

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

Held in Room 519, at the Statehouse at 3:30 ~~xxx~~ p. m., on January 11, 1978.

All members were present except: Rep. Lorentz, who was excused.

The next meeting of the Committee will be held at 3:30 ~~xxxx~~ p. m., on January 12, 1978.

These minutes of the meeting held on _____, 1978 were considered, corrected and approved.



Chairman

The conferees appearing before the Committee were:

Rev. Harold Knight, Chanute
Vincent DeCoursey, Kansas City, Kansas
Curtis Shoop, Heart of America, Kansas City, Kansas
Marilyn Huffman, VISTA, Heart of America
Rev. James Post, Chaplain, Kansas State Penitentiary
Professor Bill Arnold, Kansas University
Rev. William Gannaway, Westminster Presbyterian Church, Topeka
Ms. Jan Price, American Civil Liberties Union
Dr. Bill Lucero, Unitarian Univ. Service Comm., Topeka
Sister Delores Brinkle, Catholic Social Services, Kansas City
Darlene Stearns, Consultation of Cooperative Churches

The meeting was called to order by the Chairman, who noted that opponents to HB 2236 were scheduled to be heard.

The Rev. Harold Knight was introduced, and told the Committee that he had recently spent nine months in prison for what he termed "character assassination by the press". He expressed appreciation for support by his family and his church. He urged, that while prisons are very bad places, that there are alternatives to the death penalty. He suggested there should be a review committee to determine whether or not the individual had received a fair trial, had competent counsel and a fair and impartial judge. He further suggested that transcripts of all proceedings should follow the individual in all steps of the system. He stated that many of the people in prison can be rehabilitated, and that it is only the poor who are sent to prison. He also stated that with the death penalty, he felt it would be only the poor who were put to death.

The Rev. James Post testified that he had been a minister for 36 years, and has always been opposed to the death penalty as a moral issue, but as prison Chaplain he has witnessed six executions and feels even more strongly as a result of that experience. He stated that he feels the deterrent value is not valid, and told the Committee that all six of the men who were executed had told him they were glad it was all over and that if someone really wanted to punish them they should keep them in prison for life.

Rep. Frey noted that information indicates there are more and more murders in prison, committed by the inmates, and inquired if there might not be a deterrent factor in those cases. Chaplain Post stated it was his opinion it would not be because these crimes are committed during fits of passion or insanity when the person is not responsible for his acts and cannot rationalize.

Rep. Frey inquired about the attitude of prisoners who might consider themselves potential victims, and the Chaplain agreed that inmates want more safety and protection.

Mr. Vincent DeCoursey testified that he is appearing in opposition to HB 2236, as well as any other similar legislation which may be introduced. He stated that he is opposed to the death penalty; that people who commit crimes should be rehabilitated and those who are not amenable should be restrained, but in a humane way. (See printed statement.)

Sister Delores Brinkel told the Committee that the Catholic Social Service is opposed to any attempt to re-enact the death penalty. She noted that in 1974 the U. S. Catholic Conference, composed of all the Bishops, publicly opposed the death penalty. In 1976 the Kansas City Archdiocese affirmed this stand. She stated that they support punishment that respects the dignity of the offender. She stated that she works with inmates and has done a survey of those serving long or life sentences, and those people overwhelmingly oppose capital punishment. She agreed that there should be a secure institution which would prevent certain inmates from preying on others. (See printed statement.)

Mr. Curtis Shoop of Heart of America, testified that there are better ways or more effective ways to reduce murders than the use of the death penalty. He told the committee that his work with inmates is very worthwhile so far as rehabilitation is concerned. He stated that he considers himself a living example that death is not the answer because he has served time for murder. He explained that is why he is dedicated to helping keep people from committing crimes.

Mrs. Marilyn Huffman, VISTA volunteer with Heart of America, told the committee that a newspaper article late in December indicated that the nation's crime rate had dropped. In the same newspaper, she noted that an interim committee was studying the question of reinstatement of capital punishment. Mrs. Huffman stated that she had worked as a Correctional Officer at Lansing, and during her service had come to the conclusion that as a christian she was opposed to the death penalty because she believed in the sanctity of life. (See printed statement.)

Professor Bill Arnold of Kansas University, testified that he is a criminologist at the University, and that he deals with statistics. He stated that he is familiar with the matter of crimes (murder in particular) committed in prison by inmates, and that the person who has been sentenced for robbery is more likely to commit murder in prison than one who has been committed for murder. He

noted that Canada had recently initiated the death penalty again after a period restraint. He stated that during the period 1930 to 1939, Canada executed 75% of all murders, while in the period 1960 to 1965, they executed 12½%, yet the killing of prison guards during the two periods was exactly the same. He stated that it costs more to execute someone than it does to keep someone in prison for life. He noted that the committee should consider that death is irreversible, and there is always the element of error in convictions.

Rep. Foster stated that he had conducted a poll in his legislative district which indicated that nearly 60% of the people are in favor of the death penalty, and that would indicate that in order to represent his district he should support the legislation.

Professor Arnold expressed the opinion that public opinion has traditionally been fickle; that in 1966, only 42% of the people were in favor of the death penalty, while in 1976, 68% were in favor. He stated that the breakdown is interesting; that 60% of the white people were in favor, 29% of the non-whites, 64% of the male population and 50% of the women.

Rep. Frey noted that it has been said that the death penalty is not a deterrent and inquired if any studies have suggested an alternate deterrent. Professor Arnold stated that studies have been renewed, although it is a difficult subject to study.

Rev. William C. Gannaway, Westminister Presbyterian Church, Topeka, appeared in opposition to HB 2236, explaining that this same position was taken by the 171st and 177th General Assemblies of the United Presbyterian Church, USA. (See printed statement.)

Dr. Bill Lucero, UUSC Representative, testified that his Committee does not believe re-enactment of capital punishment is the answer. He expressed the opinion that the death penalty is most often used against the poor and the non-white. He testified that while his own father had been shot to death and he suffers anguish and anger over the result, still he does not feel that he could take vengeance; that it would not lessen grief nor restore his father. He urged that the committee reject the proposed legislation. (See printed statement.) He urged that the legislature instead provide funds for counseling and mental health agencies so that people could begin to understand the consequences of their acts. He expressed the opinion that consideration of the community corrections concept is valid.

Ms. Jan Price of ACLU, stated that her organization takes the view that death penalty legislation should not be re-enacted, because of the 1972 Supreme Court decision. She noted that a later opinion in 1976 upheld guidelines such as are contained in the bill under consideration, but still her organization opposes reinstatement of the death penalty. (See printed statement.)

Darlene Stearns distributed a position paper for the Cooperating Churches in Kansas. (See printed statement.)

The Chairman announced that the Committee would hold discussion on the proposed bill and would hopefully take action on the 12th.

A list of bills which were carried over from the 1977 session was distributed to members, and the Chairman urged members to look at them and see if there were any in which they might have a particular interest or those which constituents had expressed interest. He noted that House Bills 2002 and 2003 have been transferred to the Energy and Natural Resources Committee.

The meeting was adjourned.

