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# Capital Punishment ... On the Way Out?

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## CAPITAL PUNISHMENT . . . ON THE WAY OUT?

*There is a compelling need to review the Supreme Court's position regarding capital punishment, in light of a growing national trend in the courts, as well as the state legislatures, away from the death penalty as an acceptable mode of punishment for the convicted felon. Five crucial issues are recognizable: First, has the Supreme Court by prolonged implication of silence recognized that capital punishment is not violative of the eighth amendment prohibition against cruel and unusual punishment? Second, why has the Supreme Court remained silent during this period while a growing number of cases have been appealed in those states where capital punishment is the established law? Third, what of the hundreds of condemned felons who hope for Supreme Court review of the issue of whether the death penalty is cruel and unusual punishment? Fourth, what will be the implications of the congressional review which is currently taking place? Fifth, can the legislatures of the various states formulate law utilizing the punishment of death, in possible direct contravention to the rights of the individual as guaranteed by the Constitution?*

### I. THE SUBJECTIVE REACTION TO THE DEATH PENALTY.

Is judicial death either essential or for the public good? Lewis E. Lawes, while Warden of Sing-Sing prison in New York in the Twenties and early Thirties, developed specific opposition to the death penalty. He witnessed the deaths of over 150 men and one woman and stated:

My opposition to capital punishment is not based on sentiment or sympathy . . . I am opposed to the death penalty because the evasions, the inequality of its application, the halo with which it surrounds every convicted murderer, the theatrics which are so important to every court proceeding where the stake is life or death, the momentary hysteria, passion and prejudice aroused by the crime which often make it impossible to weigh the facts carefully and impersonally and, finally, the infrequency of its application—all tend to weaken our entire structure of social control. They make for cynicism and disrespect of all law enforcing agencies, and encourage the desperate criminal toward the extreme crime. He knows that his gamble with the death penalty is safer than with a long term in prison for a lesser offence.<sup>1</sup>

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<sup>1</sup> L. LAWES, TWENTY THOUSAND YEARS IN SING-SING 307-308 (1932) [hereinafter cited as LAWES].

As early as 1924, Clarence Darrow, the eminent defense attorney, immediately following his defense of Leopold and Loeb in the Bobby Franks murder trial, was challenged to a debate by Judge Alfred J. Talley of the Court of General Sessions, New York City. The following are Darrow's personal views as espoused in their debate:

We teach people to kill and the State is the one that teaches them. If the State wishes that its citizens respect human life, then the State should stop killing. It can be done in no other way, and it will perhaps not be fully done that way. There are infinite reasons for killing. There are infinite circumstances under which there are more or less deaths. It never did depend and never can depend upon the severity of the punishment . . . .

Now, why am I opposed to capital punishment? It is too horrible a thing for a State to undertake . . . .

The people of the State kill a man because he killed someone else—that is all—without the slightest logic, without the slightest application to life, simply from anger, nothing else! I am against it . . . because I believe that as the hearts of men have softened they have gradually gotten rid of brutal punishment, because I believe that it will only be a few years until it will be banished forever from every civilized country—even New York; because I believe that it has no effect whatever to stop murder.<sup>2</sup>

Kansas abolished the death penalty in 1907<sup>3</sup> and restored it in 1935.<sup>4</sup> During this period Governor Harry H. Woodring made a valiant plea not to restore the death penalty, vetoing a bill only for it to be later carried by the legislature:

The possibility of the infliction of the death penalty in any case dramatizes it before the public. What should be a solemn deliberation becomes a public spectacle, with the resultant brutalizing effect upon society. It is not desirable to have our communities divided, with one faction demanding the life of

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<sup>2</sup> A. WEINBERG, ATTORNEY FOR THE DAMNED 92, 96-97 (1957). Judge Talley's vindictive retort, although accepted in substance by some would not be the general view of today:

The penalty of death is the one thing the criminal fears . . .

[T]hat where [a person's] life in imminent danger "neither God nor man would question [his] right to defend [his] life." If the individual has that right to kill in self-defense . . . why has not the State, "which is nothing more than an aggregation of individuals, the same right to defend itself against unjust aggression and unjust attack?" . . .

Those who want to take away from the State the power to impose the death sentence seek to "despoil the symbol of justice."

The object of punishment of crime must be deterrent, and it must be vindictive — not vindictive in the sense of revengeful, but it must be imposed so that the Law and its majesty and sanctity may be vindicated" . . . *Id.* at 90.

<sup>3</sup> Act of January 30, 1907, ch. 188, (1907) Laws of Kansas 299–300 (repealed 1935).

<sup>4</sup> Act of March 12, 1935, ch. 154, [1935] Laws of Kansas 234. For the most recent codification of the Kansas view on capital punishment see KAN. STAT. ANN. ch. 21, §403 (1964).

the criminal and another faction going to the other extreme of sympathy for the accused, thus greatly increasing the possibility of error, and *there is no remedy in case of error.*<sup>5</sup>

In his testimony before the Royal Commission of Capital Punishment, Mr. Justice Frankfurter stated that he was strongly against capital punishment for reasons that are not related to concern for the murderer or the risk of convicting the innocent:

... When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life.<sup>6</sup>

In his dissenting opinion in *Rudolph v. Alabama*,<sup>7</sup> Mr. Justice Goldberg offered these substantial questions for the Court to consider:

I would grant certiorari in this case and in No. 169, Misc., *Snider v. Cunningham*, *supra*, to consider whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.

The following questions, *inter alia*, seem relevant and worthy of argument and consideration:

(1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate "evolving standards of decency that mark the progress of our maturing society,"<sup>8</sup> or "standards of decency more or less universally accepted"?<sup>9</sup>

(2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against "punishments which by their excessive . . . severity are greatly disproportioned to the offences charged"?<sup>10</sup>

(3) Can the permissible aims of punishment (*e.g.*, deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (*e.g.*, by life imprisonment); if so, does the imposition of the death penalty for rape constitute "unnecessary cruelty"?<sup>11</sup>

<sup>5</sup> LAWES, *supra* at 304 (emphasis added).

