JOINT ASSEMBLY AND SENATE JUDICIARY COMMITTEES
March 10, 1977
8:00 a.m.

Senate Members present:	Assembly Members present:
Chairman Close	Chairman Barengo
Senator Bryan	Assemblyman Hayes
Senator Ashworth	Assemblyman Price
Senator Foote	Assemblyman Coulter
Senator Gojack	Assemblyman Wagner
Senator Sheerin	Assemblyman Sena
Senator Dodge	Assemblyman Ross
	Assemblyman Polish
	Assemblyman Banner

This meeting was called to order at 8:00 a.m. by Senator Close for the purpose of hearing testimony on the capital punishment bills.

Assembly Bill 403:

Mr. Geno Menchetti, Attorney General's Office, Chief of the Criminal Division, was first to testify on this bill. He gave the committees some history on this matter and advised them that in 1972, the United States Supreme Court said we couldn't have death penalties that allowed arbitrary and capricious application of the death penalty. Pursuant to that decision some 36 or 37 State Legislatures passed new death penalty statutes. In 1975 the Supreme Court issued five (5) cases; they upheld three (3) state statutes and overturned two (2) state statutes. He said that the point is that we now have three approved state statutory schemes. They have tried to incorporate these things in this bill, A.B. 403. This bill is presented by the Attorney General's Office, however, Mr. Menchetti stated that it is not their bill. It is a bill that they put together after a series of meetings with law enforcement agencies throughout the state. He then made reference to his letter dated March 8, 1977 to the Chairman of the Assembly Judiciary Committee, which is attached hereto and marked as Exhibit "A". He noted for the committee that there are a number of changes to the bill listed in said letter. At this point, Mr. Menchetti detailed for the committees, various sections of this bill. He stated that in this bill, there are two sections, one of which lists the crimes which capital punishment is applicable to. Upon questioning from Senator Close, Mr. Menchetti explained that this bill lists certain specific crimes for which the death penalty must be imposed and for no other crimes than those listed in the first section. The second part of the statute provides for aggravating and mitigating circumstances. He stated that one of the key things in this bill that the committee should be aware of is page 2, lines 33 to 37. He said that they left in this bill a situation whereby the death sentence is mandatorily imposed if there is a murder by an individual who is under a sentence of death or life without the possibility of parole. There was concern about this part of the bill expressed by Senator Sheerin and questioning of Mr. Menchetti followed. Senator Gojack was concerned with Mr. Menchetti's statement regarding death penalty being a deterrent to crime. Senator Dodge pointed out that on page 3, line 50, regarding the conducting of

a separate sentencing, that this was unclear. Mr. Menchetti agreed. At this point, Mr. Menchetti made reference to the aggravating and mitigating circumstances listed on pages 2 and 3 of the bill. He stated that the law requires that a jury find at least one of those circumstances before it can impose the death sentence. It also needs to consider mitigating circumstances and it balances those two and, again, it cannot impose the death sentence unless it finds an aggravating circumstance which outweighs a mitigating circumstance. Even if it finds an aggravating circumstance which outweighs a mitigating circumstance, it is not required to return the death penalty, so, the jury in that instance, can return a sentence of life without the possibility of parole if they feel the death penalty is not appropriate. Upon questioning from Assemblyman Price regarding where terrorist activities would be covered in this bill under capital punishment. Mr. Menchetti pointed out different areas of the bill that this might be covered under, however, he could come up with some further specific language to include this. There was some further questioning from committeemen of Mr. Menchetti regarding some terminology used in these aggravating circumstances. He then advised the committees that beginning on the bottom of page 3 of the bill and continuing on page 4, the procedure is set out and basically requires the Court to conduct a separate hearing before the same judge or jury and that trier receives evidence, this evidence being broader than the evidence allowed in the criminal proceeding. Mr. Menchetti then referred the committee to the review section and the fact that they have a problem with this section, as indicated in his aforementioned letter (Exhibit "A"). He detailed this problem for the committees. He told the committee that there is one issue that has not been raised by this panel and that he would like to raise it because he is sure they will encounter it. It is a legal issue of whether or not you can have a crime listed in the capital offense area and then have an aggravating circumstance very similar to that, if, in fact, that is not something unconstitutional. The argument would be that because the aggravating circumstance is the same as the element of the crime that this is, in fact, a mandatory death sentence. In response, he pointed out that in two of the three cases where the penalty was upheld, both of the defendants were convicted of felony murder and the Court , in both of these cases, found an aggravating circumstance was that they were committed for the purposes of receiving money or committed during the commission of a felony. Therefore, he feels that the Court has addressed that issue already and said that that is not, in fact, the problem with these statutes.

Senate Bill 220:

Senator Raggio addressed the joint committees on S.B. 220, as its introducer. At this time, he went over his Memorandum of February 22, 1977 to the Senate Judiciary Committee with regard to S.B. 220, which is attached hereto and marked as Exhibit "B". He then made reference to his comparison study of the capital punishment bills, which is attached hereto and marked as Exhibit "C". There was some questioning and deliberation amongst the committeemen on various points. Sen. Raggio touched on the point of having a three-panel judge and gave reasons of why he felt this was so important.

Senator William Hernstadt then addressed the committees briefly regarding all three capital punishment bills. He stated that he proposed an amendment to Sen. Raggio's bill (S.B. 220), which basically the concept would provide that the death penalty only be applied to those persons who have either plead guilty or have, at some point in the proceeding, made an admission of guilt by confession or in testimony. The theory behind this

idea is that once a person is executed, they cannot be brought back from the grave, it is an irreversible process.

Mr. Larry Hicks, District Attorney of Washoe County and President of the Nevada Association of District Attorneys, then testified on these bills, in particular, supporting Senate Bill 220, and secondly supporting A.B. 403 as an alternative concept. He is supportive of S.B. 220 for the reason that it allows the flexibility to assess the death penalty in the type of case where it would commonly be considered appropriate. He feels that a problem exists when you start categorizing different types of capital murder for the reason that the most aggravating cases seldom will fall within those categories. He further addressed himself to some of the questions he heard in these hearings earlier to some sections in S.B. 220. He felt the burden of proof should rest with the State. He also feels the mental illness or mental disorder of the defendant should be a consideration in mitigation of penalty. He feels that there are some disorders of the mind that would not necessarily excuse the commission of the crime, to the extent that the defendant did know the difference between right and wrong. He feels the strongest point in this bill is that which provides for prior notice of the aggravating circumstances to the defendant. The problem here is that the DA makes the decision of what the aggrevating circumstances are. You cannot look into the law books in Nevada and tell what other aggrevating circumstances of a like nature are. He feels if we are going to put in a law, where we can obtain the death penalty and the prosecutor is going to be able to go into the court room and get it in an appropriate case, you want to be able to do everything you can to make your record on appeal as strong as possible. He thinks by doing anything that indicates that there is a factor that is not written in the books of the State, can create a problem on appeal. Another point he brought out was the fact that none of the bills provide for the situation where the jury cannot agree on the death penalty. There should be something defined somewhere to provide either for a new jury to be impaneled, to have it decided by the Judge, or have it just revert automatically to life with or without possibility of parole. There should also be a provision, which there has been in the past, for a plea of guilty to first degree murder with a recommendation on sentence. The way this reads now, he has got to go through the penalty trial or the penalty hearing. There are many cases that clearly should just go to the court on a life, with or without. He also feels that when the death penalty is imposed by the jury that it should be set forth that it be by unanimous decision.

Senator Close asked if there was anyone who now wished to testify against these bills.

John B. Moore, Pastor of the First United Methodist Church in Reno stated that his group is in opposition to capital punishment. He submitted his testimony for the record (see exhibit D). He also stated that he personally is against life without the possibility of parole. He has known of cases where a person was imprisoned for murder for life, was subsequently released and has led a productive life.

Onie Cooper, President Reno/Sparks NAACP stated his organization is emphatically opposed to capital punishment. He stated that the report he has passed out (see exhibit E) will give some indicators to why they are opposed. They feel that discrimination because of race has proven that, negro as it were and blacks as it is now, have been the victims of capital,

punishment. One thing this report does not bring out, is the amount of offenses committed and acquitted by each of these races. If you could make some research you would find that the acquittal rate has been higher for the whites, as well as the capital punishment rates has been higher for the blacks. We find in almost all capital punsihment for blacks, it has been 40 to 5 times higher in all areas. He feels that under life without the possibility of parole, no one should be given that much time. He feels there should be punishment and a form of correction worked out with that person, and put him back into society and make him repay the damage that is done. It costs the state to keep a man in prison, the taxpayers have to pay to keep him, so put him under some kind of program whereby he can repay society.