House
 JUDICIARY
 Committee
 1-11-78

<u>NAME</u>	<u>ADDRESS</u>	<u>ORGANIZATION</u>
J.D. Hall	Topeka	WREN.
R Myers	Topeka	KC Star
J. BRADSTEN	Topeka	American civil liberties
M. Moody	Topeka	American Civil Liberties
Jan Price	112 W 6 th Rm 203	American Civil Liberties Union
Bill Mannaway	Topeka	United Presbyterian Church
S. James B. Kenna	Salina	Marymount College
Paul Leone	Salina	Marymount College
David Leigh	Topeka	Washburn Criminal Justice Assn
<i>[Faded]</i>	<i>[Faded]</i>	<i>[Faded]</i>
<i>[Faded]</i>	<i>[Faded]</i>	<i>[Faded]</i>
Escothy Holman	Cherokee, Ks.	United Methodist Women
Don E. Holman	Cherokee, Ks.	Concerned citizen
Walter McCluney	1030 Waverly KCK.	Methodist Church
Marilyn A. Huffman	Rt 1 - Box 260 - CLATHE	HEART OF AMERICA Clathe, Kansas, 6601 city.
Mark L. Huffman	Rt. 1, Box 260 - Clathe	Student PSU
Chris Walters	509 N 9 th KANSAS CITY, MO	Heart of America
S. Dolores Benickel	415 N. 15th St.	Cath. Social Services
Janet Delourney	702 Commercial N. KCK	Canon Collier Conference
Robert Tomlinson	1800 Wasmuth Dr	Student
Ernest G. Shoop	528 W. Curtis	Olathe, Ks
Wm. R. Arnold	2631 Mission	Lawrence, 66044
Jeff Hin	TOPEKA	REP. LADY
James J. Post	Lansing Ks	Prot. Chaplain K.S.P.
David George	LEAVERSWORTH, KAN	Prot. Chaplain Intern K.S.P.
R. N. Wilson	Topeka	WIBW
Kaye Abbott	Topeka	Teacher, N.H. Gr. 4
Teresa Mc Culley	Topeka	Student
Rena Ross	Topeka	Student

[Signature]

December 30, 1977

House Majority Leader's Office
House Judiciary Committee
Rep. E. Richard Brewster
State Capital Building
Topeka, Kansas 66600

Dear Committee Members:

I read in the Chanute Tribune Newspaper, Wednesday, December 28, 1977, where the House Judiciary Committee will hear testimony on capital punishment on Jan. 10 and 11, the second and third days of the 1978 legislative session.

It is my sincere desire to appear before this committee in opposition to this bill on the death penalty, and in opposition to the possibility that any death penalty would be reinstated in the State of Kansas.

It is my understanding that those persons wishing to appear before the committee as apponents to the bill will be heard at 3:30 p.m., Jan. 11, in the committee's statehouse hearing room. Would you please confirm these facts to me, and also inform me of any time limits established for speaking during such an appearance. Thank you.

Sincerely,

Harold H. Knight

Harold H. Knight

312 West Main
Chanute, Kansas 66720

~~9-1-31-5~~

*John Knight
act
332 W. main
431-0550*

~~*West Steuben Main
431-2257*~~

*Information says
she has no listing!*

*Wilson are Baptist
700 listing
no longer exists*

1-11

TESTIMONY: Vincent DeCoursey, Executive Director
Kansas Catholic Conference

Judiciary Committee
House of Representatives

January 11, 1978

Subject: House Bill 2236 and similar measures
to restore the death penalty

I wish to thank the Chairman and the members of this committee for the opportunity to speak against the reinstatement of the death penalty in our state. Although the committee is deliberating House Bill 2236, this testimony is not only in opposition to this measure, but to any legislative proposal seeking to legalize the death penalty.

We are opposed not to details of bills setting out the degrees of guilt or safeguards proposed, but to the fundamental fact that all such proposals seek to legally put to death another human being.

Capital punishment in our view is outside the realm of practical, just punishment. As the Catholic bishops of the United States said three years ago: "Those (criminals) who are sick or otherwise truly not responsible for their serious crimes deserve treatment rather than execution; those who are responsible should receive punishment which will cause them to repent and foster their rehabilitative efforts; those who are truly incorrigible should receive humane, but permanent incarceration. Sure and speedy execution of justice, including reasonable, just prison terms for serious offenders, seems the best deterrent to crime."

Consider again the words of a distinguished former member of the Kansas House of Representatives, the Honorable John Bower of McLouth, spoken on the floor of the House Chamber some three years ago: "Punishment should not fit the crime, it should fit the criminal. I do not believe that man should shed man's blood, I do not believe a group called state has any more right to shed blood than an individual has a right to shed another's blood".

This is our philosophy. We defend life as a God-given right. This right to life cannot be taken away by man: not by murder, by euthanasia, by abortion, by war, or by court-ordered execution. The commandment that says "Thou Shalt Not Kill" is just as applicable to the criminal as it is to an innocent victim.

We respectfully submit that this committee of the legislature should vote against House Bill 2236 and any other bill which would revoke the Kansas prohibition against punishment by death.

CATHOLIC SOCIAL SERVICE
OF THE
ARCHDIOCESE OF KANSAS CITY IN KANSAS

Statement to House Judiciary Committee
re: Death Penalty
January 11, 1978

From: Criminal Justice Ministry Department

Catholic Social Service is opposed to re-enactment of death as punishment in Kansas.

In 1974, the United States Catholic Conference, composed of all the Roman Catholic Bishops of the United States, publicly opposed the death penalty. They urged the development of forms of punishment which respect the dignity of the offender and fosters the offender's rehabilitation and reconciliation with the community.

Members of Catholic Charities of the Kansas City Archdiocese at a membership meeting in August 1976 voted opposition to the death penalty. A resolution stating the same position was adopted by the National Conference of Catholic Charities in October 1976.

The arguments against the death penalty arise from religious and humanitarian values: the lordship of God over human life; the duty to help the criminal rather than just punish; the recognition of human fallibility; the need for reconciliation; the increased awareness of the complex nature (moral, psychological, cultural, sociological and hence spiritual) of criminal acts.

In case of the death penalty, three traditional ends of punishment are not achieved:

- a) It negates the possibility of the criminal to rehabilitate himself.
- b) It is vindictive or retributive; it goes against the Christian tradition of seeking humane treatment for everyone.



- c) There is no convincing evidence that it is a deterrent. This has been confirmed by a 1977 analysis by Brian Ford at the Institute of Law and Social Research.

The death penalty is unjustly applied to those with limited abilities to defend themselves.

Most importantly, capital punishment violates the ideal of human dignity. The state's killing an offender is a violent response to violence, which does not enhance society's reverence for life. The Christian tradition is one of reverence for human life, combined with a loving and forgiving attitude toward the offender. For the state to assume that those who commit heinous crimes are beyond redemption is to assume a power that belongs to God.

In the New Testament Jesus constantly rejects the normal human tendency to redress injury by injury and calls instead for generosity. He established a norm that violence and hostility are not corrected by counter-measures of violence and hostility. By contrast, through capital punishment the state obviously repudiates the humanity of the offender and despairs at the possibility of his rehabilitation and reconciliation with the community.

Primarily, Catholic Charities--Catholic Social Service speaks against the death penalty because we are for the preservation of all human life. The death penalty frustrates the Christian commitment to seek the redemption and reconciliation of the wrongdoer. And it violates the fundamental commitment this state has to a decent and humane society.

Sister Dolores Brinkel
Criminal Justice Ministry

1-11-78

Late in December as I was scanning the daily newspaper, I was very happy to see this article, entitled: NATION'S CRIME RATE AGAIN DROPS on a very prominent location of Page 1. The article further stated that the nation has reported that the crime rate- for violent crimes including rape, robbery and aggravated assault dropped by 6% over that same period in 1976, and that it was the fourth quarterly decline in a row, according to the FBI reports.

With an interest and background in corrections, I was happy to cut out the article, and continued to read the paper, when to my added amazement, I found this article on a very obscure position page 6 of the same newspaper: Kansas House Hearings On Capital Punishment.

Which would indicate that the capital punishment issue will be one of the first items on the Agenda.

Somehow that seems a bit incongruous to me.....

That we should find our state once again considering capital punishment, when our state has existed so well without such a law for over 10 yrs.

(Last death penalty in Kansas-June 2, 1967)

I have formulated my feelings in regard to the death penalty in two ways; First, as a former civil service employee I served as a Correctional Officer, and longer as a Correctional Counselor at the Kansas Correctional Institution for Women in Lansing, Kansas, during which time, I did much of the casework of the women incarcerated there. I spent over 5 years in that employment.

The major influence for my feelings in opposition of the death penalty however, would be in my convictions as a Christian. I believe in the sanctity of life, and that Life is a gift of God. Man does not presume to play God.

I believe that the Bible makes this quite implicit when even in the 6th of the 10 commandments, it is stated : Thou Shalt Not Kill.

Also, in the New Testament writings of St. Paul, as well in Jesus own commandment to his disciples in Matthew 5:38-44 He urges them to never return evil for evil, but to "Love your enemies, and do good to those who persecute you."

Even in His attitude toward the woman who had been caught in adultery, who could have been stoned to death according to the law of the time-Jesus refused to condemn her. I feel that the return of the death penalty would be a violation of Jesus Christ's own example.

