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The abolition of capital punishment: a comparative study

Michael L. Call
Portland State University

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AN ABSTRACT OF THE THESIS OF Michael L. Call for the Master of Arts in History presented May 15, 1973.

Title: The Abolition of Capital Punishment; a Comparative Study.

APPROVED BY MEMBERS OF THE THESIS COMMITTEE:

[REDACTED]

Charles M. White, Chairman

[REDACTED]

Charles A. LeGuin

[REDACTED]

G. Bernhard Fedde

The thesis is a comparative study of two campaigns waged against capital punishment. Specifically, it is an examination of the public arguments and legislative action which transpired in Oregon and Great Britain when their respective legislatures considered and then approved laws to abolish the penalty of death for the crime of murder--Oregon in 1963 and Britain in 1965.

Primary sources for the study included the public transcripts of legislative debates as well as minutes of committee meetings and hearings. For Oregon the legislative records consist for the most part of committee minutes which summarize discussions and of tape recorded

testimony at public hearings. The study also utilized Parliamentary Debates which record verbatim addresses on the floor of the House of Commons and the House of Lords as well as committee actions.

The debates in Britain began in December, 1964, when the new Labor Government provided time for consideration of a private Member's bill on abolition--the Murder (Abolition of Death Penalty) Bill. Action by the House of Commons did not conclude until the following July in part because the bill became embroiled in a partisan, procedural contest. Final discussion by the Lords followed in July and October. In Oregon the contest was of shorter duration, lasting from the beginning of the session in January, 1963 until May of the same year. Though actual time spent in the Oregon abolition law was much less than in England, the Oregon bill also became mired in legislative procedure.

The debates exhibited a concern for several issues by proponents and opponents of abolition. Foremost among those issues which touched both discussions was the argument over the deterrent value of capital punishment. Abolitionists maintained that the death penalty had no deterrent effect in murder; but the issue was never clearly resolved in favor of one side or the other. Two other arguments appearing prominently in each debate were the alternative which should replace capital punishment and the public's opinion about abolition. Though it was not really an argument on the principle involved, the alternative

nevertheless drew substantial comment and became a focus of procedural contests over the abolition bills. Also public opinion, although a major concern in Oregon and Britain, took a different turn as an issue in each discussion; in Oregon the legislators worried more over presenting the voters with a lucidly stated ballot measure than with the actual strength of popular opinion for or against abolition as in England. In either case, the validity of this argument is questionable.

There were also arguments employed which were peculiar to each debate such as the anomalies of the Homicide Act in Britain and the impact of the death penalty on the lower socio-economic classes in Oregon. But fundamentally, the same arguments were heard in each debate, even though these arguments went unexamined and unsupported by appropriate data.

THE ABOLITION OF CAPITAL PUNISHMENT;
A COMPARATIVE STUDY

by
MICHAEL L. CALL

A thesis submitted in partial fulfillment of the
requirements for the degree of

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CHAPTER I

HISTORICAL EXAMPLES OF THE USE AND ABOLITION OF THE DEATH PENALTY

The organized movements throughout the world to rescind the penalty of death as a means of criminal punishment is a recent phenomenon when compared to the penalty's long-time use. Expressed in the ancient concept of lex talionis, the death penalty had one of its earliest delineations in the Code of Hammurabi (c. 1750 B.C.), which specifies death for twenty-five different offences.¹ What is today considered a serious but non-capital crime--brigandage--was, under the Code, punishable by death. Receiving stolen property was also classified as a capital offence, as was the crime of arson.² In similar fashion, the Hebrews were also given to prolific use of capital punishment, employing it against those who committed adultery or a host of other offences. In contrast to the Babylonian strictures, however, Mosaic law occupied itself more with religious crimes, prescribing death for idolatry, blasphemy

¹John M.P. Smith, The Origin and History of Hebrew Law (Chicago: University of Chicago Press, 1961), pp. 183-222.

²John L. Beatty and Oliver A. Johnson, Heritage of Western Civilization: Selected Readings (Englewood Cliffs, New Jersey: Prentice-Hall, 1966), pp. 7-13.

and sabbath-breaking.³

Not every ancient civilization used the death penalty extensively or even in the same way. The Assyrians, although influenced by the Code of Hammurabi, did specify death as a punishment; among them mutilation was a more common punishment.⁴ The Hittite empire was also restrained in its use of the death penalty, applying it in only eight offences. Murder, the one crime for which modern states most often retain the capital penalty, was in Hittite society punishable by a fine.⁵ Still, these facts do not mean that Hittite, or even Assyrian, society was lenient in regard to criminal punishment. Secondary penalties such as flaying, castration and impalement must have often had the same effect as the death penalty in the end, since the subject criminal probably died from infections caused by such treatment.

In tribal Greece, with its tradition of "self-help" on the part of the tribal group, the clan enforced the law of homicide, taking its vengeance in kind on the supposed slayer of its kin. The possibility of feuds in such cases was great, especially when the accused sought the protection of his relatives. As a result, other means were tried

³Deut. 13:6-10; Lev. 24:16; Num. 15:32-35.

⁴Smith, pp. 223-243.

⁵Smith, pp. 247-274.

to curb the damaging effects of the inter-tribal warfare. Arbitration by public leaders and blood-money appear to have been attempted alternatives to death in instances of homicide.

By contrast, the Romans made treason and murder capital crimes. By automatically making murder a capital offence, they hoped to reduce the incidence of tribal feuds.⁶ In addition to murder and treason, death fell on those guilty of perjury, publishing libels and insulting songs, arson, and making disturbances in the city at night.⁷ Even so, the death penalty was rarely imposed on citizens and was abolished altogether in 299 B.C. in what may be one of the earliest "abolition" moves in the history of the movement.⁸

In early England the Britons employed a form of capital punishment, though its origin is not clear. Bressler writes that in Britain, after the departure of the Roman legions,

There were still no written laws or at least none that have survived. We know that capital punishment existed, but it was not the modern form, where the State metes out death to those

⁶Smith, pp. 247-274.

⁷John Laurence, A History of Capital Punishment (New York: The Citadel Press, 1960), p. 3.

⁸For a discussion of the Roman debate on abolition, see William McAllen Green, "An Ancient Debate on Capital Punishment," Capital Punishment, ed. Thorsten Sellin (New York: Harper and Row, 1967), pp. 46-54.

who have offended against it. The State was weak and did not meddle in such affairs as justice.⁹

Though early society in Britain lacked the means of establishing feasible alternatives to deal with serious criminality, the death sentence existed in a form appropriate to the time. A person accused of treason, cowardice in battle or religious transgressions would be sentenced, if he failed adequately to answer his accuser, to outlawry and not death, though the two were essentially the same. The official decree was somethin akin to caput gerat lupinum or, "Let him be treated as the head of a wolf."¹⁰ It was then the right and the duty of every man to pursue the outlaw, ravage his land, burn his house and to slay him like a wild beast. As Maitland quipped, "Outlawry was the capital punishment of a rude age."

Still, in cases of murder, outlawry was not common. The Anglo-Saxons judged the death penalty, the working of lex talionis and the blood-feud, or vengeance extracted by the victim's family, as being too costly in military terms, especially by the end of the eighth century and the Danish invasions. Thus the Saxon kings instituted a system of "worth-money" or wergild for freemen, and manbot or worth-money for slaves. If a person were killed, the slayer

⁹Fenton S. Bressler, Reprieve (London: George Harrap and Co., Ltd., 1965), p. 16.

¹⁰Bressler, p. 17.

could atone for his action by paying the victim's wergild or manbot--a sum which often depended upon the whim of the deceased's kindred. Later, in 890, King Alfred altered this system slightly by decreeing that the offender could be killed only if wergild or manbot had been demanded and refused. In general, though,

The death penalty, in whatever form, appears but seldom in Anglo-Saxon laws. Criminals were hit in their money bags, not in their person. Not only human beings, but almost every human act had its price, and in the most amazing detail.¹¹

As an example of such detail, if a man knocked out another man's back tooth, the penalty was four shillings but for a front one it was twice as much. A nose was worth sixty shillings while injury to an ear brought a fine of thirty shillings.¹²

With the coming of William the Conqueror, many institutions were greatly remodeled; but the law in regard to capital punishment remained relatively unchanged. The Conqueror, in spite of his behavior on the battlefield, was averse to taking life, and spurned the spilling of blood in peace. Though his motives followed the pragmatic belief that fighting men were too valuable to be hanged for minor offences, he earned the distinction as the first English abolitionist by decreeing shortly after assuming power, "I

¹¹Bressler, p. 18.

¹²p.J. Helm, Alfred the Great (New York: Thomas Crowell Co., 1963), p. 114.

forbid that any person be killed or hanged for any cause."¹³ Of course this was not an unqualified blessing for those who might have been hanged, for he went on to substitute mutilation for hanging, ordering in the same statute that in crimes of "capital" degree, the offender should have his eyes torn out and his testicles cut off. The net effect of such a sentence was death in many cases, owing to infection, shock, loss of blood and a variety of attendant complications. As with the Assyrians, if a person did not die, he sometimes wished he had, for there were serious social disadvantages to mutilation. Maiming often left an offender incapable of resuming a productive life, as well as marking him with a stigma which encouraged him to commit still more crimes to survive. To stem the resulting rise in crime, Henry I reintroduced capital punishment in 1100. His intent was to curb the lawlessness of the previous reign and control the deteriorating system of compensation and fines of Anglo-Saxon times.¹⁴

During the next centuries, monarchs and their agents reorganized the trial mechanisms and the procedures by which persons would be found guilty. But the sentence of death remained untouched and was applied to a growing number of offences of lesser degree than murder. The reign of

¹³Bressler, p. 22.

¹⁴Bressler, p. 23.

Henry VIII remains a foremost example of the extensive use of the death penalty; 72,000 people died while he sat on the throne.¹⁵ From the end of his rule until the eighteenth century, many convicted persons continued to suffer the supreme penalty.

With the eighteenth and nineteenth centuries and the advent of the industrial revolution, two important developments occurred in the history of capital punishment in Britain. First, the number of hangable crimes increased dramatically; and second, the modern, organized abolition effort made its first appearance. Between 1700 and 1800, capital offences in Britain rose from 50 to about 220 or 230. These figures increased still more in that

...each statute was so broadly framed that the actual scope of the death penalty was frequently three or four times as extensive as the number of capital provisions would seem to indicate.¹⁶

All felonies except petty larceny and mayhem were punishable by death. The reasons for such a sharp turn-about are several, including the fact that the country witnessed two armed rebellions within the century as well as a series of wars of empire and conquest.

¹⁵Roy Calvert, Capital Punishment in the Twentieth Century (London: G.P. Putnam's Sons, 1927), p. 4. This figure may be questionable, but certainly the number was high.

¹⁶James B. Christoph, Capital Punishment and British Politics: The Movement to Abolish the Death Penalty, 1945-1957 (London: Allen and Unwin, Ltd., 1962), p. 14.

Underlying these events was the industrial revolution which greatly stimulated the promulgation of capital legislation.¹⁷ With the industrial revolution came a substantial increase in material wealth for which there was no protection in terms of an established police force. Also there was a fundamental upheaval in the patterns of population and existence which had prevailed to that time. The growing concentration of people in fledgling urban centers and the economic privation of those uprooted by enclosure fostered criminal activity; and such turmoil was reflected in the increase in capital offences. This increase was not a natural development. In other European nations during the same period, the number and severity of punishments declined markedly, especially under the influence of the Enlightenment. Without question a major cause for the opposing trend in Britain was the social and economic chaos that accompanied the early stages of the industrial revolution.¹⁸

At the same time, as if in response to this burgeoning of capital crimes, the idea of abolition captured a few champions and was heard as a coherent force. Ironically, however, it was not an Englishman who led the initial opposition but an Italian, Cesare Bonesana, the Marquis of

¹⁷Arthur Koestler, Reflections on Hanging (New York: Macmillan Co., 1957), p. 17.

¹⁸Christoph, p. 14.

Beccaria (1738-1794), who published his famous abolitionist treatise, Of Crimes and Punishment, in 1764. Not only did this publication greatly stimulate concern and thought on the subject of the death penalty, it also achieved impressive success among the so-called "enlightened" sovereigns of that time. Catherine the Great, for example, ordered the exclusion of the death penalty from her new law code in response to Beccaria's tome, while in 1787, Joseph II of Austria removed the death penalty from the Corpus Juris Criminalis.

That Crimes and Punishment should enjoy such fame must have been somewhat perplexing to the Marquis for his treatise was written casually and reluctantly. As a member of a north Italian group of intellectuals, akin to the Encyclopedists of France, Beccaria held the charge of studying, mastering and reporting on a special subject. With little background in legal studies or penal law, he eventually produced his essay after being goaded by his compatriots.¹⁹ Basically Beccaria followed the Utilitarian principles of the day, that pleasures and pains are the springs of human action and that the end of good legislation must be the greatest happiness of the greatest number. Applying these tenets to criminal law, the Marquis declared that there should be a balanced ratio between crimes and

¹⁹Coleman Phillipson, Three Criminal Law Reformers: Beccaria, Bentham and Romilly (Montclair, New Jersey: Patterson Smith, 1970), p. 5.

punishments, a ratio which was measured in prevention not vengeance. According to his belief,

It is not the intenseness of the pain that has the greatest effect on the mind, but its continuance; for our sensibility is more easily and more powerfully affected by weak but repeated impressions, than by a violent but momentary impulse.²⁰

Furthermore, he felt that for a punishment to be just, it should "have only that degree of severity which is sufficient to deter others."²¹ Since man was not his own creator, he did not have the right to take life, either individually or collectively as a state. Because he was not, however, a thorough-going abolitionist in the contemporary use of the term, he did allow capital punishment if an execution would prevent a rebellion against "the established form of government."²²

Though these ideas had their greatest initial impact on the European continent, they were not entirely ignored in Britain. At about this time, Jeremy Bentham also began advocating similar arguments against the death penalty, proclaiming his great indebtedness to Beccaria.²³ Bentham maintained that though the death penalty impressed the public mind perhaps more than any other punishment, it did so

²⁰Cesare Beccaria-Bonesana, An Essay on Crimes and Punishments (Philadelphia: Philip H. Nicklin, 1819), p. 99.

²¹Beccaria, pp. 100-101.

²²Beccaria, p. 98.

²³Phillipson, p. 89.

only in the case of murder where it was analogous to the crime committed. But analogy alone, argued Bentham, did not justify such a sentence. Furthermore, he felt that hardened criminals would be much more dismayed by the possibility of perpetual imprisonment; his argument foreshadowed contemporary abolitionist philosophy.

Bentham's and Beccaria's ideas were forceful and became widely known; yet little was actually done in England to change the laws governing the penalty of death until Sir Samuel Romilly entered Parliament in 1806 and brought in a measure, in 1808, which repealed the death penalty for picking pockets.²⁴ To his surprise, and everyone else's, the bill passed without opposition in either the House of Commons or the House of Lords.

Romilly, the son of a jeweler, was called to the Bar of Gray's Inn in 1783. An intimate of Bentham, he drew much inspiration from Rousseau and Beccaria, pledging early in his career to devote himself to the improvement of social conditions.²⁵ Voicing the philosophical arguments of his mentors, he also saw the practical problems involved with capital punishment. Romilly,

...heard the sentence of death passed again and again in cases where there was little or no

²⁴Elizabeth O. Tuttle, The Crusade Against Capital Punishment in Great Britain (London: Stevens and Sons, Ltd., 1961), p. 2.

²⁵James McCullen Rigg, "Sir Samuel Romilly," Dictionary of National Biography, vol. XVII (1953), p. 188.

intention of carrying it into effect. Men decline to prosecute, juries violated their oaths and judges granted reprieves. Small wonder that Romilly found the field of penal law so fertile for reform.²⁶

In spite of his initial success in 1808, Romilly's second bill in 1810 to abolish capital punishment for shoplifting met greater opposition. Such was the case for most of his other efforts during the next eight years, when he sought to lessen the penalty for a variety of petty offences deemed capital by law. His argument, that if the law were less severe more juries would be willing to bring in a conviction and thus ensure that a guilty person would not escape punishment altogether, generally fell on friendly ears in the House of Commons; unfortunately, the House of Lords proved more obdurate in considering repeal of the death penalty for selected crimes.²⁷ This situation changed little after Romilly's death in 1818.

In 1819, the abolition movement entered a new phase with the appointment of a Select Committee charged to study criminal law as it related to capital punishment for felonies. The Committee reported that the abrogation of the death penalty was desirable in many crimes where that punishment was the prescribed. According to the Committee's recommendations, hanging was to be repealed for those

²⁶Tuttle, p. 3.

²⁷Tuttle, p. 7.

statutes in which it had fallen into disuse and for those which required no penalty or which could be punished under common law as misdemeanors. Repeal was also advocated for the more serious crimes which could be punished by transportation or imprisonment with hard labor. In support of these recommendations, the Committee introduced statements by more than thirty people that the death penalty had prevented convictions, statements in keeping with Romilly's beliefs and which provided arguments for later debates. The Committee revived three of Romilly's proposed measures to bring some of its recommendations into reality and succeeded in passing them into law in 1820. These measures were the abolition of the death penalty for shoplifting to the amount of five shillings, stealing from boats in a navigable river, and stealing in the amount of forty shillings from a dwelling.

Over the next few years, repeal was gradually extended and strengthened, even though Parliamentary Reform began to hold everyone's attention. Lords was still obstinate, but "the arguments of the business community [for certainty of conviction], coupled with the votes of the lower House, began to have an effect on the House of Lords, and piece by piece the more antiquated capital crimes were replaced by less final punishments."²⁸ By the time of

²⁸Christoph, p. 17.

Victoria's accession, only fifteen hangable offences remained in the statutes, including murder, arson, rioting, serious sexual crimes and robbery with violence.

Amid the turmoil of reform, Parliament appointed another study group. The Royal Commission of 1833 collected evidence for three years and, in its 1836 Report, again recommended greater restriction of capital punishment.²⁹ The investigation raised the question of complete abolition; but the Commission doubted the expediency of that proposal.³⁰

By 1840 the tide of reform began to recede; it was not until 1864 that Parliament's concern over capital punishment waxed again. In that year another Royal Commission received the charge to review the entire question of death as a criminal punishment. The one notable result of its inquiry was that it recommended in 1866 that murder should be divided into degree as in the United States, with capital punishment retained only for those murders committed with express malice aforethought, or those committed in conjunction with one of several felonies.³¹ Moreover, the

²⁹A Select Committee differs from a Royal Commission in that the former consists entirely of Members of Parliament appointed by the Whips in proportion to each party's strength in Commons. There can be no Minority Report for a Select Committee, unlike a Royal Commission. See Norman Wilding and Philip Laundy, An Encyclopedia of Parliament (New York: Frederick Praeger, 1968), p. 667.

³⁰Tuttle, p. 11.

³¹Christoph, p. 18.

Commission came near to recommending complete abolition, but only a minority of the group favored such a position. As Christoph notes, "...it was a minority viewpoint with no impact on the times."³² Actually this could be said of the Commission's whole Report since only one of its many proposals was immediately implemented--the end to public hangings.

For the next fifty years, the question of penal reform or the abolition of capital punishment were dormant issues. There were minor victories for abolitionists such as the Children Act of 1908 which prohibited capital punishment for anyone under the age of sixteen years, but real interest did not spark again until the 1920's when several draft bills for abolition were composed, but not introduced. At the same time interest in capital punishment shifted from concern for the limitation of its use to complete abolition.³³

With the advent of the first Labor Government, many thought that abolition would receive a serious hearing in Parliament.³⁴ In fact a Private Member's Bill was even drawn up and printed but no action was taken on it. In the fall of 1924, the Labor ministry was turned out in favor of

³²Christoph, p. 18.

³³Tuttle, p. 28.

³⁴For a discussion on the correlation between abolitionists and Laborites, see Tuttle, p. 62 and Christoph, pp. 19-20.

Stanley Baldwin's Conservatives. Though another Private Member's Bill was introduced in December, 1924, it too fell by the way and the issue retired for five years. Labor again returned to power in May, 1929, but took no immediate steps to introduce a bill for abolition. In October, however, Commons received a motion to abolish the death penalty for civil crimes and during the debate on that question, the House elected to appoint a Select Committee on Capital Punishment to consider all aspects of the penalty. This group was more outstanding than previous Select Committees or Royal Commissions for two reasons: first, the work of the Committee was dramatized when the Conservative members walked out of the deliberations in November, 1930, in objection to the draft of the final Report;³⁵ and second, the Report recommended the abolition of capital punishment for an experimental period of five years, and that this should be accomplished in the present session of Parliament.³⁶ Unfortunately, the Conservative walk-out greatly weakened the influence of the document and the Labor Government, without a clear majority, did not allow a debate on the Report. Before the next session, the Government resigned and again abolition fell into abeyance.

Though lay groups such as the Howard League for Penal Reform and the National Council for the Abolition of the

³⁵Tuttle, pp. 40-42.

³⁶Christoph, p. 20.

Death Penalty continued to propagandize, little happened in Parliament until 1938 when Vyvyan Adams, a Member of Parliament and a member of the executive committee of the National Council for the Abolition of the Death Penalty, brought in a motion which declared the willingness of Commons to enact the principal recommendation of the 1930 Select Committee: that capital punishment be abolished for an experimental period of five years.³⁷ On a free vote, the motion passed. It is not clear if Adams was aware of the timing of his motion; but in retrospect the introduction and passage of his measure were politic, since, at that moment a standing committee was considering the Government's Criminal Justice Bill, which dealt with other penal reforms. A favorable endorsement of Adams' motion would seem to have cast abolition in a better light; but the Government's opposition was strong. The two abolitionist amendments proposed in committee were defeated and with the coming of war with Germany, the Criminal Justice Bill itself was put away on a shelf.

