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THE DEATH PENALTY **

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There is a story, apparently well-worn when I first read it in a law review a couple decades ago. It has an anxious old lady saying to her granddaughter: "My dear, do me a favour and promise to stop using two words. One of them is swell, and the other is lousy." To which the child dutifully replied: "Why, of course, grandmother. Just tell me what the words are."

Like the professor who related that story, my trouble is also with two words: one of them is "conventional" and the other is "ingenious." (Don't ask me what the words are.) If you deem my remarks conventional, you will ipso facto rate them as readily forgettable; and if you term them ingenious, you will have applied what to any lawyer is a subtly fatal description. Show me a court opinion which characterizes as ingenious the argument of one side and I need read no more to know who lost the case. So I shall try to navigate gingerly between the Scylla of conventionality and the Charybdis of ingenuity.

In one of C.H. Chesterton's books¹ he has a judge, in passing sentence on a convicted prisoner, say: "I sentence you to three years' penal servitude, in the firm and God-given conviction that what you really require is three weeks at the sea-side." Samuel Butler put it this way in his classic *Erewhon*: "You may say it is your misfortune to be criminal; I answer that it is your crime to be unfortunate."

After World War I George Bernard Shaw penned a short essay² in which he concluded that "imprisonment as it exists today is a worse crime than any of those committed by its victims; for no single criminal can be as powerful for evil, or as unrestrained in its exercise, as an organized nation." With Shavian tongue in cheek, his solution was the death penalty for every crime.

On the other hand, Dr. Karl Menninger, the distinguished psychiatrist, advocates the elimination of all punishment, which he

contends is a euphemism for vengeance.³ Abolition of punishment does not mean omission of penalties. Quite the contrary, Menninger advocates penalties that are sure and quick. While the distinction between punishment and penalty may seem esoteric, he makes a tenable point. All legal sanctions involve penalties for infractions, this being the price paid for violation of the rules of society. Punishment is the additional penalty which corrupts the legal principle of quid pro quo with a moral surcharge.

Dr. Menninger's basic theme is that "No matter how glorified or how piously disguised, vengeance as a human motive must be personally repudiated by each of us. This is the message of old religions and new psychiatry. Unless we give up our delicious satisfactions in opportunities for vengeful retaliation on scapegoats, we cannot expect to preserve our peace, our public safety or our mental health." He expressed the belief that "the public will grow increasingly ashamed of its cry for retaliation, its persistent demand to punish. This is its crime, our crime against criminals, and our crime against ourselves."⁴

The learned doctor rendered that peroration 12 years ago. In the past decade the whole world has suffered a tragic increase in incidence of violent crimes — murders, forcible rapes, kidnappings, hijackings, and assorted offences that are politically motivated. Indeed, serious crime has risen over 30 per cent in the past decade.⁵ As a result the public is not, as Menninger forecast, increasingly ashamed of its cry for retaliation: it is, as we lawyers would put it, openly and notoriously demanding retribution. The enlightened theory that those who have fractured society's rules can be rehabilitated has been all but totally abandoned as a frightened and understandably impatient public insists upon a full measure of punishment for malefactors. If we give burglars two years in prison, and burglaries continue, we must

sentence them to four years. If that does not work, make it eight years, sixteen, life if necessary.

That tendency is based on the concept that severe criminal sanctions will deter others from committing similar offences. Most psychiatrists emphatically disagree. They concede that swift, immediate infliction of sufficiently painful stimulation to influence animals — dogs or human beings — will tend to dissuade them from certain types of behaviour of which we disapprove and which we wish to teach them not to do. But it does not deter other animals — dogs or human beings — not so treated.

The dichotomy in underlying theories of criminal justice is nowhere more dramatically illustrated than in the eternal debate over capital punishment. Whether a convicted murderer shall receive life imprisonment or the death penalty capsulates the conflict between potential rehabilitation and retribution.

I must confess — as I suspect most of you will, too — that after reading about one who committed some particularly heinous crime, I wonder if it would not be simpler and cheaper, more satisfactory and expeditious, if such a person could be quietly exterminated. He has done irreparable damage; he can never recover; he can never again be useful to the world; he will always remind us of painful sorrow; his continued existence is a burden to himself and to us. And even if his departure from the world has no demonstrable deterrent effect on others, at least he will not be able to offend society again.

That brings me to my topic — a discussion of the death penalty — even though, to make another confession, it seems virtually impossible to say anything new about capital punishment. It has existed for thousands of years,⁶ and as an issue it did not escape the attention of Plato and Aristotle, or Kant, Hegel, Beccaria, Bentham or Marx.⁷ William Seagle, in his *The History of Law*,⁸ indicates that

some scholars trace the origin of the death penalty to the ancient religious human sacrifice. The connection of capital punishment with human sacrifice rests upon the resemblance between rituals of sacrifice and methods of execution, and the ancient tendency to speak of criminals as devoted to the gods of evil. It is true that a religious ritual commonly accompanies an execution, but the link is tenuous between a condemned person making his peace with God and finding in that circumstance that he is being offered up on the altar of religious sacrifice.

Opposition to death as punishment developed early in America. Many of the classic arguments against the death penalty were articulated as early as 1822 by Edward Livingston in his quest to eliminate capital punishment in Louisiana.⁹ Of course, the classic arguments, both pro and con, have been re-examined and refined over the years, but few truly novel theories have developed.

One recent approach concerns the use of social science or behavioural research to determine the utilitarian value of the death penalty. Virtually all empirical studies have concluded that capital punishment does not deter homicides.¹⁰ The value of these studies, however, has been subject to considerable debate.

