A HISTORICAL AND PHILOSOPHICAL LOOK AT THE DEATH PENALTY—DOES IT SERVE SOCIETY'S NEEDS?

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INTRODUCTION

George Santayana, writing in "The Life of Reason," said: "Those who cannot remember the past are condemned to repeat it."¹ Nowhere does this admonition seem to be more appropriate than in connection with capital punishment. Mankind always has used capital punishment, first employing it as a means to deter crime and then abandoning it because of its apparent failure to accomplish its assigned task—only to reestablish it when the results of its earlier failure are forgotten. An examination of the history of capital punishment discloses that a cycle has been repeated periodically obviously because we "cannot remember the past."

The arguments for and against capital punishment are fairly standard and have varied little over the centuries.² Those supporting capital punishment generally argue that capital punishment is necessary to deter crime. As further justification for employing the death penalty, the proponents argue that the imposition of the death penalty is in keeping with the biblical direction of "an eye for an eye and a tooth for a tooth."³ They further argue that the "high" incident of violent crime today is because we have not executed convicted felons regularly as we have in the past. They argue that if violent criminals knew that they would be executed they would refrain from violent crime.

The opponents make the obvious counter-arguments. They maintain that because murder is an irrational act, deterrence does not play any role in preventing the crime. They further maintain

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¹ J. BARTLETT, FAMILIAR QUOTATIONS 867 (14th ed. 1968).
³ Leviticus 24:20.
that for one to take the life of another, even if in the name of society, is immoral and only brings society down to the level of the killer. They further argue that the death penalty violates not only moral law but the Constitution of the United States because to execute anyone is a cruel and unusual punishment in violation of the eighth amendment to the Constitution. The arguments on each side have just enough of the truth, fired by emotion, to create continual confusion regarding the issue.

The purpose of this article is not to argue for or against capital punishment. That is a function of the legislative branch of government, expressing the will of the people, subject only to constitutional limitations. Nor do we intend, by this article, to raise any constitutional questions which have not already been passed upon by the courts. The purpose of the article is to examine criminal punishment from a philosophical viewpoint. We shall examine the various arguments in an attempt to determine what, if any, truth can be gleaned from the various arguments, thereby allowing a decision regarding capital punishment to be made free of the emotion normally associated with any discussion of the death penalty.

The article will first review the history of the death penalty, both in Europe and in America, to determine if any evidence exists to support the claim that the regular use of the death penalty deters crime. Next, we shall attempt to examine the modern standards imposed on the death penalty first by the United States Supreme Court in *Furman v. Georgia* and its progeny and later by various states, including Nebraska. Finally, we will attempt to analyze whether, in fact, the criteria now established by the states do indeed satisfy the dictates of the *Furman* decision and provide courts with meaningful tools when attempting to determine whether the death penalty is appropriate in a particular case.

**Cyclical History**

If one were to listen to the many cries heard today about the numbers of murders committed and their cause and effect, one might be inclined to believe that this most heinous of acts was of recent origin, undoubtedly brought about by a society too much indulged and protected by uncaring, callous, and indifferent judges. Yet history tells us that man's propensity to kill appears to be as basic as his propensity to procreate, and has existed for as long. With but four inhabitants on earth and no judges save perhaps the Supreme Judge of Judges, Cain slew Abel, thereby pro-

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5. J. Joyce, *supra* note 2, at 52.
producing the first murder statistic.\textsuperscript{6} At the moment Cain slew Abel, twenty-five percent of the world’s population was murdered and the incidence of murder had increased by one hundred percent. While not to say that the incidents of crime, generally, and murder, in particular, is not a matter of great concern, it is to say that our slavish attachments to statistics and our unsupported perception as to whether capital punishment serves any societal purpose may be doing more a disservice than a benefit in attempting to find solutions to the problems of crime generally and murder specifically.

It is a fact that many streets of many cities are unsafe, particularly once the sun sets.\textsuperscript{7} History would, however, support a claim that so too was it unsafe to be out on the highways of merry old England without a sword;\textsuperscript{8} and families can tell of a member who was shanghaied while returning home or sitting in a bar, never to be seen again. Violent crime, including murder, is not new. Furthermore, the use of the death penalty in an attempt to deter crime, though generally without success, has been a long standing tradition.

Ancient Chinese records document the use of the death penalty at a very early time.\textsuperscript{9} Likewise, the records of ancient Egypt relate that criminals were sentenced to death as early as 1,500 B.C.E.\textsuperscript{10} Moreover, there is some evidence of the use of the death penalty even in prehistoric times.\textsuperscript{11} However, one finds a significant difference regarding the use of the death penalty in ancient times and in modern history. It appears that primitive peoples used the death penalty neither as a punishment nor as a deterrent but, rather, as a means of appeasing the gods for an improper act committed by a human.\textsuperscript{12} The death penalty thus appears to have been a part of the earliest forms of religion.

These religious overtones have carried through even to the present time.\textsuperscript{13} While generally the notion of \textit{lex talionis}, “an eye for an eye,” is credited to the Old Testament, in fact, one may find evidence of this retaliatory measure in the ancient code of Ham-

\textsuperscript{6} \textit{Genesis} 4:1-8.
\textsuperscript{7} \textit{See generally} United States Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports (1981).
\textsuperscript{8} \textit{See generally} L. Pike, A History of Crime in England (1873).
\textsuperscript{10} J. Laurence, \textit{supra} note 9, at 1-2.
\textsuperscript{11} E. Block, “AND MAY GOD HAVE MERCY . . .” 13 (1962).
\textsuperscript{12} \textit{Id.} Generally, the death penalty was imposed by the father, as the ruling power of the family, out of the fear that an offending kinsman, guilty of incest or inchastity, would contaminate the household in the eyes of the gods. \textit{Id.}
\textsuperscript{13} J. Joyce, \textit{supra} note 2, at 54.
muburabi and earlier. As a matter of fact, the concept of "an eye for an eye" referred to in the book of Exodus and the book of Leviticus generally is misunderstood and misquoted in modern times. Arguments are made frequently that the death penalty must be imposed because of the biblical requirement of "an eye for an eye and a tooth for a tooth." To the contrary, an examination of both the true meaning of that concept and the manner in which it was employed by the ancient high court of Israel, the "Sanhedrin," makes it clear that it generally is misunderstood by the public today. Rather than mandating the literal removal of an eye for an eye, the lex talionis of the Old Testament, at least by the time of the second temple, was intended not as an expression of the need for punishment but, rather, as a limitation on punishment. That is to say, the concept of "an eye for an eye" was not intended to mean that one eye must be removed for another but, rather, that one may not be compensated for an eye if, in fact, the injury was only to a tooth.

As one studies the ancient Talmud, one finds that there existed an elaborate system of monetary compensation for injury which limited recovery to actual damages and generally prohibited punitive damages. The early Rabbinic writings are replete with stories which make it clear that neither eyes nor teeth were re-

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14. E. Block, supra note 11, at 13; G. Scott, supra note 9, at 1-3. It is thought that this ancient code of Hammurabi dates back to 2 or 3 B.C.E. E. Block, supra note 11, at 13.
15. Exodus 21:23-25; Leviticus 24:20. The concept can also be found in Genesis 9:6 ("Whosoever shedeth man's blood, by man shall his blood be shed").
16. In the centuries before the Christian era, the Rabbis developed an elaborate system of jurisprudence which was edited into the Mishnah, a portion of the Talmud, by approximately 200 A.D. E. Block, supra note 11, at 14. A part of this system of jurisprudence required the establishment of a court in every community. Towns with less than 120 inhabitants required a court of only three judges which exercised jurisdiction in civil matters generally, as well as some minor crimes, but could not exercise jurisdiction in capital cases. In towns of more than 120 inhabitants the court had 23 judges which exercised jurisdiction in criminal matters generally, including capital cases. That court was designated as the Sanhedrin Ketannah. Finally, the highest court, known as the Sanhedrin Gedolah, consisted of 71 judges, which sat in the temple in Jerusalem and had practically unlimited judicial, legislative and administrative powers with some of those functions reserved to it alone. Thus, the High Priest, the head of a tribe, and president of the Sanhedrin, when accused of a crime, could only be tried by the court of 71. In addition, certain death penalties such as the rebellious son, the enticer of idolatry and false witnesses had to be confirmed by it before being carried out. M. Elon, The Principles of Jewish Law 562 (1975).
17. E. Block, supra note 11, at 13; J. Joyce, supra note 2, at 56.
18. J. Joyce, supra note 2, at 56.
19. The Rabbis interpreted the code as a yardstick, rather than a mandate, calling for just compensation with definitely fixed limits. E. Block, supra note 11, at 13.
moved as punishment. For example, if a neighbor's bull killed
another neighbor's son, would not the penalty be the death of the
bull and the payment of money rather than the execution of the
neighbor's son?

Nor could the concept of "an eye for an eye" be applied liter-
ally in practice. If a blind man caused the loss of another's eye, it
was asked by the Rabbis, how would the removal of the blind
man's eye constitute any punishment? And if a person struck
another in the eye, causing the loss of one-third of the injured per-
son's vision, how could the actor be so struck in the eye so as to be
certain that only one-third of the actor's vision was lost, no more,
no less?

Little, if any, support for the imposition of the death penalty
can be found in the concept of the *lex talionis*. Furthermore, even
though the Bible is replete with descriptions of crimes for which
the death penalty was to be imposed, the history of those times
makes it clear that the death penalty was rarely, if ever, imposed.
Thus, while pages and pages of the Talmud may be found concern-
ing the law of the "stubborn and rebellious son," and it is pre-
scribed that one so stubborn and rebellious is to be put to death by
stoning and then hanged, it was believed that it never happened
and it never will happen.

The procedures developed by the Sanhedrin, and required to
be followed before the death penalty could be imposed, made the
imposition of the death penalty virtually impossible. One could
not be convicted of a capital offense upon his or her own admission
but could be convicted only upon the testimony of two witnesses,
both of whom were required to testify exactly alike as to every ma-
terial fact; discrepancies in the testimony required acquittal. Both

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20. It is said that in the Talmudic discussions on the Talion, the majority set-
tailed the law to the effect that Talion for wounding was virtually abolished and re-
placed by the payment of damages, primarily because the justice of the Talion is
more apparent than real: after all, one man's eye may be larger, smaller, sharper or
weaker than another's, and by taking one for the other, you take something equal in
name only, but not in substance. M. ELON, supra note 16, at 526.

21. Id.

22. Id.

23. J. JOYCE, supra note 2, at 55-56.

24. M. ELON, supra note 16, at 491. Authorities indicate that the rebellious son
was to be executed not because of what he had actually done, but because of what
he was foreseen to be prone to do were he allowed to live. His conduct showed that
eventually he would have ruined his parents and become a robber and murderer, so
God considered it better for him to die innocent than to die guilty. Id.

25. J. JOYCE, supra note 2, at 55-56. Trial of a capital case required a court of at
least 23 qualified members, none of whom could be hard-hearted. Thus, they ex-
cluded an old man, a eunuch or a childless man. *The Death Penalty in America*
172 (H. Bedau ed. rev. ed. 1967); E. BLOCK, supra note 11, at 14.
witnesses were further required to testify that they had warned the accused just before he committed the crime that his proposed act was a capital offense. In addition, in order to convict one of a capital offense, at least one member of the Sanhedrin had to vote in favor of the accused. If all of the members of the Sanhedrin voted for conviction, the accused was acquitted. This rule was based upon the notion that at least one person on the Sanhedrin should have presented the position of the accused, and all sides should have been considered.

Capital cases provided further that testimony of blood or marriage relatives was forbidden. Witnesses were not allowed to testify to anything based on inference or secondhand knowledge, circumstantial evidence being prohibited. A witness giving false testimony against the accused would himself be subjected to the death penalty.

