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# Capital Punishment: A Model for Reform

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## CAPITAL PUNISHMENT: A MODEL FOR REFORM

## I. INTRODUCTION

I believe that in every man there is some spark of the infinite, some fragment, however deeply submerged, of the Universal good. If we can salvage the spark, we must fan it carefully until it flames into usefulness. I admit that this is not always possible. I have said many times that there are pathological incorrigibles who must be separated from society, but they must not be separated by killing them in cold blood.<sup>1</sup>

This statement by Governor Michael V. Di Salle (former Governor of Ohio) seems to express the feelings of a growing majority of the population.

The debate continues concerning the issue of capital punishment. The principal opponents in the debate are those supporting the theory of rehabilitation and those supporting retribution. On the outside, but always a part of the debate, are those primarily concerned with deterrence and self-preservation.

## II. CAPITAL PUNISHMENT

Dr. Thorsten Sellin, the nation's leading criminological statistician, having compiled a study of the death penalty for the American Law Institute, divides the two major branches of controversy into the categories of dogma and utilitarian arguments.<sup>2</sup> The arguments for and against capital punishment vary from those based on theories of vengeance, retribution and self-defense, to others based on rehabilitation and deterrence, and all may use the Bible<sup>3</sup> as support for any one particular view.

The theory that capital punishment is grounded in vengeance is invoked on both sides of the debate. On the retention side, it is contended that capital punishment is justified because it is vengeance and on the other, that capital punishment is unjustified because it is vengeance. Holmes states:

The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion for revenge outside the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.<sup>4</sup>

<sup>1</sup> M. DiSALLE, *THE POWER OR DEATH* 214 (1965).

<sup>2</sup> T. SELLIN, *THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I.* 26 (1959).

<sup>3</sup> *Genesis* 4:15; 9:6; *Leviticus* 20:10,17; *Matthew* 5:38,39; 7:1; *Exodus* 21:24; *John* 8:7; *Revelation* 13:10; *Romans* 12:19. See also *Exodus* 21:12 (King James); *Deuteronomy* 19:12,13 (King James). For an example of the extremes to which Bible quotations have been carried as a justification for capital punishment, see E. COKE, *INSTITUTES* 211 (1797).

<sup>4</sup> O'Halloran, *Capital Punishment*, 29 *FED. PROB.* 33 (1964).

But in our own day in India, Krishnamurti, poet and mystic writes: "If I am brutal and you use brutal methods to overcome me, then you become brutal like me."<sup>5</sup> Returning to the Bible: "Vengeance is mine," saith the Lord.<sup>6</sup> Since human beings do have instincts impelling them to seek vengeance, we must consider them; but as most of us will agree, vengeance is no moral justification for capital punishment, nor for any other punishment.

The retribution idea is not presently used in debates as much as it has been in the past,<sup>7</sup> but the idea is advocated especially as a justification for capital punishment.<sup>8</sup> Retribution is sometimes advocated by the opposition to capital punishment when a person has been sentenced to death and his crime is not one of taking another's life. Thorsten Sellin has stated: "Retribution seems to be unworkable. It is neither efficient nor equitably administered. This concept of justice would properly demand that every person who commits a capital murder should receive his just desserts."<sup>9</sup> He added that all such persons are not brought to justice; and that when charged parties are brought to trial, the verdict depends on the skill of the defense lawyer, the sex of the defendant, and the color of his skin.

As far back as 1764, Beccaria argued that death should not be meted out according to the social rank of the offender. As one can see, this problem merits some consideration in light of modern-day events.<sup>10</sup>

Most of the utilitarian controversy concerning capital punishment oscillates around the issue of deterrence.<sup>11</sup> A large number of those favoring retention believe death imposed for any reason should be regretted, but they believe that it can be justified because of its value as a deterrent. But abolitionists argue that the deterrent effect of capital punishment is a myth. Those favoring retention of the death penalty state that common sense is convincing evidence that fear of death is the most effective deterrent. Isolated cases can be cited where

<sup>5</sup> *Id.* at 34.

<sup>6</sup> *Romans* 12:19.

<sup>7</sup> In an article written by Richard McGee, *Capital Punishment as seen by a Correctional Administrator*, he states that during California's Legislative hearings on the death penalty, retribution was not considered a very nice word. A witness seldom advocates the death penalty on grounds of retribution, and when he does, he is quickly disowned by the other proponents. McGee, *Capital Punishment as seen by a Correctional Administrator*, 28 *FED. PROB.* 11 (1964).

<sup>8</sup> See O. SNYDER, AN INTRODUCTION TO CRIMINAL JUSTICE 20-21 (1953); Snyder, *The New York Penal Law and Theories of Punishment*, 21 *BROOKLYN L. REV.* 12, 15 (1954).

<sup>9</sup> Sellin, *Capital Punishment*, 8 *CRIM. L. Q.* 36 (1965).

<sup>10</sup> C. MAESTRO, VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW 61 (1942).