Eddie Scott stated that he wishes to concur with those expressing opposition to the death penalty. Also, he would like to get rid of the laundry list. He feels that there should be a limit on how much money is spent on trials. If you have a lawyer that is paid $300 for defense and then the State spends $25,000, where is the equality. Also the increase of the prison budget of 13 million doallrs, why can't we provide jobs for these people on the inside. He feels that at $8 a month no one should go wanting for a job and that is the only way you are going to rehabilitate anyone. If you have people sitting around idle, you are going to have problems.

Geri Alcamo, American Friends Service Committee stated that she had her testimony and an article that she wished to submit into the record (see exhibits F & G). Their group feels that capital punishment is not a deterrent, that it is not serving justice, instead it is for revenge. Also it is discriminatory against the poor and the minorities. It is very true that sometimes people, for the good of other people, have to be kept somewhere away from society, but they don't feel that capital punishment will solve this. Their main thrust is for rehabilitation, its reconciliation for working out whatever is possible between parties and the whole thing going on in that vein rather than the vein of revenge.

Senator William Raggio stated he would just like to make one more brief statement. He feels that some of these comments need a response. First, if the committee does decide to process any of these measures he would be more than happy to work with the committee, as there are amendments that are needed. On the issue of capital punishment as a whole, he suggests that the statistics provided on race are a portion of statistics you can consider. However they do not address a lot of issues involved. They don't address for example the issue of what percentage of crimes, in any given period are committed by a particular race, if you want to look at race classifications. If you look at FBI statistics, over the years, you will find that there is some correlation between the punishment, not only capital punishment, that are committed by various racial categories. He stated he really was not trying to suggest race into this, but he feels that the statistics presented were misleading. He felt it should be noted also, that since 1960 when the Supreme Court started federal review of these cases, there is a never ending situation which we are now found in. That is the reason that a lot of these penalties are not carried out. He believes in the administration of criminal justice, whether a capital case or another type of crime there are at least 3 aspects that we have to consider. One is the protection of society, secondly the deterrent and third rehabilitation of the offender, if possible. In many cases he feels that

rehabilitation is more of a realistic approach. Punishment is a factor and ought to be a factor, especially in these henious crimes involving homicide. Over the years he has gone to the scenes of crimes and has seen people that were butchered, hacked and mutilated. So, he feels there is a point where certain people forfeit the right to live among society. It disturbs him that someone can come in and say, "look, we have to forgive and forget", because that is exactly what they are asking you to do if you talk about getting away from capital punishment. He stated he would not be so convinced about capital punishment, if someone could convince him that it is not a deterrent to crime. He has had many cases where the people involved in the crime have told him if it were not for the threat of the death penalty, they would have killed. There are certain types of passion cases where it is not going to be a deterrent, but, in most he feels it is a worthwhile penalty.

There being no further testimony, the meeting was adjourned at 11:00 a.m.

Respectfully submitted,

Anne M. Peirce

Anne M. Peirce, Secretary

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
CAPITOL COMPLEX
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CARSON CITY 89710

ROBERT LIST
ATTORNEY GENERAL

March 8, 1977

The Honorable Robert R. Barengo
Chairman, Assembly Judiciary Committee
Legislative Guilding
Carson City, Nevada 89710

re: A. G. 403

Dear Assemblyman Barengo:

As you know, this office, after meeting with the law enforcement community of the State of Nevada, drafted a proposed death penalty bill and forwarded it to the legislative bill drafter. That bill has subsequently come out as A. G. 403. However, due to either attempts to standardize the bill or clerical errors, there are some significant changes between our draft and the bill as it appears in printed form.

I submit to the committee the following changes which will bring A. B. 403 back in line with the proposal submitted by this office on behalf of the law enforcement community:

Page 2, line 9, the words "one of the criminal acts defined in this section: should be deleted and replaced with "murder in any degree", so that subsection (g) reads, in toto: "A person who has previously been convicted of murder in any degree."

Page 2, line 49, the word "aggravated" should be removed, and the words "punishable by death" substituted, so that Sec. 3 reads: "The offense of capital murder is punishable by death only if one or more of the following aggravating circumstances is present:"

Page 3, line 22, should be rewritten so that subsection 8 reads: "The murder was especially heinous, atrocious or cruel, outrageous, wanton, vile, horrible or inhuman, or involved torture, depravity of mind or the mutilation of the victim."

Page 3, line 24, strike the word "is" and add the words "may be", so that Sec. 4 reads: "The offense of capital murder may be mitigated under one or more of the following circumstances:"

EXHIBIT A

Page 4, line 10, strike the words "evidence may be presented" and substitute: "either party may present evidence", so that the first line of subsection 2 reads: "In the sentencing proceeding, either party may present evidence on any ..."

Page 4, line 16, the word "defendant" should be removed and the word "parties" added, so that the sentence (beginning on line 14) may read: "The evidence may be presented ... but the parties shall be accorded a fair opportunity to rebut any hearsay evidence."

Page 4, lines 22 and 23, strike the word "sufficient" so that line 22 reads: "Whether aggravating circumstances are found to exist;" and line 23 reads: "Whether mitigating circumstances are found to exist;"

Also on page 4, line 33, insert, between the word "were" and the word "found", the word "unanimously", so that line 33 reads: "... the aggravating circumstance or circumstances which were unanimously found beyond a reasonable doubt, ..."

On page 5, line 9, between the word "cases" and the word "which", add the words "in Nevada", so that line 9 reads, "... similar cases in Nevada which it considered."

Also on page 5, line 23, insert the words "in Nevada" between the word "case" and the word "in", so that line 23 reads, "... court with a synopsis of the facts for each case in Nevada in which the death sentence ..."

Lastly, I think I should inform the Committee that in discussing the amendments to Chapter 177 of NRS with Chief Justice Cameron Batjer, he indicated to me that the provisions for review by the Nevada Supreme Court for standardization may well be outside the powers that the Nevada Constitution allows the Supreme Court. One suggestion would be to require the parole and probation information to be given to the district judge for his review before entry of judgment, and then the Supreme Court could in fact review his analysis of that information. Hopefully, we will get some information from the Court Planning office on this issue.

If this office can be of any further assistance in this most important bill, please don't hesitate to contact us.

Sincerely,

ROBERT LIST
Attorney General

By D. G. Menchetti
Deputy Attorney General
Chief, Criminal Division

DGM:lt

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Nevada Legislature

FIFTY-NINTH SESSION

DATE: February 22, 1977

TO: Senator Melvin D. Close, Jr., Chairman
Committee on Judiciary
Nevada State Senate

FROM: William J. Raggio, State Senator

SUBJECT: SB 220

I have drawn on my 18 years as a prosecutor in formulating the concept for imposition of capital punishment which appears in SB 220.

This measure reinstates the former law in Nevada which authorized capital punishment in all cases of first degree murder, but allowed the jury to fix the sentence at death, life imprisonment, with or without possibility of parole.

I have previously submitted an amendment to you which should be considered with the Bill.

I have spoken with Justice David Zenoff of the Nevada Supreme Court about SB 220 in view of the Courts recent decision in Smith v. Nevada, Adv.Op. No. 35, February 17, 1977. In his opinion this Bill meets all requirements of the U.S. Supreme Court and is consistent with the Smith decision.

I worked with the Bill Drafter for some time to develop the best possible criteria, both aggravating and mitigating circumstances to be applied by the jury in the penalty provision of the bifurcated trial.

I have requested a memorandum from Frank Daykin which indicates the sources utilized in preparation of this Bill and am submitting same, together with copies for your Committee's information.

I will be most interested in appearing in support of the measure if necessary.

WJR:mt

Attachments

EXHIBIT R

TO: Senator William J. Raggio

FROM: Frank W. Daykin

SUBJECT: Memorandum on S.B. 220.

Background. In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court rendered inoperable every state's death penalty statute. There was no clear plurality in the Furman decision, only 9 separate opinions with 2 dominant themes, first, that the death penalty was being applied arbitrarily and capriciously, and second, that juries were allowed too much discretion in capital cases.

The National Association of Attorneys General concluded that the best way to limit discretion and end arbitrariness was to make the death penalty mandatory for a few narrowly defined offenses. Over half of the 35 states which adopted new death penalty statutes followed the association's advice. The association was wrong. In the "Death Penalty" cases, Gregg v. Georgia, et al., the Supreme Court approved three death penalty statutes which controlled the discretion of juries, but disapproved two mandatory death penalty statutes. 96 S.Ct. 2909 (1976). It was only a matter of time until Nevada's mandatory capital murder statute was declared unconstitutional, which occurred in Smith v. Nevada, Adv.Op. No. 35, February 17, 1977.

