

MINUTES OF MEETING - ASSEMBLY COMMITTEE ON JUDICIARY, 54th Session, March 23, 1967

Meeting was called to order by Chairman Wooster at 2:45 P.M.

Present: Wooster, Swackhamer, White, Torvinen, Dungan, Schouweiler, Hilbrecht, Kean

Absent: Lowman

Miss Dungan moved to reconsider AB 180

Mr. Hilbrecht seconded

The motion carried, with all Ayes except Mr. Swackhamer, who voted No

Miss Dungan moved to Do Pass AB 180 as amended

Mr. Hilbrecht seconded

Motion passed, with Mr. Swackhamer voting No

MR. SWACKHAMER: Sometimes when these issues get hot your support disappears very fast. The Early Parole Bill was something like this. There is something here and somebody is going to get hurt. If you want to get hurt, that is your business.

MR. KEAN: I am sure you are right except that there is a different political thing here. That other bill was for newspaper headlines. You know that.

MR. SWACKHAMER: This seems to be a moral issue, but you can't legislate morals.

MR. KEAN: I am sure this could never be political.

MR. SWACKHAMER: I can't see where you could lose anything on this.

MR. WOOSTER: We have all been threatened on this, both ways, as far as possible.

SB 192: Nevada Administrative Procedure Act.

MR. WOOSTER: I have studied this and discussed it at great length and I have worked out four amendments.

1. Definition of "contested case": "nothing contained herein shall be construed to require a hearing where not otherwise required by law or regulation". This was Mr. Guinan's suggestion and I think it is good.
2. Delete page 3, subsection "g".
3. In section 6, page 3, line 41 insert "within twenty days".
4. Add a section which would read: "Insofar as any provision of this chapter conflicts with chapter 704 or 612 of NRS chapter 704 or chapter 612 shall govern".

I spoke with Ted Stokes about this last amendment. It isn't what he wants but he will go along with it.

Mr. Torvinen moved Do Pass SB 192 with these four amendments

Mr. Schouweiler seconded

Motion passed unanimously

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SB 386: Provides times limit for action on parole or probation violations.

MR. WOOSTER: I talked with Paul Toland about this bill. He has the authority to revoke parole, with the idea that they are then brought before the Parole Board. This bill gives them 15 days to investigate before revoking probation. The Parole Board does not have to be convened. Mr. Toland feels this bill is fine as it is.

Mr. Torvinen moved Do Pass
Mr. Swackhamer seconded
Motion passed unanimously

SB 387: Repeals portion of general improvement districts law relating to annual audits of district accounts.

MR. WOOSTER: I am satisfied now that this bill is needed.

Mr. Torvinen moved Do Pass
Mr. Schouweiler seconded
Motion passed unanimously

SB 175: Requires persons not engaged in lawful business to leave buildings and grounds of public agencies upon request at times when agency is not open.

MR. WOOSTER: We now have the amendments that Mr. Torvinen has drawn.

MR. TORVINEN: We have taken the word "property" out of the bill. We have changed it so that it must be Peace Officers that request persons to leave the building. It cannot be the custodian. If they do not leave when asked by a Peace Officer to do so, they are guilty of a misdemeanor.

MISS DUNGAN: What do you want to keep them out of the building for?

MR. TORVINEN: I don't want to. But if a group wants something from the city council and the council doesn't give it to them they may decide to stage a "sit-in", then they would have to be removed. If one of them became injured while being moved out, the Peace Officer would be liable without this bill. The bill takes him off the hook.

MISS DUNGAN: What is "lawful business"?

MR. SWACKHAMER: Any regular business during regular business hours.

MR. WOOSTER: I still think a public building is not like private property.

MISS DUNGAN: We are talking about a "sit-in". I say let them sit.

MR. TORVINEN: Let them present their case in an orderly fashion.

MISS DUNGAN: Even with the amendments, it is still so wide open.

MR. TORVINEN: Why? The building is closed. Why should the public agency have to provide light and power for some group? It could be any group.

MR. WOOSTER: We already have laws on the books for obstructing public business.

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MR. TORVINEN: I went over this with Eddie Scott. He said his only objection is general, that this is aimed at a certain group of people. He agreed with me that people should not be in a public building after hours.

