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# A Case for the Abolition of Capital Punishment

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of it. In this connection, the *Witherspoon*<sup>30</sup> decision relative to standards for selecting jurors in capital cases makes the probability of getting a death penalty slight.

*P. Raymond Lamonica*

#### A CASE FOR THE ABOLITION OF CAPITAL PUNISHMENT

Two recent decisions of the United States Supreme Court noted in this issue<sup>1</sup> and the nationwide debate which preceded them seriously question the advisability and constitutionality of capital punishment. This note will examine the legislative and judicial considerations bearing on these questions.

#### *Legislative Considerations*

At the turn of the nineteenth century, Edward Livingston, in his proposed penal code, advocated "the total abolition of capital punishment."<sup>2</sup> The Louisiana legislature rejected his recommendations, but his work has been repeatedly cited in later years by those who seek the repeal of capital punishment. In its 1968 session, the Louisiana legislature again considered the advisability of a death penalty in a bill calling for its suspension for six years.<sup>3</sup> However, again it was defeated. The following factors normally form, expressly or impliedly, a part of the consideration of such a proposal.<sup>4</sup>

#### *Deterrence*

Every year about six in every 100,000 of the population commit capital crimes in spite of the possible capital punishment. The question here is whether a change in statutory penalty to long-term imprisonment would serve as an equal deterrent.<sup>5</sup>

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30. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968), noted in 29 LA. L. REV. 381 (1969).

1. *Witherspoon v. Illinois*, 391 U.S. 510 (1968), noted in 29 LA. L. REV. 381 (1969), and *United States v. Jackson*, 390 U.S. 570 (1968), noted in 29 LA. L. REV. 389 (1969).

2. 2 E. LIVINGSTON, THE COMPLETE WORKS OF EDWARD LIVINGSTON 244 (1873).

3. La. H. Bill 303 (1968).

4. From 1930-1966 Louisiana has electrocuted 133 men. There were 39 electrocutions from 1930-1934, 19 from 1935-1940, 24 from 1940-1944, 23 from 1945-1949, 14 from 1950-1954, 13 from 1955-1959, and 1 in 1961. Of the 133 electrocuted, 30 were white and 103 were Negroes. There have been 116 electrocutions for murder; 30 white, and 86 Negro; and 17 for rape, all Negroes. U.S. Dep't of Justice, Bull. No. 41, *National Prisoner Statistics, Executions, 1930-1966*, at 10, 12 (April, 1967).

5. H. BEDAU, THE DEATH PENALTY IN AMERICA 261 (1967) (hereinafter cited as BEDAU).

Those who advocate retention of capital punishment argue that its value as a deterrent is hidden because it is impossible to determine the number of persons that have been deterred by the death penalty.<sup>6</sup>

In principle, differential deterrence can be studied by comparing the murder rates of death penalty jurisdictions with the rates of abolition jurisdictions. The results of this comparison have shown the abolition jurisdictions to have the lower average rates.<sup>7</sup> However, this comparison is superficial. The abolition states have always had lower homicide rates than the others because of differences in social organization, composition of population, and economic and social conditions. The only comparison at all defensible is one of closely similar states, some with and others without the death penalty.<sup>8</sup>

Significant studies have been made comparing murder rates of contiguous jurisdictions, some of which have the death penalty for murder, and others which have imprisonment. The results of these studies suggest that these murder rates are conditioned by factors other than the penalty.<sup>9</sup> The composition of these data shows that the trends of the rates of comparable states with or without the death penalty are similar.<sup>10</sup> The effect of suspension of capital punishment on murder rates in eleven American states has also been studied.<sup>11</sup> However, no

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6. G. MALLORY, *THE CASE FOR CAPITAL PUNISHMENT* 3-5 (1961).

7. BEDAU at 67-71, 262. Many states do not keep separate statistics on murder but only homicide rates which include all degrees of homicide (murder, manslaughter, negligent homicide). However, these figures are still good indications of the murder rates. In 1962 the average murder rate for the abolition states was 2.0 per 100,000 of the population. The national average murder rate per 100,000 of the population for the same year was 5.1. In 1965 the average murder rate of the abolition states was 2.7 per 100,000 of the population, and the non-abolition states' rate was 5.2 per 100,000. Alabama and Georgia, both having capital punishment, had murder rates of 11.4 and 11.3, respectively. Vermont, an abolition state, had the lowest rate of 0.5. Louisiana's murder rate in 1962 was 6.8 and 8.1 in 1965.

