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Rudolph J. Gerber

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## A DEATH PENALTY WE CAN LIVE WITH

Rudolph J. Gerber\*

Like perennial philosophy, the death penalty seems indestructible: it buries its judicial undertakers. Recent cases which seemingly strike mortal blows at its existence now exert peculiar impetus to mandate the very thing prohibited. Both state and federal legislation at a broad level seek to reenact, or have reenacted, varieties of the death penalty more mechanical and less discretionary than any mode of capital punishment in the history of the common law.

Another legislative stampede to the execution chambers is a dubious technique for controlling criminal traffic. This commentary advocates some official premeditation over the wisdom of resurrecting death as an advertisement for the value of life. This analysis includes the history, usage, effects, victims, and by-products of capital punishment.

### I. Background and History of the Death Penalty

#### A. *Early Development and Use*

Blood revenge, the earliest form of capital punishment, dominated all primitive societies. Initially, its spirit was clearly retaliatory. Men killed to avenge themselves and their kin long before their conduct was considered a wrong to the community. Any blood relative, no matter how far removed, could be the victim of the avenger's personal retribution. At one time, blood revenge combined utmost savagery with an embrace of familial code.<sup>1</sup> Early man had to flee to cities of refuge or form protective familial alliances to escape the consequences of such personal vengeance.

It is no surprise then that primitive criminal codes expressly endorsed personal revenge. Initially the law was used to compensate for a wrong done to a private party or his family, not to punish him in the name of the state. Hammurabi's *Fluruit* ("If a man destroy the eye of another man, they shall destroy his eye") and *Exodus* ("Eye for eye, tooth for tooth, hand for hand, foot for foot") reinforced the right of individual retribution. But the command "life for life, eye for eye, tooth for tooth" was to its day an ethical advance; excessive penalties were not in the interest of the community. The Talmud required that vengeance be proportioned to the crime. If by only taking "measure for measure" God exercised self-restraint, "*a fortiori* must the victim of the offense, the blood avenger, exercise it and never take vengeance beyond the measure of the damage or mischief caused to him."<sup>2</sup>

Gradually, due to difficulties in arresting the spiral of revenge, the personal

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\* Associate Professor of Criminal Justice, Arizona State University, member of Arizona Bar.

1 G. SCOTT, *HISTORY OF CAPITAL PUNISHMENT* (1950).

2 Cohn, *The Penology of the Talmud*, 5 ISRAEL L. REV. 53, 66 (1970) Cf. M. MELTSNER, *CRUEL AND UNUSUAL* 46 (1973) [hereinafter cited as MELTSNER], to which much of this analysis is indebted.

vendetta yielded to societal retribution. The movement, begun by Solon in the sixth century B.C. in Athens and culminating in English common law, gave the state the sole right and duty of vengeance. This political penology stabilized the capricious avenger and also became a superior form of retribution. By allowing only the impartial state to exact penal revenge, the citizenry acquired protection against further personal injury. Today society carries a system of state-controlled revenge to its ultimate triumph: a conscious or unconscious transformation into a system espousing the deterrence of offenders and the protection of victims.

As crimes progressed from personal to national status, and as the principle of deterrence became explicitly acknowledged in medieval England, increasing numbers of offenses joined the list of capital crimes. Torture and death followed by public degradation became the hallmark of punishment. In England, the number of crimes punishable by the "bloody code" rose from eight at the end of the 15th century to 223 shortly after 1800.<sup>3</sup>

The development of state-run retributory systems carried dangerous implications. Armed with powers of retaliation and deterrence, the state began not only to curb personal crime but also to interfere violently with many forms of political and religious activity. One need only consider the persecution of witches during the Middle Ages and 17th century, the attack against heresy by the Inquisition, and the barbarity employed by the Stuarts against political foes.

### B. Reform Movements

The rise of democratic political philosophy in the 18th century initiated a movement towards curbing excessive penal brutality. The effort, however, was painfully slow. Voltaire wrote in 1748:

Is it possible that nations who boast of their reformation, of trampling superstition under foot, who, indeed, supposed that they had attained the perfection of reason, could believe in witchcraft, and, upon the strength of such belief, proceed to burn poor women accused of that crime, and this, more than an hundred years after the pretended reformation of their reason?<sup>4</sup>

The writings of Cesare Beccaria<sup>5</sup> and Jeremy Bentham<sup>6</sup> did much to end brutality. Even severe Blackstone joined the opposition to excessive punishments:

For though the end of punishment is to deter men from offending, it never can follow from thence that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. . . . But, indeed, were capital punishments proved by experience to be a sure and effective remedy, that would not prove the necessity . . . of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far.<sup>7</sup>

3 H. BEDAU, *THE DEATH PENALTY IN AMERICA* 3 (1964) [hereinafter cited as BEDAU], an authoritative study of the ways and means of legal death, influential in this writing.

4 Voltaire, A Commentary appended to C. BECCARIA, *ESSAY ON CRIMES AND PUNISHMENTS* 190 (Ingraham transl. 1819) [hereinafter cited as BECCARIA].

5 BECCARIA, *supra* note 4.

6 J. BENTHAM, *THE RATIONALE OF PUNISHMENT* (1830).

7 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*10.

The exemplary value of capital punishment lay at the core of the debate then as it does now. Consider James Fitzjames Stephen's celebrated dictum: "The fact that men are hanged for murder is one great reason why murder is considered so dreadful a crime."<sup>8</sup> It may be that capital punishment for murder exerts a moral influence by indicating that life is the most highly protected value.<sup>9</sup> Beccaria, on the other hand, from the same example drew the opposite conclusion:

The punishment of death is pernicious to society, from the example of barbarity it affords . . . Is it not absurd, that the laws, which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves?<sup>10</sup>

Thus Beccaria spelled out a position that dominated abolitionist thought for a century. The death penalty was too quickly administered, too momentous to be effective; it instilled compassion rather than fear in the observer. Crime was curbed not by the "terrible but momentary spectacle" of the death of a wretch but by "the continued example of a man deprived of his liberty, condemned as a beast of burden, to repair, by his labor, the injury he has done to society."<sup>11</sup>

Leading Americans slowly—but stoutly—got the message. In May of 1774, lecturing at the house of Benjamin Franklin, Dr. Benjamin Rush urged that a "House of Reform" be built so that criminals could be taken off the streets "and detained until purged of their antisocial habits."<sup>12</sup> Drawing on the earlier work of Beccaria, he asserted that scriptural support for the death penalty was spurious. The threat of hanging, he felt, did not deter but rather increased crime, and when a government puts one of its citizens to death "it exceeds the powers entrusted to it."<sup>13</sup>

Rush proposed to remove the offender from the corrupt outside world by imprisoning him. The miscreant should be housed in the "penitentiary"—a new institution, which unlike jails, would isolate the convict from his fellow inmates until he learned the error of his ways. In 1792, Rush expanded on this theme in a famous tract: *Considerations on the Injustice and Impolicy of Punishing Murder with Death*. He felt that capital punishment lessened the horror of taking human life and influenced the suicidal to kill in order to end their lives by hanging. Jurors, loath to see a capital sentence imposed, let murderers go free. Prison avoided such problems:

If the punishment of murder consisted in long confinement and hard labour, it would be proportioned to . . . our feelings of justice, and every

<sup>8</sup> See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 58 (1963).

<sup>9</sup> Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 950, 967 (1966).