The "Death Penalty" cases. The Supreme Court decided that jury discretion can best be controlled by a bifurcated proceeding--first, a trial to determine guilt, and then a penalty hearing to determine the sentence. The jury's discretion is also to be controlled in the penalty hearing by requiring aggravating circumstances to be weighed against mitigating circumstances in deciding whether the death penalty should be applied. The bifurcated hearing and

B 2

the weighing by the jury are mandatory constitutional requirements set forth in Gregg. (See subsection 4 of section 1 and section 6 of S.B. 220 for the bifurcated procedure and weighing procedure, and sections 3 and 4 of S.B. 220 for aggravating and mitigating circumstances.) The appellate review procedure which was approved in Gregg is perhaps not mandatory (see Rockwell v. Calif., 134 Cal.Rptr 650, 657 (1976)), but was included in S.B. 220 because the Gregg decision referred to the appellate procedure as "an important additional safeguard against arbitrariness and caprice ...." Gregg, 96 S.Ct., at 2937. (See section 9, at line 10, and section 11 of S.B. 220 for appellate procedure.)

Constitutionality of S.B. 220. In Smith v. Nevada, the Nevada Supreme Court said, "In short, more than simply the limitation of the imposition of the death penalty to certain narrow, specific situations of murder is necessary to meet the standards of the Furman and Gregg cases." Adv.Op., at 3. The central question on the constitutionality of S.B. 220 is whether aggravating circumstances which are identical to the classifications that constitute first degree murder are too broad. S.B. 220 takes a slightly different approach to aggravating circumstances than do the Georgia and Florida statutes.

In the Georgia statute, the death penalty applies generally to first degree murder, but at least one aggravating circumstance must be found. Apparently there was a conscious effort to make Georgia's aggravating circumstances qualitatively or quantitatively more narrow than the classifications which constitute first degree murder. In the Florida statute, the death penalty also applies generally to first degree murder, and at least one aggravating circumstance must be found, but one of the aggravating circumstances is identical to a first degree murder classification, that of felony murder. Since that aggravating circumstance was approved in Gregg, it is reasonable to infer that premeditation and escaping

from custody, the other classes of first degree murder in NRS 200.030, subsection 2, can also be aggravating circumstances as well as first degree murder classifications.

Moreover, the Supreme Court in Gregg identified the outer limit of application of its decision to be "when a life has been deliverately taken by the offender ...." 96 S.Ct. at 2932.

Sources of aggravating and mitigating circumstances. The criterion used in determining whether an aggravating or mitigating circumstance was appropriate was whether it was compatible with existing criminal law in Nevada. For example, all of the capital murder classifications of NRS 200.030 (1) were included in section 3 of the bill as aggravating circumstances. One exception to the criterion may be the aggravation mentioned in paragraph (a) of subsection 2 of section 3 of S.B. 220, "The defendant personally committed the act or acts which caused the death of the victim," and the companion mitigation mentioned in paragraph (d) of subsection 1 of section 4, "The defendant did not directly commit or physically aid in the commission of the act or acts causing death." These were derived in modified form from Calif. Penal Code § 190.2 and .3, and it is noted that they may permit a jury to adopt California's vicarious responsibility rule of felony murder, at least as to mitigation of the sentence. The vicarious responsibility rule, which goes to the question of guilt, requires that the defendant or his accomplice have committed the murder in furtherance of the common design.

The most important omissions were as follows. First, Florida mitigating factor (b), "the capital murder was committed while the defendant was under the influence of extreme mental or emotional disturbance," adopted from the Model Penal Code and cited with approval in Gregg, was omitted because it would introduce a doctrine similar to "irresistible impulse" into Nevada law. Similarly, Florida mitigating factor (f), "the capacity of the defendant to

appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," adopted from the Model Penal Code and cited in Gregg, was omitted because it would introduce a lower standard of insanity than the M'Naghten rule into Nevada law.

Also, a watered-down version of the M'Naghten rule was not included as a mitigation for two reasons. First, the insanity defense is procedurally different from other defenses in that it must be pleaded separately, and may be pleaded at least twice, both before trial, and, with good cause, at trial. NRS 174.035, subsection 2. Second, the policy difference between insanity and other defenses is that insanity is analogous to the impermissible defense of "ignorance of the law," that is, it is a defense that almost everyone will assert, whether justified or not. Insanity differs from "ignorance of the law" in that it is, in fact, permissible, but the risk of unjustified assertion of the defense has caused English-speaking courts to adopt the strict M'Naghten rule, which focuses attention on deviation from norms of ordinary human behavior, that is, impairment of reason and understanding, rather than focusing on sickness and the unique aberrations of the defendant.

Because of the procedural difference between the insanity defense and other defenses, and especially because the insanity defense is, for policy reasons, a strict rule, strictly applied, it was considered inappropriate to add a weakened M'Naghten rule as a mitigating circumstance. Rather, it was felt that an inclusion such as that ought to be made by the committee.

Following are the sources of the aggravating and mitigating circumstances with references made in shortened form, and an appendix is attached which contains the full text of all the sources used.

Sources of aggravating circumstances:

Page 2:

Ga. (7) and Fla. (h)

Analogous to Fla. (g)

NRS 200.030(1)(e), but see M.P.C. (c)

Adapted from Cal. Penal Code § 190.2 (b)

SEC. 3. *The offense of murder of the first degree may be further aggravated under one or more of the following circumstances:*

1. The offense was:

(a) Heinous, atrocious or cruel in that it involved extreme torture, depravity of mind or an aggravated battery to the victim.

(b) An act of terrorism in that the victim was kidnaped or held as a hostage to demand or extort an act or valuable thing from a public officer or public agency of this state.

(c) The murder of more than one person willfully, deliberately and with premeditation as the result of a single plan, scheme or design.

2. The defendant:

(a) Personally committed the act or acts which caused the death of the victim.

Page 3:

Ga. (4), but see Fla. (f)

Ga. (3), Fla. (d), & NRS 200.030(1)(d)

An example of implied malice, NRS 200.020(2)

NRS 200.030(1)(c)

Ga. (6)

NRS 200.030(1)(b); see Fla. (a)

Adapted from Calif. Penal Code § 190.2 (b)(4), Ga. (1) & Fla. (6)

Ga. (5)

Calif. Penal Code § 190.2 (b)(2)

NRS 200.030(1)(a) & Calif. Penal Code § 190.2 (b)(1)

(b) Committed murder, for himself or another, for the purpose of obtaining money or any other thing of monetary value.

(c) Knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

(d) Murdered one or more persons at random and without apparent motive.

(e) Was a party to a contract to kill, or agreement, with or without consideration, whereby one or more of the parties to the agreement committed murder.

(f) Caused or directed another to commit murder or committed murder as an agent or employee of another person.

(g) Was under sentence of death or life imprisonment without possibility of parole.

(h) Has a prior criminal record which includes:

(1) A conviction for murder, burglary, arson, rape, robbery or the sexual molestation of a child under the age of 14 years; or

(2) A substantial history of convictions for battery or other crimes involving the use or threat of violence to the person.

3. The victim was:

(a) A judicial officer or district attorney, or former judicial officer or district attorney, murdered during or because of the exercise of his official duty.

(b) A witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

(c) A peace officer or fireman who was intentionally killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman. For purposes of this paragraph "peace officer" means sheriffs of counties and their deputies, marshals and policemen of cities and towns, the chief and agents of the investigation and narcotics division of the department of law enforcement assistance, personnel of the Nevada highway patrol, and the warden, deputy warden, correctional officers and other employees of the Nevada state prison when carrying out the duties prescribed by the warden of the Nevada state prison.

Sources of nitigating circumstances:

Page 3:

4. Any other aggravating circumstances of a like nature.

SEC. 4. The offense of murder of the first degree may be mitigated under one or more of the following circumstances:

1. The defendant:

(a) At the time the offense was committed:

Fla. (g) — *(1) Was of a youthful age;*

Adapted from M.P.C. (d) — *(2) Reasonably believed the circumstances provided a moral justification or extenuation of his conduct; or*

Fla. (e) — *(3) Acted under extreme duress or under the substantial domination of another person.*

Fla. (d) — *(b) Was an accomplice to a murder committed by another person and his participation was relatively minor.*

Adapted from Calif. Penal Code § 190.3 (b) — *(c) Was not personally present during the commission of the act or acts causing death, except in the circumstances referred to in paragraphs (e) and (f) of subsection 2 of section 3 of this act.*

Page 4:

Adapted from Calif. Penal Code § 190.3 (b) — *(d) Did not directly commit or physically aid in the commission of the act or acts causing death.*

See Gregg at 96 S.Ct. 2936 — *(e) Cooperated with the police.*

Fla. (a) — *(f) Has no significant history of prior criminal activity.*

Adapted from Calif. S.B. 450 (1973) — *(g) Has a background and history, including family ties, employment, education or any other relevant factor, which demonstrates there is a substantial likelihood the defendant:*

(1) Will be reformed and rehabilitated; and

(2) Will not willfully and unlawfully kill another human being.