Contrary to what many of the death penalty advocates may believe, it has never been proven that Capital Punishment is actually a deterrence to crime. In a study made last year, no significant differences were found in states with and without the Death Penalty- as far as the murder rates.

As a matter of fact, in the FBI report of that time, 5 of the 7 states with the lowest # of murders DID NOT have the death penalty, while 12 of the 13 with the highest murder rate DID have capital punishment.

(Uniform Crime Report) US Dept of Justice-1975

It is my conviction that a murder is usually a spur of the moment happening- as in a robbery, or a crime of passion- an unplanned action which the offender has the rest of their life to regret.

It was my experience too, that the Lifers are the most model inmates in the institution. They realize that the institution is to be their residence for many years, and thus, they set about, making the best of the situation having reconciled themselves to do the very best in the situation.

In states with the mandatory death penalty, it has often been indicated that juries tend not to convict genuinely guilty persons. An experimental study in the Journal of Criminal Justice (Winter, 1973) indicated that college students were less likely to declare guilt of defendants when the Death Penalty was involved. In 1973, a Harris poll indicated when people were asked to agree or disagree with the statement: "In case of proven guilt, I would always vote 'guilty' if the death penalty were automatic." ONLY 38% OF THOSE POLLED SAID YES!

THE DEATH PENALTY IS IRREVERSIBLE. YET, AT LEAST 10% OF THE CONVICTIONS FOR MURDER ARE LATER OVERTURNED BY DISCOVERY OF ERROR.
CAN WE HAVE THAT KIND OF CHANCE FOR ERROR WHEN IT MEANS TAKING A HUMAN LIFE???

Too many times, the poor, and most especially the minorities would be the victims of such justice, for they are those who can not afford a silver-tongued defense counsel persuasive enough to get them the lesser charge. There are few Patty Hearsts and even middle-class citizens of America who receive the Death Penalty for their actions- because they can afford the defense necessary.

It can also be illustrated- that in some rare cases, such as that of Mark Gilmore, the Death Penalty sentence is used to glorify the person's life and actions. The glorification and world-wide publicity which was showered upon him by the news media tends to invite even more contagious violence on the part of the lunatic fringe of society.

Many of us who feel called as followers of Christ, pray that some day our nation will be counted among the 70 other nations of the world who shun this form of legalized killings of God's human creatures. As was the sentiment of Justice Marshall of the US Supreme Court in June, 1972. Belgium, for instance abolished the death penalty more than 100 years ago, because they felt that it was brutalizing to their society.

ENGAGE? Social Action, Oct. 1974
p.18.

When this time comes to our state, we will feel that we are more fully exemplifying our Christian commitments and heritage.

Mrs. Marilyn Huffman

Rt. 1- Box 260

Glathe, Kansas

66061

913-441-1104

Death Penalty Rarely Stops Potential Killers, Study Says

By Margaret Gentry
Associated Press Writer

WASHINGTON—The death penalty rarely if ever deters murder, according to a new statistical study.

The report published in the University of Minnesota Law Review disputes the widespread argument that a fear of execution would make potential criminals change their minds about committing murder.

Brian Forst, a senior research analyst at the Institute of Law and Social Research here, concluded in the latest analysis of the issue that "capital punishment does not, on balance, deter homicides."

However, the report said there was some evidence that a high murder conviction rate and prison sentences for murders have a deterrent effect.

Forst studied murder statistics for 32 states between 1960 and 1970, a decade when the murder rate was rising nationally and the number of executions was declining. His study was published last summer.

Between 1967 and last January, there were no executions in the United States because of court challenges to the constitutionality of capital punishment.

But after the Supreme Court ruled in 1976 that the death penalty for murder is constitutional under certain circumstances, many states passed new death penalty laws. Utah became the first state in the new era to carry out an execution when Gary Mark Gil-

more was shot by a firing squad Jan. 17.

Forst wrote that if capital punishment deters murder, the murder rate should have increased the most in states where the risk of execution went down the most.

Instead, Forst said in an interview: "The states that ended the death penalty had smaller increases in the homicide rates. The homicide rate went up more in states which did not have the death penalty in 1960."

From the findings in his report, "It is apparent that those states in which the actual use of capital punishment ceased during the 1960s experienced no greater increase in the murder rate than did the states that did not use capital punishment in the first place," Forst said.

In its opinion affirming the constitutionality of capital punishment, the Supreme Court speculated that for many murderers, "the death penalty undoubtedly is a significant deterrent."

Pollsters have found a widespread public belief in the deterrent value of capital punishment, Forst noted.

He measured what happened to murder rates in states that abolished the death penalty before 1960, those that still had a death penalty law but carried out few if any executions and those that used the law more frequently until court decisions forced an end to capital punishment.

Though he found no connection between capital punishment and the

murder rate, Forst did find a link between the murder rate and convictions and prison terms.

"This finding of a deterrent effect of imprisonments of persons convicted of murder is more real than spurious," Forst wrote. The largest murder rate increases tended to occur in states with a poor record of capturing and convicting killers, he said.

Hans Zeisel, a legal scholar, called Forst's analysis "the final blow" to the theory that capital punishment deters murder.

Zeisel, professor emeritus of law at the University of Chicago and a senior consultant to the American Bar Foundation, wrote in a recent article that Forst's analysis is superior to other statistical studies.

Tracing the history of those studies, Zeisel wrote: "This then is the proper summary of the evidence on the deterrent effect of the death penalty: If there is one, it can only be minute, since not one of the many research approaches from the simplest to the most sophisticated—was able to find it. The proper question, therefore, is whether an effect that is at best so small that nobody has been able to detect it justifies the awesome moral costs of the death penalty."

He noted, however, that the resumption of executions in some states will provide "another opportunity to see whether the capital crime rate in these states will decline compared with the states that still have no executions."

The Value of Life

Arguments against the Death Penalty: A Reply to Professor Lehtinen

GERALD W. SMITH*

Associate Professor, Department of Sociology, University of Utah

The use of the death penalty in modern civilized nations is unnecessary and destructive of the social order. A careful review of the evidence indicates that, even when the risk of execution has been relatively high, the death penalty has not been shown to provide better protection for society than available alternatives. The use of the death penalty has, in fact, encouraged murder, and innocent people have been executed. The death penalty has been discriminatorily applied to racial and ethnic minorities and will continue to be, despite the current Supreme Court guidelines. The death penalty has few economic advantages, and systematic use of restitution and recoupment would make the death penalty a decided economic disadvantage for society. Setting a poor model for the community, the death penalty reduces respect for the law and places a low value on human life.

THERE IS A VERY GOOD REASON why a few scholars have written favorably about the death penalty: the arguments in favor of it are insupportable. Professor Marlene W. Lehtinen's effort to present a reasonable and logical justification for the death penalty (*supra*, pp. 237-252), while interesting and in some ways clever, fails to make a convincing case. It fails, I believe, simply because no case can be made. The use, especially *extensive* use, of the death penalty in modern civilized nations not only is unnecessary but is harmful to the social order.

Deterrence

Current statistical data do not indicate that the death penalty as a deter-

*I thank Allan Roe, Director of Research, Utah State Prison, and Jean Walters, Psycholo-

gist, Utah State Prison, for helpful suggestions. I am, however, solely responsible for the conclusions reached.

1. William J. Bowers, *Executions in America* (Lexington, Mass.: Lexington Books, 1974); Hugo Bedau, ed., *The Death Penalty in America* (Garden City, N.Y.: Anchor Books, 1967), pp. 258-332.

2. Thorsten Sellin, "Homicides in Retentionist and Abolitionist States," in Thorsten Sellin, ed., *Capital Punishment* (New York: Harper and Row, 1967), pp. 135-38; Thorsten Sellin, "Death and Imprisonment as Deterrents to Murder," in Bedau, *op. cit. supra* note 2, pp. 274-301; H. A. Bedau, "Death Penalty as a Deterrent: Argument and Evidence," *Ethics*, April 1970, p. 205.

is erroneous because "Failure to prove an effect statistically does not mean there is no effect."³ She argues that the statistical data are too "insensitive" to show the death penalty's superior deterrent effectiveness and that they could, therefore, mask significant variations in willful homicide rates. She presents a hypothetical case: if the existence of the death penalty deterred five persons a year from committing homicide in each death penalty state, the saving in innocent lives would be significant, even though the statistical indicators of homicide rates would not change significantly.