<sup>10</sup> BECCARIA, *supra* note 4, at 104-05.

<sup>11</sup> *Id.* at 99.

<sup>12</sup> BEDAU, *supra* note 3, at 8. Rush, according to Bedau, is credited with being the father of the abolition movement in the United States.

<sup>13</sup> *Id.*

member of society would be a watchman or a magistrate to apprehend a destroyer of human life, and to bring him to punishment.<sup>14</sup>

During the 1830's and 1840's, opponents of the death penalty began to have a practical impact on the criminal law. In 1824 Edward Livingston drafted a new penal code for Louisiana which substituted imprisonment for the death penalty. Although Livingston's code was too progressive to be adopted, it became a symbol to the abolitionists that their demands might be translated into action. In the mid-1850's, Horace Greeley, founder of the *New York Tribune*, became one of the leading critics of the death penalty. His efforts helped influence Michigan in 1847, Rhode Island in 1852, and Wisconsin in 1853 to abolish the death penalty, the first three political jurisdictions anywhere in the world to abolish capital punishment.

When women got the vote and whiskey got the gate another surge in the abolitionist movement produced many distinctively American developments in penology: privacy of executions, redefinition of the crime of murder, new methods of execution, and optional life sentences. Under the leadership of Clarence Darrow and the warden of Sing Sing Prison, Lewis E. Lawes, eight states—Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), North and South Dakota (1915), Tennessee (1915), and Arizona (1916)—abolished the death penalty for murder and most other crimes.

The recent reform movement of the 1960's was in part the product of the findings of the 1949 Royal Commission on Capital Punishment, the United Nations debates of the 1950's, and the 1956 *Canadian Report on Capital Punishment*. The results of this movement prompted six more states—Oregon in 1964, West Virginia, Vermont, Iowa, and New York in 1965, and New Mexico in 1969—to abolish the death penalty with little or no qualification.

The demise of some capital offenses, however, has been the birth of others. After President William McKinley was assassinated in 1901, Connecticut and New Jersey made murder of a public official a capital crime. Kidnapping was elevated to capital status in two dozen states after the Lindbergh case in 1932. Airline bombings in 1958 and 1959, air piracy in 1960 and 1961, and the assassination of President Kennedy in November 1963 prompted Congress to hysterical recourse to death, reflecting again the widespread belief in its deterrent force.

### *C. Decline, Disuse, and Rebirth*

Even before the moratorium on executions began in 1967, executions totaled only 42 in 1961 and 47 in 1962. The number dwindled to 21 in 1963, 15 in 1964, and seven in 1965; in 1966 there was one execution and in 1967 there were two. On April 12, 1967, California sent Aaron C. Mitchell, a Black, to the gas chamber; he had been convicted of killing a policeman in Sacramento in 1963. On June 2, 1967, Colorado executed Luis Jose Monge, a Mexican-

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<sup>14</sup> B. RUSH, CONSIDERATIONS ON THE INJUSTICE AND IMPOLICY OF PUNISHING MURDER BY DEATH 4 (M. Carey ed. 1792).

American, in the state gas chamber; he too was a convicted murderer whose refusal to appeal reflected his own death wish.<sup>15</sup>

This American moratorium reflects a worldwide trend mounting against the death penalty with inchworm speed. It is no longer imposed in Britain, although not all of her former colonies follow her lead. In the island nations of Trinidad and Tobago, offenders are still hung by the neck until dead, to the supposed edification of tourists.<sup>16</sup> The death penalty is still maintained in over 100 countries. Some have begun applying it as punishment in hijacking and drug trafficking, verifying the United Nations' view that new forms of terror and violence encourage a knee jerk reversion to the death penalty.

The worldwide survey undertaken by the United Nations indicates that of 133 nations involved in the survey, only nine—Austria, Colombia, Costa Rica, the Dominican Republic, Ecuador, Finland, Iceland, Uruguay and Venezuela—describe themselves as prohibiting capital punishment. Another 16 nations have abolished the death penalty for all ordinary crimes but retain it for exceptional crimes, such as treason or killing the head of state. Those nations are Afghanistan, Argentina, Brazil, Denmark, Israel, Italy, Malta, Nepal, the Netherlands, New Zealand, Norway, Panama, Peru, Portugal, Sweden and the United Kingdom. In addition, three nations—Belgium, Luxembourg and Nicaragua—still provide for a death penalty but have not in fact executed anyone for an ordinary crime for at least 40 years. Moreover, many of the retentionist countries use the death penalty so sparingly that, if one does not maintain the division between political and ordinary crimes, they may actually be executing fewer people than do certain "abolitionist" countries.

According to the U.N. report, the death penalty is regarded by a considerable number of governments as an efficient or at least an acceptable way of getting rid of certain types of problems, despite what the experts may have to say about the lack of a deterrent effect of this penalty. Moreover, it seems clear that in most cases governments satisfy public opinion by using this sentence. The U.N.'s position is that everyone has the right to life and no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment, so that the death penalty ought eventually to be abolished everywhere.

## II. Current Aspects of the Death Penalty

### A. Murder and Its Characteristics

Murder remains far and away the prime capital crime. It accounts for most executions in most countries. Accordingly, an examination of U. S. statistics on murder is the prerequisite to understanding whatever deterrent effect capital punishment may offer, as well as the types of minds it seeks to put to rest.

15 Cf. MELTSNER, *supra* note 2, at 114, where it is claimed that Monge "could not wait to die." He had turned himself in, pled guilty, and refused to appeal. See the discussion of suicide-prompted homicide, in text corresponding to notes 56-61 *infra*.

16 The author recalls a similar scene of three hanged Israeli spies, dangling from scaffolds in the pale dawn of downtown Damascus in July of 1966. The men had been executed at the height of the morning rush to work. Data in this section is from the UNITED NATIONS REPORT ON CAPITAL PUNISHMENT (1973).

In 1973, there were 9.3 victims of murder for every 100,000 people in the nation—a four percent increase from a rate of 8.9 in 1972.<sup>17</sup> This represented a five percent increase in the number of murders over 1972 and a 42 percent increase in the number of murders over 1968. The *Uniform Crime Reports* categorize these crimes by geographical area, population grouping, age, race, sex, weapons used, and circumstances involved.

Geographically, 44 percent of the 1973 murders occurred in the Southern States, 22 percent in the North Central States, 19 percent in the Northeastern States, and 15 percent in the Western States. The number of murders in these regions increased in 1973 over 1972 by four percent in the West and Northeast, three percent in the South and approximately 11 percent in the North Central States.

An analysis by population grouping shows that cities with 250,000 or more inhabitants reported a 1973 murder rate of 20.7 victims per 100,000 (a five percent increase over 1972), the suburban areas a rate of 5.1 (a nine percent increase), and the rural areas a rate of 7.4 (a .2 percent increase).

Statistics on age reveal that the young are murdered and arrested for murder more frequently than any other age group. Ten percent of all persons arrested for murder in 1973 were under 18 years of age and 45 percent were under 25. Numerically, the 20-24-year age group had the highest involvement during 1973 with 25 percent of the total arrests coming from within this group. The increases since 1968 also reveal a trend toward younger murderers and victims. During the period 1968-1973 there was a 59 percent increase in the number of persons under 18 years of age arrested for murder, while during this same period adult arrests increased 39 percent. Murder victims also tend to be young, with 30 percent of the victims between 20 and 29 years of age.

