



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 42 | Number 4

Article 9

6-1-1964

Constitutional Law -- Cruel and Unusual -- Capital Punishment

Joseph Donald Walsh Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Joseph D. Walsh Jr., *Constitutional Law -- Cruel and Unusual -- Capital Punishment*, 42 N.C. L. REV. 909 (1964).

Available at: <http://scholarship.law.unc.edu/nclr/vol42/iss4/9>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

process.¹³⁰ Some jurisdictions have emphasized the citizen's right to protection while others have given a free rein to the State to appeal criminal cases.¹³¹ Many jurisdictions have derogated the common law and have allowed some appeal by the State.¹³² Just where that appellate power should cease has been another question.

Perhaps the best approach to the problem is to allow appeals by the State on all questions of law.¹³³ The law is the basis of our society. It should contemplate its own best interest by providing appeals which would help to clarify and protect it. If questions of law are neglected when it could be to no one's harm to have them answered, society as a whole is put at a disadvantage. Not only may guilty individuals escape punishment but the citizenry must ride a crest of consequential errors promulgated in the court system.

Appeals by the State on questions of law would by definition exclude appeals from general verdicts. It would eliminate the necessity for distinctions between special verdicts, demurrers, constitutional questions and quashals. The courts could deal with legal problems and avoid the formal distinctions. Such a practice would pay dividends in efficient appellate procedure, definitive answers to legal questions, and swifter and surer justice for all.

ARNOLD T. WOOD

Constitutional Law—Cruel and Unusual—Capital Punishment

The Supreme Court of the United States recently denied certiorari to consider whether the eighth amendment prohibition against cruel and unusual punishment¹ prohibits the imposition of the death penalty on a convicted rapist.² However, Justice Goldberg, joined by Justices Douglas and Brennan, dissented and favored granting

¹³⁰ See notes 9-10 *supra* and accompanying text.

¹³¹ *Ibid.* Various states have adopted differing approaches between the extremes of no appellate power in the State and unlimited appellate power. *E.g.*, ALA. CODE tit. 15, § 370 (1940) (Recomp. 1958), allowing appeals by the State only when statutes are declared unconstitutional.

¹³² *E.g.*, ALA. CODE tit. 15, § 370 (1940) (Recomp. 1958); CONN. GEN. STAT. § 54-96 (1958); N.C. GEN. STAT. § 15-179 (1953).

¹³³ Our own court has questioned such an omission from N.C. GEN. STAT. § 15-179. See *State v. Todd*, 224 N.C. 776, 32 S.E.2d 313 (1944); *State v. Davidson*, 124 N.C. 839, 32 S.E. 957 (1899).

¹ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

² *Rudolph v. Alabama*, 32 U.S.L. WEEK 3154 (U.S. Oct. 22, 1963).

certiorari to consider whether capital punishment for rape was (1) violative of the evolving standard of decency that marks the progress of society, (2) punishment disproportionate to the offense, (3) unnecessary cruelty since the aims of punishment may be achieved by a less severe penalty than death.³ The dissenting opinion supported its reasons for raising these questions on various surveys and figures showing the decline and ineffectiveness of the death penalty as punishment for rape. The importance of the dissent lies in the possibility that the Supreme Court might take judicial notice of such criteria and consider the question of whether the death penalty, in light of such notice, might be considered cruel and unusual punishment, not merely for rape, but for all crime.

The latent ambiguities in the term "cruel and unusual" have made it difficult for the courts to define its exact meaning.⁴ The clause originated in the Magna Carta⁵ and was included in the English Bill of Rights of 1688⁶ as a result of the atrocious conduct of the Stuarts.⁷ It worked its way through several of the early American state constitutions into the Federal Bill of Rights adopted in 1791.⁸ The early cases interpreted the sanction against cruel and unusual punishment as placing a fixed standard on the inhuman methods of punishment, prohibiting only those physical brutalities and tortures which existed when it was adopted, such as burnings, brandings, and disembowelings.⁹ However, in 1909 the Court in

³ *Ibid.*

⁴ "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878).