MR. WOOSTER: You have to remember that we are making it a crime.

MR. SWACKHAMER: In San Francisco, right now, they are having trouble with the "hippies". They come to the city in droves, have no place to stay, and they stay in the parks.

Mr. Torvinen moved Amend and Do Pass SB 175

Mr. Swackhamer seconded

The motion carried with White, Swackhamer, Kean, Torvinen voting Aye and Wooster, Dungan and Schouweiler voting No.

PUBLIC HEARING ON AB 468: The Death Penalty Bill.

Reverend JOHN EMERSON, Carson City, Ordinary Minister of the Methodist Church, was the first to speak in favor of the abolishment of the death penalty. He spoke at some length and his remarks are attached to the minutes.

SAMUEL LIONEL: Attorney, Las Vegas.

I am here to speak in favor of AB 468. I was called by a member of the committee and asked if I would speak.

Before 1958 I never gave much thought to capital punishment, then I was caught up in a case of this kind, Jack Rainsberger. That case is still going on. It is just one of six cases now on death row in the state prison.

Jack Rainsberger is a very intelligent man. Now he is in his thirtie's. At the time of the crime he was 24. His case occurred when George Dickerson was Clark County District Attorney. Mr. Dickerson said the crime would never have occurred had not Jack lost his head.

The process of gassing is a real form of premeditated murder. There are two chairs in a little room. They take someone and put him in there and put a stethoscope to his heart. The doctor tries to determine how long it takes him to die. Sometimes it takes 11 minutes. I have examined the records to verify this. They fight and try not to breathe. They fight for life.

Mr. Fogliani once told me that when someone is scheduled to die, you have no idea of the effect of this on the other inmates. It is like electricity that descends over the whole place. People are troubled and it would take only a spark to set off a riot. It is a very traumatic experience for the inmates.

I have no statistics, but I believe the irrational variables have entered into the death sentence. Let's assume that there are 40 homicides in one year in our state. Let's also assume that we will take the top 10 percent, that is the ones who deserve the death sentence the most, and execute them. Then let's give the next 10 percent life imprisonment with no possibility of parole. But that is not what happens. The irrationable variables enter into it. The sentence depends upon where he is tried, who the judge is, what type of people are on the jury, the publicity, the general feeling among the people. There are also legal variables that enter into this.

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You remember the Miranda case where the Supreme Court reversed the decision because he was not fully warned of his rights before he made his confession. The Supreme Court decision arbitrarily says that their decision applies to a confession if made after a certain date but it does not apply to confessions made before that date.

The Walker case from Reno was taken to the Supreme Court and was upheld by a vote of 2 to 1. If that case came up today the decision would be reversed. What we have really is a system of death by roulette. All these things come into play. We are not executing those who fall within the top 10%. There is no rational method. I feel this state will do away with the death penalty and we should not be the last state.

RICHARD BRYAN: Public Defender from Clark County.

I am appearing in support of AB 468. It seems to me that those who favor retention of the death penalty must have a substantial burden of proof that it is still necessary.

The arguments usually used for retention are:

1. The deterrent theory
2. The vengeance theory.
3. Protection of society
4. Economic savings to execute rather than to maintain prisoner for years.

I think Reverend Emerson has successfully done away with the theory that it is a deterrent, whether it be violent or otherwise.

The President's Crime Commission Report, "The Challenge of Crime in a Free Society" concludes that there is no evidence to support the theory that capital punishment acts as a deterrent. Some of the arguments are that the certainty of punishment is a deterrent. Nothing is further from the truth. Right now there are approximately 331 prisoners awaiting execution in the United States. They have been in custody for an average of four years. The evidence doesn't bear out further protection to the public. A life sentence would serve just as well.

The accumulated wisdom of the ages rejects the philosophy of an eye for an eye. What are the arguments against capital punishment? Each person has to make his own moral judgment. I think it is immoral. Even if moral it doesn't necessarily follow that the state should take a life. Equality of justice ought to be our goal in the administration of justice.

The evidence would indicate that a gross inequality appears. It is the poor, the friendless the minority group, that most frequently fall under the death penalty. The death penalty is irrevocable and in anything there is the possibility of error. If the wrong man is convicted and put to death, the error can not be corrected.