<sup>6</sup> TASK FORCE REPORT: THE COURTS 27-28 (1967).

<sup>7</sup> 375 U. S. 889, 889-891 (1963).

<sup>8</sup> *Trop v. Dulles*, 356 U. S. 86, 101 (Opinion of Warren, C. J., joined by Justices Black, Douglas, and Whittaker).

<sup>9</sup> *Francis v. Resweber*, 329 U. S. 459, 469 (Frankfurter, J., concurring).

<sup>10</sup> *Weems v. United States*, 217 U. S. 349, 371, quoting from the dissenting opinion of Field, J., in *O'Neil v. Vermont*, 144 U. S. 323, 339-340. Cf. *Lambert v. California*, 355 U. S. 225, 231 dissenting opinion of Frankfurter, J.).

<sup>11</sup> *Id.* at 370.

Rather than excuse the use of the death penalty by stating we do it because everyone else does it, Judge Cooley in his work on *Constitutional Limitations* gives the reasoning why, until public outcry, the death penalty is acceptable in a constitutional sense:

It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offence which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be punished to the extent and in the mode permitted by the common law for offences of similar nature. But those degrading punishments which in any state had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual.<sup>1 2</sup>

Unfortunately, the execution of the innocent is not a myth. Edward Bennett Williams in his book, *One Man's Freedom*,<sup>1 3</sup> notes four cases in which a jury of twelve sentenced innocent men to their death. On August 12, 1925 a paymaster in Buffalo, New York was robbed and killed by a bandit wearing dark glasses. One Edward Larkman was arrested and charged with the crime. He was improperly identified by the sole eye-witness to the crime, an identification based on a total of five seconds of observation. Shortly before Larkman's scheduled execution Governor Alfred E. Smith commuted his sentence to life imprisonment. In commuting the sentence Governor Smith said that should a later disclosure prove him innocent, "The State would be helpless if [he] were dead."<sup>1 4</sup> Two years later a Buffalo gangster, Anthony Kolkiewicz, confessed to the crime.

In Britain, Timothy Evans, an illiterate lorry driver, was accused of murdering his wife and child. At trial, Evans accused John Christie, the chief witness for the Crown. But the jury believed Christie and disbelieved Evans who was found guilty and on March 9, 1950, Evans was hanged while still protesting his innocence. Three years later the same Christie was arrested and accused of murdering his own wife. Upon a thorough search six other victims (women) were found. Christie confessed to the earlier murders for which Evans was hanged.<sup>1 5</sup>

In another English case a prostitute was murdered, and one Walter Graham Rowland was arrested, convicted and sentenced to die. He had a criminal record and admittedly had been intimate with the victim and was seen in her company shortly before she was killed. He made a moving plea of innocence when asked the usual questions as to whether

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<sup>1 2</sup> T. M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 472 (7th ed. 1903).

<sup>1 3</sup> EDWARD BENNETT WILLIAMS, ONE MAN'S FREEDOM (1962).

<sup>1 4</sup> *Id.* at 237.

<sup>1 5</sup> *Id.* at 238.

he had anything to say about why sentence of death should not be imposed according to law. He answered:

Yes, I have, my Lord. I have never been a religious man, but as I have sat in this court during these last few hours the teachings of my boyhood have come back to me, and I say in all sincerity and before you and this court that when I stand in the Court of Courts before the Judge of Judges I shall be acquitted of this crime. Somewhere there is a person who knows that I stand here today an innocent man. The killing of this woman was a terrible crime, but there is a worse crime being committed now, my Lord, because someone with the knowledge of this crime is seeing me sentenced today for a crime which I did not commit. I have a firm belief that one day it will be proved in God's own time that I am totally innocent of this charge, and the day will come when this case will be quoted in the courts of this country to show what can happen to a man in a case of mistaken identity. I am going to face what lies before me with the fortitude and calm that only a clear conscience can give. That is all I have got to say, my Lord.<sup>16</sup>

After exhausting his appellate rights Rowland, like Evans, was hanged while still protesting his innocence. Four years later the real killer walked into a police station and confessed to the crime.<sup>17</sup> Capital punishment is indefensible if only because it renders irreversible these miscarriages of justice.

## II. THE VALIDITY OF CAPITAL PUNISHMENT AS A DETERRENT

One of the primary rationales for retaining capital punishment is that it serves as an effective deterrent against the perpetration of heinous offences. At present, it is impossible to substantiate or disprove the validity of this viewpoint. A most extensive study on the question, made by Professor Thorsten Sellin, raises doubts as to the unique deterrent effect of capital punishment. Professor Sellin analyzed the 1930-37 murder rates of several groups of neighboring and otherwise similar states; within each group one or more states had abolished the death penalty. Professor Sellin found that the trends in homicide were substantially similar for comparable capital and non-capital punishment states. Within each group of states having similar social and economic conditions, it was impossible to distinguish the abolition state from the others.<sup>18</sup> He examined the data from states which had experimented with the abolition of the death penalty and then reinstated it; this data did not reveal any significant increase in homicide rates when it was

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<sup>16</sup> *Id.* at 239.

<sup>17</sup> *Id.*

<sup>18</sup> See Sellin, *The Death Penalty*, in MODEL PENAL CODE (tent. Draft No. 9, 1959).

abolished, nor any significant decrease in the rates when it was restored. He also made a survey of the number of metropolitan policemen killed in the line of duty in the states which had abolished capital punishment and in states which had retained it. His data shows that there was no significant difference between the two types of states in so far as the safety of policemen was concerned.