The victims of murder in 1973 were male in approximately three out of four instances. This ratio of male-to-female victims is similar to the experience in the last several years.

In 1973, firearms were the most frequently used weapon in the commission of murder. Nationally, 67 percent of the homicides were committed with firearms and 53 percent were committed with handguns. Cutting or stabbing weapons were used in 18 percent of the murders; other weapons (blunt objects, poisons, explosives, arson, etc.) were used in seven percent of the murders. The remaining nine percent were committed by hand.

The circumstances which result in murder vary from family arguments to felonious activities. Criminal homicide is largely a societal problem beyond the control of police. The circumstances of murder emphasize this point. In 1973, murder within the family made up approximately one-fourth of all murder offenses. Over one-half of these family killings involved spouse killing spouse. The remainder were parents killing children and other intrafamily killings.

The *Uniform Crime Reports* define felony murder as those killings resulting from robbery, sex motive, gangland slaying, and other felonious activities. Felony murders and suspected felony murders in 1973 constituted 29 percent of all

17 These percentages and all subsequent data are taken from FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS OF 1973 2-10 (1974).

murders, whereas these two categories accounted for 25 percent of total murders in 1968.

During 1973, seven percent of the murders resulted from romantic triangles or lovers' quarrels. In murders involving husband and wife, the wife was the victim in 52 percent of the incidents. In these incidents involving spouses, 49 percent of the victims were Blacks, and 50 percent Whites. The victims of felony murder were 62 percent Whites, 37 percent Blacks, and the remaining one percent of other races.

Criminal homicide is largely an unplanned act, often marked by predictable behavior patterns supporting the recurring data in the *Uniform Crime Reports*. In Philadelphia, for example, black males, who committed an equivalent of 41.7 homicides per 100,000 inhabitants, were more likely to commit criminal homicide than females, who, however, were more prone to homicide (9.3) than the white male (3.4) and white female (.4). Criminal homicides were more likely to occur during the weekend, especially on Saturday nights, between 8 p.m. and 2 a.m. Indeed, 65 percent of the criminal homicides (380) occurred between 8 p.m. Friday night and midnight Sunday.

The criminal homicide generally results from a domestic quarrel, jealousy, an argument over money, or a robbery. Most of the known victim-offender relationships are close, intimate and frequent, and the usual homicide site is the home. In robbery-slashing cases the victim and the robber are most often strangers who were brought together by chance or involved in a sudden surprise attack.

Although middle- and upper-class homicidal acts may be stimulated by a sudden emotional crisis, they more likely exhibit major psychopathology or planned deliberation. The relative rarity of upper- and middle-class homicide suggests that cultural variables influence a person's tendency to commit homicide. Murder or manslaughter more readily occurs if violence is an accepted part of the subcultural value system.

Those investigating the weekend phenomenon of homicide not surprisingly find that either or both the offender or his victim had been drinking prior to the slaying. Many murders occur on the eve of receiving a paycheck which then is squandered on alcohol.

In a careful study at the Florida State Penitentiary at Raiford, Dr. Shaw Grigsby of the University of Florida found that as many as 75 percent of all murderers were drinking prior to commission of the crime.<sup>18</sup> International data support the same conclusion.<sup>19</sup> The statistic is instructive for advocates of capital punishment's deterrent effect, for the more a violent person has been drinking, the more suspect is the theory that he is likely to meditate upon the sober punishment lurking ahead.

The problem of deterrence appears in new guise in light of the blurred nature of murder and assault. Zimring has shown that assault and murder are

18 BEDAU, *supra* note 3, at 186. The foregoing analysis is from Wolfgang's study in BEDAU at 464.

19 See Schwartz, *Conflict Without Violence and Violence Without Conflict in a Mexican Mestizo Village*, in COLLECTIVE VIOLENCE 151 (J. Short & M. Wolfgang, eds. 1972), where the author states that there exists "an overwhelming correlation" between alcohol and violence.



inseparable in a large proportion of crimes.<sup>20</sup> Most murders are merely "complete" assaults; otherwise, their motives and means and origins do not differ. Whether the assault leads to murder often depends on whether or not a weapon is present and whether it is a knife, a small-caliber gun, or a large-caliber gun. Murders and assaults are both largely matters of "weapon and alcohol convenience"; their severity could be reduced not only by executing murderers, but also by restricting weapons or alcohol, which would cost more money—but save more lives.

### B. *Execution and Deterrence*

Also helpful to an evaluation of deterrence as a justification for the death penalty is an examination of data pertinent to the application of the death penalty. That is, is the death penalty imposed in such a way as to be of significant deterrent effect?

Women criminals are rarely punished by death. One reason is that women are involved, arrested, held for court action, and found guilty for crime less frequently than men.

Racial data, however, reveal more discrimination than sex data. Of 3,857 persons executed in the United States from 1930 to 1966, inclusive, 1,750 (45.4 percent) were Whites; 2,065 (53.5 percent) were Blacks; 42 (1.1 percent) were of other races. The number of Blacks executed has been disproportionate to their representation in the total population in these thirty-seven years:

Based upon a refined statistical analysis of rape convictions in states where rape has been a capital crime, this study shows that there has been a patterned, systematic, customary imposition of the death penalty. Far from being "freakish" or capricious, sentences of death have been imposed on blacks, compared to whites, in a way that exceeds any statistical notion of chance or fortuity.<sup>21</sup>

In the North, the fact that most persons executed are Black or poor or young is not conclusive of discrimination. Murder occurs disproportionately among the young, the poor and the Black. Wolfgang's study of 439 persons sentenced to death for murder found Blacks only slightly more likely than whites to be executed (88 percent of Blacks and 80 percent of whites were executed). Whites charged with felony murder were three times as likely as Blacks to achieve commutation. Occupation and social class have little effect on commutation. Blacks having private counsel, however, were much more likely to get a commutation than Blacks having court-appointed counsel.

In the South, however, Blacks, especially those who murdered or raped a white person, have been much more likely than whites to be sentenced to death. In more than 3,000 rape convictions in 11 Southern States between 1945 and 1965, a Black convicted of rape, though not likely to be executed, was

20 F. ZIMRING & G. HAWKINS, *DETERRENCE passim* (1973) [hereinafter cited as ZIMRING & HAWKINS] and F. ZIMRING, *PERSPECTIVES ON DETERRENCE* (1971).

21 Wolfgang & Riedel, *Race and the Death Penalty*, 407 ANNALS 119 (1973).

seven times as likely to be executed as a white. A Black rapist of a white woman was 18 times as likely to be executed as all other racial combinations. In parts of the South, heavier penalties for Blacks seem common for many offenses, not just those punishable by death.<sup>22</sup>

Of the 631 persons on death row in 1972, just before the death penalty was held unconstitutional, 364 (57.7 percent) were nonwhite. Despite the resurrected capital punishment laws, the 145 persons presently on death row include 84 nonwhites—a total of 57.9 percent.<sup>23</sup> It may be that these statistics reflect criminal propensities irradicable by any redrafted death penalty because of subtle economic and subcultural differences from the white man's morality. But it may also be that deterrence, as presently articulated, is too simplistic a concept.

The deterrence issue is not really whether the death penalty deters would-be murderers. Rather, the issue is whether it deters more effectively than the prospect of life imprisonment. Whether any penalty has a deterrent effect is disputable, but a warranted death penalty would have to supply an additional increment of deterrence sufficient to offset the costs of imposing it instead of life imprisonment.