The end of the Second World War found the Labor Party once again in power, this time with a substantial majority. Abolitionists' hopes jumped first in response to this majority and secondly because the Government could not long postpone action on the criminal justice laws. Surely any

³⁷Great Britain, 5 Parliamentary Debates (Commons), CCCXLI (1938), 954.

bill on this topic would contain a provision for the abolition of capital punishment.³⁸ However, when such a bill finally emerged from the Home Office, the expected clause for abolition was not there. As some speculated, the issue was politically too hot and the Government was anxious to see the Justice Bill enacted.³⁹ An abolition amendment was tacked on in the Commons but the House of Lords, in a pattern reminiscent of the early 1800's, rejected the clause for abolition. The Government faced the alternatives of invoking the Parliament Act and standing fully behind a clause it originally had rejected or of seeking a compromise to placate both Houses. When the Government, choosing the latter course, attempted a compromise with the assent of the abolitionists, the Lords re-asserted their position, even though the compromise would have retained the capital penalty for a number of different kinds of murder.⁴⁰ In the end, the Criminal Justice Bill became law without the clause for abolition. This fight over the issue was not, however, without its benefits. From the wrangling in Parliament over the Criminal Justice Bill, Sydney Silverman emerged as the parliamentary leader of the abolitionist movement. Silverman had been in Parliament since 1935, when he was tapped as the Labor representative of Nelson

³⁸Tuttle, p. 56.

³⁹Christoph, pp. 39-40.

⁴⁰Christoph, p. 62.

and Colne, Lancashire. The movement had had other leaders in Parliament since the days of Romilly, but none appear to have commanded the attention in Commons as did Silverman.⁴¹

The second benefit accruing from the debate over the Criminal Justice Bill was a third Royal Commission on the question of capital punishment. Unlike its predecessors, this Commission held the responsibility of investigating specifically whether the liability for the death penalty should be limited or modified, and if so, to what extent and under what conditions. The Commission was to consider, in its work, the experience of other countries for whatever knowledge they might be able to contribute to its Report.⁴² Chuter Ede, Labor Home Secretary, had promised such an inquiry first to ease discouragement of the abolitionists over the Criminal Justice Bill and secondly to assuage the Government's embarrassment at losing first the abolition clause and then the compromise clause.⁴³

Yet abolitionists were not entirely satisfied with the charge of the Commission. In their eyes it was too limiting and not directed at the real issue, which was whether capital punishment should be abolished. When the Commission's Report was brought in, however, they were much

⁴¹Earlier leaders include Sir James Mackintosh (c. 1819); William Ewert (c. 1864); and Vyvyan Adams (c. 1938).

⁴²Debates (Commons), CDLVIII (1948), 565.

⁴³Tuttle, p. 84.

heartened by its conclusions. After almost two years of deliberation and investigation, taking endless testimony and evidence, the Royal Commission concluded that:

Our examination of the law and procedure of other countries lends no support to the view that the objections to degree of murder, which we discussed above, are only theoretical and academic and may be disproved by the practical experience of those countries where such a system is in force. We began our inquiry with the determination to make every effort to see whether we could succeed where so many have failed, and discover some effective method of classifying murders so as to confine the death penalty to the more heinous. Where degrees of murder have been introduced, they have undoubtedly resulted in limiting the application of capital punishment and for this reason they have commended themselves to public opinion, but in our view their advantages are far out-weighted by the theoretical and practical objections which we have described. We conclude with regret that the object of our quest is chimerical and that it must be abandoned.⁴⁴

The issue, according to the Commission, was not whether capital punishment should be retained or abolished. It was impractical to legislate a limit to the death penalty that would be both equitable and effective without overriding disadvantages.⁴⁵

In keeping with the work of the Commission and the preparation of its Report, Parliament seemed to take an unusually lengthy time in acting upon the Commission's recommendations. The House of Lords took up the Report in

⁴⁴Great Britain. Royal Commission on Capital Punishment. Report. (London: Her Majesty's Stationery Office, 1953), p. 534.

⁴⁵Royal Commission Report, 1953, p. 278.

December, 1953, and rejected the proposal that the jury be empowered to decide whether life imprisonment should be substituted for death in cases with extenuating circumstances. Commons did not however consider the Report until February, 1955, and then only discussed the Government's motion that the House take note of the Report. Though Silverman moved an amendment that capital punishment should be suspended for a trial period of five years, in the end the motion passed without changes.

The next high water mark came soon after this defeat. When the Parliament met in 1955, the Government, under Anthony Eden, announced that it would not accept nor move upon any of the recommendations of the Royal Commission. In response, parliamentary abolitionists attempted to introduce a Private Member's Bill which would carry out abolition; and, when that failed, Silverman brought in an abolition bill under the Ten Minute Rule.⁴⁶ This procedure allows any member to introduce a measure, making a ten minute speech on its behalf. If the Commons, after the reply of one opponent, agrees to the motion, the bill is said to have had its first reading.⁴⁷ However, the opportunities for a second reading, committee stage, third reading and the House of Lords depend on the available time for unopposed business. Furthermore, should any Member object to

⁴⁶Christoph, p. 127.

⁴⁷Wilding and Laundry, p. 727.

consideration of the measure at that time, it is postponed indefinitely. Thus the chance for success of the Silverman bill under this procedure was extremely slim; but when Silverman introduced his motion, nobody, to everyone's surprise, rose to oppose it and the House allowed its first reading. Subsequently, the Government objected to consideration of the measure and thus was able to dodge a vote on the issue. There was increased pressure, however, for action on the murder penalty, and in February, the Home Secretary opened debate on the death penalty by moving that "...while the death penalty should be retained, the law relating to the crime of murder should be amended."⁴⁸ It was clear that the Government, in bowing to pressures for abolition--some of which originated on its own back benches--would bow only so far. Silverman's forces countered by putting down an amendment in the name of Chuter Ede calling upon the Government to bring in legislation for the abolition or experimental suspension of the death penalty. On a free vote, the amendment passed.

Now the Government was in a rather embarrassing position and faced two alternatives.⁴⁹ One was to follow the will of Commons and bring in a bill on abolition; the other was to allow time for the almost forgotten Silverman Ten Minute Bill, which was then at the bottom of the list of

⁴⁸Debates (Commons), DXLVIII (1956), 2544.

⁴⁹Christoph, pp. 138-139.

Private Member's Bills. The latter course had the advantages of giving the House its abolition bill without applying the stamp of Government endorsement. Choosing the second alternative, the Government allowed the Silverman proposal to come up for debate, a decision which abolitionists greeted with dismay, since it was so much more vulnerable than a Government measure. Even so, they pressed their case forward and in June, 1956, Commons approved the Silverman bill and sent it to the House of Lords. That House in its turn chose to reject the bill and in doing so raised the question of whether the Parliament Act should be invoked. Abolition after all had been endorsed by the Commons in two Parliaments--one Labor and one Conservative. Yet the issue was not clearly one of the people versus the peers in which "popular" support indicated approval of the bill. With this very unpleasant situation on its hands, the Government allowed the controversy to simmer over the summer months and then introduced its own bill to curtail but not abolish capital punishment. There would be no time for the rejected Silverman bill. Known as the Homicide Bill, the Government plan was pushed through Commons and sent to the House of Lords with an eighty-six vote majority. Lords acquiesced and it became law with the Royal Assent on March 21, 1957.

In essence, the law created six categories of capital murder, which included murder committed in the course of

theft; murder by shooting or causing an explosion; murder in the course of resisting arrest or effecting escape; murder of a prison officer in the execution of his duty, or of a person assisting him; and second or repeated murders.⁵⁰ Reaction to the new law was passive; abolitionists resigned themselves to await future developments and perhaps a Labor Government at some future date. The 1957 Homicide Act was nonetheless an important step in the direction of final abolition in 1965.

While England's experience with capital punishment is a story of gradual movement towards abolition, Oregon's history is a tale of shifting between abolition and use of capital punishment. In the first part of the 1800's, when people began migrating to Oregon country, the situation was somewhat confused with respect to applicable penal laws, owing to the dual claims of Britain and the United States on the territory and the sparsely settled nature of the area. Certainly capital punishment did exist, as an element of both legal systems; but its application was often of questionable legality. One commentator on early Oregon notes that "legal hangings", those provided for by statute and reserved for treason, rape, and murder, came to Oregon long after the first American and British settlers

⁵⁰Tuttle, pp. 157-161.

and the first known hangings.⁵¹ For example, on June 1, 1817, in the eastern part of the territory, an outlaw Indian was hanged by a party of fur traders for stealing a silver goblet. Caught in the act, the unfortunate fellow was summarily sentenced.

The gallows being now prepared, Mr. Clarke [leader of the party] gave the signal, and after great resistance, during which [the Indian] screamed in a most frightful manner, the wretched criminal was launched into eternity.⁵²

Mr. Clarke, it is noted, felt it was a dangerous precedent to allow Indians to steal from white men without being punished.

With the coming of organized government, such punishment came to be endorsed by law, as it had in many other American states and territories, though not for the crime of stealing. The territorial assembly in 1853 prescribed death as the penalty for a conviction of murder in the first degree, a punishment which continued in force until 1914.⁵³

In that year, by a narrow margin of 157 votes, Oregon repealed the law on capital punishment and substituted the

⁵¹David Hazen, "June 1, 1817," Scrapbook 76, Oregon Historical Society.

⁵²Hazen, "June 1, 1817."

⁵³Oregon, Statutes of Oregon (1853), Art. 3, sec. 1.

sentence of life imprisonment.⁵⁴ The event was but a part of a national movement for abolition begun more than one hundred twenty years earlier with Benjamin Rush and his essay "Inquiry Into the Effects of Public Punishments Upon Criminals and Society."⁵⁵

Rush based his essay on the arguments of Beccaria regarding the death penalty.⁵⁶ Not only did Beccaria's treatise, On Crimes and Punishment, stir the English movement for repeal; it also had its impact across the Atlantic as well. If the 1810 repeal of hanging for picking pockets symbolically heralded the beginning of English abolition, then in America, the beginning came with the repeal of capital punishment for all crimes except murder in the first degree in 1794 in Pennsylvania.⁵⁷ Building on the works of Rush and Beccaria as well as abolition attempts themselves, the American movement reached a high point in 1847 when the state of Michigan became the first English speaking jurisdiction to abolish the death penalty completely.⁵⁸

⁵⁴Robert H. Dann, "Capital Punishment in Oregon," The Annals, vol. 284 (1952), p. 110. The exact figures were 100,395 for capital punishment and 100,552 against.

⁵⁵Louis Filler, "Movements to Abolish the Death Penalty in the United States," ed. Thorsten Sellin, Capital Punishment (New York: Harper and Row, 1967), p. 105.

⁵⁶Filler, p. 106.

⁵⁷Hugo Adam Bedau, The Death Penalty in America (Garden City, New York: Doubleday and Co., Inc., 1964), p. 8.

⁵⁸Filler, p. 113.

Gradually, throughout the last half of the nineteenth century, many more states either abolished capital punishment outright or removed it from the statutes for many lesser crimes than murder.

The Oregon effort, though successful in 1914, actually had begun earlier. In the 1907 session of the legislature, an abolition bill was introduced in the House of Representatives. A week after its introduction, the Committee on Revision of Laws reported it unfavorably and the measure was tabled.⁵⁹ Four years later, however, abolition received a push from Governor Oswald West when, in his Governor's Message, he called upon the legislature to "take steps to do away with capital punishment in this state."⁶⁰ His reasoning for such a request is familiar and especially reminiscent of an argument often heard in England about 1800 and echoed again in the 1964 parliamentary struggle. Believing that certainty of conviction and sentencing act as a greater deterrent than hanging, West states,

It is a fact, undisputed by the judicial history of this or any other state, that the average jury shies at a verdict involving the sacrifice of human life....The result of this is the hung jury, the failure to convict, and oftentimes the cheating of justice, all of which means lessened safety

⁵⁹Hugo A. Bedau, "Capital Punishment in Oregon, 1903-1964," Oregon Law Review (December, 1965), p. 37.

⁶⁰The Oregonian, January 11, 1911, p. 8.

to society in general and an increased drain upon the purses of the taxpayers of the state.⁶¹

He noted a tremendous increase in capital crimes and executions for the previous seven years and declared,

This, in my opinion, bears out the argument that the desperate criminal, relying on the reluctance of the average juror and the caution of the court, in the imposition of the capital sentence, is more willing to take a gambler's chance with death for the furtherance of his criminal object, than he would be to face the greater certainty of a life spent behind the bars.⁶²

The result of West's expressed concern was Senate Bill 33, which was introduced on January 11, but which faltered in committee. A substitute bill did, however, reach the floor of the Senate, though it too failed by a vote of fifteen to ten.⁶³ Similar bills in the House met with the same fate. Altogether three bills and a joint resolution were introduced, but only H.B. 89 and H.J.R. 3 ever made it to the floor for discussion. On H.B. 89, it was the minority report which prevailed and the House chose to postpone the measure indefinitely; H.J.R. 3 was tabled.

In spite of this defeat, abolition continued to be an issue and came to new prominence in November, 1911, when Governor West commuted the death sentence of Jans W. Williams, convicted of murdering his wife. Citing the death penalty as a "relic of the barbarous medieval ages,"

⁶¹The Oregonian, January 11, 1911, p. 8.

⁶²The Oregonian, January 11, 1911, p. 8.

⁶³The Oregonian, January 28, 1911, p. 6.

and not a deterrent, West pronounced that,

...during his administration capital punishment will be eliminated in the state and that as a policy of [his office] all who are convicted of murder in the first degree will receive a commutation of sentence to life imprisonment at his hands.⁶⁴

This bold tactic did not permanently resolve the issue for the abolitionists. To formalize this policy into law, an initiative measure found its way onto the November general election ballot in 1912. West's policy was apparently out of step with the belief of the voting population of the state; the measure went down to defeat, 64,578 to 41,951.⁶⁵ Another initiative proposal in 1914 inspired pessimistic speculation as to its chances for success owing to the sizeable 1912 defeat. Instigated by a member of the Anti-Capital Punishment League, Paul Turner, the measure amended the Constitution to require life imprisonment as the "maximum" punishment to be inflicted and forbade the use of the death penalty for any person under Oregon law. Contrary to the popular speculation, however, the proposition passed, 100,395 to 100,552;⁶⁶ and The Oregonian editorialized, "what a weapon for eternal justice has Oregon surrendered...."⁶⁷

⁶⁴The Oregonian, November 24, 1911, p. 1. Brackets not in the original.

⁶⁵Dann, p. 113.

⁶⁶Dann, p. 113. See also The Oregonian, April 16, 1914, p. 7.

⁶⁷The Oregonian, November 22, 1914, sec. 3, p. 6.

The 1914 decision was to stand until 1920. There was a short-lived effort during the 1917 legislative session to reintroduce the death penalty for first degree murder, but it failed in committee. Momentum for repeal of the abolition law was growing, however, in response to increasing criminal activity and the public's awareness of it. A Senate Resolution to reaffirm Oregon's opposition to capital punishment encountered difficulty in the 1919 legislature;⁶⁸ and another resolution to restore hanging at the jury's discretion received a hefty endorsement in the Senate and a favorable committee report in the House, but was postponed. By 1920, opinion was clearly with capital punishment.

In January of that year, the legislature overwhelmingly passed a resolution for reinstating the death penalty as a constitutional amendment, calling for a special referendum on the subject in May. An Oregonian article notes that the measure came "because of the series of brutal murders which have been committed in Oregon during the past year."⁶⁹ Among those murders was that of Newton Burgess, a state highway commissioner, and that of George Perfinger, a wealthy farmer from Pendleton, who were shot in a roadhouse at Linnton by "bandits." The outrage over these

⁶⁸Bedau, "Capital Punishment," p. 37.

⁶⁹January 13, 1920, p. 6.

murders registered in the May vote, when Oregon's first experience with abolition ended by a vote of 81,756 in favor of restoring capital punishment and 64,589 opposed.⁷⁰

As a side note, this experiment contrasts with the development of abolition in England. There, the elimination of the death penalty for murder was gradual, without benefit of actual experience with abolition. One result of this is that the English debate is dotted with references to the experience of other countries and states, and another, as noted below, is the conclusion of one abolitionist leader that the figures on murder do not confirm nor deny the deterrent value of the death penalty.⁷¹ Still, it should be pointed out that the data from Oregon's trial period without the death penalty did not stand prominently in the 1963 discussion. Of course the Oregon experiment began and ended with a popular decision on the question. The 1914 initiative prohibited the use of the death penalty by a constitutional amendment, thus requiring such a referendum to alter or eliminate the provision.⁷² In contrast to this situation, the popular referendum in England is not part of the system; penalties for murder or any

⁷⁰Dann, p. 113.

⁷¹See below, p. 47.

⁷²Oregon. Constitution (1857), Art.I, sec.'s 36-38.

other crime being a determination of Parliament.⁷³

With capital punishment back, the issue of abolition rested inactive for almost twenty years. The House postponed indefinitely a 1939 resolution to abolish the death sentence; and again for the next five legislative sessions, abolition was dormant. Between 1949 and 1953, two more unsuccessful attempts were made, the second of which was a resolution to make life imprisonment the maximum penalty for any crime.⁷⁴ In addition, abolition suffered something of a setback when, during the 1951 session, "first degree murder" (punishable by death) was expanded to include murder in the commission of burglary, robbery, arson, and rape, and murder of a law enforcement officer while on duty.⁷⁵

By 1957, however, the Oregon legislative assembly was more disposed toward eliminating the death penalty. By a margin of forty-two in the House and a unanimous vote in the Senate, the assembly sent the matter to the voters in the 1958 general election. The electorate's response was not as enthusiastic; Oregon voters rejected abolition. Actually there appears to have been a good deal of confusion

⁷³There were many demands for a popular vote during the English debate on capital punishment. See Great Britain, 5 Parliamentary Debates (Commons), DCCIV (1964), 870-1010.

⁷⁴Bedau, "Capital Punishment," p. 38.

⁷⁵Bedau, "Capital Punishment," p. 38.

on the part of the voters as to what they were to decide.⁷⁶ The question at hand was whether or not to retain the constitutional provision for capital punishment and not, as some people assumed, whether or not to abolish capital punishment. According to one analysis,

What finally appeared on the ballot in November, 1958 was a referendum measure which some editorial observers said tried to straddle both sides of the fence. The proposal, if passed, would have amended the Constitution by removing its death penalty provision; [sic] and automatically enacted a 1957 statute giving the Legislature the power to determine the application of capital punishment, particularly to those convicted of first degree murder while serving a life sentence for another crime.⁷⁷

Moreover, the death penalty issue figured prominently in the gubernatorial race between the incumbent Democrat, Robert D. Holmes, and the Republican Secretary of State, Mark O. Hatfield. Both men were opposed to capital punishment and favored repeal of the constitutional provision making death mandatory.⁷⁸ Holmes had been severely criticized for using his authority to commute the sentences of two men convicted of murder,⁷⁹ and Hatfield drew the line between his position and that of his opponent by stating that, while he favored abolition, he would follow the law

⁷⁶See below, p. 117.

⁷⁷The Oregonian, August 27, 1961, p. 6.

⁷⁸The Oregonian, November 6, 1958, p. 1.

⁷⁹The Oregonian, August 27, 1961, p. 6.

as written.⁸⁰ In any event, the electorate chose to retain capital punishment, 274,050 to 263,320.⁸¹ Two more legislative efforts followed in 1959 and 1961, both unsuccessful. The 1961 resolution was but a repeat of the 1957-58 proposition and, though reported favorably, was returned by the House to committee where it died. The question of abolition was still very much alive, however, and appeared again when the assembly convened in 1963.

At that time, the Oregon legislature considered another proposal to eliminate the death penalty, hearing once again the arguments for and against capital punishment. Before moving to that debate, however, the discussion in Chapters II and III will focus on the successful 1965 English abolition effort and the arguments used in the debates in Parliament. Then, in Chapters IV and V, the discussion will return to Oregon for a contrasting analysis of its 1963 abolition move and conclude with a comparison of the arguments used in each debate.

⁸⁰The Oregonian, November 6, 1958, p. 1.

⁸¹The Oregonian, November 6, 1958, p. 1.

CHAPTER II

THE DEBATE IN ENGLAND: COMMONS

I. THE MURDER BILL ON SECOND READING

With the Labor victory in the fall elections of 1964, abolitionist hopes rose once more, as they had each time the socialists gained power. This time, however, they were not to be disappointed by the party's hesitance and intransigence on the question of abolition, even though Labor's majority was rather slim.¹ In her address on the opening of the new Parliament, the Queen announced that:

My government will be actively concerned to build up the strength and efficiency of the police, to improve the penal system and the after-care of offenders, and to make more effective the means of sustaining the family and of preventing and treating delinquency. Facilities will be provided for a free decision by Parliament on the issue of capital punishment.²

So, with this succinct and somewhat surprising last sentence, a new debate on the abolition of capital punishment began.

¹The Times (London), October 17, 1964, p. 6. Labor held 317 seats while the Conservatives claimed 302. The Liberals held 9.

