SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

FEBRUARY 23, 1977

The meeting was called to order at 9:00 a.m. Senator Close was in the Chair.

PRESENT: Senator Close
Senator Bryan
Senator Dodge
Senator Foote
Senator Sheerin
Senator Gojack
Senator Ashworth

ABSENT:

SB 220 Provides conditions for imposition of capital punishment.

Gino D. Menchetti, Deputy Attorney General stated that his office endorsed the concept of this bill in that in light of the recent United States Supreme Court decisions in this area, a new capital punishment bill is imperative. He informed the Committee that his office, after several meetings with the law enforcement communities throughout the state, has drafted their own capital punishment bill which should be coming out of the bill drafters office soon.
In discussing SB 220 he made the following observations:
The result of this bill is that there will now be only two degrees of murder; murder one and two. As a prosecutor, he likes the flexibility of the 3 degrees; capital murder, murder one and two.
Section 1, subsection 4 seems to indicate that the burden of proof is shifted to the defendant. If an individual is convicted of first degree murder he is punished by death unless he proves beyond a resonable doubt that the mitigating circumstances outweigh the aggravating circumstances. Although this is not violative of the recent Supreme Court decision, it is also not in any of the ones they upheld. The cases that they upheld (Gregg v. Georgia, Jurek v. Texas, Proffitt v. Florida) seem to indicate that after an individual is convicted, he then goes to a trier of fact; a separate, bifurcated hearing wherein new evidence is presented and the state must prove and a jury must find that the aggravating circumstances outweigh the mitigating circumstances before they can impose the death penalty.
Section 3, subsection 1, paragraph (b) should be expanded. He felt that if someone were going to hold a person hostage they would do so to perhaps Harrah's or Del Webb but not to the state of Nevada itself.

SB 220 Section 3, subsection 2, paragraph (a) brings us back to the old felony murder rule which is rapidly becoming discredited. He did not feel, for example, that an individual, while attempting a robbery kills someone in that robbery, should be guilty of aggravated first degree murder. He felt perhaps this would be a bit broad. The cases say, when they reviewed all of the death penalty statutes, that you have to have narrow categories and narrow rulings.

Section 3, subsection 2, paragraph (h), subparagraph (2) the use of "substantial history of convictions" is a bit vague. How do you define "substantial"?

Section 3, subsection 4 "Any other aggravating circumstances of a like nature" is perhaps the biggest problem with this bill. In researching the most recent rules promulgated by the Supreme Court on this, it is clear that they are going to require some clear directions for the jury; some limited number of aggravating circumstances. As far as his reading of what the U. S. Supreme Court now requires under the present stance of the death penalty bill, he did not feel this section would hold up.

Section 6 provides a procedure for a jury trial but there is no provision should the defendant waive a jury and ask for a judge trial. The bill addresses itself to the situation of a three-judge court on a guilty plea but does not provide for a trial before a judge.

Section 7, subsection 2 requires the jury to deliberate and announce its findings on each aggravating circumstance presented by the state and each mitigating circumstance presented by the defense. Although that is permissible, what you are doing is requiring the jury to address itself to each issue presented and announce its findings on each one. A good defense attorney will raise everything he can come up with in mitigation in order to confuse the issues and come up with some time. The Supreme Court requires that they announce which aggravating and mitigating circumstance they found but not each one addressed or raised by both sides.

This bill requires the death penalty to be returned if the aggravating circumstances outweigh the mitigating circumstances. This was upheld in Jurek v. Texas. However, in Gregg v. Georgia and Proffitt v. Florida, the Supreme Court held that the death penalty was discretionary with the trier of fact. This is a policy decision for the Committee. Both actions are available.

Section 9 requires the trial court to attach a report. He felt the Committee may wish to indicate more clearly what type of report is required. One of the keys the U. S. Supreme Court uses in upholding these cases is a statewide appellate review; the ability of the state Supreme Court to review all of its district courts using the same standard and trying to give the same application statewide. A failure to provide a uniform statewide report from the district courts might be a problem in providing a uniform review.

Section 11, subsection 2, paragraph (c) should be clarified

SB 220 by including "similar cases in Nevada." He did not feel that our courts should look to cases outside the state of Nevada to determine whether or not the death penalty is properly imposed here. He also felt that this would otherwise put an unwarranted burden on our Parole and Probation Department should they have to provide the cases and their facts from other states.