<sup>11</sup> Comment, *Capital Punishment*, 29 *TENN. L. REV.* 534 (1962).

a thief carried no weapon so that he would not be tempted to use it in making his escape; where a criminal has submitted to arrest rather than resist with a weapon; or where a criminal has moved to an abolition state in order to carry out a capital crime.<sup>12</sup> In all three cases, the offenders admitted that it was fear of the death penalty which caused their actions. The abolitionists argue that these cases are few and far between, and that isolated cases can also be cited to prove that the death penalty is encouraging capital crimes. There have been cases where criminals murdered solely because of their fear of committing suicide, thereby allowing the state to overcome that fear.<sup>13</sup>

Turning from isolated examples, because of the offsetting tendency of such examples, one must now examine the statistics. Dr. Thorsten Sellin has conclusively shown that no statistical evidence proves capital punishment to be a more effective deterrent than other available deterrent sanctions.<sup>14</sup> A conclusion that "the figures afford no reliable evidence one way or the other"<sup>15</sup> is also justified and not surprising. "Murder is a complex sociological phenomenon";<sup>16</sup> "A number of factors—ethnic, general cultural and perhaps economic—enter as determinants into the production of the phenomenon which is designated by the simple word 'murder' or 'homicide': It is not easy to isolate any one of the determinants and assess its role in the causation or inhibition of homicidal trends"<sup>17</sup> and "it is almost impossible to draw comparisons between different countries."<sup>18</sup> It is also difficult to draw comparisons between different states. Statistics show that abolition states generally have lower per capita homicide rates

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<sup>12</sup> Gerstein, *A Prosecutor Looks at Capital Punishment*, 51 J. CRIM. L. C.&P.S. 252, 254 (1961).

<sup>13</sup> ROYAL COMMISSION ON CAPITAL PUNISHMENT REPORT 338 (1949-1953). However, Dr. Melitta Schmidberg has recently made the following statement in rebuttal:

The assumption that offenders break the law because of an unconscious wish for punishment seems to me unsubstantiated and too general an explanation. It would, however, even if correct, be no argument to abolish punishment or even to avoid it in the individual offender. Punishment may not deter. If there is efficient law enforcement and a belief in justice, mostly it does.

Dr. Schmidberg is Director of Clinical Services for the association for the Psychiatric Treatment of Offenders (APTO), New York, and Medical Advisor for the Board of Corrections of New York City. Dr. Schmidberg is also co-editor of the APTO Journal, a member of the International Board of Editors of *EXCERPTA CRIMINOLOGICA* and Associate Editor of *ARCHIVES OF CRIMINAL PSYCHO-DYNAMICS*; See also Schmidberg, *The Offenders Attitude Toward Punishment*, 61 J. CRIM. L.C.&P.S. 328, 334 (1961).

<sup>14</sup> Sellin, *supra* note 2.

<sup>15</sup> ROYAL COMMISSION ON CAPITAL PUNISHMENT REPORT 18, 24 (1949-1953).

<sup>16</sup> H. WEIHOFEN, *THE URGE TO PUNISH* 165 (1956).

<sup>17</sup> G. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 29 (1954).

<sup>18</sup> ROYAL COMMISSION, *supra* note 15, at 22.

than death penalty states.<sup>19</sup> In the past twenty years, five of eight states in this country with the lowest incidence of murder were abolition states.<sup>20</sup> Opponents also point out that Georgia is a state which has the highest homicide rate in the nation despite the fact that it also has the highest execution rate.

The trouble with analysis and comparison of statistics as to variable rates of homicide in jurisdictions with and without capital punishment, or with homicide rates in the same jurisdictions during periods of retention and abolition, is that there are no statistics to indicate how many persons, entertaining thoughts of committing murder, were deterred by fear of a possible death penalty. However, most people would agree that the deterrent effect of a penalty depends upon the certainty of its execution (infliction). In "most countries where capital punishment has been abolished, statutory abolition has come after a long period when the death penalty was in abeyance;"<sup>21</sup> and where the death penalty has been retained, it has been indifferently enforced.<sup>22</sup> I suggest that this same trend prevails in this country.

Another aspect which must be considered is that statistics have "for the most part been assembled by those who would abolish the death penalty; their object has been to disprove the deterrent value claimed for that punishment."<sup>23</sup> Therefore, the conclusion, "that the figures afford no reliable evidence either way," is at the very least, eminently fair, if not generous to the opponents of capital punishment.<sup>24</sup> It was also stated in the Report of The Royal Commission that from the evidence, "it is impossible to arrive confidently at firm conclusions about the deterrent effect of the death penalty,"<sup>25</sup> and also that "[c]apital punishment has obviously failed when a murder is committed."<sup>26</sup> Its failures can be numbered, but its successes cannot. As previously stated, no one knows how many people have refrained from murder because of fear of the death penalty.<sup>27</sup>

<sup>19</sup> 284 ANNALS 57 (1952).

<sup>20</sup> H. WEIHOFEN, *supra* note 16, at 149.

<sup>21</sup> ROYAL COMM'N, *supra* note 15, at 23.

<sup>22</sup> H. WEIHOFEN, *supra* note 16, at 165.

<sup>23</sup> ROYAL COMM'N, *supra* note 15 at 22.

<sup>24</sup> Snyder, *Capital Punishment: The Moral Issue*, 63 W. VA. L. REV. 99 (1961).

<sup>25</sup> ROYAL COMM'N, *supra* note 15, at 24.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 21. See also the statement made by Judge Hyman Barshay of New York:

The death penalty is a warning, just like a lighthouse throwing its beam out to sea. We hear about the shipwrecks, but we do not hear about the ships that the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down. ABA SECTION ON CRIMINAL LAW PROCEEDINGS, 14 (1959).

