# OFFICIAL PROCEEDINGS

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## STATE OF NEW YORK

## TEMPORARY COMMISSION on REVISION

## of the PENAL LAW and CRIMINAL CODE

RALPH FINK, C. S. R.
STENOTYPE REPORTER
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STATE OF NEW YORK

TEMPORARY COMMISSION ON REVISION

OF THE

PENAL LAW AND CRIMINAL CODE

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PUBLIC HEARING ON CAPITAL PUNISHMENT

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New York County
Lawyers' Association
14 Vesey Street
New York 7, New York

December 7, 1962
10:00 A.M.

Ralph Fink, C.S.R.,
Reporter

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## MEMBERS OF THE COMMISSION

Present:

RICHARD J. BARTLETT, Chairman

TIMOTHY N. PFEIFFER, Vice Chairman

WILLIAM KAPELMAN, Secretary

NICHOLAS ATLAS

ROBERT BENTLEY

JOSEPH F. CZECHLEWSKI

PHILIP HALPERN

HERBERT WECHSLER

## STAFF

RICHARD G. DENZER, ESQ., Counsel

P R E S E N T:

Hon. Samuel Liebowitz

Hon. Manfred Ohrenstein

Jerome Nathanson

Professor Norman Redlich

Myron S. Isaacs

Hon. George Edwards

Edmund Goerke

Hon. William Rand

Sidney Boxer

Hon. Austin H. MacCormick

Hon. Charles Breitel

Hon. Ferdinand Pecora

Miss Julia Perles

George Carey

Mrs. Betty Bernstein

Theodore Torre-Bueno

Dr. Hans Kron

Charles Walker

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P R E S E N T :

Mrs. Jane Evans

Mrs. Elsie Cespedes

H. Richard Uviller

Harry Hale Purvis

Stephen Cohen

Robert R. Hannum

Joseph Stern

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# P R O C E E D I N G S

THE CHAIRMAN: Good morning, ladies and gentlemen.

This hearing is being held by the State Temporary Commission on Revision of the Penal Law and Criminal Code, on the question of capital punishment.

I am the Commission chairman, Richard Bartlett.

The other members of the Commission here with me this morning are the Vice Chairman, Mr. Pfeiffer; Professor Wechsler; Judge Halpern; Counsel to the Commission, Mr. Denzer; Judge Kapelman; representing the Speaker of the Assembly, Mr. Czechlewski; and representing the Senate Finance Committee, Mr. Bentley.

The exact question on which we are asking for an expression of views is Should Capital Punishment be Retained, Limited, Extended or Abolished in New York State.

The Commission, as most of you know, is engaged in an over-all revision of Penal Law and Criminal Code, the first undertaking in about eighty years.

The Act creating the Commission mandated that we, among other thing, "reappraise, in the light of current knowledge and thinking, existing substantive provisions relating to sentencing, the imposing of penalties and the theory of punishment relating to crime."

It is within the context of that mandate that we are making an inquiry into the subject of capital punishment, and we are holding this hearing today for that purpose.

We have approximately thirty witnesses who have indicated a desire to speak today. It is our ardent hope that we will conclude within normal business hours this afternoon. So I ask that all of you who are planning to speak to be as brief as possible in your oral presentation, and, of course, we urge you to submit a written memorandum of your position, in addition to any statement that you may make here.

Our first witness this morning is Judge Samuel Liebowitz, of Kings County, who has consented to appear before us, and who will speak first.

Judge Liebowitz, please.

Would you prefer sitting?

HON. SAMUEL LIEBOWITZ: Yes.

Mr. Chairman, and members of the Commission.

To begin with, I wish to thank the Commission for extending this gracious invitation to me, and I deem it an honor and a privilege to appear this morning, although I came from a busy courtroom, with calendars that are, figuratively speaking, to break the backs of our judges because of the tremendous increase in crime and the paucity of the number of judicial officers that we have.

I might say at the outset that you members of the Legislature might do something for the public, in curbing the crime wave from which we now suffer, by giving us some more judges, which we so sorely need.

Now, is there anything new that can be offered to this Commission by the speaker?

I take it that you have heard all of the chestnuts, pro and con, that have been offered either for or against the abolition of capital punishment.

But in my opinion, there is just one, one, one, one -- and I emphasize that with all the power at my command -- that there is just one deciding factor. And I shall deal with that at this time.

The other day I picked up anarticle in Esquire

magazine, written by a gentleman by the name of William Sturyon, concerning the Benjamin Reed case, with which you are all familiar.

That was the case of the Negro whose sentence was recently commuted to life imprisonment.

And here is what Mr. Sturyon said, and I quote: "If, for example, it could be proved that capital punishment was an effective deterrent to crime, even the most emotionally vulnerable diehard humanitarian would be forced to capitulate in favor of it."

I am going to read some quotations from various sources, and people who have dealt with the subject.

First I would like to read four or five lines from the Report of the Royal Commission. That is the British commission that came here and went all over the world to take testimony concerning the subject of capital punishment.

Here is what the Royal Commission said:

"Prima facie, the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and

there is some evidence, though no convincing statistical evidence, that that fact is so."

I would like to read a few lines from the testimony of the former Commissioner of the Royal Mounted Police of Canada, who appeared before the British Royal Commission on Capital Punishment.

Here is what he said:

"I believe that the threat of death has a deterrent effect on a professional criminal, particularly the holdup man or the man who robs with violence in any form. Remove the death penalty from murder, and they can kill during the robbery, without facing any significant additional penalty."

The Commissioner told of the gang of armed robbers who continued their operations after one of their members was sentenced to death. And then the sentence was commuted to penal servitude for life.

But the same gang disbanded and disappeared, while on a later occasion two others were convicted of murder and three were hung.

I would like to call Mr. Hoover to the witness stand. Mr. Hoover is the head of the F.B.I., as all of us know.

He said this: "Experience has clearly demonstrated that the crime problem and deterrent against crime, among others, is capital punishment. Criminals fear capital punishment."

I would like to quote the statement of one of the members of this Commission, for whom I have a very high regard. I am referring to Professor Herbert Wechsler, who at some symposium on capital punishment, before the District Attorneys Association of the State of New York, said in part as follows, and I quote:

"It still may be contended, as the police argue strongly -- and, incidentally, many of us would support them in this -- that the special threat of death exercises important influences, in many situations, prior to the final moment when the crime is perpetrated. Robbers are influenced to use unloaded guns, or burglars not to arm themselves before the entry. I think that this hypothesis undoubtedly has some foundation in experience. It is equally clear that nobody can say with confidence how often this occurs or provide any data for measuring its frequency."

Now here is a statement by the high priest of the abolitionists, the man who has gone all over the

world, from coast to coast, from continent to continent, from legislature to legislature, and has spoken out for the abolition of capital punishment. Here is what Professor Thorsten Sellin, of the University of Pennsylvania, had to say before the British Royal Commission, and I quote from the official record:

"Q. Can we not conclude from your statistics" --

Before answering, he was quoting the time-honored statistics that states that have abolished it have no greater increase in murders than the states who did have capital punishment.

Here is what Professor Sellin said, and I will read the question again:

"Q. Can we not conclude from your statistics that capital punishment has no deterrent effect?" asked one of the members of the Commission.

And this is Professor Sellin's answer:

"No. There is no such conclusion. I can find no answer, one way or the other, in this data."

And then in a debate on NBC-TV with me, on the program "The Open Mind," on February 18, 1962 -- and I have the transcript here. Here is what happened.

The moderator, Professor Goldman, of Princeton University, asked this question:

"Q. Mr. Sellin, are you saying that there is no basis for the argument of deterrents?"

Answer by Professor Sellin: "I haven't the slightest doubt that there may be some individuals who are deterred by the death penalty."

And here is a statement by one of the leading psychiatrists who is in favor of abolition, Dr. Frederick Wertham, at a symposium before the New York State District Attorneys Association, on January 27 of 1961. He said as follows:

"As far as the deterrent value of capital punishment is concerned, it is often said it is not a deterrent. And I have often seen and heard all kinds of statistics trying to prove that. It is like saying that if you threaten someone with death it has no effect on him whatsoever and the instinct of self-preservation does not exist.

"I remember, at the time of the depression, doing some research work with young holdup men, in the psychiatric clinic in the Court of General Sessions. At that time there were quite a number of young men who

thought it was the most clean-cut crime, and they got a gun and held up a man for some money. Then, as you know, very few of them committed murder, and I found out from them that what really deterred them was very definitely the death penalty.

"Who can know that for every murder committed there aren't at least a hundred people deterred from committing murder? But the deterrent effect of capital punishment does not suffer from this question at all."

He then went off on some other point.

I am going to read what Mr. Hogan's district attorneys have said on the subject, men from the Homicide Department. Certainly they are witnesses whose testimony must be taken instead of the theorists and those who wallow in statistics and issue pompous statements clothed and couched in semantics.

Here is what Mr. Hogan's assistants district attorney have stated in writing, and I will read it. And I think that this Commission must take heed of these men, who are face-to-face with the subject, have to say about capital punishment.

Here is a letter addressed to Mr. Hogan, dated 11 August, 1959, from Mr. Dermody, re: Capital Punishment.

I will read it slowly, because I would like every member of this Commission to pay heed to what they said:

MR. TIMOTHY N. PFEIFFER: Don't worry. We will pay heed to anything you say.

JUDGE LIEBOWITZ: "At the suggestion of Mr. Hogan, I have discussed with the members of the Homicide Bureau the question of capital punishment, and would like to present the views of the Bureau members now present in the office.

"It is our uniform view that capital punishment should not be abolished. This view is based on the belief that the threat of capital punishment has deterred the taking of life in a number of cases.

"We are aware that statistical studies have not convincingly established the deterrent effect of capital punishment. That we are satisfied from our experience that the deterrent effect is both real and substantial.

"For example, from time to time accomplices in felony murders state with apparent truthfulness that in the planning of a felony they strongly urge the killer not to resort to violence. From the context of these utterances it is apparent that they were led to these warnings to the killer by fear of the death penalty, which

they realized might follow the taking of life.

"Moreover, the victims of holdups have occasionally reported that one of the robbers expressed a desire to kill them, and was dissuaded from so doing by a confederate.

"Once again, we think it is not unreasonable to suggest that fear of the death penalty played a role in some of these intercessions. There have been a large number of occasions in which holdups were committed with unloaded guns. In many of these cases it is apparent that the failure to load the weapons was occasioned by a fear of killing, with its resultant possible death penalty."

I think I am going to call Judge Liebowitz to the stand now.

THE CHAIRMAN: We want to hear your views, Judge.

JUDGE LIEBOWITZ: And testify from my own experiences in one of the busiest criminal courts in this nation.

For 21 years I was a defense lawyer in capital cases and other criminal cases.

I believe that I have represented more

defendants for murder than any other living lawyer in this -- living lawyer or judge -- as a lawyer, in this country.

For 22 years I presided over this great, busy court, and in that period of time I have sentenced about ten thousand people, some to the electric chair for murder.

So I speak from experience, that capital punishment does deter.

I will prove it from a record of a case which appeared before me only a few days ago, on November 29, 1962. I will read from the record.

A thug went into a bar in South Brooklyn, with a gun, and he held up three people there, and cowed them with his revolver.

Then he took the owner of the place out, a man who had the bag with the money, and he compelled the victim to dump the money into his receptacle, the thug's receptacle.

He then struck the proprietor with the butt end of the gun and inflicted some minor wound on his forehead, and then he fled.

The other day he pleaded guilty before me to robbery, and I told him he was facing twelve and a half years to twenty-five years in State prison, because he had a

bad record.

And I asked him this question, and I quote from the record:

"I want to ask the defendant a question: Was the gun loaded?

"THE DEFENDANT: No, your Honor.

"THE COURT: Why? I am interested in knowing why.

"THE DEFENDANT: I didn't want to hurt anybody.

"THE COURT: You didn't want to kill anybody?

"THE DEFENDANT: No, sir.

"THE COURT: I ask you again, why didn't you want to have a gun that was loaded?

"THE DEFENDANT: Because I didn't want to hurt anybody.

"THE COURT: Why?

"THE DEFENDANT: Because I didn't want to go to the electric chair."

Well, there isn't much more that I want to say, except this: the fact that a few who do kill, or many who would kill, are not deterred by capital punishment is no answer to the number who have been, are, and will be deterred from committing the criminal offenses punishable

by death.

And I repeat, the issue is as simple a A, B, C, and the question is this: do the abolitionists say that they are prepared to sacrifice the life of even one innocent victim, just one innocenct citizen, so that by abolishing the death penalty the lives of even one hundred cold-blooded killers would be preserved?

That is the question.

Now, I ask also: would any proponent for abolition be frank enough to say this: Let us condemn to death not the killer, but the innocent citizen who is about to be mowed down by a would-be assassin. And surely, every right-minded person would agree that the life of but one innocent victim means more than the lives of one hundred vultures in human form that belong in the electric chair or the scaffold or the gas chamber.

Now, does capital punishment deter?

You bet it does. Certainly not all killers, but some at least. No one can tell how many.

You have heard here this morning this proof to the effect that it does deter: One, from the Royal Commission; two, from the proponents of the abolition of capital punishment: from Professor Wechsler, from Professor Sellin,

from Dr. Wertham.

You have heard it from the opponents of abolition: from J. Edgar Hoover, from the head of the Royal Mounted Police in Canada, from Mr. Hogan's Homicide Bureau, and from Judge Liebowitz.

The vast majority of citizens of our state, whom you in the legislature represent in the Capitol in Albany, are opposed to abolishing the death penalty in proper cases.

And I know that they do not wish to put our state into the shameful and unpardonable position of morally, if not legally, failing to stay the hand of the would-be cold-blooded killer by removing from our penal laws the one deterrent which, above all, he hears and understands is "Thou Shalt Not Kill on Penalty of Death."

That is my statement of this morning.

THE CHAIRMAN: Judge Liebowitz, do you have a position as to whether or not the recommendation by the jury should be extended to other capital cases than felony murders?

JUDGE LIEBOWITZ: Yes.

THE CHAIRMAN: What is your position?

JUDGE LIEBOWITZ: I am in favor of that.

THE CHAIRMAN: You are in favor of that?

JUDGE LIEBOWITZ: Yes.

THE CHAIRMAN: Do you have any position as to whether or not we should employ the two-part trial system, as is used in California and in Pennsylvania?

JUDGE LIEBOWITZ: No, I don't approve of that either.

THE CHAIRMAN: You prefer just --

JUDGE LIEBOWITZ: What I do advocate most strongly is that a commission be appointed -- call it what you will -- that would not only go into the question of whether the convicted defendant should suffer death, but also should hear testimony without any limits, proposed or present, by technical rules of evidence, to make absolutely certain, as far as human beings can make certain, that an innocent man isn't being sent to the electric chair. I would have a Commission to do that rather than have a jury trial to go over the matter again.

JUDGE PHILIP HALPERN: You would invest this Commission with the power to commute the sentence? In other words, after a jury has found him guilty?

JUDGE LIEBOWITZ: Yes, sir. I would take that power away from the Governor -- of course, I am not speaking

about the present governor or any individual governor. There is too much politics involved and too much thought, "How is that going to affect me when I run for election again?"

And I can cite chapter and verse, but I am not going to do it.

THE CHAIRMAN: Are there any other questions, gentlemen?

PROFESSOR HERBERT WECHSLER: I would like to pose this: I don't see the advantage of a commission idea as against the second stage with the jury. The jury has heard the case under the rules of evidence.

In the second stage they hear it without the rules of evidence. So if there is a prior criminal record, for example, it comes in; or if there is psychiatric testimony, or something else, mitigating that, that comes in.

The jury is there and it is under the direction of the same judge who sat in the original trial.

Aren't there economies in that? It seems to work in California.

JUDGE LIEBOWITZ: I understand the point that you make, Professor Wechsler. But I don't believe that that is good business.

If you get a commission, you will tend to have a sort of standard, so that the Negro and the white man, and the red man and the Italian and the Jew, and all of the people that are now the problems, would get equal justice.

PROFESSOR WECHSLER: Do you mean a state-wide commission?

JUDGE LIEBOWITZ: Yes. To review every commission of every murder. Not only as to whether the death penalty should be inflicted, but also to review the facts without being bound by technicalities and legal evidence, to make doubly, a thousand times sure that an innocent man doesn't go to the chair.

MR. PFEIFFER: That is after the Court of Appeals has heard the appeal?

JUDGE LIEBOWITZ: Yes.

MR. PFEIFFER: And affirmed?

JUDGE LIEBOWITZ: Affirmed.

JUDGE HALPERN: Have you given some thought to the composition of the commission?

JUDGE LIEBOWITZ: To what?

JUDGE HALPERN: To the composition of the commission.

JUDGE LIEBOWITZ: I think the commission should --

no member of a propaganda organization or minority organization should serve on that commission.

In other words, we don't want any drumbeaters on the commission. I think there are enough good level-headed citizens that could be appointed, whether by the Governor or by the Chief Judge of our Court of Appeals, to serve on a commission of that sort.

I would be opposed to having the Governor appoint the commission.

JUDGE HALPERN: Would you have psychiatrists on there?

JUDGE LIEBOWITZ: No. I would have psychiatrists testify, but I wouldn't want any partisans on there, those that have a certain axe to grind.

That sort of commission would solve this whole problem, both of whether the man should go to the chair or whether he should be commuted, so that justice, substantial justice does not require the death penalty, or there is some real doubt about his guilt.

JUDGE WILLIAM KAPELMAN: I don't quite follow the last bit of testimony of the Judge here.

Do I take it that you would still have the jury make the recommendations, in response to the inquiry that

was made to you, whether the jury has the right to recommend mercy in the light of common-law murder, as we call it, that the jury would still make the recommendation as to mercy, and that if it did not recommend mercy, it would go through all of the procedures,up to the Court of Appeals, and then what you are suggesting is a commission in lieu of the Governor's right of clemency?

JUDGE LIEBOWITZ: Yes, sir.

JUDGE KAPELMAN: That is all you are speaking of?

JUDGE LIEBOWITZ: Not only clemency, but to review all the facts, to determine whether there is any possibility that an innocent man has been convicted.

JUDGE KAPELMAN: But in the absence of that aspect of it, that you are suggesting taking away from the Governor the right to change the sentence -- in the absence of that, you want the same procedure that we adhere to now, except you join in a recommendation that the jury should have the right to recommend mercy in the case of common-law murder?

JUDGE LIEBOWITZ: Yes, sir.

JUDGE KAPELMAN: Thank you very much.

JUDGE HALPERN: Would you make the recommendation of the jury binding upon the judge?

JUDGE LIEBOWITZ: Yes. To all intents and purposes it is binding. It is not binding --

JUDGE HALPERN: We have a few cases where it wasn't.

JUDGE LIEBOWITZ: I don't know of any judge who hasn't followed the recommendation, with two exceptions.

JUDGE HALPERN: We had one in our city.

JUDGE LIEBOWITZ: In one case before the late Judge Wallace, and another case before the late Judge Goldstein -- I am sorry. I am sorry. Judge Goldstein is still in being. He is a wonderful and very dear friend.

In both of these cases, where the death penalty was inflicted, the Governor commuted.

JUDGE HALPERN: We had one in Buffalo. Judge Carlton Fisher imposed the death penalty in spite of the Governor's recommendation, but the Governor did commute.

JUDGE KAPELMAN: Judge Liebowitz, I think the interesting thing is to get at the suggestion that you made, insofar as this commission is used, that can be used, in effect, on the California and Pennsylvania system, as it could be used in the New York system, that we are using now, with the additional recommendations. Couldn't it?

JUDGE LIEBOWITZ: Yes. I am opposed to having another jury of laymen to go in there and have somebody play the violin, so to speak, and Hearts and Flowers, and have a whole mass of evidence introduced which has nothing to do with the fact-finding.

It is well enough to let a jury find what the facts are. But when it comes to deciding whether a man should live or die, I think we ought to have a permanent commission that would treat with all cases, so that you don't make fish out of one or fowl out of another; so that you don't have a jury of certain temperament, a jury with a certain temperament that might say, "Away with him, hang him," because of one thing or another, because of prejudice, either latent or expressed. And have a commission to deal with all cases, all cases, as to whether or not the man should be executed.

And in addition thereto -- this is what I want to emphasize -- to go into the facts, without any restriction, to make doubly sure that an innocent man isn't sent to his death.

PROFESSOR WECHSLER: That last part puzzles me, Judge.

Your commission deals with matters beyond

sentence. Isn't it going to be a super-Court of Appeals, then, higher than the Court of Appeals?

JUDGE LIEBOWITZ: No. The Court of Appeals deals with the record, as all of us know, and certainly the distinguished Judge of the Appellate Division of the Fourth Department, Judge Halpern, knows.

It deals with the cold record, and they determine whether, on the facts stated in the record, in a murder case, in a capital case, the verdict is justified.

MR. RICHARD G. DENZER: This commission is going to go outside of the record and hold another proceeding?

JUDGE LIEBOWITZ: The commission would go outside of the record to answer the one objection that may be offered against capital punishment.

I want to have an additional safeguard, so that an innocent man does not pay the death penalty, and an injustice of that sort is done.

I want to have an added safeguard, to allow this commission to go through the evidence and for them to decide whether there is any possible doubt about the man's guilt.

MR. PFEIFFER: Judge, I am not sure -- maybe I didn't get it -- the Court of Appealsaffirms it. The death

sentence then is to be carried out.

Your commission comes along and they hear evidence and take testimony. They do what they want. They find that the man is innocent.

What happens?

JUDGE LIEBOWITZ: That question can be answered very simply. They don't discharge the man.

MR. PFEIFFER: Yes. I don't think you told us --

JUDGE LIEBOWITZ: They only acquit him. They commute him.

MR. PFEIFFER: You mean they commute?

JUDGE LIEBOWITZ: The commission has the power to commute the death sentence to life.

THE CHAIRMAN: The question of pardon would be up to the Governor, I take it?

JUDGE LIEBOWITZ: The question of pardon, it is inherent in the position of the Chief Executive.

But the commission will commute where there is any possibility, real possibility of innocence.

MR. PFEIFFER: The only power in respect of the change of sentence that your commission would have would be that of commutation from death to life?

JUDGE LIEBOWITZ: To life, yes.

MR. PFEIFFER: I don't think that was made clear before.

JUDGE LIEBOWITZ: Then, of course, the commission issues an opinion that there is some doubt, and there would be further investigation while the man was kept alive.

This is an added safeguard, Judge Halpern.

JUDGE HALPERN: I understand that. To carry out your thought, then, wouldn't you want to see a liberalizing of the provisions for a new trial on the grounds of newly discovered evidence?

JUDGE LIEBOWITZ: Yes. Definitely. I wouldn't limit it to one year.

I think that is foolish. Suppose it turns up ten years from the date of sentence, that an innocent man has been convicted, whether a murder case or some other case?

JUDGE HALPERN: I am speaking of a case where the commission turns up evidence.

JUDGE LIEBOWITZ: Of course. I am glad that Judge Halpern made that point, and I think the Legislature ought to give serious consideration to it, that the limitation of the one-year rule for motions for new trials should be extended; or that no limitation should be

put on it at all.

MR. DENZER: We use coram nobis for that.

JUDGE LIEBOWITZ: Coram nobis has been a headache for judges in our state, as Judge Halpern will testify from his own experience. We have had about 350 coram nobises right in our court alone, in one county.

JUDGE HALPERN: Yes. We get about 200 a year on appeal.

JUDGE LIEBOWITZ: It has plagued us. I don't think it is a good solution.

I think a motion should be made for a new trial on the grounds of newly discovered evidence, and then have the courts decide.

JUDGE HALPERN: Of course, coram nobis won't cover newly discovered evidence.

JUDGE LIEBOWITZ: No, it won't.

MR. PFEIFFER: Would you require a unanimous verdict, or what have you, by your commission?

JUDGE LIEBOWITZ: Well, that is a matter that you gentlemen can think about. I haven't given it any thought.

I certainly wouldn't let the majority decide.

MR. PFEIFFER: Would not?

JUDGE LIEBOWITZ: No. I wouldn't leave it to just a bare majority.

We have the situation in our courts today, where five in the United States Supreme Court say yes and four say no, and even the five have different reasons for their opinions.

You have it in the Court of Appeals, where four of our judges say yes, and three say no. And in the Appellate Division you have, of course, three saying yes and two saying no.

That is something that you members of the Commission can think about, as to whether it should be unanimous or by a majority, or what have you. That is a matter that you can say.

THE CHAIRMAN: Judge Liebowitz, thank you very much for taking your time to appear before us this morning.

JUDGE LIEBOWITZ: You are welcome.

(Witness excused)

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THE CHAIRMAN: Our next witness comes from our Legislature, Senator Manfred Ohrenstein.

SENATOR MANFRED OHRENSTEIN: Mr. Chairman, members of the Commission. I appreciate the courtesy in calling me so early. I did not expect to be called this early.

I want to start out by saying that I could not disagree more than I am going to disagree with the last speaker, because in many ways he sums up and he summed up in his attitudes the very reason why I oppose the capital penalty.

I shall not address myself to the problem of deterrents, because I do not pose as an expert in either the psychological mechanism of the criminal, or the sociological considerations which go into making him one, or into making a deterrent, nor am I qualified to talk about the statistics of deterrence.

I assume there are other speakers here today who are more qualified in that field. I can only say that on the basis of the literature that I have read and the talks that I have had with people whom I consider qualified, that I do not believe that the death penalty has a significant deterrent value.

I believe that the study, the psychological makeup of the criminal mind -- we will come to conclude in time that he is deterred by other factors, or is compelled to act the say he does by other factors than that of the death penalty and punishment. That in itself does not play as large a role as we once thought that it did.

I want to address myself to two other aspects of this debate.

In this regard I would like to speak not only as a legislator,but as a former prosecutor in the office of District Attorney Hogan, whom Judge Liebowitz talked about, for four years, and as someone who served as a Judge Advocate in the Army for three years, also on the side of the prosecution -- not by my own choice, but by that of my commanding general at that time.

Also, subsequent to my leaving the District Attorney's staff, I have, and still do act as an attorney representing defendants.

So that I would like to speak from that experience as to the personal process which takes place in regard to the prosecution of criminals in general, and particularly in regard to the prosecution of the

capital offender. I think that is something that we must very much take into consideration.

I have always been terribly interested in the effect upon the human beings involved in the process of prosecuting a capital offender.

What happens to them in the process? What happens to the policeman, his mind, his attitudes, who must arrest a man who is charged with a murder and who may end up dying?

What happens to the prosecutor who is charged with the duty of prosecuting him, and then coming into court and asking that another human being be put to death?

What happens to the judge who must sentence him to the ultimate penalty?

What happens to the jury who takes part in this process of judging a man, his guilt or his innocence, knowing that finally he may be put to death?

What happens to the prison guards who are assigned to watch over him?

What happens to the warden who must participate in the ultimate process of putting him to death?

What happens to the witnesses whom we so

ceremoniously charge with being present at this more refined form of medieval punishment -- that I regard it?

This, I think, is a process which must very much be in our minds in determining whether the death penalty should continue.

I cannot help but feel that this whole process is not only brutal from society's standpoint, but is particularly brutal from the standpoint of the people whom we ask, as servants of the public, to participate in the process of putting a man to death.

Some of these are human beings who do not seek this privilege, but who simply must execute it because they happen to be in a particular place at a particular time.

When I say that in my opening remarks that Judge Liebowitz sums up perhaps most eloquently one of the reasons why I am against capital punishment, it is this very thing that I am talking about.

I think that in time, when exposed too long to the process of trying and executing and sentencing men to death, one almost acquires a vested interest in this form of punishment.

I am not saying that to make a moral judgment.

I am trying to say it as best I can, by having what I conceive to be an objective view.

One does not have to be against law enforcement, and yet one can say that the person who enforces the law is sometimes the worst judge as to what the process of law enforcement should be, because he views it from a particular viewpoint.

He does it as a professional, as a judge or as a prosecutor or as a policeman, with a vested interest in the process of law enforcement.

I think the greatness of a democratic society is that we do not hand over to the law enforcement agency the ultimate judgment as to what the process of law enforcement shall be, but we give it to the more general public, to the legislature, to others, who take a more objective view.

I must certainly say to you that when I was a member of the staff of the District Attorney's office, in my own personal reaction to the day-to-day handling of crime, I cannot say that I remained as an objective human being about law enforcement, as I was before I went into that office, and after I left it and once again joined the ranks of the general public.

As I say, to say that that is not in any way to question the honor or the morality of those engaged in the process, but it is simply to say that they, as all of us, are human beings and are subject to pressures accumulated over years of participating in this process which make them not objective judges of the value of a particular form of capital punishment.

THE CHAIRMAN: We are not asking people not to have a point of view.

SENATOR OHRENSTEIN: I would expect the members of the District Attorney's staff and the members of the police department, and Herbert Hoover, and Judge Liebowitz -- not Herbert Hoover. I am sorry. J. Edgar Hoover, to have a point of view.

But I am simply asking you to put their point of view in a context --

THE CHAIRMAN: Is there anyone appearing today, Senator, who has a partisan point of view on this subject?

SENATOR OHRENSTEIN: Oh, yes. I am sure I am not the most objective, either, but I am simply asking you to put their point of view in a particular context, and I am speaking because I once shared at

least their experiences, and found myself reacting in a certain way.

So I am speaking in a really personal way, and I feel this is what makes me feel so strongly, having participated in the experience to some degree, and having come out of it with a certain conclusion.

This is one aspect of this picture that I would respectfully ask you to look at.

The other aspect of it -- and I shall be very brief -- is the question that Warden Duffy has raised on a number of occasions, and some of the clergymen who have worked with him, and that is the question of discrimination in the area of the infliction of capital punishment.

They have concluded, apparently -- and I must share their conclusion -- that as the process of defense in criminal actions, as it works today, the person who is economically deprived certainly has less of an opportunity to defend himself than that person who is in a more fortunate economic position.

Of course, economic deprivation in our society today hangs mostly today over the heads of men and women of Negro descent, of the Negro race, men

and women of the Puerto Rican community, because that, simply, are the economic facts of life.

And as a result, we find that the statistics in terms of executions most heavily rest in that particular area. I think there is something terribly unfortunate about this.