There even remained an avenue of acquittal virtually to the very end. While a condemned was led to the place of execution, if indeed he ever was, it was required that he be preceded by a herald who was to call out, requesting anyone who possessed evidence which might clear or excuse the accused to come forth. If such a witness came forward or even if the accused himself maintained that his innocence could still be proved, an opportunity to present the evidence was given. Finally, the prohibition against placing one twice in jeopardy was employed, and once an individual was acquitted, he could not again be tried for the same crime regardless of any new evidence discovered.

It is apparent throughout Talmudic writings that the biblical discussion concerning the death penalty was more academic than actual and was intended for the purpose of reflecting the community's mores and not its practices. It has been said that a Sanhe-

26. E. Block, supra note 11, at 14-15; See also J. Joyce, supra note 2, at 56; The Death Penalty in America, supra note 25, at 173.
27. M. Elon, supra note 16, at 583. While it was clear that this rule applied to the Great Sanhedrin of 71 members, there is some dispute as to whether courts of 23 could vote for conviction in unanimity. Id.
28. Other restrictions in voting, by the judges, prohibited a judge from arguing for conviction if he had previously argued for acquittal, although the change from conviction to acquittal was allowed. No such restrictions existed in civil cases. Furthermore, the opinions of junior judges were expressed first to avoid influence by the votes of the senior members. The opposite procedure was observed in civil cases. J. Joyce, supra note 2, at 55; The Death Penalty in America, supra note 25, at 173-74.
29. E. Block, supra note 11, at 15; The Death Penalty in America, supra note 25, at 172-73.
30. E. Block, supra note 11, at 15; M. Elon, supra note 16, at 583.
31. The Death Penalty in America, supra note 25, at 174.
32. E. Block, supra note 11, at 15.
The death penalty
drin that effected an execution once in seven years was branded a
destructive tribunal. Rabbi Eleazar Ben Azariah says once in 70
years.\textsuperscript{23} Rabbi Tarfon and Rabbi Akiva maintain that, had they
been members of a Sanhedrin, no person would ever have been
put to death, to which Rabbon Simeon Ben Gamaliel remarked
that they would have multiplied murderers in Israel.\textsuperscript{24}

The writings of the Old Testament do address one of the argu-
ments of some of the opponents of the death penalty. Often, per-
sons who otherwise believe in a Supreme Being argue that the
imposition of the death penalty is either immoral or unethical. If,
however, as to those people, the notion of morality and ethics is
dependent upon the existence of a Supreme Being, such a position
is untenable. The reason is simple. One finds repeated references
in the Bible regarding the imposition of the death penalty. If it is
believed that the Bible was either divine or divinely inspired, it
cannot follow that the action of a Supreme Being ordering the
death of individuals for violating biblical laws can be immoral or
unethical. The argument that imposing the death penalty for hei-
nous crimes is immoral or unethical on religious grounds must be
rejected.

The argument concerning whether the imposition of the death
penalty tends to deter crime is a more difficult matter, although
history would not seem to support this thesis. Nor does there ap-
pear to be much, if any, support for the views that the regular im-
position of the penalty, even if done in barbaric ways, tends to
deter the actor.

In England, our principal source of law, one may find records
concerning the imposition of the death penalty at approximately
450 B.C.E.\textsuperscript{25} During this period, it was apparently the practice and
custom in England to throw the accused into a quagmire.\textsuperscript{26} Some
of the early records of England's history are found in notes pre-
pared by the Roman invaders who first came to England around 50
B.C.E. and occupied the area for the next 450 years.\textsuperscript{27} As in many
other areas of the world, the death penalty in England at that time
was used as a sacrifice to the gods.\textsuperscript{28} The principal difference, how-
ever, was that in some areas it was believed that the gods were
appeased with the death of the young and the virgin, while in Eng-

\begin{thebibliography}{9}
\bibitem{23} Id.
\bibitem{24} CONTEMPORARY JEWISH ETHICS 315 (M. Kellner ed. 1978).
\bibitem{25} F. Bresler, Reprieve: A Study of a System 16 (1965); J. Laurence, \textit{supra}

\textit{note 9}, at 2.
\bibitem{26} F. Bresler, \textit{supra} note 35, at 16.
\bibitem{27} Id.
\bibitem{28} L. Pike, \textit{supra} note 8, at 10-11.
\end{thebibliography}
land it was believed that the gods were appeased by the sacrifice of the criminal.\textsuperscript{39} Accounts of early invaders in England indicate that several criminals would be placed in a large wicker cage, fashioned in the form of a god. Then a large pile of wood would be placed around the cage and the entire pyre ignited. The manner in which the flames would swirl about and shoot even deeper into the group of screaming and struggling criminals made it appear as though the gods themselves were inflicting the punishment.\textsuperscript{40} While such action may have calmed the gods, there is no significant evidence that it eradicated crime.

There is little more concerning the history of capital punishment in England during the Roman occupation. By and large, the society run by the Romans was much more civilized and organized than that which existed before their arrival.\textsuperscript{41} However, when the Romans left, so did all semblance of a central government, and apparently, England returned to barbarism.\textsuperscript{42}

Following the departure of the Romans, the Isles were controlled by warring factions which prevented the development of a strong centralized government.\textsuperscript{43} The Anglos, the Saxons, and the Judes who invaded the coasts and set up chains of small kingdoms throughout England were constantly at odds with each other.\textsuperscript{44} Without a centralized government, each area and tribe was left with the responsibility to dispense justice as it saw fit and to fend for itself. The principal concern of these small kingdoms was their own survival, and, therefore, they intervened only into the personal affairs which threatened the kingdom in general.\textsuperscript{45} An offender who did threaten the kingdom in general was tried by a court of his neighbors and if convicted of the crime was punished by a decree of "outlawry."\textsuperscript{46} Once so convicted, it was everyone's right and duty in the area to hunt down the convicted and to kill him.\textsuperscript{47} Because there was no central government to which he

\textsuperscript{39.} \textit{Id.}
\textsuperscript{40.} \textit{Id.}
\textsuperscript{41.} See F. Bresler, \textit{supra} note 35, at 16.
\textsuperscript{42.} J. Laurence, \textit{supra} note 9, at 5.
\textsuperscript{43.} Some authorities indicate that this is at least one of the reasons that England, as opposed to other areas, did not keep any of the Roman laws after the Roman occupation of England ended. In fact, it does not appear that any centralized government existed until approximately 900 A.D., after Alfred the Great repelled the Danes and Edward the Elder became the first king of England. F. Bresler, \textit{supra} note 35, at 19.
\textsuperscript{44.} \textit{Id.}
\textsuperscript{45.} Examples of such crimes would be treason, cowardness in battle or non-conformity with the prevailing beliefs. \textit{Id.} at 17.
\textsuperscript{46.} \textit{Id.}
\textsuperscript{47.} \textit{Id.}
might turn to seek a reprieve, the elders' judgment was virtually final and resulted in the accused's death.48

Unlike today, when a crime committed against an individual is considered an act against the state and not against the individual, the state in England played virtually no role in the criminal justice system as it was known then, except as to those acts which threatened the kingdom in general.49 On an individual basis, it still remained the family's responsibility to seek revenge for the death of a family member, much as it had been in early times.50 Thus, blood feuds and protective alliances were the rules of the land.51

The development of a more formal criminal justice system was influenced by forces outside of England. When the Danes began invading England, the Saxon kings realized that the blood feuds were depriving them of their fighting forces.52 They suggested an alternative to blood revenge in the form of a system of compensation which provided a schedule of values for each person depending upon his position in society, much as ancient biblical law had developed earlier.53 The first of the written laws regarding compensation for death or injury were decreed by King Ethelbert of Kent in about 602 A.D.54 It was so detailed as to cover everything from teeth to fingernails.

As a result of the development of this schedule of compensation, the avenging family could choose either the "wergild" (worth money), or blood.55 This began to bring about a change in the number of avenged deaths. Obviously, the families concluded that it was better to receive money than to shed more blood.56 As the king's power grew, the family discretion in this matter decreased

48. See id.

49. This parallels earlier history when primitive tribes likewise distinguished between public and private crimes, taking no role in private crime.

50. F. BRESLER, supra note 35, at 17; E. BLOCK, supra note 11, at 13.

51. Id. Protective alliances, originally developed far earlier in history in other areas of the world, were necessary as the concept of revenge gave the avenger the right to kill any member of the offender's family, no matter how remote the relationship. Thus, the Blood Feud was touched off when the relative of the offender, whom the avenger had killed, would necessarily be forced to kill either the avenger or one of his family. Once within the confines of his allies, however, an offender was protected, as far as their power would allow, and was to be passed to more distant retreats if necessary. G. Scorr, supra note 9, at 2-3. It appears that eventually payment became the usual method of settling offenses. Id. Apparently, at some point, war between competing alliances was deemed to be too great a price to pay for the homicide.

52. F. BRESLER, supra note 35, at 17.

53. Id. Again, paralleling the notion that perhaps war may have been believed to be too great a price to pay for a homicide.

54. Id. at 18-19.

55. See id. at 17.

56. See id. In spite of this discretion, money was usually demanded, the profit
and the payment of compensation became the more generally accepted method of retribution.57

In the year 890 A.D., Alfred the Great decreed that wergild had to be first demanded and refused before blood revenge could be sought.58 It appears that during this period of Anglo-Saxon history resort to blood revenge was seldom, if ever, used and the system was almost entirely one of compensation.59

It was not until approximately the year 900 A.D., during the reign of Edward the Elder, that any notion of a centralized government developed.60 Then the king began to take a more active role with regard to the matter of revenge and the suppression of disorder.61 By the early eleventh century, the king had claimed the exclusive right to deal with a number of crimes, such as housebreaking, arson, obvious theft, and open killing.62 While hanging was the usual method of execution, the king had the power to select another.63

As the central government gained more exclusive rights of punishment, the death penalty was used less frequently. In 1023 A.D., King Canute developed standards for seeking mercy.64 The conquest of England by William the Conqueror and his ascension to the throne of England in 1066 A.D. brought an end to capital punishment in England, although there is some indication that a form of mutilation as punishment was still permitted.65 However, crimes generally were not yet viewed as an offense against the state, but still were treated as a wrong against the individual, pun-

57. See id. at 18. Although there were instances when one could kill without liability for the wergild, such as when one caught a thief in the act. Id.
58. Id.
59. See id.; G. SCOTT, supra note 3, at 5. This is probably the natural result of a system which eventually allowed killers a full year to raise the wergild and where the king would collect a share of the "boot" for himself for being deprived of a fighting man. Id.; see also J. JOYCE, supra note 2, at 56. It is said that this system of compensation virtually ended the Blood Feuds. F. BRESLER, supra note 35, at 18.
60. F. BRESLER, supra note 35, at 19.
61. See id. at 20.
62. Id.; G. SCOTT, supra note 3, at 4. With the takeover of the right to mete out vengeance, the state or the king gained the corresponding right to specify the type of retribution which would be required, thus allowing deterrence to become more of a factor. The first implication of this change was an elimination of the Blood Feud followed eventually by a decrease in the concern with the interest of those immediately affected by crime when compared with society as a body. Id. at 7.
63. F. BRESLER, supra note 35, at 20; J. LAURENCE, supra note 9, at 4.
64. F. BRESLER, supra note 35, at 20.
65. Id. at 22. There is some dispute as to whether death was a normal result of these mutilations. Id. at 22-23 (death not a normal result); contra J. LAURENCE, supra note 9, at 4.
ishable by the king on behalf of the injured party.\textsuperscript{66} This attitude might be, in part, attributed to the church's role in the affairs of state.\textsuperscript{67}

The responsibility or right of the church to have a voice in the administration of criminal justice remained through the reign of Henry I, William the Conqueror's second son, who, while reinstating the death penalty for treason, burglary, arson, robbery, theft, and homicide, left the trial of the accused to the church.\textsuperscript{68} Trials were generally trials by ordeal and were based upon the presumption that God, as judge, would protect the innocent.\textsuperscript{69} Until this point, actions against crime were considered solely as a form of punishment directed at the perpetrator and were not intended to serve as a deterrent to others.\textsuperscript{70}