Although the precept establishing the British Royal Commission on Capital Punishment directed it to report only on whether liability under criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, rather than completely abolished, the Commission stated:

The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. Prima facie the penalty of death is likely to have stronger effect as a deterrent to normal beings than any other form of punishment and there is some evidence (though no convincing statistical evidence) that this is in fact so.<sup>28</sup>

After considering these surveys and case studies, I think it can be conceded that capital punishment does act as a deterrent, but the real question is whether capital punishment is more of a deterrent and protects the community better than its alternatives.

### III. ALTERNATIVES

Much of the debate on capital punishment in the United States centers on the question of alternative sanctions. Life imprisonment is usually considered an alternative to capital punishment. One of the objections to life imprisonment is that condemned murders will become a discipline problem in prison. However, studies indicate that murderers are the best behaved class of prisoner,<sup>29</sup> and that murderers are also as capable of reform as any class of criminals.<sup>30</sup>

Economic objections have also been raised against life imprisonment as an alternative to the death penalty. "Why support some murderer for the rest of his life when we could execute him and save all that money," the argument goes. It has been estimated that the cost to society for the support of a convict is \$1200 per year,<sup>31</sup> although some authorities estimate that the figure may be as high as \$1800.<sup>32</sup> Running contra to this argument is a statement by a correctional administrator; "the actual costs of execution, the cost of operating the

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<sup>28</sup> ROYAL COMM'N, *supra* note 15, at 24.

<sup>29</sup> PA. GEN. ASSEMBLY, REP. OF THE JOINT LEGISLATIVE COMM'N ON CAPITAL PUNISHMENT 17 (1961); T. SELLIN, *THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I.* 70 (1959). Richard McGee, Administrator for the California Youth and Adult Corrections Agency points out that experience shows that it is not the life-term prisoner who kills prison officers or inmates. McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. 11 (1964).

<sup>30</sup> ROYAL COMM'N, *supra* note 15.

<sup>31</sup> Rigg, *A Penalty Worse Than Death*, SAT. EVENING POST, Aug. 31, 1957, at 13.

<sup>32</sup> PA. GEN. ASSEMBLY, *supra* note 29, at 12.

super-maximum security condemned unit, the years spent by inmates in condemned status, and a pro-rata share of top level prison officials' time spent in administering the unit add up to a cost substantially greater than the cost to retain them in prison the rest of their lives.<sup>33</sup> Not to be overlooked is the fact that convicts could be placed in critical areas to perform useful labor for the state,<sup>34</sup> or they might be farmed out on a cooperative system to earn wages which could be applied as compensation to the victim's family.<sup>35</sup> We must also consider the longer trials, the sanity proceedings, and the cost of the appeals. To single out one example, the Chessman trials cost the taxpayers of California an estimated \$500,000.<sup>36</sup>

Another reason why people who favor capital punishment will not accept life imprisonment as an alternative, is because criminals so sentenced rarely serve their terms in the entirety. Therefore, parole is something that must be considered. Penologists feel that parole is an essential corollary to life imprisonment; for without it, lifers would indeed pose quite a problem for the prison officials.<sup>37</sup> If reform is the purpose of the prison system today, it would be useless to reform someone if there is no chance for him to be sent back into society.<sup>38</sup>

There is a conflict of opinion as to the amount of time that a lifer should be required to serve before becoming eligible for parole. Some authorities have recommended between ten and fifteen years as a maximum.<sup>39</sup> In testimony before the Royal Commission, it was pointed out that a person should not be detained longer than twenty years unless he is found to be incapable of correction, because after that period of time he deteriorates mentally and physically as a result of his estrangement from society.<sup>40</sup>

The main objection to parole is that the paroled offenders will be a danger to the public. Ohio found that of the 169 paroled first-degree murderers sentenced to life since 1945, only two have been sent to the penitentiary for new offenses, one for armed robbery and the other for assault with intent to commit a felony.<sup>41</sup> New York found that only two of the thirty-six lifers paroled since 1943 have committed any infractions, one being a technical violation and the other burglary. Most

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<sup>33</sup> McGee, *supra* note 29.

<sup>34</sup> T. SELLIN, *supra* note 2, at 18.

<sup>35</sup> ROYAL COMM'N, *supra* note 15, at 223.

<sup>36</sup> PA. GEN. ASSEMBLY, *supra* note 29, at 12.

<sup>37</sup> Comment, *Capital Punishment*, 29 TENN. L. REV. 534 (1962).

<sup>38</sup> R. SALTHILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* 193 (1911).

<sup>39</sup> Rigg, *supra* note 31, at 14.

<sup>40</sup> ROYAL COMM'N, *supra* note 15, at 230.

<sup>41</sup> OHIO LEGISLATIVE SERV. COMM'N, *CAPITAL PUNISHMENT* 81 (1961).

of the thirty-six were to have been executed had they not received commutations.<sup>42</sup> California,<sup>43</sup> Wisconsin<sup>44</sup> and Michigan<sup>45</sup> have had similar results. The Royal Commission added this statement: "The evidence seems conclusive that the release of life-sentence prisoners involves little risk at present."<sup>46</sup> It is interesting to note that the Royal Commission did not recommend abolition and Parliament amended the laws along this line.