PROFESSOR WECHSLER: Is this a conclusion just drawn from the statistics on racial backgrounds of people executed, or is it something that you are telling us based on your knowledge about defense?

SENATOR OHRENSTEIN: No. I think it is based on my knowledge about defense.

As a working criminal lawyer, Professor Wechsler, I find that the person who can pay for good and superior legal talent is the person who will be most apt to get the lightest punishment, no matter for what crime.

This does not apply simply to capital punishment. But it applies to any crime.

The person who comes into court charged with a serious crime, who must rely on the offices of the Legal Aid Society or the offices of the Public Defender, I do not believe can get the same effective

presentation as the person who can pay for private counsel.

I am not saying this --

PROFESSOR WECHSLER: I must say that my own judgment is the other way.

MR. DENZER: Don't you think that the Legal Aid Society has a very high caliber of personnel, compared with the ordinary practicing criminal lawyer?

SENATOR OHRENSTEIN: Well, I am talking now, Mr. Denzer, about persons who can pay for good legal counsel.

I am not saying that any member of the criminal bar is of superior talent.

THE CHAIRMAN: We will bring ourselves back to capital cases, and then that will remove the Legal Aid Society question.

SENATOR OHRENSTEIN: I think this has a bearing, though, because what I am saying is simply this:

I am not here saying that the Legal Aid Society is not doing a job, but I don't think they have the proper economic resources to do the kind

of job that a lawyer who is well paid, and who is paid by his client also for investigatory services, can do.

The result of that is that the person who can pay high legal fees and who can pay for investigatory services simply gets a better shake.

I have a very big question in my mind and right now.

We have a situation coming up about this doctor who was just picked up in Europe, who is charged with being guilty of an abortion death.

I would like to see what happens in that instance.

I think that is something for this Commission to watch.

If this man still has economic resources at his disposal, I think his case will be a rather interesting one, in terms of what economic resources can do to get one a proper defense and to get a delay, a long delay in terms of the execution of the --

JUDGE KAPELMAN: I think we are getting off to a collateral issue here.

I don't think that you ought to talk about

that.

MR. ROBERT BENTLEY: We don't like to talk about pending cases. You can see the danger in that.

JUDGE HALPERN: It is a most unfortunate reference to a pending case, because we certainly don't want to prejudice his case by any publicity.

THE CHAIRMAN: Let us bring ourselves back to the point.

SENATOR OHRENSTEIN: Your Honor, I think it would be a good thing for the Commission to watch this case in terms of the --

THE CHAIRMAN: We are interested --

SENATOR OHRENTSTEIN: Of the thing that you are --

JUDGE HALPERN: The way you are putting it is that if the defendant happens to be acquitted, that that is evidence that you want us to consider, that there is something wrong with the system. I don't think you ought to advance it at this time.

JUDGE KAPELMAN: It would be better to watch the Leopold and Loeb case. That happened a long time ago.

SENATOR OHRENSTEIN: I leave it to your

sound judgment, your Honor, to come to whatever conclusion you want.

JUDGE HALPERN: I want to go back to something that you said in cases of indigent persons. What you have said is a very serious indictment of the legal profession, which is aware of its responsibilities in this area, and especially in capital cases.

Hasn't it been your experience that in capital cases a top lawyer of good standing is assigned by the Court?

SENATOR OHRENSTEIN: I think this is by and large true.

But those attorneys are not given the financial wherewithal to work properly in those cases, in my opinion.

JUDGE HALPERN: They are about to retain psychiatrists at State expense, County expense. They are retained, or about to have investigation at the County's expense, within certain limits.

SENATOR OHRENSTEIN: Within limits.

JUDGE HALPERN: Let me ask you about this, with which I am more familiar.

We assign counsel on appeal. And from my

experience, I can say that the lawyers who have been assigned on appeal have prepared more thoroughly their briefs and presented a more thorough case than in the case of the paid counsel.

SENATOR OHRENSTEIN: Your Honor, I cannot quarrel with your experience.

PROFESSOR WECHSLER: This is certainly a comment of Justices of the Supreme Court of the United States who assign counsel, as you know. And frequently petitions will come in there, just written on a piece of scrap paper in prison, and counsel would be assigned by the Court and it may lead to a reversal of a judgment.

I think you ought to reconsider this judgment. Of course, as a different point from the economic point that is involved.

I think Warden Duffy was speaking more about the character of the people who do turn up in the death cells.

SENATOR OHRENSTEIN: Well, your Honor --

PROFESSOR WECHSLER: The economic background.

JUDGE KAPELMAN: That is the point.

SENATOR OHRENSTEIN: The reason I make the point is that over the short years of my legal experience, as compared with yours, I have noticed a difference in result, a difference in terms of the time delays involved, in cases of defendants who are --

THE CHAIRMAN: Are you talking about capital cases now?

SENATOR OHRENSTEIN: Other cases, too.

But in capital cases, of defendants who have been better situated than of defendants who have not been as well situated.

Now, I continue to say that partially this is so because of the settled difference that it makes to an attorney who is being paid, and well paid, and who can, at his client's expense, afford other services aside from attorney's services; and the defendant who may be assigned highly competent counsel, but whose financial resources -- those that are assigned to him -- are still severely limited.

Now, I think that is correctable. And that is correctable in itself, and is not necessarily an indictment of the death penalty.

That is correctable if the State and Government

is willing, and should be willing, to pay for these things.

It has had an effect, so far as I am concerned, in terms of the death penalty.

MR. BENTLEY: Senator, your observation is limited to the particular court in which you practice in the City of New York, isn't it?

SENATOR OHRENSTEIN: No, no. My observation is in terms of my own personal experience, but I read about cases all over the country, as we all do, and we see who gets convicted and who does not get convicted, and who gets his decision stayed for years and years and years, and who doesn't.

MR. BENTLEY: You haven't seen this to be true in Western New York, have you?

SENATOR OHRENSTEIN: I can't speak about Western New York.

MR. BENTLEY: Thank you.

THE CHAIRMAN: Thank you for coming. We appreciate it.

SENATOR OHRENSTEIN: Thank you.

MR. PFEIFFER: I would like to educate you some day on the Legal Aid Society, Senator.

(Witness excused)

THE CHAIRMAN: The next appearance is a joint one, by Mr. Redlich and Mr. Nathanson, representing the State Committee to Abolish Capital Punishment.

I believe they wanted to appear together; is that right?

MR. JEROME NATHANSON: Yes.

THE CHAIRMAN: I do have to remind everyone that we have approximately twenty witnesses to hear today, so I ask you to be as brief as you can in your oral presentation.

You have submitted a brief, I believe.

MR.NATHANSON: In the hope of not being discursive and wasting your time, sir, I have a prepared statement.

THE CHAIRMAN: Fine.

JUDGE KAPELMAN: You would not waste our time, anyway.

MR. NATHANSON: Thank you.

Our counsel has just reminded me that we make a formal request, Mr. Chairman, that our brief be part of the record.

THE CHAIRMAN: Yes. All briefs filed will be attached to the record.

MR. NATHANSON: Thank you.

Since nothing which may be said at these hearings is likely to come as news to members of the Commission, my statement will be as brief as I can make it.

Obviously, I am opposed to the death penalty. I am opposed on ethical grounds. I shall deal first with an ethical view of punishment. Related to this is the role of psychiatry in trials for homicide. Finally, there is the question of the relation of public opinion to justice.

It is sometimes thought that those of us opposed to capital punishment are sentimentalists, "bleeding hearts," repelled by the thought of punishing anyone. However it may be with others, this is a travesty of the views held by all those on our Committee with whom I have worked intimately.

I believe in punishment. I do not believe in retribution or vengeance. I believe that punishment is ethically justified when its aim is educative or re-educative, reformation or rehabilitation.

As one who has been engaged in ethical education for more than a quarter of a century, I am convinced that

it is the completely permissive parent, not the justly punishing one, who damages the child. For a child needs parental and other adult standards in order to integrate its personality and to develop a conscience. Just punishment is one expression of these standards.

What holds for children holds for adults as well. Unless we are ready to concede the absurdity that adults are once and for all finished with their development as personalities, it should be evidence that education ought to continue through life. Life punishes most of us, often unjustly. When it is unjust, punishment can be highly destructive. But just punishment can be as important in the education of the adult as in that of the child.

Punishment has to be seen as a two-way street. Felix Adler, founder of the Ethical Culture Movement, once remarked: "The most effectual aid in promoting repentance is faith in the better nature of the wrongdoer, in that spiritual principle resident within him which no crime committed by him can wholly crush, and which in the most apparently hopeless cases is still to be presumed. But faith in the good that persists in those we call bad must go hand in hand with the acknowledgment

of the bad that remains unexpurgated in those whom we call good....Not to see the essentially divine nature in others and thus also in one's self is the essence of the wrong. To teach the guilty to see it is the object of punishment."

I find this statement especially relevant to the punishment of criminals. If they are not disturbed personalities requiring medical treatment -- and I do not believe all criminals are, by a long shot -- they should be punished. In a civilized society, of course, there would be no attempt to make the punishment fit the crime. To take an illustration from family-life. In a good family, parents love their children equally. Just because they do, they do not treat them the same, for each child is different and has different needs. I think we should see the punishment of criminals in precisely the same way. The punishment should fit the individual. And it should be motivated by an honest desire to reeducate that individual. To be sure, too many of our penal institutions, instead of effectively making this effort, breed more crime. This is a criticism of those institutions, not an argument against the principle of just punishment.

That properly motivated punishment is ethically

justifiable is what makes capital punishment ethically offensive. It is also a contradiction in terms. For if the intent of punishment is reeducation and reformation, then the person whose brains boil over in the electric chair is not likely to learn much from his "punishment."

I have said that the role of psychiatry in trials for homicide is related to the question of punishment. As psychiatrists are presently involved in murder trials, forensically, their role seems to me to be demeaning to their profession. How can a doctor appear as an advocate of a person's sickness or health? I believe in a two-stage procedure in criminal cases -- ideally in all cases, perhaps more practicaly in all cases involving major crimes, certainly in all murder cases. By this I do not mean the California system, for I cannot understand how the requirement of a second jury trial before there can be a death sentence makes capital punishment any more palatable or justifiable. I mean that, in the first stage, a defendant should be tried for guilt or innocence. If found guilty, he should be given a medical examination, as able and objective as the state can provide. If he is sick, he should be treated accordingly. If he is not, he should be punished in

whatever manner is likely to help him sometime become an acceptable member of society.

Finally, there is the question of public opinion. I confess that I do not know what percentage of the people of New York State favor retention or abolition of the death penalty. I can see that this might be a politically important question for members of the Legislature if they are asked to vote for its abolition. I cannot see that it is a matter of any major import for members of this Commission. For unless I have been mistakenly informed, this body was appointed for the purpose of making recommendations for modernizing and hopefully improving our present penal law and criminal come.

I do not believe that any member of this Commission would defend the proposition that that is ethically right or wrong, what is just or unjust, is to be determined by a counting of noses. If 99% of the people of this State agreed with me about abolition and they could be shown to be wrong, I would change my position. I hope a majority of the people agree with me. But whether they do or not, it is because I believe capital punishment is wrong if anything is wrong that I favor

its abolition.

We live in a time when the sense of a man's humanity to man is more desperately needed than at any time in the history of the human race. Essentially it is because the death penalty is so corrosive of this sense of humanity that it is ethically wrong. As Clarence Darrow said so many years ago in the Loeb-Leopold case: "I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men. When we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man."

Thank you.

MR. DENZER: Mr. Nathanson, if you are convinced that capital punishment were a deterrent to homicide, would you still be in favor of abolition?

MR. NATHANSON: I couldn't answer that question unequivocally.

Do you mind reframing it in a way that I find that I can answer, sir?

If I could be shown that it was a tremendously much more effective deterrent than any conceivable alternative, this would give me more serious pause.

JUDGE KAPELMAN: Mr. Nathanson, following the same inquiry -- and really it is a question that should have been propounded to Judge Liebowitz -- is it not the fact that if there is a deterrent that is desired to be shown to the criminal, that life imprisonment in itself is a safe deterrent to avoid capital cases, or to reduce the number of capital cases?

MR. NATHANSON: May I say this, may I say, Mr. Chairman, part of the reason that Mr. Redlich and I wished to appear simultaneously is that in a sense our opening statements complement each other, and perhaps we can better deal with questions in that way.

But if I may deal first with Judge Kapelman's comment.

I think that if a crime is committed by a person who is normal -- that is, as normal as you and I are. I am very serious. If this crime is committed by a normal person, any serious punishment is likely to be a deterrent.

For a person who is a complete compulsive, or an obsessed individual, I don't think it makes the slightest difference what the punishment is.

An alcoholic knows that his drinking is wrong.

He can't help drinking.

A narcotic addict knows that what he is doing is wrong. He can't help it.

A person with an obsessive hatred of his mother wants to kill his mother. He can't help it.

But I don't think most of these things happen in this way. A severe punishment is, I think, an effective deterrent for most normal people.

PROFESSOR WECHSLER: You didn't mean the statement that you think the gravity of the crime had any bearing on the justice of the punishment?

MR. NATHANSON: That is right.

PROFESSOR WECHSLER: You do mean that?

MR. NATHANSON: Of course.

PROFESSOR WECHSLER: So that you would be against Judge Kapelman's allusion to life imprisonment? You would --

MR. NATHANSON: I understood him to say that it would be an effective deterrent.

JUDGE KAPELMAN: That is what I am talking about.

PROFESSOR WECHSLER: You would be equally against it?

MR. NATHANSON: Of course. I would be glad to spell out why I am, if the Commission would like it.

PROFESSOR WECHSLER: No. I think it was in your judgment, if you really meant it.

MR. NATHANSON: Yes.

THE CHAIRMAN: May we hear from you, Professor Redlich?

PROFESSOR REDLICH: My name is Norman Redlich.

I am a Professor of Law at New York University, School of Law.

I am counsel to the New York Committee to Abolish Capital Punishment.

Our Committee, the New York Committee to Abolish Capital Punishment, has prepared a brief outlining all of our positions with regard to the death penalty, copies of which have been sent to the Commission itself, and individual members. I have about a dozen extra copies here.

THE CHAIRMAN: Would you leave some more copies?

PROFESSOR REDLICH: Yes. I have them here for your use.

Judge Liebowitz in his remarks referred to the

question of deterrents, which I would like to deal with as briefly as I can at the outset.

Judge Liebowitz seemed to direct his attention to one concept: does the penalty deter?

That, of course, is really not the issue.

The issue is: is the death penalty a unique deterrent?

Is there something unique about the death penalty, as distinguished from some other form of punishment, which warrants its retention?

And we don't solve this question by asking people, are you being afraid of being executed?

Of course, people are afraid of being executed. I dare say they are also afraid of spending thirty days in jail.

That doesn't mean that either the death penalty or thirty days in jail are appropriate penalties for particular crimes.

The issue, really, is whether the death penalty is a unique deterrent, as distinguished from some other penalty. The only way I would know to determine this factor is to do what one commission after another has done, with what I think is now boring consistency, namely,

to study the records of countries, states, jurisdictions where the death penalty has been eliminated; why it has never existed; where it has been eliminated and then re-imposed.

And all of these studies -- I use the word "all" advisedly -- without exception, all of them lead to the same conclusion. And the conclusion --

JUDGE HALPERN: How valid are these studies, Professor?

They don't take into account any of the differentiating factors, do they?

PROFESSOR REDLICH: I think they do.

For example, Professor Sellin's study did attempt to compare states in the United States of comparable economic and sociological makeup. If it did not, actually the statistics would be much more favorable on our side, because the states which have abolished the death penalty -- if you just looked at them independently -- have a low homicide rate, but Professor Sellin did not stop there.

He compared those states with comparable neighboring states, to determine whether given states of comparable jurisdiction, given cities of comparable

problems, such as the City of Detroit as compared with Chicago, whether one could find that there was any correlation between homicide rates and the death penalty.

JUDGE HALPERN: I wasn't referring to that. I was referring to differentiating characteristics of the crimes themselves. The circumstances under which the crimes were committed.

The general question which I raised with you is: is this the type of problem which yields to statistical analyses?

PROFESSOR REDLICH: I think it does. Because if there is something about the death penalty which would operate as a unique deterrent, then I think we would find that in a city such as Detroit, Michigan, we would have more police killings per rate of population; we would have more non-negligent homicides in general. We would have a greater incidence of that particular crime for which the death penalty is supposed to --

JUDGE HALPERN: Let us take a look at the statistics.

Take Detroit, for a ten-year period, in which there was a great deal of labor violence in Detroit, and you compare that with New York City, which may have had a

crime wave of crimes of robbery and killings. What valid conclusion can you draw?

PROFESSOR REDLICH: The valid conclusion that you can draw is that the experience of any state which has abolished the death penalty, or any country which has abolished the death penalty, the experience in terms of any long-range factor --

JUDGE HALPERN: How long? Have we gone long enough? Do we have statistics for long enough?

I think it may work out, but how long?

PROFESSOR REDLICH: Is fifty years enough? Is fifty years enough?

JUDGE HALPERN: I don't know.

PROFESSOR REDLICH: I wonder how long the people who feel the way we do, that the death penalty should be abolished, must bear the burden of proof, which in my view is not rightfully ours to bear.

We have willingly assumed it. We have conducted study after study after study, and every one of them -- Judge Liebowitz quoted the Royal Commission report. He should have quoted the Commission's chairman and quoted the report in its entirety. If he would have quoted Lord Gower, who originally started, as you

gentlemen will recall, as a proponent of the death penalty -- when the Royal Commission filed its report, Lord Gower wrote a book called "To Take A Life For A Life."

And he concluded on deterrents specifically as follows:

"There remains the argument that without the uniquely deterrent value of capital punishment more murder would be committed. This is the only serious utilitarian argument in favor of capital punishment, and the one on which thoughtful support of it wholly relies. It is also the argument that can be put most readily to the test of evidence in the proper sense of the word. And as we have seen, such evidence as there is goes to show that the abolition of capital punishment does not in fact have this result."

THE CHAIRMAN: Professor Redlich, how about the report of the Commission itself as to their findings on deterrence?

PROFESSOR REDLICH: The report of the Commission itself -- if you go through the record -- indicated -- and this was the Commission --

THE CHAIRMAN: This is Lord Gower's --

PROFESSOR REDLICH: This is Lord Gower's comments, really, on the findings of the Commission, and the Commission itself in its study presented a statistical pattern and, in fact, Professor Sellin's study of the American Law Institute is in part a companion piece to what was done before the Royal Commission, because he did submit testimony there as well.

The conclusion which was reached in the Royal Commission also was that if you were to study the experience of countries such as Western Germany, which abolished the death penalty; the South American countries -- countries which abolished it and reimposed it, usually because of some heinous offense, or because of the political structure in the country -- all of the evidence -- again I must emphasize "all" -- pointed to the fact that there is no uniquely deterrent effect of the death penalty.

It would seem to me, and I am a law teacher and not one that is concerned professionally with the ethical considerations, although all lawyers should be, but in terms of ethical considerations, if the state is to take a life, and to perform an act which is as meaningful and irrevocable as this, where should the

burden of proof lie? Where should this burden lie?

PROFESSOR WECHSLER: What is the use of where it should lie? You know where it does lie.

PROFESSOR REDLICH: Before this Commission, Professor Wechsler, I think it is proper to ask the question where should it lie.

PROFESSOR WECHSLER: We wouldn't help the Legislature if we recommended abolition to the Legislature on the grounds that it is up to them to prove that there was some good in keeping the thing.

PROFESSOR REDLICH: No. You would assist the Legislature, Professor Wechsler, if you were to recommend to them that there exists no credible proof that the death penalty deters homicides to any greater extent than any other penalty.

PROFESSOR WECHSLER: That is a different question from the burden of proof. That is a question of fact.

PROFESSOR REDLICH: The burden of proof relates to the fact that Judge Liebowitz and others have turned to the proponents of abolition and have said, "What proof do you have that the death penalty doesn't deter murder?"

JUDGE HALPERN: You are getting on to a pretty

abstract philosophical level.

What are your comments on the specific cases that Judge Liebowitz gave? He read from a record in his court this past week, and he has interviewed men over the years who say they deliberately refrained from loading the revolver which they used in the holdup, because they feared the death penalty.

PROFESSOR REDLICH: The comment on a man who is appearing before Judge Liebowitz for sentence and who then is asked why he didn't load the gun and he said, "Because I didn't want to hurt anybody," I give absolutely no credibility to that.

THE CHAIRMAN: That was his first statement. His second statement, when the Judge pressed him, was that he did not want to go to the electric chair.

PROFESSOR REDLICH: I give no credibility to that.

JUDGE KAPELMAN: Has there ever been anyone who wanted to go to the electric chair?

THE CHAIRMAN: I doubt it.

PROFESSOR REDLICH: The question that I would like to ask, whether you would ask this person, "Would you like to go to prison for life," whether he would answer that question "Yes."

JUDGE HALPERN: We are not on that point.

He went out on a robbery. This isn't a matter for verbal tricks or debating points.

When he went out on a robbery, if he had a record, he was running the risk of life imprisonment, a fourth offender's sentence.

PROFESSOR WECHSLER: Judge Liebowitz said it was twelve and a half to twenty-five years.

PROFESSOR REDLICH: If I were facing twelve and a half to twenty-five --

JUDGE KAPELMAN: He said he was a second offender.

JUDGE HALPERN: This takes in the case of a fourth offender who was apprehended and convicted. If he is facing what is virtually life imprisonment, and that did not deter him from going out on a robbery, something else deters him from arming himself, although the arms would help him to make his robbery attempt more successful and might even help him in escaping, in escaping apprehension. All of those factors are weighed in his mind.

Still, do you say that the deterrent of death does not enter into his thinking at all?

PROFESSOR REDLICH: No. I say it does not enter into his thinking.

I will later get into my statement. I will later go into some of the cases --

THE CHAIRMAN: You had better get into it pretty quickly, because we are running out of time.

PROFESSOR REDLICH: All right.

I would specifically answer no.

I think that all of Judge Liebowitz's examples are really irrelevant because none of them are directed to the question how would this person answer if the penalty, instead of death, were life imprisonment.

JUDGE HALPERN: Do you spurn the fact of a man who went out on a robbery, knowing that if he were apprehended he might be sentenced to life imprisonment, in effect, nevertheless undertakes the robbery, but refrains from carrying a gun, or uses an unloaded gun?

PROFESSOR REDLICH: Because the person who kills, most likely, when we reach the stage of conviction and sentence and ultimate parole, such a person is most likely to receive more favorable treatment than a person who kills. A person who kills is more likely to receive

more harsh treatment than a person who does not.

And the desire of someone to rob and not kill, in my view, would not be altered in the slightest, whether it makes the penalty life imprisonment or whether it makes the penalty death; and the only way that you and I can resolve our differences, again I say, is to examine the experiences of those areas where we don't have the penalty and we just don't find any difference.

JUDGE HALPERN: How do you reconcile your statement, your analysis of the way this criminal mind is working -- how do you reconcile it with the fact that he is consciously undertaking a criminal enterprise, which does involve a risk of thirty or forty or fifty years in prison?

PROFESSOR REDLICH: Perhaps I don't follow your question.

JUDGE HALPERN: You said that the death penalty adds no deterrent qualities in that case. How do you reconcile that with the fact that he, in the face of a prospective sentence, if apprehended, a term which is the equivalent to life imprisonment, in substance, nevertheless undertakes the criminal enterprise?

PROFESSOR REDLICH: You said equivalent to

life imprisonment in sentence.

Your basis assumption is that a person who kills is in no different position from a person who is a fourth offender in a non-felony case.

I would submit to you that this is not true, and that a prisoner would be quite aware of the fact that it is not true.

A person who kills is in a different position.

JUDGE HALPERN: Your contention is that a life imprisonment term would mean a period of longer incarceration. That is the difference?

PROFESSOR REDLICH: Yes, I am in favor of more severe penalties for first-degree murder than for any other crimes. I am in favor of more severe penalties.

JUDGE HALPERN: We turn to Mr. Nathanson's view, with a parole board and a psychiatric board, and find that with this man there is a good chance of rehabilitation and reeducation, you would advocate his release, wouldn't you?

MR. NATHANSON: If I may interrupt, Judge, that in expressing some of the views I did, I was not entirely representing the views of our committee. I hope

that is quite clear to the Commission.

JUDGE HALPERN: The views that he has expressed have evoked some sympathy.

MR. NATHANSON: Thank you.

PROFESSOR REDLICH: I would like to comment on a few other things which I would like to specifically draw to the attention of this Commission, because they have been raised in earlier testimony.

PROFESSOR WECHSLER: Can I pin you down on one point?

This is this issue: Isn't it either these homicide rate studies that you alluded to are meaningless, that they show nothing, or they should show something?

Now, I take it your testimony is that your judgment is that they should show something, and that what they showed is no appreciable influence on the homicide rate, whether capital punishment is in or out; is that right?

PROFESSOR REDLICH: That is correct.

PROFESSOR WECHSLER: Isn't there really one question, then, as Judge Halpern asked; "Are these statistics meaningful?"

How can they be other than meaningful, if the entities that are involved are sensitive enough to show what happens?

Now, are these homicide rate figures in terms of those of which studies are made -- they are the only data available -- are they extensive enough?

PROFESSOR REDLICH: I think they are, Professor Wechsler. I think they are particularly extensive, when you take one jurisdiction.

Judge Halpern, if you were directing your remarks to me, thus far comparing two jurisdictions --

THE CHAIRMAN: What jurisdictions do you have in mind?

PROFESSOR REDLICH: Take a state which has abolished the death penalty, such as Oregon, and then reimposed it because of a particular crime. In other words, you had the death penalty, you abolished the death penalty, and then you reimposed it. There are three or four states that fall into this category.

The homicide rates in those states have been examined quite carefully. And there we have the same composition that we are dealing with. There again we find that as you move from the death penalty situation

to the abolition situation, to the reimposition situation, you find no difficulty.

PROFESSOR WECHSLER: If you are taking Oregon, homicides could occur in a year, in Oregon, and not be reflected in a difference in the homicide rate. Have you figured that?

PROFESSOR REDLICH: Oregon, of course, a small number could reflect the difference in the homicide rate because of a comparatively small number of homicides.

PROFESSOR WECHSLER: What is it? I have forgotten it. Five?

PROFESSOR REDLICH: In Oregon it is in the nature of about three, I believe.

PROFESSOR WECHSLER: Three?

JUDGE HALPERN: Of the total population?

PROFESSOR WECHSLER: Three per one hundred thousand.

JUDGE KAPELMAN: Per year?

PROFESSOR REDLICH: Yes.

PROFESSOR WECHSLER: What is the population of Oregon?

JUDGE HALPERN: What is the difference --

PROFESSOR REDLICH: We are comparing Oregon to Oregon.

JUDGE KAPELMAN: He is comparing it when it first had capital punishment and then it did not.

JUDGE HALPERN: Do you have the statistics on the number of robbers who used unloaded guns, in states that have capital punishment and those that did not?

That would be the kind of statistics that would be meaningful.

PROFESSOR REDLICH: The number of robberies, of people using guns?

JUDGE HALPERN: That is a common phenomenon in New York.

You heard Judge Liebowitz on that this morning.

Is there such a phenomenon in states that don't have capital punishment?

PROFESSOR REDLICH: Where I would look for an answer to that question is to a city which has the --

JUDGE HALPERN: Has anyone looked for it? Do you have such statistics?

PROFESSOR REDLICH: I have personally not looked.

JUDGE HALPERN: Have you seen that?

MR. NATHANSON: I have never seen it.

JUDGE HALPERN: I haven't seen any. That is the kind of statistics that I would like to see.

PROFESSOR REDLICH: Perhaps when the Police Commissioner of Detroit testifies before this Commission, and Detroit, which is a city which operates in an abolition jurisdiction, he can testify as to whether we are getting a higher number of killings in the course of robberies than we are in other jurisdictions. The statistics would seem to say no, in terms of homicide rates.

Let me make this general observation, two in particular.

One I would like to ask, is this Commission in its deliberation to view the death penalty, not as some vague abstract, but in terms of its actual application in this state, and would they -- I mean we are imposing the death penalty, in essence, for one crime, and the crime is, as we know, first-degree murder. I would submit this proposition to you:

That in death penalty cases, in capital cases, we are imposing the one penalty which assumes a system of perfection, and we are imposing them in precisely those cases where the most serious deficiency in our penal law exists.

If you take the question of the rules of insanity, which this Commission is considering, the question of premeditation, the question of impartial jurors, the question of improper press coverage, the question of coerced confessions -- and I have outlined all of these in our brief -- of illegal police detention -- if you take all of the difficult questions which exist in the criminal law, they exist most severely in our capital crimes.

It is not merely a question, is the man innocent or guilty? It is a question of whether we are --

THE CHAIRMAN: It is your contention that there is a higher incidence of illegally obtained confessions in capital cases than in any other cases?

PROFESSOR REDLICH: It most certainly is. It most certainly is.

I would like to point out, for example, that

we have made a study during the period --

THE CHAIRMAN: You are talking about reversals, or at least acquittals, based on that determination?

PROFESSOR REDLICH: I would like to clarify exactly what I mean.

Our brief points out that if you look at the instances of reversals because of coerced confessions, you will find that almost always they occur in capital cases.

If you look at the present composition of the inmates in the death house -- I have in front of me now a study of 26 of them -- in 24 cases you had confessions.

Now, I am not saying that in all of these cases you had coerced confessions.

THE CHAIRMAN: I hope not.

PROFESSOR REDLICH: I hope not, too.

There is always the unfortunate tendency of overstating someone else's position in this way. I am not making that statement.

What I am saying, and what I feel is the irrefutable position that the confession assumes a

particular importance in first-degree murder cases; why is that so?

It assumes a particular importance because in a first-degree murder case you must establish the element of premeditation. Premeditation, as we know, is a --

JUDGE HALPERN: Not in felony murder cases.

PROFESSOR REDLICH: That is right. In first-degree felony you must establish the element of premeditation.

Justice Cardozo once said that the distinction between first-degree murder and second-degree murder was so vague that he couldn't understand it.

MR. ATLAS: For the average jurors. It baffles the juries. That is what he said.

PROFESSOR REDLICH: He couldn't understand it himself. He had studied it for years.

There is a quotation in our brief that he had difficulty in understanding it, after all of these years.