One commentator states that "With an issue as polemical as capital punishment, the common tendency is to select facts and to frame positions in a manner that precludes objective consideration of contrary evidence."¹¹ In fact, researchers cannot agree, much less be certain, that they are examining the right variables.¹² The issues are too complex and the present state of our objective knowledge is too feeble to take any item of empirical research as definitive proof of anything in this area.¹³ The inconclusive nature and questionable validity of social science and behavioural research has led one commentator to assert that "The death penalty is fundamentally an ethical issue [since] research is often purposefully selected to buttress with reason either what is believed or is ethically held."¹⁴

There are also significant problems with the statistical data base. By 1972, carrying out of the death penalty in the United States had dwindled to the point of

extinction; in fact, from 1967 until the celebrated Gary Gilmore case, no death sentence was administered.¹⁵ [Gary Gilmore, you may recall, was the convicted murderer who demanded his own execution; his wish was ultimately gratified.] Furthermore, measuring deterrence is "elusive largely because it is impossible to know exactly how many people have chosen not to violate the law for fear of punishment."¹⁶ One must nevertheless keep in mind that "Difficulty in measuring deterring effect does not mean that deterrence does not work."¹⁷

Nevertheless, empirical evidence on the utility of the death penalty is needed to fairly assess its deterrent effect. Recent United States Supreme Court cases have relied heavily on such research in considering the constitutionality of the death penalty under the English Amendment of our federal Constitution, the clause that prohibits cruel and unusual punishment.¹⁸ Though courts and commentators have relied on such evidence with varying degrees of confidence, the only conclusion one can reach is that the studies are inconclusive.

There are several commonly asserted justifications for the death penalty. First, it seems clear that the Eighth Amendment, when enacted, did not prohibit capital punishment as "cruel and unusual." In fact, the Fifth Amendment, enacted simultaneously with the Eighth Amendment, may be read to give the federal government implied power to deprive a person of life, so long as due process of law is respected. This implied right was extended to the states in 1868 through the Fourteenth Amendment.¹⁹ One commentator therefore frames the issue as follows: "[T]o regard the death penalty as unconstitutional one must believe that the standards that determine what is 'cruel and unusual' have so evolved since 1868 so as to prohibit now what was authorized then."²⁰

Professor van den Haag contends that a moral consensus, intellectual or popular, could have evolved to find capital punishment 'cruel and unusual,' but no such consensus has developed.²¹ On the contrary, intellectual opinion is divided, popular opinion clearly favours capital punishment, and more than two-thirds of our states have enacted death penalty laws.

According to the professor, it is this "political consensus" that is important, not any perceived consensus on the part of the judiciary.

If we need confirmation of this political consensus we can find it in the election one month ago when the people of a democratic state voted on extension of the death penalty. California, the most populous of the American states, is not merely a microcosm of the nation; it is deemed to be politically progressive, composed of people intellectually mature and socially aware. The vote was 4,400,000 for creation of additional capital crimes, only 1,700,000 against, almost a 3-1 margin.

I strongly suspect that this overwhelming sentiment for capital punishment reflects the views of the majority of the nations in today's troubled world. At the present time there appears to be no worldwide trend toward complete abolition of the death penalty. Indeed, over the past 35 years about as many countries have reinstated capital punishment as have abolished it.²²

One must concede, on the other hand, that there is a difference between *de jure* capital punishment and *de facto* capital punishment. For example, the Governor of New York, Hugh Carey, was re-elected last month, despite a strong law-and-order sentiment among the electorate, even though he forthrightly declared he would not enforce the state's death penalty law, that as a matter of personal conscience he would commute to life imprisonment every death sentence imposed by a court.

In striking contrast to times gone by, a limited number of offences carry the death penalty today. At some periods in the past the number of capital offences was virtually limitless; indeed a sociology professor has compiled an impressive and imaginative list of 109 crimes for which some countries at some reasonably modern time have imposed the death penalty. Lest you think I exaggerate, the list is attached as an appendix.

Today murder and treason are the offences most frequently defined as capital crimes. The next in frequency are espionage, arson, homicide accompanied by another serious crime, rape, robbery, insurrection or rebellion, patricide and sabotage.

As the number of capital offences has decreased, so has the number of actual executions. More than half the nations of the world record no executions each year, and many have had none for a decade or longer. Indeed the total number per year in all countries averages considerably less than that occurring in one country in earlier times. For example, during the reign of Edward VI in England there were estimated to be 560 executions yearly in London and Middlesex County alone and 72,000 executions took place during the 38-year reign of Henry VIII.²³ Today only six nations record from 50 to 100 executions. [Obviously I am speaking of legally ordered executions and not the genocide reported in such places as Uganda and Cambodia.]

To return to the purported justifications of capital punishment: several rationales other than deterrence have been advanced. One may be termed "normative validation" or maintenance of a moral condemnation for heinous crime.²⁴ In other words, imposition of the death penalty for a particular crime manifests society's revulsion for that crime. It is not self-evident, however, that "normative validation" is any greater for capital punishment than for life imprisonment, although some limited empirical research suggests that the public perceives the death penalty to be more severe than life imprisonment.²⁵ Indeed, the retributive rationale of "normative validation" appears to have a strong psychological appeal to many.²⁶

Capital punishment is commonly advanced as a more desirable alternative to private vengeance.²⁷ The argument is that "Legal vengeance solidifies social solidarity against lawbreakers and is the alternative to the private revenge of those who feel harmed."²⁸ There is no evidence, however, that capital punishment prevents private vengeance any more than does incarceration of the malefactor for life.