#### IV. CONSTITUTIONAL ARGUMENTS

In addition to the arguments previously discussed, there is the continuing effort to convince the Supreme Court that capital statutes in states which give sentencing discretion to the jury are unconstitutional under the Federal Constitution. In a recent article,<sup>47</sup> it was noted:

Given appropriate supporting arguments, the courts conceivably could conclude that: (a) Any attempt to "deprive" a person of his "life" involves a violation of "due process of law" (fifth and fourteenth amendments); (b) it is not possible to try a defendant by an "impartial jury" where the death sentence is involved (sixth amendment); (c) the death penalty is a "cruel and unusual punishment" (eighth amendment); (d) the death sentence violates "certain rights . . . retained by the people" (ninth amendment); (e) anyone sentenced to death has been denied "equal protection of the laws" (fourteenth amendment).

The argument concerning the "impartial jury" has been weakened by a recent Supreme Court decision,<sup>48</sup> which bars the death penalty where persons with scruples against capital punishment are automatically excluded from a jury by a challenge for cause. But the Court also stated: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction."<sup>49</sup> The Court stated also that if the state had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to

<sup>42</sup> *Id.* at 82.

<sup>43</sup> Rigg, *supra* note 31, at 14.

<sup>44</sup> OHIO LEGISLATIVE SERV. COMM'N, *supra* note 41.

<sup>45</sup> *Id.*

<sup>46</sup> ROYAL COMM'N, *supra* note 15, at 229.

<sup>47</sup> Bedau, *The Courts, the Constitution, and Capital Punishment*, UTAH L. REV. 201 (1968).

<sup>48</sup> *Witherspoon v. State of Ill.*, — U.S. —, 88 S. Ct. 1770 (1968).

<sup>49</sup> *Id.*



penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the state crossed the line of neutrality.<sup>50</sup>

Most of the other arguments seem unlikely to achieve ultimate success, but the "cruel and unusual punishment" argument seems to have the best possibility.<sup>51</sup> However, the most recent word from the Supreme Court is far from encouraging: "The death penalty has been employed throughout our history; and, in a day when it is still widely accepted, it cannot be said to violate the Constitutional concept of cruelty."<sup>52</sup> In short, not a single death penalty statute, not a single statutorily imposed mode of execution, not a single attempted execution has ever been held by any court to be "cruel and unusual punishment" under any state or federal constitution. Nothing less than a mightily counter-thrust would appear to be enough to alter the direction of these decisions.<sup>53</sup> As one federal court put it some years ago, "The fixing of penalties for crimes is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion, and the courts will not intervene therewith unless the penalty prescribed is clearly and manifestly cruel and unusual."<sup>54</sup> A recent writer concluded his discussion of the problem: "In light of these difficulties and the uniform authority sustaining capital punishment, to hold that it is a method of punishment wholly prohibited by the eighth amendment would be to confuse possible legislative desirability with constitutional requirements."<sup>55</sup>

#### V. LEGISLATIVE ACTION

It appears that opposition to what opponents of capital punishment call "legalized murder" has been growing steadily in the United States, and polls now show that more Americans—47 percent—favor

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<sup>50</sup> In its quest for a jury capable of imposing the death penalty, the state produced a jury uncommonly willing to condemn a man to die. . . . the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. *Id.* at 1776.

<sup>51</sup> The main attempt to develop such an argument is made by Gottlieb, *Testing the Death Penalty*, 34 S. CAL. L. REV. 263 (1961), and also in his subsequent booklet, G. GOTTLIEB, CAPITAL PUNISHMENT (1967).

<sup>52</sup> *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

<sup>53</sup> Bedau, *supra* note 47, at 201.

<sup>54</sup> *Bailey v. U.S.*, 74 F.2d 451, 452-453 (10th Cir. 1934).

<sup>55</sup> Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 639 (1966).

the end of capital punishment than want to retain it—42 percent.<sup>56</sup> This is a significant change from the Gallup poll in 1953 which showed 69 percent of the population in favor of capital punishment. Most of the nation's governors and former governors are on record as being opposed to capital punishment.<sup>57</sup>

The proponents of capital punishment among prominent Americans are scarce.<sup>58</sup> Among the few are Governor Ronald Reagan of California and F.B.I. Director J. Edgar Hoover who says: "To 'love thy neighbor' is to protect him; capital punishment acts as at least one wall to afford God's children protection."<sup>59</sup>

Some state legislatures have been giving legal voice and weight to the prevailing public view. Since 1962, six states have abolished or virtually abolished capital punishment. In 1963, Michigan repealed the death penalty for its only remaining capital crime, treason. Oregon and Iowa completely abolished the death penalty in 1964, as did Vermont and West Virginia in 1965. Also in 1965, New York repealed the death penalty except for the murder of an on-duty peace officer, or a killing by a long-term prisoner. This brings the total of abolition states to thirteen.<sup>60</sup>

More significant than the statutory abolition of capital punishment in the various states has been the de facto abolition in terms of reduced number of executions. Since 1935, when a record 199 persons were put to death, executions have been declining steadily almost to the point of disuse. For the United States as a whole, the number of executions has been as follows over the last eight years: 1962:47; 1963:21; 1964:15; 1965:7; 1966:1 (Oklahoma); 1967:2 (California, Colorado); 1968:0; 1969:0 (to date; Richard Speck has been sentenced to death, but has not been executed as of this date). The last execution in Kentucky was in 1962 when Kelly Moss was electrocuted at Eddyville penitentiary. Recently, at the close of Kentucky Governor Edward T. Breathitt's administration, December 12, 1967, he spared the lives of three convicted murderers by commuting their death sentences to life imprisonment. He also gave three other prisoners stays of execution—one for three years and two others for five years.