One of the most celebrated invocations of the unilateral deterrent approach to crime control is British Chief Justice Lord Ellenborough's classic response to a proposal that, while the death penalty for shoplifting should remain, the value of the goods stolen which incurred that penalty be raised from five to ten shillings.

Speaking in the House of Lords, Ellenborough said:

I trust your lordships will pause before you assent to an experiment pregnant with danger to the security of property . . . Such will be the consequence of the repeal of this statute that I am certain depredations to an unlimited extent would immediately be committed . . . Repeal this law and . . . no man can trust himself for an hour out of doors without the most alarming

22 Wilson, *The Death Penalty*, New York Times, October 28, 1973, § 6 (Magazine), at 34 [hereinafter cited as Wilson]. Wolfgang's data is collected in BEDAU, *supra* note 3, at 464.

23 Legal Defense Fund, private report, Sept. 8, 1974.

Persons Awaiting Execution as of October 8, 1974	
North Carolina	49
Florida	29
Georgia	18
Louisiana	8
California	5
Massachusetts	5
New Mexico	5
Oklahoma	6
Texas	5
Wyoming	4
Ohio	3
Arizona	2
Virginia	2
Mississippi	1
Pennsylvania	1
Utah	1
Tennessee	1
Total	145

apprehension that on his return, every vestige of his property will be swept off by the hardened robber.<sup>24</sup>

Another example may be found in the celebrated passage in *The Saint Petersburg Dialogues* in which Joseph de Maistre writes of the public executioner:

And yet all grandeur, all power, all subordination rests on the executioner: he is the horror and the bond of human association. Remove this incomprehensible agent from the world, and at that very moment order gives way to chaos, thrones topple, and society disappears.<sup>25</sup>

Proving that severity is not limited to the aristocracy, the Supreme Court of Georgia took advantage of a capital case pending before it to ridicule the notion that rape does not deserve the death penalty:

No determination of this question is either wise or humane if it fails to take full account of the major place in civilized society of woman. She is the mother of the human race, the bedrock of civilization; her purity and virtue are the most priceless attributes of human kind. The infinite instances where she has resisted even unto death the bestial assaults of brutes who were trying to rape her are eloquent and indisputable proof of the human agonies she endures when raped. . . . Even a cur dog is too humane to do such an outrageous injury to the female.<sup>26</sup>

What then of this much-touted deterrent effect? Thorsten Sellin has been responsible for the best-known studies.<sup>27</sup> He compared homicide rates between adjacent states with and without the death penalty. The crude rates for homicide in these groups of states appear to be about the same. He also compared homicide rates for states before and after they abolished or restored the death penalty. Again the rates did not change significantly with the change in status of the penalties. He then examined homicide rates in those cities where executions occurred. Again there was no difference in the homicide rate before and after the executions. Actually, the homicide rate is about 40 percent higher in jurisdictions with capital punishment than in those without, which at least indicates that the death penalty states have greater cause to invoke the death penalty in the first place.

Similar studies with similar results have been made by Robert Dann,<sup>28</sup> Leonard D. Savitz<sup>29</sup> and William Graves.<sup>30</sup> Graves even uncovered evidence in California that prompted him to speculate that homicides increased on the days

24 From Parliamentary Debates: House of Lords, May 30, 1810, cited in R. CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY 7-8 (1927).

25 THE WORKS OF JOSEPH DE MAISTRE 192 (J. Lively ed. 1965).

26 Jims v. Balkcom, 220 Ga. 7, 10, 136 S.E.2d 766, 769 (1964).

27 See Sellin, *Murder and the Death Penalty*, 284 Annals 1-166 (1952); Sellin, *The Death Penalty*, in MODEL PENAL CODE (Tent. Draft No. 9, 1959). The following summary parallels that in Wilson, *supra* note 22.

28 Reprinted in BEDAU, *supra* note 3, at 343.

29 *Id.* at 315.

30 *Id.* at 322.

immediately preceding an execution. To him, the emotional arousal and suggestibility associated with the death penalty seem to create homicidal tensions countering deterrent warnings.<sup>31</sup>

Sellin also has sought to discover whether law enforcement officers are safer from murderous attacks in states with the death penalty than those without it. He found that the victim-homicide rate of police officers in states that had abolished capital punishment matched the rate in states retaining the death penalty. Campion and Jayewardene reached the same conclusion after studying the deaths of police officers.<sup>32</sup>

The rejoinder to these findings often is to the effect that while executions may not deter murderers generally, they will protect prison guards and other inmates from convicts who have nothing to lose. In response to this theory, Sellin compiled a list of 59 murderers in state and federal prisons in 1965. He concluded that it is "visionary" to believe that the death penalty could reduce the hazards of life in prison. Eleven of the prison murders were found in states without capital punishment and 43 in states with it, the others being in federal prisons.

The latest official data may be still more convincing. The dry morass of the 1973 *Uniform Crime Reports*, released in September 1974 bears crucially on the deterrent impact of capital punishment during its 1973 moratorium. If the penalty does in fact deter, its widely assumed abolition by the Supreme Court in 1972 ought to have resulted in removing the fetters from would-be premeditative murderers. The facts are otherwise, and strikingly so. While in 1973 murders increased in number, the rate of increase remained identical—five percent—to that recorded in 1972. Increase in the victimization rate occurred at a lesser level—four percent—than the five percent reported for 1972. In addition, the rate of increase per 100,000 persons in 1973 was 35 percent—markedly less than the rates for aggravated assault (40 percent), forcible rape (55 percent), and robbery (39 percent) during the same period. Furthermore, the numerical increase in total murder stems almost entirely from increases in two heat-of-passion, in-the-home homicides: parent killings of a child (up to 3.2 percent of the total from 2.9 percent in 1972) and lovers'-quarrel killings (up to 7.5 percent from 7.1 percent). Most surprising to deterrence advocates was the decrease in known felony murders (murders occurring as part of a planned crime) from 22.1 percent of the 1972 total to 21.6 percent in 1973, indicating that the unavailability of capital punishment in 1973 coexisted with a decline rather than an anticipated increase in planned personal violence.

Enough is now known from these studies to raise serious doubts about the deterrent impact of the death penalty. Those bent on homicide either do not consider the penalty or, if they do, do not consider it a strong threat. In this light, police and prosecutor attitudes seem to reflect merely an overanxious search

31 Graves' speculations on this point are underscored by Sellin, *The Death Penalty*, *supra* note 27, at 60-65.

32 Reprinted in BEDAU, *supra* note 3, at 301. During 1961-70, 37 policemen were killed in Canada. "The data do not support the thesis that the absence of the death penalty increases risks to policemen," according to a recent study, Jayewardene, *The Death Penalty and the Safety of Canadian Policemen*, 15 CAN. J. CRIMINOLOGY & CORRECTIONS 356, 366 (1973).

for a panacea. These attitudes confirm what has been termed, perhaps unkindly, the "Tiger Prevention" theory. The name is derived from a well-known tale: a man seen on a main street snapping his fingers explained that the finger-snapping was "keeping tigers away." Upon being told that there were no tigers within five thousand miles, his answer was, "Well, then I must have a pretty effective technique."<sup>33</sup> The point of that story is amply reinforced by prisoners' related experiences. Clinton Duffy, former warden of the California State Prison at San Quentin, has told the story, which he means to be paradigmatic, of how one of the men who built the first gas chamber at San Quentin ended up several years later as one of its victims.<sup>34</sup> Similarly, Charles Justice, builder of the Ohio State electric chair, died in it forty years after building it.