²Great Britain. 5 Parliamentary Debates (Lords), CCLXI (1964), 12.

That the opening of the debate burst upon the scene as it did should not be taken to mean that no one suspected its coming. As already indicated, abolitionist hopes lifted naturally with the coming of the Labor Government. But it also had been seven years since the Homicide Act was passed and the interim had shown that law was difficult of enforcement and, in the eyes of some, unworkable. Few people indeed were satisfied with it.

One analysis of the Homicide Act, published after the abolition move was announced, summarizes the major flaws of the statute, beginning with its primary feature, the doctrine of "diminished responsibility."³ Endorsed by the Royal Commission on Capital Punishment (1953), diminished responsibility allowed the liability in murder cases to be reduced from murder to manslaughter with a subsequent increase in the flexibility of punishments. The test to apply the doctrine is that there must be "abnormality of mind," which must "substantially impair the mental responsibility of the accused for his acts."⁴ According to Tuttle's discussion of the concept, diminished responsibility was "perhaps the most welcome contribution made by the Homicide Act to English criminal law."⁵ By

³The Times (London), December 5, 1964, p. 9.

⁴Elizabeth O. Tuttle, The Crusade Against Capital Punishment (London: Stevens and Sons, Ltd., 1961), p. 154.

⁵Tuttle, p. 153.

1964, however, the concept garnered less enthusiasm; the Act was widely criticized at that time, especially by the Lord Chief Justice, Lord Parker of Waddington, who is quoted as saying of the law that it was a "hopeless muddle" and that no one understood the doctrine of diminished responsibility.⁶

Three other faults were also the occasion of criticism by jurists and laymen alike. First, the Act created circumstances in which a person convicted of manslaughter, in law an ostensibly less serious crime than murder, could serve a prison sentence of the same duration as one who received a "life" sentence for non-capital murder. Second, the Act raised hostile opinion in some quarters because the death penalty did not also apply to poisoners and those who killed small children.⁷ Third, there were the ambiguities in the law, when more than one person was accused, which also drew sharp criticism.

Of course the Act was not without its supporters. Mr. Iremonger, the Conservative Member for Ilford-North, defended it in his address to Commons following the Queen's Message. "It would be a pity," he declared, "if the honorable Members opposite were too glib in their acceptance of the popular dogma that the Homicide Act, 1957, was a

⁶The Times (London), December 5, 1964, p. 9.

⁷The Times (London), December 5, 1964, p. 9.

foolish measure. It was not."⁸ Yet even in praising the deterrent ability of the Act, he acknowledged the common belief that it was indeed of questionable value as a legal tool.

Though the 1957 attempt at compromise on abolition was something of a failure, the years between 1957 and 1964 were not without efforts to push final elimination of the death penalty. There was, for example, a probing effort in March, 1962, when a small contingent of abolitionists led by Sydney Silverman and Chuter Ede, former Labor Home Secretary, called on Richard Butler, then Secretary of State, to lay before him the case for final abolition and to solicit his support.⁹ Support was not forthcoming, though the Home Secretary had "much sympathy" for the cause and recognized the irregularities that so disturbed jurists. Butler felt that the composition of Parliament advised against an abolition effort at the time; yet according to Silverman, "The Home Secretary quite clearly realized that the trend of events is toward abolition."¹⁰

The 1964 election reinforced this trend. Obviously it altered the balance of power in favor of a Labor Government; but it also altered the balance of opinion in

⁸Debates (Commons), DCCI (1964), 136-137.

⁹The Times (London), March 9, 1962, p. 5.

¹⁰The Times (London), March 9, 1962, p. 5.

Parliament in favor of abolition. Aside from the rank and file Labor Members, the new Prime Minister, Harold Wilson, was "personally pledged" to the cause of abolition along with the new Home Secretary, Sir Frank Soskice.¹¹ The Conservatives, traditional supporters of the death penalty, also numbered abolitionists among their group, including Sir Edward Boyle, leader of the Opposition on Home Office Affairs.¹² One informal assessment estimated that some fifty proponents of abolition sat on the Conservative backbenches after the election.¹³

Still, the Conservative camp continued as the seat of opposition. Though Sir John Eden declined to organize a challenge to the abolition effort as he had done in 1956,¹⁴ other Members were to pick up the standard early, most prominent of whom was Sir Peter Rawlinson and Sir John Hobson, the latter as leader of the assault on the forthcoming Murder Bill in committee.¹⁵ Moreover, there was the House of Lords with which to contend, long the arch opponent of abolition. The presence of Lord Gardiner, Lord Chancellor, promised to moderate the response of the Lords, since

¹¹The Times (London), November 16, 1964, p. 7.

¹²The Times (London), November 16, 1964, p. 7.

¹³The Times (London), November 16, 1964, p. 7.

¹⁴The Times (London), December 3, 1964, p. 10.

¹⁵The Times (London), December 18, 1964, p. 4.

Gardiner was not only pledged to the abolition effort, but held a position as a committeeman for the National Campaign for the Abolition of Capital Punishment, besides being the treasurer of the Howard League for Penal Reform.¹⁶ In spite of Gardiner's influence, however, one could still speculate that the Lords would reject this latest proposal to end the death penalty. That House was not, after all, overly concerned with the esteem for a Labor Government which, though not officially involved in the debate, still had a majority of abolitionist M.P.'s. And Lords did feel special qualifications for dealing with such a moral issue as hanging, partially because of its membership of the law lords and bishops.¹⁷ Abolitionists were optimistic, though, and on December 4, Sydney Silverman, acknowledged chieftan of the abolitionists in Commons, presented a bill to eliminate the death penalty, titled the Murder (Abolition of Death Penalty) Bill.

Debate on the Murder Bill formally commenced in the afternoon of December 24, when Silverman rose to move the second reading.¹⁸ The argument which followed Silverman's brief, incisive introduction focused on three major issues of abolition, issues which were to be disputed repeatedly

¹⁶The Times (London), November 16, 1964, p. 7.

¹⁷The Times (London), November 16, 1964, p. 7.

¹⁸Debates (Commons), DCCI (1964), 871.

before the bill finally passed. (1) Underriding the debate was the question of deterrence. For the abolitionists, this was an essentially negative argument as they maintained that capital punishment did not deter, or at least it could not be proven that it did; therefore, why not strike it from the statutes? The retentionists assumed the expected stance that of course the death penalty deters people from killing others and it is dangerous to eliminate such an effective tool. (2) Public opinion was also a notable issue, but, like the question of deterrence, it was confused with the statistical evidence by each side. (3) The third major area of dispute was the alternative to the death penalty; it was an issue to be resolved once the main question of abolition had its answer. Retentionists employed the proposed alternative to launch their defence of the status quo and any substantive change in the Homicide Act. The respective armories of abolitionists and retentionists held other arguments as well. The anomalies of the Homicide Act, for example, were discussed as a rationale for abandoning the supreme penalty, but only in vague and general terms. None carried the impact and attention in this first debate as the questions of deterrence, public opinion and the alternative.

Curiously, Silverman's initial attack met no resistance either in this first skirmish or at subsequent stages of the bill in Commons. In his opening remarks, Silverman

immediately claimed victory for his cause declaring that the battle over whether to abolish the death penalty for murder was actually won in 1957. He said:

The question before the House today--the only question remaining for Parliament to decide--is whether we shall abolish or retain not the abolition of the death penalty for murder, but the exceptions to that abolition which were made in the Homicide Act, 1957....¹⁹

By Silverman's reasoning, Clause One of his bill was very much like Section Seven of the Homicide Act which reads, "No person shall be liable to suffer death for murder in any case not falling within Section Five or Six of this Act."²⁰ Hence, having once assented to this statement, Parliament had accepted in principle that the death penalty should be abolished for murder, and was therefore not required to agree to the same principle again. As for the exceptions themselves, Silverman dismissed them as the instruments of political compromise:

The exceptions in the Homicide Act, 1957, were never offered to the House, never offered to Parliament on their merits as penal reform or as criminal law. They were offered to the House of Commons as a political compromise to get the Government of the day out of a serious and awkward dilemma.²¹

In fact, Silverman reminded the Members, the Commons had voted down every exception contained in the original Death

¹⁹Debates (Commons), DCCI (1964), 871.

²⁰Debates (Commons), DCCI (1964), 871.

²¹Debates (Commons), DCCI (1964), 878.

Penalty Bill of 1956 and only later accepted them in 1957 when it appeared that that was the only way to modify the status of the death penalty. Silverman's history was correct; for, it will be recalled, the Commons assented to complete abolition by passing Silverman's Ten Minute Bill in 1956 only to have the Lords reject it and the Conservative Eden Government bring in the Homicide Bill to satisfy the Commons without coercing the Lords under the Parliament Act of 1911.

With this point made, Silverman moved on to the second major statement of his speech by anticipating the argument that the bill was ahead of public opinion. Harkening back once more to the Homicide Act, he recalled that no one had voted against it because it was far ahead of the public's opinion and no one insisted upon a referendum or even a Gallup poll. According to the abolitionist, such logic was quite correct then as it was with the present bill since, "In a Parliamentary democracy it is for Parliament to decide what Parliament thinks right, knowing that in the background there is the public...."²² For support he appealed to Edmund Burke, quoting a passage from a letter that Burke wrote to the electors of Bristol:

Parliament must take its own responsibility. In exercising that responsibility, we in Parliament must be very conscious that we are responsible to those who send us here and must answer to them

²²Debates (Commons), DCCI (1964), 872.

for what we do here....But that does not mean that we must subordinate our judgment, still less that we must destroy our consciences in order to do something we believe to be wrong because if we do not we might lose a vote or even an election.²³

Silverman did not dwell on the deterrent value of the death penalty; but when queried as to whether or not he would be amenable to a clause incorporating a trial period for abolition to "give some assurance to those...who still have doubts about whether it is a deterrent", he denied that the death penalty is a deterrent in any sense more effective than other existing or imaginable deterrents. He declared that a trial period was unnecessary; but he would not reject such a proposition categorically.²⁴ By not repudiating an experimental period, and by hinting his openness to such a possibility, Silverman thus indicated that the proponents of the measure were flexible and conscious that abolition would be more palatable if placed on a trial basis. The abolitionists were not backtracking radically since the Select Committee on Capital Punishment of 1930 had a similar recommendation in its Report. Events would prove, however, that this was the only area in which they were flexible, or indeed could be flexible within the title of the bill. The title, Murder (Abolition of Death Penalty) Bill, excluded any amendment which would do anything

²³As quoted by Silverman. Debates (Commons), DCCI (1964), 873.

²⁴Debates (Commons), DCCI (1964), 882.

except (1) establish the life of the law; (2) alter the proposed alternative sentence; or (3) advise rejection of the whole thing.²⁵

Silverman was next challenged on a minor argument by Sir Richard Glyn who asked, if the law would leave capital punishment for treason and mutiny as a deterrent, why then should it not be left for murder as a deterrent.²⁶ Of course, Glyn was assuming that the death penalty was a deterrent, which Silverman pointed out. He also noted that while he personally was in favor of abolishing the death penalty for any crime, the arguments about treason are very different from those about murder. Besides, it would have been "bad tactics" to complicate the simple issue at hand with an involved discussion on ending hanging for other crimes as well.²⁷

As the queries put to Silverman show, the deterrent value of the death penalty was uppermost in the Members' minds. Once the subject was broached with the suggestion of a trial period to prove or disprove this value, Sir Peter Rawlinson picked up the issue with his defence of the Homicide Act and its exceptions. After all, he instructed, "one should only use this penalty where one

²⁵Debates (Commons), DCCI (1964), 887.

²⁶Debates (Commons), DCCI (1964), 883.

²⁷Debates (Commons), DCCI (1964), 884.

believes that one can deter. I do not believe that one can deter a poisoner or a rapist...."²⁸ But the bill abolished the only adequate deterrent to the professional criminal who goes about his occupation "weighing risk against risk." Though the Member for Epsom was doubtless sincere in his views, he was asking much of those present to accept such ideas as valid. For Rawlinson, the deterrent value of hanging was a matter of faith:

This is an argument which crosses the lines of ordinary political controversy and almost of political instinct. It is something which depends on the personal judgment and personal conscience of every member in the House. It is a matter in which one's personal experience brings a view, a judgment and eventually a decision which has to be made, and no amount of statistics, of studies and reports affect in most people's minds their final decision.²⁹

Rawlinson's statement is not without some truth; but he appeared to have abandoned the use of statistics to the abolitionists, thereby forfeiting a most acceptable kind of evidence.

The Home Secretary, Sir Frank Soskice, was quick to advance on the statistics, but not to dismiss them entirely. Arguing for abolition, Soskice noted that the rate of capital versus non-capital murder varied little in percentages over the years. Still the figures he cited seem

²⁸Debates (Commons), DCCI (1964), 890-893.

²⁹Debates (Commons), DCCI (1964), 890.

dramatic enough: in 1956, before passage of the Homicide Act, the percentage of capital murders to all murders went up to 19.9 from 11.3 in 1955; and in 1960, it was 18.7 against 14.3 the year before; but then down in 1961 and 1962 to 12.6 and 11.7 respectively.³⁰ The conclusion he drew from these statistics was that one could not draw a conclusion because "the matter is altogether uncertain."³¹ If a conclusion was to be drawn, however, he felt it pointed towards the view that the abolition of the death sentence to the extent of the 1957 Act had no effect whatever and that the abolition made no difference in the murder rate. Thus, "we cannot allow this to go on if we are not sure it is a unique deterrent for that is the only basis on which it's justified."³²

The abolitionists were quick to point out also that the only "real" deterrent for murder or any other crime is the certainty of arrest and conviction. Mr. Mark Carlisle, a Conservative backbencher supporting abolition, made this clear when he spoke following his colleague, Rawlinson. This was a familiar argument first used in the abolition attempts of the early 1800's. As noted previously, juries at that time were reluctant to bring in a conviction because

³⁰Debates (Commons), DCCI (1964), 924-925.

³¹Debates (Commons), DCCI (1964), 924-925.

³²Debates (Commons), DCCI (1964), 924.

it often meant death for the offender, regardless of how petty the crime. The effect of this was to increase the crime rate as the offenders became confident of being turned loose if caught and tried. If the punishment were less severe, the reasoning went, the chances increased that a guilty person would not escape punishment altogether. Applying this argument, Carlisle noted that the rate of apprehension for all crimes is about 40 per cent while that for murder is more than 90 per cent.³³

Perhaps the most colorful statement advanced against the deterrent value of the death penalty--though not necessarily the most "scientific"--was Mr. Leo Abse's description of hangings at Tyburn. Referring to Rawlinson's remarks about the value of hanging, the Labor Member observed that when hangings were public, large crowds gathered at Tyburn, including many from the professional criminal classes such as pickpockets whose crime was a capital offence at the time.

At the very moment that a man was being hanged, just as he was about to be strangled to death, just as the rope was lifted and he was to be suspended, and just as all heads of the gaping crowd were lifted up to the scene--at that very moment, so great was the deterrent of the hanging upon the professional criminal classes of those days that the pickpockets had their great haul as they dipped into the pockets of the assembled crowds.³⁴

³³Debates (Commons), DCCI (1964), 921.

³⁴Debates (Commons), DCCI (1964), 936.

Picking up the cudgel of the professional criminal, the retentionists asked why it was not customary for the professional criminal in Britain to carry a gun, implying that threat of capital punishment prevented the fellow from having ready or employing greater force in his criminal activity. Abse appeared to be without rebuttal and after evading the question admitted "there is an unnecessary although understandable apprehension [about the effects of abolition on the professional criminal], and I hope that misplaced apprehension will not prevent the Bill going through by a large majority."³⁵ However, the Laborite, Mr. Raphael Tuck, reminded the House that not all murders were committed by gangsters with guns. Referring again to Rawlinson's statement that the death penalty should be used only where one can deter, he recalled the case of Ruth Ellis, who shot her lover while in a jealous rage.³⁶ "Can one deter the person like the unfortunate Ruth Ellis? Would she have been deterred by the threat of capital punishment?" queried Tuck.³⁷

³⁵Debates (Commons), DCCI (1964), 937. Brackets not in the original.

³⁶Ruth Ellis was hanged in July, 1955 following her conviction for murdering her lover outside a London pub after he left her for another woman. The execution caused a public reaction and helped to tip the balance in favor of abolition in the 1956-57 effort in the Commons.

³⁷Debates (Commons), DCCI (1964), 958.

Thus each side pursued the deterrent argument with vigor; it is often belabored by proponents and opponents of the death penalty, though the abolitionists might be able to show a scant advantage in its use. In summarizing the abolitionist case in this debate, Mr. Paget, the Labor Member who would assist in moving the bill through the Commons, characterized the deterrent argument as one which "to some degree, is discredited by its repetitiveness. For more than 150 years we have heard that argument as one crime after another was taken from the list of those which were capital."³⁸

Public opinion was the second major issue to occupy the long hours of debate on the second reading. Silverman had raised the topic in his opening remarks with the quotation from Edmund Burke on Parliamentary responsibility. Apparently this was a deliberate move to reinforce a vulnerable area in the abolitionist redoubt. In a letter to The Times, Lord Colyton, known for his involvement in the electrical generating industry and an active Member of the Lords, recounted the results of two opinion polls which showed the abolitionists did not enjoy the support of the majority of the public.³⁹ A National Opinion Polls survey taken November 5-8, 1964, showed that 65.5 per cent of

³⁸Debates (Commons), DCCI (1964), 994.

³⁹The Times (London), December 18, 1964, p. 11.

those queried favored retention of the death penalty while only 21.3 per cent thought capital punishment should be abolished and 13.2 per cent had no opinion. Colyton also noted the Daily Express poll which revealed that 39.5 per cent of those surveyed considered the present law satisfactory; 32 per cent would make all murders subject to the death penalty; and 19 per cent would abolish it completely (no mention is made of the beliefs of the remaining 9.5 per cent). Thus if such surveys are to be believed, the abolitionists were weak in popular approval for their cause. Silverman's remarks were one response to this situation; a second was that of Mr. Silkin, the Labor Member for Dulwich. He alluded to the lack of public support but called the House to account for past actions and echoed Silverman in saying,

I confess that when I entered this House 66 days ago I did so in the hope and belief that this House will always have the courage to do that which it believes to be right, even if public opinion should be against it. I received, I thought, striking confirmation of that last Friday [when the House voted unanimously to increase its salaries in the face of hostile public opinion].⁴⁰

But even though the Commons' own actions detracted from the public opinion argument, the retentionists persisted in calling attention to the published and unpublished opinion

⁴⁰Debates (Commons), DCCIV (1964), 905. Brackets not in original.

surveys.⁴¹ Aside from Silkin's coy approach, the other abolitionist speakers only echoed Silverman's comments and the thoughts of Edmund Burke. One Member reminded those present of their constitutional position, in that they "...are sent here not as delegates but as representatives, and...in the end we must make up our own minds and vote according to our own judgment and consciences."⁴²

The third major question, in addition to those of deterrence and public opinion, was that of the alternative which should or should not replace the death penalty. The Silverman bill called for life imprisonment in place of hanging; but in reality, owing to the Home Secretary's authority of parole, this would mean perhaps five years to life. Though most abolitionists tended to agree with the proposed alternative, not everyone in their ranks followed suit. Tuck, for example, supported the bill "wholeheartedly" but still held concerns for the safety of society, suggesting that murderers be taken "to a little island off the north-west of Scotland and kept there unless or until

⁴¹Debates (Commons), DCCIV (1964), 932 and 945. Dr. Wyndham Davies in his maiden address referred to surveys taken just before the debate as well as one in 1957 which showed abolition was opposed by sizeable majorities of the public. Also Brigadier Terrence Clark revealed the results of his own personal survey (albeit an imperfect one) which indicated similar results.

⁴²Debates (Commons), DCCIV (1964), 919.

they can be properly released."⁴³ In this attitude, Tuck resembled more closely the retentionists who preferred no alternative to hanging or a more stringent one than life, meaning a penalty with which the Home Secretary could tamper very little. This issue stimulated less spirited debate on the second reading, in part because it was a question more suited to the committee stage once the Commons agreed to the principle of the bill. At that stage, the retentionists would reveal their planned alternatives and exceptions.

Discussion of the bill did not focus solely on the usual arguments, however; for those who joined the debate influenced the outcome as much as any reasoned argument by virtue of the respect they commanded. Perhaps the most forceful statement issued during the entire evening was that in favor of abolition by Henry Brooke, Home Secretary in the previous Conservative Government. As a one time advocate of the death penalty and as a Conservative, Brooke, in his conversion, presented a weighty "argument" himself for retentionists to rebut.

Referring to his experience as Home Secretary and as the main arbiter in capital cases, he called attention to the anomalies the Homicide Act produced and declared that it was useless to study further the possibility of

⁴³Debates (Commons), DCCIV (1964), 959.

improving the law of murder by retaining the distinction between capital and non-capital murder.⁴⁴ He stated:

At the end of my time at the Home Office, I had become convinced that the case for retaining the death penalty was no longer strong enough to justify retention and that we were coming to the time when we ought to make trial of abolition.⁴⁵

When the former Home Secretary mentioned a "trial" for abolition, he very clearly meant that. For after his initial statement of support for the bill, he emphasized his desire to see an amendment which would place abolition on an experimental basis for five years. Furthermore, he pressed for clarification of what was to be done with those people freed from the capital penalty should the bill go through and for an examination of the custodial arrangements for those who must serve unusually long terms of imprisonment.