⁵ 9 Hen. 3, c.14 (1225).

⁶ 1 W. & M., c.2, I, § 10 (1689).

⁷ "[Cruel and unusual punishment]... is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the ironboot, the stretching of limbs and the like, which are attended with acute pain and suffering. Such punishments were at one time inflicted in England, but they were rendered impossible by the Declaration of Rights, adopted by Parliament on the successful termination of the revolution of 1688, and subsequently confirmed in the Bill of Rights of 1688." *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892) (dissenting opinion). See Notes, 41 N.C.L. REV. 244, 245 (1963); 4 VAND. L. REV. 680, 682 (1951).

⁸ BEDAU, *THE DEATH PENALTY IN AMERICA* 16 (1964). [Hereinafter cited as BEDAU.]

⁹ *O'Neil v. Vermont*, 144 U.S. 324 (1892); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878). See also *Weems v. United States*, 217 U.S. 349, 382 (1909) (dissenting opinion). This early view restricted the legislature from prescribing inhuman methods of punishment

*Weems v. United States*¹⁰ rejected the contention that the framers intended merely "to register a fear of the forms of abuse that went out of practice with the Stuarts" and stated that "the clause of the Constitution . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."¹¹ Thus the concept of cruel and unusual is no longer a static restriction against early English barbarities in the modes of punishment, but rather increases in its meaning as the "evolving standards of decency that mark the progress of a maturing society"¹² increase. This reinterpretation has expanded the eighth amendment in meaning, scope and application.¹³

Although reluctant at first,¹⁴ the Court seems to have definitely decided that the eighth amendment is incorporated into the fourteenth amendment by the due process clause and is applicable to the states.¹⁵ While the Court recognizes the power of the legislature to prescribe the severity of punishment,¹⁶ it has declared that a punish-

but gave them full power to define the severity of punishment. See Note, 36 N.Y.U.L. REV. 846, 847 (1961).

¹⁰ 217 U.S. 349 (1909).

¹¹ *Id.* at 373. Justice McKenna went on further to state that "legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.'" *Ibid.*

¹² *Trop v. Dulles*, 356 U.S. 86, 101 (1957).

¹³ See Note, 36 N.Y.U.L. REV. 846 (1961).

¹⁴ The early decisions stated that the eighth amendment was only a limitation on the federal government and did not apply to the states. *In re Kemmler*, 136 U.S. 436 (1890); *O'Neil v. Vermont*, 144 U.S. 324 (1892). However, confusion began in Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), when the Court assumed but did not decide that the eighth amendment applied to the states. It continued in *Johnson v. Dye*, 175 F.2d 250 (3rd. Cir.), *rev'd per curiam on other grounds*, 338 U.S. 864 (1949), leading one distinguished writer to the conclusion that, "while a categorical statement that the Fourteenth Amendment prohibits cruel and unusual punishment by a state has yet to be made by the Supreme Court, any judgment to the contrary would be so shocking that its possibility appears negligible." Sutherland, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271, 277 (1950).

¹⁵ *Robinson v. California*, 370 U.S. 660 (1962).

¹⁶ "We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the rights to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such a case

ment disproportionate to the offense may be cruel and unusual in the same manner as inhuman methods of punishment.¹⁷ Cruel and unusual punishment is no longer limited merely to physical cruelties but includes mental cruelty as well.¹⁸ When the purpose of a statute is deemed to place a cruel punishment on those who violate it, the Court may declare it unconstitutional.¹⁹ Thus it can readily be seen that expansion of the definition of the eighth amendment has broadened the area in which the judiciary can limit the legislature's power to inflict punishment. When a punishment violates the standard set by society, it is the duty of the court to declare it unconstitutional.²⁰ However, in order for the court to apply such an elusive test as the evolving standards of decency that mark a civilized society, judicial notice must be taken of the facts which are indicative of a punishment's acceptance and necessity in that society. The question arises whether the death penalty can now survive, or whether society has evolved to that stage in civilization where it is cruel and unusual.