Professor Glen W. Samuelson has reviewed the results of the re-establishment of capital punishment in Delaware.<sup>19</sup> Quoting Professor Samuelson:

The annual average number of murder commitments for the ten year period between July 1, 1956 to June 30, 1966 was 17.1. If abolition encouraged more murders, a higher than 17.1 annual rate of murder commitments should occur during the abolition period than before or after.

During the 21 months before abolition, 40 murder commitments occurred or a rate of 22.8 per year, 5.7 above the 10 year annual rate of 17.1. The annual rate prior to abolition was 9.0 higher than the rate during abolition (22.8-13.8=9.0).

The 44.5 months during abolition involved 51 participants or an annual rate of 13.8 murder commitments of 3.3 below the 10 year average.

During the 54.5 months after the restoration of the death penalty, 80 murder commitments occurred or a rate of 17.5 per year, 4 per year higher than the 1 year average and 3.7 higher than the annual rate during abolition (17.5-13.8=2.7).

From the results of this study, the restoration of capital punishment for first degree murder apparently did not act as a deterrent. *The return of the death penalty was primarily a reaction to four well publicized brutal murders in Southern Delaware.*<sup>20</sup>

### III. STATE COURTS INTERPRETATION OF THE DEATH PENALTY IN LIGHT OF THE EIGHTH AMENDMENT

State legislative debate has centered around the established right to determine punishment and sentence for those crimes committed in the jurisdiction of each particular state. Seemingly, there has been no original court treatment holding capital punishment as cruel and unusual punishment.<sup>21</sup> Rather legislative action in those states where capital punishment is abolished has been taken without the specific direction of the state courts.

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<sup>19</sup> See *Why Was Capital Punishment Restored in Delaware?* (60 J. CRIM. L. C. & P. S. 148 (1969)).

<sup>20</sup> *Id.* at 149-150 (emphasis added).

<sup>21</sup> U. S. CONST. amend. VIII, "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It is interesting to note the purpose of the infliction of death as noted in *State v. Tomassi*<sup>22</sup> at the beginning of the twentieth century:

But finally it is argued that the so-called Electrocutation Act is in contravention of our Constitution (article 1, § 15), which declares that "cruel and unusual punishments shall not be inflicted."

It is not easy to define what punishments are "cruel and unusual" within the the constitutional inhibition. In a limited sense, anything is cruel which is calculated to give pain or distress, and since punishment imports pain or suffering to the convict, it may be said that all punishments are in some sense cruel. But, of course, the constitution does not mean that crime for this reason is to go unpunished. On the contrary, it plainly contemplates that crime can only be effectively deterred by inflicting some sort of pain or suffering upon the convicted offender.

By the common law, murder, and indeed many crimes much less serious, were punished by death. This is still the punishment under our law for the crime of murder in the first degree. It is absurd to suppose that the Constitution prohibits it. Therefore, it is open to the legislature to determine some mode in which the death penalty may be inflicted. Instead of hanging by the neck, they have now provided that death shall be caused as speedily as possible by the direct application of electricity to the body of the convict. On its face the statute imports an effort by the lawmaking body to mitigate the pain and suffering of the convict. We cannot assume that death by electric current is a cruel punishment in the constitutional sense.<sup>23</sup>

In Ohio, the Ohio Supreme Court held in *State v. Crampton*:<sup>24</sup>

It is not argued that the penalty of death by electrocution is any more cruel or unusual than death by the historical methods of hanging or shooting. Thus, defendant's contention must amount to one that the punishment of death for the crime of first degree murder violates the constitutional prohibition against cruel and unusual punishments.

The crime of first degree murder is the most serious crime in this state and, in the instant case, required a finding by the jury, beyond a reasonable doubt, of an intentional killing with deliberate and premeditated malice. If any crime will support the death penalty, this crime will.<sup>25</sup>

In *People v. Doyle Alva Terry*,<sup>26</sup> the defendant contended that being

<sup>22</sup> 75 N. J. L. 739, 69 A. 214 (1908).

<sup>23</sup> 75 N. J. L. 746-747, 69 A. 217-218.

<sup>24</sup> 18 Ohio St. 2d 182, 248 N. E. 2d 614 (1969).

<sup>25</sup> 18 Ohio St. 2d 187, 248 N. E. 2d 618.

<sup>26</sup> 70 Cal. Sup. 2d 410, 77 Cal. Rptr. 460, 454 P. 2d 36 (1969). In *Purvis* the petitioner sought to prevent the holding of a fourth penalty trial after he had three times obtained reversal of the death penalty because of misconduct of the prosecution.



subject to a fifth trial in which the punishment would be death (the three previous trials having been reversed and the fourth declared a mistrial) would constitute cruel and unusual punishment and be in violation of the eighth amendment. The Supreme Court of California in its decision cited a previous California case, *Purvis v. State of California*.<sup>27</sup> The court in *Purvis* stated:

As a general proposition having to sit through a trial may be an onerous burden for a defendant, but it is not a cruel and certainly not an unusual punishment . . . .

. . . .

Certainly the California authorities should now be on notice that there is a constitutional limit to the number of times a man must undergo a trial where his life is at stake, and where one of the reasons for the repeated trials is deliberate misconduct by the prosecutor.<sup>28</sup>

The court, in *Terry*, didn't regard the fourth penalty trial as exceeding that limit.

In the instant case, where deliberate misconduct has not been a factor in the reversal of penalty trials, a fifth penalty trial will not constitute such punishment.<sup>29</sup>

In *People v. Vaughn*,<sup>30</sup> the defendant contended that to subject him to the death penalty for an assault which did not result in the death of the victim is to inflict cruel and unusual punishment upon him. The court held:

We have long upheld section 4500 [California death penalty] against this and related challenges to the penalty which it imposes. These decisions do not necessarily settle the question for all time, however, since in applying the Eighth Amendment's ban on cruel and unusual punishment we must reflect "the evolving standards of decency that mark the progress of a maturing society."<sup>31</sup>

In a Texas decision, *Ellison v. State of Texas*,<sup>32</sup> Judge Woodley made references to Mr. Justice Goldberg's dissent in *Rudolph v. Alabama*, supra, yet still affirmed a lower court's decision that the crime of robbery combined with rape could be punished by the death penalty. The Texas decision shows the trend in the state courts against the establishment of new guidelines, the courts being content to remain in the past. The defendant was found guilty of the crime of robbery

<sup>27</sup> 234 F. Supp. 147 (N. D. Cal. 1964).