8. BEDAU at 262.

9. The murder rate for Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, Vermont—the New England region—was 1.7 in 1964 and 2.1 in 1965. Maine, Rhode Island, and Vermont are abolitionist states. The murder rates in 1965 were Connecticut (1.3), Massachusetts (2.4), Maine (2.1), New Hampshire (2.7), Rhode Island (2.1), Vermont (0.5). The murder rate for the states of Alaska, California, Hawaii, Oregon, and Washington were 3.7 in 1964 and 4.3 in 1965. Alaska, Hawaii, and Oregon are abolitionist states. The murder rates in 1965 were Alaska (6.3), California (4.7), Hawaii (3.2), Oregon (3.4), and Washington (2.2) BEDAU at 66-67.

10. Sellin, *A Report for the Model Penal Code Project of the American Law Institute*, in *THE DEATH PENALTY* 23-34 (1959); Sellin, *Homicides in Retentionists and Abolitionist States*, in *CAPITAL PUNISHMENT* 135-39 (1967).

11. These states are Arizona, Colorado, Delaware, Iowa, Kansas, Maine, Missouri, Tennessee, Oregon, South Dakota, and Washington. Sellin, *Experiments with Abolition*, in *CAPITAL PUNISHMENT* 122-24 (1967).

significant increase or decrease in murder before, during, or after the suspensions were evident.<sup>12</sup>

Comparisons were also made in Philadelphia of murder rates before, during, and after a publicized capital trial and/or execution. If the death penalty is a deterrent, its greatest effect should be shown through executions, which are well publicized. While it is clear that among some persons who are psychopathic or psychotic, capital punishment does incite murderous intentions;<sup>13</sup> executions and the publicity surrounding capital cases did not prove to be a factor in the incidence of capital crime.<sup>14</sup>

All of these studies seem to support the basic conclusion of the Royal Commission on Capital Punishment that "there is no clear evidence in any figures we have examined that the abolition of capital punishment has led to an increase in the homicide rates, or that its reintroduction has led to a fall."<sup>15</sup> The Royal Commission's report is the most thorough study of capital punishment in existence today,<sup>16</sup> and studies completed since have reached similar conclusions.<sup>17</sup>

#### *Other Considerations*

Retentionists state that imprisonment is more expensive. However, while the state must maintain a person under sentence of life imprisonment for a longer period, the costs of capital punishment are also high. Statutory requirements of solitary confinement for death row and the higher level of

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12. Sellin, *A Report for the Model Penal Code Project of the American Law Institute*, in *THE DEATH PENALTY* 34-38 (1959); Sellin, *Experiments with Abolition*, in *CAPITAL PUNISHMENT* 122-24 (1967).

13. J. DEMARCUS, *CAPITAL PUNISHMENT* 7 (Kentucky Legislative Research Commission Information Bull. No. 40) (May 1965).

14. BEDAU at 315-322. Five cases of great notoriety were chosen from 1927, 1929, 1930, 1931, and 1932, all homicide deaths listed in the records of the coroner during 60 days before and after each case was studied. There were a total of 91 homicides in the "before execution" periods and 133 in the "after" periods. Of the 204 homicides included in the study, 19 resulted in sentences for murder in the first degree. Nine of them had occurred during the 60-day periods preceding and 10 in the corresponding periods following the executions. During the ten days before the executions there were two and during the ten days immediately following there were three such first degree murders in Philadelphia.

15. J. DEMARCUS, *CAPITAL PUNISHMENT* 7 (Kentucky Legislative Research Commission Information Bull. No. 40, May 1965); ROYAL COMMISSION ON CAPITAL PUNISHMENT § 65, at 67-68 (1949-53).