Professor Lehtinen's reasoning contains several basic flaws. To begin with, while it is true that not proving an effect does not mean there is no effect, not proving an effect also does not mean that there is an effect. Her assumption, in regard to the death penalty's possible superior deterrent effectiveness, is that the effect (imagined, not demonstrated) exists but is not picked up by the insensitive crime statistics. The opposite conclusion, however, could just as reasonably be conjectured: if, because of the existence of the death penalty, five persons were encouraged to commit a capital crime, the loss of innocent lives would be the same as in Lehtinen's hypothetical case, and the crime statistics would, similarly, not be affected by this degree of variation. Thus a simple revision of the example gives the opposite consequence: the existence of the death penalty results in a loss of innocent lives. That something (i.e., superior deterrent effectiveness of the death penalty) is

3. Marlene W. Lehtinen, "The Value of Life—An Argument for the Death Penalty," *Crime & Delinquency*, 1977, p. 239.

TABLE 1*
HOMICIDE RATES PER 100,000 POPULATION IN
DEATH PENALTY STATES AND
ABOLITION STATES FOR FIVE
SELECTED YEARS

Year	Abolition States	Death Penalty States
1928	4.2	8.8
1933	3.7	10.5
1938	2.2	7.6
1943	2.1	5.5
1949	2.2	6.0

*Karl F. Schuessler, "The Deterrent Influence of the Death Penalty," *Annals of the American Academy of Political and Social Science*, November 1952, p. 57.

possible is not a sound basis for believing it exists. Hypothetical cases merely illustrate possibility; they are not proof. In this instance two possibilities—that the death penalty is a superior deterrent and that it is not—can be conjectured. Examination of the data from abolition states and death penalty states, during a period when capital offenders were being executed, reveals consistently lower homicide rates in the abolition states. (See Table 1.)

A similar pattern emerges when we examine homicide rates in contiguous death penalty states and abolition states during a comparable period: death penalty states generally have higher homicide rates than their neighboring abolition states. (See Table 2.) Examination of actual homicide rates shows that any hidden or masked effects of the death penalty are the opposite of what Lehtinen conjectures—the existence of the death penalty is associated with the greater loss of innocent lives. It is just as reasonable and, given the data, more plausible to believe that the statistical data mask the superior protection of an abolitionist policy.

Risk of Execution

Lehtinen argues that in modern times the risk of execution has always been so low that the difference in actual penalties imposed in death penalty states and abolition states is negligible. She underestimates the actual risks. Her data show that, from 1945 to 1954, 775 persons were executed for murder, an average of 77 a

homicide would qualify for the death penalty under the statutes. The data include willful homicide from abolition states where the death penalty is not possible, as well as multiple killings by one individual. If we could reduce the 7,268 incidences of willful homicide to individual killers who would qualify for execution, we would probably find that about one-tenth of the possible candidates were actually executed. A 10 per cent chance of execution is not a negligible risk. The absence of statistically significant variations in contiguous death penalty and abolition states may mean, as Lehtinen conjectures, that the risk of execution was not high enough to make a difference and that raising the risk of execution might make a difference; on the other hand, it may mean that the deterrent effects of the death penalty are no different from those of alternative punishments available. Lehtinen consistently conjectures a favorable deterrent effect when a different outcome is equally plausible.

To raise the conditional probability of execution, Lehtinen proposes that we execute, at a minimum, all first-degree murderers—about 3,000 persons a year, or 15 per cent of the approximately 20,000 willful homicide offenders. Doing this, she believes, will increase the deterrent effectiveness of the death penalty and reinforce the taboo on killing. The opposite result seems to me more likely. By taking so many lives, the state expands the acceptability of killing, undermines the value of life in general, and sets a poor example for its citizens. Intentional killing is an odd way to reinforce the taboo on murder—the diminution of morality to a *quid pro quo* ethic encourages vindictiveness and hostility. Accep-

TABLE 2*
ANNUAL AVERAGE HOMICIDE RATES
IN FIFTEEN STATES
SELECTED ACCORDING TO CONTIGUITY

State	1931-35	1936-40	1941-46
Rhode Island ^a	1.8	1.5	1.0
Connecticut	2.4	2.0	1.9
Michigan ^a	5.0	3.6	3.4
Indiana	6.2	4.3	3.2
Wisconsin ^a	2.4	1.7	1.5
Illinois	9.6	5.7	4.4
Minnesota ^a	3.1	1.7	1.6
Iowa	2.6	1.7	1.3
Kansas ^b	6.2	3.6	3.0
Colorado	7.5	5.5	3.7
Missouri	11.1	6.6	5.3
Nebraska	3.7	1.7	1.8
Oklahoma	11.0	7.2	5.6
Arizona	12.6	10.3	6.5
New Mexico	12.5	8.4	5.3

*Karl F. Schuessler, "The Deterrent Influence of the Death Penalty," *Annals of the American Academy of Political and Social Science*, November 1952, p. 58.

a. Abolition state.

b. Abolition between 1931 and 1935.

year. She then concludes that, "Given . . . an estimate of 7,268 incidences of murder and non-negligent manslaughter annually, the chance of execution was less than 1 in 100."⁴ She is stacking the deck because only a small proportion, perhaps 10 per cent, of the 7,268 incidences of willful

4. Lehtinen, *supra* note 3, p. 241.

tance of Lehtinen's proposal⁵ would reduce our civilization to a barbaric level where life is short, cheap, and brutal.

Though Lehtinen insists that the law-abiding masses are the most important clients of the conformity-encouraging criminal justice system, her proposal gives them the basest example to emulate. A system of just and appropriate punishment based on due process, equal protection, and fundamental fairness is important to achieve adequate social protection, but conducting blood sacrifices to appease an appetite for justice is unnecessary and destructive. The degree of punishment should be the minimum necessary to achieve the goal of social protection. Although deterrent considerations are important, some compromises are possible with reform and rehabilitation considerations.⁶ Some research concludes that it is not the amount but the fact of punishment that most deters.⁷ We ought to be able to harmonize the crime prevention goals of deterrence with programs designed to prevent recidivism in offender populations, without significant loss and with a net gain. Compromise of

5. Unlikely, even by the present Supreme Court, which recently ruled against the mandatory death penalty. See *Woodson v. North Carolina* and *Roberts v. Louisiana*, *Criminal Law Reporter*, July 28, 1976, pp. 4110-12.

6. A similar conclusion is reached by H. L. A. Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility, Essays on the Philosophy of Law* (New York: Oxford University Press, 1968), p. 27.

7. Johannes Andenaes, "General Prevention Revisited: Research and Policy Implications," *Journal of Criminal Law and Criminology*, September 1975, pp. 338-65; Morris Silver, *Punishment, Deterrence, and Police Effectiveness: A Survey and Critical Interpretation of Recent Econometric Literature* (report prepared for the Crime Deterrence and Offender Career Project), February 1974.

the goals of punishment with considerations of mercy, love, and reform sets a far better model for the community than a proposal that fosters anger, hostility, and vindictiveness. I want to live in a community that cherishes principles of justice based on love, mercy, and reform. I seriously doubt that even Professor Lehtinen would want to live in the kind of community her proposal would create.

Ehrlich's Research

Lehtinen enthusiastically cites the elaborate econometric model (which includes, among other things, the probability of apprehension, the conditional probability of conviction, and the actual probability of execution) developed by Professor Isaac Ehrlich, who asserts he has demonstrated the deterrent effect of the death penalty.⁸ But she notes only briefly that serious questions have been raised about the validity of the assumption underlying the model.⁹ Neither Professor Ehrlich nor anyone else has demonstrated the superior deterrent effectiveness of the death penalty.

Reverse Deterrence

The homicide-suicide phenomenon is an established fact: some persons commit murder in order to be executed by the state; for them, the existence of the death penalty is an incentive to murder. Estimates of the

8. Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," *American Economic Review*, June 1975, pp. 397-417.