<sup>28</sup> *Id.* at 151.

<sup>29</sup> 77 Cal. Rptr. at 465, 454 P. 2d at 41-42.

<sup>30</sup> 78 Cal. Rptr. 186, 455 P. 2d 122 (1969).

<sup>31</sup> 78 Cal. Rptr. at 192, 455 P. 2d at 129.

<sup>32</sup> *Ellison v. State*, 419 S. W. 2d 849 (Tex. Crim. App. 1967).

with a deadly weapon. The Texas Court of Criminal Appeals held that evidence that the defendant had kidnapped and raped a sales clerk after robbing a liquor store was admissible at the defendant's trial, even though he was being tried for robbery with a deadly weapon, and the death penalty was not excessive or cruel and unusual punishment for the conviction of robbery with a deadly weapon. The court stated that:

We are aware of no authority for a holding that death is excessive punishment for robbery with a deadly weapon. The nearest appellant approaches the question is the dissenting opinion in *Rudolph v. Alabama* . . . which expressed the view that certiorari should be granted "to consider whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life."<sup>33</sup>

On December 11, 1970 the Fourth Circuit Court of Appeals, sitting as a court of three judges, rendered its decision in *Ralph v. Warden, Maryland Penitentiary*.<sup>34</sup> The court held that in a conviction for rape where the victim's life was neither taken or endangered, the punishment of death was prohibited under the eighth amendment, as being a cruel and unusual punishment for the crime involved.

Armed with a tire iron, Ralph broke into the victim's home late at night. Threatening her and her young son, who was asleep in another room, with death if she did not submit, he forcibly committed rape and sodomy . . . . The physician who thoroughly examined her shortly after the crime testified that he found "no outward evidence of injury or violence" nor any signs of unusual psychological trauma.<sup>35</sup>

Five days later Ralph was arrested in the District of Columbia on other charges and while incarcerated, he confessed to the Maryland crime.

The court would not accept the state's argument, other than lack of precedent, favoring Ralph:

[T]hat abolition of capital punishment presents a political question which only the legislative branch of government can resolve.<sup>36</sup>

<sup>33</sup> *Id.* at 851.

<sup>34</sup> 438 F. 2d 786 (4th Cir. 1970), *petition for cert. filed*, 40 U.S.L.W. 3058 (U.S. June 1, 1971) (No. 228).

<sup>35</sup> *Id.* at 788. Part of the Court's rationale was espoused in this quote from *Snider v. Peyton*, 356 F. 2d 626, 627 (4th Cir. 1966):

There is extreme variation in the degree of culpability of rapists. If one were sentenced to death upon conviction of rape of an adult under circumstances lacking great aggravation, the Supreme Court might well find it an appropriate case to consider the constitutional questions tendered to us. Even inferior courts such as ours might find the question not foreclosed to it if the actual and potential harm to the victim was relatively slight.

<sup>36</sup> *Id.*

The court also noted:

The fact that a Maryland statute<sup>37</sup> authorizes capital punishment for rape does not conclusively establish the punishment's constitutionality, for the Eighth Amendment is a limitation on both legislative and judicial action.<sup>38</sup>

The court commented on the extreme infrequency of execution for rape:

Infrequent imposition of the death penalty for rape not only indicates that it is excessive, it also suggests that it is meted out arbitrarily. In 1960, the year Ralph committed the offence, 15,560 reports of rape were recorded in the United States . . .

In contrast to the frequency of the commission of rape, the imposition of the death penalty is extremely rare. In 1961, the year in which Ralph was convicted, 21 persons were sentenced to death for rape, and in the period 1960-1968, 101 convicted rapists received death sentences. During the same period of time 28 prisoners were actually executed for the crime. The high incidence of the crime compared with the low incidence of the death penalty suggests the lack of a rational ground for selecting the prisoners on whom the death penalty is inflicted. This is particularly true when, as here, the harshest penalty is imposed on a rapist whose act is not marked with the great aggravation that often accompanies this crime.<sup>39</sup>

The court held:

We conclude, therefore, that two factors coalesce to establish that the death sentence is so disproportionate to the crime of rape when the victim's life is neither taken nor endangered that it violates the Eighth Amendment. First, in most jurisdictions death is now considered an excessive penalty for rape. This has been demonstrated by the legislative trend to abolish capital punishment for this crime and by the infrequency of its infliction in jurisdictions that still authorize it. Second, when a rapist does not take or endanger the life of his victim, the selection of the death penalty from the range of punishment authorized by statute is anomalous when compared to the large number of rapists who are sentenced to prison. Lest our opinion be given a breadth greater than is necessary for the decision of this case, we do not hold, despite the argument of the *Amicus Curiae*, that death is an unconstitutional punishment for all rapes.<sup>40</sup>

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<sup>37</sup> MD. ANN. CODE art. 27, §461 (Repl. Vol. 1967) provides:

Every person convicted of a crime of rape or as being accessory thereto before the fact shall, at the discretion of the court, suffer death, or be sentenced to confinement in the penitentiary for the period of his natural life, or undergo a confinement in the penitentiary for not less than eighteen months nor more than twenty-one years; and penetration shall be evidence of rape, without proof of emission.

<sup>38</sup> 438 F. 2d at 788-789.

<sup>39</sup> *Id.* at 793.

