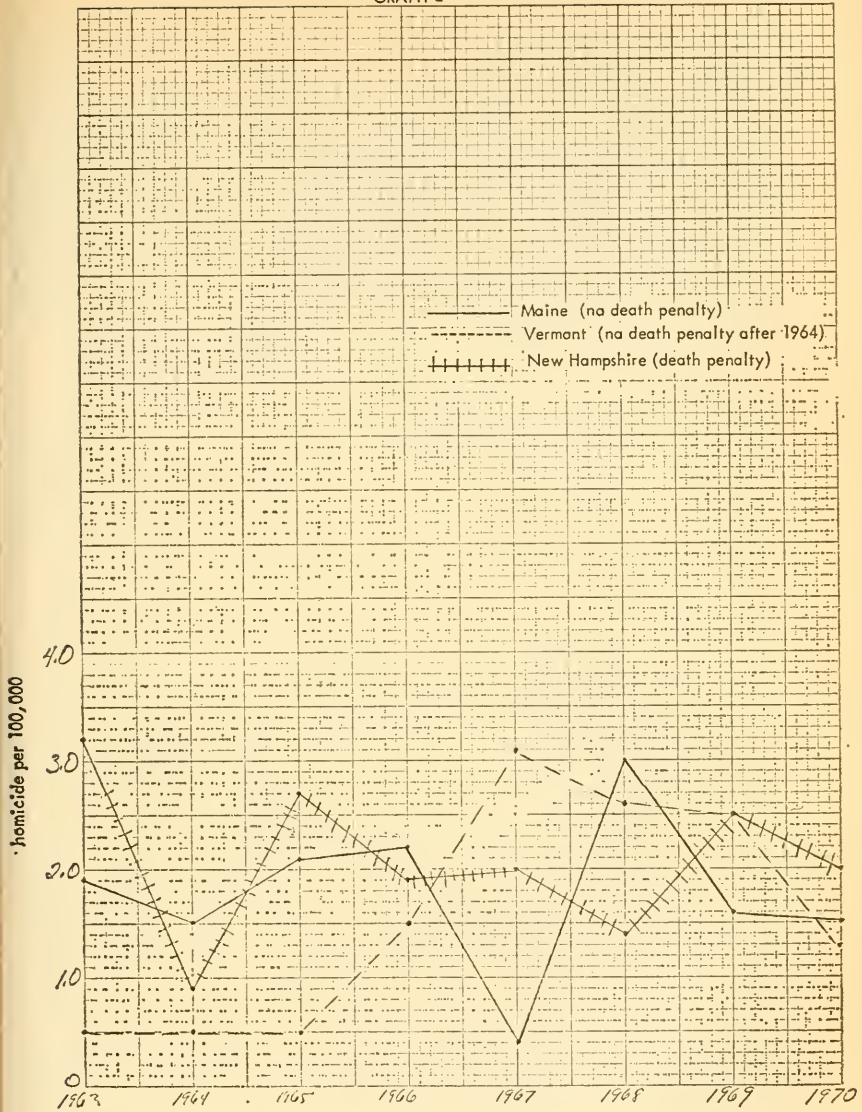
Note: States include: Florida, Georgia, Tennessee.
 $X^2=138.4186$; $P<.001$.

APPENDIX B—SIX GRAPHS OF CRIMINAL HOMICIDE RATES, 1963-70,
COMPARING SEVERAL ABOLITION AND RETENTION STATES

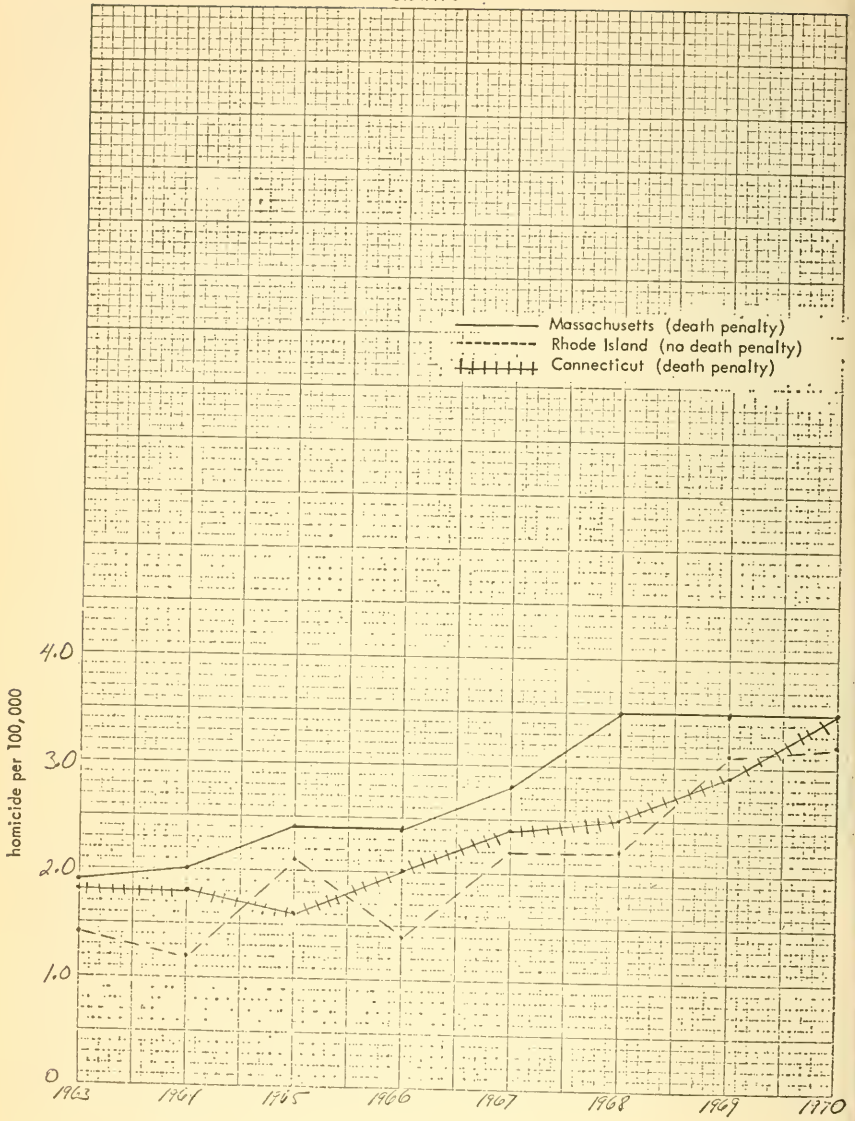
GRAPH 1



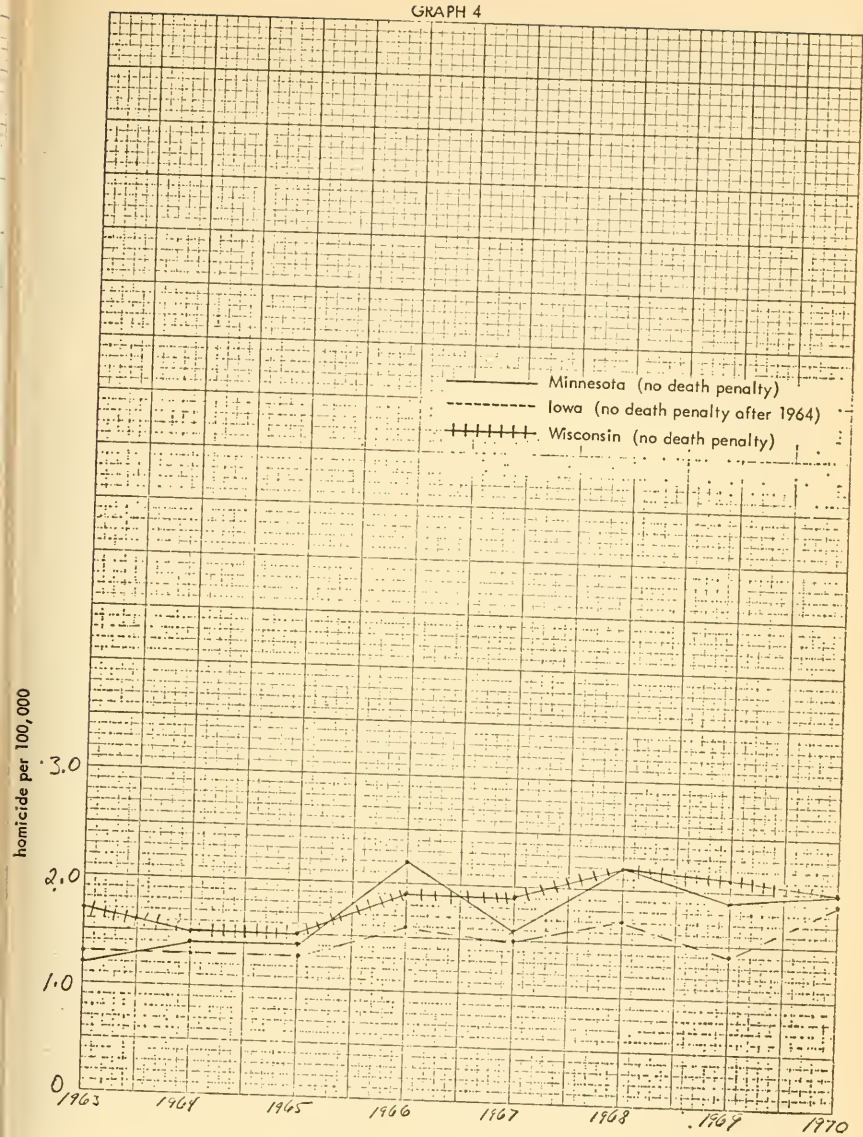
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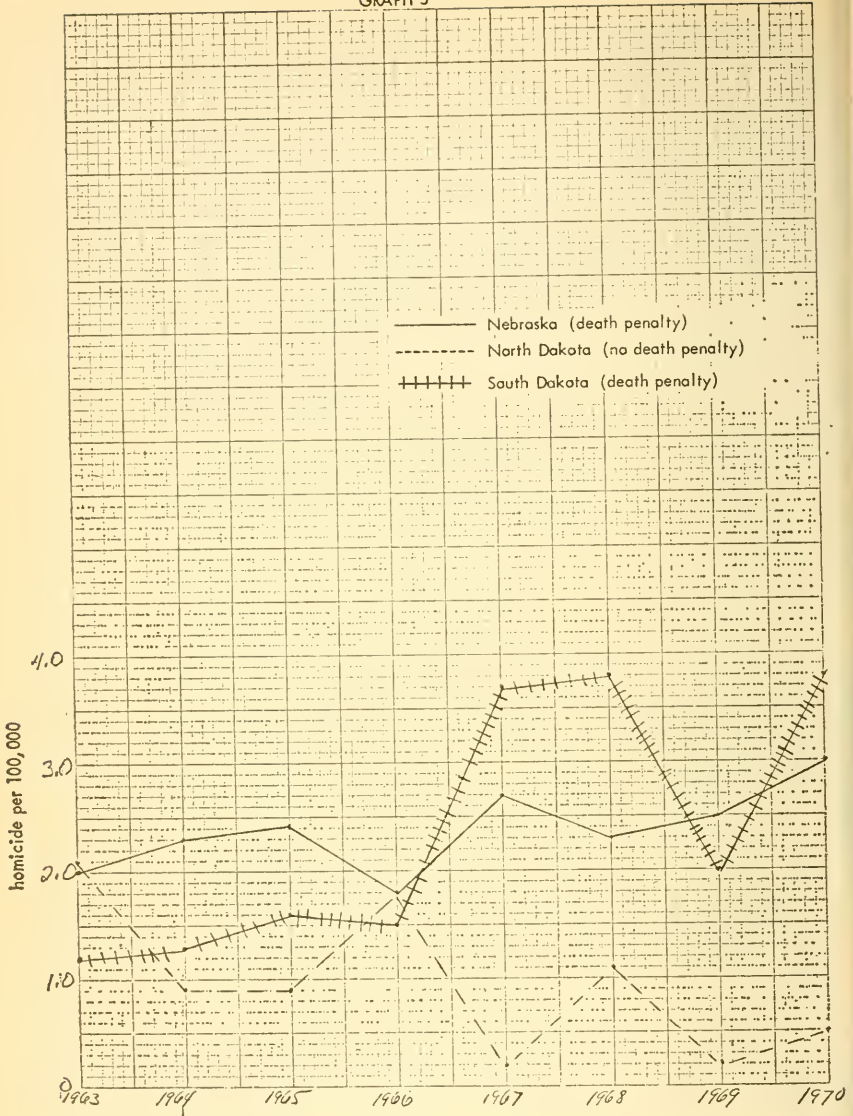
GRAPH 3



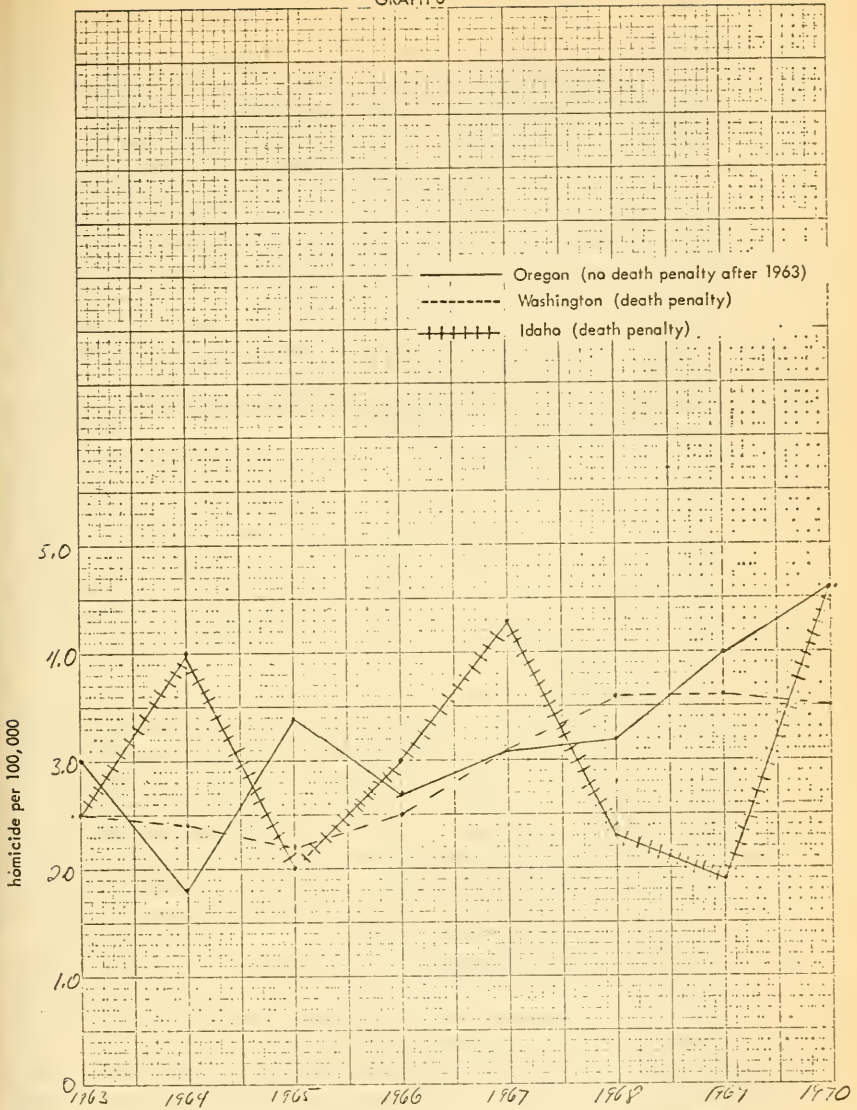
GRAPH 4



GRAPH 5



GRAPH 6



Mr. KASTENMEIER. Thank you, Professor Wolfgang. The gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman. I want to commend you on your study. Are there many other studies that make that same kind of inquiry that you have so brilliantly presented to us today?

Professor WOLFGANG. There are only about half a dozen studies altogether that are research studies as such, rather than simply national statistics on executions coming from the Bureau of Prisons.

The study I referred to, in which was rape and capital punishment in the seven Southern States, is unique, in the sense that it made an effort to dig more deeply into a refined analysis of nonracial variables than other studies.

Now Professor Bedau, who will be following me, has done an excellent study in New Jersey, in which some of these variables have also been examined, but there are very few such studies.

Mr. CONYERS. Do you have any suggestions as to why these penalties are so heavy and racist in the case of rape?

Professor WOLFGANG. I think Bedau and others have alluded to this earlier. And I think there is no change in the interpretation. The mores in the South have been such that the perspective on the administration of criminal justice views a white/white encounter crime as one that should be objectively treated in the court.

If it is black/black rape—and I am drawing upon the inferences that have been made in sociological analyses—the assumption has been, in that judicial attitude, that this is a common phenomenon, and it is not very serious, after all.

Consequently, greater leniency in the courts has judicially appeared in the case of a black raping a black. If a black rapes a white, the general attitude, Myrdal, Johnson, and others have said, means that this is a horrible, horrendous attack on the traditions of the community and we need to determine what kind of penalty should be given.

Very little doubt is raised about the veracity of the case itself. But if it is a white raping a black and gets to the court level, the assumption has been that obviously there was provocation and mitigating circumstances involved. Consequently, we have to look very closely to determine whether indeed this was a rape.

Mr. CONYERS. I have had instances in Detroit, for example, where black women have complained of being followed in a car by a white person into their neighborhoods for purposes of which they were not sure. But they certainly seemed to be threatening.

By the time they would complain to the police and the police would come out and visit them on the job, the police would try to talk them out of it, and ask them if they were sure they did not know this man before.

I remember one instance in which it was suggested that the offender was a married man and that the complainant ought not to get him in trouble by raising this complaint that he followed her all the way home right up to her house, and actually got out of his car. What I am thinking of is the complaint that has recently been raised by women, both black and white, about the lack of enthusiasm of law enforcement agencies for prosecuting, or attempting to determine whether there was any pressure or attempt made.

It has apparently become extremely burdensome for black women to follow through with this kind of complaint. Have you had any ob-

servations, or supporting evidence toward these views that I have presented?

Professor WOLFGANG. Yes, I concur with your observations completely. The basis on which I have made some observations occurred most recently in a study of victims of rape that is under process now through the Philadelphia General Hospital. We have, thus far, collected data on over 100 cases, or rape complaints, brought in for gynecological observation at this hospital.

What you say is very clearly borne out by much of the information we thus far have. There are difficulties regarding the credibility of rape. But it has been historically a policy of police operations, in urban ghettos in the United States. It is not only true of urban blacks today, but it was true in an earlier period, of the Irish, and even the Germans and Poles, in conditions of poverty in earlier periods of our history.

When the police put a cordon around these areas, they were interested only in the fact that the offenders, particularly violent ones, would not come out over the boundaries into the white, middle-class areas. What was going on internally within the ethnic population was usually of very little concern to the police. I think considerable changes have occurred in recent times, and the police are much more sensitive to these issues than they used to be.

But you have drawn upon a particular crime, rape, in which the black female, I suggest, is much more in doubt for most police than is the credibility of the white victim.

Mr. CONYERS. Finally, have you run into the type of news story that I remember running into last year. I think it was Oklahoma, where a black convicted of rape was given 1,000 years, or 900 years, or some incredible sentence, which reflected the feelings of the court in no uncertain terms.

Have you encountered this kind of situation?

Professor WOLFGANG. Yes. It is meant as a reflection of the sentiments the community has in that particular kind of offense.

Mr. CONYERS. Thank you very much, Professor. Your testimony has been consistent with experience I have run into with a number of black constituents in the Detroit area.

Mr. KASTENMEIER. The gentleman from Pennsylvania.

Mr. BIESTER. Thank you, Mr. Chairman. I should first apologize to the witness that I was not here during the early part of his testimony.

I really do not have any questions, because I have had an opportunity to look over the witness' statement, and I think it sets forth the proposition without any doubt that this discrimination has occurred. And were there to be no moratorium, and the penalties carried out, that this discrimination would result in the death of significant numbers of black people.

I think the case is made out very powerfully and rationally in the paper.

Professor WOLFGANG. Thank you.

Mr. KASTENMEIER. The gentleman from New York.

Mr. FISIL. Thank you, Professor Wolfgang. This is such a splendid job, which totally in my mind bears out the suspicion I have had thus far.

Mr. KASTENMEIER. Again the committee appreciates your testimony this morning. You have been very helpful, and we thank you for coming.

Professor WOLFGANG. Thank you for the invitation.

Mr. KASTENMEIER. Next, the Chair would like to call a very distinguished witness, Prof. Hugo A. Bedau, who is professor of philosophy at Tufts University, and is testifying this morning on behalf of the American Civil Liberties Union. You may proceed, sir.

**TESTIMONY OF PROF. HUGO ADAM BEDAU, TUFTS UNIVERSITY,
ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION**

Mr. BEDAU. I am honored to be invited by the committee to testify before it today on behalf of the bills that are pending before it to abolish the death penalty, and other bills to institute a death penalty moratorium around the United States.

You have, I believe, my prepared testimony, and with your permission, I would like to make available to you now, as an appendix to it for the final record, and article of mine that appeared in *Federal Probation*, a Government publication, entitled "The Death Penalty in America." It is moderately brief but still comprehensive review of a wide range of issues and events throughout the Nation during the past decade which bear upon the deliberations of this committee.

If I may, I will proceed with a summary of my prepared testimony.

Mr. KASTENMEIER. Without objection, the committee will receive the article you have referred to as an appendix to your prepared statement.

Professor BEDAU. Thank you again, Mr. Chairman. My testimony this morning is confined really to one point that I think is of great urgency to this committee.

Suppose it were decided by the committee that a moratorium on capital punishment nationwide should be instituted *de jure* in the period immediately ahead. What would the committee be able to say to the Congress, and through the Congress to the Nation—that the Congress ought to study, or to investigate, during the period of the moratorium? The moratorium, aside perhaps, from various useful political effects, must be conceived on the assumption that there is something to be done during the period of moratorium if we are going to institute by law the cessation of all executions.

What could this committee sponsor by way of investigation? What could the Congress expect to learn as a consequence of the institution of the moratorium? What questions that remain in dispute, if not in my mind or in Professor Wolfgang's mind, could we hope to see resolved?

I want to speak directly and exclusively to that question now. I would like to preface these remarks on that question by drawing your attention to the record over the past years of this century of the Congress, and of other States and Federal bodies, in coping with the question of the death penalty.

I have set out in detail in my testimony what that record shows. What this record shows is a deplorable neglect on the part of the Federal Government in particular. State governments, too, no doubt. But a deplorable record on the part of the Federal Government in addressing itself to this question.

There have, after all, been something on the order of 7,000 executions in this century under State and Federal law. Seven thousand people put to death in the name of the law, and presumably in some

belief that a useful public purpose is thereby served through their deaths. Of course, they had to be convicted of a crime carrying the death penalty.

But lying behind that has to be the belief that killing 7,000 people under the color of the law has served a useful purpose. I submit that if you look at the intent of the government in whose name these executions are, in every case, carried out, if you look at the record of the Government's attempt to assure itself that these executions do serve a public purpose, the record is scandalously weak.

I would go even further and say that there is no record whatsoever. What we have in fact, therefore, is an institution of capital punishment, a practice of killing people, that is as old as biblical times. At least in our country, at the Federal level of government we have nothing that could be said to be a rationale for this practice.

The legislature, at one time or another, has dipped its toes into these waters, but for various reasons has not gone in deeply at all. I think, gentlemen, the time has come for the Congress to rise with some sense of responsibility, and spend some taxpayers' money on behalf of establishing as well as we can at this stage in our career, as a society under constitutional law, a society intended to secure the interest of all that, indeed, the death penalty plays an unavoidable role.

I think now there is nobody in this Congress, or in this room, who can give you that kind of assurance. So, I would say that you have something approaching an obligation, a very strong public responsibility, to take the initiative at this time. Belatedly, no doubt, but still to take the initiative.

Now, against the background of this regrettably, slight and inadequate record of the use of public resources to investigate disputed questions about the death penalty, let me offer you five different kinds of things that I think could be profitably studied.

Let me also make clear that in my judgment as a student of the issue before us over the past 15 years, I do not think that it is necessary for the legislature, itself, in order to settle questions in its mind, to conduct any or all of the investigations that I am going to outline.

But I have absolutely no doubt that there are questions in other people's minds. People who have been interviewed during the testimony. Questions in their minds which could be resolved by these investigations.

I refer, particularly, to the testimony of the Department of Justice earlier, in which the Department's position against this legislation is based upon the Department's belief that there is evidence of deterrence for certain classes of criminals.

You will recall the testimony that I am referring to; it has to do with the deterrent efficacy of the death penalty to prevent crimes of felony murder. The belief which you have heard in testimony earlier, and which is widely shared, goes something like this.

Because there is a death penalty which threatens capital punishment for those who commit a capital crime in the course of a felony, many persons who have committed burglary or rape, or armed robbery in particular, either will not carry a gun at all, or, if they carry a gun, will see to it that it is unloaded. If it is not unloaded, at least they will not use it, but only threaten with it. All in order to avoid the risk of the death penalty.

This, I think, continues to be one of the most confidently asserted yet dubious generalizations in this whole area. And, it is one of several particular questions that I think could profitably be studied with the kind of criminological and investigative expertise that Professor Wolfgang, and others like him, represent and could offer this committee.

This is one particular area in the general question of deterrence that I think all parties to the dispute over capital punishment could rejoice in seeing more carefully studied. I think, as another example under this same category of deterrence, a more careful study could be given to the experience during the past decade of the assault record upon police and law enforcement officers, and upon custodial personnel in prisons.

Studies have been made, and are made available to this committee, and I cite them in the footnotes to my prepared testimony, that there was this question in an earlier period. But some 10 years have gone by, indeed more than 10 years, since we have had a general study of the record in this area. I am confident of what the results would show. I have no hesitation, whatsoever, in recommending to the Congress the investigation into this and other areas. I think those who are against the death penalty would have to agree with me that it would be nice if we did not have to make inferences because we had reliable data directly on the question.

I think we can get it. The studies of Father Campion and of Professor Sellin that we have on this question during the 1950's are eminently respectable, and eminently relevant. But it could be objected that they are 1½ decades out of date.

Another category where I think work could be done bearing on the question of the efficacy of deterrence has to do with crimes other than homicides. Particularly, crimes that in the past have gained great notoriety for the death penalty. I am referring particularly to kidnaping and to air piracy. Kidnaping and air piracy are crimes that have brought the death penalty at the Federal level as a consequence of great public anxiety and great alarm, and I believe some demagoguery on the part of politicians and others.

I think this committee has absolutely no basis whatsoever for supposing that the Congress was wise a decade ago in instituting the death penalty for air piracy, although I am sure that there was great alarm and desire to do so. A decade has passed and air piracy continues. I think the Congress is in no position to assure the public or itself that the institution of the death penalty for these crimes has served any useful purpose whatsoever.

Those are three particular areas of capital crimes where, I think, with regard to the general issue of deterrence, research could be profitably conducted.

I have also mentioned the great importance of a fourth subcategory—the category of felony murder. This, in my opinion, is the most important single area in which research should be undertaken to settle, insofar as research can ever settle, complicated questions about the great dispute that ranges between those who are opposed to the death penalty and those who are in favor of it.

As a second category where research could usefully be done and sponsored by this committee, I would cite the whole category of what

we might call the reverse of deterrence. Namely, the category of the incitement to murder and other capital crimes that the death penalty itself constitutes. It is very hard for us to believe what many have given in testimony, and many anecdotes support, that the death penalty, even if it is a deterrent for some, constitutes an incitement and inducement for others.

The fact that these others may be of deranged mind and unbalanced personalities is hardly a reason for not investigating more seriously this whole area. The testimony in this regard is extensive. I think it will have to be categorized, if not dismissed, as anecdotal. It does not reach the area or the level of statistical significance, yet it cannot, for that reason, be safely ignored.

If your committee, and others in the country, are inclined to believe the death penalty must be kept because somewhere, somehow, somebody may have been deterred, for the same reason you ought to say that somebody unbalanced may have been incited to commit a crime he would not have committed had the death penalty not been in existence.

As a third category, I think more research needs to be done concerning the actual experiences of persons who await the penalty of death under sentence of death on the various death rows around the land. The very fact that in Massachusetts, my State, and other States, death row has now been abolished is strong evidence that something ugly goes on there, that something unacceptable goes on there, that the characteristic pattern of life on death row is something that decent men will not tolerate after they investigate it.

The observations of Congressmen and Senators from Massachusetts concerning life on death row in Massachusetts—and I do not think we are the most unenlightened State in this regard—which are contained in the report that is mentioned in my testimony, is of particular relevance to this sort of thing that a person might expect to see generally.

What type of personality deterioration goes on in death row? There are too many persons who never even get executed, even if we do not abolish capital punishment. From the fact that a person is sentenced to death, it no more follows that he is executed, than it follows from the fact that he committed a capital crime. We know this.

It is not new that the number of persons who are sentenced to death is much greater than those who are actually executed. Here is an area of study in which I think Congress has been woefully negligent. There is some indirect evidence, which I cite, suggesting that one of the ancillary features of the administration of capital punishment is a feature inseparably connected with administration throughout the century.

It is ugly, unacceptable, inhumane, and needs radical change.

As a fourth category, I have proposed in my testimony undertaking a new study unlike any empirical study undertaken anywhere so far. The purpose is to bring together at the empirical level what are, in fact, constitutional issues concerning inequality and cruelty of the death penalty.

As you know, a year or so ago the U.S. Supreme Court held in the *McGautha* and *Crompton* cases that it would not pursue any further through appellate litigation the objection that the death penalty is in violation of the equal protection clauses of the 14th amendment.

But you gentlemen and your colleagues are honor bound under exactly the same Constitution to pass your own judgment on this and related constitutional questions. It is not for the Supreme Court of the United States alone to tell the people of the United States what the Constitution means. It is the responsibility of all branches of Government. I think an excellent and persuasive line of argument in this precise direction bearing on capital punishment has been set out by former Justice Arthur Goldberg and his former legal counsel and now a professor of law, Alan Dershowitz, in their article on capital punishment in the *Harvard Law Review* of 11½ years ago.

What I have outlined I will not review here, but its essential purpose is to try to study exactly the character of the persons under sentence of death by comparing them with other groups of prisoners who have committed the same, or similar, crimes, but who have been handled in their conviction and sentencing in a very different way.

As you know, there is a very small likelihood that a person who commits what you and I might regard as first degree murder will, in fact, be convicted of that crime and then sentenced to death for it. A very small likelihood, but many are convicted who have participated in such crimes, and many are sentenced to life imprisonment, and many others through plea bargaining and turning State's evidence, and other grounds, receive even less than a life sentence.

We have in the total prison population of the States and of the Federal Government a laboratory, if we will only make use of it, to study whether we can, in fact, find anything of general relevance that distinguishes those who do get the death penalty from those who do not.

The fact that a person is black—which we know from the testimony Professor Wolfgang has given—correlates at a far greater than random significance with who gets the death penalty. But color and race are not criminologically relevant. The fact that a murderer is a man and not a woman, as we know, practically guarantees that he runs a grave risk for the death penalty. This, also, is not criminologically relevant.

What are the criminologically and penologically relevant factors that the legislature can properly point to and say, "Look, there are 700 people under sentence of death in the United States today, and the vast proportion of them exhibit qualities of mind, qualities of behavior, qualities of likely future conduct that show there is no alternative but to execute them?"

"We have demonstrated that to our satisfaction by comparing them to others who have committed equally serious crimes, but who are not equally serious.

"Our opinion is vindicated that discriminatory death penalties work, and work effectively to protect the public." It is evidence for such beliefs that the Congress of the United States owes the people.

The last category of the five that I would urge research be taken in, and thus makes reasonable serious consideration of a nationwide moratorium now, is in the area of economic considerations.

The Congress and the people are continuously interested in the cost of government. I am struck, as many others have been, by the way in which the penal system in general is denied money in every political forum where the question of money is raised. At the same time, we are

throwing money down what I regard as a rathole, the rathole of capital punishment.

I am a Californian by origin, and I noticed with interest the long proceedings culminated 12 years ago in the execution of Caryl Chessman. Most legal observers regarded it as something costing the taxpayers of California \$0.5 million—and that was 12 years ago. In the subsequent 12 years, the cost of putting a person to death has skyrocketed.

I do not know what a proper cost accounting would show that the State of New Jersey has paid in order to try to execute Edgar Smith, and now clearly has failed to do so. The cost to government, including the cost of executing people, has gone up enormously.

I think the public generally might be edified to learn that it is not, in fact, cheaper to put people to death. It is, in fact, far more expensive to try to put them to death, even if you succeed. But, again, I have to confess that I and my colleagues who oppose the death penalty cannot put before you evidence that would constitute an absolutely conclusive taxpayers' argument against the death penalty.

But I think you can generate the information that would give us the data.

There is my testimony, gentlemen. I think the record of the failure of the Federal Government to investigate this whole area is clear and deplorable. I think the opportunities to use a 2-year moratorium to conduct an investigation that would put at rest the minds of many, many people are very clear, and I have attempted to outline those areas for you to investigate. Thank you very much.

Mr. KASTENMEIER. Thank you, Professor Bedau. I have a number of questions for you, but in fairness would like to yield first to my colleagues, Mr. Fish.

Mr. FISH. Mr. Chairman, I have no question for Dr. Bedau. I think this is a very fine statement and a useful springboard for us to know what we should be doing in this period of moratorium.

Mr. KASTENMEIER. Thank you very much, Mr. Biester.

Mr. BIESTER. I would also like to thank Dr. Bedau for his testimony, and I wonder if the witness can tell us what the recidivist rate is in homicide cases.

Professor BEDAU. You have just pointed your finger at a sixth category in which more work might be done. I can tell you what my knowledge on the subject consists of. In the book that I edited a few years ago, "The Death Penalty in America," I attempted to bring together in convenient published form all the evidence that then was at my disposal on the recidivist rate of persons initially convicted of capital offense.

I think I can fairly accurately summarize it. Of about 10 States roughly distributed throughout the United States on which data of this sort was available, during somewhat different periods of unequal duration, the commission of a second capital offense by somebody who had been convicted of a capital offense and then paroled was something of the order of 1 in 1,000.

Let us say there are roughly 1,000 persons paroled in the United States convicted of a capital offense. Only one would be subsequently indicted and convicted of another such offense. I think there is no question that this is another area of general and legitimate public concern.

But I think the evidence which we would get if we had more than a sample, which is all that I had at my disposal 7 or 8 years ago, would confirm what I have just said.

Mr. BIESTER. I have no further questions.

Mr. KASTENMEIER. Mr. Railsback.

Mr. RAILSBACK. I also want to thank the witness. Let me ask you your feelings about this. As pertains to your recommendations that more empirical studies be undertaken in the five different areas, I personally do not think I would want to lump them all together.

In other words, in taking the various instances that you have cited where there is a need for a study, do you think that where capital punishment may be a deterrent, until we have studied the case of prison guards, or prison administrators, do you think it would be wise to exclude from a moratorium such particular cases where capital punishment may be the only deterrent to prevent it? Say, a lifer from executing or trying to kill a guard, or administrator?

Professor BEDAU. That is, until we can conduct a very thorough study? My position, which has been a matter of record in various places for a long time, is that it is safe and reasonable to abolish the death penalty for all crimes, now. There is no doubt that many do not hold that position. For those who do not, it might very well be a way of hedging about making them more amenable to going along with the moratorium.

I am skeptical, however, that the exceptions could be kept from one. If you are prepared to accommodate those who are either strongly in favor of the death penalty, or who generally have an open mind on it, I think you have opened the door to other exceptions, and will, indeed, in order to accommodate others, perhaps have to make a whole series of exceptions, which will make the moratorium essentially absurd.

Mr. RAILSBACK. Let me suggest to you, that there may be a big difference between permitting capital punishment in the case of a rapist and in every other category that you have cited needing further study. But, yesterday we had some people from the New York City Bar here, and I asked them the same question. They seemed to feel that at least in the case of prison guards, or in the case of the prison administrator, that at least there could be established standards which do not now exist, which could prevent some of the arbitrary and indiscriminate application of the capital punishment laws. I am inclined to think that possibly the only value of capital punishment, if you believe in the value of rehabilitation as one of the primary purposes of an enlightened penal system, would be the one case where it could possibly be the only deterrent to prevent somebody from killing another inmate or killing a guard.

Professor BEDAU. If I may comment on this, I would suggest that here we be guided by two quite different, but convergent, considerations. One is what we already know, about the deterrent effect of death as opposed to the other more settled and oblique deterrents that exist throughout the prison system.

I am referring to the investigations that I have cited in my testimony that Professor Sellin has undertaken directly on this subject. The essence of Professor Sellin's research comes to this. He examined the assault, including, but not solely, fatal assaults, because the differ-

ence between death and very serious assault is just that the knife did not go so deep. He examined both prisons in death penalty States, and in non-death-penalty States, of which there are a dozen or so around the United States. Professor Sellin concluded that there is no difference in these assault rates, so as far as we can see right now, and I am relying on this being a fair sample of what further investigation will confirm. Therefore, I would say that on the basis of our knowledge today, as distinct from conjecture, or prejudice, or firm belief, our knowledge warns us not to be perturbed in favor of this exception.

The second consideration, I would say, is this. It seems to me that if we will look at the situation that we find, particularly in prison riots or prison revolts, and we had a marvelous opportunity around our country not too many months ago to do this, we will see that the level of internal controls that operate upon the conduct of a prisoner are not rationally augmented by the fact that on the statutes there is a death penalty.

What is far more relevant, it seems to me, is the internal morale structure that many criminologists and penologists have put before us for years now. The impact of that statutory provision on the conduct of persons who have nothing to lose, if that is how they regard themselves, or who have a lot to lose, in terms of their career in prison, is slight. The presence or the absence of the death penalty is not a factor in controlling or guiding in their conduct. I firmly believe this. I think the evidence shows that this is reasonable, and on this I am not persuaded by the kinds of reasoning that your committee has heard from others that would lead you to modify either the abolition or the moratorium bills that you are deliberating on.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you. I take it then that you do not give much thought to the claims made by persons who are convicted of crimes that they did not go all the way and commit murder was because, by their own self-admission, they wanted to avoid the death penalty.

Professor BEDAU. I give less thought to it than those who bring it before your committee and elsewhere and rest their case for the death penalty on it. I make less out of it, because those anecdotes can be matched by other anecdotes.

I am thinking particularly of the kinds of evidence that we have in the book by Clinton Duffy, formerly warden at San Quentin, Calif. The title of the book is, "Eighty-eight Men and Two Women," a reference to the 90 people whose execution he supervised there. He gives anecdotes in that book based upon his direct testimony from persons in prison, when he asked them this question himself. He gave his testimony before the California Legislature, also. Whose testimony are we to believe? I am inclined to believe it all. I am inclined to believe everybody. Let us stipulate that nobody is lying.

What I suggest is that you can trade anecdotes back and forth on this question and keep the ball of indecision in the air interminably. What we have to face seriously is whether the anecdotes, either way, are symptoms of a general pattern, symptoms of a general trend, symptoms of a prevailing pattern of conduct, and I do not see how we have any reason to believe that is so now.

Until we have seen that in Michigan, Rhode Island, and Hawaii, a sample of States that do not have the death penalty and as you know, your own State has not had it for well over a century. Until we can see in Detroit, Providence and Honolulu that persons who engage in holdups and shoot or kill with impunity do so because the States do not have capital punishment, whereas in Chicago or San Francisco or Boston, cities in States which do have the death penalty, they will not use firearms for this reason—until we have that kind of information, I think it is irresponsible for anyone to purvey these anecdotes, since the anecdotes, it seems to me, cancel one another.

But they do not cancel general and reliable statistical evidence of the sort that I think we need. So I do not put much stock in them, as you have rightly guessed.

Mr. CONYERS. Thank you very much. I hope that you will follow the developments of the Judiciary Committee. We are moving into territory that has not been investigated by the House before. I think your recommendations are extremely important, and I am sure that they will be considered by many members of the subcommittee besides myself. Thank you.

Mr. KASTENMEIER. I have just one or two questions I would like to ask. I think that of all of the witnesses we have had thus far, Dr. Bedau is the one who has presented the most compelling statement for a study or moratorium.

I am wondering if you could be a bit more specific as to what you contemplate as a study. You indicated, as I recall, that what was to be undertaken by the Federal Government need not be a legislative study. How do you see this study? To be conducted by the Justice Department, by a commission, or a branch of the Congress? Could you give us a little more feeling for what sort of structured study you have in mind.

Professor BEDAU. I am certainly not the best person, even in this room, to advise the subcommittee on how to execute the program of investigation that I have outlined. Presidential commissions are available. Legislative investigative research, I believe, is not unknown in this House. I think it would be inappropriate, however, for another branch of Government, including the executive, to undertake this. I would like to see the legislature in this House concern itself with this task. As I have indicated in my testimony, I am concerned, as you are, about those of your critics who regard the legislature as "the sapless branch." I am concerned about its opportunities to stake out a claim, a job of work for itself, as I think legislation very much requires.

I think particularly in the area of penal reform investigation is needed. If I may return for a moment to the example you, yourself, cited of the working papers of the reform commission. What those papers consisted of, to some extent, and I hope this is not immodest of me, is what was found in my book, and the research of others like Professor Wolfgang and Professor Sellin. I consider Professor Wolfgang's work, Professor Sellin's work and my work to be research.

But the reform commission published is hardly investigation. It is a serious attempt to be informed about what is already known. I am asking you gentlemen to extend the borders of our knowledge, to push back the horizons of our ignorance somewhat.

Mr. KASTENMEIER. How might we do this? Do you think we might, as a committee of the House of Representatives, do it? Or do you think that perhaps it ought to be an organization outside of any of the branches? For instance, an independent presidential commission?

Professor BEDAU. I said and I believe that it might be less desirable were this particular study to be undertaken by a presidential commission. If the Congress is sufficiently confident, as the bill indicates, drawn up by Senator Hart and Congressman Celler—I am referring now to the language of the preamble of the moratorium bill—if this is the judgment of the subcommittee of the Congress that there is a prima facie case indicating inequality in capital punishment its characteristic administration, and indicating cruelty in its outcome in every case, then it seems to me the appropriate body to organize, fund, and supervise the investigation is the Congress itself.

Precisely how this should be done, I cannot seriously guide you. I will not attempt to offer mere conjecture now. I do not think that it should be undertaken by any other branch of government. I do not think it should be handled under private auspices.

It seems to me that research, investigation of the sort that I have in mind and that I have outlined this morning could be organized under the aegis either of this subcommittee, or the House altogether. But I remain to be instructed about what is possible and desirable in this area. It is of primary concern to me that this subcommittee authorize and create an investigatory body to deal with this, than that this branch of the government do it. I am far more concerned about the former than the latter.

But I do think I remain to be instructed to the contrary, that it would be best if the Congress could itself take the initiative to create a moratorium, and then take the further initiative to arrange for the study that legitimates and vindicates that moratorium.

Mr. KASTENMEIER. That might have to be in the nature of a special subcommittee, which would hire staff extensively for that purpose. Perhaps it could be done in 2 years.

The parent committee, the Judiciary Committee, authorized a special study of conglomerates in the United States, which was a productive study although we have not legislated in the field. On the other hand, I have often observed that the work of presidential commissions, such as the one on pornography and those that recommend changes in legislative treatment of narcotics, drugs, marijuana, are sometimes repudiated by the executive branch.

Even the work of the Commission on the Reform of Federal Criminal Laws undoubtedly will undergo drastic revision with respect to how the Justice Department presently views that.

Suppose research is undertaken, and that the research proves nothing beyond what is now known. It is not probable, but possible. What then at the end of the 2 years would be your recommendation?

Professor BEDAU. I can conjecture possibilities of the outcome of research that would be devastating for my beliefs. They remain mere abstract possibilities at this juncture, and I am confident that there would not even be possibilities at the conclusion of 2 years.

As I have indicated in the course of my remarks, and not in the prepared testimony, I have no qualms whatsoever in recommending nationwide abolition legislation repealing capital statutes. I have

urged this on a State-by-State basis where it has been appropriate to do so. I would urge the other in this setting.

The research I have outlined that I think ought to be done is not designed to put my mind at ease, and frankly not so much to put your mind at ease, but to put at ease the public mind, which, I think, is a relevant factor.

In this morning's paper, we have the latest Gallup poll reported on capital punishment, which indicates that the public continues to be roughly evenly divided on this question, with a slight preponderance in favor of keeping capital punishment. But I think that is rather vague. Still, that is what the Gallup poll shows. So I think we need to speak to that mood. I think part of the purpose of a moratorium would be indeed a nationwide exercise in self-education. Not only with regard to the data and results that would emerge from the moratorium investigations themselves, but with regard to the vast quantity of data that I know of and that you have at your disposal, but which many, many people in the country still do not.

I am struck by the way that in 1972 the press and the media generally are almost in unanimous agreement in opposing the death penalty in every form.

Fifteen or 17 years ago, when I first became interested in this subject that was not true. I think there is a clear and irreversible trend that is a function of public education. The Gallup poll reported in this morning's paper that younger people are far more opposed to the death penalty than their elders. This is precisely what you would expect when classroom after classroom of students leave Professor Wolfgang's classes and go out into the world as lawyers, sociologists, administrators, et cetera. This is exactly what one would hope and would predict, and the polls support it.

Meanwhile, there are people under sentence of death whose position is not a direct function of what the people believe at all. It is a function of what some jury decides, what some prosecutor seeks, and what some defense counsel is unable to avoid. That is the issue that I am concerned with, and I think the moratorium would have an extremely beneficial effect in generally making available the information already known, quite apart from the possibility that it might not generate decisively new information at all.

Mr. KASTENMEIER. Thank you very much, Dr. Bedau. Your testimony has been very helpful to this subcommittee, and it is a very crucial decision we will have to make.

Professor BEDAU. Thank you again for inviting me.

(Professor Bedau's prepared statement and appended article follow:)

STATEMENT OF HUGO ADAMS BEDAU ON BEHALF OF THE AMERICAN CIVIL
LIBERTIES UNION

WITNESS

[Hugo Adam Bedau, 172 Annursnac Hill Road, Concord, Massachusetts. President, American League to Abolish Capital Punishment, Boston, Massachusetts. Editor and author, *The Death Penalty in America* (1967 ed.), and other essays and articles on capital punishment in the United States. B.A., University of Redlands, 1949. M.A., Boston University, 1951. Ph. D., Harvard University, 1961. Carnegie Fellow in Law and Philosophy, Harvard University Law School, 1961-62. Austin B. Fletcher Professor of Philosophy, and Chairman, Department of Philosophy, Tufts University, Medford, Massachusetts. Editor and author, *Civil*

Disobedience: Theory and Practice (1969), Justice and Equality (1971), and other essays and articles on social, political, legal philosophy.]

If executions are to be done in the name of the People, by the People's elected representatives and appointed officials, and according to the doctrine *salus populi suprema lex*, it is only reasonable that the People through allocation of tax resources should from time to time vindicate the desirability, necessity, efficiency, and humanity of the methods and practices and purposes of such punishment. But the first step toward such vindication is investigation.

In the English-speaking world, we must look to Great Britain for leadership in the use of public monies to sponsor hearings, interviews, and research into the death penalty. The first such effort took place in 1866 and resulted in what even today would be regarded as a massive report; 671 pages of testimony and appraisal published in a still useful document. Again, in 1929-1930, Parliament created a Select Committee to investigate the death penalty; the Committee produced 681 pages of testimony and a 48 page final report. Finally, beginning in 1949 and continuing for four years, the Royal Commission on Capital Punishment (even though its terms of reference did not permit it to study directly the question of outright abolition of capital punishment) supervised the publication of nearly 700 pages of "Minutes of Evidence" and over 500 pages of its final printed "Report."

What, for the sake of comparison, do we find in the United States, with its more than 7,000 legal executions since 1900?¹

Despite executions in this century at the average of two persons a week for seventy years, in over forty jurisdictions for over a dozen different capital crimes,² only ten State governments have even bothered to investigate officially the subject.³ Some of these reports (e.g., New Jersey's, in 1964) are little more than an extended bibliography prefaced by platitudes and pieties showing neither originality, seriousness of purpose, nor discharge of public responsibility. Only in three cases (viz., Massachusetts, 1958; Ohio, 1961; Maryland, 1962) did the State governments sponsor more than voluntary testimony and undertake investigations beyond what their Legislative Reference Bureaus could supply from their shelves and files.

As for the federal government—executive, legislative, and judicial branches—not a single piece of original research has been published in any document, periodical, report, essay or other publication financed by tax monies and designed to test even one of the many controverted empirical questions concerning the operation of the death penalty in America.

It is as though there were a conspiracy of neglect and silence to insure that capital punishment, provided under the statutory law of the states and federal government since the earliest years, was to continue indefinitely, with legislatures uninstructed by their committees as to the actual operation of these laws, executives charged to dispense clemency but ignorant of the overall workings of capital punishment in the society, and the judiciary ready to impose death sentences but wholly uninformed as to the function role being played by this mode of punishment.

The entire contribution of the federal government to public enlightenment on the death penalty issue, with all its ramified questions hoary with inconclusive controversy, is quickly catalogued:⁴

- 1912—Library of Congress, Division of Bibliography, *Select List of References on Capital Punishment*. In 1924, 1926, 1930, 1931, 1935, this item was supplemented by mimeographed and photo-offset addenda.
- 1926—House of Representatives, Committee on the District of Columbia, *Hearings on H.R. 349 and H.R. 4498 (Capital Punishment)*. Jan.-Feb. 1926, 168 pp. *Report*, April, 1926, 5 pp.
- 1930—Department of Justice, Bureau of Prisons, *National Prisoner Statistics—Execution Bulletin*, annually.
- 1930—Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports*, annually.

¹ See H. A. Bedau, ed., *The Death Penalty in America* (1967 ed.), pp. 35-36. (Hereinafter cited as Bedau.)

² See Bedau, pp. 12, 39-52, 94-119, and cf. *National Prisoner Statistics*, No. 45, "Executions 1930-1968," August 1969.

³ See Bedau, pp. 565-566, for a complete list of all recent published state investigations and reports on capital punishment, as of 1967. Since that date, no further such reports have appeared.

⁴ See Bedau, pp. 566; Julia E. Johnson, ed., *Capital Punishment* (1939), pp. 245, 249, 256; University of Chicago Center for Studies in Criminal Justice, "A Selected International Bibliography on Capital Punishment," Part III, pp. 2-4 (March, 1968).

- 1959—Department of Justice, Bureau of Prisons, "Bibliography on Capital Punishment."
- 1960—House of Representatives, Committee of the Judiciary. *Hearing on H.R. 870 (Abolition of Capital Punishment)*. May, 1960. 181 pp.
- 1966—Library of Congress, Legislative Reference Service, "Capital Punishment: Pro and Con Arguments." 71 pp., August 1966.
- 1968—Senate, Committee on the Judiciary. *Hearings on S. 1760 (To Abolish the Death Penalty)*. March and July, 1968. 239 pp.
- 1970—National Commission on Reform of Federal Criminal Laws, *Working Papers*, II, "Memorandum on the Capital Punishment Issue," pp. 1347-1376.

Although these items amount to a fairly substantial quantity of published matter, their contents (apart from the two serial items begun in 1930) are woefully insufficient and unsatisfactory, for three reasons at least. (a) In the Senate and House testimony, very few persons directly concerned with administering the death penalty in state or federal governments gave their evidence and responded to interrogation from the Committees. No Attorney-General has come before a Congressional Committee to defend the federal death penalty; no federal law enforcement officer has tendered his personal convictions in this forum; no prison administrator has defended his role in carrying out legal executions—if anything, the evidence is quite the reverse (cf. testimony in item 1968 from Mr. Ramsey Clark and Mr. James Bennett). Conspicuous by their absence were the judges, state and federal. We have no official record, in any state or federal document in this century on the subject of capital punishment, of the views of any members of the judiciary on the death penalty which has been imposed over 7,000 times in the jurisdictions of this nation. (b) In none of this material, and in particular at the three public hearings held in Washington, D.C., under the spotlight of national publicity, do we have any truly new evidence, original research, or other tender of the government's responsibility to support its practice of capital punishment. No government researcher, committee counsel, legislative aid has offered one scintilla of evidence for the public record which would tend to resolve disputed questions concerning the death penalty. (c) The vast majority of the information contained in items (1)-(7) above is bibliographic, expression of opinion, anecdote, and the digest of material already available to the public in other forms. What research is published in these government documents is merely republished from private sources, or it is reported by private citizens and non-governmental agencies.

In a word, the record shows that the federal government in all three branches has stood massively silent on the substance of every significant question affecting the necessity, desirability, and humanity of the more than 7,000 legal executions carried out in this century under state and federal law.

These days we hear a great deal about the usurpation of Congressional and legislative power by the executive and especially the judicial branches of government. One partial explanation of this usurpation is the failure of the legislatures themselves to exercise leadership. Inquiry into the broad questions of penal policy—the causes and nature of crime, the psychological and sociological analysis of offenders, the deterrent and rehabilitative effects of sanctions—is pre-eminently an area for legislative authority. The death penalty as a national phenomenon, authorized by both state and federal statutes since the founding of this Nation, deserves careful inquiry at this time, especially in light of the sorry record of prior neglect concerning research in this area.

To what good use, the Congress no doubt wants to know, could a nationwide two-year moratorium on the death penalty, be put? What could be gained during that time which would be worth the delay and uncertainty resulting from placing the death penalty in such a legal limbo? The answer, I think, is clear. Much of the controversy over capital punishment continues without end in sight because a number of major empirical questions—issues calling for careful research study by experienced investigators—remain unanswered and therefore subject to conjecture and uncertainty in the minds of the general public and legislatures. A two-year nationwide moratorium on capital punishment is justified if and only if there is significant empirical research deserving to be done because of its relevance to the issues in controversy; and there is. I would propose that the Congress, through its committees and their investigative staffs, supplemented no doubt by professional experts from around the nation, undertake to investigate five significant kinds of questions.

I-Deterrence.—The ineffectiveness of capital punishment as a general deterrent, we know, is now one of the commonplaces of contemporary criminology.⁵ Yet there are half a dozen subsidiary questions concerning certain major categories of offense, victim, and offender where more empirical research designed along novel lines would be of considerable value in dispelling public reluctance to believe what the experts believe: that the death penalty is not and cannot be a more effective deterrent for any crime nor any kind of criminal than imprisonment.

(1) *Assaults on police.*—We have two studies done more than a decade ago, both of which tend to confirm the general thesis that police officers are no safer from criminal assault and homicide in death penalty jurisdictions than they are in abolition jurisdictions.⁶ These studies, while no doubt reliable so far as they go, could well be extended to cover more jurisdictions and more recent years.

(2) *Assaults on prison officials and prisoners.*—We have various studies on American prisons which tend to show that the death penalty is not useful in providing added safety to prisoners and prison administrative personnel. But these studies need extension both into recent history, as well as across more jurisdictions.⁷

Both (1) and (2) are of utmost national importance, since during the past generation the defense of the death penalty has rested more and more upon the belief that it provides a special deterrent for lifeterm convicts and special protection for prison personnel. The only way to dispel, or reinforce, that belief is by conducting the requisite empirical research on a nationwide scale.

(3) *Rape, kidnapping, and air piracy.*—There are good reasons for believing that the death penalty fails to provide any special deterrent effect upon those who contemplate such crimes as rape, kidnapping, and airplane hijacking. Yet it is often these crimes—where life is risked but life is not always taken—which the public wants prevented, and not unnaturally turns to the death penalty for help. The Congress itself has done this within the past decade, when it made the crime of air piracy a criminal offense punishable (optionally) by death, a statute passed in 1961.

Curious as it may seem, criminologists have not undertaken any direct research on the deterrent efficacy of the death penalty vs. imprisonment for these crimes. No doubt some difficulties would attend serious scientific inquiry into the question. Nevertheless, the people and the Congress should realize that crimes such as these, where murder is not always involved, do carry the death penalty, that persons have been executed for (some of) them, and that there is much more to be learned than we currently know in regard to the possible deterrent effects of penalties of varying severity for these crimes.

(4) *Felony murder.*—One of the most important categories of crime for which confidence in the deterrent efficacy of capital punishment has been expressed is the crime of felony murder, notably, murder in the course of armed robbery and burglary. Evidence abounds that police officials and spokesmen generally believe that the death penalty helps to deter robbers, burglars, and others from carrying guns (or using the guns they carry) in the course of perpetrating their non-homicidal felonies, lest they kill someone and be sentenced to death for felony murder.⁸ In general, opponents of the death penalty have long disbelieved this, and for good reason: the level of law enforcement, the possibilities of plea bargaining, the optional death penalty for felony murder,—all these reduce the likelihood that the determined and cynical "professional" criminal will refuse to use a gun in order to avoid risking a death sentence. However, specific empirical studies designed to test precisely this issue do not exist, and none seem to be currently underway. There is room for conjecture and speculation here, but the public deserves to have its doubts dispelled by careful empirical inquiry which the Congress is in the best position to authorize and assess.

II—Incitement.—Anecdotal evidence shows that many investigators in a large variety of social situations have found that the death penalty not only fails to

⁵ See Bedau, pp. 258-332, and Bedau, "Deterrence and the Death Penalty," 61 *Journal of Criminal Law, Criminology & Police Science* 539 (1970), at p. 543, note 543, for a representative listing of authorities.

⁶ Thorsten Sellin, "Does the Death Penalty Protect Municipal Police?", and Donald Campton, "Does the Death Penalty Protect the State Police?", both reprinted in Bedau, pp. 284-315. cf. Cardarelli, "An Analysis of Police Killed by Criminal Action, 1961-1963," 59 *Journal of Criminal Law, Criminology & Police Science* 447 (1968).

⁷ Thorsten Sellin, "Homicides and Assaults in American Prisons," 31 *Acta Criminologicae et Medicinae Legalis Japonica* 139 (1965), and "Prison Homicides," in T. Sellin, ed., *Criminal Punishment* (1967), pp. 154-160.

⁸ See, e.g., Bedau, p. 267.

function as an effective deterrent; it seems to function in some cases as an incentive to crime, particularly the crime of murder. The general public is readily able to believe that persons under death sentence have an added incentive to risk the death of others in order to escape from prison, however slight the chance; witness the case of George Jackson in San Quentin Prison, California, in 1971. Also, the public can understand how a person, having already committed a felony, would be willing to risk killing in order to avoid apprehension and the testimony of witnesses against him. Here are possible areas of criminality where the death penalty may well cancel whatever deterrent effect it has elsewhere. Somewhat more bizarre than such cases are the so-called "suicide-through-murder" cases.⁹ Confessions from murderers who have nothing to gain by deception, and the testimony of psychiatrists, tends to confirm the hypothesis that persons of unstable mentality may resort to committing the crime of murder in order to kill themselves, i.e., in order to be convicted of murder and sentenced to death. It is all the more interesting to note, therefore, evidence which tends to suggest that the incidence of murder in fact rises during the period of impending execution.¹⁰ To be sure, our present knowledge does not enable us to assert with confidence how many, or what proportion of, persons become killers through the desire to end their own lives. Nevertheless, here is a fertile field for inquiry, and one sadly neglected so far by systematic criminological investigation. It is especially important to conduct investigations into this area because of its indirect bearing on the whole issue of deterrence.

III—Agony on Death Row.—It has long been the practice for prisons to segregate their death sentence convicts on so-called "Death Row." There, convicts are received under death sentence and wait, in solitary confinement and under special deprivations and restraints, until the hour of their execution. For many prisoners this has been a living death, stretching out months and years. The famous French movie, "We Are All Murderers," gave graphic portrayal to the special miseries of the condemned. In America, "Death Row" has in practice been an inseparable part of the entire institution of capital punishment as administered in this nation. Yet, apart from testimony introduced in the course of some recent cases¹¹ (available only to the attorneys and courts concerned), there is only one general study of what can be truly called the agonies of "Death Row."¹² One notes with interest the tendency within the past year or two to abolish "Death Row," and keep death sentence prisoners among the general prison population until such time as their execution is imminent. Massachusetts, for example, has taken this course in 1970.¹³ Even today, however, the vast proportion of the 600 persons currently under sentence of death remain under the aggravated and segregated conditions of "Death Row." If, as it is widely believed, the conditions of confinement for such prisoners is deleterious in the extreme, and constitutes a "cruel" punishment, then the public and the legislators ought to be told this. Only a general inquiry into the matter, conducted with scrupulous care and thoroughness, can put our minds at rest on this matter.

IV—Inequality, Cruelty, and Unusualness.—As generally understood by lawyers and courts, the question posed to various state and federal courts over whether the death penalty is a "cruel and unusual punishment" and thus unconstitutional, is not an empirical question at all; it is a legal question entirely, a question of the "living law of the constitution." It is true that there are to date no empirical findings obtained with direct relevance to the question whether the death penalty is unconstitutionally "cruel and unusual," and none have been cited in the leading article on the topic.¹⁴ But this does not mean that new evidence might not be gathered through suitable scientific inquiry which would have direct value upon this question, certainly for legislatures and possibly even for courts.

⁹ See Bedau, p. 264 note 7, and T. Sellin, *The Death Penalty* (1959), pp. 65-69.

¹⁰ William F. Graves, M.D., "The Deterrent Effect of Capital Punishment in California," reprinted in Bedau, pp. 322-332.

¹¹ Brief of Amiel Curiae in Support of Petitioners, *In re Anderson and Saterfield*, California (Crim. 11572, 11573), 1969. Cf. Tom Murton, "Treatment of Condemned Prisoners," 15 *Crime and Delinquency* 94 (1969).

¹² Harvey Bluestone and Carl L. McGahee, "Reaction to Extreme Stress: Impending Death by Execution," 119 *American Journal of Psychiatry* 393 (1962).

¹³ Select Study Committee Established to Investigate and Study Conditions Existing on the Death Row Section of the Massachusetts Correctional Institution at Walpole. *First Report*, Senate No. 1589, July 1970.

¹⁴ Arthur Goldberg and Alan Dershowitz, "Declaring the Death Penalty Unconstitutional," 83 *Harvard Law Review* 1773 (1970).

Here is an empirical hypothesis and a method of investigation which could very well shed considerable light on the question.

Hypothesis: It is cruel and unusual to punish by death a statistically typical person convicted of murder, rape, burglary, etc., because if there is nothing significantly different about him relevant to his criminality—the nature of his offense, his prior criminal record, the unlikelihood of further safe incarceration or eventual parole, etc.—then the greater severity of punishment (by death) serves no possible legitimate purpose of punishment.¹⁵

Method of Confirmation: Each state's death penalty population (over 700 persons in 33 states, which for purposes of the study would include both New Jersey and California, even though their state Supreme Courts struck down the death penalty early in 1972) would be matched, person by person, against the members of two other groups drawn from the state's criminal population, with type of capital crime, sex of offender, status of victim, prior criminal record, etc., held constant: Group (a) would consist of an equal number of persons convicted of the same capital crime but sentenced to imprisonment by judge or by jury; group (b) would consist of an equal number of persons probably guilty of the same crime but through "plea bargaining" or other judicially permissible practices were convicted of a lesser crime or no crime at all. The hypothesis is that given any person on "Death Row" anywhere in the country, it is possible to match him/her two others in the same (or a very similar) jurisdiction, one of whom though convicted of the same crime was given the lighter punishment of imprisonment and the other of whom was not even convicted of the same crime at all. Only in this way, or by means of some equivalent test, is it possible to test whether, e.g., refusal to plead guilty, "to turn state's evidence," to rely upon a court-appointed attorney, etc.—all irrelevant factors so far as determining the severity of the sentence is concerned—nevertheless play a statistically significant role in explaining who goes to death for his crimes and who does not.

If a study of this sort were undertaken genuinely new information of a very significant and hitherto unavailable nature would for the first time be at the disposal of the legislative branch of government. More than any other single kind of inquiry, it would tell us in scientifically accurate and socially relevant ways the true nature of those whom we sentence to death and execute. In the absence of such information, how can we rest content to permit our statutes to inflict the death penalty for dozens of crimes? Here is a great and unique opportunity for inquiry at the Congressional level to provide us with information of unusual relevance.

V—*Economic Considerations.*—A decade ago it was widely said that it cost the State of California over half a million dollars to execute Caryl Chessman. Everyone familiar with the administration of criminal justice knows the enormous "hidden costs" associated with bringing criminals to trial; all these costs are aggravated beyond doubt in capital cases. Yet reasonable and undisputed as this belief is, once again the truth of the matter is that we do not have a single case of accurate cost-accounting for a single capital jurisdiction in the United States. The public has the right to know what it costs to maintain the practice of capital punishment, the actual economic dollar charges attributable to the death penalty, from the time a person is indicted and denied bail to stand trial on a capital indictment, to the moment when he walks "The Last Mile." If the costs are as staggering as it is generally believed, this is information which ought to be generally available. There is no reason why the death penalty should be immune from the ordinary cost-accounting practices of every other undertaking of government. To date, the death penalty has evaded precisely this kind of scrutiny, and Congress could and should support investigation into this dark area.

Here, then, are five diverse but interrelated areas where systematic (and, no doubt, expensive and complex) empirical inquiry is badly needed before the legislature and the people can think they know the answers to questions of vital interest to them regarding the death penalty in our society. These five kinds of inquiry form a comprehensive package of scientifically relevant areas deserving the kind of study which Congress is in the best position to finance and supervise. Partisans on both sides of the merits of capital punishment should be able to join together in effective support of such inquiry. Surely, no more worthy reason could be given for a Congressional nationwide moratorium on capital punishment for two years than to conduct such investigations.

¹⁵ Trevor Thomas, *This Life We Take* (1970 ed.), p. 21; et. The Washington Research Project, *The Case Against Capital Punishment* (1971), pp. 61–62.



APPENDIX

[Reprinted from Federal Probation, June 1971]

THE DEATH PENALTY IN AMERICA—REVIEW AND FORECAST

(By Hugo Adam Bedau, Ph. D., Chairman, Department of Philosophy, Tufts University)

The threshold of a new decade is a conventional period for stocktaking, so it is not unfitting that the accomplishments, frustrations, and prospects of the movement to abolish the death penalty in the United States should undergo a review at this time. Let us look first at a dozen of the highlights from the past decade and the trends of rapid change we have experienced.

In the 1960's, six states—Oregon (1964), West Virginia (1965), Vermont (1965), Iowa (1965), New York (1965), and New Mexico (1969)—abolished the death penalty with few or no qualifications. Only in one other decade have more states entered the abolition category. That was between 1906 and 1917, when 10 states abolished the death penalty for murder; but by 1919, five had reintroduced it.¹

During the 1960's, only one state, Delaware, reintroduced the death penalty (in 1961) after having abolished it in 1958. Late in 1970, the constitutionality of the hasty legislation which reintroduced it has been challenged in court on quite technical and perhaps insufficient grounds.²

During the past decade, the last mandatory death penalties for first degree murder were repealed—in the District of Columbia (1962), and New York (1963)—to be replaced by optional death sentences subject to jury discretion. A dozen other felonies, not all involving criminal homicide, in more than a dozen jurisdictions continue to carry the mandatory death penalty. The crimes for which they are specified, however, rarely occur.³

Between 1961 and 1970 several new kinds of crime were made capital offenses by the Federal Government, notably air piracy (1961) and assassination of the President or Vice President (1964). In 1970 Governor Ronald Reagan of California signed into law the death penalty for anyone who explodes a "destructive device" causing great harm or injury to a person.⁴

Whereas the number of person received annually under death sentence has not significantly changed between 1961–1970, the total death sentence population has *trebled* during the decade. It increased from an average of 145 during the 1950's⁵ to an average of 325 during the 1960's (See Table 1). As of February 1971 it stands at the all-time high of 617 (See Table 2).

¹ See *National Prisoner Statistics*, No. 42, "Executions 1930–1967," Table 16, p. 32. The comparable tables in H. A. Bedau, ed., *The Death Penalty in America*, rev. ed., 1967, p. 12 (hereinafter cited as *The Death Penalty*), and in Walter C. Reekless, "The Use of the Death Penalty—A Factual Statement," *Crime and Delinquency*, XV, January 1969, p. 49. Table 6, are at variance and presumably in error. All statements of fact in the text not specifically documented are based on information in the files of the American League to Abolish Capital Punishment, 33 Mount Vernon Street, Boston, Massachusetts 02108.

² See *Wilmington* (Delaware) *Evening Journal*, January 4, 1971, p. 1. Apparently, in overriding the Governor's veto of the bill to reintroduce the death penalty, the lower house of the legislature failed to wait the necessary minimum of one day after receiving the measure from the upper house.

³ See *The Death Penalty*, pp. 29, 46–59; cf. Thorsten Sellin, ed., *Capital Punishment*, 1966, pp. 24–25. The Bedau and Sellin tabulations do not agree precisely.

⁴ *New York Times*, August 23, 1970, p. 58.

⁵ See *National Prisoner Statistics*, No. 23, "Executions 1959," February 1960.

TABLE 1.—EXECUTIONS, COMMUTATIONS, AND DEATH SENTENCES IN THE UNITED STATES, 1961-71

Year:	Received under death sentence	Total under death sentence ¹	Commutations	Executions
1961	140	219	17	42
1962	103	266	27	47
1963	93	268	16	21
1964	105	298	9	15
1965	86	332	19	7
1966	118	351	17	1
1967	85	415	13	2
1968	102	434	16	0
1969	(?)	479	(?)	0
1970	(?)	² 525	(?)	0
1971		⁴ 620		

¹ As of January 1.

² No data available.

³ Source: Bureau of Prisons, National Prisoner Statistics, as reported by Legal Defense Fund in its brief *amicus curiae* in *McCautha v. California*, O. T. 1970, No. 203, p. 15 note 18.

⁴ Source: Newsweek, January 11, 1971, p. 23.

Source: National Prisoner Statistics, Number 45, Tables 1 and 4, "Executions 1930-68," August 1969, for the years 1961-69.

During the 1960's, hearings were held on the federal death penalty in the House (in 1960), under Congressman Abraham J. Multer and in the Senate (in 1968) under Senator Philip A. Hart.⁵ This was the first time in history that both houses of Congress held such hearings. While they did afford an unprecedented national forum for attack on the death penalty, they did not really compare to the forceful parliamentary inquiries on the death penalty conducted in Great Britain (1954) and Canada (1956) which subsequently led to all but complete abolition in both countries for experimental periods beginning, in 1965 and 1968, respectively.

During the 1960's, opposition to the death penalty continued to be the policy of almost all major organized church groups in the country and became the national policy of a number of secular nationwide organizations with professional or political stature. Chief among these were the National Council on Crime and Delinquency (1963), the American Civil Liberties Union (1965), the American Correctional Association (1966), and the NAACP Legal Defense and Educational Fund.

Because of delays in the courts and appeal litigation, the record time spent under death sentence was raised during the past decade from 11 years, 10 months, 7 days (set by Caryl Chessman, executed May 2, 1960, in California) to more than 13 years in several cases.⁷ Over the same period, the *average* time under death sentence was *more than doubled*, from 14.4 months to 32.6.⁸

⁵ See 86th Congress, Second Session, House of Representatives, *Hearing Before Subcommittee No. 2 of the Committee on the Judiciary*, on H.R. 870, May 25, 1960, 1960; and 90th Congress, Second Session, United States Senate, *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee of the Judiciary*, on S. 1760, March 20, 21, and July 2, 1968, 1970.

⁷ See *National Prisoner Statistics*, No. 41, "Executions 1930-1966," April 1967, p. 5, and No. 45, "Executions 1930-1968," August 1969, p. 3.

⁸ Compare, respectively, James McCafferty, "The Death Sentence, 1960," Table 6, reprinted in *The Death Penalty*, p. 102, and *National Prisoner Statistics*, No. 45, "Executions 1930-1968," August 1969, pp. 1-2.

TABLE 2.—PERSONS UNDER DEATH SENTENCE IN THE UNITED STATES AS OF FEBRUARY 8, 1971

State	Total	Murder	Rape	Other
All States.....	617	1 433	1 78	1 5
Alabama.....	28	20	7	² 1
Arizona.....	17	17		
Arkansas.....	0			
California.....	94	(1)	0	(1)
Colorado.....	7	7		
Connecticut.....	3	3		
Delaware.....	3	3		
District of Columbia.....	1	1		
Florida.....	72	49	23	
Georgia.....	28	19	8	² 1
Idaho.....	0			
Illinois.....	30	30		
Indiana.....	7	7		
Iowa.....	1	1		
Kansas.....	16	16		
Kentucky.....	43	27	16	
Louisiana.....	19	15	4	
Maryland.....	15	15		
Massachusetts.....	7	(1)	(1)	(1)
Mississippi.....	11	11		
Missouri.....	0			
Montana.....	2	2		
Nebraska.....	6	6		
Nevada.....	2	2		
New Hampshire.....	22	22		
New Jersey.....	1	1		
New York.....	15	13	1	³ 1
North Carolina.....	42	42		
Ohio.....	12	12		
Oklahoma.....	27	27		
Pennsylvania.....	10	7	3	
South Carolina.....	0			
South Dakota.....	12	6	6	
Tennessee.....	41	31	8	⁴ 2
Texas.....	4	4		
Utah.....	8	6	2	
Virginia.....	11	11		
Washington.....	0			
Wyoming.....				

¹ Data are incomplete as to capital crimes under which death sentence prisoners were convicted.

² Robbery.

³ Rape/robbery.

⁴ Armed robbery.

Source: Citizens Against Legalized Murder, Douglas Lyons, chairman.

In 1965 Ramsey Clark, then Deputy Attorney General of the United States, announced that the office of the Attorney General was opposed to the death penalty in the District of Columbia.⁹ During the next 3 years Mr. Clark lent

⁹ See the letter from Deputy Attorney General Ramsey Clark of July 23, 1965; portions are quoted in the speech of Senator Phillip A. Hart, *Congressional Record*, CXIX, July 25, 1966, at p. 16181.

the weight of his office to the cause of abolition. In a memorable speech in 1968, during the hearings before Senator Hart's subcommittee, the Attorney General said, in part:

Society pays a heavy price for the penalty of death it imposes. Our emotions may cry vengeance in the wake of a horrible crime. But reason and experience tell us that killing the criminal will not undo the crime, prevent other crimes, or bring justice to the victim, the criminal, or society. Executions cheapen life. We must cherish life The death penalty should be abolished.¹⁰

In 1967 unprecedented class actions initiated by Legal Defense Fund attorneys were successful in blocking all executions in Florida, then California, and subsequently, in effect, throughout the Nation, pending judicial determination of federal "due process" and "equal protection" issues raised against state death sentences for murder, rape, and other crimes.¹¹ At the same time, the Legal Defense Fund undertook to provide counsel for all condemned persons anywhere in the United States for whom adequate legal representation could not otherwise be obtained.

The year 1968 was recorded as the first calendar year in American history during which no execution occurred anywhere under American civil law. What many hope will turn out to be the last legal execution in the United States occurred in Colorado on June 2, 1967.¹²

In 1969 the United States Supreme Court for the first time heard argument against the death penalty on the ground that it is unconstitutional under the eighth amendment ("cruel and unusual punishment"), in *Boykin v. Alabama*,¹³ a case involving not murder or rape, but robbery. The court reversed the conviction, but not on this ground.