Larry Hicks, Washoe County District Attorney and President of the Nevada District Attorneys' Association testified before the Committee on this measure.
He stated that both his office and the District Attorneys' Association favored the death penalty in the appropriate cases He informed the Committee that he had reviewed the Attorney General's proposed bill and that he would support it should SB 220 fail. However, he favored SB 220 first. The other bill would provide that the factual situation has to fall within certain categories before the death penalty can be assessed. The problem with this is that it is inflexible; it does not allow for mitigating vs. aggravating circumstances. What the Supreme Court has said in this regard is that before you impos the death penalty, there must be very defined circumstances which would support it. In other words, other than the offens itself, you could assess the death penalty if you can find sufficiently aggravating circumstances over and above mitigating circumstances.

A. A. Campos, Chief Parole and Probation Officer indicated that he had a problem with the death penalty not being allowable unless the murders were by common scheme or design. He cited an instance where an individual had been convicted of four counts of first degree murder but under this law would not be eligible for the death penalty because they had not been of a common scheme or design; they were all random killings.
He also expressed concern over the absence of the inclusion of Parole and Probation officers under the definition of peace officer in Section 3, subsection 3, paragraph (c).
He stated that last year 31% or nearly 1/3 of all persons received at the Nevada State Prison were parole or probation violators and of that 31% they had made 1/2 of those arrests.

Geri Alcamo and Joni Ann Kaiser, American Friends Service Committee testified in opposition to this bill. See attached Exhibit A for their testimony.
Senator Ashworth requested Ms. Alcamo to submit the article containing the statistics she had quoted. See attached Exhibit B.

It was the decision of the Committee to withhold action pending the bill from the Attorney General's office.

SB 88 Includes driver's license suspensions under implied consent law in consecutive suspensions.

Howard Hill, Director of Department of Motor Vehicles stated that this bill is to clarify the statutes concerning suspensions and revocations. The problem is that the statute is silent as to whether, under the implied consent law, that the suspensions should run concurrently or consecutively. The practice at the present time is to run them concurrently however this is a policy decision for the Committee. They are only asking that the law be clarified one way or the other.

Senators Sheerin and Bryan will review the matter and report back to the Committee.
No action was taken at this time.

SB 211 Provides for informing jury of any workmen's compensation benefits and proper relationship of benefits and damage awards

Kent R. Robison, Nevada Trial Lawyers Association testified in support of this measure. He stated that it was their feeling that this instruction would clear the problem of speculation and conjecture on the repayment of NIC by injured plaintiffs and would allow the jury to return a more informed decision and verdict.

Senator Dodge expressed concern that this could potentially be extended into other areas of insurance protection. He also indicated that he would like to hear some testimony from the Nevada Industrial Commission on this matter.

It was the decision of the Committee to withhold action pending further testimony.

SB 214 Makes cumulative voting rights for corporate stockholders the general rule.

Senator Bryan stated that under the present law, the articles of incorporation provide for cumulative voting if the incorporators elect to do so. This bill would conform with the California law which makes it mandatory unless they opt otherwise.

It was the decision of the Committee to withhold action pending testimony from Senator William J. Raggio, who introduced the bill.

The Committee approved for introduction BDR 13-480 which provides for the supervision of charitable trustees.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Cheri Kinsley, Secretary

APPROVED:

Senator Melvin D. Close, Jr., Chairman

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 A

Regional Office for Northern California, Nevada and Utah
2160 Lake Street, San Francisco, California 94121 (415) 752-7766

"THE CASE AGAINST capital punishment"

The New York Times Magazine / Jan. 23, 1977

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 paradoxical. 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 it 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.

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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-

Abe Fortas was an Associate Justice of the United States Supreme Court from 1965 to 1969. He now practices law in Washington, D.C.

that statutory or judicial developments that change the risks 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)
of execution is illuminating:

condemn a human being to 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 generally a matter of right;

would be disregarded in other 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.