In February of 1966, the Kentucky State Legislature overwhelmingly defeated a bill to abolish capital punishment. During the 1970

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<sup>56</sup> N.Y. Times, July 7, 1968, at 12, col. 1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> In addition to the six states listed above, Alaska, Delaware, Hawaii, Maine, Minnesota, Wisconsin, North Dakota, and Rhode Island have abolished the death penalty. (New York is not considered a total abolition state since it has retained the death penalty in some situations).

term of the Legislature, when that body is considering the proposal by the state Crime Commission, the question of the abolition of capital punishment should be examined. The Crime Commission did not propose any changes in jury sentencing in capital cases, although they did recommend abolition of jury sentencing in non-capital cases.

## VI. BIFURCATED TRIAL

The Legislature should retain capital punishment, but in doing so, they should follow the lead of four other states, which have introduced a bifurcated proceeding for the imposition of capital punishment. In California by statute of 1957,<sup>61</sup> in Pennsylvania by statute of 1959,<sup>62</sup> in Connecticut by statute of 1963,<sup>63</sup> and in New York by statute of 1963,<sup>64</sup> a new trial stage was added to proceedings in capital cases. After the trial on the issue of the defendant's guilt for the capital offense charged, ending with a unanimous jury verdict of guilty, the second trial stage begins before the same jury "as promptly as practicable."<sup>65</sup>

Assuming the retention of the death penalty as an alternative in certain classes of offenses, the separation of the determination of punishment from the determination of guilt is a first step in implementing the goal of imposing a socially useful punishment in each case.<sup>66</sup> There are two goals to be attained by the use of the bifurcated trial procedure: (1) avoiding prejudice to the defendant on the issue of guilt, since evidence relevant solely to punishment will not be allowed until guilt has been established; (2) allowing an extensive inquiry into defendant's background and character and the circumstances of his crime to provide a basis for an informed selection of penalty, thus terminating the purely retributive basis for arriving at the sentence.<sup>67</sup>

It would be beneficial now to consider the differences in the bifurcated trial statutes. In the following analysis, reference will be made, where pertinent, to the death-penalty provisions of California,<sup>68</sup> Pennsylvania,<sup>69</sup> Connecticut,<sup>70</sup> New York,<sup>71</sup> and the Model Penal Code.<sup>72</sup> California and Pennsylvania provide the most useful guide-

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<sup>61</sup> CAL. PENAL CODE § 190.1 (West 1957).

<sup>62</sup> PA. STAT. ANN. tit. 18, § 4701 (1959).

<sup>63</sup> CONN. GEN. STAT. REV. § 939-53.10 (1963).

<sup>64</sup> N.Y. PENAL LAW § 1045-a (McKinney 1967).

<sup>65</sup> *Id.*

<sup>66</sup> Note, *The California Penalty Trial*, 52 CALIF. L. REV. 386 (1964).

<sup>67</sup> *Id.*

<sup>68</sup> CAL. PENAL CODE § 190 (West 1957).

<sup>69</sup> PA. STAT. ANN. tit. 18, § 4701 (1963).

<sup>70</sup> CONN. GEN. STAT. REV. § 939-53.10 (1963).

<sup>71</sup> N.Y. PENAL LAW § 1045-a (McKinney 1967).

<sup>72</sup> MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

lines since their statutes have been in existence for some time; and in California, there is a significant body of interpretive case law.

All the statutes with the exception of New York permit the trial court to impose the death sentence under a plea of guilty.<sup>73</sup> In New York, if the plea of guilty is accepted, the defendant automatically receives life imprisonment under a mandate that no individual shall have the power to impose the death penalty.<sup>74</sup>

In California, if the trial on the issue of guilt has been conducted before a court without a jury, the trial judge determines the sentence.<sup>75</sup> However, if the defendant pleads guilty, the second trial is before a jury; but if the jury is waived, the court may impose either life imprisonment or death.<sup>76</sup> The punishment is to be decided by the jury in all other cases except where the defendant was under eighteen years of age at the time of the crime, in which case the statute dictates life imprisonment.<sup>77</sup>

In New York, after a jury returns a verdict of guilty, the trial court may decree life imprisonment if it should find that "the sentence of death is not warranted because of substantial mitigating circumstances."<sup>78</sup> In using this method, New York differs from Pennsylvania and Connecticut and adopts a procedure similar to the one advocated by the Model Penal Code.<sup>79</sup> This would appear to have the practical effect of saving the time and expense of an unnecessary second trial, since facts sufficient to warrant a directed verdict of life imprisonment by a judge would probably lead a jury to impose the same sentence,<sup>80</sup> but the judge and jury are deprived of the consideration of any aggravating circumstances. The Model Penal Code allows the judge to prevent imposition of the death penalty only after all the aggravating

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<sup>73</sup> CAL. PENAL CODE § 190.1 (West 1957); PA. STAT. ANN. tit. 18, § 4701 (1959); CONN. GEN. STAT. REV. § 939-53.10 (1963); N.Y. PENAL LAW § 1045-a (McKinney 1967); MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

<sup>74</sup> N.Y. PENAL LAW § 1045-a (McKinney 1967).

<sup>75</sup> CAL. PENAL CODE § 190.1 (West 1957).

<sup>76</sup> *Id.*

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

<sup>78</sup> N.Y. PENAL LAW § 1045-a (McKinney 1967).