Brooke's speech was not significant for revealing any new data on capital punishment; nor was it important for exploring any new and original arguments. Rather its import came from the speaker himself and his position among the Members of the House of Commons. One analysis marked his conversion as something of a surprise:

Mr. Brooke, as the House knows to its cost, is not a man who changes his mind easily. As Home Secretary, though his honesty was respected, his stubbornness was notorious. It must have taken courage to come to Commons today and confess that although he had once been in favor of hanging all

⁴⁴Debates (Commons), DCCIV (1964), 907.

⁴⁵Debates (Commons), DCCIV (1964), 908.

murderers and had disliked the 1957 Homicide Act for that reason, his years at the Home Office had convinced him that the death penalty was no longer justified....His words carried undoubted weight. He had not, he said, been influenced in his decision by Mr. Silverman's speech, but by his own experience.⁴⁶

Members on both sides of the question explored other arguments besides those of deterrence, public opinion, the alternative, and Brooke's conversion. Wyndham Davies devoted his allotted time to an essentially moral and philosophical discussion on the sanctity of human life for the "innocent victim" and the nature of justice, in which a miscarriage must be part of God's purpose.⁴⁷ Such arguments did not draw the response that the other issues raised did.

After more than six hours of debate, the House divided and the bill was read a second time (Ayes: 335; Noes: 170). But the work of the House was not done, for immediately following Rawlinson moved that the bill be committed to a Committee of the Whole House, a rather traditional move with measures involving a decision of such import. The motion failed, however, and the bill was sent "upstairs" to be considered by Standing Committee C.

That this second motion failed is not central to the arguments for or against the abolition bill; that the bill

⁴⁶The Times (London), December 22, 1964, p. 10.

⁴⁷Debates (Commons), DCCIV (1964), 935.

was sent upstairs, however, was to play an important part in its progress through the committee stage and become an issue in later debates. Though the records do not clearly reveal exactly what transpired following the second reading division, The Times reporter noted that there was some confusion about who was to move committal of the bill to the Whole House. According to one Conservative Member, it was understood that Silverman himself would move committal, but when the time came he did not follow through. Hence Rawlinson, who was also aware of the understanding, had to act quickly with his motion.⁴⁸ The vote against the motion can be attributed in part to the last minute activity of the Labor strategists, for there is some evidence that "the Government Whips took a very active part in the Second Division on committing the Bill to a Committee of the Whole House."⁴⁹

This would seem plausible in light of the Government's heavily laden legislative program and its desire to clear the Commons' sitting time for this work. Initially, the strategy worked, though not without jeopardizing the bill itself. The unsuccessful committal attempt "created a sense of bitter grievance among Conservative supporters" of the measure.⁵⁰ So incensed, for example, were two

⁴⁸The Times (London), December 22, 1964, p. 10.

⁴⁹Debates (Commons), DCCVII (1965), 1702.

⁵⁰The Times (London), December 22, 1964, p. 10.

Conservative abolitionists and sponsors of the bill at what they regarded as Silverman's deception, that they voted with Rawlinson.⁵¹ Though the question of abolition was apolitical, partisanship clearly had not left it entirely.

⁵¹The Times (London), December 22, 1964, p. 10.

II. THE MURDER BILL IN COMMITTEE

With its second reading and the Commons' rejection of the move to refer the measure to a Committee of the Whole House, the bill went upstairs to Standing Committee C for the next stage. This "stage" was to be a single step only in official parlance; in fact, the bill was to run through three minor stages of development before it was reported out of Committee: 1) review by Standing Committee C; 2) a procedural stage in which Commons decided to remove the measure to a Committee of the Whole House; and 3) debate by that committee on the proposed amendments.

Standing Committee C, reflecting Labor's majority, had twenty-six Labor representatives and twenty-five Conservative members; yet the margin for the abolitionists was slightly greater.¹ To the chagrin and frustration of those in favor of capital punishment, the abolitionists were, for the most part, able to maintain an upper hand in considering the amendments to the bill.

¹According to a tally of the members and their votes on the second and third readings, there were approximately thirty members generally in favor of abolition and twenty-one opposed. An accurate figure is not readily available because about one-fourth of the committee members apparently did not participate in the debates or divisions on the bill.

The thirty amendments eventually proposed during the committee stage reflected the arguments delivered at the second reading debate and focused once more on the question of the deterrent value of the death penalty. Though none of the amendments were aimed at, or in fact were argued on the basis of, public opinion, the concern for an alternative to capital punishment was very much in evidence. Indeed, the amendments suggested in committee can easily be classified into that group concerned with alternative sentences for convicted murderers and a second group which proposed exceptions to the law on the assumed premise that hanging or the threat of it deterred people from killing one another.

Briefly, the amendments in the latter group included such propositions as retaining capital punishment for one convicted of murder previously who murders again and for one who murders a police officer acting in the execution of his duty. In the former group on alternatives, there was, for example, an amendment which would substitute for "life" imprisonment "for a period of not less than 25 years unless a court in its discretion orders otherwise."² These suggested changes represented a "last ditch" attempt to preserve the death penalty in some form as well as to soften the impact of the bill. In committee, however, the attempt proved futile.

²The Times (London), February 3, 1965, p. 11.

From the first decision, concerning when the Committee should sit, the retentionists were outnumbered. In spite of their efforts to attach additions to the bill, the opponents of abolition made very little headway. After five sittings of two and one-half hours each, the Committee had reviewed three amendments and negatived them. It became obvious to the bill's opponents early on that no progress would be made in such a situation and so on February 17, in the Ballot for Notices of Motions, Mr. A. F. Hendry, the Conservative Member for Aberdeenshire, gave notice that he would move to bring the bill down from upstairs for consideration by a Committee of the Whole House.

The contest to bring the bill back to the floor of the House was stormy and heated, reflecting the opponents' basic hostility to the measure as well as the frustration of both sides over its development. This procedural contest also underscored that more was at work on the bill than the arguments expressed for and against it. In moving that the bill be returned to the House, Hendry explained his rationale for such an "unusual" motion.

First, there was not adequate time at second reading to consider the implications of the committee stage of the bill; second, for a bill of this nature, the committee stage should be given the widest possible scope in order that as many Members as possible could make their views known; and third, the bill had made very slow progress and

was holding up other important business such as the Criminal Justice Bill and the Armed Trespass Bill.³ The abolitionists countered with an accusation that the bill, in fact, had made progress in spite of the retentionists' filibuster.⁴ But in a rather candid statement, Silverman admitted he had "considerable sympathy" with the idea of having the bill on the floor. Such was not the Government's preference however. Acknowledging a painful fact of life for the abolitionists, he declared that, "We could only have the Bill at all if the Government were prepared to afford time for it. It was not for me, who was dependent upon Government time to take the Bill any further...to quarrel with the Government about what sort of time they should give."⁵ To rationalize any potential conflict between the expected full calendar of legislative business and the desire to enable consideration of abolition, it was expedient to put the bill in committee, "out of the way" so that precious House time would not be consumed by it. The Conservatives--abolitionist and retentionist alike--were mindful of this situation. In addition to the expressed reasons for bringing the bill before a Committee of the Whole House, it can be presumed with some foundation

³Great Britain. 5 Parliamentary Debates (Commons), DCCVII (1965), 1701-1812.

⁴Debates (Commons), DCCVII (1965), 1706.

⁵Debates (Commons), DCCVII (1965), 1724.

that Hendry's motion was as much a move to obstruct the Government's program as it was a move to allow a more comprehensive discussion of the bill. When the House divided, Hendry's motion held a majority of eight.

Having successfully wiped out all progress on the bill, opponents of the measure claimed to have killed it "for all practical purposes."⁶ The Government was now in the awkward position of having to make time for the Murder Bill if it intended to follow through on its pledge. In its analysis of this predicament, The Times noted, "Now that the season of the Estimates, the Budget, and the Finance Bill has arrived Ministers reckon that there are only about 16 parliamentary days available in the House for legislation between now and the end of July."⁷

A way out was found, however, when the Cabinet proposed on March 11 to have a complete committee stage of the Whole House sitting on Wednesday mornings from 10:30 am to 1:00 pm, a novel though not necessarily innovative approach which accommodated all three objectives involved in the situation.⁸ The Conservatives were to have their Committee of the Whole House; the Government was to have as much time as before for its business; and the abolitionists

⁶The Times (London), March 6, 1965, p. 8.

⁷The Times (London), March 6, 1965, p. 8.

⁸The Times (London), March 12, 1965, p. 17.

were to continue to have time for their bill. Only the Opposition's desire to obstruct the Government calendar was unfulfilled.

Debate on the proposal lasted for more than six hours with the Conservatives implying that morning sittings violated constitutional propriety and would disrupt the operation of the ministries by causing their chiefs to be absent for committee work.⁹ In the end, the proposal stood, 299 to 229. Having resolved the procedural matters, the House was again ready to proceed with the committee stage.

With all work on the bill cancelled by re-referral, Commons, as a Committee of the Whole House chaired by Dr. Horace King, began to reconsider the amendments to the bill. In the first group concerned with exceptions to the law, there were ten amendments tabled and selected for discussion, though only six were to have a division. Committee debate on the proposed additions to Clause One began on March 24 with Amendments One and Four, which would respectively retain hanging for "a person previously convicted of murder who shall murder again" and "an already convicted murderer who, in the course of life imprisonment, shall murder again." In moving the first amendment, Mr. Scott-Hopkins outlined the retentionists' related concerns with the recidivist and, in their view, the obvious deterrent

⁹The whole debate is recounted in Parliamentary Debates (Commons), DCCVIII (1965), 1486-1616.

value of the death penalty:

It is wrong for the Committee to take the chance that [people convicted of murder], either inside prison or outside it, will commit a second murder. We should ensure that there is the full deterrent effect to try to stop them so doing....I do not think it is right that this Committee should allow that type of person to be released into society without the maximum deterrent being available in an effort to safeguard the public and the individual.¹⁰

In reply, the abolitionists underscored the low incidence of recidivism by pointing out that "...in this country we know of only three cases where an already convicted murderer has murdered again."¹¹ Of course they failed to also note that the low rate was due primarily to the fact that, before 1957, all convicted murderers were hanged.

Speaking directly to the amendments under discussion, Silverman asserted that they implied a certain inequity between those convicted of murder and other criminals who may have a "worse" record of violence but have never murdered. In this sense, the amendments would penalize the murderer and still offer no more "protection" to society or officials who must deal with such individuals. The attempt to make exceptions, Silverman reminded the Members, would create more anomalies than it solved.¹² With the vote, the Silverman forces prevailed and the amendments

¹⁰Debates (Commons), DCCIX (1965), 495.

¹¹Debates (Commons), DCCIX (1965), 511-512.

¹²Debates (Commons), DCCIX (1965), 511-512.

were defeated.¹³

Though endeavors to create exceptions to the proposed abolition appear illogical in terms of the bill's title and the substantial endorsement of its principle on the second reading vote, the abolitionists found themselves in a much more difficult situation with Amendments Two and Seven. These two measures would have applied hanging to any person who murdered a police officer acting in the execution of his duty. Still recognizing the death penalty as a deterrent, retentionists altered their strategy somewhat by arguing that the exceptions provided for in the amendments were necessary to the protection of the police and the preservation of an unarmed police society. According to Edward Gardiner, one retentionist spokesman,

The majority of policemen believe that when they do their duty...they are protected from violent assault and even from the criminal killer because, at present, the death penalty stands between them and the perils which they otherwise would face. The Committee would be doing a grave disservice to our police forces if it were lightly to accept that the police could still perform their duties without the protection of the death penalty....¹⁴

Thus the abolitionists were characterized as not caring for the safety and welfare of the police officers if they opposed the amendments. Nevertheless, the abolitionists

¹³Division on Amendment One came on March 31, whereas the House divided on Amendment Four on April 14 following a discussion of other measures related to police safety.

¹⁴Debates (Commons), DCCIX (1965), 1606-1607.

reiterated the difficulty of making exceptions to the law. Why not, asked Alice Bacon, the Minister of State, Home Department, make an exception for the other people who contact the criminal element such as the night watchmen and bank tellers?¹⁵ As with preceding amendments, number Two and Seven fell in defeat.

Debate entered a new phase when the second group of proposals was brought forth for consideration. Now the Committee was to deal with the alternatives to hanging and the methods by which the alternative was to be imposed. The first five amendments drawn for discussion sought to replace the life sentence provided for in the bill with a sentence determined by the court. As explained by Sir John Hobson, the Conservative Member for Warwick and Leamington and former Attorney General, the purpose of his amendment and the others in the group was to "see that responsibility for fixing the real sentence which a murderer serves shall rest with the judges and not with Ministers...."¹⁶ By the bill as introduced, the court would have to pass a "nominal" sentence of life imprisonment but, according to Hobson, "we all know perfectly well that that is a mere pronouncement of a formula and that the reality of the situation will be that the Executive will then take charge of

¹⁵Debates (Commons), DCCX (1965), 412-413.

¹⁶Debates (Commons), DCCX (1965), 409.

the question of how long an individual convicted murderer shall spend in prison."¹⁷ Some form of judicial association with the sentence was, therefore, in order.

Obviously those who supported the amendment were suspicious of the power of the Home Secretary to parole convicted murderers. In part this suspicion resulted from the prospective use of the Home Secretary's power if and when abolition ever took effect as outlined in the Murder Bill. The Prison Act of 1952 allowed the Home Secretary to release a man sentenced to life imprisonment on "license", subject to such conditions as the Secretary may impose. Until the Homicide Act, there were obviously few opportunities to employ such authority; and even after 1957, this power received "little attention" where the Home Secretary did not hold control of all murderers.¹⁸ But the proposed law before the Committee would alter this situation, causing all those convicted of murder to fall within the Secretary's province of release--a threatening prospect to the proponents of the amendment.

It is equally plausible that such suspicion was generated by the Home Secretary himself when he suggested during the debate on the second reading that the alternative sentence to hanging should in reality not be much longer

¹⁷Debates (Commons), DCCXI (1965), 410.

¹⁸Debates (Commons), DCCXI (1965), 411.

than five years.¹⁹ In fact, however, the average length of imprisonment of a person sentenced to death before the Homicide Act and whose sentence was commuted was nine years.²⁰ The Home Office reported that the average may well be longer for those sentenced to life after 1957 but no estimates were then available. Moreover, throughout the committee stage, the abolitionists continually referred to the average sentence of nine years. But the retentionists pressed their view that five, seven or even ten years was not enough to safeguard the public and expressed this belief in Amendment Eleven, which would have instituted a sentence of not less than twenty-five years, unless the court directed otherwise.²¹ Amendment Eleven, also being discussed with Amendment Nine, would also have served the retentionists in that any sentence less than life would encroach upon the Home Secretary's parole authority.

In examining these proposals, Hobson did note one disadvantage for the judiciary inherent in any amendment in the group. At the time of sentencing a judge could not foresee what progress the convicted person may make during his sentence. The Member went on to add, however, that this same predicament was very much the case for every other

¹⁹Debates (Commons), DCCIV (1964), 926.

²⁰Debates (Commons), DCCII (1964), 612-613.

²¹Debates (Commons), DCCXI (1965), 408-409.

criminal offence. "In those circumstances," he maintained, "I do not see why the sentence for murder should not be treated in the same way as the sentence for any other serious offence."²²

In his rebuttal, Silverman picked up on this point, though he strayed from the issue at hand. Harkening once again back to the second reading debate, he asserted that the retentionists had undergone a fundamental change in attitude by suggesting that murder no longer be treated as an exceptional crime. Directing his attention specifically to Amendment Nine, he indicated that to accept it would make murder indistinguishable from manslaughter for which the sentence was at the court's discretion. According to Silverman, "This is surely a very strange attitude to be taken by people who have always said that murder is so exceptional a crime that the death sentence ought to be automatic for it."²³ Reassuring the Members present, he cautioned, "Murder is an exceptional crime, to be exceptionally treated."

Soskice followed, reminding the Committee that while the judicial association proposed in the amendments had not always been the rule when considering the release of a prisoner, he, as Home Secretary, would adopt the practice of

²²Debates (Commons), DCCXI (1965), 1281.

²³Debates (Commons), DCCXI (1965), 1290.

consultation with the trial judge by requesting a memorandum on each case at sentencing outlining any special feature of which he should be cognizant.²⁴ In any event, as far as he was concerned, "life imprisonment" meant life, a rather cryptic remark given the Home Secretary's previous statements.

When the division on the amendments was called at the beginning of the sitting on May 12, abolitionist strategy failed. The bill was altered significantly and almost without warning to either side. Amendment Nine, reviewed at length, was negatived without a division. Then, as the Members prepared to begin discussion on the remaining additions to the bill, Dr. King interrupted the proceedings to declare that he had promised there would be a division on Amendment Eleven if necessary.²⁵ Because this proposal called for the deletion of "life" and the substitution of a sentence of not less than twenty-five years, two divisions were technically required. On the first, the question was that "life" should stand as part of the bill, to which the Committee replied no by a majority of twelve. On the second vote, however, the question was to insert the proposed alternative sentence to which the Committee again replied no by a majority of six. Hence the bill was left

²⁴Debates (Commons), DCCXI (1965), 1300.

²⁵Debates (Commons), DCCXI (1965), 409.

to read that a person found guilty of murder, "shall, subject to subsection (4) below, be sentenced to imprisonment for".²⁶

By design or by chance the abolitionists were caught off guard by the first division and were only able to summon a majority to the division lobbies in time for the second vote. The exchange which followed the event indicated that they were unprepared for a vote on Amendment Eleven, assuming the only decision on the last group would be for Amendment Nine.²⁷ The restoration of the life sentence to the bill during the report stage also indicates the abolitionists lost control of the proceedings for a brief moment.²⁸ With the confusion, the Committee adjourned to reflect on this turn of events.

Reconvening the next week, those opposed to abolition took the opportunity provided by the previous decision to press unsuccessfully for a court-determined sentence. Dr. King obliged by selecting Hobson's Amendment Thirty which required a sentence for such period as the court determined.²⁹ Though the Chairman asked that debate be confined to the question of using the amendment to fill the hiatus

²⁶Debates (Commons), DCCXII (1965), 466-467.

²⁷Debates (Commons), DCCXII (1965), 480.

²⁸Debates (Commons), DCCXVI (1965), 379-404.

²⁹Debates (Commons), DCCXII (1965), 1372.

left in Clause One, discussion retraced the question of whether the length of imprisonment should be left to the court or to the Home Secretary. In the course of argument, the abolitionists' impatience to report the bill out of committee became apparent. Silverman reasoned that to accept the amendment would restore the death penalty already denied in principle, and he reminded the Committee that the report stage was more appropriate for revising the group's action on the sentence provision of Clause One.³⁰ The Home Secretary was somewhat more direct in urging those present to vote against the measure in order that "we may make progress with the Committee Stage of this most important Bill."³¹

Aside from the decision to delete the life sentence from the bill, the only other change in the text enacted by the Committee was the addition of a new clause on duration moved by Henry Brooke, one of the principal spokesmen for abolition during the second reading debate. Brooke's clause provided for a trial period of five years for abolition; the Act would expire by July, 1970, unless both Houses resolved that it should continue.³² Referring to

³⁰Debates (Commons), DCCXII (1965), 1374-1375.

³¹Debates (Commons), DCCXII (1965), 1399.

³²In December both Commons and Lords passed a resolution that the Murder Bill should not expire as provided by Brooke's clause. See Debates (Commons), DCCXCIII (1969), 1148-1298; and Debates (Lords), CCCVI (1969), 1106-1258, 1264-1322.

the question of deterrence, Brooke reiterated his belief that no one can prove either way the deterrent value of hanging; only experience can provide the answer.³³ Furthermore, the new clause would also allay the anxiety "in the minds of a great many people" and lead to "greater unity of sympathy towards what Parliament is seeking to do...."³⁴ Another Member called attention to Silverman's 1948 effort to pass a similar clause on the report stage of the Criminal Justice Bill.³⁵ Being absent from Westminster that day, Silverman could not respond if, indeed, he would have. He already indicated that a trial period was not out of the question. Mr. Silkin, however, expressed the opinion of some abolitionists that the experimental time provided in the clause was too short by which to render an effective decision, primarily because the murder rate was so unstable. Also, a Royal Commission on Penal Policy (appointed by Brooke in the previous Government) was sitting to consider revision of the penal system; to accept the clause would prejudice the outcome of the Commission's work.³⁶

While the statistics cited in debate tend to support the first of these statements, the second was weak in that

³³Debates (Commons), DCCXIII (1965), 530-531.

³⁴Debates (Commons), DCCXIII (1965), 533.

³⁵Debates (Commons), DCCXIII (1965), 537.

³⁶Debates (Commons), DCCXIII (1965), 539-542.

the same effect of prejudice could also be ascribed to passing the Murder Bill. However, W. F. Deedes, the ever-vocal retentionist, espoused one more argument which supported the opponents to the clause when he declared that Parliament could not play Hamlet on the measure; it ought to make up its mind one way or the other.³⁷ With the division, the new clause received a majority of forty-eight; and after a short delay, the Committee agreed that the bill be reported.

³⁷Debates (Commons), DCCXIII (1965), 547-549.

III. REPORT OF THE MURDER BILL AND THIRD READING

Opponents of the Murder Bill and those who favored substantial changes in its provisions did not give up their effort once the measure was out of committee. At the report stage, this group brought to the floor two new clauses and an amendment which clearly echoed the proposals put forth previously.