The history of the death penalty found its origin in the Biblical admonition that "Whoso sheddeth man's blood, by man shall his blood be shed."²¹ However, as time went on, capital punishment failed to be so restricted. Between the fifteenth and nineteenth centuries in England, the crimes punishable by death increased from fifty to two hundred and thirty-three, which included "crimes of every description against the state, against the person, against property, [and] against the public peace. . . ."²² The earliest codification of capital crimes in the United States, "The Capitall Laws of New England," was enacted in the Massachusetts Bay Colony in

not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked." *Weems v. United States*, 217 U.S. 349, 378 (1909).

¹⁷ *Weems v. United States*, 217 U.S. 349 (1909) (hard and painful labor as punishment for falsifying public documents). In reaching his decision Justice McKenna urged that a less severe punishment would suffice since "the state suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting severity, its repetition is prevented and hope is given for the reformation of the criminal." *Id.* at 381.

¹⁸ *Trop v. Dulles*, 356 U.S. 86 (1957). In declaring that denationalization was cruel and unusual, Chief Justice Warren took judicial notice of the fact that the civilized nations of the world were in virtual unanimity that statelessness is not to be imposed as punishment for crime. *Id.* at 102-03.

¹⁹ *Robinson v. California*, 370 U.S. 660, 668 (1962) (concurring opinion of Justice Douglas). See Note, 41 N.C.L. Rev. 244 (1963).

²⁰ See note 16 *supra*.

²¹ *Genesis* 9:6.

²² BEDAU 2.

1636 and listed thirteen offenses punishable by death.²³ Although the use of capital punishment in the United States today has progressed over that of nineteenth century England, the effect of such progress has been more evident in the methods used in administering the death penalty than in the number of crimes punishable by it.²⁴

However, the decline of the death penalty in the United States cannot be recognized by reviewing the number of statutes that prescribe it,²⁵ or the number of jurisdictions that retain it.²⁶ It is more significant to note that in the actual disposition of capital cases, the number of persons executed has been dropping steadily, while the number of persons awaiting execution has been increasing. Whereas the number of persons executed in England between 1805 and 1812 was two to three thousand,²⁷ the number executed in the United States between 1955 and 1962 was approximately four hundred and fifty.²⁸ During the past decade, it is estimated that only one out of every ten persons convicted of first degree murder was executed.²⁹

²³ *Id.* at 5. Among those included were: idolatry, witchcraft, blasphemy, sodomy, buggery, adultery, and manstealing.

²⁴ "Probably few Americans have any idea just how many crimes still carry a death penalty—anywhere from thirty-three to sixty-seven, depending on how they are classified and counted. They range from the familiar ones such as murder, kidnapping, rape, and treason, to such crimes as desecrating a grave (Georgia), attempting to set fire to a prison (Arkansas), and sexual intercourse with a girl under eighteen, so called 'statutory rape' (Nevada and Texas)." *Id.* at 32-33. There are four crimes punishable by death in North Carolina: arson, N.C. GEN. STAT. § 14-58 (1953); burglary, N.C. GEN. STAT. § 14-52 (1953); murder, N.C. GEN. STAT. § 14-17 (1953); rape, N.C. GEN. STAT. § 14-21 (1953).

²⁵ "According to the *National Prison Statistics* there are only seven capital crimes for which the death sentence has been carried out since 1930: murder, rape, armed robbery, kidnapping, espionage, burglary, and assault by a life term prisoner. Thus, when one speaks about the volume of capital crimes in the United States, one refers for all practices to the volume of these seven crimes." BEDAU 57.