<sup>79</sup> MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). Under the *Model Penal Code*, the jury, upon evidence submitted at a separate trial on the issue of penalty, first determines whether the punishment should be life or death. If the verdict is the latter, the concurrence of the court is required before the death sentence can be imposed. *Id.* at § 210.6(2). In California, the concept of absolute discretion in the jury has been held not to affect the statutory power of the trial court to reduce the punishment in lieu of ordering a new trial. (CAL. PENAL CODE § 1181 (West 1957). The vigorous use by the judge of the power to reduce the penalty is undoubtedly the most effective control of arbitrary action by the jury. See Note, *The California Penalty Trial*, 52 CALIF. L. REV. 386 (1964).

<sup>80</sup> Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L. REV. 50 (1964).

circumstances have been brought out in the penalty trial.<sup>81</sup> The approach taken by the Model Penal Code seems to provide for the ultimate goal of a more rational determination of the death sentence.

It is recognized that for the jury to intelligently use these alternative penalty statutes, it must have the same type of evidence before it that a judge or agency has in non-capital cases.<sup>82</sup> In states, other than the four which have enacted the bifurcated trial procedure, the jury is required to determine in a single proceeding, both the guilt or innocence of the accused and the punishment to be imposed.<sup>83</sup> Since evidence relevant solely to punishment would, if admitted, probably influence the verdict on the guilt issue, evidence of the habits and background of the accused is generally held inadmissible in a single trial situation.<sup>84</sup> Therefore, evidence presented to the jury for the determination of the penalty is restricted to that otherwise admissible on the issue of guilt.<sup>85</sup>

The bifurcated trial procedure is designed so that the jury will not be deprived of evidence that is admittedly relevant to the punishment. With the issues of guilt and punishment separated, there is no longer a reason for excluding this background evidence.<sup>86</sup> Where there is a second trial in California, the statute permits evidence ". . . of the circumstances surrounding the commission of the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty."<sup>87</sup> By looking at the statute, it is obvious that there are no statutory limitations on the admissibility of evidence in the penalty trial, the legislature apparently having intended that judicial discretion should determine evidence admitted in each case.<sup>88</sup> Since the sole issue is life or death, the scope of relevant inquiry is very broad, but in order to provide for expeditious judicial administration and to avoid prejudice to the convicted defendant, that inquiry is not unlimited. California statute § 190.1 has been construed as allowing

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<sup>81</sup> MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

<sup>82</sup> See, e.g., ROYAL COMM'N ON CAPITAL PUNISHMENT REPORT 194-207 (1953); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

<sup>83</sup> Handler, *Background Evidence in Murder Cases*, 51 J. CRIM. L.C.&P.S. 317 (1961).

<sup>84</sup> There have been instances in other jurisdictions where evidence relevant solely to punishment has been admitted, but no single-verdict jurisdiction has a consistent policy of admission. See Handler, *supra* note 83.

<sup>85</sup> See, e.g., *State v. Mount*, 30 N.J. 195, 152 A.2d 243 (1959).

<sup>86</sup> Note, *The California Penalty Trial*, *supra* note 66.

<sup>87</sup> CAL. PENAL CODE § 190.1 (West 1957); See also PA. STAT. ANN. tit. 18, § 4701 (1959); CONN. GEN. STAT. REV. § 939-53.10 (1963); N.Y. PENAL LAW § 1045-a (McKinney 1967).

<sup>88</sup> Note, *The California Penalty Trial*, *supra* note 66.

only "competent" evidence to be presented to a jury.<sup>89</sup> The rule in New York is different since its statute provides in part: "Any relevant evidence, not legally privileged shall be received regardless of its admissibility under the exclusionary rules of evidence."<sup>90</sup>

When otherwise "competent" evidence is involved, there is the problem of determining its relevancy. The same balancing technique is used in the penalty trial as in the other trials. Evidence will be excluded if its probative value is outweighed by its tendency to unduly protract the trial, to confuse the essential issue, or to inflame and prejudice the minds of the jurors against the defendant.<sup>91</sup>

Due to the lack of legislative standards for the admissibility of evidence, the California Supreme Court has been compelled to fill the gap. The California Court has held prejudicial: (1) the admission of inflammatory evidence which could have been relevant only to retribution for the enormity of the crime;<sup>92</sup> (2) admission of evidence offered to prove the relative efficacy of the death penalty as a deterrent to crime, or its social desirability, or its moral permissibility;<sup>93</sup> (3) an inquiry concerning the possibility that a defendant sentenced to life imprisonment might be paroled.<sup>94</sup> Although the exact scope of the rule is unclear, generally any crime committed by the defendant, whether or not resulting in a prior conviction,<sup>95</sup> may be proved in the penalty proceeding.<sup>96</sup>

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<sup>89</sup> *People v. Hamilton*, 32 Cal. Rptr. 4, 18, 383 P.2d 412, 426 (1963); *People v. Purvis*, 52 Cal. 2d 871, 883, 346 P.2d 22, 29 (1959).

<sup>90</sup> N.Y. PENAL LAW § 1045-a (McKinney 1967). (For a discussion of the blanket admission of hearsay evidence, see Note, *The Two-Trial System in Capital Cases*, *supra* note 80, at 63.)

<sup>91</sup> See, e.g., *People v. Purvis*, 56 Cal.2d 93, 362 P.2d 713 (1961); See generally C. McCORMICK, EVIDENCE chs. 16, 17 (1954).

<sup>92</sup> *People v. Love*, 53 Cal.2d 843, 350 P.2d 705 (1960).