The report stage began on June 25, 1965 with the first new clause in Sir John Hobson's name. Briefly, New Clause One would restrict the parole authority of the Home Secretary, causing him to consult a Judicial Review Tribunal as to the desirability of releasing a fellow sentenced to life for murder and as to the conditions for such parole.¹ Though a similar measure was put down in committee, it was not chosen for discussion, since by that time the Committee had eliminated the life imprisonment provision without a replacement and it was logically impossible to have a review procedure for a sentence which did not exist.

The clause reflected the earlier proposals on alternative sentences and release procedures, and evinced retentionist concern about these areas. Hobson's clause also

¹Great Britain. 5 Parliamentary Debates (Commons), DCCIV (1965), 2115.

anticipated a move by Silverman to rectify the error made in omitting the life sentence. In that event, the new clause would provide:

...an investigation, not in the sense of a trial or retrial of the original case but in the sense of an advisory review by people who are particularly concerned and experienced in dealing with crime, sentencing, ascertaining facts and in balancing the need for deterrence and the safety of the public against the liberty of the individual.²

Noting the composition of the Judicial Review Tribunal as set out in other clauses in Hobson's name, Silverman suggested that such a procedure might create an antagonistic situation between the courts and the Home Secretary.

Soskice followed with his objections, maintaining that the Home Secretary already acted on a question of release only after a thorough review of all available information provided by those people who had contact with the individual to be paroled. There was nothing to be gained by having a trio of judges perform the same function.³ Moreover, he noted again for the House that he planned to adopt the same practice of seeking consultation as in the exercise of the Royal Prerogative of Mercy, thus making a review panel again unnecessary. Silverman came back without objecting to the proposal specifically and suggested that the review procedure not be confined to murder cases alone. In fact

²Debates (Commons), DCCXIV (1965), 2119-2120.

³Debates (Commons), DCCXIV (1965), 2128-2129.

it might be extended to other situations of lengthy imprisonment and therefore should be taken up at another time when it could be given more careful consideration.⁴ Together, though, these two abolitionists failed to raise any objections in principle to the review procedure. Still, when the vote was put, the majority went into the no lobby and New Clause One was defeated.⁵

The next struggle came over Amendment Five, a revision of the several amendments which sought to substitute a court determined sentence for that of life. Also introduced to remedy the hiatus left by the unexpected deletion of the life sentence, the amendment provided that a full Court of Criminal Appeal, including trial judge, would determine the sentence for anyone found guilty of murder.

Discussion encompassed argument heard previously during committee but did allow for a few new statements on the amendment and the issue it represented. In moving the amendment, Sir Peter Rawlinson referred to the crime of manslaughter, for which judges have discretionary sentencing power, and reasoned that murder "has never been considered so unique that we should take from the judges the power to administer a proper penalty and punishment."⁶

⁴Debates (Commons), DCCXIV (1965), 2147.

⁵Debates (Commons), DCCXIV (1965), 2175-2178.

⁶Debates (Commons), DCCXIV (1965), 2182-2183.

There was no reason, Rawlinson submitted, to take the power of sentencing from the courts and give it to the Home Secretary, which would be the case if his parole power went unchecked in some manner.⁷

Silverman in turn noted what had only been implied before, that the Home Secretary would lose his review and parole authority under the Prison Act altogether if the amendment were passed. Furthermore, the measure would not allow for a review of lengthy sentences, the principle of which was endorsed by those who voted for Hobson's judicial review clause.⁸ Mr. Silkin, supporting Silverman, stated that to accept the proposal was not consistent with the position many retentionists took on the Homicide Act. Reminding them of their opposition to a variable sentence, he declared that if a variable sentence was not right then, it could not be right in 1964 since nothing had changed since 1957.⁹

Lengthy and drawn out, this debate, which carried over until July 13, re-worked well-worn arguments and revealed few new approaches not covered in committee to the question of the discretionary sentence as opposed to the automatic sentence of life imprisonment. The retentionists

⁷Debates (Commons), DCCXIV (1965), 2185.

⁸Debates (Commons), DCCXIV (1965), 2189.

⁹Debates (Commons), DCCXIV (1965), 2195.

consumed many minutes on the amendment alone; but it was the Silverman forces who prevailed, voting it down by a majority of 101.¹⁰

With that business done, Silverman moved his anticipated amendment to restore the life sentence to his bill. He argued against the previous question holding that the life sentence was the best alternative to death as a sentence for murder. Underscoring an apparent shift in outlook by retentionists, he reiterated that murder is a unique crime "in its own category, and a crime which society is bound to condemn by enacting a mandatory sentence for it, whatever happens afterwards in the administration of it."¹¹ Having said this previously, he declined to restate the arguments for or against the mandatory sentence.

Sir Richard Glyn objected to the automatic life sentence because it would have no deterrent effect. According to Glyn, nobody knew what a life sentence was in actuality; a person convicted of murder goes to prison without any idea as to how long he will be incarcerated.¹² The abolitionists had in effect responded to this reasoning earlier in noting that life imprisonment "was precisely that form of experiment in the indeterminate sentence" which was

¹⁰Debates (Commons), DCCXVI (1965), 378-380.

¹¹Debates (Commons), DCCXIV (1965), 2191.

¹²Debates (Commons), DCCXVI (1965), 392.

called for in the early stages of the debate.¹³ On the whole, however, they did not rally to the amendment's defense. Yet when the division came, they mustered 207 Members to the aye lobby as opposed to only 86 noes. "Life" was duly re-inserted in the bill; and without pausing, the abolitionists pressed on for the bill's third reading.

The third reading debate was much less spirited than any of the preceding eight months' activity, resulting from a certain weariness with the bill and its issue, and also reflecting traditional procedure that arguments on the third reading be confined to the contents of the bill under discussion.¹⁴ Debate focused on specific provisions rather than on the principle involved as during the second reading. The question of deterrence persisted, however, as a dominant theme of discussion, though a new element thrust forward by events outside Parliament afforded retentionists a new weapon to throw into this last fight to halt the bill.

Opening debate, Silverman recounted succinctly the history of the movement for abolition and challenged the repeated assertion that abolition raised constitutional issues. If by chance a constitutional question were involved, then the principle of it was resolved in 1957 with the Homicide Act when Parliament accepted it without much

¹³Debates (Commons), DCCXIV (1965), 2195.

¹⁴Eric Taylor. The House of Commons at Work. (London: Penguin Books, 1971), p. 142.

opposition.¹⁵

Sir John Hobson opened the retentionists' assault by referring to the general increase in violence and crime and alluded to a breakout which occurred a few days before at Wandsworth Prison.¹⁶ "One could not imagine," he declared, "a more inappropriate week in which we should have the Third Reading of the Bill."¹⁷ The events at Wandsworth and the provisions of the bill had serious implications for the safety of society and its servants.

This Bill by its consequences removes a most potent protection, first of all for police officers, secondly for prison warders, thirdly for those who are responsible for effecting lawful arrest, and fourthly for those responsible for preventing rescues from lawful prisons.¹⁸

Speaking later, Glyn also reminded the House of the "wholesale escape in daylight" with firearms, and protested that,

For this House to pass this Bill the very next week is a desperate step and one which puts into jeopardy not only the prison officers and police officers whose duty it will be to apprehend these

¹⁵Debates (Commons), DCCXVI (1965), 407.

¹⁶On July 9, 1965, Ronald Arthur Biggs and three compatriots escaped by force from the prison. Biggs, serving a thirty year sentence, was notorious as a participant in the great mail train robbery. The police issued a warning to the public not to approach the escapees as they may be armed. See The Times (London), July 9, 1965, p. 12.

¹⁷Debates (Commons), DCCXVI (1965), 412.

¹⁸Debates (Commons), DCCXVI (1965), 413.

men...but those members of the public who feel it their duty...to assist the police in this regard.¹⁹

Moreover, Glyn suggested that the recent events were evidence that there was no prison in the country capable of holding a "ruffian" determined to get out.²⁰

The use of the spectacular prison break to argue for the death penalty--in this case against removing it--was reminiscent of the late eighteenth and early nineteenth centuries when it was believed that a severe penalty was needed to halt the increase in crime, petty and otherwise, among the populace and to restore order to a society in upheaval. The same reasoning was at work in Oregon, as noted above, when, in 1919, it returned to hanging as a punishment for murder following a rise in the number of murders. A corollary to persuasion by panic, Hobson's and Glyn's dire forebodings were obviously calculated to play upon the sensational event to gain their objective: forestalling, or even defeating, the Murder Bill. Such a tactic failed to achieve results, however, in part because the Wandsworth break-out lacked a direct connection with the proposed legislation and because the vast majority who had voted for abolition all along refused to accept the claim advanced by retentionists that the death penalty deterred people from committing crimes for which it was applicable.

¹⁹Debates (Commons), DCCXVI (1965), 423.

²⁰Debates (Commons), DCCXVI (1965), 426.

Glyn spoke to the question of deterrence and prophesied that the bill, if passed, would create a "Chicago situation" in which the only effective deterrent would cease to exist for the professional criminal.²¹ To fail the bill would be to ward off such a calamity and, by implication, guard against future Wandsworths. Hobson attempted to support the claim for deterrence by citing Home Office figures on murder provided in June. The figures, according to Hobson, showed a "substantial increase" in non-capital murder while the number of capital murders remained fairly constant in the three years before and after the Homicide Act.²²

Although he hadn't intended to, Henry Brooke entered the debate to comment on the statistical evidence introduced by Hobson. Brooke repeated his statement on second reading that "Statistics prove nothing in this case. They are indications but they are not proof."²³ He reminded the House that the ratio of capital to non-capital murders since 1957 "hardly changed at all," and was therefore "perhaps a disproof of some of the more extreme statements about the deterrent power of the death penalty."²⁴

²¹Debates (Commons), DCCXVI (1965), 421.

²²Debates (Commons), DCCXVI (1965), 416.

²³Debates (Commons), DCCXVI (1965), 442.

²⁴Debates (Commons), DCCXVI (1965), 443.

The debate, though spent largely on questions of deterrence and prison breaks, was not without disagreement on procedure. Two Members declared their intention to enter the no lobby on the third reading because of the rigidity of the bill's sponsors in accepting amendments all along the line.²⁵ There was also an extended exchange between several Members over the possible use of a three line whip on the vote with retentionists maintaining the whips were on and the abolitionists denying it. At about a quarter past midnight, the question was moved and the House divided. With a vote of 200 ayes and 98 noes, the bill was read a third time and sent to the House of Lords.²⁶

²⁵Debates (Commons), DCCXVI (1965), 420, 458.

²⁶Debates (Commons), DCCXVI (1965), 463-466.

CHAPTER III

THE DEBATE IN ENGLAND: LORDS

The House of Lords took up the Murder Bill on July 19 when Baroness Wootton of Abinger moved the second reading. The debate which ensued cast up the same principal arguments heard in the Commons at the second reading stage; but the discussion also went beyond these arguments to touch upon other aspects of capital punishment and certainly to involve a rather different section of the legislative community. Thus, in addition to questions raised about the deterrent value of hanging, the influence of public opinion and the proper alternative to the sentence of death, the Lords also dwelt briefly upon the anomalies of the Homicide Act. Furthermore, the debate was joined by the law lords and the bishops, whose arguments, if not influential in their logic, at least carried the influence of their authors' position.

Baroness Wootton, leading the fight for abolition in the Lords, opened debate by claiming, much as Sydney Silverman had eight months earlier, that the Murder Bill was not a statute for the abolition of the death penalty but a bill for the abolition of the exceptions to the rule

of life imprisonment for murder.¹ Implicit within this argument was also the same claim voiced by Silverman that the question of abolition had been decided, though strictly speaking, the title of the bill and the first clause weakened such logic. Neither the title nor the first clause say anything of exceptions contained within the Homicide Act and, if literally interpreted, present the principle of abolition directly for consideration. Apart from such specifications however, Wootton's argument did have some basis, for as noted above, Parliament had endorsed abolition in passing the Homicide Act. Only one retentionist, Viscount Dilhorne, later objected to such reasoning. He overlooked the underlying issue, picturing the bill merely as a question of making the capital categories of the 1957 Act non-capital.²

Moving beyond her initial statement, the Baroness drew attention to the "disastrous failure" of the Homicide Act, which produced not justice but anomalies of the worst order.³ To her it was inconsistent to hang a murderer who used a gun and not the murderer who preferred poison. Furthermore, it was not necessarily the professional criminal who incurred the force of the 1957 law but rather the

¹Great Britain. 5 Parliamentary Debates (Lords), CCLXVIII (1965), 457.

²Debates (Lords), CCLXVIII (1965), 465.

³Debates (Lords), CCLXVIII (1965), 459.

murderer whose crime was one of passion. She reviewed for the House, the case of the college lecturer who, in a jealous fit, murdered a girl and her boyfriend and was executed for it.⁴ With what the former Oxford don considered such irregularities, she concluded that there was no compromise possible, citing the noted judgment of the Royal Commission (1953) that the object of such an attempt was chimerical.

By contrast Viscount Dilhorne argued that the inherent contradictions of the Homicide Act and the loss of lives in sentencing should be accepted "rather than do something which might lead to more loss of innocent lives."⁵ Like other retentionists in the debate, he presumed the effective deterrence of the capital penalty and marked a distinction between the worth of a person who committed murder and a person who did not. To the Lord Chief Justice however, the inequities and irregularities of the law were unacceptable. Speaking from his vantage as judicial primate, Lord Parker declared of the Homicide Act, "I have seen the complete absurdities that are produced, and have been completely disgusted with the result."⁶ For Parker to assail the compromise of 1957 and proclaim his support of the abolition bill was a weighty endorsement for

⁴Debates (Lords), CCLXVIII (1965), 459.

⁵Debates (Lords), CCLXVIII (1965), 467.

⁶Debates (Lords), CCLXVIII (1965), 481.

the abolitionist cause. Since becoming Lord Chief Justice in 1958, he had spawned a reputation as a very stern judge.⁷ Not only was he a reported advocate of flogging but he also believed in stringent sentences for offenders, actually increasing some prison terms when the cases reached his court on appeal.⁸

Moving into another area of debate, Lord Parker noted the alternative sentence prescribed by the bill and pressed upon the House the importance of having that life sentence mean more like "life".⁹ He felt the public would be happier with abolition if such a safeguard could be insured. Earlier Dilhorne cautioned the Lords that a "life" sentence would mean only a nine year imprisonment, citing Sir Frank Soskice's statement in the Commons two weeks before.¹⁰ For both Dilhorne and Parker this was not long enough; but while the former was already opposed to the bill, the latter was not. Hence Parker could apply whatever influence he had in the House and threaten that unless "suitable safeguards" were put into the bill, he would vote against its final acceptance.

⁷Anthony Sampson, Anatomy of Britain Today (New York: Harper and Row, 1965), p. 171.

⁸Sampson, p. 171.

⁹Debates (Lords), CCLXVIII (1965), 485.

¹⁰Debates (Commons), DCCXVI (1965), 388.

Pushing for an actual life sentence, Parker tacitly acknowledged that the public was not happy with the proposed abolition. Baroness Wootton confronted the issue of the public's opinion in her opening remarks conceding that the public may be opposed. But she blithely dismissed this factor; after all, she chided, public opinion had never bothered the Lords before.¹¹ Opponents of the bill gave the popular view more weight. Like his retentionist counterparts in the Commons, Lord Derwent attacked the bill as lacking endorsement by the public. Rather than calling for a referendum, he noted that the Labor Party manifesto said nothing of abolition and implied that the public should have been allowed to express its opinion at the October (1964) election. Derwent was correct that the manifesto said nothing of ending the death penalty, although the Laborites did express their concern for, and intent to remodel criminal law and the criminal justice system.¹² For either party to discuss moral questions such as abolition in its election platform would have been a dramatic departure from political tradition. Such issues have not found a place in the central party doctrine of "bread and butter" matters in part because they are politically unrewarding.¹³

¹¹Debates (Lords), CCLXVIII (1965), 462.

¹²The Times (London), September 12, 1964, pp. 6-8.

¹³James B. Christoph, Capital Punishment and British Politics (London: Allen and Unwin, Ltd., 1962), p. 173.

The Marquess of Salisbury also decried the lack of a public mandate and demanded to know why there was no mention of the bill until the opening of Parliament. He indicated that those who sat in Parliament ought to be guided by the interest of the whole country and not solely by sectional, local or personal views;¹⁴ and the interest of the whole was against abolition. Lord Gardiner followed Salisbury, attacking his statement that the bill lacked a mandate. It was impossible, he reminded the House, to have a mandate for a Private Member's Bill since nothing can be an election issue unless it appeared as part of the party's program.¹⁵ Attaching the criticism that nothing was heard of abolition until the "gracious Speech," the Lord Chancellor alluded to a comment by Harold Wilson prior to the election. Wilson had acknowledged that the Homicide Act was unworkable but he also indicated that the matter should be left to a free vote of Parliament. The Government would find time for such a decision.¹⁶ On the issue of public opinion, the abolitionists held their ground.

On the question of deterrence, the result was less decisive. Baroness Wootton initiated the argument by denying the deterrent value of hanging as a penalty and

¹⁴Debates (Lords), CCLXVIII (1965), 692.

¹⁵Debates (Lords), CCLXVIII (1965), 696.

¹⁶Debates (Lords), CCLXVIII (1965), 697.

asked the Lords to examine the statistical results of abolition in the United States.¹⁷ Using the work of Thorsten Sellin to support her contention, she pointed out the conflicting data for contiguous states with and without the death penalty. Maine, an abolitionist state, maintained a generally higher level of homicide rates than did New Hampshire, which used the death penalty; but Michigan's rate was lower without the death penalty than Ohio's, a capital punishment state.¹⁸ Sellin himself concluded from his studies that the trends of homicide rates of economically and socially comparable states with or without the death penalty are similar and that the "inevitable conclusion is that executions have no discernible effect on homicide death rates."¹⁹

The question then posed to the House was whether such findings were applicable to England. For Viscount Derwent the answer was no; he dismissed any references to, or statistics of, other countries.²⁰ Lord Stonham, the Joint Parliamentary Under-Secretary of State, Home Office, reviewed for the House those figures relevant to England and

¹⁷Debates (Lords), CCLXVIII (1965), 461.

¹⁸Thorsten Sellin, ed., Capital Punishment (New York: Harper and Row, 1967), pp. 136-137.

¹⁹Thorsten Sellin, "Death and Imprisonment as Deterrents to Murder," The Death Penalty in America, ed. Hugo Adam Bedau (Garden City, New York: Doubleday and Company, Inc., 1964), p. 279.

²⁰Debates (Lords), CCLXVIII (1965), 467.

Wales as to the percentage of capital and non-capital murders previously noted in the Commons.²¹ He submitted:

There is no conclusive evidence that the execution of three or four offenders a year had any deterrent effect. If the death penalty is not a deterrent, there cannot possibly be any justification for retaining it.²²

The Bishop of Chichester entered the contest on the deterrent question, referring to the judgment of the Royal Commission (1953) that "there is no clear evidence in any of the figures that we have examined that the abolition of capital punishment had led to an increase in the homicide rate...."²³ The allegiance of the bishop and others in the ecclesiastical hierarchy was support of significance. Though the clerics who joined the discussion spoke to specific issues as the Bishop of Chichester had done, their primary concern seemed to attach itself to the more basic purposes of punishment. The Bishop of Chichester, for example, rejected vengeance as a motive for punishment and postulated that "society can repudiate the taking of life far better, and can declare its conviction of the importance and sanctity of life more effectively, if it refuses to claim a life for a life...."²⁴ Maintaining that

²¹Debates (Lords), CCLXVIII (1965), 492.

²²Debates (Lords), CCLXVIII (1965), 498.

²³Debates (Lords), CCLXVIII (1965), 524; as quoted by the Bishop of Chichester.

²⁴Debates (Lords), CCLXVIII (1965), 525.

punishment should have as its purposes reformation, retribution and deterrence, he argued that the death penalty did not serve any of these ends. Reformation was confounded by the nature of the penalty; there was no convincing proof that hanging deterred others; and of retribution, he said the Homicide Act had reduced it to a "grisly farce."

How can the State claim to express its condemnation of the crime of murder by the imposition of the death penalty when...some of its most bothersome manifestations do not suffer the death penalty [sic], while many of those which evoke some sympathy receive the capital sentence.²⁵

Agreeing with the bishop, the Archbishop of Canterbury, Michael Ramsey, also spoke in favor of abolition and underscored the need for reclamation of those who offended against society.

Thus the second reading debate in the Lords brought the endorsement of the Church of England for abolition as well as that of the Lord Chief Justice. It allowed for an exploration of the arguments already discussed in the Commons but with new emphasis and treatment. After a relatively short debate visited by fewer Lords than in previous sessions on abolition,²⁶ the Lords divided and the Murder Bill was read a second time by a majority of one hundred, a considerable margin in view of their past actions on abolition.

²⁵Debates (Lords), CCLXVIII (1965), 608.

²⁶Debates (Lords), CCLXVIII (1965), 603.

In keeping with the pattern established by the Lords on the second reading, the committee stage of the bill was also brief and without diversion. Though several amendments were put down, only two sparked extended debate; the others were either "housekeeping" moves or so eccentric as to be dismissed after only token discussion.