2. The victim:

Fla. (c) — *(a) Consented to the act.*

Fla. (c) — *(b) Was a participant in the defendant's conduct.*

See NRS 200.410 — *(c) Engaged in a duel with the defendant.*

3. Any other mitigating circumstances of a like nature or recognized by law.

Sources of aggravating and mitigating circumstances:

Aggravation:	Mitigation:
Nevada: NRS 200.030 (1)	none

1. Capital murder is murder which is perpetrated by:
(a) Killing a peace officer or fireman:
(1) While such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity; and
(2) With knowledge that the victim is or was a peace officer or fireman.
For purposes of this paragraph "peace officer" means sheriffs of counties and their deputies, marshals and policemen of cities and towns, the chief and agents of the investigation and narcotics division of the department of law enforcement assistance, personnel of the Nevada highway patrol when exercising the police powers specified in NRS 481.150 and 481.180, and the warden, deputy warden, correctional officers and other employees of the Nevada state prison when carrying out any duties prescribed by the warden of the Nevada state prison.
(b) A person who is under sentence of life imprisonment without possibility of parole.
(c) Executing a contract to kill. For purposes of this paragraph "contract to kill" means an agreement, with or without consideration, whereby one or more of the parties to the agreement commits murder. All parties to a contract to kill are guilty as principals.
(d) Use or detonation of a bomb or explosive device.
(e) Killing more than one person willfully, deliberately and with premeditation as the result of a single plan, scheme or design.

Georgia Code Ann. 27-2534.1 (b)	none

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Aggravation:

Florida Stat. Ann. 921.141 (5)

Florida Statutes Annotated Section 921.141(5) (Supp.1976–1977) lists as aggravating circumstances:

"(a) The capital felony was committed by a person under sentence of imprisonment.

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

"(c) The defendant knowingly created a great risk of death to many persons.

"(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(f) The capital felony was committed for pecuniary gain.

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) The capital felony was especially heinous, atrocious, or cruel."

Mitigation:

921.141 (6)

"(a) The defendant has no significant history of prior criminal activity.

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(c) The victim was a participant in the defendant's conduct or consented to the act.

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

"(e) The defendant acted under extreme duress or under the substantial domination of another person.

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

"(g) The age of the defendant at the time of the crime." (§ 921.141(6) (Supp.1976–1977).)

Model Penal Code

The Model Penal Code proposes the following standards:

"(3) Aggravating Circumstances.

"(a) The murder was committed by a convict under sentence of imprisonment.

"(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

"(c) At the time the murder was committed the defendant also committed another murder.

"(d) The defendant knowingly created a great risk of death to many persons.

"(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

"(g) The murder was committed for pecuniary gain.

"(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

Model Penal Code

"(4) Mitigating Circumstances.

"(a) The defendant has no significant history of prior criminal activity.

"(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

"(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

"(f) The defendant acted under duress or under the domination of another person.

"(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

"(h) The youth of the defendant at the time of the crime." Model Penal Code § 210.6 (Proposed Official Draft, 1962).

B,

Aggravation:

Calif. Penal Code 190.2

Section 190.2 provides: "The penalty for a person found guilty of first-degree murder shall be death in any case in which the trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:

"(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. 'An agreement,' as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.

"(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:

"(1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

"(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

"(3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

"(i) Robbery, in violation of Section 211.

"(ii) Kidnapping, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.

"(iii) Rape by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of Section 261.

"(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.

"(v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling housing entered by the defendant with an intent to commit grand or petit larceny or rape.

"(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree."

Mitigation:

190.3

Section 190.3 exempts certain defendants from the death penalty, providing:

"(a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

"(b) Except when the trier of facts finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37 or 128, the death penalty shall not be imposed upon any person who is a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts."

S.B. 450 (1973) (amended out of 190.2)

"(6) There are no substantial facts in mitigation of the offense, and any of the following is true:

"(i) The defendant's background, history, and prior criminal record, if any, demonstrate, beyond a reasonable doubt, that there is no substantial likelihood of his being reformed and rehabilitated.

"(ii) There were aggravating circumstances surrounding the commission of the offense which demonstrate, beyond a reasonable doubt, that there is no substantial likelihood of his being reformed and rehabilitated.

"(iii) There were aggravating circumstances surrounding the commission of the offense which, when viewed in light of the defendant's background, history, and prior criminal record, if any, demonstrate beyond a reasonable doubt that there is a substantial likelihood that the defendant will willfully and unlawfully kill another human being." (Sen. Bill No. 450, March 14, 1973. Emphasis added.)

Subdivision (6) was deleted in its entirety by a June 4, 1973, amendment.

1. The principal difference between S.B. 220 and A.B. 403 is the scope of the class of murders for which the death penalty may be imposed. The following chart shows the different classes of murders for which the death penalty may be imposed, as found in NRS 200.030:

Until 1972

First degree murder:

1. Premeditation
2. Felony murder
3. Murder by a convict lifer

1973-77

Capital murder:

1. Peace officer
2. Murder by convict lifer
3. Contract to kill
4. Bomb
5. Premeditated killing of more than 1 (unconstitutional as applied)

S.B. 220

First degree murder:

1. Premeditation)
2. Felony murder)1972
3. Avoiding arrest or escape from custody

A.B. 403

Capital murder:

1. Public officer or peace) officer
2. Murder by convict lifer)
3. Contract to kill) 1973-
4. Bomb)
5. Premeditated killing of) more than 1
6. Felony murder-1972
7. Prior conviction for dangerous felony
8. Escape from custody

EXHIBIT 78

Nevada's murder statute which was in force through 1972 was the traditional Ohio first degree murder statute. The death penalty could be imposed primarily for:

1. Premeditated murder and
2. Felony murder.

From 1973 until the present, the scope of the class of murders for which the death penalty could be imposed was severely narrowed to include only 5 types of capital murder.

S.B. 220 would restore the death penalty to substantially the same class of "death penalty" murders which existed in 1972, that is, premeditated murder and felony murder. A.B. 403 would extend the existing capital murder statute to include felony murder, but not premeditated murder. This is logically putting the cart before the horse.

During this century the fundamental element of first degree murder has been a mens rea or mental state of malice or intent to kill. Felony murder is classified as first degree murder because the mental state of a person who commits a dangerous felony is reckless, in that he knew or should have known that murder might ensue. Felony murder thus includes as first degree murder some killings which, except for the felony, would not likely be intentional. For example, killing a pedestrian in a cross-walk during flight from the scene of a felony is first degree murder, but without the felony it would be manslaughter, or at the worst second degree murder.

A person who commits an intentional act has always been considered more culpable or blameworthy than a person who commits a reckless act.

This fundamental policy decision, which is found at the heart of the criminal law and the law of torts, is given recognition in S.B. 220 by including willful, deliberate and premeditated killing in the class of "death penalty" murders. A.B. 403 rates felony or reckless murder as more blame worthy than intentional murder, by including the former but not the latter in the class of "death penalty" murders.

S.B. 220 permits the death penalty to be imposed for substantially the same class of murders as in 1972. A.B. 403 does not. It is clearly permissible to permit imposition of the death penalty for traditional first degree murder. New Jersey just enacted such a statute.

2. A second distinction between S.B. 220 and A.B. 403 is the procedure in imposing the death penalty. The "Death Penalty" cases recently decided by the United States Supreme Court primarily addressed procedural issues in imposition of the death penalty. The Council of State Governments pamphlet "Legislating a Death Penalty" summarizes the procedures which must be included when drafting a new death penalty statute, as follows:

Perhaps the most unique feature in the recent U.S. Supreme Court decisions on capital punishment is the apparent grant of wide latitude to the States in enacting laws relating to the death penalty. The statutes of Georgia, Florida and Texas had three distinct methods of providing for capital punishment. Each one, though different in

mode and method, was upheld. What binds these three different legislative packages together are three major themes pointed out repeatedly by the Court:

(1) A bifurcated hearing on the issue of guilt and penalty:

(2) Most important of all, and definitely required, procedures to focus on (a) the circumstances of the offense, and (b) the individual, with room for discretion, and the exercise of mercy amd mitigation; and

(3) Meaningful appellate review.