It was not until Henry's grandson, Henry II, became king that crime began to be viewed as a wrong against the state.\textsuperscript{71} Henry II instituted a central system of justice and, in approximately 1166 A.D., set up the jury of presentment.\textsuperscript{72} He imposed further restrictions upon trials by ordeal and insisted upon a right to grant mercy even to those found guilty by trial.\textsuperscript{73} Once Henry II had, as king, taken over the responsibility for administering the criminal justice system and began to view the commission of a crime as a wrong against the state and not just against an individual, the focus of punishment changed from pure punishment to deterrence.\textsuperscript{74} This change of focus appears to have brought about a significant increase in both the number of crimes which became subject to the death penalty and the manner in which the penalty itself was carried out.\textsuperscript{75} Human life was taken lightly, oftentimes with less re-

\textsuperscript{66} See, e.g., G. SCOTT, supra note 3, at 5.
\textsuperscript{67} While the distinction between church and state has always, until recently, been a very nebulous one, it appears that society's moral discipline had become the sole responsibility of the church. J. JOYCE, supra note 2, at 54, 56-57.
\textsuperscript{68} See F. BRESLER, supra note 35, at 23. There were basically three types of trial by ordeal: trial by water, sinking indicated innocence; trial by fire, innocent if no festering occurred three days after holding a hot iron bar or plunging one's hand into boiling water; trial by coarsened morsel, swallowing bread with a feather in it without choking indicated innocence, generally reserved for ecclesiastics. Id.
\textsuperscript{69} Id. at 23-24.
\textsuperscript{70} See id. at 20; J. LAURENCE, supra note 9, at 4.
\textsuperscript{71} G. SCOTT, supra note 9, at 5.
\textsuperscript{72} F. BRESLER, supra note 35, at 24.
\textsuperscript{73} See id. Because of the power of the church, these developments were not without concessions. The king was forced to give the ecclesiastic courts the sole jurisdiction of clerics charged with all offenses, thus giving birth to the benefit of clergy, a concept which was not totally extinguished until well into the eighteenth century. Id. at 23.
\textsuperscript{74} E. BLOCK, supra note 11, at 16. See G. SCOTT, supra note 9, at 4.
\textsuperscript{75} E. BLOCK, supra note 11, at 75. Even animals were subject to the death penalty. G. SCOTT, supra note 9, at 34-35.
gard than that of an animal. 76 For example, history reports that Edward I executed the Mayor of Exeter and the town gatekeeper for failing to close the gate in time to prevent a murderer from escaping. 77

The ebb and flow of the public's attitude toward crime, on the one hand, and punishment, on the other, is reflected periodically throughout this history. During the reign of Edward I exculpatory circumstances were little known. 78 On that basis the killing of one man by another was murder regardless of whether it was done intentionally, by accident, or in self-defense, much as it was in ancient times before the development of cities of refuge. 79 However, by late in the thirteenth century, pardons were granted for crimes committed by accident or in self-defense. 80 This practice lasted until 1309 A.D., when the king was criticized by many for being too merciful. 81 Over 100 years later this criticism reappeared, and so the number of people put to death for an ever-increasing number of crimes grew steadily during the reign of Henry VI. 82

During the reign of Henry VIII, more than 2,000 people per year were executed, for a total of some 72,000 during the thirty-six years of his reign. Henry's daughter, Elizabeth, did little better. She ordered executions on an average of 800 a year. 83 Apparently, the people were slow to learn or at least were not deterred easily.

Not only did the number of executions increase, but so did the crimes for which the penalty could be imposed, apparently on the theory that if confronted with death, one would not commit a crime. By 1714, the number of crimes for which the death penalty could be imposed numbered thirty-two. 84 At the time George I as-

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76. G. Scott, supra note 9, at 37-38.
77. F. Bresler, supra note 35, at 27; J. Laurence, supra note 9, at 6.
78. Henry I was known to have said, "Who sins unwittingly shall knowingly make amends." F. Bresler, supra note 35, at 27.
79. Id. The Blood Revenge was a marked feature of Mosaic Law and initially there were no extenuating circumstances by which one could escape the vengeance of the aggrieved relative, who was the judge, jury and executioner. G. Scott, supra note 9, at 1. Eventually, there arose what were known as cities of refuge. Once within the confines of one of these cities, the avenger was prohibited from killing the offender unless, after a trial, it was found that the killing had been premeditated. Id. at 2; M. Elon, supra note 16, at 531.
80. F. Bresler, supra note 35, at 27.
81. Id. In fact, by 1695, exculpatory circumstances appeared to have disappeared. G. Scott, supra note 9, at 38.
82. G. Scott, supra note 9, at 38.
83. J. Laurence, supra note 9, at 8; see also F. Bresler, supra note 35, at 29. It is said that Henry VIII was the only king to allow executions on Sunday. Id. at 29.
84. F. Bresler, supra note 35, at 31. Other authorities have put the number closer at 50. A. Koestler, Reflections on Hanging 17 (1957); J. Laurence, supra note 9, at 5.
cended to the throne in 1714, there began to develop what was to be known as the Bloody Code.85

By 1769, the number of offenses for which the death penalty could be imposed had grown to 160.86 At the end of the eighteenth century, all felonies, except petty larceny and mayhem, had become capital offenses.87 By the early 1800's, the total number of capital offenses exceeded 220 in number.88 Examples of these capital offenses included the shooting of a rabbit, the forgery of a birth certificate, the theft of a pocket handkerchief, the adoption of a disguise, the damaging of a public building, and associating with Gypsies.89 Though the number of the crimes for which the death penalty could be imposed increased in number, there appears to be little evidence that the number of crimes committed was in any way affected.

Those in authority apparently believed that the imposition of the death penalty for all manner of crime would indeed serve as a deterrent.90 So convinced were they of the merits of their ways that they made little, if any, distinction as to the age of the criminal.91 In 1748, a ten-year-old boy was sentenced to death for fear that other children might get the impression that they could commit crimes without punishment.92 In imposing the death penalty, the trial court said that the child:

is certainly a proper subject for capital punishment and ought to suffer; for it would be a very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. There are many crimes of the most heinous nature . . . which children are very capable of committing; and which they may, in some circumstances, be under strong temptation to commit; and therefore, though the taking away of the life of a boy of ten years old may savor of cruelty, yet, as the example of this boy’s punishment be a means of deterring other children from the like offenses; and as the sparing of this boy merely on account of his age will probably have a quite

85. F. BRESLER, supra note 35, at 32.
86. Id.
87. Id.
88. Id.; J. LAURENCE, supra note 9, at 13; G. SCOTT, supra note 9, at 39.
89. G. SCOTT, supra note 9, at 39-40. The death penalty, pure and simple, was viewed as a cure-all for every offense. A. KOESTLER, supra note 84, at 16.
90. See J. LAURENCE, supra note 9, at 8.
91. It is reported that the death sentences were imposed on children as late as 1833, although the penalty was not imposed on children younger than seven, and on those between seven and fourteen, only where there was strong evidence of malice. A. KOESTLER, supra note 84, at 13-15; see also E. BLOCK, supra note 11, at 18.
92. E. BLOCK, supra note 11, at 18.
contrary tendency in justice to the public the law ought to take its course.\textsuperscript{93}

Apparently, the child ordered executed had killed a five-year-old girl when he became enraged over her soiling her bed.\textsuperscript{94} The story does, however, have a happier ending. It appears that the child never actually was executed. He was granted several reprieves before the judge finally decided to order his execution. At that point, George III granted the boy a formal pardon on the condition that he enlist in the Royal Navy.\textsuperscript{95} It is uncertain which punishment was the worse.

Other children did not, however, fare so well. In 1800, a ten-year-old boy was hanged for stealing mail. In ordering the execution, the trial court said: "All the circumstances attending the transaction manifested art and contrivance beyond his years and I therefore refuse the application of his counsel to respite the judgment on the ground of his tender years, being satisfied that he knew perfectly what he was doing."\textsuperscript{96}

In 1808, a boy, age eleven, and his sister, age seven, were hanged for the commission of a felony.\textsuperscript{97} At one point, ten children, all less than ten years old, were hanged at once as a warning to men.\textsuperscript{98} In 1814, three boys, aged eight through eleven, were executed for stealing a pair of shoes, as was a boy of nine for setting fire to a house.\textsuperscript{99} And, in 1833, a boy of nine years was hanged for stealing a set of children's paints from a London shop.\textsuperscript{100}

An examination of the history through that time discloses that it was the general attitude of the community that the death penalty was a panacea for all of society's ills. Statistics indicate that in 1785 in London and Middlesex alone there were 97 executions. Of the 97 executions, only one was for murder, the remaining 96 for property offenses.\textsuperscript{101} What is clear from all of this, however, is that

\textsuperscript{93} A. Koestler, \textit{supra} note 84, at 13-14.
\textsuperscript{94} F. Bresler, \textit{supra} note 35, at 34.
\textsuperscript{95} \textit{Id.} at 34-35.
\textsuperscript{96} J. Laurence, \textit{supra} note 9, at 18.
\textsuperscript{97} A. Koestler, \textit{supra} note 84, at 10.
\textsuperscript{98} J. Laurence, \textit{supra} note 9, at 18.
\textsuperscript{99} E. Block, \textit{supra} note 11, at 18-19.
\textsuperscript{100} \textit{Id.} It appears quite likely, that had young George Washington lived in England he would have never lived long enough to become the Father of our Country. In the year 1814, a man was hanged in Chelmsford for cutting down a cherry tree. G. Scott, \textit{supra} note 9, at 40. Since the offense was a capital one and England regularly imposed the death penalty on children of tender years, one might surmise that young George, considering the price he would have had to pay for telling the truth, may have learned to lie.
\textsuperscript{101} A. Koestler, \textit{supra} note 84, at 16. In reading this figure, one should keep in mind that this is not a figure for the entire country, but only a portion thereof, the
the imposition of the death penalty did not deter those who were inclined to commit crimes.\textsuperscript{102} It does, of course, leave open the question which it appears we cannot answer—how many more would have committed a crime but for the penalty? For the great numbers executed the question seemed irrelevant.

What one does, however, see in all of this is an interesting pattern. As more and more crimes became subject to capital punishment, more and more judges and juries tended to find reasons why the accused should not be found guilty of the crime. Juries began to develop their own reprieve system, straining a point in order to acquit a defendant or to find him guilty of a non-capital offense.\textsuperscript{103} Thus, when stealing goods worth more than 40 shillings was made a capital offense, juries would often find the defendant guilty of the theft of 39 shillings, regardless of the value established by the evidence.\textsuperscript{104} In one case, the jury made such a finding even though the accused had confessed to stealing an amount in excess of that which would have required the imposition of the death penalty and for which the jury would have been required to convict.\textsuperscript{105} The purpose intended to be accomplished by the imposition of the penalty seemed to be self-defeating.

It appears that it was the juries' refusal to convict which ultimately broke down the Bloody Code in England. Businessmen, shopkeepers, and bankers who had influence in Parliament began to advocate lesser punishment so that the law would be enforced and juries would convict when the facts established guilt.\textsuperscript{106} A petition from the bankers of 214 towns pressed for punishment less than death for forgery because the death penalty was a barrier to

\textsuperscript{102} See notes 143-45 and accompanying text infra; E. Block, supra note 11, at 16. It appears, in some instances, that the authorities were even trying to deter people from lawful acts. It is reported that in 1820 some 46 persons were executed for forging one pound Bank of England notes, some of which turned out to be valid. J. Laurence, supra note 9, at 14.

\textsuperscript{103} F. Bresler, supra note 35, at 45; G. Scott, supra note 9, at 76-77; L. Lawes, Man's Judgment of Death 4-5 (1969). While Koestler lays part of the blame for the rise in the Bloody Code on the judges of the time for blindly following precedent, Bresler indicates that judicial reprieves of those sentenced to death increased from 33\% in 1756 to 87\% in 1808. See A. Koestler, supra note 84, at 17-23; F. Bresler, supra note 35, at 32.