²⁶ The United States is made up of fifty-four jurisdictions—the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the federal government under both civil and military law. Of these fifty-four jurisdictions, only six have totally abolished capital punishment—Alaska, Hawaii, Maine, Minnesota, Puerto Rico, and Wisconsin. Three other states have abolished it for all but certain crimes: Michigan (treason); Rhode Island (murder by a life term convict); North Dakota (murder by a life term convict serving a life term for murder). Ten states have abolished the death penalty and then restored it. See BEDAU 12.

²⁷ *Id.* at 2.

²⁸ *Id.* at 110-11. Since 1909 in North Carolina, there have been 275 executions for murder, 68 for rape, 11 for burglary, and 1 for arson—murder. Letter from the North Carolina Parole Board, to Floyd McKissick, February 10, 1964, on file in the North Carolina Law Library.

²⁹ BEDAU 36.

In 1962, out of three hundred and seventy-two people sentenced to death, forty-seven were executed, fifty-eight were disposed of by other means,³⁰ and two hundred and sixty-seven were awaiting execution at the year's end.³¹ This reluctance of the courts to carry out the death penalty leads one to the conclusion that capital punishment in the United States today is "an anachronism, a vestigial survivor of an earlier era when the possibilities of an incarcerative and rehabilitative penology were hardly imagined."³²

However, the judiciary does not seem to hold as high a regard for human life in construing cruel and unusual punishment, as it does in actually disposing of the death penalty. Thus far, cruel and unusual "implies that there be something inhuman and barbarous, something more than the mere extinguishment of life."³³ The Supreme Court has made the distinction that "punishments are cruel when they involve torture, or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution."³⁴ According to this view, while death itself is not cruel and unusual, the methods of inflicting it may be, if they add unnecessary pain.³⁵ Thus, burning at the stake, crucifixion, breaking at the wheel, or the like are cruel and unusual methods,³⁶ while hanging,³⁷ electrocution,³⁸ lethal gas,³⁹ and shooting⁴⁰ are humane and progressive means to administer death. Other cases offer the suggestion that as all punishment is in a sense cruel, the cruelty inherent in the death penalty is sanctioned by the Constitu-

³⁰ Twenty-seven received commutations, 4 were transported to a mental hospital, while the other 27 received either reversals of judgments, vacated sentences or grants for new trials. *Id.* at 108.

³¹ *Id.* at 106.

³² *Id.* at 31.

³³ *In re Kemmler*, 136 U.S. 436, 447 (1890).

³⁴ *Ibid.*

³⁵ *In re Storti*, 178 Mass. 549, 60 N.E. 210 (1901).

³⁶ *In re Kemmler*, 136 U.S. 436, 446 (1890).

³⁷ *State v. Burris*, 194 Iowa 628, 190 N.W. 38 (1922); *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914).

³⁸ *In re Storti*, 178 Mass. 549, 60 N.E. 210 (1901); *State v. Tomasi*, 75 N.J.L. 739, 69 Atl. 214 (Ct. Err. & App. 1908); *People ex rel. Kemmler v. Durston*, 119 N.Y. 569, 24 N.E. 6, *application for writ of error denied sub nom.*, *in re Kemmler*, 136 U.S. 436 (1890); *Hart v. Commonwealth*, 131 Va. 726, 109 S.E. 582 (1921).

³⁹ *Hernandez v. State*, 43 Ariz. 424, 32 P.2d 18 (1934); *People v. Daugherty*, 40 Cal. 2d 876, 256 P.2d 911, *cert. denied*, 346 U.S. 827 (1953); *State v. Gee Jon*, 46 Nev. 418, 211 Pac. 676 (1923).