Now, if you look at some of the confessions in common-law murder cases -- and I have looked at

them -- obtained in the absence of counsel, you find not merely the statement that the act was committed, you find certain statements which go a long way towards establishing the fact of premeditation, which, in the absence of the confession, would be extremely difficult to prove in a trial.

I would like to devote my few remaining minutes to one concept, because it was raised earlier.

That was this question of assigned counsel and discrimination against poor people in capital cases.

If someone were to ask me the question -- and I had hoped that one of the Commission would -- and so I will ask it myself:

Has it been your experience that defendants in capital cases -- in the cases that you have examined -- has it been your experience that these men are receiving the benefit of top counsel?

My answer would be no. Most emphatically no.

The assigned counsel system, as I have seen it in operation, is not working properly. There have

been many cases in New York County and in Kings County, where you find four lawyers assigned to represent a defendant. They get a combined fee of $2,000. One or two of them will do the work and the others will do nothing. I have asked these --

MR. DENZER: Excuse me.

PROFESSOR REDLICH: May I make one further statement?

I have asked these lawyers, what happens?

I have been told on repeated occasions that these assignments are political.

I am making this statement for the record.

MR. DENZER: That isn't really an argument against capital punishment. That is a separate point.

If that is all there were, we could amend our laws to improve the assignment of counsel.

PROFESSOR REDLICH: The fact is that in capital cases, right now, of all the people in the death house -- there are 18 in the death house -- 16 were assigned counsel.

Yet now you might say this applies in all cases.

MR. ATLAS: Mr. Redlich, it is well known

that it is a custom of the judge who assigns three or four counsel -- and I know of my own experience -- will assign at least one who is a fit leader and a fit advocate.

Now, I don't say that the others are unfit, but I mean especially fit. So I don't think it is a good argument.

PROFESSOR REDLICH: I must emphasize, my opinion is that this is not collateral, that the question of assigned counsel is directly related to capital punishment, because you are dealing exclusively with indigents.

JUDGE KAPELMAN: If every one of these people were given Clarence Darrow to defend them -- let us start with that premise -- would you be in favor of capital punishment, then?

PROFESSOR REDLICH: I would be opposed to capital punishment.

JUDGE KAPELMAN: All right.

THE CHAIRMAN: All right.

JUDGE KAPELMAN: That makes the whole point.

THE CHAIRMAN: Is this covered in your brief, Professor?

PROFESSOR REDLICH: Yes, this point is emphatically covered in the brief.

May I say just one thing more in conclusion? That every one of the issues which I have demonstrated in this brief, relating to the death penalty and to the way in which it is discriminatory against poor people, it could be said in a great many other cases. But I do not feel that this Commission can ignore the fact that it is precisely in capital cases where you have the greatest indicia of discrimination, and where you have the greatest indicia of situations in which the most serious fallacies in our criminal system are operating.

THE CHAIRMAN: Mr. Nathanson, do you want to make a statement?

MR. NATHANSON: Yes, as long as I have a minute. I hope you won't mind my imposing on you, but the only reason I am stepping out of my role as Chairman of the New York Committee to Abolish Capital Punishment, and speaking as Chairman of The Fraternity of Ethical Leaders in the United States -- this is not directly germane to this hearing, but it does have to do with the question of death.

THE CHAIRMAN: I hope it is pretty close to germane.

MR. NATHANSON: It is going to be very brief.

Judge Liebowitz, and many others who advocate the retention of the death penalty, do so in the name of protecting the citizens, and particularly innocent people.

I do not believe that the death penalty does this. I am concerned -- as I hope all of us are -- with protecting innocent people and protecting society.

Under the existing laws, unless I misunderstand them, there is nothing that can be done about countless paranoids and schizophrenics, who will, as surely as we are sitting here today, commit crimes of violence. And if we want to protect innocent people, let us help to try to find some way of dealing with these people.

THE CHAIRMAN: Thank you both for appearing.

(Witnesses excused)

THE CHAIRMAN: The next witness will be Professor Monrad Paulsen, of Columbia Law School.

PROFESSOR MONRAUD PAULSEN: Thank you very much for letting me appear, and I only have a very brief statement to make.

Speaking for myself and my own experiences, I am opposed to the death penalty. And the reasons, as I heard them from the previous speaker, are in some respects reasons that appeal to me.

However, I have another view, and that is what the State of New York should do, as opposed to my own personal preferences.

I think that it is a very serious mistake for a state to abolish capital punishment too soon, even from the point of time of the abolitionists. Because if you succeed by one or two or three votes in abolishing capital punishment, what will occur is that an outrageous case will come along and the citizens will be affronted and the repeal will be repealed.

We have had a good many instances of that sort in our national history.

PROFESSOR WECHSLER: A very recent one

in Delaware?

PROFESSOR PAULSEN: Yes.

Indeed, if you look at the history of capital punishment, there have been several states that have flocked over from time to time.

I think that what is required before such a basic change is made is that a general concensus representing a very broad agreement has to be achieved. Or you may end up with something worse than you now have.

I think that a movement to abolish, as such, might blunt and frustrate a very real opportunity that does exist,as I see it.

It seems to me that the principal evil, or a principal evil of our system of capital punishment is that it is applied so capriciously,and flagrantly in a sense, that the legislative formulations that are designed to tell us when the death penalty should be imposed are not very good.

Take the simple formulation of premeditated murder. Some of the most appealing -- if an act of killing can be appealing, but the one that you feel for the killer -- are cases of premeditation.

For example, a mercy killing can be a premeditated act, if that word is to have any meaning at all. Yet it can arouse sympathy enormously with the actor in such a case.

The legislative formulae in many other ways are inappropriate to tell us who should be executed and who should not be executed.

I think that it is true that very frequently the person who should be executed is selected on the basis of the sensational character of the criminal act, the subsequent publicity given to it, as opposed to his character and his depravity and his degemeracy.

If it makes any sense at all to have a system of capital punishment, we should select those for execution who are of such character that death at the hands of the State is in some sense an appropriate fate for them.

I think that there are ways of doing that that are at hand. I am making a very simple proposal, that has been adopted in other states, that we have in New York,as a first reform, a two-stage system.

First, an adjudication of guilt as to the

criminal act.

Secondly, some kind of inquiry and hearing on the question of is this the kind of person that ought to be executed.

And, gentlemen, I would call to your attention and support the use of the model penal code as a model for this drafting. It seems to me that the penal code goes further than merely providing a two-stage hearing; that also seeks by legislation, by legislative formulation, to announce in advance some of the creteria which are both aggravating and mitigating. That section is, of course, Section 210.6. I assume that you have copies of that document available, and I shan't bore you more with it.

MR. ATLAS: Professor, would you say that connected with this two-stage procedure there must be a serious reconsideration of what is homicide and what is a capital crime?

PROFESSOR PAULSEN: Well, I would think so. Yes.

MR. ATLAS: In other words, the two-stage procedure alone isn't what you propose, but you propose the two-stage procedure in a setting of a

revision of the law of homicide, for example?

THE CHAIRMAN: In the definition of murder-one.

PROFESSOR PAULSEN: Yes. I certainly would agree that we can make improvements in that formulation as well.

I am not speaking to that question. I am saying that assuming that you have done the best possible job of reform, with reformulation of the homicide crime, that you still have the further task, if one retains that penalty, of focusing at a separate kind of stage of hearing, upon the particular character of the guilt of the person.

MR. ATLAS: Forgive me for pressing this. Wouldn't you say that these two things must go together?

PROFESSOR PAULSEN: Well, yes. But I don't want to defend that proposition. I don't know what is involved in the word "must."

THE CHAIRMAN: We are dealing simultaneously with a consideration of the death penalty as well as the reformulation of the homicide article.

PROFESSOR PAULSEN: I don't feel secure with

the word "must."

MR. ATLAS: In other words, the double process must go in together, may result in a minimization of the number of instances in which capital punishment would become inflictable, and those instances will at least have some worthy reason for the infliction.

PROFESSOR PAULSEN: You are persuading me.

MR. ATLAS: I hope I am.

JUDGE HALPERN: Before you arrived this morning, Professor, Judge Liebowitz made a proposal which I would like to get your comment on.

He proposed that instead of having a second stage of the jury trial, the jury trial be conducted substantially as it is now, except this, an extension of the power to recommend life imprisonment in all capital cases, not merely in felony cases, and that the recommendation be binding.

With those two exceptions, you would have the jury trial proceed as it does now, but he would have a permanent review commission, which would have the power to take further evidence, particularly evidence which would not be admissible in the jury trial under

the rules of law, not prevailing, and would decide whether the capital sentence should be imposed or should be commuted.

PROFESSOR PAULSEN: Let me understand this. The jury would --

MR. ATLAS: Under our present system, the jury would find the defendant guilty and decline to make a recommendation. The Court would then impose a capital sentence. This review commission would review the matter.

THE CHAIRMAN: It would be after the Governor's clemency hearing.

MR. PFEIFFER: After the Court of Appeals has affirmed the judgment of conviction.

JUDGE HALPERN: On the record.

MR. ATLAS: Does that mean a commission -- to whom the facts in the original question of guilt come anew?

JUDGE HALPERN: Yes.

THE CHAIRMAN: In a sense, yes.

JUDGE HALPERN: That was added. That raises another question.

He also wanted to have this commission to

have the power to consider whether a motion for newly discovered evidence should be entertained with respect to the one-year limit and things of that kind.

But its primary function, as I understand Judge Liebowitz, was to serve the purpose of a second-stage jury trial, to decide whether or not,not going primarily to the guilt or innocence, but psychiatric evidence and evidence of that kind, if the defendant should be executed.

PROFESSOR PAULSEN: Well, to my mind, that smacks of some kind of review of almost an appellate nature, if I understand the proposal.

What I would fear about that is some kind of momentum with respect to the original adjudication that could carry over into the later proceedings.

We all know that when you get something that separate, they begin to have a lot of respect for what is below.

And I think that in every case there ought to be a careful examination, not only to the question of the guilt, which our institutions provide so handily, but also as careful as one can, an inquiry into the very character of the accused. And I would

like that to be a regular part of every proceeding, and not have something that looks as if it is a review.

MR. ATLAS: Wouldn't such a commission as Judge Liebowitz recommends impinge somewhat on the Governor's freedom of action?

THE CHAIRMAN: He stated it would be before the Governor.

MR. ATLAS: All right.

Thank you.

THE CHAIRMAN: Thank you very much, Professor.

PROFESSOR PAULSEN: You are welcome. Thank you.

(Witness excused)

THE CHAIRMAN: The next witness represents the Urban League of Westchester County, Mr. Myron S. Isaacs.

MR. MYRSON S. ISAACS: Thank you, Mr. Chairman.

Mr. Chairman and Commissioners:

I am not an expert. I am a lawyer. I practice civil law.

I have done a great deal of study in consideration, discussion, and I represent the view of the Urban League of Westchester County, Inc. following such study and discussion.

We start with the belief that that the proper goals of the Penal Law and thenCriminal Code are the protection of society and the rehabilitation of offenders. To achieve those goals it is essential that justice be equitably and impartially administered.

It is our view that capital punishment today is incapable of equitable and impartial administration. It represents, in our judgment, a cruel concession to vengeance inherited from a time when revenge on the offender was a primary aspect of a penal code. Of course, it abandons all hope of rehabilitation of the

prisoners that are put to death.

We have looked at some of the most recent comprehensive studies of capital punishment in England and the United States that have been made recently, and we are persuaded by the fact that "All data on deterrence have been negative," a summary of Messrs. Bloch and Geis.

We did our own study to a certain extent. And we have an appendix to this memorandum.

THE CHAIRMAN: By "negative," do you mean that they indicate that capital punishment is not a deterrent, or that we can't tell from the statistics?

MR. ISAACS: It is negative in one or both of those senses.

I would say that the indication is not that no individual is ever deterred by capital punishment, but at least as many people are incited as are deterred; that there is no deterrent effect that can be seen.

What we have done here in this appendix is, of course, an assembly of figures that don't prove in a sense that this matter can be proven, that capital punishment is a deterrence.

They are indications of the fact -- if you take the states by the groups of those organized in the reports of the Federal Bureau of Investigation and arrange them in the order of the numbers of their consistence, proportionally that they execute, and then see how the murder compares in those states, the intentional homicides in those states, you find there is quite a remarkable degree of correlation in the states that kill -- there is quite a proportion of their consistence in the electric chair or on the gallows, also seems to have the greatest proportion of private murders.

This is one case of what we think are the facts, that the deterrent effect of capital punishment is an illusion and not a fact.

Then we took all the individual states in which there have been 28 or more executions during the past twelve years, 1950 through 1961.

We arranged them in the order of frequency of executions. The number of executions in relation to population.

And again, the states which kill the individuals, the individual states which put to

death the highest proportion of their own citizens, also seems to have highest of intentional homicides.

Then we took a straight look at six of these states which have done without capital punishment, for thirty, forty, fifty years or one hundred years.

In each case the rate of intentional homicide in the year 1961 was substantially lower than the over-all rate for the country.

In three of the six states the rates were approximately the same as for the regions, according to the F.B.I., in which they are located.

In the other two, they were substantially below, less than 50 per cent of the average, for the regions in which they were located.

JUDGE HALPERN: Do you seriously mean that statement at the foot of your statistics, on Appendix 1, page 2?

"The remarkable degree of correlation between rate of executions and rate of intentional homicide suggests that executions tend more to incite than to inhibit homicide."

MR. ISAACS: I think that is a suggested

conclusion. Let me --

JUDGE HALPERN: Doesn't that show that the statistics are meaningless?

MR. ISAACS: I don't think so, your Honor.

It seems to me that executions and trials for life have a double effect.

There are very few people --

JUDGE HALPERN: Let us leave the statistics for a moment.

Give us a little thinking on where you think that the existing death penalty incites to more homicides.

MR. ISAACS: I think a good deal of our homicide today is committed by psychopathic persons, and not by normal persons, that have been talked about.

JUDGE HALPERN: They weren't made psychopathic by the sentence of the death penalty.

MR. ISAACS: This is a condition that seems to me to exist.

There have been a number of states that have indicated that at times of trials for life and

actual executions, that those events very often have been followed by a noticeable increase in the rate of homicide, where the execution is publicized.

I am not suggesting that I am a psychological expert. To me this is one of the explanations for the fact that in spite of the fact that -- you can't say that no individual is ever deterred. You can't find any indication in any of these statstics, that I see, that capital punishment has a net deterrent effect on the rate of homicide.

In fact, it seems to be fairly consistent that more executions are accompanied by more homicides.

That as our rate of executions in the country is going down, the rate of homicide has tended to go down. When we look at the states that --

PROFESSOR WECHSLER: Is that more probable in the reverse, that as the rate of homicide has gone down the rate of executions has gone down?

MR. ISAACS: They go together.

PROFESSOR WECHSLER: I have no way of telling whether there is an ideology one way or the other. I am assuming there is a correlation.

MR. ISAACS: We start with the fact that we kill very few people, compared with the number of homicides. Where it is less than one-half of one per cent.

PROFESSOR WECHSLER: That is why the law of average upon the statistics' usefulness has such little application.

MR. ISAACS: One of the questions, I suppose, is a little like trying to disprove the existence of witches. You get to a point -- you look at the facts, what seems to be credible.

JUDGE HALPERN: Can't we approach this problem a little more intelligently than that? Let us leave the statistics alone and let us have your reasons.

MR. ISAACS: I gave you the statistics as a starter. Somebody ought to look at individual cases and make a study, that the Urban League has not made. They are at best indications, and not proof.

It is also our judgment that the administration of any penal code, no matter how carefully put together, is bound to be impertinent; or that there

will be some convictions of innocent defendants.

When an erroneous conviction is followed by execution, the injustice is most flagrant and reparation is impossible.

In terms of the deterrence, it is our judgment that a penalty has to be reasonably certain and prompt, or at least a likely consequence of specified conduct, in order to be a real deterrent. And that a penalty which is imposed in less than one in a hundred of the cases of crime can't rationally be considered a real deterrent, in that effect.

It is also our judgment that the cold-blooded killing by the state of a few scapegoats, one in one hundred, one in two hundred, among the many who commit murders, is morally wrong, and that it is a degrading, vindictive practice that ought to be abolished.

Now, as you know, an intentional homicide may be first-degree murder, second-degree murder, depending on whether deliberation and premeditation are found.

The distinction between the degrees is so vague as to permit arbitrary and capricious decisions

by prosecutors and juries, in which prejudice may operate, without any effective review being possible.

Finally, the general emotional and economic factors that operate throughout a prosecution with life at stake may cause the ultimate result to be determined by extraneous factors irrelevant to the issues of guilt and degree of guilt.

The Urban League of Westchester County is particularly concerned with the inequity and discrimination against minorities that appear to be inherent in the administration of capital punishment in New York State.

Years ago Warden Lewis E. Lawes of Sing Sing prison, who came to his job believing in the necessity of capital punishment, became convinced (a) that it has no sound justification; and (b) that it is an unequal punishment in the way it is applied, to the rich and poor.

He made the very broad statement that "No defendant of wealth and position ever goes to the electric chair or to the gallows."

Today, it seems to me that among the poor

Negroes and Puerto Ricans, that they are the principal victims of the death penalty in New York.

I have tabulated at page 5 a list of all the persons received in Sing Sing under sentence of death, over the most recent five-year period that I could get.

The list was checked with the Acting Warden at Sing Sing.

JUDGE HALPERN: Would you have comparable statistics without this, which would be meaningless, as to the percentage of crimes committed by those people?

JUDGE KAPELMAN: That is the point. That is what I would like to know.

MR. ISAACS: I would like to see this Commission get to --

JUDGE HALPERN: Aren't your statements based upon this inflammatory statement, and you make this conclusion, that Negroes and Puerto Ricans are discriminated against in this regard?

MR. ISAACS: We don't quite say that. We say that those figures appear to indicate that. We would like you to --

JUDGE HALPERN: You recognize that you don't appear to indicate antyhing unless you have the facts.

MR. ISAACS: It would be nice if we had all the facts. We wouldn't need the study, if all the facts were known.

This is an area in which we have to use the best we can. And a starter is to find out who is being sentenced to death and who is being put to death.

THE CHAIRMAN: You made no analysis of those charged with homicide in New York, so as to determine what groups they were coming from?

MR. ISAACS: No. We have looked for whatever figures we have.

We were advised that there are no accurate figures. It would take a case-by-case study to know who committed the 603 violent homicides.

MR. PFEIFFER: You used the word "consistently," that they discriminate against them. The whole point of what the Judge is saying is that your figures don't prove a discrimination at all.

They prove the fact that Negroes and

Puerto Ricans are executed more than others are.

It is true; but it doesn't prove discrimination, in the absence of other things. It is a very unfortunate situation that they happen to be the ones that economically are at the bottom of the ladder. It doesn't prove discrimination in the application of the death penalty.

Isn't that your point, Judge?

JUDGE HALPERN: Yes.

MR. ISAACS: Mr. Pfeiffer, we don't say -- and I have to repeat -- we have no figures in terms of who is being penalized, by way of discrimination.

It is a fact that 80 per cent of those sentenced to death and 100 per cent of those out of the group who are executed were Negroes or Puerto Ricans.

MR. PFEIFFER: That is the fact.

MR. ISAACS: It is an indicative fact and a relevant fact in determining whether discrimination operates in this field.

We believe that it does.

I am not suggesting and I am not saying that these facts prove discrimination. But to know

whether it exists you have to start with a fact, who is sentenced to death, who is executed, and go on from there.

PROFESSOR WECHSLER: Let us try to get at the facts and the questions that are addressed to that.

You have a list here of cases from December 3, 1957 to November -- the last one was November 8, 1962. These are the people who were received in the death house at Sing Sing.

MR. ISAACS: Yes.

PROFESSOR WECHSLER: I assume you got this information from the Correction Department? Is that the source?

MR. ISAACS: No. A study had been made of twenty years, through 1960, and I was able to get hold of the more recent names, and checked back by mail with the Acting Warden of Sing Sing.

PROFESSOR WECHSLER: I was wondering whether a similar list could not be obtained for the same period of time for those persons charged with murder in the first degree whose cases did not result in a sentence of death.

MR. ISAACS: I would be happy, it it could be.

PROFESSOR WECHSLER: I am asking you.

MR. ISAACS: I inquired and I could find no source for the figures on those charges.

I was told that it would be possible by sending people around to the various courts throughout the state.

PROFESSOR WECHSLER: These cases all come from only about five counties, don't they? Kings County, Bronx, Manhattan, a few from Erie, and one from Franklin.

MR. ISAACS: Three from Orange.

PROFESSOR WECHSLER: One from Suffolk County.

It should be possible to get a list from the District Attorneys of those counties for this five-year period.

MR. ISAACS: With the staff that this Commission has, I think that is a very perfectly feasible study.

It was not feasible with the limited resources that we have in the Urban League.

There were no published figures; there were no collated figures in one place that would be

comparable to those people over --

PROFESSOR WECHSLER: If such a list of names did show the same ratio of predominance, you would be exploded on the discrimination point. If it didn't, you would have some supporting evidence.

MR. ISAACS: There have been no indications of figures that I have seen where studies have been made.

Taking the last one in New York City, which was twenty years back, it wouldn't indicate like thirty or forty times the number of crimes being committed in the Negro and Puerto Rican population, as in the rest of the population.

On the executions, you are at an area of 100 per cent of those who are executed from this group being from the Negro and Puerto Rican population.

I don't think it is possible that the statistics can show anything like a comparable figure on commission of crimes.

JUDGE HALPERN: Take the table on page 6, where you have the underlying data with respect to the one problem with the number of those who got commutation, as against those who were sentenced in

the first place.

MR. ISAACS: Yes.

JUDGE HALPERN: Do you have a sufficient statistical sample, without knowledge of the circumstances of each case? Do they justify the conclusion that the death penalty is functioning inequitably, in discriminating against Negroes and Puerto Ricans?

MR. ISAACS: All I can say, your Honor, is that this is an indication of it.

Let me say this: if you want to know whether the death penalty is discriminating against any particular group, the first thing is to see who is being sentenced and executed, and then go on from there.

PROFESSOR WECHSLER: The word "discrimination" has a very definite meaning, of a very willful taking into account of irrelevant factors of race.

MR. ISAACS: Yes. It is our belief, your Honor -- I am not talking about willfulness in terms of any judge, any particular jury, any particular prosecutor, or any particular policeman.

JUDGE HALPERN: The word "discrimination" has that meaning, doesn't it?

MR. ISAACS: I believe the death penalty type is inherently a penalty that is found to discriminate against certain groups in the population.

JUDGE HALPERN: Why?

MR. ISAACS: For many reasons. The penalty is excessively severe to our normal standards of behavior. It was quite normal to go and kill people who committed offenses. Today I don't think it is. Today it is the unusual case. One in two hundred, one in a hundred fifty. One in very few of the murderers ever goes to the electric chair.

When you have a penalty that is excessively severe in relation to your normal standards, it tends to be applied against people, a few scapegoats who have to satisfy many criteria.

MR. ATLAS: When you say "scapegoats," Mr. Isaacs, you are referring to somebody that is chosen to carry a burden.

May I ask you a question, sir?

MR. ISAACS: Yes, sir.

MR. ATLAS: I don't think here you said one word about the fact or the suggestion that the infliction of the death penalty is a revolting

punishment.

I haven't seen a single statistic concerning how people in this State of New York react to so revolting a punishment. This I haven't heard.

MR. ISAACS: We do say that we regard this as a cruel, vengeful punishment that has no place in the penal law. That is our opinion, too.

I would say this, it is a necessary leg of our opinion, Mr. Atlas.

THE CHAIRMAN: I am going to have to ask you to summarize rather quickly, if you can, Mr. Isaacs.

MR. ISAACS: All right.

The figures in New York tend to conform to what we have read in studies more generally.

Professor Jeffery, in the "Society and the Law," published, noted that very, very few people are executed out of the many who commit murder.

And he stated that "There is a certain injustice in this system since whether a man is executed or not becomes a capricious and arbitrary matter. Of those executed, most are poor, ignorant, and from

minority groups, expecially from the Negro population."

This was also the conclusion of a study that was made by Franklin Williams, Assistant Attorney General of California.

And it is our judgment, our opinion -- we are not posing as experts -- that if the facts as to the numbers of Negroes and Puerto Ricans sentenced to death and executed in New York reflect an inherent tendency of the death penalty today, to victimize those two minorities in our state population. As administered in New York today, capital punishment is a symptom of, and a stimulus to, racial prejudice.

MR. PFEIFFER: Mr. Isaacs, excuse me. Are you finished?

MR. ISAACS: Yes. I was going to urge that the matter be studied by the Commission, and that the Commission recommend to the Legislature the abolition of capital punishment.

MR. PFEIFFER: The question is this: Apart from any aspect of discrimination against Negroes, white, Jews, Catholics, and any group, just on the merits or demerits of the question itself, are you in favor, is your organization in favor, or are you

in favor of or against the abolition of capital punishment?

MR. ISAACS: We are against capital punishment and favor its abolition.

We believe, as Mr. Atlas said, that --

MR. BENTLEY: For whites also?

MR. ISAACS: For everybody. We are not recommending that any greater number of any other group be executed.

We are recommending that the death penalty be abolished. We are opposed to it as a general thing.

THE CHAIRMAN: Thank you, Mr. Isaacs.

MR. ISAACS: Thank you.

(Witness excused)

THE CHAIRMAN: The next witness is Mr. Edmund Goerke, representing the New York Yearly Meeting of the Religious Society of Friends.

Mr. Goerke, please.

MR. EDMUND GOERKE: Gentlemen, it is a privilege for us to be here and we certainly are very glad to have this opportunity to present our position.

This is going on the 125th year in which we have appealed to our State Legislature to abolish capital punishment.

MR. PFEIFFER: So you are an old hat at this?

MR. GOERKE: Yes. We haven't succeeded as yet.

MR. PFEIFFER: Keep right on trying.

MR. GOERKE: Our report consists of five parts. I am only going to speak very briefly about it.

The first part is a statement issued last week of the Representative Meeting of the New York Yearly Meeting on its position on capital punishment.

Second, we have this documented as clearly as we could from first-hand sources with first

explanations.

Third, we have a brief on the mandatory clause of capital punishment and the M'Naghten Rule, which will be forthcoming.

Fourth, we have a statement on "What Do the Churches Say on Capital Punishment?" which has been compiled for the last few years by some of our Protestant, Jewish, and some of our Roman Catholic clergymen on this issue.

Fifth, the position of the Friends on crime and punishment in general.

MR. PFEIFFER: You are going to confine yourself to an oral statement?

MR. GOERKE: Yes. I will speak to you on our statement on capital punishment, and then, if I may, I would just like to speak on one or two issues extemporaneously.

The Religious Society of Friends (Quakers) from its very beginnings over 300 years ago has had a deep concern for the laws relating to criminal acts and in particular those associated with the death penalty.

From 1839 the New York Yearly Meeting of the

Religious Society of Friends has petitioned our State Legislature to abolish capital punishment and substitute other measures which would help in the redemption of the offender. We realize the duty and the responsibility of civil government is to maintain law and order and to protect the innocent from the ravages of crime.

However, it is in this regard we deny the value of our present statutes dealing with capital punishment and urge in its place other methods which will offer aid to the victims or their families, help the offender rehabilitate himself, and at the same time protect the public from further acts.

We feel that capital punishment does a great amount of harm by showing disrespect for the sanctity of life by the State, by encouraging criminal acts by those who have suicidal or other psychotic tendencies, and by maintaining an archaic form which is the antithesis of modern correctional philosophies and a hindrance to the administration of criminal justice.

We again reaffirm our deep and abiding faith in the immeasurable value of every human

life, and the infinite possibilities of spiritual reclamation.

It is our belief that the taking of a human life, both by individuals and groups of individuals formed into a civil state, is incompatible with the teachings of Jesus and the New Testament, and that a government has no mandate from God to take the life of one of his children.

The sanctity of human life is one of the fundamentals of a Christian Society, and can in no circumstances be set aside. Our concern, therefore, is for all victims of violence and oppression, not only the murderer and other criminals, but all those who suffer by their acts.

Trials in which the death penalty is a factor, and the executions themselves, have a debasing and hardening effect not only on those connected with them, directly and indirectly, but upon the entire community, and tend to produce the very brutality they seek to prevent.

Past evidence clearly shows that the death penalty is unequally applied, falling mainly on the poor, the friendless, the mentally or

emotionally unstable, and the ignorant, while many other criminals with means escape execution.

Moreover, we believe that capital punishment fails as a deterrent, and that there is always the possibility of executing the innocent and that such an act is irrevocable.

We feel the function of penal procedures should never be on vengeance and other cruel methods of retaliation, but on a safe and humane custodial system based on constructive principles.

Now, if I may, I would like to just speak on a few of these statements.

It was brought out earlier today the inequality and inconsistency of its application. This we also would like to reaffirm.

There have been 3,706 executions since 1930 throughout the United States. Fifty-three per cent were Negroes, although they consist of only about 10 per cent of the population of the United States. And, again, as our friend mentioned -- I wish we had figures on the homicide rates of all our groups, but this we do not have.

MR. DENZER: The figures aren't worth

saying; isn't that so?

JUDGE KAPELMAN: They don't prove the point?

MR. GOERKE: No. But it is something that indicates

MR. DENZER: Fifty-three per cent of the crimes were committed by Negroes, so there wouldn't be anything unusual about it, would there?

MR. GOERKE: This is just for murder.

Take rape, for example.

MR. DENZER: I mean murder.

MR. GOERKE: But I am going to talk about rape, and it is not applied on this.

It is that 90 per cent of all that are executed for rape have been Negroes, and in some of the Southern states --

THE CHAIRMAN: You are talking about country-wide?

MR. GOERKE: Yes. We don't have capital punishment here for rape.

In six of our Southern states, all those executed for rape have been Negroes.

Also, all those executed for robbery have been Negroes, in the Southern states.

Now, what we are saying is: is New York different from these Southern states?

I hope that we are, to some extent, but I feel that --

JUDGE HALPERN: Isn't it a pretty safe premise to start with, that New York is different from the Southern states?

MR. GOERKE: Yes.

On these things, I wish we had more figures, Judge, to go into. These things are just coming to light, and since 1930, the figures we have from the Federal Bureau of Investigation are going to show things which we always felt were inherent.