<sup>40</sup> *Id.*

The court noted that (1) the Commission on National Reform of Federal Criminal law has recommended the abolishment of the death penalty for the crime of rape; that (2) in the District of Columbia Congress eliminated death as a penalty for rape;<sup>41</sup> and that (3) the Model Penal Code in its proposed official draft of 1962 has recommended repeal of the death penalty for rape.<sup>42</sup>

#### IV. MARYLAND'S STAND ON CAPITAL PUNISHMENT.

Inflicting the death sentence by hanging was held not cruel or unusual punishment in Maryland in 1914. In *Dutton v. State*,<sup>43</sup> appellant was convicted of an assault with intent to rape and was sentenced to be hanged by virtue of a statute in effect at that time. It was argued that the penalty was contrary to the Constitution, forbidding cruel and unusual punishments. The court said:

Article 16 of the Declaration of Rights of our present Constitution declares that "No law to inflict cruel and unusual pains and penalties ought to be made in any case or at any time hereafter," and Article 25 is, "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the Courts of Law." It would hardly be contended that the punishment provided by our statute for the crime of rape—death or confinement in the penitentiary for not less than eighteen months, or more than twenty-one years—is in conflict with those provisions, and when the Legislature changed the penalty for an attempt to commit the crime to death or confinement in the penitentiary, in the discretion of the Court, it is probable that it took into consideration the fact that it is often difficult to prove whether the crime of rape was actually consummated. Under some circumstances, the outrage upon the particular woman and upon society can scarcely be said to be less because the prisoner did not succeed in accomplishing his purpose than if he had. If a revolting crime of this nature is so frequently repeated as, in the judgment of the Legislature, to call for such punishment, we cannot declare it to be contrary to such provisions of the Constitution.<sup>44</sup>

Maryland has gone through a change in application of its death penalty. As late as 1951 the sentence of death was by hanging.

If an offender, on conviction, may be sentenced to suffer death, the Court before whom such offender shall be tried and convicted, shall sentence him to suffer death by hanging by the

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<sup>41</sup> D. C. Ct. Ref. & Pro. Act of 1970, Pub. L. No. 91-358, §20, 84 Stat. 473, 600, *amending* D. C. CODE ANN. §22-2801 (1970).

<sup>42</sup> ALI, MODEL PENAL CODE, § §213.1 and 6-06 (Proposed Official Draft, 1962).

<sup>43</sup> 123 Md. 373, 91 A. 417 (1914).

<sup>44</sup> 123 Md. at 385, 91 A. at 422.

neck; and when a case has been removed for Trial and the party shall be sentenced to be hung, the Court shall remand him to the place where the indictment was found, where such offender shall remain in the custody of the Sheriff of that County or City for disposition as hereinafter provided.<sup>45</sup>

With the passage of time, Maryland has what would appear to be a more humane method of execution:

If an offender, on conviction, may be sentenced to suffer death, the Court before whom such offender shall be tried and convicted, shall sentence him to suffer death by the administration of a lethal gas; and when a case has been remanded for trial and the party shall be sentenced to death, the Court shall remand him to the place where the indictment was found, where such offender shall remain in the custody of the Sheriff of that County or City for disposition as hereinafter provided.<sup>46</sup>

Yet an attempt to administer a more humane death still does not answer the query whether the death penalty by itself is cruel and unusual punishment. The following crimes in which murder is committed as a by-product all fall under the death penalty: conviction of murder in the first degree,<sup>47</sup> murder committed in perpetration of arson,<sup>48</sup> murder committed in burning barn, tobacco-house, etc.,<sup>49</sup> and murder committed in perpetration of rape, sodomy, mayhem, robbery, burglary, kidnapping, storehouse breaking, daytime house-breaking or escape.<sup>50</sup>

In the context of defining the latitude of the trial court's and jury's discretion in prescribing the death penalty, the Maryland Code states:

Every person convicted of murder in the first degree, his or her aiders, abettors and counsellors shall suffer death or undergo a confinement in the penitentiary of the State for the period of their natural life, in the discretion of the Court before whom

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<sup>45</sup> MD. ANN. CODE art. 27, §503 (1951). Considered as humane, hanging by the neck until dead also involved witnessing the State's act:

The Warden of the Maryland Penitentiary is hereby authorized and directed to provide and maintain a permanent death chamber within the confines of said Penitentiary, and which said death chamber shall have all the necessary appliances for the proper execution of felons by hanging by the neck until dead. In said chamber shall be executed all felons upon whom the death penalty has been imposed, for offences committed on or after January 1st, 1923. Each execution shall be conducted by the said Warden or some assistant or assistants designated by him, in the presence of the Sheriff of the County or City where such felon was indicted, the physician of the said Penitentiary, or his assistant, and a number of respectable citizens numbering not less than six or more than twelve. Counsel for the convict and two ministers of the gospel may be present. MD. ANN. CODE art. 27, §504(1951).

<sup>46</sup> MD. ANN. CODE art. 27, §71 (1957).

<sup>47</sup> MD. ANN. CODE art. 27, §407 (1957).

<sup>48</sup> MD. ANN. CODE art. 27, §408(1957).

<sup>49</sup> MD. ANN. CODE art. 27, §409 (1957).

<sup>50</sup> MD. ANN. CODE art. 27, §410 (1957).

such person may be tried; provided, however, that the jury in a murder case who render a verdict of murder in the first degree, may add thereto the words "without capital punishment," in which case the sentence of the Court shall be imprisonment for life, and in no case where a jury shall have rendered a verdict in manner and form as herein prescribed "without capital punishment" shall the Court in imposing the sentence, sentence the convicted party to pay the death penalty.<sup>51</sup>

In *Abbot v. State*,<sup>52</sup> the accused had pleaded guilty to an indictment for murder and had been sentenced to be hanged. The Maryland Court of Appeals held that the extent of punishment rested solely with the trial court, and it was not to be the subject of appellate review.