Incapacitation of recidivistic offenders is sometimes advanced as a rationale for capital punishment.²⁹ If a murderer is executed he cannot possibly commit another offense. Incapacitation is a defensible rationale only if those sentenced to die have recidivistic tendencies. No such evidence exists; in fact, there

is convincing evidence that most murders are isolated, situational incidents.

Other non-deterrence rationales commonly advanced for other punishments appear to have no application to capital punishment. "Normative insulation" is one, but there is no evidence that behaviour constituting a capital offense is learned through association with convicted capital offenders.³¹ "Enculturation" is another, but it seems unlikely that executions advance the public's knowledge of the criminal law.³² Finally, there is "stigmatization"; however, it is unlikely that extralegal consequences of receiving the death penalty deters any more than life imprisonment or even the mere notoriety of the crime.³³

Now, to examine the other side of the coin. Commentaries opposing the death penalty dominate the literature. Many of the commentaries, especially those of empirical quality, have appeared following the United States Supreme Court case of *Furman v. Georgia*.³⁴ For a decade before *Furman* the death penalty had been slowly fading away. *Furman*, instead of eliminating capital punishment altogether, revived public and scholarly debate and generated a considerable degree of legislative enthusiasm for its continued use.³⁵ Most of the recent articles attempt to establish the disutility or immorality of capital punishment.

Most empirical studies, which, I have noted, are subject to criticism, conclude that the death penalty does not deter the commission of capital offences.³⁶ Yet, "future death penalty challenges will almost certainly focus on the type and quality of evidence available to serve as 'objective indicia that reflect the public attitude toward a given sanction.'" ³⁷ Thus, there is little doubt that scientific behavioural research will play a significant role in consideration of this and other legal issues.

An interesting empirical study by Sarat and Vidmar tested the "informed opinion" hypothesis. The issue was "[W]hether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust and unacceptable."³⁸ Subjects first responded to a series of questions designed to isolate their views on capital punishment, and then were given

an opportunity to respond again after being provided with utilitarian information concerning the death penalty. The results tend to confirm Justice Marshall's assertions in *Furman* that an informed citizenry would find the death penalty morally unacceptable because it is "unwise," and because he "cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance."³⁹

Sarat and Vidmar found that subjects knew little about the death penalty, especially its effectiveness. When confronted with utilitarian information, a substantial percentage of subjects altered their opinion. The shift was not dramatic but the number of people favouring the death penalty was reduced to less than a majority. Finally, Sarat and Vidmar were able to isolate retributive notions as a strong link to support for the death penalty. Retributive beliefs were positively related to initial views on the death penalty, and negatively related to change in those views.⁴⁰

Another study revealed the distinction between the abstract and the precise. This was in a recent public opinion poll taken by a psychology professor at Yale University.⁴¹ When asked the broad question, "Do you favour the death penalty?" a majority of the public sample replied affirmatively. And when asked, "Do you favour the death penalty for one who kills a police officer?" 66 percent of those interrogated stated they did. But when details of a specific case were supplied — a hunter under the influence of drugs shot a policeman — only 15 per cent favoured the hunter's execution. Similar disparate results flowed when details of other cases revealed that a husband killed his wife in a domestic quarrel, or that the victim of a killing was himself a criminal.

Another recent empirical study examined statistical evidence compiled during the 1960s, and declared that capital punishment, on balance, does not deter homicides.⁴² The study concludes that "The 53 per cent increase in the homicide rate in the United States from 1960 to 1970 appears to be the product of factors other than the elimination of capital punishment. Foremost among these are a decline in the rate of imprisonment (from 41.3 per cent in 1960 to 34.6 per cent in 1970 for the states that reported in both

years) and increasing affluence during the 1960s."⁴³

In a non-empirical commentary Professor Radin argues against the death penalty using a "risk of error principle."⁴⁴ The two determinative aspects of the principle are (1) likelihood of error, and (2) gravity of error. Radin asserts all human judgments are fallible, and imposition of the death penalty is an irrevocable deprivation which cannot be undone or mitigated. Given the possibility and seriousness of error Radin asks, "on which side is it preferable to risk error?"⁴⁵ He concludes: "The irrevocability and enormity of the death penalty, as well as the individual defendant's fundamental interest in life require that the risk of error principle be used to resolve moral uncertainty about the substantive meaning of the cruel and unusual punishments clause against the state. In more traditional terms, something approaching compelling state interest/least restrictive alternative analysis is the proper level of scrutiny. In addition, the burden of persuasion on the issue of the existence of a moral consensus supporting the death penalty must fall on the state."⁴⁶

Radin's argument has a certain logical appeal. He contends that instead of presenting evidence that the death penalty results in measurable net social gain, proponents of the death penalty have been successful in creating a presumption, not easily rebuttable, that it does.⁴⁷ He argues that this presumption is impermissible due to the nature of the fundamental personal right at stake. "[I]n a conflict between fundamental rights of individuals and interests of the state, questions of the validity of a moral theory concerning which there exists no consensus, should be resolved against the state."⁴⁸ Radin concludes that a presumption **against** capital punishment is especially warranted in light of the fallible procedures that are available to identify which persons are to be killed.⁴⁹

One American commentator⁵⁰ offers striking examples of the fallability of our procedures, and still another element that often plays a part. That element is luck — or fate, if you are a romanticist.