Within the last month of 1970 and the first month of 1971, four extraordinary and unprecedented events occurred, and some may prove to be auguries of even more profound changes to come in the months and years immediately ahead:

On December 11, 1970, the United States Court of Appeals for the Fourth Circuit held in the *Ralph* case that the death penalty for rape, when the victim's life was neither taken nor endangered, violates the eighth amendment prohibition against cruel and unusual punishment.¹⁴ This is the first judicial determination by an appellate court that any capital statute is in violation of the eighth amendment.

On December 29, 1970, Governor Winthrop Rockefeller of Arkansas, although defeated for his bid for reelection in the previous November, commuted the sentence of all 15 men under sentence of death. "I hope the position I take will have an influence on other Governors," he is quoted as saying.¹⁵ Governor Warren Hearnes of Missouri, chairman of the National Governors Conference, said he was certain the matter would be taken up at the next Governors Conference, slated for February 23, 1971.¹⁶

On January 7, 1971, the National Commission on Reform of Federal Criminal Laws, under the chairmanship of Edmund G. Brown, former Governor of California, released its final report. The Commission recommended abolition of all federal death penalty statutes, a shift from the position it took in the study draft in June 1970.¹⁷ Although the recommendation against the death penalty was not accepted by two of the 12 commissioners, Senators Sam J. Ervin and John L. McClellan,¹⁸ considerable editorial interest and support has been registered across the Nation for this particular recommendation.¹⁹

¹⁰ See Senate, *op. cit.*, pp. 91-98, and, generally, Ramsey Clark, *Crime in America* (New York, Simon and Schuster, 1970), pp. 330-337.

¹¹ See American Civil Liberties Union, *Civil Liberties*, May 1967, p. 1, and December 1967, p. 7; also Jack Greenberg and Jack Himmelstein, "Varieties of Attack on the Death Penalty," *Crime and Delinquency*, XV, January 1969, pp. 112-120.

¹² See Sid Ross and Herbert Kupeferberg, "The Longest Week in One Man's Life," *Parade*, May 4, 1969.

¹³ 395 U.S. 238 (1969). See, for the constitutional argument, especially the Brief filed in the case by Gerald H. Gottlieb and Earl Klein, *amicus curiae*.

¹⁴ *New York Times*, December 12, 1970, p. 56. The case is *Ralph v. Warden*, No. 13, 757 (4th Cir. 1970). As of this writing it was uncertain whether the state would appeal.

¹⁵ *New York Times*, December 30, 1970, p. 26.

¹⁶ (Albany, N.Y.) *Times Union*, December 31, 1970, p. 2.

¹⁷ Compare National Commission on Reform of Federal Criminal Laws, *Study Draft of a New Federal Criminal Code* (1970), pp. 307-308, and *Final Report* (1970), pp. 310-314. See also *Working Papers of the National Commission on Reform of Federal Criminal Laws* (Washington, D.C., G.P.O., 1970), II, "Memorandum on The Capital Punishment Issue," pp. 1347-1376.

¹⁸ See National Commission, *op. cit.* *supra* note 17, p. 310, and *New York Times*, January 8, 1971, p. 1.

¹⁹ See, e.g., *Baltimore Evening Sun*, January 8, 1971; *Salt Lake Tribune*, January 9, 1971.

On January 19, 1971, Attorney General Fred Speaker of Pennsylvania ordered the State's electric chair dismantled and declared that Pennsylvania's death penalty was "unconstitutional and unenforceable." Professor Louis Schwartz, director of the National Commission for Reform of Criminal Laws, commented, "The constitution is the supreme law of the land and the governor and attorney general take an oath to support it. But if in good faith they decided that executions are forbidden by the constitution, I see no way the courts could compel the governor to carry them out."²⁰ Less than 2 weeks later, however, J. Shane Creamer, Mr. Speaker's successor as Attorney General, rescinded the constitutional ruling. He did let stand the dismantling of the electric chair, and further ordered all death row prisoners to be returned to the general prison population.²¹

Some of these events and trends do not warrant a further elaboration in this necessarily brief survey. Others have been treated elsewhere at adequate length, as the references and citations show. But several are interesting surface phenomena of deeper causes, and they deserve further scrutiny. Still other important patterns and possibilities are not so easily depicted in a memorable event or striking statistic; they, too, require commentary and analysis. Accordingly, I shall devote the remainder of this review and forecast to five topics: *Public Opinion, The Question of Deterrence, Miscarriages of Justice, Legislative Reform, and Constitutional Litigation*. These topics by no means exhaust all the general themes of importance deserving survey, but they are the most prominent and they will have to suffice here. Much of the other information of interest is available through the volume I have edited, *The Death Penalty in America*.

PUBLIC OPINION

What the American public currently believes about the death penalty must be inferred from two quite different sorts of data at least. One sort has been obtained at the voting booths in four different states during the past decade. In 1964 Oregon abolished all its death penalties by a constitutional referendum; the vote was 455,654 to 302,105. In 1966 the voters of Colorado upheld its death penalty statutes by a vote of 389,707 to 193,245. Then, in 1968, Massachusetts voters, in an advisory referendum, also voted to keep the death penalty, 1,159,348 to 730,649. In Illinois, late in 1970, the electorate approved a new state constitution but defeated an amendment to outlaw capital punishment by 1,110,189 to 607,096.

In no other decade of American history have there been such referenda on this issue, and in three of these four cases, as we see, the public preferred to keep rather than discard capital punishment. A careful study of even one of these campaigns has yet to be published, but from my personal participation in two of them, I would say it is fairly clear that the public will vote against the death penalty only if it has been skillfully persuaded by a well-organized campaign, fully supported by state and local politicians and not opposed by law enforcement spokesmen or any other major interest group. Only the first of these can be secured by money alone (it is worth noting that to win the 1964 Oregon referendum, four times the money per voter was spent as in Massachusetts in 1968). Otherwise, public campaigns such as this are at the mercy not only of money but also of chance. One brutal slaying a few weeks before the election can destroy months of patient and otherwise effective education. The prospect in this country for abolition at the polls during the 1970's, therefore, is not very great.

Among specialized groups surveyed for their attitudes on the death penalty, the sharp conflict that can emerge is well illustrated by two polls published during November 1969. *Psychology Today* reported that 65 percent of its readers polled were against the death penalty even for the "premeditated murder of a policeman" and 86 percent were against it for "forcible rape."²² But *Good Housekeeping* declared that its readers supported the death penalty "nearly two to one"; 62.1 percent believed it was "a deterrent to murder and other serious crimes," including kidnapping and political assassination.²³ How scientific either of these polls was it is impossible to judge. What is strongly suggested by these results is that since the more sophisticated and better educated readership tends

²⁰ *Philadelphia Inquirer*, January 21, 1971, pp. 1; also, *Philadelphia Evening Bulletin*, January 21, 1971, p. 1. See also the press release from Attorney General Speaker of January 25, 1971.

²¹ See letter to Commissioner Allyn Siefaff from Attorney General J. Shane Creamer of January 27, 1971.

²² *Psychology Today*, III, No. 6, November 1969, p. 24.

²³ *Good Housekeeping*, November 1969, p. 24.

strongly to oppose the death penalty even for the gravest crimes, there is considerable basis for hope that in the years ahead, as mass higher education continues to expand, we shall see more rather than less opposition to the death penalty and other brutal forms of social control.

Comprehensive public opinion polls of the Gallup and Harris type, as I have reported elsewhere,²⁴ show that over the years from 1936 to 1966 the American public moved noticeably away from support of capital punishment to a (near or bare) majority in opposition to it. But that majority is shifting and unstable. A recent comprehensive survey of such polls²⁵ shows that the latest Gallup Poll (February 1969) puts the American public exactly back where it was a decade earlier: 51 percent of the people are still "for" the death penalty for convicted murderers, and 40 percent against it (in 1960 it was 36 percent).²⁶ This study confirms the generally accepted view that younger persons tend to oppose the death penalty, that women oppose it more strongly than men, but it disconfirms the view that whereas the better educated oppose it the blue collars and "hard hats" support it. Despite the polls which showed significant support for capital punishment in Canada and in Britain during the 1960's, their parliaments voted significantly in favor of all but complete abolition.²⁷ Only in a handful of states in America have we seen comparable legislative leadership during the past decade.

With the possible exception of Oregon, therefore, the six states which abolished the death penalty in this country during the past decade probably did so without the support of a majority of the public. Since there is no reason to expect public sentiment to undergo a significant and rapid shift favoring abolition during the present decade, one can nourish hopes for statutory repeal of the death penalty in the immediate years ahead only if significant moral suasion and political skill are brought on its behalf in Congress and state legislatures. The public is almost certainly not going to rise up in collective indignation and demand it!

THE QUESTION OF DETERRENCE

In October 1968 the Special Commission of the Massachusetts Legislature To Investigate the Effectiveness of Capital Punishment as a Deterrent to Crime rendered its 17-page Interim Report. Although the Commission undertook no research of its own, the majority had no difficulty in reaching the conclusion, expressed in the report's opening sentence, that "the death penalty is not a deterrent to crime." This position had received some national publicity during the previous year, as it was essentially the same conclusion reached by The President's Commission on Law Enforcement and Administration of Justice.²⁸ A minority of the Massachusetts Commission, 6 of the 14 members, however, were dissatisfied with this conclusion. They argued that "because of the lack of enforcement of the death penalty in Massachusetts [no execution since 1947], no one can intelligently determine whether it is a deterrent—it certainly is not an effective deterrent as presently administered. . . ."

I believe these conclusions of the majority and minority in the 1968 Massachusetts Study Commission are typical of where the line of disagreement is drawn at present on the issue of capital punishment as a deterrent. With the precipitous nationwide falling off of executions during the past decade, the argument of the minority will likely become generally heard throughout the Nation. Nonopponents of the death penalty (one hesitates to call them "retentionists") will increasingly be heard to argue that since the death penalty is not really used any more (or very much), and since we cannot expect the unenforced statutory provisions of capital punishment to constitute much of a threat, therefore we cannot conclude that the death penalty as such is no deterrent, but only that as presently administered it is not effective as a deterrent.

There is a certain irony, therefore, in the *de facto* trend toward abolition. It further weakens the ability of those who would oppose the death penalty on grounds of its failure as a general deterrent to marshal convincing evidence to establish their case. Scepticism and the appeal to ignorance will remain the last ditch defense for those who, in their heart of hearts, *know* that the death penalty is an effective deterrent and therefore do not want it abolished. Their ultimate argument (as we have heard it expressed so many times) goes like this: "It is

²⁴ *The Death Penalty*, pp. 236-241.

²⁵ See Hazel Erskine, "The Polls Capital Punishment," in *Public Opinion Quarterly*, XXXIV, 1970, pp. 290-307.

²⁶ Erskine, *op. cit.*, p. 291.

²⁷ Erskine, *op. cit.*, pp. 298-300.

²⁸ See *The Challenge of Crime in a Free Society*, 1967, p. 143, note 1.

easy to number the failures, but we cannot number the successes. No one can ever know how many people have refrained from murder because of the fear of being hanged." As Professor Thorsten Sellin has rightly said, this is "a red herring."²⁹

It is still somewhat surprising, however, that the past decade has produced no new research on the differential deterrent efficacy of capital punishment, namely, research which would show whether it is more or less or equally (in)effective as imprisonment in deterring capital crimes. Even so, the belief that the death penalty is no deterrent, or (what is more to the point) that it is no better a deterrent than imprisonment has become a commonplace of contemporary criminology.³⁰ The earlier well known research conducted mainly by Professor Sellin during the 1950's, and summarized in his article in *FEDERAL PROBATION* 10 years ago,³¹ continues to be the mainstay in the area, and the prospects are not very good for adding to it in some novel or decisive research. At most, perhaps, we can develop (as I have tried to sketch elsewhere)³² a fuller analysis of the relevant variables in the very concept of deterrence, and a closer fit between the familiar statistical correlations from the research of Professor Sellin and others and a general theory of the causation of crimes of personal violence, their diminution and prevention.

What we should watch for, in the years immediately ahead, is to see whether those in authority who believe the death penalty is a deterrent (provided it is actually enforced) will be successful in their attack upon the procedural safeguards developed during the past two decades. This raises a question which honest believers in the deterrent efficacy of the death penalty seem unwilling to face: How many constitutional rights should criminal defendants sacrifice so that they can be convicted and executed more swiftly, in order to obtain the deterrent protection it is believed will ensue? The tragedy is that whereas it is easy to identify the rights in question, it will be difficult to point to any gain in security from crime. History has yet to record a single empirical study undertaken by those who defend the death penalty on deterrent grounds. It will be interesting to see whether the forthcoming decade in any way remedies this notable failure.

MISCARRIAGES OF JUSTICE

The classic argument that the death penalty must be abolished to avoid executing innocent persons—expressed in the quotation, variously attributed to Thomas Jefferson and the Marquis de Lafayette, "I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me"³³—no longer plays the role in debates over the death penalty that it once did. Not that miscarriages of justice in capital cases no longer occur. A far from complete list published since my survey in 1962³⁴ shows a number of examples which deserve wider publicity. In his testimony before the Senate hearings on abolition of the death penalty, Professor Donald MacNamara cited three clear cases (in South Carolina, Florida, and Pennsylvania) where homicide convictions were secured against persons innocent of the crime.³⁵ Four recent cases, three of them from New York alone, may be mentioned here as additions to the record. In 1966 the manslaughter conviction of Miguel Arroyo was dismissed after Arroyo had spent a year in prison and another man, Jose Velasquez, was arrested for the crime.³⁶ Csaba Horvath confessed in 1968 to murdering his wife: he was charged with the crime, and it was not until 4 months later it was proved he had lied and the victim was alive and unharmed.³⁷ Isidore Zimmerman spent 24 years under arrest and in prison, including 3 years on Sing Sing's death row, for the murder of a policeman he did not kill.³⁸ In Texas, Anastacio Vargas spent 4 years in jail and was on the verge of execution in 1964 when the real murderer confessed.³⁹

²⁹ Senate, *op. cit.*, p. 85.

³⁰ See the references cited in my article, "Deterrence and the Death Penalty: A Reconsideration," *Journal of Criminal Law, Criminology and Police Science*, LXI, December 1970, pp. 539-548, at p. 543 note 22.

³¹ Thorsten Sellin, "Capital Punishment," *Federal Probation*, XXV, September 1961, pp. 2-11.

³² See my *op. cit.*, *supra* note 30, at pp. 209-214.

³³ See, respectively, Eugene B. Block, *And May God Have Mercy . . .* (1962), p. 1, and Ramsey Clark, *op. cit.*, p. 334.

³⁴ See *The Death Penalty*, pp. 434-452.

³⁵ Donald E. J. MacNamara, "Convicting the Innocent," *Crime and Delinquency*, XV, January 1969, pp. 57-62, at p. 60.

³⁶ See *Tempe* (Ariz.) *Daily News*, July 27, 1966, p. 9.

³⁷ See CALM Newsletter, III, No. 6, September 1969, p. 3.

³⁸ See Isidore Zimmerman, *Punishment Without Crime*, N.Y., Clarkson Potter, 1964.

³⁹ See Rupert C. Koeninger, "Capital Punishment in Texas, 1924-1968," *Crime and Delinquency*, XV, January 1969, pp. 132-141, at p. 141.

None of these cases represents the execution of an innocent person, and that is some consolation. But they do show that research into the past and into current events will continue to uncover cases which come closer than one would want to that tragic extreme. No doubt, a vastly greater number of miscarriages of justice go all but unnoticed in connection with crimes which do not carry the death penalty. It is also a false sentimentality to argue that the death penalty ought to be abolished because of the abstract possibility that an innocent person might be executed, when the record fails to disclose that such cases occur. But one may justifiably reply that the social advantages obtained from capital punishment are too elusive to warrant its preservation, given the unimpeachable record of our failure to convict only the guilty.

Far more significant as a development during the 1960's than the discovery of death sentences of the innocent was the growing documentation of systematic miscarriages of justice in the normal administration of capital crimes. Chief among these demonstrable unfairnesses was the role played by *race* in determining indictments, convictions, sentences, appeals, clemency, and executions. More research needs to be done on the subject, as on all other aspects of racism in America, and especially in the criminal justice system of the several states. Even so, the emerging pattern of discrimination and injustice has received documentation. Two minor studies appeared during this period and tended to confirm the belief that convicted murderers are more likely to be sentenced to death⁴⁰ and less likely to be commuted⁴¹ if they are black than if they are white. The major research effort in this area in recent years has been conducted under the auspices of the Legal Defense Fund and directed by Professor Marvin Wolfgang. To date, only some of the results have been published, notably in support of appellate court cases contesting death penalty convictions for rape.⁴² What was carefully studied was whether the race of the criminal and his victim would prove to be correlated at a statistically significant level with type of sentence among convicted rapists. In the *Maxwell* case, Arkansas data were reported and the analysis showed "conclusively that Negro defendants convicted of rape of a white woman were disproportionately frequently sentenced to death"⁴³ and "no non-racial variable of which analysis was possible could account for the differential observed."⁴⁴ Professor Wolfgang naturally concluded that "Negro defendants who rape white victims have been disproportionately sentenced to death, by reason of race during the years 1945-1965 in the State of Arkansas."⁴⁵

Sociology is not infrequently accused of laboring to demonstrate the obvious, and the above conclusion one might well view in that light. Yet the difference between science and superstition, between verified claims and conventional wisdom, lies in precisely such careful data-gathering and statistical analysis as can be found in Professor Wolfgang's studies. So far, the courts before whom this evidence has been laid have turned their backs on the legal argument it was meant to bolster and in some cases found other reasons to reverse.⁴⁶

What has happened during the past decade, I suggest, is that the attack against the death penalty on grounds of unfairness has shifted away from the classic questions surrounding the innocent (their conviction, sentence, or execution) to a whole host of procedural unfairnesses which exhibit irreversible harm when they involve the death penalty. Racial discrimination is perhaps only the most obvious of these systematic miscarriages of justice. As all of them have been documented with increasing accuracy and publicity, and used to raise constitutional questions about capital punishment, I defer further discussion of these issues to a later section of this review.

LEGISLATIVE REFORM

During the 1960's repeal of death penalty statutes was achieved in five states. Only in Oregon was the death penalty lodged in the state constitution. In four—

⁴⁰ See Edwin Wolf, "Analysis of Jury Sentencing in Capital Cases: New Jersey, 1937-1961" *Rutgers Law Review*, XIX, Fall 1964, pp. 56-64.

⁴¹ H. A. Bedau, "Death Sentences in New Jersey, 1907-1960," *Rutgers Law Review*, XIX, Fall 1964, pp. 1-54, at pp. 18-21.

⁴² See especially the opinion in *Maxwell v. Bishop*, 257 F. Supp., 710 (E.D. Ark. 1966), and the Brief for Petitioner, *Maxwell v. Bishop*, 196S (Sup. Ct. No. 622), at pp. 11-24, and Appendix A.

⁴³ Brief in *Maxwell v. Bishop*, *op. cit.*, *supra* note 42, p. 18.

⁴⁴ *Op. cit.*, p. 19.

⁴⁵ *Loc. cit.*

⁴⁶ See Legal Defense Fund, *Equal Rights*, I, June/July 1970, p. 1.

Iowa, West Virginia, Vermont, and New Mexico—it came as a result of direct action by the legislature, in each case with the support (and notably in Vermont and New Mexico, with the active leadership) of the governor. Although the full story has not been told in detail, the general outlines of the way abolition was achieved seem comparable to what happened in Delaware in 1958 (the first state to end the death penalty in 40 years; both Hawaii and Alaska, which abolished capital punishment in 1957, did so while they were still territories). The story of Delaware has been told elsewhere in detail and need not be recounted here.⁴⁷ Only in New York was the death penalty abolished as a result of a recommendation by a special penal law revision commission. It remains to be seen whether the recommendation from the National Commission on Reform of Federal Criminal Laws (cited earlier) will have a comparable influence on Congress.

No one has kept close watch and marked the progress of the bills filed annually during session of the three dozen state legislatures where the death penalty for murder still prevails. Since the high water mark 5 years ago, few abolition bills have been near passage. Despite occasional successes, the defeats have been numerous, repeated, and seemingly unavoidable. In Massachusetts, for example hearings before the Judiciary Committee on abolition bills have been held each spring in the past decade, but those who participate in them (no doubt on both sides of the platform) cannot escape a sense of futile repetition in these annual performances. In Massachusetts, it seems, we can go for a generation without a legal execution in our prisons (the last one was in 1947); we cannot go 1 day without the death penalty on our statutes. The factors which explain this nationwide legislative apathy are not difficult to identify: (a) Police spokesmen still form an organized lobby in favor of death penalties in many states; (b) the diminishing number of executions and the remoteness of death row from the ambit in which politicians prefer to travel make the issue of capital punishment slightly less real each year for the legislature; (c) the readiness of appellate courts to extend stays of execution, to grant reversals of death penalty convictions, and to cooperate with resourceful defense counsel for condemned men encourages the typical legislator to believe that abolishing the death penalty is no longer his problem because it has become one for the judiciary; (d) the enormous political pressure since 1968 built up behind "law and order candidates" tends to make abolition of the death penalty an unpopular public stance for a politician.

Nevertheless, legislative reform of death penalty laws remains in the 1970's, as it has for decades, the main challenge facing the abolition movement in this country. What is needed is well illustrated by the continuous labors of responsible state legislators, such as Senator Robert K. Holliday of West Virginia. Beginning in 1963, he introduced abolition bills in his State legislature, and after seeing his work succeed in 1965, he has continued to keep a watchful eye on the subject and to use his good offices to secure continuing education among subsequent legislatures.⁴⁸ Elsewhere, notably in California, where the abolition issue for a decade has caused continuous controversy and is now caught up in the political struggle between "ins" and "outs," it is very difficult to see how forward progress can be made. The only hope, I believe, lies in those smaller states where a simpler, more rational, less acrimonious political setting prevails, and thus where patient, trusted politicians can exercise leadership on this issue. Then, hopefully, the larger states will be encouraged (or even shamed) into following the lead of their neighbors. Even as I say this, however, I cannot wholly suppress a certain scepticism. My own state, Massachusetts, for example, has had the example of abolition in its immediate neighbor, Rhode Island, since 1852. I wish I could believe that the Bay State will learn in the next decade what it has not learned in the past century.

CONSTITUTIONAL LITIGATION

It has been rightly said more than once that, in this country, a moral controversy tends to become a legal dispute whereas a legal dispute tends to become an issue of constitutional interpretation. So it is not surprising that during the

⁴⁷ See James V. Bennett, "A Historical Move," *American Bar Association Journal*, LXLV, November 1968, pp. 1053-1054; Herbert L. Cobin, "Abolition and Restoration of the Death Penalty in Delaware," in *The Death Penalty*, pp. 359-373; Glenn W. Samuelson, "Why Was Capital Punishment Restored in Delaware?," *Journal of Criminal Law, Criminology and Police Science*, LX, 1969, pp. 149-151.

⁴⁸ See the speech by Robert K. Holliday, "How to Save Lives with Pen and Paper," delivered May 9, 1965, in Brookline, Mass., and published in his column, "Our Chat," in *Fayette* (W. Va.) *Tribune*, May 20, 1965, p. 1.

1960's the fight to abolish the death penalty—carried on for over a century in legislative halls and gubernatorial chambers around the Nation—has instead become increasingly concentrated upon appellate courts, state and federal, at every level. The typical educated person, acquainted with the facts about the actual operation of the death penalty in this country, is bound to wonder how it is possible for the death penalty to continue year after year in the face of constitutional prohibitions of "cruel and unusual punishment" and constitutional protections of "due process of law" and "equal protection of law." It now seems incredible that the first serious scholarly attack on the constitutionality of capital punishment under the eighth amendment did not occur until Mr. Gerald Gottlieb's influential essay in 1961.⁴⁹ The first notice of this line of argument by the Supreme Court did not come until 1963, in the dissenting opinion of then Justice Arthur J. Goldberg in *Rudolph v. Alabama*.⁵⁰ By 1970, the traditionally conservative *Harvard Law Review* carried a lengthy article by former Justice Goldberg and his erstwhile law clerk, Alan M. Dershowitz, developing this line of argument to the fullest degree.⁵¹ As I mentioned earlier, the first attempt to present this argument before the Supreme Court, in the *Boykin* case in 1969, was unsuccessful, despite the fact that this case (a death sentence for simple robbery, unaccompanied by any assault, much less murder) "presented the strongest possible setting for a cruel and unusual punishment holding."⁵²

Meanwhile, as I have also previously noted, the Legal Defense Fund attorneys since 1967 have secured nationwide delays in all executions pending resolution of various other constitutional issues they have raised in a host of death penalty cases. The most important of the L.D.F. cases was *Maxwell v. Bishop*, held over for reargument from the 1968 to the 1969 term, and finally decided in June 1970.⁵³ Maxwell was sentenced to death for rape, but the case raised issues having possible effect upon almost all death penalty statutes and death penalty convictions. Under attack were two almost universal practices in death penalty cases: *standardless sentencing and the unitary trial*. The first of these means that juries with discretionary power to award a death or life sentence, subsequent to conviction of a capital crime, operate without any statutory or other standards in arriving at the sentence they mete out. The second means that the defendant is torn between his right of allocution (to address the court on his own behalf) and his right against self-incrimination, cross-examination, and impeachment. These twin obstacles to fair procedures, it is argued, help us account for the facts that, since 1930, 54 percent of all persons executed and 89 percent of all those executed for rape were black.⁵⁴ Clarence Darrow and other founders of the American League To Abolish Capital Punishment in the 1920's made famous the fact that the executed were "the poor, the ignorant, the friendless." In the 1960's, the Legal Defense Fund made it clear that they were black, and that this was no mere accident, either. But the Supreme Court, although it spared Maxwell, did so without reaching any new ruling of general application.

If *Boykin* and *Maxwell* represent less than perfect success for those trying to use constitutional resources in attacks upon death penalty statutes, two other 1968 cases managed to have a favorable effect. In the first of these, *United States v. Jackson*, the Supreme Court held that the Federal Kidnapping Act contained an unconstitutional death penalty provision.⁵⁵ The kidnapping statute provided that a defendant could guarantee that he would avoid a death sentence if he chose to avoid a trial by jury and accept sentencing by a judge; but this, the Court held, was bound "to discourage assertion of the fifth amendment right not to plead guilty and to deter the exercise of the sixth amendment right to demand a jury trial."⁵⁶ A subsequent memorandum from the Attorney General's office indicated that this decision probably rendered 7 of the 16 federal death penalty statutes unconstitutional.⁵⁷

⁴⁹ Gerald H. Gottlieb, "Testing the Death Penalty," *Southern California Law Review*, XXXIV, Spring 1961, pp. 268-281, and also *Capital Punishment*, Center for the Study of Democratic Institutions, 1967.

⁵⁰ 375 U.S. 889 (1963), cert. denied.

⁵¹ "Declaring the Death Penalty Unconstitutional," *Harvard Law Review*, LXXXIII, June 1970, pp. 1773-1819. This "reversed" the conclusions of the *Review's* only previous entry into these waters; see Note, "The Cruel and Unusual Punishment Clause and the Substantive Criminal Law," *Harvard Law Review*, LXXIX, January 1966, pp. 635-655, at pp. 638-639. See also Sol Rubin, "The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty," *Crime and Delinquency*, XV, January 1969, pp. 121-131.

⁵² Goldberg and Dershowitz, *op. cit.*, p. 1798.

⁵³ 398 U.S. 262 (1970).

⁵⁴ *National Prisoner Statistics*, No. 45, "Executions 1930-1968," Table 1, p. 7.

⁵⁵ 390 U.S. 570 (1968).

⁵⁶ *United States v. Jackson*, 390 U.S. 570 (1968), at p. 581.

⁵⁷ Cited in National Commission on Reform of Federal Criminal Laws, *Working Papers*, II, pp. 1348-1350.

The second case was *Witherspoon v. Illinois*. In its decision in this case, the Court held that the usual practice of excluding prospective jurors for cause from capital trials because of their conscientious scruples against the death sentence rendered the verdicts of those trial juries constitutionally invalid.⁵⁵ The essence of the Court's argument was that the defendant cannot have an impartial jury on the issue of his guilt or innocence when the jury has been drawn with an explicit bias in favor of the death penalty. The background of this line of reasoning is to be found in the research by Professor Walter E. Oberer, then of the University of Texas Law School, beginning in 1961.⁵⁶ In the following years his argument received some experimental support which showed that these so-called "scrupled juries" tend in fact to be biased against the defendant on questions such as guilt versus innocence.⁵⁷ The immediate result of the *Witherspoon* ruling, even though it was given full retroactivity by the Court, was slight. Even though many cases have been remanded by the courts to determine whether the *Witherspoon* ruling applied, only in a minority of cases have death sentences been vacated on the ground that they violated *Witherspoon*.⁶¹

As of this writing, the chief cases before the Supreme Court are *McGautha v. California* and *Crampton v. Ohio*, combined for argument in November 1970 and likely to be decided some time in the spring of 1971. They continue questions raised earlier but unsuccessfully in *Maxwell*, and attempt to show that the death penalty juries have arbitrary sentencing power in violation of the "equal protection" and "due process" clauses of the Constitution. The argument developed by the petitioners, however, reaches to the situation of all but a few of the hundreds now under death sentence.⁶² Potentially so comprehensive, therefore, would be a reversal in these cases that the Solicitor General has been invited by the Court to supply a brief *amicus curiae* arguing against all of the claims advanced by the petitioners. (This is perhaps consistent with the reputed support being given to capital punishment by the Attorney General's office in the current administration.) The battle lines in 1971, therefore, have been drawn more clearly than before, as the pressure mounts on the Supreme Court to use its powers to end death penalties.

If the Court refuses to overthrow the unitary trial and standardless sentencing in the cases now before it, what lies ahead? Are there further possibilities available whereby on essentially collateral attack (viz, attack on procedure alone) the death penalty might be rejected by the Court because it can be administered only by unconstitutional methods? Elsewhere, I have reviewed the possibilities.⁶³ No doubt, inchmeal progress toward abolition has been and will continue to be made by pursuing the procedural gambits reviewed above. As in the *Witherspoon* case (merely the latest of a long line of cases, going back at least as far as the famous "Scottsboro Boys" in the 1930's), the Court can and will, if pressed, introduce administrative reforms in the administration of criminal justice (state as well as federal) and these will make it more difficult to convict and to sentence to death anyone of any crime.

As of February 1971, over 100 death penalty cases are pending before the Supreme Court on writ of certiorari, in which an enormous range of procedural objections to capital punishment have been raised and will be pursued in the years ahead. But procedural palliatives are rarely sufficient to achieve substantive cures. That is why the frontal assault on capital punishment as "cruel and unusual punishment"—a direct attack on the substance of the penalty, no matter how decently, fairly, and rationally it may be administered—looms as the profound issue of controversy in the 1970's. Indeed, it can be argued that all the judicial reforms in recent years have only served to set in a brighter light the fundamental, inescapable inhumanity of capital punishment. Fairly drawn juries, using rational standards for sentencing, can no doubt be achieved even

⁵⁵ 391 U.S. 510 (1968).

⁵⁶ "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?," *Texas Law Review*, XXXIX, May 1961, pp. 545-567.

⁵⁷ The evidence has not yet been published in full; for a summary, see my article, "The Courts, The Constitution, and Capital Punishment," *Utah Law Review*, May 1968, pp. 201-239, at pp. 206-210. See also Hans Ziesel, *Some Data on Juror Attitudes Towards Capital Punishment*, University of Chicago Law School, 1968. The latest studies in this vein are reported and reviewed in George L. Jurow, "New Data on the Effect of a 'Death Qualified Jury on the Guilt Determination Process,'" *Harvard Law Review*, LXXXIV, January 1971, pp. 567-611.

⁵⁸ See *Spencer v. Beto*, 398 F.2d 500 (5th Cir. 1968); *William v. Dutton*, 400 F.2d 797 (5th Cir. 1968); *Rideau v. White*, E.D. La., Baton Rouge Div., Misc. No. 970, decided May 12, 1969.

⁵⁹ According to the Legal Defense Fund, in its Brief *amicus curiae* in *McGautha v. California* and *Crampton v. Ohio* at pp. 14ff.

⁶³ See Bedau, *op. cit.*, *supra*, note 49.

in capital cases, if we really want them. But for what purpose? To see that men are fairly, rationally—and therefore deservedly—sentenced to death and executed? Government lawyers might as well have spent their energies in the 1840's and 1850's attempting to create rational rules and procedures so as to mitigate the brutality, unfairness, and inefficiency of chattel slavery. The very attempt to make such things as slavery and executions fair and rational can only sap the motives in decent men to preserve these practices at all. The chief legal development to watch, therefore, are the ways in which legal scholars hammer away at the theme that the death penalty is in irremediable violation of the constitutional prohibition against "cruel and unusual punishment."

CONCLUSION

As we contemplate the threshold of an epoch without recourse to the death penalty, can abolitionists face the American public and assure them that getting rid of the death penalty, *de jure* as well as *de facto*, is truly reasonable, humane, and safe? Do we really know enough to support our moral, religious, and sentimental convictions? During the past decade, a considerable amount of relevant research has been published, far in excess several times over to that made available in any previous decade. Some of it I have already cited, but some more of it also deserves mention. For instance, we have had published (a) extensive descriptive studies of the death sentence populations in states from every part of the country;⁶⁴ (b) records of judicial miscarriages of justice (discussed previously); (c) analyses of juror attitudes toward questions of guilt and sentence (also discussed previously); (d) records of incarceration and parole behavior of convicted murderers;⁶⁵ (e) studies in jury sentencing bias in capital cases (discussed previously); (f) an extensive search for implicit bias and/or standards in jury sentencing in murder cases;⁶⁶ (g) the practice and the law controlling the exercise of executive clemency;⁶⁷ (h) studies of how incarceration affects men awaiting execution on "death row";⁶⁸ (i) a full digest of parole eligibility statutes for life term prisoners;⁶⁹ (j) a digest of the statutory law governing jury discretion and sentencing standards in capital cases.⁷⁰ While it is true that little has been added to our knowledge on the controversy over deterrence beyond what was available in 1960 (as I have already explained), we can say that today we have an enormous body of research dealing with every important aspect of the death penalty, and that we have produced evidence for views which hitherto rested upon surmise and hypothesis.

Some years ago, after listening for several hours to "emotional and religious" views expressed in a public hearing, a state legislator in New Jersey asked with exasperation, "Are facts and figures and information available that can be laid on the table and discussed and considered, at least to attempt to evaluate the social effect of abolition of the death penalty?"⁷¹ No one at the hearing or anywhere else had the answers he wanted. That was in 1957. Today, few arguments over the death penalty need to go begging for lack of relevant data.

⁶⁴ H. A. Bedau, "Capital Punishment in Oregon, 1903-64," *Oregon Law Review*, XLV, December 1965, pp. 1-39; Bedau, *op. cit.*, supra, note 41; Koeninger, *op. cit.*, supra, note 39; Robert M. Carter and A. LaMont Smith, "The Death Penalty in California—A Statistical and Composite Portrait," *Crime and Delinquency*, XV, January 1969, pp. 62-76; also, Ohio, Legislative Service Commission, *Capital Punishment* (1961), and Maryland, Legislative Council Committee, *Report . . . On Capital Punishment* (1962).

⁶⁵ For parole, see John M. Stanton, "Murderers on Parole," *Crime and Delinquency*, XV, January 1969, pp. 149-155; and the digest of eight states' reports in H. A. Bedau, "Parole of Capital Offenders, Recidivism, and Life Imprisonment," in *The Death Penalty*, pp. 305-405. On incarceration, see Thorsten Sellin, "Homicides and Assaults in American Prisons, 1964," *Acta Criminologica et Medicinæ Legalis Japonica*, CXXI, 1965, pp. 139-143; and Thorsten Sellin, "Prison Homicides," in Sellin, ed., *Capital Punishment* (1967), pp. 154-160.

⁶⁶ "A Study of the California Penalty Jury in First-Degree Murder Cases," *Stanford Law Review*, XXI, June 1969, pp. 1297-1497.

⁶⁷ Note, "Executive Clemency in Capital Cases," *New York University Law Review*, XXXIX, January 1967, pp. 136-192; Solle M. Ringold, "The Dynamics of Executive Clemency," *American Bar Association Journal*, LII, March 1966, pp. 240-243.

⁶⁸ Harvey Bluestone and Carl L. McGahee, "Reaction to Extreme Stress: Impending Death By Execution," *American Journal of Psychiatry*, CXIX, November 1962, pp. 393-396; Tom Murton, "Treatment of Condemned Prisoners," *Crime and Delinquency*, XV, January 1969, pp. 94-111; Select Senate Committee Established to Investigate and Study Conditions Existing on the Death Row Section of the Massachusetts Correctional Institution at Walpole, *First Report*, Senate No. 1589, July 1970.

⁶⁹ Edwin Powers, *Parole Eligibility of Prisoners Serving a Life Sentence*, Massachusetts Correctional Association, Boston, Mass., 1969.

⁷⁰ *Op. cit.*, supra, note 65, at pp. 1432-1438.

⁷¹ Quoted in H. A. Bedau, "The Struggle Over Capital Punishment in New Jersey," in *The Death Penalty*, p. 376.

What is most encouraging is that despite the nationwide preoccupation during the last few years with issues of law and order, anxiety over the rising crime rate, particularly flagrant crimes of personal violence (aircraft piracy, bombings of police stations, widespread use of addictive drugs—all of which have led to proposals for capital punishment), the trend against the death penalty has not been reversed or even significantly stalled. The only possible explanation is the steadily growing disbelief in the uniquely deterrent effect of severe criminal penalties. Interestingly enough, the war in Vietnam may have helped rather than hindered the growing revulsion at officially sanctioned violence—next to the war, capital punishment remains the greatest affront to our civilized pretensions.

Abolitionists in the last 2 years occasionally have been overcome by apocalyptic nightmares of a "bloodbath" of executions in the mid-1970's unless the courts or legislatures or governors do something to cope with the rapidly growing numbers under death sentence. The very success in stalling executions since 1967 has created unprecedented possibilities of mass executions in many States. But a brighter prospect also emerges, as each day extends the moratorium of executions. No governor or court or legislature anywhere in the Nation, despite occasional boasts and threats to the contrary, really wants to gain instant and worldwide notoriety as the first to violate the moratorium and resume executions. The pressures, therefore, to reverse death penalty convictions and to commute death sentences steadily increase even as the legislatures continue to evade or to balk at outright appeal. We are witnessing, therefore, a subtle struggle among powerful political forces deployed over a wide arena.

The striking quartet of events in the past winter mentioned earlier shows precisely the kind of *official* sense of moral urgency which we must have if we are to survive this century in coping with the larger social ills confronting us. It is gratifying to see this moral urgency at last directed toward ending the long and bloody history of legal executions. When courts, governors, attorneys general, and penal reform commissions will openly reject executions, death sentences, and capital statutes despite the predictable grumbling from yahoo constituents, there is considerable hope that capital punishment in this Nation will soon pass from desuetude into oblivion.

ADDENDUM

On May 3, 1971, when this article was already in galley proof, the Supreme Court announced its decision in the *McGautha* and *Crampton* cases. By a vote of 6 to 3, the Court affirmed both convictions, thereby dealing a severe but not wholly unpredicted blow to the aspirations of those who hope to have the federal courts dismantle the capital punishment system in this country. There is not space here to review the reasoning of the Court, of the dissenting Justices, nor to try to forecast whether this decision will lead to the first execution(s) since 1967 or what tactics in further appellate litigation will now unfold. From initial and scattered reports in the news media, it appears that in some states executions are now significantly more likely, whereas in other states the *McGautha* and *Crampton* decisions will have little effect. Two things only are clear. The Supreme Court has brought itself one significant step closer to facing the ultimate constitutional argument: Is the death penalty "cruel and unusual punishment"? Meanwhile, the burden on the prison system (with 649 persons under death sentence as of May 1) and on the conscience of all thoughtful persons is noticeably heavier.

MR. KASTENMEIER. Our last witness this morning we are going to have to wait to hear. The House has a vote presently on, and accordingly the subcommittee will need to recess for 15 minutes, after which time we will return to reconvene to hear Mr. Frank Carrington, executive director for Americans for Effective Law Enforcement.

Until that time then, the subcommittee stands recessed.

(Recessed at 11:52 a.m.)

MR. KASTENMEIER. On the record. The subcommittee will come to order.

When we recessed, we had just concluded examination of Prof. Hugo Bedau, and now we would like to call the subcommittee's last witness today, Mr. Frank G. Carrington, executive director of Americans for Effective Law Enforcement. We are most pleased that you

could come, and we appreciate your patience in putting up with the interruptions for an important vote.

If you desire to either submit your statement for the record and summarize or present it, you may do either.

Mr. CARRINGTON. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Incidentally, I should point out that Mr. Carrington was, in fact, introduced to this subcommittee earlier by his Congressman, Hon. Philip Crane of Illinois, and we were very pleased to have that introduction. You may proceed.

TESTIMONY OF FRANK G. CARRINGTON, EXECUTIVE DIRECTOR, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

Mr. CARRINGTON. Thank you, sir. It is a privilege to be invited to appear before the subcommittee today. I am very grateful for the opportunity to establish our views. I would prefer, with your indulgence, Mr. Chairman, to submit the prepared statement for the record and to summarize briefly.

Mr. KASTENMEIER. Without objection, the statement will be received and printed for the record.

(The statement referred to appears at p. 235.)

Mr. CARRINGTON. Thank you, sir. The frame of reference in which this prepared statement was drafted, and a frame of reference of which I have not heard one word in the testimony this morning, is that of the victim of violent crime: those people who actually suffer at the hands of those for whom we are considering the penalty. There are two aspects in which the rights of the victim should be considered: those of the actual victims and, of course, their families in the case of homicides, and those of potential victims who could conceivably be the beneficiaries of the deterrent effect which we believe the death penalty has on potential murderers.

I might add parenthetically at this point that this statement deals with homicides. We are not taking the position that rape should necessarily be a capital crime. It would not disturb me, personally, if all rape death sentences were commuted, so long as there was not a capital crime involved, a death involved along with the rape. That is parenthetical.

The victims of crime, we submit, are deserving of consideration in a hearing such as this, and I think it should be pointed out that, beyond any doubt whatsoever, the racial minorities and the ghetto dwellers are the principal victims of crime.

I have cited on page 3 several studies which point this out. Particularly, the Packer study, which went so far as to say that ghetto dwellers are perhaps 100 times more likely to be the victims of violent crime as are nonghetto dwellers.

I would like to quote to the subcommittee a very dramatic statement made by State Senator Raymond Ewing of Illinois. Senator Ewing, who is black, refused to vote for a moratorium on the death penalty in Illinois, and gave this as his reason.

"I realize that most of those who face the death penalty are poor and black and friendless. I also realize that most of their victims are poor and black and friendless and dead."

If we are going to talk about the victims, however, we have to get over the original argument that even if the perpetrator of the homicide is executed, this will not bring the victim back to life. This, of course, is perfectly true. But, hopefully, and this is the thrust of our argument, the execution of the perpetrator of certain classes of homicides will deter others from committing similar crimes, and it will make absolutely certain that that particular perpetrator will not kill again.

I will address myself briefly to both of these points. I cite to the subcommittee the study by the Los Angeles Police Department in February 1971 on the deterrent effect of capital punishment. The Police Department took statements from 99 individuals who were willing to give statements, and found that of 99 people who did not carry a weapon during the perpetration of their crime, or who did carry a weapon but did not use it, or carried a phony weapon such as a toy pistol, 50 individuals reported that they were, in fact, deterred from carrying or using an operative weapon, because they were afraid of the death penalty. Ten percent were undeterred.

The conclusions of the Los Angeles Police Department, and I grant immediately that this study must be considered in light of the fact that they are the interested party, is that there is a definite deterrent. At least to the extent that the death penalty is a reality. But they make a statement that I think is a rather key one cited on page 5, with regard to the study.

They noted, "If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement."

In other words, if one life was saved by the deterrent effect, that this is a valid argument for the death penalty. An interesting study cited here was made by Justice Marshall McComb. He cited this in his dissent in a capital punishment case in California in 1960. Justice McComb was on the California Supreme Court and was, incidentally, the sole justice who dissented in the death penalty case, the Anderson case, that just overthrew the capital punishment in California as cruel or unusual.

Justice McComb, in his opinion, cites 14 instances with the actual statements of the perpetrators of violent crimes, in which the perpetrators made such statements as "I would have killed them but I did not want to go to the gas chamber. I knew that if I used a real gun and if I shot someone in a robbery, I might get the death penalty and go to the gas chamber."

Discussing why he did not shoot during a bank robbery, a convict stated, "I thought about it at the time but I changed my mind when I thought about the gas chamber." I do not think these need elaboration. They are here and they are emphasized, the emphasis being in the original text for the subcommittee's attention.

One is perhaps of particular interest, on page 7, No. (vii), a statement by one Salvador A. Estrada, quoted by Justice McComb, who told the arresting officers, "I want to ask you one question, do you think they will repeal the capital punishment law. If they do, we can kill all you cops and judges without worrying about it."

Another point related to the deterrent effect, is that to be a deterrent to anything, the deterrent must be actual rather than imagined.

During the past 5 years, there has been an absolute moratorium on the death penalty caused by judicial, legislative and legal maneuvering. There has not been an execution since 1967. Most of what we say in the context of deterrent would presuppose that the death penalty does in effect become a reality and becomes a real deterrent, rather than in the current situation.

You also have the problem of people who, having committed one murder, are paroled, or escape, or while in prison, murder again. Here you have a second killing, a second life which is lost, a murder perpetrated by one who has already proved himself capable of killing and who kills again.

Again, I do not think it is necessary to cover cases such as these in detail as they are described in my prepared statement. I do think that if the lives of some of these victims of second killings can be saved, it is a valid argument for the death penalty.

We have the question of lenient parole laws, and I suppose a perfect situation is the California situation where a life sentence, in effect, means that the individual will be eligible for parole in 7 years. I stress eligible. This does not necessarily mean that he will be paroled, but I do not believe that, if our court rulings outlawing death sentences are upheld, anyone can state categorically that James Earl Ray, Sirhan Sirhan, Richard Franklin Speck of Illinois, whose sentence was vacated by the U.S. Supreme Court, Charles Manson and his followers, or James Linley Frazier will not appear some time in the future before a high-minded parole board, and convince them that they should be paroled.

We take the position that there are some people who are just not fit to return to society. Currently, the most recent example is the individual or individuals who placed two bombs on airplanes in order to extort money from TWA. He did not kill anybody, but I do not think it was his fault that he did not kill anybody. The bombs were both operable—one blew up on the ground and one could have blown up in the air. If the death penalty could deter even one person from committing a crime like this, the number of lives saved could number anywhere from 25 to 400.

Our statement emphasizes two special cases in this area—those of law enforcement officers and those of prison guards. I consider law enforcement officers on a personal basis because I spent 10 years as a State and Federal law officer. Now, being out of law enforcement, at least on an active level, I still consider law enforcement officers as special cases.

Our society puts the responsibility of going out and confronting the criminal on our law enforcement officers. If I am walking down the street and see a robbery in progress, or a rape in progress, I do not have the legal obligation, certainly not one that is enforceable, to do something about it. I do not have to respond to disturbances and crimes in progress cause. Our police officers do. We, our society, thrusts them into daily contact with the violent and lawless elements of our country. I think that this should be recognized, and that because we require the policeman to engage in face-to-face confrontation with criminals on a day-to-day basis, the death penalty should be awarded as the punishment for the willful murder of a police officer on duty.

The statistics of police officers being murdered in the same period of the moratorium on the death penalty are extremely tragic. In 1967,

76 were murdered. In 1971, 125 law enforcement officers were murdered. And some of these murders are almost beyond belief. The most recent ones in New York, involved, perhaps ironically, a black police officer and a white police officer. They were literally ambushed and shot to death. We think in cases like this, the death penalty should be the proper penalty.

Mr. KASTENMEIER. There is one thing I am not clear on. In New York State, is that not a crime punishable by death?

Mr. CARRINGTON. Yes.

Mr. KASTENMEIER. Then it did not deter this?

Mr. CARRINGTON. No. Your argument, however, presupposes that because the death penalty does not deter all murderers, it therefore does not deter any murderers. And I do not think that this is correct.

I think that the statements in Justice McComb's opinion, cited earlier and those found in the study conducted by the Los Angeles Police Department (see my prepared statement) prove that the threat of capital punishment does deter some potential murderers. The actual figures on deterrence, of course, are never going to be known, because we are not going to know who has been deterred, except in these instances when we can get statements, because, by definition, if he is deterred, he will not have committed his crime.

We believe that the death penalty should be the penalty for the murder of law enforcement officers. We also feel that, on the other side of the coin the lack of the death penalty increases their danger. If a policeman responds to a scene of a robbery, let us say, and the robber has to weigh the decision as to whether or not to shoot the policeman and hope that he can get away, or to let himself be apprehended, in a State like California where, as of now, under the supreme court ruling, this would be murderer of a policeman knows that he might only face a maximum of 7 years in the penitentiary, this very well might tip, in his mind, the balance in favor of an attempt to kill the apprehending police officer in order to make good his escape. I think our police officers surely need all the protection that we can give them. And I do not think that under the current California Supreme Court ruling, that is being accorded them.

A like argument can be made for prison guards and administrators and prisoners. In the cases of the second murder, cited in my statement on page 9, there were several inmates who were murdered by other inmates. Prison guards, additionally, deserve our full protection.

This, then, is our position. We believe that if capital punishment were again to be made a real threat, and swift and sure execution followed the cases of murder which we have discussed herein—premeditated, murder for hire, murder by bombing, and murder of police officers and prison guards—the deterrent effect would be very much a reality.

The execution of the human being by the State is never a pleasant thing. However, we believe that such executions would, in fact, deter potential murderers and prevent second killings by those who have already been proven to be killers. The saving of the innocent lives far outweighs any concern we should have for convicted killers. Capital punishment should be maintained and made a reality once more.

Just as a postscript, we also take the position, categorically, that the criminal justice system must be made nondiscriminatory. This is

in line with what Prof. Van den Haag said earlier. I would say, perhaps, that in the cases of capital punishment for rape where no murder was committed, a case is made that there is discrimination there. In advocating the death penalty, we advocate it in a criminal justice system which, within the limits of our human fallibility, has been made as nondiscriminatory as possible.

I think we are moving that way. I think the ruling of the judge in the cases of Bobby Seale and Ericka Huggins, dismissing murder charges against them after a hung jury because he felt they did not get a fair trial, is an example. I think that the acquittal of the Black Panthers in the shootout with the police in New Orleans and the acquittal of the Panther 21 in New York, on charges of conspiracy to blow up police stations and public buildings indicate that we are moving toward this nondiscriminatory system. That is the ideal. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Carrington. You have pointed out that you have been in law enforcement for the last 10 years as a Treasury agent and police legal adviser. Does a police legal adviser in Chicago actually work for the police department as such?

Mr. CARRINGTON. Yes, he does. What we did was to go—

Mr. KASTENMEIER. Did you advise police officers of their rights?

Mr. CARRINGTON. No. Both in Denver and in Chicago, I, as an attorney with prior police experience, went to the scene of riots, raids and major crimes, to advise the officers, not of their rights, but what they could and could not do with regard to such legal issues as search and seizure and confessions. The job involves being on the streets with the policemen during all phases of police activity.

Mr. KASTENMEIER. Are the Americans for Effective Law Enforcement, Inc., a national organization?

Mr. CARRINGTON. Yes. The scope of our approach is national. We appear primarily in the U.S. Supreme Court, in the State supreme courts, in the Federal courts as *amicus curiae*, in support of the law enforcement positions taken; much as the American Civil Liberties Union appears, *amicus curiae*, for criminal defendants.

Mr. KASTENMEIER. I take it that your membership consists of a large number of police officers and law enforcement officers.

Mr. CARRINGTON. There are quite a few. We have a standard policy, however, that no person who is currently a police officer can sit in any policymaking position, either on our board of directors or on our advisory board, because we do not want to get a rubberstamp image.

We do have prosecuting attorneys. Frank Hogan of New York City and Royston Jester III, who happens to be the Commonwealth attorney for Lynchburg, Va., sit on our advisory panel. They do not set policy, but they advise about it. No policeman who is active in his police trade sits on such policy bodies for our organization.

Mr. KASTENMEIER. From the testimony, the very least one could say about the deterrence effect of capital punishment is that it is rather inconclusive. You cite the California interviews with the Los Angeles Police Department, which was referred to in earlier testimony before the subcommittee.

One statement which I think is probably not very persuasive is the Estrada statement, because it sounds a great deal like bravado. Whether that really represents an intention which, if the individual

were capable of carrying out, he would, is hard to say. But the fact also remains that the California Supreme Court clearly was not persuaded, except one justice who dissented.

Mr. CARRINGTON. Excuse me, sir. That is a different dissent than in the recent California case. This dissent was written by Justice McComb in 1960.

Mr. KASTENMEIER. Would you not concede that the question of deterrence ought to be more reliably resolved or studied by a public body?

Mr. CARRINGTON. I think that it very definitely should. Whether it follows from this, that a moratorium should be declared, I am not quite as certain. In other words, at the end of 2 years—and I think that is a somewhat optimistic view if the Presidential commission comes into this. I think it may stretch out longer than 2 years—but during those 2 years—if our view is correct and there is a significant deterrent, a number of people will be killed because during the moratorium the deterrent effect is not present. I think this would be a terrible and tragic thing.

The victims of crime are truly innocent people. On the one side we are weighing a moratorium for people who have been convicted of committing a capital crime. And, again, I would like to limit this testimony to capital crimes. On the other side, we are weighing the possibility that either potential victims who do not become victims because the killer was deterred, or the second victims, those people murdered by persons who kill a second time, might be saved. As the Los Angeles Police Department said, I think rather dramatically, in 1970 in the city of Los Angeles, 374 innocent people were the victims of an unlawful execution without the rights of the due process of law.

I think what they are driving at is that perhaps the rights of potential victims and actual victims of second killings should be weighed much more heavily in the balance, than the rights of the convicted killers.

Mr. KASTENMEIER. In other words, if I understand you, you would not object to it, but in fact you would support the 2-year study, and your only difference with the preceding witnesses is that you would not provide a moratorium for those presently on death row under a present death sentence.

Mr. CARRINGTON. That is correct. You might, however, turn it around and make a different study. Suppose the death penalty were made a reality, suppose that this legislation is not passed, and that the U.S. Supreme Court does not declare a capital punishment as cruel and unusual, and then a significant number of executions were to take place. When I say significant, I am speaking of about 10 percent to 20 percent, I think that there would be many more commutations than there would be executions. At any rate, it would be interesting to see whether the fact of execution has some kind of impact on the homicide rate, and particularly killers of policemen.

Mr. KASTENMEIER. I suppose one could also conclude if that were the case that even further impact could be achieved by having all 600 or 700 executed.

Mr. CARRINGTON. I am sure of that. It would take on a certain atmosphere, but I do not think that is realistic at all to suppose that all 700 will, in fact, be executed. I certainly would have no objection

to all of the noncapital rape cases being commuted. I do believe capital punishment should be, in most instances, for the actual taking of a life. Perhaps, however, in the event of a plane bomber, if our deterrent theory is correct, then the mere act of putting a bomb on an airplane should be a capital offense.

Mr. KASTENMEIER. I take it from your comments that in any event you would want to see the list of capital crimes substantially revised?

Mr. CARRINGTON. Yes; I think so. Not for a man who kills his wife in a fit of passion.

Mr. KASTENMEIER. Let us assume a 2-year study at the highest level, a really persuasive study, were conducted, one that might take 3 years as you suggest, whether or not we place a moratorium on executions or, indeed, have any moratorium at all. If at the end of that period let us assume that it is proved that capital punishment does not deter, then what would you conclude? Would you no longer object to the abolition of capital punishment?

Mr. CARRINGTON. I think that might be a fair statement. It would take, as my predecessor here has said it would take in his case a lot of convincing for him, so it would take an awful lot of convincing for me. To me, the statements of Justice McComb's opinion and in the Los Angeles police survey are extremely persuasive. It would take almost a recantation of these statements—perhaps if 30 out of 50 said, "Yes, we said that just because we wanted to get out easier, and told the police what they wanted to hear"—I think it would take evidence of this type to convince me. Because I think the perpetrators of crime are indeed in the best position to know whether or not they were deterred from killing rather than the aseptic statistics that we have had.

But, yes, if it could be shown convincingly that it was not a deterrent, I think we might change our position.

Mr. KASTENMEIER. Thank you for your statement. I yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you very much. Is this the organization for which Fred Inbau was one of the founding fathers?

Mr. CARRINGTON. He is still the president.

Mr. RAILSBACK. Maybe it is too early, but I cannot help but wonder what the effect is on police morale. For instance, in California, as a result of the supreme court decision there, what is going on in the police ranks in response to that decision?

Mr. CARRINGTON. It was a terrible morale blow. Here is a piece which I think is from the Los Angeles Times—I will make copies available—called, "Police Chiefs Deplore Supreme Court Decision, 'Judicial Stupidity' Increases Crime Rate."

Five police chiefs in this area agreed, to a man, the California Supreme Court's decision abolishing the death penalty has done away with the only deterrent to premeditated murder in California. These chiefs were joined by Chief Ed Davis of the Los Angeles Police Department, and by Evelle Younger, who is the attorney general of California, although he was speaking more from a legal aspect.

But I think the California decision swept through California police ranks with a terrible morale effect. It was almost a slap.

On death row now, you have one man who murdered four highway patrolmen. They walked up to his car and he just "blew them away," as the saying goes. It was a cold blooded and premeditated a

crime as you can find, and he is eligible in 7 years. I am quite sure he will not get out in 7 years, but he is eligible, and he may get out at some future date.

When you hit a policeman with something like that, it has an incomparable adverse effect on morale.

Mr. RAILSBACK. From that standpoint, I take it that there could be some kind of an exclusion, such as for somebody who kills a police officer—what effect would that have on morale?

Mr. CARRINGTON. It would have an excellent effect on the morale, because it does recognize and single out the policemen for the dirty and difficult and dangerous job that they do. In effect, it would say to them that the legislature does realize that they are a special case. I do not think you should limit it to police officers, though. Take a hired killer, who does it just for money—a syndicate “hit man”—he should equally receive the mandatory death penalty as a killer of policemen.

Mr. RAILSBACK. Let us list those, because I notice you did list some that you thought should be excluded. I think you have included kidnaping, multiple murders, killings of police officers, prison guards, and prison administrators, hired killers—what else did you have?

Mr. CARRINGTON. On page 8, premeditated murder, felony-murder, killing of law enforcement officers and prison guards, murder for hire, and multiple murder. I should have added a murder in the course of a kidnaping.

Mr. RAILSBACK. On premeditated murders, I take it that is first degree murder.

Mr. CARRINGTON. That is right. Murder by poison, for instance, or by torture, or by lying in wait, or by fire. These are the classic common law cases of first degree murder, where you assume premeditation. Under the common law under most State statutes, if a man sets out to kill his wife by poisoning her, or waiting until she comes home and shooting her to make it appear as if she were attacked by a stranger, that is premeditated murder.

Mr. RAILSBACK. Let me just suggest this to you. It may be premeditated murder and yet it may involve a real crime of passion and provocation. In other words, if you believe in the value of rehabilitation at all, and if you think that somebody can be helped who has committed a crime of passion against someone, whether it is his wife or his father-in-law or mother-in-law, that he can be rehabilitated, even though committing this terrible act, so that he or she can become a constructive or useful citizen, should we not give that individual such an opportunity—particularly when you consider that there have been rather heinous offenses committed by some individuals who have hired a good lawyer and have been able to beat the death penalty?

Mr. CARRINGTON. Unquestionably, the case where a person in a fit of passion kills is not the type of premeditated murder that I am talking about. There is a difference between a husband picking up a knife—we seem to be dealing in marriage situations all the time—or two friends talking in a kitchen, or arguing over a card game, and one of them picks up a knife and stabs one, that is totally different than a husband who calculatedly puts poison in his wife’s coffee, or who sets the house on fire, and gives her sleeping pills, knowing that she will burn to death. The crimes of passion generally—

Mr. RAILSBACK. It is an irrevocable act in both cases.

Mr. CARRINGTON. The question you propose is a question of rehabilitation. Someone who kills another in a drunken fit does not show this total propensity toward doing away with somebody, and perhaps is a much more likely candidate for rehabilitation than somebody who coldly and calculatedly goes about extinguishing the life of somebody else. I think it goes directly to your point of rehabilitation, the state of mind of an individual when the killing took place.

Mr. RAILSBACK. What do we say about the *Leopold and Loeb* case—men who committed one of the most heinous offenses, hired Clarence Darrow, beat the death penalty and then Loeb was killed in prison, but Leopold finally got out and became a male nurse down in the islands? Everything leads us to believe that he became a very repentant, constructive, useful citizen. I just wonder, myself.

Mr. CARRINGTON. He is one of the exceptions that proves the rule. Part of the reply to that would be Bobby Franks, whom Leopold murdered, might have become a very constructive citizen also.

I have no objection to the parole of Nathan Leopold, and he spent about 35 years in the penitentiary. But I know in Colorado that the life sentence, even for killing a policeman, generally ran about 14 years. So, your point, in my opinion, is very well taken about Leopold. But I do not think you can apply his case across the board.

Mr. RAILSBACK. I must say that I do have concern, frankly, about the morale of our police departments. I am also concerned with what effect this might have if we do not make some exclusions, at least for some classes.

I may be in the minority here, but I do feel that.

Mr. KASTENMEIER. The gentleman from Pennsylvania.

Mr. BIESTER. One time when I was trying to sell some property, I got an offer of what I thought was not exactly an attractive price. I said I think I will turn it down. Whereupon, the real estate broker used what, I guess, was a standard practice, and he said, "Well, you just bought it for that."

Pursuing that analogy, I would like to see whether we would buy the death penalty if we did not already have it. And I wonder if we could suppose that we do not have the death penalty, but that we are considering instituting it. You would agree, would you not, that if we were considering instituting a penalty which would be as final as death, and is certainly outside the norm of human behavior of a society's general practice in its more civilized moments, that you have to have some kind of burden of proof to propose such a penalty. You would need this burden of proof; would you not?

Mr. CARRINGTON. Yes.

Mr. BIESTER. And I take it from your testimony that it would be appropriate to study and to find out whether in fact those who were pressing to institute the death penalty, if we did not have it, could justify that imposition by demonstrating that, in fact, it operates as a deterrent.

Mr. CARRINGTON. Yes, sir.

Mr. BIESTER. And that would mean a study, I assume, into the statistical background of those societies which exercise the death penalty, and those which do not. Am I right about that?

Mr. CARRINGTON. Yes.

Mr. BIESTER. Now, we have heard here today and yesterday that there really is not any statistical difference between societies which impose the death penalty and those which do not. That, in fact, in England without the death penalty, the murder ratio is either at the same level, or even slightly below what it was when the death penalty was taken off. And that in comparable States, in the testimony of Professor Wolfgang, comparable States, neighboring States, in which apparently the only distinction lies in whether you impose or do not impose the death penalty, there is really no appreciable difference in the death rate and murder rate. There are six different examples of that involving perhaps as many as 16 States.

So, if we have that kind of evidence which does not sustain any burden to demonstrate, that is, with statistical background, that the death penalty would be a deterrent, what would we use to carry the burden of proof to a legislature, or to the Congress, to impose it?

Mr. CARRINGTON. I think you should also consider that evidence which puts me on the other side of the fence from yourself: the Los Angeles study and Justice McComb's study. The fact that these are the statements of actual people, while the statistics, with all due respect to my predecessors here, are quite aseptic statistics. These are the actual statements. They are actual declarations. Against interest in that they are at least admitting that they were involved in the crime.

I think that the statements of people deterred from killing are entitled to some weight. They are the statements of persons who are best in a position to know whether they were or were not deterred.

Mr. BIESTER. If their statements were, in fact, correct, why are they not expressed in the murder rates? Why are they not expressed in some distinction which we could find statistically somewhere?

Mr. CARRINGTON. It is like my predecessor here, Professor Bedau, castigating one and all for not making any studies. I do not think anybody thought to make such a study, except those made in California. The California law enforcement area is very progressive, and I have tremendous respect for the Los Angeles police because they are always going out and making empirical studies that other police departments never take.

I think the answer to your question is that nobody really bothered to, in the 10 years between Justice McComb's study, which he obviously had to get from police records, and the current study.

Mr. BIESTER. I guess one of the questions we might get, if we were urging the institution of the death penalty, again if we did not have it, would be how can you guarantee that some innocent people will not be killed and then we will discover that they were in fact not the true criminal?

Mr. CARRINGTON. There is no way. But you can, perhaps, temper this with the fact that a lot of innocent people are killed by murderers.

Mr. BIESTER. Yes, but that does not mean that the society should take life, does it?

Mr. CARRINGTON. If you want to put it in a totally absolute sense, no. But suppose in a given year, one innocent person is electrocuted. I simply do not think that under our criminal justice system as it is today that this is possible, but assuming that that happened, and assuming also that a soft-headed parole board admitted to parole a very dangerous individual after 7 years in prison in the State of California,

despite clear evidence that he was dangerous and should have been executed, or retained in prison, and he goes out and the first thing he does is murder somebody else. You have just balanced out one with one.

Mr. BIESTER. And supposing we also got the question that there is a risk that there may be some discrimination occurring with respect to the imposition of that death penalty on blacks? In some areas of the country, due to circumstances or lack of funds or other reasons, blacks may suffer a higher degree of death penalty imposition than whites. What would our answer be to that question?

Mr. CARRINGTON. I would surely say, coming back to the rape cases, that I think a case is made on those. As to other cases the question has been considered, for instance, I suppose, considered at least by the voters of Illinois, who voted 2 to 1, to retain the death penalty in Illinois, in the face of a somewhat extensive campaign to get rid of it.

I think that the Supreme Court of the United States is certainly not unmindful of the terrible problems of discrimination. And I think that the Burger Court in this particular area is equally as mindful as the Warren Court. There is the busing decision. The Burger Court is much more hardlined on criminal procedure issues, and the Burger Court in the McGautha and Crampton said they were not going to rule that the standards for setting the death penalty were constitutionally improper, but on civil rights issues, that is, discrimination. I think that the Burger Court is equally alert.

I have not read the prepared statements of the gentlemen who testified before me, so I am not in a position to comment on them at any length, but I will repeat what I have said before: our advocacy of the death penalty advocates it in a system of criminal justice that is nondiscriminatory as is humanly possible.

Mr. BIESTER. As we are considering hypothetically still, you want to impose the death penalty, and we found we had a wealth of statistical information which would indicate rather conclusively in terms of figures that there is no real difference between the murder rates in those societies which have, or do not have, the death penalty. Don't you think it might be better to wait a couple of years before we impose it to be sure we had satisfied ourselves, in fact, that it was going to be a useful deterrent, before taking the rather drastic step of imposing it?

Mr. CARRINGTON. Except that while you are assuring yourself, those people who believe equally as strongly as you do that the deterrent effect is in fact, present, are going to feel that the rights of the victims are subordinated to the rights of convicted murderers. As I said, I think a study should be made.

Mr. BIESTER. Do you agree with that?

Mr. CARRINGTON. Yes. A study should be made.

Mr. BIESTER. Now you have an open mind on this, I take it. Suppose that study should demonstrate that, in fact, there is no deterrent.

Mr. CARRINGTON. I have already said I would probably change my position if they demonstrated it conclusively to me. I would change my position.

Mr. BIESTER. It could not change 100 people who might have been executed, could it?

Mr. CARRINGTON. No, but the 100 people who will have been executed will have been people who have already been convicted in our

criminal justice system. They will have been people convicted of heinous crimes. We are not talking about innocent people being murdered.

Mr. BIESTER. You are not saying that because they are convicted of heinous crimes their deaths, for no useful purpose, would not be consequential?

Mr. CARRINGTON. It would be consequential, but it presupposes that there would be no deterrent, and therefore the deaths of the people who are killed during the moratorium because of the nondeterrence occasioned by the moratorium—they are consequential, too. And as I said, if you are weighing one against the other, you are weighing innocent victims against people who have been convicted.

Mr. BIESTER. I appreciate that distinction. But, what if we find as a result of the study that it has no deterrent effect, and while we are making that study we had executed 100 people?

Mr. CARRINGTON. There are other reasons given for the death penalty. The only way you could say it is a mistake is to go back to the history of our country and say they have all been a mistake.

Mr. BIESTER. We may discover that: right?

Mr. CARRINGTON. We very well may, but I do not think so.

Mr. KASTENMEIER. The gentleman from New York, Mr. Fish.

Mr. FISH. Mr. Carrington, is it your position that the sole justification of the death penalty is a deterrent?

Mr. CARRINGTON. As a practical matter: no. We also have incapacitation, which is in addition to the deterrent, as I mentioned in my statement.

Mr. FISH. I see you do not buy the "eye for the eye" argument. You are thinking solely as a law enforcement official that it is, from the basis of your information, a deterrent to others committing a capital offense?

Mr. CARRINGTON. That and incapacitation from killing again. Not solely deterrence, but deterrence and incapacitation.

Mr. FISH. I think one thing should be put to rest right away before I pursue any other line of inquiry. You said at the opening of your testimony, that uniquely your testimony concerned those who might be the victims of crimes who might lose their lives if capital punishment is abolished.

I just want to make it very clear, and I am sure I speak for the subcommittee, that in no sense do we feel that there is any less concern for human life by any other witnesses that have been present before us on this subject in the last several days.

Mr. CARRINGTON. I did not mean to imply that. I just made the point that the victims had not been the subject of discussion. I am quite sure that those who were testifying here before me might also be concerned.

Mr. FISH. I think that the victims have very much been the subject. In fact, one victim is the figure of 7,000 who have been put to death by the State, a matter that you are obviously concerned with, because many of those did not take a life before theirs was taken.

But I think as you read through Professor Bedau's statement, in all the areas that he recommends that we look into in great detail, he does so only because there is such an open question on the issue of deterrence, on such issues as whether peace officers are safer from criminal assault because there is a death penalty or not, and the same in prison matters.

But let us get right on to that question, because this is one that obviously concerns this subcommittee a great deal. The matter of the peace officer and the correction official in the prison.

We had summarized by Professor Wolfgang this morning the testimony of Professor Sellin, that capital punishment is no protection for police or for correction officers, and that police are killed as often in death penalty States as in States that have abolished the death penalty; that is the moratorium would have no effect on current homicide rates.

I say that because there is no conflict between that statement and the statistics that you have given us on page 11, the dreadful statistics of the increasing number of law enforcement officers killed in the period of 1967 to 1971. It would be of importance to this subcommittee if those figures were broken down into whether they were in States that had abolished the death penalty or States that had not.

This would be a very relevant factor to the issue of deterrence, because we have in Professor Wolfgang's testimony facts taken from the uniform crime report of the FBI, that between 1967 and 1970, serious crimes defined as homicide, rape, robbery, aggravated assault, auto theft, and larceny increased 42.6 percent, while criminal homicide increased only 27.8 percent.

So, actually, during this period in which there was a judicial moratorium, there was a lesser increase in homicides than in other forms of serious crimes. And second, the 27.8-percent figure was actually below the 35.5-percent figure for 1963 to 1967.

This would indicate that a moratorium does not encourage people to commit homicide does it not?

Mr. CARRINGTON. It is evident that that is obviously cited by the other side. First of all, 27.8 is no figure to take any confidence in whatsoever.

Mr. FISL. But if you compare it with this 42.6 in other crimes, then does it become more relevant? Or only when you compare it with a higher figure in the period preceding the judicial moratorium does it become relevant?

Mr. CARRINGTON. It is a relevant figure. It is not a conclusive figure. To me, the Los Angeles study is equally relevant. One is based on statistics that you have to extrapolate, making an inference from, in the balancing out of the nonmoratorium period.

The Los Angeles study and Justice McComb's study on the unequivocal statements of people who are in a position to know whether or not they were deterred are, I believe, quite persuasive.

Mr. FISL. Is the universal crime report of the FBI made up of people who are in a position to know?

Mr. CARRINGTON. Yes; those were good figures, but the inferences are made by my predecessors testifying here. But one point should be made. With all respect to Professor Sellin, if we are going into the area of deterrence of murderers of police officers, I think, and I think you will find it to be an almost total consensus, of how the police feel about this, should equally be considered.

Mr. FISL. Nobody in society condones the fact that there has been an increase. But the interesting thing is that while there has been a deplorable increase in all forms of crime, the increase in criminal homicides has been less during the period of judicial moratorium than it had been for the preceding 3 or 4 years.

I noted also your concern over the number of people under conviction for rape involving the death penalty, particularly in the Southern States. Yet, you do not favor this moratorium. There are hundreds of people involved here, people, as I understand it, for whom you would not favor the death penalty, unless there was a death incurred in connection with the rape.

If we do not have this moratorium, what action do you suggest by the Congress that would avoid the prospect of these people being executed who have not taken a life?

Mr. CARRINGTON. I certainly would not come up here and testify against a properly worded bill that actually put a moratorium on the rape cases.

There may be a question as to whether constitutionally it can be done or not. But setting that aside, if a moratorium was for noncapital offenses, with the possible exception of rapes and explosives, I certainly would not be here testifying against it.

Mr. FISH. Thank you, Mr. Chairman.

Mr. KASTENMEIER. On behalf of the committee, Mr. Carrington, I want to express our gratitude for your appearance and for your help here this morning.

Mr. CARRINGTON. Thank you, Mr. Chairman.

(Mr. Carrington's prepared statement follows:)

STATEMENT OF FRANK G. CARRINGTON, EXECUTIVE DIRECTOR, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

Mr. Chairman: My name is Frank Carrington. I reside at 1341 Chestnut Street, Wilmette, Illinois. I am an attorney, and hold a Master of Laws degree in criminal law from Northwestern University. I have been in law enforcement work for the past 10 years, serving as a United States Treasury Agent and as a Police Legal Advisor with the Chicago and Denver Police Departments. I am currently the Executive Director of Americans for Effective Law Enforcement, Inc., 228 North LaSalle Street, Chicago, Illinois.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit organization, the purpose of which is to give a voice to the law-abiding citizen in our criminal justice system. AELE has been described as a conservative counterforce to the American Civil Liberties Union (ACLU) in the area of the criminal law.¹ AELE believes that the right of the law-abiding citizen to be reasonably free from criminal harm should not be subordinated to the increasingly contrived "rights" which are being accorded to the violent and lawless elements in this country. To this end, AELE seeks to represent, here, and in the criminal courts, nationwide, the views of the law enforcement community and the interest of the actual and potential victims of crime in America. A summary of the aims, activities and accomplishments of AELE, together with a listing of its Board of Directors and Advisory Board, is contained in the brochure attached hereto as Exhibit #1.

AELE'S POSITION ON THE ISSUE OF CAPITAL PUNISHMENT

AELE does not believe that capital punishment should be abolished in federal or state criminal justice systems. Our reasons for this position are set forth below, however, at this juncture we wish to state, as emphatically as possible, our view that *if* capital punishment should be abolished, it should be by legislative action rather than by judicial fiat. We refer, of course, to the recent decision of the California Supreme Court which banned the death penalty in that state as "cruel or unusual punishment."² In our opinion the California court

¹ See: "A Counterweight to ACLU Thrives" by Fred P. Graham, *New York Times*, Feb. 22, 1971 page 30m.