⁴⁰ *Wilkerson v. Utah*, 99 U.S. 130 (1878).

tion since it is necessary for the protection of society.⁴¹ Although it is conceded that the death penalty could be disproportionate to the offense, the courts have failed to strike down capital statutes for lower felonies,⁴² and in one case for a misdemeanor,⁴³ usually under the logic that such statutes do not shock the conscience of the community.⁴⁴ Except for a recent dictum to the contrary,⁴⁵ it is obvious that the death penalty has been held constitutional under a narrow and static interpretation of the eighth amendment. By applying the "lingering death" rule, the courts are foreclosing the possibility that death, as a mode of punishment, might become cruel and unusual,⁴⁶ which in itself is contradictory to the evolving standard test accepted by the contemporary judiciary. If the standards of society have changed so that the death penalty is no longer acceptable to its ideas of decency, then it seems capital punishment ought to be struck down by judicial action.

Since the Supreme Court must view cruel and unusual punishment in the light of an evolving standard, it is necessary for it to take judicial notice of data relevant in determining that standard.⁴⁷

⁴¹ *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914); *State v. Tomasi*, 75 N.J.L. 739, 69 Atl. 214 (Ct. Err. & App. 1908).

⁴² *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952) (conspiring to espionage); *Ex parte Wells*, 35 Cal. 2d 889, 221 P.2d 947 (1950) (assault by a person serving a life term); *People v. Tanner*, 3 Cal. 2d 279, 44 P.2d 324 (1935) (kidnapping); *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74 (1910) (assault with a deadly weapon by a person serving a life term); *Gibson v. Commonwealth*, 204 Ky. 748, 265 S.W. 339 (1924) (burglary); *Walker v. State*, 186 Md. 440, 47 A.2d 47 (1946) (attempted rape); *Territory v. Ketchum*, 10 N.M. 718, 65 Pac. 169 (1901) (assault upon a train with intent to commit robbery); *Ellis v. State*, 54 Okla. Crim. 295, 19 P.2d 972 (1933) (robbery with firearms); *Hart v. Commonwealth*, 131 Va. 726, 109 S.E. 582 (1921) (attempted rape).

⁴³ *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914) (assault with intent to commit rape).

⁴⁴ See, e.g., *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952).

⁴⁵ "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." *Trop v. Dulles*, 356 U.S. 86, 99 (1957).

⁴⁶ In Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the court followed the lingering death test and held that re-executing a man after an electrical power failure in the first execution did not subject him either to a lingering death or to unnecessary cruelty.

⁴⁷ The Supreme Court has taken judicial notice of such data in declaring other punishments cruel and unusual. *Robinson v. California*, 370 U.S. 660 (1962) (punishment imposed for being a dope addict); *Trop v. Dulles*, 356 U.S. 86 (1957) (denationalization).

Recent surveys conducted at home and abroad seem to reject the contention that the death penalty is still "widely accepted"⁴⁸ and warrant the Supreme Court's recognition. Although many foreign countries retain capital punishment, a very substantial number of civilized countries have abolished it.⁴⁹ Surveys of the United States tend to question the acceptance of death as a punishment. According to one estimate there was a seventeen per cent decline between 1953-1960 in the number of people favoring the death penalty for the crime of murder.⁵⁰ More specialized interviews with prison wardens⁵¹ and policemen⁵² demonstrate divided opinions on the efficacy of capital punishment. As already mentioned, the declining number of executions per year compared with the increasing volume of capital offenses⁵³ indicates the judiciary's disfavor with the death penalty. There is also authority that a severe penalty can come within the eighth amendment prohibition against unnecessary cruelty if the purposes of punishment—rehabilitation, isolation, and deterrence—can be achieved by a less severe punishment.⁵⁴ Undoubtedly,

⁴⁸ See note 45 *supra*.

⁴⁹ "The death penalty is found in Australia, except in Queensland; in Africa; and in Asia, except in Israel, Ceylon (temporary moratorium), and the Indian provinces of Travancore and Nepal. It is in Europe and the Americas that the cleavage of opinion is found. The countries of Eastern Europe and the Balkans have retained it, but in Western Europe it has been abolished in all nations except in Spain, France, the United Kingdom and the Irish Republic. In Latin America, it has been abolished in Argentina, Brazil, Colombia, Ecuador, Venezuela, Uruguay, Costa Rica, the Dominican Republic, Panama, and Mexico (federal law and all but eight of the states). In North America, Canada has retained it." SELLIN, *THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* 1 (1959).