The history of American courts is filled with little-known instances of luck, of coincidence, and of

hair-breadth timing. Perhaps one of the most dramatic involved Joe Vernon, sentenced to death in Alabama for killing a college student during a robbery. In 1940, not long after Justice Frankfurter had become an Associate Justice, the Supreme Court denied a petition for hearing. On the evening Vernon was to die, his attorney called Justice Frankfurter and was able to persuade him that even though the Supreme Court had already refused to hear the case, a stay of execution should be granted to enable still another application to be filed. Frankfurter, new to the bench, was not certain as to his authority. He called Edward Cullinan, the Court's deputy clerk, who assured the Justice he had the requisite power to act. "All right," said the Justice. "Stop the execution."

This proved easier in the saying than in the doing. With only half an hour to go, Cullinan telephoned the warden of Vernon's prison and told him Justice Frankfurter had issued a stay. The warden replied tartly that he took orders from the governor and the attorney general but not from some stranger over the telephone. Frantically, Cullinan put through a call to the attorney general of Alabama, who fortunately remembered the deputy clerk from a previous visit to the Court. The attorney general contacted the warden, and the execution was halted with only minutes to spare.

Vernon's case was subsequently heard — and reversed — by the Supreme Court.

Justice Brennan recalls another recent case. He was vacationing in a remote mountain area near Aspen, Colorado, when he received word that his son, who was in military service, was about to arrive in Aspen. The Justice rushed off to the village to meet him. While he was waiting at an inn, a waiter recognized him and reported that a package had been waiting for him for several days. The Justice secured the package, and inside was the application for a stay of execution from a man scheduled to die the next day. By phone, the Justice stopped the execution. The New Jersey Supreme Court later granted the man a new trial.

These are dramatic examples, and they illustrate the role that chance can play in even so important a matter as a capital case. But these examples also

illustrate another phase of current judicial work, because each involved purposeful delay in the final disposition of a criminal case. Delay haunts the American judicial system like a specter perhaps more so than in other parts of the world. Before the beginning of the twentieth century, substantial delay between trial and execution was almost unthinkable, in part because of the wear and tear on the defendant. As one lawyer put it in 1774: "The cruelty of an execution after respite is equal to many deaths, and therefore there is rarely an instance of it." But today, respite after respite is common.

Many will recall the **Caryl Chessman** case, a man who through remarkable perseverance and self-education, kept himself and his case alive for more than 11 years. Before we condemn the judicial system in his instance, however, I must advise you that under a later decision of the California Supreme Court involving other defendants — of which I was the author — Chessman if tried today would not have received the death penalty.⁵¹

Another interesting argument against the death penalty focuses on its distractive effect on the community. Due to the notoriety surrounding an execution, the penalty does not serve as an "example" to others, rather it becomes an entertainment event. The following passage, written by Edward Livingston over 150 years ago, appears prophetic: "But if this punishment be kept for great occasions, and the people are seldom treated with the gratification of seeing one of their fellow-creatures expire by the sentence of the law; a most singular effect is produced; the sufferer, whatever be his crime, becomes a hero or a saint; he is the object of public attention, curiosity, admiration, and pity. Thus the end of the law is defeated, the force of example is totally lost, and the place of execution is converted into a scene of triumph for the sufferer, whose crime is wholly forgotten, while his courage, resignation, or piety, mark him as the martyr, not the guilty victim, of the laws."⁵²

Articulated in the commentaries are other familiar arguments for abolition of the death penalty. They include the drastic consequences of a mistaken conviction; incarceration for life as a continuing example of punishment; the uncertainty of

the death penalty ever being carried out greatly reducing its effectiveness; and the "costs" of the death penalty which some contend exceed the "costs" of life imprisonment.

If the death penalty were to be eliminated, then capital offenders would serve life in prison, with the possibility — indeed, likelihood — of release at some future date, by means of pardon, commutation or parole. What then? Should such malefactors be freed of all responsibility to society?

Today most persons assume that there is no alternative to imprisonment. However, anthropologists tell us that prehistoric and primitive societies contained no prisons. In historical times, imprisonment was used infrequently. An entirely different concept prevailed: the wrongdoer was required to compensate the victim of his crime, or the victim's family, for the wrong done. With the development of the notion of crime as a wrong against the state, not the individual, private vengeance was replaced by government prosecution. Few people would want to see individual vengeance and blood feuds replace prosecution by the state under law before an impartial court of justice. However, many current critics are demanding that the needs of the victim and his family be considered, both in the prosecutorial function and in meting out the sentence. This is retrograde, for it would substitute the understandable hostilities of the victim for the unbiased deliberation by a legally trained public official.

To deny vengeance to the victim, however, does not mean that he should be ignored. The old system, which required the criminal to make amends to the victim, was fundamentally fair. The first serious proposal in this century to compensate victims of crime was made by a British woman, Margery Fry, in 1957. She urged that the government provide limited compensation for personal injuries suffered by victims of crime. In the succeeding two decades, Britain, many Canadian provinces, Ireland, Sweden, Norway, New Zealand, some Australian provinces and American states have enacted laws providing for some form of victim compensation.

With few exceptions, the compensation provided to victims of crime by public funds is very limited. Requiring the criminal to

contribute to the compensation of the victim may be a reasonable and practical substitution for imprisonment in many cases and as a condition of release in the case of a capital offender. The reasons are obvious: first, simple justice requires it; second, the act of reparation through work and payment to the victim offers a means of atonement and may in itself be both therapeutic and deterrent; third, the taxpayers should be relieved of those costs.