² *California v. Anderson*, — Cal. —, Criminal No. 13617, Supreme Court of California (February 18, 1972).

in so holding substituted sociological abstractions for the law, and, based upon the *personal* feelings of the six majority justices, negated the very clear will of the California Legislature and of the citizens of that state. (According to Tom Wicker, an anti-capital punishment columnist, mail to the California Supreme Court chambers is running 2-to-1 in favor of capital punishment. See: *The New York Times*, March 7, 1972, p. 37m, col. 1).

The issue of abolishment or retention of the death penalty is properly one to be determined by the democratic process. For example, in December of 1970, in a state constitutional election, the voters of Illinois rejected a proposition abolishing the death penalty, casting 1,218,791 votes *against* abolishment to 676,302 *for* abolishment, a margin of almost 2-to-1.³

Be that as it may. This is, in fact, a legislative hearing; and we are here to express our opposition to the abolishment of the death penalty by legislative action for the following reasons:

CONSIDERATION SHOULD BE GIVEN TO THE VICTIMS OF CRIME

AFILE is, frankly, a victim-oriented organization. We believe that many of those who advocate the abolition of the death penalty evidence a highly unrealistic and lofty disregard for: (a) the plight of the actual victims of countless murderers and (b) the safety of the *potential* victims of those who will kill in future.

Insofar as the actual victims are concerned, consider these questions: Who can name just one of the eight nurses murdered by Richard Franklin Speck? Likewise, if one of Charles Manson's victims had not been a famous movie actress, who would be able to recall the names of any of those who were murdered by Manson and his foul clan?

Yet the names Richard Speck and Charles Manson are, in truth, "household words" in the United States and, while their victims are lying in their graves, active efforts, evidenced by these proceedings, are under way to save Manson, Speck and others from the consequences of their acts.

We submit that past and future victims of crime *are* deserving of our consideration, especially in view of the fact that, beyond any question, our racial minorities and ghetto-dwellers are the principal victims of violent crimes, including those crimes for which the death penalty is provided.⁴ We concur with Illinois State Senator Raymond Ewing, a black, who refused to vote for a moratorium on the death penalty in Illinois because:

I realize that most of those who would face the death penalty are poor and black and friendless. *I also realize that most of their victims are poor and black and friendless and dead.*⁵ (emphasis supplied)

Our concern for the victims of murderers leads inevitably to the abolitionist response that the execution of the death penalty upon killer "A" will not bring his victim "B" back to life. This is, of course, true; but the question goes deeper than that. The fact that "A" is executed will not, concededly, bring "B" back to life; however, such arguments ignore the fact that although "B" is beyond resurrecting, the fact that "A" has been executed for the crime: (1) may well deter "C", "D", and "E" from following "A"'s example of killing and (2) *will* make absolutely certain that "A" will never kill again.

This brings us to the main bases for our contention that capital punishment should not be abolished: the deterrence of capital crimes and the incapacity of a killer, once executed, to kill again.

— CAPITAL PUNISHMENT AS A DETERRENT

We believe that if the threat of capital punishment were to be a real, rather than an imagined, threat potential murderers in many cases would, in fact, be deterred from killing. Evidence to support this contention is to be found in a study conducted in 1970 and 1971 by the Los Angeles Police Department in

³ Illinois Secretary of State, Constitution of the State of Illinois and the United States, 13, 15 (1971).

⁴ See, e.g., Crime Control Digest, March 25, 1970, page 7, in which is described a study by Stanford Criminologist Herbert L. Packer which concluded that ghetto residents are 100 times as likely to become victims of violent crime as their more affluent suburban counterparts. See also: "Black Crime Preys on Black Victims" an Associated Press study appearing in the *Denver Post*, August 23, 1970, page 35; and "Black Law and Order" in the *National Observer*, May 10, 1971, page 1.

⁵ *Chicago Tribune*, "Ban Death Penalty, State House Visit Urges" April 15, 1971 section 1, page 1, col. 5.

an effort to measure the deterrent effect of the death penalty.⁶ The study involved a compilation of statements taken from persons who had been arrested for crimes of violence. Those interviewed had either been unarmed during the commission of their crimes or had been armed but did not use their weapons. Of 99 persons who gave a statement as to why they went unarmed or did not use their weapons the results were classified as follows:

Los Angeles Police Department Study of the Deterrent Effect of the Death Penalty, February, 1971

1. Deterred by fear of death penalty from carrying weapon or operative weapon, 50 (50.5%).

2. Unaffected by death penalty because it was no longer being enforced, 7 (7.07%).

3. Undeterred by death penalty, would kill whether it was enforced or not, 10 (10.1%).

4. Unaffected by death penalty because they would not carry weapon in any event, primarily out of fear of being injured themselves or of injuring someone else, 32 (32.3%).

Thus we see a 5-to-1 ratio of deterrence over non deterrence as reported by individuals who were in the best position to make such a judgment: the perpetrators themselves.

The conclusions drawn from this study by the Los Angeles Police are as follows:

I. The adoption of an effectively enforced death penalty system is a deterrent in the prevention of homicides. II. Though the death penalty has not been removed from the statutes in California, many suspects believe in reality that no death penalty exists as it is not being enforced. III. Some suspects, while realizing that the California death penalty exists in name only, disclose that the certainty of an executed death penalty sentence would deter them from being armed while committing crimes.

The report also notes that:

If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement. In 1970 in the City of Los Angeles, 394 innocent people were victims of an unlawful execution without the right of due process of law. (emphasis supplied)

Additionally, Justice Marshall McComb of the California Supreme Court (who was the sole dissenter in the *Anderson* case in which the California Supreme Court held the death penalty to be "cruel or unusual") had, in an earlier case,⁷ cited, as evidence of the deterrent effect of the death penalty, another series of examples of violent criminals who did *not* kill because of the threat of death involved for capital crimes.

We are submitting verbatim these examples from Justice McComb's opinion as a part of our statement because we believe that they indicate very clearly the true deterrent nature of capital punishment. We urge this Subcommittee to consider them with care. These are cases in which lives were *actually saved* because a would-be killer, *by his own admission*, was deterred, by the threat of the death penalty, from murdering others in the course of violent crimes.

These cases cited by Justice McComb are as follows:

(i) Margaret Elizabeth Daly, of San Pedro, was arrested August 28, 1961, for assaulting Pete Gibbons with a knife. She stated to investigating officers: "Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*"

(ii) Robert D. Thomas, alias Robert Hall, an ex-convict from Kentucky; Melvin Eugene Young, alias Gene Wilson, a petty criminal from Iowa and Illinois; and Shirley R. Coffee, alias Elizabeth Salquist, of California, were arrested April 25, 1961, for robbery. They had used toy pistols to force their victims into rear rooms, where the victims were bound. When questioned by the investigating officers as to the reason for using toy guns instead of genuine guns, all three agreed that real guns were too dangerous, *as if someone were*

⁶ Los Angeles Police Department, Detective Bureau, Administrative Analysis Section, A Study by the Los Angeles Police Department on Capital Punishment II (February, 1971).

This study was cited by the State of California in the Supreme Court of the United States in *Aikens v. California*, October Term 1971, No. 68-5027.

⁷ *People v. Love*, 56 Cal. 2d. 720, 336, P. 2d. 33, (1961) (McComb, Jr., dissenting).

killed in the commission of the robberies, they could all receive the death penalty.

(iii) Louis Joseph Turck, alias Luigi Furchiano, alias Joseph Farino, alias Glenn Hooper, alias Joe Moreno, an ex-convict with a felony record dating from 1941, was arrested May 20, 1961 for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery here. He told investigating officers that he was aware of the California death penalty although he had been in this state for only one month, and said, when asked why he had only simulated a gun, *'I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber.'*

(iv) Ramon Jesse Velarde was arrested September 26, 1960, while attempting to rob a supermarket. At that time, armed with a loaded .38 caliber revolver, he was holding several employees of the market as hostages. He subsequently escaped from jail and was apprehended at the Mexican border. While being returned to Los Angeles for prosecution, he made the following statement to the transporting officers: *'I think I might have escaped at the market if I had shot one or more of them. I probably would have done it if it wasn't for the gas chamber. I'll only do 7 or 10 years for this. I don't want to die no matter what happens, you want to live another day.'*

(v) Orelus Mathew Stewart, an ex-convict, with a long felony record, was arrested March 3, 1960, for attempted bank robbery. He was subsequently convicted and sentenced to the state prison. While discussing the matter with his probation officer he stated: *'The officer who arrested me was by himself, and if I had wanted, I could have blasted him. I thought about it at the time, but I changed my mind when I thought of the gas chamber.'*

(vi) Paul Anthony Brusseau, with a criminal record in six other states, was arrested February 6, 1960, for robbery. He readily admitted five holdups of candy stores in Los Angeles. In this series of robberies he had only simulated a gun. When questioned by investigators as to the reason for his simulating a gun rather than using a real one, he replied that *he did not want to get the gas chamber.*

(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officer: *'I want to ask you one question, do you think they will repeal the capital punishment law? If they do, we can kill all you cops and judges without worrying about it.'*

(viii) Jack Colevriss, a habitual criminal with a record dating back to 1945, committed an armed robbery at a supermarket on April 25, 1960, about a week after escaping from San Quentin Prison. Shortly thereafter he was stopped by a motorcycle officer. Colevriss, who had twice been sentenced to the state prison for armed robbery, knew that, if brought to trial, he would again be sent to prison for a long term. The loaded revolver was on the seat of the automobile beside him and he could easily have shot and killed the arresting officer. By his own statements to the interrogating officers, however, *he was deterred from this action because he preferred a possible life sentence to death in the gas chamber.*

(ix) Edward Joseph Lapienski, who had a criminal record dating back to 1948, was arrested in December 1959 for a holdup committed with a toy automatic type pistol. When questioned by investigators as to why he had threatened his victim with death and had not provided himself with the means of carrying out the threat, he stated, *'I know that if I had a real gun and killed someone, I would get the gas chamber.'*

(x) George Hewlitt Dixon, an ex-convict with a long felony record in the East, was arrested for robbery in kidnaping committed on November 27, 1959. Using a screw-driver in his jacket pocket to simulate a gun, he had held up and kidnaped the attendant of a service station, later releasing him unharmed. When questioned about his using a screwdriver to simulate a gun, this man, a hardened criminal with many felony arrests and at least two known escapes from custody, indicated his fear and respect for the California death penalty and stated, *'I did not want to get the gas.'*

(xi) Eugene Freeland Fitzgerald, alias Edward Finley, an ex-convict with a felony record dating back to 1951, was arrested February 2, 1960, for the robbery of a chain of candy stores. He used a toy gun in committing the robberies, and when questioned by the investigating officers as to his reasons for doing

so, he stated: 'If I had a real gun and killed someone, I would get the gas. I would rather have it this way.'

(xii) Quentin Lawson, an ex-convict on parole, was arrested January 24, 1959, for committing two robberies, in which he had simulated a gun in his coat pocket. When questioned on his reason for simulating a gun and not using a real one, he replied that *he did not want to kill someone and get the death penalty.*

(xiii) Theodore Roosevelt Cronell, with many aliases, an ex-convict from Michigan with a criminal record of 26 years, was arrested December 31, 1958, while attempting to hold up the box office of a theater. He had simulated a gun in his coat pocket, and when asked by investigating officers why an ex-convict with everything to lose would not use a real gun, he replied. 'If I used a real gun and shot someone, I could lose my life.'

(xiv) Robert Ellis Blood, Daniel B. Gridley, and Richard R. Hurst were arrested December 3, 1958, for attempted robbery. They were equipped with a roll of cord and a toy pistol. When questioned, all of them stated that they used the toy pistol because *they did not want to kill anyone, as they were aware that the penalty for killing a person in a robbery was death in the gas chamber.* (Emphasis in the original.)

On a related point, we often hear the arguments of those who would abolish capital punishment that the ever increasing numbers of murders in the United States indicate that capital punishment, which is still in effect in most states, is not a deterrent to crime. This argument might have some validity if capital punishment had for the past few years constituted a genuine threat; however, it is common knowledge that because of judicial, legislative, and other legal maneuverings against the death penalty there have been no executions in this country since 1967 and very few executions before then. As a result the threat of capital punishment is not taken seriously by many killers. We submit that it is highly likely if in certain carefully delineated classes of crimes (premeditated murder, felony-murder, killing of law enforcement officers and prison guards, murder for hire, and multiple murder) the death penalty for the convicted perpetrator would be swift and sure, homicides would in fact decline in number.

THE "SECOND MURDERS"—KILLINGS BY PERSONS WHO HAVE KILLED BEFORE BUT WHO, NOT HAVING BEEN EXECUTED, HAD THE OPPORTUNITY TO KILL AGAIN

The brief of the State of California in its petition for rehearing in the *Anderson* case cites, at pages 17 and 18, cases in which persons who had been once convicted of murder had killed again, either in prison, after escaping, or after being paroled. Summaries of six such cases follow:

People v. Purvis, 52 Cal. 2d 871, 346 P. 2d 22 (1959)

In 1950 defendant was convicted of second degree murder of his wife and sentenced to prison. In 1954 he was paroled. In 1957 he murdered a woman and was convicted with the death penalty imposed. The California Supreme Court affirmed judgment but ordered a retrial on issue of penalty.

People v. Gilbert, 63 Cal. 2d 690, 408 P. 2d 365 (1965)

Gilbert was convicted in 1947 of second degree murder for killing a fellow prisoner at San Quentin. He was released on parole in 1959 and convicted of burglary in 1960. He escaped in 1965 and committed a series of armed bank robberies. In 1964 he killed a police officer while committing a bank robbery. Gilbert was convicted of first degree robbery, and kidnapping and received the death penalty.

People v. Robles, 2 Cal. 3d 205, 466 P. 2d 710 (1970)

Robles was serving life sentence for first degree murder. He had a prior conviction for assault with intent to commit murder. While in prison, he murdered an inmate by striking him on the head and then cutting his throat from ear to ear. Robles was convicted of first degree murder and received the death penalty. The California Supreme Court reversed the penalty.

People v. St. Martin, 1 Cal. 3d 524, 463 P. 2d 390 (1970)

Defendant was serving a life sentence for second degree murder and robbery in the first degree. While a guard was trying to restrain him, defendant plunged a knife three times into an inmate's chest killing him. Defendant was convicted and given the death penalty. The California Supreme Court reversed the judgment.

People v. Pecte, 28 Cal. 2d 306 (1946)

Defendant was convicted of murder in 1921 and after 18 years was released from prison. In 1944 defendant murdered another person and this time received the death penalty.

People v. Hall, 199 Cal. 451 (1926)

Hall escaped from prison while serving a life sentence for murder. Subsequently he committed another murder and was convicted and received the death penalty. The California Supreme Court reversed judgment.

People v. Morse, 70 Cal. 2d 711.

Morse, serving a sentence of life imprisonment for two murders garrotted a fellow prisoner who owed him some cigarettes. Sentenced to death for this murder, Morse had the judgment reversed by the California Supreme Court.

Cases such as these, and other similar cases, nationwide, clearly indicate that misguided leniency towards one who has been proven to be a murderer can result in the loss of the lives of the victims of "second killings." Abolitionists often couch their opposition to the death penalty in terms of "reverence for human life;" however, this reverence appears to be directed solely towards the lives of the killers. It ignores the fact that the lives of the innocent "second victims" have also been taken—lives that could have been saved if one had already demonstrated a potential for killing had not been given a "second chance" to kill again.

EASY PAROLE LAWS

In California a "life sentence" actually means that the individual convicted is eligible for parole in seven years.⁸ Other states provide for parole eligibility after relatively short periods of confinement. Parole laws such as these indicate our preoccupation with the criminal and our total amnesia with regard to such rights to life as the victims might have had. Who can guarantee that, after a given period of years, Sirhan Sirhan, Richard Speck, Charles Manson and his followers or James Earl Ray might not be paroled by a high-minded parole board who saw before them an apparently repentant and rehabilitated individual? We believe that there are certain individuals who are, quite simply, not fit to return to society again (for example the person or persons who planted operable bombs of extreme explosive power aboard two airliners last week, in an attempt to extort two million dollars from Transworld Airlines). Yet overly lenient parole laws, coupled with our tendency to deny any thought to the victims of crime, could act to return the most hideous of murderers to the community—perhaps to kill again.

SPECIAL CASES—LAW ENFORCEMENT OFFICERS AND PRISON GUARDS

We have, in the foregoing section, spoken of our overall concern for the actual and potential victims of homicides. We turn now to two special cases: law enforcement officers and prison guards.

1. Law Enforcement Officers

In our society we have placed the responsibility for the prevention of crime and the apprehension of criminals squarely upon our law enforcement officers. As a part of their duty to protect the public, they must seek out confrontations with the criminal element which others are privileged to avoid. The average citizen who sees an armed robbery, a street mugging, or an attempted rape in progress has, as a general rule, no duty to intervene. Not so the policeman. On duty or off he must attempt to apprehend the perpetrator. Between 1966 and 1970, 261 law enforcement officers were killed answering disturbance calls, responding to crimes in progress and making arrests (except traffic arrests.)⁹

It is precisely because we require the policeman to engage in face-to-face confrontations with criminals on a day-to-day basis that they should be considered as special cases when we consider the punishment to be accorded to their killers. *AELE takes the unequivocal position that the punishment for the murder of a law enforcement officer engaged in his duties should be death.*

⁸ California Penal Code, Section 3046.

⁹ FBI Uniform Crime Reports 1970.

Consider the tragic statistics of law enforcement officers killed during the five-year period 1967 to 1971:

1967	-----	76
1968	-----	64
1969	-----	86
1970	-----	100
1971	-----	125

We believe that if a *non-commutable* death sentence were the *only* penalty upon conviction of the murderer of a law enforcement officer, these statistics would rapidly decline.

The other side of the coin is also true. As we have had mentioned, "life imprisonment" in California now means that the convict is eligible for parole in seven years. In a recent case in Illinois the murderer of a policeman received a "tough" sentence of 100 to 200 years; the killer will, however, be eligible for parole in eleven years and three months. We believe that parole laws such as these make the already dangerous job of a law enforcement officer infinitely more hazardous. When an armed robber, rapist or fleeing killer is cornered by a police officer he may well consider that killing the officer in order to escape apprehension may well be the best option open to him in view of the current lack of enforcement of the death penalty and our overly lenient parole laws.

A policeman, in his day-to-day confrontation with criminals, deserves the full protection that the law can give him; and that protection is assuredly *not* present in a state, such as California, where the would-be cop-killer knows that, if apprehended, seven years in prison may be the total penalty that he must face.

2. Prison Guards and Corrections Officers

Just as policemen are required to confront the criminals on the streets, prison guards confront them daily in our correctional institutions. Prison guards go unarmed among their charges and are vulnerable at any time to an attack. In the notorious "Soledad Brothers" case a guard was thrown to his death from a third floor tier, and, in the Attica riots and the escape attempt of George Jackson from San Quentin prison, unarmed guards were murdered by inmates.

Prison guards, like law enforcement officers, deserve the maximum protection of the law. We favor the death penalty for the killing of any prison guard or corrections officers while he is on duty.

CONCLUSION

AELE's presentation herein may be considered a hard line approach to the issue of capital punishment. If this is, indeed, true, the hard line approach is based upon our preoccupation with the rights of the actual and potential victims of murderers (most of whom will be members of minority races and ghetto dwellers) rather than with those of the murderers themselves. Additionally, we have a special regard for the safety of law enforcement and correctional officers.

We believe that if capital punishment was once again to be made a *real* threat and that swift and sure execution followed upon conviction of the classes of murders we have discussed herein, the deterrent effect would be tremendous. The execution of a human being by the state is never a pleasant thing; however, we believe that such executions would, in fact, deter potential murderers and prevent "second killings" by those who have already been proven to be killers, that the saving of these innocent lives far outweighs any concern that we should have for convicted killers, and that capital punishment should clearly be retained and made a reality once more.

Respectfully submitted,

FRANK CARRINGTON,
Executive Director,

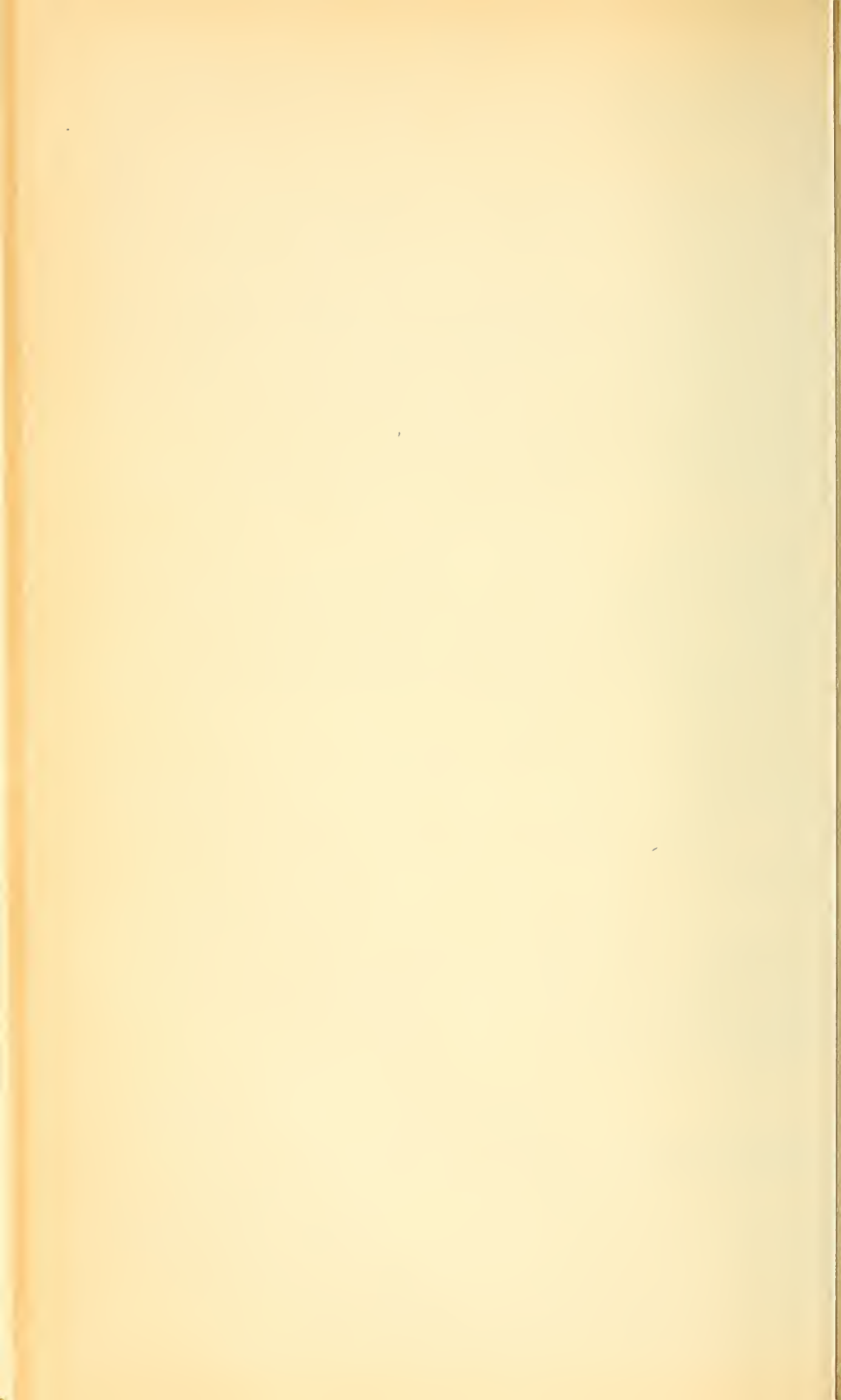
Americans for Effective Law Enforcement, Inc.

MR. KASTENMEIER. This, then, concludes today's testimony on the question of suspension or abolition of capital punishment.

Tomorrow morning, in this room, at 10 a.m., the subcommittee will hear from Mr. Douglas Lyons, executive director of Citizens Against Legalized Murder; Mr. William Lunsford, legislative representative for Friends Committee on National Legislation and the American Friends Service Committee; Mr. Howard Gill, Director of the Institute of Correctional Administration at American University.

Until then, the subcommittee stands adjourned.

(Whereupon, the subcommittee adjourned at 1:13 p.m.).



CAPITAL PUNISHMENT

FRIDAY, MARCH 17, 1972

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:25 a.m., pursuant to recess, in room 2226 Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier and Biester.

Also present: Herbert Fuchs, counsel, and Samuel A. Garrison III, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

The hearing will resume on H.R. 8414, and other bills suspending the death penalty, and on H.R. 3243, and other bills abolishing the death penalty.

This morning our first witness is Mr. Douglas B. Lyons, executive director of Citizens Against Legalized Murder, Inc., which has the acronym of CALM.

We welcome you and notice you have, together with appendices, an extensive statement. The statement and the appendices will be accepted for inclusion in the record.

TESTIMONY OF DOUGLAS B. LYONS, EXECUTIVE DIRECTOR OF CITIZENS AGAINST LEGALIZED MURDER, INC.

Mr. LYONS. Thank you, Mr. Chairman.

I will read an abbreviated version of the statement but I do request the entire statement and appendices be included in the record.

I also included a copy of the booklet entitled "The Case Against Capital Punishment" and commend it to your attention.

I agree with the National Commission on Reform of Federal Criminal Laws which stated, in its working papers that "while de jure abolition [of the death penalty] has ebbed and flowed, a de facto abolition has practically become a reality in the United States."

But the fact that there have been no executions in this Nation since June 2, 1967, should not lead us to believe that the death penalty no longer exists in the United States. There are today 582 men under sentence of death in our Nation. Men are still being condemned to death by electrocution, gassing, hanging, or shooting.

Over 100 crimes are theoretically punishable by death in one or more of the jurisdictions in the United States. But since 1930, when the U.S. Department of Justice started to keep accurate records,

we have executed people for only eight types of crime: murder, rape, armed robbery, kidnaping, burglary, sabotage, aggravated assault by a life term prisoner, and espionage.

The existence of so many death penalty statutes under which executions are never likely to be carried out is attributable on the one hand to the political tenacity such statutes possess and on the other hand to the lack of pressure to remove capital statutes from the books when nobody—or only an occasional unknown—is actually being executed.

Professor Bedau characterizes the effect of these dual phenomena of the incredibly small number of executions and the continued existence of a large body of death penalty statutes by stating:

In Massachusetts, it seems, we can go for a generation without a legal execution in our prisons (the last one was in 1947); we cannot go one day without the death penalty on our statute books.

Some crimes which are ostensibly punishable by death are so bizarre as a basis for executing anyone that they have never been enforced to the point of execution, but they remain on the statute books. For example, nobody has been executed for forcing a woman to marry, fetacide, or arson, although these are all subject to the death penalty under the law, in some States.

I would just point out one of the appendixes, appendix "B," has a list of all capital offenses in the United States.

This large number of death penalty statutes represent more than a mere historical curiosity. All such laws represent a moral indictment of our society. Some present a real threat of rare, arbitrary execution.

Armed robbery, for example, carries the death penalty in seven States. Twenty-five men have been executed for armed robbery since 1930, the last one in 1962. Today, four men await execution for armed robbery.

The striking disparity between the existence of a capital statute and the rare enforcement of it, in fact, is most evident for these arcane crimes which are no longer heralded as valid bases for the death penalty.

But as Professor Amsterdam has pointed out to the committee in his testimony, executions have become "unusual" in a constitutional sense, that is, rare, not simply for the strange capital crimes I have mentioned, but for murder and rape as well.

Half the States which retain capital punishment on the books have had no executions for over a decade. During the last 6 years, there were approximately 78,000 murders in this country. During the same period roughly 600 men were sentenced to death for murder. Yet, there were only three executions—all for murder—during the last 6 years.

In other words, in the last 6 years, we have executed only one two-hundred-and-fiftieth of 1 percent of all murderers.

Why is the death penalty retained in so many American jurisdictions? The major argument put forth to keep the death penalty is that it is that it is a deterrent to serious crimes, especially to murder.

If the death penalty were a deterrent to murder, it would follow that those States which have and use the death penalty would have lower murder rates than the States which have abolished the death penalty. But just the opposite is true.

In 1970 the death penalty States had an average of 7.7 homicides per 100,000 population, while the abolition States had an average murder rate of only 4.6. Furthermore, in 1970 the States which had the three highest murder rates, Georgia, South Carolina, and Florida, were all States which have and use the death penalty. On the other hand, the States with the three lowest murder rates in 1970 were all abolition States: Maine, Vermont, and North Dakota.

If the death penalty were a deterrent to murder, the situation would be reversed. That is, the abolition States would have the highest murder rates, and the States which have capital punishment would have the lowest murder rates. This is not the case.

Of course, the retentionist's answer to this statistical argument is that it is not fair to compare Georgia to North Dakota. Of course it isn't because there are other factors involved, racial factors, population makeup, socioeconomic factors.

I contend it is those other factors contributing to a higher murder rate rather than the lack of the death penalty.

The President's Commission on Law Enforcement and Administration of Justice studied the death penalty with particular reference to its alleged value as a deterrent. The Commission concluded:

It is impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes. The most complete study on the subject, based on a comparison of homicide rates in capital and noncapital jurisdictions concluded that there is no discernible correlation between the availability of the death penalty and the homicide rate. This study also revealed that there was no significant difference between the two kinds of States in the safety of policemen. Another study of 27 States indicated that the availability of the death sentence had no effect on the rate of assaults and murders of prison guards.

The study the Commission report refers to was from Professor Sellin, from whom the committee will hear.

Far from deterring murder, the continued existence of the death penalty lulls us into the mistaken belief that we are actually doing something about murder. In fact, we are doing virtually nothing about it. We have been killing murderers for eons—but the murders continue. The time has come for us to realize that we cannot stop killing with more killing.

I believe that we are, as a Nation, to be judged by the company we keep. As far as the death penalty is concerned we are in bad company. For example, only four nations in the world punish rape with death: Nationalist China, the Republic of South Africa, Malawi, and the United States of America.

Among the Western European nations outside the Soviet bloc, only France, Spain, and Greece still prescribe the death penalty for murder and other peacetime crimes, and France may soon abolish capital punishment.

In the Western Hemisphere, this Nation stands virtually alone in keeping the death penalty. Capital punishment for murder, rape and kidnaping has been almost totally abandoned in the Anglo-American world—except for the United States.

The existence of the death penalty has an indelible and harmful effect on the administration of justice. We might do well to recognize that in 1966 Queen Elizabeth issued a royal pardon to Timothy John Evans, who was hanged in 1950 for a crime he did not commit. I hope

that the death penalty will be abolished in the United States before we, too, are reduced, by the execution of a man later proven innocent, to the ultimate absurdity: a posthumous pardon.

But the effect of the death penalty on the administration of justice is by no means limited to the problem of executing innocent people. One obvious problem is delay. The length of time spent on death row has nearly doubled in the last 10 years. At last report, the mean elapsed time spent on death row was 32.6 months—nearly 3 years. There is every reason to believe that this figure will continue to rise.

During these months and years on death row, men under sentence of death appeal to the State courts, to the Federal courts, back to the State courts, to the Governor and back to the courts again.

There is a quotation from Justice Jackson in the appendix to my remarks:

When the penalty is death, we, like State court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.

Litigation in many cases is endless and we can only guess at what effect these lengthy appeals have on the judicial system.

Another major effect which the existence of capital punishment has on the administration of justice is the clogging of the courts, especially the Federal courts. Over 100 petitions for writs of certiorari are now pending in the Supreme Court of the United States in capital cases. The dockets of the courts of appeal and the U.S. district courts are likewise overcrowded with death penalty cases.

Discussing the problem of murder, J. Edgar Hoover, a supporter of the death penalty stated that—

Police are powerless to prevent a large number of these crimes, which is made readily apparent from the circumstances or motives which surround criminal homicide. The significant fact emerges that most murders are committed by relatives of the victim or persons acquainted with the victim. It follows therefore, that criminal homicide is, to a major extent, a national problem beyond police prevention.

I agree.

I hope that the investigation of the administration of the death penalty which the Death Penalty Suspension Act establishes will enable us to look at the problem of criminal homicide dispassionately. We must look beyond mere revenge in structuring our legal system.

Now, if you have any questions, Mr. Chairman, I will try to answer them.

Mr. KASTENMEIER. Thank you, Mr. Lyons.

One thing I didn't realize is that at least one jurisdiction has made it a capital offense to force a woman to marry.

Mr. LYONS. My guess, Mr. Chairman, is that some of these crimes that strike us as bizarre, at least as far as capital offenses are concerned, were enacted after a particularly horrible crime and somebody in the legislature says, "This crime is so terrible we should provide the death penalty for it." Then the crime never occurred again or the death penalty was never used but it was left on the books and, since no one was prosecuted, there was no effort made to take it off the books.

Mr. KASTENMEIER. Our distinguished colleague and member of this subcommittee from Massachusetts who is so interested in this legislation is unable to be with us today and I know he will be very dis-

appointed to have missed your testimony. I just wanted to mention that for the record.

Your organization is a relatively recent one, 6 years old, is that correct?

Mr. LYONS. Right.

Mr. KASTENMEIER. Why was it founded in 1966—as a result of any particular occurrence?

Mr. LYONS. In 1966 I was a freshman at Berkeley, which is about 30 miles from San Quentin. At that time there were about 65 condemned men on death row there, the largest number at one time anywhere in the world. Since that time, there have been as many as a hundred.

Efforts to abolish capital punishment have not been carried on by the Citizens Against Legalized Murder, alone. At the time I was at Berkeley, in California there were very few groups in the bay area working for the abolition of the death penalty and I started working on this.

Mr. KASTENMEIER. There are a number of options open to the Congress, I suppose, while we are awaiting Supreme Court action. One is to do nothing, two is a 2-year moratorium, a third would be to abolish the death penalty in the Federal jurisdiction only or, four, we could do it for State jurisdictions as well, five, a constitutional amendment and six, we could selectively eliminate some of the capital crimes, such as rape.

Of these various options, the six of them, you come today to testify for a 2-year moratorium?

Mr. LYONS. That is partially correct. I am also in favor of Federal abolition and outright abolition by the Congress.

Needless to say, I hope the Supreme Court makes these recommendations moot by declaring the death penalty to be cruel and inhuman punishment. I am getting cramps in my fingers from keeping them crossed waiting for the Supreme Court.

Mr. KASTENMEIER. Practically speaking, why do you support the 2-year moratorium? If we do act affirmatively on that particular proposal, what is it you hope we can achieve by it?

Mr. LYONS. In preparing my testimony for today's hearing, I tried to develop some statistical evidence relating to what kind of people get sentenced to death. I wanted to find out, by taking equal numbers of blacks and whites charged with a capital offense, how many get convicted in each racial group, how many are sentenced to death, how many are executed.

After much research, I concluded that these statistics do not exist, the statistics I wanted to report to the committee. On the Hart-Celler bill they do not exist.

I think, as Professor Bedau pointed out, only the Congress is in a position financially, and otherwise, to carry out the studies on the death penalty and help us to understand how it is administered.

Mr. KASTENMEIER. It is your recommendation that the Congress undertake a 2-year study of the death penalty in America?

Mr. LYONS. That can be done directly. There are a number of means open to the Congress to make that study.

You asked about constitutional amendment abolishing the death penalty. I am a little wary of constitutional amendment and submitting the death penalty to the voters because what usually happens is the people make up their minds based on little information and, if

there is a particular horrible crime the week before the election, that pretty much clinches the fact that abolition will fail.

I think it is primarily up to the legislature to remove these laws from the books, except if the court decides to do so because of the constitutional challenges to the administration of the death penalty.

Mr. KASTENMEIER. What is it we do not know that we need to know in order to legislate in this field?

Mr. LYONS. We can guess pretty well at the present time that the death penalty is administered in a discriminatory fashion. It is particularly evident in rape cases that the major reason people get sentenced to death for rape is if they are black and are convicted of raping white women.

The element of race is also evident. I believe, in capital sentencing for crimes other than rape, but we don't know, the answer is always the blacks get sentenced to death for all crimes more than whites because they have a higher crime rate.

Whether that means murders in which the victim and defendant are both black are more frequent, or it is other combinations, we don't know. It is very rare for a white man to get sentenced to death for killing a black man and whether that is due to other factors, we don't know.

We might conduct a study on a national scale, such as the one Professor Wolfgang and Professor Amsterdam conducted in the South on rape cases. As Professor Wolfgang mentioned, the resources the Legal Defense Fund had were pretty exhausted by that limited study. We don't really know.

Given equal numbers of blacks and whites charged with capital offenses from the point of indictment, we don't know how many of them, absent other individual factors, are likely to get sentenced to death depending on their race.

Mr. KASTENMEIER. Apparently you feel it is necessary to have that sort of information. Other nations in the world, I gather from your statement, have abolished the death penalty and they did not necessarily have that much information. If they did have that information, it should be available to us here.

I realize Great Britain had an extensive 5-year study and it took 4 more years to complete it.

Mr. LYONS. I would like to put the English study in the record. The problem in the other countries, the situation has been that capital punishment is administered in every other country that still has it, on a national level; whatever statistics they have, they are available in one office and they are not available in this country.

Mr. KASTENMEIER. What I am suggesting is that there may well be tactical reasons for embracing the Celler-Hart bill in addition to this sheer quest for additional knowledge.

Mr. LYONS. I agree there may be such reasons, however, as I mentioned in my prepared statement, many people believe—you can almost hear the quotation marks—that we have to have the death penalty for our protection. Their belief and analysis on the subject goes no further than that repeated belief.

If the Congress were to halt executions this would give the Nation a breathing space so the question "should we have the death penalty" does not devolve into "should a particular defendant get executed",

which I think all too frequently happens. I think we will remove the delusion that we are protecting ourselves by having capital punishment and I think, for that reason, to enable the public to think about the death penalty in more realistic terms and to apprise the public of the studies already done on the death penalty, I think a study like this is very important.

Mr. KASTENMEIER. I would like to make one additional comment: that is, I hope proponents of the Hart-Celler bill will at some point in the immediate future indicate carefully what structural form an organization might take which might be created to inquire into this and what questions it ought to try to answer for the purpose of setting to rest major questions attending this public issue.

I say that because, obviously, should this committee recommend enactment of the Celler-Hart bill, it will be desirable to advise Congress as to what entity, if any, should be created to inquire into this and what it is expected this entity would find or would look into with some preciseness. If this bill is reported out, we are going to have to suggest how much it will cost to do this.

The advocates of the legislation have not so far been very precise, understandably perhaps, in this connection, but it would be useful for the committee to know.

Mr. LYONS. I think we are at a threshold where we know some of the questions we want to ask. I assume as we find the answers to some of these questions, the answers will generate new questions in new areas for inquiry. I think we have enough evidence now based in good part on Professor Wolfgang's and other studies that have been done, to realize that there is a substantial question that the death penalty is administered on a discriminatory basis.

Mr. KASTENMEIER. If Congress should enact the Celler-Hart bill, it would be possible, would it not, that at the end of 2 years it would be necessary to extend the life of the study entity and the suspension of executions in order fully to answer the questions raised by the initial inquiry?

Mr. LYONS. That is possible. I think the advantage of a national moratorium, in my experience—and I have been involved in this movement for 11 years—very often people support or oppose the abolition of the death penalty because they believe a particular named defendant should or should not be executed, whether it is Sirhan, Manson, Speck or others.

People say, "I am for it because I think he should get it"; and I think we have to remove ourselves from that kind of vengeful analysis.

Mr. KASTENMEIER. Thank you.

The gentleman from Pennsylvania.

Mr. BIESTER. Thank you, Mr. Chairman.

I want to thank the witness for his testimony.

I wonder if we have not spent a great deal of our time in our study of this question during our hearings on the rational level, while society decides the death penalty is important and worth retaining from the irrational level? I wonder if the witness has studied an irrational basis for the retention of the death penalty?

Mr. LYONS. Study is not the word I would use. It would be whether I have counted them. Yes; I have. First, the people who have studied the death penalty, I agree, are aware of most of the conclusions of the

experts in the studies done such as those included in my testimony, that the death penalty is not a deterrent.

Yet they believe in spite of all this testimony they are simply stuck with the death penalty, the death penalty is a deterrent and nothing will shake that belief.

As I pointed out, J. Edgar Hoover is in favor of the death penalty in spite of his statement that most murders cannot be prevented by the police.

No analysis is made and no answer to all the studies done. There is also the argument that we have to have the death penalty for revenge. It is often given in the following manner—someone who kills has, therefore, forfeited his right to live—as though that followed logically. That does not follow logically to me nor to many people in the country.

It is difficult for me to discuss the matter with someone who reduces the question to that level. I don't know how to make a logical argument to people who believe somebody should fry.

Mr. BIESTER. I would like to come back to this in a minute, but another thought crossed my mind.

You mentioned the *Manson* case, *Speck* case, and some others. Do abolitionists concede the possibility there are some people who commit murder who are incapable of rehabilitation and are doomed to recommit the crime if let loose?

Mr. LYONS. I would concede there are many people—let me rephrase that—a number under sentence of death who should never be released to society again.

Mr. BIESTER. What would you do with those men?

Mr. LYONS. I am not sure at the moment. So little has been done in the study of murderers. I suggested in my testimony last month, before Senator McClellan's subcommittee holding hearings on the reform of Federal criminal laws, that the Congress establish a study of the people currently incarcerated for homicide to determine why they killed. I dare say such a study would find there are few differences between those winding up on death row and those in the prison population not under penalty of death.

We don't know why people commit murder. I don't think by executing a *Speck* or *Manson* we will learn anything about why they commit crimes. If we study them, psychiatrically or criminally, we might learn something.

There are other people exposed to the same phenomena who did not commit murder. I should point out there was a time when people thought Nathan Leopold was the worst man in creation, he should have been hanged in Illinois, and certainly never released. He was, I suppose, the best example of a rehabilitated prisoner in this country's history. He spent over 20 years in prison and when released became a great asset to society as a scientist and a writer.

I wouldn't want to be in the position of saying none of the people on death row should ever be released. I wouldn't want to make that decision right now.

Mr. BIESTER. Let me return to the line of questions I was on before. What do you make of the proposition that the imposition of the death penalty is an atavistic survivor of the practice of human sacrifice for the purpose of a cathartic effect?

Mr. LYONS. Not terribly much because executions are carried out in such a secretive manner. There was a time in the country—as recently as 1936 in Kentucky—when hanging was public. They were public affairs and people came with their children to watch hangings.

Mr. BIESTER. Why did they bring the children?

Mr. LYONS. It was an outing, a family affair, the thing going on in town, the thing to do that day.

When I was in California and engaged in the abolition movement there, I tried to get the warden of San Quentin to have executions televised. We believed people should know what was being done with their money and their employees.

On the other hand we felt if there was a dormant, previously undiscovered, deterrent value, sitting in front of television sets and viewing the execution would show that value.

The effort didn't get very far. Hopefully the gas chamber at San Quentin will be removed after the action of the California Supreme Court.

Very few people are aware now when an execution is carried out. There was a story by Ex-Governor Michael V. DiSalle of Ohio. He said the day of an execution he was in his limousine and a call came through on his telephone that a prisoner had just been executed. He looked out his car window at the people going by, going about their own business, and it made no difference to them that a man had been executed.

I think the secretiveness is part of the reason there is no concerted abolition effort in this country. People don't know there are executions going on. They are carried out in secret.

Mr. BIESTER. I didn't think we would recommend that they be done in public.

Mr. LYONS. The suggestion has been made that, when pickpockets were publicly hanged in England, the pickpockets in the crowd would go around and pick the pockets of the people viewing the hanging.

I am not sure I believe public executions should be resumed in this country but I do think the fact that executions are carried out in the dead of night, in some States by law at midnight, I think the secretiveness that executions have in the way they are carried out is one of the reasons we have executions.

There is another examples; no one is really responsible for an execution. When the jury imposes a death penalty, there are 12 people on the jury and none is actually guilty of killing the man. The judge imposing the sentence is bound by the jury's determination, he is not responsible. he is following the law. The court of appeals are not responsible, they only review what the judge and jury did. It goes to the Governor and he says, "I won't place myself above the law," even though in many States the Constitution gives the power to the Governor to commute the death sentence.

Then the power comes to the executioner and he is not responsible, he carries out the law of the State. In many cases it is machine. whether the electric chair, gas, or hanging, and there is more than one switch. Two of the switches are dummies and only one actually engages the mechanism. So, each of the people pulling the switch can tell himself. "I didn't do it, I had a dummy."

Likewise on the gas chamber, there are three switches. On the firing squad, which is still a possible form of execution in Utah, the firing

squad is recruited from the county of conviction and the men are brought to the place of execution, handed rifles which have already been loaded. There are five rifles with only four of the rifles containing live bullets, the fifth is a blank. The reason for this is that every man can go home and sleep and say, "I had the blank, I am not responsible."

I wonder, if the death penalty is so good for us, why should anyone be embarrassed by performing an execution if it is good for us? Someone who is an executioner should be considered a life-saver and be publicly rewarded. It is difficult in some States to find out who the executioner is, it is a well-kept secret.

That is a disservice to society: either we believe executions should be done and say so honestly—though incorrectly, I believe—or we should end this vicious circus, this charade. We are embarrassed and don't tell anybody about it.

Mr. BIESTER. I think a great deal of what you have said bears on the whole rationality of the process.

Mr. LYONS. There are a number of States, one of my jobs as executive director of Citizens Against Legalized Murder is to keep track of people under sentence of death in the country. As part of that endeavor, I am in contact with wardens around the country and ask them by letter and telephone who is under sentence of death. In some States they refuse to give the information. It strikes me as preposterous that people are executed to deter the public and yet it is kept secret.

Mr. BIESTER. The execution itself is done by furtive means?

Mr. LYONS. Right. Although again, when I was in California, I wrote to the warden at San Quentin and asked that my name be added to the list of witnesses for the executions. I guess that is to prevent a man on death row being spirited out of the prison alive. The waiting list for witnesses was so crowded it had been closed and the warden suggested I wait for a while and then write again.

I thought I had a legitimate interest in witnessing executions, which I have never done, and hopefully I won't get the chance.

The wardens frequently get requests from people offering to be the executioner for nothing, which leads me to believe executions bring out the worst of us and the worst in us. It is a very scary situation.

Mr. BIESTER. Thank you very much.

Mr. LYONS. Thank you.

Mr. KASTENMEIER. Thank you.

I wonder, however, Mr. Lyons, how much relative concern the public can be expected to have when a man in Columbus Ohio, who has grievously offended society is executed.

In the name of the Government we have killed hundreds of people each week, every year—thousands, if we believe our military figures in Southeast Asia—and many of them we now know were women and children. Why is it we should be so concerned about one individual who has broken society's rules as compared with what must be—since even the time of the present moratorium—the hundreds of thousands of people we have killed in Southeast Asia?

Mr. LYONS. I think there is a decided difference in the State in many cases spending millions of dollars to put one particular named, known individual to death and mustering all the resources that a State possesses, that is prosecutors, Governors, and so on, to put one man to death—and killing in war. We don't know who he is, he may or may

not have been involved in some political insurgency that deserves death. Execution does not have the anonymity from the point of view of the State killing in wartime. Most of the people killed in wartime are statistics and no more. That obviously, I think, is atrocious but there is a difference in killing one single person with all the forces of the State marshaled against him and killing a number of anonymous individuals in time of war.

There may be no moral difference between the two but I think there is a gigantic pragmatic difference.

Mr. KASTENMEIER. At least we agree that is a difference.

I thank you very much for your testimony. The committee is aware of the organization you have founded and you are to be congratulated on your significant effort.

Mr. LYONS. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Your statement, the appendixes, and the booklet "The Case Against Capital Punishment," to which you referred in your testimony, will be included in the record at this point.

(The documents follow:)

STATEMENT OF DOUGLAS B. LYONS, EXECUTIVE DIRECTOR OF CITIZENS AGAINST LEGALIZED MURDER, INC.

Mr. Chairman and Members of the Committee:

I am Douglas B. Lyons, Executive Director of Citizens Against Legalized Murder, Inc., an organization I founded in 1966 to work for the abolition of the death penalty.

I agree with the National Commission on Reform of Federal Criminal Laws which stated, in its Working Papers that ". . . while de jure abolition [of the death penalty] has ebbed and flowed, a de facto abolition has practically become a reality in the United States."¹ But the fact that there have been no executions in this nation since June 2, 1967 should not lead us to believe that the death penalty no longer exists in the United States. There are today 582 men under sentence of death in our nation.² Men are still being condemned to death by electrocution, gassing, hanging, or shooting.

Over one hundred crimes are theoretically punishable by death in one more of the jurisdictions in the United States.³ But since 1930 (when the U.S. Department of Justice started to keep accurate records), we have executed people for only eight types of crime: Murder (3,334 executions); Rape (455); Armed Robbery (25); Kidnapping (20); Burglary (11); Sabotage (6); Aggravated Assault by a Life Term Prisoner (6); Espionage (2). (Total executions 1930-1971: 3,859).⁴

The existence of so many death penalty statutes under which executions are never likely to be carried out is attributable on the one hand to the political tenacity such statutes possess and on the other hand to the lack of pressure to remove capital statutes from the books when nobody (or only an occasional unknown) is actually being executed.

Professor Bedau characterizes the effect of these dual phenomena of the incredibly small number of executions and the continued existence of a large body of death penalty statutes by stating:

"In Massachusetts, it seems, we can go for a generation without a legal execution in our prisons (the last one was in 1947); we cannot go 1 day without the death penalty on our statute books."⁵

Some crimes which are ostensibly punishable by death are so bizarre as a basis for executing anyone that they have never been enforced to the point of

¹ National Commission on Reform of Federal Criminal Laws, "Working Papers", pp. 1350-1351.

² For a list of condemned men in each state, see Appendix A, A1.

³ For a complete list of capital crimes in the United States, see Appendix B.

⁴ Source: U.S. Department of Justice, Bureau of Prisons, National Prisoner Statistics Bulletin No. 45, "Capital Punishment 1930-1968" (August, 1969) [hereafter NPS], pp. 10-11. See also Appendix C.

⁵ Bedau, "The Death Penalty in America, Review and Forecast," 35 Federal Probation 32, 38 (June, 1971).

execution, but they remain on the statute books. For example, nobody has been executed for forcing a woman to marry,⁶ fetacide,⁷ or arson.⁸ Other death penalty statutes are enforced with amazing selectivity.

The selectivity with which the death penalty is enforced is best exemplified by the case of Eddie Slovik. Theoretically, all 40,000 American soldiers who deserted during World War II could have been executed. In fact, though, only Slovik faced the firing squad—the only American soldier executed for desertion since the Civil War.⁹

But this large number of death penalty statutes represents more than a mere historical curiosity. All such laws represent a moral indictment of our society. Some present a real threat to rare, arbitrary execution. Armed robbery, for example, carries the death penalty in seven states. Twenty-five men have been executed for armed robbery since 1930, the last one in 1962.¹⁰ Today, four men await execution for armed robbery.¹¹

The striking disparity between the existence of a capital statute and the rare enforcement of it in fact is most evident for these arcane crimes which are no longer heralded as valid bases for the death penalty. But as Professor Amsterdam has pointed out to the Committee in his testimony, executions have become "unusual" in a constitutional sense, that is, rare, not simply for the strange crimes I have mentioned, but for murder and rape as well.

Half the states which retain capital punishment on the books have had no executions for over a decade.¹² During the last six years (1965-1971), there were approximately 78,000 murders in this country. During the same period roughly 600 men were sentenced to death for murder. Yet there were only three executions (all for murder) during the last six years.¹³ In other words, in the last six years, we have executed only one two hundred and fiftieth of one percent of all murders.

DETERRENCE

Why is the death penalty retained in so many American jurisdictions? The major argument put forth to keep the death penalty is that it is a deterrent to serious crimes, especially to murder.

If the death penalty were a deterrent to murder, it would follow that those states which have and use the death penalty would have lower murder rates than the states which have abolished the death penalty. But just the opposite is true. In 1970 the death penalty states had an average of 7.7 homicides per 100,000 population, while abolition states had an average murder rate of only 4.6. Furthermore, in 1970 the states which had the three highest murder rates, Georgia (1970 murder rate: 15.3); South Carolina (14.6); and Florida (12.7) were all states which have and use the death penalty. On the other hand, the states with the three lowest murder rates in 1970 were all abolition states: Maine (1.5); Vermont (1.1); and North Dakota (0.5).¹⁴

If the death penalty were a deterrent to murder, the situation would be reversed. That is, the abolition states would have the highest murder rates, and the states which have capital punishment would have the lowest murder rates. This is not the case.

The President's Commission on Law Enforcement and Administration of Justice studied the death penalty with particular reference to its alleged value as a deterrent. The Commission concluded:

"It is impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes. The most complete study on the subject, based on a comparison of homicide rates in capital and non-capital jurisdictions

⁶ Forcing a woman to marry is a capital crime in Arkansas. See Appendix B, B 7.

⁷ Fetacide is a capital crime in Georgia. See Appendix B, B 3.

⁸ Arson is a capital crime in North Carolina. See Appendix B, B 5.

⁹ See Hule, "The Execution of Private Slovik". For a list of military executions since 1930, see Appendix B, B 8.

¹⁰ The last execution for Armed Robbery was in Texas. NPS, pp. 10-11.

¹¹ 2 men are under sentence of death for Armed Robbery in Georgia; 2 are under death sentences for Armed Robbery in Texas. (1 man is currently under a death sentence for Robbery, in Alabama.) See Appendix A, A1.

¹² For a list of the states which have capital punishment, but which have had no executions for a decade or more, see Appendix A, A2.

¹³ NPS, p. 7.

¹⁴ Source: "Crime in the United States, Uniform Crime Reports, 1970", U.S. Department of Justice, F.B.I. (1971) [hereafter UCR], pp. 72-81. For a list of all 50 states, in descending order of homicide rates, see Appendix D.

concluded that *there is no discernible correlation between the availability of the death penalty and the homicide rate*. This study also revealed that there was no significant difference between the two kinds of States in the safety of policemen. Another study of 27 states indicated that the availability of the death sentence had no effect on the rate of assaults and murders of prison guards." (Emphasis added)¹⁵

The Commission's conclusions are valid. The British Royal Commission on Capital Punishment, which studied the death penalty from 1949 to 1953 made the following statement with regard to deterrence:

"... We agree with Professor Sellin that the only conclusion which can be drawn from the figures is that there is no clear evidence of any influence of the death penalty on the homicide rates of those States [neighboring abolition and death penalty states, studied by Sellin] and that, whether the death penalty is used or not and 'whether executions are frequent or not, both death penalty States and abolition States show rates which suggest that these rates are conditioned by other factors than the death penalty.'"

"... The general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall."¹⁶

The conclusions reached by the President's Commission on Law Enforcement and Administration of Justice, and the British Royal Commission on Capital Punishment, on the purported value of the death penalty as a deterrent are typical. Some others are set out below:

1. Capital punishment does not act as an effective deterrent to murder.¹⁷
2. Capital punishment is ineffective in deterring murder.¹⁸
3. The evidence indicates that the death penalty for murder has no discernible effects in the United States.¹⁹
4. The use or non-use of capital punishment has no effect on the number of murders committed within a state or the nation.²⁰
5. Capital punishment has had no appreciable influence on the murder rate in the states which have been investigated.²¹
6. Statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value.²²
7. The capital punishment controversy has produced the most reliable information on the general deterrent effect of a criminal sanction. It now seems established and accepted that the death penalty makes no difference to the homicide rate.²³
8. The death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes.²⁴
9. The studies suggest no discernible relationship between the presence of the death penalty and homicide rates.²⁵
10. In jurisdictions which abolish the death penalty, abolition has no influence on the rate of criminal homicide.²⁶
11. Jurisdictions which reintroduce the death penalty after having abolished it do not show a decreased rate of criminal homicide after reintroduction.²⁷

¹⁵ "The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice" (1967), p. 143.

¹⁶ Royal Commission on Capital Punishment, 1949-1953, Report (1953), p. 23.

¹⁷ Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions," 1967 Wisconsin Law Review 703, 706 (1967).

¹⁸ Doleschal, "The Deterrent Effect of Legal Punishment: A Review of Literature," 1 Information Review on Crime and Delinquency (No. 7) 7 (1969).

¹⁹ Reckless, "The Use of the Death Penalty—A Factual Statement," 15 Crime and Delinquency 43, 52 (1969).

²⁰ Lunden, "The Death Penalty" (1960).

²¹ Andenaes, "Does Punishment Deter Crime?" 11 Criminal Law Quarterly 76, 83 (1968).

²² Schwessler, "The Deterrent Influence of the Death Penalty," 284 The Annals 54, 62 (1968).

²³ Morris and Zimring, "Deterrence and Corrections," 381 The Annals 137, 143 (1969).

²⁴ Sellin, "The Death Penalty," Appendix to the Model Penal Code, American Law Institute (1959) (hereafter Sellin (1959)) p. 63.

²⁵ Zimring, "Perspectives on Deterrence" (National Institute of Mental Health, (January 1971)) p. 17.

²⁶ Sellin (1959) 34-38; Sellin (1967), 122-124; Samuelson, "Why Was Capital Punishment Restored in Delaware?" 60 Journal of Criminal Law, Criminology and Police Science 148, 150-151 (1969).

²⁷ Sellin (1959), 34-38. Sellin (1967) 122-124; Samuelson, *supra*, 150-151.

12. Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.²⁸

13. Police officers on duty do not suffer a higher rate of criminal assault and homicide in abolition jurisdictions than in death penalty jurisdictions.²⁹

Far from deterring murder, the continued existence of the death penalty lulls us into the mistaken belief that we are actually "doing something" about murder. In fact, we are doing virtually nothing about it. We have been killing murderers for eons—but the murders continue. The time has come for us to realize that we cannot stop killing with more killing.

I have appended to my remarks a portion of the Washington Research Project's "The Case Against Capital Punishment," dealing with deterrence.³⁰

WORLDWIDE ABOLITION

I believe that we are, as a nation, to be judged by the company we keep. As far as the death penalty is concerned, we are in bad company. For example, only four nations in the world punish rape with death: Nationalist China; the Republic of South Africa; Malawi; and the United States of America.

Among the Western European nations outside the Soviet bloc, only France, Spain, and Greece still prescribe the death penalty for murder and other peace-time crimes, (and France may soon abolish capital punishment.) In the Western Hemisphere, this nation stands virtually alone in keeping the death penalty. Capital punishment for murder, rape and kidnapping has been almost totally abandoned in the Anglo-American world—except for the United States.³¹

THE DEATH PENALTY AND THE ADMINISTRATION OF JUSTICE³²

The existence of the death penalty has an indelible and harmful effect on the administration of justice. We might do well to recognize that in 1966 Queen Elizabeth issued a royal pardon to Timothy John Evans, who was hanged in 1950 for a crime he did not commit.³³ I hope that the death penalty will be abolished in the United States before we are reduced, by the execution of a man later proven innocent, to the ultimate absurdity: a posthumous pardon.

But the effect of the death penalty on the administration of justice is by no means limited to the problem of executing innocent people. One obvious problem is delay. The length of time spent on death row has nearly doubled in the last ten years. At last report, the mean elapsed time spent on death row was 32.6 months—nearly three years.³⁴ There is every reason to believe that this figure will continue to rise. During these months and years on death row men under sentence of death appeal to the state courts, to the federal courts, back to the state courts, to the governor and back to the courts again. The litigation is, in many cases, endless. We can only guess at what effect these lengthy appeals have on the judicial system.³⁵

Another major effect which the existence of capital punishment has on the administration of justice is the clogging of the courts, especially the federal courts. Over one hundred petitions for writs of certiorari are now pending in the Supreme Court of the United States in capital cases. The dockets of the Courts of Appeal and the United States District Courts are likewise overcrowded with death penalty cases.

CONCLUSION

Discussing the problem of murder, J. Edgar Hoover, a supporter of the death penalty, stated that:

²⁸ Massachusetts Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases, Report and Recommendations, 21-22 (1958); Sellin (1967), 154-160; Sellin, "Homicides and Assaults in American Prisons, 1964," 31 Acta Crim. et Med. Leg. Jap. 139 (1965).

²⁹ Sellin, "Does the Death Penalty Protect Municipal Police?" in Bedau, "The Death Penalty in America (1967)," 284-301; Campion, "Does the Death Penalty Protect the State Police?" in Bedau, 301-315.

³⁰ See Appendix E.

³¹ For a list of nations and states which have abolished the death penalty, see Appendix F.

³² See the attached excerpt from "The Case Against Capital Punishment" dealing with the death penalty and the administration of criminal law, Appendix G.

³³ See Kennedy, "Ten Rillington Place".

³⁴ NPS, p. 12.

³⁵ See, e.g., *U.S. ex rel. Townsend v. Twomey*, 322 F. Supp. 158, 160, (N.D. Ill., E.D. 1971).

“ . . . police are powerless to prevent a large number of these crimes, which is made readily apparent from the circumstances or motives which surround criminal homicide. The significant fact emerges that most murders are committed by relatives of the victim or persons acquainted with the victim. It follows therefore, that *criminal homicide is, to a major extent, a national problem beyond police prevention.*” (Emphasis added.)³⁶

I agree.

I hope that the investigation of the administration of the death penalty which the Hart-Celler Act establishes will enable us to look at the problem of criminal homicide dispassionately. We must look beyond mere revenge in structuring our legal system.

³⁶ UCR, p. 9.



APPENDIX A

PEOPLE UNDER SENTENCE OF DEATH AS OF MAR. 14, 1972

State	Total	Murder	Rape	Other	Year of last execution	Year of abolition	Total executions, 1930-70
Alabama	26	20	5	² 1	1965		135
Alaska ¹						1957	
Arizona	20	20			1963		38
Arkansas	1	1			1964		118
California					1967	1972	292
Colorado	2	2			1967		47
Connecticut	3	3			1960		21
Delaware	3	3			1946		12
District of Columbia	2	2			1957		40
Florida	92	³ 68	24		1964		170
Georgia	40	26	12	⁴ 2	1964		366
Hawaii ¹						1957	
Idaho	0				1957		3
Illinois	28	28			1962		90
Indiana	8	8			1961		41
Iowa ¹					1962	1965	18
Kansas	2	2			1965		15
Kentucky	20	20			1962		103
Louisiana	43	31	12		1961		133
Maine ¹					1885	1887	
Maryland	23	18	5		1961		68
Massachusetts	16	16			1947		27
Michigan ¹						1847	
Minnesota ¹						1911	
Mississippi	9	9			1964		154
Missouri	17	17			1965		62
Montana	0				1943		6
Nebraska	2	2			1959		4
Nevada	8	8			1961		29
New Hampshire	2	2			1939		1
New Jersey					1963	1972	74
New Mexico ⁵					1960	1969	8
New York ⁵	3	3			1963	1965	329
North Carolina	11	9	2		1961		263
North Dakota ^{1,6}					1905	1915	
Ohio	56	56			1963		172
Oklahoma	17	17			1966		60
Oregon					1962	1964	19
Pennsylvania	25	25			1962		152
Rhode Island ^{1,6}						1852	
South Carolina	12	11	1		1962		162
South Dakota	0				1947		1
Tennessee	17	12	5		1960		93
Texas	50	39	9	⁴ 2	1964		297
Utah	5	5			1960		13
Vermont ^{1,6}					1954	1965	4
Virginia	9	7	2		1962		92
Washington	10	10			1963		47
West Virginia ¹					1959	1965	40
Wisconsin ¹						1853	
Wyoming	0				1965		7
Federal	0				1963		33
Total	582	500	77	5			3,859

¹ Abolition States.

² Robbery.

³ Indicates number of women.

⁴ Armed robbery.

⁵ New Mexico keeps the death penalty for killing an on-duty policeman or prison guard, and multiple murder. New York keeps it for killing an on-duty peace officer, and killing by a life-term prisoner.

⁶ Death penalty retained for a limited number of crimes, such as treason and piracy.

Source: Citizens Against Legalized Murder, Inc.

States which have capital punishment, but which have had no executions in 10 years or more

State:	<i>Year of last execution</i>	State—Continued	<i>Year of last execution</i>
Connecticut -----	1960	Nebraska -----	1959
Delaware -----	1946	Nevada -----	1961
District of Columbia -----	1957	New Hampshire -----	1939
Idaho -----	1957	New Mexico -----	1960
Indiana -----	1961	North Carolina -----	1961
Louisiana -----	1961	South Dakota -----	1947
Maryland -----	1961	Tennessee -----	1960
Massachusetts -----	1947	Utah -----	1960
Montana -----	1943		

Source: U.S. Department of Justice, Bureau of Prisons, National Prisoner Statistics Bulletin No. 45 "Capital Punishment 1930-1968" (August, 1969), pp. 8-9.

APPENDIX B

CAPITAL CRIMES IN THE UNITED STATES

A. FEDERAL CRIMES ¹

Murder; rape; presidential and vice-presidential assassination; wrecking train, resulting in death; mailing injurious article, causing death; destruction of aircraft or motor vehicle carrier facilities, resulting in death; certain explosive offenses, resulting in death; murder of officers and employees of the Federal government; kidnapping if victim is not released unharmed; bank robbery accompanied by death or kidnapping; aircraft piracy, including attempts; rape or murder on an aircraft; gathering or delivering defense information to aid a foreign government; treason.

B. UNIFORM CODE OF MILITARY JUSTICE ²

Murder; rape; espionage; aiding the enemy; mutiny or sedition; desertion; misbehavior before the enemy; assaulting or willfully disobeying a superior commissioned officer; improper use of a countersign; misbehavior of a sentinel.

I. Crimes resulting in death

<i>Crime</i>	<i>Jurisdiction</i>
Murder -----	U.S., U.C.M.J., Ala., Ariz., Ark., Col., Conn., Del., D.C., Fla., Ga., Ida., Ill., Ind., Kan., Ky., La., Md., Mass., Miss., Mo., Mont., Neb., Nev., N.H., N.C., Ohio, Okla., Pa., S.C., S.D., Tenn., Tex., Utah, Va., Wash., Wyo.
Killing with a concealed weapon -----	Alabama
Killing by stabbing -----	South Carolina
Second first degree murder -----	Vermont
Murder aboard aircraft -----	United States
Murder of officers and employees of the U.S. -----	United States
Murder of police officer -----	N.M., N.Y., Ohio, Vt.
Murder by life term prisoner -----	Ala., N.Y., R.I.
Convict killing guard -----	Ohio
Murder of prison guard -----	New Mexico, Vermont
Murder by prisoner serving a life sentence for first degree murder -----	North Dakota

¹ Since 1930 the Federal Government has carried out only thirty-three (33) executions—an average of less than one per year. The last Federal execution was in 1963—nearly a decade ago. 15 of these executions were for murder; 6 were for kidnapping. (Under the Federal kidnapping statute, the death penalty provision of which was ruled unconstitutional by the U.S. Supreme Court in *United States v. Jackson*, 390 U.S. 570 (1968), kidnapping is a capital crime only if the victim is not released unharmed. In 5 of the 6 cases, the victims were killed by the kidnapers); 6 were executed for sabotage. (All in the District of Columbia in 1942); 2 for rape on a Federal reservation; 2 for bank robbery with murder; and 2 for conspiracy to commit espionage.

Source: U.S. Department of Justice, Bureau of Prisons, National Prisoner Statistics Bulletin No. 45, "Capital Punishment 1930-1968" (August, 1969) p. 29.

² Since 1930, the U.S. Army (including the Air Force) has carried out 160 executions; 148 from 1942-1950, three each in 1954, 1955, and 1957 and one each in 1958, 1959 and 1961. Of the total, 106 were for murder, (including 21 involving rape), 53 were for rape, and one was for desertion. (See note 9, *supra*.) The U.S. Navy has had no executions since 1849.

NOTE: Some virtually identical statutes, such as "kidnapping if victim is harmed" and "kidnapping if victim is not released unharmed" have been grouped together.

Death penalty statutes from California and New Jersey have not been included in this list, because the California and New Jersey Supreme Courts have struck down their respective states' death penalty statutes.

I. Crimes resulting in death—Continued

<i>Crime</i>	<i>Jurisdiction</i>
Life prisoner killing any person while attempting to escape.....	Nevada
Killing while attempting to escape prison or commit rape, sodomy, mayhem, or robbery.....	Maryland
Killing in a duel.....	Ala., Ark., Fla., Ind., Miss., Nev., N.C., S.C., Utah, Wyo.
Lynching	Ala., Ky., Pa., S.C., Tex.
Mob lynching causing death.....	Indiana
Presidential and vice-presidential assassination..	United States
Killing President or presidential successor.....	Ohio
Explosive offenses resulting in death.....	United States
Destruction of aircraft or motor vehicle carrier facilities resulting in death.....	United States
Mailing injurious article causing death.....	United States
Throwing bombs damaging property where death results	Florida
Killing during advocacy of criminal syndicalism	Kentucky
Causing death during commission of criminal anarchy	Colorado
Police officer causing death by exceeding bounds of moderation.....	Arkansas
Unnecessary killing while resisting a felony.....	Arkansas
Aiding suicide.....	Arkansas
Captain of boat causing death by deliberate ramming into craft.....	Arkansas
Causing death after boarding train with intent to commit a felony.....	Wyoming
Causing death by train wrecking.....	U.S., Conn., Fla., Ida., Ind., Ky., Md., Mont., Ohio, Pa., Wash., Wyo.
Kidnapping where victim is not released alive before trial.....	South Carolina
Killing a kidnapped person by designated means..	Ohio
Killing governor, or lieutenant-governor.....	Ohio
Perjury in a capital case resulting in the death of an innocent person.....	Ariz., Col., Ida., Mont., Nev.
Perjury in a capital case resulting in death of the accused.....	Georgia, Missouri, Texas
Causing death by arson.....	Ark., Conn., Ind., Md.
First degree arson with loss of life.....	Alabama
Second degree arson with loss of life.....	Alabama
Killing committed in burning of barn, tobacco-house, stable, or warehouse.....	Maryland
Causing death of woman by abortion.....	Colorado, Kentucky, Missis-sippi
Causing death of woman during pretended abortion	Colorado
Fetacide	Georgia
Causing death by obstructing road.....	Kentucky
Bank robbery accompanied by death.....	United States
Second capital felony after time for due deliberation after the first.....	New Mexico

II. Rape and related offenses

Rape	U.S., U.C.M.J., Ala., Ark., Fla., Ga., Ky., Md., Miss., Mo., N.C., Okla., S.C., Tenn., Tex., Va.
Rape aboard aircraft.....	United States
Rape with substantial bodily harm.....	Nevada
Aggravated rape.....	Louisiana
Carnal knowledge.....	Ala., S.C., Tenn., Tex., Va.

II. Rape and related offenses—Continued

<i>Crime</i>	<i>Jurisdiction</i>
Carnal knowledge if victim is under ten.....	Florida
Carnal knowledge of child under 14.....	Maryland
Carnal knowledge of woman intentionally drugged	Arkansas
Attempted rape.....	Mississippi, Virginia

III. Robbery, and related offenses

Robbery	Alabama
Armed Robbery.....	Ga., Ky., Miss., Mo., Okla., Tenn., Tex.
Train robbery.....	Alabama, Arizona
Aggravated robbery.....	Virginia
Armed bank robbery.....	Virginia
Burglary	Alabama, North Carolina, Vir- ginia
Bank robbery accompanied by kidnapping.....	United States

IV. Kidnapping and related offenses

Kidnapping	Maryland, Mississippi
Child stealing.....	Wyoming
Aggravated kidnapping.....	Louisiana
Kidnapping for ransom.....	Ala., Ark., Fla., Ga., Ill., Ind., Ky., Mo., Mont., Okla., Tenn., Tex., Utah, Va., Wash.
Kidnapping if victim is not released unharmed..	U.S., Ark., Col., Kans., Nebr., S.D.
Kidnapping for ransom if victim is harmed.....	Ariz., Idaho, Nev., Wyo.
Kidnapping for robbery if victim is harmed.....	Wyoming
Kidnapping or maiming for extortion if victim is not released unharmed.....	Ohio
Kidnapping if victim is threatened with injury..	Nebraska
Kidnapping for immoral purposes.....	Virginia
Attempted kidnapping for ransom.....	Alabama
Conspiracy to kidnap.....	South Carolina

V. Arson and related offenses

Arson	North Carolina
Arson of prison by convict.....	Arkansas
First degree arson with maiming.....	Alabama
Second degree arson with maiming.....	Alabama

VI. Bombing, and other offenses related to explosives

Bombing	Missouri
Bombing in or near inhabited area.....	Mississippi
Throwing bombs or firing machine gun in public	Florida
Dynamiting where threat to human life.....	Nevada
Dynamiting under or near inhabited area.....	Alabama

VII. Assault, and related offenses

Assault on a prison guard.....	Alabama
Armed assault by a life term prisoner.....	Arizona, Utah
Armed assault by escaped life prisoner.....	Colorado
Assault to rob, or with intent to rob.....	Kentucky
Assault with intent to kill by life term prisoner	Pennsylvania
Assault with deadly weapon while in disguise...	Tennessee
Assault with intent to rape.....	Maryland, South Carolina
Assault with intent to rape, accompanied by acts of violence and bodily harm.....	Nevada
Assaulting or wilfully disobeying a superior com- missioned officer.....	U.C.M.J.

VIII. Miscellaneous offenses

<i>Crime</i>	<i>Jurisdiction</i>
Treason -----	U.S., Ala., Ariz., Ark., Ga., Ill., Ind., Kan., La., Miss., Mo., Mont., Nev., N.D., Tex., Va., Wash.
Machine gun used in perpetration of crime of violence -----	Virginia
Instigation of a minor by a relative or spouse to commit a capital crime -----	Texas
Third conviction for crimes optionally punish- able by death -----	South Carolina
Reckless shooting into train or motor vehicle ---	Kentucky
Forcing woman to marry -----	Arkansas
Desertion -----	U.C.M.J.
Mutiny or sedition -----	U.C.M.J.
Misbehavior of sentinel -----	U.C.M.J.
Misbehavior before the enemy -----	U.C.M.J.
Improper use of countersign -----	U.C.M.J.
Aircraft piracy, including attempts -----	U.S.
Advising fetacide to a woman -----	Georgia
Gathering or delivery defense, information to aid a foreign government -----	United States
Espionage -----	U.C.M.J.
Sabotage -----	Alabama, Florida
Aiding the enemy -----	U.C.M.J.
Giving information or aiding the enemy in time of war -----	South Carolina

APPENDIX C

PERSONS EXECUTED IN THE UNITED STATES 1930-71

C.A.L.M. NEWSLETTER, VOL IV, NO. 2 DEC. 1970, CITIZENS AGAINST LEGALIZED MURDER,
P.O. BOX 24 NEW YORK CITY 10024

RACE

The table below show the correlation between executions and race. Figures indicate total number executed, and percentages. Source: National Prisoner Statistics Bulletin No. 45, August 1969, CAPITAL PUNISHMENT.