Rape constitutes, by itself without loss of life, a crime by which the perpetrator or his accessory may also suffer the death penalty:

But no particular amount of force, either actual or constructive, is required to constitute rape. Necessarily that fact must depend upon the prevailing circumstances . . . [F]orce may consist of threats without violence. If the acts and threats of the defendant were reasonably calculated to create in the mind of the victim—having regard to the circumstances in which she was placed—a real apprehension, due to fear, of imminent bodily harm, serious enough to impair or overcome her will to resist, then such acts and threats are the equivalent of force.<sup>53</sup>

In *McEntire v. State*,<sup>54</sup> it was noted that penetration must be proved before there can be a conviction of rape; and yet penetration could be shown by testimony from the prosecuting witness that the defendant had "sexual intercourse" with her.

Some would say we have come a long way toward a humane approach to the death penalty wherein at the turn of the century:

If any person or persons shall willfully and maliciously make an assault upon any railroad train, railroad cars or railroad locomotive within this Territory for the purpose and with the intent to commit murder, robbery or any other felony, upon or against any passenger on said train or cars, or upon or against any engineer, conductor or fireman, brakeman or any officer or employee connected with said locomotive, train or cars, or upon or against any express messenger, or mail agent on said train, or in any of the cars thereof, on conviction thereof, shall be deemed guilty of a felony, and shall suffer the punishment of death.<sup>55</sup>

<sup>51</sup> MD. ANN. CODE art. 27, §413 (1957).

<sup>52</sup> 188 Md. 310, 52 A. 2d 489 (1947).

<sup>53</sup> *Hazel v. State*, 221 Md. 464, 469, 157 A. 2d 922, 925 (1960).

<sup>54</sup> 2 Md. App. 449, 235 A. 2d 311, 313 (1967).

<sup>55</sup> *Territory v. McGinnis*, 10 N. M. 269, 278-279, 61 P. 208, 212 (1900).

Yet review of the statutes presently in force in Maryland in 1971 would indicate quite to the contrary; we have remained static as regards capital punishment.

#### V. SUPREME COURT TREATMENT OF THE ISSUE OF CAPITAL PUNISHMENT.

The guideline the court has followed was first reported in *In re Kemmler*, in 1890.<sup>56</sup> There the court held:

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the mere extinguishment of life.<sup>57</sup>

In *Ex parte Wilson*,<sup>58</sup> Mr. Justice Gray in his majority opinion granting a plea for habeas corpus stated:

What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous . . . . But at the present day either stocks or whipping might be thought an infamous punishment.<sup>59</sup>

In 1910, the Court held in *Weems v. United States*<sup>60</sup> a sentence of fifteen years unconstitutional when the punishment was at hard labor in ankle chains, and life time civil disabilities were imposed for the falsification of a public record in the Philippines Territory, this penalty, *cadena temporal*, being held unconstitutionally disproportionate for so minor a crime.

The Supreme Court in 1947 was faced with a unique decision, in *Francis v. Resweber*<sup>61</sup> in which it, following the earlier *In re Kemmler* decision, upheld the death penalty as not violative of the eighth amendment. The issue and the fact situation are so unique that it is given here in detail.

Upon writ of certiorari, the Court reviewed a unique situation. Willie Francis, a black citizen of Louisiana was duly convicted of murder and in September 1945 was sentenced to be electrocuted for the crime. Pursuant to a warrant he was prepared for electrocution on May 3, 1946 and was placed in the official electric chair of the State of

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<sup>56</sup> 136 U. S. 436, 447 (1890).

<sup>57</sup> *Id.* at 447. See *Wilkerson v. Utah*, 99 U. S. 130 (1878), where it was held death sentences by shooting do not violate the eighth amendment.

<sup>58</sup> 114 U. S. 417 (1885).

<sup>59</sup> *Id.* at 427-428.

<sup>60</sup> 217 U. S. 349 (1910),s,

<sup>61</sup> 329 U. S. 459 (1947).

Louisiana in the presence of authorized witnesses. The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. He was thereupon removed from the chair and returned to prison. A new death warrant was issued by the Governor of Louisiana. By applications for certiorari petitioner claimed the protection of the due process clause of the fourteenth amendment on the ground that the execution under the circumstances would deny due process to him because of the double jeopardy provision of the fifth amendment and the cruel and unusual punishment provision of the eighth amendment.

The Court stated:

We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner. Petitioner's suggestion is that because he once went under the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. *The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.* The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.<sup>62</sup>

Mr. Justice Burton with Mr. Justice Douglas concurring offered a prophetic dissent, and conceivably Mr. Justice Douglas' view may well be the view he would hold today; seemingly this view is one to which

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<sup>62</sup> *Id.* at 473-464(emphasis added).



most lay people and jurists today adhere:

The capital case before us presents an instance of the violation of constitutional due process that is more clear than would be presented by many lesser punishments prohibited by the Eighth Amendment or its state counterparts. Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether. It is unthinkable that any state legislature in modern times would enact a statute expressly authorizing capital punishment by repeated applications of an electric current separated by intervals of days, or hours until finally death shall result.<sup>63</sup>

In 1958 the Court determined that a punishment for a crime could be cruel and unusual without regard to the seriousness of the crime. In *Trop v. Dulles*,<sup>64</sup> the court held that the punishment of expatriation violates the eighth amendment. It moved beyond concern with extreme, lingering physical pain to the mere possibility of much pain and then to similar distress; beyond that, it emphasized the sheer enormity of the punishment. The Court's decision although not holding that the death penalty is unconstitutional may offer some indicia of a development in thinking towards this end:

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. 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 power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect . . . The Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society.<sup>65</sup>

The Supreme Court found a procedure in 1968 for declaring the death penalty unconstitutional, though not challenging the legality of capital punishment per se. The Court held that a death sentence could

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<sup>63</sup> *Id.* at 473-474.

<sup>64</sup> 356 U. S. 86 (1958).