How each individual State, wishes to handle those three criteria is up to the State. But it should incorporate the above three factors and must definitely comply with the second one.

(Howard J. Schwab (1977) p.18)

Both S.B. 220 and A.B. 403 make provision for these three procedural requirements. The major difference is the manner is which S.B. 220 and A.B. 403 make provision for considering the circumstances of the offense and the individual.

S.B. 220 defines first degree murder as aggravated murder for which the death penalty may be imposed. In other words, a finding of guilty of premeditated murder, felony murder or murder while escaping from custody, is, in itself, a finding of an aggravating circumstance. S.B. 220 does not require the sentencing authority at the penalty hearing to make a second, identical finding of first degree murder as an aggravating circumstance. The initial finding of aggravated murder carries over, and the sentencing authority is required to find only additional aggravating circumstances and mitigating circumstances.

A.B. 403 requires a finding of guilty of capital murder at the trial, and a finding of a separate aggravating circumstance at the penalty hearing. In A.B. 403 an aggravating circumstance may be identical to the underlying capital murder, so that the same thing must be found both at the trial and at the penalty hearing. The best example is felony murder, which is both a capital offense (A.B. 403, p.2, line 6) and an aggravating circumstance (p.3, line 8). The difference between S.B. 220 and A.B. 403 in this instance is that an element must be found only once as opposed to twice. A.B. 403 apparently requires two findings of the same thing because the Florida first degree murder statute, which was approved by the U. S. Supreme Court, required two findings.

It may be argued that if the only aggravating circumstance found is the aggravated nature of the offense, that there is a forbidden, automatic or mandatory death sentence, unless the defendant meets the burden of showing mitigating circumstances. If such an argument is valid against S.B. 220, it is also valid against A.B. 403 with respect to felony murder and several other instances where the offense and the aggravation are identical, and it is also valid against the Florida statute approved by the Supreme Court.

The gist of the procedure which is required by the "Death Penalty" cases is that the sentencing authority must consider the circumstances of both the offense and the defendant, both the aggravating and mitigating circumstances, and weigh them in deciding whether to impose the death penalty. Both S.B. 220 and A.B. 403 provide for this.

The Supreme Court did not address itself to the question of when an aggravating circumstance must be found, but only that it must be considered, or weighed, against mitigating circumstances.

The Supreme Court apparently granted the states wide latitude in enacting death penalty statutes. If the committee feels that there should be two findings where the nature of the offense is also an aggravating circumstance, it is recommended that S.B. 220 be amended by deleting the phrase "[aggravated nature of the offense and additional] aggravating circumstances," and adding the elements which constitute first degree murder (S.B. 220, p.2, lines 4 to 10) to the list of aggravating circumstances (p.2, line 40).

With reference to letter from Attorney General dated 2-28-1977

P.2, line 43 The aggravating circumstance of "An act of terrorism" need not preclude extortion from the moneyed groups, i.e., the banks, casinos and so forth, since "pecuniary gain" is already an aggravation.

P.2, line 49 The aggravation, "personally committed the act or acts which caused the death of the victim," would permit a jury not to apply the vicarious responsibility rule for a felony murder sentence, especially in tandem with the mitigation, "Did not personally commit the act..." (p. 4, line 3) or "Was not personally present (p. 3, line 49).

P. 3, line 18 "Substantial history" is vague and in need of quantification (" a prior conviction" or "2 or more") See Gregg, 96S.Ct. at 2939.

P.3, line 21 "Prosecuting attorney" to be substituted for "district attorney"--good point.

P.3, line 37 and P.4 line 36 Aggravating and mitigating circumstances "of a like nature": This would be a question of law for the judge to decide, not the jury, and since aggravating circumstances to be argued by the state must be divulged to the defendant before the penalty hearing, there is reasonable opportunity to object. The problem addressed here is similar to the problem encountered in trying to list every conceivable deadly weapon. The restriction "of a like nature" keeps the scope of added circumstances reasonably narrow.

P. 4, line 24 Add ", or the court if the trial was without a jury," --good point.

P.4, lines 42-50 Although the jury must announce findings of mitigating circumstances, they will only make findings on issues submitted to them by the judge, and there is a threshhold evidentiary standard to prevent a flood of irrelevant issues at submission.

P.4, lines 45-50 Mandates a death sentence if the aggravation outweighs mitigation--I am not aware of any statute that permits a life sentence instead of death in these circumstances, and if there were one, it would certainly vitiate the "controlled discretion" which is the key requirement of the penalty hearing if the jury can arbitrarily not impose death where it is warranted.

P.5, lines 6 to 13 The report is to assess passion, prejudice or arbitrariness, and any lingering doubts about guilt or the death sentence, as suggested in Gregg, 96 S.Ct. at 2922. An assessment of "the quality of the defendant's representation" was omitted. These requirements were.

P. 5, line 49 On review, the supreme court must determine whether the sentence is disproportionate "in similar cases." The addition of "in Nevada" is good.

S.B. 220--Significant differences or omissions:

P.2, line 40 to P.3, line 37	The offenses which currently constitute capital murder are aggravating circumstances in S.B. 220, and the capital murder classification is eliminated.
	Aggravating circumstances in S.B. 220 but not A.B. 403:
P.2, line 43	"an act of terrorism..."
P.2, line 49	"Personally committed the act..."
P.3, line 6	Murder at random or without motive
P.3, line 11	Murder by agent or employee
P.3, line 21	Murder of judicial officer or district attorney
P.3, line 24	Murder of a witness to a crime
P.3, line 4	Other aggravation "of a like nature"
	Mitigating circumstances in S.B. 220 but not A.B. 403:
P.3, line 49	"was not personally present..."
P.4, line 3	"Did not directly commit...the act..."
P.4, line 5	Cooperated with police
P.4, line 7	Background and history other than of crime
P.4, line 15	Engaged in a duel
P.4, line 16	Other mitigation "of a like nature"
P.4, line 23	If mitigation outweighs aggravation, the sentence may be life with as well as without parole. A.B. 403 provides only for life without parole.
P.4, line 24	The procedure should provide for a penalty hearing by the court without a jury if the case was tried without a jury, as provided in A.B. 403 at P.4, line 3.
P.4, line 29	No evidence may be used if seized in violation of the 4th amendment. A.B. 403 is contra, P.4, line 14.
P.4, line 31	State must notify defendant of aggravating circumstances to be argued. Not in A.B. 403.
P.4, line 44	Jury must be instructed on and make a finding on each mitigating circumstance. Not in A.B. 403.
P.4, line 49	Jury must impose death if aggravation outweighs mitigation. Not in A.B. 403 which apparently permits life even if aggravation outweighs mitigation.
P.5, line 6-10-11-14	Sentencing provisions. Not in A.B. 403. Report on prejudice of jury or lingering doubt about guilt or sentence. Not in A.B. 403.
P.5, line 33	S.B. 220 provides for automatic review of sentence, whereas A.B. 403 provides for automatic appeal of guilt as well as review of sentence (P. 4, line 43 to P.5, line 18).

A.B. 403--Significant differences or omissions

	Capital murder is retained and augmented.
P.2, line 21	First degree murder is killing to "avoid arrest" or "escape from custody"
P.2, line 11	Capital murder is killing "while incarcerated"
P.3, line 14	Aggravating circumstance if the murder was to "avoid arrest" or "escape from custody"
P.2, line 33	The mandatory death penalty for murder committed by a person already under sentence of death or life imprisonment without possibility of parole is clearly unconstitutional. Sec, e.g., Woodson v. North Carolina, 96 S.Ct. 2978, 2990 (1976).
	Aggravating circumstance in A.B. 403 but not S.B. 220:
P.3, line 18	Murder of a public officer
	Mitigating circumstances in A.B. 403 but not S.B. 220:
P.3, line 27	Irresistible impulse
P.3, line 41	Watered down standard of insanity
P.4, line 3	Provides for sentencing hearing before judge only. Not in S.B. 220.
P.4, line 7	Provides for empaneling new jury for sentencing hearing. Not in S.B. 220.
P.4, line 14	Evidence may be presented regardless of the exclusionary rule. S.B. 220 is contra (P.4, line 29).
P.4, line 18	Provides for who may argue the question of sentence. Not in S.B. 220.
P.4, line 43 to P.5, line 18	Provides for automatic appeal of finding of guilt (not in S.B. 220) as well as automatic review of sentence (in S.B. 220).
P.5, line 17	Permits the Supreme Court to set aside the death penalty. Not in S.B. 220.
P.5, line 19-38	Provides a source for synopses of similar death penalty cases. Not in S.B. 220.
P.5, line 39	Provides for passage and approval! Not in S.B. 220.