The savings to the state theory: This is rather an argument for elimination of capital punishment. Think of the time involved in terms of the resources of the state in going through these endless murder trials, with their endless appeals. We now have six cases waiting in Nevada, all of which are in some form of litigation. All this is a rather staggering cost to Nevada. I believe a strong view would be that it would be less expensive to sentence to life imprisonment.

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The death sentence is immoral, it imposes inequality of sentence, it is expensive, it is irrevocable beyond the power of mere mortals to correct.

Dr. West says that legal extermination of human beings in a society engenders within the society killing as a remedy. Thirteen states have abolished the death penalty. I would like to see Nevada be number fourteen.

MR. HILBRECHT: Do you have any statistical data on other countries that have abolished the death penalty?

MR. BRYAN: No, I don't. I think that when the death penalty is being imposed but not executed, it should be done away with.

BOB LEWIS: Las Vegas Police Department.

I just found out about this hearing after noon today, so definitely I am not prepared. I will express my personal feelings and things that have happened to me.

I wonder what effect abolishing capital punishment and making it life imprisonment will have. What effect is this going to have on a killer that is in a prison control. What is there to prevent him from doing what he wants? What protects the officer? This man has nothing to lose. He is already in prison for life and he knows there will be no death penalty.

We have confirmed burglars throughout the state. These are not one-shot affairs. I have had these burglars look me in the eye and say "I would have no qualms about killing you if I thought I could get away with it". Why don't these burglars carry guns, since they have no qualms about killing? They will not take the chance of having their lives taken away from them. They tell me "I might get in a corner and use that gun if I had it with me." Capital punishment is a deterrent!

Relative to the poor and unprotected: As long as we have the system we have developed now the poor are being protected. The Public Defender in Southern Nevada is giving the people as good protection as they could get. This is not a problem now. We have got away from the poor versus the rich.

Concerning the variables: The murderer Mr. Lionel is defending was given another chance because of a variable of 5 to 4 among the judges in Washington. It was this variable that gave Mr. Lionel another chance to save the life of his client. The variables work just as well on one side as on the other.

I think most of the police officers would be against repeal of the death penalty. You cannot sentence a man to the penitentiary without the possibility of release. The people sitting on the Board of Pardons can commute any sentence. We cannot sit on a jury and sentence a man to life imprisonment and know that he will never again be back in society. The chances are good he will be.

I think it does work as a deterrent, and there are plenty of safeguards as shown by the Rainsberger case. Law enforcement as a whole would be against the death penalty repeal.

MR. TORVINEN: The professional burglars that you talked about: Do they have prior burglary convictions?

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MR. LEWIS: Some do and some don't.

MISS DUNGAN: Are there statistics available on the 13 states that do not have the death penalty that would show higher incidence of killing of police officers?

MR. LEWIS: I have no such statistics.

MR. HILBRECHT: You raised the parole power of the governor. To me, that is part of our system, to have the right to reviews, even forty or fifty years later if necessary. You would deny that to someone who has had capital punishment meted out to him.

MR. LEWIS: The death sentence is subject to revocation.

ROBERT HUMPHREY: Sheriff of Ormsby County.

I speak in opposition to abolishment of capital punishment. It is a deterrent because the convicts themselves have told me so. Many, many of them have told me they would do nothing to put themselves in the gas chamber, but that anything short of that they would do.

If a man were in prison under the death penalty and had a chance to escape, what would stop him from killing again?

One burglar told police that he would not carry a gun because he was afraid he would kill someone and wind up in the electric chair.

What about the victim of the murderer? He doesn't have any chance to get back either. I would rather think about the victims than I would about these hardened, vicious killers. The rate of rescidivism of crime is 84%. We could use our time better in some other area.

MR. HILBRECHT: Under our present statutes several crimes can be punished with death.

MR. HUMPHREY: Yes, but I don't remember it ever being used in Nevada for these other crimes. Morally, the death penalty is wrong, but we must have it. Just the possibility of it being enforced is the deterrent.

The two inmates who kidnaped the Champions: One of them told me they killed a man in Oregon where there is no death penalty, but they did not kill anyone in California or Nevada because then they would be facing a death penalty.

The hearing was adjourned at 4:30 P.M.