\textsuperscript{104} E. Block, supra note 11, at 20.

\textsuperscript{105} F. Bresler, supra note 35, at 45. It appears that even when the capital offense was raised to five pounds, juries would go one better by raising the verdict to four pounds nineteen shillings. Id. The juries, however, did not seem to be lenient with repeat offenders. G. Scott, supra note 9, at 77.

\textsuperscript{106} A. Koestler, supra note 84, at 25.
any conviction. The petitioners complained that the existence of the death penalty caused an increase in forgery rather than a decrease. Similarly, 150 proprietors of bleaching establishments and calico printers demanded that stealing from their stores cease being a capital offense for the very same reason.

One may argue that such evidence only supports the proponents' view that if the death penalty was indeed imposed, fewer people would commit the offense. Yet, history would seem to indicate that if the commission of the offense is so unrelated, at least in the first instance, to the nature of the punishment, that ultimately even the juries will refuse to carry out the punishment when it becomes so unreasonable. Thus, it appears that once the people find a law to be repulsive or the punishment excessive, they will choose to disregard it and will prefer to find an individual not guilty, thereby relieving him of any punishment, rather than subjecting him to a penalty harsher than that which the public believes should be imposed. All of this may simply be further proof of the fact that people can talk about capital punishment in the abstract much easier than they can deal with it when required to face the reality of imposing the death penalty.

Proponents of capital punishment during the sixteenth, seventeenth and eighteenth centuries not only believed that inflicting the penalty would serve as a deterrent, but apparently they further believed that the more brutal the manner in which the death penalty was inflicted, the more likely it would serve as a deterrent to others. As a result, virtually nothing was considered too savage if thought to have a deterrent effect.

Two of the oldest methods used in England were drowning and burning. Drowning was used at least until 1697, and burning at the stake was a common method of execution until it was finally abolished in 1790. Burning at the stake was used particularly in connection with the execution of women, because it was felt that either hanging or drawing and quartering would be indecent, as it would tend to expose the body of the executed woman and thereby offend the modesty of the crowd.

107. Id.; E. Block, supra note 11, at 20.
108. See L. Lawes, supra note 103, at 11-15.
109. A. Koestler, supra note 84, at 25. Abolition of the death penalty for many crimes began in 1808, and by 1837 the number of capital offenses had been reduced to 15. Id. at 23.
110. E. Block, supra note 11, at 16.
111. G. Scott, supra note 9, at 8.
112. Id. at 21-22; J. Laurence, supra note 9, at 9-10.
113. J. Laurence, supra note 9, at 9; see also A. Koestler, supra note 84, at 31. It was customary to strangle the condemned woman with a rope before the flames
Another age-old method of execution, which apparently was introduced first by William the Conqueror in 1076, was beheading. First done by an axman, and then the Halifax Gibbet and the Scottish Maiden, it later was made more sophisticated with the development of the guillotine. The Gibbet was first used in 1541 and discontinued in 1650. The Scottish Maiden, itself a facsimile of the Halifax Gibbet, was used first in 1565 and was thought to have been discontinued by 1710 or 1716. Beheading came to an end in England in 1747.

It is worthwhile to note that the development of the guillotine was thought to be a humanitarian step in that it was developed in 1792 as a more painless method of inflicting death, as opposed to the often clumsy work of the axman. The effect of all of this on the "law-abiding" public is interesting. In fact, when the guillotine was first used, the crowds, accustomed to the long and drawn-out executions practiced earlier, were terribly disappointed by the quickness with which the whole affair took place. Unfortunately, the efficiency of the guillotine ultimately led to the atrocious reputation that it gained during the French Revolution. Moreover, it seems that any deterrent effect from the threat of being guillotined was more than offset by the morbid affection which criminals appeared to have toward the guillotine. A favorite tattoo of the French criminal class was a ring of dots tattooed about the actually reached her. However, there are many instances in which the executioner, for one reason or another, let go of the rope early, in which case the woman was literally burned alive. G. Scott, supra note 9, at 31-32.

114. G. Scott, supra note 9, at 167; see also J. Laurence, supra note 9, at 28.
115. G. Scott, supra note 9, at 182-86; J. Laurence, supra note 9, at 38-40.
116. Id. Perhaps the most interesting fact concerning the Scottish Maiden is that the Earl of Morton, who had ordered it built after seeing the Halifax Gibbet work, himself fell prey to its blade in 1581. Id.
117. J. Laurence, supra note 9, at 29, although beheading with an ax occurred in Germany as late as 1914. Id. at 38.
118. Id. at 71; J. Joyce, supra note 2, at 69-70; G. Scott, supra note 9, at 185-86.
119. J. Laurence, supra note 9, at 73. The French were more accustomed to ordeals lasting for over an hour, such as the drawing and quartering of one Robert Francois Damiens, on May 18, 1757, for attempting to assassinate Louis XV. The poor man was tied to a scaffold, whereafter his hand was burnt to a crisp, and large chunks of flesh were virtually torn from his arms, thighs, and chest with red-hot pinchers. Boiling oil and melted lead were then poured into the wounds. Only after all of this was he finally tied to four horses which attempted, for over an hour, to dismember him, and only accomplished their task after the principal sinews of his limbs were severed by a physician. It is said that Damiens did not expire until after both arms and one of his legs were torn away. G. Scott, supra note 9, at 155-57. It is thought that Damiens were the last person executed in France in this manner. J. Laurence, supra note 9, at 15.
120. See generally J. Joyce, supra note 2, at 69-72; J. Laurence, supra note 9, at 72-78.
neck with an accompanying instruction "Cut along dotted line."\textsuperscript{121} In fact, it was not until 1939, after close-up sequential photographs of the guillotining were published in a newspaper, that public revulsion forced the termination of public executions in France.\textsuperscript{122} Convinced that merely hanging the accused or beheading him was insufficient to either discourage future crime or to punish the offender adequately, Edward III, in 1241, devised the method of hanging, drawing, and quartering.\textsuperscript{123}

Bressler, in his work on the death penalty, describes the penalty as follows:

The 'drawing'-part of the sentence originally referred to dragging the condemned man along the ground to his place of execution, tied to the tail of a horse. Later this was considered too unkind—possibly to the horse—and the victim was strapped instead to a sled, on which he was drawn to the gallows. On arrival his fate was grim. He was half-hanged, cut down alive, his entrails taken out and burnt before him, and final oblivion reached only with beheading. Thereafter the body was cut into quarters and exhibited, together with the head, in some public place pour décourager les autres.\textsuperscript{124}

The chronicles are filled with reports concerning the imposition of the death penalty in the most vicious and uncivilized manner imaginable.\textsuperscript{125} It is clear, however, that the manner of inflicting the death penalty did little to eliminate the crimes for which the penalty was imposed. It did, however, provide a certain amount of entertainment for the general public, without little, if any, other public benefit.\textsuperscript{126}

In England, executions were, almost without exception, performed publicly. The thought was that the more public the execu-

\textsuperscript{121} J. Joyce, \textit{supra} note 2, at 72.
\textsuperscript{122} Id. at 82. The pictures were originally published in an effort to deter others by impressing upon them the consequences of murder. \textit{Id}.
\textsuperscript{123} J. Laurence, \textit{supra} note 9, at 6; see also F. Bresler, \textit{supra} note 35, at 30.
\textsuperscript{124} F. Bresler, \textit{supra} note 35, at 30.
\textsuperscript{125} The records indicate that this sentence was imposed as late as 1812. G. Scott, \textit{supra} note 9, at 179. It was not until 1814 that the law was amended so that the quartering would take place after death. A. Koestler, \textit{supra} note 84, at 31. The penalty was technically possible in Scotland until 1950. F. Bresler, \textit{supra} note 35, at 30. Defenders of the punishment usually pointed out that the individuals were hanged until deprived of sensation. However, there are many instances to the contrary such as the case of one Tinoco who watched two others proceed him through the ordeal and who, after being cut down too early, began struggling with the executioners. He was held down by members of the crowd and disemboweled and quartered. Bennett, \textit{The Death Penalty}, cited in J. McCafferty, \textit{Capital Punishment} 146-47 (1972).
\textsuperscript{126} G. Scott, \textit{supra} note 9, at 41-58.
tion, the greater the fear of those observing the execution.\textsuperscript{127} To further heighten the spectacle, many who were executed were hung in chains after being boiled in pitch in order to preserve the bodies for longer periods. This practice began in about 1381, but did not become common until after 1752; it is reported to have occurred as late as 1834.\textsuperscript{128}

At first, individuals were executed as near to the scene of the crime as possible. Eventually, they were hung in chains near the scene of the crime after they had been executed previously at a central location.\textsuperscript{129} The most famous of these in London was Tyburn, located near Hyde Park, at the junction of what is now Oxford Street and Edgware Road.\textsuperscript{130} It has been said that some 50,000 persons were executed publicly at Tyburn.\textsuperscript{131} Apparently the English were slow to learn. Until the drop was used, hanging was little more than slow strangulation.\textsuperscript{132} The real cruelty of this is not appreciated fully until one understands that quite often individuals were cut down only to revive sometime later, and then be forced to again suffer the ordeal.\textsuperscript{133} Public hangings were abolished finally in England in 1868, and the executions became principally a private matter.\textsuperscript{134}

In light of the above discussion, one appropriately might ask whether the executions did, in fact, have any effect on the populous. Did executions, in fact, serve their intended purpose of deterring crime, even though they were so horrible? Did the sight of a man being put to death in public have any solemnizing effect on anyone else? The answers to these questions, based upon what evidence we can examine, appears, by and large, to be no. The carnival-like scenes and frequent display of violence committed upon a human being made the general public hard and callous, ambivalent to the existence or passage of life.\textsuperscript{135} Often the crowds attending the execution would cheer each contortion the dying man went

\textsuperscript{127} J. Laurence, supra note 9, at 4.
\textsuperscript{128} Id. See G. Scott, supra note 9, at 203.
\textsuperscript{129} J. Laurence, supra note 9, at 169.
\textsuperscript{130} Id. at 177, 179; G. Scott, supra note 9, at 41-42. The first recorded execution at Tyburn took place in the year 1196, the last one in 1783, after which public executions were moved to Newgate, perhaps the second most famous scene of executions in England. G. Scott, supra note 9, at 43.
\textsuperscript{131} J. Laurence, supra note 9, at 178.
\textsuperscript{132} E. Block, supra note 11, at 17. The drop has generally been credited to the Irish. G. Scott, supra note 9, at 207.
\textsuperscript{133} See, e.g., E. Block, supra note 11, at 17; A. Koestler, supra note 84, at 10-11; J. Laurence, supra note 9, at 56-57, 196-97.
\textsuperscript{134} G. Scott, supra note 9, at 58.
\textsuperscript{135} See id. at 59-63; J. Laurence, supra note 9, at 44.
through as he hanged. At times the crowds were known to become furious if a last-minute reprieve were granted, robbing them of the spectacle they had gathered to see.

The scenes typical in London executions give no indications of any deterrence being worked upon anyone. Usually the condemned man, bound to prevent escape, was hauled in an open cart to the place of execution. The procession would stop along the way at St. Sepulcher's church where the condemnee was addressed by the bellman. The procession usually would then stop at the Crown Inn so as to allow the accused a last drink. And, if he were a popular fellow, he was allowed to stop at the house of friends along the way. Often, it is reported, the condemned were drunk by the time they reached their place of execution. This may account for many of the stories of seeming bravery by the accused at their executions, turning the spectacle into a triumph rather than a deterrent.

Not only were prisoners often drunk by execution time, but, too often, so were the executioners. It is told that one such executioner, thinking that there were to be three to be hanged, when in reality there were only two, tried to hang the attending parson and had to be prevented physically from doing so.