Offense	Total	Black	White	Other
Murder.....	3,334	1,630	1,664	140
Percent.....	(100)	(48.9)	(49.9)	(1.2)
Rape.....	455	405	48	2
Percent.....	(100)	(89)	(10.5)	(.4)
Armed robbery ¹	25	19	6	0
Percent.....	(100)	(76)	(24)	(0)
Kidnapping.....	20	0	20	0
Percent.....	(100)	(0)	(100)	(0)
Burglary.....	11	11	0	0
Percent.....	(100)	(100)	(0)	(0)
Sabotage.....	6	0	6	0
Percent.....	(100)	(0)	(100)	(0)
Aggravated assault by a life-term prisoner.....	6	1	5	0
Percent.....	(100)	(16.5)	(83.5)	(0)
Espionage.....	2	0	2	0
Percent.....	(100)	(0)	(100)	(0)
Total.....	3,859	2,066	1,751	42
Percent.....	(100)	(53.5)	(45.4)	(1.1)

¹ 17 American Indians, 13 Filipinos, 8 Chinese, 2 Japanese.

² American Indians.

³ Includes 2 Federal executions for bank robbery with homicide.

APPENDIX D

STATES IN DESCENDING ORDER OF MURDER RATE

State	Murder rate per 100,000 population, 1970	Total executions for murder 1930-70	State	Murder rate per 100,000 population, 1970	Total executions for murder 1930-70
Georgia.....	15.3	299	West Virginia ¹	6.2	36
South Carolina.....	14.6	120	Oklahoma.....	5.9	54
Florida.....	12.7	133	New Jersey.....	5.7	74
Alaska ¹	12.2	0	Wyoming.....	5.7	7
Alabama.....	11.7	106	Pennsylvania.....	5.3	152
Louisiana.....	11.7	116	Indiana.....	4.8	41
Texas.....	11.6	210	Kansas.....	4.8	15
Mississippi.....	11.5	130	Idaho.....	4.6	3
Kentucky.....	11.1	88	Oregon ¹	4.6	19
North Carolina.....	11.1	207	South Dakota.....	3.8	1
Missouri.....	10.7	52	Hawaii ¹	3.6	0
Arkansas.....	10.1	99	Connecticut.....	3.5	21
Illinois.....	9.6	90	Massachusetts.....	3.5	27
Arizona.....	9.5	38	Washington.....	3.5	46
New Mexico ¹	9.4	8	Utah.....	3.4	13
Maryland.....	9.2	44	Montana.....	3.2	6
Michigan ¹	8.9	0	Rhode Island ¹	3.2	0
Nevada.....	8.8	29	Nebraska.....	3.0	4
Tennessee.....	8.8	66	Minnesota ¹	2.0	0
Virginia.....	8.4	71	New Hampshire.....	2.0	1
New York ¹	7.9	327	Wisconsin ¹	2.0	0
California.....	6.9	280	Iowa ¹	1.9	18
Delaware.....	6.9	8	Maine ¹	1.5	0
Ohio.....	6.6	172	Vermont ¹	1.3	4
Colorado.....	6.2	8	North Dakota ¹5	0

¹ Abolition States.

Sources: Citizens Against Legalized Murder, Inc., Newsletter Vol. V, No. 2, November 1971. Crime in the United States. Uniform Crime Reports—1970, U.S. Department of Justice, pp. 72-81; U.S. Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, Capital Punishment, 1930-68.

APPENDIX E

Appendix E of Mr. Lyons' submission is found at pages 281 through 288 of the hearings. (See "Deterrence," pages 11 through 18 of the Case Against Capital Punishment published by the Washington Research Project.)

APPENDIX F

WORLD-WIDE ABOLITION OF THE DEATH PENALTY

WORLD-WIDE ABOLITION

This table lists abolitionist jurisdictions outside the U.S. by year of *de jure* abolition except for Lichtenstein, Luxembourg, Nicaragua, and Surinam, for which the last execution year is given to mark the beginning of *de facto* abolition. Nine of the listed jurisdictions retain execution as the penalty for certain extraordinary civil offenses (the 4 Australian jurisdictions, Canada, Israel, Nepal, New Zealand, and United Kingdom); 8 permit the death penalty in wartime or under military law (Brazil, Denmark, Finland, Italy, Netherlands, Norway, Sweden, and Switzerland); and two executed Nazi collaborators after World War II (Netherlands and Norway).

Argentina -----	1922	Luxembourg -----	³ 1821
Australia (Federal) -----	1945	Mexico (Federal) -----	1931
New South Wales -----	1955	29 of 32 States -----	1931-70
Queensland -----	1922	Monaco -----	1962
Tasmania -----	1968	Mozambique -----	1867
Austria -----	1968	Nepal -----	1950
Belgium -----	¹ 1863	Netherlands -----	1886
Bolivia -----	1961	Antilles -----	1957
Brazil -----	1946	New Zealand -----	1961
Canada -----	² 1967	Nicaragua -----	³ 1892
Colombia -----	1910	Norway -----	1905
Costa Rica -----	1880	Panama -----	1915
Denmark -----	1930	Portugal -----	1867
Dominican Republic -----	1924	San Marino -----	1848
Ecuador -----	1897	Surinam -----	³ 1927
Finland -----	1949	Sweden -----	1921
Germany, West -----	1949	Switzerland -----	1942
Greenland -----	1954	United Kingdom	
Honduras -----	1957	Great Britain -----	1965
Iceland -----	1940	Northern Ireland -----	1966
India, Travancore -----	1944	Uruguay -----	1907
Israel -----	1954	Vatican City State -----	1969
Italy -----	1944	Venezuela -----	1863
Lichtenstein -----	³ 1798		

¹ Excludes one soldier executed in 1918.

² Statute abolishing capital punishment for murder expires after a 5-year period (beginning in 1967) if not renewed.

³ *De facto* only; date is last execution.

⁴ Excludes one.

ABOLITION STATES

This table lists abolition states, with date of *de jure* abolition.

Alaska -----	1957	North Dakota -----	⁴ 1915
Hawaii -----	1957	Oregon -----	1964
Iowa -----	1965	Puerto Rico -----	1929
Maine -----	1887	Rhode Island -----	³ 1852
Michigan -----	¹ 1847	Vermont -----	³ 1965
Minnesota -----	1911	Virgin Islands -----	1957
New Mexico -----	² 1969	West Virginia -----	1965
New York -----	³ 1965	Wisconsin -----	1853

¹ Death penalty retained for treason until 1963.

² Death penalty retained for murder of police officer or prison guard, or for commission of second unrelated murder.

³ Death penalty retained for murder of police officer and for any homicide by life term prisoner.

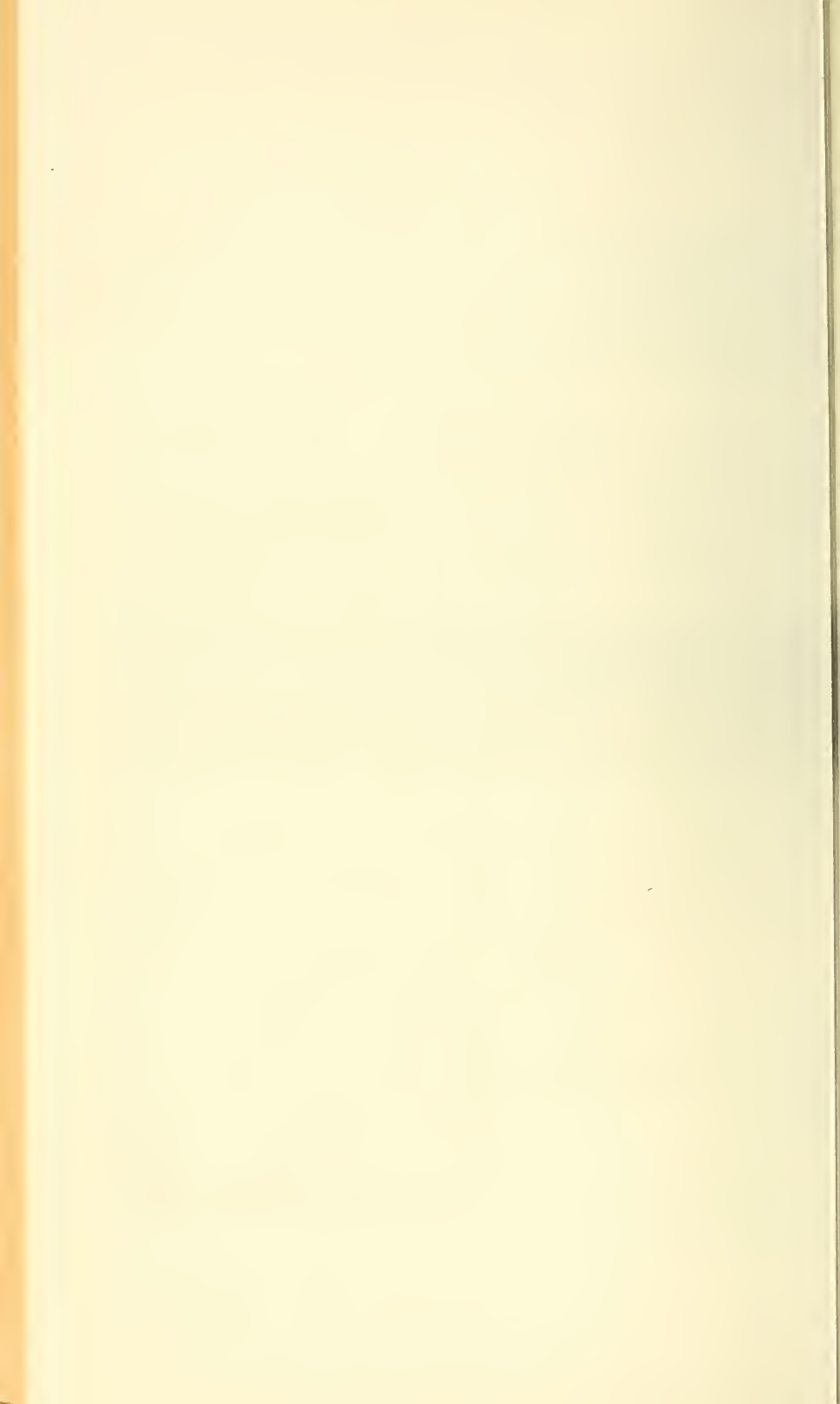
⁴ Death penalty retained for treason and for murder by life term prisoner incarcerated for murder.

⁵ Death penalty retained for murder by life term prisoner.

APPENDIX G

Appendix G of Mr. Lyons' submission is found at pages 323 through 330 of the hearings. (See "The Death Penalty and the Administration of Criminal Justice," pages 53 through 60 of the Case Against Capital Punishment published by the Washington Research Project.)

(269)



The Case Against Capital Punishment



**THE CASE
AGAINST
CAPITAL PUNISHMENT**

By

The Washington Research Project

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(272)

TABLE OF CONTENTS

	<i>Page</i>
INTRODUCTION	5
CHAPTER I	
THE DEATH PENALTY TODAY	7
CHAPTER II	
DETERRENCE	11
A. Statistical Evidence	11
B. Personal Experience	14
C. The Psychology of Deterrence	16
D. Conclusion	18
CHAPTER III	
RESTRAINT AND REFORM	19
A. Murderers on Parole	19
B. Murderers in Prison	21
C. Rehabilitation	21
D. Conclusion	23
CHAPTER IV	
RETRIBUTION	25
CHAPTER V	
THE BARBARITY OF CAPITAL PUNISHMENT	29
A. The Psychological Effect	30
B. The Physical Effect	34
C. The Witness	37
CHAPTER VI	
THE FINALITY OF CAPITAL PUNISHMENT	41
CHAPTER VII	
THE ARBITRARY AND DISCRIMINATORY	
APPLICATION OF THE DEATH PENALTY	47
A. The Lottery	47
B. The "Privilege of the Poor"	50
C. Racial Discrimination	51
D. Conclusion	52
CHAPTER VIII	
THE DEATH PENALTY AND THE	
ADMINISTRATION OF CRIMINAL JUSTICE	53
A. Sensationalism	53
B. Hard Cases Make Bad Law	54
C. Delay in the Courts	57
D. Conclusion	60
CHAPTER IX	
THE FINANCIAL COSTS OF CAPITAL PUNISHMENT	61
Footnotes	63

INTRODUCTION

The long controversy over capital punishment in this country has entered a new phase. Until recently, the question was whether a familiar practice within the criminal justice system—capital punishment—should be continued. Today the situation has changed. By August of this year, the nation will have gone four full years without a single execution. Accordingly, the question now is whether capital punishment should be reinstated.

The question is acute. For although the executions have stopped, most of the laws authorizing capital punishment remain on the books, and the courts continue to pronounce sentences of death. In July of 1971, there were about 650 prisoners on the Death Rows of American penitentiaries—a number unprecedented in this country's history. Many of these prisoners have had their executions postponed by stays or reprieves granted pending the outcome of cases involving challenges to the constitutionality of the procedures by which the death penalty is normally imposed, challenges just recently rejected by the Supreme Court. The Court has agreed, however, for the first time in history, to rule on the constitutionality of the death penalty itself, and that agreement may have the effect of extending the moratorium on execution of prisoners on Death Row.

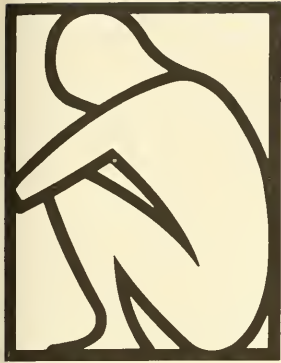
It may be that the Supreme Court will one day hold that the Constitution forbids the death penalty as cruel and unusual punishment. In the meantime, the people and their elected representatives must determine whether the grim machinery of death should again be set in motion. This document attempts to state, concisely and accurately, what we believe to be the overwhelming evidence and arguments supporting the permanent abolition of capital punishment.

Chapter I describes the current status of capital punishment, both legal and factual, in this country, with brief reference to the

situation in other countries. Chapters II through IV examine effects of capital punishment in light of the recognized purposes of the criminal law—deterrence, restraint, rehabilitation and retribution. Chapters V through IX state the particular objections to capital punishment—its unnecessary cruelty and brutalizing effect; its arbitrary, sporadic and discriminatory administration; its irrevocable character; and its destructive effect on the criminal justice system and its high financial cost.

We have tried to cover most of the issues involved in the debate over capital punishment. We have not included theological arguments based upon the Bible or the scriptures of other religions, feeling that these are matters better left to professional theologians. We have also omitted arguments against capital punishment based upon belief in the absolute sanctity of life. Our arguments proceed within the moral framework reflected in law—that taking the life of a criminal may be justified if it tended to preserve the lives of innocent persons.

In our view, an underlying presumption against institutional killing and the present factual situation—the *de facto* suspension of capital punishment—place a heavy burden of demonstrating its utility upon those who would restore the death penalty. This burden cannot be met.



CHAPTER I

THE DEATH PENALTY TODAY

The unmistakable trend of history is toward the abolition of capital punishment. Once in use everywhere, and for a wide variety of crimes, it is today widely abolished in law and even more widely abandoned in practice. Most of the developed nations of the western world have abolished the death penalty, including Great Britain, West Germany, Italy, the Netherlands, all the Scandinavian countries, Switzerland, Austria and Portugal. Belgium retains the death penalty on the statute books, but it has not been used since 1863. Capital punishment has been abolished either formally or in practice in many Latin American countries, including Argentina, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, Honduras, most of the federal states of Mexico, Nicaragua, Panama, Uruguay and Venezuela. Israel, Turkey and two of the Australian states do not use it. In Canada, the death penalty has been suspended for a five year period, except for the killing of policemen or prison guards.¹

In the few developed countries which retain capital punishment, executions have become very rare. Indeed two of them—Spain and the Soviet Union—have in the past year commuted death sentences under the pressure of world opinion.

In many European countries, formal abolition was preceded by a period in which no executions were carried out, although the law

still authorized capital punishment. Thus in the Netherlands, the last execution was in 1860, but legal abolition did not come until 1870. In Norway the comparable dates were 1876 and 1905, in Sweden 1910 and 1921, and in Italy 1876 and 1890.² It may be that the capital punishment jurisdictions in this country are now in the midst of this kind of gradual development toward abolition.

The abolition movement in the United States dates back to the 18th century. In 1846, Michigan became the first jurisdiction in the English-speaking world to abolish the death penalty; Rhode Island and Wisconsin followed a few years later. A few more states abandoned capital punishment during the late 19th century and several more shortly before the First World War, although most of the latter group later restored it. During the 1960's, six states eliminated the death penalty as the punishment for first degree murder.³

Presently, nine of the 50 states, plus two federal territories, have no death penalty at all, while another five have abolished it as the general penalty for first degree murder, although retaining it for a few relatively rare crimes.

TABLE I
ABOLITION JURISDICTIONS IN U.S.
(With Abolition Dates)

Michigan (1846)a	Puerto Rico (1929)	Iowa (1965)
Rhode Island (1852)b	Alaska (1957)	West Virginia (1965)
Wisconsin (1853)	Hawaii (1957)	New York (1965)d
Maine (1887)	Virgin Islands (1957)	Vermont (1965)e
Minnesota (1911)	Oregon (1964)	New Mexico (1969)f
North Dakota (1915)c		

a—Death penalty retained for treason until 1963.

b—Death penalty restored in 1882 for murder by life term prisoner.

c—Death penalty retained for murder by life term prisoner.

d—Death penalty retained for murder of police officer on duty, and for murder by life term prisoner.

e—Death penalty retained for murder of police officer or prison guard on duty, kidnapping for ransom, and killing or destruction of vital property by a group during wartime.

f—Death penalty retained for murder of policeman or prison guard on duty, and for commission of second capital felony.

The remaining 36 states, the District of Columbia and the federal government retain the death penalty for first degree murder.

These jurisdictions also provide capital punishment for a variety of other crimes.⁴ Since 1930, however, there have been executions for only six crimes apart from murder: rape, armed robbery, kidnapping, espionage, burglary and assault by a life term prisoner. By far the great bulk of executions in this country have been for murder—3334 of the 3859 reported since 1930. More than 80 per cent of the rest have been for rape.⁵

While a number of states have abolished capital punishment by statute in recent years, the trend against the death penalty in practice has been far more dramatic. A high mark in annual executions was reached in 1935, when 199 defendants were put to death. Since that year, the trend has been steadily downward, and since 1967 there have been no executions in the United States.

TABLE II⁶
EXECUTIONS IN U.S.

1935—199	1955—76	1963—21	1967—2
1940—124	1960—56	1964—15	1968—0
1945—117	1961—42	1965— 7	1969—0
1950— 82	1962—47	1966— 1	1970—0

Several jurisdictions which retain capital punishment on their statute books halted executions much earlier than in 1967.

TABLE III⁷
JURISDICTIONS WITH DEATH PENALTY IN ABEYANCE
BEFORE 1960's

New Hampshire (1939)	Delaware (1949)
Montana (1944)	District of Columbia (1959)
Massachusetts (1947)	Idaho (1959)
South Dakota (1949)	Nebraska (1959)

In addition, Wyoming has had only one execution since 1944, and Indiana, only one since 1955.

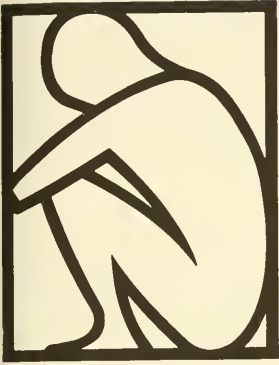
The national moratorium on executions since 1967 has been partly the result of court and executive stays granted in connection with cases challenging the constitutionality of the death penalty or of procedures used in carrying it out. However, before 1967, there was no concerted legal campaign against the death penalty, and the striking decline since 1935, through years marked by rising population and increasing crime rates, must find another explanation. In the case of almost all capital crimes today, the decision whether to impose the death sentence rests with the jury. In addi-

tion, governors or pardon boards in every jurisdiction have the power to commute a death sentence to life imprisonment, or to stay an execution temporarily. Finally, appellate courts have given increasingly strict scrutiny to convictions and sentences in capital cases, often staying executions for years in the process. It is through these mechanisms—largely responsive to public opinion—that the decline and halt in executions in this country have taken place.

While executions have fallen off and finally stopped altogether, courts in capital jurisdictions have continued to pronounce death sentences—at an average of about 100 a year during the 1960's. As a result, unprecedented numbers of condemned men have accumulated on the Death Rows of the nation. On January 1, 1961, there were 219 prisoners under sentence of death. By 1968 the number had climbed to 434, and in July of 1971 it was about 650.

The halt in executions and the subsequent accumulation of condemned men on Death Row are the most dramatic recent trends in capital punishment. Another major development is just beginning to unfold—for the first time, capital punishment is coming under serious constitutional challenge. In two separate cases in the 1960's, the Supreme Court ruled familiar statutes and practices used in capital punishment unconstitutional.⁹ Just recently, the Court narrowly rejected more sweeping procedural challenges which would have invalidated virtually all current sentences of death.¹⁰ At the same time, the legal profession and the courts have begun to confront the fundamental issue whether capital punishment in any form is consistent with the Constitution and its prohibition against cruel and unusual punishment. Already, distinguished legal scholars, including former Supreme Court Justice Arthur Goldberg, have argued that it is not.¹¹ A federal appeals court has held that the death penalty for some kinds of rape is unconstitutional, and the Supreme Court has been asked to review that decision.¹² In June of 1971, the Court agreed to rule on the constitutionality of the death penalty, and lawyers are preparing evidence of the cruelty and barbarity of execution and life on Death Row to present in test cases.

Congress as well as the courts is debating the constitutionality of the death penalty. Bills have been introduced in both houses of Congress—in the House by Chairman Emanuel Celler of the Judiciary Committee, and in the Senate by a member of the Judiciary Committee, Senator Philip A. Hart—which would stay all executions in the nation for two years while Congress studied the constitutional questions involved. Such study could lead to federal legislation abolishing capital punishment nationwide.



CHAPTER II

DETERRENCE

The argument most often urged in support of capital punishment is that it deters capital crimes more effectively than do penalties of imprisonment. Three main kinds of argument are heard on the question of deterrence—statistical arguments from comparative crime rates, arguments from individual incidents and personal experience, and arguments based on assumptions as to the responses of potential murderers. None of them withstand careful examination.

A. STATISTICAL EVIDENCE

Crime statistics show no higher homicide rates in states with capital punishment than in those without.¹ In response to the possibility that figures of this kind may reflect divergent social and cultural factors other than capital punishment, more sophisticated studies have compared homicide rates in contiguous states, where

history, geography, and social and economic conditions are similar. No matter how these figures are arranged and compared, they have consistently led social scientists to the same conclusion: "You cannot tell from . . . the homicide rates alone, in contiguous states, which are abolition and which are retention states; this indicates that capital crimes are dependent upon factors other than the mode of punishment."²

In the best known of these studies, Professor Thorsten Sellin compared homicide rates between 1920 and 1963 in abolition states with the rates in neighboring and similar retention states. He found that on the basis of the rates alone it was "impossible to identify the abolition state" within each group.³ A similar study comparing homicide rates in states recently abolishing the death penalty and neighboring retention states during the 1960's reached the same results.⁴

Michigan became the first state to abolish capital punishment in 1846, and it has never restored the death penalty. Comparisons between Michigan and the bordering retention states of Ohio and Indiana—states with comparable demographic characteristics—have shown no significant differences in homicide rates.⁵

Students of capital punishment have also studied the effect of abolition and reintroduction of the death penalty upon the homicide rate in a single state. If the death penalty has a significant deterrent effect, abolition should produce a rise in homicides apart from the general trend, and reintroduction should produce a decline. After examining statistics from 11 states, Professor Sellin concluded that "there is no evidence that the abolition [of capital punishment] generally causes an increase in criminal homicides, or that its reintroduction is followed by a decline. The explanation of changes in homicide rates must be sought elsewhere."⁶ In Delaware, the most recent state to abolish and then restore capital punishment, the homicide rate was actually lower during the period of abolition than before or after.⁷

Other criminologists have examined the short term deterrent effects of capital punishment. One study compared the number of homicides during short periods before and after several well-publicized executions during the Twenties and Thirties in Philadelphia. It was found that there were significantly more homicides in the period after the executions than before—the opposite of what the

deterrence theory would suggest. Another short term study in Philadelphia tested the hypothesis that the pronouncing of the death sentence, with its attendant publicity, would deter homicides. It found no significant difference in homicide rates for equal periods before and after sentence of death was pronounced in four widely publicized trials during the 1940's."

In Chicago, three capital cases received extensive press coverage during 1962, and two of them resulted in executions in that year. There had been only one execution in the city in the previous 16 years. The publicity surrounding the cases did not affect the homicide rate in the city, which fluctuated according to typical seasonal patterns, independently of the executions.¹⁰

Some retentionists argue that, whether or not the death penalty deters murder in general, it does discourage the killing of policemen. Empirical studies fail to support this theory. The rate of police homicides during the period 1919-1954 was not significantly different for 182 cities in retentionist states (1.3 per 100,000 population) than in 82 comparable cities in states which did not have capital punishment (1.2 per 100,000).¹¹ During the years 1961-63, 140 police officers were killed by criminals or suspects, all but nine of them in retention states. In abolition states, 1.31 officers per 10,000 officers were killed, and 1.32 in the retention states bordering on them.¹² A survey of state police departments revealed that 71 officers had been killed in 18 retention states, while six abolition states reported a total of only six killed. Detailed analysis of the data failed to show any added protection for state police in the death penalty states.¹³

In contrast to the studies we have reviewed, we have found no published study that gives any support to the theory that the use of the death penalty reduces the number of murders. Retentionists frequently argue that there is no way of knowing how many people are deterred by the death penalty since these people do *not* commit murders and hence are not identified. But those deterred by capital punishment should appear—statistically—in the capital crime rates of abolition jurisdictions. According to all the evidence, they simply are not there.

Admittedly, these studies do not *conclusively* prove that the death penalty has no special deterrent effect, because the available crime rates do not distinguish between capital and noncapital homicides, and because of imperfections in the nature of the control

population groups with which homicide rates are compared. But in no area of public policy are social science or statistical studies conclusive of the relevant facts. Social and political decisions must always be made on limited and imperfect information; sound public policy is made on the basis of the weight of the evidence available. In this area, there can be no doubt but that the weight of the evidence is against the claim of deterrent effect. While retentionists ask for *conclusive* proof that the death penalty does not deter, abolitionists in turn need only ask for *any substantial evidence* that it does; none can be provided.

B. PERSONAL EXPERIENCE

Faced by the strong statistical case against the deterrent theory, retentionists, particularly law enforcement officials, sometimes argue from personal experience, often relating anecdotes of criminals who have told police that they modified their criminal activity to avoid the death penalty. For example, the Los Angeles Police Department reported to a California Senate Committee considering the abolition of the death penalty that during the course of one year, 13 robbery suspects had told police that they used unloaded or simulated guns "rather than take a chance on killing someone and getting the gas chamber."¹⁴ And in 1959, newspapers reported that an escaped convict had released hostages at the state line because he feared the death penalty for kidnapping in the neighboring state.¹⁵ In other instances, law enforcement officials have argued that the death penalty has a unique deterrent value, based on their general experience with criminals.

But for every individual account tending to show deterrence, there are many that indicate the contrary. Clinton Duffy, former Warden of San Quentin Prison and a correctional officer for over 30 years, asked thousands of prisoners convicted of homicide or armed robbery whether they had thought of the death penalty before their act. Not one had. Robbers who used unloaded or toy pistols told him they had done so not out of fear of execution, but because they did not want to hurt anyone and only wanted money. When he asked why they told police officers that fear of the death penalty motivated them, they typically responded that it seemed like a good thing to say at the time.¹⁶

Anecdotes illustrating the death penalty's lack of deterrent effect abound in abolitionist literature. Charles Justice, an inmate

in the Ohio State Penitentiary assigned to housekeeping duties in the death house, suggested and designed improvements in the prison electric chair. He was released on parole, and within a few months returned to the penitentiary convicted of murder in the first degree. He died in the electric chair he had helped design.¹⁷ Similarly, an inmate at San Quentin helped install the lethal gas chamber there. After his release, he killed three people, and was sentenced to death.¹⁸ Finally, a policeman in Delaware **who** had forcefully argued for restoration of capital punishment in **that** State on the ground of its deterrent value killed his wife just ten days after the penalty was restored in 1961.¹⁹

Moreover, if reports of individual cases are to be considered, it should be noted that there are numerous reports of psychotic individuals who are apparently driven to kill by the existence of the death penalty itself. Many murderers kill themselves after their crime; a few apparently wish to die at the hands of the state. Dr. Louis West, Professor of Psychiatry at the University of Oklahoma, describes several cases:

"Recently an Oklahoma truck driver had parked to have lunch in a Texas roadside cafe. A total stranger—a farmer from nearby—walked through the door and blew him in half with a shotgun. When the police finally disarmed the man and asked why he had done it, he replied, 'I was just tired of living.'

"In 1964 Howard Otis Lowery, a life-term convict in an Oklahoma prison, formally requested a judge to send him to the electric chair after a District Court jury found him sane following a prison escape and a spree of violence. He said that if he could not get the death penalty from the jury he would get it from another, and complained that officials had failed to live up to an agreement to give him death in the electric chair when he pleaded guilty to a previous murder charge in 1961.

"Another murderer, James French, asked for the death penalty after he wantonly killed a motorist who gave him a ride while hitch-hiking through Oklahoma in 1958. However he was 'betrayed' by his Court-appointed attorney who pleaded him guilty and got him a life sentence instead of the requested execution. Three years later French strangled his cell-mate for no obvious reason: a

deliberate, premeditated slaying. He has been convicted three times for that crime, declared legally sane and sentenced to death each time. This sentence he deliberately invites in well-organized, literate epistles to the Courts and in provocative challenges to the jurors. During a psychiatric examination in 1965 French admitted to me that he had seriously attempted suicide several times in the past but 'chickened out' at the last minute, and that a basic motive in his murdering another prisoner was to force the State to deliver the electrocution to which he feels entitled and which he deeply desires.

"Many other examples may be found in which the promise of the death penalty consciously or unconsciously invites violence. Sellin reviewed a number of them. Wertham's analysis of Robert Irwin, who attempted suicide by murder, is a classic. Some who seek execution even borrow somebody else's murder! A few months ago Joseph Shay in Miami admitted that he had falsely confessed to an unsolved murder 'because I wanted to die.'"²⁰

In short, reports of individual incidents can be collected to support each thesis concerning the death penalty—that it deters, that it has no deterrent effect, and that it actually encourages capital crime. Similarly, men with long experience in dealing with criminals have found support for each of these theses in the totality of that experience. Arguments and claims of this sort tend to neutralize each other, and because of their unsystematic character they give little help in settling the basic factual question whether or not the death penalty is an effective deterrent.

C. THE PSYCHOLOGY OF DETERRENCE

Retentionists often discount statistical evidence, and argue that the deterrent effect of the death penalty is obvious as a matter of common-sense psychology—men fear death above all else, hence the threat of death must deter. The argument has appeal at first glance; the ordinary citizen knows he is less likely to exceed the speed limit where the penalty is loss of license than where it is a ten-dollar fine. By the same common sense reasoning, should not some potential murderers be deterred by a possible death penalty?

On closer examination, however, the analogy is unsound. A large percentage of homicides are within families, or result from emo-

tional entanglements, and occur in circumstances suggesting that the killers have been driven beyond their breaking point by hatred or frustration. Another large group of homicides occur between acquaintances as a result of arguments, most of them on the public street — again circumstances which do not suggest deliberation or a weighing of consequences. Alcohol was found to be associated with nearly two-thirds of criminal homicides in one study.²¹

In American law, killings occurring during the commission of a felony are treated as first degree murder, punishable with death in capital punishment jurisdictions, regardless of whether the killing is unpremeditated or even if it is accidental. Many robberies and associated killings which lead to the imposition of the death penalty are committed by addicts who need money to feed their habit and are unlikely to be in a calm, deliberative state. A killing associated with rape is frequently unplanned. This is also true of accidental killings during the commission of other felonies.

Some homicides are simply the senseless murder of strangers. In some cases, such killers are found insane, but under the narrow prevailing definition of legal insanity, many are not. Whether or not they are legally insane, these aimless killers must be sufficiently deranged from normal patterns of thought that the notion of their weighing potential penalties is absurd.

All the kinds of homicide described above may amount to first degree murder as our law defines it, and hence may be punished by death in capital jurisdictions. What studies and statistics exist suggest that killings of this kind make up the bulk of our criminal homicides.²² But in none of them does it seem plausible that the murderer has made any meaningful “decision to kill” at all, much less one which turned on his consideration of the likelihood of being executed after capture, trial and sentence.

Turning from these typical cases to consider the “rational killer” — and we do not know how many of them exist — several considerations make it unlikely that the death penalty would play a large part in his thought. First, since the penalties for murder, whether death or a long prison sentence, are both so severe as to destroy the future of anyone subjected to them, the crime would not be committed by a rational man unless he thought there was little likelihood that he would be caught. For this reason, the difference in deterrent effect between the possibility of execution and a maximum of life imprisonment must be small to the vanishing point.

Second, and perhaps more important, even in a death penalty state, the likelihood of execution after capture is very slight. There is the chance of acquittal at trial. There is the chance that the jury or the judge will exercise the discretion to withhold capital punishment, as they do in the majority of first degree murder cases today. There is the chance of commutation. There is the endless process of post-conviction litigation, which has kept many condemned men alive for more than a decade. Indeed, as we have noted, there have been no executions in the entire country since 1967. This situation, which is unlikely to change drastically, takes away from the death penalty those attributes which criminologists have long agreed give punishment its deterrent power—swiftness and certainty.

Finally, the chief risk of death from crime is not execution, but killing at the hands of a policeman or other citizen during or after the commission of the crime. A study showed that in Chicago between 1934 and 1954, policemen killed 69 and other people killed 261 homicide suspects. During the same period, Chicago had only 43 executions.²³ Thus the presence of the death penalty raises the risk of death for the criminal only slightly; most of that risk is equally present in the abolition state.

D. CONCLUSION

Perhaps the most important single question in the debate over the death penalty is whether it has unique deterrent power. Given the barbarity of the penalty, the chance of killing an innocent man, and the practical objections to capital punishment arising out of its effect on the administration of criminal justice, retentionists bear the burden of demonstrating that it is needed for the protection of society. Their chief attempt to meet this burden lies in the claim that executing criminals saves innocent lives which the normal penalties of the criminal law could not. But they have totally failed to establish that claim. Arguments from personal experience and common sense are at most inconclusive on the question of deterrence, and the hard scientific data tend overwhelmingly to show that the death penalty does not deter. A careful examination of all the evidence must lead to the conclusion reached by Professor Thorsten Sellin, perhaps the leading authority on the deterrence theory, that "the death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent."²⁴



CHAPTER III

RESTRAINT AND REFORM

One of the recognized purposes of criminal punishment is the restraint of the individual offender. Retentionists often argue that only the death penalty can sufficiently protect the public against further crimes by convicted murderers. The evidence is overwhelming that they are wrong. Murderers are the least likely of all classes of offenders to return to crime when they are paroled or released. They make the best prisoners. In some cases, the worst murderers can be transformed into decent and even exceptional human beings. In situations in which this is not the case, the prisoners can be indefinitely incarcerated.

A. MURDERERS ON PAROLE

Numerous studies have examined the risk presented by paroled murderers, and the findings have always been the same—their rate of parole violation is by far the lowest of all classes of offenders. Paroled murderers almost never commit another murder, and few

of them commit any serious crimes—in sharp contrast to persons released after serving sentences for other crimes, who show a shockingly high rate of recidivism. For example, between 1930 and 1961 in New York, 63 first degree murderers were released on parole. Sixty-one of them had been sentenced to death, but had had their sentences commuted. By the end of 1962, only one had committed another crime (burglary). In the same study, the rate of violation for all parolees was 41 per cent—22.8 per cent technical violations, and 18.2 per cent criminal arrests.¹

In California, 342 first degree murderers were paroled between 1945 and 1954. About ten per cent of them violated parole, but only 2.6 per cent committed new felonies—the lowest rate for any class of parolees. According to the same study, comparable rates of felony recidivism for parolees convicted of some other crimes were: auto theft—31.2 per cent; forgery—30.2 per cent; burglary—25.6 per cent; robbery—20.8 per cent.²

Similar studies in other states have produced the same results. In Massachusetts the rate of parole violations for released murderers was only one-sixth the overall violation rate.³ A legislative report in Ohio concluded that “the 169 first-degree life-sentence prisoners paroled since 1945 have compiled the highest parole success rate of any offense group.”⁴ When studies in nine different states were grouped, it was found that of 1293 first degree murder parolees, only 71 violated their paroles. Only nine of them were convicted of a second felony, and only one of a second murder.⁵

It might be argued that statistics from death penalty states are slanted because the worst murderers are executed. However, the figures from abolition states are similar. Of 370 released life prisoners in Wisconsin, only 18 committed parole violations.⁶ In Michigan, of 164 paroled first degree murderers between 1930 and 1959, only four violated parole and only one committed another felony.⁷

There seem to be two primary reasons for the excellent parole record and low recidivism rate established by murderers. First, they are on the average somewhat older than other offenders when they commit their crimes and, because they serve much longer sentences, they are much older when released. Second, and more important, murderers are not usually professional or habitual criminals, but rather people driven to kill by exceptional situations of stress.⁸

B. MURDERERS IN PRISON

Retentionists sometimes argue that murderers, if not executed, present an unacceptable danger to prison guards and other correctional employees. The exact opposite seems to be the case, according to the reports of prison officials.

Lewis Lawes, late warden of Sing Sing, has written:

"I believe that nearly all wardens are united in agreeing that as a group [life prisoners] constitute the most reliable and dependable men in the institution. In a great majority of cases the murderer is not a criminal in his nature as we ordinarily understand this term. Given places of trust and responsibility, as they often are, these men invariably make good."⁹

Nor does this generalization hold true only in death penalty states, where "the worst murderers are executed." A survey of prison administrators in abolition states concerning the behavior of life term prisoners confirmed the general impression. A Rhode Island official pointed out that his state had retained the death penalty for murder by a life term prisoner, and the law had never been invoked. A Maine official reported: "Lifers are not a special morale problem. No guards or other persons have been killed by lifers." A Wisconsin official reported that "[l]ifers . . . have been the best behaved and have made the greatest effort to help themselves while in the institution . . . I have been warden here since 1938 and no guard, other civilian employee or prisoner has been murdered by anyone." No abolition state official reported special problems with life prisoners.¹⁰

C. REHABILITATION

The statistics and surveys firmly establish that murderers not executed are no substantial threat to the security of the public—scarcely a threat at all in comparison to those convicted of lesser crimes which no one advocates be punished with death. What the figures leave out is the affirmative loss society suffers when it kills men who, even though they may be guilty of the worst crimes, bear within them the seeds of redemption into decent and productive human beings.

1. Nathan Leopold and Richard Loeb committed what many still consider the most terrible murder in our history. The two

young men, wealthy, intelligent and highly educated, kidnapped and brutally killed a fourteen year old boy. The crime was done virtually for sport, apparently under the influence of philosophical theories which stressed the inapplicability of ordinary morality to men of superior intelligence and will.

The two would surely have been executed, except that their families hired Clarence Darrow to represent them. In a famous speech, which left the judge and the courtroom in tears, Darrow won for the young murderers a sentence of "life plus 99 years", rather than death in the electric chair.

During his years in prison, Leopold continued his education, reading widely and teaching himself several languages. He served as a guinea pig for medical experiments. He played a large part in organizing and developing the prison educational system, through which inmates could earn high school equivalency certificates and college degrees. Finally, in recognition of his remarkable life's work, he was released in 1958, after 33 years in prison. He went to work at a hospital in Puerto Rico operated by a religious order and later taught mathematics at the University of Puerto Rico. In 1963, Governor Muñoz Marin of Puerto Rico said of Leopold, "I know what he is doing, and believe me, he's more than earning his way."¹¹

2. Paul Crump came to Death Row in Illinois, in the words of the warden, "choked up with hatred. He was animalistic and belligerent. Self-preservation was the only law he knew." Crump came to trust and be friends with the warden, began reading widely, and over the years of his legal battle against execution was transformed into a source of strength and stability for other prisoners who came to talk to him. He was put in charge of the convalescent tier of the prison hospital, where a guard described him as "mother, father, priest and social worker" for some fifty prisoners. He wrote an autobiographical novel, *Burn, Killer Burn*, which was published. After seven years on Death Row, the warden said of him:

"Paul Crump is completely rehabilitated. Should society demand Paul's life at this point, it would be capital vengeance, not punishment. If it were humanly possible, I would put Paul back on the street tomorrow. I have no fear of any antisocial behavior on his part. I would stake my life on it. And I would trust him with my life."

Crump's death sentence was finally commuted to life imprisonment in 1962.¹²

3. Edgar Smith, an aimless and uneducated young man came to Death Row in New Jersey 14 years ago, convicted of the murder of a young girl. Legal battles have won him almost endless postponements of execution, and in the meantime he has educated himself and made himself into a writer of recognized skill, author of the best-selling *Brief Against Death*. During these years he won first the attention and then the friendship and respect of conservative columnist William F. Buckley, who has written of him,

"Edgar Smith went to the Death House not far removed from the wasteful class of humanity . . . He emerges as . . . a most extraordinary man who may not succeed in triumphing over the chair, but has clearly triumphed over himself."¹³

In May of 1971, Smith's conviction for murder was finally set aside by a federal court, on the ground that it had been based on an illegally coerced confession.

Leopold would most likely have been executed had not his family been able to retain Clarence Darrow. Crump and Smith would be dead today if capital punishment worked swiftly and surely, as retentionists believe it should. The stories of the transformation of these men—and there are other stories like these—illustrate as no statistics can one way in which capital punishment violates civilized public morality. The *civilized* goal of criminal justice is the reformation of the criminal, and the death penalty means the abandonment of this goal for those who suffer it. Many retentionists decry the principle that there is hope for *every* man, but Leopold, Crump and Smith and many other are witnesses for the truth of that principle.¹⁴

D. CONCLUSION

It remains true, after all this is said, that a very few convicted murderers will kill guards in prison or will kill members of the public after they are released. Such cases always attract maximum publicity and strengthen the support for capital punishment. What is forgotten is that convicted burglars, narcotics violaters, auto thieves and indeed traffic offenders *may* commit murder when their penalties are served, and in a few cases will. Murderers are

less likely than other offenders to return to a life of crime, and they are less likely to make difficult or dangerous the work of prison employees. In these circumstances, the need to protect society provides no case for killing them while letting those convicted of other crimes live.



CHAPTER IV

RETRIBUTION

Under the retributive view of criminal justice, the criminal should be punished with severity equal to the evil of his crime. On this view, death is the only appropriate punishment for murder — “a life for a life”.

Most philosophers have rejected retribution as a proper goal of punishment. Plato wrote:

“[H]e who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention . . .”¹

Similarly, St. Augustine urged that the death penalty not be inflicted upon a group of heretics who had murdered Christians:

"We do not wish to have the sufferings of the servants of God avenged by the infliction of precisely similar injuries in the way of retaliation. Not, of course, that we object to the removal from these wicked men of the liberty to perpetrate further crimes, but our desire is rather that justice be satisfied without the taking of their lives or the maiming of their bodies . . ."

In contemporary America, it is firmly settled that retribution has no proper place in our criminal systems. As the New York Court of Appeals has put it:

"[T]he punishment or treatment of offenders is directed toward one or more of three ends: (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not harm society, and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution."

Similarly, the California Supreme Court has held that "to conclude that the Legislature was motivated by a desire for vengeance" would be "a conclusion not permitted in view of modern theories of penology."

The same view has been adopted in official studies of capital punishment. The British Royal Commission on Capital Punishment concluded that "[m]odern penological thought discounts retribution in the sense of vengeance." The Florida Special Commission on capital punishment, which recommended retention of the death penalty on other grounds, rejected "vengeance or retaliation" as justification for the official taking of life.⁶

The reason for the general rejection of retribution as a purpose of the criminal system has been stated concisely by Professors Michael and Wechsler:

"Since punishment consists in the infliction of pain it is, apart from its consequences, an evil: consequently, it is good and, therefore, just only if and to the degree that it serves the common good by advancing the welfare of the person punished or of the rest of the population . . .
[R]etribution is itself unjust since it requires some hu-

man beings to inflict pain upon others, regardless of its effect upon them or upon the social welfare.”

Some retributivists have argued that retaliatory punishment is required as a form of moral education. In this view, the sentiment of vengefulness against criminals is a good one, which the law should encourage and reinforce by the infliction of harsh penalties lest the public forget that murder is a terrible crime. Thus Sir James Stephen wrote:

“I think it highly desirable that criminals should be hated, that the punishment inflicted on them should be so construed as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.”

This view, in somewhat more subtle terms, is still reflected in the arguments of those who claim that respect for human life is reinforced by capital punishment. A Presbyterian minister writes:

“The law of capital punishment must stand as a silent but powerful witness to the sacredness of God-given life.”⁹

And a police chief argues:

“To allow heinous criminals to commit their crimes without the commensurate reparation of the death penalty would surely brutalize and degrade human nature and reduce society to a state of barbarism.”¹⁰

It is difficult to argue logically with the view that vengeance is a “healthy sentiment” which the state should foster, or that official killing, particularly in the circumstances detailed in Chapter 5 below, promotes respect for human life. However, the feelings which underlie these views are common to almost all of us, and abolitionists too often ignore rather than confront them. Arthur Koestler has put the point well:

“[T]hough easy to dismiss in reasoned argument on both moral and logical grounds, the desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation or revulsion—whether the reasoning mind approves or not. This psychological fact is largely ignored in abolitionist propaganda—yet it has to be ac-

cepted as a fact. The admission that even confirmed abolitionists are not proof against occasional vindictive impulses does not mean that such impulses should be legally sanctioned by society, any more than we sanction some other unpalatable instincts of our biological inheritance. Deep inside every civilized being their lurks a tiny Stone Age man, dangling a club to robe and rape, and screaming an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the land."¹¹



CHAPTER V

THE BARBARITY OF CAPITAL PUNISHMENT

“Capital punishment” and “the death penalty” are abstract names for a practice, the details of which few Americans know because public executions were long ago abandoned in this country. This chapter examines the reality of capital punishment—its effect, mental and physical, upon the condemned man, and the reactions to it of those who have seen it from close range. Most of this book is deliberately calm and unexciting, relying as it does upon surveys, statistics, and general observations of human nature. This chapter in places is lurid and horrifying—not because we have set out to make it so, but because the nature of the subject compels it. As Camus prefaced his “Reflections on the Guillotine”:

“[I]t is my intention to talk about [capital punishment] crudely. Not because I like scandal, nor, I believe, because of an unhealthy streak in my nature. As a writer, I have always loathed avoiding the issue; as a man, I

believe that the repulsive aspects of our condition, if they are inevitable, must merely be faced in silence. But when silence or tricks of language contribute to maintaining an abuse that must be reformed or a suffering that can be relieved, then there is no other solution but to speak out and show the obscenity hidden under the verbal cloak,"¹

A. THE PSYCHOLOGICAL EFFECT

In most jurisdictions, condemned men are confined to maximum security units which they never leave, and in which their only companions are guards, occasional visitors, and each other. "Death Row" was designed to hold prisoners for what used to be the short time between pronouncement of sentence and execution; today, many inmates have spent over ten years there.

In these grim surroundings, the condemned man lives a life of extraordinary stress. In the usual case, he is fighting a legal battle for his life, and each time an appeal is turned down he faces the immediate threat of death. Then begins the agonizing wait while applications for stays are considered by the courts or the governor. Very frequently, a date of execution is actually set only to be postponed. Stays have been granted when the condemned man is in the execution chamber, and it is not impossible for a prisoner to go through this experience more than once.

Prisoners on Death Row get to know each other well, and when an execution date is set, they suffer through the last days with the inmate scheduled to die. When efforts to win a reprieve fail, they watch him go to his death, and thus receive a vivid image of their own execution day. In some instances, they are housed close to the execution chamber, and sometimes can even see the death apparatus. In addition to the constant threat of death, they of course suffer the privations of other prisoners: no conjugal visits, no privacy and no freedom.²

One psychiatrist has described Death Row as a "grisly laboratory"—"the ultimate experimental stress, in which the condemned prisoner's personality is incredibly brutalized."³ There are occasional suicides, despite the strictest precautions, and "the strain of existence on Death Row is very likely to produce . . . acute psychotic breaks."⁴ Some inmates are driven to ravings or delusions,

but the majority sink into a sort of catatonic numbness under the overwhelming stress.⁵

A few abandon the legal battle to save their lives, preferring death itself to the torture of uncertainty and waiting. Most, however, continue to fight for life, often at severe psychological cost. A psychiatrist who came to know Caryl Chessman well reports that Chessman was able to go on only by imagining himself to be merely the lawyer in his case—by denying his identity as the condemned man. However, he could not maintain the “denial” continuously:

“At those times . . . , Chessman would talk about the feelings of torture that he experienced waiting for death. At times he felt that he could no longer tolerate the pain, the anxiety and the fear. At such times, he expressed a wish to get the suffering over with.”⁶

When Death Row inmates do fall into psychosis, they come under that strange doctrine of our law that an insane man cannot be executed. There have been many implausible attempts to explain this doctrine, which seems in no way justified by deterrent or preventive theories of capital punishment. Many believe that one Mississippi court gave the true explanation: the insane man has “lost awareness of his precarious situation”, and therefore “amid the darkened mists of mental collapse, there is no light against which the shadows of death may be cast. *It is revealed that if he were taken to the electric chair, he would not quail . . .*” (emphasis added).⁷

The doctrine produces strange results. Henry McCracken, a condemned sex murderer, fell into a “self-induced hypnotic condition caused by fear of his impending execution. . . .” The execution was stayed, and McCracken was given electric shock treatments. He showed improvement, stopped imagining there were rabbits and cats in his cell, became neat in his personal habits, and began playing the guitar. The successful treatment meant that the stay of execution must be removed; McCracken was sane and ready to be killed.⁸ Under the interminable uncertainty of the Death Row regime, the only wonder is that more inmates do not become so obviously insane that the resources of modern psychiatry are needed to cure them for the executioner.

The long uncertainty of the wait is terrible indeed, but for many the worst time must be the last few hours, when all uncertainty is

gone and the moment of death is known. Dostoevski, who actually faced a firing squad only to be reprieved at the last instant, described it thus:

"[T]he chief and the worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and now, at the very moment, the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's *certain*. When you lay your head down under the knife and hear the knife slide over your head, that quarter of a second is the most terrible of all."⁴

In these last moments, men often simply disintegrate. From the chaplain of San Quentin we have this account of the execution of Leanderess Riley:

"At nine-fifty, Associate Warden Rigg and the doctors came in. I told Leanderess to say a prayer to himself, if he did not care to have me pray, and to relax into God's care. He did not seem to hear me. When the doctors started to approach his cell, he made a throaty, guttural growling sound. Frantically, at random, he picked up some of the old legal papers on his table and began passing them through the bars to the associate warden, as if they were appeals or writs.

"A guard unlocked his cell. He gripped the bars with both hands and began a long, shrieking cry. It was a bone chilling wordless cry. The guards grabbed him, wrested him violently away from the bars. The old shirt and trousers were stripped off. His flailing arms and legs were forced into the new white shirt and fresh blue denims. The guards needed all their strength to hold him while the doctor taped the end of the stethoscope in place.

"The deep-throated cry, alternately moaning and shrieking, continued. Leanderess had to be carried to the gas chamber, fighting, writhing all the way. As the witnesses watched in horror, the guards stuffed him into a chair. One guard threw his weight against the struggling little Negro while the other jerked the straps tight. They backed out, slammed the door on him.

"Leanderess didn't stop screaming or struggling. Associate Warden Rigg was about to signal for the dropping of the gas pellets when we all saw Riley's small hands break free from the straps. He pulled at the other buckles, was about to free himself.

"The Associate Warden withheld his signal. San Quentin had never executed a man raging wildly around the gas chamber. He ordered the guards to go in again and re-strap the frenzied man. One of the guards said later he had to cinch the straps down so tightly the second time that he 'was ashamed of himself.'

"Again the door was closed. Again Leanderess managed to free his small, thin-wristed right hand from the straps. Riggs gave the order to drop the pellets. Working furiously, Leanderess freed his left hand. The chest strap came off next. Still shrieking and moaning, he was working on the waist strap when the gas hit him. He put both hands over his face to hold it away. Then his hands fell, his head arched back. His eyes remained open. His heart beat continued to register for two minutes, but his shrieking stopped and his head slowly dropped."¹⁰

In the same chamber, Aaron Mitchell became the second to last man to be executed in the United States, on April 12, 1967. A few hours before his execution, he took off his clothes and slashed his wrists with a hidden razor blade; he stood in the form of a crucifix, arms outstretched, with blood dripping to the floor. "This is the blood of Jesus Christ, I am the second coming," he cried. He was dragged struggling and screaming into the chamber and strapped in the chair, and was still shouting "I am Christ" when the cyanide fumes reached him.¹¹

Camus has well summarized the terrible psychological cruelty of capital punishment:

"[Execution] is not simply death. It is just as different, in essence, from the privation of life as a concentration camp is from prison . . . [I]t adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is in itself a source of moral sufferings more terrible than death . . . For there to be equivalence, the death penalty would have to punish a

criminal who had warned his victim of the date at which he 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."¹²

B. THE PHYSICAL EFFECT

The classic form of execution, still used by several states, is hanging. Warden Duffy of San Quentin, a frequent witness, describes the process:

"The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurements, et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few minutes there is usually considerable struggling in an effort to breathe."¹³

If the drop is too short, there will be a slow and agonizing death by strangulation. On the other hand, if the drop is too long, the head will be torn off. In England, centuries of practice have produced a detailed chart relating a man's weight and physical condition to the proper length of drop, but even there mistakes have been made.¹⁴ In 1927, a surgeon who witnessed a double execution wrote:

"The bodies were cut down after fifteen minutes and placed in an antechamber, when I was horrified to hear one of the supposed corpses give a gasp and find him

making respiratory efforts, evidently a prelude to revival. The two bodies were quickly suspended again for a quarter of an hour longer . . . Dislocation of the neck is the ideal aimed at, but, out of all my post-mortem findings, that has proved rather an exception, which in the majority of instances the cause of death was strangulation and asphyxia."¹⁵

Thereafter, until the abolition of capital punishment in England in 1965, executed prisoners were left hanging for a full hour¹⁶

The first major substitute for hanging was electrocution, still the most widely used form of execution in this country. The prisoner's hair is cropped short, and a pants leg is slit. He or she is led—or dragged—into the death chamber, strapped securely in the chair, and electrodes are fastened to the leg and head. Then, as Warden Lawes of Sing Sing describes it:

“As the switch is thrown into its sockets there is a sputtering drone, and the body leaps as if to break the strong leather straps that hold it. Sometimes a thin gray wisp of smoke pushes itself out from under the helmet that holds the head electrode, followed by the faint odour of burning flesh. The hands turn red, then white, and the cords of the neck stand out like steel bands. After what seems an age, but is, in fact, only two minutes, during which time the initial voltage of 2,000 to 2,200 and amperage of 7 to 12 are lowered and reapplied at various intervals, the switch is pulled and the body sags and relaxes, somewhat as a very tired man would do.”¹⁷

As another frequent witness has reported: “The noise is loud. The dying man fights the straps with amazing strength. Usually, some smoke rises up from the chair. . . The body will burn if it requires a second or third jolt or if the condemned perspires excessively.” In some cases, the eyeballs burst from their sockets.¹⁸

The length of time it takes to die in the electric chair is open to serious question. Often several shocks are required, over a period of some minutes. The prison doctors who pronounced Julius Rosenberg dead, after two minutes and three shocks, found that his wife Ethel was still alive after three applications of current. They pronounced her dead after two more shocks and a total of over four

minutes.¹⁹ No one knows whether electrocuted individuals retain consciousness until dead, but if they do it is certain that "such a form of torture would rival that of burning at the stake."²⁰ A French scientist has concluded:

"I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be . . . This method of execution is a form of torture."²¹

Electrocutions, too, can go wrong, and one that did produced a celebrated Supreme Court decision. Louisiana attempted to execute Willie Francis, a teen-ager, but the current was apparently not strong enough. As one witness described the scene:

"Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breathe.'"²²

The current was turned off, and Francis was returned to his cell to await another attempt on his life. Later, by a five to four vote, the Supreme Court held that the Constitution did not forbid sending him to the chair a second time, and he died there.²³

The third major method of execution used in the United States is the application of lethal gas. Warden Duffy, who has seen many gassings, reports that the prisoner is strapped in a chair, the chamber is sealed, and the cyanide gas eggs are dropped into the sulphuric acid. When the gas reaches the prisoner "at first there is extreme evidence of horror, pain, strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It finally is as though he has gone to sleep."²⁴ It is controversial how quickly the prisoner loses consciousness. Some medical experts believe cyanide poisoning amounts to slow, agonizing strangulation.²⁵ It was reported that Caryl Chessman gave a prearranged signal six minutes after the gas reached him.²⁶ The last execution in the United States, the gassing of Luis Jose Monge in Colorado in June of 1967, produced this eyewitness account:

"According to the official execution log unconsciousness came more than five minutes after the cyanide splashed down into the sulphuric acid. And to those of us who watched, this five minute interlude seemed interminable.

Even after unconsciousness is declared officially, the prisoner's body continues to fight for life. He coughs and groans. The lips make little pouting motions resembling the motions made by a goldfish in his bowl. The head strains back and then slowly sinks down to the chest. And in Monge's case, the arms, although tightly bound to the chair, strained at the straps, and the hands clawed torturously as if the prisoner were struggling for air."²⁷

The physical horror of executions is not likely to be eliminated by changing the techniques used. The British Royal Commission on Capital Punishment thoroughly canvassed several suggested alternatives, including death by lethal injection. Technical obstacles were found to all of them (in any event the medical profession refused to have anything to do with actually killing prisoners), and the Commission concluded that hanging, with all its drawbacks, remained the best method available.²⁸

C. THE WITNESSES

There are two typical reactions to observing an execution. Most people are horrified and disgusted by what they have seen. Some, on the other hand, are drawn to the spectacle and appear to enjoy it. Both reactions provide strong arguments against capital punishment.

Many witnesses to executions have described their reaction of horror. Thus Thackeray wrote, after watching a public hanging:

"I must confess . . . that the sight has left on my mind an extraordinary feeling of terror and shame. It seems to me that I have been abetting an act of frightful wickedness and violence, performed by a set of men against one of their fellows; and I pray God that it may soon be out of the power of any man in England to witness such a hideous and degrading sight."²⁹

Similarly, Camus tells that his father, "a simple straightforward man," had been particularly aroused by the murder of a whole family including several children. He decided to attend the public execution of the murderer:

"What he saw that morning he never told anyone. My mother relates merely that he came rushing home, his

face distorted, refused to talk, lay down for a moment on the bed, and suddenly began to vomit."³⁰

A French judge tells that only once in his career did he pronounce a death sentence; the criminal had tormented his daughter and finally thrown her in a well, and the judge thought he could watch the execution with equanimity:

"But, after his execution, for weeks and even months, my nights were haunted by that recollection . . . Like everyone else, I served in the war and saw an innocent generation die, but I can state that nothing gave me the sort of bad conscience I felt in the face of the kind of administrative murder that is called capital punishment."³¹

Revulsion at the duty to supervise and witness executions is one reason why so many prison wardens, men unsentimental about crime and criminals, are opponents of capital punishment. Two of the most famous American correctional officials, Lewis Lawes of Sing Sing and Clinton Duffy of San Quentin, have been leaders of the abolition movement; their descriptions of the many executions they have witnessed are filled with their disgust at what they have seen.³² Most prison guards have the same reaction: some "go all to pieces" and "their nerves just don't hold up." One guard relates:

"In my opinion it's something you never become accustomed to. It's the most gruesome job I've come in contact with during my 35 years with the department."³³

If most men react this way to executions—and it seems surprising, from the descriptions of them, that any sane man would not—the question naturally presents itself: why has not capital punishment been abolished long ago? One answer is, of course, that executions are carried out in private; there are few witnesses; pictures are not allowed; and newspaper accounts are, because of "family newspaper" requirements of taste, sparing in detail. The same authorities who uphold the death penalty because of its supposed deterrent value, take every care to minimize publicity of executions. Camus has suggested one reason for this secrecy:

"[P]ublicity runs the risk of provoking revolt and disgust in the public opinion. It would become harder to execute

men one after another . . . if those execution were translated into vivid images in the popular imagination. The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail."⁵⁴

It is for this reason that many abolitionists have opposed measures—proposed as reforms—to execute secretly rather than in public. As Gambetta argued: "If you suppress the horror of the spectacle, if you execute inside prisons, you will smother the public outburst of revolt that has taken place of late and you will strengthen the death penalty."⁵⁵ Indeed, there is something immoral in killing for reasons of public safety but keeping from the public what is done in their name. "One must kill publicly or confess that one does not feel authorized to kill."⁵⁶

There may be another reason why the horrible reality of capital punishment has not led to universal abolition. Executions seem to appeal to strange aberrant impulses in some people, and give an outlet to sadistic urges which society otherwise discourages. Thus, when executions were public, too many citizens were *not* disgusted at the spectacle, but rather were drawn to it and regarded it as a form of public entertainment. Thackeray describes the scene:

"Forty thousand persons (say the Sheriffs), of all ranks and degrees—mechanics, gentlemen, pickpockets, members of both Houses of Parliament, streetwalkers, newspaper-writers, gather together before Newgate at a very early hour; the most part of them give up their natural quiet night's rest, in order to partake of his hideous debauchery, which is more exciting than sleep, or than wine, or the last new ballet, or any other amusement they can have . . ."⁵⁷

Koestler reports that:

"For distinguished onlookers grandstands were erected as at contemporary football games; balconies and windows in the vicinity were let at fabulous prices; ladies of the aristocracy, wearing black Venetian masks, queued to pay last visits to the condemned man in his cell; fobs and dandies travelled all over the country to see a good hanging."⁵⁸

Public executions were common in this country during the 19th century; and the last one was not until 1936 in Kentucky, when 20,000 people gathered and some climbed telephone poles and hung from balconies to watch a black man hang.³⁹

With the abolition of public executions, there continue to be many with a morbid attraction to the sight of a man being killed. Warden Lawes has written of the many requests to watch electrocutions, and tells that when the job of executioner became vacant, "I received more than seven hundred applications for the position, many of them offering cut-rate prices."⁴⁰ Dr. Louis West, who was attending physician at a 1952 execution in Iowa, tells of the "strange and unhealthy glitter" in the eyes of some of the witnesses.⁴¹ Sadists apparently sometimes become guards on Death Row. One former condemned man, now pardoned, tells of a guard who, the night before a scheduled execution, "paced beyond the bars, combing his hair and vividly detailing the precise, practiced execution procedure. 'This is the kind of job I like', he told Jones. 'It's my meat.'"⁴²

Delight in brutality, pain, violence and death may always be with us. But surely we must conclude that these impulses were better not encouraged by the law. When the government sanctions, commands and carries out the taking of human life in the gruesome circumstances detailed in this chapter, it lends support to this dark side of human nature.



CHAPTER VI

THE FINALITY OF CAPITAL PUNISHMENT

Unlike all other criminal punishments, the death penalty is irrevocable. Mistakes discovered after an execution cannot be undone. It was for that reason that the Marquis de Lafayette said, "I shall ask for the abolition of the penalty of death until I have the infallibility of human judgment demonstrated me."¹

Of course every criminal trial raises the possibility of wrongful conviction, and the imprisonment of an innocent man is no light thing. But, as the distinguished criminologist Leon Radzinowicz has said, "the likelihood of error in a capital case stands on a different footing altogether. If proved to have occurred, it would certainly produce an explosion of deep emotions in society at large."²

Where cases of wrongful execution have come to public attention, they have been a major force in producing the abolition of capital punishment. The Evans case in England, in which an innocent man was apparently hanged in 1949, played a large role in the elimination of capital punishment in that country.¹ It is said that the hanging of innocent men led to abolition in Wisconsin, Rhode Island and Maine during the last century.²

Proponents of capital punishment have not argued that the institution is worth the execution of innocent men, but rather that there is no real possibility of innocent men being executed. Today, however, there exists a large body of careful research which shows that innocent men are often convicted of crimes, including capital crimes, and that some of them have been executed. The books of Borchard, Gardner, Frank and Radin document scores of cases of conviction of the innocent.³ Bedau reports 74 instances of wrongful conviction for murder in this country since 1893, resulting in eight executions.⁴

It is true that *most* of the known cases of wrongful convictions, and all of the best documented ones in this country, have involved prisoners who were still alive at the time the error was discovered. The reason for this is not hard to discern. Where a man is alive, conscious of his own innocence, he will exert every effort to prove that innocence. Sometimes he will have help from his family; sometimes his sincerity will convince officials, lawyers or writers to pursue his case. There will be official channels of pardon through which he can document his case once he has developed it.

By contrast, a man who has been executed is no longer there to insist on his innocence. There are no official channels through which the matter can be pursued. Official resistance to claims of unjust conviction, strong in any case, will be especially forceful where the possibility is raised that they have taken part in the taking of an innocent life.

Despite all these barriers, we have strong evidence that Timothy Evans was hanged in England in 1949 for a murder he did not commit. Evans' wife and baby daughter were killed, and he, a man of

subnormal intelligence, confessed to the crime. He was convicted, sentenced and hanged. Four years later, one John Christie, another occupant of the house in which Evans had lived, and the leading prosecution witness at the Evans trial, was found to be a multiple murderer. After Christie himself was hanged for murder, an official inquiry concluded that Evans was innocent; and, for what it was worth, he was granted a posthumous pardon.⁷

There is no such clearly documented case of wrongful execution in this country in recent years, but there have been many near escapes. In Texas in 1926, Anastacio Vargas was convicted of murder and sentenced to death. His head had been shaved in preparation for the execution when a stay was granted because another man, who resembled Vargas, had confessed to the crime.⁸ Similarly, an Army private, A.B. Ritchie, was reprieved from hanging at the very last moment by President Truman in 1945; he was pardoned, upon evidence of his innocence, two years later.⁹ Silas Rogers was sentenced to death for first degree murder in 1944. Only because his sentence was commuted to life in 1945 was he still alive in 1952, when newly discovered evidence led to his pardon.¹⁰ Pietro Matera had his death sentence for murder commuted in New York in 1930. Thirty years later, the wife of the real killer confessed on her deathbed that she had "fingered Matera to save her husband," and Matera was pardoned.¹¹

Students of the criminal process have identified several reasons why innocent men are convicted of crime. Most of them agree that the largest single factor is mistaken eyewitness identification. Few kinds of evidence are more convincing to jurors than the witness who points to the defendant and says "that's the man"—and yet few kinds of evidence are less reliable. Scientific experiments have shown the unreliability of "positive" and good faith eyewitness identification. Often these laboratory experiments have been confirmed in the courtroom.¹²

Thus, Southerland and Mathis were convicted of bank robbery in Texas in 1934 and sentenced to 50 and 30 years respectively, on the identification testimony of three eye-witnesses. Two years later, two other men confessed to the crime, and Southerland and Mathis were pardoned.¹³

In Colorado in 1936, Ernest Mattice received a life sentence for the kidnap-rape of a Denver woman, who identified him as one of her two assailants. Later another man confessed to the crime and named his accomplice, who was not Mattice. Confronted with these two, the woman identified them as the criminals and admitted her mistake.¹⁴

Radin reports several cases of mistaken identifications in which the person wrongly identified bore little physical resemblance to the actual criminal, and yet the witnesses made the identification in court with complete confidence.¹⁵ Mistaken identifications are difficult to counter. Defense lawyers often cannot shake them on cross-examination, and the sincerity of a mistaken witness can be wholly convincing. Especially where no alibi witnesses can be found, they almost guarantee conviction; even where there are such witnesses, they are often friends of the defendant and the jurors do not believe them.

Defendants have been convicted on the basis of mistaken identity even without eyewitness identification, and in the teeth of strong alibis. Thus Hiawatha Wynn was convicted of burglary and the rape of a white woman in Goldsboro, North Carolina, largely because he matched her description of the assailant as a large black man with two front teeth missing. He could have received the death penalty, but was sentenced to life. Two weeks later, Goldsboro police arrested another man for attempted burglary under similar circumstances. They arranged a confrontation between him and the woman who had been Wynn's supposed victim. When she saw the second man, she recognized him and fainted. Wynn was given a "pardon because of innocence."¹⁶

Innocent men have been framed by their enemies in several documented cases. In June 1957, Dale Bundy was convicted of first degree murder and sentenced to death in Canton, Ohio. The chief prosecution witness was Russell McCoy, himself under arrest for two murders on the basis of evidence supplied by Bundy. Three days before Bundy's scheduled execution, a letter arrived from a woman in Texas. She told of a conversation she had had with McCoy, who had told her he intended to kill a friend who had turned against him, and to "have the law do it for me." The execution was stayed, and after the woman's story was checked, Bundy received

a new trial and was acquitted. The woman in Texas had come to send the letter by the merest chance. She had picked up a copy of a "true crime" magazine left in her liquor store, and leafing through it had seen McCoy's picture and an article about Bundy's trial. On that unlikely coincidence, Bundy's life was saved.¹⁷

In another case, Joseph Smith was convicted of robbery in Pennsylvania in 1950. After he had served 13 years in prison, one of his supposed accomplices confessed that he had asked Smith to act as the lookout man for the robbery, but Smith had refused. When the robber was arrested, he named Smith as an accomplice because he hoped his "cooperation" would get him lighter treatment.¹⁸

The investigators of unjust convictions have documented scores of these cases. They result not only from mistaken eyewitness identification, but also from faulty police work, from over-aggressive prosecutions, and from community pressures and prejudices. And they occur with uncomfortable frequency.

Proponents of the death penalty often point to the elaborate machinery of appeal and post-conviction review which our courts now provide and argue that with all these safeguards false convictions are impossible. This misconceives the nature of appeal and post-conviction remedies. These forms of review concern themselves almost exclusively with errors of law, not of fact—with improper charges by trial judges, with the admission of illegal evidence or with the exclusion of evidence which should have been admitted. The one question which they do not concern at all is the credibility of witness testimony, which our legal system commits entirely to the jury. Thus it is not open to a defendant in post-trial proceedings to argue that an eyewitness identification was mistaken, or that the jury should not have believed the testimony of a prosecution witness who the defendant thinks has perjured himself. Only in the rare case where genuinely new evidence turns up after the trial may a defendant hope for a second hearing on the basic factual issues in his case, and even then there are severe procedural obstacles in his way.

There are now too many documented cases of mistaken convictions for anyone seriously to argue that capital punishment raises no substantial risk that an innocent life will be taken. In some cases,

this *has* occurred. In many other cases, only coincidence or luck has prevented it from occurring. It is too much to hope that chance has saved or will save every innocent man who, like Vargas or Bundy, comes within hours of execution. It is far more likely that our execution rolls conceal many cases which differ from theirs only in that the evidence of their innocence has not been revealed.



CHAPTER VII

THE ARBITRARY AND DISCRIMINATORY APPLICATION OF THE DEATH PENALTY

The administration of the death penalty is characterized by arbitrariness, sporadic application, and socio-economic and racial discrimination. Only a small proportion of capital criminals are sentenced to death, and, even before the 1967 moratorium on executions a much smaller proportion were actually put to death. The few who die are selected not by rational standards or legal principles, but by the unguided discretion of prosecutors, juries, judges and governors. Those best able to operate within this system of discretion are the rich, the influential, and the well-counseled; and criminals of this sort are almost never executed. Others, both because they are less likely to be well-represented and because they are more likely to be the objects of prejudice, are almost always the victims.

A. THE LOTTERY

The question whether a capital criminal will be executed or not turns, in the first instance, on where he committed his crime. Thirty-six of the 50 states have the death penalty for first degree murder; 14 do not.¹ Sixteen states have it for rape; 34 do not.² Some states have capital punishment, but almost never impose death sentences; other states impose death sentences but appear

never to carry them out.³ The same crime may be “premeditated murder” under the law of one state, but second-degree murder under the law of another.⁴ Similarly, the definition of capital felony murder varies from state to state.⁵ Definitions of legal insanity also vary.⁶ These variations, acceptable side-effects of a federal system of government when lesser legal consequences are at issue, become a crazy-quilt of injustice when the question is life or death.

Apart from the geographic lottery, the determination within a single jurisdiction of who shall be executed is extraordinarily haphazard. First, the prosecutor has discretion whether to charge a capital offense (first-degree murder) or non-capital offense (second-degree murder). The exercise of that discretion is influenced by the state of the evidence, but also by factors irrelevant to the defendant’s culpability, such as the apparent skill and tenacity of defense counsel and the state of the prosecutor’s docket. Extraneous factors such as a defendant’s influence, status or race, or political considerations like the approach of an election, may also play a part. Even after the charge has been made, and the defendant has come to trial, the prosecution may choose not to ask the jury to return a death sentence; in such cases, a death sentence is rarely imposed. Once the defendant has been found guilty, the jury generally has absolute discretion, unguided by any legal standards laid down by legislature or court, to determine whether he should live or die.⁷ Nowhere in this country does the most common capital crime, first degree murder, or the second most common, rape, bear a mandatory death sentence.⁸ Where the jurors determine the sentence, they are given no criteria by which to make their decision; they may be guided by passion, prejudice or caprice.⁹ In some jurisdictions, the trial judge has the additional discretion—again unguided by legal standards—to reduce a jury death sentence to life imprisonment.¹⁰

Finally, in every state, some official or agency—usually the governor or the parole and pardon board, both, or a combination of the two—has the power to commute a death sentence. That power is frequently exercised, though the frequency of its use varies with the personal views of the relevant officials and with the political situation. This power is not controlled by substantive legal standards, and normally no reasons need be given for the grant or denial of clemency.¹¹

Thus at each step of the process, someone—prosecutor, jury, judge or commuting official—has the power to keep the defendant from being executed; each of these decisions is wholly discretion-

ary and unreviewable. In practice, this system has meant that a very small proportion of capital crimes has resulted in executions. Since 1930, when adequate statistics began to be compiled, there have been over 350,000 reported criminal homicides.¹² Though there are no reliable figures on the number of first-degree murders, authorities have settled on 15 per cent as the best estimate.¹³ If this is correct, there have been over 50,000 capital murders during the period. But, since 1930 there have been only 3334 executions for murder.

Not only is the rate of executions low; it has declined drastically during the period. There were 155 executions in the country in 1930, the first year such national statistics were kept. The total rose to a high of 199 in 1935. Since then it has declined steadily, to 124 in 1940, 82 in 1950, 56 in 1960, 21 in 1963, seven in 1965 and two in 1967. Since 1967, there have been none.¹⁴

The total moratorium on executions of the last few years is partly the result of stays obtained in litigation attacking procedural aspects of the imposition of the death penalty, but the steep decline of the early 1960's cannot be attributed to this cause. Rather it was the apparent result of widespread popular revulsion at the general use of the death penalty, and a response to this public opinion by representative samples of the community—juries, and politically responsive officials—prosecutors, governors and pardon boards, operating through their discretionary powers to spare the lives of capital criminals.