The first amendment²⁷ given lengthy, serious consideration came in the name of Lord Conesford, who moved to retain the hanging penalty for three categories of murder to include killing of a private person attempting to arrest or prevent the escape of a felon, killing a police officer and killing a prison officer. Though the intent of the amendment was the "protection" of the police and others involved in the apprehension and detention of criminals, implicit within the proposal was, once again, the assumption that the death penalty deterred. It was on this assumption and the question of anomalies that the Lords argued the amendment.

In moving his measure, Conesford noted the large majorities in the House of Commons and the Lords which held initially that imprisonment was an adequate deterrent in contrast to hanging. Agreeably he too was "content to

²⁷Actually Conesford put down three amendments, the latter two being contingent upon the first. They were discussed as one but only the first one received a division. Debates (Lords), CCLXVIII (1965), 1170.

accept that view in nearly every case."²⁸ But he was not prepared to endorse the principle without exception; he did not believe imprisonment to be an adequate deterrent when an arresting officer was involved. Giving reference to the numerous statistical studies of Sellin, Conesford justified his proposal in that such figures "do not, of course, show that no one has been deterred by the death penalty from committing murder."²⁹ As for what the figures did show of experience in other countries, he could not see the relevance to England's situation.

Lord Stonham followed these remarks with an attack on the claim of deterrence. Acknowledging that police officers were more often exposed to the dangers of violent criminals, he reasserted that,

There is no sort of evidence to support the belief that this Bill will lead to an increase in violent crime, or to more killings by criminals in order to escape detection. Especially, there is no reason to believe that the police will be in greater danger as a result of this Bill than, unfortunately, they are today.³⁰

In sum, "there is no objective evidence that the death penalty deters murders of police officers, any more or any less than other types of murder."³¹ For Stonham, the Sellin

²⁸Debates (Lords), CCLXVIII (1965), 1172.

²⁹Debates (Lords), CCLXVIII (1965), 1174.

³⁰Debates (Lords), CCLXVIII (1965), 1176.

³¹Debates (Lords), CCLXVIII (1965), 1177.

researches outlined a more positive view, though it is not clear from what source the Lord drew his references. The studies, according to Stonham, "indicated that the fatalities to police officers were at least greater--something like six per cent greater--in the cities of those States which had retained the death penalty for murder than in those where it was abolished."³² Yet Sellin's often cited study, "The Death Penalty and Police Safety", reveals not as great a difference; and in concluding the survey the author states:

The claim that if statistics could be secured they would show that more police are killed in abolition states than in capital punishment states is unfounded. On the whole, the abolition states, as is apparent from the findings of this particular investigation, seem to have fewer killings but the difference is small.³³

No one challenged this oversight; if they had, the abolitionist case would have been less weakened because the statistics still favored that position. Lord Reay, while admitting that the data so far discussed could not prove the whole case for abolition, issued that the statistics were still "very powerful evidence" and therefore could not be dismissed. Assailing the retentionists' corollary view that the experience of other countries was not relevant because their situations were not the same, he went on to add

³²Debates (Lords), CCLXVIII (1965), 1177-1178.

³³Sellin, Capital Punishment, p. 152.

that,

It is precisely because of their great variety that the uniformity of their experience is so striking; for the history of each of them in each case provides evidence that the murder rate is affected by factors other than the death penalty--and these murder rates, of course, include murders of policemen.³⁴

In any event, the retentionist Lords continued to deny such evidence; only Viscount Dilhorne took a more novel approach in favor of the amendment by producing a letter from "an inmate of one of Her Majesty's Prisons." In it the author reveals that prisoners were laughing about the Murder Bill because in the future they would be able to use weapons to keep from being apprehended without fear of being hanged.³⁵ For Dilhorne, this was proof positive not only of the deterrent value of hanging but also of the proposed amendment.

In addition to the question of deterrence, the abolitionists were quick to point out that to accept the amendment would be inconsistent in principle and would produce more anomalous situations than were then operating under the Homicide Act. Lord Stonham commented that,

It would surely be anomalous to retain capital punishment for murder in those circumstances affecting private citizens, but to abolish it, for example, for the murder of an elderly or defenceless shopkeeper in the course of theft. In other words, I would submit... that this

³⁴Debates (Lords), CCLXVIII (1965), 1198.

³⁵Debates (Lords), CCLXVIII (1965), 1181-1182.

particular class of murders cannot justifiably be treated in a different way from capital murders in general.³⁶

In response, Lord Ilford reasoned that the amendment did not seek to differentiate between individual classes of murder but rather "classes of persons who may be at the risk of murder."³⁷ A class of persons or victims such as police officers can, with certainty, be defined while it is impractical to distinguish between different classes of offences by method. But Baroness Wootton countered by expressing her distress to see, when different categories of murder are made,

...how the issue of life and death can turn upon points which are so fine and upon forensic skill which is so subtle that no ordinary person can feel that fundamental justice is thus done.³⁸

In summation, Lord Conesford restated his belief in the necessity of the amendment and his apprehension that without it, the law would provide no deterrent of any kind "because the imprisonment to which the murderer would be liable would be certain even in the absence of murder."³⁹ When the House divided, the amendment failed by a majority of thirty-three.

³⁶Debates (Lords), CCLXVIII (1965), 1176.

³⁷Debates (Lords), CCLXVIII (1965), 1193.

³⁸Debates (Lords), CCLXVIII (1965), 1206.

³⁹Debates (Lords), CCLXVIII (1965), 1210.

The second proposed amendment to receive extensive attention was put down by Lord Parker and called for a discretionary sentence of imprisonment imposed by the court instead of the mandatory life sentence prescribed by the bill. Introducing the measure, Parker addresses himself to the two dominant themes of contention raised by it: the question of a fixed versus a determinate sentence; and the status of murder as a unique crime. To the Chief Justice, the fixed sentence allowed no room for mitigation and consideration of individual circumstance. Reflecting on his own history on the bench, Parker said:

It is a horrifying experience to have to sentence the perpetrator for a mercy killing, in circumstances which are most distressing...when nobody has the slightest desire that anything should happen other than that a home should be found for him and somebody to look after him.⁴⁰

As for treating murder as a crime apart, and therefore deserving of a lengthy fixed sentence, Parker doubted that there should be a distinction between it and other serious crimes. "What really is the difference today between murder and attempted murder?" he asked. Supplying his own answer, he replied:

The only difference is the accident that in one case the man dies. Yet in a case of attempted murder the judge, according to the circumstances... can do anything from putting the man on probation to giving him life imprisonment.⁴¹

⁴⁰Debates (Lords), CCLXVIII (1965), 1213.

⁴¹Debates (Lords), CCLXVIII (1965), 1213.

To those who opposed Parker's move, not only did the amendment diminish the gravity of the crime of murder, but it also endangered the public. Lord Stonham noted that a life sentence was not an empty prescription and that it was the only way of giving maximum flexibility in the period of detention.⁴² The amendment would remove any safeguard against the premature release of a convicted murderer because at the end of a fellow's sentence he would be released whether he was ready or not.

There was also discussion on the effect which the proposed sentence of the bill would have on the criminal. Lord Denning, in support of the amendment, objected to the life sentence as not being in accordance with reality even though it sounded "awe-inspiring."⁴³ If the sentence for murder was to carry real effect, it must be left to the discretion of the court; a seventeen year sentence must be just that--seventeen years. Lord Reid echoed these feelings and attacked Stonham's argument that the amendment would jeopardize public safety by allowing the release of convicted murderers earlier than was thought best. When the question was put at the end of this often heated exchange, Parker's amendment passed by a margin of two.

Following the division the House considered a variety of minor additions to the bill which were uncontested,

⁴²Debates (Lords), CCLXVIII (1965), 1230.

⁴³Debates (Lords), CCLXVIII (1965), 1227.

frivolous or given only short debate. Lord Parker moved a new clause requiring the Home Secretary to consult with the Lord Chief Justice or Lord Justice General (for cases in Scotland) and the trial judge before releasing a fellow convicted of murder. Since this was already the practice of the Home Secretary it passed without a division.⁴⁴

Viscount Stuart of Findhorn introduced a proposal to allow any person sentenced to imprisonment for life "the right to choose to be executed rather than suffer the decay of soul and body resulting from a long term of imprisonment."⁴⁵ Only a brief exchange ensued as Baroness Wootton reminded the Lords that the amendment might be in conflict with the laws against aiding, abetting or counseling suicide. The amendment was defeated.

Lord Gardiner next attempted to readjust the clause on duration inserted by the Commons by moving that the Act "expire on" the thirty-first day of July (1970) instead of "continue in force until" the thirty-first. Designed to insure that there would be no risk of the Act expiring by default simply because no resolutions to continue it were moved,⁴⁶ the amendment was, by the Lord Chancellor's own words, "not a matter of grave importance one way or the

⁴⁴Debates (Lords), CCLXVIII (1965), 1246.

⁴⁵Debates (Lords), CCLXVIII (1965), 1247.

⁴⁶Debates (Lords), CCLXVIII (1965), 1254-1255.

other."⁴⁷ The Lords must have agreed for after a short but animated debate in which the amendment was all but forgotten, they negatived it, fifty-five to fifty-nine.

Gardiner was more successful with his next proposal which was simply a housekeeping measure to make the death penalty, should it eventually be revived, applicable only to murders committed after revival. Agreeing to this without division, the Lords reported the bill.

The report stage followed on August 5, 1965, with Viscount Dilhorne opening the session with his motion for a new clause. Responding to the criticisms of Lord Parker's amendment providing for a court determined sentence as approved in committee, Dilhorne moved to insert a provision allowing the Home Secretary to parole any person imprisoned on a conviction of murder, providing that person had served five years of his sentence. The clause was put down to meet a difficulty created by the discretionary sentence amendment in which the Home Secretary could not release a man early even though he may be fit for parole.⁴⁸ Dilhorne acknowledged, however, that the proposal did not deal with the criticism that if a determinate sentence were imposed, it would, when expired, result in the release of a person who might not be ready.

⁴⁷Debates (Lords), CCLXVIII (1965), 1251.

⁴⁸Debates (Lords), CCLXIX (1965), 406.

Lord Stonham duly noted this failing in the clause and underscored the fundamental concern raised by it for the need of a system of parole for prisoners serving long terms for other offences besides murder. He preferred to defer any action on any aspect of such a system pending the Report of the Royal Commission on the Penal System.⁴⁹ While Baroness Wootton expressed her agreement with the clause, she too asked to reserve it for a later time when the principle could be applied to the whole sentencing policy and not just to that for murder.⁵⁰ Dilhorne, after receiving assurances that the subject of sentences and release would be dealt with by the Royal Commission and that the Government would move ahead for a policy in this area, then withdrew his amendment.

Had the clause been approved, it surely would have been out of place because the next amendment drawn for discussion was that of the Chief Justice, who proposed to delete the court determined sentence and reinstate the automatic life sentence. He also moved to allow the court to declare a recommended minimum period which should elapse before someone convicted of murder was released on parole. Parker's reason for undoing what he had done only a week before was to meet the same criticisms with which Dilhorne

⁴⁹Debates (Lords), CCLXIX (1965), 411-412.

⁵⁰Debates (Lords), CCLXIX (1965), 415.

had just attempted to deal.⁵¹ Murder would retain its unique status by having a fixed statutory sentence and by giving the trial judge power "to mark the gravity of the offence," and it would also restore to the Home Secretary authority to parole convicted murderers. More important, Parker noted, the amendment would remove the objection to the required but premature release of a prisoner who had served his sentence.⁵²

In support of his amendment, the Chief Justice cited a letter he received from the Lord Chancellor in 1962 in which Gardiner suggested the same approach. But support was not lacking for this compromise effort as Stonham and Wootton both spoke their endorsement. The amendments passed without a division and the House adjourned.

The third reading did not follow until October 26. Moving that the bill be read a third time, Baroness Wootton recognized that many in the House had doubts about the wisdom of passing the Murder Bill; but she reminded the Lords that amendments had been made to allay such hesitations. She named in particular the provision requiring the Home Secretary to consult the Lord Chief Justice and the trial judge before releasing a convicted murderer and the provision permitting the court to append a recommended minimum

⁵¹Debates (Lords), CCLXIX (1965), 418.

⁵²Debates (Lords), CCLXIX (1965), 419.

period of imprisonment when sentencing someone under the proposed Act. She further reminded the House that approval of the bill was not a final decision, holding out to some the prospect of ending abolition after five years time.

Lord Colyton followed and, like the Baroness, avoided discussing the arguments raised earlier except for one. He made a special appeal to the question of popular opinion:

All I wish to do is to make one final plea to your Lordships, even at this late hour, to reject this Bill on the simple ground that it does not command the support of the overwhelming mass of the people in this country. Parliament has no mandate to pass this measure.⁵³

He then produced a petition with some three thousand signatures collected by two auto mechanics in only ten days asking that the death penalty not be abolished.⁵⁴ Moreover, he recalled the national opinion polls taken earlier in the year which showed the majority of the public did not favor the abolition of hanging.⁵⁵

Only the Lord Chancellor chose to deal with Colyton's argument, conceding that "public opinion is probably against the abolition of the death penalty and the public opinion polls are as good a reflection of public opinion as we are to get at present."⁵⁶ Gardiner insisted, however, that the

⁵³Debates (Lords), CCLXIX (1965), 531.

⁵⁴Debates (Lords), CCLXIX (1965), 532.

⁵⁵Debates (Lords), CCLXIX (1965), 553.

⁵⁶Debates (Lords), CCLXIX (1965), 554.

public was ill-informed.

Another often heard argument was martialled for the discussion. The Archbishop of York, for example, confessed that he was "considerably moved" by the evidence on the deterrent value of capital punishment examined at various stages of the bill and expressed his firm support for the measure.⁵⁷ By contrast, Lord Dilhorne came back maintaining he did not wish to retain the death penalty out of a spirit of vengeance or retribution; but he went on to assert:

What concerns me is the possibility that, if it is not retained, a lot of people will be murdered in [the] future who would not suffer that fate if in fact the law were not altered.⁵⁸

He warned that by passing the bill, the House would be removing the deterrent to killing by those with long criminal records and the deterrent against killing to avoid arrest.

Perhaps the most interesting argument expressed on behalf of the bill was that of the possible constitutional conflict should the measure fail in the Lords. At the conclusion of his speech in opposition, Lord Colyton declared his intent to have a division of the House.⁵⁹ This must have caused some alarm among supporters of the bill out of

⁵⁷Debates (Lords), CCLXIX (1965), 535.

⁵⁸Debates (Lords), CCLXIX (1965), 544.

⁵⁹Debates (Lords), CCLXIX (1965), 534.

fear they did not have a majority. Lord Parker stated:

I am a little worried today at those who threaten to divide the House at this stage. I cannot believe that they would face a constitutional issue on this point, and that really the gambit-- if it be a gambit--is to see that the Bill does not get through this Session, and that those who favor it should start again. I ask those who threaten that to think again.⁶⁰

But Lord Dilhorne could not "see any constitutional issue arising if the House takes a different view from another place on a Private Member's Bill."⁶¹ Looking back at the events of 1956 when Silverman's Ten Minute abolition bill was defeated in the Lords, it would seem that Dilhorne's view was sound. At the time, Silverman himself maintained that the Lords were within their constitutional rights in rejecting his bill;⁶² his concern was that the Government would not uphold the decision made in the House of Commons in favor of abolition. That would have prompted a "grave" constitutional crisis.⁶³ But in 1965 the Government was not opposed to abolition; and because of its declared commitment to a decision on abolition, the next step would be to apply the Parliament Act (1949) to secure implementation of the bill should the Lords reject it. This would not appear to involve the constitutional crisis feared by some.

⁶⁰Debates (Lords), CCLXIX (1965), 542.

⁶¹Debates (Lords), CCLXIX (1965), 542-543.

⁶²The Times (London), July 11, 1965, p. 10.

⁶³The Times (London), July 17, 1965, p. 11.

Such fears were unfounded though; when the division was called after one and a half hours of debate, the bill received its third reading, 169-75.

Though the bill had come through a long fight, there was yet one more skirmish before final resolution and passage. It was the Commons' turn to review the Lords' three amendments and accept or reject them. Taking up these additions two days after the third reading in the House of Lords, the Commons examined the implications of each and, in the end, approved them all. This does not mean the amendments were favorably received or received without dissent. On the provision allowing the trial judge to recommend a minimum period of imprisonment before release, Sir Richard Glyn indicated his distaste but also declared he would not vote against it;⁶⁴ and Sir Frank Soskice, tempering his position on a similar amendment put down in Commons, indicated that he was not "wildly enthusiastic" about it but felt it would serve a moderate but limited purpose.⁶⁵

The most notable feature of the debate was the support by the abolitionists of the same measures they had opposed earlier so vehemently. Silverman moved all three of the Lords' amendments and was supported by Soskice.

⁶⁴Debates (Commons), DCCXVIII (1965), 374.

⁶⁵Debates (Commons), DCCXVIII (1965), 387.

This was done with reservations but also with the knowledge that the principle of the bill remained intact.

Having secured the final concurrence of the House of Commons, the Murder Bill was ready for the Royal Assent, which followed on November 8, 1965.

CHAPTER IV

THE DEBATE IN OREGON: SENATE

The Oregon debate on capital punishment, which was to culminate in final abolition, began in January, 1963 when the fifty-second Legislative Assembly convened for its regular session. At this time, abolitionists in the legislature put down their proposals to abolish the death penalty and prepared to hear the arguments voiced so often before on similar discussions.

Aside from the arguments for and against the death penalty which emerged from the legislative action, the Oregon abolition effort contrasts with that of England in several ways. First, three bills and accompanying joint resolutions, each designed to deal with capital punishment, were introduced and considered by the Assembly, while the English Parliament had only one. Representative J. E. Bennett of Portland, for example, put down a bill, HB 1677, to eliminate the use of capital punishment for first degree murder except when unanimously recommended by the trial jury. Also, it provided for "imprisonment for not less than twenty years" should the jury decide against death.¹ The

¹Oregon, Legislative Assembly, House Bill 1677, 52nd Sess., 1963.

companion resolution, HJR 29, would have so amended the Constitution, subject to approval by the people at a general election.

Senator Edward Fadeley of Eugene introduced another bill, SB 21, providing for an automatic life sentence for those convicted of first degree murder unless the offender were serving a life sentence at the time of the murder.² Also excepted were those "convicted of treason against the state."³ But this bill, like HB 1677, was tabled in committee. The hopes of legislative abolitionists rested instead with a third proposal, SB 10 and its companion resolution, SJR 3. Introduced by Senators Don Willner and Dwight Hopkins with Representatives Bennett, Eymann, Howard, McClure, Packwood, Peck and Whelan, Senate Bill 10 provided for an automatic life sentence for a conviction of treason or murder in the first degree. The joint resolution proposed asked for repeal of section thirty-eight of the Constitution and amended section thirty-seven to embody the provisions of SB 10.

Beside the stipulation in SB 21 which applied capital punishment to those convicted of treason and those who murdered while serving a life sentence, the primary difference between it and the SB 10 package was that the former would

²Oregon, Legislative Assembly, Senate Bill 21, 52nd Sess., 1963.

³Senate Bill 21.

have removed any mention of capital punishment from the Constitution, substituting a statute outlining the penalty for murder.

In an editorial review of the death penalty bills, the Oregonian endorsed the Willner proposals (SB 10 and SJR 3), noting these differences and the recommendations of the Constitutional Revision Commission.⁴ A legislative task force charged with the responsibility of composing a new state constitution, the Commission favored reducing the capital punishment sections to statutory status. The newspaper observed that retaining the "process of referral of a constitutional amendment provides for a cooling period for consideration of legislation conceived in the heat of reaction to a particular crime."⁵ Besides, referral of an amendment to the people eliminated hours of debate on what the public thought of abolition.

On another point of comparison, the Oregon effort to abolish the death penalty as represented by SB 10 was, like its English counterpart, a bi-partisan measure, drawing support from the opposing political parties in each legislative body. Senator Willner was a Democrat while Representative Robert Packwood, for example, was a Republican. The English Murder Bill also had sponsors from each party;

⁴The Oregonian, February 14, 1963, p. 26.

⁵The Oregonian, February 14, 1963, p. 26.

but a partisan flavor lingered throughout the debates, as evidenced by the heated procedural arguments while the bill was in committee. Partisanship was not characteristic of the debate in Oregon since little could be gained by either side in casting abolition as an obstacle to a specific program of business.

In contrast to the Murder Bill, the Oregon proposal came amid the controversy of a sensational murder case. Miss Jeannace Freeman was scheduled to die in the gas chamber December 6, 1962--the first woman in the state's history to be legally executed.⁶ Tried for the murder of two young children, Miss Freeman and her case generated much public concern, not because her guilt was questionable but because of the circumstances surrounding her action. Many felt society was in some way responsible for her history as a juvenile delinquent while others felt it unjust that her accomplice and the mother of the murdered children received life imprisonment after confessing to a part in the crime. Still others opposed the death penalty and felt the Freeman case exemplified the evils of that punishment. The execution date of December 6, however, was deferred first to January 29, 1963 and then to March 15.⁷

⁶The Oregonian, November 18, 1962, p. 47.

⁷The Oregonian, January 18, 1963, p. 1. Miss Freeman's execution was postponed again and her life finally spared when abolition became a reality in 1964. In 1969, she was transferred to the federal prison at Alderson, West Virginia.

By the beginning of the year the apparently imminent execution had stirred numerous appeals for clemency and renewed the desire to be done with capital punishment.⁸ An Oregonian editorial against the death penalty cited the Freeman case as evidence of the "inexact application of justice."⁹ But in spite of the notoriety of the case, it was not raised by the legislators as one might expect. The role of the Freeman sentence appears to have been to kindle the flame of abolition rather than to fuel the debate as an argument.