At most, these multiple deterrence studies show that abolishing capital punishment does not lead to any increase in homicide. One would not be able to say much more. Such factors as age (the young commit more murders), region (the South has proportionately more murders than the North), race (Blacks are more likely to murder, and to be murdered, than Whites) and class (the poor are more likely to murder, and to be murdered, than the well-to-do)

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33 The illustration is borrowed from ZIMRING & HAWKINS, *supra* note 20, at 27, and is reinforced by the unfounded clinging to deterrence illustrated in these pages by Vance, *The Death Penalty After Furman*, 48 NOTRE DAME LAWYER 850 (1973). Actually:

[T]he chief risk of death from crime is not execution, but killing at the hands of a policeman or other citizen during or after the commission of the crime. A study showed that in Chicago between 1934 and 1954, policemen killed 69 and other people killed 261 homicide suspects. During the same period, Chicago had only 43 executions. Thus the presence of the death penalty raises the risk of death for the criminal only slightly. Most of that risk is equally present in the abolition state.

T. SELLIN, CAPITAL PUNISHMENT 124 (1967).

To provide a more refined and theoretically sound examination of the relationship between the death penalty and capital homicide, Bailey conducted a survey of state bureaus of prisons throughout the country requesting admission statistics for first and second degree murder for 1967 and 1968, with the following results:

First, a comparison of death penalty and abolition states for both 1967 and 1968 revealed mean offense rates of first degree murder, second degree murder, total murder and homicide to be substantially higher in jurisdictions retaining capital punishment. Further, for all four categories, for both years, mean rates for death penalty states exceeded average rates for the country.

Secondly, to meet the common objection that comparison of rates for capital punishment and abolition states ignores other possibly important etiological factors, rates of eight groupings of contiguous states which differ in the provision for the death penalty were examined. For first degree murder, for both years, over 60 percent of the neighboring states examined showed rates to be higher in death penalty jurisdictions, while less than 30 percent of the contiguous states showed rates higher in abolition jurisdictions.

Thirdly, to further control for other possibly important etiological factors, rates for all four categories were also compared for death penalty and abolition states similar on two socioeconomic and five demographic variables. In addition, abolition and retentionist states having similar aggravated assault rates were compared. This analysis revealed that for all categories, for both years, at all levels on the control variables (with but one exception), rates were higher in capital punishment states.

Fourthly, to look beyond simply the normative provisions for the death penalty, execution rates and offense rates were examined in death penalty jurisdictions. For all four categories, for both years, the association between risk of execution and offense rate was found to be in the predicted inverse proportion.

The findings summarized above are, according to Bailey, consistent with those of earlier investigations of homicide but quite contrary to what deterrence theory would predict. W. Bailey, *Murder and Capital Punishment: Some Further Evidence*, 1974 (unpublished report at Cleveland State University).

34 C. DUFFY, 88 MEN AND 2 WOMEN 155 (1962). Duffy's survey of opinions from inmates is untrustworthy, however, because prisons do not include those persons who in fact were effectively deterred by the death penalty. Cf. ZIMRING & HAWKINS, *supra* note 20, at 31.

all contribute to the homicide rate. If these factors are reckoned in any statistical explanation of the murder rate, the deterrent importance of the death penalty or its absence to the analysis is likely to be slight.<sup>35</sup>

### C. Furman v. Georgia

*Furman v. Georgia*<sup>36</sup> spared the lives of 631 persons under sentence of death. An analysis of *Furman* is a prerequisite to understanding the future of capital punishment. Two of the five justices who supported the result in *Furman* believed the death penalty to be a *per se* violation of the eighth and fourteenth amendments of the U.S. Constitution. Justice Brennan listed four principles essential to determining whether a punishment violates the "cruel and unusual punishment" clause of the eighth amendment: (1) it must not be so severe as to be degrading to the dignity of human beings; (2) it must not be arbitrarily inflicted; (3) it must not be unacceptable to contemporary society; and (4) it must not be excessive. Examining the death penalty in light of these norms, Brennan concluded that the penalty violates all four: It is unusually severe and degrading, it is inflicted arbitrarily, its rejection by contemporary society is virtually total, and it serves no penal purpose more effectively than the less severe punishment of imprisonment.<sup>37</sup>

Justice Marshall, also finding the penalty *per se* unconstitutional, examined the history of the penalty and found that it violates the Constitution because it is excessive and unnecessary. The death penalty is excessive and unnecessary because it does not serve any of the six conceivable purposes for its existence: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. He concluded that its lack of utility makes it "morally unacceptable to the people of the United States at this time in their history."<sup>38</sup>

The opinions of the other three justices on the majority of the Court (Douglas, Stewart and White) do not specifically hold the death penalty unconstitutional *per se* but hold that its imposition in the cases before the court violated the eighth and fourteenth amendments. All three justices specifically refused to consider whether the death penalty is *per se* unconstitutional.

The import of these three opinions is that since the death penalty is not unconstitutional *per se*, a constitutional system of capital punishment could be devised by avoiding present inequities. The features of the present system that make it objectionable are: (1) according to Justice Douglas, that it allows the penalty to be discriminatorily and disproportionately applied to the poor, the Blacks, and the members of unpopular groups;<sup>39</sup> (2) according to Justice Stewart, that it allows the penalty to be so wantonly and freakishly imposed;<sup>40</sup> and (3) according to Justice White, that the infrequent imposition of the penalty

35 Wilson, *supra* note 22, at 42.

36 *Furman v. Georgia*, 408 U.S. 238 (1972).

37 *Id.* at 271-310 (concurring opinion).

38 *Id.* at 360 (concurring opinion).

39 *Id.* at 249 (concurring opinion).

40 *Id.* at 309-10 (concurring opinion).

makes the threat of execution too weak to be of any real service to criminal justice.<sup>41</sup>

Chief Justice Burger and the other dissenting justices on the Court held that the death penalty is not cruel and unusual punishment in violation of the eighth amendment. Examination of the historical evidence on the early use of the death penalty led Chief Justice Burger to conclude that it was not intended to be included in the ban on cruel and unusual punishments. Even though enforced death is cruel and its use has been increasingly unusual, that does not render it cruel and unusual in the constitutional sense. Burger observed that the fifth amendment to the Constitution itself explicitly recognizes the power to inflict the death penalty: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."<sup>42</sup>

Justice Blackmun could not agree that the death penalty is unconstitutional as a "matter of history, or law, or of constitutional pronouncement." He found that the legislative enactments embodying the death penalty indicate the present moral climate of the United States as tolerating the death penalty.<sup>43</sup>

Agreeing with Burger's historical and constitutional analysis, Justice Powell added that on every occasion where the Supreme Court has touched on the constitutionality of the death penalty, it has tacitly assumed that the Constitution did not prohibit the death penalty.<sup>44</sup> Justice Rehnquist, concurring in the above opinions, adds a scolding at the Court for its lack of judicial self-restraint.<sup>45</sup>

The most interesting parts of the dissenting opinions, however, are the exegetical attempts to interpret the holding of the majority. The Chief Justice explains his own confusion as follows:

The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions [of Justices Stewart and White], is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner as they have in the past.

While I do not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made. Since the two pivotal concurring opinions (Stewart and White) turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards of juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed. If such standards can be devised or the crimes more meticulously defined, the result cannot be detrimental.