Those of us who have studied the abolition movement for the last several hundred years notice that when slavery was instituted there were two distinct laws. This is obvious.

Today we maintain that there is one. But it is applied, to any extent, really, on this one issue.

JUDGE HALPERN: Unfortunately, we have to deal only with the problem of New York, and this whole problem of the Negro, with the weighing in so

heavily of what takes place in the South, is it possible for us to draw any relevant conclusions about New York State from country-wide figures?

MR. GOERKE: I would like to suggest this may be significant. This is true here.

We are not sitting here with the absolute truth, but it is something that we would like to suggest.

Although New York -- I won't mention figures any more on that. But in the minority groups in New Jersey, which is similar to New York, we have examined all the executions since the electric chair was instituted, in 1907. And we concede that those who are at the bottom of the social scale, whether they are immigrant Irish, immigrant Italian, they usually bore the brunt.

I wish this thorough study was done in New York of this situation. Those who at the bottom of the social scale, they usually bear the full impact of this particular penalty.

Another thing that we would like to mention is that it is very difficult to administer. The endless litigation regarding capital cases is something which

stands in the way of the administration of justice.

Capital punishment in the United States today is all bark and mostly no bite.

How many were executed? In the last 42 years, out of 8,600 homicides -- what is it, intentional homicides? There also were 133,000 assaults.

Now, just by luck, a lot of these weren't killed.

So this 8,600, which usually you hear brought up, are just the actual homicides. There have been many, many more assaults, really to kill, also in robberies.

But this is very difficult to administer. Too many variables are present, which are right to protect the innocent.

But I think the purpose of law is to act quickly and just, and as long as they are drawn out it does not act in the best interest of the State, when it is a deterrent.

Also, it was brought out that it might be a cause of murder. This we know so little about. We are just beginning to gather the facts. Dr. Graves in California made a study; Dr. Dann from Philadelphia;

and Thorsten Sellin was mentioned.

But on a few cases, among psychopathics, this might incite them. We have some studies, which certainly aren't conclusive, but it indicates that this might be so.

JUDGE HALPERN: Isn't the imitative behavior of psychopathics in connection with the publicity given to the original act rather than to the execution of the actor?

MR. GOERKE: Well, for example, with the Starkweather case, you remember, in the mid-West, right after he was convicted an almost imitative crime took place.

JUDGE KAPELMAN: Fifty miles away.

PROFESSOR WECHSLER: It wasn't after the execution?

MR. GOERKE: After his conviction. Whether it was the publicity around it, I wouldn't make much distinction, but there is something that I think --

JUDGE HALPERN: Isn't there a great deal more imitative behavior b psychopaths when publicity is given to the original act of killing?

MR. GOERKE: I think that has a lot to do with

it.

MR. ATLAS: The point you are making is that it is not a deterrent.

MR. GOERKE: I don't believe it is an effective deterrent.

MR. ATLAS: Would you know of any way of deterring a crime committed on the spur of the moment?

MR. GOERKE: I am not a psychiatrist, but there are studies which I have read, and which are available to this Commission, by better experts than me, to prove that it is the value which society has placed on the deterrent which just doesn't hold up.

If it did, there might be some merit in upholding capital punishment, as our Judge before testified.

But from our experience, from the last several hundred years, I doubt it very, very much, this theory of the deterrence of capital punishment.

Also, one of the -- if I may continue? -- on the changing of the attitude in the churches. In the last century, most of what anyone reads, a study of the abolition movement, the churches were upholders of capital punishment.

Today, in the last ten years, there has been a great turnabout. And why?

I believe they are becoming sensitive to this evil.

In studying it, the abolition of slavery movement and the abolition of capital punishment movement, there is very little difference in the argument, when they quote the Scriptures.

Finally, I would like to say that our main purpose is moral. It is entirely at odds with the teachings of Christ and the New Testament, of love and forgiveness. We all know it is true.

We are not lawyers. We are not psychiatrists. We are not criminologists.

We are citizens who believe that there are other ways of dealing with our misfits than cruel and archaic things which were used years ago. That the spirit of Christ should be closer to us, even in our hearts and in our Legislature, than it actually is. This is our position.

We hope that you will seriously consider abolishing capital punishment in New York, and set an example for the rest of the states.

Thank you very much.

THE CHAIRMAN: Thank you.

(Witness excused)

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JUDGE KAPELMAN: Mr. Chairman, may I have the pleasure of introducing John J. Ryan, who is a member of the Codes Committee, and who is sitting in at this Commission meeting on behalf of the Codes Committee.

THE CHAIRMAN: Do you want to be heard, Mr. Ryan?

MR. JOHN J. RYAN: No.

THE CHAIRMAN: Perhaps we also ought to note the appearance of Mr. Thomas McCoy, the Court Administrator of the Judicial Conference, who is also present this morning.

I am glad that you could come here today, Mr. McCoy.

Is Dean MacNamara here?

(No response)

THE CHAIRMAN: We will next hear from Mr. Sidney Boxer, who is appearing individually.

Are you Mr. Boxer?

MR. SIDNEY BOXER: Yes, I am.

THE CHAIRMAN: I am going to have to caution all witnesses to limit themselves as best they can in terms of their oral presentation, and to

please file memoranda, either today, or you can file them subsequent to today.

MR. SIDNEY BOXER: I am appearing individually, and in behalf of the Annual Meeting of the Society of Friends, Quakers.

We are one of the smaller member groups. We are called an executive committee group, and we are members of the New York Yearly. And since the Quakers' point of view has been given, I will not do that, except to note this fact, that our group has gone on record as favoring abolition of capital punishment, as I do personally.

I am appearing here individually for a very basic reason. I feel there has to be some presentation not of facts or of experts, or of all the criminologists and the different points of view that were brought up on the questions of all the trees that we have in this forest; I think, listening to the testimony today, we can get lost in these trees.

We have various trees making up a whole forest here today. If you look at all the trees you will find that there is a great deal of expert

opinion both ways, and you judges, and some of you lawyers like myself, in twenty years of practice it is very easy for lawyers to listen to pros and cons, bring out those big scales of justice, and weigh all of it and try to find which is heavier.

This has been true of the issue of capital punishment, which has been down through the ages both pro and con.

I remember back twenty-five or so years ago, in college days, when we used to have these big debates on capital punishment, get out the old Encyclopedia Britannica and look up all the pros and cons and the arguments, and weigh the testimony.

I think you will find that it is true of every single state in this union and every country throughout the world that has had this particular issue at stake. It has been brought up constantly throughout the last one hundred years in South America, for example, it has been -- there is oodles of testimony which is available to this Commission.

The BBC and the British Government just did a tremendous job on it, over a period of almost eight years, in which all the pros and cons were brought out.

So I do not want to go into all the testimony, the expert opinions and everything else. I want to present to this Commission the larger issue, the bigger problems --

PROFESSOR WECHSLER: Please get on to it.

MR. BOXER: I am coming to it.

But the big problem is not whether a deterrent, or whatever words that are used here, that society uses as an excuse to salve its own conscience. The question is, is this considered capital punishment? Is it really punishment? This is the whole basic issue.

It is punishment, yes. That is all it really is. We are trying to get revenge. Revenge for a horrendous crime, on whom society thinks or someone who is going against the mores of society.

How do we do that, to eliminate him? We kill him.

We take on ourselves a very basic inhuman instinct that we have been trying to overcome for a thousand years.

I say to you, gentlemen, it boils down to this one issue. Are we going to move up the ladder

of civilization, take the next step out of the animal world into the world of civilization that we claim to be members of, and prove to the world, to ourselves and to all society that on this point we are civilized, civilized to the point where we will not take it on ourselves to commit the very crime of killing which we deplore in the person that we are trying to punish?

Because he is not the one who is being punished. The people who are being punished are the ones who kill him, all the people around him: the warden, and everybody else.

Books have been written about this, what they go through when he is being killed.

Who is punished? He no longer is being punished. He is glad to be out of there.

I say, instead this Commission should look forward to making recommendations, to take the leadership, not following what they think the people want, because the people have elected you as representatives, for one purpose: to lead, to find out the facts and to make suggestions back to us, as our representatives.

I say to you on that basis, on the overall policy, the big question of whether we are going to continue with capital punishment, because it is not punishment. As we know it, in the true sense of the word, it is truly revenge.

I would want to comment on one statement, one point that was brought up here. The question was what is a capital crime.

You asked a professor from Columbia about that. That is a very, very interesting question on the whole question of capital punishment.

A capital crime goes back to the ancient history of crime against the state. And we have actually two divisions of capital crime -- a crime against the state and crime against society; the one which is the moral crime, and the other which is the political crime.

And, traditionally and throughout history, crime against the state, which is treason and that sort of thing, where they used to banish people --

THE CHAIRMAN: What point do you want to make?

MR. BOXER: The point I want to make is that

you have again here, it is not a question of intent but revenge of the state and where the state took it on itself; and that is how capital crime, capital punishment came about, in the private crimes through political purposes, and it spilled over into revenge, where the state took it upon itself to do that.

THE CHAIRMAN: Thank you.

MR. BOXER: That is my statement.

(Witness excused)

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THE CHAIRMAN: I understand that Mr. Austin MacCormick is here, former Correction Commissioner of the City of New York, and a Professor of Criminology.

We would like to hear from you now, Professor, if you would care to come up.

PROFESSOR AUSTIN MacCORMICK: Mr. Chairman and members of the Commission:

I had not expected to be called today. But I must admit that I have been thinking and watching on this problem all my adult life, and it is pretty hard to sit here and listen without having a chance to speak, to comment on some of the things that were said, as well as to get my own ideas across and to speak at this opportunity.

Without going back over the whole thing, as a matter of fact, I think I would start with the thing that I was approached to comment on, the things that I might have been questioned about.

Of the proposals that I know you have under consideration, and which anyone must have to do in studying this problem, I have this position:

I take this position, seriatim:

(1) I believe that the mandatory

provisions in the New York law should be removed. And that the jury should have the right to recommend mercy in all types of murder cases.

Second, I believe in the two-part trial, such as we have in California and in Pennsylvania, and such as has been under discussion at your previous hearing; and that Judge Liebowitz proposed, a new thing, which I had not thought of.

I may as well comment on it at this time.

The purpose, as you know, of the second part of the trial, or sometimes should be a hearing -- it is better, I think, to be called a hearing -- whether by the same jury or another jury or under a judge -- there are all kinds of proposals -- the purpose is this, to decide, having established the guilt of the person and the degree of guilt, whether or not he should receive the death penalty or life imprisonment, or some other penalty.

Now, this, then, would be a finding of which all types of evidence would be admissible, and all of us know that we would want a great deal of psychiatric testimony, but we would also want a lot of the man's social history, his military history, his

career or school record, and all that sort of thing, everything that is pertinent.

The hearer, or whoever is presiding, whoever has the power to preside would then advocate the type of penalty that it called for.

Judge Liebowitz's proposal of a commission would set that decision back.

He made it perfectly clear that he thought we need more information than we are now getting in our present procedure, and he proposed that we get it through a commission hearing.

I don't think he realized that he was saying a word for the weakness of the death penalty by saying that we need plenty of safeguards. And he went much more elaborately into this whole situation of what elaborate safeguards we need than I would have thought of doing.

Therefore, he must mistrust the complete accuracy of the decisions that are reached in capital cases in so many instances.

I wouldn't put it that far. I wouldn't have it after the trial, after the jury and everybody is else is through with it, and the sentence has been

pronounced.

Why shouldn't we know all these things before the sentence is pronounced?

It also gets fouled up in the appeal procedure, it seems to me.

You have a State Court of Appeals deciding one thing, and you have a State Commission deciding another thing. This begins to me to seem pretty remote from what has been going on in the courtroom, and, it seems to me, if it is possible to have the same jury, that that is desirable.

I have seen it work in California. I have been favorably impressed by it.

I was teaching out there for nine years, until I retired. This I won't go into any deeper.

PROFESSOR WECHSLER: Unless you could give us any more detailed information about the workings of it in California.

PROFESSOR MacCormick: No.

PROFESSOR WECHSLER: Because we haven't had any --

PROFESSOR MacCormick: I regret to say that I couldn't give you any --

PROFESSOR WECHSLER: So far as you know, the law enforcement peole and the lawyers and the judges are happy with it?

PROFESSOR MacCORMICK: Yes, I think so.

It is true, isn't it, that the District Attorneys Association here has endorsed it?

PROFESSOR WECHSLER: Yes. They have endorsed it.

MR. PFEIFFER: May I inquire, Professor, do you know, having lived in California, you say, for nine years, has any conclusion of the jury that a person shall not be excuted, although he has been found guilty, been violently opposed by public opinion?

PROFESSOR MacCormick: No.

MR. PFEIFFER: I was wondering if public opinion has accepted, by and large, so far as you know, the second-stage determination?

PROFESSOR MacCormick: I don't think that the public knows. And the only opposition that would come would be from prosecutors and the police. The public ordinarily doesn't know.

MR. PFEIFFER: If you had a heinous murder, they would certainly know.

JUDGE KAPELMAN: Something that received much publicity.

THE CHAIRMAN: In the Finch-Tregoff case, they certainly had a great deal of nationwide publicity.

PROFESSOR MacCORMICK: Which one?

JUDGE KAPELMAN: Finch-Tregoff.

THE CHAIRMAN: Dr. Finch.

PROFESSOR MacCORMICK: We had plenty of publicity on that. That case came -- that case did more to protect the abolition in California than anything else.

We had here a case that could be settled very quickly, if there had been no death penalty involved.

And while I don't go along with this idea that no person with means and with a good counsel was ever executed, that isn't so; but I would say that the odds are against his being executed, in comparison with another person.

But there was one example where there was

an awful lot of money spent, and I think that what most people don't realize, not only the fees to the lawyer, but the investigation by these skilled criminologists -- we call them -- scientific detection by laboratory methods.

I have known of a man who was sentenced to death, and his case was set aside on the testimony of a skilled pathologist, that the man died of a natural cause.

This man told me that he also brought it to the attention of the people, a case of murder, which they had passed over as death from natural causes. This type of scientific detection, of course, costs money. I am way off the beam.

I would say that out there this is accepted, but the whole question of capital punishment in California has been so fouled up by the Chessman case, and all the thinking has been so distorted by the feeling over that, that it has been almost impossible to view anything that has to do with the death penalty, clearly and judiciously.

MR. ATLAS: Wouldn't you say that was because the Governor of California had no power to

act on his own in the Chessman case?

PROFESSOR MACCORMICK: Well, of course, he had to get the majority vote of the Supreme Court.

MR. ATLAS: It would be like the commission that Judge Liebowitz proposes?

PROFESSOR MACCORMICK: No. This was a court. And, don't forget, in Georgia, too, the Governor can't act without -- he can't pardon anyone himself. I think the Supreme Court has to approve.

But I don't see any point in going into that.

All that Governor Brown had to do was wait another month or two, and a judge was coming on, an appointee of his who was ready to vote with him. This fact is not generally known. He felt he had no business to sort of manipulate it by that means. But that was true.

No, the feeling was, of the people, that the man had kept himself alive all these years by making monkeys of the court. I don't think you can make monkeys of the court.

PROFESSOR WECHSLER: They either are or are not.

JUDGE KAPELMAN: I knew that was coming.

PROFESSOR MacCORMICK: They granted appeals and reviews and everything else. And they did it over and over again.

I am frankly amazed that he had lived that long. I would rather the people wait than one person be killed.

Now if we can get away from Chessman. That is what we are unable to get away from in many cases. Had I spoken of the fact that -- no.

No matter what else is done, I think we should substitute a new basis of criminal responsibility, for the McNaghten Rule.

I thought that the Durham Rule was a step in that direction. And I think the proposal in the American Law Institute's Model Penal Code, in Article IV, goes still further.

As of now, I would tend to subscribe to that as a good provision.

Now, this does not mean that I approve of all of the mitigating and -- what is the word?

PROFESSOR WECHSLER: Aggravating.

PROFESSOR MacCORMICK: -- aggravating and

mitigating circumstances. This isn't the point to go into that. It has been thought out very carefully.

Sometimes I would like to see a thoughtful step taken, even though it doesn't go as far as I want it to go.

I haven't made it clear that I am unequivocally opposed to capital punishment.

And I am as certain as anybody can be that is has no significant deterrent effect. But I would like to say one thing.

I think most of us are very foolish to come in and try to prove things statistically in this field. All you can do is get up the best statistics that you can and try to analyze them and try to come to some conclusion of what is probably so.

The latest article written by Professor Sellin, and if I may say so, Judge Liebowitz didn't quite do justice to Sellin's position. I won't say that he misquoted him, but I would never recognize it.

Professor Sellin said, with respect to states that are comparable, and they are the only ones you have the right to weigh, Indiana against

Michigan, that is fair enough. Michigan against New Hampshire, maybe. But you know, you have to know the social climate, too.

But he came to this conclusion:

"It is important to conclude that states which are similar in the characteristics of their problems, their urban and industrial development, and their mores, have similar homicide rates, whether or not they have the death penalty."

He then came to the conclusion on -- this is an article in the Federal Probation Quarterly, September, 1961, the latest thing that he has written.

After discussing his testimony before the Canadian Commission -- and he has been called to testify before all of them -- he said that he believes that the death penalty as a unique instrument for the protection of society against murder, and superior to life imprisonment, in this respect, is not supported by any credible evidence now available to us.

And as for Mr. Hoover, who had no business writing his opinion of the death penalty

into an F.B.I.-uniformed crime report, this is supposed to be an objective,statistical report, but I will admit that what Mr. Hoover says needs to be listened to.

In the summary of the report, in which Mr. Hoover said this statement, which was referred to here this morning, in the summary of the same report is the following statement:

"Proponents of abolition of capital punishment cannot find support for their cause in studying state murder rates, since results are inconclusive."

And I think the inconclusive nature of the statistics is the point at which you have to arrive at when you are sitting where you gentlemen are.

I think, as citizens, as individuals, as people who have ethical beliefs and so on, we have a right to draw conclusions, if we wish.

Before I leave statistics -- and I am nearly through -- I want to say that I was going to ask whether you gentlemen questioned the completeness and the validity of the statistics that Mr. Isaacs gave.

My understanding was that he gave all the figures on it, the figures on all of those admitted to the death house in the five-year period. And that some other countries -- there aren't any more, these are all we have.

PROFESSOR WECHSLER: That is right.

PROFESSOR MacCORMICK: I want to say this bluntly. I have warned editorial writers, I have warned my friends, I have warned myself, that one must not draw conclusions as to the disproportionate rate of executions on racial or any other grounds, unless you know how many murders, or how many rapes, or how many other capital offenses were committed by the racial group in this particular place.

You have to know what somebody says. Fifty-three per cent of all the murders are committed by Negroes; then 53 is an improper rate of execution? It might still be, by the way.

PROFESSOR WECHSLER: Yes.

PROFESSOR MacCORMICK: Because, of the Negroes, half might be mental defectives or something else, or some other reason.

You have to go into the nature of the murder,

the apparent motivating and contributory causes, and so on.

Now, there is no way of finding out what the race of these people were, unless we could -- unless every murder was cleared.

It is the arrest rate only, in the F.B.I. reports, that is broken down by race and age -- and arrest only. They are very careless, in saying that all the robberies, say, or all the crimes of violence, of all the crimes of violence in the United States in any given year, such and such a percentage are committed by Negroes. That isn't so.

Because we don't know who committed a great many of them. All you can say is that of those who were arrested for such and such a crime; and then if you are very careful, you would have to determine whether the person was convicted of that crime or whether this is just what the police booked him for, which is frequently heavier than that, which will not stand up in court.

MR. ATLAS: In making that distinction, the counsel pointed out the fact that people in lower economic circumstances, whoever they are, are inclined,

I think, would you not agree, to breed more crime and more opportunity for crime?

PROFESSOR MacCORMICK: That has been the general assumption. But one of the things we have to be careful of, that poverty in and of itself is not a cause of crime. If it were, I would certainly be a criminal. Many of us would.

You know, I mean you have to be very careful; that these things are not inevitable. No census has ever been taken of the slums to find out how many law-abiding people are in them.

MR. ATLAS: That is right.

PROFESSOR MacCORMICK: But I would say that anybody who belongs to a minority group in New York City, and has to reside in a slum neighborhood, has a much greater chance of becoming a delinquent, and then a much bigger chance of becoming a criminal, than somebody in a good location or social economic strata.

I want to say this bluntly: that no matter what question you asked about is it fair to say this is disproportional, -- I don't want to use the word disproportional or discrimination -- you cannot

dodge the very ugly statement, that every one of the persons sentenced to death during the five-year period, and executed, has been a Negro, ten, or a Puerto Rican, one. This puts us right in the class with Georgia, with Mississippi, and we cannot try to dodge it.

We don't have to say it is disproportionate; we had better question a penalty, in a five-year period, which was inflicted on ten Negroes and one Puerto Rican, and no others. This is an ugly fact.

I ask you, don't dodge it.

Don't let people get by with unwarranted conclusions. But, on the other hand, don't avoid this situation, or consideration of it.

Let me go back one minute. If the two-part trial or hearing, whatever way it is formed, came into effect, I would hope it would reduce the number of executions. Because I am unequivocally opposed to the death penalty, on ethical grounds, religious, humanitarian, and, mostly now on disproportional grounds, on the basis of 45 years dealing with criminals.

If it increased the number of executions,

I would still believe in it, because then those executions would have been carried out on the basis of knowledge, which you need.

So that if it worked against the way I hope it would, I would still be for it.

I think we must have more knowledge, and this is some method of getting it.

I have spoken of the substitution of something in the M'Naghten Rule. You may recall the British Commission recommended the approbation of the M'Naghten Rule, and they didn't recommend abolition. Many people asked why. Because they were not allowed to.

When they were set up, their directive was so worded that they were not to express an opinion on abolition.

Now, I have made it clear, I hope, that I am for abolition.

One last point. As sure as shooting, the death penalty is disappearing in America; but not by abolition.

I have recently had to write something, and during the last half of the 19th century, four states

went into the abolition column, and stayed there. There were six, actually; two others abolished it for a while. Michigan is the leader, since 1846.

In the first half of the 20th century, up until 1957, we have made a gain of exactly four more, - a net gain. We had Delaware, and that was lost by one single murder.

Now, this, then, is in the last two centuries: exactly the same gain.

Yet it has gone down in use, so far except, I must say, for the South -- and I will be mean enough to say that if New York wants to be in the business of executing Negroes and Puerto Ricans, maybe it will stay with the South, too -- but on the side of disuse, we had only two executions in 1961. It is disappearing so rapidly --

THE CHAIRMAN: None since?

PROFESSOR MacCORMICK: None since June 8, 1961.

PROFESSOR WECHSLER: Don't forget, there are about twelve fellows in the death house now, or fourteen?

THE CHAIRMAN: Seventeen.

PROFESSOR MacCORMICK: They haven't been there long enough. It was six in 1960. So two is an unusual figure.

MR. ATLAS: The last two pleaded for commutation and the District Attorney joined in.

PROFESSOR MacCORMICK: Let me point up something, because I figured these out, and most people haven't bothered to.

From the 1930 decade to the 1950 decade -- and 1940 is not typical because we had the war, so many men under arms.

By the way, I sat in on a Clemency Board after the war, and reviewed 35,000 cases, General Court Martial cases -- not with respect to guilt or innocence. Former Justice Roberts was the Chairman; I was the Vice-Chairman.

And we had a lot of men under arms, and a lot of crime was handled by the Army. That is what I am getting at.

So 1940 is not so typical, but the decrease in the average number of executions per year, or the total number of executions in the decade -- taking into account the changes in population, which is

very significant in California -- in the Northeast, the average number decreased 64 per cent; in the North Central States it decreased 73 per cent, from 218 in the 1930's to 58 in the 1950's.

It decreased in the South 54 per cent -- really 55 per cent -- and in the West 40.8 per cent.

California is responsible for most of it, what happened out there.

In the country as a whole, the average number of executions went down 57 per cent.

Now, the significant thing about it really is that even the South has gone down.

I think you know that in 1961, of 42 executions, 26 were in the South. And the South has roughly the same population. In the 1960 Census it had about fifty million population.

And the North Central States, that is, the big, populous states of Indiana, Illinois, Ohio, Michigan, to the Dakotas and down to Mississippi, Missouri, that has a population of about fifty-five million.

So their populations are roughly comparable.

That North Central area had two executions.

That North Central area had two executions in 1961, both in Ohio. A couple of years ago, as I recall it, they only had one.

The South had 26, and you figure out these rates --

JUDGE KAPELMAN: Over how long a period?

PROFESSOR MacCORMICK: This is for the year 1961.

JUDGE KAPELMAN: Just for that one year?

PROFESSOR MacCORMICK: Yes.

So that when you have a good populous area like that, even though it contains abolition states, it is very significant that they can get along with so few executions; and it is perfectly understandable why the South has thirteen times as many, with the same population.

Now, I think I could say lots more, but I don't think there is any point in taking more time.

Have I made it clear that I am for abolition?

PROFESSOR WECHSLER: You have made it clear that you are for abolition.

What are you in favor of now in New York State -- abolition? Or do you favor the gradual approach, to the two-part system and a change in the homicide law?

PROFESSOR MacCORMICK: If you could arrive at the decision, if you agreed that you wanted to recommend abolition, my own feelings are that it would be very wise to recommend these other things, the two-part recommendation. --

(Discussion off the record)

PROFESSOR MacCORMICK: I stopped in the middle of a sentence.

The point I was making, that you should make the recommendation, if you believe in recommending abolition and did recommend it, you also should recommend these steps to be taken, if abolition is not accepted. Because you are doing something that one can agree to, whether he believes in abolition or not.

I mean that this is a method.

With the possible question of whether the mandatory provision should be removed or not, I am certain it should be. New York State is the only

state that has it.

But the two-part trial, I think, and all this business of clearing up the question of criminal responsibility so that it is consistent with what we have learned since 1943, the year of the M'Naghten Rule, all of these rules, one can believe in them without believing in abolition.

I hope you believe in them and will advocate. Go the whole way.

By the way, people asked me, "Would you recommend a moratorium?"

We had played around with that idea in California. There was a chance of getting it through.

But again, one of you said in comment on something, it can be restored so quickly by just one bad murder.

We also had two men in California who licked abolition all the time; their crimes were so heinous that they licked it every time it came up.

PROFESSOR WECHSLER: The Legislature wanted to wait until they were executed?

PROFESSOR MacCORMICK: No.

MR. ATLAS: A bad murder, Professor, and a vote of two to three in the Senate.

PROFESSOR MacCORMICK: I talked to the Senate Committee in California. That is the closest I came to it.

Suppose you had a moratorium, a three- or five-year moratorium. Then a terrible murder occurs, and the Legislature rescinds it.

Then they say, "We rescinded it after three years of careful study," when they didn't. They did it on one murder.

By the way, I have seen the gentleman in Delaware who was the cause of abolition. He was in the mess line, going to the mess with the prisoners. He was a giant of a Negro, a mental defective or pretty close to it, and so on. These things happen. And so a moratorium puts you in a bad fix. They can always blame it after a study has been made, and prove that it doesn't work.

THE CHAIRMAN: Thank you very much.

PROFESSOR MacCORMICK: Thank you.

(Witness excused)

THE CHAIRMAN: Chief Edwards.

Would you prefer to be heard now, Chief, or is it all right if we take a little recess?

MR. GEORGE EDWARDS: Mr. Chairman, my situation is somewhat unfortunate in that I have a 3:55 plane to catch back to my bailiwick, where I have a basic responsibility.

THE CHAIRMAN: All right. We will now hear from George Edwards, the Chief of Police of Detroit, Michigan, who certainly gets the prize for having come the longest distance, to be heard.

We appreciate your coming here, Chief.

MR. GEORGE EDWARDS: I want to thank you very much.

May I present my credentials, so that I can talk on this topic?

I have spent, practically speaking, all of my life in close contact with the criminal law, in some area or another.

My father was a lawyer. My grandfather was one of the earliest judges in Dallas County, Texas.

I grew up in Texas, around Fort Dallas. I

went through the Bar in Michigan, practiced in Michigan.

I have been in each of the three major court systems, as a judge. I served four years in the Juvenile Court of Wayne County, which encompasses the jurisdiction of three million people, including those who lived in the City of Detroit.

And then I served on the Trial Court, General Jurisdiction, comparable to your Supreme Court, I believe, which had criminal jurisdiction as well as civil jurisdiction.

Then for six years, until this past January, I was a member of the Supreme Court of Michigan, which is your Court of Appeals.

I left it in January, at the request and urging of the Mayor of the City of Detroit, and various and many of the leading citizens of that community, and both of the Metropolitan dailies of the City, to accept the post of Commissioner of Police of the City of Detroit, Michigan.

As a result of a very difficult, not I think unparalleled however, problem in the City of Detroit, in the enforcement of law, which resulted

from suspicions and conflicts between the law enforcement agencies and the Negro community of our City, which apparently has about 30 per cent of the population of the City of Detroit.

I might add, in relation to this basic undertaking of these last and very fascinating months, I think that I can report that I am glad that I undertook this function. I think we are making great progress.

Now, to turn to the topic which you are considering, which is, as I understand it, the topic of abolition of capital punishment.

I have been most of my life of the opinion that capital punishment was not necessary and was undesirable.

Nothing I have seen, as Commissioner of Police, has changed my mind on either of those scores.

I would like to make these points to you, and seek to develop them briefly.

First, capital punishment tends to promote public disrespect for the law.

It prevents our system of justice from

correcting our most dramatic mistakes. They are buried by the mistakes that are discovered, at least in some instances.

PROFESSOR WECHSLER: You put yourself on a par with the medical profession?

COMMISSIONER EDWARDS: That is true. But that is not a respect in which I would like to achieve that particular equality.

MR. PFEIFFER: Apparently.

PROFESSOR WECHSLER: I agree with you.

COMMISSIONER EDWARDS: It occasions the most brutal proof possible of the ultimate effect of all of the race discrimination in our society. The most brutal proof possible.

It makes a mockery of the law-abiding and defensible delays.

Secondly, capital punishment, in my view, is not necessary to the maintenance of reasonable order in our society.

It does not deter murder.