That capital punishment is less and less inflicted is of course desirable, given the brutality and futility of the death penalty. But for the few who are left to die, it means that great injustice is added to cruelty. The entirely standardless process by which most capital offenders are spared execution means that those who do die are selected by fluke, even leaving aside the possibilities of racial and economic discrimination created by unchecked discretion. As Ramsey Clark said while Attorney General:

“A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of men on death row.”¹⁶

As the system of capital punishment now operates, the law could as well provide that persons committing capital crimes shall be sentenced to play Russian Roulette with a fifty or hundred chambered revolver.

Apart from its obvious injustice, the present system of capital punishment—its sporadic, rare application, uncontrolled by legal standards—“deprives it of any functional place in the rational scheme of a state’s penal law. Punishment used in this manner ceases to be an instrument of public justice or of reasoned penal policy, and hence it ceases to have any claim to legitimacy . . . ”¹⁷ The claim by proponents of capital punishment that it has unique deterrent value, a claim which has little or no factual support in any event, becomes entirely implausible when the death penalty is administered in this fashion.

B. THE “PRIVILEGE OF THE POOR”

The system of sparing men convicted of capital crimes through the discretion of juries and clemency officials does not work entirely at random. Where discretion is absolute, it is easy for prejudice to play a part in the decision. Beyond that, defendants with friends or money are better able to invoke available remedies than are the poor and hopeless. The result is that, as Warden Duffy has put it, capital punishment is “a privilege of the poor.”¹⁸

Governor Disalle of Ohio described his personal experience with the death penalty thus:

“During my experience as Governor of Ohio, I found the men in death row had one thing in common; they were penniless. There were other common denominators—low mental capacity, little or no education, few friends, broken homes—but the fact that they had no money was a principal factor in their being condemned to death . . . ”¹⁹

The few statistical studies of the question confirm the conclusions of these experienced officials. An examination of sentencing decisions by California juries in first-degree murder cases over an eight-year period found that 42 per cent of blue collar workers convicted of murder received death sentences, while the comparable figure for white collar workers was 5 per cent. Death sentences were given to 67 per cent of those with “low job stability”, and to only 39 per cent of those with stable job histories. The study concluded, after taking account of other factors such as previous criminal record, that low socio-economic status made it far more likely that a defendant would be sentenced to death.²⁰

One reason the poor are disproportionately sentenced to death and executed is their inability to obtain good legal assistance. Legal assistance is important not only at the trial and appeal stage, where counsel is appointed for indigent defendants, but in collateral judicial and in clemency proceedings, where counsel is generally not

appointed. A Pennsylvania study showed that over 30 per cent of condemned men with retained counsel received commutations, while less than 20 per cent of those with court-appointed counsel did.²¹ In Ohio, the comparable figures were 44 and 31 per cent, respectively.²² Only two states, New Jersey and California, have assured the right of the condemned man to assistance of counsel beyond the trial and first appeal.²³ In the rest of the states, there is no assurance of legal representation for petitions for certiorari, habeas corpus petitions to state or federal courts, clemency applications, or sanity hearings, any of which might save the defendant from execution.

C. RACIAL DISCRIMINATION

It has long been thought that the death penalty fell disproportionately upon black defendants. Available evidence establishes conclusively that this is true—in the North as well as the South, and for capital crimes generally as well as for rape. Of 455 men executed for rape in this country since 1930, 405, or nearly 90 per cent have been black.²⁴ In six of the 19 jurisdictions which impose the death penalty for rape, only black defendants have been executed for that crime.²⁵ With respect to other capital crimes, there is an equally strong indication of racial discrimination. Blacks constitute 76 per cent of those executed for robbery, 83 per cent of those executed for assault by a life prisoner, and 100 per cent of those executed for burglary in the same period. Of those executed for murder since 1930, 49 per cent have been black, although blacks have made up only about ten per cent of the population during that period. Of all persons executed since 1930, 53.5 per cent have been black.²⁶ Of prisoners on death row as of the end of 1968, 52 per cent were black.²⁷

The rate of execution of blacks far exceeds the proportion of capital crimes committed by black defendants. This has been most clearly proven with respect to executions for rape. A study of rape cases in Florida between 1940 and 1964 revealed that only five per cent of whites who raped white victims were executed. No white man was sentenced to die for raping a black woman. However, 54 per cent of the blacks convicted of raping white victims were sentenced to death.²⁸ An exhaustively careful study of rape cases in a random selection of Arkansas counties showed similarly gross disparities in death sentences for rape between black and white defendants.²⁹

With respect to crimes other than rape, the evidence of discrimination is still strong. A study of all capital cases in New Jersey

between 1930 and 1961 revealed that just under a half of the blacks convicted of capital crimes were sentenced to die. In the same period, less than a third of the whites convicted of the same crimes received death sentences.³⁰ A study of homicide cases in ten North Carolina counties over a ten-year period revealed clear evidence of discrimination in sentencing. Of blacks convicted of killing whites, 37 per cent were sentenced to death. No white defendants received death sentences for killing blacks.³¹

The pattern of racial discrimination continues after sentencing. A study of commutations in Pennsylvania between 1914 and 1958 revealed that whites were nearly twice as likely as blacks to have their sentences commuted.³² A similar study in New Jersey found almost precisely the same pattern—whites were twice as likely as blacks to have death sentences commuted.³³ In Ohio, over a ten-year period, 78 per cent of blacks sentenced to death were actually executed, while only 51 per cent of whites were.³⁴ A study of executions in the southern states showed that of those sentenced to death, blacks were far more likely than whites actually to be executed; for instance, in North Carolina only 35 per cent of whites sentenced to death were finally executed, while the comparable figure for blacks was 67 per cent.³⁵

D. CONCLUSION

As presently applied, the death penalty operates as a lottery—and not even a fair lottery, but one rigged against the poor, the friendless and the members of minority groups. While the wholly discretionary system of determining which capital defendants shall live and which shall die has the effect of reducing the number of executions, it does so at the expense of equality before the law. The sporadic and random aspects of the system are grossly unjust to those who draw the long straw, and at the same time they deprive capital punishment of any status as a regular and rational part of the system of criminal justice. The power granted to juries and officials to select those who are to die without regard to standards and without review creates great leeway for class and racial discrimination in the imposition of the death penalty; and the figures show that such discrimination is in fact widespread.

Since it seems plain that no jurisdiction would now be prepared, in the face of the other considerations mitigating against capital punishment, to require the mandatory imposition of the death penalty without possibility of clemency, these defects in the administration of the death penalty cannot be eliminated short of the elimination of the penalty itself.



CHAPTER VIII

THE DEATH PENALTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE

Many students of the criminal law believe, with the President's Crime Commission, that "the death penalty . . . clearly has an undesirable impact on the administration of criminal justice."¹ The existence of the penalty creates a sensational atmosphere which prevents calm and dispassionate trials, leads to acquittals and new rules of law motivated by abhorrence of capital punishment and the fear of executing an innocent man, and generates endless litigation which clogs the courts and produces delays which themselves bring discredit on the law.

A. SENSATIONALISM

As the President's Commission has said, "[t]he trial of a capital case is a stirring drama, but that is perhaps its most dangerous attribute."² There are of course sensational trials in noncapital cases, but they are exceptional. Where the death penalty is involved, lurid press coverage and high public emotion is the rule

rather than the exception. Press and public attention centers, not on the facts and legal principles involved in the case, but on the penalty. The public hears its representative, the prosecutor, harangue the jury to kill the defendant, often with the most blood-curdling appeals to emotion. Defense attorneys engage in maudlin orations, little related to the law or the relevant facts. The gruesome details of the crime and the heart-rending history of the defendant's life, both usually irrelevant to questions of guilt or innocence, dominate the case. Public opinion often polarizes between a lust for vengeance and sympathy for a lonely and often pathetic underdog fighting for his life.

The effect of all this cannot be lost on the jury or even the judge. The inevitable result is a reduction of the possibility of a fair and dispassionate trial. Further, such spectacles—former Governor Brown of California has called the capital trial “our modern equivalent of the Roman Circus”³—cannot but lower public respect for the law. This effect alone has been enough to condemn capital punishment in the eyes of many students of the problem. In his testimony before the British Royal Commission on Capital Punishment, the late Mr. Justice Frankfurter said that he was:

“strongly against capital punishment for reasons that are not related to concern for the murderer or the risk of convicting the innocent . . . When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the judiciary, I regard as very bad.”⁴

B. HARD CASES MAKE BAD LAW

Throughout history, capital punishment has been opposed by law enforcement authorities who realized that distaste for it generally, and horror at the idea of killing an innocent man in particular, has often led juries to acquit guilty men charged with capital crimes. The movement to abolish the death penalty for theft offenses was led in England by businessmen who found that the laws against stealing were not being enforced because juries would not return guilty verdicts which would result in the defendant being hanged.⁵

Today, retentionists argue that this problem has been eliminated by granting the jury discretion to return a guilty verdict “without capital punishment” in most cases. However, in many jurisdictions,

the jury recommendation of mercy must be unanimous, while in others it must be by a majority.⁶ Hence there is still the strong chance that a juror, opposed to executing the defendant but fearing that he will not achieve unanimity in behalf of a recommendation of mercy, will vote to acquit on the first degree murder charge and either hang the jury or force a conviction on a lesser offense. The President's Crime Commission has cited "unwarranted acquittals" as a continuing problem in capital cases.⁷

Another effort to deal with this problem has been "death-qualification" of juries, under which those potential jurors who state any personal opposition to the death penalty have been excused for cause. Recently the Supreme Court, noting that, according to public opinion polls, perhaps half the population is opposed to capital punishment, has held that this practice violates the requirement that a jury represent a cross-section of the community and produces an unconstitutionally stacked jury on the issue of penalty.⁸ The practical impact of this decision cannot yet be determined, but it may lead to an increase in acquittals or hung juries in capital cases.

Many now believe that the most serious detrimental effect of the death penalty on the enforcement of the criminal law is its influence on appellate courts. Many landmark decisions extending the rights of criminal defendants have come in capital cases, and there is reason to believe that these decisions have been influenced by general opposition to the death penalty or, at the very least, by a natural desire to insure that every safeguard is observed before a defendant is executed. As Mr. Justice Jackson candidly admitted:

"When the penalty is death, we, like State court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."⁹

James Bennett, former director of the Federal Bureau of Prisons, has argued that the death penalty has warped the criminal law:

"At bottom, the retention of the death penalty has led to all sorts of controversial not to say inconsistent and erratic decisions of our courts on such things as mental responsibility for crime, use of confessions, admissibility of evidence, arrest and arraignment procedures and so

on. We might not have the *Miranda*, *Escobedo*, *Mallory*, *Durham*, and other decisions were it not for the fact that the death penalty was involved."¹⁰

In at least two areas of substantive criminal law, the death penalty has influenced legal doctrine so as to produce vague and confusing charges to juries, and many appellate reversals. The first is the convoluted distinction between degrees of murder, originally enacted to mitigate the harshness of mandatory death sentences for murder. Mr. Justice Frankfurter described one jury charge attempting to explain the distinction as "the dark emptiness of legal jargon."¹¹ Mr. Justice Cardozo said of it:

"I think the distinction [between degrees of murder] is much too vague to be continued in our law . . . [It] is 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 mystifying psychology, scores of men have gone to their deaths."¹²

Another area of doctrinal confusion resulting from the death penalty has been the insanity defense. In practice, the insanity defense is normally raised only in capital cases, since acquittal by reason of insanity usually leads to life-long incarceration in hospitals for the criminally insane. Like the distinction between degrees of murder, the insanity defense has consumed inordinate judicial time, lengthened trials and confused jurors, caused numerous appellate reversals, and in the end produced vague definitions which satisfy few students of either criminal law or mental illness.¹³

Barrett Prettyman, a former law clerk for the United States Supreme Court, has described the dilemma engendered by the application of doctrines attributable to the death penalty to the criminal law system as a whole:

"Life is precious and sacred, and the state undertakes no more awesome a responsibility than when it deliberately sets about to excise the life of one of its citizens. Every protection must be accorded innocent and guilty alike, regardless of delay, lest a mistake be made for

which there can be no remedy. As terrible as life imprisonment would be for an innocent man, nothing transcends the horror of a life wrongly taken—not in the heat of passion, not in a haze of alcohol, not through provocation or hatred or revenge, but coolly, deliberately, by society itself. Because of this possibility, doubts are resolved in favor of the accused. Rules are stretched. Some bad law is made. And all because there are no second chances once the penalty has been exacted.

“It is my own belief that many delays, many votes, and many decisions in these cases can be explained only in terms of the schizophrenic situation in which the Justices find themselves—compelled to recognize and even enforce a penalty they abhor: the death penalty.”¹⁴

C. DELAY IN THE COURTS

The death penalty clogs the courts with litigation on behalf of condemned men, and, in the words of the President’s Crime Commission, the resulting “spectacle of men living on death row for years while their lawyers pursue appellate and collateral remedies contradicts our image of humane and expeditious punishment of offenders.”¹⁵ The American Bar Foundation concluded after a 1961 study that the endless litigation in capital cases weakens public respect for the law.¹⁶

In the first place, capital trials are almost inevitably long, drawn-out affairs—at least where the accused is adequately represented by competent counsel. Impaneling a jury in such a case may take weeks, even months, both because jurors dislike such cases and often seek to be excused, and because those who state that they would under no circumstances vote for the death penalty are ineligible to serve. The trials themselves are typically protracted; since life is at stake, every possibly relevant point must be explored. In some states, there are two trials, one on the issue of guilt, and, if the defendant is convicted, another on the issue of penalty.

Then begins the longest part of the process: the appeals, collateral litigation, and clemency proceedings, all of which typically consume years. The result is well known. Caryl Chessman’s trial began in June 1948 and ended with his execution on May 2, 1960.

That long a stay on Death Row was unusual at the time, but since then has become almost commonplace. As of the end of 1968, some 35 prisoners had been on Death Row for eight years or more.¹⁷ There have been no executions since that time, so presumably most of them are still there. Edgar Smith has spent nearly fourteen years on Death Row in New Jersey. When his book, *Brief Against Death*, was published in 1968, there had been 14 separate rulings in his case by state and federal courts.

There can be little doubt that condemned prisoners generate a disproportionate amount of post-trial litigation. It is true that some prisoners who are not under sentence of death are inveterate "writ-writers" who barrage the courts with pleas and appeals, but their numbers are few and in many cases their efforts can be quickly dismissed as frivolous. Almost all condemned prisoners, at least those under real threat of execution, are constantly in litigation. Richard Hammer, in his book *Between Life and Death*, reports that few appeals went from Death Row in Maryland to the federal courts while a governor with a liberal commutation policy held office. However, when a new governor took office and announced that he would not commute death sentences, "that was when the guys started appealing. Of course after that it got to be a habit to appeal, to look for grounds, and it's kept right on."¹⁸

Legal actions brought by condemned men are never treated lightly by the courts. Barrett Prettyman has described the procedure in the Supreme Court:

"What happens in practice is that some cases are so obviously frivolous that the Justices agree not even to discuss them. However, I have never known a capital case to be treated in this manner. On the contrary, the Court overcomes all kinds of difficulties to devote to such cases a disproportionately large amount of time. Most capital cases involve indigents, and their appeals come to the Court *in forma pauperis*—that is, without the ordinary expenses involved in presenting an appeal. Thus, instead of filing forty printed briefs and records, the attorney for an indigent files only one. Sometimes the petition is in the defendant's own handwriting—ungrammatical, barely legible, and wild in its accusations. The single copy is circulated among all nine Justices,

accompanied by a memorandum prepared by one of the Chief Justice's law clerks. Nevertheless, despite these unpropitious circumstances, each Justice gives meticulous attention to the file when he sees the label 'capital case' printed in red on the outside cover. In fact, the capital case receives more attention than any other class of cases coming before the Court."¹⁹

Lengthy periods of incarceration on Death Row have become common only in recent years. In the past, most executions were carried out quite promptly after sentence of death was passed. There are two main reasons for this change.

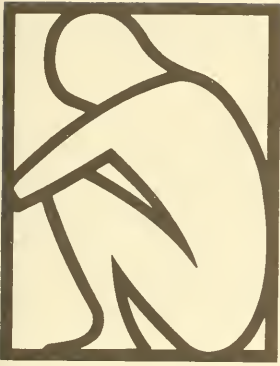
First, the great majority of persons sentenced to death are too poor to hire lawyers. For a variety of reasons, the quality of representation by appointed counsel has greatly improved in the past dozen years. Moreover, in the past the right to be appointed counsel was generally limited to the trial level—leaving the defendant unrepresented on appeal, collateral proceedings, or clemency proceedings. The few condemned men able to obtain proper legal help—Sacco and Vanzetti, for instance—were not executed for many years after sentence was passed. Recently, Supreme Court decisions requiring the appointment of counsel on appeal, public funding of legal aid, and a new growth of interest in criminal law among lawyers has meant that many criminal defendants, and most condemned men, can obtain good post-courtroom legal representation.

The second development has been an expanded access to the writ of habeas corpus and other collateral remedies. In the past, a criminal defendant was largely confined to matters raised by his lawyer at trial. Legal points not raised were considered waived, even when legal doctrines pertaining to the defendant's procedural rights were expanded after the trial. Appointed counsel would sometimes forego raising legal points which would require extra research and trial time. Thus men have been executed even though their convictions were obtained on the basis of unconstitutionally coerced confessions, for no better reason than that lawyers whom they had no part in choosing failed to raise the point at their original trials or because the standards of inadmissibility were tightened after their trials.²⁰ Today, such points may be raised in federal court, and in some state courts, on petition for habeas corpus after trial and appeal. Federal courts will no longer dismiss substantial points on

technical procedural grounds, particularly when a human life is at stake.²¹

D. CONCLUSION

In short, extended delay is an inevitable consequence of capital punishment once the system sees that condemned men are properly represented, and as long as the courts take meticulous care to see that no defendant is wrongly executed. And yet when the delay is as great as it is, much of the effect of punishment as a deterrent, dependent as it is on swiftness and certainty, is lost. Respect for the law is seriously eroded in the public mind. And the cruelty of the death penalty is enhanced, as condemned men live for years in the terrible environment of Death Row, with the uncertain threat of death always close to them.



CHAPTER IX:

THE FINANCIAL COSTS OF CAPITAL PUNISHMENT

Retentionists sometimes argue that taxpayers should not have to pay the cost of imprisoning convicted murderers when money would be saved by executing them. The same argument would justify the killing of the helplessly senile, sick and mentally deficient. In any event, examination of the relevant costs indicates that it is far more expensive to put a man to death than to imprison him for life.

The relevant costs are those of litigation and imprisonment. As has already been indicated, a capital trial generally takes longer than one in which the death penalty is not involved, and is correspondingly more expensive. Trial costs, including judge and lawyer time, courtroom space, security arrangements, and stenographer costs can run very high.¹ It is said that the recent Sirhan and Manson murder trials have each cost the state of California close to one million dollars.

The additional appellate and collateral litigation brought by condemned men is also very expensive to the state. Where the defend-

ant is indigent, as capital defendants usually are, the high costs of printing briefs and records on both sides must be born by the state. Government lawyers must defend the litigation, and where publicly funded legal aid agencies represent the condemned man, the taxpayer is paying the lawyers for both sides. Since courts usually give careful consideration to appeals by condemned men, substantial expensive judicial time is involved. *Time* magazine recently reported that the commutation of the death sentences of 15 Arkansas prisoners saved the state an estimated \$1.5 million, "considering the many appeals that would have been argued."²

On the imprisonment side, the lengthy time condemned men now usually spend on Death Row is extremely costly. Richard McGee, administrator of the California correctional system, has written:

"The actual costs of execution, the cost of operating the super-maximum security condemned unit, the years spent by some inmates in condemned status, and a pro-rata share of top level prison officials' time spent in administering the unit add up to a cost substantially greater than the cost to retain them in prison the rest of their lives."³

In 1968 the annual maintenance cost for noncapital prisoners in California was about \$2700 and for Death Row inmates \$3800.⁴ However, a factor not included in that estimate adds greatly to the relative cost of confinement on Death Row. Many prisoners take part in prison industries programs which in some cases completely offset the costs of operating the prison system and in any event substantially contribute to meeting those costs.

Condemned men are not permitted to offset the costs of their confinement by taking part in these programs.

When the exclusion of condemned men from the prison-industries program is taken into account, it appears that the imprisonment costs of a life sentence are likely to be less than the cost of the current average Death Row detention period. When the unquestionably higher litigation costs engendered by the death penalty are added to the equation, it seems clear, from the narrow perspective of financial cost accounting, that capital punishment is a losing proposition.

FOOTNOTES

CHAPTER I

1. *Citizens Against Legalized Murder, Inc. (C.A.L.M.) Newsletter*, Dec. 1969, at 1.
2. Royal Commission on Capital Punishment, *Report* (1953) at 340.
3. H. Bedau (ed.), *The Death Penalty in America* (1967) (hereinafter H. BEDAU) at 8-13.
4. H. BEDAU at 48-52.
5. United States Department of Justice, *National Prisoner Statistics: Capital Punishment, 1930-1968* (1969) (hereinafter NPS) at 7.
6. NPS at 7.
7. *Id.* at 8-11.
8. *Id.* at 12; The May 1971 figure is reported by Citizens Against Legalized Murder (C.A.L.M.).
9. *United States v. Jackson*, 390 U.S. 570 (1968); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).
10. *McGautha v. California*, U.S. Law Week (May 3, 1971).
11. Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 *Harvard Law Review* 1773 (1970).
12. *Ralph v. Warden*, 438 F. 2d 786 (4th Cir. 1970).

CHAPTER II

1. Indeed the states without the death penalty are by and large those with the fewest homicides. In 1969, the three states with the lowest homicide rates, and five of the lowest seven, were abolition states. The six states with the highest rates, and 12 of the top 13, retain the death penalty. Federal Bureau of Investigation, *Uniform Crime Reports—1969* at 58-63.
2. "To Abolish the Death Penalty", Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, 90th Cong., 2d. Sess. (1968) (hereinafter HART HEARINGS) at 109.
3. T. Sellin, "Death and Imprisonment as Deterrents to Murder," in H. BEDAU, at 279.
4. Reckless, "The Use of the Death Penalty—A Factual Statement", 15 *Crime & Delinquency* 43 (1969).
5. T. Sellin, *supra* note 3, at 281.
6. T. Sellin (ed.), *Capital Punishment* (1967) at 124.
7. Samuelson, "The Effect of the Abolition and Restoration of the Death Penalty in Delaware," in HART HEARINGS at 112, 119.
8. Dann, *The Deterrent Effect of Capital Punishment* Committee of Philanthropic Labor of Philadelphia Yearly Meeting of Friends (Bul. No. 29) 1935.
9. Savitz, "The Deterrent Effect of Capital Punishment in Philadelphia" in H. BEDAU at 315.
10. H. Mattick, *The Unexamined Death* (1963) at 12-13.
11. T. Sellin (ed.), *The Death Penalty* (1959) at 34.
12. T. Sellin, *supra* note 6, at 152-153.
13. Campion, "Does the Death Penalty Protect State Police," in H. BEDAU at 301, 314.

14. H. BEDAU at 267.
15. *Id.*
16. HART HEARINGS at 23; H. BEDAU at 267.
17. HART HEARINGS at 11.
18. HART HEARINGS at 24.
19. Cobin, "Abolition and Restoration of the Death Penalty in Delaware" in H. BEDAU at 373.
20. HART HEARINGS at 126-127.
21. See generally Wolfgang, "A Sociological Analysis of Criminal Homicide", in H. BEDAU at 74-89.
22. See *Id.*; and see Federal Bureau of Investigation, *Uniform Crime Reports—1969* at 8.
23. T. Sellin (ed.), *supra* note 6.
24. T. Sellin, *supra* note 3, at 284.

CHAPTER III

1. Stanton, "Murderers on Parole," 15 *Crime and Delinquency* 149 (1969).
2. California Assembly, Interim Committee Reports, Vol. 20, No. 3, "Problems of the Death Penalty and its Administration in California" (1957), at 12.
3. Massachusetts Department of Correction, *An Analysis of Convicted Murderers in Massachusetts: 1943-1966* (1968).
4. Ohio Legislative Service Commission, "Capital Punishment" (1961).
5. HART HEARINGS at 110.
6. Wisconsin Legislative Reference Bureau, Bulletin #210, (March 1962).
7. HART HEARINGS at 110.
8. Stanton, *supra* note 1, at 153-154.
9. L. Lawes, *Man's Judgment of Death* at 49.
10. Ehrmann, "The Human Side of Capital Punishment", in H. BEDAU at 497-500.
11. On Leopold's life, see his autobiography, *Life Plus 99 Years* (1958), and "The Rehabilitation of Nathan Leopold," 236 *Saturday Evening Post* 66 (1963). Loeb died in prison.
12. Bailey, "Rehabilitation on Death Row", in H. BEDAU at 556.
13. See Smith's autobiography, *Brief Against Death* (1968) with introduction by William F. Buckley.
14. For other stories of rehabilitation on Death Row, see Gaddis, "Birdman of Alcatraz"; *Life* magazine Apr. 11, 1960; Hammer, *Between Life and Death* (1969).

CHAPTER IV

1. Plato, *Protagoras*, 324.
2. Quoted in A. Koestler, *Reflections on Hanging* (1957), at 105.
3. *People v. Oliver*, 1 N.Y. 2d 152, 160, 134 N.E. 2d 197, 201, 151 N.Y.S. 2d 367, 373 (1956).
4. *In re Estrada*, 63 Cal. 2d 740, 745, 408 P. 2d 948, 951, 48 Cal. Rptr. 172, 175 (1965).
5. Royal Commission on Capital Punishment, *Report* at 17.

6. State of Florida, Special Commission for the Study of Abolition of Death Penalty in Capital Cases, *Report* (1965) at 23.
7. J. Michael and H. Wechsler (eds.), *Criminal Law and Its Administration* (1940) at 9-10.
8. W.J. Stephen, *A History of the Criminal Law of England* (1883) at 81-82.
9. Vellenga, "Christianity and the Death Penalty," in H. BEDAU at 129.
10. Allen, "Capital Punishment: Your Protection and Mine," in H. BEDAU at 138.
11. A. Koestler, *supra* note 2, 105-106.

CHAPTER V

1. Camus, "Reflections on the Guillotine", in *Resistance, Rebellion and Death* (1960) (hereinafter CAMUS) at 133.
2. For descriptions of life on Death Row, see E. Smith, *Brief Against Death* (1968); R. Hammer, *Between Life and Death* (1969).
3. West, "Medicine and Capital Punishment" in HART HEARINGS at 127.
4. *Id.*
5. Bluestone & McGehee, "Reaction to Extreme Stress: Impending Death by Execution," *American Journal of Psychiatry*, Nov. 1962, at 393.
6. Ziferstein, "A Psychiatrist Looks at Capital Punishment," 8 *Frontier* 5 (1957).
7. *Musselwhite v. State*, 215 Miss. 363, 367 So. 2d 807, 809 (1952).
8. Ehrenzweig, "A Psychoanalysis of the Insanity Plea—Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell", 1 *Criminal Law Bulletin* 3, 11 (1965).
9. F. Dostoevski, *The Idiot* (Modern Library, 1935) at 20.
10. B. Eshelman & F. Riley, *Death Row Chaplain* (1962) at 160-161.
11. Wolfe, "Death Row Is Crowded With Waiting Men", *Newark News*, September 28, 1969.
12. CAMUS at 149-150.
13. HART HEARINGS at 20.
14. Royal Commission on Capital Punishment, *Report* (1953) at 249.
15. G. Scott, *The History of Capital Punishment* (1950) at 213-214.
16. Royal Commission Report, *supra* note 14, at 250.
17. L. Lawes, *Life and Death in Sing Sing* (1928) at 171.
18. Rubin, "The Supreme Court and the Death Penalty," 15 *Crime and Delinquency* 128 (1969).
19. *New York Times*, June 20, 1953, p. 1, col. 8.
20. *United States ex. rel. Francis v. Resweber*, 329 U.S. 459, 476 (1947) (dissenting opinion of Burton, J.).
21. Prof. L.G.V. Rota, quoted in G. Scott, *supra* note 15, at 219.
22. *United States ex. rel. Francis v. Resweber*, *supra* note 20, at 280 n. 2.
23. B. Prettyman, *Death and the Supreme Court* (1961) at 127-128.
24. HART HEARINGS at 21.
25. See J. Kevorkian, *Medical Research and the Death Penalty* (1960) at 18-19; Schmitt & Schmitt, "The Nature of the Nerve Impulse: The Effect of Cyanides upon Medullated Nerves (Pt. 2)", 97 *American Journal of Physiology* 302, 302-304 (1931).

26. Stevens, "Caryl Chessman's 'After Death' Letter," *San Francisco Examiner*, May 3, 1960, p. 1, col. 5.
27. *Time*, June 23, 1967, Letters to Editor.
28. Royal Commission Report, *supra* note 14, at 256.
29. Thackeray, "Going to See a Man Hanged," *Fraser's Magazine*, August 1840, at 156, quoted in H. BEDAU at 2.
30. CAMUS at 132.
31. *Id.* at 142.
32. See generally, C. Duffy and A. Hirshberg, *88 Men and 2 Women* (1962); L. Lawes, *Life and Death in Sing Sing* (1928).
33. Quoted in Rubin, *supra* note 18, at 129.
34. CAMUS at 141.
35. *Id.*
36. *Id.* at 142.
37. Thackeray, *supra* note 29.
38. A. Koestler, *Reflections on Hanging* (1957).
39. H. BEDAU at 21-22.
40. L. Lawes, *supra* note 32, at 168.
41. HART HEARINGS at 124.
42. *Philadelphia Bulletin*, November 2, 1969, sec. 2, p. 6.

CHAPTER VI

1. Quoted in Pollak, "The Errors of Justice", *The Annals*, Nov. 1952, at 115.
2. HART HEARINGS at 59.
3. HART HEARINGS at 60.
4. On Wisconsin, see Wisconsin, *Capital Punishment in the States* (1962), at 2; on Rhode Island, see L. Beman (ed.), *Selected Articles on Capital Punishment* (1925), at 355-356; on Maine, see the letter of March 20, 1958 by then Governor Edmund Muskie of Maine, in Society of Friends, *Materials: New Jersey Assembly Bills 33 and 34* (1958).
5. E. Borchard, *Convicting the Innocent* (1932); E. Gardner, *The Court of Last Resort* (1952); J. Frank & B. Frank, *Not Guilty* (1957); E. Radin, *The Innocents* (1964).
6. H. BEDAU at 434-451.
7. HART HEARINGS at 60.
8. Ehrmann, "The Human Side of Capital Punishment", in H. BEDAU at 502.
9. *Id.*
10. *List of Pardons, Commutations, Reprieves, and Other Forms of Clemency: Report to the General Assembly of Virginia* (1954) at 1-2.
11. Ehrmann, *supra* note 8, at 502.
12. Frank & Frank, *supra* note 5, at 61-62.
13. *Id.* at 40-50.
14. *Id.* at 78-83.
15. Radin, *supra* note 5, 86-103.
16. See *Raleigh (N.C.) News and Observer*, October 5, 6 and 7, 1967.
17. Radin, *supra* note 5, at 130-133.
18. *Id.* at 136-137.

CHAPTER VII

1. See Table II, Chapter I, *supra*.
2. *Ralph v. Warden*, 438 F 2d 786, 791-792 (4th Cir. 1970).
3. See Table III, Chapter I, *supra*.
4. See, e.g., J. Michael and H. Wechsler, *Criminal Law and its Administration* (1940), at 162-170.
5. See *id.* at 202-223.
6. See, e.g., National Commission on Reform of the Federal Criminal Laws, *Final Report*, (1970), at 40-42.
7. See *McGautha v. California*, 39 U.S. Law Week 4529, 4531 (May 3, 1971); and see Knowlton, "Problems of Jury Discretion in Capital Cases", 101 *Univ. of Pennsylvania Law Review* 1099 (1953).
8. H. BEDAU at 45-47.
9. See note 7, *supra*.
10. See *id.* at 4531.
11. See generally Abramowitz and Paget, "Executive Clemency in Capital Cases", 39 *New York Univ. Law Review* 136 (1964).
12. H. BEDAU at 36; Federal Bureau of Investigation, *Uniform Crime Reports*, 1961-1969.
13. H. BEDAU at 62.
14. See Table II, Chapter I, *supra*.
15. The average annual number of criminal homicides during the 1960's was something over 11,000; using the 15 per cent figure, this produces an average of about 1700 capital murders annually.
16. HART HEARINGS at 93.
17. Brief Amicus Curiae of N.A.A.C.P. Legal Defense and Educational Fund in *Boykin v. Alabama*, 395 U.S. 238 (1969), at 56.
18. HART HEARINGS at 25.
19. *Id.* at 11.
20. "A Study of the California Penalty Jury in First Degree Murder Cases," 21 *Stanford Law Review* 1297 (1969).
21. Wolfgang, Kelly and Nolde, "Executions and Commutations in Pennsylvania", in H. BEDAU at 483.
22. Ohio Legislative Service Commission, *Capital Punishment* (1961).
23. N.A.A.C.P. Legal Defense and Educational Fund, *supra* note 17, at 8.
24. NPS at 10.
25. *Id.* at 10-11.
26. *Id.*
27. *Id.* at 3.
28. American Civil Liberties Union of Florida, *Rape: Selective Execution Based on Race* (1964).
29. Transcript of Pretrial Hearing, *Maxwell v. Bishop*, No. PB66-C-52, August 22, 1966 (E.D. Ark.) (testimony of Dr. Marvin Wolfgang).
30. Wolf, "Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey", 19 *Rutgers Law Review* 56 (1964).

31. Garfinkel, "Research Note on Inter- and Intra-Racial Homicides", 27 *Social Forces* 369 (1949).
32. Wolfgang, Kelly and Nolde, *supra* note 21, at 474.
33. Bedau, "Death Sentences in New Jersey—1907-1960", 19 *Rutgers Law Review* 1 (1964).
34. Ohio Legislative Service Commission, *supra* note 22, at 62-63.
35. M. Wolfgang and B. Cohen, *Crime and Race: Conceptions and Misconceptions* (1970), at 85-86.

CHAPTER VIII

1. President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Courts* (1967), at 27.
2. *Id.*
3. Brown, "Statement on Capital Punishment" (1963), at 5.
4. Quoted in E. Gowers, *A Life for a Life* (1956), at 59-60.
5. A. Koestler, *Reflections on Hanging* (1957).
6. Knowlton, "Problems of Jury Discretion in Capital Cases", 101 *Univ. of Pennsylvania Law Review* 1099 (1953).
7. President's Commission, *supra* note 1, at 27.
8. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).
9. *Stein v. New York*, 346 U.S. 156, 196 (1953).
10. HART HEARINGS at 35.
11. *Fisher v. United States*, 328 U.S. 463, 487 (1946) (dissenting opinion of Mr. Justice Frankfurter).
12. B. Cardozo, *Law and Literature* (1931) at 99-101.
13. Ehrmann, "The Death Penalty and the Administration of Justice", in H. BEDAU at 430.
14. B. Prettyman, *Death and the Supreme Court* (1961), at 308.
15. President's Commission, *supra* note 1, at 28.
16. McIntyre, "Delays in the Execution of Death Sentences", American Bar Foundation Research Memorandum Series, No. 24 (1960).
17. NPS at 26.
18. R. Hammer, *Between Life and Death* (1969), at 231-232. (Note: The current governor of Maryland, Marvin Mandel, has halted all executions in the state pending a decision by the United States Supreme Court on the constitutionality of the death penalty.)
19. B. Prettyman, *supra* note 14, at 305.
20. *Williams v. Georgia*, 349 U.S. 375 (1955), 350 U.S. 950 (1956). The case is described in detail in B. Prettyman, *supra* note 14, at 258-294.
21. *Fay v. Noia*, 372 U.S. 391 (1963).

CHAPTER IX

1. See "The Death Penalty Cases", 56 *California Law Review* 1268, 1312 (1968).
2. *Time*, January 11, 1971, at 50.
3. McGee, "Capital Punishment as Seen by a Correctional Administrator", 28 *Federal Probation* 13 (1964).
4. "The Death Penalty Cases", *supra* note 1, at 1311.

Mr. KASTENMEIER. Our next witness is Mr. Howard B. Gill, Director of the Institute of Correctional Administration, Washington, D.C., and Senior Fellow, Institute for Studies in Justice and Social Behavior, Washington College of Law, The American University, Washington, D.C.

We are very pleased and honored to welcome you, Mr. Gill. We are aware of your very long and distinguished record as an educator and as a penologist.

I notice you have a rather brief statement and we would be pleased if you would present it to us.

If you have any addenda to your statement, we will add them for the record.

You may proceed, Mr. Gill.

TESTIMONY OF HOWARD B. GILL, DIRECTOR OF THE INSTITUTE OF CORRECTIONAL ADMINISTRATION, WASHINGTON, D.C.

Mr. GILL. Thank you very much, Mr. Chairman.

It is a pleasure to be here before the Committee and I have come to testify in opposition to H.R. 3243 and H.R. 12217 and related bills, and to H.R. 8414, unless certain provisions establishing positive action as a result of such a 2-year moratorium of the death penalty are included in the bill.

I do not expect to thresh over old straw, that is deterrence, self defense, sanctity of life, executions of the innocent, inequalities in criminal justice or cruel and unusual punishment, because all these arguments are mainly subjective. There is no proof for example that capital punishment is a deterrent or is not a deterrent; there is evidence on both sides. My own experience in prison work indicates that prisoners are not deterred. On the other hand, there is no evidence to show that other people are deterred, but they obviously are. There have been studies made which show deterrence has some effect, but it can't be proved.

As for cruel and unusual punishment, the Supreme Court, I think, acted recently in the case of *Louisiana ex rel Francis v. Resweber* when it stated:

The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method humanely employed to extinguishing life humanely.

I don't want to take the time of the committee to go into other similar arguments because I think they are not particularly relevant.

The chairman proposed six options. I think there is a seventh option which the committee ought to take into consideration.

I have not had the privilege of reading Mr. Lyon's extensive statement, but I notice he says we are not doing anything about murder, yet he proposes nothing. That is so true of people proposing the abolition of capital punishment.

I propose a constructive force, a positive way of using capital punishment as a corrective agent.

First, I would like to extend the statement about my own experience. While I am a college professor I should like to appear here chiefly as one who has handled between 40,000 and 50,000 prisoners in my lifetime as warden of a Massachusetts prison, as assistant to the Direc-

tor of the Federal Bureau of Prisons, where I had charge of 5,000 offenders under the Selective Service Act, and also as superintendent of prisons for the District of Columbia, with over 20,000 prisoners annually under my supervision.

One thing that always impresses me with respect to most people in favor of the abolition of capital punishment is that they have never had experience with criminals. I think that is true of Professor Sellin, Professor Wolfgang and, I assume, of Mr. Lyons. I think this is a very important point. I should like this committee to listen to people like John Case, director of corrections and warden of Bucks County Prison in Pennsylvania; I don't know his point of view, but he is an operator and an idealist as well.

The current opinion is that all people in favor of retention of capital punishment are violent, revengeful people. I am not a revengeful person. There are some people—Jacques Barzun, former dean of faculties and provost of Columbia University and Alexis Carrell, author of "Man the Unknown,"—who favor the death penalty. They are not violent people and I am not a violent person.

This simplistic point of view which wants to exchange one extreme for another, it seems to me, is entirely punitive.

I have known personally or been acquainted with many offenders condemned to death. One man convicted of an atrocious murder spent 60 years and died a natural death in prison. For those years he had undergone a living death.

I also knew a man who spent 9 years proving his innocence of murder and was then under my supervision for several years.

Another man who was on death row when I was Superintendent of Prisons for the District of Columbia threatened to cut my throat. I went up and sat down in his cell with him and discussed his problems.

What I am saying is one must have experience with prisoners if one is to testify with effectiveness because the experience of dealing with the offender produces a very different point of view from that which is the result of some ivory tower studies.

Most of the people who write on the abolition of capital punishment are of the ivory tower type.

The aim of punishment is not merely deterrence. Indeed, deterrence is a very uncertain thing. The aim of punishment is to protect the public and change the offender. We don't really rehabilitate anyone; we change people a little. You can't rehabilitate a criminal in a few years after he has spent 30 or 40 years some other way. So we are satisfied if we merely change prisoners slightly.

One important motivation for change, as I point out in my formal statement, is based upon the need of survival. The basic need of man is to survive and, when that is threatened, the normal man will change.

The case of Caryl Chessman is an excellent example. After 12 years on death row in San Quentin, he was a different man. I think that is an observation we ought to bear in mind.

I am proposing a seven-point positive program and I should like to read that for the sake of the record.

If we abolish the death penalty, we remove this most potent force in changing persons convicted of a capital offense. By retaining the death penalty, but providing for its modification through constructive use of it as a motivating factor, we can turn it from an "irrational and

archaic institution," as claimed by the abolitionists, into a constructive force for reform.

What I propose is briefly—

- (1) That all persons convicted of a capital offense be sentenced conditionally to capital punishment;
- (2) With a finding by the jury of either aggravating or mitigating circumstances;
- (3) That such convicted persons be remanded to a diagnostic center for thorough observation and diagnosis;
- (4) That on findings as to the probable problem or problems underlying the offense, the convict be given the opportunity for treatment toward change;
- (5) That as long as constructive change is demonstrated, the execution of the sentence shall be held in abeyance;
- (6) If in the opinion of those in charge of such treatment, such change is sufficient to warrant release under supervision (either work-release or parole), recommendations to this effect shall be made to the committing court, and, if approved, the convicted person shall be released under such conditions as are appropriate; (That may be at the end of 10, 15, or 20 years. I don't know how long that will be.)
- (7) If no adequate change is noted, then recommendations for execution of the sentence shall be made to the court, and appropriate action follow.

Quite contrary to the news media, we have very effective ways of changing people, not rehabilitating but changing. We can use psychotherapy or psychosurgery. Lobotomies are being tried in California and they are an important possibility for dealing with violent offenders obsessed with the idea of killing people. We have social, medical, and a variety of methods which can be used to change people.

As far as H.R. 8414 is concerned, which proposes "to suspend the death penalty for 2 years," it should be something other than merely a means of adding more and more convicts on death row to the 600 or more now there. As it now stands, it is a "stall" toward abolition. That is not a sound, positive approach. However, as provided on page 2, line 8, it can provide under "further investigation and consideration," specific recommendations for examination and report in every State, of the convicts now sentenced to death, and for sufficient appropriations to carry out a nationwide, State-by-State study of these cases by experienced, professional persons who are competent to evaluate such cases. Both the sentimental proponents of abolition and those violent persons who advocate the retention of the death penalty for punitive reasons, should be excluded from such investigations.

The chairman has asked what kind of organization might be suggested. I think it should be very simple. There might be a national commission and each State could appoint its own separate commission perhaps on a matching basis. The cost would be up in the millions, \$4, or \$5, or \$6 million, a small amount compared with the importance of the question.

We are not going to face a blood-bath in this country even if the Supreme Court refuses to abolish the death penalty. Neither will the States be satisfied to commute all such sentences to life imprisonment in spite of the pressures which will be exerted by a well-organized

and vocal minority to do so. Something constructive must be considered. H.R. 8414, if amended, can provide such an alternative.

As for H.R. 3243, H.R. 11217, and related bills which propose to substitute a form of punitive action for capital offenses which is, at best, only negative and, at worst, a living death, I suggest a modification of the imposition of the death penalty instead of its abolition. Such modification, as suggested in the seven-step program outlined herewith, will meet all the valid objections of those who now favor the abolition of the death penalty and it will satisfy most of the arguments in favor of its retention. In addition, it will provide a positive program for the treatment of persons convicted of a capital offense.

I propose that H.R. 3243 and H.R. 12217 be rewritten to propose a modification of the death penalty as suggested, and not its abolition.

In the light of existing knowledge of behavior modification through psychosurgery, psychotherapy, and other medical and social practices, the proposals embodied in H.R. 3243 and H.R. 12217, and in H.R. 8414 as they now stand, imply a total ignorance or misconception of modern criminological concepts.

Justice Louis Brandeis has said, "The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning, but without understanding."

The proposal to exchange one extreme (unlimited capital punishment) for another extreme (unmodified abolition of capital punishment) as proposed in H.R. 3243 and H.R. 12217 and related bills, is an example of such "zeal, well-meaning, but without understanding".

Even H.R. 8414, if proposed without conditions which will insure a thoughtful examination and evaluation of capital punishment as it applies to an abundance of existing cases, is also a naive attempt to postpone a decision which should be met with all the professional judgment available. Such simplistic approaches do not provide satisfactory answers to a very serious, complex problem in society's war on crime.

My thesis is neither that of the blind but primitive man of vengeance who seeks "eye for eye and tooth for tooth"; nor is it that of the blind zealot, "well-meaning but without understanding." I ask simply for a rational and professional approach to this question of capital punishment.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Professor Gill, for your statement.

I should perhaps say a word in defense of the witnesses we have had in the past. I think the record of the committee will not characterize people as either bloodthirsty or bleeding hearts and those academics appearing here, and who will perhaps appear in the future, do not presume to testify except within their own competence if, indeed, they lack the experience you have had. The committee is mindful of that.

It occurs to me that among notable wardens and penologists in the country, there is certainly no unanimity in favor of the death penalty. Jim Bennett and Warden Lawes, among others, were opposed to the penalty of death. In any event, your own novel suggestions are indeed welcomed by this Committee.

You make the suggestion that an individual convicted of a capital crime could avoid the death penalty by responding to treatment directed toward change. As long as he responded he could avoid the

death penalty. Ultimately, how and by whom would the decision be made that he has responded and changed and that some other disposition might be made of him?

Mr. GILL. It would have to be made on the recommendation of a professional body made up of competent people, to the court, and it might have to be presented to a jury as in the original case.

Mr. KASTENMEIER. I would agree with you; I think procedurally the determination would have to be judicial in some sense.

Mr. GILL. That is the proposal made in item 6, that the recommendation would be submitted to the court. That might entail a jury.

With regard to Mr. Bennett, Mr. Lawes, Mr. Duffy, all of whom I have known and have met and talked with, I would say, with all due respect to those gentlemen, they are administrators but not profound students of penology. I knew all of them quite well in my 45 years in this business.

Mr. KASTENMEIER. I don't want to be contentious about discussing anyone's background but the men you have mentioned, I think they are eminent and have been listened to with respect on this question.

You would not say on that point that the overwhelming majority of your colleagues favor retention, would you?

Mr. GILL. I wouldn't know. That is a question I don't have any information on and, if I did, it would not be particularly significant because so many such are either political appointments or practical administrators, not particularly devoted to a study of the philosophy of corrections.

It is very seldom we find men who have both. A man like Austin McCormack, who I think is opposed to capital punishment, is a practical administrator and a student on this subject. There are others—I don't know how they stand—men like Lloyd McCorkle of New Jersey, Russell Oswald, Commissioner of Corrections in New York, Richard McGee, former Commissioner of Corrections in California, Myrl Alexander of the University of Southern Illinois and former Director of the Federal Bureau of Prisons. The combination is very rare. So many operators in prison work are not students and so many students of criminology are not operators.

Mr. KASTENMEIER. Would you tell us something about the Institute of Correctional Administration of which you are director and senior fellow here in Washington?

Mr. GILL. The original Institute was established in 1952 at George Washington University as a result of a conference between representatives of the Department of Defense, the Federal Bureau of Prisons and representatives of George Washington University. It operated at George Washington University for 6 years until 1958 when it was transferred to American University and continued there on a contract basis. When I retired in 1970, I continued the Institute as a consulting and organizing force.

Recently we established five courses in correctional administration for the University of North Carolina at Greenville. I am in the process of developing and they are in the process of carrying on five such courses at the University of Maine. I am teaching in another Institute at the Law School at American University as part of my contribution from the original Institute and also in the Center for the Adminis-

tration of Justice at American University. I carry a small course for George Washington University at the present time.

The original Institute operates now as a source for consultation, research and information. It is made up chiefly under my direction of my former graduate students of whom there are a number, including Warden John Case, for one. The Commissioner of corrections in Maine is also one of my former students.

Mr. KASTENMEIER. I yield to the gentleman from Pennsylvania.

Mr. BIESTER. Thank you, Mr. Chairman.

I think it would be useful for this committee to know that the witness has had a notable influence on the reform of penal systems in very many areas of this country and that he has, through the Institute, made possible the transposition, by training, of many institutions from custodial, punitive instruments of society to instruments of change for the people who go through them.

While I may not agree with him on this particular subject, I think it would be useful for the committee to know the witness does have a rich background and an early background in terms of change and reform in the motivations, purposes and conduct of American prisons.

We have heard many witnesses, in the course of our work on penal reform and study of prisons, who have commended the work of Mr. Jack Case. Jack Case is the first person to confess he was a Marine major who was "Gillanized." I may find myself in disagreement with the witness in this instance, but it would be important for this committee to know that he has made an enormous contribution to the humanizing of American prisons.

Now, with respect to this subject, do we know what happens psychologically to a man who faces an indefinite period of subjection to the fear of capital punishment?

Mr. GILL. I think the case of Caryl Chessman is a classic and the writings in Chaplain Eshleman's book, Chessman's own statements, his final statement just before he was taken to the execution chamber are very interesting witness of what happens to a man who is motivated to change through having his need for survival threatened. The basic need of man is to survive. When that is threatened, any normal man will change.

It is the abnormal man who does not change. That is the big problem. What we do about him is a very graphic question.

Now, I think we can change him. We may come to the point, as they have in California, of using psychosurgery, lobotomies, glandular surgery. We have to render them harmless if we abolish the death penalty and if we continue to extend community involvement to the better type of prisoners.

We are going to find it difficult to hire people to handle the violent, aggressive prisoners we have in our institutions unless there is some provision for very serious change.

I would hope the committee, if we disagree on the two bills proposing abolition, could concentrate on the proposal of H.R. 8414, is it?

Mr. BIESTER. Yes.

Mr. GILL. I think that is a very interesting and a very important bill, but I am terribly disturbed by the fact it is so simple, that it does not provide for anything specific. Are we just going to have these 600 people lie in death row indefinitely?

I don't see that Mr. Lyons has a proposal for anything. I don't find anything before the Committee that proposes to do anything but keep them there. In 2 years we would have another 600. I tremble to think what our institutions will look like by that time. They will be nothing but custodial institutions for aggressive, violent people.

The Committee must take into consideration that it can propose specifics. It can propose a means of financing this. I think the chairman's suggestion is a very vital and pregnant one. What kind of organization and what kind of appropriation are necessary? I think that is important to this Committee.

I think you will not get abolition of capital punishment in this country. The legislatures and the people are not for it. There is a minority that has been heard in the last few years, but a great majority of the people are not for it, whatever the courts say.

Mr. BIESTER. In your testimony you indicated that for a man to spend 60 years, for example, in jail or prison, is a rather horrendous consequence to him. Aren't there sufficient motivating factors to impel change or a mood to seek change arising out of the possibility of freedom from the prison—wouldn't that be a sufficient inducement to change rather than to hold the additional sword of Democles over them?

Mr. GILL. Theoretically, yes. Actually the organization and the personnel of our prisons today is not fitted for it. The greatest contribution this Committee could make would be to inspire the kind of study proposed. Here we have the greatest group of cases open to consideration and investigation. As a result, we could do a great deal to promote professionalization in our institutions which would make for change. As they exist today, it isn't there. The prison this man spent 60 years in was a human warehouse, old Charlestown prison in Massachusetts.

Mr. BIESTER. There is some motivation, is there not, in the quest for freedom as opposed to a life in prison which induces a man to seek to change?

Mr. GILL. Of course, the greatest coin around a prison is time, good time. If you can offer a man hope for release, that will do something. Unfortunately, however, our parole boards are not always professional. They frequently operate on a rule-of-thumb basis. I have sat in many parole hearings; it is pathetic what goes on. They try the case all over again even if a man has been in prison 10 or 15 years. Their point of view is often political. Think what a study of these 600 cases would do to the whole field of penology in pointing out how change could be effected.

Under a plan such as I propose, 80 percent of the men on death row now would not be executed. That is a conservative estimate. This proposal would save many more than the argument of the abolitionists who want to go from one extreme to the other.

Mr. BIESTER. Would you think that the court proceedings which you point to in paragraph 6 would be in the same court which handled the case in the first place?

Mr. GILL. No. In general the criminal court, but it might not be the same judge, because the time span might be 10 or 15 years. There is no guarantee as to how long a person should be kept subject to change and there are other things to consider besides just change.

Of course, popular opinion would have to be brought to bear too. I remember one time in Illinois when a man who had murdered a policeman was paroled after 20 years, the excitement engendered by that parole was terrific. You have to take into consideration that society also has an interest.

As I understand the courts, they always balance the interest of society against the interest of the individual. It seems the abolitionist who wants pure abolition is always on the side of the individual, never on the side of society. We have to maintain that balance between the two.

Mr. BIESTER. It seems to me society has an interest in the reasonableness or wholesomeness of its institutional activities.

Mr. GILL. I think more than that since society has assumed the responsibility for self-defense. In all the years I have dealt with prisoners, I have never been afraid of any prisoner. But suppose some paranoic gets the notion that I have done something to him and he kills me. If a policeman is on the job, he can shoot that man or in my own self-defense I can shoot him. But we don't. Does it matter whether it is 5 minutes, 5 days, 5 hours, or 5 years? No. Society has assumed it will protect me. Therefore, the whole principle of self-defense enters and society cannot deny the responsibility of self-defense, once having assumed it.

Mr. BIESTER. One last question, which Mr. Fish has always asked me to ask. Do you think, using the structure of H.R. 8414—I appreciate your specifics—but do you think 2 years is a long enough time to successfully study these questions?

Mr. GILL. I think a great deal could be done in 2 years if it were divided up. If you had an over-all Federal Commission working with the States, the responsibility of each State should be felt here. Each State should do its share to study the cases in its jurisdiction, and possibly share in the expense.

If the bill were put on a matching grant basis and the responsibility for making a special study put on each State, it would not only be a good thing from the consitutional point of view but it would be a practical thing.

Mr. BIESTER. Thank you very much.

Mr. GILL. Even at the end of 2 years, if nothing more were accomplished than to open up this question on a constructive basis rather than a negative basis, it would have accomplished a great deal. Then if you wanted to extend it, as the chairman suggested, that would be a proper thing to do provided the studies showed progress. The trouble with the present argument is there is no progress. It is just one extreme or the other extreme.

Mr. BIESTER. Thank you very much, Mr. Gill.

Mr. KASTENMEIER. As to the idea, except for the cost factor, it is a rather intriguing one. If such legislation were enacted, it should encourage the States to set up their own bodies to ask the question in the same fashion.

Would that apply to abolitionist States such as Wisconsin, would they want to re-examine the question as well even though for a hundred years they have not had capital punishment?

Mr. GILL. Yes; for their lifers. In so many States where there is no capital punishment, the lifers are just rotting.

Mr. BIESTER. Yes; that slipped my mind.

Mr. GILL. They have had an accumulation at the Stillwater prison in Minnesota of a large group of lifers who have just become vegetables because nothing has been done for them. I don't know what they are doing for lifers in Wisconsin. My friend, John Gillen, a professor at Wisconsin, once made a study of lifers. That study is probably 35 years old by now. Another such study would be excellent.

Mr. KASTENMEIER. One other comment I would make on your proposal. This subcommittee, in addition to this particular question of capital punishment, has been looking into the question of corrections and parole and one of the questions is the efficacy and desirability of indeterminate sentences such as California has. Your proposal as applied to the death penalty seems to be an indeterminate sentence insofar as it is quite open ended and relies heavily on response to treatment. Would you not agree?

Mr. GILL. No, I have not been in favor of the indeterminate sentence. Experience in Illinois was very unfortunate. It appeared that the people getting release the soonest were those with political influence and those with no friends, stayed.

The experience in California has not been satisfactory. There has been a great deal of criticism of the indeterminate sentence. The experience in Patuxent, Md., has also been very unfortunate. Balancing the rights of individuals against those of society indicates that society ought to give some attention to making the punishment fit the crime. While that is not the whole answer, it should be part of the picture. We send a man to the hospital and keep him there until he is well, but that does not apply to criminals.

The courts are wise in establishing a minimum and a maximum. When it comes to capital punishment, that is something else again. I have never been in favor of the indeterminate sentence. It is an idea that has not proved sound.

Mr. KASTENMEIER. I would say this subcommittee has found problems attendant to it in our investigations in California and a great deal of complaint. So we might well concur.

In any event, on behalf of the committee, Professor Gill, I would like to thank you for your attendance this morning. Your suggestions are very helpful to the committee.

Thank you very much.

Mr. GILL. Thank you, Mr. Chairman.

(Mr. Gill's prepared statement follows:)

STATEMENT OF HOWARD B. GILL, DIRECTOR OF THE INSTITUTE OF CORRECTIONAL ADMINISTRATION, WASHINGTON, D.C. AND SENIOR FELLOW, INSTITUTE FOR STUDIES IN JUSTICE AND SOCIAL BEHAVIOR, WASHINGTON COLLEGE OF LAW, THE AMERICAN UNIVERSITY, WASHINGTON, D.C. MARCH 17, 1972

Thank you for inviting me to present my views on H.R. 8414, H.R. 3243, H.R. 12217 and related bills. I wish to testify in opposition to H.R. 3243 and H.R. 12217 and related bills, and to H.R. 8414 unless certain provisions establishing positive action as a result of such a 2-year moratorium of the death penalty are included in the bill.

PUNITIVE ACTION VS. CORRECTION FOR CAPITAL OFFENDERS

Advocates and opponents of the death penalty, as a rule, confine their arguments, pro or con, to assertions and assumptions re the *punitive* effects of capital punishment as they relate to the concepts of deterrence, sanctity of life, self-defense, execution of the innocent or cruel and unusual punishment. Questions

relating to a distortion of legal procedure or discrimination between poor and minority groups and others, are not peculiar to capital punishment and hence are irrelevant. I shall not waste your time by threshing over this old straw.¹

It is time to discard the simplistic approach which adopts either one extreme or the other—abolition or retention—and attack the question from a rational and professional point of view. Hermann Mannheim, noted English criminologist writing of the recent Moors Murder Trial in which a man and a woman were convicted of the murder of a girl of 10, a boy of 12, and a youth of 17, has stated, "Our penal systems have not yet discovered effective methods of treatment for such cases".² Nowhere in the literature or in testimony before legislative committees such as this, do I find any consideration given to the basic question of capital punishment as a *correctional force in treating persons convicted of a capital offense*. This I propose to offer.

THE NEGATIVE, PUNITIVE APPROACH

Without wishing to appear facetious, it may be thought that the final words of a man about to be hanged who said, "This is going to be a powerful lesson for me", sum of the entire question of corrections for capital offenders. May I call your attention, on the contrary, to a proposal which does offer the possibility of correction in capital cases.

I have been personally acquainted, directly or indirectly, with a number of offenders condemned to death. One man spent 60 years in prison until his death from natural causes. Another spent nine years proving his innocence of murder and then paroled in my custody for several years. Several were executed—one who threatened to cut my throat until I sat by his side in his cell and listened to his problems, and at least two of whom, after years on death row, were executed by officials who were convinced of their guilt, but who found them also changed men.

To those who propose to abolish the death penalty, "The battle over capital punishment may be seen as a microcosm of the conflict between those in authority who believe in violence as a means of coping with society's problems, and those who oppose the use of violence".³ Professor Jacques Barzun, formerly Dean of Faculties and Provost of Columbia University, Alexis Carrell, author of "*Man, the Unknown*", and many others who have given the subject of capital punishment thoughtful consideration and who oppose its abolition, are not among those "who believe in violence as a means of coping with society's problems". Neither am I. So simplistic a point of view is characteristic of those who are really punitive-minded desiring only to trade one form of punishment for another equally negative. As a result, a California court has just sentenced a man convicted of murder to five consecutive life sentences in that State where the State Supreme Court has recently declared the death penalty unconstitutional. Could anything be more "irrational and archaic"?⁴

THE POSITIVE, CORRECTIONAL APPROACH

I would invite your attention to a positive and correctional approach to the treatment of persons convicted of a capital offense.

The aim if punishment for crime is two-fold: To protect the public, and to change the offender through observation, diagnosis, and re-training. Motivation for such change is based on anxiety over need-satisfaction. The most basic need of man is for survival. When survival is threatened, intelligent, normal men will change course. This has been proved time and time in the case of men sentenced to death. The prolonged confinement on death-row of many condemned men is witness to this concept. The case of Caryl Chessman is a case in point. I have known others.

To abolish the death penalty is to remove this most potent force in changing persons convicted of a capital offense. By retaining the death penalty, but providing for its modification through constructive use of it as a motivating factor, turns

¹ For a more detailed statement of these seven typical arguments, see Hearings before the Sub-Committee on Criminal Law and Procedures of the U.S. Senate Committee on the Judiciary, February 16, 1972; statement of Howard B. Gill.

² Mannheim, Hermann, Book Review, *Crime and Delinquency*, Vol. 15, No. 1, page 174, National Council on Crime and Delinquency, N.Y., January 1969.

³ Greenberg, J. and Himmelstein, J., "Varieties of Attack on the Death Penalty", *Crime and Delinquency*, Vol. 15, No. 1, page 120, January 1969.

⁴ *Ibid.*, page 116.

it from an "irrational and archaic institution", as claimed by the abolitionists, into a constructive force for reform.

What I propose is briefly :

(1) That all persons convicted of a capital offense be sentenced conditionally to capital punishment ;

(2) With a finding by the jury of either aggravating or mitigating circumstances ;

(3) That such convicted persons be remanded to a diagnostic center for thorough observation and diagnosis ;

(4) That on findings as to the probable problem or problems underlying the offense, the convict be given the opportunity for treatment toward change ;

(5) That as long as constructive change is demonstrated the execution of the sentence be held in abeyance ;

(6) If in the opinion of those in charge of such treatment, such change is sufficient to warrant release under supervision (either work-release or parole), recommendations to this effect shall be made to the committing court, and if approved, the convicted person shall be released under such conditions as are appropriate ; and finally,

(7) If no adequate change is noted, their recommendations for execution of the sentence shall be made to the court, and appropriate action follows.

"FURTHER INVESTIGATION AND CONSIDERATION" UNDER H.R. 8414

If H.R. 8414 which proposes "To suspend the death penalty for two years," is to be something other than merely a means of adding more and more convicts on death-row to the 600 or more now there, it should provide under "further investigation and consideration" (page 2, line 8), specific recommendations for examination and report in every state, of the convicts now sentenced to death, and for sufficient appropriations to carry out a nation-wide, state-by-state study of these cases by experienced professional persons who are competent to evaluate such cases. Both the sentimental proponents of abolition and those violent persons who advocate the retention of the death penalty for punitive reasons, should be excluded from such investigations.

It is quite obvious that the United States will not undertake a blood-bath of hundreds of prisoners should the U.S. Supreme Court decide not to abolish capital punishment. Neither will the States be satisfied to commute all such sentences to life imprisonment in spite of the pressures which will be exerted by a well-organized and vocal minority to do so. Something constructive must be considered. H.R. 8414 if amended, can provide such an alternative.

MODIFICATION VS. ABOLITION OF THE DEATH PENALTY

As for H.R. 3243, H.R. 12217 and related bills which propose to abolish the death penalty, I am opposed to them on the grounds that they propose to substitute a form of punitive action for capital offenses which is at best only negative and at worst a living death. In their place, I suggest a *modification of the imposition of the death penalty* instead of its abolition. Such modification, as suggested in the seven-step program outlined herewith, will meet all the valid objections of those who now favor the abolition of the death penalty and will satisfy most of the arguments in favor of its retention. In addition, it will provide a positive program for the treatment of persons convicted of a capital offense. I propose that H.R. 3243 and H.R. 12217 be rewritten to propose a modification of the death penalty as suggested, and not its abolition.

SIMPLISTIC ANSWERS VS. A PROFESSIONAL APPROACH

In the light of existing knowledge of behavior modification through psychosurgery, psychotherapy, and other medical and social practices, the proposals embodied in H.R. 3243 and H.R. 12217, and in H.R. 8414 as it now stands, imply a total ignorance or misconception of modern criminological concepts. Justice Louis Brandeis has said, "The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning, but without understanding".

The proposal to exchange on extreme (unlimited capital punishment) for another extreme (unmodified abolition of capital punishment) as proposed in H.R. 3243 and H.R. 12217 and related bills, is an example of such "zeal, well-

meaning, but without understanding". Even H.R. 8414, if proposed without conditions which will insure a thoughtful examination and evaluation of capital punishment as it applies to an abundance of existing cases, is also a naive attempt to postpone a decision which should be met with all the professional judgement available. Such simplistic approaches do not provide satisfactory answers to a very serious, complex problem in Society's war on crime.

My thesis is neither that of the blind but primitive man of vengeance who seeks "eye for eye and tooth for tooth"; nor is it that of the blind zealot, "well-meaning but without understanding". I ask simply for a rational and professional approach to this question of capital punishment.

HOWARD B. GILL.

Mr. KASTENMEIER. The committee would now like to invite our next witness, Mr. William G. Lunsford, to come forward.

Mr. Lunsford appears here on behalf of the Friends Committee on National Legislation and the American Friends Service Committee in support of legislation abolishing and suspending the execution of the death penalty.

Mr. Lunsford, you have a brief statement which, if you like, you may read for us.

TESTIMONY OF WILLIAM G. LUNSFORD, FRIENDS COMMITTEE ON NATIONAL LEGISLATION AND THE AMERICAN FRIENDS SERVICE COMMITTEE

Mr. LUNSFORD. I would like to preface my remarks by warning the committee another extremist is coming before you.

Mr. Chairman, members of the committee, my name is William G. Lunsford. I am the human rights secretary for the Friends Committee on National Legislation.

I testify today on behalf of FCNL and the American Friends Service Committee. Due to the democratic nature of the Religious Society of Friends neither a single person, nor a particular Friends organization can purport to speak for all Friends, therefore my testimony only represents the thinking of the two named organizations and other like-minded Friends.

Over the years many individual Friends, and Friends organizations have spoken out for the abolition of the death penalty as a means of punishment for criminal offenses. FCNL and AFSC again emphatically reaffirm their support for the total abolition of the death penalty for all criminal offenses. If there exists a continuing hesitancy on the part of the Congress to enact abolition legislation either nationally, or at least for Federal offenses, we also support those bills designed to suspend the carrying out of the death penalty for a period of 2 years.

I cannot approach the question of the abolition of capital punishment either from the standpoint of legal interpretation or by using cold statistical data. My only plea, my only argument can be made based upon humanitarian, moral considerations.

I would like to insert here a comment. The phrase in the previous witnesses' written statement which advocates "The attack upon the question from a rational and professional point of view," and the idea expressed several times throughout that there is a need for experienced and professional people to consider this particular question chills me a great deal. I do not come here so much today as an opponent to the death penalty as much as I come here as a proponent of life.

As far as the experience is concerned, I have had experience with living and it is therefore from that approach I approach the question of death. Moral arguments may seem a little old fashioned to some in these modern times, but I happen to feel we would all benefit if more consideration were given to the humanitarian implications of the many pieces of legislation coming before the Congress.

The book "The Prophet," by Kahil Gibran, was recently given to me by a friend. It has become very dear to me. I would like to read from the section where "The Prophet" speaks of crime and punishment:

It is when your spirit goes wandering upon the wind,
That you, alone and unguarded, commit a wrong unto others and therefore unto
yourself.

And for that wrong committed must you knock and wait a while unheeded at the
gate of the blessed.

Like the ocean is your god-self ;
It remains forever undefiled.

And like the sun is you god-self ;
It knows not the ways of the mole nor seeks it the holes of the serpent.

But you god-self dwells not alone in your being.

Much in you is still man, and much in you is not yet man,

But a shapeless pigmy that walks asleep in the midst searching for its own
awakening.

And of the man in you would I now speak.

For it is he and not your god-self nor the pigmy in the mist, that knows crime
and punishment of crime.

Oftentimes have I heard you speak of one who commits a wrong as though he
were not one of you, but a stranger unto you and an intruder upon your
world.

But I say that even as the holy and the righteous cannot rise beyond the highest
which is in each one of you,

So the wicked and the weak cannot fall lower than the lowest which is in you
also.

And as a single leaf turns not yellow but with the silent knowledge of the whole
tree,

So the wrong-doer cannot do wrong without the hidden will of you all.

Like a procession you walk together towards your god-self.

You are the way and the wayfarers.

And when one of you falls down he falls for those behind him, a caution against
the stumbling stone.

Ay, and he falls for those ahead of him, who though faster and surer of foot,
yet removed not the stumbling stone.

And this also, though the word lie heavy upon your hearts :

The murdered is not unaccountable for his own murder,

And the robbed is not blameless in being robbed.

The righteous is not innocent of the deeds of the wicked,

And the white-handed is not clean in the doings of the felon.

Yea, the guilty is oftentimes the victims of the injured,

And still more often the condemned is the burden bearer for the guiltless and
unblamed.

You cannot separate the just from the unjust and the good from the wicked ;

For they stand together before the face of the sun even as the black thread and
the white are woven together.

And when the black thread breaks, the weaver shall look into the whole cloth,
and he shall examine the loom also.

If any of you would bring to judgment the unfaithful wife,

Let him also weigh the heart of her husband in scales, and measure his soul
with measurements.

And let him who would lash the offender look unto the spirit of the offended.

And if any of you would punish in the name of righteousness and lay the ax unto
the evil tree, let him see to its roots ;

And verily he will find the roots of the good and the bad, the fruitful and the fruitless, all entwined together in the silent heart of the earth.

And you judges who would be just,

What judgment pronounce you upon him who thought honest in the flesh yet is a thief in spirit?

What penalty lay you upon him who slays in the flesh yet is himself slain in the spirit?

And how prosecute you him who in action is a deceiver and an oppressor. Yet who also is aggrieved and outraged?

And how shall you punish those whose remorse is already greater than their misdeeds?

Is not remorse the justice which is administered by that very law which you would fain serve?

Yet you cannot lay remorse upon the innocent nor lift it from the heart of the guilty.

Unbidden shall it call in the night, that men may wake and gaze upon themselves. And you who would understand justice, how shall you unless you look upon all deeds in the fullness of light

Only then shall you know that the erect and the fallen are but one man standing in twilight between the night of his pigmy-self and the day of his god-self.

And that the corner-stone of the temple is not higher than the lowest stone in its foundation.

That is a very beautiful passage, full of meaning, and containing the essence of my own philosophy in looking at the question of crime and punishment.

Those condemned to die for crimes committed against society do not face death only as the result of the imposition of a sentence by a judge or a jury. The condemned person was prosecuted by one of our 50 States or by the United States. Therefore, the approximately 700 inmates held on death rows around the Nation await the ultimate sentence at the wish of all the citizens of a particular State, or of the Nation. I am not satisfied to be a party to the taking of another human life, even tacitly.

To the mayor of one of America's largest cities who sought his own local electric chair by stating that "The death penalty is the only 100 percent deterrent which assures a particular individual will never commit the same crime again," I ask the question, "Are you willing to be the one to pull the switch?" In this particular case there probably would be a willingness, but I feel the overwhelming majority of citizens would find the task abhorrent.

The fact that the death sentence is carried out in isolation, behind high walls away from the public eye does not absolve us of our own involvement. Because we do not see the death throes agonies of the dying our conscience should not remain clear, for it is our own hand on the switch, or on the lever to the trapdoor, or holding the cyanide pellets.

Early Quakers were responsible for instituting the penitentiary as a substitute for the then more cruel and inhumane forms of punishment. Of course that experiment has not met with the results hoped for, and we continue our efforts to straighten out that mess. However, the motivation behind the idea remains the penultimate reason for the current opposition to the death penalty.

At the base of Quaker philosophy is the belief that "there is that of God in every man." Although not expressed in the above terms, the concept of the equality of man is a basic principle in Judaic and Christian philosophy, and also a stated part of the American creed. Therefore, how can we take the life of another, even under the law, without taking away a part of our own humanity?

In concluding, I would ask that the committee allow to be printed as part of the record a pamphlet printed by California Friends Committee on Legislation entitled "This Life We Take," a case against the death penalty, to have this included in the record.

Mr. KASTENMEIER. The committee will be pleased to receive the pamphlet to review and possibly include in the record.

I thank you for an eloquent statement. I would like to say, perhaps to the contrary of the testimony of the preceding witness, this question surely transcends any purely legal or political or clinical and detached academic or statistical view. It is not solely, if at all, a technical question. It, in fact, contains the essence of a moral question and that is why your testimony, as well as that of the preceding witnesses, has been highly relevant.

I really have very little to ask of you in terms of questions. I might ask, as far as legislation is concerned, which of the options do you prefer and why?

Mr. LUNSFORD. The most preferable piece of legislation would be the set of bills that would abolish the death penalty on a nationwide basis and I guess, if there were a pecking order, the next preferable would be the abolition process as far as Federal offenses are concerned, and the bill H.R. 8414, which would suspend the death penalty.

In talking in terms of the suspension piece of legislation, I think the major motivating factor there is basically the reason which was cited by you previously; as simply a tactical type of maneuver to highlight the particular kind of issue involved and to give the Nation an opportunity to really examine the question and come back before the Congress at some other time.

In addition to that, if there should be an adverse ruling handed down by the Supreme Court, it would also prohibit the immediate carrying out of the death sentences of those currently facing them.

Mr. KASTENMEIER. The implication of my questions to the former witness, was in no way meant to derogate, or question the motives for the legislation. Obviously the experience in Great Britain, for example, has been that an extensive study has been quite useful both in terms of the information derived and in preparing the nation for possible alternative courses of action with respect to this question.

I yield to the gentleman from Pennsylvania.

Mr. BIESTER. Thank you, Mr. Chairman.

I would like to ask whether the witness thinks that 2 years under H.R. 8414, would be a sufficiently long period of time for the kind of studies that should be undertaken?

Mr. LUNSFORD. I really don't think there is a great deal more information, personally, that needs to be gathered on the particular issue. Some of the things Mr. Lyons pointed out are specific kinds of gaps but I think the kinds of things coming before the committee just in these hearings compile a great backlog of information. Taking a pragmatic view of the problems involved, I think a period of 2 years would be sufficient, simply from the standpoint of being able to compile the information, pull it together and then to begin a highlighting process of the actual issue concerning whether or not the death penalty is going to be abolished or not.

Mr. BIESTER. In terms of life—and I have often used the analogy of John Donne's meditation that every man's death diminishes me for

I am involved in mankind—a man can die and we tend to think in terms of shortening the lifespan. He is killed or murdered, or the State takes his life. In terms of 25 or 30 years of his life, we think of that as a kind of death because it is a shortening of the lifespan. Don't you think the taking of part of a man's life circumscribes a person's life by making it less whole, narrowing the scope, and defining it?

Mr. LUNSFORD. Certainly, and I think the record should be clear. Here I am speaking directly to the capital punishment. The Friends have compiled another record completely in terms of the question of prison reform, if you want to call it that, of the elements we see that would have to go into that process. Certainly the way the system is operated at the present time, just to suspend the death penalty without making any further changes in the way our criminal justice system functions at the present time does not provide a solution to the overall problems in the justice field.