A CASE AGAINST CAPITAL PUNISHMENT AND IN
SUPPORT OF A.B. 468 OF THE 54TH
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I am before you today to testify for the abolition of capital punishment as an antiquated means of dealing with that anti-social problem called "capital crime." By way of introduction only, I want to point out that we are dealing with one of the gravest of moral issues: whether or not an agency has the right to schedule a person's death (for even euphenasia, commonly known as mercy killing, for the most humane reasons has not been condoned by society or law); whether or not a responsible society can rightfully commit an act of murder.

Let me hasten to say that no one, least of all myself, would deny the necessity of the state to protect society from violent crimes, such as murder, treason, kidnapping, rape and assault where extreme violence or bodily harm is inflicted, as well as protecting society from those who perpetrate such heinous crimes. But I call into serious question the notion that capital punishment is the only means of achieving such protection and the only way by which to deal with the offender.

There are principally two reasons why the death penalty prevails and its abolition is stubbornly resisted by law-making bodies and others. One reason is that many proponents of capital punishment fail to consider the evidence calling the death into question. Many of these proponents ridicule statistics supporting abolition, because they have no facts of their own to submit for the alleged effectiveness of capital punishment. A second reason why the death penalty prevails is that the desire for vengeance is a deep and unconscious human emotional force in all of us.

Let me quickly move on to four arguments in defense of abolishing the death penalty with supportive evidence. These four arguments are: (1) that capital punishment is not punishment; (2) that the strong probability that heinous crimes are committed by mentally deranged persons makes penalties meaningless and rehabilitation advisable; (3) that certain variables introduced in the decision of the death sentence strongly suggests no equality under the law; and (4) that studies indicate that capital punishment is not clearly an effective deterrent to capital crimes. Let us consider each of these arguments in more detail.

I

First, capital punishment is not a punishment. Death has nothing to do with punishment, for punishment implies a measure to correct an individual's attitude or behavior. Execution is so final that no opportunity is given for correction.

A parent reprovcs a child in hopes that the youngster will learn a lesson to be applied later in life. There is certainly some evidence that certain crimes can be deterred by punishment. A traffic fine is a means of persuading an offender to improve his driving habits. The threat of exposure and punishment can deter collusion and embezzlement. Execution, however, in exterminating the criminal offers no incentive for improvement. Even with the threat of execution, capital crimes continue to be committed. Let us be honest and say that we are not punishing but killing, taking revenge. It is clearly a misnomer to label the death penalty capital "punishment."

II

Secondly, those of us with training in psychology and counseling who have had clinical experience in mental hospitals and penal institutions are increasingly convinced that a very thin line separates the criminal from the mentally ill. In this connection, I am not speaking of "insanity," for that is a legal term used in court proceedings which may or may not bear relationship to mental illness of various types and degrees. It is inconceivable to me that, a violent act of murder, even if premeditated, is spawned from a healthy, balanced mind.

We live in an enlightened age with new skills and tools being perfected for rehabilitating the handicapped and disoriented. We have the capacity, through the social sciences, to understand that the criminal is often the product of a delinquent home and social environment which planted within him the seed of hate, greed and violence. I wish it were possible for me to relate to you the case histories of potential criminals under my care for two years in a California children's home, the backgrounds of violent and disoriented persons in the violent ward of a Vermont mental hospital where I was both an attendant and later a chaplain, the counseling sessions I have had with inmates in our own state prison; but I am pledged to keep such privileged information in confidence. I assure you that I speak out of experience. I am convinced that a great number of those who perpetrate vicious crimes of a capital nature are mentally deranged. To the psychopathic killer, a penalty is meaningless, and death by execution perhaps is a welcome escape from a tormenting life for one too weak and cowardly to take his own life. Is murder by the state the best way to deal with such individuals?

III

Thirdly, let us consider the observation that a substantial number of those convicted of capital crimes and sentenced to death can be characterized as 266 follows:

- they are poor and unable to pay for a good attorney and for court appeals;
- they are friendless with few caring enough to fight in their behalf;
- they are poorly educated with estimations that $\frac{1}{4}$ of those executed are mentally defective and $\frac{2}{3}$ have not been educated beyond the 8th grade; and
- a proportionately large number are of minority groups and thus are subject to greater suspect.