16. J. DEMARCUS, *CAPITAL PUNISHMENT* 7 (Kentucky Legislative Research Commission, Information Bull. No. 40, May 1965).

17. *Id.* at 8. See CALIFORNIA ASSEMBLY REPORT ON THE DEATH PENALTY 30 (1957); CEYLON, REPORT ON CAPITAL PUNISHMENT 45, 52 (1959); PENNSYLVANIA REPORT ON CAPITAL PUNISHMENT 20-24 (1961). See also T. SELLIN, PUBLIC HEARING BEFORE THE COMMISSION APPOINTED TO STUDY CAPITAL PUNISHMENT IN NEW JERSEY 22-23 (Pursuant to Senate Joint Resolution No. 3, Assembly Chamber, State House, Trenton, New Jersey, July 10, 1964).

security required are expensive. The inmates on death row contribute nothing to their own upkeep, while other prisoners work in various prison industries. There are also high court costs involved in the administration of justice in most capital cases. Much of this time and expense would be unnecessary if it were not for the death penalty.<sup>18</sup>

Most criminologists agree that it is the swiftness and probability of conviction which deters criminal behavior, not the severity of the penalty.<sup>19</sup> The substitution of imprisonment for capital punishment would probably result in more convictions, since juries are hesitant to convict, realizing that their action may result in the death of the accused. A large proportion of all serious crimes, including gangland killings and kidnappings for ransom, are committed by those who think they will never be caught. The only way to deter such persons is by increasing the effectiveness of law enforcement.<sup>20</sup>

Those who favor the retention of capital punishment fear that the capital criminal when paroled will inflict further damage on society by repeating his crime.<sup>21</sup> However, a study conducted in 1967 of the behavior of parolees after imprisonment for willful homicide showed that only three persons (two-tenths of one percent) were convicted again of willful homicide during the year after parole. Ninety-one percent were found to have "favorable" parole performance. The study concludes that persons convicted of capital crimes are generally the most reliable groups of prisoners and parolees.<sup>22</sup>

Many police officers feel that the criminal, in attempting to escape or destroy evidence, would resort to violence against pursuing police if the death penalty was not present. However, a 1954 survey found that fatal attack on police in death penalty

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18. J. DEMARCUS, CAPITAL PUNISHMENT 8 (Kentucky Legislative Research Commission Information Bull. 40, May 1965).

19. *Id.* at 7 and 8.

20. See BEDAU at 258, 405.

21. According to a recent survey of parole and release procedures, there are thirteen states (Arizona, Arkansas, Indiana, Iowa, Louisiana, Massachusetts, Nebraska, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, Wyoming) in which "some or all life prisoners are ineligible for parole." T. SELLIN, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE, THE DEATH PENALTY 131, 402 (1959).

LA. R.S. 15:574.3 (B) (1956): "No parole shall be granted to any prisoner serving a life sentence until his life sentence has been commuted to a fixed term of years by action of the state board of pardons and the Governor, and until the prisoner has served at least one-third of the time fixed by the commutation of sentence."

22. NEWSLETTER, UNIFORM PAROLE REPORTS OF THE NATIONAL PROBATION AND PAROLE INSTITUTES (Dec. 1967).

states was 1.3 per 100,000 population, while fatal attacks on police in abolition states was only 1.2 per 100,000 population.<sup>23</sup> In addition, leading prison officials do not believe that the abolition of capital punishment presents a danger to prison personnel.<sup>24</sup>

### *Judicial Considerations*

The question of the constitutionality of capital punishment is being raised by numerous condemned men across the nation in challenging the death penalty. These challenges have resulted, *inter alia*, in the staying of all executions in California<sup>25</sup> and Florida pending a determination of the complex and weighty constitutional questions presented.<sup>26</sup> The constitutional objections that may be raised against capital punishment rest on two clauses of the Constitution, the prohibition against "cruel and unusual punishment"<sup>27</sup> in the eighth amendment,<sup>28</sup> and the due process clause of the fifth and fourteenth amendments.

### *Eighth Amendment*

The early decisions of the United States Supreme Court held that the phrase "cruel and unusual punishment" applied only to the death practices of several centuries ago.<sup>29</sup> Only such ex-

23. J. DEMARCUS, CAPITAL PUNISHMENT 8 (Kentucky Legislative Research Commission Information Bull. No. 40, May 1965). All of the studies available in this area show a lack of statistical difference between capital punishment states and abolition states. T. Sellin, *The Death Penalty and Police Safety*, in CAPITAL PUNISHMENT 138 (1967).