⁵⁰ BEDAU 240.

⁵¹ In one survey, 89% of the wardens interviewed did not regard capital punishment as deterrent to murder. Thomas, *Attitudes of Wardens Toward the Death Penalty*, in BEDAU 244.

⁵² Campion, *Attitudes of State Police toward the Death Penalty*, in *id.* at 252.

⁵³ A comparison of the volume of crimes with the number of executions for that crime in 1962 shows that there were 8,400 murders and only 41 executions; 16,310 rapes and only 4 executions; 139,600 assaults, 95,260 robberies, 892,800 burglaries with only 2 executions for crimes other than murder or rape. See BEDAU 65, Table 1; 110-11. In North Carolina there were 5,786 convictions for burglary in Superior Court between 1960-61. [1960-1962] N.C. ATT'Y GEN. BIENNIAL REP. 214-15. Yet since 1909, there have only been 11 executions for burglary. Letter from the North Carolina Parole Board to Floyd McKissick, February 10, 1964, on file in the North Carolina Law Library.

⁵⁴ *Robinson v. California*, 370 U.S. 660, 668 (1962) (concurring opinion of Douglas); *Trop v. Dulles*, 356 U.S. 86, 104 (1957) (concurring opinion of Black and Douglas); *Weems v. United States*, 217 U.S. 349 (1909).

the deterrent factor is the basic purpose in retaining the death penalty.⁵⁵ Thus, if capital punishment does not in fact deter, it could be unnecessarily cruel. Yet, the death penalty remains unquestioned by the Supreme Court in spite of exhaustive studies by sociologists and criminologists which led one of them to the conclusion: "[T]he death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent."⁵⁶ Comparisons made of those states that have abolished the death penalty and those that retain it, refute the contentions that homicide rates increase without the death penalty,⁵⁷ that capital punishment is necessary for the protection of the police,⁵⁸ or that executions actually serve as a deterrent to future crimes.⁵⁹ Thus, such surveys and statistics illustrate that there is a doubt whether capital punishment per se is acceptable or necessary in present-day society; however, it should also be noted that these surveys are, for the most part, directed toward the total abolition of capital punishment, leaving the constitutionality of death as a punishment for rape, burglary, and arson in even more uncertainty.

As the eighth amendment derives its meaning from the changing standards of society, the death penalty can not be condoned under a standard set by ancient penal theories. If capital punishment for various, if not all crimes, is constitutional, the courts must consider it according to contemporary society, and ratify it in view of the standards of contemporary society. It is hoped that Justice Goldberg's dissent in the principal case indicates that, in future capital cases the Supreme Court will apply the evolving standards test and take judicial notice of those facts illustrative of a changed society.

JOSEPH DONALD WALSH, JR.

⁵⁵ *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914); *State v. Tomasi*, 75 N.J.L. 739, 69 Atl. 214 (Ct. Err. & App. 1908); *People ex rel. Kemmler v. Durston*, 119 N.Y. 569, 24 N.E. 6 (1890).

⁵⁶ Sellin, *Death and Imprisonment as Deterrents to Murder*, in BEDAU 284.

⁵⁷ *Id.* at 274.

⁵⁸ A 1950 survey of 82 cities in states abolishing capital punishment, with a population total of 2,804,757, and 182 cities in states that have retained it with a population total of 7,147,216, showed that the rate per 100,000 of fatal attacks on the police was 1.2 for the abolition cities and 1.3 for the retentionist cities. Sellin, *Does the Death Penalty Protect the Municipal Police*, in BEDAU 291-92.

⁵⁹ Savitz, *The Deterrent Effect of Capital Punishment in Philadelphia*, in *id.* at 315; Graves, *The Deterrent Effect of Capital Punishment in California*, in *id.* at 322.