There are no figures which indicate that it does. And the abolition does not increase the murder rate. There are many figures which indicate the

contrary of that.

There is no proof that abolition of capital punishment makes the police officer's job any more difficult nor any more hazardous.

Third, and I suppose underlying my own personal philosophy in relation to this, is my deep conviction that capital punishment tends to brutalize the society which employs it, and, hence, serves or may serve actually to increase criminal tendencies.

Now, may I go back to the first two points for a brief moment?

I don't know whether you gentlemen in your court systems ever make mistakes or not; but, unfortunately, in Michigan this is possible.

We have had many such in the history of our state. I would not want to exaggerate this point. I think that by and large our criminal justice is accurate.

I think that mistakes in criminal justice are a very small minority. But to bury a mistake is something which tends to reflect upon the basic justice of the whole system. And this, unfortunately, is what capital punishment achieves.

We had a murder in Detroit on October 4, 1960, where three people were convicted of the murder. I vouchsafe the judgment, knowing a great deal about the facts in relation to this case, that if capital punishment had existed in Michigan, these men would -- all three of them -- now be dead.

No one of those three men were at that drugstore at that time, or had anything whatsoever to do with that murder.

They are now completely free of any association with that murder, or any guilt in relation to that murder.

Needless to say, some of them are suing. But at least their wives and widows are not suing for their deaths.

And the people who did commit that murder, four of them, are now serving life sentences in Michigan Penitentiary.

If you want to know how this happened, I can tell you, because I have spent some little time in ascertaining the details in the matter. And I spent yesterday talking with one of the experienced police officers who worked on this case, and who heard the

testimony in the original trial.

The testimony was the testimony of an alleged accomplice who, seeking favor in relation to her situation, in relation to other violations of the law, pinned this murder right on these three men.

If you say would a court accept such testimony, I might add this fact, that I had described to me with great vividness yesterday the testimony of the lady clerk in the store, who was present at the time of the murder, and who, when questioned about the defendants in this trial, left the witness stand under the instructions of her counsel, walked down to these three large Negro defendants who were seated before the bar of justice, and put her hand on the shoulder of each one of them in turn, at the request of the prosecutor, identifying them as the persons whom she saw in the store, and one of them as the one who pulled the trigger that killed the store owner.

Now, this was a brutal murder. There were five or six shots fired. It was one which inflamed public opinion. It was one which came at a time when there had been other concerns. And the net result of

this was a very quick trial, a very rapid conviction. The men were in Jackson Penitentiary in short order, but they were not executed. Because Michigan has not had capital punishment since 1846.

I have not myself ever presided as a judge at a murder trial where this kind of an error occurred. But I have seen a criminal trial tried before my own eyes, where a jury in a bitterly contested criminal case, basing its decision undoubtedly upon the utterly sincere evidence of two eye witnesses, found a man guilty who was not guilty at all.

I might say again, I have a great respect for the jury system. I don't think jurors frequently err.

This is the only time on a factual matter that I have ever seen a jury err, in my entire experience with the law.

But, nonetheless, this was the identification of a stranger, in relation to the happening of a crime. And I say to you, gentlemen, this is a very weak form of testimony, but in human affairs it is felt by ordinary people to be a very strong form of testimony.

And time after time, murder convictions result from just such eye witness identification, without the circumstantial evidence that actually is almost essential to actually proving it, tying it in.

The guilty parties were ultimately identified in this instance, by being tied in with an entirely different holdup, where a shot was fired. That bullet was proved to have been fired by the same gun that killed Mr. Lipton, and with this original fact to start with, the police ultimately ended up with the complete confessions of five of the six people who were involved, including all of those who were actually in the store.

Let us turn for a second to this proposition which I stated to you, that capital punishment tends to promote public disrespect for the law because it occasions the most brutal proof possible of the ultimate effect of all the race discriminations in our society.

I want to make it clear that at this point I am not talking actually about the discriminations that are implicit in the trial of an impvoerished client, or a person who is before the bar of justice

without money adequate to muster a formidable defense.

There are discriminations involved in both of these aspects of the matter.

What I am talking about is the fact that actually in the becoming of a criminal there are factors of race discrimination involved.

And I think that we simply cannot, in our society, overlook or bury or pass by the very simple statistics which you find in the United States Department of Justice Reports, under National Prisoner Statistics, in the publication of April, 1961, labeled "Executions," which indicates in its Table 4, entitled "Prisoners Executed Under Civil Authority in the United States, by Offense, Race and State, 1930 to 1961."

And that in those years, in the United States, 3,766 persons were executed for all offenses.

Of those, 1,695 were white; 2,030 were Negroes; 41 were other races.

PROFESSOR WECHSLER: What year is that?

COMMISSIONER EDWARDS: 1930 to 1961.

This is an accumulative table, and this just indicates the fact that I think is beyond dispute,

th t the majority of people against whom capital punishment is used in this country are Negro citizens.

This does not for one minute dispute any of the counsel to guard the use of these statistics with care, which Austin MacCormick just gave you.

I would save time by joining with him in all of these cautions on that score.

But you cannot look at those figures and defend the notion that there is equality in this great land of ours, except as a dream and a goal.

This proving of inequality in this fashion with that statistic does not breed support for our law enforcement from that portion of our society who need most dramatically to be convinced that they should support law enforcement in all of its phases.

The majority of citizens executed, Negro; Negroes are eleven per cent of the population of the United States.

I am not going to beat this matter of defensible delay over the years. I would gather that you had already heard adequately about the

Chessman case. You have it firmly in mind.

But I say to you this, I have sat on the Appellate bench for six years, and associated with Appellate Judges who, contrary to myself, have had the responsibility of passing on appeals involving capital cases.

I know that one of the reasons for delay in capital cases is that the consciences of the Appellate Judges are troubled by the possibility that they may be participating in burying mistakes, and I know that such appeals receive more than ordinary care. They would, if I were involved in it, I assure you. That almost any error received exaggerated attention; it would, if I were an Appellate Judge with such a problem.

And I think that we have currently built those delays into our law so that they cannot be dug out, except by the simple expedient of abolishing the system which produces them.

MR. PFEIFFER: May I ask you a question, sir?

COMMISSIONER EDWARDS: Yes.

MR. PFEIFFER: Is there an automatic appeal in the State of Michigan, in the event of a sentence for life?

COMMISSIONER EDWARDS: No.

MR. PFEIFFER: No? You know that there is an automatic appeal to the Court of Appeals.

COMMISSIONER EDWARDS: Yes.

MR. PFEIFFER: That is, for life. In your state, Michigan, there is no automatic appeal?

COMMISSIONER EDWARDS: There is not. But there will be under our court rules as of January of 1963.

Up to that point, the court rules require an application for leave to appeal. This has been changed, was changed, while I was a member of the Supreme Court, but the effective date was set ahead.

Now, the second proposition that I propounded to you was that capital punishment is not necessary to the maintenance of reasonable order in our society.

The figures in relation to this -- I am sure you are familiar with this -- but I join again with Mr. MacCormick in cautioning the comparisons, cautioning

as to the comparisons, because, obviously, unless you can assume equality, why, you can't be sure that the results which you are getting are based upon a difference in just the statutory provisions containing punishment.

But the fact of the matter still is that eight states operate without capital punishment. They have a murder rate of 2.5 per cent per 100,000 population; whereas, 42 states with capital punishment have a murder rate of 4.9.

I suggest this to you, not to prove that the abolition of capital punishment will produce that decrease that would be suggested there, but simply to suggest to you that you can run a civilized state without capital punishment. This is the limit of what I am suggesting these figures to establish.

There is a much more specific comparison available, if you take several of our mid-Western states which have abolished capital punishment, and several others which have not abolished capital punishment.

If I may, I will simply leave these sheets with you, for your records.

THE CHAIRMAN: Thank you, Judge.

COMMISSIONER EDWARDS: Without reading from them in detail. Perhaps they can be placed in the record, for such purposes as they serve.

I have here a comparison for four years, the most recent years where the figures were available, through 1961, for the six states of Michigan, Minnesota, Wisconsin, Illinois, Indiana and Ohio.

Michigan, Minnesota and Wisconsin have for a long time gotten along with the substitution of life sentences for the punishment which ordinarily capital punishment is used for.

Illinois, Indiana and Ohio maintain capital punishment.

If these three states are grouped together, you find that in all of these years the Michigan-Minnesota-Wisconsin group are substantially lower in murder rates than the three neighboring states, which have maintained capital punishment.

If you seek for closer parallels, I think you will find them in the comparison of Michigan to Illinois, of Michigan to Indiana. And in both of these instances you will find that Michigan has done

somewhat better than the other two sister states, although -- I don't really say "although" -- while having capital punishment abolished in Michigan and while these other two sister states maintained capital punishment.

Again, I will submit that chart to you for such value as you may find it to be.

There is in the magazine "Police" for July and August of 1961, of which I have a copy here present, an article by Professor Sellin, whom I gather you have heard something about earlier today.

Professor Sellin undertook to make a study of the death penalty as a deterrent of attacks on police officers.

Has this been referred to previously in this hearing?

JUDGE KAPELMAN: No, not the police officer approach.

THE CHAIRMAN: Not in testimony.

MR. ATLAS: In Albany.

COMMISSIONER EDWARDS: In any event, and this is a result of studies of the rate of attacks made on police officers, made in 1951 by Professor

Thorsten Sellin, of the University of Pennsylvania, which covered 266 cities in 17 states. In six states without capital punishment, the rate of attacks upon police officers per 100,000 population was 1.2.

And in the eleven states with capital punishment, the rate of attacks upon police officers were, per 100,000 population, 1.3.

Professor Sellin's conclusion was:the claim that more police officers are killed in abolition states than capital punishment states is unfounded.

I do not think that there is any substantial agitation in the State of Michigan for the return of capital punishment,on this ground.

There is from time to time agitation for the return of capital punishment, which I will refer to in a moment.

The third point I made is that capital punishment tends to brutalize the society which employs it, and hence that it may actually serve to increase criminal tendencies rather than the other way around.

Admittedly, this is a philosophical sort of concern, and yet our whole nation has been founded

on philosophic views.

The difference between the United States of America and the systems which we discard and distrust and dislike is that we emphasize the importance of the individual human being, and the Fascist states and the Communist states don't.

It is interesting to note that every time a dictatorship is established, if capital punishment has been abolished, it is promptly reinstituted.

The Nazis did it immediately. Mussolini did it immediately. The Nazis did it in every territory they went into.

When these countries were freed, they went back to abolishing capital punishment. This is an interesting aspect of the matter.

Capital punishment was a very real part of the Soviet system, particularly during the Stalin regime.

It is disputed, perhaps, as to how much movement there has been away from its use in recent years, but there is no doubt about it during the Stalin period.

Now, if we really believed in deterrence,

gentlemen, in the use of capital punishment, we would execute in public. We would go back to the original use of capital punishment.

If we really believed that deterrence was what we were seeking, and that brutality to the defendant produced deterrence of other criminals, we would go back to public executions.

Let me tell you the history of Michigan's abolition of capital punishment.

Buried in our history, but it is there and it is available, in 1821 two Indians were convicted of murder. They were convicted in somewhat summary fashion, according to what the history books relate. But they were hung in public, physically, gentlemen, in what is now known as Cadillac Square, in the heart of the City of Detroit, where a large audience watched the public hanging.

The trap was sprung on one of them, and it was a successful execution, in that the neck was snapped and he died almost immediately, I presume.

But the second Indian's experience was somewhat different. The trap was sprung, the rope fouled, and in place of the fall snapping the Indian's

neck and killing him almost immediately, he hung at the end of the rope and kicked and struggled and struggled, and kicked, while he was strangling to death for many minutes, in front of a large audience of Michigan's citizens.

And finally, the execution was completed when one of the wardens had to jump up and grab hold of his legs and pull down on his body, adding his weight to the Indian's body, to successfully conclude the strangulation.

This was 1821. Michigan wasn't a state. This occurred under the Northwest Territory Law, and it was fresh in the minds of the people of the State when they ultimately got around to statehood, which came in 1837.

The last execution under civil law occurred in 1830. There, again, there was a big crowd, and a military band was playing.

In 1837 Michigan joined the Union, and in 1846 capital punishment was abolished.

But one other case played a role in the abolition of capital punishment, and that was in the neighboring area, just across the River in Canada.

It wasn't Windsor then. A man was executed for murder, on circumstantial evidence, and it was subsequently discovered that he was innocent.

And the burial of our neighbor's mistake, plus the public view of these two public executions, was such as to occasion the end of capital punishment in Michigan, in 1847.

From time to time we have had murders in Michigan which have been of a brutal variety. And one involving the murder of a small child, as I recall it, it provoked the last advocacy of the return of capital punishment in our State.

The bill providing for the return of capital punishment died in the House of Michigan's Legislature, when a somewhat savvy Irish Legislator prepared a very simple amendment: He proposed that in place of the provisions in the bill which called for execution in the electric chair, that the bill provide for stoning the defendant to death by the Members of the Legislature on the steps of the Capitol.

In the debate over determining the method of execution, that bill was sentto the Committee, and

never reappeared on the scene.

What I am seeking to say is merely this: that if we want to have a free and civilized society in these United States -- and I think we should have and I hope we do have -- then its concern for the individual should be such that we should be willing to make use of civilized methods in our administration of the criminal law.

I believe that a requirement for civilized methods in the administration of the criminal law is the abolition of capital punishment.

I greatly appreciate the courtesy of you gentlemen throughout, and your counsel. I don't know whether I should refer to it as an invitation, but there was an inference that my presence would be acceptable.

Is that a fair statement?

And I value your courtesy in listening to me.

THE CHAIRMAN: Are there any questions?

JUDGE KAPELMAN: We are indebted to you.

(Applause)

PROFESSOR WECHSLER: Judge Edwards, do you

have any difficulty in recruiting police officers for your department, because of the state of the law with respect to capital punishment in Michigan?

COMMISSIONER EDWARDS: I am very happy that you asked that question.

As of yesterday, I released a statement to the newspapers, showing that our police department in the City of Detroit had achieved the highest manpower it has ever had in the history of that community, 4,351 police officers.

We have currently fewer than fifty vacancies in our department. This is the lowest ratio of vacancies to authorized strength in the history of the department. We have a class forming at the present time which will take up most of the balance of these.

I believe we have the lowest vacancy ratio of any major police department in the United States of America. And we have the highest standards, and we maintain those standards.

So I would say that we do not have trouble based on this problem at all.

PROFESSOR WECHSLER: I have one other

question. Have you had any experience with criminals, particularly in crimes of violence, entering the state from adjoining states, where capital punishment is in force, with the apparent purpose of committing a crime in an abolition state?

COMMISSIONER EDWARDS: This is certainly not a problem in our state. If I were to say to you that I never heard of such an instance, somebody might recall to my memory some instance where somebody had come in from out of the state, with conceivably possibly having this in view.

We have had at least one murder where there was a long chase, along the Indiana border, where the desperadoes ended up in Indiana rather than in Michigan.

And perhaps it might be implied that they sought -- that doesn't end up proving anything to the contrary at all, does it?

I don't know why they went to Indiana. Maybe they wanted to be executed.

THE CHAIRMAN: Are there any questions?

JUDGE KAPELMAN: They were afraid of life imprisonment as a deterrent?

COMMISSIONER EDWARDS: Well, perhaps. Life imprisonment in Michigan comes awfully close to meaning life imprisonment.

THE CHAIRMAN: I wanted to ask you about that. After how many years are lifers considered for parole?

COMMISSIONER EDWARDS: My recollection is that the present practice of the Parole Board is that they cannot have a hearing before 17 years. And rarely, never in my memory, has the thing been granted in the course of the first hearing.

THE CHAIRMAN: Your lifers are at least ten years better off than ours.

JUDGE KAPELMAN: Our law says after forty years, and they may get ten years off.

PROFESSOR WECHSLER: You don't favor this, this very long delay on parole hearings in life cases?

COMMISSIONER EDWARDS: Well, my basic view in relation to that would take a long time to set forth before this Committee, if you really wanted me to go into it.

Fundamentally, I am in favor of keeping behind

bars permanently all persons who are likely to prove to be mad-dog killers. And I think society has the means, if it is willing to use them, to identify these people.

We had one turned out of our penitentiary, for a relatively minor offense, not long ago, who was such a mad-dog killer, and within a week he came down to Detroit and committed a heinous murder. And, so help me, that man could have been identified.

This takes a long, long time to go into. But if it is asked, I would have to respond.

There are corollaries to this, I say. There are many people who have been convicted of murder who have been very good risks, from the point of view of society.

THE CHAIRMAN: This is the minimum time, after which they are considered for parole?

COMMISSIONER EDWARDS: Yes. Actually, I think most of the lifers, most of them probably die in the penitentiary, in Michigan. And twenty to thirty years, for those who actually get out, is about the range.

THE CHAIRMAN: We thank you very much,

Commissioner, for favoring us with your appearance here today.

COMMISSIONER EDWARDS: Thank you very much.

THE CHAIRMAN: We are running late, as anticipated, and we will now recess until 2 o'clock, until we finish.

(Witness excused)

(Whereupon at 1:40 o'clock p.m. a luncheon recess was taken.)

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AFTERNOON SESSION

2:15 P. M.

(All Committee members present, including staff)

THE CHAIRMAN: I would like to call the session to order.

I guess we still have a quorum of the Commissioners here.

Yes, everyone is back.

Our first witness this afternoon, who is appearing at the invitation of the Commission, is the Honorable Charles Breitel, Associate Justice of the Appellate Division, First Department.

Judge Brietel has asked to address us this afternoon, not so much on the basis of his judicial experience, but because for a number of years he was counsel to former Governor Thomas Dewey, and in that capacity had a great deal to do with the functioning of capital punishment in the State.

Judge Breitel, please.

JUDGE CHARLES BREITEL: Thank you very much, Mr. Bartlett.

This is the seat of the witness, I take it?

THE CHAIRMAN: Yes.

JUDGE BREITEL: I want to say that I am very happy to have been asked by you to come here and give whatever views I may have on the subject.

You have mentioned it already, but I would like to emphasize it because it gives me a little more freedom in speaking, that my court does not pass upon any capital cases. We have an unlimited jurisdiction otherwise, both with regard to civil and criminal cases, but capital cases go directly to the Court of Appeals.

However, we do have many homicide cases in which, for one reason or another, the punishment is less than capital, and so we have a few of those.

I think also, so that you may be able to evaluate whatever views I have, I also was a prosecutor for six and a half years, although none of that was directly in homicide work.

Now, I think also I should state immediately what my views are, so that you can consider what data I present to you, and analyze it against that.

I am in favor of the abolition of capital punishment.

My principal reasons are that, in the first place -- and I will develop that I hope, a little bit later -- it has that aspect of irrevocability that no other form of punishment that we have has. And this has various consequences, as we handle that mode of punishment; and various consequences, as we deal with the consequences of possible error, not so much in the guilt of a person, but whether the person should have been treated with this degree of sanction or not.

Also, it is a maximum punishment, which covers a very wide range of cases, and those eligible to pass the minimum, and yet the range is so wide that one faces the problem of application of this maximum punishment to the range in cases. You do not come up with any rational formulae or criteria that you apply.

To put that concretly, you have the range of the long-time professional killer, who kills a policeman either in the commission of his crime or in escaping from the crime, or upon being apprehended. Then, on the other range, you have some unfortunate person who commits a murder out of passion and

distress, and with no likelihood whatsoever of it being repeated -- it is the product of a long and bitter experience, let us say, with a faithless paramour or something of that kind.

Then, of course, very significantly on the matter of deterrence, the proof in that area, with which I know your Commission is familiar, from the work that has been done in the field, shows an inconclusive result with regard to capital punishment as a deterrent.

I won't bother you with any analysis of that. I know you have had it.

And, of course, the material is replete in the reports of the British Royal Commission, and also the many studies by Professor Thorsten Sellin, and especially the monograph he prepared for the American Law Institute.

One can still have a view about these things, and my own is that capital punishment does deter many persons who never get into the criminal statistics, but you will never be able to prove who or what they are.

Again, by way of theoretical belief, I am

convinced that there are many persons who commit crimes, including capital crimes, who are not deterred by the danger of the punishment. So that is why you can have the interesting disputes that we had, because you make your choice and you can pick those who were not deterred and those who were deterred.

I think this problem of deterrence extends well beyond criminal punishment. I think it all comes down to all sentences, long ones and short ones. Some are deterred, I believe, and others are not deterred by the punishment. That, as you all know, does not dispose of the problem of what we do by way of punishment.

Very significantly, I think that any kind of killing -- any kind of killing -- tends to cheapen life and, therefore, introduces a low value in our society, with regard to life.

Of course, we have killings in war and we have other kinds of killings that arise, and these are necessary, in the views of most of us.

The question is, then, what price do we wish to pay for cheapening life in our society? Capital punishment is one of the prices that I

personally am willing to surrender and not pay.

I also have a horrible fear that capital punishment satisfies only the hysterical fears of many of our individuals and whole masses of our society. This, of course, if it has any basis, I can't prove it. It certainly is a very bad ground for capital punishment.

Now, to really tell you what I think you would want to hear from me, all of the foregoing is really to give you the background.

With my experience for seven years as counsel to the Governor, I went over some of the figures. I don't have all the records. They are all up in Albany. And I was surprised to find that in the seven years that I was Governor's Counsel, we passed on 81 persons who were facing capital punishment. That did not mean 81 cases because there were doubles and some triples, but not many. It would mean that there were at least 70 cases.

Of these, 23 persons were commuted from death to life. The ratio over the years and the number in each of the years shows you that there is some kind of a pattern, but what it is it would be difficult to

say by just looking at the statistics.

For example, in the first year, 1943, there were 12 persons who were executed, and there were four who received commutations.

In 1944, there were 20 who were executed, and one who received a commutation.

In 1945, no one was executed, and one man received a commutation from death to life.

In 1946, there were four who were executed. No one was commuted.

In 1947, there were 12, and two received commutations.

In 1948, there were six, and two received commutations.

And in 1949, there were 14, and three received commutations.

Now, there is some evidence of what this pattern may be, and I could easily tell you part of that. The earlier years were the war years. And then you have the small lapse, and then we reach the post-war period.

But I can assure you, on the basis of my recollection, without having had the opportunity to

consult the individual files, that if you tried to explain the figures on just that basis, you would be wrong. That is just part of it. I am thoroughly convinced.

Now, the way we have handled these cases, because I think that is of relevancy to you, is that the entire office of the Counsel -- that would be four lawyers besides myself -- would work on capital cases. We had other clemency matters, but all capital cases we would work on all together. And then we would consult with one another. This is long before we were to report to the Governor on our recommendations. And we would work the cases, I can now say, as thoroughly as a well-run appellate court should work cases.

The record was reviewed, as well as any legal opinions that were available in the process of the case, from psychiatrist to the Court of Appeals, together with the parole and probation reports that may have been available, as well as the investigation made by the clemency investigators working under the supervision of the State Board of Parole, together with the views submitted to us, without limitation by the rules of evidence or any

similar limitation, from the District Attorney, the Judge who tried the case, and any other persons.

And then we had the job, as we looked over these cases, to decide whether any factors were present that suggested that the man should not receive capital punishment.

Of course, we accepted the law as it was. And it meant that capital punishment was indicated, unless there were extenuating or mitigating circumstances or explanations.

Now, the range of those cases, you will recall I referred to that in the beinning, was tremendous. And there were no set of rules that you could apply. There were two -- one or two.

The Court of Appeals disagreed on the weight of the evidence; there would be an automatic commutation. The reason would be obvious.

But you rarely had such an easy factor to apply. As you considered the persons involved, it was always difficult -- this despite the fact that perhaps the defendants were men of long criminal records, that committed very vicious crimes, and even one could say that their propensity for harm

in the future, in or out of prison, might still be great.

In every single kind of case -- I don't think there were any exceptions -- there were strong, very good cases could be made on various factors as to why this person should not receive capital punishment.

Incidentally, we would see to it that all five of us acquiesced in the conclusion, at which point we would then take the case up to the Governor, and then there would be an extensive discussion.

In the case of my Governor, this was very significant, because he was a former prosecutor and a lawyer and, therefore, these cases could be discussed with him with all of the technical and historical and other details that might be necessary,with a rather complete communication.

I am not suggesting that others are not so qualified, but I can certify as to the qualification of my own client at that time.

Here are the difficulties that we have. First, and I referred to that already, was the fact that you had this difficulty of making a comparison among these kinds of people, and the trouble, as the

cases would be coming through, you had this natural tendency of thinking in terms of precedent: Well, this is what we did with respect to Jones. How did that apply to Brown? Because we didn't decide whether he should get a $10,000 judgment or not; we were deciding whether he should die. And if he died and if our attitudes changed later, there was no way of undoing what we had done.

That is why I had referred earlier to this irrevocable situation.

Incidentally, there is another aspect to such final action, there is a chance of error in these things.

Most people talk in favor of abolishing capital punishment because of this, but frankly, I am not too much conerned about the chance of error; but there is, there is a chance of error that human beings can make. Even in a civil case you may commit an error so serious that it may result in the suicide of a person who is involved in the case.

And we just cannot get ourselves into a psychopathic state about the potentialities for error.

The chances for error --

MR. DENZER: Excuse me. In that connection, do you recall any cases, and if so, many cases over the years that came before Governor Dewey that were based on either single -- or, first of all, are they single identification, without any other circumstantial evidence of any kind? Any murder case?

JUDGE BREITEL: I am sure there was none such. Because if there were to be one, I would have been so alarmed by it that the case would have given me trouble on that score.

JUDGE KAPELMAN: Because reference was made to that in the testimony of another witness here of a single identification.

JUDGE BREITEL: That is not your whole danger of error.

Incidentally, in all my experience as a prosecutor or as Governor's Counsel, I have had error cases. And we have to distinguish between two kinds of error.

One is the error where an innocent person is charged and is in danger of conviction, or has been convicted of a crime, and we have clear proof

subsequently, or at a sufficiently significant stage, that he is innocent; that is the real error that we are really worried about. That is very rare.

In all my time I remember one case about this, and I remember that it was a robbery case. It never reached the point of conviction. It could have been a murder case, because the case involved the shooting of a man through the head. He happened to survive.

In that case it would have been the easiest possible thing to convict two men innocent of the crime, on proof that would have been available; circumstantial evidence, prior criminal records, identification by five witnesses, not by one. They happened to have the two wrong men.

How we got to the truth is an interesting story in itself. But that I can remember only once. There are other error cases. This is the kind that most people talk about, where the proof of the witnesses gets undermined subsequently, without necessarily establishing the innocence of the man. This is a very troublesome kind of error, too. But this happens much more often.

The reason it happens much more often is

that in criminal cases, even more than in civil cases, the kind of witnesses you get and the kind of testimony they give is not completely reliable. That is one of the risks we have in court.

So, therefore, given enough time, you can do a lot of undermining, accidentally or intentionally. That kind of error I have seen maybe a dozen times.

Of course, the most notable one, that received a great deal of publicity at the time, was the Campbell forgery case. By the way, with regard to that case, I think it is a perfect example of the proof against him being completely undermined.

And at that point, I stop talking.

Did you want to ask me something?

MR. DENZER: No. I understand that in that case the prosecutor still swears he is guilty.

JUDGE BREITEL: In dealing with this question of irrevocability of sanction that you impose, you have to realize, too, as we did, that you could have changing attitudes in short periods of time as well as in long.

For example, I put the question to you rhetorically, would we apply the same standards to the

persons who are involved in these 81 cases, in the years 1943 to 1949, inclusive, today?

If we didn't, and if the result were different, there is not a thing in the world we could do about it, because, of the 81, 68 are dead. And to suggest that there would be no change in the attitude -- I am not talking about confession of error -- no change in attitude, I think it is to state a nonsensical proposition.

Well, now, this gets to prudence. Because, among other aspects of clemency that we have are those of men who are sentenced to death, were commuted to life, and, in my time, by previous Governors, and after having served many years in prison, the case comes up for further commutation. They have been in prison twenty years.

Now, as we take these cases, these, too, are murder cases. These, too, are cases involving all of the intangibles, these changing attitudes, these risks of error of both kinds that I have referred to, as well as perhaps the difference in the attitude of the personalities who are handling the matter.

You know, if you make the mistake, it isn't

too bad. Because he can make a new application three years later, or wait for another Governor. But you see, those, of course, who receive capital punishment, all of this is not available. This is a very significant thing that society should put that kind of yoke around its neck, especially with its modern thinking. We are more humble about our capacity for achieving absolute truth, to decide that there are certain things that we will do and make it absolutely impossible for ourselves to change our minds in any way with regard to what we did.

And working on the 81 cases would make this a very, very difficult burden for anybody.

There is another little bit, and I don't like to refer to the glory or emotional aspect of these things, and I raise this not for this purpose, because I think the worst thing any of us can do is to handle this from an emotional angle. We have.

You can divide the sheep from the goats very easily in this area. But there is a last-hour problem, for example, Thursday nights, that is execution night, the warden will call up the Governor and call up his counsel, in case we weren't

together, which most often is the case, to make sure that nothing had happened in between. The result, because, as you know, the Governor never denies clemency; he only grants it. So until the last minute, something can happen.

Now, at 9 o'clock on Thursday night, you might get a long-distance telephone call from New York -- and this happened more than once -- where the man with a thick voice on the telephone would say, "You are about to electrocute an innocent man."

What are you supposed to do -- grant respite on a telephone call?

The man speaks with a thick voice. And you know something about the case. He starts to tell you something about it. You proceed to go through this perfectly ridiculous business of trying to investigate the quality of the man's statement on the telephone.

And, of course, this is inevitable. And it is an incident that stems from the peculiarity of this sanction, with its irrevocability. When you send a man to prison, and you make it as brutal a sentence as you like, 100 years to life, all of these things

cease to be important, and a wild telephone call seems to be insignificant.

Apropos of the chance of error, I remember one instance where we commuted a sentence from death to life, not because we thought this man deserved any better than any others who were refused, but just because of the peculiar concern that the District Attorney had that he get clemency. Although the case looked absolutely perfect from every point of view, his anxiety finally impressed us that there was something we did not know about the case, and for that reason alone the man received clemency.

Now, just reverse the field. The District Attorney did not make those importunings.

I think that covers about as much as I ought to take up of your time today.

I will be glad to answer any questions that you have.