Exhibit D

FIRST UNITED METHODIST CHURCH

Reno's First Church – Organized in 1868

First Street at West
Phone: (702) 322-4564

P.O. Box 789
Reno, Nevada 89504

John V. Moore Douglas M. McCoy
Ministers

March 10, 1977

Senate and Assembly Judiciary Committees
Nevada Legislature

Honorable Members of the Legislature:

I am John V Moore, pastor of the First United Methodist Church of Reno. I am here to testify in opposition to capital punishment.

I have no new nor different arguments. The historic arguments persuaded the General Conference of the United Methodist Church to reaffirm in 1976 the long-standing opposition of the church to capital punishment.

I do not speak for the United Methodist Church. No individual can. Only our General Conference can speak for the church. The General Conference said last April in Portland:

> "There have been new calls for the use of the death penalty in the United States. Although there has been a moratorium on executions for the past several years, a rapidly rising rate of crime in the American society has generated support for the use of the death penalty for certain serious crimes. It is now being asserted, as it was often in the past, that capital punishment would deter criminals and would protect law abiding citizens.
>
> The United Methodist Church is convinced that the rising crime rate is largely an outgrowth of unstable social conditions which stem from an increasingly urbanized and mobile population, from a long period of economic recession, from an unpopular and disruptive war, a history of unequal opportunities for a large segment of the nation's citizenry and from inadequate diagnosis and treatment of criminal behavior. The studies of the social causes of crime continue to give no substantiation to the conclusion that capital punishment has a deterrent value.
>
> The United Methodist Church is convinced that the nation's leaders should direct attention to the improvement of the total criminal justice system and to the elimination of the social conditions which breed crime and cause disorder, rather than fostering a false confidence in the effectiveness of the death penalty. The use of the death penalty gives official sanction to a climate of violence.
>
> The United Methodist Church declares its opposition to the retention and use of capital punishment and urges its abolition."

I would be glad to respond as best I can to any inquiries, speaking, of course, only for myself.

Thank you,

John V Moore

John V Moore

NATIONAL PRISONER STATISTICS #46, August 1971, published by U.S. Department of Justice Bureau of Prisons.

Table 1. - PRISONERS EXECUTED UNDER CIVIL AUTHORITY IN THE UNITED STATES, BY RACE, OFFENSE AND YEAR: 1930-1970

(For years 1930-1959 excludes Alaska and Hawaii except for three Federal executions in Alaska: 1939, 1948, 1950)

Year	All offenses				Murder				Rape				Other offenses[a]		
	Total	White	Negro	Other	Total	White	Negro	Other	Total	White	Negro	Other	Total	White	Negro
All years	3,859	1,751	2,066	42	3,334	1,664	1,630	40	455	48	405	2	70	39	31
Percent	100.0	45.4	53.5	1.1	100.0	49.9	48.9	1.2	100.0	10.5	89.0	0.4	100.0	55.7	44.3
1969, 1970	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
1968	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
1967	2	1	1	-	2	1	1	-	-	-	-	-	-	-	-
1966	1	1	-	-	1	1	-	-	-	-	-	-	-	-	-
1965	7	6	1	-	7	6	1	-	-	-	-	-	-	-	-
1964	15	8	7	-	9	5	4	-	6	3	3	-	-	-	-
1963	21	13	8	-	18	12	6	-	2	-	2	-	1	1	-
1962	47	28	19	-	41	26	15	-	4	2	2	-	2	-	2
1961	42	20	22	-	33	18	15	-	8	1	7	-	1	1	-
1960	56	21	35	-	44	18	26	-	8	-	8	-	4	3	1
1959	49	16	33	-	41	15	26	-	8	1	7	-	-	-	-
1958	49	20	28	1	41	20	20	1	7	-	7	-	1	-	1
1957	65	34	31	-	54	32	22	-	10	2	8	-	1	-	1
1956	65	21	43	1	52	20	31	1	12	-	12	-	1	1	-
1955	76	44	32	-	65	41	24	-	7	1	6	-	4	2	-
1954	81	38	42	1	71	37	33	1	9	1	8	-	1	-	1
1953	62	30	31	1	51	25	25	1	7	1	6	-	4	4	-
1952	83	36	47	-	71	35	36	-	12	1	11	-	-	-	-
1951	105	57	47	1	87	55	31	1	17	2	15	-	1	-	1
1950	82	40	42	-	68	36	32	-	13	4	9	-	1	-	1
1949	119	50	67	2	107	49	56	2	10	-	10	-	2	1	1
1948	119	35	82	2	95	32	61	2	22	1	21	-	2	2	-
1947	153	42	111	-	129	40	89	-	23	2	21	-	1	-	1
1946	131	46	84	1	107	45	61	1	22	-	22	-	2	1	1
1945	117	41	75	1	90	37	52	1	26	4	22	-	1	-	1
1944	120	47	70	3	96	45	48	3	24	2	22	-	-	-	-
1943	131	54	74	3	118	54	63	1	13	-	11	2	-	-	-
1942	147	67	80	-	115	57	58	-	25	4	21	-	7	6	1
1941	124	59	64	1	102	55	46	1	20	4	16	-	1	-	1
1940	124	49	75	-	105	44	61	-	15	2	13	-	4	3	1
1939	160	80	77	3	145	79	63	3	12	-	12	-	3	1	2
1938	190	96	92	2	154	89	63	2	25	1	24	-	11	6	5
1937	147	69	74	4	133	67	62	4	13	2	11	-	1	-	1
1936	195	92	101	2	181	86	93	2	10	2	8	-	4	4	-
1935	190	119	77	4	164	111	66	4	13	2	11	-	2	2	-
1934	168	65	102	1	154	64	89	1	14	1	13	-	-	-	-
1933	166	77	81	2	153	75	76	2	7	1	6	-	2	1	1
1932	140	62	75	3	128	62	63	3	10	-	10	-	2	-	2
1931	152	77	72	4	137	76	57	4	15	1	14	-	1	-	1
1930	155	90	65	-	147	90	57	-	6	-	6	-	2	-	2

Exhibit E

AMERICAN FRIENDS SERVICE COMMITTEE
RENO AREA OFFICE 560 Cranleigh Drive, Reno, Nevada 89502 (702) 323-1302

First may I thank you for this opportunity to speak. My name is Geri Alcamo and I am representing the American Friends Service Committee for the Reno Area. We are a Quaker sponsored service organization that has traditionally been concerned with human dignity and life.

Our organization has a deeply felt commitment to peace, nonviolence and justice. We have a long history of concern with the immorality of capital punishment. Our organization is a member of the National Coalition Against the Death Penalty.

The fundamental question is whether the state has the right to take human life. There is a substantial body of belief that the state has no such right.

There is also substantial evidence that resort to capital punishment reflects a desire for revenge rather that reflecting a commitment to justice. Further, there is no conclusive evidence that the death penalty deters crime.

The death penalty falls heaviest on poor and non-white people as a result of their lack of equal access to legal and other resources and as a reflection of the lesser value society assigns to their lives.

Our system of justice is made up of people and we are all fallable. Dare we risk one life to the final and total violence we call capital punishment? Beyond the horror of mistakes, errors and mitigating circumstances stands the all pervasive question: Do we have the right to take another human life? We believe without question that we have not. We cannot teach our children to seek nonviolent solutions in life when we condone official death.

Prison wardens who have supervised executions have at times attested to the fact that the death penalty is futile and works brutal mental torture on the condemned and his or her family. Former death row inmates who were pardoned or won appeals and now lead productive lives offer living proof that no human is beyond rehabilitation. The death penalty is contrary to moral and religious teachings and when there is a choice between life and death, the moral verdict should be for life. The devastating and long-lasting effect of calculated murder by the state upon family members of executed persons is incalculable. Who is the victim? If we retain the death penalty, we all are. We do not gain by executing another. But, we do lose- something of that which makes us human.

EXHIBIT F

Capital Punishment

By Abe Fortas

I believe that most Americans, even those who feel it is necessary, are repelled by capital punishment; the attitude is deeply rooted in our moral reverence for life, the Judeo-Christian belief that man is created in the image of God. Many Americans were pleased when on June 29, 1972, the Supreme Court of the United States set aside death sentences for the first time in its history. On that day the Court handed down its decision in *Furman v. Georgia*, holding that the capital-punishment statutes of three states were unconstitutional because they gave the jury complete discretion to decide whether to impose the death penalty or a lesser punishment in capital cases. For this reason, a bare majority of five justices agreed that the statutes violated the "cruel and unusual punishment" clause of the Eighth Amendment. The result of this decision was paralysis. Thirty-six states proceeded to adopt new death-penalty statutes designed to meet the Supreme Court's objection, and beginning in 1974, the number of persons sentenced to death soared. In 1975 alone, 285 defendants were condemned—more than double the number sentenced to death in any previously reported year. Of those condemned in 1975, 93 percent had been convicted of murder; the balance had been convicted of rape or kidnapping.