Mr. BIESTER. I agree, that is absolutely correct. And the observations of the immediately preceding witness in terms of the extent of life that may occur to a human being spending 40 years in prison suggest that that is not much more than death.

I wonder whether we don't congratulate some institutions and other countries on their abolition of the death penalty without ferreting into what extent they leave a total number with arbitrary and circumscribed life styles in prison for long periods of time in substitution.

This has been a subject which has troubled me for some time. I am not suggesting taking the life is better than circumscribing it but the long, horrible circumscription, I think, must be offensive to society.

Mr. LUNSFORD. I am cognizant of the fact the subcommittee has been exploring the whole question of prison reform and eventually will come forward with a forthright proposal if on nothing more than the Federal level, or maybe as a kind of filtered down thing from a leadership kind of position.

I would like to extend your comment to one other realm, that is the fact that I think just as much as anything we have also not explored the elements in other societies which has led to a crime and punishment system that is so completely different than our own; for example, the kind of circumstance that led English policemen for so many years to carry out their duties without actually having sidearms or using firearms in their kind of work. I think these are the kind of elements that need to be brought into play if we are going to look at the total structure in terms of what we have to do in terms of the justice system. That kind of thing has to be looked at.

Mr. BIESTER. Very good. I think we have to look at the ultimate horror that should disturb us just as much.

Thank you.

Mr. LUNSFORD. Thank you.

Mr. KASTENMEIER. The Committee is most grateful for your appearance this morning, Mr. Lunsford.

(Mr. Lunsford's submission of the pamphlet, "This Life We Take" follows:)

THIS LIFE WE TAKE

by Trevor Thomas

A CASE AGAINST
THE DEATH PENALTY

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A Man Who Changed His Mind—

ERNEST GOWERS, Chairman of the British Royal Commission on Capital Punishment:

"Before serving on the Royal Commission, I, like most other people, had given no great thought to this problem. If I had been asked for my opinion, I should probably have said that I was in favor of the death penalty, and disposed to regard abolitionists as people whose hearts were bigger than their heads. Four years of close study of the subject gradually dispelled that feeling. In the end I became convinced that the abolitionists were right in their conclusions though I could not agree with all their arguments . . ."

"The only moral ground on which the State could conceivably possess the right to destroy human life would be if this were indispensable for the protection or preservation of other lives. This places the burden of proof on those who believe that capital punishment exercises a deterrent effect on the potential criminal. Unless they can establish that the death penalty does, in fact, protect other lives at the expense of one, there is no moral justification for the State to 'take life'."

Rev. DANA MCLEAN GREFLEY, Rabbi ROLAND B. GITTELSON, Rt. Rev. Monsignor THOMAS J. RILEY. Members of the subcommittee of the Massachusetts Commission to Investigate the Advisability of Abolishing Capital Punishment.



The man sits in a cage of steel and concrete under a single bright light that burns around the clock. He has been tried by a jury of his peers, judged and sentenced to die. He has killed and now society, through the anonymous machinery of the state, will kill him. He has been brought here to keep that appointment with death.

Two guards will watch him this last night so that he can do no violence to himself. Before settling down for the long night, they offer tobacco and a variety of food for the last "hearty" meal.

After an eternity of night they see the beginning of a new day and a last breakfast. There will be no reprieve. The time of death, so impossible, so unimaginable, has come. Now the warden and the captain of the guards move down the long corridor toward the cell. A physician harnesses a stethoscope across his chest, its black tube dangling like an obscene umbilical cord.

Shoeless, he walks—or is carried or dragged—between two guards through the green door of the octagon chamber. Inside he is strapped to a metal chair; first around the chest, then the stomach and each arm and leg. A guard connects the black tube.

Outside, the physician adjusts the stethoscope to his ears. Twelve witnesses of the people, as required by law, watch through thick glass windows.

Each step of the ritual is checked and checked again. The last guard steps from the chamber and seals the door. The executioner makes his motions, inside liquid acid gurgles into a well beneath the chair. A bag of cyanide eggs is immersed in the acid. The combination produces deadly hydrocyanic acid gas, sweet-smelling like peach blossoms.

The man in the metal chair gasps and throws his weight against the straps in a final convulsive bid for life. Minutes pass. The head snaps back, then slumps forward. The physician hears the pounding, straining heart hesitate, become faint and then stop. He notes the official time on the appropriate charts. The man is pronounced dead.

IN CALIFORNIA, death is by gas. In Massachusetts, New Jersey and Tennessee the condemned die by electrocution. New Hampshire, Kansas, and Washington hang the prisoner "by the neck until dead." In Utah he may be shot or hanged. From 1930 through 1969, nearly four thousand men and women were legally executed in the United States.

Why? For many the answer is obvious—to protect the rest of us, or to serve as a warning and prevent repetition of the crime. Others argue in the name of justice, or revenge.

Then why have some states and not others outlawed capital punishment? Does the destruction of an occasional criminal protect any of us? Is the penalty a just one? If it is evil for us to take life as individuals, do we compound that evil by killing in the name of the state?

These are questions which have social and moral implications for us all. They demand that we cast off old prejudices in our search for the truth; that we put to use the knowledge of criminologists and psychiatrists; that we and our legislators take a careful look at present practices. This pamphlet is one attempt to throw light into some of the dark corners of that ancient institution, legal killing.

THE BEGINNING OF THE END

The first record of abolition of capital punishment was by edict of King Leopold of Tuscany in 1786, followed by Joseph II of Austria in 1787. Yet the English courts in 1800 punished over 200 offenses by death. One might forfeit his life for stealing five shillings, fishing in private streams, or robbing a rabbit warren.

In 1801, a boy thirteen years old was hanged in England for stealing a spoon. Another boy, ten was sentenced to death

for murder in 1748. The judges all ruled it proper to hang the child because, ". . . the example of this boy's punishment may be a *means of deterring other children from the like offenses.*"* And just as certainly, the judges reasoned, no one would risk his neck for five shillings. They were wrong. In fact, picking pockets, itself punishable by death, thrived at public hangings "when everybody was looking up." Stealing increased to a point where bankers from 214 English towns petitioned Parliament for milder punishment that could be enforced. By 1819 there were more than twelve thousand similar petitions.

But when Sir Samuel Romilly introduced a bill in 1810 to abolish the death penalty for stealing five shillings from a shop, not a single judge would support him. He was told such a law might even lead to abolition for stealing from a dwelling house and then no man "could trust himself for an hour without the most alarming apprehensions that, on his return, every vestige of his property will be swept away by the hardened robber."

Gradually public opinion did away with the greatest number of capital crimes in England. The dire predictions did not come to pass. In fact, such crimes decreased after partial abolition.

After a four-year investigation by a Royal Commission, Parliament passed the Homicide Bill of 1957, eliminating three-fourths of the remaining crimes subject to execution. Eight years later Great Britain abolished capital punishment for a trial period of 5 years. In October, 1965, the House of Commons approved a bill introduced by abolitionists almost 20 years before; 155 years after Sir Romilly failed in his effort to stop the hanging of thieves. The new law allows the judge passing sentence for a crime formerly punishable by death to set the number of years to be served before the prisoner can be considered for parole. Before abolition, a murderer who escaped the gallows or received a life sentence served an average of eight to ten years before parole.

Britain's legislators, having studied the evidence of the last two centuries, in 1969 have decided that the death penalty is not a deterrent to serious crime, but an affront to humanity. In December, 1969, the abolition of capital punishment was made permanent.

* Arthur Koestler, *Reflections on Hanging* (MacMillan Co., 1957), p. 14.

THE TREND IN CAPITAL PUNISHMENT

The world trend is toward abolition of the death penalty. Over the past century more and more legislative bodies have abolished it. Those countries which still retain the death penalty use it less frequently. A United Nations study reports that "in general, the modern tendency is more and more to drop the mandatory character of the death penalty."* Another study, for the Council of Europe, noted an "undoubted decline in capital punishment" in European countries.**

The 1968 up-dating by the UN of its capital punishment report*** lists 16 countries whose laws do not provide the death penalty for any offense. However, since most executions are for the crime of murder, a more accurate index to the prevalence of the death penalty is the number of countries which do not invoke death for any form of murder. The UN report lists 26 such countries. (See back cover.)

Countries may keep the death penalty on their statute books but not use it. This is de facto abolition, as contrasted to removal by law (de jure abolition). Belgium, Liechtenstein, Luxembourg and the Vatican State are abolitionist de facto.

The UN also reports a general trend toward limiting the categories of offenses for which the death penalty is exacted. The trend is to apply it less often for crimes, such as murder, to which it has traditionally applied. However, there is a slight contrary tendency to invoke it for economic and political crimes.

For some time the legislative direction has been toward making capital punishment a discretionary rather than a mandatory penalty. In many countries the death sentence is mandatory only for very specific crimes, or in special courts, such as military courts. Where capital punishment is mandatory, it is primarily for murder and crimes against the security of the state.

The trend away from capital punishment is disrupted in time of war. Abolitionist countries may restore the death sentence, as did Italy, which was abolitionist until 1928,

*Ancel, Marc, *Capital Punishment* (United Nations, Department of Economic and Social Affairs, New York, 1962).

**Ancel, Marc, *The Death Penalty in European Countries*, European Committee on Crime Problems, Council of Europe, Strasbourg, 1962.

****Capital Punishment*, Part I, Report 1960; Part II Developments 1961-65 (United Nations, Department of Economic and Social Affairs, New York, 1968), 134 pp.

when the death penalty was brought back for crimes against "national security." By 1930, capital punishment was again applied for felonies as well. Germany had the death penalty before the Nazis came to power and made a death-house of Europe. In wartime, even the abolitionist countries reintroduced the death penalty on a limited scale. Belgium, the Netherlands, and Norway executed traitors, persons guilty of war crimes, and collaborators with the enemy. After the war, the death penalty was abolished in both Italy and West Germany, and other abolition countries returned to their pre-war status. France and Spain still exact the death penalty. The Soviet Union once reserved death for "political crimes"; now the penalty applies to economic crimes as well as murder, spying and sabotage. Economic crimes include money speculation, large-scale embezzlement of state property, and counterfeiting.

In the United States the trend is also away from the use of capital punishment. Although death may still be imposed by 40 states, the District of Columbia and the federal government, in actual practice there is a steady decline in executions. In 1935 there were 199 executions, 82 in 1950, 7 in 1965, and none since two persons were executed in 1967.* Under the constitutional challenges which have been raised against the death penalty since 1968, all pending executions have been stayed. There are close to 500 persons on death rows in the United States awaiting the outcome of court challenges.

Ten states have abolished the death penalty for all crimes — Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New Mexico, Oregon, West Virginia and Wisconsin. Another four states retain the death penalty only for such crimes as treason, killing a policeman, or killing of a prison guard by a life-term prisoner — New York, North Dakota, Rhode Island and Vermont. Montana has not had an execution since the early forties.

The first state to abolish capital punishment was Michigan in 1847. The most recent is New Mexico in 1969. Ten states have abolished the death penalty, then re-established it. Dela-

* NPS Bulletin, No. 42, June 1968, U.S. Dept. of Justice, Bureau of Prisons.

ware, the most recent to change its law, abolished the death penalty in 1958, then reinstated it in 1961, after the slaying of an 89-year-old woman by a young Negro man. Oregon, abolitionist from 1915 to 1920, revived capital punishment until 1964, when voters repealed the death penalty.

Restoration of capital punishment in these ten states, as in Delaware, has usually followed a particularly brutal crime, or an increase in the crime rate. The death penalty was again made law despite the fact that its existence or absence does not affect the number of annual murders. Five of the states which restored the death penalty did so under the impact of the crime wave at the end of World War I, which affected death penalty and abolition states alike. Lawmakers bowed to the demands for righteous vengeance and reinstated the death penalty. Thorsten Sellin, the University of Pennsylvania sociologist has made a thorough study of the homicide rates of states which have experimented with abolition then revived the death penalty. He concluded that abolition had no visible effect on those states' homicide rates.*

For the first time in history, the United States Department of Justice now stands opposed to the death penalty. "Modern penology with its correctional and rehabilitation skills affords far greater benefits to society than the death penalty which is inconsistent with its goals."**

Discussing the trend away from the death penalty, the *New York Herald Tribune* said, editorially:

"These states (with abolition) have not found that the lack of a supreme penalty has affected their crime rate; careful comparisons of states, region by region, shows that capital punishment does not have the deterrent effect which is alleged as its principal social excuse. The number of executions, even in states which retain the death penalty, is declining more rapidly than the homicide rate which indicates a public revulsion which has not yet found expression in statutes.

"Over the centuries, society has moved away from the crueller forms of inflicting legal death; it has limited the number of capital crimes; banned public executions; tended to be

* Sellin, Thorsten, *The Death Penalty: A Report for the Model Penal Code Project of the American Law Institute* (The American Law Institute, Phila., 1959), pp. 36-50.

** *San Francisco Chronicle*, July 24, 1965.

less ready to carry existing laws to extremes. Evidently, capital punishment itself is becoming outdated . . . as the public conscience becomes more and more aware of the possibilities for fatal error, of the capriciousness, of the relative ineffectuality of the death penalty, its end is inevitable and should be hastened.”

OUT OF FEAR FOR OUR LIVES

The most persuasive argument for capital punishment is that the threat of death keeps people from committing murder and other capital crimes. The argument goes something like this:

- (a) People do not commit crimes because they fear punishment,
- (b) Therefore, since people fear death more than anything else, the death penalty will better prevent capital crimes than any other form of punishment.

Though not supported by evidence, this argument is advanced as fact whenever the issue comes before a legislative body. The real question is whether the individual who commits a capital crime *considers* the death penalty *before, he acts*—*whether the fear of death is sufficient to prevent murder*. We know this much—that the threat of death failed to stop 13,650 Americans who committed the crime of murder in 1968. Nor did it have any effect on those who also took their *own* lives—64 of the 461 Californians who killed in 1957 committed suicide afterward. Nor did it prevent passion murders—21% of those Californians *executed* between 1943 and 1963 who in a rage had killed their wives, mistresses, or girl friends. Prisoners trying to escape have killed guards in the very shadow of the gallows or gas chamber. There are even instances of murder and attempted murder by off-duty law enforcement officers, thoroughly acquainted with the (theoretical) penalty for killing. The penalty is even less a threat to the mentally ill, but psychiatric evaluations made at California’s San Quentin prison over a 15-year period reveal that a *majority* of those executed were emotionally unstable, psychoneurotic, or psychopathic.

One of the most striking bits of evidence before the Royal Commission of 1866 was from the Bristol prison chaplain who pointed out that of 167 persons awaiting execution in that prison, 164 had previously witnessed at least one execution! What would the Medical Association say of the value of polio vaccine if it were found that of 167 polio cases, 164 had been treated with that vaccine?

Nearly thirty-two percent of those executed in California (1943-1963), killed in the course of a robbery. If a thief is surprised he often, rather than risk capture, (probable penalty five years) "chooses" to shoot it out, and is caught, gun in hand. Does he weigh the penalty for armed robbery against that for murder the instant before he pulls the trigger? No; for this act, like other crimes of violence, is usually committed in a blind rage or under great mental stress which shuts out any thoughts of penalty.

Thousands have *not* been deterred by the threat of the death penalty. It is not possible to prove that a single potential murderer *was ever deterred*. Ask yourself; is fear of the death penalty the primary reason that you do not kill a neighbor with whom you may be in violent disagreement? Social scientists and psychiatrists, ministers and criminologists know that this is not the case; that love, desire for approval and acceptance, favorable personal relationships, environment and other cultural factors all play greater roles than fear in controlling or giving direction to anti-social impulses. The "fear of death" theory omits another large factor—the inability of most people to comprehend their own destruction. Even men on death row cannot believe "this will happen to me."

But the opponents of abolition will still insist, what about the hardened criminal, the premeditated murderer? If he is a rarity, the lives he takes are no less precious. Can we be sure the death penalty does not deter him?

This we know; the man who kills has *not* been deterred by the threat of capital punishment. The claim that the penalty prevents murder, or that execution is a just punishment for murder is a belief, not a fact. That abstract rarity, the person whose hand may be stayed from killing because of the death penalty is a phantom, unknown and undetected. Neither do

statistical studies, by themselves, finally decide the case for, or against, the death penalty.

What all careful evaluations of homicide rates before and after abolition *do* reveal is that in the long run changes in the *homicide rates are unrelated to the death penalty*. If capital punishment prevents murder, the murder rate should increase when the death penalty is removed. In case after case of countries and states with and without the penalty no such correlation can be shown. This is a fact corroborated by extensive study.

The Royal Commission on Capital Punishment sat for four years heard innumerable witnesses, and sifted hundreds of documents. They visited Norway, Sweden, Belgium, Holland and the United States to hear further evidence in those countries. In 1953, the Commission reported that "whether the death penalty is used or not, both death penalty and abolition states show homicide rates which suggest that these rates are conditioned by *other* factors than the death penalty" —another way of saying there is no deterrent effect.

Further, "the general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate or that its re-introduction has led to a fall."*

Following the Royal Commission's findings, Parliament passed a bill in 1957 which reduced the number of crimes punishable by death. It also introduced the concept for "diminished responsibility" into law, whereby a man accused of a capital crime could be found guilty of a non-capital crime, thus saving him from death, upon presentation of psychiatric proof of substantial mental disorder.

Finally, in 1965, also on the basis of the Royal Commission study, Parliament abolished capital punishment. It did so despite the fact that 79% of Britains either opposed abolition or were uncertain. Overwhelming proof and careful evaluation outweighed emotional arguments in the minds of British legislators. (Sidney Silverman, the bill's author, said, "We don't, in matters of life and death, think it is right to decide

* Report, Royal Commission on Capital Punishment, 1949-1953, page 23.

what is just or unjust by a spot, unconsidered reaction taken on the street corner or in a club or pub.”)

The conclusions of the Royal Commission were reconfirmed by Marc Ancel's United Nations study. While reporting that many governments reserve judgment on whether the death penalty is or is not a deterrent, he concluded that “all the information available appears to confirm that such a removal [of the death penalty] has, in fact, never been followed by a notable rise in the incidence of crime no longer punishable with death.”

These conclusions are borne out in small-scale studies. Philadelphia had *more* known murders 60 days *following* five highly publicized executions than in the 60 days before.* Either the state killings stimulated the crime of murder, or other unknown factors were responsible. The only certain fact is that the “lesson” did not take. Murder increased.

Suppose, in this instance, there had been no death penalty and no executions. What would have happened in these 60 days? More murders, or less? There of course can be no verifiable answer, only speculation and opinion.

Another study of the effect of executions—this time on a state-wide level—points to the possibility that, though the homicide rate may drop after an execution, it is canceled out by abnormal rise just prior to the execution date.

An analysis of homicide rates in California from 1946 to 1955 on the week before and after executions showed that while a peak in murder normally occurred on Saturday-Sunday, it occurred on Thursday-Friday during execution weeks. (Until recently, executions were on Friday at 10 a.m. in California.) To the author of the study, William F. Graves, M.D., this fact suggested a “brutalizing effect” of the death penalty. The death penalty was found to have no overall deterrent effect.**

Any deterrent value in punishment depends upon swiftness and certainty. Yet capital punishment is the most uncertain punishment on the statute books. In 1963, there were 21 persons executed in the United States. In the same year, there

* Bedau, Hugo Adam (ed) *The Death Penalty In America: An Anthology*, (Aldine Publishing Company, Chicago, 1964), pp. 315-22.

** Bedau, *op. cit.* p. 322-332.

were 8,404 cases of murder and non-negligent manslaughter.

These are odds of better than 400 to 1 against a murderer paying the death penalty. In California, in 1963, the uncertainty of the law was even more striking: *

Willful homicides reported by police	656
Convictions for murder	208
Sentenced to death	24
Executed	1

COMPARISON OF OTHER STATES

If the death penalty is a deterrent to murder, then fewer murders should be committed in those states that retain the penalty than in those that have abolished it, other factors being approximately equal. This last qualification is important, for we cannot honestly compare Rhode Island with, say, Georgia. One has the death penalty, the other does not, but there are many other economic and social differences that are more significant. Rather, we must select states for comparison that are as alike as possible socially and economically, with about the same type of population distribution, one with the death penalty, and the other without.

The following states most nearly meet these qualifications:

Murder and Non-Negligent Manslaughter**

(Rate per 100,000 population)

	1964	1965	1966	1967	1968
Rhode Island (abol.)	1.2	2.1	1.4	2.2	2.4
Connecticut (d.p.)	1.8	1.6	2.0	2.4	2.5
Wisconsin (abol.)	1.5	1.5	1.9	1.9	2.2
Indiana (d.p.)	3.0	3.5	4.0	3.7	4.7
Michigan (abol.)	3.3	4.4	4.7	6.2	7.3
Illinois (d.p.)	5.5	5.2	6.9	7.3	8.1
Oregon (abol.)	1.8	3.4	2.7	3.1	3.2
Washington (d.p.)	2.4	2.2	2.5	3.1	3.6

* Crime in California, Bureau of Criminal Statistics, California Dept. of Justice, 1963.

** Uniform Crime Reports, F.B.I., 1969.

Rhode Island, an abolition state since 1852, has a homicide rate very similar to, though slightly and consistently lower than Connecticut, where the penalty has been retained. The murder rate in Michigan, where the penalty was abolished in 1847, parallels that of Indiana and Illinois, while Wisconsin, an abolition state for practically a hundred years, has a rate significantly below Michigan, again indicating that the murder rate is not affected by the presence or absence of the death penalty.

The murder rate seems to be affected more by social and economic conditions. Michigan and Wisconsin are both abolition states, yet Michigan is more industrial and has the higher murder rate, which seems to support the observation of Richard A. McGee, former head of the California Youth and Adult Corrections Agency: "One must conclude that there are many factors other than the presence or absence of the death penalty which result in a higher or lower incidence of murder."

Some of the highest murder rates in the United States are to be found in the feud counties of Kentucky. The generally high rates in our southern states reflect cultural conditions in those areas. A little noticed fact is that in the south not only is the homicide rate high among Negroes, but for whites it is far higher than among white people in other parts of the country—all this despite the fact that executions in our southern states have historically been far more frequent than in other regions.

Dr. Karl Schuessler summarizes: "Statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value. The belief in the death penalty as a deterrent is repudiated by statistical studies, since they consistently demonstrate the differences in homicide rates are in no way correlated with differences in the use of the death penalty. Case studies consistently reveal that the murderer seldom considers the possible consequences of his action, and if he does, he evidently is not deterred by the death penalty. The fact that men continue to argue in favor of the death penalty on deterrence grounds may only demonstrate man's ability to confuse tradition with proof, and his related ability to justify his established way of behaving."*

* Deterrent Influence of the Death Penalty, Karl F. Schuessler, *The Annals of the American Academy of Political and Social Science*, November, 1952.

THE DEATH PENALTY AND POLICE SAFETY

Law enforcement people are often the strongest supporters of the penalty. One readily sympathizes with their motivation, but does the death penalty protect police officers? Careful and extensive studies say "no."

A 1950 study of over 266 cities of over 10,000 population in 17 states (six abolition, eleven death penalty) revealed that "on the whole, abolition states . . . seem to have fewer police killings, but the differences are small."*

The claim that the death penalty protects police officers is also disproved by a study of police homicides in Chicago from 1920-54. Executions for Cook County take place in Chicago. If the death penalty is a deterrent, when the execution rates rise the homicide rates should fall. But between 1920 and 1954 the two rose and fell together. Here again, the homicide rate was unaffected by the death penalty.

The Chicago study also shows that most of the police killings resulted from interruption of robbery. Since robbery murders usually occur as a result of panic, they do not appear to be deterred by the death penalty. This suggests that the police homicide rate is affected primarily by the general crime rate, not by the presence or absence of the death penalty. The Chicago figures bear this out. The police homicide rate was highest between 1925 and 1936, a period when the general crime rate in this country was particularly high.

The British Royal Commission, referring to the fears of English police officers, reported: "We received no evidence that the abolition of capital punishment in other countries had, in fact, led to the consequences apprehended by our witnesses in this country."

"After several killings of policemen, Austrian police claimed that the presence of the death penalty in the law offered such a threat to certain types of offenders that they would go to the extreme in attempting to avoid capture, and that if the death penalty were removed there would be less danger for the police."** The penalty was removed.

* Dr. Thorsten Sellin, *The Death Penalty and Police Safety*.

** Testimony by Dr. Thorsten Sellin before the Royal Commission on Capital Punishment, 1951.

Cases where armed robbers used toy guns have been cited as evidence of fear of the death penalty. This is difficult to prove—or to disprove because the interviews with criminals are always after the fact. It may even happen in isolated instances. But toy guns are also carried by hold-up men in *abolition* states! According to the former Director of the Michigan State Police, Dr. LeMoyne Snyder:

“The argument that criminals frequently use toy guns in the commission of armed robberies because they fear the death penalty is without merit in my opinion. Many long-time criminals have told me they have never heard of such a thing.

“The reason that toy guns are used is because they are cheap; they can be bought in any ten-cent store and usually accomplish their purpose as well as a regular weapon. In states such as Michigan which abolished capital punishment decades ago, the armed robbery with a toy gun is common.”*

IN THE NAME OF JUSTICE

James V. Bennett, former Director of the Federal Bureau of Prisons, argues that the death penalty should be retained for certain crimes. Nevertheless, he writes: “Today, it is chiefly the indigent, the friendless, the Negro, and the mentally ill who are doomed to death. Or the young.”**

The late Warden Lewis E. Lawes of Sing Sing Prison recalled:

“In the twelve years of my wardenship I have escorted 150 men and one woman to the death chamber and the electric chair. In ages they ranged from seventeen to sixty-three. They came from all kinds of homes and environments. In one respect they were all alike. All were poor, and most of them friendless.

“The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favor the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented

* Telephone conversation with Dr. Snyder, November 22, 1965.

** Beunett, James V. “A Cool Look at the Crime Crisis”, Harpers, April, 1964, pp. 123-27.

with every favorable aspect, while the poor defendant often has a lawyer assigned by the court.

"Thus it is seldom that it happens that a person who is able to have eminent defense attorneys is convicted of murder in the first degree, and very rare indeed that such a person is executed. A large number of those who are executed were too poor to hire a lawyer, counsel being appointed by the State."

Warden Lawes' statement as to the discriminatory aspect of capital punishment is borne out by the facts. The trend can be briefly summarized: the death penalty in this country is predominantly and disproportionately imposed upon Negroes, the poor and the less educated, and upon men.

Statistics from the California Department of Corrections reveal much about those executed in a twenty-year period up to 1963.*

Ethnic Group: Of those executed, 65.8% were white, 22.8% Negro, 8.2% Mexican descent, 3.2% other groups. (Note: The Negro averaged 3% of the California population 1940-1960.)

Occupation: 50% were classified as unskilled workers.

Education: 47% had not attained the 9th grade level. 10.7% were illiterates.

Prior Commitment: 29% had no record of prior commitment for a criminal offense. 42% had a record of prior commitment to prison. 29% were first committed to a juvenile institution, jail, or prison between 15 and 19 years of age.

Home Life: 60.4% were from homes broken by death, divorce, separation, etc., prior to age 18.

Juvenile Record: Nearly 52% had a record of juvenile delinquency.

To these findings should be added the following fact from Robert M. Carter's study of executions in California,

* In general, these statistics agree with a study of all the men executed in California since 1893 (500 total) by Robert M. Carter and A. Lamont Smith in *Crime and Delinquency*, Vol. 15, No. 1, Jan. 1969. "The Death Penalty in California — A Statistical & Composite Partrait."

1938-54: In general, the psychiatric evaluations made at San Quentin indicated that the majority of the men executed were emotionally unstable, psychoneurotic, or psychopathic.

As Sara Ehrmann writes, there is some basis in fact for belief that "a rich man never gets the chair."

"It is difficult to find cases where persons of means or social position have been executed. Defendants indicted for capital offenses who are able to employ expert legal counsel throughout their trials are almost certain to avoid death penalties. In the famous Finch-Tregoff case in California, there were three trials, two hung juries, and finally verdicts of guilty but *without* the death penalty. It is estimated that the cost of these trials was over \$1 million. But in the trials of some defendants without funds, juries have deliberated for as little as nineteen minutes, or an hour more or less, and then returned verdicts of guilty and death."*

Legislators who have conducted impartial investigations have been aware of the discriminatory aspects of the penalty for many years. As far back as the sixty-ninth Congress, a House Committee on the District of Columbia reported favorably to out-law the death penalty in Washington, D.C., but the bill did not become law. The committee said:

"As it is 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 a tradition."

Recent Congressional proposals for abolition or a moratorium on the death penalty for federal crimes have failed to reach the floor of either house for a vote.

The late August Vollmer, former Chief of Police of Berkeley and nationally known criminologist, contended that, "Until capital punishment is abolished, there is little hope of even-handed justice in murder trials."**

* Sara R. Ehrmann, "For Whom the Chair Waits", *Federal Probation*, March, 1962, p. 17.

** August Vollmer, *The Case Against Capital Punishment in California*, pamphlet, 1931.

A classic case illustrating Vollmer's point is that of Alger Simmons (*People vs. Simmons*, August 1946). In the course of a holdup of a service station operator by Simmons and his partner Webb, a repairman was shot and killed in a struggle for Webb's gun.

Webb entered a plea of guilty and was given a life sentence. At Simmons's trial, Webb testified "that he was the one who had the gun . . . and that he himself had fired the fatal shot." The station operator testified that Simmons was with him in the back room during the entire time, including the time the shot was fired. The Supreme Court concluded that there was a "strong showing made . . . that it was Webb and not the defendant (Simmons) who was in the front office at the time of the shooting."

But the jury found Simmons guilty of first degree murder. He was sentenced to death and executed in the San Quentin gas chamber.

DOLLAR VALUES AND HUMAN VALUES

At the close of 1968, a total of 497 prisoners were awaiting execution by civil authorities in the U.S. The median elapsed time on death row for the group was 33 months. A Negro prisoner had been awaiting execution for 13 years, 8 months and 28 days in Illinois. Nearly one-third of the 497 were distributed among three states: California 85, Florida 59, and Louisiana 36. During 1968, 16 prisoners had their sentences commuted to life imprisonment.

Capital punishment has been justified as an economical and legal means to rid society of criminals. A man can be killed neatly for less than two hundred dollars, the argument runs, whereas his maintenance in prison costs the taxpayers several hundred dollars more a year.

It is a specious claim; to effect any sizeable saving would necessitate executing not only death row inmates, but other unwanted members of society such as the hopelessly insane and mentally retarded.

Although a prisoner may not be self-supporting, he usually contributes something to his upkeep. Were we willing, the

prisoner could contribute, not only toward his own support, but toward that of the dependents of the victim of his crime.

This question reaches beyond the issue of capital punishment. Our prison system does not keep just the men on Death Row in enforced idleness; it condemns men by the thousands to wasting years of their lives with little to do. Though we boast of academic and vocational training in prisons, and of correctional industries, in the best of our state systems these are inadequate. If we had work opportunities for all the men, those condemned to life for murder could well produce much more than the cost of keeping them.

Second, states retaining the death penalty are harrassed by lengthy and costly trials and repeated appeals especially by men of means or exceptional intelligence. The less fortunate, but no less guilty, are often executed with comparative haste. Where there is no death penalty, there are fewer prolonged cases and a greater chance for even-handed justice.

It cost the State of California well over half a million dollars and 12 years to send Caryl Chessman to his death in the San Quentin gas chamber. (Had Chessman been on trial ten years later, it is possible he would not have been sentenced to death, but to life in prison under the kidnapping section of the California penal code, revised some years after his original conviction.)

Abolition could lead to substantial savings on the country level of government and in Superior and Supreme Court costs, by reducing the length of trials. In Michigan, a comparable abolition state, murder trials seldom last more than two or three days. Some California trials last two or three weeks. In addition, California laws require an automatic appeal to the State Supreme Court in every death penalty case. This is time-consuming and expensive, though necessary to the minimum requirement of justice.

Richard A. McGee draws an inescapable conclusion: "The actual costs of execution, the cost of operating the super-maximum security condemned unit, the years spent by some inmates in condemned status, and a pro-rata share of top level prison official's time spent in administering the unit add up to a cost substantially greater than the cost to retain them in prison for the rest of their lives . . . When the other costs

of the death penalty cases are added—the longer trials, the sanity proceedings, the automatic and other appeals, the time of the Governor and his staff—then there seems no question but that economy is on the side of abolition.”*

THE CHANCES FOR ERROR

“That is the man who killed my husband.”

There was no doubt as the widow of Charles Drake identified James Foster as the slayer of her husband in June 1956. Mrs. Drake was an eye witness. Neither was there doubt in the minds of the jury who sentenced Foster to death by electric chair in the Jefferson, Georgia jailhouse.

Appeals delayed the execution and Foster sat on death row for 29 months. In July, 1958, a former policeman confessed in detail the planned robbery which resulted in the death of Charles Drake. Foster, “positively identified as the murderer” was released.

John Rexinger of San Francisco, “practically has the pellets (in the gas chamber) dropping.” So said a police officer working on this 1957 case. Everything pointed to Rexinger as a torture-rapist; he was an ex-convict; he could not account for his where-abouts at the time of the crime. Finally, he was *twice* identified by the victim. Several days later the actual criminal confessed. He was a full eight inches shorter than Rexinger.

“I pleaded guilty only because my lawyer told me to. I told her I was innocent.” John Fry, a hard-drinking man with a long police record was convicted of manslaughter when he pleaded guilty to the strangling of his common-law wife.

After seven months in San Quentin, Fry was pardoned by Governor Brown after another man’s confession was verified.

Charles Bernstein was convicted of murder in the District of Columbia and sentenced to death. Minutes before his scheduled execution the sentence was commuted. Two years later, police proved he was innocent and he was released and later pardoned by the President.

A forced confession figures in the recent campaign against the death penalty in New York which resulted in almost com-

* Richard A. McGee, *op. cit.*

plete abolition. Police wrung a confession to the slaying of two girls from 19-year-old George Whitmore. But another man was later charged with the crime, and a statement issued by the district attorney's office completely absolved Whitmore.

Investigators in the Los Angeles Public Defenders office estimate they have saved the lives of 84 defendants charged with murder. The police and the District Attorney were sure of their guilt. Some of them had even confessed. Many had been positively identified by witnesses. But eyewitness reports are notoriously fallible. A Los Angeles Police Department survey of identifications of suspects in a line-up once indicated that 28 percent—more than one out of four—are later proved false!*

Until recently, there were several studies of men and women convicted of crimes who were later proved innocent, but no information on how many persons have been executed for murders they did not commit. Edwin Borchard cited cases of 65 innocent convictions; the late Judge Jerome Frank of the Second Circuit Court of Appeals documented 36 such cases. Now Hugo Adam Bedau has discovered 74 men wrongfully convicted of criminal homicide. Eight of these men were executed. Twenty-four others received a death sentence but were not executed. Of these Bedau writes, "Whether any of the eight cases really deserve to be classified as wrongful executions remains in some doubt. No doubt, however, attaches to the fact that nearly two dozen men have been sentenced to death for crimes they demonstrably did not commit." In nearly every one of the 74 cases, "the appellate court had sustained the conviction and usually unanimously."**

At the beginning of 1967, there were 415 prisoners under sentence of death in the U.S. Of these, 68 men finally had their cases disposed of *other than by execution*: 13 were commuted, 50 had reversals of judgment, sentences vacated or grants for new trials. Three men were transferred to mental hospitals and two died (one suicide and one natural death).

* Reported by Keither Monroe in "California's Dedicated Detective," *Harpers*, June 1957.

** Hugo Adam Bedau, *op. cit.* p. 437.

The degree to which the condemned man is subject to a capricious fate is summed up by Bedau: "The whole pattern of treatment of capital convictions by the higher courts seems devoid of rhyme or reason. Thus, a man proven guilty is saved from execution by the striking ingenuity of his counsel on appeal to the Supreme Court. But another man goes to his death purely because his attorney neglected to raise a point of procedure at the trial, thereby barring the higher courts from touching the issue. One man is literally taken from the electric chair, after his counsel had the good luck to find a Supreme Court Justice who would issue a temporary stay of execution; upon re-hearing, the conviction was reversed. But another man is executed because the notice of stay of execution arrived seconds too late to halt the flow of lethal gas into the execution chamber."*

California has an automatic appeal to the State Supreme Court in all death penalty cases. Of 180 sentences of death (1942-57) there were 25 reversals on appeal. On retrial of these cases, six were dismissed or acquitted, and only three resentenced to death. This is strong evidence of the high rate of error in trial courts. Another eleven persons had their death sentences commuted to life imprisonment. Each of these eleven persons would have been executed after full judicial consideration except for executive clemency. What of the others, perhaps no more guilty, who were not so fortunate?

Those opposed to abolition have said that the innocent are seldom executed. By that measure, if we consider the number executed in relation to the total capital crimes committed, we seldom execute *anyone*. But the supporter of the penalty never claims its infrequent use to be one of its merits. To do so would be to advance one of the strongest arguments against it.

The question is not numerical nor utilitarian, but ethical. Whether it be one innocent man executed or one hundred, the system is not defensible. And until the death penalty is erased, the possibility of error is constant. To argue otherwise is to support the notion that errors do not occur in sentencing for non-capital crimes, or in life terms for capital offenders, which clearly is not the case.

* Bedau, *op. cit.* pp. 410-11.

Seventy years ago, the state of Maine hanged an innocent man. As former Gov. Edmund Muskie wrote, "This unfortunate accident was the main reason for doing away with capital punishment in this state. . . ."*

In the year 1852, the state of Rhode Island abolished the death penalty when it was discovered that an innocent man was put to death for a murder he did not commit. Today, the F. B. I. Uniform Crime Report reveals that Rhode Island, with a 1.4 rate per 100,000 population has the fourth lowest murder rate in the nation. But Rhode Island would probably have a low murder rate with or without the death penalty.

MYTH OF THE LEGALLY SANE

Leandress Riley, Negro, defended by a Public Defender, convicted of robbery and first degree murder, executed February 20, 1953; family background: confused and unstable, St. Louis slum . . . left school at fourteen.

Legally sane when executed but reports by San Quentin psychiatrists point to medical insanity. June 26, 1950 report: ". . . at present he is so depressed and so agitated, despite electric shock treatment, that we are all agreed he is too insane to be executed. We recommend early transfer to Mendocino State Hospital." But Leandress Riley was executed two and one half years later.

San Quentin records repeat this story again and again: execution of a legally "sane," but medically insane person. ". . . We are of the opinion that he has fundamentally a psychoneurotic personality, considerable cerebral deterioration . . . chronic alcoholic, and definitely a suicide risk."

". . . We are all in agreement that although he is medically insane, he knows fairly well the crime he committed . . . [so] he is considered to be legally sane at this time."**

On March 28, 1961, California's Governor Brown commuted to life the death sentence of Edwin Walker. Walker was convicted of killing a police officer. At his sanity trial he

* Letter, dated March 20, 1958, from Edmund S. Muskie, Governor of Maine.

** Robert M. Carter, *Capital Punishment in California, 1938-53*. Thesis, University of California School of Criminology.

was found sane despite a strain of mental illness traced through five generations of his family which made fifteen of his relatives either mentally defective or psychotic. But, on the day of his scheduled execution, he was found to be insane and sent to a mental hospital. Years later, he was again declared sane and a new death warrant was signed. It was then that Governor Brown commuted his sentence, writing: "In my term as Governor, I have never before stayed the execution of one convicted of slaying a peace officer. And were it not for the overwhelming evidence of mental illness and the fuller light cast upon his behavior over these many years, I would be loathe to intervene now. But I cannot . . . find it possible to believe that California, after investing twelve years, thousands of dollars, and scientific resources in restoring this broken mind, has done so only that it may now be thrust into the cell for execution." (Governor's Commutation Order, p. 3)

A recent study shows that of the 25 men whose sentences have been commuted in California between 1950 and 1965, 12 were on the basis of psychiatric evidence.* But why has it been necessary for a Governor to save the mentally ill from death? Why could not this have been possible in the courts?

For hundreds of years our criminal law has divided offenders into "sane" and "insane." Insane defendants are judged "not guilty" and today are committed to mental institutions. Legally "sane" defendants, on conviction, are sentenced to prison or death regardless of their respective mental conditions. For over a century, our criminal law has clung to the test of sanity laid down in the M'Naghten's case of 1843, viz:—did the accused, at the time of the crime, know that his act was wrong and contrary to law?

Psychiatry, on the other hand, has long since discarded such concepts of responsibility. Hence, from the medical standpoint, mentally diseased persons are executed, though the law may hold them sane through the haphazard application of the outdated "M'Naghten test."

This test was formulated without benefit of over a century of psychiatric knowledge accumulated since 1843. As Bernard

* Lloyd Braithwaite, "Executive Clemency in California: A Case Study Interpretation of Criminal Responsibility," *Issues In Criminology*, Vol. 1, No. 1, 1965.

L. Diamond, noted authority of psychiatry and the law, has observed: "Under a strict definition, the only persons who are so mentally ill that they do not know this [the difference between right and wrong] are a few far-deteriorated, schizophrenic toxic and delirious, or senile patients" incapable of aggressive impulses.*

The psychiatrist knows that knowledge of right and wrong alone is not an adequate test of a man's responsibility before the law. The M'Naghten test does not allow for the many factors other than reason which control human conduct. It assumes that all men are equal in their ability to conform to the law if they know what is right and wrong. Modern psychiatry shows that men are mentally and emotionally unequal—the mentally ill do not have the same chance to lead law abiding lives as the mentally well.

By California Law (Penal Codes Sec. 1367) it is possible to be legally sane and medically judged mentally ill at the same time. A man may be judged legally sane at his trial, but then become legally insane by the time of his execution. If this happens, the execution is postponed until he is well, or, as in the case of Edwin Walker, his sentence maybe commuted. Robert M. Carter's study of men executed in California between 1938 and 1953 shows that some condemned men cross the bridge between medical and legal sanity several times. In such cases how can we be sure a man was capable of conforming his conduct to the law at the time he committed a crime? If there is doubt, is it not far more humane to spare his life?

In the case of *People vs. Wolff* (August, 1964), California moved in the direction of a concept of diminished responsibility before the law based on evidence of mental illness. The Supreme Court determined that evidence of mental illness affects an offender's ability to reflect upon the seriousness of his criminal act. The Court held that Wolff should have been convicted of second rather than first degree murder.

But despite liberal court rulings, as long as the death penalty is on the books, the poor, and/or mentally ill, are at the mercy of a most capricious chance. It takes time and money to prove mental illness, or legal insanity.

* Bernard L. Diamond, "Preparing Psychiatric Testimony," *California Criminal Law Practice I* (University of California, 1964).

IS THE DEATH PENALTY CONSTITUTIONAL?

Since 1965 a concerted effort has been mounted to challenge the death penalty in the courts as violating the Constitution of the United States. This litigation has been carried out largely through the efforts of the NAACP Legal Defense Fund and the American Civil Liberties Union, working in close cooperation with private attorneys throughout the country.

As a result, there were no executions in the United States between June 7, 1967 and January 1, 1970, when this was written. It is unlikely that any executions will take place until the United States Supreme Court has decided a number of cases now pending before it.

Early in the 1960's, the Supreme Court of the United States declined to review a case in which a constitutional challenge was made to the death penalty for rape. However, three justices dissented in a decision written by Mr. Justice Goldberg in which he raised a number of questions concerning the death penalty for rape.*

This case encouraged the Legal Defense Fund to embark on a systematic attempt to have the death penalty for rape declared unconstitutional on the grounds that it was applied discriminatorily against black defendants who had raped white women. (Significantly, the death penalty exists for rape only in Southern and border states, the District of Columbia and Nevada in the United States.)

Early in 1967 developments in Florida and California compelled the extension of this systematic approach to the death penalty in general. In both states the governors had been opposed to the death penalty. There had not been any executions over a number of years. As a result, Florida had more than 50 men on its death row and California more than 60. In 1967, however, new governors came into power who favored capital punishment.

Faced with the possibility of a mass slaughter, actions were brought in federal court in both states jointly by the Legal Defense Fund and the ACLU on behalf of all persons on death row. In both instances, the federal judges issued stays of all executions until final determinations of the constitutional

**Rudolph v. Alabama*, 375 U.S. 889 (1963).

issues raised. The federal court in California eventually vacated its stay but a similar stay was granted by the California Supreme Court. This remained in effect until November, 1968, when the court rejected the various constitutional arguments.

In the meantime, a number of the issues were raised in cases in the Supreme Court of the United States. In two cases the Supreme court held unconstitutional certain practices involved in the administration of the death penalty. At the present time there is before the Court another case, *Maxwell v. Bishop*, which could have a profound effect on the administration of the death penalty in every state. Pending that decision, stays of execution have been obtained in many individual cases.

The constitutional challenges made in these cases can be divided into two broad categories. The first is a challenge to the death penalty on its face, and the second consists of a number of challenges to the ways in which it is administered.

The first urges that the death penalty violates constitutional prohibitions against cruel and unusual punishment; that is, the death penalty, regardless of the way it is carried out by the state, is in conflict with basic concepts of how a civilized society should act. Although the Supreme Court of the United States had in 1969 an opportunity to hold that the death penalty for robbery constituted cruel and unusual punishment; the Court avoided deciding the issue by reversing the conviction on other grounds.

The other challenges deal with the manner in which courts and juries determine whether or not the death penalty is to be given in any particular case. To understand these issues a brief description of the working of a court in a death case may be helpful.

In every state, if the defendant chooses to be tried by a jury, the jury itself decides whether or not he should receive the death penalty. In some states the jury must affirmatively vote for death; in others, the statutes provide that death will be the penalty unless the jury votes otherwise. In most states there is only a single trial in which the jury decides both whether the defendant is guilty and whether he will receive life or death. In certain states, however, California for ex-

ample, the trial is split into two parts. In the first the jury decides only guilt and in the second, decides the penalty.

In virtually every state the jury is instructed that it is entirely up to its own conscience whether or not a particular defendant will receive the death penalty; that is, it is not instructed as to any standards which, by law, govern its determination. Indeed, in many states, the jury is specifically instructed that there are no standards, but that the penalty is entirely up to the jury's own discretion.

Until a 1968 decision of the United States Supreme Court, which will be discussed below, virtually every state either required or allowed persons who were opposed to the death penalty to be excluded from the jury in a capital case. Opposition could be as mild as a general dislike for the death penalty.

The issues arising from this system are briefly these. First, the lack of standards to guide the jury in determining life or death is a violation of the Fourteenth Amendment's prohibition against depriving a person of life without due process of law. That is, the jury is allowed to act solely at its own discretion or, in effect, on the basis of whim or caprice. This is not permissible where the momentous decision of life or death is involved.

In November, 1968, the California Supreme Court of the rejected this argument by a 4-to-3 decision. The Supreme Court of the United States, however, has agreed to hear the issue in the case of *Maxwell v. Bishop*, mentioned above. This case will be argued probably early in 1970.

The problem of the standardless jury is worse where there is only a single trial, since the defendant faces an impossible choice. He must testify on his own behalf in order to inform the jury of mitigating circumstances. If he does so, however, he leaves himself open to cross-examination as to whether or not he committed the crime. If he chooses not to testify in order to preserve his right not to give testimony against himself, the jury will decide whether he should live or die on incomplete or biased information. The single trial issue is also before the Court in *Maxwell*.

The next constitutional challenge combines the cruel and unusual punishment argument with the lack of standards argument. It urges that for a jury to act without standards, and hence arbitrarily and capriciously, is by its nature cruel and unusual punishment. That is, because the jury acts whim-

sically, it imposes punishment without regard to the circumstances of the crime or the character of the defendant and thus in any particular case it is arbitrary and cruel.

The next argument stems from the exclusion of persons opposed to the death penalty. In 1968 the Supreme Court, in the case of *Witherspoon v. Illinois*,* held that it violated the Constitution to exclude scrupled jurors from the penalty phase of the capital trial. The Court held that a jury must adequately represent a cross-section of the community when its function is to reflect the overall conscience of the community.

The Supreme Court did not hold that persons who would never vote for the death penalty regardless of the circumstances of the case could not be excluded. It left that issue open to be decided at some later time.

Following *Witherspoon* many death sentences imposed by improperly constituted juries were overturned by state and federal courts. In California over 30 death sentences were set aside and the cases returned to court for a new penalty trial within a year of the *Witherspoon* decision.

Finally, the Supreme Court handed down some significant decisions in cases involving the death penalty under specific federal statutes. The leading case, *United States v. Jackson*,** involved the federal kidnapping statute. That statute provided that the death penalty could be given only by a jury. If the defendant pled guilty or if he was tried by a judge without a jury he could not be executed.

The Supreme Court held that this necessarily imposed a burden on the exercise of the constitutional right to plead not guilty and to be tried by a jury. Faced with the possibility of the death penalty, a defendant would inevitably be coerced into avoiding the possibility by giving up his fundamental constitutional rights. As a result of *Jackson*, challenges to similar death penalty statutes in various states have been made.

The litigation described above has resulted in a two and a half year moratorium on the use of the death penalty in the United States. How long this moratorium will remain in effect will depend to a great extent on the outcome of *Maxwell v. Bishop*. In any case, it is certain that the attempt to eliminate the death penalty through legal action will continue to be vigorously pursued.

*391 U.S. 510 (1968).

**390 U.S. 570 (1968).

WHAT WE MUST DO

In 1748, solemn English judges ruled it proper to hang a boy of ten as an example to other children. We restrict such punishment to adults, but the arguments in support of the death penalty have not changed one whit in 200 years.

What plaintiff would want to be compensated for the loss of an eye by being permitted to pluck out one of the defendant's eyes. We no longer take "an eye for an eye, or a tooth for a tooth." Yet we continue the barbarous practice of taking a life for a life.

But what is the alternative? How is society to be protected against the murderer? The answer is epitomized in two words, *rehabilitation* and *prevention*.

MURDERERS CAN BE PAROLED

The alternative to punishment by death most commonly advanced by abolitionists is life imprisonment with no possibility of parole. It is frequently offered to meet the charge that one-time murderers will be paroled only to kill again. Both this fear and the life-without-parole alternative are mistaken. *Some* few murderers may need to be permanently isolated without parole. But to abolish death as a punishment and then indiscriminantly condemn *all* convicted men to prison with no chance for a new life, makes no sense at all. For the many who could succeed on parole, life in prison is a living death.

What happens to first-degree murder defendants who are convicted and imprisoned but not executed? Dr. A. LaMont Smith, University of California criminologist now with the Arizona Department of Corrections, cites a fifteen year period during which only *one* of 920 paroled murderers was returned to prison with the death penalty.

"On January 1, 1945, there were 398 men *on parole* in California who had committed murder. In the following period 1945 to 1958, an additional 522 were placed under lifetime parole supervision for a total of 920. In this fifteen year period only *one man* was returned to prison with the death penalty or one-tenth of one percent of the total. An analysis of the remaining 919 reveals that 24% died, 8.2% were pardoned and 55.4% were still on parole, or a total of 87.6%. The balance of 12.3% were returned to prison as violators,

"An analysis of the 1959 *prison intake* for homicide in California reveals that only one-fifth (41/197) had prior prison records. There were 36% without a jail or reformatory record—first offenders. Less than half, 44%, had been in such institutions. In fact, the report, *California Prisoners 1958-1959*, states that homicide is one of the 'two offense groups with the highest proportion of men with *no* prior commitment history at time of admission to prison'. . .

"Ex-prison felons, therefore, are the least responsible for homicides. Life-imprisonment without possibility of parole to prevent homicides is not warranted by the known facts."*

Of 117 murderers paroled in New Jersey over a ten-year period, all under life sentence and some originally condemned to death, none had subsequently been charged with another murder. Only ten have violated parole in any way. They had served an average of 19 years in prison before being paroled.

Only the best risks among imprisoned first-degree murderers are selected for parole. For such men and women we now have a clear alternative to the death penalty; life imprisonment *with* possibility for parole. Murderers are clearly the best parole risks of any class of offenders.

Hugo Adam Bedau has collected parole statistics from eight states covering different periods of time ranging from 1900 to 1961. The longest period is 1900-1958 (Mass.), and the shortest period 1950-59 (New York):

	PAROLED MURDERERS	SECOND IMPRISONMENT FOR MURDER
California (1945-54)	342	1
Connecticut (1947-60)	60	0
Maryland (1936-61)	37	0
Massachusetts (1900-58)	10	0
Michigan (1938-59)	164	0
Ohio (1945-60)	169	0
New York (1950-59)	357	1
Rhode Island (1915-58)	19	0

* Statement, A. LaMont Smith to the California Assembly Committee on Criminal Procedure, April 10, 1961.

Out of some 1,158 murderers paroled, two committed another murder, 9 committed a crime of personal violence short of murder, or a felony.

It is easy to overlook the much larger number of murderers who are either not apprehended or not convicted and are at large among the population. As Zechariah Chafee of the Harvard Law School wrote:

"It is not the occasional pardon to a murderer that endangers society but rather the fact that indictments of first degree so often lead to acquittal. Undoubtedly ten murderers are free on our streets due to lack of apprehension and conviction to everyone who is pardoned after careful consideration."*

SOCIETY AT FAULT TOO

Men in society are responsible for their acts, but the man society executes for a crime is society's own child. He has been reared and nurtured by it, and is conditioned by what that society has done or failed to do for him, sometimes by what it has done to him. He is evidence of the tragic fact that home and school, church and synagogue, social agency and institution have partially failed in their purpose.

Experience so far indicates that through psychiatry, psychotherapy and religious resources, most men whom we condemn to death cells, or to slow death for life behind bars, can be returned safely to life in society.

When there is a public philosophy which values rehabilitation and crime prevention more than revenge or punishment, other ideas will emerge, and proven experiments thrive and expand.

The death penalty is not consistent with that philosophy; it can no longer be accepted as right punishment. We now understand that it does not prevent crime. Let us abandon the death penalty, and quickly.

* *Abolish the Death Penalty*, Massachusetts Council for the Abolition of the Death Penalty, 1928, p. 8.

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WORLD TREND TOWARD ABOLITION OF CAPITAL PUNISHMENT

ABOLITIONIST BY LAW (De Jure)

Argentina	Nicaragua*
Australia	Norway*
(Queensland & New South Wales*)	Portugal* (1867)
Austria	San Marino (1848)
Brazil*†	Sweden*
Colombia	Switzerland*
Costa Rica	United States
Denmark*	Alaska
Dominican Republic	Hawaii
Ecuador	Iowa
Federal Republic of Germany	Maine
Finland	Michigan (1847)
Great Britain	Minnesota
Greenland	New Mexico
Iceland	New York*
Indonesia*	North Dakota*
Israel*	Oregon
Italy	Rhode Island* (1852)
Mexico (24 of 29 states and the	Vermont* . . .
federal territory)	West Virginia
Netherlands* (1870)	Wisconsin (1853)
Netherlands Antilles*	Uruguay
New Zealand*	Venezuela (1863)

ABOLITIONIST BY CUSTOM** (De Facto)

Belgium (1867)	U.S. Navy (1849)
Liechtenstein	
Luxembourg	
Vatican City State	

Source: CAPITAL PUNISHMENT, United Nations, New York, 1968.

Note: Only those countries which replied to the UN questionnaire are listed. Dates given only for jurisdictions which have been abolitionist 100 years or more.

*No death penalty for murder. Death penalty retained only for certain exceptional crimes, such as treason, piracy, killing of policeman.

**Death penalty on statute books but not used.

†Restored death penalty 1969 for acts of subversion and terrorism (New York Times, Sept. 10, 1969.)

MR. KASTENMEIER. This concludes this morning's hearing and presently scheduled hearings on this matter. We will probably have another day or two of hearings in the near future but at present we do not have witnesses scheduled.

So, until those hearings are set and publicly announced, this subcommittee stands adjourned.

(Whereupon, at 12:05, the subcommittee recessed subject to call of the Chair.)

CAPITAL PUNISHMENT

WEDNESDAY, MAY 10, 1972

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:10 a.m., pursuant to adjournment, in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Conyers, and Biester.

Also present: Herbert Fuchs, counsel.

Mr. KASTENMEIER. The hearing this morning will please come to order.

We have met this morning for the fifth and probably the last public hearing of this subcommittee on pending legislation to either abolish or to suspend the death penalty in the United States.

Our first witness this morning is Mr. Glen King, who is Director of the Information Service Division of the International Association of Chiefs of Police.

Mr. King, the subcommittee is very pleased to welcome you, sir.

You have a statement?

Mr. KING. Yes, I do, sir.

Mr. KASTENMEIER. You may proceed as you wish.

Mr. KING. Thank you.

Mr. KASTENMEIER. We are very pleased that you could come.

TESTIMONY OF GLEN D. KING, DIRECTOR, INFORMATION SERVICE DIVISION, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

Mr. KING. I would like to express the regrets of Mr. Tamm. He would have liked to appear before the committee, but he had an unavoidable conflict that could not be rescheduled.

So if I may speak for Mr. Tamm and the president of the association, Chief George Murphy, Oneida, N.Y., and on behalf of them and the 8,500 members of the International Association of Chiefs of Police, I do express our appreciation for your invitation to testify.

Rather than specifically addressing the bills being considered by this subcommittee, I would like to voice a belief regarding the general nature of capital punishment and its influence on the commission of capital crimes.

The IACP, as the world's leading association of police executives, has traditionally been greatly concerned about deterrents to crime and has viewed capital punishment as one of great impact.

Although the number of incidents in which capital punishment has been exercised has been extremely limited, its total impact as a deterrent to crime has far exceeded its numerical size.

The seriousness of your task and the very great difficulty it poses for you is emphasized by the fact that persons of differing opinions can look at the same basic facts and come to entirely contrary conclusions.

I am sure that most persons who appear before this subcommittee urging legislation to abolish capital punishment do so because of a concern for human life. It is precisely for this reason that I urge the subcommittee to decide in favor of recommending a retention of this form of crime prevention.

The logic which urges an abolition of the death penalty in the interest of human life is more apparent than real. For I am convinced that ultimately abolition of capital punishment would result in a much greater loss of human life than would its retention.

It is admittedly tragic whenever the State in the most awesome exercise of its authority decides that capital punishment must be invoked, tragic because any loss of human life is a tragedy. But I submit to you that even in the tragedy of human death there are degrees, and that it is much more tragic for the innocent to lose his life than for the State to take the life of a criminal convicted of a capital offense.

My statement implies a belief that there is a direct relationship between the legal existence of capital punishment and the incidents of criminal homicide. Although statistics are generally unreliable in this area, I am convinced that such a relationship does exist. I am convinced that many potential murderers are deterred simply by their knowledge that capital punishment exists, and may be their fate if they commit the crime they contemplate.

I think it significant that during recent years we have seen a consistent reduction in the number of incidents of capital punishment, and at the same time a very great increase in the number of criminal homicides.

As an example, in 1950, 82 convicted felons were executed, a very great percentage of whom were guilty of the crime of homicide. During the same year, 7,020 criminal homicides were reported.

A decade later, the number of executions dropped to 56, and the number of criminal homicides rose to 9,140.

Throughout the 1960's, we experienced a steady increase in the number of criminal homicides, with 14,590 recorded in 1969. During the same decade, we saw a practical end to the utilization of the death penalty. Since 1967, no executions have occurred in the United States, and there were only two that year. In 1966, there was only one instance in which this form of punishment was applied.

I realize that a very great number of factors are involved in this extremely complex question, and I do not suggest for a moment that the de facto end of the death penalty as a form of punishment is solely responsible for the burgeoning homicide rate in the United States. But I suggest it is equally unrealistic to assume that there is no relationship between the two.

The danger of resorting solely to statistics in attempting to determine the best course of action to follow in something as complex as the issue of the death penalty is illustrated by some of the statistics cited to support its abolition.

Opponents of capital punishment point to the criminal homicide rates in States which have legally banned the death penalty, and claim support for their beliefs in the fact that the statistics in these States are lower than in some in which capital punishment continues to be legally permissible.

The questionable nature of such statistics becomes immediately apparent when we realize that capital punishment as a practical matter has ceased to exist in all States. When 4 years pass without a single State exacting the death penalty, then statistics comparing States with capital punishment and those without become ridiculous.

We have in effect become a Nation in which capital punishment does not exist, and I am convinced that part of the results of this has been a very great increase in capital offenses.

It is equally as invalid to rely on emotional appeals, because there is an inherent element of emotion both in appeals to continue and to discontinue capital punishment.

Lurid descriptions of the death scene have painted a horrible picture of the execution. Of equal impact are descriptions of the savage atrocities visited upon innocent victims by those who commit murders and rapes. A description of the execution scene which revolts and repels is no more valid a basis upon which to make a decision than is the gore of the criminal homicide scene.

Our courts, with every justification, have refused to admit into evidence in the trial of an accused pictures and oral descriptions which repel human sensibilities and are revolting to human decency. The courts realize that reliance upon such methods cause conclusions to be reached on the basis of emotion rather than on the basis of logic.

Such an application can with equal validity be made to execution.

At one time in the history of man, 168 violations were capital offenses. It is to the credit of our forebears that they realized that the death penalty could not properly be applied in minor cases, but must be reserved to those cases of greatest magnitude.

I am convinced that an equal exercise of good judgment calls upon us to decide that conditions can exist in which this act of the utmost gravity is not only justified but is demanded, and that violations can be committed which are so reprehensible that no other form of punishment is suitable.

If we are to apply those methods which serve as the greatest deterrent, we are going to have to continue to suit the punishment to the offense.

The Nation's police officers are particularly concerned with this issue, not merely because they are called upon for direct involvement in the incidents which may result in the application of the death penalty, but because they themselves are so often the victims of offenses for which the death penalty may be assessed. We have in recent years seen a very great increase in the number of criminal assaults committed on the police officer, and in the number of injuries and fatalities resulting from those assaults.

Several of the five States which have partially abolished the death penalty have retained it for the killing of a police officer or a prison or jail guard who is in the performance of his duties. The States of New Mexico, New York, and Vermont have specifically cited such offenses as being justification for the exercise of the death penalty while prohibiting it in other criminal homicides.

Whether these States are correct in their partial abolition of the death penalty, they are unquestionably correct in their implication that the death of a police officer inflicted while that officer is acting in the line of duty is somewhat different and apart from other criminal homicides.

The policeman willingly subjects himself to a greater element of danger than most persons ever experience while protecting the citizens he serves. He is not, however, willing to be the victim of the criminal who uses violence as the method of obtaining that which he seeks. Nor is he willing to be the victim of felonious assault merely because his assailant knows that he can maim and kill without being subjected to meaningful and appropriate punishment.

Gentlemen, I am of the belief that capital punishment must be assessed only after every legal safeguard has been provided, and that it can be properly applied only with a full understanding of the very great gravity of its exercise.

But I am convinced, and I urge you to conclude, that capital punishment under carefully prescribed conditions and for highly selective offenses is a deterrent to certain kinds of crimes, and that the value of human life is not lessened but is rather protected by retention of the death penalty as a form of punishment.

That is the end of the statement.

I thank you.

Mr. KASTENMEIER. Thank you, Mr. King, for that statement. It is one on which a number of this committee place some reliance.

We are, of course, sorry that your executive director could not be here this morning. He is well known to the Congress, as is the International Association of Chiefs of Police.

For the record, I might ask something about your association. Is it national, or is it international in character?

Mr. KING. It is international in character. We have now slightly more than 8,500 members, representing 64 nations.

Mr. KASTENMEIER. Would a majority of your membership be U.S. citizens?

Mr. KING. A very great majority is. Only somewhat less than a thousand are foreign to the United States.

Mr. KASTENMEIER. Do you meet during the year, like the bar association, and take positions on matters of public policy? For example, matters of policy in respect of crimes and the like?

Mr. KING. The association does meet, and we have an annual conference, and it does consider matters at the conference.

The association as such, or the membership of the association, has not adopted a formal policy on the death penalty.

Mr. KASTENMEIER. One of the difficulties or dilemmas the committee has—as do a number of witnesses, some of whom would share your position, more or less—is that statistical evidence is really lacking or not very conclusive as to what causes what.

Does the abolition of the death penalty lead to more crime? Does in fact the death penalty deter?

We are not certain.

One of the arguments made very forcefully for the bill which provides for suspension of the death penalty pending some review of the matter is that we need a time to see if we can determine from studies

whether the death penalty does have the claimed relationship, and I wonder how you react to that.

Would you or your association, in your view—you can speak either for yourself or your association—feel that if studies on which you place some reliance came to the conclusion that the death penalty was not in fact a deterrent or an aid in fighting serious crime, change your mind with respect to whether or not it ought to be abolished?

Mr. KING. Addressing several points that you made, I think the first one is that—

Mr. KASTENMEIER. I apologize for the complexity of the question.

Mr. KING. Not at all.

I am not sure I will be able to answer all of it. I think I agree very simply that there is not reliable statistical data. I think it does not exist. I think perhaps in something as complex as this, the controls that would need to be established to conduct meaningful research are not possible.

I think, very simply, at the end, or at the beginning, we are going to have to have some largely subjective evaluations of this.

I think it is easy to establish certain impacts of law enforcement. You can assign greater numbers of officers to an area to determine whether the presence of uniforms has an impact on the number of offenses that occur there.

You are not justified, perhaps, in doing this when you are dealing with human lives. I think when you are dealing with property and dealing with life, it is entirely different, and I suspect that what we actually are doing when we conclude that we will establish a moratorium on the death penalty is transferring that greater danger to the citizen who is the victim of the assault and substituting it for the greater danger to the criminal.

I think the studies can be made equally as well and equally as validly with the death penalty continuing to exist, as it has continued to exist in the past years, and I think the greater danger to the society and the dangers to the society would mandate that it be continued while the studies were made.

Secondly, could the opinions be changed if it were proven that the death penalty does not have a deterrent effect? Certainly, because I think there are other factors at work, here. I think there are other persuasions here, but I think none of them are compelling.

I think the only compelling one is the preventive nature of capital punishment, and if it can be shown not to be, or can be shown to be a preventive to other capital offenses.

Mr. KASTENMEIER. One of the difficulties with present statistics is that so many different things can be shown.

For example, our State of Wisconsin does not have the death penalty, and we probably have a low rate of homicides, and probably even lower with respect to homicides on police officers and other law-enforcement personnel. Yet in a State, as you point out in your own statement on page 5, such as New York, that has specifically cited such offenses as being justification for the exercise of the death penalty, we find, nonetheless, homicides of law-enforcement personnel has risen dramatically and scandalously and alarmingly.

So one would almost think that there is no deterring some people from committing homicides. For example, with respect to the murder of law-enforcement personnel.

Mr. KING. I also tried to make the point immediately following page 5 that this is an extremely complex thing, and that I did not intend to imply that this was the only factor at work here.

There are many factors at work, and I do suggest to you again that there is a practical end, so far as its exercise is concerned, of the death penalty.

I also suspect that if you will look at the crime rate of your State in other offenses, you will find there is a difference also in rate there.

Mr. KASTENMEIER. I think that is true.

Thank you very much.

I yield to the gentleman from Pennsylvania.

Mr. BIESTER. I, too, want to thank the witness for testifying.

Mr. Railsback was on the telephone with me just a moment ago, and he expressed his regret that he could not be here to hear you, because your testimony and the point of view of the organization you represent is a point of view which Mr. Railsback has urged me to have a chance to hear in the course of our hearings, and he asked me specifically to apologize to you for his not being here.

Mr. KING. Thank you, sir.

Mr. BIESTER. I wonder if in your membership you have members who work in nations which have abolished the death penalty some time ago.

Mr. KING. I am sure there will be. I did not study the membership to see what percentage there would be, or whether they actually exist, but logic would persuade me that certainly they do exist.

Mr. BIESTER. What do you make of the British experience, and the finding that the homicide rate has remained stable? If fact, if you want to look at the findings, it has actually gone down since they abolished capital punishment several years back.

Mr. KING. I think we have to look at it very simply, and the totality of the conditions that exist in England, and if we could impose those here, then perhaps the same results might accrue here.

I think, very simply, that we do have to take into account all of the circumstances that exist in determining whether something will work or will not work.

I think if you will take a look at the number of criminal homicides that occur in England, the number of criminal homicides that occur in the United States, you will find that the social conditions that exist that would influence this are markedly different.

Mr. BIESTER. Then, should we not focus on those social conditions, rather than on this?

Mr. KING. I think so, yes. I think it is not either/or, I think it can be both.

Mr. BIESTER. You mentioned two potential tragedies: One, of course, is the tragedy of the victim, which by the time we get to trial in this country—since trials seem not to occur until some time after the event occurs—is somewhat lost in the shuffle; the other is the potential tragedy to the convicted murderer. As I think you have expressed it, if there is a comparative in tragedies—and I am not sure there is—but if there is a comparative in tragedies, certainly the tragedy of the death of the victim is the more intense tragedy.

What about the tragedy of the man who is convicted, executed, and then discovered innocent? Is that not the most intense tragedy?

Mr. KING. I think it would certainly not be excelled by any, and I think the legal system of the United States has to be applied with the greatest caution, and I think it is applied with the greatest caution. I think it moves sometimes with such deliberation that it seems not to be moving at all.

But I think that when something as serious as this does occur, when a capital crime is being heard, I think there is awareness on the part of the judiciary and on the public that serves as jurors of the gravity of this, and I think they approach it from that point of view.

I don't have figures on it. I suspect figures on this area also would be unreliable, on the number of persons who were innocent of an offense, who were convicted of it, and were ultimately executed for it. I don't have those figures.

I would again suspect the figures that I saw, because I think someone else's deathbed confession or the denial of the person who has been convicted cannot be accepted completely as evidence that he did not commit the crime.

Mr. BIESTER. Of course. There are two different kinds of expressions, I suppose, as to what innocence means and what we are talking about. There is actual innocence, and there is judicial innocence.

Mr. KING. Yes.

Mr. BIESTER. Because of the persistence of counsel in cases in which there is a life imprisonment imposed, we may 8 to 10 years later have a court ruling that the earlier conviction was violative of due process rights. In capital cases, of course, where the execution has been carried out, there is not then an assiduous search for error.

So in one sense, actual innocence may be difficult to discover. Like you, I have some reservations about other people's death-bed confessions, although there have certainly been proved instances in which this has happened.

But what about judicial innocence, the lack of due process which may have occurred?

Mr. KING. Does not law apply to the conditions that exist at the time the law is enacted, or at the time that it is applied?

The Constitution of the United States, which probably has the greatest permanency of any law that we have, has been amended many times, and it is not now the Constitution that was written originally, and it should not be, because the conditions that existed at that time don't exist now.

The conditions that do exist because of changing social customs, of mores, of legalities, the fact that something is not now legal and proper does not mean it was not legal and proper at the time it was applied. I think you have to look at it in the context of the times in which it occurs.

There are undoubtedly going to be changes made in the law in the future that will move it in a different direction, that will give it different thrusts, and this is entirely proper.

We are not able to, and I think we are doomed to failure if we try to predict what the law is going to be 20 years from now, and let our actions at this present time be determined by that. I think it very simply cannot work.

Mr. BIESTER. We have heard testimony here, which is quite persuasive, to the effect that there has been racial discrimination in the im-

position of the death penalty in many parts of the country under many different kinds of circumstances, and especially with respect to the crime of rape, particularly in the South.

I trust you would agree that, to the extent that such discrimination occurs, we should eliminate it from our system.

Mr. KING. I certainly agree with that, yes.

Mr. BIESTER. Are you aware of the fact that among the people awaiting execution are perhaps maybe 150 to 200 blacks who have been convicted of rape in the South? Would you hold out any distinction with respect to the execution of those sentences?

Mr. KING. I think, very simply, before you make decisions in this area, you have to admit other factors also, because I think that while certainly the possibility that these are of a racial nature exists, certainly the possibility that they are not of a racial nature also exists, and I think we ought to take a look at some of the victims here, also, and see what percentage of the victims were black, and see if, like in homicides, this is going to be true.

Mr. BIESTER. I am particularly concerned with the rape cases.

Mr. KING. Having glanced very rapidly at this, I thought the figure was 77 rapes, with 66 of those blacks. I am not sure.

Mr. BIESTER. It has been a couple of weeks since we had that testimony.

Mr. KING. I am not at all sure.

Mr. BIESTER. But even if it were 66, do you think that those executions should be carried out?

Mr. KING. In the absence of indication that the sentence itself was not a proper sentence, I think it should be carried out, yes.

I think this is a factor to be considered, and I think it is an important factor. I think it is not the only factor to be considered, and I think, very simply, that the conclusion that because a greater number of those, whether for rape or for homicide, or for whatever reason the sentence has been imposed, I think the conclusion that this sentence resulted because of the race of the person involved, and would not have resulted had the race been different, I think requires substantiation.

Mr. BIESTER. But if it were substantiated?

Mr. KING. I would not ever recommend that any sentence of any magnitude be carried out against a person who was convicted for anything other than a provable commission of the offense.

Mr. BIESTER. One last question—perhaps not last, but at least the last area I would like to get into.

We talk about continuing capital punishment, but I am wondering if we were to begin setting up a society at the present time, and we had to make the decisions on establishing the Constitution and the general laws of that society, whether in fact we would include among the punishments the death penalty.

Do you think that we would be justified, beginning from scratch, to impose the death penalty based on such subjective feelings, or do you think that we would be constrained to impose that penalty on the basis of some factual data, some genuine evidence which indicates that it would be a deterrent?

Mr. KING. I think before I could answer it, I would have to see the criteria on which you selected your population. If you could establish a population that would conform to the customs and conven-

tions of society, which are its laws, and who would not commit assaults upon and murders of its fellow man, then, certainly, you would want to establish that as a society that did not have a death penalty.

I think, very simply, that the question implies that there is not a relationship between the death penalty and the commission of capital offenses, and this is, I think, incorrect. I think there is that.

I say again that I think the ability to prove or disprove that point at the present time does not exist.

Mr. BIESTER. That is my question. If it cannot be proved, and it cannot be disproved, if we are unable to satisfy ourselves intellectually that it does make a difference, then do we have a right to impose it?

Mr. KING. I think, very simply, we not only have a right, but we have an absolute responsibility to evaluate this, and to apply the best judgment that we have to it. And if our best judgment persuades us that there is a deterrence to it, then we proceed as if the deterrence actually exists, that we perhaps arrive at the conclusion subjectively, but after having adopted subjectively, we apply it with the greatest objectivity we can bring to bear.

Mr. BIESTER. I just want to finish by thanking the witness very much. The body of citizens he represents here is a group about whom many of us on the subcommittee have been especially concerned.

I think all of the members of the subcommittee have been concerned with respect to the question of deterrence. I think your observation that those you represent do face special hazards that are not faced every day by the average citizen creates a higher degree of interest in this whole subject, and I think that should be something to which all here would agree.

I am not sure that means we should go ahead and go further down the line with you, but I think that there is a special circumstance in the special set of hazards faced by those in police work.

Thank you.

Mr. KASTENMEIER. Mr. King, the committee thanks you for your appearance and your testimony this morning.

Mr. KING. Thank you, Congressman Kastenmeier, Congressman Biester.

Mr. KASTENMEIER. Next the Chair would like to call the chairman of the board of directors of the Southern Christian Leadership Conference, and to introduce Dr. Lowery I would like to call on David A. Clarke, who is director of the Washington bureau of the Southern Christian Leadership Conference.