9. William J. Bowers and Glenn L. Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment," *Yale Law Review*, December 1975, pp. 187-208.

extent of the phenomenon differ; however, there is general agreement that it is not negligible.¹⁰ Lehtinen's suggestion for lessening this effect of the death penalty by reducing the pomp and sensationalism of trial and execution is unrealistic. Cases involving the death penalty have a high degree of public interest, and it is unreasonable to expect the media to reduce their coverage of these cases. Similarly unrealistic is her suggestion that executions be conducted in hospitals by physicians. Physicians are not likely to abdicate their responsibility to save life. They are not likely to accept the role of state executioner and, even if they did, would not thereby significantly reduce the homicide-suicide phenomenon. A good deal of pomp and sensationalism would probably surround executions carried out precisely as she suggests. On the other hand, executions disposed of secretly and easily, without appropriate ceremonial trappings and the fundamental safeguard of public accountability, depreciate life in general. Each method carries the seed and substance of totalitarianism.

Increasing the number of executions, advocated by Lehtinen, can be expected to intensify the homicide-suicide phenomenon. With extensive and systematic use of the death penalty, we increase the incentive for committing suicide in this manner and, thereby, expand the loss of innocent lives.

Discrimination

In the past, application of the death penalty has been discrimina-

tory, resulting in the execution of a disproportionate number of men, blacks and other racial and ethnic minorities, and the socially and economically disadvantaged.¹¹ Juries tend to be more lenient to defendants from their own socio-economic classes.¹² I do not share Lehtinen's belief that "procedural safeguards can be designed to provide fair and nondiscriminatory application of the death penalty,"¹³ a belief held also by the U.S. Supreme Court justices who announced recently that some kind of controlled discretion by the sentencing authority could prevent discrimination.¹⁴ The controlled discretion model will not end the discriminatory application of the death penalty. We will continue to impose the death penalty on the poor and socially and economically disadvantaged classes because they are least capable of defending themselves before middle- and lower-middle-class juries. Given the realities of our system of justice and continuation of the death penalty, I do not believe that discriminatory application of the penalty can be eliminated.¹⁵ In a few years we can analyze cases resulting in execution and determine whether the new

11. Bowers, *op. cit. supra* note 1, and G. L. Juror, "New Data on the Effect of a Death Qualified Jury on the Guilt Determination Process," *Harvard Law Review*, January 1971, p. 44.

12. *Ibid.* See also M. E. Wolfgang and M. Riedel, "Race, Judicial Discretion, and the Death Penalty," *Annals of the American Academy of Political and Social Science*, May 1973, pp. 119-33.

13. Lehtinen, *supra* note 3, p. 247.

14. *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas*, *Criminal Law Reporter*, July 28, 1976, pp. 4108-10.

15. Former Supreme Court Justice Goldberg agrees with this analysis. See Arthur J. Goldberg and Alan M. Dershowitz, "Declaring the Death Penalty Unconstitutional," *Harvard Law Review*, June 1970, pp. 1773-819.

10. See NAACP Capital Punishment Project, "Current Fact Sheet," July 1, 1974. See also Lehtinen, *supra* note 3, notes 33, 34.

guidelines work. Of course, if we find that controlled discretion has failed to eliminate discriminatory application of the death penalty, the discovery will have come too late for those executed.

Execution of the Innocent

Lehtinen maintains that the risk of executing the innocent has been fairly negligible. I agree. However, her proposal of a 4,000 per cent annual increase in executions means that we would be executing a significant number of innocent people. Nothing that she or anyone else has said can justify that possibility. An execution is irreversible; other sentencing alternatives are not.

Rehabilitate Murderers

Lehtinen thinks that rehabilitation considerations for murderers are neither meaningful (i.e., persons who have murdered are excellent parole risks because the circumstances involved in most killings are generally not reproducible) nor appropriate (i.e., "retributive and deterrent considerations . . . present a much stronger case than rehabilitation"). She then concludes that, because principles of justice require proportionate retribution for injury, "We weaken the credibility of the deterrent threat of punishment when we use less severe punishment than justice would require."¹⁶ This conclusion is unwarranted. She has nowhere shown that use of the death penalty, as opposed to life imprisonment, appreciably affects the deterrent influence of punishment. To

reach her conclusion, one would have to demonstrate that the public lust for a blood retribution is so strong that no other sentence would be satisfactory. The deterrent effects of punishment do not operate as she indicates. The significant considerations in deterrence are speed and the fact of punishment, not severity.¹⁷ The death penalty is unnecessary for ensuring justice and making credible the deterrent threat of punishment.

Costs

Lehtinen argues that the cost of the death penalty is considerably less than the cost of lengthy imprisonment and that, consequently, by not using the death penalty, the state wastes a great deal of money. Other authorities have argued the opposite.¹⁸ Life sentences generally average about fifteen years,¹⁹ not thirty years as conjectured by Lehtinen; their cost does not approach the cost of executions. Direct cost, however, is not the only consideration in determining the trade-off between a life sentence and the death penalty. There is always the possibility that an offender will reform. One need only speak with the warden of a state prison to be reminded that some very bad people are capable of change. There is also the possibility of some kind of restitution when an offender is kept alive. Life is a positive value. The prison of the future, one can hope, will use offender resources

17. Andenaes, *supra* note 7; Silver, *op. cit. supra* note 7.

18. See Lehtinen, *supra* note 3, references cited in note 34.

19. Personal communication from Allan Roe, Director of Research, Utah State Prison.

humanely and intelligently, will stop being primarily a human warehouse, and will make substantial contributions to society.

Conclusion

The state has a duty to protect its citizens from crime. It should carry out this protective responsibility with a minimum of intervention in individual lives and the lowest net loss in human suffering. The use of the death penalty is inconsistent with this goal.

There is no evidence to indicate that the death penalty provides better protection for society than the available alternatives afford. The deterrent, educational, and moralizing functions of punishment are largely independent of the nature of the penalties employed.²⁰ The death penalty adds nothing to these functions of punishment; it subtracts much. The taking of a human life is an evil in itself and should be en-

20. See Gordon Hawkins, "Punishment and Deterrence: The Educative, Moralizing, and Habituated Effects," in Stanley L. Grupp, ed., *Theories of Punishment* (Bloomington: Indiana University Press, 1971), pp. 163-80. Also Andenaes, *supra* note 7, and Silver, *op. cit. supra* note 7.

dured only for a greater good. It is incumbent on the advocates of the death penalty to prove that positive social effects will result from its use. Failure to demonstrate such effects should compel us to avoid use of an irrevocable penalty.

The use of the death penalty does not increase respect for law and the system of criminal justice—it undermines it. The death penalty places a low value on human life and sets a poor model for the community; in so doing, it undercuts the taboo on killing and increases the future probability of killing. Beccaria made the same argument in 1764:

The death penalty cannot be useful because of the example of barbarity it gives men. If the passions or the necessities of war have taught the shedding of human blood, the laws, moderators of the conduct of men, should not extend the beastly example, which becomes more pernicious since the inflicting of legal death is attended with much study and formality. It seems to me absurd that the laws, which are an expression of the public will, which detest and punish homicide, should themselves commit it.²¹

21. C. Beccaria. *On Crimes and Punishments* (Indianapolis: Bobbs-Merrill, 1963), p. 50.

TESTIMONY OF REV. WILLIAM C. GANNAWAY
United Presbyterian Church, U.S.A.
In Opposition to H.B. 2236 and Resolution 5032
January 11, 1978

I appreciate this opportunity to speak in opposition to H.B. 2236 and Resolution 5032. I speak not only for myself, but also for the 171st and 177th General Assemblies of the United Presbyterian Church, U.S.A.

We recognize the responsibility of the state to protect its citizens and promote justice and freedom in society and that the imposition of the death penalty is one of the means that a state may use to exercise this responsibility. As Christians, however, we cannot support such a means as the death penalty to be used in exercising the state's responsibility.

We believe that capital punishment cannot be condoned by an interpretation of the Bible based on the revelation of God's love in Jesus Christ and that as Christians, we must seek the redemption of guilty persons and not their death.

We affirm the sovereignty of God's grace and his power to redeem and restore the lost to a meaningful and useful life.

We further believe in the ultimate significance of each individual person as one for whom Christ died. Capital punishment, by its nature, obviates the full impact of our Christian conviction and belief in the worth of human life.

Statistical evidence consistently asserts the failure of the death penalty as a deterrent of crime. We also know that justice sometimes miscarries because of human fallibility in the judicial process and we note the grave and irrevocable nature of execution as punishment. We believe that enlightened penal practice seeks both to protect society and to reform and rehabilitate guilty persons, and the use of the death penalty tends to brutalize the society that condones it.