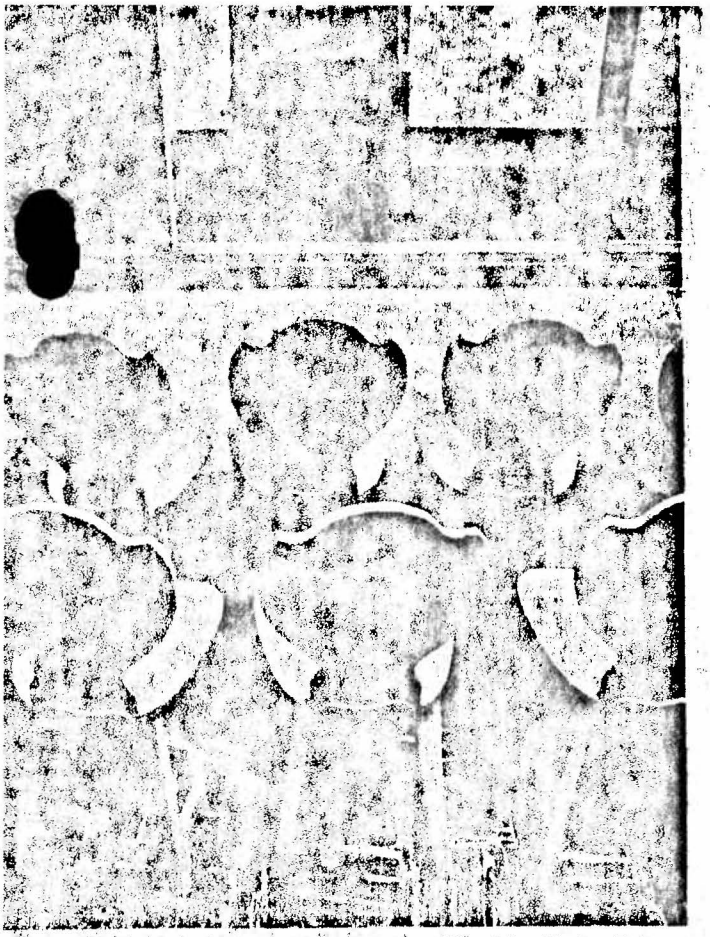
In 1970, 68 prisoners on death row had their death-penalty status changed as a result of appeals, court actions, commutation, resentencing, etc. This was more than 20 percent of the new death-row prisoners admitted during that peak year.

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.

□

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



lectric chair and witnesses' seats at Florida State Prison. 'The issue is fundamental. It is wrong for the state to kill."

ni character of capital u ent. We insist that it e imposed for relatively few rimes of the most serious na ire and that it be imposed nly after elaborate precau ons to reduce the possibility f error. We also inflict it in fashion that avoids the ex reme cruelty of such methods s drawing and quartering, hough it still involves the arbaric rituals attendant pon electrocution, the gal ows or the firing squad.

But fortunately, the death enalty is and will continue to e sought in only a handful f cases and rarely carried ut. So long as the death enalty is a highly exceptional unishment, it will serve no eterrent or penological func ion; it will fulfill no prag natic purpose of the state; nd inevitably, its selective mposition will continue to be nfluenced by racial and class rejudice.

f the standards that can tten, all of the word and the procedural afeguards that can be de ised to compel juries to im ose the death penalty on apital offenders without ex eption 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. ■

The case against capital punishment
BY Abe Fortas
New York Times (1857-Current file); Jan 23, 1977; ProQuest Historical Newspapers The New York Times (1851 - 2005)
pg. 180

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The result of this decision was paradoxical. 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 it 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.

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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 excellent study, "Executions in America" 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)*

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of execution is illuminating:

(1) Juries are reluctant to condemn a human being to 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 generally a matter of right; slight legal errors, which would be disregarded in other 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

Electric chair and witnesses' seats at Florida State Prison. "The issue is fundamental. It is wrong for the state to kill."

unique character of capital punishment. We insist that it be imposed for relatively few crimes of the most serious nature and that it be imposed only after elaborate precautions to reduce the possibility of error. We also inflict it in a fashion that avoids the extreme cruelty of such methods as drawing and quartering, though it still involves the barbaric rituals attendant upon electrocution, the gallows or the firing squad.

But fortunately, the death penalty is and will continue to be sought in only a handful of cases and rarely carried out. So long as the death penalty is a highly exceptional punishment, it will serve no deterrent or penological function; it will fulfill no pragmatic purpose of the state; and inevitably, its selective imposition will continue to be influenced by racial and class prejudice.

All of the standards that can be written, all of the word magic and the procedural safeguards that can be devised to compel juries to impose the death penalty on capital offenders without exception 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

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

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

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. ■