In 1955 it will be recalled, the execution of Ruth Ellis created a climate favorable to abolition in England, contributing noticeably to the support for the Silverman Ten Minute Bill of that year.¹⁰ However, in 1964 and 1965, there were no such executions stimulating the popular mind and no controversial cases which influenced Parliament's decision.

Finally, there are the contrasting experiences with abolition of Oregon and Great Britain. Over the years, England had gradually removed the capital sentence for one crime after another and eventually for certain classes of murder. But Oregon had experimented with abolition from

⁸The Oregonian, January 13, 1963, p. 34.

⁹The Oregonian, January 4, 1963, p. 12.

¹⁰See above, p. 21.

1914 until 1920, restoring it after a sharp increase in violent crime and the murder of two prominent citizens. Interestingly, Oregon's experience was not a source of comment for or against capital punishment in the 1963 debate, though the experience of abolitionist jurisdictions figured prominently in the British debate.

As for the arguments themselves, those used in each contest were similar in principle and sometimes even in content and data; but the Oregon legislators encountered more varied propositions in their discussion. The question of deterrence, for example, was examined in both situations, but those who debated the issue in Parliament never raised the question of the poor and economically destitute as bearing the burden of the capital punishment law. Yet even though the arguments were somewhat broader in scope in Oregon, those used in Oregon appear to be lacking in development and full expression--a characteristic which can be attributed in part to the nature of the legislative process in Oregon. The Assembly's committees, for example, are responsible for a greater share of the work load than in England, where the tradition for handling as much work as possible on the floor of the Commons appears quite strong. Hence, when a bill comes out of committee in Oregon, the arguments have been heard and amendments made with very little for the Senate or House to do but approve, disapprove or return the bill to committee for more

adjustments. In this situation, whatever debate occurs on the floor of the Assembly is not always the thorough-going, disciplined and organized confrontation seen in Parliament.

The effect of different legislative processes can also be seen in the absence from the Oregon debate of the public opinion issue so heatedly contested in Parliament. The question as to whether the public favored abolition received little notice because in Oregon the prescription of death for murder was a constitutional clause and therefore required a popular vote, as proposed in SJR 3, to change. Once the abolition bill and its enabling resolution passed the Assembly, it remained for the people to register their opinion at the prescribed election. Moreover, the legislative process in Oregon provides for the registration of opinion through public committee hearings as in the case of Senate Bills 10 and 21. In England, the system does not allow for such procedure, except with a special Royal Commission which can take testimony from outside Parliament. Thus the question of popular feeling on abolition was not as volatile as in Parliament.

With these procedural differences and contrasts of argument in mind, it is now appropriate to examine the action on the abolition bill and resolution. Though the Senate read the package a second time and referred it to the Judiciary Committee on January 18, 1963, action did not follow until March 22. Chaired by Senator Thomas Mahoney,

a Democrat, the Judiciary Committee began its deliberations with a public hearing on both SB 10 and SB 21. Though this session was devoted to both of these bills and their companion resolutions, few of the witnesses made a distinction between the approach represented by each. For those who testified the overriding concern was abolition regardless of format. Some witnesses, however, seemed to give more credence to SB 10 and SJR 3, perhaps because it was the package for complete abolition.

Senator Willner, chief sponsor of SB 10 and spokesman for Senate abolitionists, appeared first, addressing himself to a variety of arguments against capital punishment. He began his presentation by recalling the unsuccessful 1958 attempt to remove the death penalty from the Constitution when the voters rejected the ballot measure. Noting an unnamed survey conducted after that election, Willner asserted that the people were clearly confused by the ballot title, which read, "Capital Punishment Bill--Purpose: To eliminate from Oregon Constitution present provision for death penalty for first degree murder. Allows legislature to fix penalty."¹¹ In voting yes to repeal the capital punishment provisions, a person was not necessarily

¹¹Oregon, Legislative Assembly, Senate, Committee on Judiciary, Minutes, 52nd Sess., March 22, 1963. For text of ballot measure see, Oregon, Secretary of State, Official Voter's Pamphlet: General Election, November 4, 1958, p.16.

endorsing abolition; rather he was agreeing with the view that the legislature should determine the applicability of the death penalty and ultimately the question of abolition. Willner reminded the Committee that the issues were whether or not to abolish capital punishment and whether or not the Constitution should contain an amendment for abolition. Given the opportunity once again, the people of Oregon would vote to eliminate the death sentence.¹²

Willner went on to attack the supposed deterrent effect citing the Royal Commission Report (1953) already indicated as confirming that such a penalty did not deter others from committing murder. Moreover, there was also the possibility of human error in deciding the guilt of someone accused of murder. Willner's experience as an attorney pointed up to him that people are fallible.¹³

Concluding his testimony, the Senator initiated a line of argument about the morality of capital punishment which was to pervade the remainder of the hearing. The death sentence was, he asserted, "contrary to our religious and ethical teachings" and was incompatible with the view of human life as sacred.¹⁴ This argument had been heard in the debates in Parliament, perhaps more often in the House

¹²Committee on Judiciary, Minutes, March 22, 1963.

¹³Committee on Judiciary, Minutes, March 22, 1963.

¹⁴Committee on Judiciary, Minutes, March 22, 1963.

of Lords than in the Commons; yet the Judiciary Committee hearing gave such contentions a certain visibility not achieved in England. Of twenty-two witnesses¹⁵ who appeared before the Committee, nine or about forty per cent were members of the clergy. The moral and religious implications of the death penalty were to be repeated throughout the hearing.

The next person to testify was Representative Philip Lang, a member of the House Constitutional Revision Committee which would later consider the abolition package. He declared his firm opposition to abolition and the proposals before the Judiciary Committee.¹⁶ In fact he was the only witness at the hearing to take a stand against abolition. Accordingly, he submitted that the argument that capital punishment did not deter was invalid; his experience as a law enforcement officer had shown him that this was so, though he did not fully elaborate on this claim.¹⁷ When asked by Senator Fadeley of the Committee if he was aware of the studies on police deaths in abolitionist jurisdictions, Lang discounted them noting that there were so many other relative factors involved.¹⁸ It should be noted that

¹⁵Committee on Judiciary, Minutes, March 22, 1963.

¹⁶Committee on Judiciary, Minutes, March 22, 1963.

¹⁷Committee on Judiciary, Minutes, March 22, 1963.

¹⁸Committee on Judiciary, Minutes, March 22, 1963.

when this same question of deterrence--especially in relation to police safety--was raised in the House of Lords, those who raised it were much more specific about documenting the evidence to support or deny the argument. Lord Stonham, for example, founded his assertions on this issue on the Sellin study, "The Death Penalty and Police Safety."¹⁹

Though Lang differed from those present on the question of deterrence as well as abolition itself, he was in league with Willner in recognizing that abolition was not the only issue before the legislature. Commenting on whether or not the Constitution should contain an amendment for abolition, Lang insisted that whichever decision was eventually reached on eliminating the death penalty, that decision should be a part of the Constitution and it should be made by the voters. In making this statement, he lent his support to the "popular will" concept of Willner's proposal.

Willner and Lang both considered the deterrent argument; but like the issue of popular opinion, it received little attention in contrast to its prominence in Parliamentary discussions. Hugo Bedau, the noted author of

¹⁹See above, p. 96.

several studies on capital punishment,²⁰ commented on the deterrent value in his testimony, but only when queried. In response to a question by Senator Mahoney, Bedau read an article to the Committee about a Delaware policeman who insisted that capital punishment was a deterrent and then killed his wife; it was not an accident, Bedau added.²¹ Mrs. Claire Argow, Professor of Criminology at Pacific University and representative of the Oregon Committee to Repeal the Death Penalty, asserted that, "we are lulled into a false sense of security, thinking [we] are protected better by the [gas chamber] and therefore we do not do what we are capable of doing and should be doing to prevent murder."²²

Still the factual data on deterrence bandied about the House of Commons and the House of Lords was not to be heard in the testimony that day. Willner had alluded to the conclusions of the Royal Commission which contains a wealth of statistical information; but the detail was

²⁰See, for example, "A Survey of the Debate on Capital Punishment in Canada, England, and the United States," The Prison Journal, XXXVIII (October, 1958), pp. 35-40; "Death Sentences in New Jersey, 1907-1960," Rutgers Law Review, XIX (1965), pp. 1-64; and "Murder, Errors of Justice, and Capital Punishment," Death Penalty in America, ed. Bedau (Garden City, New York: Doubleday and Company, Inc., 1964), pp. 434-452.

²¹Committee on Judiciary, Minutes, March 22, 1963.

²²Committee on Judiciary, Minutes, March 22, 1963. Brackets not in original.

missing. Given the opportunity for limited testimony, such experts as Bedau and Argow chose to generalize rather than specify.

As mentioned in the opening of this chapter, the arguments employed in Oregon against capital punishment went beyond those of deterrence and public opinion. One objection to the death penalty was the cost involved. Thomas Gaddis, Portland author of the popular novel on the life of an imprisoned murderer--Birdman of Alcatraz--submitted that, contrary to the prevalent view, it was a costly process to execute a man convicted of murder. In Gaddis' words, "cyanide pills are expensive," referring to the gas chamber, then the mode of execution in the state.²³ Pushing his argument he recalled the case of Caryl Chessman who was executed in 1960 after receiving eight stays of execution since being convicted in 1948 of robbery, kidnapping and attempted rape, and sentenced to death.²⁴ Gaddis argued that in capital cases, the many legal appeals and maneuvers which are pressed into service on behalf of the accused skyrocket legal costs to the taxpayer. Thus the state expended more to execute a person than to incarcerate him for life. This was due, Bedau added, to the increasing

²³Committee on Judiciary, Minutes, March 22, 1963.

²⁴"Caryl Whittier Chessman," Facts on File, XX (1960), p. 156.

sensitivity of appellate courts to cases involving capital punishment.²⁵

As an argument against such punishment, this assertion was relatively unworn and conceivably appealing to legislators who were also the state's fiscal watchdogs. Similar observations were not expressed in the English discussion nor does the argument of cost occur in the reviews of traditional statements on the death penalty question.²⁶

Another point of contention not given voice in the Parliamentary debate yet often heard in Oregon was that the death penalty fell most often on members of the minority races and the poor. At base the claim is one of inequitable application; but in England its advocates expressed it as a failing of the Homicide Act and as an unjust application of the death sentence between one class of murder and another, rather than between one socio-economic group and another. Oregon did have categories of murder though they were not delineated in the same way. The concern, however, was for the number of people, especially those of minority groups, convicted of first degree murder and sentenced to death apparently because they lacked the financial resources to press their appeals through the courts.

²⁵Committee on Judiciary, Minutes, March 22, 1963.

²⁶See Finn Hornum, "Two Debates: France, 1791; England, 1956," Capital Punishment, ed. Thorsten Sellin (New York: Harper and Row, 1967), pp. 55-76.

The question of the relationship between the death penalty and the lower socio-economic class concerned the Committee as indicated by Senator Mahoney. He queried the witnesses on this point several times during the hearing.²⁷ Of Paul Harvey, Jr., the "dean of the capital press corps" and Associated Press Bureau Chief, Mahoney asked if he had investigated the financial background of any of the people he had seen executed in his duties as a correspondent.²⁸ Harvey replied that "every one of the victims had an attorney appointed by the court which would indicate that he had no funds to hire his own lawyer."²⁹ Dr. Bedau, in response to a similar probe, insisted upon the abolition of capital punishment because "it discriminates against minorities and the poor." According to the professor, the abolition of the supreme penalty "won't end discrimination but it will keep us from killing them because of their skin."³⁰

Yet Bedau, writing two years after his testimony, was skeptical of the evidence submitted that the last sixteen persons executed in the state--those seen by Harvey--had

²⁷Committee on Judiciary, Minutes, March 22, 1963.

²⁸Paul Harvey, Jr. was the only witness to testify that day who was subpoenaed by the Committee. He had not volunteered to appear but the Committee felt that his experience was of value to their deliberations.

²⁹Committee on Judiciary, Minutes, March 22, 1963.

³⁰Committee on Judiciary, Minutes, March 22, 1963.

been defended by court appointed attorneys.³¹ He notes that available court records and newspaper sources fail to show the status of the attorney in these cases. At the time, however, the detail of this assertion was not questioned and the Committee seemed content to accept the fundamental argument that the death penalty fell most heavily on minorities and the poor.

Another point of contention, the question of the alternative sentence, also attracted attention in Oregon as it did in Parliament. As previously noted, Senate Joint Resolutions 3 and 4 put the question of repealing the death penalty before the people and provided life imprisonment as a substitute; but Senate Bills 10 and 21 modified the life sentence with exceptions, as in the case of SB 21, or with parole restrictions as with SB 10. Several of the witnesses commented on the proposed alternative and most referred to SB 10 which required a person convicted of first degree murder to serve a minimum of fifteen years. As in England, comments on the alternative were directed at the number of years stipulated rather than imprisonment itself as a viable alternative. In spite of his opposition to abolition, Representative Lang suggested that the minimum sentence be "at least twenty years;"³² and the journalist Harvey felt

³¹Hugo A. Bedau, "Capital Punishment in Oregon, 1903-1964," Oregon Law Review, XLV, (December, 1965), p. 20.

³²Committee on Judiciary, Minutes, March 22, 1963.

the fifteen year minimum called for in SB 10 to be vindictive, though he did not object to imprisonment as such.³³

Most of those who testified on this particular topic, however, recognized the fifteen year sentence as necessary to induce voter approval of abolition. Dr. Bedau expressed his support of SB 10 but objected to the sentence, noting that it was unnecessary since "a parole board rarely...makes a mistake."³⁴ When asked by Chairman Mahoney if he thought it would be easier to sell the people on abolition if there were some assurance that those sentenced to life would serve more than ten years, Bedau replied:

Yes, I do think that this is a selling point for those who are not going to study this issue as closely as you or I. In my heart, however, I feel very definitely that this is a compromise-- a relevant compromise.³⁵

Mr. Clarence Gadden, Warden of the Oregon State Penitentiary, held the same view and indicated that the minimum should be left to the parole board.³⁶ Mrs. Argow added her endorsement to the parole board and, referring to Lang's statement about the minimum length of imprisonment, suggested that "if it is rehabilitation that we are after then the length of the sentence is not important."³⁷ Yet before

³³Committee on Judiciary, Minutes, March 22, 1963.

³⁴Committee on Judiciary, Minutes, March 22, 1963.

³⁵Committee on Judiciary, Minutes, March 22, 1963.

³⁶Committee on Judiciary, Minutes, March 22, 1963.

³⁷Committee on Judiciary, Minutes, March 22, 1963.

concluding her remarks she indicated that the Committee to Repeal the Death Penalty was cognizant of the "practical reasons" for the fifteen year minimum and would support that portion of SB 10.³⁸

Many of the witnesses implied that the minimum sentence was a sop to the public. But Senator Fadeley reminded those who testified and the Committee that the minimum term of imprisonment was intended not so much for the public as for the legislature.³⁹ The suggestion that the voters would be less difficult than the legislators on the abolition package gained credence as the bill wound its way through the legislative process.

Another dominant concern of those who testified was the moral and religious implications of the death penalty. As noted earlier, Senator Willner broached this topic in his brief opening statement and was followed by several clergymen. Rabbi Emanuel Rose questioned the legitimacy of the often cited "eye for an eye" maxim as an argument:

It was a few thousand years ago that this statement was introduced and defined in Jewish tradition as meaning the following: financial compensation equal to the value of an eye for an eye, a tooth for a tooth and a life for a life.⁴⁰

There is no value for the taking of a life, he asserted.

³⁸Committee on Judiciary, Minutes, March 22, 1963.

³⁹Committee on Judiciary, Minutes, March 22, 1963.

⁴⁰Committee on Judiciary, Minutes, March 22, 1963.

The Reverend Eric Robinson of the Errol Heights Methodist Church in Portland also referred to this doctrine, commenting on the inconsistency of its application:

It is true that the death penalty is advocated and given divine sanction. But it is not only for murder; [it is] also for adultery, incest... and witchcraft.⁴¹

Noting that the death penalty was used only for murder, he reminded the Committee that "we are not living in the same times."⁴²

Such was the testimony presented to the Senate Judiciary Committee. It reflected as much concern for the proposed alternative to capital punishment as in Parliament but differed noticeably in the emphasis given to other arguments such as that of deterrence. The variety of arguments, mostly against the penalty, was also a contrast. It should be remembered, however, that the testimony represented the thoughts of special interest groups and the "experts"; and, except in the case of Senator Willner and Representative Lang, the testimony was not necessarily the response of the Committee nor of the Senate itself to the issue of capital punishment.

Yet according to the subsequent meetings of the Committee, the sentiments of the witnesses were not so very different from its members. The principle of abolition

⁴¹Committee on Judiciary, Minutes, March 22, 1963.

⁴²Committee on Judiciary, Minutes, March 22, 1963.

was not in doubt; only the details remained to be adjusted.

Meeting in executive session on April 1, the judiciary group settled one of the two issues identified by Senator Willner. By unanimously tabling SB 21 and SJR 4 and moving immediately to consider SB 10 and SJR 3, the Committee determined that the Constitution should contain an amendment specifically abolishing the death penalty.⁴³ Evidently there was a consensus on this move because it was accomplished without discussion or objection.

Considering first SJR 3, Senator Mahoney reported on the title under which the resolution would appear on the ballot. He had discussed the title with the state Attorney General, Robert Thornton, and indicated to Thornton his intention to amend the resolution to make clear to the voters how they would be voting should the measure go to the people. The Attorney General in turn suggested that the legality of such an amendment would be in doubt--though on what grounds is not clear--and agreed to a simple title in lieu of an amendment.⁴⁴

Mahoney's interest in this point was not frivolous. As mentioned in testimony, there was some evidence that people were confused by the 1958 ballot title. A person could have been for abolition and still opposed to removing

⁴³Committee on Judiciary, Minutes, April 1, 1963.

⁴⁴Committee on Judiciary, Minutes, April 1, 1963.

mention of the sentence for first degree murder from the Constitution.

Continuing with SJR 3, Senator Corbett questioned the meaning of certain lines which state that "the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all crimes committed before the taking effect of this section."⁴⁵ He was informed that the resolution would not apply to those persons under sentence of death prior to the time the amendment took effect, and if someone were to kill the day before it became effective, he would be prosecuted under the Constitution as it was without the amendment.⁴⁶ Corbett then asked why a person under capital sentence would then be put to death if that penalty were abolished; he felt that the Governor could interpret the lines in question as meaning he must let the death penalty apply. Senator Willner interjected his doubt that a law could be passed to change the law as it was at some previous time when a crime was committed. But Corbett pushed ahead and moved deletion of the language.

Before the vote, Senator Anthony Yturri submitted that the implication cited by Corbett was not present in the resolution; and he voiced his fear that if the lines

⁴⁵Oregon, Legislative Assembly, Senate Joint Resolution 3, 52nd Sess., 1963.

⁴⁶Committee on Judiciary, Minutes, April 1, 1963.

were deleted, there would be a problem as to the legislature's intent.⁴⁷ His fear was allayed, however, when the Committee voted not to remove the language. To clarify the action, Mahoney agreed to write a letter to the Governor indicating that the Committee, in defeating the motion, did not mean that the death sentence should not be commuted if the people approved the resolution.

The group then adopted a motion to report SJR 3 out of committee with the recommendation "Do Pass with Amendments." Only Senator Ward Cook of Portland dissented.⁴⁸

Moving on to Senate Bill 10 which detailed the mechanics of SJR 3, Senator Corbett proposed the deletion of the lines which required that a person, having served fifteen years of his life sentence, be paroled "only on the unanimous vote of the State Board of Parole and Probation after a public hearing."⁴⁹ He argued that to call for a hearing fifteen years after a crime had been committed would be poor policy and that the parole board should have some flexibility in exercising its judgment. The Committee must have agreed with him; his amendment passed, six to one, without discussion.⁵⁰

⁴⁷Committee on Judiciary, Minutes, April 1, 1963.

⁴⁸Committee on Judiciary, Minutes, April 1, 1963.

⁴⁹Oregon, Legislative Assembly, Senate Bill 10, 52nd Sess., 1963.

⁵⁰Committee on Judiciary, Minutes, April 1, 1963.

Corbett next moved to report the bill, "Do Pass as Amended." Before the vote, Senator Fadeley indicated his preference that nothing be said about the compulsory length of time a person convicted of murder must serve; but he also recognized the feeling of the bill's proponents that the fifteen year minimum was a selling point "on the repeal," and therefore he said he would vote for the measure.⁵¹ The motion passed unanimously.

The strong support for the abolition measures exhibited in the Judiciary Committee was reflected in the Senate as a whole. When the resolution reached the floor for its third reading, it passed by a vote of twenty-five to three.⁵² After some clarification by Senator Willner that it was the intent of the bill that a convicted murderer, after release, remain under supervision, SB 10 also passed, twenty-four to six.⁵³

⁵¹Committee on Judiciary, Minutes, April 1, 1963.

⁵²Oregon, Legislative Assembly, Journals and Calendars of the Senate and House, 52nd Sess., 1963, p. 581.

⁵³Journals and Calendars, p. 453.