The constitutionality of these death sentences and of the new statutes, however, was quickly challenged, and on July 2, 1976, the Supreme Court announced its rulings in five test cases. It rejected "mandatory" statutes that automatically imposed death sentences for defined capital offenses, but approved statutes that set out "standards" to guide the jury in deciding whether to impose the death penalty. These laws, the court ruled, struck a reasonable balance between giving the jury some guidance and allowing it to take into account the background and character of the defendant and the circumstances of the crime.

> 'The law of revenge has its roots in the deep recesses of the human spirit, but that is not a permissable reason for retaining capital punishment.'

The decisions may settle the basic constitutional issue until there is a change in the composition of the Court, but many questions remain. Some of these are questions of considerable constitutional importance, such as those relating to appellate review. Others have to do with the sensational issues that accompany capital punishment in our society. Gary Gilmore generated an enormous national debate by insisting on an inalienable right to force the people of Utah to kill him. So did a district judge who ruled that television may present to the American people the spectacle of a man being electrocuted by the state of Texas.

The recent turns of the legislative and judicial process have done nothing to dispose of the matter of conscience and judgment for the individual citizen. The debate over it will not go away; indeed, it has gone on for centuries.

Through the years, the number of offenses for which the state can kill the offender has declined. Once, hundreds of capital crimes, including stealing more than a shilling from a person and such religious misdeeds as blasphemy and witchcraft, were punishable by death. But in the United States today, only two principal categories remain—major assaults upon persons, such as murder, kidnapping, rape, bombing and arson, and the major political crimes of espionage and treason. In addition, there are more than 20 special capital crimes in some of our jurisdictions, including train robbery and aircraft piracy. In fact, however, in recent years murder has accounted for about 90 percent of the death sentences and rape for most of the others, and the number of states prescribing the death penalty for rape is declining.

At least 45 nations, including most of the Western democracies, have abolished or abandoned capital punishment. Ten U.S. states have no provision for the death penalty. In four, the statutes authorizing it have recently been declared unconstitutional under state law. The Federal Criminal Code authorizes capital punishment for various offenses, but there have been no executions under Federal civil law (excluding military jurisdiction) since the early 1960's.

Public-opinion polls in our nation have seesawed, with some indication that they are affected by the relative stability or unrest in our society at the time of polling. In 1966, a public-opinion poll reported that 42 percent of the American public favored capital punishment, 47 percent opposed it and 11 percent were undecided. In 1972-1973, both the Gallup and Harris polls showed that 57 percent to 59 percent of the people favored capital punishment, and a recent Gallup poll asserts that 65 percent favor it.

Practically all scholars and experts agree that capital punishment cannot be justified as a significantly useful instrument of law enforcement or of penology. There is no evidence that it reduces the serious crimes to which it is addressed. Professor William Bowers, for example, concludes in his ex-

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that statutory or judicial developments that change the risk of execution are not paralleled by variations in homicide rates. He points out that over the last 30 years, homicide rates have remained relatively constant while the number of executions has steadily declined. He concludes that the "death penalty, as we use it, exerts no influence on the extent or rate of capital offenses."

I doubt that fear of the possible penalty affects potential capital offenders. The vast majority of capital offenses are murders committed in the course of armed robbery that result from fear, tension or anger of the moment, and murders that are the result of passion or mental disorder. The only deterrence derived from the criminal process probably results from the fear of apprehension and arrest, and possibly from the fear of significant punishment. There is little, if any, difference between the possible deterrent effect of life imprisonment and that of the death penalty.

In fact, the statistical possibility of execution for a capital offense is extremely slight. We have not exceeded 100 executions a year since 1951, although the number of homicides in death-sentence jurisdictions alone has ranged from 7,500 to 10,000. In 1960, there were only 56 executions in the United States, and the number declined each year thereafter. There have been no executions since 1967. In the peak year of 1933, there were only 199 executions in the United States, while the average number of homicides in all of the states authorizing capital punishment for 1932-33 was 11,579.

A potential murderer who rationally weighed the possibility of punishment by death (if there is such a person), would figure that he has considerably better than a 98 percent chance of avoiding execution in the average capital-punishment state. In the years from 1960 to 1967, his chances of escaping execution were better than 99.5 percent. The professional or calculating murderer is not apt to be deterred by such odds.

An examination of the reason for the infrequency *(Continued on Page 24)*

death. The evidence is that they are often prone to bring in a verdict of a lesser offense, or even to acquit, if the alternative is to impose the death penalty. The reluctance is, of course, diminished when powerful emotions come into play—as in the case of a black defendant charged with the rape of a white woman.

(2) Prosecutors do not ask for the death penalty in the case of many, perhaps a majority, of those who are arrested for participation in murder or other capital offenses. In part, this is due to the difficulty of persuading juries to impose death sentences; in part, it is due to plea bargaining. In capital cases involving more than one participant, the prosecutor seldom asks for the death penalty for more than one of them. Frequently, in order to obtain the powerful evidence necessary to win a death sentence, he will make a deal with all participants except one. The defendants who successfully "plea bargain" testify against the defendant chosen for the gallows and in return receive sentences of imprisonment.

This system may be defensible in noncapital cases because of practical exigencies, but it is exceedingly disturbing where the result is to save the witness's life at the hazard of the life of another person. The possibility is obvious that the defendant chosen for death will be selected on a basis that has nothing to do with comparative guilt, and the danger is inescapable that the beneficiary of the plea-bargain, in order to save his life, will lie or give distorted testimony. To borrow a phrase from Justice Byron R. White: "This is a grisly trade...." A civilized nation should not kill A on the basis of testimony obtained from B in exchange for B's life.

(3) As a result of our doubts about capital punishment, and our basic aversion to it, we have provided many escape hatches. Every latitude is allowed the defendant and his counsel in the trial; most lawyers representing a capital offender quite properly feel that they must exhaust every possible defense, however technical or unlikely; appeals are

types of cases, are grounds for reversal; governors have, and liberally exercise, the power to commute death sentences. Only the rare, unlucky defendant is likely to be executed when the process is all over.

In 1975, 65 prisoners on death row had their death-penalty status changed as a result of appeals, court actions, commutation, resentencing, etc. This was more than 20 percent of the new death-row prisoners admitted during that peak year.

It is clear that American prosecutors, judges and juries are not likely to cause the execution of enough capital offenders to increase the claimed deterrent effect of capital-punishment laws or to reduce the "lottery" effect of freakish selection. People generally may favor capital punishment in the abstract, but pronouncing that a living person shall be killed is quite another matter. Experience shows that juries are reluctant to order that a person be killed. Where juries have been commanded by law to impose the death penalty, they have often chosen to acquit or, in modern times, to convict of a lesser offense rather than to return a verdict that would result in execution.

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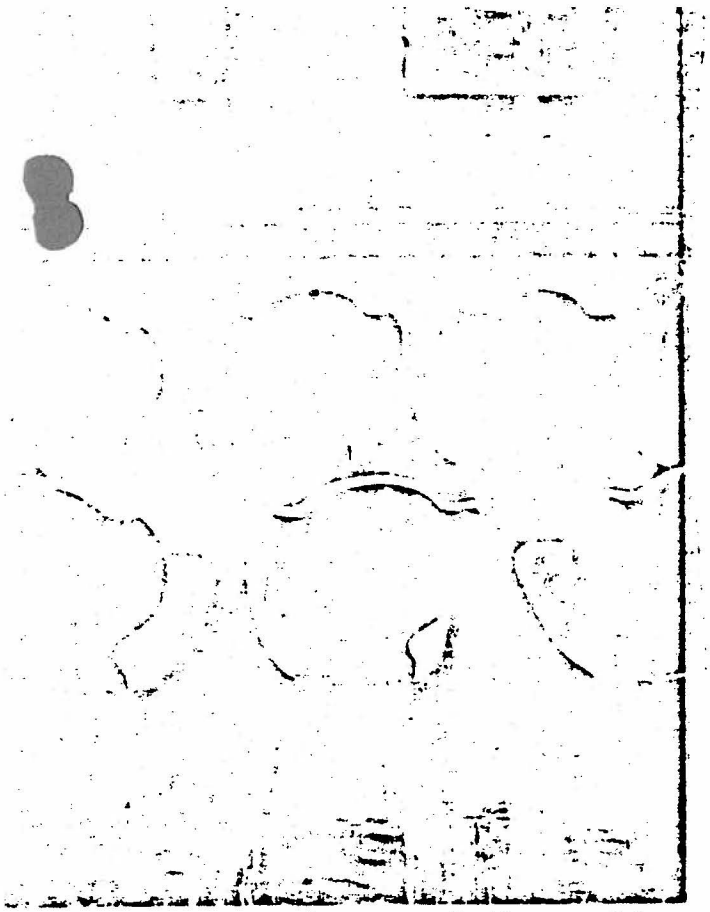
The law is a human instrument administered by a vast number of different people in different circumstances, and we are inured to its many inequalities. Tweedledee may be imprisoned for five years for a given offense, while Tweedledum, convicted of a similar crime, may be back on the streets in a few months. We accept the inevitability of such discriminations, although we don't approve of them, and we constantly seek to reduce their frequency and severity. But the taking of a life is different from any other punishment. It is final; it is ultimate; if it is erroneous, it is irreversible and beyond correction. It is an act in which the state is presuming to function, so to speak, as the Lord's surrogate.