In addition, about one out of seven of all murders are committed by women who are rarely executed.

A conclusion could be easily drawn that a caucasian woman, well-educated with friends and money could escape the death penalty. On the other hand, a lonely, unemployed and poorly-educated Mexican would likely receive the full limit of the law. As portrayed in the novel, To Kill a Mockingbird, the defendant might be innocent and yet condemned to death and actually receive the penalty. Let me quote Warden Lawes of Sing Sing Prison who once said: "In the 12 years of my wardenship I have escorted 150 men and 1 woman to the death chamber and the electric chair . . . In one respect they were alike. All were poor, and most of them were friendless." San Quentin's Clinton Duffy has corroborated this in his own experience. (Lewis Lawes, Twenty Thousand Years in Sing Sing, p. 336)

The salient point I am trying to make here is that there are so many irrational variables that can enter the decision of execution, including the hysteria of public and press sensationalism, attitudes of the judge and jury, and who the defendant is rather than the nature of his crime. Is, then, the death penalty a judicious and indiscriminating law? I think not.

IV

The fourth and final argument surrounds the most widely used utilitarian explanation for the death penalty: the assumption that it is an effective deterrent to capital crime.* The process of deterrence is a psychological one. It presumes that life is regarded by man as a precious possession which we want to preserve more earnestly than anything else. He would then defend it to the utmost against every threat, including that of execution by the state. Every such threat, it is thought, arouses his fear and as a rational being he would try to conduct himself in such a manner as to avoid the threat. It is further

*From Sellin's The Death Penalty, Amer. Law Inst. Press, 1959, pp. 19-38.

assumed that the potential threat is made vivid to him because he knows that the death penalty exists.

If the death penalty offers a potential threat, restraining human conduct, we may assume further that the greater the threat the more effective it would be. Its deterrent power means many things, however. First, there is the death penalty proscribed by law as a mandatory or discretionary punishment for crime. Then, there is the death penalty that exists as a threat to a person arrested for a capital crime. There is also the threat of capital punishment as pronounced in the sentence. Finally, there is the threat of the penalty actually applied to the offender. The potential power of deterrence of the death penalty is not the same at all levels of manifestation. Were it present in the law alone it would lose its most potent threat.

It is reasonable to assume that if the death penalty exercises a real deterrent to prospective murderers or rapists or kidnapers, the following would be true:

- murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal; and that murders should increase where the death penalty has been abolished and should decline where it is restored.

Such comparisons have been made among states that are as alike as possible in population and social and economic conditions in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these states. But before we examine such studies, we must make two assumptions: first, that the finality of execution offers the strongest means of deterrence. Secondly, that we do not know with any great degree of accuracy how many murders punishable by death occur. In the U.S., where only murders in the first degree of similar murders are subject to the death penalty, no accurate statistics of such offenses exist. Yet this is the only type of murder which people are presumably to be deterred from committing. Most deaths are probably recorded, but among deaths regarded as accidental or due to natural causes or suicide there are no doubt some successful murders. Where the killer never becomes known it is often impossible to determine if the death was due to murder.

Students of criminal statistics have examined homicide data with enough care to conclude that the homicide death rate is adequate for an estimate of the trend of murder, to use just this one and undoubtedly the most often committed capital crime punishable by death. This conclusion is based on the assumption that the proportion of capital murders in the total of such deaths remain reasonably constant. Accepting this assumption, we can examine the relationship between

executions and the rates of death due to homicide.

From the Comparative Crude Homicide Death Rates in States With and States Without the Death Penalty, 1920-1955 (a 35 year span), we can draw an interesting comparison among the New England states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut, all belonging to the same culture area. Two of these states, Maine and Rhode Island, have no death penalty. The similarity in the rates of these states is obviously noticeable. The same can be said for homicide rates and executions in the neighboring mid-western states of Michigan, Ohio and Indiana; Minnesota, Wisconsin and Iowa; and North Dakota, South Dakota and Nebraska. The data reveal that:

- The level of the homicide death rates varies in different groups of states. It is lowest in the New England areas and in the northern states of the middle west and lies somewhat higher in Michigan, Indiana and Ohio.
- Within each group of states having similar social and economic conditions and populations, it is impossible to distinguish the abolition state from the others.
- The trends of the homicide death rates of comparable states with or without the death penalty are similar.