<sup>65</sup> *Id.* at 99-101.

not be carried out if the jury that imposed it was chosen by excluding veniremen for cause, simply because they voiced general objections to the death penalty or expressed religious or conscientious scruples against its infliction. The Court held that the only persons who may be constitutionally excluded are those who state they would never impose the death penalty; if the voir dire testimony in any given case indicates that veniremen were excluded on any broader basis than this, the death sentence will be deemed invalid.<sup>66</sup>

With the governors of those states having condemned men awaiting execution requiring some direction from the Court as to the constitutionality of the death penalty,<sup>67</sup> the Court rendered on May 3, 1971, a combined decision, *McGautha v. California* and *Crampton v. Ohio*<sup>68</sup> not on the constitutionality of capital punishment, but on the secondary issue as to the rights of the accused and condemned as to due process of law.

In *McGautha* the petitioner was convicted of first degree murder in California and was sentenced to death. The penalty was left to the jury's absolute discretion, and punishment was determined in a separate proceeding following the trial on the issue of guilt. In *Crampton* the petitioner was convicted of first degree murder and was sentenced to death in Ohio, where the jury which also had absolute penalty discretion, determined guilt and penalty after a single trial and in a single verdict. The *McGautha* case was limited to the question:

Whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards.<sup>69</sup>

While in the *Crampton* case the issues were limited to the *McGautha* issue and to the further question of whether the jury's imposition of the death sentence in the same proceeding as determined the issue of guilt was constitutionally permissible.

The Court held that the claimed absence of standards to guide the jury's discretion on the punishment issue, leaving the jury completely at large to impose or withhold the death penalty as it sees fit, does not violate the basis due process command of the fourteenth amendment.

The Court stated:

In light of history, experience and the present limitations of human knowledge, we find it quite impossible to say that com-

<sup>66</sup> *Witherspoon v. Illinois*, 391 U. S. 510 (1968).

<sup>67</sup> *E.g.* The reaction to the *McGautha-Crampton* decision in Maryland was as follows: Governor Mandel said today that he would not permit any executions to take place in Maryland's gas chamber before the United States Supreme Court has decided whether the death penalty is cruel and unusual punishment under the Constitution. *The Sun* (Baltimore), May 18, 1971, at C 13, col. 1.

<sup>68</sup> *McGautha v. California*, *Crampton v. Ohio*, 91 S. Ct. 1454 (1971).

<sup>69</sup> *Id.* at 1456.

mitting to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.<sup>70</sup>

The Court noted:

The Final Report of the National Commission on Reform of Federal Criminal Laws (1971) recommended entire abolition of the death penalty in federal cases.<sup>71</sup>

The Court's consideration of the proposed reforms brings criticism on the bodies that created them:

It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible consideration. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. In short, they do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of "standards" which the history of capital punishment has from the beginning reflected.<sup>72</sup>

If the Court makes light of the Commission's efforts toward reform, the Court apparently wishes that some other august body make the final determination as to the constitutionality of capital punishment. In concluding the majority opinion the Court stated:

It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all.<sup>73</sup>

Mr. Justice Black's concurring opinion considers the overriding issue of the constitutionality of capital punishment and provides the only insight as to the decision of a single Justice when faced with the ultimate issue of whether the death penalty is unconstitutional as a cruel and unusual punishment:

I concur in the Court's judgments and in substantially all of its opinions. However, in my view, this Court's task is not to determine whether the petitioners' trials were "fairly conducted." The Constitution grants this Court no power to reverse convictions because of our personal beliefs that state criminal

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<sup>70</sup> *Id.* at 1467.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1474.

procedures are "unfair," "arbitrary," "capricious," "unreasonable," or "shocking to our conscience." See, e.g., *Rochin v. California*, 342 U.S. 165, 174 (1952) (Black, J. concurring); *United States v. Wade*, 388 U.S. 218, 243 (1967) (Black, J. dissenting and concurring). Our responsibility is rather to determine whether petitioners have been denied rights expressly or impliedly guaranteed by the Federal Constitution as written. I agree with the Court's conclusions that the procedures employed by California and Ohio to determine whether capital punishment shall be imposed do not offend the Due Process Clause of the Fourteenth Amendment. Likewise, I do not believe that petitioners have been deprived of any other right explicitly or impliedly guaranteed by the other provisions of the Bill of Rights. The Eighth Amendment forbids "cruel and unusual punishments." In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the Framers intended to end capital punishment by the amendment. Although some people have urged that this court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that life time judges in our system have any such legislative power. See, *Harper v. Virginia Board of Education*, 383 U.S. 663, 670 (1966) (Black, J. dissenting).

The true nature of what the Court had been called upon to decide was admirably stated by Mr. Justice Brennan in his dissenting opinion:

It is of critical importance in the present cases to emphasize that we are not called upon to determine the adequacy of inadequacy of any particular legislative procedure designed to give rationality to the capital sentencing process. For the plain fact is that the legislatures of California and Ohio, have sought no solution at all. We are not presented with a State's attempt to provide standards, attached as impermissible or inadequate. We are not presented with a legislative attempt to draw wisdom from experience through a process looking towards growth in understanding through the accumulation of a variety of experiences. We are not presented with the slightest attempt to bring the power of reason to bear on the considerations relevant to capital sentencing. We are faced with nothing more than stark legislative abdication.<sup>75</sup>

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<sup>74</sup> *Id.* at 1476-1477.

<sup>75</sup> *Id.* at 1489. It is interesting to observe further executive reactions to this decision:

An aide to Governor Reagan said the Governor "agrees with the decision" handed down today because "he believes that capital punishment is a deterrent."

....  
In Ohio, Gov. John Gilligan reiterated his previous stand that he would permit no executions until the Supreme Court had ruled on the fundamental issue of the constitutionality of the death penalty. *The Sun* (Baltimore), May 4, 1971, at A 6, col. 1.