PROFESSOR WECHSLER: I have one question, Judge Brietel.

Since you have been sitting in the Appellate Division, you have undoubtedly examined records in second-degree cases, or even manslaughter cases, that

have been appealed to your Court.

I wonder if you would have anything to tell us about your reaction to those cases, in contrast to the first-degree, capital cases, that you had occasion to review as Governor's Counsel. That is, is there a contrast there that has meant anything to you?

JUDGE BREITEL: You mean a contrast in the handling of the case, the decision?

PROFESSOR WECHSLER: Or in the character of the case itself. Did you get the sense that the cases that ended up as first-degree cases were significantly different from the cases that ended up as second-degree cases, and thus came to your Court on appeal?

MR. DENZER: Perhaps the first-degree cases with recommendations would be the best comparison.

JUDGE BREITEL: We get some of those. We have had some first-degree cases.

Now, if I understand the question, and I think I do, the answer is "No."

But it does suggest another difference that

perhaps I should have mentioned before and I just did not because I don't want to take up your time all day.

One of the difficult areas is the fact that a case coming from different counties of the State carry with them an entirely different kind of handling. For instance, there was one case that was very difficult, very serious in its implications, for clemency purposes as well as for ordinary criminological purposes.

It arose in a county that hadn't had a homicide in thirty years. The result was that the District Attorney and the Bar in that county -- it was one of our rural counties, of course -- were really put at a loss, because they didn't know how to handle this.

Then, to make matters worse -- what I say now makes the case identifiable, because you can get this much from the newspapers, because the man did receive a commutation.

The defendant told the Deputy Sheriff that he was innocent, and the Deputy Sheriff reported this to his lawyers, and also to the prosecutor, and when

they asked him about it, he denied that he had ever said it, and denied that it was true.

As a result of that, they decided to have a very careful mental examination of him in Rochester, in the State Hospital, and that produced ambiguous reports, in which sometimes he said that he was innocent and sometimes he said that he wasn't.

And, by the way, he refused to put any defense in. He refused to take the stand.

By the way, he was a young man of about 21, and he was duly convicted.

That was the condition that we got it in, as a clemency case.

What happened was, by the way, we thoroughly investigated that case, even to the point of cross-examining him at Sing Sing in the death house, and arranging to have him submit to narcosynthesis, and to the extent also of questioning both his father and his mother. Because part of his story was that his mother had done it, not he.

I asked his mother if she had done it, her son having said it. She said, "I don't know."

JUDGE KAPELMAN: May I address a question to

Judge Brietel?

THE CHAIRMAN: Yes.

JUDGE KAPELMAN: I was very much in agreement with the remark that you made that insofar as the deterrence aspect, there are so many cases that we won't know whether it has acted as a deterrent, namely, the capital penalty.

But do you not believe that the thought of life imprisonment would act similarly as a deterrent, if it does act as a deterrent?

JUDGE BREITEL: I think that one can only talk in terms of theory.

My personal view is this: I think there are some men who have such a fear of death, as compared with other fears, that that one is supreme.

I think there are other men, to whom the fear of death is relatively unimportant, and I am quite confident that the psychiatrists are quite correct when they say there are many men, among criminals, too, who actually have a death wish.

So that instead of it being the deterrent, it could be a come-on.

The other thing is that with regard to life

imprisonment, I think we should be perfectly honest and recognize that a man -- and the boys know this -- that a man sentenced to life improsonment rarely serves life.

MR. PFEIFFER: Have you views on the subject of whether capital punishment has a bad effect on the administration of justice generally, including the actions of police as well as prosecutors and so forth?

JUDGE BREITEL: I think it is difficult, again, to make a statement that it is more than just an opinion, and, therefore, a personal reaction. But I have one.

I just say that by way of caveat.

As one thing, I would suggest that, instead of it being detriment to the killing of policemen, it may cause their death.

MR. PFEIFFER: I didn't mean that.

JUDGE BREITEL: You didn't mean that?

MR. PFEIFFER: No. What I meant was --

JUDGE BREITEL: The brutalizing of the police?

MR. PFEIFFER: The obtaining of confessions by third-degree methods and so forth, in the

administration of the criminal process, is there a bad effect by reason of it, or the difficulties in proving or getting a conviction of murder in the first degree, and, therefore, excessive activity on the part of the police and prosecuting attorneys?

JUDGE BREITEL: I now understand you, sir.

MR. PFEIFFER: There is a great deal of talk about that.

JUDGE BREITEL: Yes. I would suggest that it probably is a factor, but even if you remove it, there are other factors. There are some other conclusions.

There is such a variety of so many counteracting factors that would make the police be overzealous or less than overzealous, and that will make persons being questioned more or less afraid or helpful, as the case may be, based upon the kind of punishment involved, that I don't think we can single that one factor out and give it any special weight.

In fact, Mr. Pfeiffer, the thing that I would stress most is that both on the law enforcement side and on the criminal side, we are dealing with lots of

different people.

MR. PFEIFFER: We tend to generalize, don't we?

JUDGE BREITEL: Some would be brutalized by it; other wouldn't.

There are men who would make grand executioners, because it would satisfy their sadistic impulses. Another man would get hardened by it.

PROFESSOR WECHSLER: There is a common factor in the sensationalizing of a trial, don't you think, Judge, that has a bearing on the administration of justice?

JUDGE BREITEL: I suppose so. Again, I don't know its overwhelming importance in analyzing the problem.

The fact that there now may be a life sentence, for example, would do the same thing; or the nature of the crime. The nature of the crime would do it very, very much.

I suppose that would be a factor. Especially when dealing with that part of the community which gets a really sadistic pleasure out of these things, too.

MR. ATLAS: My question is, speaking of deterrence, do you think that a Legislative Commission ought to be deterred from making a recommendation for the abolition of punishment, out of worry as to how it would be received throughout the State, given the types of mind you have already described?

JUDGE BREITEL: Well, of course, a Legislative Commission has the job of presenting proposals that they think can be passed by the Legislature, and not merely be an exercise in --

MR. ATLAS: We haven't learned that. We learned our lesson.

JUDGE HALPERN: That isn't so. We might want to plant our standards high. The Legislature might not accept it.

JUDGE BREITEL: That could well be.

By the way, one could also do both.

You put whatever score of music you want on the piano, but you have got to decide what it is that you are going to play.

THE CHAIRMAN: Judge Breitel, assuming for the moment that we decided to not recommend outright abolition, do you have an opinion as to the

desirability of the two-part trial system as used in California and in Pennsylvania?

JUDGE BREITEL: Yes. As a matter of fact, it originated -- Professor Wechsler knows better than anyone else. I think that is a magnificent step in many directions.

In the first place, it would give the jury almost what we had in handling clemency. You see what happened. We were the only ones, by the way, who really had the whole story, because the whole story was now near its last chapter.

Well, the jury still wouldn't get the last, you see, but they would get a lot, a lot more than they now get. It would be a way of getting community reaction as to how the sanctions should be imposed.

It might help judges who might otherwise be deterred from being courageous to flout what seems to be a community reaction.

It might be that the jury might reflect community hysteria. Frankly, because it would increase the chances,and in a very well intentioned way, for avoiding capital punishment, I think it is a magnificent step. But if those of you feel the way

about it that Judge Halpern feels about raising high standards, the best way is for abolition.

MR. ATLAS: The second step, in effect, would be spreading what we now find in a proration, encapsule, into an entire trial, into testimony, and to leave alarms.

JUDGE BREITEL: It has value, but you still don't have the rest of that story up to that point, up to the few weeks before the execution. What happened in the Court of Appeals, what other material may have developed in prison, what the so-called Lunacy Commission -- I assume you know about those -- what they have reported about the findings in the matter.

JUDGE KAPELMAN: Judge Breitel, I would like very much to go into this area, because we have certain testimony on it this morning by Judge Liebowitz, of the Supreme Court, Brooklyn, in which he suggested a Commission, in place of the Governor, acting on the question of clemency.

JUDGE BREITEL: In place of, or in addition to?

JUDGE KAPELMAN: No; in lieu of, in substitution, in place of.

MR. PFEIFFER: Not an ad hoc commission. A permanent commission, not appointed by the Governor.

JUDGE KAPELMAN: This is not to be confused, Judge, with the question of substituting the jury on the two-stage California plan.

JUDGE BREITEL: I understand that.

JUDGE KAPELMAN: He is not speaking of that. He is speaking of the regular jury trial as we have it today, with the additional right of the jury to recommend mercy, as he said it, in the case of common-law murder, as we call it.

But in addition to that, that after the Court is finished, after the Court of Appeals has finished with the subject, that then, instead of it being submitted to the Governor for clemency, it be submitted to a permanent commission, and the commission to consist of persons who are acquainted with the field in which they are operating, and who are going to have duties other than this. He tried to make the point, and I purposely throw the ball to you so that you may react to it, in many instances the question of granting clemency have been difficult questions, and I am being as kind to his testimony as

I can. He felt that the Governor's office, for one reason or another, may not have wanted to act in a particular situation, and under those circumstances would it be a good idea to take from the Governor the right of clemency, and to substitute in his place, instead, this commission idea?

JUDGE BREITEL: In the first place, you realize it is in the Constitution.

JUDGE KAPELMAN: I understand that.

JUDGE BREITEL: That would require a constitutional amendment.

I certainly wouldn't take the power of clemency away from the Governor, or from any other place where the power of clemency exists.

Two, I don't think theories in this area as to whether Governors are going to be weak about this is of any significance.

I think you ought to look at what the past history has shown. New York State, by and large, has been blessed with very strong Governors. Certainly in our century that has been true.

I don't recall in my time -- and this goes back to my youth as well -- that there was any

peculiarity in that area.

I think Governors from time to time may have reflected the community. This is a different note. This is something that bothers me, too. This bears on the question of whether, with the passage of time and the community attitude changing there, they might have done otherwise. But apart from that, I don't recognize any such difficulties at any time.

I have certainly had an opportunity to observe the Governor's clemency for many years, beyond my own service there. But with regard to having a permanent board, I think that would be very dangerous, because they, too, would tend to develop a kind of hardening setup.

JUDGE KAPELMAN: He wanted that. He said a set of standards would be evolved and would be used.

MR. ATLAS: A part of the hardening process.

JUDGE BREITEL: That is right.

If I am right, what I described before, that I found in the 81 cases, was that it is very difficult to have any standards here that are

meaningful.

Let me tell you this. While I was Governor's Counsel, I had recommended that we have the Court of Appeals have the power to reduce the sentence from death to life. In other words, give them a kind of clemency power -- not changing the Governor's clemency power.

JUDGE KAPELMAN: Not changing it?

JUDGE BREITEL: That is right.

JUDGE HALPERN: They would have the record before them?

JUDGE BREITEL: Yes. That would be another change. I had the idea at the time that this might help them, because sometimes they struggled with a case, they knew that they were also struggling with a man's life as well as a legal or factual issue.

But we tried it out, and then the Chief Judge of the Court of Appeals took it up with his colleagues,and they wanted no part of it. That was the end of that.

Apart from that, I have played with the idea of having clemency boards, but not in lieu of. It would be in addition to.

But as to the role, I was never able to

solve what kind of people should be on it.

MR. PFEIFFER: There is a Lunacy Board appointed in the case of every person before he is executed?

JUDGE BREITEL: Yes. Two psychiatrists are appointed, on the recommendation of the Commissioner of Mental Hygiene, to examine every defendant facing capital punishment, and to report --

MR. PFEIFFER: That is automatic?

JUDGE BREITEL: Yes, automatic. Unless they are given special instructions, they merely report, under the M'Naghten Rule, as to the man's present state.

JUDGE HALPERN: Whether he is presently able to understand the nature of what is going to happen to him.

Judge, I would like to ask you about your opening statement, the analysis of the problem. I would like to state it and see whether I understood you correctly.

As I understood your statement, it is this: That on your own judgment you believe that capital punishment does have a deterrent effect in some cases;

but that for ethical or moral considerations, society ought to give up that deterrent, because of higher values that society must serve?

JUDGE BREITEL: I wouldn't phrase it quite that way.

In the first place, I don't think it deters at all. It deters some people. Some people are not deterred by it.

I think it is similarly true of prison sentences, that some people are deterred by them. Some people are deterred because of the publicity, that they have committed the offense, not to do it. Others enjoy it.

I didn't stress the other ethical standards, although I have --

JUDGE HALPERN: You called that cheapening of life.

JUDGE BREITEL: Yes. I wasn't doing that on the basis of a moral code or such. I was doing that on the theory that we take it as a social goal of our society, that life should not be cheapened. In fact, we proved that by imposing capital punishment for another killing. If you want to avoid killing

people, I am accepting that as a datum, then, one of the ways to avoid doing that, letting anybody know that before any killing is done we have to be driven by either desperate straits, such as a war, and things like that.

I realize that one might say that is an ethical judgment. But I have really tried to phrase it in terms of less than ethical or social engendering, the reason being that most of us, I am quite convinced, react to these things on the basis of our own standards and views, and have no mistake about it. I find cold-blooded killing a horror.

MR. DENZER: Judge Breitel, just one question along these lines, or two questions.

From your experience, in the Governor's office, with felony murder cases where the jury did not recommend, wasn't it true that the Governor was rather reluctant to commute in those cases? In other words, that the jury had already voted on it, and that it would have vetoed the jury's verdict on it?

JUDGE BREITEL: No. That wouldn't have impressed us too much.

In the first place, again, we would have recognized that they had their own role to play.

Two, they didn't have what we had by way of information -- not nearly.

When you have a story -- and that is why I said before that even with the worst of men, those most eligible to get the chair, as you read their whole story you didn't have to be a sob sister to make quite a case for saying, "Why throw an additional stone at this poor fellow?"

MR. DENZER: This California A.L.I. model system, the two-part jury system, would probably make life much easier for the Governors. There you do have a full hearing, and there the Governor would be vetoing a jury's verdict based upon a great deal of evidence other than that at the trial.

JUDGE BREITEL: Yes. I think that is true. If you think that might mean less than clemency, then.

MR. DENZER: Yes.

JUDGE BREITEL: Less executions, then.

MR. DENZER: That is a question.

JUDGE BREITEL: I would doubt it. I imagine that juries would reach the clemency response just

about as quickly, unless, by the way, it happens in a time of hysteria. That is your danger.

You have a trial that takes place very shortly after a particularly horrendous crime has been committed, when the community is greatly upset and afraid, they are frightened that this has happened; it could happen to them. They are going to be a hanging jury.

MR. DENZER: Certainly any Governor --

MR. ATLAS: So it was a hanging Legislature that revoked the abolition of hanging in Delaware. I don't think it is a proper example.

THE CHAIRMAN: We are very grateful to you, Judge, for having appeared this afternoon and giving us your time and your views.

JUDGE BREITEL: Thank you.

(Witness excused)

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THE CHAIRMAN: Next we will hear from the Honorable William Rand, who is a Justice of the Supreme Court, First Department, and a former Assistant to the Governor.

JUDGE WILLIAM RAND: I would have to say that I appreciate being asked to come here. I have a jury waiting for me up in the Bronx, so I am going to be very brief.

Just like Judge Breitel, I feel that we should do everything we could to restrict the use of capital punishment.

The obvious reason, other than it is an irrevocable act which always has the possibility of error, it is the utmost form of corporal punishment, and like any other form of corporal punishment, it must have a brutalizing effect on the society that uses it.

Finally, I think that one of our crime problems is the amount of publicity we give to a crime, in a free society, with a free press, and the use of capital punishment tends to increase the amount of publicity that follows certain types of sensational crimes. And I think that society would be better off

if we did everything we could to decrease the amount of publicity of those crimes.

The difficulty is that I do feel that capital punishment does provide a deterrent force. I don't see how you can get away with very much less use of it than we have now.

The moment you do away with capital punishment, you find a number of situations where a criminal will have no further deterrent to kill. The obvious examples are these escaping life convicts, who want to escape, who want to avoid recapture. The man who has just committed a rape and knows that at his age it probably means pretty much the rest of his life in prison, he no longer has any deterrent to killing the police officer trying to arrest him, or killing the girl who would testify against him.

The same with a robbery, whether the robber has committed three other felonies and faces life imprisonment, or the mere robbery itself, with his record, he feels that at his age it would be a life sentence, and he no longer has any deterrence from taking a life.

And unless you keep this extra punishment for these situations, I think you end up with a weak

penal structure that at one point no longer provides any deterrence.

Now, believing as I do that we should do everything to restrict capital punishment, I believe there are a number of areas where this can be done. I look somewhat to the fact that the number of commutations granted by the Governor have been, I believe, more or less steadily increasing. And that is somewhat evidence that perhaps our law, even as carried out by prosecutors and juries, still is more strict than it needs to be.

I think it would be a good idea to relieve the Governor of as many of these cases as possible and put them where they belong, in the courts, with a resolution that you ultimately want, rather than convicting at one time and having the Governor do something, that shouldn't be his role in the average case.

There are two ways that I can see of doing this:

One is to permit a recommendation of clemency in a murder in the first degree case, as well as in a felony murder.

There are a certain number of murders in the first degree --

MR. DENZER: Common-law?

JUDGE RAND: Yes. I meant common-law.

There aren't too many of those cases, but there are some in which I think a jury might recommend clemency, if they had been given a chance to do so, and that would remove some of them from the Governor's commutation or possibly from executions that are unnecessary.

Now, if you were going to increase the jury's power in any way to make recommendations, I think you have got to give them the information that any sensible human being would want, in order to make such a recommendation.

So I strongly favor the model penal code provision of the second proceeding, in which evidence relevant to such a recommendation is introduced.

PROFESSOR WECHSLER: I am not sure, Judge, that I understood your first point.

You accept the definition of murder one as it is, and counsel its retention?

JUDGE RAND: There wouldn't be any further

point, I don't think, in keeping the distinctions between subdivisions 1 and 2. If you permit a recommendation for clemency in both cases, you describe it as the same crime.

PROFESSOR WECHSLER: There is still the question of whether the present distinction between murder 1 and murder 2 makes any sense.

But Judge Halpern corrected me by saying that you weren't really addressing yourself to that problem, and I suppose that was true.

JUDGE RAND: I don't think so, because I want to retain the death sentence for murder.

The question would be whether to extend it to murder 2.

JUDGE HALPERN: That is, to eliminate it?

JUDGE RAND: I am not against eliminating it. We can restrict it, if it is interfering.

PROFESSOR WECHSLER: That brings us to facing the question of whether premeditation standards in murder 1 is a meaningful legal standard.

JUDGE RAND: Well, I do feel that almost any healthy human being, when he contemplates a life sentence or a death sentence, would be deterred from a

murder, if his mind was working properly.

Now, I think you have to build your penal law --

PROFESSOR WECHSLER: Depending upon provocation.

JUDGE RAND: On the average human being, with healthy reactions.

The death wish type is that somebody that you should try to reach under the definition of insanity or some other way, to get them out of the rules of deterrence which you apply to the usual human being with a healthy instinct.

JUDGE HALPERN: Judge, what the Professor is directing your attention to -- you weren't aware of that -- that separately we have under consideration proposals for the revision of the definition of homicide. And if in the course of that work we should decide that premeditation is not a valid ground of differentiation between murder first and murder second, then it would incidentally, perhaps accidentally, have the effect of extending whatever punishment there is now for murder first to what you now define as murder second. There is a finding of

an intent to kill.

THE CHAIRMAN: Without premeditation.

JUDGE RAND: Yes, I would be very sympathetic to that thought, to put the stress on it that the law does, but to throw it into the consideration of whether it is a clemency case or not.

JUDGE HALPERN: We got to the point that you said that you opposed it.

We would have the incidental fact of extending into an area in which the capital punishment might be imposed.

THE CHAIRMAN: If we would come up with the recommendation, it might well be a consideration to the jury of the degree of premeditation, too.

JUDGE RAND: Most of the murder 2's would fall into the recommendation of a life sentence.

PROFESSOR WECHSLER: Aren't you impressed with the situation in Michigan, where we just heard evidence about, before lunch, that there seems to be no evidence, no fact of a need for this additional deterrent for the lifer, or the person who is confronted with a heavy sentence. There is no need felt for that sort at all.

There are some states that have abolished it, states like Rhode Island, of course, where they --

JUDGE RAND: I have never been too impressed with the Sellin arguments and the British Royal Commission arguments on statistics, because I think you have got to somehow isolate --

PROFESSOR WECHSLER: I am not talking about statistics. I am talking about law enforcement people. We heard Chief Edwards, the Chief of Police in Detroit, Michigan.

JUDGE RAND: You mean the rapist doesn't go on to kill, because he feels there is no sense of punishment?

PROFESSOR WECHSLER: Just as a detective in New York will tell you, that they, as a practical sense, feel there is a need for this; the detectives in Michigan, having lived without it, will tell you that they have no practical sense for the need for it.

How do you weigh this evidence?

JUDGE RAND: Of course, you have a lot of crimes where the criminal does kill the witness. Now, whether you have more or less of them if you don't

have another punishment, I can only rely on my own common sense and put myself in the position of a fellow facing a thirty-year sentence, or, if I go on and throw her off the roof, some additional penalty.

And I would think that a penal law has to be built upon a mentality that will be deterred by an additional penalty.

Now, I don't see how an additional number of years can ever be used for that purpose. The difference between thirty years and forty years doesn't seem to mean anything.

THE CHAIRMAN: Judge Rand, in terms of ending a jury's recommendation to all first-degree murders, do you have an opinion as to the desirability of following the two-part system, such as used in California?

JUDGE RAND: Yes. I am very much in favor of it. Having worked on clemency in Albany, with Governor Rockefeller, in the beginning of his administration, one of the problems I had was when you got a recommendation for clemency from the jury -- I never had an awful lot of confidence in it, as

compared with a case where you didn't get the recommendation, because they had so little, it seems to me, that any human being would want to have, to make an intelligent recommendation.

So that I think one reason is that in many cases where you have recommendations, that they don't have the information.

JUDGE HALPERN: We come down to the second-stage trial. Do you think it would be most helpful to the Governor in these clemency hearings?

JUDGE RAND: Yes, I think it would.

I don't think it is proper to have as much of this work going on in the Governor's office as is becoming the case.

JUDGE HALPERN: It would be on the record in the second trial, even though the jury had decided to impose capital punishment.

JUDGE RAND: The Governor's commutation should be an unusual thing, not a regular part of your working penal system.

JUDGE KAPELMAN: Judge Rand is also saying, Judge, that the jury should have all of this information on the second stage; that it is not only a

question of the Governor having it available, but that the jury who today may or may not grant clemency has so little to work on, in making its decision. But that if we had the second stage --

JUDGE HALPERN: I was just pointing out the additional value.

JUDGE KAPELMAN: By all means.

THE CHAIRMAN: Judge, thank you very much.

JUDGE RAND: Thank you very much.

(Witness excused)

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THE CHAIRMAN: We will next hear from the Honorable Ferdinand Pecora, former Justice of the Supreme Court.

Judge Pecora, we are glad to have you here, sir.

JUDGE FERDINAND PECORA: Yes. It was suggested to me about two weeks ago that if I care to express my views to this honorable Commission on the question of whether or not capital punishment should be abolished in our State, that an opportunity would be afforded to me.

I want to express my thanks to you gentlemen for giving me this opportunity.

I trust that I will not abuse it by prolixity.

I have very decided views on the question of the desirability and the wisdom of capital punishment.

I served for twelve years in the District Attorney's office of this County. From 1918 to 1922 I served under District Attorney Swan.

From 1922 to 1930 I served as Chief Assistant District Attorney, under District Attorney

Banton.

I have had other contacts with the criminal law, the enforcement of it, because for a period of about sixteen years I was privileged to serve as a Justice of the Supreme Court in the First Judicial District.

I have felt, in the light of the experience that I have acquired in those two spheres of activity, that capital punishment serves no useful purpose whatsoever. It does not, in my opinion, operate as a deterrent upon others so as to prevent them or to deter them from the commission of premeditated murder.

If we can gather any logic from statistics, I believe that it has been shown that, in the ten or twelve of our states that have abolished capital punishment, the homicide rate for the population, 100,000 population, is, generally speaking, lower than it is in those states where capital punishment still prevails. It does not necessarily prove one conclusion or the other.

All we can do is to view the facts as they are and as they are supported by official records,

namely, that in the jurisdictions where capital punishment does not exist, the homicide rate is generally lower than in those states where capital punishment still prevails.

I am not one of those -- at least I hope I am not -- who has become maudlin or unduly sentimental on this subject. But it does seem to me that human life is too sacred a thing for anyone to take, even the state.

It is taken, of course, by individuals or by groups of individuals, and in violation of the Divine commandment "Thou Shalt Not Kill," and in violation of the law of the land.

But I know of cases, gentlemen, where persons have been indicted right in this community for first-degree murder, have been tried and convicted by juries, and where the convictions were affirmed by the Court of Appeals, and it was subsequently shown that the person so indicted, convicted, with an affirmance of conviction, was innocent.

I give you one such case. I give it to you out of my own experience during my service in the

District Attorney's office.

A man named Joseph Cohen, who was indicted by the Grand Jury of New York County with four or five others, charged with the crime of murder in the first degree. They were indicted for the alleged killing of one Barnett Bath, who was a wholesale commission poultry merchant here in the West Washington Poultry Market.

Bath was killed in a brutal fashion, late in the day of November 24, 1914. He was called from his store in the public market, where he had a store, to answer a telephone call across the street. That call was a mere decoy to get him out of his crowded store.

And as he crossed the street, two men fired at him. He dropped dead in his tracks. The two men were observed to run towards an automobile nearby that was parked, but with its motor running. And they were whisked away from the scene of the crime.

About three weeks after that crime was committed, an interview was given by the District Attorney of the County of New York to the representatives of the press. In the course of which he said --

referring to the murder of Barnett Bath, which was a shocking crime -- that he hoped to have enough evidence to connect Joseph Cohen with the crime, or the commission of the crime.

Well, that murder was committed in the same month in which the then District Attorney of New York County was elected Governor of the State of New York.

I refer, of course, to the Honorable Charles S. Whitman.

The rest of that year, 1914, went by, and that is about from the middle of December, when this interview was given to the press and published, and the then District Attorney took his oath of office on the 1st of January, 1915, as Governor, without having been able to get evidence sufficient to connect Joseph Cohen with this crime.

His successor was unable to get any such evidence. And in December, 1916, just before the expiration of what then was the two-year statute of limitations for the bringing of an action for libel, an action for libel was brought in behalf of Joseph Cohen, by a well-known lawyer of this community at that time, whose name I recall, Townes, in which

damages were sought from each of the seven newspapers, and they included the leading press of our City at that time, for having published that interview.

Very shortly after the institution of those libel actions, the newspapers, who were made defendants, pooled their legal interests and confided them to an attorney of standing -- I have every reason to believe an honorable man -- and he proceeded to do what apparently is the accustomed thing in libel cases, get all the dirt you can against the plaintiff. It may be useful on the trial of action to discredit him, or even sometimes in mitigation of damages.

Well, shortly after those libel suits were brought -- they were brought within a few days of the expiration of the two-year period of limitation that would have barred the action -- things began to happen.

The gentleman who represented the seven newspapers provisionally went to Albany accompanied by two men, one of whom had been an Assistant District Attorney under Mr. Whitman, and the other of whom was known as William Johnston. And they made

representations to the Governor, the nature of which could never be ascertained, but, as a result of those representations, the Governor, exercising his power under the Executive Law of our State, issued an Executive Order, superseding the then District Attorney of New York County, Judge Swan, from any jurisdiction over the prosecution of anyone in connection with the murder of Barnett Bath. He transferred that jurisdiction to the Attorney General of the State of New York.

No hearing was given by the Governor prior to the issuance of that Executive Order.

Within a short time thereafter, evidence was gathered which was presented to the Grand Jury of New York County, by the Attorney General of the State of New York, by his deputies, which led to the indictment of Joseph Cohen and two of his half-brothers and three other persons, whose business activities centered in and around the West Washington Market at the time of the murder of Bath. And the indictment of these men was for murder in the first degree.

They were tried in the Criminal Term of the Supreme Court of this County, in July and August of

1917. It was a very long trial.

And the jury convicted Joseph Cohen of murder in the first degree, and an indictment against one of the co-defendants was dismissed by the Court. Two others were acquitted, and one, or two others were convicted of manslaughter.

I am giving you this, gentlemen, from a recollection of something like forty years.

Cohen was duly sentenced to death. On appeal, the Court of Appeals affirmed his conviction; one Judge dissenting, but without writing a dissenting opinion.

The trial of Cohen, on the trial of Cohen, he was represented by a very able lawyer, the late Frank Moss, who had served as Chief District Attorney under District Attorney Whitman for the greater part of his first term.

Mr. Moss sought to have the United States Supreme Court review the conviction by certiorari, but certiorari was denied.

Then came, in the month of January, 1919, an attorney well known in this community, who served honorably on the Bench, who came to see Judge Swan and urged him to investigate reports that the

conviction of Joe Cohen had been brought out by perjured testimony.

Sufficient data was given by this attorney to Judge Swan, and I was assigned -- I was then the Deputy Assistant District Attorney. I was assigned to conduct the investigation. And I did so.

After more than a year of effort to get evidence, which was present to the Grand Jury, the Grand Jury indicted one of the principal witnesses against Cohen, on a charge of perjury;and they indicted two other persons on a charge of subornation of perjury.

One of them was this Walter Rogers Deuel, whose name I have referred to; and the other one was this Johnston, whom I have already referred to.

Johnston, in fact, gentlemen, was none other than one Philip M. Musicker, who had had an unusual criminal record here in the County of New York.

In due course, Sorro was brought to trial before a judge and jury in the Court of General Sessions, and in 1921 I prosecuted the case, and after a six weeks' trial he was convicted of perjury.

Upon that conviction, a motion was made by Cohen's lawyer to set aside the conviction of Cohen,

who had been convicted in 1917 of murder, on the ground of newly discovered evidence, the newly discovered evidence consisting of substantially the record of the evidence which I had presented to the jury on the trial of Joseph Sorro, the witness charged with perjury.

That motion was given very long consideration by the late Justice Gavagan, Edward Gavagan. He wrote a long opinion, which was reported in 117 Misc., and he set aside the conviction.

He based his decision upon the record, not only of the Cohen trial, but also of the perjury trial and conviction of Sorro.