24. A. MACCORMICK, PUBLIC HEARING BEFORE THE COMMISSION APPOINTED TO STUDY CAPITAL PUNISHMENT IN NEW JERSEY 53A (Pursuant to Senate Joint Resolution No. 3, Assembly Chamber, State House, Trenton, July 10, 1964).

25. However, in *In re Jackson*, 37 U.S.L.W. 2288 (Cal. 1968), the California Supreme Court upheld capital punishment as not violative of the due process clause or the prohibition against cruel and unusual punishment.

26. See *Hill v. Nelson*, 271 F. Supp. 439 (N.D. Calif. 1967); *Adderly v. Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1967). See also *Maxwell v. Bishop*, 385 U.S. 650 (1967); *Clarke v. Grimes*, 374 F.2d 550 (5th Cir. 1967).

27. *Trop v. Dulles*, 356 U.S. 86, 100 (1958): "Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual'. If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done."

28. U.S. CONST. amend. VIII: "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

LA. CONST. art 1, § 12 provides identical language.

LA. CODE CRIM. P. art. 878: "A sentence shall not be set aside on the ground that it inflicts cruel or unusual punishment unless the statute under which it is imposed is found unconstitutional."

29. *In re Kemmler*, 136 U.S. 436 (1890).

treme practices as "burning at the stake, crucifixion, breaking on the wheel, or the like"<sup>30</sup> were unconstitutional.

The contemporary view of "cruel and unusual punishment" was first stated in *Weems v. United States*.<sup>31</sup> There the defendant had been sentenced to fifteen years imprisonment carrying a chain hanging from his ankle and wrist. He was also to be employed at hard and painful labor and suffer permanent loss of civil rights. The Supreme Court, in holding the sentence "cruel and unusual" stated that "[t]he clause of the Constitution . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice."<sup>32</sup> Thus the English Bill of Rights of 1689 would no longer be allowed to determine the meaning of "cruel and unusual" but in its stead "the evolving standards of decency that mark the progress of a maturing society"<sup>33</sup> would be used. The Court established "a primary concept that the definition of cruelty shall be fashioned in terms of the present and future needs of society, rather than the public's inclination, or standards regarding cruelty of medieval Europe."<sup>34</sup>

In early cases the Supreme Court held that the eighth amendment limited only the federal government and did not apply to the states.<sup>35</sup> However, in *Weems* the Court elevated its importance by holding it "essential to the rule of law and the maintenance of individual freedom."<sup>36</sup> Then in *Robinson v. California*,<sup>37</sup> the Court incorporated it into the due process clause of the fourteenth amendment by declaring unconstitutional a California statute punishing the status of narcotic addiction.

In *Rudolph v. Alabama*<sup>38</sup> the Supreme Court, by denying certiorari, refused to consider whether the imposition of the death penalty on a convicted rapist who has neither taken nor

30. See *Weems v. United States*, 217 U.S. 349, 382 (1910) (dissenting opinion); *Wilkerson v. Utah*, 99 U.S. (9 Otto) 130 (1878); Note, 36 N.Y.U. L. Rev. 846, 847 (1961).

31. *Weems v. United States*, 217 U.S. 349 (1910). See *Trop v. Dulles*, 356 U.S. 86 (1958); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

32. *Weems v. United States*, 217 U.S. 349, 378 (1910).

33. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

34. BEDAU at 200: "Haven't we, then, at our present-day level of social progress and civilization arrived at the point where to retain capital punishment any longer as a part of our system of justice would seem to be as obsolete as using galleys, torture or branding?" See Cutler, *Criminal Punishment—Legal and Moral Considerations*, 6 CATHOLIC LAW. 110, 111-12 (1960).

35. See *O'Neil v. Vermont*, 144 U.S. 323 (1892); *In re Kemmler*, 136 U.S. 436 (1890).

36. *Weems v. United States*, 217 U.S. 349, 367 (1910).

37. 370 U.S. 660 (1962).