## VI. REVIEW OF PROPOSED NEW FEDERAL CRIMINAL CODE

Under the direction of President Lyndon B. Johnson and by authority of the Senate and House of Representatives<sup>76</sup> a National Commission on Reform of Federal Criminal Laws was formed.

The Commission was directed by Congress to "improve" and "reform" not merely to recodify existing law. Among the duties placed upon the Commission by statute was an explicit obligation to propose "changes in the penalty structure (to) better serve the ends of justice."<sup>77</sup>

Final draft form was submitted to the President and to Congress January 11, 1971, as well as approximately 5000 copies of the study draft and working papers were circulated by the Commission to federal agencies and throughout the legal profession. Commentary is now being solicited and compiled as reference material by the National Archives in Washington, D. C. Congress is presently reviewing the final draft form and likely debate on the floor of Congress will occur later in 1971. The Commission has recommended the abolition of the death penalty.<sup>78</sup>

The arguments of the Commission against the death penalty include the following:

Studies of the deterrent effect of capital punishment do not support the view that there is an extra margin of deterrence as between the death sentence and life imprisonment. Abolition states show no higher murder rate than comparable states retaining the death penalty. The murder rate shows no significant correlation with abolition or reinstatement of capital punishment in a particular state or country. From a moral point of view, the infliction of capital punishment is intolerable because errors of justice do occur and are irremediable once the accused has been executed. The state should in any event abjure deliberate killing so as to demonstrate the supreme value which this nation places on the sanctity of life. Capital punishment falls unequally on rich and poor, black and white; and, in any event, it must operate almost by chance when only a very small number of those who commit "capital offenses" are in fact put

<sup>76</sup> Public Law 89-801, 89th Congress, H. R. 15766 Nov. 8, 1966.

<sup>77</sup> FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS at xiii (1971).

<sup>78</sup> The specific Commission draft provision reads as follows:

§ 3601. Life Imprisonment Authorized for Certain Offenses.

Notwithstanding the provisions of sections 3001, 3201 and 3202, the court may impose a sentence of life imprisonment or a sentence up to the maximum term authorized under section 3201 for a Class A felony in the following cases:

(i) where the defendant has been convicted of treason;  
 (ii) where the defendant has been convicted of murder and the court is satisfied that the defendant intended to cause the death of another human being.

A sentence to life imprisonment shall have a minimum term of ten years unless the court sets a longer minimum up to 25 years. The period of parole under a life sentence, for the purposes of section 3403 (1), shall be the balance of the parolee's life or any lesser period fixed by the court at Sentencing. *Id.* at 311.

to death. The role of chance and bias in capital punishment is underlined by the extreme difficulty of defining criteria for the imposition of the death sentence and the involvement of lay juries who, encountering the responsibility once in a lifetime, cannot give consistency to any capital punishment policy. The existence of capital punishment encourages extreme procedural safeguards against it by extension against all major criminal sanctions, to the point where law enforcement generally is impeded and the system of criminal justice loses credibility.<sup>79</sup>

## VII. CONCLUSION: IS THERE A SOLUTION?

With review of the limited number of cases in point decided by the Supreme Court, the valued pronouncements of Mr. Justice Frankfurter and Mr. Justice Goldberg and such involved witnesses to judicial death as former Warden Lewis E. Lawes, the heroic stand that the Fourth Circuit Court of Appeals has taken in the *Ralph* case,<sup>80</sup> and the strong recommendations that the National Commission on Reform of Federal Criminal Laws has taken in its revised federal criminal code, it is apparent that society is ready to abolish capital punishment. Abolishment of the death penalty may come from Congress as it may be applicable under the newly proposed revised Title 18, United States Code, but this will only be effective in the area of federal crimes on federal enclaves, only an influence upon the states. Ultimately, abolishment of the death penalty will have to come either from the Supreme Court<sup>81</sup> on constitutional grounds or from the legislative bodies of the several states. The challenge to meet head-on the issue of judicially sanctioned death has been thrown out to all Americans, and it shall be answered according to what the best interests of society demand.

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<sup>79</sup> *Id.* at 310. Alternatives to the text, in retaining capital punishment, would be:

(1) to extend the list of capital offenses, perhaps to all instances where it exists under present federal law; (2) to restrict capital punishment for murder to (a) intentional murder of the President, Vice President, President-elect or Vice President-elect of the United States; (b) intentional murder of a law enforcement officer, or a public servant having custody of the defendant or another, to prevent the performance of his official duties; and (c) intentional murder by a convict, under sentence of imprisonment for murder or under sentence of life imprisonment or death, while in custody or immediate flight therefrom. *Id.* at 312.

<sup>80</sup> Petition for certiorari has been filed by Francis B. Burch, Attorney General of Maryland, for review of the *Ralph* case by the United States Supreme Court. The question presented was: Does the Eighth Amendment's prohibition against cruel and unusual punishment forbid execution for rape if victim's life was neither taken nor endangered? *Ralph v. Warden, Maryland Penitentiary*, 438 F.2d 786 (4th Cir. 1970), *petition for cert. filed*, 40 U.S.L.W. 3058 (U.S. June 1, 1971) (No. 228).

<sup>81</sup> This issue will seemingly be decided by the Supreme Court during its next term. Motions have been filed and leave to proceed *in forma pauperis* were granted to petitioners, limited to the question:

Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments? *Aikens v. California*, 268 Cal. App. 2d 721, 450 P.2d 258, 74 Cal. Rptr. 882 (1969); *Branch v. State*, 447 S.W. 2d 932 (Tex. Crim. App. 1969); *Furman v. State*, 225 Ga. 253, 167 S.E. 2d 628 (1969); *Jackson v. State*, 225 Ga. 790, 171 S.E. 2d 501(1969); *cert. granted*, 39 U.S.L.W. 3566-3567 (U.S. June 29, 1971) (Nos. 5049, 5135, 5059, 5133).