Real change could clearly be brought about if legislatures provide mandatory death sentences in such a way as to deny juries the opportunity to

41 *Id.* at 311-12 (concurring opinion).

42 *Id.* at 380 (dissenting opinion).

43 *Id.* at 411-14 (dissenting opinion).

44 *Id.* at 428 (dissenting opinion).

45 *Id.* at 470 (dissenting opinion).

bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal.<sup>46</sup>

Apparently, then, when all opinions are read in unison, the three alternatives open to legislatures wishing to retain the death penalty are:

1. Provide standards for juries and judges to follow in determining the sentence in capital cases;
2. More narrowly define the crimes for which the penalty is to be imposed; or,
3. Provide an inescapable, mandatory death sentence upon conviction for specified crimes.

Actually all three of these alternatives are interdependent. If a legislature provides mandatory death for a specified crime, it would also limit such a severe punishment to very narrowly defined crimes and establish standards for its imposition.

Several seemingly exemplary statutes mentioned in the Court's opinions impose mandatory death sentences for specific crimes and receive gentler treatment at the hands of the Court. Federal law requires the death penalty for any person convicted of acting as a spy for the enemy in time of war.<sup>47</sup> Rhode Island requires the death penalty for a life-term prisoner who commits murder.<sup>48</sup> Massachusetts requires death for anyone convicted of murder in the commission of forcible rape.<sup>49</sup> Ohio imposes mandatory death upon the assassin of the President of the United States or of the governor of a state.<sup>50</sup> In his opinion, Justice Stewart suggests that he does not include these statutes in his conclusion that the death penalty is unconstitutional.<sup>51</sup> Justice Powell takes further note of this and states that "since Rhode Island's only capital statute—murder by a life term— is mandatory . . . [it is not] struck down by virtue of the Court's decision today."<sup>52</sup>

All of this is not to say that a mandatory death penalty is constitutional, but merely that a mandatory death penalty has the better claim on constitutionality. However, in his tortured dissent, the Chief Justice confessed that he could more easily be persuaded that mandatory sentences of death "are so arbitrary and doctrinaire" that they violate the Constitution.

#### D. New Legislation

For many Americans today, capital punishment is almost a forgotten issue. But not so to Jesse Lee Coley, a 29-year-old convicted of rape in Georgia and sentenced in April 1973 to be electrocuted; nor to Wallace L. Rhodes, Jr., and

46 *Id.* at 397, 400-01 (dissenting opinion).

47 Uniform Code of Military Justice, 10 U.S.C. 906 (1970). See Note, *The Future of Capital Punishment in Florida*, 64 J. CRIM. L.C. & P.S. 2, 9-10 (1973), whose analysis is followed here.

48 R.I. GEN. LAWS ANN. § 11-23-2 (Supp. 1973).

49 MASS. GEN. LAWS ANN. ch. 265, § 2 (1968).

50 OHIO REV. CODE ANN. §§ 2901.09, 2901.10 (1954).

51 408 U.S. at 307-08 (concurring opinion).

52 *Id.* at 417 n.2.



James M. Shields, two Idaho jail escapees, who in July 1973 were sentenced to be hanged for the kidnapping and murder of a Montana jeweler; nor to more than 140 other defendants in 19 states who have been sentenced to death since the Supreme Court decision in *Furman*. Their plight reflects the fact that the court did not abolish capital punishment; it only barred the haphazard manner of its past imposition and served billboard size notice to legislatures on how to revive legal death.

The Senate has passed a bill which would make the death penalty available for treason, assassination, certain serious acts of sabotage and espionage, and for kidnapping and skyjacking resulting in death.<sup>53</sup> The death sentence for such crimes would be determined through a posttrial hearing in which a jury would evaluate itemized aggravating or mitigating circumstances surrounding the offense. The death penalty would be obviated if the hearing discovered just one mitigating factor, such as the fact that the defendant was under age 18. Death would be mandatory, however, if an aggravating factor was found in the absence of any mitigation.

Meanwhile 29 states have already reinstated the death penalty designed in their own ways to meet what they surmise are the Supreme Court's objections. The pattern usually is to limit executions to certain major but relatively uncommon offenses (for example, killing a police officer) or to reduce judicial discretion in imposing death sentences so as to avoid charges of arbitrariness. No one has yet been executed, and no such law has yet been tested before the Supreme Court, although Tennessee's<sup>54</sup> and New York's<sup>55</sup> typical statutes have been struck down by their high courts.

In effect, the *Furman* decision has paradoxically focused legislative attention on making death mandatory for various offenses. These new laws may well rescue or even augment the use of capital punishment by making its application inescapable. As a result, capital punishment must be debated anew on its merits without recourse to the easy assumption that capricious administration will accomplish what appeals to public opinion cannot.

### III. Arguments Against Reenacting the Death Penalty

#### A. *Suicide via Murder*

There are several cogent reasons why we should not enact a death penalty "which we can live with." The first is the "suggestibility" of executions on persons with suicidal tendencies.

It is a curious fact that sensational acts are self-propagating. There are cases on record showing that the warped desire to be executed has caused persons to

<sup>53</sup> S. 1401, 93d Cong., 2d Sess. (1974).

<sup>54</sup> *State v. Hailey*, 505 S.W.2d 712 (Tenn. 1974). The case, however, was not decided upon the eighth amendment.

<sup>55</sup> *People v. Fitzpatrick*, 32 N.Y.2d 499, 300 N.E.2d 139 (1973). None of the new capital punishment laws enacted to date handles either sentencing or nonsentencing in a way acceptable to *Furman*. Indeed, no death penalty is likely to pass muster as long as prosecutors, juries, and governors possess wide-ranging, undefined discretion in charging, acquitting, and pardoning. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1692, 1719 (1974).

commit capital crimes. Such crimes are indirect forms of suicide, reflecting a pathological desire to die by more courageous hands than the victim's own. One example covers a multitude: In 1820, in Dresden, Germany, when a murderer was beheaded publicly, the ritual made such an impression on a weak-minded woman present that four weeks later she killed a girl visiting her. She surrendered to police, who found the date of the original execution carved on her door. She reported that this execution, as well as two others she had witnessed in 1804 and 1809, had given her the idea of committing a murder so that she could die in the same way. Sellin lists a long series of such offenses.<sup>56</sup>

To what extent the desire for self-immolation lies subtly hidden in the motivation of murderers is a problem for psychiatrists. The instances are real though no doubt rare. Those involved might be found to be mentally deranged and placed in appropriate institutions. However, without the existence of the death penalty, these rare murders might not have occurred. Strangely, the evidence indicates that three of the last four men executed in this country wanted to die at the hands of the state.<sup>57</sup> Graves' similar discovery of increased homicides at the time of executions suggests that the state's example of taking life actually encourages others to follow it.<sup>58</sup> If so, the deterrent effect of a typical execution is offset by its "brutalizing" effect.