<sup>93</sup> *People v. Lane*, 56 Cal.2d 773, 366 P.2d 57 (1961); *People v. Kidd*, 56 Cal.2d 759, 366 P.2d 49 (1961).

<sup>94</sup> *People v. Morse*, 36 Cal. Rptr. 201, 388 P.2d 33 (1964).

<sup>95</sup> Compare *People v. Bentley*, 58 Cal.2d 458, 374 P.2d 645 (1962), with *People v. Purvis*, 52 Cal.2d 871, 346 P.2d 22 (1959). Such evidence must be competent.

<sup>96</sup> Under California decisions, the following have been held relevant: *People v. Corwin*, 52 Cal.2d 404, 406, 340 P.2d 626, 627 (1959) (evidence that the defendant after his apprehension had stated that he would kill the victim again and would like to kill some others also); *People v. Love*, 53 Cal.2d 843, 853, 350 P.2d 705, 711 (1960) (evidence that the defendant, a few years prior to the crime and at a time when he was on parole, told a neighbor that he possessed a gun); *People v. Ketchel*, 59 Cal.2d 503, 541, 381 P.2d 394, 415 (1963) (evidence of prior crimes to which defendant had confessed and the existence of which had been corroborated by witnesses); *People v. Purvis*, 52 Cal.2d 871, 881, 346 P.2d 22, 27 (1959) (evidence of circumstances surrounding an earlier crime for which defendant was convicted); *People v. Griffin*, 60 Cal.2d 129, 132, 383 P.2d 432, 436 (1963) (evidence of circumstances surrounding a crime for which the defendant was acquitted). Pennsylvania limits evidence on the punishment issue to the official record of prior convictions and the admissions and confessions of

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When the issue of guilt is eliminated in penalty hearings, evidentiary policies should be reexamined with regard to evidence relevant to the purpose of the hearing—the imposition of the death penalty. Revealing the full import of the defendant's record through admission of evidence, not merely listing the categories of offenses committed, but specifying the details of these offenses, will best enable a jury to determine if execution of this defendant will serve to deter others, or if it is deemed necessary to prevent the defendant himself from perpetrating further killings.<sup>97</sup>

If the jury is unable to agree on the penalty to be imposed, all of the bifurcated trial statutes provide the court with the power to discharge the jury after a period of time it deems reasonable, and "either impanel a new jury to determine the sentence or impose the sentence of life imprisonment."<sup>98</sup>

If the second stage of the bifurcated trial procedure results in a death verdict, the California statute provides for *automatic* review by the California Supreme Court.<sup>99</sup> This review extends both to the determination of guilt and to the determination of penalty. Since the two issues are separated, the court may reverse a judgment imposing the death penalty without affecting the judgment of guilt. Assuming no error occurred in the guilt phase of the trial, the conviction will be affirmed regardless of the disposition required by the judgment imposing the death penalty.<sup>100</sup> The scope of review of the death sentence is then limited to determining whether prejudicial error occurred at the penalty trial. The California Court will not weigh the evidence on the issue of punishment, even though it might doubt the "appropriateness" of the death penalty in a particular case. If no prejudicial error occurred in the penalty phase of the trial, the judgment

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the defendant. *See* Commonwealth v. McCoy, 405 Pa. 23, 172 A.2d 795 (1961); Commonwealth v. Rucker, 403 Pa. 262, 168 A.2d 732 (1961).

<sup>97</sup> Note, *Capital Punishment—The Issues And The Evidence*, 6 THE CATHOLIC LAWYER 269 (1960).

<sup>98</sup> N.Y. PENAL LAW § 1045-a (McKinney 1967); *See also* CAL. PENAL CODE § 190.1 (West 1957); PA. STAT. ANN. tit. 18, § 4701 (1959); CONN. GEN. STAT. REV. § 939-53.10 (1963). Model Penal Code differs from this in that it automatically provides for a sentence of life or less (at the court's discretion) when the jury is unable to agree. MODEL PENAL CODE § 210.6(2) (Proposed Official Draft 1962); *See* MODEL PENAL CODE § 606(1), which provides that the court may sentence for term less than life. The Code proceeds on the assumption that if twelve representative people cannot agree on the death penalty, the defendant should receive life imprisonment.

<sup>99</sup> CAL. PENAL CODE § 190.1 (West 1957); *See also* N.Y. CODE CRIM. PROC. 517(1) which provides for an appeal to the court of appeals; *see generally*, Note, *Post-Conviction Remedies in California Death Penalty Cases*, 11 STAN. L. REV. 94 (1958).

<sup>100</sup> Note, *The California Penalty Trial*, *supra* note 66.

will be affirmed,<sup>101</sup> but if prejudicial error was present, the Court has held that it may not reduce the death penalty to life imprisonment. It must reverse the judgment imposing the death penalty and remand for a new trial solely on the issue of punishment.<sup>102</sup>

The New York Statute provides another alternative—if error is found in the second proceeding, the Court of Appeals will remand the case to the trial court for a statute-directed imposition of life imprisonment.<sup>103</sup> There are many problems inherent in remanding for completely new penalty trials. One major disadvantage of a new trial solely on the issue of punishment is that the new jury impaneled for this purpose has not heard the evidence relating to the crime for which the penalty is being determined. Thus, while only the penalty is technically in issue (guilt having been conclusively established by the affirmance of the conviction on appeal) the prosecution must repeat most of the evidence introduced at the guilt phase of the prior trial. The necessity of repeating this evidence adds appreciably to the length of time required to retry the penalty issue.<sup>104</sup> The best solution may be to remand to the trial court with the stipulation that the trial court may in its discretion either impose life imprisonment or impanel a new jury to determine the sentence. Another alternative would be to empower the Court of Appeals to allow either a sentence for life or to remand to the trial court for a new proceeding.<sup>105</sup>