Therefore, we declare our opposition to capital punishment, as a means of dealing with crime.

We call upon the legislature of the State of Kansas to keep capital punishment out of the penal code of the State of Kansas.

We urge the legislature to seek improvement of our various penal institutions and systems in our state to the end that society may be protected and persons convicted of crimes be rehabilitated.

TESTIMONY TO HOUSE JUDICIARY COMMITTEE ON CAPITAL PUNISHMENT
William J. Lucero, UUSC Representative / January 11, 1978

Mr. Chairman and members of the House Judiciary Committee:
I have come to testify on behalf of the Unitarian Universalist Service Committee as the State of Kansas Task Force spokesman on the issue of Capital Punishment.

Although the official Unitarian position is absolute opposition to reinstatement of the death penalty, we are at the same time especially concerned with securing the safety of our citizenry. However, re-enactment of capital punishment will not serve this purpose.

By now you are all well aware of the constitutional abuses of capital punishment -- the denial of due process of law and the administration of cruel and unusual punishment. Likewise, you have heard considerable testimony and doubtless will hear much more that the death penalty's application has been used as a discrimination tactic against the poor and the non-white; that the threat of the death penalty has not had any remarkable effect on the reduction of heinous crime; and that the overall cost to taxpayers to execute those found guilty is no less than to imprison them with ^{life} ~~the mandatory minimum 30 year~~ sentences. Since there exists ~~overwhelming~~ statistical evidence that those statements are true, why then does this demand for the death penalty occur year after year? The only apparent answer to me is the desire for revenge!

I seriously doubt if there is a person in this room who wasn't appalled at hearing of the alleged murder of six children by their father this past week. It frustrates and angers me every time I read or hear of one person taking the life of another. I feel a great sense of outrage when a person refuses to recognize the dignity of another human life and my immediate reaction is to strike out at the individual in the same manner as they struck out against the victim of his rage. But only then do I recognize that I would be acting in the same animalistic, irrational manner as did the disturbed individual who committed the crime.

Yet it is easy for an armchair, bleeding-heart liberal to come in and testify to you, asking for understanding and forgiveness for those who have strayed. Understand me on this one point, then! I am not coming from an ivory tower. My father, who influenced my choice of religious persuasion and profession of service, was shot to death simply because his newly wedded wife could not have his entire attention to herself. Although five years have past since then, my anger has not yet subsided. It would be easy for me to ask you to avenge my father's death along with all the other brutal crimes committed against society by re-enacting capital punishment legislation. But I do not wish to degrade and devalue myself by committing an act of vengeance. Nor do I wish you to commit such acts in my name. Taking that woman's life will not restore my father nor will it lessen my grief about him. I must work through my feelings myself -- vengeance will not do that for me. Therefore, instead of attempting to rectify something that can't

be undone, I urge you to concentrate efforts at enhancing understanding and respect for one another through preventive legislation by increasing available funds for counseling and mental health agencies so that we may reduce the hatred and misunderstanding which lead to such violent acts.

Thank you for your attention and consideration.

1-11

TESTIMONY OF

American Civil Liberties Union of Kansas

on HB 2236

PRESENTED TO

The House Committee on Judiciary

of the

Kansas Legislature

The Honorable E. Richard Brewster, Chairman

January 11, 1978

American Civil Liberties Union of Kansas

January 11, 1978

Mr. Chairman, Members of the Committee...

My name is Jan Price. I am the Executive Director of the American Civil Liberties Union of Kansas. Thank you for this opportunity to speak before your committee. So that you may know for whom I speak I would like you to know that while I am not an attorney I have access to expert research and resource persons. National A.C.L.U. has a separate Capital Punishment Project and staff counsel which is well-versed in the legal meaning of the recent decisions. Today, I plan to draw upon that knowledge. I am also speaking for our membership as we are a membership organization.

The A.C.L.U. takes the position that the moral and legal principles and the array of factual evidence that persuaded the majority of the Supreme Court in 1972 to rule against the death penalty as currently administered destroy the basis for reintroduction of the death penalty in any form for any crime. The death penalty, we believe, continues to be the symbolic representation of everything that is brutal and futile in our present system of criminal justice. This is what I'm asking of you today - to defeat HB 2236 and all other death penalty bills.

In 1972 the Supreme Court of the United States held in the case of Furman vs. Georgia that the death penalty was unconstitutional, a cruel and unusual punishment because it enabled the uniquely harsh penalty to be applied in an arbitrary and capricious manner. We are very much in alignment with this decision and look to it as the basis for eliminating such punishment from our law.

A later Supreme Court decision in 1976 held that the guided-discretion statutes (such as HB 2236 which takes into consideration aggravating and mitigating circumstances) appears on paper to provide adequate standards to ward against arbitrary infliction of death upon some defendants while other defendants in similar cases were spared. The key words are "appears on paper" since the court sustained the constitutionality of these narrower statutes without inquiry into the way the statutes are being used in actual practice. It must be remembered that the court has not encouraged the writing of these narrower, guided-discretion statutes. In fact, in Furman vs. Georgia the majority of the Supreme Court agreed that one purpose of the Eighth and Fourteenth Amendments is to bar legislatures from imposing punishment like the death penalty which, because of the way it is administered, serves no valid social purpose.

As progressive as it was, the Furman decision left several crucial questions about the death penalty undecided. Therefore, some believe, unlike the A.C.L.U., that correctly framed death penalty statutes may be found acceptable by the Supreme Court. HB 2236 fits into this mold. Writing

110 E. 7th, Topeka, Kansas 66603

the court in 1971 Justice Harlan recognized the problem of framing acceptable statutes: "...Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history... To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." (McGautha v. California, 402 U.S. 183. 1971)

The American Civil Liberties Union opposes the death penalty, however written, however modified based on several constitutional grounds. The death penalty in practice (not necessarily on its face, but in practice) denies equal protection of the laws. It discriminates against the poor, the uneducated and minorities. The record of actual application of the statutes is sobering. The non-white population of the U.S. is about 13% of its total population. Just prior to Furman 53% of the people on death row were non-white. Today, 51% of the people on death row in the so-called guided-discretion states are non-white. In other words, the racial record is essentially the same. Non-whites are sentenced to die in numbers that are four times greater than their numbers in the general population under both the old statutes and the supposedly non-arbitrary statutes.

Though Legislators often do not intend discrimination when writing a bill such as HB 2236, evidence shows that the consequence of application, due to political, economic and social factors in our society, is almost always discrimination. Although many people believe that the 1976 Supreme Court decision settled the problem of arbitrary and capricious application, statistics show the problem still remains. In practice, equal protection is not being provided.

The American Civil Liberties Union opposes the death penalty, however written, however modified on several constitutional grounds. Capital punishment is cruel and unusual punishment and in violation of the Eighth Amendment of the U.S. Constitution. It is a relic of the earliest days of penology when slavery, branding and other corporal punishments were commonplace; like other barbaric practices it has no place in civilized society. Kansans have defeated the death penalty bill for the past two years and they will do it again this year. Kansas is a leader in the growing number of states without a death penalty statute. The fact that 17 states have now abolished the death penalty statutes reveals the general public abhorrence to legal killing by the State, a murder for a murder. No one suggests a rape for a rape nor an assault for an assault. The U.S. Supreme Court in the Furman decision was so right when it called capital punishment cruel and unusual punishment. This destroyed the basis for reintroduction of the death penalty in any form.

The American Civil Liberties Union opposes the death penalty, however written, however modified. Among other constitutional denials, the death penalty also denies due process of law. Its imposition deprives an individual of the benefits of new law or new evidence that might affect his conviction. The irreversibility of the death penalty means that error discovered after the penalty has been imposed cannot be corrected. One who suffers the death penalty, and subsequently is found to have been improperly convicted, has been denied due process of law. Moreover, because jury panels in capital cases are selected partly on the basis of a belief in the death penalty, the state is protected against a jury biased against capital punishment, but the defendant is not protected against a jury biased in favor of it. I

ask the committee, is reinstatement of the death penalty worth jeopardizing our constitutional guarantees?