Mr. Clarke, would you like to introduce our witness?

You are both most welcome.

Mr. CLARKE. Mr. Chairman, it has been my pleasure to appear before the Congress on several occasions to testify. It is indeed an added pleasure to introduce the chairman of our board of directors, Joseph E. Lowery, who has come here from Atlanta, Ga., to personally present the views of our organization with respect to an issue that we consider so important as to warrant his presence at this hearing to present these views.

So it is my pleasure to introduce the chairman of our board of directors, Dr. Joseph Lowery.

Mr. LOWERY. Thank you, Mr. Clarke.

Mr. KASTENMEIER. You are most welcome. We are looking forward to hearing your testimony.

**TESTIMONY OF JOSEPH E. LOWERY, CHAIRMAN OF THE BOARD,
SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, ACCOMPANIED BY DAVID A. CLARKE, DIRECTOR, WASHINGTON BUREAU,
SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE**

Mr. LOWERY. Thank you, Mr. Chairman and members of the subcommittee.

I deeply appreciate the opportunity to present this statement on behalf of the Southern Christian Leadership Conference and our constituents.

The issue of capital punishment is one of life and death, and, as it seems to be with matters of such intensity we are prone to not look directly at it, but to somehow deflect our view through statistical analyses of deterrent effect or constitutional and legal arguments as to whose responsibility it is to take action, the Congress or the courts, et cetera, all of which result in hundreds of people condemned to their deaths, with the imminent possibility of multiple executions following no rhyme or reason as to who lives and who dies.

As to those legal and statistical arguments, we would note our agreement with the fine presentations before this subcommittee by Attorney Jack Greenberg and Dr. Marvin Wolfgang.

We would specifically note that we agree with the arguments that legalized murder is cruel and unusual punishment banned by the eighth amendment to the Constitution, and that the Congress has the power to both prohibit or suspend it as it seeks to affirmatively enforce the negative prohibitions of that amendment.

We would also like to emphasize those statistics which convincingly show that legalized murders deny equal protection of the laws, in violation of the fifth and 14th amendments to the Constitution.

Black people constitute 11.1 percent of the population of the United States. Yes, as of April 6, 1972, 310 of the 581 condemned people in our country, or 53.4 percent, were black.

Of those 77 condemned for rape, 66, or 85.7 percent, were black.

Regarding rape, studies in Florida of condemnations there for rape from 1940-64 show none for white men raping black women, while 54 percent of the black men convicted of raping white women were condemned.

Similarly, three out of five, or 60 percent, who stand condemned in the Nation for robbery are black.

Thus, if we begin the slaughter again and execute all the condemned, the black, poor, and other minorities will bear the brunt of America's pharisaical self-flagellation.

But the plain truth of the matter is that all those people will not be executed. Some may die, but others will live, and, while the manner of choice will be absurd in any way it is done, it is clear that the black population will again suffer the most.

Since 1930, 89 percent of those executed in the United States for rape have been black, as were 76 percent of those executed for robbery, 83.5 percent of those executed for assault by a life-term prisoner, 48.9 percent of those executed for murder, and 100 percent of those

executed for burglary. All together, 53.5 percent of those we have put to death in this Nation since 1930 have been black.

From 1944-58, 20.2 percent of the white condemned had their sentences commuted, while only 11.6 percent of the black condemned were so fortunate.

"Law can raise no higher standard of morals for the government of the individual than society itself, in the aggregate, has attained." It is no surprise, therefore, that the States with the highest homicide rates are States still seeking to put people to death, while the States with the lowest homicide rates have abolished State murder.

On a national average, abolition States in 1970 had a homicide rate of 4.6 per 100,000 population, compared to a rate of 7.7 per 100,000 in the others. And, as hatred and discrimination are both the children of evil, it is little surprise that two of the highest homicide, death-inflicting States are Georgia—my own State—with a 1970 homicide rate of 15.3 per 100,000, which as of April 6, 1972, had 29 black and eight white people scheduled to die, and Florida, with a homicide rate of 12.7 per 100,000, which, as of April 6, had 64 black and 30 white citizens marked for death.

The style of justice which leads to these condemnations and sanctioned murders is not inconsistent with its result.

I am attaching to my testimony the story of Wilbert Lee and Freddie Pitts, who await their deaths in Florida for something they did not do, apparently, to the prosecution's desire to execute somebody, and therefore not to extend immunity to the acknowledged perpetrator of the crimes charged.

These young men are innocent, and should not even be incarcerated, much less condemned to death.

England abolished its death penalty when it discovered that it hung Timothy Evans, an innocent man.

And it could happen here again, as it has happened here before. In 1893, Will Purvis swung momentarily from a hangman's rope, but the knot slipped. Later, another confessed to the crime.

In 1898, Jack O'Neil died at the hands of Massachusetts authorities for a murder it was later discovered that he did not commit.

New York took the life of "Dago" Frank in 1915, and later found that he was not even at the scene of the crime.

In 1920, a man known only as "Russell" was executed, and the reason we do not know his name is that it was later cleared.

In 1930, George Chew Sing was deported from life in New York, and even law enforcement officers, whose lobby cries for the retention of this relic of barbarism, became convinced of his innocence.

Perjured testimony was discovered in the trial of Coke and John Brite, but too late to do them much good, as they were killed by the State of California in 1936.

There may be many more whose innocence will not be confirmed because the efforts in their behalf ceased with the pull of the switch.

The truth we cannot ignore is that we have been executing innocents since we began the process—for example, Socrates and Jesus Christ—and that, in each case, we were sure at the time that it was the right thing to do.

But, as I indicated, SCLC is never totally swayed by statistics and legalisms. Too many times, justice would not have been done had we allowed ourselves to be swayed by them alone.

We are, however, swayed by and committed to what we feel is moral, just, and right, not solely because it has rationally been proven to us to be so, but because we cannot escape the compulsion of that conclusion.

It is crystal clear to us that no man has the right to take another's life. This is the principle which capital punishment is asserted to defend, but it is also the principle which capital punishment corrupts.

I feel, sir and gentlemen, that no group of American citizens knows this better than does its black citizens, for, as we have been the chief victims of the crime of capital punishment, we have also been the chief victims of the crimes sought to be capitally punished.

Many a black rapist learned the practice from seeing his mother or some other female relative forcibly defiled by some stalwart member of the white community, acts which never made it into the uniform crime report statistics.

For every homicide of a black man listed in the reports, there exist many more such murders known only to the waters of some swamp, or the limb of some tree, or the tragedy experienced by the black community.

And, as I feel that God has suffered our people to endure these indignities and bring from the experience a well of redemptive love for and salvation to our tormentors, I feel that possibly SCLC has been appointed to suffer an extra share so as to say to you and to the Nation what we are saying today.

No man knew the desire for vengeance more than we did on Bloody Sunday in Birmingham, Ala., when little Denise McNair and her three Sunday school classmates were blown to pieces by some racists' bomb. But we know that hate was the cause of that tragedy, and cannot, therefore, be its remedy, and, while we think it hypocritical that their murderers have not been brought before the bar of justice, we are not displeased that they are probably alive today.

We knew anger in Selma, Ala., when within days we lost Rev. James Reeb and Mrs. Viola Liuzzo to the hands of a sick society, yet we want not their killers' blood.

Sorrow reaked our souls as the search for James Chaney, Michael Schwerner, and Andrew Goodman yielded not only their bodies but those of many of our brethren murdered by those same people, who now call for the State to do their dirty work.

The pain and sorrow have left some fresh scars, too, Mr. Chairman, for, within the past 11 months, we have had to bury two fine, young, beautiful black women: Jo Etha Collier murdered as she was proudly graduated from her high school in Drew, Miss., and Margaret Ann Knott, run over in Butler, in Choctaw County, Ala., by a racist's automobile while she demonstrated nonviolently for his as well as her own rights.

Yes, we have thirsted for the vinegar of vengeance. We have tasted the bitter herb of hate. We have known them well. I cannot begin to tell you what went through us as our first president and founder, Dr. Martin Luther King, Jr., was shot down beside us, or as we identified his body on that cold slab in the Memphis, Tenn., morgue.

But I can tell you this: that those negative feelings did not last in us, nor are they the cry of our people today. If Dr. King's life, or that of any of those beautiful souls, is to have meant anything, it is

that love must overcome hate, the justice must be more than balance, that each killer of these beautiful people must be redeemed by confronting in his own conscience the suffering he has inflicted, and not by his own death.

We rest assured that all of these murderers will meet their God, but pray that it be at such time and in such manner as He appoints. We know justice will be done, because, as Dr. King used to recite so often:

Truth forever on the scaffold,
Wrong forever on the throne,
But that scaffold sways the future,
For beyond the dim unknown
Stands God in all His majesty
Looking over his own.

No, Mr. Chairman, we have come to forgive James Earl Ray as we forgive the Nation in whose stead he pulled the trigger. We forgive him, and the countless others whose identity may never be sought, much less known, and we pray continuously that they may confront the evil of their deeds, see the redemptive love of those upon whom they inflicted such suffering, and be born anew.

We pray no less for our Nation as it confronts its conscience and its deeds in this regard, in the matter of capital punishment.

Thank you very much, Mr. Chairman and members of this subcommittee.

Mr. KASTENMEIER. Thank you, Dr. Lowery, for a most powerful and eloquent statement, which was especially appropriate.

The story of Wilbert Lee and Freddie Pitts will be attached to our record.

(The document referred to follows:)

MEMORANDUM—ATTACHMENT TO THE TESTIMONY OF DR. J. E. LOWERY

THE STORY OF WILBERT LEE AND FREDDIE PITTS

The case of Freddie Pitts and Wilbert Lee, two Black men now under sentence of death in Florida for allegedly killing two white gas station attendants in a 1963 robbery is almost a classic example of the type of inequality and injustice under law which is the experience of many Black people in the United States, and against which the NAACP Legal Defense and Educational Fund, Inc. has long striven. It is a classic example of injustice and inequality because Freddie Pitts and Wilbert Lee are innocent. Yet they sit on death row and have been caged in that dreary place since 1963 and the end is not yet.

In late July, 1963, Pitts and Lee, Lee's wife, Ella Mae, a young woman (unrelated) named Willie Mae Lee, and several other Black people, stopped at the Mo-Jo gas station in Port St. Joe, Florida. Mrs. Lee asked to use the station ladies room and was told that she could not by the attendants as it was for "whites only". A brief argument ensued and finally Pitts, Lee and company left. A day or two later the slain bodies of the two attendants were found on the outskirts of town. Pitts, Lee and many other Blacks were rounded up wholesale by the Sheriff's office and put in jail for "questioning". That "questioning" consisted of beatings, threats and all other manner of intimidation and incommunicado questioning employed by state officials in an effort to "coerce" some of those arrested into confessing or implicating others in the crime. Mrs. Lee and the others stood firm in their resistance to the terror and pressure of the Sheriff and the prosecutor. Mrs. Lee over and over told them that her husband and Freddie Pitts had not been involved in the crime. She told them that after leaving the gas station they went home and did not go out again that night. But there was one who was not so strong, Willie Mae Lee, then 19 years old, was told by the Sheriff that if she didn't tell who committed the crimes she could be sent to the electric chair, or put on the chain gang for the rest of her life. She was told that if she didn't tell who committed the crime her child would be

taken from her. Although she first denied any knowledge of the crime, Willie Mae Lee finally succumbed to her fears and implicated Pitts and another Black man, Lambson Smith, in the crime. When it came to light that Smith could not conceivably have been involved in the killings because he was on a distant army base at the time, Willie Mae Lee named Wilbert Lee as a co-participant in the crime.

Pitts and Lee were brutally beaten by the sheriff and their officers. According to the defendants they were told by their court appointed white lawyer that they had better confess their guilt or they would receive the electric chair. The lawyer had himself spent time in jail previously for income tax evasion. After six (6) days of such beatings and intimidation, they "confessed" their guilt, and threw themselves on the mercy of the court. The judge before whom they were brought then empanelled a special jury to pass upon the question of punishment. Willie Mae Lee was put on the witness stand before the jury and gave an "eye-witness" account of how Pitts and Lee had murdered the white men. On the very day, August 28, 1963, that Dr. Martin Luther King spoke at the Great March on Washington about his dream that Black men and women would be free one day, the all-white jury, after deliberating briefly, returned a death penalty.

Thus began the long and uphill fight of NAACP Legal Defense Fund cooperating attorneys to free these two black men.

On appeal the Florida Supreme Court examined the conviction and found no error. Pitts and Lee spent years in prison under sentence of death. They were poor people and, therefore, had no funds to procure counsel to establish their innocence. Had it not been for a stay of all executions which the NAACP Legal Defense Fund secured in 1967, Pitts and Lee might even have been executed.

In 1968, a state investigator looking into a similar gas station attendant slaying which had occurred near Port St. Joe was questioning a white convict named Curtis Adams, Jr., who was then serving a life sentence for a similar crime which took place in Fort Lauderdale only 16 days after the Port St. Joe slayings. In the course of the questioning, Adams admitted that he had committed the Port St. Joe slayings. In a detailed confession which was tape recorded by the investigator, Adams detailed how he had been at the gas station when Pitts and Lee and his friends had come there on that fateful July night. Adams stated that he had been hiding in the men's room at the time Pitts and Lee arrived; that he heard the argument between Willie Mae Lee and the attendants concerning her use of the all-white ladies room and Adams further admitted that after Pitts and Lee left he then took the two attendants out to the woods where he shot them both. Furthermore, Adams explained how he had taken the receipts of the robbery home with him to a woman with whom he was living. He explained how he had destroyed the receipts in her presence and how he and this woman had then left Port St. Joe.

Legal Defense Fund lawyers thought that the case against Pitts and Lee would be dismissed in view of Adam's confession. They presented evidence of the confession to a Florida Circuit Court judge who vacated the guilty plea and death sentence entered against Pitts and Lee. However, Adams subsequently recanted his confession, and the judge reversed himself and reinstated the sentence of death upon Pitts and Lee.

Legal Defense Fund lawyers were finally successful in winning a new trial for the defendants when it came to light that the prosecutor, J. Frank Adams unlawfully concealed vital evidence at Pitts and Lee's trial which would have aided them in establishing their innocence. Prosecutor Adams had not told defense counsel as he was required by law to do of the first statement made by Willie Mae Lee falsely accusing Lampson Smith of the crime; of a statement by Wilbur Lee that he was innocent; of a statement by Mrs. Lee's sister that Wilbert Lee did not leave her house at the time of the crime; and of a statement by another soldier that Lee had not left the house on the night of the crime. The Attorney General of the State of Florida, Robert L. Shevin, finally asked the Florida Supreme Court to grant Freddie Pitts and Wilbur Lee a new trial in the interest of justice. The Attorney General in his motion to the court noted that the prosecution's most important witness, Willie Mae Lee, had made several inconsistent statements and stated "accordingly, and in the interest of justice your respondent is compelled, in light of the decision discussed herein and the corresponding duty to see justice is done to respectfully suggest that petitioners be awarded a new trial."

That new trial, after further intervening legal actions by the Pitts-Lee attorneys, took place in March 1972. No blacks sat on the jury. Curtis Adams, the white convict who had confessed to the crime denied committing the crime again because the prosecutor would not grant him immunity. The judge would not permit the jury to hear the tape recording of Adams' confession. Pitts and Lee, after a 90 minute deliberation by the jury, were resentenced to death. The case is now being appealed.

It has been said that the system of criminal justice for Black people in Florida is just like that of the wild west. Mrs. Lee and her husband, not married too long, were relative newcomers to Port St. Joe when the events which tore their life together apart took place. As "strangers", they were suspect to the white authorities who, as if by reflex, looked for Black people to punish when the crime was committed. It is this practice of legalized lynching which the Legal Defense Fund is fighting to end.

Mr. KASTENMEIER. I have some questions, but I will reserve them. I yield first to the gentleman from Pennsylvania, Mr. Biester.

Mr. BIESTER. Thank you, Mr. Chairman.

I also wish to thank the witness for a very forceful statement.

Dr. LOWERY. Thank you.

Mr. BIESTER. I really have, I guess, only one question and the question goes to the fundamental point of the statement.

This subcommittee has heard testimony pro and con, back and forth. We have had statistics provided for us, and the question which many of us have considered is to what extent, if at all, the death penalty may be a deterrent to violent crime, and in particular to murder.

I take it that your statement is to the effect that even if it were demonstrated statistically and in other ways that the death penalty was a deterrent to such violent crime that the nature of the penalty is such that it is so repellent that it should not even under those circumstances be exercised. Am I correct in that?

Dr. LOWERY. Let me say this, Mr. Biester, in response to that: that first of all, we recognize a very difficult situation involved in interpreting and evaluating statistics.

Although it is true that the highest homicidal averages are in States which maintain the death penalty, and the three lowest in terms of rate are those in which it has been abolished, we still understand the difficulty in dealing with statistics.

I think the main point of our concern here is that somewhere we have got to reaffirm the sacredness of human life, and that when the Government participates in the taking of human life, for whatever reason, it affirms and confirms the practice and the acceptability of taking human life as an approved mode of conduct in human relationships.

Whether the Government does this by due process or not, the fact that it does it has its recurring impact as it goes down through our citizenry, and it is our contention that nobody has the right to take another human life, and that the Government should establish a pattern of conduct that affirms a sacredness of human right in that regard.

Then let me say finally that according to the late Mr. Hoover's statistics, most murders are crimes of passion, and that people who kill in passion are neither aware nor concerned about punishment or getting caught. They are simply caught up in a passion, and they respond according to the impact of their experiences and their environment in resolving their differences, both on an international level and national level, and in interpersonal relationships, if mankind is to survive, we must find a more humane way of resolving our differences

than by war, or by execution which takes human life, by murder, by homicide.

We must reaffirm the sacredness of human life, and the right of a person whose life is given by God to live it out as he and God so order.

Mr. BIESTER. Thank you very much.

Mr. KASTENMEIER. The Chair would like to yield to the distinguished gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to add a personal note of belated welcome to the witness, the chairman of the board of directors of the Southern Christian Leadership Conference, who is personally known to me in his activities across the country.

I am especially proud and pleased that SCLC, recognizing the significance of the legislation before us, has dispatched its distinguished chairman of the board to present this very, very powerful and moving statement to us.

It is an unexpected privilege. I think that it will add significantly to those statements that have already been gathered, and I feel that this kind of responsible enunciation of goals reflects very, very admirably on the objectives of SCLC.

Might I ask only this question: Dr. Lowery, is there any doubt in your mind about the fact that abolition of the death penalty has racial implications in terms of those who have suffered capital punishment?

Dr. LOWERY. No, Mr. Conyers.

First of all, let me thank you for those very kind words, and say in response to your question that there is no doubt in our minds about the racial aspect of implementation of the whole principle of capital punishment.

As we stated in our testimony, in the period since 1930 89 percent of those persons executed in the United States for rape has been black, 76 percent for robbery, 83.5 percent for assault by a life-term prisoner, 48.9 percent executed for murder, and 100 percent of those executed for burglary, all have been black, and all together, 53.5 percent that have been put to death in this Nation since 1930 have been black.

Between 1954 and 1958, more than 20 percent of the white persons who had been condemned had their sentences commuted, while just a little better than 11 percent of blacks who had been convicted had their sentences commuted.

So there is no question in our minds about its implementation, racial discrimination is involved.

Mr. CONYERS. Thank you.

On a final but perhaps broader note, the whole question of prisons and the conditions to which persons sent there are subjected to is the broader subject of this Subcommittee. One of the places, although we have been probably to over 25 penitentiaries and penal institutions of one form or another we have not been is the South.

I was wondering if, based on any information you or SCLC might have, would you particularly recommend that this subcommittee make excursions into the prison systems in the Southern States in particular?

Dr. LOWERY. By all means, Mr. Conyers. It is inconceivable to me that the committee would conclude its deliberations on this matter without visiting Southern prisons.

I think you will find perhaps the strongest indication of what is happening in our whole system of jurisprudence in the Nation, that you will find two and three different styles and systems of justice in most Southern communities where you might find at least two across the Nation, or at least three in Southern communities, and the black population of prisons will far exceed what would be the normal expectancy because of these varied systems of justice in the communities.

Blacks who commit crimes against blacks operate within one system, blacks who commit crimes against whites are processed under an entirely different system, and whites who commit crimes against blacks are processed under yet another system.

Mr. CONYERS. So those are the three systems that you feel are operative in many Southern regions?

Dr. LOWERY. In all of them.

Mr. CONYERS. In all Southern regions?

Dr. LOWERY. In all Southern regions.

Mr. CONYERS. Has SCLC set up a committee of any kind to inquire into this question of prisons? Has it reached that urgency with you, or are you willing to consider it?

Dr. LOWERY. We are certainly willing to consider it. We have done it on a very limited basis, the best we could in terms of staff.

We have been so involved trying to fight the system broadly that we have had very little time and staff to deal specifically with this, but we certainly would be willing to do that.

Our affiliates and chapters across the Nation, and in the South particularly, have had experience with it, and do have information that would be helpful in this regard, and we certainly would be willing to cooperate with this committee, or any other agency, for whatever it might be worth.

Mr. CONYERS. That is fine. I want you to know that the question of our going into Southern prisons has been dealt with many times. We are not about to close these hearings without doing so. We just simply have not been able to get to any more places yet, but there is a strong feeling on my part, and I am glad to hear you reinforcing it, as to the necessity for us to compare what we will see there with what we have seen elsewhere.

It is a very unhappy picture across this land, and we feel that we should perhaps get down there.

Thanks so much. I appreciate these comments, and it is a pleasure to see you again in this formal capacity.

Dr. LOWERY. Thank you very much.

Mr. KASTENMEIER. Dr. Lowery, for the record, would you briefly describe the character and size of the Southern Christian Leadership Conference on behalf of which you appear? Is it principally in the South, but do you have chapters elsewhere?

Dr. LOWERY. Yes. When we say "Southern," we are like the Southern Baptist Convention, it is just a matter of title, not a matter of function. The Southern Baptist Convention has churches in Canada, so the Southern Christian Leadership Conference is national, and, as a matter of fact, we have some chapters outside of the United States, although, obviously, our principal work, from our founding back in the mid-1950's by Martin Luther King, Jr., Ralph Abernathy, myself,

and a few others, we were mostly preachers trying to exercise the moral imperative of the Christian faith in our communications, and the Montgomery boycott triggered the sort of fellowship that took place between us and led to the organization of the Southern Christian Leadership Conference.

We have chapters across this Nation. Our membership is difficult to determine, because we count our membership through the membership of our chapters.

We have some 1,600 or 1,700 churches which are affiliated, and so we consider our minimum membership is 22 million, which is every black person in this country, and then many other white persons who are committed to justice and equality and the beloved community.

I suppose the thing which may be singular about our organization as it relates to other groups in the field is that while we call ourselves Christian, we do not restrict our membership to persons who are members of the Christian church, but those who are committed to the Christian ethic of love, of redemptive love, and the efficacy of love in human relationships.

We believe that we must come to establish the kind of community where all men are equal, and are related to each other as children of God, and it is to this end that we work.

MR. KASTENMEIER. Thank you, Dr. Lowery.

There are a number of bills before us, principally of two types. One is a 2-year moratorium on the death penalty, anticipating I suppose, the Supreme Court decision on the matter, which might be handed down at any time, and the other is an outright abolition.

Do you or your organization take a position choosing between those two, or what is the position of your organization with respect to the legislation before this subcommittee?

DR. LOWERY. Well, it is the position of our organization that the capital punishment ought to be abolished as a practice of Government in this country, that it is cruel and inhuman punishment, and that it does violate human rights of individuals, that it is inconsistent with the Constitution.

I am not a lawyer, and cannot deal with the specific legal matters. We do not oppose a moratorium while issues are being settled and discussed, but it is our firm conviction that capital punishment ought to be abolished.

As I said, we do not oppose a moratorium while other matters are being argued and deliberated and studied and researched.

MR. KASTENMEIER. One last question. On page 2 of your statement, you documented alleged discrimination at least in terms of those condemned men in terms of race, and you speak strongly of the sanctity of human life.

I am wondering whether it could be proven, and I am sure you would believe it could be proven, that such discrimination statistically is also present for those who are life termers or who serve very, very long terms in prison and are disproportionately black, whether you would be disposed to oppose in terms of life or long terms of imprisonment because of this disparity?

DR. LOWERY. That is a very difficult question, Mr. Chairman. I would think that before I would want to give a firm answer on that, I would

want to say that it seems to me—and this is one of the things we have been trying to do—that a great need in this area is to deal with the social economic factors that contribute to crime, to deal with the systems of justice that exist in our community in regard to black and white, minority and majority groups, that are the primal causes of the situation that we find in the prison, and then we would be better able to deal with the specific thing you request.

However, there is little doubt in our minds that the whole matter of crime and punishment is pregnant with racial discrimination, and not only racial discrimination but class discrimination. Both black and poor are subjected to more severe punishment than those who are affluent and those who are able to afford the kind of counsel and defense that others cannot afford.

But I would say that we would be just as concerned about the questions you raise in terms of long sentences as we were about long-term punishment, although the matter of human life is in regard to capital punishment taking a human life.

Mr. KASTENMEIER. So if I understand you, you are saying that capital punishment is different because it does involve the sanctity of human life.

Dr. LOWERY. Yes.

Mr. KASTENMEIER. And so the question of racial discrimination really is another question which should be dealt with through the social and economic factors that lead ultimately to this, and to the criminal justice systems in other respects. Are not these the basic reason why we find this disproportionate number of black people more heavily penalized within the system presently?

Dr. LOWERY. Yes, absolutely.

Mr. KASTENMEIER. Thank you very much, Dr. Lowery, for your as I say very eloquent statement here today.

Dr. LOWERY. Thank you, Mr. Chairman and members of the committee.

Mr. KASTENMEIER. Now the Chair is pleased to welcome Dr. Robert D. Gordon, who is the executive director of the International Conference of Police Associations, whose office is here in Washington.

Mr. Gordon, we are most pleased to see you and we ask you to identify the gentlemen who accompany you.

TESTIMONY OF ROBERT D. GORDON, EXECUTIVE DIRECTOR, INTERNATIONAL CONFERENCE OF POLICE ASSOCIATIONS, ACCOMPANIED BY JAMES VAN NORMAN, ATTORNEY, AND FRANK V. CARPARELLI, PRESIDENT, SUPERIOR OFFICERS ASSOCIATION, NASSAU COUNTY POLICE DEPARTMENT

Mr. GORDON. Yes, sir.

Mr. James Van Norman, our attorney, and Lt. Frank Carparelli, the president of the Superior Officers Association in Nassau County, N.Y., Police Department, who is one of the members of our association.

Mr. KASTENMEIER. Fine.

Mr. Gordon, you may proceed as you wish.

You have a relatively short statement.

Mr. GORDON. Thank you, sir.

Mr. Chairman and members of the committee, I am indeed honored to appear before this committee to present the position of the International Conference of Police Associations. As the executive director, it is my responsibility to place before this committee the position of our organization, which consists of more than 150,000 men throughout the United States and Canada.

Upon the decision handed down by the Supreme Court of the State of California, the constitutionality of the death penalty in capital offenses has come under severe attack from civil liberty groups and is a constant subject of many Law Review articles.

The Honorable Emanuel Celler, chairman of this committee has introduced into the House of Representatives two bills. The first bill proposes to abolish the death penalty under all laws of the United States; namely, H.R. 3243, February 2, 1971, while the second seeks to suspend the death penalty for 2 years, H.R. 8414, May 17, 1971.

As a representative of the International Conference of Police Associations, I am present to express the Association's opinion on the issues presented within the two bills.

Since the inception of the U.S. Constitution, as citizens of America we have enjoyed the benefit of a separation of powers between the three branches of the Federal Government. The courts of the land have been traditionally called upon to interpret and weigh the acts of the legislative as well as the executive branch of the Government.

In light of this purpose, it would be violative of the role of the Constitution to allow the legislature to interpret an issue that has been historically removed to the Supreme Court of the United States. The question of whether the imposition of the death penalty is violative of the 8th and 14th amendments should be decided by the highest court of the land, particularly since the issue is presently pending before the Supreme Court of the United States.

If the legislature were to decide the issue, as passage of the proposed bills would effectively do, then it would be a blatant usurpation of the power of the Supreme Court. It has been argued by the Honorable Mr. Celler that the substantive attack on the death penalty has been primarily based on the "cruel and unusual punishment" clause of the eighth amendment (Congressional Review, May 17, 1971, p. 3999).

Are we to overlook that the criminal acts which the death penalty have been considered for are in themselves cruel and inhuman?

We cannot escape the possibility that the passage of the act itself could promulgate a lesser regard for the value of human life by the criminally accused. The fact that suspension of the death penalty for all offenses for a period of 2 years would very possibly eliminate many of the trepidations usually associated with the criminal act itself. The possibility that the hardened criminal may be further emboldened to commit capital crimes without fear of the death penalty is a possibility too grim to contemplate in these days of escalating crime.

The bills are also based on the concept that the imposition and carrying out of the death sentence is generally perceived as occurring more often when the defendant is poor and a member of a racial or ethnic minority group.

The solution to this problem does not lie in the abolition or suspension of the death penalty, but rather with a critical evaluation of the socioeconomic factors that underlie criminal motivations.

The death penalty is by no means an arbitrary tool that is used capriciously by judges or juries, but instead should be recognized as a tightly restricted tool to preserve the rights of the individual.

We recognize that the concept of rehabilitation should still be paramount. The protection necessary for a police officer to effectuate his public responsibility cannot be totally abrogated. A total elimination of the death penalty would have a tendency to do this.

Instead, the solution should lie in the articulation of guidelines for the juries, as well as judges, in deciding whether the death penalty should or should not be imposed.

Therefore, the International Conference of Police Associations recommends to the committee that these bills not be enacted by the House of Representatives, since there are obvious and various remedies of appeal on the issues of the individual conviction and on the very question of the constitutionality of the death penalty. The Supreme Court of the United States should decide the issue.

In closing, Mr. Chairman, I might add I am also speaking on behalf of the more than 250 police officers, both black and white, who have been slaughtered in the United States over the past 2 years.

Mr. KASTENMEIER. Thank you, Mr. Gordon.

The International Conference of Police Associations is a conference of organizations?

Mr. GORDON. Yes, sir: we have 173 police departments in our association.

Mr. KASTENMEIER. Does that mean that each member of that police department is a member of your association?

Mr. GORDON. It is a membership association, yes, sir.

Mr. KASTENMEIER. Roughly speaking, then, how many police officers would be represented through your association?

Mr. GORDON. 153,000.

Mr. KASTENMEIER. Of course, the Supreme Court will soon decide this issue. We are all aware of that. Very frankly speaking, this subcommittee does not intend to take action before they decide.

I don't know whether your California constituent associations and members agree that the Supreme Court of California should finally be the arbiter and decide the matter of the death penalty in that jurisdiction, as they have.

What I am saying is: are you necessarily content that a Supreme Court finally put the matter to rest in terms of capital punishment, in the States or in the Nation?

Mr. GORDON. Yes. If that is their decision, we would most assuredly abide by the law.

However, we also feel that a true life sentence should be meted out. In many areas of this country, I am sure you are aware of the people who are committing murder and are out of jail in 8 or 9 years.

In New York State, I believe the sentence is 13 years and 8 months, and in many, many instances, which we can document, these people are out of jail in 7, 8, 9 years, and commit murder again.

Mr. KASTENMEIER. One bill before us is a moratorium bill, a 2-year moratorium bill. Let me pose a question this way. Would it make any difference to you whether we had a 2-year moratorium to try to determine the impact of the death penalty in the United States in terms of whether it deters potential capital offenders, or does not? Would

it make any difference whether or not we have the moratorium on executions, or have such a study without a moratorium on executions, depending on what the Court does?

In other words, would you support a study which might be definitive of what the fact is with respect to the usefulness of the death penalty in this country?

Mr. VAN NORMAN. May I answer that?

Mr. KASTENMEIER. Yes.

Mr. VAN NORMAN. Certainly we would support any ruling a congressional committee or the Congress itself will make on this particular issue. However, we felt that we don't want the Congress at this particular juncture to influence the Supreme Court by putting a moratorium or by eliminating the death penalty.

If the Supreme Court were to decide that it was a cruel and inhuman treatment of a convicted felon, then this committee could decide if they wanted to adhere to what the Supreme Court did, but to decide it in advance, we think that that is entirely wrong, whether it be a 2-year moratorium or just elimination of the death penalty.

Let the Supreme Court make its decision, and then take up the issue from that point on.

If in the meantime you wish to survey this, and find out from various States what are the undetermined elements concerning itself regarding the death penalty, and whether there are undetermined rational implications, fine, but not to make a decision prior to the Supreme Court ruling on it.

Mr. KASTENMEIER. Yes.

I don't find that this subcommittee is about to make recommendations, because, very frankly speaking, we would anticipate a Court decision at the end of this term, which is June.

However, in view of the congressional schedule for the balance of this year, it has been thought well that the subcommittee make inquiries and make a record which would serve as a base for congressional action, subsequent to the Supreme Court decision.

What comment would you have—and it is a similar question that I asked Mr. King—about the fact that a number of officers who have been killed in the line of duty in recent years in this country have been killed in jurisdictions where such offense is punishable by death?

Should not the death penalty deter these individuals from taking the lives of police officers?

Mr. GORDON. If I may answer it in this light, New York State happens to be a State in which there is a death penalty for killing a police officer. However, since that has been invoked, not one person who has killed a police officer has been executed. I believe this is what—3 years?

Mr. VAN NORMAN. Three years.

Mr. GORDON. Not one, and we had something like, in New York City last year, about 17 police officers that were gunned down and shot. Not one has been given the death penalty yet.

Mr. VAN NORMAN. I think a further factor is that you have to consider the more metropolitan the State, the more urban the State, the more possibility there is of crime.

As Mr. King pointed out, you would have to look at the other criminal acts that go on in your State as compared to a place such as New York.

There is a concentration in ghetto areas in New York that bring forth the crime that we are presently before the committee on.

So I don't think that there are any satisfactory figures to go on to relate to what you are trying to say, that those States that have abolished the death penalty ipso facto now have a lower rate of people committing the felony of murder. You would have to look at all the States, all the statistics over the year, and what has happened to their other criminal records during this period of time, and I think you would find that in those States where the primary crime rate has risen, it has risen in all categories.

MR. KASTENMEIER. I quite agree.

MR. VAN NORMAN. Lastly, if they did abolish it in the State of New York 3 years ago, how many would be dead today? That is an unanswerable question.

MR. GORDON. Mr. Chairman, if I may, I presented this argument. We wrote a resolution to Chief Justice Burger of the Supreme Court. I just put this out for an argument: How many people we will never know that may have wanted to commit murder did not commit murder because of the fact they knew they could be electrocuted.

In other words, statistics we will never be able to come up with, and I venture to say it will run into the thousands, because people did not do this because they were afraid of being executed.

MR. KASTENMEIER. This is one of the imponderables that presently we have been confronted with on this committee. We do not know the answer.

MR. GORDON. We have used statistics, that we can produce, where people have kidnaped people in certain States and got to a State line and threw the people out of the car. When they were finally captured, later on, and asked why, they said, "Well, we knew if we went across that line, we would be hung, executed, given the gas chamber."

That was a deterrent to taking those people across the State line. So our argument is that it is a valid argument, that it is a deterrent, but the mere fact that New York slayings are still going on, because nobody has received the death penalty or actually has been executed yet.

MR. KASTENMEIER. Of course, many homicides are presumably committed without any forethought, or very little forethought.

MR. GORDON. We certainly agree to that.

MR. BIESTER. Mr. Chairman, would you yield?

MR. KASTENMEIER. Yes.

MR. BIESTER. Because it seems to me while most homicides we know are crimes of passion which occur among a community in which the people are familiar with each other, either in the family or a neighbor, still is there not a growing class of homicides which, for lack of a better word, can only be called assassinations in the police officer field, which are not immediately motivated but in which there is a level of true premeditation involved?

You mentioned the blacks and whites. I was thinking of the team shot in the back of the head in New York City.

I can recite an instance in my own area within the last 2 months in which such an event happened to a police officer.

This is a pattern which is not the traditional emotional crime of passion, or crime of liquor or drugs or something like that.

Mr. VAN NORMAN. May I say on that point, we did not oppose. When the State of New York was passing the legislation, our only opposition to it was to continue it for police officers, but as to the crimes of passion, which certainly juries consider when they are rendering their verdict, sure, eliminate it for that, but do not eliminate when it has no passion involved, as you put it, an assassination of a particular individual with no basis as to why that individual was assassinated.

Mr. GORDON. Right.

Mr. VAN NORMAN. I think we defined the law as premeditation down to the point where it became so easy to prove premeditation, it was such an easy thing to establish for the prosecution, that it missed the point of what I think had been traditionally intended.

Mr. GORDON. That is our stand. We readily understand you can say murder in the heat of passion, but we have groups that are in this country today who are planning in the near future to murder even more police officers.

That is unequivocal, that is a fact we are aware of.

Mr. BIESTER. Is this not a new phenomenon in which it is difficult to apply statistics from some time back? This is one of the problems I have with the statistical evidence.

By the same token, I am still struck with the subjective difficulty of the States taking life.

Mr. GORDON. If I may just offer one other thing, Mr. Chairman, and I offered this to several people in the past, and we gave it a lot of thought.

It was my personal feeling as executive director if this law is abolished, I have no doubt in my mind the next move will be to disarm the police officer, because if it is illegal for the people of a State or the country to take a life, then who is going to authorize me as a 22-, 25-year-old police officer to take somebody's life with a weapon.

I sincerely believe it is something to give serious consideration to.

Mr. KASTENMIER. That is a worthy comment, and I don't know the answer to that.

The argument that the State ought to set an example in terms of legally taking a life is historically a fairly persuasive one.

The early records of pickpockets attending executions, largely pickpockets at work, make a sort of a sad hypocrisy out of crimes of that sort, and the taking of life.

Yet, as we come to the end, now, of these hearings, I think we are in that sense presented a number of dilemmas which make it a very perplexing public question.

Mr. GORDON. I think when you say "inhuman" to what these gentlemen are going through on death row, I could not agree with you more, but I think the problem could and should lie with the courts.

When you take a man—I forget his name—in New Jersey was in death row for something like 13 years, and had something like 19 appeals.

Mr. BIESTER. Smith.

Mr. GORDON. I heard the gentleman that preceded me here talking about England, and to my knowledge, when you are convicted in England, you have 90 days within which to start your appeal, and at the end of 80 days, you either have it or you don't.

I think maybe we ought to look into that. Where a man can linger on death row for 13 to 15 years, it is surely inhuman for a man, not knowing what is going to happen to him. I think in that area, we should also look into it.

Mr. BIESTER. I think that is a problem that also occurs in this country right now, where we have on death row some 500 people who have been there at least for 6 years, and some for much longer. The carrying out of execution after that span of time creates a tremendous problem.

Mr. GORDON. Absolutely.

Mr. KASTENMEIER. I think we would all agree. Those of us on the subcommittee are also concerned with the entire corrections continuum, and not merely the death penalty, and the penal laws of the United States, and would agree that a great deal of the problem is in the lack of certainty about what sort of penalty can be expected, and the lack of swiftness and even-handedness in the application of justice.

We have these things, and if we could move toward these things, probably other changes could be made which today seem out of the question to some people.

Mr. BIESTER. You know, we also face a great morale problem in our associations. Right here in the District in the past 17 months, 1,043 members have left the police department.

I don't mean that they retired. I mean that they were only on the force a year, a year and a half, costing the District thousands upon thousands of dollars for training. The average police officer worries about the way police officers are being slaughtered.

We keep records. The average police officer out on the street today is just going to turn the other way, because his life is as dear to him as to the fellow who is going to prison or to the electric chair. He has to support a family.

Mr. KASTENMEIER. I think the morale problem is more widespread than the danger to his own person.

Mr. GORDON. Yes, sir.

Mr. KASTENMEIER. And this should be of concern to every person, not only in Government, but every citizen.

Mr. BIESTER. If the Chairman would yield, the morale problem also intrudes into the whole efficient functioning of the police forces, too, because these assassinations occur by ambush, they occur by phony calls.

I cannot imagine what it must be like for a police officer, each time he goes to respond to a call of a family quarrel, not knowing whether it is phony or real, and not knowing what the consequences are.

Mr. GORDON. We just had a very unfortunate incident in New York City, where a black detective had a man on the ground, and a white plain clothesman arrived at the scene, and he shot the black detective dead.

Can you say he was trigger happy? Very possibly, but to bear out what you just said, this gentleman had in his mind what took place 2 or 3 days previous, when his partners were shot dead.

We are having young policemen out there, 22 and 23 years of age, and they are not waiting to find out who is who, and I think it is setting a very bad precedent throughout the country.

Mr. BIESTER. Are there not cases of phony calls coming through?

Mr. CARPARELLI. Yes. We had that recently, in the last month, in New York City, at that Moslem House of Worship, where they received a call that somebody needed assistance, and they went in, and they ran into an ambush and fighting, and resultantly a policeman died in that. He was not killed on the spot, but he died of his injuries a few weeks later, and this was just within the past month.

Mr. BIESTER. I had a case in my own area of a 25-year-old officer, who had been to a robbery.

Mr. GORDON. Where are you from, Mr. Biester?

Mr. BIESTER. Pennsylvania.

There was a robbery and he stopped a car. One of the people in the car just opened the window and shot him right in the head.

Mr. GORDON. I would say that is cruel and inhuman.

Mr. KASTENMEIER. Gentlemen, Mr. Gordon and associates, who have come here this morning before this subcommittee, the subcommittee is grateful to you for your testimony.

Your testimony concludes our hearings on the subject of capital punishment and some broader ramifications of it.

In any event, we will now, having concluded the hearings, await the decision of the Supreme Court, and contemplate possible further legislative action.

Thank you.

Mr. GORDON. Thank you very much.

Mr. CARPARELLI. Thank you.

Mr. KASTENMEIER. The subcommittee stands adjourned.

(Whereupon, at 11:47 a.m., the subcommittee adjourned, to reconvene at the call of the Chair.)

CORRESPONDENCE AND OTHER MATERIAL

YALE LAW SCHOOL,
New Haven, Conn., October 29, 1971.

HON. EMANUEL CELLER,
House of Representatives,
Washington, D.C.

MY DEAR CONGRESSMAN CELLER: I have today sent to my friend, Congressman Bob Eckhardt, a letter expressing my views on the constitutional power of Congress to outlaw capital punishment. I am ashamed to say that I do not know what the exact status now is of the bill which I understood you to be putting forward, providing for a moratorium. Nevertheless, I know this subject is one which interests you vitally, and I am therefore enclosing a copy of my letter to Bob Eckhardt. It contains one theory—that of Congressional legislative power to concretize and give specific meaning to the “cruel and unusual punishment” clause—which I have not seen in print, though that is probably because I have not investigated the literature on the subject, as I plan to do.

As will be inferred from the enclosed letter, I want to be of help in this effort in any way possible, and will be grateful to you for calling on me for any assistance which I might be able to render.

Very sincerely yours,

CHARLES L. BLACK, JR.,
Luce Professor of Jurisprudence.

Enclosure.

YALE LAW SCHOOL,
New Haven, Conn., October 29, 1971.

HON. BOB ECKHARDT,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN ECKHARDT: As you know, there are now pending before the Supreme Court several cases tendering the issue whether capital punishment violates the “cruel and unusual punishment” provision in the Constitution. If these cases are lost, the short range effect will be the exposure of some 600 to 700 persons to the infliction of the penalty of death. I am sure you will agree that the carrying through of such a massive slaughter would permanently stain the United States, both inwardly and outwardly. The long-range effect would be that we would still be left with the punishment of death as part of our institutions.

While I wholly and unreservedly agree with the contention that the punishment of death ought now judicially to be held to violate the “cruel and unusual punishment” clause, I know that the question can be considered a close one, and even that some people, though as revolted as I am by capital punishment, may nevertheless feel that it is putting too great a load on the Court to ask it to outlaw this institution. Realistically, moreover, one must prepare oneself for the possibility that the Court will actually hold against the petitioners in the pending cases, whatever one may think of that judicial result.

In view of the absolutely prime moral character of the emergency that will then exist, it seems to me that Congress ought now to be readying, and moving toward passage, legislation which will prevent the hecatomb which might ensue. I think Congress has constitutional authority to forbid the infliction of capital punishment throughout the United States, on the basis of at least two of its constitutional powers.

First, I have already put in print my own belief, which for all I know is not original with me, to the effect that Congress, under Section 5 of the Fourteenth Amendment, may forbid the infliction of capital punishment on the ground (clearly established by uncontradicted statistics) that it has for a long time been administered in a racially discriminatory manner, enabling Congress to act under the principle of *South Carolina v. Katzenbach*. Allow me to quote the following passage from my *Holmes Devise Lectures*, delivered at the University of Washington some eighteen months ago:

"No one can now say how far we may go with the use by Congress, in application to racial problems, of the very same spaciousness of interpretation that is elsewhere applied to Congressional powers. I will only mention what to many of us now is a possibility of prime moral importance. It has been pretty generally assumed that capital punishment can be abolished in the United States only through action by 50 state legislatures. But suppose Congress were to conclude—as I think statistics would force it to conclude—that capital punishment had been administered for a long time in a manner discriminatory against blacks and other minority groups. Suppose Congress were to judge, from this long experience, that this discriminatory administration was likely to continue or to recur. Could these judgments be faulted? If so, how? If not, then why could not Congress abolish capital punishment for the entire nation? Congress could beyond doubt make unlawful a practice whose adverse impact on interstate commerce was far less well attested than is the inequality, past and predictable, in capital punishment as actually administered. I will not press the point, but simply mention it as an example of the vistas opened by the Warren Court's bringing methods of other constitutional law."

I would only add that the finding that capital punishment is likely to be administered with racial discrimination in the future, or that there is sufficient likelihood of that to make its elimination an appropriate means of enforcing the equal rights clause, is a finding which a legislative body might suitably make, even in a judicial body might feel itself precluded by institutional considerations from making it. Thus, an adverse judicial decision in the pending cases ought not be thought to bar congressional action.

It seems to me more than "reasonable", in the constitutional sense, for a legislative body to conclude that a racial discrimination that has existed for decades, with regard to a given practice, is so likely to continue to exist as to make appropriate the total abolition of the institution as to which the discrimination has been practiced. This seems to me a legitimate application of the teaching of *South Carolina v. Katzenbach*: it is, moreover, plain common sense. This conclusion clears the way for Congress to abolish capital punishment altogether, by whatever government administered, under its Section 5 enforcement power in the Fourteenth Amendment, in coaction with the equal protection clause.

I think there is another and quite independent ground on which Congress might act. The Constitution forbids the infliction of "cruel and unusual punishments." There can hardly be any question that this prohibition applies to the states by way of the due process clause of the Fourteenth Amendment; see *Louisiana v. Resweber*. Nothing could more clearly violate the minimum standard of civilized justice which the Fourteenth Amendment imposes on the states (see Mr. Justice Harlan, concurring in *Griswold v. Connecticut*, and many other decisions) than the infliction of a "cruel and unusual punishment".

The words "cruel and unusual" are, however, vague words. They suggest a reference to the ethical sentiments of the community, that is to say, the nation. Now if (as I hope will not happen) it should turn out to be the case that the Court believes it cannot consider itself, as a judicial organ, to be standing on firm enough ground with regard to national ethical sentiments to justify its concluding that the Eighth Amendment (covering the States through the Fourteenth) prohibits capital punishment as a matter of presently standing law, it would seem uniquely appropriate for the highest and most democratically representative body in the nation—the Congress of the United States—to resolve the ambiguity in these words. If a constitutional prohibition such as this is vague, and if its vagueness results from its making reference to national ethical standards, then it is perfectly plain that the national legislative body might suitably decree, with binding force as a matter of law, that the practice under scrutiny does indeed violate the ethical concepts of the country it represents, and is, as our nation now views the matter, "cruel and unusual".

Here again the legislative authority of Congress rests on more than inference from political appropriateness. The Eighth Amendment applies to the states through the linkage of the due process clause in the Fourteenth Amendment. Congress, in Section 5 of the latter Amendment, is given power to "enforce" its provisions by appropriate legislation. The concretization of vague language has always been a part of the process of enforcement; indeed it is a necessary part, if such language is to have any effect at all. I would, therefore, conclude that the Eighth Amendment, the due process clause of the Fourteenth Amendment, and the enforcement Section of that same Amendment, in coaction, give Congress full power

to outlaw capital punishment for the entire nation, on the ground that it is in the judgment of Congress, representing the people, "cruel and unusual".

Now these two grounds suffice as constitutional support for Congressional action wholly and permanently outlawing capital punishment. It would be my hope that Congress would pass such legislation, and that the President would sign it. But we are working on a tight time schedule, with men's lives in the balance, and it may be that it will be more feasible to induce the Congress to pass legislation imposing a moratorium on capital punishment, while the Congress investigates the question of its permanent abolition. It is too obvious for argument that if Congress has the power to abolish capital punishment permanently, it has the power at least to investigate the subject—including the constitutional question—and to preserve the status quo while this is being done. I understand there is legislation pending to bring about this result.

I would only add—and this is very important—that it seems to me that such moratorium legislation, if that is all we can have at this time, might with entire legitimacy include a provision commuting all the death sentences now pending, on the ground that the holding of these people in suspense for several more years, while Congress investigates the question, would be itself cruel and inhuman, and that Congress, having a right to place a moratorium on capital punishment for legitimate investigative reasons, has also the right to see to it that this moratorium take effect without the inhumanity of several more years' residence in the death house for people some of whom have already been there a very long time.

I am ashamed to say that I do not know what the present status is, in Congress, of any proposals resting on any of the foregoing theories, or addressing themselves to the capital punishment problem. Since I know that this is a question that will interest you vitally, I would request that you let me know what you can find out on this matter, and at the same time inform any offices that are active in the problem that I would be happy to be of assistance. In that connection, or in any other which you deem useful, you may certainly duplicate and distribute this letter, using it in any way which to you seems wise.

With all best wishes,

Very sincerely yours,

CHARLES L. BLACK, JR.,
Luce Professor of Jurisprudence.

THE UNIVERSITY OF MICHIGAN LAW SCHOOL,
LEGAL RESEARCH BUILDING,
Ann Arbor, Mich., April 23, 1971.

Senator PHILIP HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: I am writing in response to your letter of April 19 inviting an expression of my views on the proposal that Congress enact legislation imposing a two year moratorium on all executions within the United States. I am wholeheartedly in support of the proposal and hope that you will decide to introduce the necessary legislation.

No one can assert with confidence whether the Supreme Court would sustain such legislation, but in my judgment the legislation is constitutional. The essential reasons which support that judgment are persuasively stated in the memorandum prepared by the Washington Research Project which accompanied your letter. Implicit in my judgment that the legislation is constitutional is the conclusion that it is not unduly intrusive upon federalist values. There are at least two reasons why I believe this to be so notwithstanding the traditional power of the states to set penalties for crime. Initially, the Congress, as the most broadly representative of our governmental institutions, is uniquely competent to give content to the vaguely worded prohibition of "cruel and unusual punishment," a prohibition which, as the Supreme Court has written, embodies "the evolving standards of decency that mark the progress of a maturing society." Secondly, the Congress, as repeatedly recognized in recent years both by it and by the Supreme Court, does not intrude upon the domain of the states when it acts to protect individuals against radical discrimination by the states. The evidence marshalled by the Washington Research Project surely provides ample basis for an inquiry by the Congress to determine whether the death penalty has in fact been administered on a racially discriminatory basis.

If I may offer one suggestion concerning the draft bill which you enclosed, it occurs to me that it might be desirable to include a provision directing the appropriate committees in each House to conduct the investigations mentioned in Section 3. Such a provision would, if the legislation were challenged in court, add strength to the Congressional determination that a moratorium is appropriate.

I hope that this brief statement of my views will be of assistance to you. If there is any way I may be of further assistance, I hope that you will not hesitate to call upon me.

Sincerely yours,

TERRANCE SANDALOW,
Professor of Law.

DUKE UNIVERSITY,
Durham, N.C., April 26, 1971.

Senator PHILIP A. HART,
Senate Judiciary Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR HART: I am writing in brief reply to your letter and enclosures regarding the proposed bill to suspend the death penalty throughout the United States for a period of two years, pending further study and action by Congress, the courts, and the state legislatures. So far as the bill would affect federal prisoners currently under sentence of death, I believe that the national power to suspend execution of their sentences clearly exists pursuant to the Constitution. So far as the bill would affect state prisoners, a sufficient argument can be made pursuant to section 2 of the thirteenth amendment and section 5 of the fourteenth amendment to sustain the proposed Act within the ameliorative powers of Congress that those otherwise favoring the bill should feel entirely free to vote for it.

I put my second conclusion this way for very simple reasons. A failure of Congress to act solely because there may be some reasonable doubt about the ultimate constitutionality of that act necessarily contemplates that a number of persons may be executed even though no court will have an opportunity to determine whether those executions were beyond the power of Congress to forbid. Action by Congress will insure that none need die solely because of constitutional doubts that may well turn out to be unfounded, even while respectfully reserving to the courts the appropriate authority to resolve all constitutional questions as they may arise in a proper case.

It is not often that this kind of choice is before Congress, and I am not among those who believe that Congress need never be concerned with the constitutional reach of its powers. Indeed, I rather think that it should be more concerned in general and that Congress' deliberations on the Constitution are important to its own political integrity. Where the issue in question is even fairly debatable as I am positive that it is here, (i.e., that Congress may well possess the power to suspend or to abolish the death penalty), where the courts will be open to review that question in due course, and where any congressman's mistaken view regarding the scope of congressional power might well lead him needlessly to contribute to the deaths of several hundred persons that he would otherwise wish to have spared, however, it is unimaginable that the outcome of this bill should prefer the certainty of death to what may well be a wholly constitutional preference for life.

Sincerely,

WILLIAM VAN ALSTYNE,
Professor of Law.

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, N.Y., April 27, 1971.

Senator PHILIP HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: I am responding to your letter of April 19, which invited my comments on a draft bill which would stay all executions by the United States, the several states and their subdivisions for a period of two years. The stated purpose of this bill would be to enable the federal government and the states to consider, deliberately, what action they might wish to take following the imminently expected Supreme Court decision on an aspect of the death penalty.

In my view the draft bill is both wise and constitutional, and I therefore hope you decide to introduce it and that the Congress enacts it into law.

The wisdom of the bill seems to me evident in view of the importance of the issue concerning the death penalty, the confusion surrounding many aspects of it, its doubtful constitutionality, and the desirability of a careful legislative review unhurried by the pressures to execute that inevitably will follow any Supreme Court decision that does not restrain further use of the penalty.

The question of the constitutionality of the measure calls for somewhat more extended discussion, although I am in no real doubt that prior decisions of the Supreme Court, in their holdings and premises, amply support the validity of the bill. I shall content myself with three points.

1. Section 5 of the Fourteenth Amendment, which authorizes Congress to "enforce by appropriate legislation" the provisions of the Amendment, has been interpreted broadly by the Supreme Court. The Court has held that Congress may enact remedial legislation concerning state laws and practices if it "perceives a basis" for concluding that these laws and practices are unconstitutional. *Katzbach v. Morgan*, 384 U.S. 641, 653 (1966). This it certainly would be free to do, in the case of the death penalty, in light of judicial decisions that have interpreted the Eighth Amendment "cruel and unusual punishment" provision, as incorporated in the Fourteenth Amendment. See, e.g., *Ralph v. Warden, Ct. App. 4th Cir.*, No. 13757 (December 11, 1970); cf. *Rudolph v. Alabama*, 375 U.S. 889 (1965) (Goldberg, J., dissenting).

That the Supreme Court has not held the death penalty to violate the cruel and unusual punishment prohibition is of course not dispositive of the issue. As the *Morgan* case and *South Carolina v. Katzenbach*, 384 U.S. 301 (1966) reveal, the Congress may go beyond judicial rulings in asserting the reach of the Fourteenth Amendment. Indeed, the congressional action upheld by the Court in the *South Carolina* case went beyond what the Congress would be asked to do here. In that litigation the literacy provisions of the Voting Rights Act of 1965 were sustained in the face of an earlier decision, *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959), holding that such tests were not inherently discriminatory. No such decision of the Supreme Court has sustained capital punishment against a direct attack on the ground of cruel and unusual punishment.

2. There presently exists considerable evidence, which I shall not detail in this letter, to the effect that the death penalty has been applied in a discriminatory manner against poor persons and nonwhites. E.g., Bedau, *Death Sentences in New Jersey—1907—1960*, 19 Rutgers L. Rev. 1 (1964). Certainly Congress could "perceive a basis" for concluding that the equal protection clause of the Fourteenth Amendment has been violated by the application of the death penalty. Accordingly, Congress has the authority—some would say the duty—to assure that the most extreme of all penalties is not being employed in violation of the Constitution.

3. The net effect of the above analysis is that under existing precedents the Congress could act to abolish the death penalty by concluding that state executions amount to cruel and unusual punishment or that the death penalty as implemented denies nonwhites or poor persons of the equal protection of the laws. The remaining question is whether the Congress can choose to legislate the lesser remedy—a two year stay which would for this period bar executions while the necessary study was undertaken to determine whether the death penalty should be prohibited in all cases or certain classes of cases.

I find no difficulty in responding to this question in the affirmative. One of the chief advantages of the legislative process is its flexibility. Another is its capacity for fact-gathering to assure, as far as possible, the solid grounding of enactments as well as their long-term acceptability to the public. All of these values would be furthered by a congressional decision to permit itself the time to acquire the digest data, and reflectively debate, the validity of capital punishment. Indeed, I can hardly think of a better means to assure "appropriate legislation" under the Fourteenth Amendment in an area as complex and subtle as the one under consideration. Just as courts of equity for many centuries have used the judicial stay to good effect, so too should the Congress employ it so it may act in a deliberate and fully informed manner.

For the above reasons I endorse the draft bill you have sent me.

Sincerely,

NORMAN DORSEN,
Professor of Law.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., April 29, 1971.

HON. PHILLIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: I appreciate your letter inviting my views on a possible bill that would impose a two-year stay of executions in capital cases while Congress and the states decide what action, if any, they wish to take in this area following a decision by the Supreme Court.

I find persuasive the considerations supporting the authority of Congress to enact such a measure. The bill would essentially be an adjunct of the power of Congress to legislate under Section 5 of the Fourteenth Amendment. That power is most clearly established in the field of equal protection of laws with respect to race, and there is at least reason to believe that the death penalty has lent itself to discriminatory application. In addition the power under Section 5 draws support from the guarantee against cruel and unusual punishment, a guarantee that may appropriately be defined by Congress, at least where Congress does not narrow the protection beyond the scope given it by the courts.

A moratorium is a legislative measure that in this context would reflect a tentative finding by Congress, subject to fuller investigation and final determination. It is particularly appropriate where the ultimate penalty is involved and where reparation would be impossible if and when Congress finally determines to abrogate the death penalty. Since the proposed measure would be general in application, not singling out particular death sentences, there should be no objection on the score of separation of powers between the legislative and judicial branches. Amelioration of penalties can of course be made retroactive without infringing on the judicial function.

I trust that these views are responsive to your inquiry.

With kindest regards,
 Sincerely,

PAUL A. FREUND.

STANFORD LAW SCHOOL,
Stanford, Calif., May 3, 1971.

Re Proposed Death Penalty Suspension Act of 1971.

HON. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: I appreciate your letter of April 21 and the opportunity to comment upon the draft Death Penalty Suspension bill. Before coming to the merits, however, I should make clear that I am not a disinterested observer on the subject of capital punishment. I presently represent a considerable number of condemned men, and have argued the unconstitutionality of the death penalty in several cases in the Supreme Court. You will doubtless want to take these circumstances into account in determining what weight to give my opinions on the questions you ask.

I think that there can be no serious doubt about the constitutionality of the proposed moratorium legislation. No constitutional proposition is plainer than that the Equal Protection Clause of the Fourteenth Amendment forbids racial discrimination in criminal sentencing. The First Civil Rights Act of April 9, 1866, Ch. 31, § 1, 14 Stat. 27 (now 42 U.S.C. § 1981) expressly provided that American citizens "of every race and color, . . . shall be subject to like punishment, pains and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Fourteenth Amendment was designed to constitutionalize the 1866 Civil Rights Act; and Congress has acted time and again during the past 100 years—from the Civil Rights Act of 1870 to the Voting Rights Amendments of 1970—to enforce under § 5 of the Fourteenth Amendment the right against state-sanctioned racial discrimination that lies at the heart of that Amendment. Congressional power to enforce the plain constitutional command of racial equality in the conduct of every organ of State government has never been judicially questioned, and is unquestionable.

As the Washington Research Project memorandum points out, there is substantial published evidence of racial discrimination in capital sentencing. In addition to the published evidence, I have access to the results of exhaustive empirical studies conducted in 1965 under the direction of Dr. Marvin Wolfgang and myself, which demonstrate beyond peradventure that the death sentence has been systematically applied in a racially discriminatory fashion for the crime of rape in the several States we studied. But the question, of course, is not whether Congress is now prepared to accept the conclusions of our studies, or of any other extant studies. It is whether Congress can and should enact a moratorium of executions to enable Congress to bring its own superior fact-finding processes to bear on the question of discrimination.

Surely, the answer to that question is yes. Strong indicators of discrimination have been found by numerous private observers whose studies could provide the starting point for more comprehensive and authoritative factual investigation by Congress; such discrimination, if it exists, would be a flagrant and invidious violation of the Fourteenth Amendment, which Congress plainly can prohibit; and a moratorium to enable Congress to conduct the necessary factual inquiries and to deliberate upon the constitutional and policy questions involved is—as the British experience of the 1960's demonstrates—a wholly appropriate method of legislative approach to such a problem.

Congressional power to enact a moratorium in order to conduct a similar examination of the Eighth Amendment issues raised by the death penalty in contemporary American society also seems to me solidly grounded in § 5 of the Fourteenth Amendment. Admittedly, the Eighth Amendment power assumes some Congressional competence to define—not merely to implement—the rights given by the Eighth and Fourteenth Amendments, and so presents a harder constitutional question than the exertion of Congressional power under the Equal Protection Clause. But, while harder, it is still not very hard. Indeed, I do not think that Congress needs to rely upon the full sweep of § 5 power conceded to it by *Katzenbach v. Morgan* and the opinions in the *Voting Rights Cases* to act in the Eighth-Fourteenth Amendment area. This is so because the Supreme Court itself, in its very definition of the Eighth Amendment as a precept which “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion), has referred Eighth Amendment interpretation to the touchstone of national moral consciousness that Congress is uniquely qualified to express. For this reason, I would say that Congress not merely can, but is morally obliged to, consider the Eighth Amendment implications of the death penalty in this year 1971, when it has become apparent on a world-wide scale that the progressive abolition of capital punishment is a major indicator, a paramount achievement, and perhaps an indispensable condition, of mankind's advance on the long road up from barbarism to civilization. A moratorium to consider that issue is both constitutionally proper and, I think, strongly advisable.

As you know, the Supreme Court has today decided, in the *McGautha* and *Crampton* cases, that the procedures for imposing the death penalty employed by most American States which retain capital punishment are not unconstitutional. That decision does not speak to the ultimate constitutionality of capital punishment itself under the Eighth Amendment and the Due Process and Equal Protection Clauses of the proposed Death Penalty Suspension Act is literally vital.

By my count, there are about 620 men on the death rows of the United States at this time. Most of their executions have been delayed pending disposition of *McGautha* and *Crampton*. The decision of those cases adversely to the constitutional claims of the condemned men clears the way—unless Congress acts—for a spate of electrocutions and gasings that is unprecedented in our time. At the very moment in history when dictatorships in Spain and Russia, under the pressure of world opinion, are commuting sentences of death, the United States of America—which has not had an execution in almost four years—is about to resume the killing of human beings by the hundreds. That seems to me to be a stark abdication of our proud national role as leaders in the advance of the spirit of humanity.

I hope that you will introduce the Death Penalty Suspension bill and that Congress will speedily enact it. If I can give you any further, more specific information or assistance, please let me know.

Sincerely,

ANTHONY G. AMSTERDAM.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., May 4, 1971.

Senator PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: I have read with interest the draft of a Death Penalty Suspension Act enclosed in your letter of April 19, and also the attached memorandum.

In my opinion, the bill is within the constitutional powers of the Congress.

The necessary and proper clause would seem to give Congress power to preserve the status quo in an area in which it may legislate provided that there is reasonable ground to believe that facts may be developed establishing the power of Congress to enact substantive legislation on the subject.

Probably, such a stay could also be enacted under the necessary and proper clause upon the ground that the status quo should be preserved throughout the country until the Supreme Court has had time to render a decision upon the basic question whether capital punishment under any circumstances violates the Eighth and Fourteenth Amendments. This constitutional theory seems entirely sound, but resting your bill upon this ground alone might be thought to carry the implication that Congress would be through with the matter once the Supreme Court had rendered a decision.

It seems to me that there is reasonable ground to believe that Congress, upon thorough investigation, would find actual conditions to be such as to lay a foundation for federal legislation under Section 5 of the Fourteenth Amendment. I have some misgivings, after *Oregon v. Mitchell*, about the continued validity of the argument that Congress may make a determination as to whether a punishment is "cruel and unusual," within the meaning of the Eighth Amendment. It seems unnecessary to reach a conclusion on that point, however, because the statistics in the memorandum you enclose, while subject to some criticism, are quite sufficient to raise a serious question as to whether capital punishment in the United States does not presently involve racial discrimination violating the equal protection clause of the Fourteenth Amendment. To my mind, the figures certainly suggest that further investigation might lead Congress to such a finding of fact and, if Congress made such a finding, there could be no doubt of the constitutionality of further federal legislation abolishing the death penalty as a way of preventing continued racial discrimination in the administration of criminal justice.

It is a pleasure to hear from you.

With best wishes,

Sincerely,

ARCHIBALD COX.

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif., May 4, 1971.

Senator PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: This responds to your letter of April 19.

I have read the draft bill and its supporting study proposing a two-year stay of executions in all jurisdictions pending Congressional study of the course it might wish to pursue under the implementing clause of the Fourteenth Amendment.

The procedure seems to be novel, but I do not see any substantial grounds for concluding it is unconstitutional. First, the cruel and unusual punishment and equal protection arguments appear to me open and non-trivial. The Court's decisions yesterday, as reported in the press, do not purport to close the cruel and unusual punishment issue. Second, this being so, Congress would have the power under Section 5 of the Fourteenth Amendment, pending a Supreme Court determination, to consider for itself whether the arguments carry weight and what legislation to enact to enforce those constitutional provisions. Moreover, in the circumstances the power to consider these questions must also encompass the power to maintain the status quo by preventing executions in the interim. If executions turn out to be violations of constitutional rights, they are not the kind that can be remedied retrospectively. The analogy to the traditional power

of equity courts to enjoin prejudicial change in the circumstances pending the court's adjudication of the merits seems to me persuasive. Congress would be maintaining the total effectiveness of its law making authority, explicitly delegated by the necessary and proper clause as made applicable to the Fourteenth Amendment through its Section 5.

May I suggest two additional grounds you and your advisors might want to consider to shore up even further the case for a two-year stay:

1. The desire by Congress to consider not only whether capital punishment is unconstitutional, but whether it should be made so under a constitutional amendment. This would draw upon Congress' authority with respect to amendments found in Article VI. It would also serve to provide a basis, in addition to the line of thought exemplified in *Katzenbach v. Morgan*, for justifying the stay if and when the Court denies the cruel and unusual punishment claim.

2. The appropriate interest of Congress to act in support of the jurisdiction of the Supreme Court and other federal courts by saving the need to obtain individual case by case stays pending the resolution of the issue in these courts.

I hope these observations may be of some use to you.

Respectfully,

SANFORD H. KADISH,
Professor of Law.

THE UNIVERSITY OF MICHIGAN LAW SCHOOL,
Ann Arbor, Mich., May 4, 1971.

Hon. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: Many thanks for your letter of April 19, inviting comments on the proposal that Congress impose a two-year "stay" of all executions within the United States pending further study of the death penalty.

There is substantial evidence from which Congress may conclude that the death sentence works unfairly against black Americans in practice and thus that a nationwide ban—let alone a suspension—of the death penalty is "appropriate legislation" to enforce the equal protection clause of the Fourteenth Amendment.

To paraphrase Justice Black in *Oregon v. Mitchell*, 400 U.S. 112, 134 (1970), (upholding the literacy test ban of the Voting Rights Act Amendments of 1970), Congress may properly recognize that the administration of the death penalty in a racially discriminatory manner is not confined to the South, but exists in various parts of the country, and may properly conclude that the way to cope with this problem is "to deal with nationwide discrimination with nationwide legislation." Similarly, to paraphrase Justice Stewart, (joined by Burger, C. J., and Blackmun, J.), concurring in the judgment of the Court sustaining the aforementioned literacy test ban, 400 U.S. at 284: Because the justification for suspending the death penalty throughout the land need not turn on whether it is discriminatorily enforced in every state, Congress is not required to make state-by-state findings concerning the actual impact of the penalty. "In the interests of uniformity, Congress may paint with a much broader brush than may [the Supreme] Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records."

Although the Washington Research Project's memorandum makes a powerful and persuasive argument that federal legislation abolishing or temporarily suspending the use of the death penalty by the states may also be sustained on another ground—Congress could properly conclude that the death penalty amounts to cruel and unusual punishment and (since the Fourteenth Amendment applies to the states the Eighth Amendment prohibition) thus prohibit its use by the states pursuant to the power granted it by Section Five of the Fourteenth Amendment—this strikes me as a closer question. Congress would seem to have the power (and special competence) to make its own findings of fact and evaluation of the competing considerations involved¹ in determining whether the death penalty constitutes "cruel and unusual punishment" or a violation of "due process". Or to put it another way, this issue would seem to fall within "a sort of 'buffer zone' in which Congress has discretion to define these standards."² However, al-

¹ E.g., the injustice wrought by the erratic and discriminatory imposition of the death penalty versus the deterrent value above life imprisonment, if any, of the theoretical availability and rare enforcement of the death penalty.

² Cf. Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 92, 121 (1966).

though they agree that Congress has the power "to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause" at least some members of the United States Supreme Court balk at recognizing Congress' power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause [and other constitutional prohibitions and requirements] and what state interests are 'compelling,'"³ and might well regard a determination by Congress that the death penalty amounts to "cruel and unusual punishment" as falling within the latter category.

It seems so clear, however, that Congress may override state death penalty laws "on the ground that they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion" (see the aforementioned opinion of Stewart, J., 400 U.S. at 295-96), so clear that a two-year Congressional "stay" of all executions would be regarded "an appropriate means of remedying discriminatory treatment" in the administration of capital punishment (id at 295), that other bases for supporting the proposed federal legislation need not be pursued.

Sincerely yours,

YALE KAMISAR,
Professor of Law.

CENTER FOR ADVANCED STUDY
IN THE BEHAVIORAL SCIENCES,
Stanford, Calif., May 6, 1971.

HON. PHILIP A. HART,
*Senate Office Building,
Washington, D.C.*

DEAR SENATOR HART: I am temporarily in California, and your letter of April 19 addressed to the Yale Law School reached me here. I regret the consequent delay in answering.

I have examined the proposed Death Penalty Suspension Act, and the memorandum entitled, "The Constitutionality of Federal Legislation Suspending the Use of the Death Penalty in State Courts." In my opinion, Congress is empowered under Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause of Article I of the Constitution to enact legislation imposing a moratorium on executions for a time certain. I say this even though I do not accept, and I do not believe the Court would again accept in its full implications, the doctrine of *Katzenbach v. Morgan*. But in this instance Congress would not, as in that case, without factual foundation, be purporting to issue an authoritative construction of the Constitution differing from a construction arrived at by the Supreme Court. Rather Congress would be proposing to exercise a fact-establishing function which undoubtedly belongs to it, and simply creating the conditions to make effective exercise of this function possible. The relevant precedent seems to me to be *South Carolina v. Katzenbach*.

I would suggest that another, and entirely consistent, action that Congress ought to take as soon as possible is to propose to the states an amendment abolishing capital punishment. The issue is an entirely novel one, but I would be prepared to argue that if Congress had proposed such an amendment to the states, its authority to order a moratorium on executions in the meantime would, under the Necessary and Proper Clause, be additionally enhanced.

Faithfully yours,

ALEXANDER M. BICKEL.

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, Ill., May 7, 1971.

HON. PHILIP A. HART,
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR HART: I write in response to your inquiry about the constitutionality of your proposed bill calling for a moratorium on the execution of the death penalty for a period in which the Congress can decide whether abolition is desirable and appropriate.

³ Opinion of Stewart, J. (joined by Burger, C.J., and Blackmun, J.), in *Oregon v. Mitchell*, 400 U.S. 281, 296. See also Harlan, J. (joined by Stewart, J.), dissenting in *Katzenbach v. Morgan*, 384 U.S. 641, 659 (1966). But compare the opinion of the Court, per Brennan, J., in *Katzenbach v. Morgan*.

I do not propose to write a brief here. The memorandum accompanying your request and a letter to you from Professor Robert A. Burt, which he was kind enough to show me, are more than adequate analyses of the case law on the subject. My conclusions are simply stated.

1. Congress does have authority under the fifth section of the Fourteenth Amendment to enact legislation enforcing the substantive clauses of that Amendment as it construes them.

2. There is ample evidence to suggest that the death penalty has been and continues to be applied discriminatorily, *i.e.*, in such a manner as to suggest a denial of equal protection of the laws to those upon whom it is imposed. Whether that discrimination is wilful or arbitrary remains to be determined, but in either event Congressional action would be justified. I am not troubled by the Voting Rights Cases, for an age question for voting is necessarily arbitrary whether the choice be 18 years or 21 years.

3. It is clear to me that the wilful killing of any human being, whether by the state or nation, could be deemed and, I think, should be deemed a cruel and unusual punishment, thus bringing the problem within the scope of Congressional authority under the terms of the Fourteenth Amendment by way of the Eighth Amendment.

My conclusion, therefore, is that the proposed bill is not only constitutional, but highly desirable. Mr. Justice Holmes used to say that the solution for most societal problems was for the nation to become more civilized. In this day and age, I believe that the wilful killing of a human being, whatever the nature of his crime, is a step away from civility and can be justified only in terms of primitive laws that should no longer hold us in thrall.

With all good wishes,

Sincerely yours,

PHILIP B. KURLAND.

STANFORD LAW SCHOOL,
Stanford, Calif., May 11, 1971.

Re Proposed Death Penalty Suspension Act of 1971.

HON. PHILIP A. HART,
U.S. Senate
Washington, D.C.