We have gone a long way toward recognition of the



ectric chair and witnesses' seats at Florida State Prison. T[illegible]sue is fundamental. It is wrong for the state to kill."

[illegible] character of capital [illegible]ment, We insist that it imposed for relativeiy few mes of the most serious na- e and that it be imposed ly after elaborate precau- ns to reduce the possibility error. We also inflict it in fashion that avoids the ex- me cruelty of such methods drawing and quartering, ough it still involves the rbaric rituals attendant on electrocution, the gal- vs or the firing squad.

But fortunately, the death nalty is and will continue to sought in only a handful cases and rarely carried t. So long as the death nalty is a highly exceptional nishment, it will serve no terrent or penological func- n; it will fulfill no prag- atic purpose of the state; d inevitably, its selective position will continue to be fluenced by racial and class judice.

[illegible] the standards that can [illegible]tten, all of the word [illegible] and the procedural [illegible]ards that can be de- ed to compel juries to im- se the death penalty on pital offenders without ex- ption or discrimination will be of no avail. In a 1971 capital-punishment case, Justice John Harlan wrote on the subject of standards. "They do no more," he said, "than suggest some subjects for the jury to consider during its deliberations, and [the criteria] bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected."

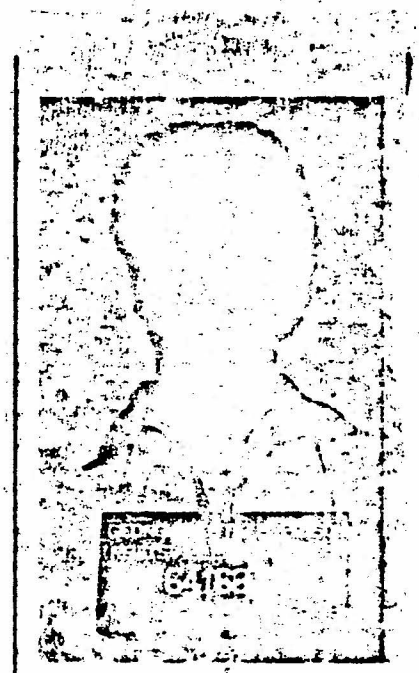
Form and substance are important to the life of the law, but when the law deals with a fundamental moral and constitutional issue—the disposition of human life—the use of such formulas is not an acceptable substitute for a correct decision on the substance of the matter.

The discrimination that is inescapable in the selection of the few to be killed under our capital-punishment laws is unfortunately of the most invidious and unacceptable sort. Most of those who are chosen for extinction are black (53.5 percent in the years 1930 to 1975). The wheels of chance and prejudice begin to spin in the police station; they continue through the prosecutor's choice of defendants for whom he will ask the death penalty and those he will choose to spare; they continue through the trial and in the jury room, and finally they appear in the Governor's office. Solemn "presumptions of law" that the selection will be made rationally and uniformly violate human experience and the evidence of the facts. Efforts to bring about equality of sentence by writing "standards" or verbal formulas may comfort the heart of the legislator or jurist, but they can hardly satisfy his intelligence.

If deterrence is not a sufficient reason to justify capital-punishment laws and if their selective application raises such disturbing questions, what possible reason is there for their retention? One other substantive reason, advanced by eminent authorities, is that the execution of criminals is justifiable as "retribution." This is the argument that society should have the right to vent its anger or abhorrence against the offender, that it may justifiably impose a punishment people believe the criminal "deserves." Albert Camus, in a famous essay, says of capital punishment:

"Let us call it by the name which, for lack of any other nobility, will at least give the nobility of truth, and let us recognize it for what it is essentially: a revenge."

We may realize that deep-seated emotions underlie our capital-punishment laws, but there is a difference between our understanding of the motivation for capital punishment and our acceptance of it as an instrument of our society. We may appreciate that the *lex talionis*, the law of revenge, has its roots in



William Henry Furman: Sentenced to death for murder in 1969; resentenced to life in prison after the Supreme Court's 1972 decision.

the deep recesses of the human spirit, but that awareness is not a permissible reason for retaining capital punishment.

It is also argued that capital punishment is an ancient sanction that has been adopted by most of our legislatures after prolonged consideration and reconsideration, and that we should not override this history.

But the argument is not persuasive. If we were to restrict the implementation of our Bill of Rights, by either constitutional decisions or legislative judgments, to those practices that its provisions contemplated in 1791, we would indeed be a retarded society. In 1816, Thomas Jefferson wrote a letter in which he spoke of the need for constitutions as well as other laws and institutions to move forward "hand in hand with the progress of the human mind." He said, "We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors."

As early as 1910, the Supreme Court, in the case of *Weems v. United States*, applied this principle to a case in which the defendant had been sentenced to 15 years in prison for the crime of falsifying a public document as part of an embezzlement scheme. The Court held that the sentence was excessive and constituted "cruel and unusual punishment" in violation of the Eighth Amendment. In a remarkable opinion, Justice Joseph McKenna eloquently rejected the idea that prohibitions of the Bill of Rights, including the Eighth Amendment, must be limited to the practices to which they were addressed in 1791, when the great amendments were ratified. He said, "Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions." As to the "cruel and unusual punishment" clause of the Constitution, he said that it "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."

We have also long recognized that the progressive implementation of the Bill of Rights does not depend upon first obtaining a majority vote or a favorable Gallup or Harris poll. As the Supreme Court stated in the famous 1943 flag-salute case, "The very purpose of a Bill of Rights was to place [certain subjects] beyond the reach of majorities and officials. . . ."

Indeed, despite our polls, public opinion is unfathomable; in the words of Judge Jerome Frank, it is a "slithery shadow"; and if known, no one can predict how profound or shallow it is as of the moment, and how long it will persist. Basically, however, the obligation of legislators and judges who question whether a law or practice is or is not consonant with our Constitution is inescapable; it cannot be delegated to the Gallup poll, or to the ephemeral evidence of public opinion.

We will not eliminate the objections to capital punishment by legal legerdemain, by "standards," by procedures or by word formulas. The issue is fundamental. It is wrong for the state to kill offenders; it is a wrong far exceeding the numbers involved. In exchange for the pointless exercise of killing a few people each year, we expose our society to brutalization; we lower the essential value that is the basis of our civilization: a pervasive, unqualified respect for life. And we subject ourselves and our legal institutions to the gross spectacle of a pageant in which death provides degrading, distorting excitement. Justice Felix Frankfurter once pointed out: "I am strongly against capital punishment. . . . 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."

Beyond all of these factors is the fundamental consideration: In the name of all that we believe in and hope for, why must we reserve to ourselves the right to kill 100 or 200 people? Why, when we can point to no tangible benefit; why, when in all honesty we must admit that we are not certain that we are accomplishing anything except serving the cause of "revenge" or retribution? Why, when we have bravely and nobly progressed so far in the recent past to create a decent, humane society, must we perpetuate the senseless barbarism of official murder?

In 1971, speaking of the death penalty, Justice William O. Douglas wrote: "We need not read procedural due process as designed to satisfy man's deep-seated sadistic instincts. We need not in deference to those sadistic instincts say we are bound by history from defining procedural due process so as to deny men fair trials."

I hope and believe we will conclude that the time has come for us to join the company of those nations that have repudiated killing as an instrument of criminal law enforcement. ■