Enforcing such sentences presents many difficulties. Most defendants are without skills and are essentially unemployable. Restitution to the victim would require many years. However, the problem is not insoluble. Convicts, after they are found not to be a physical danger to society, could be placed on parole and required to participate in some type of government-sponsored employment with deduction from their wages for restitution to the victims of crime and repayment of court costs. These deductions could be pooled in a revolving fund, from which payment would be made to the victim immediately or periodically. The court trying the criminal case could determine the amount to be paid in compensation for property taken or destroyed and for physical injuries or death, assessments comparable to decisions made by judges every day in civil actions.

It is widely conceded today that our correctional institutions have failed to rehabilitate street criminals. The demands on these institutions are excessive. A prison cannot be expected to restructure in 10 or 20 years a human being who has been warped by a lifetime — even a short lifetime — of negative experiences. However, there are more limited goals which can be achieved. Functional illiteracy is the hallmark of the young male street criminal. Young prisoners can be taught to read in prison. This is a feasible and sensible use of incarceration and rehabilitation.

The present policy is spending from \$7,000 to \$40,000 a year in order to support unproductive imprisoned offenders, while ignoring the victims of their wrongdoing shows impracticality and insensitivity. We provide psychiatric, medical, and dental care as well as guidance, counselling, and job training for the wrongdoers. But there are no comparable services

available for the victim who may need them desperately. Society should not abandon efforts, however futile in many instances, to rehabilitate criminals. It should certainly provide similar services for the needy victims of crime.

As I indicated earlier, there is no strong trend toward universal abolition of capital punishment. It will come, along with the end of warfare and all killing, but probably not within the lifetime of anyone present. So for current purposes, I assume capital punishment will remain with what we call our civilized society.

The history of capital punishment through the ages is a tribute to the remarkable ingenuity of man in devising methods of extermination. The techniques are almost as prolific and imaginative as the arsenal of warfare. At the risk of being macabre, let me briefly mention a few of the more significant methods.

The first is hanging, which is traceable to biblical days, but it has maintained a certain contemporary utility. Despite the efforts to render hanging less painful and more expeditious, however, it remains a particularly violent form of execution.

The current trend in the United States is against hanging. Less than a century ago hanging was authorized in every American state. Today, although 40 states retain capital punishment, only 9 permit hanging.¹³

A second method of execution is shooting, which probably had its origin with the military. One American state — Utah — permits the condemned to select shooting as an alternative to hanging. Firing squads in Utah are composed of five citizen volunteers selected secretly by a presiding officer. Four of the five are given weapons with live rounds; the rifle of the fifth contains a blank. The victim is strapped in a chair less than 10 feet from the firing squad. A hood is fitted over his head and a small target placed over his heart. Upon the signal to fire, four bullets are supposed to enter his heart and kill him instantly.

It is not certain whether death by firing squad causes physical pain. It is probable, however, that if the marksmen miss their target, as has occurred in instances, pain will occur.

Electricity is the slave of modern technology, so it was inevitable

that electrocution should be developed as a means of execution. It was originally thought to be a more humane method than hanging and shooting. Yet most jurisdictions have had second thoughts about its assumed painlessness. Two American states — Oklahoma and Texas — recently abandoned what one legislator called the "gruesome ritual" of a "barbaric torture device."

Lethal gas was introduced in response to the cruelties of hanging, shooting, and electrocution. Although the gas chamber has certain advantages over these other methods because it is less violent and does not mutilate or disfigure the body, it is questionable whether death by lethal gas is painless.⁵⁴

Finally, a comparatively new method is the lethal injection. Intravenous injection of sufficient quantities of an ultra fast-acting barbiturate combined with a paralytic agent causes unconsciousness within 40 seconds and death shortly thereafter. A variation of the lethal injection is Prof. Gardner's proposed use of a lethal gas mask.⁵⁵ A concentration of pure and odorless carbon monoxide administered through a mask would cause instantaneous loss of consciousness followed rapidly by death.

There may be other methods that have escaped my attention. I have mentioned those most common merely to emphasize the brutality inherent in almost any technique selected. Given capital punishment as a present reality, however, human decency as embodied in the Eighth Amendment and defined by the courts demands at least that execution be imposed more humanely than it has been in the past. The movement away from ruthless punishment has been a gradual process. The incremental humanitarian gains achieved by rejection of more cruel methods of execution in favour of less cruel methods may be insignificant in the progression from a barbarous society to one that espouses principles of dignity and humanity. Honest and open scrutiny of the ways we inflict death may serve eventually to raise the collective moral conscience to the point that the public will oppose any infliction of death as a punishment. Until then, rejection of present cruelties would at least — to use the words of Camus — "provide a little decency where today there is

nothing but a sordid and obscene exhibition."

American courts have been relatively complacent about the methods of execution. As Chief Justice Burger wrote in *Furman v. Georgia*,⁵⁶ Of all our constitutional guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms."

Although capital punishment existed in America since our origin as a nation, not until 1878 was a challenge made to a shooting and that was on technical rather than constitutional grounds. Nevertheless, in dictum the Supreme Court held that shooting did not inflict torture, nor was it unnecessarily cruel.⁵⁷

The cruelty of electrocution was obliquely called into question in *Louisiana ex rel. Francis v. Resweber*.⁵⁸ The issue in that case was whether the state of Louisiana could constitutionally execute Willie Francis after the electric chair had accidentally malfunctioned during a previous execution attempt. Francis had been prepared for execution, placed in the chair, and kept there for a period of time after the switch was thrown. The victim, who experienced considerable discomfort, was removed from the chair when it became apparent that he would not die. A new death warrant was issued.