DEAR SENATOR HART: I appreciate this opportunity to clarify the view stated in my letter of May 3, that Congressional enactment of the proposed Death Penalty Suspension Act is urgently needed to avert the threat of imminent executions. You raise the question whether federal legislative action is in fact necessary, or whether—if, as the legislation supposes, there exist grave unresolved constitutional questions in all of these death cases—courts and state executive officials will not stay the executions. My answer is that, "under any system which leaves the matter of stays to individual applications on behalf of individual condemned men, many of these men will die by reason of flukes and vagaries having nothing to do with the merits of their constitutional claims." This is so for several reasons:

(1) Large numbers of men on death row are indigent, functionally illiterate and unrepresented by counsel. In order to obtain a stay of execution, an unrepresented condemned man has to present a stay application to some court or legally empowered authority (such as the Governor in some States, the Pardon Board in others), which is sufficiently articulate to attract the attention of that court or authority. Most men on death row are incapable of doing this. Even were they highly literate—as they are not—they simply cannot know of the complex legal doctrines (such as doctrines limiting the jurisdiction of particular state courts, the exhaustion-of-state remedies doctrine in federal *habeas corpus*, the requirement in some States of a Pardon Board recommendation before the Governor may act) which may disempower the court or authority to which they apply from granting a needed stay. If a lower court should refuse a stay—as frequently happens, in my experience—the condemned man must then apply to a higher court, usually in a different city and sometimes in a different State. Mail from and to prisons is always delayed and is sometimes lost. Court clerks not infrequently return prisoners' papers for formal insufficiencies (such as failure to use required forms, or to attach pauper's affidavits), or delay submitting the matter to the judge. Unrepresented prisoners may neglect to state the dates of their scheduled executions in their stay applications, so that the clerks do not appreciate the need for haste. The judge himself may be otherwise occupied or out of town when the application arrives. Although there are only a few days or hours

remaining, the condemned prisoner has no one to contact the court for him, to learn whether the stay application has been received, whether it is being considered, whether it will be acted upon in time. Under these circumstances, any fluke—a miscarriage of the mails, a clerk's mishandling of a paper, a judge's attendance at a judicial convention—can snuff out a human life.

(2) Some condemned men, indeed, do not even try to put stay applications before courts or other lawful authorities. These include men who are legally unrepresented but do not know it. Attorneys handling capital cases in the post-appeal stages (usually counsel who were court-appointed for the original trial or appeal and have remained in the case as uncompensated volunteers) may suddenly drop the case for many reasons—lassitude, erroneous belief that all remedies are exhausted, professional relocation, illness, death—without notice to the condemned man. In these cases, the death row inmate continues to rely for his life upon a lawyer who is no longer there.

(3) Even where condemned men are represented by counsel, the situation is often almost as perilous. As I have said, most of the lawyers in these cases are uncompensated volunteers. Where they are criminal lawyers, they are often sole practitioners; they may be tied up for days or weeks in another trial, and be forced to let stay applications for a condemned client wait until the last moment, when some quirk can prove fatal even in a lawyer-handled case. (I shall say more about this in the next paragraph.) Oftentimes, counsel are not criminal lawyers, and lack the experience or knowledge necessary to present their client's claims. In recent months, I have encountered lawyers representing death-row inmates who were unaware of the 1968 Supreme Court decision in *Witherspoon v. Illinois* which established that their clients' death sentences were federally assailable. I want to make it clear that I am not faulting these attorneys, many of whom have served their clients selflessly and with dedication for years. But they are occupied with other responsibilities, unequipped with the resources necessary to handle a case in which life is at stake, and quite unable to keep abreast of legal developments in areas of law in which they do not generally practice.

(4) That problem is exacerbated by two others, relating to the courts:

(a) Frequently, constitutional issues in capital cases are foreclosed by decisions of the lower courts, and open only at the Supreme Court level. (This is true, in most States, of the Eighth Amendment issue and the issue of racial discrimination in capital sentencing.) Lower court judges, for the most part, will not grant stays of execution on these issues; and stays must be sought in appellate courts or even in the Supreme Court of the United States. In *Maxwell v. Bishop*, 398 U.S. 262 (1970), for example, stays were refused by all lower courts and a stay was finally granted by a Supreme Court Justice only twenty-four hours before Maxwell's scheduled electrocution. You will understand that overburdened volunteer attorneys, working under the enormous time pressures of an imminent execution date, uncompensated for their time or even for their out-of-pocket expenses, hundreds of thousands of miles from Washington, D.C., and often totally unfamiliar with Supreme Court practice, simply cannot effectively pursue judicial remedies at this level.

(b) State courts, federal courts and state executive officials ordinarily have concurrent jurisdiction to stay an execution. Ironically, this seeming multiplicity of remedies itself creates a deadly trap into which the unrepresented condemned man, or inexperienced counsel representing a condemned man, may fall. When an execution date is fast approaching, it is necessary to apply to two or three courts and the Governor simultaneously for a stay. I have seen it happen time and again that each court and the Governor then waits for the other to act first. Time and again, I have seen cases go down to the last day without a stay, despite the pendency in several courts of meritorious stay applications. In this situation, again, only experienced counsel with a healthy measure of luck can prevent an execution from occurring.

What I have said in the preceding paragraphs is based upon considerable familiarity with post-conviction litigation in capital cases. Since 1965, I have spent about one-third of every day working on death cases. I have obtained stays of execution for scores of condemned men, and consulted with other attorneys in obtaining scores of additional stays. In case after case we have gone down to the final hours—an experience of mind-shattering cruelty to the condemned prisoner—and emerged with a stay only through incredible good fortune. One slip in any of a dozen circumstances beyond our control in any of these cases would have killed the man.

Unquestionably, the only reason why there have been no executions in the United States since 1967 has been the pendency in the Supreme Court of the United States of the two constitutional challenges to the death penalty which that Court finally rejected on May 3, 1971. The Court granted certiorari on these issues in December 1968 (*Maxwell v. Bishop*, 393 U.S. 997), and has had them continually under consideration since (see *Maxwell v. Bishop*, 395 U.S. 918 (1969); *Maxwell v. Bishop*, 398 U.S. 262, 267 n. 4 (1970); *McGautha v. California*, 398 U.S. 936 (1970); *Crampton v. Ohio*, 398 U.S. 936 (1970)). Prior to the Supreme Court's agreement to hear these issues, it was exceedingly difficult to procure stays of execution for all condemned men in the lower courts, even though (1) the numbers of men on death row then were far smaller than the comparable number today, and (2) the two constitutional issues then in litigation had been definitely rejected by only two of the eleven federal Circuit Courts of Appeals, and by a handful of state courts, prior to the Supreme Court's grant of certiorari upon them. After certiorari was granted, of course, stays were far easier to obtain: we could often secure them routinely at the trial level; and, in many States, execution dates were not set at all, pending the Supreme Court's decision. Today, by contrast, (1) the number of men on death row is almost 650 (as compared with 435 in December, 1967, and 479 in December, 1968), and (2) the remaining constitutional issues—that is, principally, the Eighth Amendment and racial discrimination issues—which the Supreme Court has not agreed to review, were rejected many years ago by a large majority of the federal Courts of Appeals and the States' highest courts. There is absolutely no doubt in my mind that, unless Congress enacts the proposed Death Penalty Suspension Act, there is going to be a resumption of executions in this country on a scale unknown for decades.

Sincerely,

ANTHONY G. AMSTERDAM.

YALE UNIVERSITY, LAW SCHOOL,
New Haven, Conn., May 11, 1971.

HON. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: By letter of April 19 you were good enough to send me a copy of the draft bill entitled "Death Penalty Suspension Act of 1971," inviting my comment on the bill:

1. I favor the bill and I hope you will submit it. The bill is, in my judgment, a thoughtful and courageous approach to a tragically difficult national problem. To provide two years' time within which Congress and state legislatures would have the opportunity (and correlative responsibility) to examine the constitutional and other issues presented by the continued use of the death sentence seems to me both "necessary and proper." With hundreds awaiting execution in prisons throughout the country, legislators can no longer responsibly avoid confronting these issues.

2. I am persuaded that Congress is constitutionally empowered to pass a law staying all executions, federal and state alike, for two years. I believe Congress is thus empowered because I think there is a substantial likelihood that extended Congressional investigation would yield data supporting at least one of the two hypotheses tendered by the bill—(a) that the death sentence is (at least as to most offenses¹) a "cruel and unusual punishment"; (b) that the death sentence is imposed, in a grossly disproportionate number of instances, on blacks and others customarily subject to racial discrimination. Either such finding would provide a rational basis for Congress to pass a law abolishing the death sentence.² Given a reasonable possibility that two years of investigation by Congress would be persuasive to Congress that it should and constitutionally could legislate to end the death sentence, Congress would appear to be fully empowered to declare a two-year moratorium on executions and thereby prevent massive and unutterably calamitous frustration of what Congress may two years hence determine to be in the nation's best interest.

¹ One could conceivably conclude, for example, that the death sentence was a not inappropriate punishment for the single gravest crime—the federal crime of treason—but was barbarous in any other context.

² Or permitting it, as was suggested in footnote 1, only in cases of treason.

With respect to the power of Congress to ban the death sentence, on the basis of findings of the sort referred to above, I would add these brief comments:

A. The power of Congress to end the use of the death sentence for any and all federal crimes would not appear to require argument, since Congress has plenary power (within constitutional limitations) to define and declare the punishment for all offenses against the United States. With this in mind, I should point out that the draft bill places entire reliance on Congressional power to enforce the Fourteenth Amendment; since this power is irrelevant to federal crimes and punishments, appropriate language relating to Congressional power over the federal criminal process should be added to the draft bill.

B. Whatever power Congress has to end the use of the death sentence in the states flows from the power of Congress, acting under Section 5 of the Fourteenth Amendment, to enforce the guarantees of due process of law and the equal protection of the laws contained in Section 1 of the Amendment. A Congressional finding that the death sentence is a cruel and unusual punishment would call into play Congressional power to promote due process of law. A Congressional finding that the death sentence falls with disproportionate impact on racial minorities would call into play Congressional power to promote the equal protection of the laws.

C. Up to now there has, of course, been no determination by the Supreme Court that the death sentence is cruel and unusual (and hence in contravention of due process) or that it denies equal protection. Per contra, the Court has not, in its recent history (including the *McGautha* and *Crampton* decisions, on May 3, 1971), taken occasion to consider and reject either of these constitutional challenges to the death sentence. But even if the Court's recent occasional affirmances of death sentences, as in *McGautha* and *Crampton*, were viewed as implied rejections of these constitutional contentions (a reading of the Court's opinions which I would not regard as faithful to the Court's limited disposition of the limited questions presented), it would still appear that Congress retains some legislative authority to fashion its own more protective definition of the constitutional norms of due process of law and the equal protection of the laws. This would appear to be the teaching of *Katzenbach v. Morgan*.

D. I do not pretend to be able to formulate with confidence the scope of the Congressional power, declared by *Katzenbach v. Morgan*, to go beyond the Court in giving content to Fourteenth Amendment guarantees.³ For immediate purposes however, it would seem sufficient to make three points in this connection:

(1) Deference to a legislative extension of constitutional guarantees would seem most appropriate where the predicate of such legislative action is the sort of detailed inquiry into a vast array of institutional practices which Congress is peculiarly well fitted—and courts are peculiarly unfitted—to make. Both of the inquiries which Congress would be expected to undertake, pursuant to the draft bill, would seem to be of this nature.

(2) The propriety of Congressional inquiry into, and legislation protective of, due process rights draws support from Chief Justice Warren's invitation to Congress (and indeed the states as well) in *Miranda v. Arizona*, "to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws," presumably as supplements and/or alternatives to judicially formulated rules.

(3) With respect to the equal protection challenge to the continued use of the death sentence, it seems particularly appropriate to note that *Katzenbach v. Morgan* was a case in which Congress legislated against arrangements which it found to foster racial discrimination. That is to say, it would appear a fair inference that the legislative power sustained in *Katzenbach v. Morgan* is at its greatest when Congress is legislating with respect to discrimination against racial minorities, most especially blacks, since that evil was the chief target of the Fourteenth Amendment. It is in this setting that special weight attaches to the following observations, made by my distinguished colleague, Professor Charles L. Black, Jr., one year ago:

No one can now say how far we may go with the use by Congress, in application to racial problems, of the very same spaciousness of interpretation that is elsewhere applied to Congressional powers. I will only mention what

³ I tend to take a rather narrower view of *Katzenbach v. Morgan* than many other constitutional lawyers do. For example, I thought (and said) a year ago that the doctrine of *Katzenbach v. Morgan* was insufficient to sustain federal legislation lowering the voting age to eighteen.

to many of use now is a possibility of prime moral importance. It has been pretty generally assumed that capital punishment can be abolished in the United States only through action by 50 state legislatures. But suppose Congress were to conclude—as I think statistics would force it to conclude—that capital punishment had been administered for a long time in a manner discriminatory against blacks and other minority groups.⁶⁴ Suppose Congress were to judge, from this long experience, that this discriminatory administration was likely to continue or to recur. Could these judgments be faulted? If so, how? If not, then why could not Congress abolish capital punishment for the entire nation? Congress could beyond doubt make unlawful a practice whose adverse impact on interstate commerce was far less well attested than is the inequality, past and predictable, in capital punishment as actually administered. . . .

⁶⁴ A very old phenomenon, in one form or another: "Ye poor and miserable were hanged, but ye more substantiall escaped." 6 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 508 (1924). (The reference is to executions following Monmouth's rebellion.)⁴

I am grateful to you for the opportunity to comment on the profoundly important issues presented by the draft bill. I hope that (subject to the modest emendation suggested in paragraph 2A of this letter) you submit the bill. And I hope it is enacted into law: the lives of hundreds of Americans, and also the integrity of the American legal process, are at stake.

Sincerely yours,

LOUIE H. POLLAK.

UNIVERSITY OF PENNSYLVANIA,
Philadelphia, Pa., May 12, 1971.

HON. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: This is in response to your letter of April 19, asking my views on the idea of a Federal statute imposing a two-year "stay" of all executions while Congress and the States decide what action, if any, they wish to take in the area of capital punishment, following the Supreme Court's disposition of the "Death Penalty" cases before it.

I have given substantial thought to the question, and in my judgment, Congress has power under the Constitution to enact such a statute. I do not assert that it is clear beyond question that a Congressional Act declaring the death penalty unconstitutional and completely prohibiting its infliction by the States (as well as the Federal Government) would necessarily be upheld as an appropriate exercise of Congress' power to enforce the Fourteenth Amendment. At the same time, there is certainly a reasonable possibility that such an Act would be sustained as valid on the basis of that power conferred by section 5 of that Amendment. Moreover, it is also true that the form and substance of the particular Act—for example, the content of the findings which Congress might make—might well exert substantial influence on the ultimate judgment about the validity of the Congressional exercise of power.

This last point is particularly significant for present purposes. For it indicates the importance of Congress being able to consider carefully, on thorough investigation and full deliberation, whether it wishes to proceed—and if so, how—in this difficult and important area. From this aspect, the very processes of our Constitutional system call for assuring an adequate opportunity for wise deliberation by Congress (as well as the States). Certainly a "stay" of all executions for a specific stated period to allow such deliberation to take place is within Congress' power under the Constitution.

Such a "stay" also seems to me a wise provision at this point. So long as the "Death Penalty" cases were actively moving toward a Supreme Court decision, Congress and State Legislatures, pressed by much other and urgent business (and perhaps even inhibited somewhat by possible questions of propriety), were not likely to reach out to address the issues of capital punishment. In view of the Court's dispositions, the responsibility of the legislative bodies is now greatly sharpened. But, as with any complex institution, it will take some time for that to come into sharp focus, and a bit longer for the issues to be worked through to

⁴ Black, *The Unfinished Business of the Warren Court*, 46 WASH. LAW REV. 3, 19 (1970).

some sort of resolution. The process is likely to produce a wiser resolution if it is not under the pressure of a need to act quickly. Moreover, and perhaps no less important, these issues are not without a strong emotional component; however, they are resolved, there is likely to be less of a residue of acrimony if adequate time for consideration is definitely known to be assured.

For these reasons, I believe that an Act of Congress imposing a two-year stay of executions by the States as well as the Federal Government is both constitutional and wise at this time.

Sincerely,

PAUL J. MISHKIN,
Professor of Law,

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
New York, N.Y., May 13, 1971.

HON. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: This has been my first chance to study the draft bill and memorandum on suspension of the death penalty that you were kind enough to send me with your letter of April 19.

I am writing to say that while I do not readily accept the validity or propriety of new federal interventions in affairs traditionally thought to be within the realm of State autonomy, the considerations adduced in the memorandum seem to me to provide reasonable grounds for supporting the authority of Congress.

There is a further point that has much weight with me. Mass executions of hundreds of the prisoners now under sentence of death throughout the country would be a catastrophe of national and international dimensions. The unprecedented accumulation of unexecuted sentences was due primarily to stays ordered or anticipated to be ordered by the courts of the United States, exercising jurisdiction conferred by Acts of Congress. As Congress is authorized to remedy conditions or to deal with dislocations caused by exercise of granted legislative power (See e.g. *Stewart v. Kahn*, 11 Wall. 493, 507; *Norman v. B & O Railroad Co.*, 294 U.S. 240 at 315; *Woods v. Miller Co.*, 333 U.S. 138), I should suppose that it is authorized to avert a catastrophe caused in large part by the authorized exercise of federal judicial power.

I should add that I do not feel competent to judge the political wisdom of the proposal. The introduction of the bill may have the unintended effect of distracting effort from pursuit of clemency or of State legislation; and its rejection by the Congress may well fortify the forces that would welcome the blood bath it is your object to avoid.

With high regard, I am
Yours faithfully,

HERBERT WECHSLER.

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, N.Y., May 14, 1971.

HON. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: I am most pleased to learn that you are thinkinf of introducing a bill similar to that prepared by the Washington Research Project proposing a two-year "stay" of all executions. I write now to say that, after examining the excellent memorandum prepared by the Project, I am persuaded of the constitutionality of the proposal.

The matter has a special urgency now in light of the recent Supreme Court decisions upholding procedures now used in capital cases in some states. I do hope you will introduce the bill and that it will pass so that time for further study will be secured on how to solve this vital issue.

Sincerely,

ROBERT B. MCKAY.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., May 14, 1971.

Senator PHILIP HART,
Old Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: You asked for my opinion on the constitutionality of the legislation you may submit suspending the use of the death penalty in state courts. Rather than reiterate a multitude of possible arguments, I have attempted to present you the strongest argument in support of constitutionality.

In my opinion the legislation is clearly constitutional. Under the enforcement section of the Fourteenth Amendment Congress is given the power to enforce by appropriate legislation the Amendments's substantive provisions of due process and equal protection. Under this section and under the similar section of the Fifteenth Amendment, acts of Congress bearing close analogy to the legislation you propose has been upheld by the Supreme Court. In what follows I will describe these Acts and the Supreme court cases upholding them, setting forth the analogies they bear to your proposed legislation.

South Carolina v. Katzenbach, 383 U.S. 301, decided by the Supreme Court in 1966, involved the constitutionality of the Voting Rights Act of 1965. The Voting Rights Act was based on a congressional finding that literacy tests and like devices, fair on face, had been used in the South as the means of discriminating against Negroes in registering to vote. The Act automatically suspended the use of such tests, including all literacy tests, in any State or County in which less than half of the adult population had voted in the Presidential Election of 1964. This, it was thought, gave reason to believe that the tests might be used for racial discrimination.

Thus, the Act was framed to provide a new prophylactic remedy for violations of the Fifteenth Amendment for which prior remedies had been inadequate. These prior remedies, of course, consisted mainly of case-by-case judicial challenges to discriminatory voter-registration practices.

South Carolina argued that Congress had no power to adopt prophylactic remedies in the absence of a judicial finding of discrimination in each case. The issue turned on the enforcement section of the 15th Amendment:

"The Congress shall have power to enforce this Article by appropriate legislation."

Solicitor General Archibald Cox argued that this section gives to the Congress the same discretion in enacting measures reasonably adapted to preventing discrimination in voting as the "necessary and proper" clause confers upon Congress in regulating such matters as interstate commerce. Chief Justice Warren, quoting Chief Justice Marshall, agreed:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Thus, *South Carolina v. Katzenbach* clearly upholds congressional power (1) to determine that the application of literacy tests is often discriminatory and (2) to suspend them as a prophylactic means of ending such discrimination.

The analogy to the measure you propose is clear. Here the source of congressional power would be the enforcement section of the Fourteenth Amendment. Congress could (1) rationally determine that the death penalty, like the literacy test, though fair on its face, has too often been discriminatory in its application, and (2) suspend the death penalty as it suspended the literacy test, as a prophylactic measure to prevent discrimination in its application.

Cases subsequent to *South Carolina v. Katzenbach* have only served to strengthen its authority. *Katzenbach v. Morgan*, 384 U.S. 641 (1966) the Supreme Court upheld the section of the Voting Rights Act which provided that no person who had successfully completed the sixth grade in a Puerto Rican school should be denied the right to vote because of inability to read or write English. The effect of this measure was to enfranchise thousands of Spanish-speaking citizens who had moved to New York from Puerto Rico.

Relying on the enforcement section of the Fourteenth Amendment, the Supreme Court upheld this enactment as an appropriate means of effectuating the rights guaranteed by the equal protection clause. Enfranchisement, said the Court, "will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community."

Morgan strongly illustrates the breadth of congressional power under the enforcement sections. Substantive equal protection violations were not clearly defined in *Morgan*, nor was there any specific judicial or congressional finding with respect to such violations.

On the basis of these cases I come to the firm conclusion that legislation suspending the death penalty would be fully within congressional power as an appropriate means of enforcing the equal protection clause. Congress could rationally conclude that (1) the death penalty is racially discriminating in its application, and (2) that suspension of the death penalty is an appropriate means of eliminating such discrimination.

Your proposed legislation merely suspends the death penalty for a period sufficient to allow Congress to examine its application. That such legislation is constitutional follows a *fortiori* from the discussion above. Just as a court may issue temporary restraining orders to maintain the status quo while it considers the merits of a case, so Congress is authorized by the enforcement section of the Fourteenth Amendment to maintain the status quo while it decides. Indeed this seems an altogether sensible and laudible manner by which to proceed.

I conclude with assurance that the legislation you propose is constitutional.

Yours sincerely,

CHARLES R. NESSON,
Professor of Law.

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THE CRISIS IN CAPITAL PUNISHMENT

By CHARLES L. BLACK, JR.*

We are at crisis. For about four years, because of judicial stays necessary to the orderly administration of justice, no human being has been killed by warrant of law in the United States. We have had much time for thought on the subject. If we resume the infliction of death by law, we shall have to answer to ourselves, to the future, to the rest of the world, and to whatever or whomever else it may be that judges us, how it came about that we did this after so much time for reflection. Meanwhile, some 600 persons have been condemned to die, and are in the death cells of our capital punishment states. Of course, not all these will be killed, in any event, for it is the policy in some states to delay clemency hearings until all judicial remedies are exhausted, and some of those now under condemnation will be commuted, or be transferred to asylums, or die. But if the protection of the judicial stays be removed, and if no other remedy supervene, it is reasonably certain that within a year a good many times as many people will be killed in the name of law as in any year in recent American history. Although I am aware that much, indeed most, of what I shall have to say cannot be new, and although I know my subject is a most unpleasant one, I dare not put myself in the position of having to explain to my children how it happened that at such a crisis I could find myself honored by being tendered a platform such as this, at a great university such as this, and then not use this opportunity to have my say on this subject.¹

* Henry R. Luce Professor of Jurisprudence, Yale University; B.A., 1935, M.A., 1938, University of Texas; LL.B., 1943, Yale University.

1. This piece, as published, is an amplification of the Morris Ames Soper Lecture delivered at the University of Maryland School of Law on March 16, 1972. I am deeply indebted to the Dean and Law Faculty for this invitation, and to the editors of the *Maryland Law Review*, particularly Mrs. Ann Hoffman, for their kind cooperation.

As the piece is in essence a lecture, I have annotated it very lightly. Fortunately, there exists a first-rate compendium on the subject, *THE DEATH PENALTY IN AMERICA* (rev. ed. H. Bedau 1968). My indebtedness to the book is quite general.

I cannot pin down, in many cases, the origin of ideas that come out of years of conversation with Guido Calabresi (who has kindly read and commented on the piece), Alexander Bickel, Louis Pollak, Abraham and Joseph Goldstein, Dr. Jay Katz, Eugene V. Rostow and others of my colleagues at Yale. I have also corresponded with

I cannot be entirely honest with you without confessing a bias — not simply a bias against capital punishment, for I am sure that bias will already have been revealed to you — but a bias against the question's being regarded as discussable at all. The consciousness of this bias came to me clearly one night this winter, as I was walking with my elder son. He and I were together going over some fine point in an argument I was composing in a reply to an eminent public man, concerning this subject. Suddenly we looked at each other, in astonishment at our words and at the framework of public discourse in which they were uttered. One of us, I cannot remember which, spoke both our thoughts when he said, "What are we talking about? We are talking about whether it is a good thing to lead or carry a helpless human being, who could be kept helpless as long as we wanted to keep him so, into a small room, and there to kill him, under warrant of law. How can we be *reasoning*, in the fine grain, about that question?"

There used to be a great deal of earnest talk about torture, with reasons proffered that shifted the balance of conviction to and fro. Many thoroughly decent people, in most cases regretfully, believed in the necessity and propriety of torture, both as a punishment and as a means of ascertaining truth. Then somehow, after several centuries, all this discourse ceased, though nothing changed, or has to this day changed, in the force of the reasons for and against torture as an instrument of law. Torture, somehow, simply became unthinkable as a thing society could do through law. Nobody discusses it anymore. The bias which I must in honesty reveal to you is that I think — or, rather, I feel, for feeling is really what makes torture undiscussible among us now — that this undiscussibility is the position we ought to be in today with regard to capital punishment.

As it is, I have to admit that many people of good will do not regard the capital punishment question as one to which the answer is as obvious as the answer to the torture question now seems to be. By anyone, then, who is not so bigoted as to expect that the opinions of the world must obediently follow his own, the question must be regarded as publicly an open one, however closed the private mind may be. I propose tonight, therefore, to go through the reasons which underlie my own opinion concerning the punishment of death. I shall then mention a few of the constitutional and practical means for dealing with this problem, if the public will to deal with it can be found.

It is necessary for me to mention at this point, parenthetically, the cases now pending before the Supreme Court, wherein is tendered the issue whether capital punishment, as a matter of constitutional law, unaided by statutory judgment, is a "cruel and unusual punish-

Lou Henkin at Columbia and William Van Alstyne at Duke. Some of the constitutional ideas expressed herein are obviously related to (though not, as I read them, identical with) those expressed in Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970). I have, through the years of our association, learned much about this, as about most other topics in and outside law, from Jack Greenberg and James M. Nabrit III.

I reserve until last that matchless paladin of this noblest cause, Anthony Amsterdam. I have learned from him, but more than that I have been inspired by what he has done and is doing. He has declared war on death; I am proud (though late-coming) to enlist under his banner.

ment" within the meaning of the eighth amendment. Those cases have been argued by some of the ablest advocates in the world, and I am not going to argue them again tonight, beyond summarily saying that if the punishment of death, and waiting for death, is not "cruel," and if a punishment is not today "unusual" which was inflicted, before the judicial stays stopped it, on some fifty persons a year in the whole country, a tiny fraction of those who had committed nominally capital crimes, then the words "cruel" and "unusual," in the eighth amendment, must be Pickwickian terms of art, bearing almost as little relation to their colloquial homonyms as the word "use" in the Statute of Uses bears to the word "use" in common speech. What I must say tonight is that the forthcoming decision in these cases will either have made retrospectively unnecessary my present remarks, or will have brought it about that the issues I shall discuss become issues of immediate life or death. I hope the first of these things happens; I think it ought to happen; I have spent the year up to now hoping the Supreme Court would shoot this platform out from under me; I have even prepared an alternative lecture, to cover the position if they should have done so today or yesterday. We must proceed for now on the opposite assumption. If the judgment of the Court is wholly adverse on the naked constitutional point, then we must be at the ready, for our work will be just beginning. Without, therefore, either anticipating or much less anticipatorily approving an adverse decision, I shall speak tonight just as I would speak if one had come down, treating the issue as the issue of high policy which would remain wholly open even if the Court should rule adversely on the issue tendered it.

I assert, first, that the punishment of death is an evil, if considered apart from possible justification. To this proposition, after all is said, I cannot logically coerce agreement, but only invite it. As such an evil, it must be condemned if it cannot be justified. I shall then try to show that there is no adequate justification. That is the whole of the case. Now let me try to make it.

Capital punishment is an evil, unless justified, for two general reasons. The first of these is that it extinguishes, after untellable suffering, the most mysterious and wonderful thing we know, human life; this reason has many harmonics, only a few of which I shall sound. The second reason is that this suffering and death must necessarily be inflicted sometimes by mistake. This reason has more branches than are commonly talked about, and I shall therefore lay particular stress upon it.

It is tempting to dispose of the first of these reasons rather summarily. Premeditated killing of a human being is everywhere and by all peoples regarded as a thing profoundly wrong in itself, and therefore as a thing that must be strongly justified if it is under any circumstances to be allowed. One could really stop there, and proceed to inquire into the proffered justifications. But premeditated killing by the law is not quite like other killing.

I shall say very little about the manner of killing. All the means that are in use are quite horrible. I should suppose that any person favoring capital punishment owes it to his own conscience to inquire

fully into the physical facts about that which is being done with his approval. But the manner of killing, which could be changed while the killing remained, does not go to the principle of the thing.

What cannot be changed, apart from the killing itself, is the fear. To say the literal truth about this fear, and about its grosser physiological consequences, even in restrained language, is to incur the charge of sensationalism. This is the standard fatigued old charge which must always be borne by the opponents of cruelty in any form. The charge was patiently endured by the opponents of torture and of slavery; I suppose it must be endured by the opponents of killing in the name of law. I shrink, however (being old-fashioned in taste and finding myself in mixed company), from saying out the known literal truth about many final scenes at or on the way to the execution place. I will go a step back from that, and ask you to imagine — or to try to imagine, for the imagination of terror and false hope and despair is not fully attainable by the fortunate — the situation of the person who waits in a cage to be slaughtered. When he can sleep, one can be pretty sure that he dreams of pardon, only to awaken and to find the clock has moved a little. At first, he may know that the vote of one judge on a fine point of law, or the discretion of a governor on a fine point of extenuation, may save him. Then such possibilities close off, one by one, and he waits, imagining again and again the final agony. I really can't go on with this. I don't have to; it is not my duty to harrow myself, because I am against this thing, and want to see it stopped. But I solemnly assert that those who are still in doubt owe it to their own consciences to think often, and to read much in Koestler,² and in Camus,³ and in the psychiatric literature, on what it does to a human being to be classified as a piece of trash, fit only to be disposed of, and then to be given a while, in close confinement but under close observation, to think about the impending disposition. Perhaps nothing is evil; perhaps the very notion of there being a difference between good and evil is only an hallucination of man himself, a creature not created, but born of the chance collision of the atoms. But if anything at all is evil, then I submit that the imposition of this fear, with its consequences, is in itself an evil of a size too big for language, an evil sternly demanding the clearest and most weighty justification.

Then there is the killing itself, however performed. Here we knock on the door that never opens. But we do know something of what we do by killing. As Camus has put it, we take away all power to make amends or to try to make amends, either on the victim's part or, if the case should turn out to demand it, on our own.⁴ How many people now are sorry that Leopold, sentenced to life instead of to death for a revolting crime, made something good of himself and helped many others, and at last had a little freedom after paying so much for his crime? But after all is said, we know very little of

2. A. KOESTLER, *REFLECTIONS ON HANGING* (1956).

3. Camus, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* (J. O'Brien transl. 1961).

4. *Id.* at 220.

life, of this wonderful power of choosing and feeling and knowing that has somehow arisen or been created in matter not distinguishable in its constituent parts from the stuff of stones. Here then, with a special force, one can apply the saying of Confucius, "Not understanding life, how can one understand death?" We do not know what we are doing when we kill a human being. Perhaps it is this, clearly or dimly apprehended, that has made mere premeditated killing, even when unaccompanied by any adventitious brutality, a thing looked on everywhere as evil, requiring powerful justification.

We have, then, the killing and the horrible fear. What more? I suppose the most obvious thing is the effect on utterly innocent people, those most likely to love the executed man, his family. Again, I don't have to harrow myself by recurrent reflection on that matter, because I don't want it to occur again, and I mean to do what little I can to see that it does not recur. But if you favor capital punishment, or if you are in doubt about capital punishment, then I solemnly say to you that you owe it to your conscience to ask yourself, and to try imaginatively to consider, how it would feel to go through months of knowing that, for example, your father, or your son, was condemned to death, to watch hope vanish bit by bit, and at last to go to the prison to be given his body, somewhat mutilated, to dispose of. What do you think your chances would be of a happy or even a sane life thereafter? And remember that the people who suffer this are guilty of nothing, nothing at all.

Just a few minutes ago, in so much as alluding to the horrors of execution and of the fear that precedes it, and to the disgusting effects of that fear, I risked the charge of sensationalism. Now I have risked the charge of sentimentalism. Well, if anyone thinks it sentimentalism to feel repugnance at the infliction of the most horrible suffering that could be visited upon a person's kin, themselves utterly innocent, then I venture to suggest that the person who so reacts has himself become pathologically callous, and himself badly needs to take thought. Let him face the facts about capital punishment, abundantly accessible in writing. Let him drop the shabby defense against reality that is contained in the charges of sensationalism and sentimentalism brought against those who have faced the facts. And let him decide afresh whether he really can afford in conscience to go on trivializing this deadly serious issue by such characterizations as "sentimentalism" and "sensationalism." I cannot think that honest reflection along these lines can lead any sane person anywhere but to the conviction that the punishment of death is an unspeakable evil, allowable only if the most weighty and certain justification be put forward.

Before I proceed to examine the second branch of the evil in the death penalty — the possibility of mistake — let me mention a few of what have seemed to many the probable *general* effects of capital punishment in a wider societal frame. I have hesitated before deciding to do this. The death, the fear, and the unearned horror inflicted on the family are all absolutely certain, and are overflowing sufficient in themselves to establish that the punishment of death, if it is to be

used, must be justified by the surest data, purified by the clearest thought. I do not want to weaken that case by introducing matter which is inherently conjectural, however plausible the conjectures may be. But I have decided that my remarks would be incomplete without some allusion to these wider possibilities.

It seems to me very likely that capital punishment tends to brutalize society. Beyond doubt, it conveys one very clear message: human life is a thing that may be taken by the State, either for utilitarian reasons not (as I shall show) in the least established, or for the satisfaction of the desire for vengeance. It seems to me very plausible to conjecture that this message reverberates in society, and tends to make human life seem the cheaper. This conjecture may be made a little more plausible if one asks what the general societal effects of abolition would be. Would not the assertion made by abolition be that human life is very precious? I think it would, but I have no desire to press the conjecture, which is really unverifiable. The death and the fear are enough.

I think, further, that the abolition of capital punishment would convey a most desirable message about the State and its competence and powers. Here I recur to Wordsworth's sonnet, the fifth in his lamentable sonnet sequence *On The Punishment Of Death*. The message of this sonnet is that the State cannot retain full and absolute dignity unless it has and wields the final power of life and death; "she" would be, he says, "self-shorn of Majesty." I heartily agree with Wordsworth's intuition as to the importance of the State's possessing and using this power, as a definitory sign of the State's character; Wordsworth's poetic insight was here deadily accurate. What I would disagree with is his conclusion that the use of this power defines a concept of the State that we need in these times, or in any times. Capital punishment defines the omnipotent State, the State that can and will do anything to its citizens — even kill them after they have been rendered utterly helpless. The difference I have with Wordsworth is that that is just exactly the kind of State I do not want. Of course the State *can* kill its citizens. Authentic majesty would, for me, be found in its solemnly deciding that it will never do so .

Finally under this heading of general effects, let me take up the problem of the effect of capital punishment on the treatment of prisoners in general. Without, again, pressing the point — for it is only a conjecture in social psychology — I suggest that the fact that society is willing to kill some people tends to define the limit of what society will do to its deviant members, and so to make every other form of treatment of them, however brutal, seem less than extreme. The abolition of capital punishment would move the line; there would then no longer be possible a sort of vague emotional a fortiori argument generating the feeling that, since men who transgress the law may be killed, those who are not killed are getting a break, and have no reason to complain of their treatment. This consideration, if it has any validity, would be a partial and collateral answer to those who argue that capital punishment is no worse than long imprisonment, given

the conditions in today's prisons, for it might hold out hope that the abolition of capital punishment would be a first step in still further self-limitation on the part of society. (One full and directly responsive answer to the argument — the only humane argument I know in favor of the death penalty⁵ — is that those who put it forward cannot, be it said with greatest respect, mean what they seem to be saying, for their argument, if valid at all, would lead to a very large multiplication of executions, perhaps by a factor of hundreds, not only for murder but for a great many other crimes. A second and equally full answer would be that at best the choice should be left to the person affected,⁶ and that few if any sane prisoners condemned to death have ever indicated anything but a strong preference for commutation.)

But let me put all the immediately foregoing material, on general societal effects and on effects upon prison life, in its place. It is conjectural. What is sure, once again, is the killing, the dehumanizing fear, and the suffering spread among innocent people who love the condemned man. These things, I repeat, are enough. If they are to be continued, they ought to be justified — not by guesses, not by smirking ironic questions, but by the solidest fact and the solidest reason.

The second chief heading of evil in the punishment of death is the possibility of mistake. If you have concluded, perhaps with shrinking regret, that it is necessary and proper to kill the right man or woman, with all, as I have just reminded you, that that entails, then I submit that you must nevertheless concede that there is in the whole universe of moral possibility hardly anything more horrible than the killing of the wrong man or woman. Yet I doubt, from what reading I have done, that the subject of mistake in the infliction of death by law has yet been accorded comprehensive justice.

First, let me remind you that the word "possibility," so innocent in its sound, can be quite misleading. It is so easy to move from "possibility" to "some possibility," thence to "bare possibility," and thence to a dismissal of the subject from the mind. This progression is quite unwarranted. In no other branch of human action, of human judgment on controverted matters of fact or law, would we regard the possibility of mistake as negligible. The concept of reasonable doubt, where taken seriously, reduces the risk. But it also verbally encapsulates and sanctions the risk of mistake, for it permits and

5. See Barzun, *In Favor of Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 154 (rev. ed. H. Bedau 1968). I do not mean to suggest that Professor Barzun commits himself to this argument, but the considerations (undoubtedly founded in fact) which he urges seem to me to lead toward it; I have actually heard it put forward in serious conversation, more than once.

6. See Bedau, *Death as a Punishment*, in *THE DEATH PENALTY IN AMERICA* 219 (rev. ed. H. Bedau 1968). For my part, I would strongly oppose euthanasia for prisoners electing it, because I would fear that, under prison conditions as they now stand, life might, in some places, designedly be made unendurable for those known to have this choice open to them. This danger would be compounded by the fact that there could be no rational ground for confining the "privilege" to the worst criminals, or indeed, for limiting it at all. Like all other kinds of "euthanasia," therefore, but with peculiarly acute dangers, it runs the risk of the operation of outside pressures for nominally "voluntary" death. But all this, as Bedau makes perfectly clear, has nothing to do with capital punishment.

directs conviction not only in that case (if such a case could ever be found) where there is no doubt at all, but also in the case where doubt exists, but is regarded as unreasonable. That standard openly defines a system wherein execution is possible though some doubt remains.

A second absolutely vital point is that the possibility of mistake, however small in each single case, adds up to affirmative probability in a long run of cases, and to virtual certainty in a sufficiently long run. To say that human judgment is fallible in capital cases, as it is fallible everywhere else, is the exact equivalent of saying that a mistake will certainly once in a while be made. That which is fallible sometimes fails. So let us be clear about it: the evil of capital punishment consists not only in inflicting the cruelty to which I have just been rather politely alluding on those who by societal standards deserve its infliction. It consists, with practical certainty in the long run, in the infliction of that cruelty on some people who do not meet those standards, who have not in fact deserved to suffer so, even under the rules society has set. I do not say that nothing could possibly justify the decision that the wrong man is once in a while to be tortured by fear and then killed. But I do say that the justification for such a horror must rise to a height almost beyond attainment by any prudential or moral consideration.

But we have only begun to consider the problem of mistake. I find that when most people, even most writers on this subject, think of "mistake," they think of a certain rough kind of mistake, the mistake that consists in a finding that the defendant killed the victim, when in fact he did not do so. That kind of mistake can happen; in the long run, it must sometimes happen, and in a few cases it has been shown, with high probability, actually to have happened. But it is very far from being the only kind of mistake that counts. For we have not committed ourselves, as a society, to kill or even to punish every person who kills somebody else. We have, exactly to the contrary, committed ourselves not to kill, and in many cases not even to punish, many of those who kill other people. And — since this is just about the most serious matter with which our society, as a society, deals — we have to assume that this commitment is seriously binding, and that a grave mistake has occurred if a person be executed who falls, as to *any* of the rules we have committed ourselves to, on the wrong side of the line.

First of all, and simplest of all, we have committed ourselves not to execute people, even though they have killed others, where certain gross factual conditions are found to have existed in connection with the killing. A defendant may, for example, admit that he killed the victim, and this may seem certain beyond any possible shadow of doubt, but he may plead self-defense, claiming that he reasonably feared for his own life or bodily safety. The trier of fact must pronounce on the validity of this defense. In the first murder trial I remember — one held perhaps forty-five years ago in Texas — the defense was that the defendant thought the victim was reaching for a gun, though in fact he was reaching for a handkerchief. As it happens, the jury acquitted. But the defendant was a minister. Would the jury have

acquitted if the defendant had been a shifty-eyed drifter? I don't know for sure. All I need to know, and all you need to know, is that mistake, in regard to the validity of the plea of self-defense, is a clear and ever-present possibility.

We have committed ourselves not to kill, though not to refrain from punishing, one who accidentally kills another. I need not go through examples to convince you of the obvious fact that mistake is plainly possible — even quite likely — with respect to this commitment. In many cases, nobody will really know the truth about this except the defendant; the jury has simply to make a plausible guess based on circumstances. Yet, if you assume the jury is right nine times out of ten on this issue — a pretty good performance, after all — then a little elementary arithmetic will convince you that in a run of only eight cases it is more likely than not that a mistake will be made.

So far, I have sampled only what I may call the grossly factual mistakes possible in any fact-finding process. Let me pass to mistakes involving a mixture of matters which are progressively more difficult to classify as purely factual. But in doing so, let me strongly remind you that we have in this most serious of matters committed ourselves not to kill anyone whose case falls on the exculpating side of any one of the lines I am about to mention. The fact that the lines become progressively more difficult to draw or to locate does not excuse us from the unspeakable offense of executing the wrong man. It only makes it enormously more likely that we will do so.

Let us, then, pass on to the concept and the clouded reality of "premeditation." This takes us back to the distinction introduced rather generally in the last century, between "first-degree" and "second-degree" murder.⁷ It is familiar and despairing learning, to those who have written on the subject, that the distinction between "premeditation," which makes one eligible for the gallows, and absence of "premeditation," which does not, is in close cases virtually impossible to state with any clarity. Yet we must sometimes submit an issue so framed to the finder of fact in murder cases, and in those cases it is the crucial issue. How likely do you think it is that the finder of fact — the jury — will always be right in resolving it? Yet its right resolution goes to our moral life and death as a society; if we premeditatedly kill one as to whom this issue has been wrongly resolved, then we, and not he, are guilty of first-degree murder, rendered immune from punishment only by the fiction, the arrogant fiction without cozening ourselves with which we could not bear to inflict capital punishment at all, that we are always right.

I come now to the issue of "insanity." We are committed, as a society, not to execute people whose action is attributable to what we call "insanity" or who are mentally incapable of standing trial, or who are what we call "insane" at the time of execution. As to the second and third of these, little need be said. In judging a defendant's capacity to participate effectively at his trial, we take into account neither low intelligence, unless, perhaps, he is clinically an imbecile,

7. Bedau, *General Introduction*, in *THE DEATH PENALTY IN AMERICA* 25 (rev. ed. H. Bedau 1968).

nor cultural inaccessibility, to him, of any understanding of the proceedings, just as we disregard his lack of financial resources to engage able counsel or to set afoot investigation that might clear him. As to insanity at the time of execution, this is so familiar a phenomenon in fact, and the procedure for ascertaining and acting upon it is generally so defective, that the thing speaks for itself. Obviously, mistake is easily possible in either of these two respects, and doubtless often occurs. Let me focus on so-called "insanity" as a defense.

Once again, let us remember that we have committed ourselves not to kill by law, or even to punish, anyone who satisfies certain criteria as to the connection of "insanity" with the commission of the act. Yet the astounding fact is that, having made this commitment, for what must be the most imperative moral reasons, we cannot state these criteria in any understandable form, in any form satisfying to the relevant specialists or comprehensible to either judge or jury, despite repeated and earnest trials. The upshot of the best writing on the subject is that we have so far failed in defining exculpatory "insanity," and that success is nowhere in sight.⁸ Yet we have to assume, unless the whole thing has been a solemn frolic, that we execute some people, and put others into medical custody, because we think that the ones we execute fall on one side of this line, and the others on the other side.

I am talking about mistake, and it is hard to apply the concept of *mistake*, of rightness or wrongness, to the application of criteria of the quality we have succeeded in expressing, criteria which we do not ourselves even pretend to understand. But what a fearful alternative faces us here! Either mistake is possible as to the application of such criteria, and therefore extremely likely to occur, given the quality of the criteria, or else the criteria themselves are quite meaningless, and mark no line. If the latter is true, then we are executing some people, and treating others medically, on an irrational basis.

It would not be surprising if this were so, for we are dealing here, in truth, with philosophic issues which philosophy has quite failed to resolve — issues of determinism, free will, and responsibility. But we are not debating these issues philosophically. We are putting some humans through inutterable agony on the basis of a pretense, nothing short of frivolous, that we have satisfactorily resolved these issues. How can we dare go on doing this?

I want now to digress, briefly, to cover a special problem which seems to fit here better than anywhere else. As I have worked on this lecture, I have, of course, talked it over with many people. I want to mention now one particular view which I have encountered several times. I have heard it said, by people I must respect, that they generally deplore the use of capital punishment, as to almost all killings — the *crime passionel*, the street-fight knifing, or even the fatal mugging for money — but that they believe a few crimes — the Sharon Tate murders, for example, or the multiple mad killings by Starkweather —

8. See A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967) *passim*, especially 213-14. (I do not, of course, mean to associate Dean Goldstein in any way with my own remarks on the possibility of mistake in application of the insanity "tests.")

to be so horrible as suitably to be atoned only by death. I introduce this special view at this very point in order to focus attention on the fact that it is precisely as to such crimes that we run the greatest chance of misapplication of the insanity "test" to which we must be taken solemnly to have committed ourselves. This is true, above all, for an intrinsic and inescapable reason. Where the killing is of a kind colloquially describable as mad, and actually is so described in newspaper headlines, where the crime exhibits a total wild departure from normality, we come exactly to the point where consideration of the insanity problem is at once most necessary and most difficult. The man who kills his wife's lover in a fit of rage is not necessarily mad at all. To call sane the man who, for no visible reason, walks into a barber shop with a Tommy gun and shoots a dozen barbers and customers, is to call into question our deepest assumptions as to what sanity, in social life, can possibly mean. We must, in such a case, face the issue of exculpatory insanity. But I have already reminded you that the tools we have elaborated for resolving it are about as useful as flamingoes are for playing croquet. In every case, therefore, of the supremely revolting murder, we face in particularly acute form the exculpatory insanity question, without adequate means, to say the very least, for answering it. How likely is it that we will answer it rightly? Before we frame our reply to that question, we have to face the further realistic fact that the issue of "insanity" is referred, with inadequate if not totally meaningless directions, to people who must, if they are normal, view the defendant with extremest abhorrence. I suggest that those people who disapprove of the death penalty in general, but who would apply it in such cases ponder these facts.

(I should point out here, parenthetically, that it is only with respect to the punishment of death that our insane "insanity" rules do major damage. If a "sane" man is mistakenly classified as "insane," and confined indefinitely in a state hospital, then that is in itself a very heavy punishment. If an "insane" man is mistakenly classified as "sane," and sentenced to that indefinite imprisonment we call "life," then his condition can be, and is, reviewed medically from time to time, and he may be, and sometimes is, transferred to a hospital. The difference is of an altogether different order of magnitude from the difference between killing and not killing.⁹ I hope, also parenthetically, that I will not be taken to have implied that people like Starkweather could ever safely be turned loose, under any foreseeable state of the art of psychiatry.)

I believe I have now adequately sampled the possibilities of mistake with respect to the question of guilt in the narrow sense, and I believe I have said enough to show that the possibility of mistake in that regard is not a simple one, involving the mere question whether the defendant did it or not, but rather a very complex one, ranging into the puzzling but tragically real possibility of mistake in application of rules notoriously refractory to the best-instructed human understanding. To make the picture complete, I must now go into the

9. *Id.* at 20.

possibility of mistake with respect to judgments which are openly advertised as "discretionary," with no standards set out in words. Executive clemency has always been like that. A recent case in the Supreme Court holds that due process of law does not require that any verbally expressed standards be given to the jury that is to choose between life and death for the defendant, but that that matter is to be left in their discretion.¹⁰ So be it, or rather, so must it be. But this makes discretionary decision, without publicly expressed standards, a major part of the capital punishment system. If juries and governors and pardon boards select men who are to live by the exercise of standardless discretion, then they are selecting men who are to die by standardless discretion.

Can one properly speak of "mistake" in the exercise of "discretion"? Some of the most interesting recent jurisprudential work has been done on that question.¹¹ I cannot be sure that I have understood in more than a rough way what the legal philosophers have been concerned about. But my own interpretation, which in any case seems to me inevitably correct as far as it goes, is that we have to choose between two things, or a mixture of them. The first alternative is that, though discretionary judgment is not bound by any verbal standards, it is bound by standards that cannot be or at least are not expressed in words. If that is true, then a discretionary decision may be right or wrong, in that it implements or fails to implement the unstated and perhaps unstateable standards that bound it. If this alternative is right, then it is clearly possible that a jury or a governor may make a mistake in selecting which man is to die and which to live, and that, given the absence of authoritative verbal expression of standards, mistake is likely and even invited. Under the other alternative, the one that says that discretion is bound by no standards, stated or unstated, stateable or unstateable, mistake would be impossible, for there is nothing to be mistaken about. But how dreadful (again) that alternative is! For if the decision of life or death is not being made by standards, as to which mistake is possible, then it is being made on some other basis — whim, prejudice, chance, or some blind unconscious factor. The psychological fact in most good faith decisions labelled as "discretionary" probably is a mixture of these two things — some vaguely-felt standards and some degree of uncontrolled hunch or impulse. But no imaginable mixture is any better than either of the alternatives in isolation.

Now I have depicted the capital punishment system, first as a system breaking violently, in the name of law, on the greatest of mysteries, human life; as a system imposing the most horribly cruel and prolonged fear on those who are caught in it; as a system visiting utterly undeserved indelible horror on their families; as a system containing multiple serial possibilities of mistake in selecting those who are to die, with very probably, an element therein of prejudice and caprice. Leaving out the minor points I have made, I think that is an accurate description of the system — sensational, to be sure,

10. *McGautha v. California*, 402 U.S. 183 (1971).

11. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32 *et seq.* (1967).

because the subject is sensational in its nature, and sentimental, if you like, because it is only sentiment, after all, that makes us abhor cruelty, or see human life as a mystery, just as it is only sentiment that makes us love our children. Saving such epithets, however, I submit that the picture I have drawn is true and undistorted.

Such a set of practices is a very great evil in itself. It cries rather than calls for justification. Let us now examine the justifications proffered.

The only practical or utilitarian justification, of a magnitude even arguably commensurate with the facts of the capital punishment system, is the allegation that capital punishment deters potential killers, and so saves innocent lives. If it were known, to any substantial degree of probability, that innocent lives were saved by this punishment, then those of us who oppose it would be bound to re-search our hearts and minds.

As has often been pointed out,¹² it is very important to be precise as to the question here being asked. One is not asking whether capital punishment would have deterrent force if it were the only penalty, and impunity the only alternative. I should think it completely obvious to common sense that, in this imaginary case, capital punishment would have at least some deterrent force. But that is not the question. The question is whether the whole of the evidence makes it substantially probable that the threat of capital punishment has *greater* deterrent force than the threat of long imprisonment.

Now the short facts about the deterrence question are these: after comprehensive study, not only is it not known to any slight degree of probability whether capital punishment has this differential deterrent effect, but, for systematic and easily comprehensible reasons, it can never be known whether this effect exists, barring some radical and utterly unforeseeable breakthrough in the relevant methodology. The first of these propositions is the consensus, I believe, amongst all competent persons who have studied the subject, and who claim to speak on the basis of the evidence. The second proposition is really a by-product of the studies which have been conducted, for it is in the course of their conduct that the following insights have emerged:

First, there is no possibility of any adequate control, in the scientific sense. All you can do is compare homicide rates in the same state during periods when it does and periods when it does not administer capital punishment, or compare states that have capital punishment with states that do not. But no state is in the same social condition at one time as at another, and no two states are exactly alike at any one time. Variances, therefore (and the variances tend to be small), could easily be attributable to other factors than the presence or absence of capital punishment. (Lest I sound apologetic here, let me say that the raw statistics, viewed absolutely uncritically, show that there is more homicide in capital punishment states than elsewhere,¹³ but I certainly do not want to make anything out of that.)

12. Bedau, *The Question of Deterrence*, in *THE DEATH PENALTY IN AMERICA* 261 (rev. ed. H. Bedau 1968).

13. *Id.* at 262.

Secondly, we have no reliable statistics on capital homicide, and, more important, we will never have such statistics, because most people who are charged with homicide plead guilty to a lesser offense, or have their cases disposed of in some other way. We do not know, and never can know, whether any one of these would, if charged and tried, have been found guilty of first-degree murder. There is not the slightest reason to think this pattern will change. (There is no reason, either, to think that the proportion of undetected capital homicide is invariable.)

Thirdly, it is known for sure that *some* persons use murder as a form of suicide, killing in order to be killed,¹⁴ but we have no way, and never will have any way, of knowing how many. This phenomenon is not surprising; one could be pretty sure that it must be the case. There are a great many suicides in this country. It is well known that one of the main things standing in the way of suicide is irresolution — sheer inability to perform for oneself the final fatal act. What could be more natural than the would-be suicide try to produce a situation in which, as in his disturbed condition he believes, the state will do the job for him? And of course we now know that the impulse to self-destruction is sometimes unconscious, and may easily be the real motive for some killings that seem senseless on any other ground. Such cases may balance out any deterrent effect, but we cannot know whether that is true or not, because we cannot know how many such cases there are, or how much deterrent effect there is, if any.

Any one of these three reasons, considered independently, stands athwart the path to any firm scientific conclusion about deterrence, one way or the other. Together, they make the position quite hopeless. No responsible person can assert (or, as far as we can foresee, ever will be able to assert) that capital punishment does or does not deter. (It may be added that I have shown this assertion to rest on grounds of which any court may readily take judicial notice.) All we can say is that it obviously doesn't deter very much, for if it did the effect would be unmistakably noticeable as between the retention and abolition states, and it is not. It is even possible, in this state of ignorance, that the deterrent effect, if there is one, may save fewer innocent lives than are taken through mistake by the death penalty.

If evidence fails us, then it is reasonable to pass from evidence to common sense. When I do this, I encounter insuperable difficulty. Like you, I have never come close to considering the killing of a human being; I have never been on anything like intimate terms with anyone who has. The mind of a person premeditating a murder is a mind unknowable to me; I can only attempt to imagine its state. Insofar as I can perform that act of imagination, my own common sense advises me, with all the appropriate incertitude, that a mind so far gone down a strange and wild path would probably not be swayed by the difference between possible (though highly improbable) execution and possible (and much more probable) long imprisonment. But whichever hunch I had, I would look on it as a totally unsatisfactory basis for

14. *Id.* at 264.

putting human beings through the agony of dying by deliberate publicly sanctioned killing, and of waiting for that end — particularly as a mistake is, in the long run, certain.

Evidence and common sense seem to leave the matter of deterrent effect in equipoise. As lawyers, then, I think we have to ask where we want to place the burden of proof.

Does it not seem plain that the burden of proof ought to be on the proponents of legalized killing? Capital punishment is very cruel — in all the ways I have shown. If this cruelty is to be inflicted in the name of deterrence, then a solid evidentiary case should be made for the superiority of capital punishment as a deterrent. That case has not been made. It cannot be made. Summarily (so far as deterrence goes) we are inflicting this cruelty without in the least knowing whether it does any good. That is strong language. But does it not precisely summarize the case? Do we not shrink from its strength because we know it is true, rather than because of its extremeness of expression?

I think this about disposes of the only full, rational argument in favor of capital punishment. Other arguments are more difficult to answer, because it is more difficult to make out what is being asserted. I have more than once been confronted with an argument from history, which seems to boil down to the assertion that capital punishment is a very old institution, practiced *semper et ubique et ab omnibus*, and should in consequence (as I understand the argument) be continued. It is difficult to state this argument in plain form without appearing to caricature it, and perhaps that is all the answer it needs. But its proffering does serve the useful purpose of reminding us that one may derive an exactly opposite suggestion from history.

The relevant history, it seems to me, has in all civilized nations uniformly been one of gradual and then drastic reduction in the number of crimes for which this punishment may be inflicted, and in the number of cases, even of such crimes, in which it actually is inflicted. This historical movement includes, of course, progressive eliminations of refinements of cruelty in infliction, and has in recent times moved toward its culmination in a world-wide trend to complete abolition, realized in many countries and in some of our states. In the United States, even before the recent judicial stays, capital punishment had become vestigial — a token payment, as it were, to some sinister lurking creditor, made at fearful cost to a few. The ecumenical movement of history is strongly and unambiguously against the retention of capital punishment.

I would not dismiss out of hand those who sincerely feel that the Bible commands the infliction of capital punishment. I would only remind them that, even for the impeccably orthodox, there is no more perplexing question than the question to what extent the Mosaic law was for a certain people in a certain time, and to what extent it binds all Jews or Christians forever. Directly to the present point, most of the Mosaic law as to capital punishment is not followed, has not been followed, and never will be followed by any modern civilized nation. Anyone who advocated its literal following in all its branches would

be thought, to say the least, very peculiar.¹⁵ I have great respect for the Bible as a repository of religious and moral wisdom, but in this matter we are not considering whether we shall exactly follow the Mosaic injunctions — no one among us would advocate that or anything near that — but whether, having departed from them almost all the way, we shall depart the rest of the way. And I think it not inappropriate to remind you that the first recipients and eternal guardians of the Law of Moses very early conceived a strong repugnance to the death penalty, and elaborated so intricate a set of procedural requirements as to make its infliction virtually impossible among them.¹⁶

I am afraid that all we come down to at last is retribution, or, to give it its shorter name, vengeance. I think we all know that capital punishment would not last two weeks, anywhere, if it were not supported by the naked desire for vengeance, felt by enough people, intensely enough, to support the continuance of the token payment we make.

There is not much rational you can say about vengeance. No logical or experimental demonstration can show that the desire for vengeance is wrong, anymore than such demonstration can show that murder is wrong. There are, however, some peripheral things one can say about the retribution or vengeance motive.

Vengeance restores nothing. In the typical angry letter to the editor, the writer charges that opponents of capital punishment, preoccupied with the sufferings of the condemned, are callous to those of the victims of crime. This is, of course, a silly falsehood, wantonly uttered, for not even a fool could find validity in the inference that those who would stop killing where it can be stopped must be callous as to the victims of other killing, and as to their kin. But it also ignores the fact that the slaughtering of the killer does nothing for the one already dead, or for the bereaved family. No balance is redressed, no restitution effected. Payment of a sort is exacted, to be sure, but of that payment there is no recipient. The name for that kind of payment is vengeance, pure and simple.

It ought also to be said here, as so many others have said, that the payment which vengeance, in its death-penalty form, exacts is in most cases, even under the *lex talionis*, grossly out of proportion to the crime. This is obviously true as to such crimes as armed robbery. But few murderers possess either the means or the combination of ingenuity and diabolic derangement requisite for a crime corresponding, in prolonged and resolute cruelty, to the penalty exacted. The few who do are probably in all cases visibly mad.

But in the end, as I have said, one comes at last, as with all moral questions, to the naked choice. Reason leads and then leaves you there. One has to decide for oneself whether the desire for vengeance is to be indulged. The conflict at last, after reason has done all it can, is between the desire for vengeance on the one hand, and on the other, the desire to avoid great cruelty, sometimes, inevitably, inflicted by

15. See, for one example among many, *Leviticus* 20:9.

16. Kazis, *Judaism and the Death Penalty*, in *THE DEATH PENALTY IN AMERICA* 172 *et seq.* (rev. ed. H. Bedau 1968).

mistake. These desires are equally sentimental; the first is as much a sentiment as is the second. One has simply to choose between incompatible sentiments.

I do think there is a clear duty incumbent on those who favor capital punishment, or who are in doubt about it — the duty of inquiring and pondering. There is the duty, first, of finding out the real facts about the infliction of death, about the minutes preceding the infliction of death, and about the months of fear. There is the duty of probing fully, along the lines I have indicated, the multiple possibilities of mistake, and even of caprice. There is the duty of evaluating intelligently, on the basis of full information, the truth or falsity of the assertion I have made that the differential deterrent effect of capital punishment is not known and cannot be known. I cannot think how a person could even so much as acquiesce in the imposition of the death penalty without making and continually renewing these inquiries, and not tremble for fear that he may, after all, be incurring a judgment. Indeed, he is incurring a judgment — his own judgment, conscious or unconscious, that he has let people be killed without asking any questions, except the sardonic question of Cain, to which the dooming affirmative answer thundered in silence, and thunders through the ages.

I am entirely confident that most intelligent people who make these inquiries will come to see that capital punishment rests on no rational ground, but only, after all, on the desire for vengeance, and that they will reject that desire as an inadequate and unworthy justification. From now on I shall speak to and for those who have so chosen, talking about ways and means, while asking you to remember, again, that we are at crisis.

Two main problems present themselves. First, how shall we generate a public resolution that capital punishment be abolished? Secondly, through what constitutional means may that resolution drive to effect?

As to the first of these, the answer is as various as opportunity. Everybody talks to other people; talk about this. If, as has happened to me here, you get a chance to speak to an audience on a topic of your own choice, speak about this. You may find, somewhere near, a society against capital punishment; join it. Remember, the next few days, weeks, and months are crucial.

You will want to approach your representatives, in the state legislatures and in Congress, in both houses of both these bodies. Having known and dealt with a good many people in these positions, I would say two things. First, they are impressed by sober intensity of interest as well as by mere head-count; the person who will take the trouble to go to the capital city and get in touch is likely to exert much more influence than the man who listlessly answers "yes" or "no" to a pollster at his door. Secondly, legislators are, by and large, accessible to reason, are quite capable of understanding, and are anxious to do right. Of course they are bounded by the lines of political possibility. But change as to capital punishment has now come within those lines. And within those lines very many of those in power are

persuadable by cogent argument. For this reason, the carefully structured oral presentation, or the closely reasoned letter, is likely to have much more effect than the mere statement of one's conclusion.

If interest in this problem, and opinion favoring abolition, can be generated, then what are the structural means for change?

Most obviously, the state legislatures, one by one, might abolish capital punishment. Governors possessing clemency power might be induced to exercise it generally, as some have already done. As a constitutional lawyer, I don't think I need to say any more about these obvious possibilities. I want to pass on to some not quite so obvious.

I believe it can now be said to be the consensus among academic constitutional lawyers of standing that Congress has the power to abolish capital punishment for the entire nation, for state as well as for federal crimes.¹⁷ No two lawyers reason exactly alike, but, broadly, the grounds of this congressional power are two. First, Congress could very reasonably conclude — indeed, it is hard to see how it could fail to conclude — that capital punishment has for some time been administered in a racially discriminatory manner, and hence is likely to continue to be so administered. This conclusion would bring capital punishment squarely within the rationale of *South Carolina v. Katzenbach*¹⁸ and *Oregon v. Mitchell*,¹⁹ cases which held that where a device, innocent in itself, is shown to have been used as a vehicle for racial discrimination, Congress may altogether forbid the use of the device. Secondly, the fourteenth amendment incorporates the eighth amendment,²⁰ which forbids the imposition of cruel and unusual punishments. In section 5 of the fourteenth amendment, Congress is given the power to enforce that amendment — including, of course, whatever is incorporated in it. Thus, Congress has the power to enforce the ban on cruel and unusual punishments. Now these words — cruel and unusual — are vague. Part of the process of “enforcing” vague standards is the process of making them more concrete. There could be no more natural and proper exercise of the power of enforcing this standard than congressional findings that capital punishment is indeed cruel and unusual. Congress is the uniquely fit body for declaring the national sense and will on this question. And let me emphasize strongly that such action would not be made improper by a judicial decision (if, as I hope will not be the case, such a decision should come down) that, *without* the aid of congressional findings and action, the words standing alone could not serve as a ground for striking down the death penalty. Such a judicial decision would probably have been uttered, *mutatis mutandis*, as to the “devices” which Congress was held to have power to abolish, in the two cases just cited. It would make neither common nor constitutional sense — and let us hope

17. See the letters put in the *Congressional Record* by Senator Hart in introducing his moratorium bill (note 21, *infra*, and accompanying text), 117 CONG. REC. 7919-31 (daily ed. June 1, 1971). See also Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 19 (1970).

18. 383 U.S. 301 (1966).

19. 400 U.S. 112 (1970).

20. See *Robinson v. California*, 370 U.S. 660 (1962); *Louisiana v. Resweber*, 329 U.S. 459 (1947).

that these march along together — to equate the situation in which the people's representatives have fixed a concrete meaning on these vague words with the one where they have not done so.

The most important legislative proposal on capital punishment is the Hart-Celler bill,²¹ now under consideration in Congress. That bill, basing itself on the foregoing constitutional grounds, would impose on the death penalty, whether inflicted by the nation or by any of the states, a two-year moratorium, during which Congress could study its own powers and the subject in general. This bill ought to be the focus of effort today, though not at the cost of abandonment of effort in the state legislatures and with state governors.

I think one amendment to the bill would also be constitutional, and ought to be added, unless its addition would make passage less likely. Congress, if it has a right to impose this moratorium, has a right to do so on humane terms; the attainment of humaneness is as "necessary and proper" as any other objective. I think Congress might easily conclude that, as to persons already under sentence of death, it would be inhumane to keep them in the agony of suspense for two more years. I would therefore favor an amendment to the bill requiring the commutation of all such sentences. For similar reasons, I should think it proper that the bill prohibit not only the carrying out but also the imposition of the sentence of death during the moratorium. In this way, Congress would put itself in the position of writing on a clean slate, without pressure.

If the Hart-Celler bill were to pass in time — with or without the amendments I have suggested — then the way would be cleared for thorough national deliberation on this question. This interim victory would be a great one — perhaps the best we can hope for now, outside of a favorable Supreme Court holding. But we have to face the possibility that an adverse decision of the Court may come down any day, and that the Hart-Celler bill may not be passed in time.

For the constitutional theory I would put forward to take care of that contingency, I can claim no consensus. I have indeed made no wide survey. The theory is my own, as far as I know, but I believe in it and invite you to consider it.

In the event of a gap between an adverse Court decision and seemingly possible passage of the Hart-Celler bill, it is my contention that it lies within the power of the President to provide by Executive Order for a stringently limited moratorium, strictly in aid of proposed legislation and so conditioned as to expire after a stated time, or to be rescinded upon the President's further order. Such an Executive Order would be ancillary to the legislative process, and in no wise in derogation of congressional power, since it would do no more than prevent a cruelly irreversible change in the status quo, pending congressional deliberation. Its issuance would not even imply the espousal by the President of any views on the merits of capital punishment, or on congressional power thereover. It would simply preserve an irrestorable situation, while the Congress deliberated on both these issues.

21. S. 1969, 92d Cong., 1st Sess. (1971).

Of course such a suggestion is novel, and must (as have many other now accepted developments in constitutional law) rest principally on constitutional theory rather than on close precedent. The postulates of the theory on which it has to rest are not, however, anything like exotic in our constitutional law.

The theory is a simple one, appearing on the face of the matter. An irreversible change in situation threatens; the possibility looms that many lives may be destroyed, in contravention of what may after deliberation be judged by Congress to be our dearest national moral interests, expressed in the Constitution. The executive power, I contend, may validly act, simply and solely in order that Congress may not be rendered powerless to act with effect. It is, in part, for just such emergencies that executive power exists.

There is, as I have said, no direct and close precedent for this executive action. But neither is there an entire dearth of suggestive authority in the cases. In *United States v. Midwest Oil Co.*,²² it was decided (by a Bench on which there sat, among others, Justices White, Holmes, and Hughes) that President Taft, "[i]n aid," as his order put it, "of *proposed* legislation,"²³ might validly suspend the sale of certain lands which the Congress had actually, some twelve years earlier, explicitly laid open to public purchase. Approving this action the Court said:

The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and *being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large.*²⁴

These words, particularly the ones I have emphasized, would apply, *mutatis mutandis*, to the present issue.

The *Midwest Oil* case is, admittedly, distinguishable on three grounds — none of them, I submit, sufficient to make a difference.

First, that case involved federal property rather than federal interest with respect to the taking of life. The clear statement of this distinction exposes its nearly shameful inadequacy. The United States has, to say the least, as much interest in the sufficiency of deliberation on issues concerning the lives of its citizens as it has in holding on to its property.

Secondly, the *Midwest* opinion rested principally on prescription; the presidential power there exerted, the Court held, had been so long acquiesced in as thereby to be legitimated. But that distinction is far from fatal to the contention I am making, for long acquiescence in a process such as that used in *Midwest* could occur only in a government whose general tone and theory was friendly and not hostile to the enjoyment by the President of such power as is necessary, in affairs

22. 236 U.S. 459 (1915).

23. Temporary Petroleum Withdrawal Order No. 5, Sept. 27, 1909, *reprinted in* 236 U.S. at 467 (emphasis added).

24. 236 U.S. at 471 (emphasis added).

of the first importance, to preserve a status upon which legislation may effectively act, rather than being frustrated by intervening events. Concededly, the power I am here upholding does not rest on prescription — far from it. But the very grounds on which *Midwest* is placed suggest the point that such a power as the one now contended for would not be exotic or strange in a system of government that could acquiesce so long in actions of the *Midwest* sort.

Thirdly, the action which I contend is authorized would effect a temporary and provisional incursion on a power *prima facie* belonging to the states, whereas the *Midwest* decision concerned only federal matters in the narrow sense. This cannot be an insignificant consideration in a federal system. But I would direct attention, first, to the smallness of the proposed incursion; all that would be involved, or could be involved, would be a few weeks' reprieve for the condemned, pending consideration by a Congress in which the states, and the people of the states, are fully represented. I would also make the much more important point that nothing is so vital to the maintenance of a sound federalism as is adequate, and therefore unhurried, deliberation on the location of its balances. In the nature of the case, it is in Congress and then in the courts that this deliberation normally takes place. In debating the Hart-Celler bill, Congress will be considering whether the law and the high policy of federalism justify its own intervention. The adequacy of that deliberation, and the efficacy in practice of its outcome, are the very life's blood of sound federalism. An order of the sort which I contend the President is empowered to make, therefore, would be exactly apt to sustaining a sound federalism, in this profoundly important sense. It would go not a step further than insuring that, if Congress should determine that the national power is paramount in the premises, that determination would (if sustained by the courts) be efficacious. Finally, it must be remembered that, even in our federalism, any valid national interest, moral as well as proprietary, is paramount to state interest.

In the end, however, as to a novel question, such as the present, one must turn to the question concerning presidential power stated and, by implication, answered by affirmation of its second branch, in *In re Neagle*:²⁵

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?²⁶

Condemned men, whose lives may soon be spared by congressional action, are entitled to "protection implied by the nature of the government under the Constitution." During necessary congressional deliberation, only the President can give them that protection.

25. 135 U.S. 1 (1890).

26. *Id.* at 64.

It is of high interest, moreover, that the actual judgment in the *Neagle* case, by a step only one removed logically from the general presidential power therein approved, took a man charged with murder out of the hands of the state authorities and freed him. What I am advocating now is a much lesser degree of interference with state power in regard to the punishment of crime — the mere suspension of the administration of a penalty pending congressional deliberation thereon. The quotation from *Neagle* also serves to remind us that our foreign relations are sure to be affected by wholesale executions; this fact might motivate the President to act, and may even serve as a second basis for his power to act.

There is nothing against any of the foregoing in the precedent of *Youngstown Sheet & Tube Co. v. Sawyer*,²⁷ for the broad and simple reason that at least three of the six Justices in the majority in that case clearly based their concurrence on their belief that Congress had, by implication, forbidden the presidential step taken. By contrast, the step I am here suggesting has not been forbidden by Congress, and would extend no further than to the aiding of Congress by preserving for it the situation upon which it might decide to act. Even Mr. Justice Black's opinion for the Court stressed the ground that Congress was to make policy, and not the President; the action I propose would do no more than enable Congress efficaciously to make policy.

It should be pointed out, finally, that a presidential moratorium order could be and undoubtedly would be tested in the courts, unless Congress acted soon enough to moot any possible test. The President need not, therefore, step back, as in some other sort of case he conscientiously might, from unreviewable innovation. Indeed, presidential action might suitably include directions to the Attorney General to implement the declared moratorium by court action — perhaps, for reasons of expedition, within the original jurisdiction of the Supreme Court — so as to ensure the concurrence of the judiciary on the constitutional question, as a condition precedent to the moratorium's taking effect.

Other possibilities suggest themselves. Under the constitution of any particular state, the governor, even if he does not possess full clemency power, might be held to possess a power, with respect to executions in his state, analogous to that I have advocated for the President. Either state or federal judges, sitting in equity and faced with a threat of irreparable harm quite *sui generis*, might impose stays pending legislative action, where the latter (either in Congress or in a state legislature) seems definitely possible. Any state legislature, even if unwilling to abolish capital punishment altogether, might be prevailed upon quickly to pass a little Hart-Celler bill, imposing a moratorium for purposes of study. All these possibilities should be fully explored and pushed to the end; others may suggest themselves to other minds.

It is perhaps time to summarize. But I shall not do so; I think my principal points must be fresh in your minds. Let me instead go

27. 343 U.S. 579 (1952).

at last to the heart of the matter. There once were uttered six tremendous words: "The greatest of these is charity." Law which blushes or smirks at the mention of charity is bad law. Charity is not sending in money; charity is not merely giving other people the benefit of the doubt. Charity — in its human-to-human aspect — is the virtue of connectedness with all other people, of concern for them, of obligation for their well-being. Charity is the belief, and action on the belief, that we are all severally members each of the other. Our society, our whole world, are sick from the want of charity. We pass one another by without looking; that sums up what is wrong. Now we will never attain to within calling distance of full charity; we need not worry about going too far in that direction. But I have been talking tonight, after all, about the extremest possible denial of charity, the denial that stultifies every other move toward charity, namely our claim, and our acting on that claim, of a right officially to classify a helpless human being as a thing merely to be destroyed, a thing with which we have a right to end all relation by deliberately killing him or her after long brutalizing fear. Underlying everything I have said is my belief that we cannot move an inch toward that rough approximation to charity which must be the foundation of any good society, so long as we keep this institution in place. If you agree with me, whether in the same words or in your own, then let us work together, using the ample means afforded by our constitutional democracy, to bring it about that not one person ever again be killed by law in the United States.