Many proponents of the death penalty argue that our society needs protection from those who would kill. However, in cases when the crime is premeditated, where there is criminal intent, the criminal ordinarily expects to escape detection, arrest and conviction. It is impossible to see how the threat of a severe punishment can deter an individual who does not expect to get caught. The fact that capital punishment does not deter crime was plainly recognized by a majority of the Supreme Court in Furman. Actual experience establishes these conclusions beyond reasonable doubt.

Experience over the past three decades tends to establish that the death penalty as currently administered is no more effective than imprisonment in deterring crime and that it may even be an incitement to criminal violence (The Case Against the Death Penalty; Bedau, Hugo A.):

- A) Use of the death penalty in a given state does not decrease the subsequent rate of criminal homicide in that state.
- B) Use of the death penalty in a given state may increase the subsequent rate of criminal homicide in that state.
- C) Death penalty states as a group do not have lower rates of criminal homicide than non-death penalty states.
- D) States that abolish the death penalty do not show an increased rate of criminal homicide after abolition.
- E) States that have reinstated the death penalty after abolishing it have not shown a decreased rate of criminal homicide.
- F) In two neighboring states - one with the death penalty and the other without it--the one with the death penalty does not show any consistently lower rate of criminal homicide.
- G) Police officers on duty do not suffer a higher rate of criminal assault and homicide in states that have abolished the death penalty than they do in death penalty states.
- H) Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition states than they do in death penalty states.

Actual experience establishes these conclusions beyond reasonable doubt. No comparable body of evidence contradicts these views. We see only one tolerable alternative: Repeal the death penalty entirely.

Thank you.

1-11-78

A STATEMENT AGAINST THE REINSTATEMENT
OF CAPITAL PUNISHMENT January 6, 1978

The representatives to the Consortium on Legislative Concerns are strongly opposed to the reinstatement of capital punishment in Kansas. The Consortium has chosen to work for a more effective system of criminal justice by opposing reinstatement of capital punishment and supporting penal reform. This concern is one of the six main issues selected by the Consortium for study and action in 1978.

A strong majority of the church judicatories represented on the Consortium have taken official action in their legislative bodies opposing the reinstatement of capital punishment. The attitude of these church bodies in Kansas is evident in the following sample of official statements:

We will continue to oppose capital punishment In the love of Christ who came to save those who are lost and vulnerable, we urge the creation of genuinely new systems of rehabilitation that will restore, preserve, and nurture the humanity of the imprisoned. For the same reason, we oppose capital punishment and urge its elimination from all criminal codes.

--Kansas East Conference, United Methodist
Church; Annual Conference, June 1-4, 1977

These Brethern are encouraged to work for the following changes That the use of capital punishment be abolished.

--Church of the Brethren; Annual
Conference, June 1975

We base our opposition to capital punishment on the following grounds:

(1) We believe it to be morally wrong--we are mindful of our Lord's injunction not to resist evil with evil; (2) We believe it to be destructive in its effect on the judges, the juries, and the larger communities who pass such judgments, as well as those who are its victims; (3) We believe it to be, in practice if not in intent, discriminatory and arbitrary, falling most heavily on those least able to defend themselves; (4) We believe it to be an ineffective deterrent to crime, less productive than many affirmative actions (e.g. social and penal reform) that might be taken to lessen criminal violence; and (5) Finally, the crucifixion itself reminds us of how possible it is for human justice to inflict execution on an innocent person.

--Episcopal Diocese of Kansas; Bishop and
Council, December 8, 1976

We affirm once again our opposition to capital punishment. Death is a judgment that should be left to God alone. We commit ourselves to the rehabilitation of offenders without the use or threat of the death penalty. We will set an example of compassion and make our community better and safer places to live. As the death penalty robs the person marked for death of human dignity, it detracts from the worth of each person in our country. Murder and other acts of violence are possible only when persons forget their own humanity and that of others. When another person is seen as an object or a thing, any brutality is possible.

--The Mennonite Church; Western District
Conference; October 22-24, 1976

Consortium on Legislative Concerns Representatives
CONSULTATION OF COOPERATING CHURCHES IN KANSAS

Mrs. Alice West, Lawrence, Kansas
United Presbyterian Church

Ms. Verda DeCoursey, McPherson, Kansas
Church of the Brethren

The Rev. Dave Stewart, Manhattan, Kansas
Kansas Baptist Convention

Ms. Nancy Lengel, McPherson, Kansas
Church of the Brethren

Mr. K. Ray Marrs, Arkansas City, Kansas
Kansas West Conference, United Methodist
Church

Representative Ruth Wilkin, Topeka, Kansas
United Presbyterian Church

The Rev. John McLaughlin, Topeka, Kansas
Episcopal Diocese of Kansas

Dr. Jack Bremer, Topeka, Kansas
Kansas East Conference, United Methodist
Church; Chairperson

Mrs. Edith Stucky, McPherson, Kansas
General Conference, Mennonite Church

LEGISLATIVE COORDINATOR:

Ms. Darlene Stearns, Topeka, Kansas
(913) 235-3757

C.C.C.K. EXECUTIVE COORDINATOR:

Ms. Dorothy Berry, Topeka, Kansas
(913) 272-9531



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

January 10, 1978

MEMORANDUM

TO: The Honorable Richard Brewster, Chairman and
the House Judiciary Committee

FROM: Curt T. Schneider, Attorney General

RE: Death Penalty Legislation

As Attorney General, I support reinstatement of the death penalty in Kansas. In Furman v. Georgia, Chief Justice Burger stated, "legislative bodies have been given the opportunity and indeed unavoidable responsibilities, to make a thorough re-evaluation of the entire subject of capital punishment." Since the Chief Justice spoke in Furman, some thirty-eight states have adopted death penalty statutes. The Kansas Legislature has considered several capital punishment proposals in the past few sessions without reaching a consensus. In considering a death penalty bill in the current session, the legislature has the benefit of considering the guidelines enunciated in the United States Supreme Court's decisions which have considered other states' death penalty statutes.

I am submitting to the committee for its consideration and attention the attached proposed capital punishment bill which is drafted to most efficaciously achieve the objective enunciated in the Supreme Court opinions, i.e., the fair and evenhanded application of the death penalty to offenders in similar circumstances.

Although many types of offenses are reprehensible and arguably could be deterred more effectively by the presence of the death penalty, it would seem that this most ultimate of penalties should be reserved solely for the most severe offense outlawed by society, first-degree murder. Although admittedly many offenses other than first-degree murder may inflict tragic

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consequences upon their victims, when the factor of the proportionality of a death sentence to a particular offense is considered, it is reasonable to restrict the imposition of the penalty to those situations where a life has been taken by the offender. Of equal importance in determining the type of offenses that should be subject to the penalty is the fact that death sentences in the State of Kansas in this century have been imposed and executed only upon those convicted of first-degree murder.

The significant question remains as to what categories of first-degree murders should be subject to the death penalty. The Supreme Court, although not indicating that the death penalty could not be imposed in all instances of first-degree murder, clearly demonstrated a preference for statutes that restricted the sanction to those specific categories of the offense deemed especially reprehensible by society. This narrowing of focus was the purpose served by the aggravating circumstances.

Although the following does not purport to constitute a comprehensive enumeration of the special circumstances warranting the imposition of a death penalty in a first-degree murder case, reasonable specifications of aggravating circumstances would include: (1) murder of public officers or employees during the course of his official duties or as a result of the exercise of his or her official duties; (2) murder committed by one serving a felony sentence; (3) murder committed in an especially heinous, atrocious or cruel manner; (4) murder committed by one posing a great risk of death to many persons; (5) murder performed for hire or for the purpose of obtaining anything of monetary value; (6) murder committed during the commission inherently dangerous felonies, i.e., kidnapping, burglary, robbery, rape, etc.; and (7) murder committed by one previously convicted of first- or second-degree murder, voluntary manslaughter or aggravated battery.

Respecting the so-called mitigating circumstances, it would clearly seem preferable to designate them by statute in order to focus the jury's attention on the proper factors rather than follow the Georgia practice of non-specification. However, since any such list of factors cannot possibly be all inclusive, the provision should also generally allow any other relevant evidence in mitigation, thus insuring full consideration of the character of the offender and avoiding any possible constitutional challenges under either the federal and state (§ 9 of the Kansas Bill of Rights) constitutions.