Francis obtained a stay of execution and sought judicial approval for his claim that any further attempt to execute him would be cruel and unusual punishment. A plurality of our high court took the position that subjecting him to the process of execution a second time would not violate the Eighth Amendment. The cruel and unusual punishment clause was interpreted by the plurality to prohibit only the "wanton infliction of pain" or the "infliction of unnecessary pain," not the suffering involved in "humane" executions. Because the pain inflicted upon Francis was accidental and unintentional, the state would not be precluded from making a second attempt to execute him.

An ancient alternative to state executions has been proposed in some academic quarters: that is, to permit the condemned person the option of taking his own life.⁵⁹ This concession to human dignity is not being practiced in any modern society, to my knowledge, but it is

not unknown historically and it has its contemporary advocates.

The example of Socrates will be recalled. He refused the pleas of his followers to postpone death until the last legally permitted instant; he deemed it an affront to his self-respect to prolong life beyond the moment it lost meaning. To have hemlock at his disposal infused the whole death process with at least a modicum of dignity.

Professor Gardner of the University of Nebraska has proposed that similar humanitarian considerations could be incorporated into modern execution procedures. An execution date could be set; for a brief, specified period after that date the condemned person would be provided the means to take his life if he chose.

He would be told the lethal dosage of an oral sedative that would be placed at his disposal. Death by drug overdose would be virtually painless and without many of the other human and economic costs that attend traditional modes of execution. If the condemned person failed to take his own life before the period for optional suicide had expired, the state would then execute him in the regularly prescribed manner.

To permit capital offenders the right to suicide does not imply that everyone has a moral right to take his own life. Nor does it imply that the offender has the right to demand that he be executed. Rather, after all legal remedies have been exhausted and execution is virtually inevitable, the condemned person could be allowed to pick the moment of his death.

Much can be said for encouraging the suicide of those sentenced to death. One American bar leader has described it as "Do-It-Yourself Capital Punishment."⁶⁰

The contra argument is that it is too humane, thus defeating the ancient purpose of the death penalty: to create deterrence by revulsion at the prospect of suffering. But if that were an appropriate aim, society would not have forsaken the rack, the gibbet, or the Roman cross. Formerly executions were public spectacles, staged so that those who witnessed the events would be strongly motivated to follow the path of righteousness. But, except perhaps in a few retarded societies, this didactic feature has been eliminated; now the death ritual is carried

out in camera, carefully screened from the public view.

Parenthetically I note that when a television station went to court in Texas to demand the right to film an actual execution, a federal court judge wryly observed to the government attorney who insisted such a broadcast would shock the public: "It might be suggested that if what the government is doing is so terrible, perhaps the government should not be doing it."⁶¹

The ultimate fact is that execution formalities are hollow mummery. The ritual contributes nothing to the peace of mind of the condemned, and it cannot be said to profit the survivors. On the contrary, like the holy men who administer the last rites and the healers who must attend the final heartbeats, some are caught up in a painful conflict with the fundamental tenets of their respective disciplines. The other participants — press observers, official witnesses, death-watch personnel, scaffold-builders, head-shavers, wardens, etc. — fare little better.

Thus, a number of commentators urge, every condemned man should be accorded the right, after pronouncement of sentence, to take his own life by any reasonable and convenient means of his choosing. In candor, however, I do not see this proposal being readily adopted; perhaps it is too simple and rational.

Continuing to assume that the death penalty is here to stay — in countries less enlightened than Israel — a question remains as to what discretion is to be vested in the trier of fact, judge or jury.

In American jurisdictions there is a definite trend toward the reduction of discretion in all stages of the enforcement of criminal law, and that trend is conspicuous in recent opinions of the United States Supreme Court on the death penalty.⁶² The rulings of the court are clearly in the direction of rejecting absolutely mandatory death sentences but at the same time imposing rigorous controls on procedures in sentencing and precluding unlimited discretion. What the court appears to be calling for is recognition of mitigating and aggravating circumstances. There is no doubt that some relevant circumstances can be described in objective terms (e.g., whether the murder victim was a prison guard acting in the line of

duty), hence, a statutory designation of them may be feasible.

However, the kinds of circumstances that courts will accept as reasonable and justifiable remain to be seen, and the retributive doctrine scarcely speaks to the question. For that matter, insofar as advocates of the doctrine speak to the issue of discretion at all, they appear badly divided.

The dissensus among retributivists with regard to discretion is puzzling, because once it is accepted that the severity of punishment should be proportionate to the seriousness of the offense, there is nothing to preclude considerable discretion by a sentencing judge or jury in determining how serious the offense was. To be sure, the statutory prescription of a mandatory, definite sentence may appear to insure equity in punishment and hence be more consistent with the retributive doctrine. Yet, it is not rational to assume that all instances of any type of crime are equally serious or heinous. Hence, if the severity of punishment is to be proportionate to the seriousness of the offense, alternative statutory penalties appear the only way by which that principle can be applied in particular instances. In the case of capital punishment, this translates into death or something less.

To conclude: I suspect my bias has shown through this paper. My reverence for life requires me to oppose capital punishment. History shows that the death penalty has been unjustly imposed — it is ordered only for the weak and the poor, innocents have been killed by the state, effective rehabilitation has been impaired, judicial administration has suffered — and crime has not been deterred. Our emotions may cry for vengeance in the wake of a horrible crime, but we know that killing the criminal cannot undo the crime, will not prevent similar crimes by others, does not benefit the victim, destroys human life, and brutalizes society. If we are to still violence, we must cherish life. Executions cheapen life.