Thereupon, Cohen was brought down from Sing Sing and lodged in the Tombs, to await his second trial.

That second trial never took place, because the Attorney General who had prosecuted Cohen and obtained his conviction for murder in 1917 frankly stated to the Court, in a recommendation, that Cohen should be discharged on his own recognizance.

Gentlemen, the evidence that was presented which led to the indictment and conviction of Sorro

for perjury showed that pactically all of the important witnesses who testified for the People against Joseph Cohen had committed perjury. And that the whole scheme, this whole web of perjury that was spun around Cohen, emanated from the ingenious but diabolical mind of Philip M. Musicker.

Meanwhile, while the proceedings were pending before the Grand Jury, which led to the indictment of Sorro, Governor Smith, who was then Governor, granted two or three respites to Cohen, and finally, before he left office in the end of 1920, following his defeat for reelection by Judge Miller, he commuted his sentence to life imprisonment.

Now, there is a case, gentlemen, that I would urge you to read the record of, the Sorro trial. I urge you to read the record of the Cohen case. And I am sure that you will come to the conclusion that Mr. Justice Gavagan came to, and that the jury at the Sorro trial came to, that Cohen was convicted on perjured testimony; and if it had not been for the fact, for the fortuitous circumstances that I related, that is, that a few weeks before the

date that had been fixed for the execution of Joseph Cohen, that evidence was brought to the attention of District Attorney Swan that led to this investigation, I think that the State of New York would have committed a legal murder.

Now, you cannot tell in how many cases that sort of thing has happened.

We earnestly hope that it has not happened. But we know that in that case it did happen.

Now, so long as capital punishment does not seem to operate as a deterrent to the commission of murder, why take the chance of the State executing a person because he was convicted, where he may have been convicted on improper evidence or on perjured testimony, and the facts with regard to that did not become apparent until after his execution?

I could go on in this vein, but I think I made my point, gentlemen, and I submit it to you for your earnest consideration.

THE CHAIRMAN: You made it very well, Judge. Thank you for coming down here.

JUDGE PECORA: Thank you very much.

(Witness excused)

THE CHAIRMAN: Ladies and gentlemen, we have a number of witnesses to be heard from this afternoon. I am going to again ask those of you who want to be heard to be as brief as possible and, whenever possible, to submit a memorandum. And if you don't have one prepared today and wish to submit it to the Commission, we will consider it as part of the record.

MISS JULIA PERLES: I am Julia Perles.

I am Chairman of the New York County Lawyers Association, the Committee on Law, Psychology and Psychiatry.

Rather than take your time for a statement, I respectfully beg leave to submit one in the next day or two.

JUDGE KAPELMAN: She ought to receive a particular commendation.

THE CHAIRMAN: Thank you very much.

MR. GEORGE CAREY: My name is George Carey. I am from the Rockland Friends Meeting.

I have a memorandum here that I would like to submit, Mr. Chairman.

THE CHAIRMAN: Thank you very much, Mr. Carey. We appreciate your doing so.

I also want to note on the record a memorandum from Bernard Arluck, of New York City. He submitted a memorandum in lieu of an appearance.

MRS. BETTY BERNSTEIN: My name is Betty Bernstein. I am Administrative Secretary to the New York Chapter of the National Lawyers Guild.

I beg leave to submit a further and more detailed memorandum at a later point.

THE CHAIRMAN: We will be very happy to receive it. Thank you very much.

You don't care to be heard this afternoon?

MRS. BERNSTEIN: I submit that I have too much work to do. Thank you.

MR. THEODORE TORRE-BUENO: My name is Theodore Torre-Bueno, of the New York Chapter of the American Humanist Association.

THE CHAIRMAN: Fine. Thank you very much.

JUDGE KAPELMAN: May I suggest again that you once again repeat to the audience that we have so many witnesses and that we are going to be here for such a long time that it would perhaps serve their convenience, as well as ours, if some of them had prepared statements, to submit them to us right

now.

THE CHAIRMAN: If there are any others, we will be happy to receive them.

We will next hear from Dr. Hans Kron.

We are glad to have you here, sir.

DR. HANS KRON: Thank you.

First of all, I have to thank you for the opportunity that you are giving me to express my personal feeling about the problem of today's hearing.

I am not going to go back to all that was said, the evidence. I will not go into any legal approach.

I am just here to give you the feeling of a man who for five years has been the Chief of the Psychiatric Service in Sing Sing Prison, and who has been in contact with men expecting execution.

I am not especially tender. I am not trying to sentimentalize. But I was obliged, anyhow, to review my feelings towards it, and I have reached a few conclusions, while I have been in this very, very old institution.

First of all, I consider capital punishment in our system of law as a somewhat contradiction with

the laws of the system.

Today we give all the guarantees to a man of legal proposals. He knows that actually what he has is what we call punishment. When we take it over, that is really another type of punishment.

Now, a contradiction occurs in another approach. We have seen during the first part of the century a counterchange in the handling of criminals. We saw it before in terms of punishment. We were looking for some kind of revenge. We have given up.

Today we think, when we speak in terms of rehabilitation, about rehabilitation work.

For the time that I was in Sing Sing I saw quite a number of men leaving. I saw men going and coming back. And many of them never came back and they never committed any other crimes.

If I have to express an opinion, the murderer is the least dangerous of all the criminals.

THE CHAIRMAN: The least dangerous?

DR. KRON: Yes. A murder is an isolated gesture.

When we speak of rehabilitation, we give an opportunity to a man to think, to develop a new

picture of himself.

When we kill a man he has not such an opportunity.

But there is one that we should try to convince of the good of society, that the crime is not isolated as a crime, that the crime of one is a crime of all. And when we try to convince prisoners that they are here for their rehabilitation, all of the work that we have done for the years, on the night of an execution is completely destroyed.

I remember once,that this was at a university, I had a conversation with one of the Commissioners of Correction. He told me, "What do you suggest as an improvement for rehabilitation in Sing Sing?"

I said, "Take the death house, put that in an island in the middle of New York Harbor, away from the prison, because all that we do is destroyed by the execution."

You have to know what is the atmosphere of Sing Sing on the night of an execution. Not the night -- that starts the day before, when a man -- I am an old physician -- when my colleagues have to

prepare the body for autopsy -- he is brought to the death house, and everybody knows that an execution will take place.

There is an excitement that you can't know of. Certainly an execution would have given a good deal of thinking to many people around, but not to him.

Now, for the prisoners themselves. I see that if there will be no execution, they will be frustrated.

THE CHAIRMAN: They will be frustrated?

DR. KRON: Deeply, yes.

THE CHAIRMAN: The prisoners?

DR. KRON: Yes, sir. The prisoners.

THE CHAIRMAN: That is interesting.

DR. KRON: Yes, very. Actually, if we are to be very popular, very few correction officers were not so long ago called guards, they would be against it.

JUDGE KAPELMAN: They would be against what?

DR. KRON: Against capital punishment. Against executions.

You have no idea of the guilty feeling they have when they put the straps around the condemned man.

If we will have the same thing among the prisoners -- we will have an overwhelming majority in favor of it. They are in favor of executions.

JUDGE KAPELMAN: A Roman circus approach, they want to see it?

DR. KRON: Yes.

That is why we actually frustrate the needs of many people when we will have no more public executions. The public execution was not working as it did. But that was a whole Roman approach, (Witness indicates with his thumbs down) "Kill him."

PROFESSOR WECHSLER: Do you think that this would cause general neuroses, the abolishing of public executions?

DR. KRON: I cannot say. You have a good point there.

PROFESSOR WECHSLER: One of the causes?

DR. KRON: Yes. Certainly that was a way for people to express their pent-up feelings of hostility, their aggressiveness. We become more and more self-controlled. That is why we cannot afford

public executions. We try to make executions humane. There is no humane way to kill. I agree.

I am French by birth, and I am an American citizen for quite a few years, and I am proud to be one. I am proud to take a part in public life when that opportunity was given to me.

But I have to say, up to 1929, in France, executions were taking place in public, and that the most -- that was a real bourgeoise -- you could imagine what it was to behead a man. You have no idea of the sight.

When a man's execution was taking place, the last execution which had taken place in public was the consequences of the law, of 1929, in France, which was a public execution, which was an execution of a murderer, a white man.

I should say he was executed, not because he was a murderer, but because he was a homosexual. You know how much the jury feels towards a homosexual than a murderer, but, anyway, they didn't like the man.

He was executed in Versailles, which is a suburb of Paris. You had these buses around the

night clubs in Paris picking up people to take them to the execution.

There was such a strong demonstration, that the head of the Government at the time -- it was a sign of instability -- to introduce a law on executions, that it should take place in the yard of a prison.

At that point I was having a discussion with a professor in the Elysee, who told me, "That is nice, because I will not have to worry about crowds any more. I have a very good man there. I will not have to be in the crowds any more, because I know very well the Public Keeper, and I will have my pass to go to the prison."

That will give you the idea of the deep meaning of execution.

We know that it does not work, that it does not exist. In the countries in which executions do not take place any more -- I don't speak of many countries -- like Belgium, it is still used, the term, but no execution has taken place, outside of political executions, which has nothing to do with your topic.

Since 1875, if I have a good memory -- that is a very long time -- the criminality does not show any change.

In Italy, where about the same time capital punishment was abolished, criminality has been vigorous.

I don't think that came from the suppression of the execution. I don't think so at all.

THE CHAIRMAN: You see no relationship?

DR. KRON: No relationship at all.

Exactly like in our own body of law, there is no correlation between capital punishment and all the others.

That is something completely different, but the only time in which we try to give to the general population his pound of flesh.

I think that is the only mention I can make about capital punishment. But I think as a nation, we should not follow it. We have to follow the lowest strata of society to enforce the law, a law by mob, but we are no law. We should not follow the mob.

JUDGE KAPELMAN: Very good.

DR. KRON: The last point, I mean to be brief, because I mean to be just -- I could enter into the legal approach. I give you some of these problems, since at an early age I had to travel a good deal to stay alive. I have been confronted with the possibility of many deaths.

I think the last point that we have to see, no deterrent, a very low satisfaction, a contradiction without plan to rehabilitation, that will not formulate it. We have to educate the public, if we do not abolish immediately.

To abolish immediately, that will be a real revolution. This is a matter of education.

It is curious to see that in some countries many people are not as educated as we are. It is possible to do that.

But, unfortunately, when executions are exceptions, as they are here, when they are accomplished in a very discreet way, with nearly acceptable means for many people, when Socrates had to drink the hemlock, that was very acceptable, because that is nice, that was a nice death.

I agreed that we have no more to do with the guillotine or --

THE CHAIRMAN: Drawing and qaurtering.

DR. KRON: Yes.

That will be the truth.

We try actually to give a small reward. That is, we have no public opinion about that, because people, you know -- there is a good paper here, the New York Times, which does not publish an execution.

I was reading in the suburbs, a local paper from Ossining, that was a very good paper. It took easily two columns on an execution, with all the details possible. That was it. All the kids at school -- not in night school -- all the kids in grade school were delighted.

I apologize to have been on the edge of emotion, but I think it is probably a purely emotional one. And as a psychiatrist I am dealing with emotions.

Thank you.

THE CHAIRMAN: Thank you, Doctor.

(Witness excused)

THE CHAIRMAN: Do we have a representative here of the Liberal Party, Mr. Morrison?

(No response)

THE CHAIRMAN: Mr. Charles Walker, please.

MR. CHARLES C. WALKER. Yes, sir.

THE CHAIRMAN: You are representing the Fellowship of Reconciliation, in Nyack; is that right?

MR. WALKER: Yes.

Could I first ask whether or not the report and study made by the Legislature of Pennsylvania has been presented to this Committee?

THE CHAIRMAN: I don't know.

MR. DENZER: No, I don't think so.

MR. WALKER: I would like to file this with the Committee. This was a study conducted by the Joint Legislative Committee at the instance of the State Legislature, at their last session in Pennsylvania (handing document to the Chairman).

THE CHAIRMAN: Thank you. We will avail ourselves of this information and get some more copies.

MR. WALKER: I will not deal with facts

and figures. That has already been done.

Just in passing, I might say that the most decisive of all these figures, which are often dismissed as fanciful figures, can be found in those states which abolished capital punishment experimentally for a time and then reinstituted it.

These are the studies that you should go into very carefully, and what the conclusion are there, there is practically no change whatsoever, before and after, in homicide rates.

But these are not the remarks which I wish to comment on.

First of all, capital punishment has a most disreputable history, as has already been indicated by the previous witness.

While at present in the United States the death penalty is inflicted in only one of four ways, there has been a fantastic variety of methods of execution.

It has been accompanied by practically every form of torture and torment known to man: burning alive, boiling in oil, suffocation in a quagmire; impalement, crucifixion, beheading,

sawing in two, pulling to pieces by horses, tearing to death with red-hot pincers, burial alive -- the list goes on.

A great variety of cruelties have been visited upon those about to be executed: public dissection, boiling, drawing before quartering, dismemberment, breaking bones on the rack, and beatings of every description.

These facts of history belie what is probably the major purpose of capital punishment, that is, punishment. It represents a dark chapter in man's inhumanity to man. The primitive emotions it symbolizes can be seen at the time of sensational trials. It overshadows public thinking and feeling, diverting attention from serious exploration into the roots of pathological human behavior and its personal and social causes.

It is patently hypocritical for a nation possessed of nuclear bombs, germ weapons and other means of widespread destruction to say to one who kills: you have committed the greatest crime and you shall surely die. All of us have become benumbed by the ever-present possibility of massive extermination

of human beings. Life has become cheap, and casualties are calculated in "megadeaths." How is a society thus preoccupied with violence to inculcate respect for each individual human life? It is this fundamental respect -- indeed, reverence -- for life that is the true deterrent. The eradication of the ritualized killing called capital punishment would be one step in that direction.

The death penalty is a symbol of an approach to crime: thus it is called the supreme penalty. It is the wrong symbol and the wrong approach. About 15 years ago a great campaign was undertaken in the field of mental health, to get the public to recognize that the mentally afflicted were ill. Research produced drugs that brought on a revolution in both understanding and treatment of mental illness. Tremendous strides have been made.

In the field of crime and delinquency -- a curious complex of mental and moral illness -- we are still far behind, not much beyond the beginning point.

Let us direct public opinion, money for research, and the skills and imagination of

professional people to the task of understanding, treatment. We may discover that not only does the offender against society need treatment, but the society needs forgiveness and repentance for its offenses against man's true humanity and dignity.

Capital punishment is called the supreme penalty. All of us live under the sentence of death as mortals. The date of its coming should be set by the Supreme Being alone.

THE CHAIRMAN: Thank you, sir.

MR. WALKER: Thank you.

(Witness excused)

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THE CHAIRMAN: We will take a five-minute recess at this time.

(A five-minute recess was taken.)

THE CHAIRMAN: All right. The hearing will come to order.

We will now hear from Mr. Bernard Arluck.

MR. BERNARD ARLUCK: Honorable Chairman, and members of the Commission:

As an ex-police officer, I should feel aggrieved that the words were stolen out of my mouth, but inasmuch as the gentleman who did that was the Honorable Judge Pecora, I feel highly flattered.

In the interest of brevity, I am going to read this. I was going to speak extemporaneously, but I want to read this.

As a practicing attorney and ex-member of the New York City Police Department, of 22 years experience, I am unalterably opposed to capital punishment.

The reason that I am so is very simple. When an innocent man is executed for a crime and subsequent investigation and legal research show that the

man was innocent, there is an irreparable damage done to the executed man's family, for how can you bring back from the grave, to a family who loved and respected this man, a human being who formerly was a happy member of the family.

Without going into other reasons, as other people who have spoken before you have gone into, the simple fact remains that when an innocent man is unjustly sentenced to prison instead of being electrocuted, there will always remain the possibility that if he is innocent he will be released to society as an alive human being.

Gentlemen, I speak from personal experience. Together with some other people, we fought for twelve years to effect the release of an innocent man, Louis Hoffner, from prison.

It was only through the grace of God that he was not electrocuted. In fact, the crime of which he was accused was a cold-blooded holdup. Technically, he was guilty of a felony murder, and normally a cold-blooded murder of that type is punished by execution. By some strange quirk, in spite of the fact that this was a cold-blooded murder, the jury recommended life

imprisonment. Perhaps that was their way of showing that they either doubted his guilt or were opposed to capital punishment and they took that means of showing their opposition to capital punishment.

Gentlemen, my background as a police officer for 22 years certainly does not put me in the place of people who are coddling criminals. In fact, I have made this subject my lifetime study, and a man more brilliant and capable than I, Professor Bouchard, in a book called "Convicting The Innocent," points out many cases in which the accused man was executed, and the so-called victim of the crime appeared alive and well.

Summing it up, gentlemen, the mere fact and possibility that an innocent person could be executed, and it has happened, and there are many innocent men in prison today who are incarcerated by a mistake of justice, and if the crime for which they were charged was one which called for execution, they, too, would be those who were the victims of grave injustice.

In other words, gentlemen, as long as that man who is unjustly convicted of a crime -- as

proven by subsequent investigation -- is alive in a penal institution, he can be returned to his loved ones. But if he is executed, there is nothing but a corpse to be returned to his family.

And that, in my eyes, is sufficient justification for my opposition to capital punishment.

THE CHAIRMAN: Thank you.

(Witness excused)

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THE CHAIRMAN: We will now have Mrs. Jane Evans, Executive Director of the National Federation of Temple Sisterhoods.

MRS. JANE EVANS: Thank you, Mr. Chairman.

I am speaking not only for the National Federation of Temple Sisterhoods, but for the Commission on Social Action, of the American Reformed Judaism, which includes the Union of American Hebrew Congregations, the Central Conference of American Rabbis, and the National Federation of Temple Sisterhoods, Brothers and Youth.

Officially, these organizations, representing one million of the Jewish community, men, women and children, have through their delegate bodies adopted strong positions against capital punishment.

As you would expect, since we are a religious movement of Reformed Judaism, I do not speak as a legal expert. But in all of our resolutions we have clearly stated that the legal execution of a criminal is an anachronism, in a society which has long since abandoned the primitive concept of "An eye for an eye, and a tooth for a tooth."

However, it should be noted that this was

never actually interpreted as being literally an eye for an eye, and was meant to imply a monetary compensation.

We heard much today, in the testimony of Judge Liebowitz and one or two other persons, on the question of capital punishment as a deterrent. I would, sir, if I might be allowed to, leave as part of our testimony one of our booklets, one of the issues of "Conscience," published by the Commission on Social Action, called "Man's Right to Live."

However, I must for one second refer, on the question of deterrence, to a fact that we have stressed in this booklet, and that is this: that 175 years ago in England, there were 200 crimes which were punishable by death, including robbery, and for robbery as little as five shillings. Hanging, for these offenses, were, as you know, always held in public.

We would like to point out that this was done obviously because this was thought to be a deterrent to potential criminals.

But what was the favorite time and place in England for pickpockets to execute their work?

Invariably, the pickpockets had their best heyday, according to all those who have written on the subject, at public hangings of other persons being hung for, if you please, robberies as low as five shillings.

This for deterrence in England 175 years ago.

All of us would also agree that fear of physical maiming, the gouging out of eyes, the excising of tongues, and the lopping off of ears, which were common punishments in some lands up until 150 years ago, were by their proponents also proclaimed to be deterrents.

Even if there were a grain of truth, which most of us might deny, none of us would wish today to continue this form of punishment.

Lastly, and in closing, I would stress, sir, that our unalterable position to capital punishment is based on the fact that there is no crime, however horrendous, for which society has the right through its judicial processes to order the taking of a human life.

Rather, we believe it is the absolute

obligation of society to evolve other,more effective and more humane methods in punishing and dealing with crime. We do believe that we cannot brutalize a human society by having any form of brutalization as part of the punishment.

And, lastly, we believe that we must all of us recognize the redemptibility and the rehabilitative possibilities for every man, no matter how great the crime.

I should like to submit the issue of "Conscience," which includes many statistics that you have heard about.

MR. ATLAS: How about one for every member?

MRS. EVANS: I would be glad to provide one for every member. We will mail it to your Commission within the next few days.

THE CHAIRMAN: Thank you very much.

MRS. EVANS: You are welcome.

(Witness excused)

THE CHAIRMAN: We will now hear from Mrs. Elsie Cespedes.

MRS. ELSIE CESPEDES: I am Elsie Cespedes.

I have been a practicing social worker for the last sixteen years.

I represent the Hispanic Association of Social Workers.

I have heard a great deal today about deterrence, but I haven't heard a word about prevention. When we speak of deterrence, I think we speak of the individual responsibility for crime. While it is true that in some percentage of crime this might be true, I think that in many crimes we can not deny social responsibility.

By the way, I happen to have worked on the social study of the Salvatore Agron case. You may remember that this was a gang killing that took place in New York City, in the summer of 1960.

MR: PFEIFFER: Has that case been finally disposed of?

THE CHAIRMAN: Commutation.

MRS. CESPEDES: Yes, clemency.

It is unfortunate that the court, or

through the judicial processes, that the mental condition and the social responsibility for the crime that this youngster and others committed were not taken into account, and even though, through the good legal counseling that he had assigned by the court, the psychiatric examination was fruitless. It proved that he was really sane, even though the social studies showed, and all the social agencies knew him, that this youngster had been schizoid and disorganized throughout his life.

MR. DENZER: Didn't the Governor hold a clemency hearing on that?

MRS. CESPEDES: Yes.

MR. DENZER: What did they do?

MRS. CESPEDES: Why should the case reach a clemency hearing? Why should it be left to the Governor? Why shouldn't this have been taken through the judicial processes?

THE CHAIRMAN: Do you think, Mrs. Cespedes, that the jury should be given the opportunity, before a finding of guilt or innocence, to hear such testimony as the Governor hears?

MRS. CESPEDES: Yes, even before the Governor. I think in every major crime there should be a complete psychiatric, sociological and psychological study of the individual.

MR. DENZER: The probation report is very full on that.

MRS. CESPEDES: I don't think so, sir. Because it proved nothing until we got to work.

MR. DENZER: It was enough to make the District Attorney of New York County affirmatively recommend clemency to the Governor; which he followed.

MRS. CESPEDES: Some attempt was made to collect social data on that case, and not until we got into the case did we get ample evidence.

MR. ATLAS: Do I understand you to say that psychological or sociological matters should be introduced during the trial?

MRS. CESPEDES: Yes. I want that point clear.

MR. PFEIFFER: I don't think you need to argue that. That is your point.

MRS. CESPEDES: There should be hospitalization, when considering the criminal.

And I also feel that in the present code the

application of knowledge is very limited. The definition of "insane" is very limited. It doesn't amount to anything.

MR. PFEIFFER: We have your point.

THE CHAIRMAN: This is a separate study that we are undertaking. We held a hearing on that last week.

MRS. CESPEDES: One thing that came in this case, that society was responsible for the incident that brought about this crime. This was a gang killing. And if society permits these youngsters to murder each other in the streets, you know, out of tension or out of racial or minority -- or whatever it is --

THE CHAIRMAN: You are opposed to capital punishment in all cases?

MRS. CESPEDES: Yes.

THE CHAIRMAN: In all cases?

MRS. CESPEDES: Yes. I think that capital punishment is against the humane concepts of our modern-day society. It does not keep up with our modern philosophy. I mean, it is cruel and it is gruesome.

MR. PFEIFFER: You have been here all day, have you?

MRS. CESPEDES: Yes.

MR. PFEIFFER: You have heard what was said?

MRS. CESPEDES: Yes.

MR. PFEIFFER: There were those who were opposed to capital punishment. You associate yourself with those ideas?

MRS. CESPEDES: Yes, I do. Definitely.

I will submit a more detailed report to you, because I feel that there are a lot of points that I haven't been able to cover.

MR. PFEIFFER: We would appreciate that.

THE CHAIRMAN: We will be glad to have it.

MRS. CESPEDES: The point is that society has a great share of the responsibility in crime, and that we should assume and face that squarely.

It is true that there may be a percentage, there may be criminals that can not be rehabilitated, but a great majority of the human beings can be rehabilitated. That is the basis of our work. We see it every day.

And the emotional atmosphere of the home

and the environment, and of society in general, is a great contributing factor to crime, or to prevent crime. Prevention, I think, should be the focus.

THE CHAIRMAN: Thank you very much.

Will you submit a statement?

MRS. CESPEDES: Yes, I will.

PROFESSOR AUSTIN H. MacCORMICK: Could I add a footnote?

In the Agron case it reached a point where, when it came to the Governor for clemency consideration, the Judge, who had said privately, I think, that he would not oppose it, finally made an affirmative recommendation in favor of it.

And District Attorney Hogan's office, through a Deputy whom he sent up, actually appeared and argued for it. This is quite an unusual case, that the prosecution and the court is making sure that action was taken.

THE CHAIRMAN: Thank you, Professor.

(Witness excused)

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THE CHAIRMAN: Our next witness is H. Richard Uviller, Assistant District Attorney of New York County.

MR. ATLAS: Who recommended clemency in the Agron case.

MR. H. RICHARD UVILLER: Mr. Chairman and members of the Commission:

I was, indeed, the Assistant District Attorney who did appear before the Governor in the celebrated Agron case.

I think that that case has been mentioned here, and quite properly, but only as one of a number of cases in which the District Attorney's office in New York County has taken a position with the Governor at the point of clemency, recommending affirmatively that the Governor commute a death sentence which was imposed by a court.

There was a case that stirred a considerable amount of controversy, but I think the considerations that went into our position in that case are applicable to many cases that we have appeared on, and I will try and cull from those experiences, in my remarks here.

There are many, and among the many are in our office itself, who have taken the position that capital punishment is, per se, wrong, predicating this position purely on moral or religious considerations.

I think that such a position is entitled to considerable respect. No one can really doubt the sincerity of those who feel that, because of ethical or religious commandments, a human life, be it the life of a criminal or an innocent man, is something which is so sacred that it is not for any human agency, particularly not for the State, to take it for whatever cause.

I certainly would not put myself in a position to criticize this judgment, nor could I advance reasons in opposition to it.

I think if the position is predicated solely and exclusively on the moral injunction, there is little that can be said to controvert it. I think the only comment that I could offer with respect to that position --

PROFESSOR WECHSLER: Because you don't think questions of morality are arguable?

MR. UVILLER: I would say that in this instance --

THE CHAIRMAN: Do you share the same feelings?

MR. UVILLER: Well, I would prefer to speak exclusively in my representative capacity, representing the office.

But I do think that any question of morality, particularly with religious foundations, is predicated purely on matters of faith. There is a biblical commandment, upon which some of the religious thought is based; and I think even where the ethical argument is based upon purely ethical or moral grounds, that it is also predicated on an item of faith.

Perhaps when I say "faith," that is more of a religious term. Perhaps I should say "emotion."

MR. ATLAS: Mr. Uviller, there are approximately 18 instances in which capital punishment is enjoined by the Bible. I say that not to disconcert you, but it happens to be the fact. Also, because it happens to be the fact that the courts have administered those injunctions; they have sought

every possible means of avoiding the inflicting of that penalty. That is historical.

MR. UVILLER: As I say, I think that is a strong and a sincere position, and I think it is entitled to considerable respect.

I can only comment on it by saying that I don't think that it is universally held. I think even among those who consider themselves religious persons, as well as those who are motivated by strong ethical judgments, they find nothing inconsistent with the idea of morality or religion and capital punishment.

So that I can only say that it is not a universally held position, even though for those who hold it, it is a strongly and sincerely held position.

In our office -- well, a word should be said about deterrence, which is generally advanced on the other side. I don't think you can weigh deterrence against immorality; if you take the position that it is immoral, it does not matter whether it is an effective deterrent or not. You could take the most effective deterrent in the world -- a

torture or a public execution -- and that torture itself, no matter of strong the deterrent value of such a torture, would not in itself convince those who took a moral position; in fact, the stronger the deterrent, the stronger the moral opposition.

However, should you say something about the statistical evidence of deterrence, of which much has been spoken here today. I think it is at best confusing. I don't think that it is possible to determine whether or not there is a detterent value, purely on a statistical basis.

I can report to you that those who have had actual contact with homicides and potential homicides do believe there there is a deterrent effect, and they don't base this on any statistical consideration at all. They base it purely on private interviews with criminals and potentional criminals who have reported this to them.

Incidentally, just to cite a few examples, a man may report to the District Attorney, "Yes, I have committed many robberies, but I have never loaded my gun when I went out for the robbery." Or an instance that I read about recently, where two

accomplices committed a holdup, and during the course of the holdup, or after its completion, one of the two accomplices, who held the gun, pointed the gun at the victim of the robbery and saying that he would kill him, thereby leaving no witnesses behind.

Whereupon the somewhat more level-headed, cooler, second man, wrested the gun from the hand of the other robber; in other words, interfered with the potential murder by his accomplice.

THE CHAIRMAN: Haven't some of these defendants indicated that they have a revulsion to killing, but not to stealing? That is, quite apart from the question of punishment?

MR. UVILLER: No, I don't think that it is due to any particular revulsion, Mr. Chairman, It is hard to say whether or not the deterrence of punishment would be sufficient, or whether there is some sort of faint-heartedness -- perhaps this is an ill-chosen word -- connected with it. But I think that it is fair to say that when they report to you that they feared the possibility of capital punishment involved in the killing, that they are giving, at least in some instances, an accurate report.

MR. ATLAS: Don't you think that appeared as an afterthought, and maybe intuition or reaction of your reporter?

MR. UVILLER: I don't think that is fact, Mr. Atlas. But I cannot hope to persuade anyone of the large numbers of these instances. I can only say that there is a belief among those who have come in contact with these men that there is at least some deterrent effect.

But again, you don't have a balancing of deterrence against immorality.

PROFESSOR: It may have a balancing effect just the opposite; that the macabre aspect of the death penalty is for some an incitement to crime.

MR. UVILLER: On the theory of the masochistic criminal?

PROFESSOR WECHSLER: Yes, to put it that way, as a well-documented psychiatric phenomena.

MR. PFEIFFER: Aren't you trying to tell us that you can't really get much in the way of an argument one way or the other, from the point of view of deterrence?

MR. UVILLER: That is my own feeling.

MR. PFEIFFER: That is what a dozen witnesses have testified to today.

MR. UVILLER: I can move ahead from there.