An added irony is the fact that oftentimes the executioners were themselves reprieved criminals. One would therefore believe that if anyone was to be deterred, the executioner would be. Yet, many returned to crime and themselves ended up on the gallows. It is suggested that such a result should not be surprising, for one made by the law to be a human butcher must, of necessity, become callous, cold, and brutal, losing most, if not all, respect for life. To the populous, executions, of which there were nearly 100 per year, were like holidays and had the same effect as the midweek races or weekend football games do today. The crowds

136. Id.
137. G. Scott, supra note 9, at 54-55.
138. J. Laurence, supra note 9, at 134.
139. A. Koestler, supra note 84, at 10; G. Scott, supra note 9, at 52, 134.
140. G. Scott, supra note 9, at 134. See A. Koestler, supra note 84, at 10.
141. A. Koestler, supra note 84, at 10; G. Scott, supra note 9, at 140.
142. J. Laurence, supra note 9, at 86-87.
143. Id. at 86; A. Koestler, supra note 84, at 10; G. Scott, supra note 9, at 140.
144. A. Koestler, supra note 84, at 10; J. Laurence, supra note 9, at 86.
145. J. Laurence, supra note 9, at 87. There are, however, indications that those executioners who were not totally brutalized by their work were often so repulsed that they ultimately became strong advocates of the abolishment of capital punishment or, in some instances, took their own lives. Id. at 124; G. Scott, supra note 9, at 120-21.
146. A. Koestler, supra note 84, at 8.
were known to have numbered from 10,000 to 40,000.\textsuperscript{147} Any window with a view of the scaffold commanded a high price, and, for a time, stands with paid seating were erected.\textsuperscript{148} One of the most serious problems to occur during public hangings of pickpockets were pickpockets who went through the crowds at the moment of the hanging, picking pockets.\textsuperscript{149}

There is a significant amount of evidence which indicates that, rather than act as a deterrent, public executions encouraged crime. Cases of murders committed shortly after witnessing public executions were reported by A. A. Dymond.\textsuperscript{150} Further, the Royal Commission reported that of 167 persons awaiting execution who had been visited by the prison chaplin, 164 had previously witnessed at least one execution.\textsuperscript{151}

Perhaps the best example of how the imposition of the death penalty may not serve as a deterrent, because of the nature of the criminal mind, is reflected in a conversation, reported by Scott, with a prisoner under sentence of death:

Question: Have you often seen an execution? Answer: Yes, often. Question: Did it not frighten you? Answer: No, why should it? Question: Did it not make you think that the same would happen to yourself? Answer: Not a bit. Question: What did you then think? Answer: Think? Why I thought it was a—shame. Question: Now when you had been going to run a risk of being caught and hanged, did the thought never come into your head that it would be as well to avoid the risk? Answer: Never. Question: Not when you remembered having seen men hang for the same thing? Answer: Oh, I never remembered anything about it. And if I had, what difference would that make? We must all take our chance. I never thought it would fall

\textsuperscript{147} Id. at 9; J. Laurence, supra note 9, at 183; G. Scott, supra note 9, at 49. In 1807, a human stampede was touched off and over 100 people were killed. A. Koestler, supra note 84, at 9.
\textsuperscript{148} G. Scott, supra note 9, at 50.
\textsuperscript{149} Apparently, pickpockets selected the time when the condemned was being hanged as a perfect opportunity to ply their trades as everyone's eyes were looking up. A. Koestler, supra note 84, at 53. In addition, assaults, prostitution, robbery and drunkenness were major problems, and it is reported that forged notes were passed in the dissecting halls where the bodies of criminals, hanged for the very same offense, were laid. G. Scott, supra note 9, at 59-60.
\textsuperscript{150} G. Scott, supra note 9, at 62. Cases of executions touching off murders are not restricted to England, as the same phenomenon has been reported in the United States. N. Teeters, Hang by the Neck 42-44 (1967). Studies conducted in the United States, however, have found no significant difference between the number of capital offenses committed prior to an execution and the number committed after an execution. Reckless, The Use of the Death Penalty: A Factual Statement, cited in J. McCafferty, Capital Punishment 58-59 (1972).
\textsuperscript{151} A. Koestler, supra note 84, at 53.
on me and I don't think it ever will. Question: But if it
should? Answer: Then I hope I shall suffer like a man.
What's the use of sniveling?152

Scott reported that the conversation was not a single instance,
but was representative of many conversations with prisoners
awaiting execution.153 One is compelled to conclude, that on bal-
ance, the indiscriminate use of the death penalty failed to deter
crime in England.154

The history of capital punishment in the United States is not
dissimilar with that found in other countries.155 The first docu-
mented legal execution in this country occurred in the colony of
Virginia on March 1, 1622. Daniell Frank was hanged for stealing a
calf and other chattels from Sir George Yerdley.156 While this is
the first documented execution, it is likely that there may have
been others, in view of the fact that the first settlers arrived in
Jamestown in 1607.157 It seems unlikely that no one was executed
between then and 1622. John Billington became the first person to
be hanged for murder in the colonies on September 30, 1630, in
Plymouth, Massachusetts.158 Billington has the distinction of not
only being the first person to be hanged for murder in the colonies,
but also to have been one of those who arrived in this country on
the Mayflower.159

The American experience with the death penalty began where
the British experience left off. Even though those crimes punish-
able by death in the American colonies were many and varied, the
dearth penalty was not as common a punishment as it had been in
England.160

The first documented codification of capital offenses known to

152. G. SCOTT, supra note 9, at 63.
153. Id. There are many other examples of individuals who first got the idea of
committing a certain crime while they observed another hang for the very same
offense. See, e.g., id. at 245-47; A. KOESTLER, supra note 84, at 53.
154. It was once said by Dr. Stephen Lashington that “every execution brings
another candidate for the hangman.” N. TEETERS, supra note 150, at 42.
155. Part of the problem in examining and analyzing the death penalty in the
United States is that there is so little information available. This is particularly true
in examining the history of the death penalty because: (1) each state has its own
criminal code, approach to capital punishment, and list of crimes which carry the
death penalty; (2) during much of our history in this country, many different crimes
carried the death penalty, and (3) we, in the United States, have no comprehensive
report on the death penalty as do the British in the British Royal Commission Re-
port. See J. JOYCE, supra note 2, at 140.
156. N. TEETERS, supra note 150, at 7.
157. Id. at 7-8.
158. Id. at 8.
159. Id.
exist in this country was drawn by the Massachusetts Bay Colony in 1636 and was entitled "The Capitall Lawes of New-England." The offenses punishable by death were listed as follows:

- idolatry, witchcraft, blasphemy, murder ('manslaughter, committed upon premedita malice, hatred, or cruelty, not in a man's necessary and just defense, nor by mere casual-tie, against his will'), assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape (punishment of death optional), man-stealing, perjury in a capital trial and rebellion (including attempts and conspiracies).\(^{161}\)

As authority for the imposition of the death penalty, each crime was accompanied in the statute by an Old Testament text,\(^{162}\) even though, as we have observed earlier, the imposition of the death penalty by the Sanhedrin was imposed rarely, if ever, for the violation of the crimes.\(^{163}\) Unlike the Sanhedrin, colonial America imposed no rigid requirements similar to the Sanhedrin before imposing the death penalty. Nevertheless, how rigorously these laws were enforced in Massachusetts is not known. Nor is there any explanation as to why these particular crimes were taken from the Old Testament while nearly three dozen capital offenses noted in the Mosaic Code were not likewise adopted.\(^{164}\)

There is little documentation of what was a capital offense in other American colonies during this period. However, it is suggested that the South Jersey and Pennsylvania laws, influenced by the Quaker colonists, were much milder.\(^{165}\) The 1646 Royal Charter for South Jersey did not prescribe the death penalty for any crime, and there was no reported execution in this colony until 1691.\(^{166}\) In Pennsylvania, the humanitarian influence of William Penn was a factor in the colony's decision to confine the death penalty to the crimes of treason and murder.\(^{167}\)

In the decades following the development of the Massachusetts Code, an adherence to the Mosaic Code generally gave way to purely secular needs.\(^{168}\) By the time of the Revolutionary War, many of the colonies' laws imposing capital punishment were

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\(^{162}\) THE DEATH PENALTY IN AMERICA, supra note 25, at 5.

\(^{163}\) For a discussion of the Sanhedrin, see notes 16-30 and accompanying text supra.

\(^{164}\) THE DEATH PENALTY IN AMERICA, supra note 25, at 5.

\(^{165}\) Id. at 6.

\(^{166}\) Id.

\(^{167}\) Id.

\(^{168}\) Furman v. Georgia, 408 U.S. at 335 (Marshall J., concurring).
fairly consistent.\textsuperscript{169} In most colonies, the crimes of murder, treason, piracy, arson, rape, robbery, burglary, sodomy, and, from time to time, counterfeiting, horse-theft, and slave rebellion were usually punishable by death.\textsuperscript{170} The form of execution was usually death by hanging.\textsuperscript{171}

Several states, however, maintained a more extensive list of crimes for which capital punishment could be imposed.\textsuperscript{172} In 1837, North Carolina still imposed the death penalty for all of the crimes generally included in other states, but also the crimes of:

- arson, castration, burglary, highway robbery, stealing banknotes, slave stealing, 'the crime against nature' (buggery, sodomy and bestiality), duelling if death ensues, burning a public building, assault with intent to kill, breaking out of jail if under a capital indictment, concealing a slave with intent to free him, taking a free Negro or mulatto out of the state with intent to sell him into slavery;
- the second offense of forgery, mayhem, inciting slaves to insurrection, or of circulating seditious literature among slaves; being an accessory to murder, robbery, burglary, arson or mayhem. Highway robbery, and bigamy, both capitaly punishable, were also clergiable.\textsuperscript{173}

It is suggested that the harsh code persisted for so long in North Carolina partly because the state had no state penitentiary, and thus no suitable place to keep all prisoners.\textsuperscript{174} Execution was, in part, a matter of administrative convenience. Once again, as in England, if the use of the death penalty served as a deterrent, it was difficult to discern. At this point, the wheel of time appears to have started to make another turn, and the notion that the death penalty should be eliminated again raised its head.

The first documented official opposition to the death penalty in the United States occurred in 1682 with the passage of an act authored by William Penn, which provided that the death penalty could be imposed only for premeditated murder.\textsuperscript{175} However, this

\begin{itemize}
  \item \textsuperscript{169} \textit{The Death Penalty in America}, supra note 25, at 6.
  \item \textsuperscript{170} \textit{Id}.
  \item \textsuperscript{171} \textit{Id}.
  \item \textsuperscript{172} \textit{Id}.
  \item \textsuperscript{173} \textit{Id}; at 7.
  \item \textsuperscript{174} \textit{Id}.
  \item \textsuperscript{175} J. Joyce, supra note 2, at 151. For more than 200 years the arguments of the abolitionists have been somewhat similar. For example, in his concurrence in \textit{Furman v. Georgia}, Justice Brennan stated:
  
  At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this
reform was not long-lived. Apparently, the mildness of the code offended official sensibility. In 1718, in part because of pressure from the Crown's representatives, the Pennsylvania Code was abandoned for the harsher penal code of England, and thus thirteen offenses became capital crimes once again in Pennsylvania. As observed by William Bradford, attorney general of Pennsylvania and later of the United States, there was little evidence that the milder code had resulted in more frequent or more extreme offenses in that state than occurred elsewhere in the colonies with harsher penalties.

Prior to and during the Revolutionary War, there were some attempts at forming societies to seek the abolition of capital punishment. However, the abolitionist movement did not develop any significant momentum until 1787 when Dr. Benjamin Rush read a paper at the home of Benjamin Franklin entitled "An Enquiry Into the Effects of Public Punishments Upon Criminal and Upon Society." Rush's statements expressed the rehabilitative philosophy of penology. In addition, they represented the first significant American statement for the abolition of the death penalty. The main points of Rush's argument were simple enough: "[S]criptural support for the death penalty was spurious; the threat of hanging does not deter but increases crime; when a government puts one of its citizens to death, it exceeds the powers entrusted to it."