Although the possibility of executions inciting persons to criminal violence may provoke sophomoric derision, it receives passing support in current psychiatric literature. On the phenomenon of "suicide by murder" Dr. Isador Ziferstein, a Los Angeles psychiatrist, writes:

A couple of fairly recent cases come to mind. One, the case of a disc jockey from Las Vegas who shot a complete stranger on the streets of Los Angeles in broad daylight. On being arrested, he stated that he had been despondent for some time but did not have the courage to commit suicide. He therefore chose murder as an indirect route to his own destruction. A similar case occurred a couple of years ago in Los Angeles, where a man, after several unsuccessful attempts at suicide, killed his landlady and turned himself in. As I recall, the state eventually obliged him by executing him. For every case where this mechanism of suicide-by-murder is conscious and is verbalized, there are probably several where the same mechanism is unconscious and not manifestly verbalized, although it can be deduced from a careful study and interpretation of the material. In these cases, obviously, the death penalty is not a deterrent, but has quite the opposite effect of motivating the sick person to commit murder.<sup>59</sup>

<sup>56</sup> Sellin, *supra* note 27, at 60, from whom this example is taken.

<sup>57</sup> See note 15 *supra*. Hearings on S. 1, S. 1400, S. 1401 before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., at 164 (1972) (statement of Douglas Lyons).

<sup>58</sup> See note 30 *supra*.

<sup>59</sup> Ziferstein, *A Psychiatrist Looks at Capital Punishment*, 8 FRONTIER 5, 6 (Jan. 1957). S. PALMER, *THE PREVENTION OF CRIME* (1973) asserts that homicide offenders are almost universally frustrated psychologically or sociologically, with aggression patterns dating from youthful exposure to violence in the home or on television. *Id.* at 25.

Dr. Louis West, Professor of Psychiatry at the University of Oklahoma, describes several suicide by murder/notoriety by murder cases in his testimony in Hearings Before the Subcomm. on Criminal Laws, 90th Cong., 2d Sess., at 126-27 (1968):

Recently an Oklahoma truck driver had parked to have lunch in a Texas roadside cafe. A total stranger—a farmer from nearby—walked through the door and blew

The identical point applies to other crimes such as kidnapping and sky-jacking where distraught persons kill in distraught circumstances. In *The Sky-jacker*<sup>60</sup> (the result of extensive psychiatric studies of skyjackers) Hubbard argues that skyjackers are universally deranged individuals desirous of dying but unable to do the job themselves. Offering death to a skyjacker is, in Hubbard's words, "like offering candy to a child for being bad." As to the kidnapper, imposing death for the abduction achieves nothing beyond endangering the victim, for the kidnapper has nothing to lose by killing his victim. On the other hand, reserving capital punishment for the killing of the kidnaped punishes an impulsive, desperate, and distraught act analogous to, if not identical with, a crime committed in the "heat of passion" which the law has never punished as the most severe degree of homicide. As to qualifying felony murder for capital punishment, the simple and honest response is that the felony murder rule itself is an anachronism, with an extensive history of thoughtful condemnation as its only badge of honor.<sup>61</sup>

### *B. Mandatory Standards Will Not Eliminate Discretion*

Sidney Hook, retired professor of philosophy at New York University, and a proponent of the death penalty, offers sobering strictures against a mandatory death sentence:

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One thing is clear. From the standpoint of those who base the case for him in half with a shotgun. When the police finally disarmed the man and asked why he had done it, he replied, "I was just tired of living."

In 1964 Howard Otis Lowery, a life-term convict in an Oklahoma prison, formally requested a judge to send him to the electric chair after a District Court jury found him sane following a prison escape and a spree of violence. He said that if he could not get the death penalty from the jury he would get it from another, and complained that officials had failed to live up to an agreement to give him death in the electric chair when he pleaded guilty to a previous murder charge in 1961.

Another murderer, James French, asked for the death penalty after he wantonly killed a motorist who gave him a ride while hitch-hiking through Oklahoma in 1958. However he was "betrayed" by his Court-appointed attorney who pleaded him guilty and got him a life sentence instead of the requested execution. Three years later French strangled his cell-mate for no obvious reason: a deliberate, premeditated slaying. He has been convicted three times for that crime, declared legally sane and sentenced to death each time. This sentence he deliberately invites in well-organized, literate epistles to the Courts and in provocative challenges to the jurors. During a psychiatric examination in 1965 French admitted to me that he had seriously attempted suicide several times in the past but "chickened out" at the last minute, and that a basic motive in his murdering another prisoner was to force the State to deliver the electrocution to which he feels entitled and which he deeply desires.

Many other examples may be found in which the promise of the death penalty consciously or unconsciously invites violence. Sellin reviewed a number of them. Wertham's analysis of Robert Irwin, who attempted suicide by murder, is a classic. Some who seek execution even borrow somebody else's murder! A few months ago Joseph Shay in Miami admitted that he had falsely confessed to an unsolved murder "because I wanted to die."

60 D. HUBBARD, *THE SKYJACKER* 229-30 (1971).

61 See Note, *Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496 (1955); Note, *California Rewrites Felony Murder Rule*, 18 STAN. L. REV. 690 (1966).

retention of capital punishment on the necessity of "satisfying community needs," there should be no justification whatsoever for the *mandatory* death sentence attempts to determine in advance what the community need and feeling will be, and closes the door to fresh inquiry about the justice as well as the deterrent consequences of any proposed punishment.<sup>62</sup>

Judge Fuld, in *People v. Fitzpatrick*,<sup>63</sup> restates a similar criticism in reflecting on the aftermath of *Furman*:

[M]andatory sentences for crimes do not best serve the ends of the criminal justice system. Now, after the long process of drawing away from the blind imposition of uniform sentences for every person convicted of a particular offense, we are confronted with an argument perhaps implying that only the legislatures may determine that a sentence of death is appropriate, without the intervening evaluation of jurors or judges.<sup>64</sup>

Governor Dan Walker made the same point in vetoing proposed Illinois death penalty legislation with the kind of example that escapes standardization:

A mandatory death penalty is troublesome for still another reason—it takes away from judge and jury an opportunity to exercise the quality of mercy based on the particular facts of the case before them. Is there any category of crime so heinous that everyone who commits it must be executed regardless of circumstances? I cannot accept that view. These bills provide mandatory execution for murder of a fireman on duty. Suppose, for example, that a fireman has a fight with his wife, beats her unmercifully, and goes on duty. Enraged, she follows him to the fire station and shoots him. She is guilty of murder of a fireman. Should she be automatically executed? Suppose that a father kills two men who have raped his daughter. He is guilty of double murder. Should he be automatically executed? Under these bills there would be no choice.<sup>65</sup>

Other discretionary problems abound for the jury. Because *Furman* is a due process decision, it demands that *McGautha v. California*,<sup>66</sup> upholding the constitutionality of the death-imposition process, be confronted. *McGautha* addressed the question whether juries empowered to impose or withhold the death penalty should be given standards by which to exercise that power. The Court refused any standards, holding "it is quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."<sup>67</sup> In *Furman*, however, it is precisely this "untrammelled" discretion that makes the administration of the death penalty "offensive" to the Constitution. If *Furman* is right, *McGautha* is wrong, for *McGautha* permits absolute jury discretion in sentencing.

Writing for the *McGautha* Court, Justice Harlan concluded that it is im-

62 Hook, *Symposium on Capital Punishment* (Panel Discussion 2), 7 N.Y.L.F. 276, 281 (1961) [emphasis supplied].

63 32 N.Y.2d 499, 300 N.E.2d 139 (1973).

64 *Id.* at 512 n.2, 300 N.E.2d at 145 n.2, citing *Furman v. Georgia*, 408 U.S. 238, 402-03 (1972) (Burger, C.J., dissenting).

65 Letter to the 78th Illinois General Assembly from Governor Dan Walker, November, 1973.

66 402 U.S. 183 (1971).