The inevitable conclusion is that executions have no discernible effect on homicide death rates which, as we have seen, are regarded as adequate indicators of capital murder rates.

It would be of help to also examine data regarding those states which introduced or abolished the death penalty. Arizona had no capital punishment between December 8, 1916 and December 5, 1918. The Governor reported that 41 murderers were convicted during the 2 year period prior to abolition, and 45 the following 2 years. Kansas returned to the practice of executions in 1935. The annual average homicide death rate dropped from 6.5 during the five year prior to 1935 to 3.8 during the next five years. South Dakota went back to the death penalty in 1939. The rate of homicide deaths before and after that year remained constant at 1.4. The abolition of capital punishment in Delaware in April of 1958 has not been followed by any appreciable increase in murders. In its city of Wilmington, which contains more than a third of the state's population, there were 10 murders known to the police during 1957, one in March of 1958 and none since then to the middle of November of 1958. (read from Brit. MS, p. 7-8) McCafferty, "Major Trends in the use of C.P.", Federal Probation Sept. '61, pp.3-21.

Let us consider quickly other reasons why capital punishment is no effective deterrent. The first has to do with the circumstances under which most murders occur. A daily reading of the newspaper discloses that most murders are not committed by hardened underworld racketeers or repeaters, but by wives or husbands,

boy-friends or mistresses. Crimes of passion are rarely premeditated but committed on impulse. They result from deep emotional disturbances that do not weigh the consequence of penalty by death. About 3/5 of all murders in California occur during an armed robbery not by habitual criminals but bungling amateurs, those interrupted during their crime and decided to shoot it out with their victims or with police. About 1/4 of the murders in the same adjoining state are of the passion murder type.

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A study entitled "The Home is for Homicide" reveals that the chances are 5 to 1 that you will be murdered by a member of your own family than by a deliberate act of a stranger. (Dan Taylor, Peace and Power, p. 20)

Another reason capital punishment proves ineffective as a deterrent is that the murderer could calculate the consequences without fearing death. He might decide, for example, that he preferred death to life imprisonment. He might also decide that the chances are pretty good that he will not be executed anyway. And he would be right about that, for only the occasional murderer is executed. In the State of Nevada only 31 persons have been put to death in the gas chamber since 1924. The last one was executed in 1961. There are only six on death row at the present time. Most, if not all of them, have appeals pending in court.

Let me conclude my remarks by asking what we should do with these persons instead of killing them. Quickness and sureness in bringing the criminal to justice, not severity. There is a growing realization that a civilized society should redeem and rehabilitate rather than destroy human life. This can be accomplished within the limit of life imprisonment without possibility of parole, as specified in the present measure under your study. With a strong rehabilitation and work program within the prison, the criminal can serve a useful purpose to society. While the cost of initiating such a program would likely increase the tax burden, in subsequent years the production of goods and services to society and the redemption of human beings would begin to pay for itself.

Perhaps our faith in the rehabilitative process can be strengthened by these facts regarding parole during a recent 9 year period in California. 342 persons who had been convicted of murder in the first degree were paroled. They had served an average of 12½ years in prison. Of these 342 only 37 ever violated their parole, and most of the violations were technical. Only nine of them were ever recommitted to prison. Only one of them was for murder and this time it was in the second degree, which means that it was a provoked attack. Other states and other nations that use the clinical approach have similar success with parole. (Sub-committee of the Judiciary Committee of the California Assembly, Vol. 20, No. 3, January 1957).

I am not versed in the technicalities of jurisprudence to examine critically each section of the Assembly bill before you. But after reading the bill carefully, I believe it is a sound and responsible piece of legislation. Laws help to educate the citizenry. While public opinion is not vocal in overwhelming support of A.B. 468 (although this does not mean necessarily that it does not have wide support), this becomes yet another occasion for the legislature to lead and educate the public in providing for the commonwealth. Life imprisonment without possibility of parole both meets the need to protect society, punish the offender and attempt to redeem and salvage a human being to be productive with the remainder of his life. I urge your support of A.B. 468. I will be happy to answer any questions you may have.

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Presented in a hearing of the Nevada
Assembly Judiciary Committee,
March 23, 1967.

John H. Emerson