Rush was one of the Pennsylvania reformers who, along with such others as Franklin, were fighting against the Pennsylvania penal laws of 1718 and 1786. Their efforts apparently bore some fruit because Pennsylvania abolished the death penalty for witchcraft in 1791, and by 1794, reformers were successful in achieving the repeal of the death penalty for all crimes in Pennsylvania except for first-degree murder. Furthermore, the Pennsylvania Legislature in 1794 was convinced to make a distinction between...
first and second-degree murder, with only first-degree murder carrying the death penalty.182

The 1830's marked the beginning of a heyday for the abolitionist movement. Abolitionist societies grew in popularity in many states throughout the Union, particularly in the northeast. This period also marked the founding of the American Society for the Abolition of Capital Punishment in 1845.183

Although no state had yet abolished the death penalty entirely, there was at this time a move away from public executions. In 1830, New York gave county sheriffs the discretion to hold executions out of public view.184 This option of private executions became mandatory five years later in 1835.185 Not all states, however, followed suit. Several states, such as New Jersey and Pennsylvania, required only that executions be held within the walls or buildings of the county jail, making no restriction upon who might

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182. Id. at 24. The practice of chipping away at the death penalty by making distinctions between degrees of murder spread to several other states, including Virginia in 1796 and later in Ohio in 1815. Id. Although one of the possible motives for such legislative action may have truly been humanitarian interests, it appears that at this point in American history and later we find a parallel to what occurred in England during the Bloody Code. See notes 103-09 and accompanying text supra. In the early years of this country, states uniformly followed “the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.” Woodson v. North Carolina, 428 U.S. 280, 289 (1976). American juries, like their English counterparts, reacted unfavorably both to the mandatory death sentences and to a large number of crimes which carried the death sentence. Id. at 289, 291. Apparently this dissatisfaction of the jury—that is, their unwillingness to convict because the sentence carried the death penalty—played a major role in encouraging state legislatures to decrease the number of offenses carrying the death penalty. Id. at 291. Even so, this reform apparently did not solve the problem of jurors refusing to convict murderers rather than subjecting them to mandatory death sentences. It appears that the creation of degrees of murder and corresponding punishment was one more attempt at salving the jurors' conscience. However, it was apparently not sufficient to alleviate the problem. Therefore, states, one by one, began to allow the juries' sentencing discretion in capital cases to impose either the death penalty or life imprisonment. Tennessee was the first of these states in 1838, followed by Alabama in 1841 and Louisiana in 1846. By the end of the nineteenth century, other states and the federal government joined in this trend. During the next two decades, the mandatory death penalty statutes were replaced in 14 other states. All remaining jurisdictions replaced their automatic death penalty statutes with discretionary jury sentencing by 1963. Id. at 291-92. Mandatory death sentence statutes did not again appear on the scene until after Furman v. Georgia. This appeared to be a response to the Furman decision rather than a statement by the public that they approve of and were once again willing to provide mandatory sentences. It appears that the needs and desires of the state to convict those who fall under the statutory definitions and the desires of the jury to not be responsible for putting defendant to death create an interesting point of tension which has played a major part in the development and evolution of the death penalty.

183. THE DEATH PENALTY IN AMERICA, supra note 25, at 9.

184. Id. at 21.

185. Id.
witness the execution.\textsuperscript{186} Since most gallows were erected in jail yards, it was very easy for the population of the community to sit upon the walls and observe the executions.\textsuperscript{187}

In 1846, the territory of Michigan became the first to abolish the death penalty for all crimes except treason. In enacting this law on March 1, 1847, "Michigan became the first English-speaking jurisdiction in the world to abolish the death penalty, for all practical purposes."\textsuperscript{188} The Michigan example was followed by Rhode Island in 1852 and Wisconsin in 1853.\textsuperscript{189}

Although no other states joined Michigan, Rhode Island, and Wisconsin in abolishing the death penalty prior to the beginning of the Civil War, other states did pass measures intended to lessen the harshness of the death penalty.\textsuperscript{190} In some, it was a matter of decreasing the number of offenses which were subject to capital punishment. In northern and eastern states, only treason and murder were capital offenses.\textsuperscript{191} Outside of the south, few states had more than one or two additional capital offenses.\textsuperscript{192}

The advent of the Civil War seemed to have blunted some of the abolitionist's momentum. It has been argued that the Civil War, and war in general, with one man watching another man die, tends to harden one to the loss of life.\textsuperscript{193} However, in the recon-

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\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 9.
\textsuperscript{189} Filler, \textit{Movements to Abolish the Death Penalty in the United States}, 284 \textit{ANNALS AM. ACAD.} 124, 128 (1952).
\textsuperscript{190} Id. at 124-28.
\textsuperscript{191} Id. See Furman v. Georgia, 408 U.S. 238, 338 (1972) (Marshall, J., concurring).
\textsuperscript{192} 408 U.S. at 338. Some states took action which, although it did not eliminate the death penalty, made its imposition substantially more difficult. For example, Maine in 1836 and New York in 1860, passed measures which forbade the executive to issue a death warrant within one year after the criminal had been sentenced by the court (two years in the case of New York). These measures were, in a de facto sense, meant to indirectly abolish the death penalty. The New York measure only lasted two years. See Filler, supra note 189, at 128; Furman v. Georgia, 408 U.S. at 337-38 (Marshall, J., concurring).
\textsuperscript{193} 408 U.S. at 338-39 (Marshall, J., concurring). An examination of the history of the death penalty in the United States reveals that the abolitionist movement seems to have been most fruitful in times of peace and plenty. It should be noted that there was little abolitionist activity immediately following the Civil War. The abolitionist movement did not gain steam again until just prior to World War I. Then, after World War I, what ground had been won was, for the most part, lost. There was another long period of activity between the World War I and the World War II. This might be attributed, in part, to the Great Depression. Once again, there was little activity up to and just after World War II. The abolitionist movement did not really gain steam again until the 1950s. At first glance it might seem inconsistent that the present abolitionist movement had its origin during the Vietnam War era of the 60s and early 70s. However, it could be argued that this most
struction era of the 1870's two more states, Iowa and Maine, joined Michigan, Rhode Island, and Wisconsin. Both were later to restore the death penalty and then abolish it again.

This on-again, off-again attitude seems to have affected much of America. At least twenty-three states have, at one time or another, abolished the death penalty, and at least twelve have restored the death penalty after having abolished it earlier. Of those who have restored the death penalty, having once abolished it, at least four thereafter reabolished the death penalty or abolished it except for very isolated cases such as treason or the murder of a police officer on duty.

The murder statistics between those states which have abolished the death penalty and those which have not provide an important laboratory for examining the deterrent effect of the death penalty. Thorston Sellin in *The Death Penalty—A Report for the Model Penal Code Project of the American Law Institute, 1959* attempted to examine statistically the deterrent effect of the death penalty. He stated as follows:

> It seems reasonable to assume that if the death penalty exercises a deterrent or preventive effect on prospective murderers the following propositions would be true: (a) murderers should be less frequent in states that have the death penalty from those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects—character of population, social and economic conditions, etc., in order not to introduce factors known to influence murder rates in a serious manner but present in only one of those states. (b) Murder should increase when the death penalty is abolished and should decline when it is restored. (c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crimes occurred and its consequences are most strongly brought home to the population. (d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than those without it.

recent movement was completely in line with the new public awareness of humanitarian values which were expounded during that time.

194. *The Death Penalty in America*, supra note 25, at 12, Table 1.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

After a lengthy discussion, Sellin made an examination of homicides in those states which had abolished capital punishment. The data examined revealed that:

1. The level of the homicide death rate varies in different groups of states. It is lowest in the New England areas and in the northern states of the middlewest and lies somewhat higher in Michigan, Indiana and Ohio.
2. Within each group of states having similar social and economic conditions and populations, it is impossible to distinguish the abolition state from the others. (3) The trends of the homicide death rates of comparable states with or without the death penalty are similar. The inevitable conclusion is that executions have no discernible effect on homicide death rates which, as we have seen, are regarded as adequate indicators of capital murder rates.

Sellin further examined the experience of states which temporarily abolished the death penalty. He reported that Arizona, which abolished the punishment between December 8, 1916, and December 5, 1918, showed no significant difference. Forty-one murderers were convicted during the two years prior to abolition, forty-six during the abolition period and forty-five during the following two years. Colorado, Iowa, Missouri, Tennessee, Oregon, and Washington experienced similar results.

Between 1930 and 1967, 3,709 persons were executed in the United States. The greatest number of those were executed between 1930 and 1949, with an average of 148 persons being executed each year between 1930 and 1949. One would nevertheless be hard pressed to suggest that that period of time was necessarily a law-abiding period for America, or that anyone's experience with the death penalty resulted in deterring violent crime. This may, of course, be due to the simple fact that capital crimes are most often crimes of fear or passion and therefore are committed without much, if any, previous planning, though with sufficient premedita-

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200. Id. at 34.
201. Id. at 36.
202. Id. at 36-37. Regardless of what effect the death penalty may have on potential criminals, it has been argued that the existence of the penalty in a state may have a detrimental effect on the public. "It can just as easily be argued that executions through cruel methods encourage public brutality and disrespect for the law. In the past, lynchings seem to occur more often in states that employ the traditional modes of execution than in jurisdictions that had abolished capital punishment." Gardner, Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO ST. L.J. 96, 117-18 (1978).
203. UNITED STATES BUREAU OF PRISONS, NATIONAL PRISONER STATUTES, EXECUTIONS, 1930-60, at 53 (No. 45).
204. Id.
tion to satisfy the law's requirement that there be a momentary turning over in the mind. As an example, of all of the murders committed in Nebraska in 1981, 73% were committed by a relative or an acquaintance of the victim. One would conclude that the argument which says that the regular imposition of the death penalty will reduce the instance of capital crimes has been refuted, if history is any proof of the matter.

THE FURMAN DOCTRINE ERA

Little significant change occurred in the United States regarding the death penalty during the 1950s and 1960s except that few, if any, death sentences were either imposed or carried out in the United States. The reason for this seems to be unclear. However, 1972 saw a significant attack on the imposition of a death penalty in the United States. On June 29, 1972, the United States Supreme Court did, in one fell swoop, what no abolitionist group could possibly accomplish. In the case of Furman v. Georgia, the United States Supreme Court imposed the "death penalty" on capital punishment in the United States, as it was then known. In a series of cases, two from Georgia and one from Texas, the United States Supreme Court, in a brief per curiam opinion, held "that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." The per curiam opinion, while terse and to the point, did not reflect the complete difference of opinion which existed among the members of the Court. The Court appeared to be in total disagreement, even as to those who agreed that the death penalty was unconstitutional. In addition to the per curiam opinion, there were five separate concurring opinions and four separate dissenting opinions. Each member of the Court insisted on expressing his individual view on the subject. Justices Brennan and Marshall both concluded that the imposition of the death penalty was, in all cases, a violation of the eighth and fourteenth amendments. They concluded that no set of

207. Id. at 239-40.
208. Concurring opinions were filed by Justices Brennan, Douglas, Stewart, Marshall, and White.
209. Dissenting opinions were filed by the Chief Justice and Justices Blackmun, Powell and Rehnquist.
210. 408 U.S. at 305.
211. Id. at 314.
facts could exist which would result in the imposition of the death penalty not being a cruel and unusual punishment.

Justice Douglas, on the other hand, concluded that the manner in which the death penalty was imposed, to wit, without any standards or guidelines, caused it to violate the equal protection clause. Douglas said, in part:

In a Nation committed to equal protection of the laws there is no permissible ‘cast’ aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

In short, Douglas concluded that it was simply unfair and therefore unconstitutional to inflict the death penalty on equally guilty parties in a discriminatory manner. The significance of the Douglas opinion will be examined in a moment.