38. 375 U.S. 889 (1963).

endangered human life violates the prohibition against "cruel and unusual punishment." However, Justice Goldberg, joined by Justices Douglas and Brennan, favored granting certiorari to consider whether capital punishment for rape (1) violates the evolving standards of our society; (2) punishes disproportionate to the offense; and (3) constituted an unnecessary cruelty if the aims of punishment—deterrence, isolation, rehabilitation—could be achieved as effectively by a less severe punishment than death. The significance of the dissent may be appreciated when it is recognized that the "cruel and unusual punishment" issue was not presented in the petition for certiorari.<sup>39</sup>

Society's standard of decency with regard to the death penalty is certainly evolving to the point where it is considered abhorrent.<sup>40</sup> This is evidenced by the number of states that have abolished it, either by action of the legislature in suspending it<sup>41</sup> or action of the executive branch in failing to carry it out.<sup>42</sup> In the past, the court has taken judicial notice of such changes in declaring other punishments "cruel and unusual."<sup>43</sup>

Capital punishment may also violate the eighth amendment in the manner it is administered. The lack of criteria to guide juries or judges in imposing a death sentence may render it "cruel and unusual." The death penalty may be cruel not only because it is extreme but because it is wanton, and unusual not only because it is rare, but because the decision to remove the defendant from the ordinary penological regime is arbitrary.<sup>44</sup> However, this lack of standards may also be a violation of due process and will be discussed in detail there.

### *Due Process Clause*

The Supreme Court of the United States has long condemned a degree of vagueness in criminal statutes that "licenses the

39. In *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950), the court belittled the precedent value of dissents from denial of writs.

40. Increasing public sentiment against the death penalty is evident. The Gallup Poll recently reported that a majority of Americans favor its abolition. *Philadelphia Bulletin*, July 1, 1966, at 7, col. 6. Concerned private and public agencies agree. The influential National Council on Crime and Delinquency recommended abolition in 1936. See 9 *CRIME AND DELINQUENCY* 225 (1963).

41. See note 11 *supra*.

42. UNITED STATES DEPARTMENT OF JUSTICE, BULL. No. 41, NATIONAL PRISONER STATISTICS, EXECUTIONS, 1930-1966, at 9-13 (April 1967).

43. See *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958).

44. See *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963) (dissenting opinion); Note, 42 *N.C. L. REV.* 909 (1964).



jury to create its own standard in each case."<sup>45</sup> The vices of such statutes<sup>46</sup> are that they not only fail to give fair warning of prohibited conduct, but that they also provide the foundation for jury arbitrariness and persuasion by impermissible considerations. In *Giaccio v. Pennsylvania*<sup>47</sup> the Supreme Court stated:

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."<sup>48</sup>

In capital cases jurors are not required to direct their attention to the purposes of criminal punishment, nor to any pertinent aspect or aspects of the defendant's conduct. They are not invited to consider the moral heinousness of the defendant's acts, his susceptibility or lack of susceptibility to reformation, or the extent of the deterrent effect of killing the defendant.<sup>49</sup> They are permitted to choose between life and death upon conviction for any reason or for no reason at all. There are no criteria to assure that there will be a connection between the sentence they exact and a reasonable justification for exacting it.<sup>50</sup> To concede the complexity and interrelation of sentencing goals<sup>51</sup> is no reason to sustain a procedure which ignores them all. Under such a sentencing regime, capital punishment in those few, selected cases where it is applied may be arbitrary and thereby a violation of the due process clause.

The imposition of the death penalty may also inflict the loss of life without commensurate justification. Life is a fundamental right, protected by the due process clauses of the fifth and fourteenth amendments. Because of the advances of man's liberty, culture, and civilization for many generations, there

45. *Herndon v. Lowry*, 301 U.S. 242, 263 (1937). See, e.g., *Winters v. New York*, 333 U.S. 507 (1948); *Smith v. Caboon*, 283 U.S. 553 (1931); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

46. The Louisiana Code of Criminal Procedure fails to provide any such criteria. See, e.g., LA. CODE CRIM. P. arts. 782, 814, 815, 817.

47. 382 U.S. 399 (1966).

48. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

49. Cf. *Packer, Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964).

50. Cf. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

51. See *Knowlton, Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1106 (1953); *Sellin, The Death Penalty and Police Safety*, in CAPITAL PUNISHMENT 138 (1967).

has been a lessening of severity of punishment, accompanied by an increasing appreciation and valuation of life.<sup>52</sup>

When the state attempts to restrict a fundamental right it can do so only on the showing of a "compelling interest."<sup>53</sup> The state's "compelling interest" asserted to justify criminal sanctions is the punishment and treatment of criminal offenders, under which three legitimate ends can be characterized:<sup>54</sup> (1) deterrence, (2) isolation, and (3) rehabilitation. Vengeance is not a legitimate legislative purpose. It is by nature irrational and should not justify capital punishment.<sup>55</sup>

As noted above,<sup>56</sup> capital punishment is not a more effective deterrent than life imprisonment. Deterrence as an objective of criminal law, therefore, does not demonstrate that the state has a "compelling interest" in executing the condemned, for there are alternative means less subversive of the fundamental right to life available to the state for accomplishing that objective. Of the two remaining legitimate purposes of criminal sanctions, isolation and rehabilitation, it is submitted once again the "compelling interest" requirement is unfulfilled. Capital punishment is not a way to meet those objectives; it is a way to avoid them. Therefore, since the state has no demonstrable "compelling interest" in inflicting the death penalty, it should be held unconstitutional.

### Conclusion

As the advantages of the death penalty over life imprisonment have been shown to be lacking, it should be abolished, or at least suspended by the legislature. Its inherent evils are exposed by the United States Department of Justice:

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52. *Trop v. Dulles*, 356 U.S. 86, 100 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this limit be exercised within the limits of civilized standards."

It can be summarized that the majority of the Justices of the United States Supreme Court dislike capital punishment and find it repugnant. *Id.* at 99: "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful . . ."

53. *Sherbert v. Werner*, 374 U.S. 398, 406 (1963); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 644 (1943).

54. *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963) (dissenting opinion); *People v. Oliver*, 1 N.Y.2d 152, 160, 151 N.Y.S.2d 367, 373, 134 N.E.2d 197, 201 (1956).

55. *People v. Oliver*, 1 N.Y.2d 152, 160, 151 N.Y.S.2d 367, 373 (1956), 134 N.E.2d 197, 201 (1956).

56. See note 15 *supra* and accompanying text.

"We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitative skills affords greater protection to society than the death penalty which is inconsistent with its goals. This Nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime."<sup>57</sup>

However, in default of legislative action in this area, the United States Supreme Court seems to be moving toward such a result. This is evidenced by the attitude taken by the Court in the two cases noted in this series,<sup>58</sup> and the fact that the Court has granted certiorari in a case which clearly presents the issue.<sup>59</sup> It is submitted that society's "evolving standard of decency" requires the court to declare capital punishment unconstitutional.

*Edward A. Kaplan*

#### CIVIL PROCEDURE—DEFICIENCY JUDGMENT AFTER INVALID EXECUTORY PROCESS

After default in payments plaintiff successfully foreclosed *via executiva* on a chattel mortgage securing the purchase price of defendant's automobile, without authentic evidence of the chattel mortgage. Since defendant, although having notice of the proceedings, did not seek to enjoin or appeal the seizure and sale, the car was sold to a third party.<sup>1</sup> Soon thereafter, plaintiff sought a deficiency judgment for the balance of the debt. Defendant's administratrix argued that the acknowledgment of the chattel mortgage under private signature, by an agent of the mortgagee, was improper; the evidence given in order to use executory process was illegal; and therefore everything done subsequently was null and void.<sup>2</sup> *Held*, where executory process is invalid because a chattel mortgage under private signature has not been duly acknowledged, a deficiency judgment is not al-

57. Letter of then Deputy Attorney General Ramsey Clark to the Honorable John L. McMillan, Chairman, House Committee on the District of Columbia, July 23, 1965, reported in the N.Y. Times, July 24, 1965, at 1, col. 5.

58. Notes, 29 LA. L. REV. 381 (1969) 29 LA. L. REV. 389 (1969).

59. *Boykin v. Alabama*, 37 U.S.L.W. 3133 (Oct. 15, 1968).

1. Although the facts of the case are unclear, it will be assumed for the purpose of this Note that no appeal or injunction was sought, and that the automobile was sold to a third party purchaser in good faith.

2. Since the agent of the chattel mortgagee was neither the grantor of nor a witness to the act as required by LA. R.S. 13:3720 (1950), the act was not duly acknowledged.