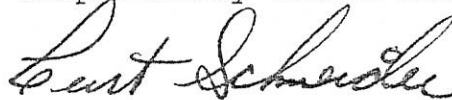
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Certain procedural guarantees should be enacted to insure the proper consideration and application of the aggravating and mitigating circumstances by the sentencing authority, be it judge or jury. Thus, the sentencing authority should be directed to weigh the factors against each other in reaching its penalty assessment and should be required to find the existence of an aggravating circumstance beyond a reasonable doubt. Although none of the statutes involved in the recent cases contained such a provision, it would seem appropriate to provide for reciprocal discovery by the parties prior to the penalty stage in order to prevent undue surprise in the presentation of the evidence. Also, it would seem advisable to allow the defendant to produce psychiatric evidence at the penalty stage even if a defense of mental incapacity was not relied upon at trial to insure that all relevant evidence is brought before the judge or jury. In order to avoid undue delay between the guilt and penalty stages of the proceedings, any mental evaluation could be conducted in advance of trial.

Insofar as appellate review is concerned, the Georgia system requiring the court to analyze the evidence and to compare the penalty imposed with that imposed in similar cases should be statutorily provided. In order to insure that all similar cases are indeed considered, the Kansas Supreme Court should be authorized to compare not only cases in which a death penalty has been imposed, but also those cases where a defendant was found guilty of a capital crime but was sentenced to life imprisonment.

The above mentioned considerations are incorporated into the attached bill prepared by my office. I stand ready to assist the committee with any legal opinions or other questions they may have concerning the subject of capital punishment during their deliberations in drafting a bill and I ask that careful consideration be given the attached proposal.

Respectfully submitted,



CURT T. SCHNEIDER
Attorney General

AN ACT relating to sentencing procedures in capital felonies
Be it enacted by the Legislature of the State of Kansas

Section 1. Separate proceedings on issue of penalty -
Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by K.S.A. 21-4501. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special jury of twelve persons to determine the question of the penalty to be imposed. If the trial jury has been waived, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted by the court. In the proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated hereafter. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the admission of any evidence obtained in violation of the Constitutions of the United States or the State of Kansas. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument.

Sec. 2. Instructions of the Court in jury proceedings - At the conclusion of the evidentiary portion of the proceedings, the court shall provide instructions to the jury orally and in writing to guide its deliberations. The court's instructions shall include those aggravating and mitigating circumstances as demonstrated by the evidence and all other matters necessary to the proper consideration of the penalty decision.

Sec. 3. Jury deliberations - After hearing the evidence and argument of the parties, and having received the instructions of the court, the jury shall retire to deliberate whether a sentence of life imprisonment or death should be imposed upon the defendant. In determining the question of sentence, the jury shall initially determine whether any aggravating circumstances have been established beyond a reasonable doubt by the state. If the jury, by unanimous vote, finds the existence of one or more aggravating circumstances, it shall then determine whether any mitigating circumstances have been demonstrated and whether such circumstances, if present, outweigh the aggravating circumstances. Based upon these considerations, the jury shall determine whether a sentence of death or life imprisonment should be imposed. A death sentence shall require the unanimous consent of all jurors and shall be evidenced in writing, signed by the foreman of the jury, designating the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. Should the jury, after a reasonable period for deliberation, be unable to reach a verdict, the jury shall be discharged and shall be deemed to have rendered a verdict of life imprisonment. In non-jury cases, the

court shall follow the requirements of this section in determining the sentence to be imposed.

Sec. 4. Trial court review of sufficiency of jury's verdict - Notwithstanding the verdict of the jury concerning the sentence to be imposed, the trial court shall review the sentence in all cases to ascertain whether it is supported by the evidence. If the court should determine that the sentence is not supported by the evidence, it shall be authorized to modify the sentence to life imprisonment or death. However, whenever the court enters a judgment modifying the sentencing verdict of the jury, the court shall set forth its reasons for so doing in a written memorandum which shall become part of the record.

Sec. 5. Review of judgment and sentence - A judgment of conviction resulting in a death sentence shall be subject to automatic review in the Supreme Court of Kansas. The review shall be expedited in every manner consistent with the proper presentation of the appeal. It shall be the duty of the court reporter to transcribe the entirety of the trial and sentencing proceedings in the case and to prepare a certified record thereof within sixty (60) days of the rendition of sentence by the court. For good cause shown, the trial court may allow an additional period of thirty (30) days in which the transcript shall be completed. Upon completion of the transcript, the clerk of the trial court shall certify the entire record and transmit the same to the Clerk of the Supreme Court together with a notice setting forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, and a narrative statement

of the offense, the judgment, and the punishment prescribed. The briefs of the parties shall be filed in accordance with the Rules of the Supreme Court and the appeal shall be given priority for hearing over all other types of cases.

The Supreme Court of Kansas shall consider the question of punishment as well as any errors asserted in the appeal and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.

Regarding the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(b) Whether the evidence supports the findings that an aggravating circumstance or circumstances existed and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances and

(c) Whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Similar cases shall include, in addition to those in which a death sentence has been imposed for the particular offense, those in which a defendant has received a sentence of life imprisonment.

The court shall be authorized to enter such orders as are necessary to effect a proper and complete disposition of the appeal. In its decision, the court shall include a reference to the similar cases which it took into consideration.

Sec. 6. Aggravating circumstances - Aggravating circumstances shall be limited to the following:

(a) The offense of first degree murder was committed by a person with a prior record of conviction for first or second degree murder, aggravated kidnapping, aggravated robbery, voluntary manslaughter, or aggravated battery.

(b) The offense of first degree murder was committed by a person who knowingly created a great risk of death to more than one person.

(c) The killing of a human being occurred while the offender was engaged in the commission of, or the attempted commission of, any robbery, burglary, kidnapping, arson, or rape.

(d) The offender committed the offense of first degree murder for himself or another for the purpose of receiving money or any other thing of monetary value or authorized or employed another person to commit the offense of first degree murder.

(e) The offense of first degree murder was committed against a public officer or employee during or because of the exercise of his official duties or against a former public officer or employee because of the exercise of his official duties.

(f) The offense of first degree murder was committed in order to avoid or prevent a lawful arrest or prosecution.

(g) The offense of first degree murder was committed in an especially heinous, atrocious, or cruel manner.

(h) The offense of first degree murder was committed by a person serving a sentence of imprisonment for a felony offense.

Evidence in aggravation of the offense shall be limited to those circumstances revealed to the defendant by the state prior to trial.

Sec. 7. Mitigating circumstances - Mitigating circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme distress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Sec. 8. Death sentence constitutionality - In the event the death penalty or any provision of this act authorizing the death penalty is held to be unconstitutional by the Kansas Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court, and the court shall sentence such person to imprisonment for life.

Sec. 9. Severability - The provisions of this act are severable and if any part or provision hereof shall be held void, the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

K.S.A. 21-3401 is hereby amended as follows:

Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony.

Murder in the first degree is a class A felony *for which the penalty shall be death or imprisonment for life.*

K.S.A. 21-4501 is hereby amended as follows:

For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:

(a) Class A, the sentence for which shall be death or imprisonment for life *as provided by law.* ~~If there is a jury trial the jury shall determine which punishment shall be inflicted.~~ ~~If there is a plea of guilty or if a jury trial is waived the court shall determine which punishment shall be inflicted and in so doing shall hear evidence;~~

K.S.A. 21-3421 is hereby amended as follows:

Aggravated kidnapping is kidnapping, as defined in section 21-3420, when bodily harm is inflicted upon the person kidnapped.

Aggravated kidnapping is a class A felony *for which the penalty shall be imprisonment for life.*

K.S.A. 21-3433 is hereby amended as follows:

Aircraft piracy is the willful or unauthorized seizure in this state of any aircraft containing a pilot and one or more persons by the use of force or any other means with the intent to exercise control over the aircraft.

Aircraft piracy is a class A felony for which the penalty shall be imprisonment for life.

K.S.A. 21-3801 is hereby amended as follows:

(1) Treason is levying war against the state, adhering to its enemies, or giving them aid and comfort.

(2) No person shall be convicted of treason unless on the evidence of two (2) witnesses to the overt act or confession in open court.

(3) Treason is a class A felony for which the penalty shall be imprisonment for life.