Justice Stewart likewise concluded that the petitioners had been selected capriciously in violation of their constitutional rights. While concluding that retribution is a constitutionally permissible ingredient in the imposition of punishment, Stewart, nevertheless, believed that in cases such as those then before the Court, the selection of those three petitioners for execution was impermissible, saying:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all of the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Justice Blackmun, while dissenting, took pains to express his personal distaste for the death penalty. He noted that it could not be demonstrated that capital punishment served any useful purpose. Nevertheless, he did not believe that it was for the courts to make that decision.

212. Id. at 240.
213. Id. at 255.
214. Id. at 306.
215. Id. at 309-10.
216. Justice Blackmun stated:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhor-
Whatever may have been the individual feelings of the members of the Court, it was clear that *Furman* had failed to establish any consensus and did little more than to point out the problem without much, if any, direction as to how the problem might be solved. The decision did, however, result in a number of death sentences being set aside and sent legislatures back to the drawing boards.

On July 2, 1976, the United States Supreme Court dropped the other shoe when it released opinions in a series of cases which did attempt to provide some guidelines for the states. In the case of *Woodson v. North Carolina*, the Court struck down North Carolina's mandatory death sentence for first degree murder. In essence, the Court held that establishing a mandatory death penalty did not overcome the defect of arbitrary imposition and could not satisfy constitutional infirmities. The Court was still concerned about the absence of any meaningful guidelines to assist the jury in determining whether the death penalty should be imposed. In *Roberts v. Louisiana*, the Court likewise struck down the Louisiana death penalty scheme which narrowly defined five categories of first degree murder for which the death penalty was mandatory. However, in *Proffitt v. Florida*, the Court approved the Florida statutory procedure which required the judge to consider specific aggravating and mitigating factors and which required the judge to set forth written findings when the death penalty was imposed. And, in *Jurek v. Texas*, it likewise upheld the Texas capital sentencing procedure which required the jury to consider five categories of aggravating circumstances as well as considering mitigating circumstances and which focused on the particularized circumstances of the individual offense and individual offender.

renee, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of 'reverence for life.' Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the justices who vote to reverse these judgments.

There—on the Legislative Branch of the State or Federal Government, and secondarily, on the Executive Branch—is where the authority and responsibility for this kind of action lies. The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.

*Id.* at 405-06, 410.

It was, however, in *Gregg v. Georgia* that the Court appeared to plot the proper course for a state desiring to impose the death penalty. In these cases, the Court approved a new Georgia statute which set out, in detail, various aggravating and mitigating circumstances. The Georgia statute has served as a model for a

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222. GA. CODE ANN. § 27-2534.1 (Supp. 1978). The statute provides in part:

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

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

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.
number of other states, including Nebraska.\textsuperscript{223} Incidentally, the

\textsuperscript{223} \textsc{Neb. Rev. Stat.} § 29-2521 (Reissue 1979) provides:

\textit{Determination of sentence; procedure.} In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

\textsc{Neb. Rev. Stat.} § 29-2522 (Reissue 1979) provides:

\textit{Sentence; death; life imprisonment; determination of death in writing.} After hearing all of the evidence and argument in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

\textsc{Neb. Rev. Stat.} § 29-2523 (Reissue 1979) provides:

\textit{Aggravating and mitigating circumstances, defined.} The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) \textbf{Aggravating Circumstances:}

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another;

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) \textbf{Mitigating Circumstances:}

(a) The offender has no significant history of prior criminal activity;
series of decisions released on July 2, 1976, appear to resolve one further question, to wit, that the imposition of the death penalty in all circumstances did not, in the opinion of the Court, constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments. As might be expected, Mr. Justice Brennan\(^\text{224}\) and Mr. Justice Marshall\(^\text{225}\) strongly disagreed with that view, and have ever since held unwaveringly that the imposition of the death penalty, under any circumstance, is a violation of the eighth and fourteenth amendments.

Under the Georgia statutory scheme, as well as Nebraska's, a bifurcated trial is conducted. First the issue of guilt or innocence is determined by the jury. If a verdict of guilty is returned, then the issue concerning the penalty is considered. In Georgia, it is presented to the same jury that decided guilt, while, in Nebraska, it is presented to either the presiding judge, acting alone, or, if he chooses, a panel of three judges, the other two being selected by the Chief Justice.\(^\text{226}\)

Mr. Justice Stewart,\(^\text{227}\) writing for himself, Justice Powell and Justice Stevens approved the Georgia statutory scheme on the basis that the Georgia statute had somehow eliminated the arbitrary imposition of the death penalty with which the Court was concerned in \textit{Furman}. Finding support in the A.L.I. Model Penal Code, Justice Stewart said:

While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the

\begin{itemize}
  \item[(b)] The offender acted under unusual pressures or influences or under the domination of another person;
  \item[(c)] The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;
  \item[(d)] The age of the defendant at the time of the crime;
  \item[(e)] The offender was an accomplice in the crime committed by another person and his participation was relatively minor;
  \item[(f)] The victim was a participant in the defendant's conduct or consented to the act; or
  \item[(g)] At the time of the crime the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.
\end{itemize}


\textit{226.} \textit{NEB. REV. STAT. §} 29-2520 (Reissue 1979).

\textit{227.} \textit{Gregg,} 428 U.S. at 158.
factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to insure that death sentences are not imposed capriciously or in a freakish manner.228

Justice Stewart and those members of the Court joining with him seemed to feel that the list of aggravating factors and mitigating factors set forth in the Georgia statute would eliminate chance in selection and provide a method whereby a sentence of death could be subjected to a litmus paper test on appeal by examining the sentence under the microscope of the guidelines. We would suggest, if that was the Court's conclusion, that neither experience nor analysis would support such a conclusion.

Opponents in Gregg argued that the guidelines would be skewed because of the discretion of the prosecutor229 and because the guidelines were too broad to be of any real assistance to a jury or court.230 In short order, Stewart addressed these arguments concerning such discretion and that the standards were so broad and vague as to leave juries free to act as arbitrarily and capriciously as they wished.

As to the first concern, prosecutorial discretion, Justice Stewart said in part: "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."231 Yet when one compares Justice Stewart's answer here with his earlier concern in Furman, one wonders how granting one defendant mercy and ordering another to be executed is not the very type of random selection with which he was so concerned in Furman.232 It would seem that selecting one to live even though he had committed murder is only the other side of randomly selecting one to die for committing murder. With regard to the vagueness argument, Justice Stewart disposed of the matter by saying simply that it was not true.233

The effect of the first concern, discretion by the prosecution, is readily seen when just a few recent Nebraska cases are reviewed. Without expressing any view as to the legality of any sentence imposed in these cases, but using them only for the purpose of showing what would appear on its face to be a wide variance, though apparently legal, we need only look at the Nebraska cases of State

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228. Id. at 193-95.
229. Id. at 199.
230. Id. at 202.
231. Id. at 199.
233. Id. at 302.
In Stranghoener, it appears that the defendant, a member of a social "family," conspired with several others to murder James Gosley, one of the family members. The facts of the case would appear to support a conviction of first degree murder. In fact, Stranghoener was charged originally with first degree murder. Subsequently, the charge was amended to second degree murder pursuant to a plea bargain. The defendant pled guilty to the amended charge and was sentenced to a term of twenty years imprisonment. In the Randall case, the defendant participated in the beating death of a young man who had given Randall and two other hitchhikers a ride. Randall was charged originally with first degree murder but, as a result of a plea bargain, was permitted to plead guilty to second degree murder and was sentenced to life imprisonment. While, to be sure, a sentence of life imprisonment is not a light sentence, these two cases are but a few of the many which do disclose that prosecutorial discretion does have a significant impact upon who shall be sentenced to death and who shall be sentenced to life or less. There appear to be no guidelines for the exercise of prosecutorial discretion.

The point of this discussion is not to suggest that the existence of prosecutorial discretion causes the imposition of the death penalty to be unconstitutional, for indeed the United States Supreme Court, in Gregg, has held to the contrary. Instead, the suggestion is that if, philosophically, we are attempting to impose the death penalty in some non-discriminatory, fair, and even-handed manner because we believe that as civilized human beings the imposition of the death penalty in any other manner, even if legal, is improper, experience discloses that this goal, under present standards, is nearly impossible to meet.

Nor do events following the decision in Gregg appear to have given support to Stewart's conclusion in Gregg that a list of aggravating and mitigating circumstances such as those approved in Gregg are not too vague and overbroad to serve the purpose sought by the Court in rejecting the death penalty in Furman, Woodson, and Roberts. One reaches the conclusion that even if the creation of aggravating and mitigating circumstances eliminates the constitutional infirmities which heretofore have existed when attempting to impose the death penalty, their creation does little to aid the jury or court in reaching the decision as to whether the death penalty should be imposed nor ultimately to bring about

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a fair and consistent policy as to when, in fact, the death penalty will be imposed.

As noted by the Nebraska statute, the function of the aggravating and mitigating factors is to assist the court in determining "whether sufficient aggravating circumstances exist to justify imposition of a sentence of death" and "whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances." It would not at all seem inappropriate to observe that not even an Apple Computer could objectively make that determination, let alone a human being. The task, while perhaps constitutionally valid, is, in practice, impossible to perform, thereby making all of the concerns expressed in Furman and its allied cases virtually meaningless.

As one reads the list of aggravating and mitigating circumstances, immediately one is compelled to question whether the factors which have been isolated and set as standards really satisfy the objectives implied by the Court's opinion in Gregg. After an examination of the mitigating factors set out in either the Georgia or Nebraska statutes, one is compelled almost immediately to ask how these factors can reasonably aid a jury or a court in deciding whether sufficient reason exists to dispense with the imposition of the death penalty, particularly if the penalty is intended to either deter future crimes or avenge the victim. One of the factors is that "the offender has no significant history of prior criminal activity." If the purpose of imposing the death penalty is either to deter murder or to punish the most serious of all crimes, then what difference does it make that the perpetrator has not previously engaged in criminal activity? Is the victim any less dead because this is the perpetrator's "first bite?" Are we attempting to suggest that, as a matter of philosophy, anyone who is willing to spend twenty or more years in prison is entitled to at least one murder? It would be unimaginable to think such is the case. Then why should one's prior criminal activity mitigate against the seriousness of the crime of murder? Can it be because regardless of what we may say, we recognize that there are a host of domestic murders and murders of similar type in which we would not wish to impose the death penalty? And, yet, should it not be critical to attempt to deter domestic murders by announcing in an unqualified fashion that if one spouse murders another, the murdering spouse will forfeit his or her life. What justification can be offered for exempting do-

237. Id. at § 29-2522(2).
238. Id. at § 29-2523(2)(a).
mestic murders from the imposition of the death penalty? By doing this, are we not again creating classes and discriminating? The mere fact that we identify the classes in which we discriminate would not appear to make discrimination any less inappropriate.

The second mitigating factor under the statute is that "the crime was committed while the offender was under the influence of extreme mental or emotional disturbance" or "that at the time of the crime the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication." Again, if the purpose of imposing the death penalty is to deter crime and to hold those who commit "the act" liable for their actions, what is the basis for arguing that one's mental or emotional state should be a mitigating factor? If indeed one's mental state is sufficient to meet the standards of the M'Naghten Test, then indeed the individual will not be deemed to have committed the crime. But if, in fact, we determine that all of the elements of the crime are present and that the murder was committed, what is the basis for suggesting that one should be spared the ultimate punishment for having committed the ultimate crime on the basis of intoxication or extreme mental or emotional disturbance? We do not mitigate the penalty in a motor vehicle homicide case because of intoxication. Why, then, should we do so in murder?

A further mitigating factor as described by the statute is "the age of the defendant at the time of the crime." And yet when one again views the purpose of imposing the death penalty in any case, one must ask immediately what is the significance of age. Does a seventy-year-old man die more easily when killed by a sixteen-year-old than when killed by a nineteen-year-old? Are we not as interested in deterring seventeen-year-old murderers as we are twenty-two-year-old murderers? And what is said with regard to the mitigating circumstances may likewise be said with regard to the aggravating circumstances.