There is no persuasive justification for the death penalty. It demeans life. Its inhumanity raises basic questions about our institutions and our purpose as a people. We must revere life and in so doing create in the hearts of all people a

love for mankind that will finally still violence. A humane and generous concern for every individual, for his safety, his health and his fulfilment, will do more to soothe the savage heart than the fear of state-inflicted death, which chiefly serves to remind us how close we remain to the jungle. So long as government takes the life of its citizens, the mandate "Thou shalt not kill" will never have the force of the absolute. Our greatest need is reverence for life — mere life, all life — life as an end in itself. Indeed, it is the Talmud which declares that "He who destroys one person has dealt a blow at the entire universe."

****Address by JUSTICE STANLEY MOSK to the Fourth International Congress of Jewish Lawyers and Jurists Jerusalem, December 27, 1978**

APPENDIX

(Patrick, *The Status of Capital Punishment: A World Perspective* (1965) 56 *Journal of Criminal Law, Criminology, and Police Science*, 397, 406-407.)

CAPITAL OFFENSES (1963)

1. (A) Arson
2. (B) Burglary
3. (E) Espionage
4. (K) Kidnapping
5. (M) Murder, homicide
6. (Ra) Rape
7. (Ro) Robbery (aggravated or armed)
8. (T) Treason
9. Abetment by a relative involving a minor or spouse in a capital crime
10. Abandoning a person to die of smallpox
11. Abetment of mutiny
12. Abetment of suicide usually involving a child, insane or intoxicated person
13. Acts of torture on people
14. Adultery by women and other offences prescribed by the Quran
15. Any serious crime committed during a state of national emergency or war
16. Arson during riots or national emergencies.
17. Arson if repeated on a large scale.
18. Arson in H.M. dockyards and ships
19. Arson of Crown property
20. Arson with violence
21. Assault (aggravated)
22. Assault by a life prisoner
23. Attempted kidnapping
24. Attempted murder by a convict service a sentence of 15 years imprisonment, if hurt is caused
25. Attempted murder by a person under a sentence of transportation
26. Attempted murder of a policeman
27. Attempt on the life of a Minister of the Government resulting in death or serious injury
28. Attempt on the life of an heir apparent to the royal throne
29. Attempt on the life of members of the royal family
30. Attempt on the life of the Chief of State

31. Bribery
32. Castration
33. Causing disorder (riots, etc.)
34. Collaboration (assisting the enemy, quisling)
35. Corruption
36. Counterfeiting currency
37. Counterfeiting government or military documents
38. Crimes against the country's integrity (independence)
39. Criminal attempt on the life of an authorized religious practitioner
40. Dacoity (gang robbery)
41. Depriving the Chief of State of his personal freedom
42. Desecration of a grave with intent to rob or molest the human remains
43. Deserting the army during war
44. Destruction of military facilities
45. Destruction of public property aimed at weakening the state and causing grave public danger
46. Dynamiting causing death or danger of death
47. Exposing means of communication resulting in death
48. Forcibly freeing a prisoner convicted of a capital crime
49. Forcing a woman to marry against her will
50. Forcing a Chief of State to act against his will
51. Genocide
52. Giving, furnishing, or selling narcotics to minors
53. Grave military offenses
54. Homicide accompanied by or resulting from another serious crime
55. Illegal command of a troop or division of the army
56. Illegal possession of arms
57. Illegal use of explosives
58. Illegally changing the form of government
59. Illicit trade in narcotics
60. Infanticide
61. Instigating an invasion
62. Insurrection or rebellion
63. Inundation with water of an occupied house
64. Looting during war or national emergency
65. Looting of evacuated houses following war
66. Lynching
67. Maintaining linkage with imperialists
68. Malfeasance in office
69. Malversation to a grave degree in partnership or by a recidivist
70. Matricide
71. Membership in an anti-soviet organization
72. Military usurpation
73. Murder by a life prisoner serving a life sentence
74. Murder of a foreign chief of state
75. Murder of the head of the Government
76. Mutilation or damage causing serious mental or physical injury
77. Mutiny
78. Nazi crimes (aggravated)
79. Offenses against the security of the state
80. Organization of gangs or armed groups for purposes of terrorism, sabotage, etc.
81. Overturning trains, vessels, etc.
82. Parricide
83. Patricide

84. Perjury that leads or might lead to conviction and execution in a capital case
85. Piracy
86. Piracy with violence
87. Plunder or theft of social or government property
88. Poisoning
89. Poisoning an ascendent or ascendent of one's spouse
90. Poisoning a teacher or tutor even if death does not occur
91. Political assassination
92. Rape by a group
93. Repeaters terrorizing inmates of a prison camp
94. Ring leader of an insurrection
95. Ring leader of a riot having grave consequences
96. Robbery with violence
97. Sabotage
98. Sedition
99. Speculation (economic)
100. Seriously injuring the Chief of State
101. Spreading microbes or poisonous gases
102. Subversion
103. Superstitious practices resulting in death
104. Terrorism to a grave degree
105. Torture in order to help the enemy
106. Undermining the national economy
107. Violence exercised on the body of an ascendent or ascendent of one's spouse
108. Wrongful detention with torture
109. Other crimes by analogy

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1. Chesterton, *The Club of Queer Trades*.
2. Shaw, *The Crime of Imprisonment* (Philosophical Library edition, 1946).
3. Menninger, *The Crime of Punishment* (1966).
4. *Id.*, at page 280.
5. Forer, *The Law: Excessive Promise and Inadequate Fulfillment* (1978) 24 *Crime and Delinquency* 197, 202.
6. The Chinese legal system has survived continuously to date for more than 4,000 years, and has traditionally included death as one form of punishment. Kim & LeBlang, *The Death Penalty in Traditional China* (1975) 5 *Geo. J. Inter. & Comp. L.* 77.
7. Wolfgang, *The Death Penalty: Social Philosophy and Social Science Research* (1978) 14 *Crim. L. Bull.* 18.
8. Seagle, *The History of Law* (1946) page 127.
9. Mackey, Edward Livingston on the Punishment of Death (1973) 48 *Tulane L. Rev.* 25. Livingston's two essays, Report Made to the General Assembly of the State of Louisiana, on the Plan of a Penal Code for the Said State (1822), and Introductory Report on the Code of Crimes and Punishments (1825), became famous and were frequently quoted in the next several decades, especially by leaders of the anti-gallows movement.