Apparently, the desirability of providing the jury with ground rules for their deliberations has not been recognized by the legislatures or the courts with regard to the punishment under the bifurcated trial statutes.<sup>106</sup> The New York Statute, which directs the jurors to reach a unanimous verdict, has been interpreted as giving the jurors absolute discretion to act according to their judgment and conscience.<sup>107</sup> This approach is the same as that adopted by the California Courts.<sup>108</sup> The

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<sup>101</sup> *E.g.*, *People v. Rittger*, 54 Cal.2d 720, 355 P.2d 645 (1960); *People v. Cash*, 52 Cal.2d 841, 345 P.2d 462 (1959); *People v. Brust*, 47 Cal.2d 776, 306 P.2d 480 (1957); *People v. Odle*, 37 Cal.2d 52, 230 P.2d 345 (1951).

<sup>102</sup> *E.g.*, *People v. Cash*, 52 Cal.2d 841, 345 P.2d 462 (1959); *People v. Linden*, 52 Cal.2d 1, 338 P.2d 397 (1959); *See People v. Green*, 47 Cal.2d 209, 235, 302 P.2d 307, 325 (1956).

<sup>103</sup> On an appeal by the defendant where the judgment is death, the court, . . . if it finds substantial error only in the sentencing proceeding, may set aside the sentence of death and remand the case to the trial court in which event the trial court shall impose the sentence of life imprisonment. N.Y. PENAL LAW § 1045-a. (McKinney 1967).

<sup>104</sup> Note, *The California Penalty Trial*, *supra* note 66.

<sup>105</sup> Note, *The Two-Trial System In Capital Cases*, *supra* note 80.

<sup>106</sup> *Id.*

<sup>107</sup> *People v. Dusablon*, 16 N.Y.2d 9, 209 N.E.2d 90 (1965).

<sup>108</sup> *People v. Love*, 53 Cal.2d 843, 853, 350 P.2d 705, 711 (1960); *People v.*

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Model Penal Code takes a "categorical prerequisite" approach.<sup>109</sup> Under that approach, the Code sets up controls for discretionary judgments, by enumerating a list of aggravating<sup>110</sup> and mitigating circumstances<sup>111</sup> and commands the jury (or court) not to "impose . . . sentence of death unless it finds one of the aggravating circumstances . . . and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency."<sup>112</sup> The Model Penal Code approach appears to be the better view although it is a departure from the absolute discretion concept, it appears to be a departure that is needed.

## VII. CONCLUSION

There is no way to gloss over the brutality of capital punishment. It is an imperfect penal device within an imperfect society. The extermination of human life is enormously tragic whether it is a malicious murder or a methodical execution. Yet as citizens of one community, we must accept the evidence of reality as a guide and not give way to deceiving idealistic fantasies disguised in the white shrouds of righteousness. Being a rational society, it is imperative that we simply weigh the interests in deciding whether capital punishment's service to society outweighs its harshness to the *deserving* individual. If through study and serious cogitation we find that it does, then with the ends justified, we must provide a responsible means.

In the balance, capital punishment should be retained with the bifurcated trial procedure as the best method of imposing a socially useful punishment in every case. The evidence presented at the penalty trial acquaints the jury with all the relevant information necessary for an intelligent and rational determination of punishment. The states now using this procedure have found the cost not to be prohibitive, because the same jury can be used for the second proceeding, and the balancing technique for admissibility of evidence is used at the penalty stage so as not to unduly protract the trial.

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Friend, 47 Cal.2d 749, 306 P.2d 463 (1957); *People v. Green*, 47 Cal.2d 209, 302 P.2d 307 (1956).

<sup>109</sup> MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

<sup>110</sup> MODEL PENAL CODE § 210.6(3) (Proposed Official Draft 1962).

<sup>111</sup> MODEL PENAL CODE § 210.6(4) (Proposed Official Draft 1962).

<sup>112</sup> MODEL PENAL CODE § 210.6(2) (1962); *See also* MODEL PENAL CODE § 201.6, Comments 3, 4 at 71, 72 (Tent. Draft No. 9, 1959). For another approach, whereby certain factors must be considered in the exercise of a "legal discretion" to select either penalty, see *Commonwealth v. Green*, 306 Pa. 137, 151 A.2d 241 (1959); Note, *Scope of Appellate Review of Sentences in Capital Cases*, 108 U. PA. L. REV. 434 (1960). Failure to consider those factors is an "abuse of discretion" subject to appellate review.

The bifurcated trial procedure decreases substantially the chances of sentencing an undeserving citizen to death. The term "undeserving" is used to designate defendants who cannot be classified as being what Governor Di Salle called "pathological incorrigibles."

Capital punishment should be retained in Kentucky. However, this severe penal reprimand should be closely accompanied by the most efficient and equitable procedural device available, which is the bifurcated trial procedure. Perhaps if such an apparatus is provided for death sentencing in Kentucky, the opponents of capital punishment will be justifiably less pertinacious in their protest. For then the dignity of human life will be respected even in its taking and the awesome price that is rendered will not be paid in vain.

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