It may very well be that the creation of a list of factors, both aggravating and mitigating, such as those contained in the Nebraska statute may satisfy the various courts' view as to what the eighth and fourteenth amendments, as a minimum, require. But they do little toward attempting to accomplish what both Justices

239. Id. at § 29-2523(2)(c).
240. Id. at § 29-2523(2)(g).
241. Id. at § 29-2523(2)(d).
Douglas and Stewart so fully developed in Furman, to wit, a system whereby the imposition of the death penalty does not come to but a few on the basis of factors which cannot be meaningfully articulated.

To all of this we must add two other factors which would appear to create only greater uncertainty rather than less uncertainty. Under the United States Supreme Court's decision in Lockett v. Ohio243 and followed by the Nebraska Supreme Court,244 not only must the itemized factors be considered, but, in addition, the court must consider, as a mitigating factor, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."245 While that requirement appears to be decent and humane, it does little to articulate a set of standards which a court or jury may use in order that "a human life should be taken or spared" in such a manner "as to minimize the risk of wholly arbitrary and capricious action."246 The question as to who is spared the death penalty is of necessity critical when attempting to analyze whether who is not spared is arbitrary.

A further function of the aggravating and mitigating factors is to assist the court in determining "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."247 Assuming, for the moment, one could find a "similar" murder, history discloses that we have now excused enough people for "similar crimes" that imposing the death penalty under such standards is near impossible. There are presently 121 convicted murderers in the Nebraska Penal Complex.248 One hundred and ten are serving non-death sentences while eleven are awaiting execution.249 An examination of the many non-death penalty murderers would seem to indicate that at least some of the death penalty cases should be otherwise.250

In State v. Nokes,251 the defendant pleaded guilty to one count
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of first degree murder for the killing of Wilma Hoyt and one count of second degree murder for the killing of Edwin Hoyt. The facts disclosed that the defendant shot and killed the couple, dismembered their bodies with a butcher knife, wrapped the pieces, and placed them in a freezer. Later the frozen pieces were removed from the freezer and thrown into a lake. The defendant was given a life sentence.

In *State v. Sims*, the defendant was convicted of first degree murder. The facts disclose that prior to the shooting the deceased had been driving his automobile. The defendant and the deceased were involved in a near accident which resulted in the defendant having words with the deceased. After a brief conversation, the defendant returned to his automobile. A short time later the defendant returned to the area where the deceased was parked. A passenger in the defendant's automobile stepped out of the car and fired a pistol in the air. The defendant removed a shotgun from the car and walked rapidly in the direction of the deceased who was standing against his car. The defendant stopped when he was about ten feet away from the deceased and fired one shell which struck the deceased in the abdomen, causing his death. The defendant was sentenced to life imprisonment.

In *State v. Stewart*, the evidence discloses that the defendant, though only 16 years of age, was engaged in the business of selling marijuana. He induced his suppliers to meet him so that he could "rip them off." The defendant, without provocation, shot both of the suppliers in the head. One died instantaneously and the other fell to the floor of the van wounded. The wounded victim observed the defendant spreading gas in the van and igniting it in an effort to conceal the crime. The defendant was sentenced to life imprisonment.

In *State v. Record*, the defendant and another were driving in an automobile when they decided to rob anyone who next came along. They drove to approximately 180th and Dodge Streets in Omaha and parked on a side road waiting for someone to drive by so that the defendant could shoot and rob someone. At approximately 3 a.m., a car driven by the victim passed their parked car, proceeding east on Dodge Street. With one of the parties driving, the victim's car was pursued. As the car drove alongside it as if to pass, the defendant fired a shot, breaking the glass and killing the driver. The defendant was sentenced to life imprisonment.

252. 197 Neb. 1, 246 N.W.2d 645 (1976).
In State v. Scott, the defendant was charged with murder in the perpetration of or an attempt to perpetrate a robbery. The evidence discloses that the defendant entered the home of William and Bertha McCormic in Omaha and demanded money at gunpoint. A scuffle ensued, and Mr. McCormic was shot twice and killed, and Mrs. McCormic was shot twice and wounded. Mr. McCormic was 92 years of age at the time. Mrs. McCormic, age 83, had impaired vision and could not describe her assailant with any specificity. The defendant was sentenced to life imprisonment.

In State v. Prim, the defendant was charged with first degree murder, having shot and killed a defenseless operator of a gas station during the commission of a robbery. He was sentenced to life imprisonment.

In State v. Anderson, the defendant, though admittedly only 15 years old, had three previous felonies. During the course of a robbery which was committed by jumping into the victim's automobile, the defendant shot the victim in the head. He was sentenced to life imprisonment.

In State v. Hatcher, the defendant, being pursued by a police officer, engaged in a struggle with the police officer, and as the officer struggled with the defendant the officer's gun went off twice, the second time hitting the officer in the head. The defendant was sentenced to life imprisonment.

In State v. Brown, the defendant killed his victim during a robbery. He was sentenced to life imprisonment.

In State v. Jimmie Ray Anderson, the 34-year-old defendant and his wife resisted arrest by a patrolman and in the struggle in the police car, the patrolman was shot and killed. The defendant was sentenced to life imprisonment.

In State v. Schaeffer, the defendant, a 16-year-old, together with a friend, forced the owner of the Ace Hardware Store in Grand Island into their car at gunpoint where, after robbing him,
they shot him 17 times. The defendant was sentenced to life imprisonment.

In State v. Floyd, the defendant, 37 years old, shot and killed an unarmed gas station attendant during the course of a robbery. He was sentenced to life imprisonment.

In State v. Rowert, the 23-year-old defendant, who had been drinking, robbed another who also was intoxicated and who had a substantial sum of money on his person. The defendant determined to kill the victim so that the defendant could not be identified. The defendant lured the victim out of a bar and drove him out into the country where he took the money and then slit the defendant's throat and decapitated him. He was sentenced to life imprisonment.

In State v. Marshall, the defendant, a 20-year-old working in a flower shop in Lincoln, robbed the owner and, in the course of the robbery, struck the owner in the head several times with a metal bar from which injuries the victim died. He was sentenced to life imprisonment.

The purpose of this comparison is not to argue that any law has been violated. Assuming, for argument, all constitutional requirements have been met, the present burden placed upon lay jurors or trained judges to "color-match" similar cases has been rendered nearly impossible by reason of actions long since taken.

The difficulty with all of this is made more apparent by recent decisions of the United States Supreme Court carving out exceptions to the rules approved in Gregg. Specifically, in Godfrey v. Georgia the defendant was convicted of the first degree murder of his estranged wife and her mother, and he was sentenced to be executed. The sentence was affirmed by the Georgia Supreme Court and appealed to the United States Supreme Court. One of the grounds for imposing the death penalty under the Georgia statute approved in Gregg was that the murder "was outrageously or wantonly vile, horrible or inhuman and that it involved torture, depravity of mind, or an aggravated battery to the victim." The evidence disclosed that Godfrey went to his mother-in-law's trailer where his estranged wife was staying. He fired a shotgun through

263. District Court of Platte County, Neb., Case No. 2805 (sentenced Dec. 8, 1977).
265. 446 U.S. 420 (1980).
266. Id. at 431.
the window of the trailer, killing his wife instantly. He then proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun and then shot and instantly killed his mother-in-law. At the sentencing portion of the trial, the court instructed the jury on the statutory provisions in question, as a result of which the jury imposed the death sentence. In reversing the decision of the jury, the United States Supreme Court, in an opinion by Mr. Justice Stewart, held that the murders were not "outrageously or wantonly vile, horrible, or inhuman." In reviewing the entire issue of imposing the death penalty, Justice Stewart again referred to the Court's earlier holding in Furman: "This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion'. . . . It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

Stewart then concluded that while it was possible for a person of ordinary sensibility to consider the murder committed by the defendant as outrageously or wantonly vile, horrible, and inhuman, such view was not sufficiently definite under the standards existing in Georgia. The Court would appear to be saying that the quick, instantaneous taking of a life is not the commission of a murder in an outrageously or wantonly vile, horrible or inhuman manner. Juries, therefore, are now called upon not only to determine whether the crime was indeed committed but also whether it was committed apparently with greater intensity than was necessary. One would be inclined to believe that the general public in favor of the death penalty would be unwilling to accept the limitations now apparently imposed by the Court under the Godfrey decision.

The Godfrey decision has likewise been followed by several others which again make it clear that perhaps the United States Supreme Court did not mean quite all that it appeared to be saying when it approved the Georgia-type statute in Gregg and, at that
time, seemed to be little bothered by the argument that the standards were too broad and too vague for useful application.

In *Enmund v. Florida*,270 the Supreme Court determined that the non-killing co-conspirator in a felony murder case could not be sentenced to death. This decision appears to be based upon nothing more than the Court's visceral reaction that imposing so severe a penalty upon one who has not in fact taken a life, though he or she has actively participated in the crime resulting in the taking of the life, is much too severe. While one may not take serious issue with the Court's opinion in *Enmund* nor its rationale for not imposing the death penalty, one is inclined to believe that some of the arguments made for not imposing the death penalty in *Enmund* would work as well in a host of other situations, thereby only creating more disparity in those cases in which the death penalty may be imposed.

This seems particularly the case in light of language employed by Mr. Justice White in *Enmund*. In attempting to determine whether the non-participating felony murderer should be subject to the death penalty, Justice White said:

We have no doubt that robbery is a serious crime deserving serious punishment. It is not, however, a crime 'so grievous an affront to humanity that the only adequate response may be the penalty of death.' . . . '[I]t does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, [robbery] by definition does not include the death of or even the serious injury to another person. The murderer kills; the [robber], if no more than that, does not. Life is over for the victim of the murderer; for the [robbery] victim life . . . is not over and normally is not beyond repair.'271

It would seem that Justice White is concerned and interested that we look at the victim and not at the perpetrator when considering the nature of the crime of murder. And yet, after having said what it said in *Enmund*, the Court apparently still subscribes to its conclusion in *Godfrey* that the imposition of the death penalty for the senseless murder of a man's estranged wife and his defenseless mother-in-law is improper. And if indeed such a murder does not justify the imposition of the death penalty under any standard, then what murder can, and still in fact, if not in law, be arbitrary?

270. 102 S. Ct. 3368 (1982).
271. Id. at 3377 (citations omitted).
CONCLUSION

As this article indicated at the outset, the purpose in addressing this issue was not to determine whether statutes imposing the death penalty in Nebraska or elsewhere were valid or invalid. The case law makes it clear beyond question that statutes such as those adopted in Georgia and Nebraska are, in all respects, constitutional, valid, and enforceable.

The fact, however, that a statute passes constitutional muster does not, standing alone, establish beyond question either the wisdom of the law or whether it should remain. In a free, open society concerned with the treatment of humans, other factors, in addition to a law's validity, may properly be considered by the society. While courts have no choice but to enforce valid laws, regardless of a judge's personal view, the community, speaking through its legislative body, may do otherwise.

If history has any value in assessing the worth of a present action, one is led to believe that the imposition of the death penalty has served little purpose in either deterring murder or making the society better. The more barbaric the punishment, the higher the incidence of crime; the greater the number of crimes for which penalty may be imposed, the less often it is imposed. It would appear that the only element affected by the wide use of the death penalty is the society itself. It appears that its value of life is diminished as it steels itself to more frequently impose the penalty.

Furthermore, experience in recent years seems to indicate that establishing constitutionally sufficient guidelines for imposing the death penalty still results in the penalty being imposed philosophically in something less than a definite pattern. As we review the events in recent years, it seems strangely *deja vu.* The wheel of experience appears to be turning again. Emotions run high when discussing the issue. Yet in all of it, the real issues seem to be overlooked.

If true punishment is what we seek to impose, one is inclined to think that confinement to a prison cell for an extended period of time, perhaps without the possibility of early release, might better deter the crime and serve the ends of society. In any event, a more meaningful, less emotional examination of the problem is required. If we fail to do that, it would appear that we "are once again condemned to repeat" the past.