MR. ATLAS: In any event, nearly everyone seems to agree, Mr. Uviller, that the statistics are not reliable enough to form a judgment upon mere statistics.

PROFESSOR WECHSLER: I am a little bit concerned about this.

It seems to me that we throw out statistics a little bit too readily that way. It is one thing to say that the statistics don't measure up with utter precision of everything that happens in every individual case. But surely the statistics aren't lying when they show no significant change in homicide rates in the same jurisdiction after abolition, after restoration, comparable jurisdictions I mean. You have to say that either those homicide figures are wrong or that there is an inaccuracy in the maintenance, in the counting of the number of homicides, or else it seems to me that you have to say that those figures do show that quantitatively nothing substantial happens -- not that nothing

happens in a particular case, but quantitatively nothing substantial happens.

MR. UVILLER: That is so, Professor.

I think there are so many different factors, that it is difficult to rely upon statistics.

You take New York, where you get a high incidence of capital crimes, a high incidence of capital punishment. I am not up-to-date, but there was a period of eighteen months, over a year, in which no one was executed in Sing Sing.

PROFESSOR WECHSLER: We had a period of that in Pennsylvania. After that there were three executions, and the count showed an increase in the number of homicides in the period immediately following that, and then a lag, and then a drop.

But doesn't that dismiss the point of the figures? That is all that I am talking about.

If over and over again a state makes a change in its policy on this point, either a change going from abolition to restoration or the other way, they change in the policy of executing when sentences are imposed, and over and over again you see that

nothing substantially happened in the homicide rates; is that evidence to be regarded as inconsequential?

MR. UVILLER: Well, perhaps the key word, Professor Wechsler, is "no significant change." I am not a statistician, and I don't know what you mean by a significant change.

But I know from our experience that there is always a fluctuation in the rate of capital crime. A holiday falling on a hot summer weekend is going to raise the rate of crime for that month far more significantly than the abolition of capital punishment. The month before probably wouldn't.

PROFESSOR WECHSLER: It seems to me the only possible point is that the homicide rate being based on homicides per 100,000 is too vast a concept to show sensitive changes.

But if that is your point, it seems to me that unless you are intellectually affirming that, I don't see how you can intellectually affirm that the statistics are insignificant.

MR. UVILLER: Well, Professor Wechsler --

PROFESSOR WECHSLER: There is statistical element to that judgment, I agree.

MR. UVILLER: The third problem is that I am confronted with the statistical reports and the experiences of those who have dealt with individual criminals.

PROFESSOR WECHSLER: My whole point is that is there a conflict? Because the statistics represent a quantitative appraisal, and your detectives who say "Well, I know Joe Doakes, who never loads his gun" is dealing with an individual case or with a number of individual cases.

You can still say, as Judge Liebowitz did, "Well, it is enough for me that there is some intuitive evidence that some one human life might be saved." If you say that, that is something that I understand.

But if you meant that the quantitative appraisal is the relevant appraisal, so that if you are a Legislator, if you knew that the total number of homicides would be likely to be the same one way or the other, this would make a difference to us, which, I think, is a more general view of it. Then,

it seems to me, you can't throw those figures out.

MR. UVILLER: Perhaps, in view of the time, I should proceed to a further point. I acknowledge the strength of your argument.

PROFESSOR WECHSLER: It is only because I have such confidence in your view that I put it to you this strongly.

MR. UVILLER: I can say little to refute the argument, Professor.

I think that I ought to say just a few words on how we operate. We in the office, and I think the District Attorneys Association generally have tremendous confidence in the ability of a jury to weigh questions of ultimate punishment. We have sponsored time and again a bill to broaden the responsibility of the jury from the felony murder case to include the common-law murder case as well.

I think that as far as the jury's responsibility is concerned, it is properly a question for the jury.

I think that, unfortunately, under the present standards, the jury does not receive a sufficient amount of background in order to make an

intelligent decision.

I think that there can be very little dispute that if the jury is to be given this responsibility, they must be given it along with some additional procedural provisions which would allow them to consider matters which are not normally relevant on the question of guilt alone.

THE CHAIRMAN: The California and Pennsylvania practice?

MR. UVILLER: Exactly.

MR. ATLAS: Where it will be put in the trial proper?

MR. UVILLER: You can't do that, because if you are going to do that it will present grave danger to the ordinary rules of evidence and prejudice the defendant perhaps as seriously as the People, and more so.

PROFESSOR WECHSLER: As a matter of fact, Pennsylvania held it unconstitutional to put it into the trial.

JUDGE HALPERN: It would be in this State, too, because you would have irrelevant material before the jury, which would prejudice the defendant.

Along that line, while you are speaking of that point, the need for the separate trial or the second-stage trial by the jury, it would be greatly increased, wouldn't it, if a re-definition of homicide were made clear. We should drop out the distinction of premeditation, and merge murder 2nd and murder 1st.

MR. UVILLER: Yes. I never could understand the distinction between murder 1st and murder 2nd myself.

JUDGE HALPERN: We all have that difficulty.

MR. ATLAS: You are not alone.

MR. UVILLER: I am sure that there are others who have that difficulty.

I would hope that the homicide section would be redrafted.

But I speak now primarily of the question of punishment, where capital punishment is involved.

JUDGE HALPERN: Capital punishment is involved in an extended area.

MR. UVILLER: Yes. I would go one step further than this two-stage proposition. Perhaps at first blush it might seem an insignificant step,

but I think it is quite significant.

I feel that on the basis of our experience, that as we look at the case in all of its outlines, and if it appears to be a technically complete case of murder in the first degree or a capital crime, that we then go through a second process, which is more or less an extralegal or extrajudicial process, of seeking out matters in the background of the individual involved, or in the circumstances of the crime, which would reveal either the presence or absence of aggravating or mitigating circumstances.

Now, the Agron case was mentioned here as being a very significant thing, what occurred in that case.

Agron, of course, was guilty of murder in the first degree, on a mound of evidence, a mountain of evidence which could barely be surmounted by the defense. There was no defense.

When the case came up for clemency before the Governor, all sides, including many social agencies, presented to the Governor a wealth of material dealing with the background of that

particular individual

We ourselves had available to us, in forming out own position, a rather complete report from social agencies concerning the background of the defendant. We in that case ended up in recommending clemency.

The significant thing that I want to say is this: during the clemency hearing it is extremely unusual, it happens virtually on no occasion, that the Governor will interject any remark at all. The Governor himself sits quite placidly and listens to what is being said, and says very little other than "Thank you."

On this occasion, after the completion of the reports of those interested people who spoke, spontaneously, the Governor said, "This matter should have been brought before the jury."

The Governor, not being an attorney, did not realize that in a case of this nature there is no provision for it to be brought before the jury.

But, nonetheless, I think there was something quite significant in his remark. And I think that there was a spontaneous feeling on his part that these considerations were properly those which a jury

might consider, in determining whether or not to make a recommendation. In that case, of course, they couldn't make a recommendation. This was a common-law crime.

THE CHAIRMAN: Under the present law.

MR. UVILLER: Yes. But I suppose theoretically they could have achieved the same result by voting for a lesser degree of murder.

PROFESSOR WECHSLER: Probably in infidelity to their oath.

MR. UVILLER: In fact, I think the recommendation, particularly in view of the difficulty in distinguishing between murder 1 and murder 2, it might be accomplished in that way.

It seems to me -- this is an additional point I wanted to make -- it seems to me that in an ordinary case, our feeling is usually that the capital punishment provided by law is too stringent a punishment. We generally seek that in a case of an unusually aggravated circumstance, before we will compel a defendant to go to trial on the top count of a murder first degree indictment, without offering him a plea, in order that when the

clemency hearings come for us to take the position that the Governor should not award clemency. There has to be an aggravating situation in the case. It s ems to me that if there is a jury recommendation, that jury recommendation should be an affirmative one, rather than a negative one. It seems to me that the jury should not recommend mercy on the theory that in the ordinary case there should not be capital punishment. But if there is an extraordinarily mitigating factor, they will not recommend mercy, but on the contrary, if it heard just one, there would be life imprisonment imposed, because of the aggravating cause, should there be a recommendation short of death.

THE CHAIRMAN: You would reverse the function of the jury in Part 2 of the trial?

MR. UVILLER: Yes. I would say that the ordinary capital case, which is now considered capital, should be a case entailing life imprisonment, absent an aggravating feature.

This formulation is employed in the A.L.I. provisions --

PROFESSOR WECHSLER: It is the law in

some states, yes.

MR. UVILLER: There is a dual feature to the A.L.I. provisions, in which there is an aggravating and mitigating factor, that those factors are set forth in the A.L.I.

I have no quarrel on that, and that, it seems to me is the mitigating factor, which seems to be a little inconsistent with innocence as a defense.

But I don't know that there is any necessity for spelling them out in such detail. Nor do I think that there is a necessity for finding both the absence of a mitigating factor and an aggravating factor. It seems to me that the matter should be left to the jury on the general instructions, and if they find no aggravating factor, that the punishment should be life imprisonment. And I think that we would have accomplished substantially the justice that we seek.

PROFESSOR WECHSLER: There is a difficulty there. I wonder if you really thought that out. You can't define those aggravating factors in a way that will give them universal operativeness, if there

is no counterbalance with respect to mitigating factors. In other words, if I understood --

MR. UVILLER: The mitigating factors, or other than the aggravating factors.

PROFESSOR WECHSLER: It is because they are not, but they are both relevant. Let me give you an illustration so as to make it perfectly clear.

The aggravating feature in a murder case may be that this was a killer for hire, and everybody would say the worst kind of a case.

And the mitigating feature may be an obsessive psychotic who had been under --

MR. UVILLER: That would be a defense. Let us say that he has had no previous record.

PROFESSOR WECHSLER: A mental disturbance, short of a defense, assuming M'Naghten, you could have it, you see.

Now, if you said just aggravating factors, have you excluded that?

If you say a mitigating factor, well, the other thing is entitled to be considered too.

MR. UVILLER: But it is permissive. The jury is permitted to recommend.

THE CHAIRMAN: Under the California practice, it takes a unanimous recommendation on the part of the jury, before the defendant goes to the gas chamber; isn't that so?

PROFESSOR WECHSLER: I think so.

THE CHAIRMAN: The judgment they make is always unanimous, that he should be put to death. Otherwise it is life imprisonment?

MR. UVILLER: That is also true of the A.L.I. provisions.

PROFESSOR WECHSLER: That is in Pennsylvania.

THE CHAIRMAN: Yes.

MR. BENTLEY: One thing about the two-stage proceedings. You said the second stage should be before the same jury?

MR. UVILLER: Yes.

MR. BENTLEY: What about the defendant's right to appeal? Wouldn't you be jeopardizing that with an open record -- his appeal?

MR. UVILLER: To a certain extent that is so.

But theoretically, the appellate court could have both, let us say the probation material

or anything which the Judge alone took into consideration, on the sentence as well.

The sentence, for example, in a non-capital case in this State is reviewed by the Appellate Division, which has discretion to review the severity of the sentence as well as the correctness of the verdict. Consequently, in order to make that review, they could have available to them anything which the trial judge had in pronouncing the sentence.

MR. DENZER: Including the probation report which they call for?

MR. UVILLER: Yes. This is really a more extended, fuller kind of probation report, presented under these circumstances, but I don't think it is any more prejudicial on his appeal than the ordinary probation report would be.

JUDGE HALPERN: I think that Mr. Bentley has a point, that we have greater values and lesser values. I think an Appellate Court, in reviewing the lower court, with a second record before it, might be influenced by the second record before it, which is unavailable --

MR. UVILLER: That may be so. There are

certain things in a trial record which the jury does not see: the matters off the record, offers of proof.

JUDGE HALPERN: Sometimes they should influence them.

MR. ATLAS: I don't want to get off the main theme, but it has been said here today, Mr. Uviller, that defendants in capital cases who have assigned counsel are more or less ill represented.

THE CHAIRMAN: Now we are off the main theme.

MR. ATLAS: That theme has been bothering me all day. You know, I have been a prosecutor; I have also been assigned counsel. I have also gone up to the Court of Appeals at my own expense, where I disagreed with the Court, and got a recommendation of mercy.

I would like to know from you whether there is any indication that assigned counsel are doing less for a defendant in a capital case than anyone else equally capable, generally capable?

MR. UVILLER: Mr. Atlas, that is not a topic that I would like to talk about. I would like

the Chairman's permission not to commit myself to an answer.

THE CHAIRMAN: We can pass that.

MR. BENTLEY: Mr. Uviller, going back to this two-stage proceeding, you are aware, are you not, of the controversy which came up in the Family Court Act, where there was a feeling that the defendant's counsel should see a probation report, because of the damaging hearsay in it?

MR. UVILLER: In a Domestic Relations proceeding?

MR. BENTLEY: Yes. The Family Court would not be a Domestic Relations Court.

THE CHAIRMAN: Yes.

MR. UVILLER: Well, all I can say is that I hope that members of the legal profession, and certainly judges, are able to discount matters which we normally deem to be prejudicial when heard by a jury.

MR. BENTLEY: Is the jury capable of discounting it?

THE CHAIRMAN: Off the record.

(Discussion off the record)

THE CHAIRMAN: On the record.

MR. UVILLER: I don't quite understand the thrust of the question, sir.

As I understand it, the two-stage proceeding is simply this: the same jury, a jury in a capital case first decides the issue of the guilt or innocence, predicated upon matters which are normally considered to be relevant to that issue alone, which would, I assume, exclude the defendant's criminal record, his associations, hearsay evidence about him, his personal and social background, and so forth, except as they may be relevant towards an insanity defense.

After that decision is rendered to the Court, guilty or innocent, the same jury then hears matters dealing with aggravated circumstances or, perhaps, in the alternative or in addition, circumstances in mitigation.

MR. BENTLEY: Right at that point you are making the defendant, who probably has an appeal, and contending that he is innocent, you are then making him come in and testify as to his character, or practically plead for his life while his appeal is pending.

MR. UVILLER: First of all, there is no appeal pending at that particular stage, because there is no judgment. Beyond that, when he appeals he does not contend that he is innocent. The issue on appeal is a little bit different; that is, where there are errors committed during the course of the trial. In fact, it is quite improper for an attorney to say on appeal that his client is innocent.

As far as the material which has come out is concerned, although it may be prejudicial to him, that type of prejudicial matter is normally before an appellate court, as we have the procedures today -- most of it.

MR. ATLAS: As a practical matter, matters on the second stage of the trial, the defendant comes in and says, "I have been found guilty and I don't want to address myself to the question of whether or not I am guilty," which would be determined on an appeal somewhere, but only to the question of the what the sentence ought to be, and he says the same things he would normally say to a probation officer, in your court, for example, perhaps a little more expanded, perhaps with witnesses.

And I don't think that he need therefore prejudice his position on the original trial, excepting, of course, if he reveals a long string of arrests, on a yellow sheet, it might, as Judge Halpern pointed out, influence the appellate court.

MR. UVILLER: I will say in summary, without taking any further time, that the position of our office is that capital punishment should be retained, but it should be retained only for those few particularly aggravated cases where a jury, after a special proceeding where they have the full evidence, makes an affirmative recommendation that it should be imposed.

THE CHAIRMAN: Mr. Uviller, you aren't suggesting that it be retained for special categories of murder, as there is in some jurisdictions?

MR. UVILLER: We are not, no.

THE CHAIRMAN: Such as the killing of a policeman?

MR. UVILLER: No, no.

MR. PFEIFFER: You are in favor of a rather drastic revision of the homicide law of the State of New York, are you?

MR. UVILLER: Yes, oh, yes. I would hope so, in all degrees.

I think it could use a substantial revision.

PROFESSOR WECHSLER: May I ask you one question, so that I understand your testimony?

MR. UVILLER: Yes.

PROFESSOR WECHSLER: I understand you to be presenting the position of Mr. Hogan's office.

MR. UVILLER: Yes, sir.

PROFESSOR WECHSLER: And I also understand that, as in any group position, this is the consensus that involves also individual differences. For example, Mr. Herman has taken a public position in favor of abolition.

We are now to understand your testimony to be indicative of a change in his individual view?

MR. UVILLER: That is correct.

I think I stated at the outset that, among those sincere individuals who favor total abolition on moral and ethical or on religious grounds, a number of them are within our office.

JUDGE HALPERN: Now that you have raised that question about the split in your office, and Professor Wechsler has asked about some personal expression by one of the members of the staff --

PROFESSOR WECHSLER: That is a public statement issued by Mr. Herman, the head of the Homicide Bureau.

JUDGE HALPERN: Is there a division in your office on the conclusions, reached from experience, that capital punishment is an effective deterrent?

MR. UVILLER: An effective deterrent?

JUDGE HALPERN: Yes. The conclusion that you gave.

MR. UVILLER: I don't know about the effective aspect of it.

But I think we are fairly much uniform on the feeling that it does deter in at least some cases.

JUDGE HALPERN: That is what I thought. I inferred that what you thought was that those who are opposed to capital punishment are so opposed on moral and ethical grounds?

MR. UVILLER: Yes. Precisely so, sir.

THE CHAIRMAN: Thank you very much.

MR. UVILLER: Thank you.

(Witness excused)

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THE CHAIRMAN: We will now have a representative from the Conscience Bay Meeting of the Religious Society of Friends, Mr. Harry Hale Purvis.

MR. HARRY HALE PURVIS: Thank you, Mr. Chairman.

I live in Northport, New York, and I am a member of the Conscience Bay Meeting of Friends, but I was asked, the night before last, to also represent two other Mettings of Friends, on Long Island, in Westbury and in Jericho. There is a Joint Committee on Peace and Social Order of our Conscience Bay Meeting and the other two, and I was asked to speak on behalf of them also.

I did write to you and include in the letter a statement from the New York Yearly Meeting of the Religious Society of Friends.

THE CHAIRMAN: We have received that from several of the Meetings in the State.

MR. PURVIS: I would just like to comment that while this is not a creedal statement and therefore it cannot be claimed that every member of the Friends agrees with this, that it is one of the provisions in the Discipline that it is part of the

entire spirit that a member of the Friends is supposed to agree with, and that, therefore, it does represent a very broad concensus of all of the members of the Religious Society of Friends in New York State, and it does state that the Friends are opposed to the death penalty.

I say this merely to the point that Judge Liebowitz made the flat statement that he thought the overwhelming majority of people were in favor of the death penalty.

I have heard several references today to the political practicality of abolishing the death penalty.

THE CHAIRMAN: You don't have any polls that have been taken on this?

MR. PURVIS: No, I don't know of any polls. I do realize that you are not taking a poll here. But perhaps my best function here is to indicate not only a quantity of people who wish the death penalty to be abolished, but also the depth of feeling of those people; and I think that this depth of feeling is just as important in considering political practicalities as whether a person would

vote "Yes" or "No" on a subject, not having quite made up his mind. Because we feel that this is a deep moral question. And just as we would not base it on statistics, that it could be proved that by boiling people in oil that you had less crime, we would still be against boiling people in oil. And by the same token, we are against the death penalty for this moral reason.

Now, I would just like to comment on several of the things that I have heard in this very interesting hearing today, and one of them was the recommendation of the Columbia Professor that we not go too far in abolishing the death penalty because in Delaware a murder came up and it was re-instituted.

Now, I feel that there is a danger, in the retaining of the death penalty, that we are liable to have a very notorious case, in which we put a man to death and then it turns out that he did not really commit the murder. So I think you have an equally strong consideration on the other side, that if you really feel that it is a bad thing, that you have an obligation to do it right away, and not to

tolerate it.

I might mention, while I am here, that I wrote a letter to Governor Rockefeller, commending him for commuting the death sentence recently of the man in Astoria, and I received a letter from his assistant, telling me about this hearing.

I included in that commendation a statement urging him to remove the death penalty, and he suggested -- that is, his assistant -- suggested that I come here.

Now I would like to just emphasize this depth of moral feeling, to indicate my own conviction. I really feel that, just as I could not serve in an army that is dedicated to total war, just as I am a conscientious objector to the dropping of a bomb on a city, that I could not serve as a jury member on a death penalty case.

And I have also considered very carefully the question of what I would do if I were asked to testify on behalf of the prosecution in a death penalty case.

I don't believe that I could give that testimony, if I knew that it was to be used to put

a man to death in the electric chair. I would have to become a conscientious objector.

I feel that there are times when a man must commit civil disobedience, in respect for his moral principles, and I am really troubled about this. And I would hope that this Commission would take into consideration the degree to which putting a man to death violates the deep feelings of a substantial number of people in this State, and really to a certain degree alienates them and their respect for the process of law.

And I feel that Judge Liebowitz brought the thing into focus, in his statement that he believed that -- he was in favor of this -- "Thou Shalt Not kill" -- in the Bible -- "On pain of death, on penalty of death."

It seems to me that that is an ultimate contradiction. And that is why the death penalty, although it may deter a few people, really undermines the very principle of "Thou Shalt Not Kill," because society is giving this example of killing.

If society gives this horrible example and says it is all right to kill under certain

circumstances, why should not the would-be killer decide that under certain circumstances it is all right?

I believe that this undermines the whole sanction, and should be counterbalanced against this once-in-a-while deterrence.

Thank you.

THE CHAIRMAN: Thank you.

(Witness excused)

JUDGE HALPERN: Before you call the next witness, Mr. Chairman, Mr. Bentley raised some questions and Mr. Uviller gave some answers, on the question of how we would proceed on an appeal, at a two-stage trial.

On reflection, it seems to me that there would be no occasion to submit the second-stage record as part of the appeal record. Because if the jury found a verdict in favor of capital punishment, it would go to the Court of Appeals, which would have no power to deal with the sentence; it could only deal with the question of guilt or innocence. If they found for capital punishment, it would go to the Appellate Division.

If the statute were so worded as to a finding of life imprisonment by the jury, as I think it would be worded, the Appellate Division would have no power to alter that sentence.

There would be no occasion to submit that record, and I would think that the only record submitted on appeal would be the record of the first trial.

That would meet Mr. Bentley's point.

There was a reference b- Mr. Uviller to the present practice of the Appellate Court sending for the probation report. I never heard of a case -- perhaps in New York City they have it -- where the defendant had a double-barrelled appeal, where he asked for a reversal on the merits and at the same time asked for a reduction.

We have never had one in our Department, during my period of time. Because we usually find that where the defendant appeals only on the severity of the sentence, the case is one in which is guilt is overwhelmingly clear. We send for a probation report. But I would say that if we had a double-barrelled appeal of that kind, we would not send for a probation report until we first decided the question of guilt or innocence. That would dispose of the proboem.

THE CHAIRMAN: Thank you, Judge.

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THE CHAIRMAN: Mr. Stephen Cohen.

MR. STEPHEN COHEN: I am not a lawyer. I am certainly not a judge.

I am an electrical engineering student, who would like to voice my views on capital punishment. I have this in a prepared statement.

MR. PFEIFFER: Will you try to be as brief as possible?

MR. COHEN: Yes.

As capital punishment progressed through the ages, gradually discarding the axe and club for such modern devices as the cyanide gas chamber and the electric chair, myths about the deliberate taking of one's life by the State continued to grow. And they have grown to such monstrous proportions that the average citizen is unconcerned about the death penalty.

He knows nothing of its fiendish brutality, its agonizing torture, both mental and physical, of the men, women and adolescents who wait out their last hours of life.

Of these myths, which have been responsible for the retention of the death penalty in 42 states,

the one probably the most well known is the myth that capital punishment deters the murderer.

No criminal expects to be caught. He takes a calculated risk. His mind is too immature to reason out the consequences of his act. He acts impulsively, even if he does plan his act. He pushes the possibility of punishment from his mind. It is not until after he is caught that he becomes frightened.

Public hangings in England were called to a halt when it was found out that spectators at the hangings of pickpockets were having their pockets picked while their attention was fixed on the swaying bodies.

The idea that capital punishment is justified is another myth. Nobody has the right to take a life, and that includes the State. Murder is murder, no matter how you look at it.

If a State really held life to be sacred, as it claims to when it frowns on murder, then it would refuse to take a life in its name. But somehow the State thinks of itself as being above all moral responsibility, as far as murdering a human being is concerned.

I wonder how many murderers were executed for killing other murderers which the State would have executed, had not the condemned gotten to them first.

The electric chair is theoretically no respecter of age. In New York, a 15-year-old boy or girl can be put to death just as easily as a 70-year-old man or woman. If a person is 15 years old or over, he can be executed.

THE CHAIRMAN: Mr. Cohen, may I interrupt you for a moment?

Since you do have a written statement, could you submit that to us in lieu of giving it to us now?

MR. COHEN: Yes.

THE CHAIRMAN: We had hoped to conclude this at 5 o'clock, and we have at least two more witnesses.

MR. COHEN: Could I point out one more paragraph that I would like to read?

THE CHAIRMAN: Yes.

MR. COHEN: This is not directly on the subject of capital punishment. It will take about

two or three minutes to read it.

THE CHAIRMAN: Go ahead.

MR. COHEN: All right.

Society can be sufficiently protected by a sentence of life imprisonment with a possibility of parole for a murderer, when the parole boards do not act in haste and release a man against the advice of psychiatrists.

It is a pity that New York will not revise its entire penal system and base it on rehabilitation rather than on revenge. By this I mean that all serious offenders should be sentenced to a rehabilitation center for an indefinite period and should not be released until they are adjudged cured, by competent psychiatrists. Even if this means 50 years in the institution for the thief, it should be set up this way.

After all, why release a person who is a potential threat to those around him? Under the present system, based on retribution and one's "paying his debt to society," a prisoner sentenced to ten years in prison must be released after ten years, even if it is obvious to the prison

officials that the prisoner is still a criminal.

But under a new system of rehabilitation, such a thing would be most improbable. And even if there were an occasional slip, in the new system, resulting in the release of a prisoner not ready for release, it must be admitted that the present system is one thousand times more vulnerable to the problem of the repeated offender. Proof? Sixty per cent of the prisoners in the United States return to prison after being released.

But the ones who permanently stay out of prison are the offenders who probably could have been talked out of committing their crimes and who acted for such reasons as needing money for their families.

THE CHAIRMAN: Thank you.

(Witness excused)

THE CHAIRMAN: Mr. Robert R. Hannum.

MR. ROBERT R. HANNUM: Being last, I feel being the last one over the field.

I have a point of view that I think is important. It may get away from the highly academic material that has been heard today.

Public Safety has been my business for 32 years. I am a specialist in handling felons returning to New York City from Federal, out-of state, and Armed Forces prisons: some 30,000 ex-inmates: murderers, conspirators, car thieves, pickpockets, gangsters, safe blowers, embezzlers, gunmen, et cetera, along with the less spectacular offenders who constitute the vast majority of our penal populations.

Here are a few findings which are pertinent to our purpose today.

The murderers that I meet show more white racial origin than Negro. Compared to most other categories of criminals, the murderer has done heavy time (long imprisonment), yet his classification scores best of all in the community. He is usually quiet, productive, easy to supervise, regular in his employment, usually faithful in his religious

practices, and considerate of the rights of others.

I am speaking as one who deals with ex-offenders, long after the judge is finished with them, and jurors.

One that we meet may have killed his wife -- premeditated, gruesome -- but his remorse is genuine and permanent. His life is simple, his needs are modest. He is a dishwasher who never complains, although he works ten hours a day, six days a week, on a minimum salary.

Another, he once shot at his superior officer, deliberately -- but missed and killed his best friend, while a soldier in the European theatre. Today, he never forgets his crime, but supports his family faithfully from his earnings as a laborer.

The third and last instance is a man who killed a ship's cook with a carving knife in a kitchen fight on the high seas. During 21 years of incarceration in the U. S. Penitentiary at Atlanta, he became interested in saving lives and has become a dedicated expert in this line.

They have a United States Public Health hospital in all of the Federal bureaus of prisons

in the United States.

He is the most skillful orderly ever known by the Sectarian Hospital where he works today.

He is the man that I would want near me, if my life were to dwindle when a surgeon's knife finished the job.

He has no idea of time. His is strictly dedication.

This same murderer, who many would feel should have paid with his own life, has saved countless lives. He also developed one of the largest blood banks ever known in a maximum security prison.

There is little doubt that some individual murderers should be kept in prison, working for the taxpayer, for the balance of their natural lives, in the name of Public Safety.

I am, however, definitely opposed to capital punishment, because the majority of murderers, premeditated, can ultimately take their places in our society as productive citizens.

It is wasteful for the State of New York to practice electrocution any longer.

I know the finished product better than most sentencing judges.

Thank you.

THE CHAIRMAN: Thank you, sir.

(Witness excused)

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THE CHAIRMAN: Mr. Joseph Stern.

MR. JOSEPH STERN: Thank you for hearing me, Mr. Chairman.

My name is Joseph Stern. I am an attorney.

I wasn't here all day, but I am aware of Judge Liebowitz's views. And I think that the deterrent effect expressed by Judge Liebowitz is at variance with what I understand Warden Duffy has indicated to be the fact, based on his interviews with some three thousand either murders or potential murderers, who committed felony murders, or rather felonies where murder could easily have taken place.

I think that too often in our society today the people who commit murder, or who participate in the decision of capital punishment, are not directly a part of the killing process.

And I think that if the execution, instead of being performed in Sing Sing, is performed in, let us say, Harlem, 125th Street and Seventh Avenue, that the deterrent effect could be more accurately measured, in having it in a place where the origin of criminals allegedly take place.

And it should be done by means of the

yard-arm or hanging, and possibly even a pikestaff to put the head of a criminal on. Possibly even Judge Liebowitz would like to officiate at the ceremonies. It might be something that he might appreciate.

THE CHAIRMAN: I take it that you are against capital punishment?

MR. STERN: Yes, sir.

THE CHAIRMAN: Could I ask you, if you have any extended remarks, to submit a memorandum to us, as a number of people have done today, and we would be glad to add them to the record.

MR. STERN: I am opposed to capital punishment.

I think the rehabilitative approach, based on indefinite sentence, and incarceration with rehabilitation, could be used. It is effective.

Thank you very much.

THE CHAIRMAN: Thank you.

We will now conclude the hearing. Thank you all for your attention during the course of these hearings.

The Commission will hold one more hearing

a week from today, in the City of Rochester, on the same subject matter.

(Whereupon, at 5 o'clock p.m., the hearing was concluded.)

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