67 *Id.* at 207.

possible to predict in advance the types of offenders worthy of death and those who are not:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.<sup>68</sup>

He rejected the approach of the Model Penal Code and that recommended in January 1971 by the National Commission on Reform of Federal Criminal Laws. Instructing the jury about aggravating or mitigating factors gave at best minimal control over the jury's exercise of discretion. Additionally, the factors enumerated in the model codes were not exhaustive. Their incompleteness suggested the "intractable" nature of the problem of drafting standards.<sup>69</sup> The jury in *McGautha*, Harlan noted, had been able to distinguish between McGautha and his less culpable codefendant who had received a life sentence. If the Court attempted to enumerate the appropriate factors, the result might be to inhibit rather than expand the scope of consideration since no list could be comprehensive. Thus, *McGautha* holds that specific standards to aid juries in determining the appropriate punishment are actually impossible to fashion. *Furman*, on the other hand, sent 29 legislatures into frenzied attempts to do just that.

There is another reason why no mandatory penalty can ever exist: such a statute would still—and necessarily—leave undisturbed vast areas of discretion, including executive clemency, jury discretion to convict of lesser included offenses, and "plea bargaining." Even a mandatory statute cannot bar the capricious prosecutor from exercising his traditional discretion to charge a lesser offense or a sympathetic governor from commuting all, some, or a random few death sentences. Even the legislature is powerless to eliminate jury nullification of a mandatory penalty by returning unwarranted acquittals or, more likely, convictions for lesser offenses. The operation of these or other discretionary processes will continue to produce death sentences as random and capricious as the permissive death sentences mentioned in *Furman*.

### *C. The Typical Murderer Is Not a Repeater*

The main objection to less than capital punishment for the murderer is his eventual return to society. The main objection is that released offenders will again endanger the public. However, correctional administrators describe murderers with life sentences as the most adaptable of prisoners and the offense group presenting the fewest problems in institutional settings. The group also represents the fewest problems in community release settings. Parole violation recidivism rates for the murderer are quite startling. It is far less likely that a paroled

68 *Id.* at 204. Such a procedure is not only beyond human ability; it also inhibits the jury's role. Cf. Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32 (1974); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 435 (1966); see also Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1100 (1953).

69 402 U.S. at 207.

murderer will murder again or commit any other crime than it is that the burglar, robber, forger, or thief will commit a new offense while on parole. In point of fact, murderers are less likely to recidivate than any other category of major felony offender. In Connecticut, the success rate for parolees convicted of willful homicide is 97.2 percent; the 2.8 percent failure rate is comprised wholly of individuals who absconded from parole or committed technical violations.<sup>70</sup> Ohio found that of the 169 paroled first degree murderers sentenced to life since 1945, only two have been sent to the penitentiary for new offenses, one for armed robbery and the other for assault with intent to commit a felony.<sup>71</sup> New York found that only two of the 36 lifers paroled since 1943 have committed any infractions, one being a technical violation and the other a burglary. Most of the thirty-six were to have been executed had they not received commutations.<sup>72</sup> California, Wisconsin, and Michigan have had similar results.<sup>73</sup> All the evidence reinforces the Royal Commission's report that the release of life sentence prisoners involves little risk at present.<sup>74</sup>

#### D. *Moral Issues*

When the State uses capital punishment, "thou shalt not kill" loses the force of the absolute. Murder and capital punishment are not opposites that cancel each other, but likenesses that breed their kind. The death penalty is no less than a legitimization of extreme violence. It exemplifies and teaches what it seeks to discourage. The battle over capital punishment is a microcosm of the conflict between those who see violence as the means of coping with society's problems and those who oppose violence as counterproductive. Violent force employed after the fact legitimizes a method of coping with violence that is the antithesis of the goals society seeks to instill. Capital punishment is the supreme example of an irrational response which promotes with the right hand what it would like to discourage with the left.

The "public" nature of executions reflects this ambivalence. A hundred years ago a large crowd would turn out for a public hanging; today, most people would condemn executions on television, as have all legislatures who have weighed the seductively deterrent advantages of televised death.

Today the individual face of death has become blurred by embarrassed incuriosity and institutionalization. Yet if capital punishment is ever to exercise its deterrent charms, it deserves to be televised in minute detail; failure to do so defeats the rationale for its existence. Yet that very reluctance to brutalize society through a televised report is exactly the reason society should not be brutalized at all by an actuality too gruesome to be publicized.<sup>75</sup>

<sup>70</sup> Orland, *Without Benefit of Parole*, New York Times, July 8, 1972, at 25, col. 6.

<sup>71</sup> OHIO LEGISLATIVE SERV. COMM'N, CAPITAL PUNISHMENT 81 (1968).

<sup>72</sup> *Id.* at 62. See Note, *Capital Punishment: A Model for Reform*, 57 Ky. L.J. 508, 513-14 (1969).

<sup>73</sup> OHIO LEGISLATIVE SERV. COMM'N, *supra* note 71.

<sup>74</sup> ROYAL COMMISSION REPORT ON CAPITAL PUNISHMENT 38 (1949).

<sup>75</sup> Indeed, the flip side of this argument is that televised executions will augment the morbid sensationalism which excites some weak minds to kill merely for the sake of notoriety. K. MENNINGER, *THE CRIME OF PUNISHMENT* 24, 185 (1968) relates examples of how the publicity surrounding executions has incited many persons to kill in order to die with the solace of a newspaper headline.

In *Justifying Violence*,<sup>76</sup> the authors speak about official and unofficial use of violence (including death) as a means of achieving social control. They conclude their analysis as follows:

It seems clear that violence feeds on violence; a violent act tends to evoke a violent response. The goals of the two types of violence considered in this research, violence for social control and violence for social change, stand in marked contrast to each other, yet the means by which these goals are to be accomplished are identical. It is unlikely that the use of force for social control will eliminate the desire for social change, although it may indeed suppress the expression of that desire. It is also unlikely that the use of violence for social control can be expected to teach the lesson that the use of violence as a means to an end is unacceptable. Violence for social control exemplifies the opposite lesson, and by example teaches it.<sup>77</sup>

The severity of punishment, Montesquieu wrote, is fitter for despotic governments whose principle is terror than for a monarchy or republic whose wellspring is honor and virtue. Legislatures hastily breathing life back into the death penalty may well be pandering to the very philosophy that penalty is intended to exorcise. Analysis of public attitudes toward the death penalty reveals that supporters of the death penalty tend to be the same persons who view violence as a legitimate means to their own goals.<sup>78</sup>

#### IV. Conclusion

We must be concerned not simply to determine when violence "works" but to judge its rightness and propriety. The most difficult task for those who would limit or eliminate violence lies in avoiding situations where some believe mortal violence legitimate. That task remains the perennial challenge to political philosophy, to legislators, and to the law, so long as all power legitimately rests in the people.

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<sup>76</sup> M. BLUMENTHAL ET AL., *JUSTIFYING VIOLENCE* (1972).

<sup>77</sup> *Id.* at 247.

<sup>78</sup> Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1267 (1974).

The sentiment of most sociologists on the question of capital punishment is probably well reflected in this frequently cited statement by H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 31 (1951):

Not a single assumption underlying the theory of capital punishment can be squared with the facts about human nature and social conduct that have been established through the progress of scientific and sociological thought in the last century and a half. In fact, the whole concept of capital punishment is scientifically and historically on a par with astrological medicine, the belief in witchcraft, or the rejection of biological evolution.