10. For example, Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's* (1977) 61 *Minn. L. Rev.* 743; Sarat & Vidmar, *Public Opinion, the Death Penalty and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 *Wis. L. Rev.* 171. But see Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death* (1975) 65 *Am. Econ. Rev.* 397 (statistical evidence that the death penalty deters murder). Ehrlich's methodology and conclusions have received widespread criticism. See *Gregg v. Georgia* (1976) 428 U.S. 153, 234-236 (Marshall, J., dissenting.)
11. Thomas, *Eighth Amendment Challenges to the Death Penalty; the Relevance of Informed Public Opinion* (1977), 30 *Vanc., L. Rev.* 1005, 1026. See also Wolfgang, *supra*, footnote 2.
12. Thomas, *supra*, footnote 5, at page 1027.
13. *Id.*, at page 1029.
14. Wolfgang, *supra*, footnote 2.
15. Tao, *Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment* (1976) 51 *Notre Dame L. Rev.* 722, 728-729, 731-732.
16. *Id.*, at page 734.
17. *Id.*
18. See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153.
19. van den Haag, *In Defense of the Death Penalty: A Legal-Practical Analysis* (1978) 14 *Crim. L. Bull.* 51.5
20. *Id.*
21. *Id.*
22. Patrick, *The Status of Capital Punishment: A World Perspective* (1965) 56 *Journal of Crim. Law* 397, 411.
23. Seagle, *The History of Law*, page 239.
24. Gibbs, *Preventative Effects of Capital Punishment Other Than Deterrence* (1978) 14 *Crim. L. Bull.* 34, 40-42. "Normative validation" is somewhat related to the retributive argument that a sanction should be proportional to the crime. See van den Haag, *supra*, footnote 13, at page 53.
25. Gibbs, *supra*, footnote 17, at page 42.
26. Tao, *supra*, footnote 9, at pages 725-726.
27. *Id.*, at pages 46-47; van den Haag, *supra*, footnote 13, at page 65.
28. *Id.*
29. Gibbs, *supra*, footnote 17, at pages 37-38.
30. *Furman v. Georgia* (1972) 408 U.S. 238, 355 (Marshall, J., concurring).
31. Gibbs, *supra*, footnote 17, at page 43.
32. *Id.*, at page 44.
33. *Id.*, at pages 44-45.
34. (1972) 408 U.S. 238.
35. Tao, *supra*, footnote 9.
36. See footnote 10, *supra*.
37. Thomas, *supra*, footnote 5, at page 1007 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 173.
38. Sarat & Vidmar, *supra*, footnote 10.
39. *Furman v. Georgia* (1972) 408 U.S. 238, 363 (Marshall, J., concurring).
40. Sarat & Vidmar, *supra*, footnote 10, at page 195.
41. Department colloquium by Dr. Phoebe Ellsworth (1977) Yale University, reported in *San Francisco Daily Recorder*, Nov. 13, 1978. Dr. Ellsworth is currently a visiting scholar in the

- Psychology Department Stanford University, California.
42. Forst, *supra*, footnote 4.
 43. *Id.*, at page 762.
 44. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause* (1978) 126 U. Pa. L. Rev. 989.
 45. *Id.*, at page 1020.
 46. *Id.*, at page 1062.
 47. *Id.*, at pages 1062-1063.
 48. *Id.*, page 1064, footnote 280.
 49. *Id.*, at page 1064.
 50. *Prettyman, Death and the Supreme Court* (1961).
 51. *See People v. Daniels* (1969) 71 Cal. 2d 1119.

52. Mackey, *supra*, footnote 3, at page 30.
53. Delaware, Idaho, Kansas, Montana, New Hampshire, North Dakota, Rhode Island, Utah and Washington.
54. Proposed Repeal of the Death Penalty Under Federal Law: Hearings on S. 1760 Before the Subcommittee on Criminal Laws and Procedures of the Commission on the Judiciary, 90th Congress, Second Session 21 (1968) (statement of Warden Clinton Duffy).
55. *Gardner, Executions and Indignities* (1978) 39 Ohio State Law Journal 96, 112.
56. (1972) 408 U.S. 238, 376.
57. *Wilkerson v. Utah* (1878) 99 U.S. 130.

58. (1947) 329 U.S. 459.
59. *Gardner, Executions and Indignities* (1978) 39 Ohio State Law Journal 96, 110.
60. *King, Some Reflections on Do-It-Yourself Capital Punishment* (1961) 47 A.B.A.J. 668.
61. *Garrett v. Estell* (1977) 556 F.2d 1274.
62. *Gregg v. Georgia* (1976) 428 U.S. 153; *Proffitt v. Florida* (1976) 428 U.S. 242; *Jurek v. Texas* (1976) 428 U.S. 262; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Roberts v. Louisiana* (1976) 428 U.S. 325; *Furman v. Georgia* (1972) 408 U.S. 238.

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