CHAPTER V

THE DEBATE IN OREGON: HOUSE

Having passed its third reading, SJR 3 went to the House of Representatives where it received an initial reading and was referred to the Constitutional Revision Committee on April 8. SB 10 followed on the tenth when it received its first reading; it was read a second time the next day and referred to the Committee on State and Federal Affairs. This group, under the chairmanship of Representative Norman Howard (who was a co-sponsor of the abolition package), began its comparatively quick deliberations with testimony by Senator Willner. He recounted the substance of prior statements before the Senate Judiciary Committee which "clearly established that the death penalty does not deter people from committing murder."¹ Moreover, Willner emphasized that there was always the possibility of human error; he noted evidence submitted to the Senate committee indicating that in the past seventy years there had been seventy miscarriages of justice in homicide cases.² Though

¹Oregon, Legislative Assembly, House of Representatives, Committee on State and Federal Affairs, Minutes, 52nd Sess., April 26, 1963.

²Committee on State and Federal Affairs, Minutes, April 26, 1963.

he did not cite a source for this information nor where these miscarriages transpired, this was an important argument. Willner had given it only passing mention before the Senate committee as had other witnesses. In the Parliamentary debates, the question of errors in capital cases was often alluded to but never contested between the opposing sides of the issue.

Willner also noted Warden Gladden's comments against the death penalty and called attention to the discriminatory application of the penalty with respect to the poor and the minorities. Two days later, the legislators passed the bill out of committee with a "Do Pass" recommendation. There was little discussion and no changes.³ By a sizeable margin (forty-two to fifteen), the House sent the bill to the Committee on Constitutional Revision to join its companion measure, SJR 3.⁴

The Constitutional Revision Committee began its work on SB 10 with two hearings scheduled a week apart. Representative Edward Elder of Lane County spoke first, directing his few remarks primarily to the convicted murderer who commits a second, "planned" murder. Insisting that punishment was a deterrent, he briefly declared his desire

³Committee on State and Federal Affairs, Minutes, April 26, 1963.

⁴Committee on State and Federal Affairs, Minutes, April 26, 1963.

to see the penalty for recidivists and for those who killed a police officer on duty stated specifically in the bill.⁵ As the bill stood, it did not provide for the recidivists, and, lacking support of the Senate, there was no mention of excepting murder of a policeman from its provisions.

Representative Atiyeh, Washington County, appeared to oppose section three of the bill, which removed the death penalty for treason and substituted life imprisonment. He suggested that the original language of the statute involved remain untouched so that the law would read, in spite of abolition: "The penalty for treason is death, except when the trial jury in its verdict recommends life imprisonment, in which case the penalty shall be life imprisonment."⁶ Atiyeh argued that including the penalty for treason as a part of abolition would "cloud the issue" and complicate the bill in its passage;⁷ he implied that this section was unnecessary if the Committee intended to pass the bill.

In the English debate, Sydney Silverman confronted the reverse of this same dilemma. His abolition bill excluded the penalty for treason and he had to answer to his

⁵Oregon, Legislative Assembly, House of Representatives, Committee on Constitutional Revision, Minutes, 52nd Sess., May 2, 1963.

⁶Oregon, Revised Statutes (1963), sec. 162.030.

⁷Committee on Constitutional Revision, Minutes, May 2, 1963.

critics why this was so.⁸ His reply was precisely what Atiyeh argued: that by encompassing treason in the abolition move, the "real question" would become clouded. Given the events in the history of abolition to that time, it would be difficult to speculate how much the issue would be confused by including the treason provision. Through hindsight, however, it is apparent that section three had little adverse effect on the voters, who, eighteen months later, enacted SB 10 by approving SJR 3.

Senator Willner also testified before the Committee, summarizing once again the Senate hearings. According to the Committee minutes, Willner put heavy emphasis on the proposed alternative outline in SB 10.⁹ He insisted that many people would vote for abolition if they were assured that the minimum term in prison for first degree murder was fifteen years. Primarily, he asserted, the objective of this minimum sentence was the protection of society and not the punishment of the convicted murderer.¹⁰ Moreover, the fifteen year provision was endorsed by "practically all" witnesses who appeared before the Senate Judiciary Committee; it was not noted that those who endorsed

⁸See above, p. 45.

⁹Committee on Constitutional Revision, Minutes, May 2, 1963.

¹⁰Committee on Constitutional Revision, Minutes, May 2, 1963.

this provision did so out of recognition of its voter appeal and not because of any inherent wisdom within the policy itself.¹¹ But Willner also emphasized that he would object to amending SJR 3 to include the minimum sentence, saying that it should be left in the statutes, subject to the discretion of the legislature.

A week later, the Committee again sat for testimony. The Reverend William Cate, Executive Secretary of the Greater Portland Council of Churches, presented similar testimony to that given before the Senate Judiciary Committee. Besides observing that capital punishment was an irrevocable act and questioning the deterrent value of the death penalty, Cate also declared:

It is well recognized that the death penalty is not administered impartially to all types, classes, colors, and levels of income of first degree murderers and there is serious question as to whether it can be administered impartially.¹²

Warden Gladden also appeared once more to present the facts he had gathered on capital punishment. He recalled, for example, that in the countries and eight states in the United States which had abolished the death penalty, the statistics indicated that there was not an increase in

¹¹Committee on Constitutional Revision, Minutes, May 2, 1963.

¹²Committee on Constitutional Revision, Minutes, May 2, 1963.

capital crimes after doing so.¹³

Meeting two days later, the Committee set about its own review of the abolition package. The members considered several amendments to SJR 3 before sending the proposal back to the floor of the House. One overriding concern was to build into the resolution the necessary alternatives for approval by the people should the new state Constitution, then under consideration, be submitted to the voters and approved or rejected. If they accepted the new document at the next state primary election, SJR 3 was to reflect the change by repealing sections 37 and 38, Article I of the 1859 Constitution as well as Article VI and section 6, Article XIV of the new Constitution.¹⁴ If the new Constitution were not submitted to the people, or submitted and then not approved, the resolution was to ask only for the repeal of sections 37 and 38 of the current Constitution.¹⁵

It should be underscored that the original resolution called for the repeal of section 38 while amending section 37 to include the life sentence provision. In considering the amendment to account for the fate of the new Constitution, Representative John Dellenback of Medford, Chairman

¹³Committee on Constitutional Revision, Minutes, May 7, 1963.

¹⁴Oregon, Legislative Assembly, Proposed Amendments to SJR 3, 52nd Sess., May 13, 1963.

¹⁵Proposed Amendments to SJR 3.

of the Committee, moved an amendment to the amendment which would repeal both section 37 and 38.¹⁶ Dellenback indicated that he was not concerned by the possibility of "flip flopping" between abolition and recall of the death penalty. However, Representative James Redden, chief spokesman for House abolitionists, maintained that the people wanted the penalty for first degree murder in the Constitution; those who opposed capital punishment would feel more secure. But Dellenback countered by reminding the members that the provisions of the new Constitution would make the amendment process more difficult.¹⁷ On the vote, Dellenback's amendment carried, seven to two, with only Representatives Berkeley Lent and Redden voting in the negative.

Representative Jones moved another amendment to SJR 3 which proposed to include death for the crime of murder in a penal institution by one already sentenced to life imprisonment. According to the Committee's minutes, Jones stated that his reasons for offering such an addition were,

...that this would be a tangible deterrent to killing in penal institutions and it might encourage the people to vote for abolishing the death penalty in cases where they might not otherwise do so.¹⁸

¹⁶Committee on Constitutional Revision, Minutes, May 9, 1963.

¹⁷Committee on Constitutional Revision, Minutes, May 9, 1963.

¹⁸Committee on Constitutional Revision, Minutes, May 9, 1963.

Redden remarked, however, that the proposal detracted from the principle of the resolution and he implied that, should Jones' amendment pass, the resolution would be opposed on the floor of the House.¹⁹ Furthermore, he asserted, the resolution on which the voters were to make their decision should be presented to them as a clear issue. Dellenback interjected that if the death penalty were to be used as a deterrent in certain situations, then he would want to consider also the crime of kidnapping in which the victim is murdered. Commenting specifically on Redden's objection, Dellenback noted "that SJR 3 does not abolish capital punishment as it is tied only to first degree murder."²⁰ Redden in turn replied that he was cognizant of this distinction but again declared that the resolution without Jones' amendment "would present a clear question to the people."²¹ When the Committee voted, the motion failed.

The brief debate on this proposal revealed once again that the 1958 abolition attempt had had its impact. As already observed, the sponsors of abolition deigned to present the electorate with a choice on capital punishment which

¹⁹Committee on Constitutional Revision, Minutes, May 9, 1963.

²⁰Committee on Constitutional Revision, Minutes, May 9, 1963.

²¹Committee on Constitutional Revision, Minutes, May 9, 1963.

would be directly translated into law to avoid the confusion which prevailed in 1958. Such confusion prompted Redden to emphasize the necessity of maintaining the principle of the resolution without exception.

Also the discussion disclosed that the members of the House continued to worry over voter approval. The often heard argument that a certain minimum sentence or a special exception to abolition would "encourage people to vote an end to the death penalty...where they might not otherwise do so...,²² was adaptable to either side of the abolition issue as Jones' statements illustrate.

The last proposed amendment to SJR 3 came from Representative Lang who had testified earlier before the Senate Judiciary Committee against the abolition package. He moved now to include the minimum sentence for first degree murder in the resolution and to allow no parole before a given time had elapsed.²³ This addition would incorporate the primary provisions of the companion bill into the Constitution if the resolution were eventually approved by the people. The implications of this maneuver were obvious, especially to Representative Chappel. He observed that with the alternative sentence and minimum period of

²²Committee on Constitutional Revision, Minutes, May 9, 1963.

²³Committee on Constitutional Revision, Minutes, May 9, 1963.

imprisonment before parole in the Constitution, the legislature could not then alter them without referring any change to the electorate.²⁴ Lang replied that this was one of his reasons for moving the amendment. Moreover, he believed that SJR 3 did not face "the problem" squarely because a sentence of life imprisonment was not actually for life.²⁵ As the resolution and companion bill then stood, life meant seven years. But whatever the minimum he favored making it a part of the Constitution.

Redden objected to Lang's proposal because he did not believe that enough was known about the treatment and rehabilitation of murderers to freeze the alternative sentence in the Constitution.²⁶ He suggested that authorities could find in the future that prisoners could be released sooner than they could at that moment. Furthermore, he implied that by omitting the Lang amendment, the legislature could revise the minimum sentence in the light of experience and research. He prophesized that the topic "would be brought up from time to time before the legislature...if the [Lang] provision were defeated."²⁷ In

²⁴Committee on Constitutional Revision, Minutes, May 9, 1963.

²⁵Committee on Constitutional Revision, Minutes, May 9, 1963.

²⁶Committee on Constitutional Revision, Minutes, May 9, 1963.

²⁷Committee on Constitutional Revision, Minutes, May 9, 1963. Brackets not in the original.

deciding the question, the Committee disapproved the proposal by three to five.

Lang's anxiety that life imprisonment did not mean "life" in reality was one of the first objections raised during the Parliamentary debate on the proper alternative to hanging. The question of how long a sentence should be and by whom it should be determined came up many times; Sir John Hobson's comment that the nominal sentence of life imprisonment was "a mere pronouncement of a formula,"²⁸ was reminiscent of Lang's feelings about the provisions of SJR 3 and SB 10. Though the initial attempt failed in committee, there was yet the struggle on the floor of the House. Much as the British lawmakers, Oregon's legislators attempted to rationalize the disparity between a mandatory life sentence and a minimum length of imprisonment before parole.

Having done its work on SJR 3, the Constitutional Revision Committee turned to SB 10 with Chairman Dellenback opening the discussion by reaffirming his belief in the death penalty as a deterrent to killing in some cases.²⁹ Jones was of a similar persuasion; he followed Dellenback's remarks with a motion "to include the concept that the penalty for killing the victim in a kidnap case and killing

²⁸See above, p. 66.

²⁹Committee on Constitutional Revision, Minutes, May 9, 1963.

in a penal institution by one already sentenced to life imprisonment be death."³⁰ To this, Lang moved an amendment to add that death be the penalty for killing a peace officer on duty.³¹ Without discussion the Committee negatived both amendments, four to three.

The next items relative to SB 10 followed in quick succession with few or no exchanges by the members. Jones moved to eliminate the fifteen year minimum term provided in the bill, leaving the present seven year minimum untouched. Redden briefly indicated his assent to the motion, but Dellenback reasoned that a fifteen year minimum was desirable as a deterrent, especially in view of the defeat of the exceptions to abolition previously considered.³² Before the vote, however, Jones withdrew his motion only to have Berkeley Lent move it in his name. It passed, five to two, with Lang and Dellenback voting in the negative.³³

After the Committee agreed to amend SB 10 to make it conform to the provisions of SJR 3 and to provide that the

³⁰Committee on Constitutional Revision, Minutes, May 9, 1963.

³¹Committee on Constitutional Revision, Minutes, May 9, 1963.

³²Committee on Constitutional Revision, Minutes, May 9, 1963.

³³Committee on Constitutional Revision, Minutes, May 9, 1963.

electorate would consider SJR 3 at the general election of 1964, Representative Chappel moved to restore the language regarding life imprisonment for second degree murder.

SB 10 altered the original statute by stating that: "Every person convicted of murder in the second degree shall be punished by imprisonment in the penitentiary for not more than twenty-five years."³⁴ Chappel's proposal would keep life imprisonment as the punishment and thus make the sentence for first and second degree murder, virtually the same, as Redden observed. Aside from this comment, there was little comment and the motion passed, five to two.³⁵

The contrast in this particular situation with England is interesting. In Parliament, Silverman and the other abolitionists strongly opposed erecting a classification system for the degree and types of murder. The experience under the Homicide Act with its distinctions was frustrating. In Oregon, however, Redden favored continuing the distinction between different classes of murder while other abolitionists and even some retentionists endorsed a single penalty for first and second degree murder. Lent serves as an example of the former group and Lang represents the

³⁴Oregon, Legislative Assembly, Senate Bill 10, 52nd Sess., 1963, lines 13-15.

³⁵Committee on Constitutional Revision, Minutes, May 9, 1963.

latter.³⁶ To some abolitionists such as Redden there was apparently some latitude in the answer to the question of maintaining degrees of murder in the prescribed alternative sentences while abolishing the death penalty.

After restoring the life imprisonment sentence for second degree murder, Richard Eymann moved that SB 10 be returned to the floor of the House as amended with a "Do Pass as Amended" recommendation. The Committee agreed on a vote of five to two with Lang and Dellenback dissenting.³⁷

In other action that day, the Committee tabled the one other remaining proposal which approached abolition, HB 1677 and its companion, HJR 29. It would have changed only the emphasis of the current law allowing a trial jury to impose the death penalty for first degree murder by a unanimous recommendation. As the Oregon law worked, the death penalty was automatic unless the jury advised life imprisonment. Unfortunately for this package, the sentiment was running for complete abolition.

When the SB 10 - SJR 3 package reached the floor on May 17, the members rejected the Constitutional Revision Committee's recommendation for SB 10, but accepted the

³⁶Committee on Constitutional Revision, Minutes, May 9, 1963.

³⁷Committee on Constitutional Revision, Minutes, May 9, 1963.

resolution to submit the question to a vote of the people. SJR 3 was read and adopted on a vote of forty-five to thirteen;³⁸ but Dellenback moved to re-refer SB 10 to the Constitutional Revision Committee so that body could reinstate the fifteen year minimum sentence deleted just a few days before.³⁹ In support of his motion, Dellenback declared:

It is because I favor SJR 3 and think we ought to have this out that I feel we ought to have... returned to the code a minimum of fifteen yearsI think our chances of getting the people to approve SJR 3 are vastly enhanced if we are able to say "we have in the code a definite provision that [a convicted murderer] must serve fifteen years. He will not be killed; but he must serve fifteen years." I think this will be important in the passage of SJR 3.⁴⁰

Redden affirmed his opposition to the motion, recounting for the House how the Committee sat one afternoon for two hours on SB 10. He noted the exceptions proposed during that sitting and reminded the members present that every one was defeated. By implication Redden seemed to say that the work was through and there was no reason to send the

³⁸Oregon, Legislative Assembly, Journals and Calendars of the Senate and the House, 52nd Sess., 1963, p. 581.

³⁹Oregon, Legislative Assembly, House of Representatives, Selected Proceedings of the House, 52nd Sess., (Tape No. 47), May 17, 1963.

⁴⁰Selected Proceedings, (Tape No. 47), May 17, 1963. Brackets not in the original.

bill back.⁴¹ The only reason for such a tack, Redden surmised, was that of delay in the hope that sine die, or the end of the session, would arrive before passage of SB 10.⁴² For whichever reason, the majority of the House concurred in Dellenback's motion, re-referring SB 10 to committee by a vote of thirty-five to twenty-three.⁴³ Though the House believed the people should decide the fate of the death penalty and was rather facile about approving SJR 3, it was more stubborn when prescribing an alternative.

Three days after re-referral, the Constitutional Revision Committee once again took up SB 10 and Dellenback outlined the task before the members. First there was the question of reinstating the language in section one regarding the minimum term of imprisonment. Second the Committee was to consider reinstating the language in section five relative to the twenty-five year maximum sentence for second degree murder. Finally there were the possible exemptions from life imprisonment as the penalty for first degree murder.⁴⁴

The second of these items was dispensed with first after a short discussion. Redden moved that the twenty-five

⁴¹Selected Proceedings, (Tape No. 47), May 17, 1963.

⁴²Selected Proceedings.

⁴³Journals and Calendars, p. 387.

⁴⁴Committee on Constitutional Revision, Minutes, May 20, 1963.

year maximum sentence for murder in the second degree be once again added to the bill. Jones stated that some second degree cases were very serious and, in his opinion, should be first degree. He went on to suggest that the penalty for murder in the second degree be left at life but that first and second degree murder be distinguished by having no parole until fifteen years were served in the first instance and seven years in the second.⁴⁵ Redden reminded the Committee that many convictions that were then rendered as second degree murder would possibly be first degree without the death penalty. Jones countered by raising the deterrent argument. If a fifteen year sentence were valid as a deterrent in first degree murder cases then seven years should be a deterrent for murder in the second degree. Moreover, a second degree murderer might be a hopeless case for rehabilitation; but if the maximum sentence were twenty-five years, there would be no grounds to hold the fellow once the term expired. His suggested minimum sentence in each case was, however, put forth only as a suggestion.⁴⁶ When it was put to the test, the motion carried, six to two.

Redden then turned the Committee's attention to the first point mentioned by Dellenback by moving to restore

⁴⁵Committee on Constitutional Revision, Minutes, May 20, 1963.

⁴⁶Committee on Constitutional Revision, Minutes, May 20, 1963.

the language in section one which stipulated the fifteen year minimum term of imprisonment before parole. He explained that he was not necessarily in favor of such a regulation; but he recognized the necessity for it if capital punishment were to be abolished. Representative Shirley Field, however, objected primarily because of the cases in which a person ought to be paroled before the fifteen years elapsed.⁴⁷ On the vote, the motion failed.

Af this point Jones moved again to restore the language of section one as amended by the Senate but he changed the minimum sentence to be served to ten years. In doing so, he indicated that he did not believe ten years to be long enough but it was still longer than the seven year minimum still in the bill. The response to Jones' attempt at compromise was varied. Eymann, without speaking directly to the motion, suggested using the language of the proposed Constitution which said that the penalty for first degree murder would be life imprisonment unless the trial jury recommends death. He went on to suggest that the matter of abolition be left at that point for the next two years and then have the next Legislative Assembly act on it.⁴⁸ The question for the people to decide would then be

⁴⁷Committee on Constitutional Revision, Minutes, May 20, 1963.

⁴⁸Committee on Constitutional Revision, Minutes, May 20, 1963.

whether or not they wanted the provision for the death penalty in the Constitution. Reminiscent of earlier proposals in Committee, Eymann's suggestion also took the situation back to 1958 when the people faced a similar decision.

Redden alluded to this, stating that if such a proposition as outlined by Jones were to go to the people, they should know that they were voting whether or not to abolish capital punishment.⁴⁹

Reacting to Eymann's remarks, Representative Wilmot said she felt a great deal of thought had been given to the matter of abolition by the sponsors of SB 10 and SJR 3 and therefore felt that SB 10 should go along with SJR 3 for a vote of the people. Moreover, she preferred ten years to the fifteen desired by some members of the House. The majority of the Committee also preferred the ten year minimum term because it endorsed Jones' motion, five to two.⁵⁰

Dellenback then noted that one essential question remained which was whether the Committee wanted to insert any exceptions to the life imprisonment provision into the bill. Jones indicated that he had given much thought to a suggestion by Warden Gladden that the penalty for killing

⁴⁹Committee on Constitutional Revision, Minutes, May 20, 1963.

⁵⁰Committee on Constitutional Revision, Minutes, May 20, 1963.

while under sentence in the penitentiary still be death. But this was also one situation in which the error in convicting the wrong person would be greatest. The case of killing the victim of a kidnapping was also one exception that might be valid. But again Jones noted that having this one exception might present problems, though he did not conjecture what those problems might be.⁵¹ Therefore, he concluded it was best to have no exceptions at all. Eymann then moved that the penalty for first degree murder be left with no exceptions. After a vague protest by Dellenback that he preferred to let the legislature decide what the penalty should be for murder in the first degree, the Committee approved the motion, seven to two.⁵²

Having adjusted the bill, the Committee then voted five to four to return SB 10 to the floor with a "Do Pass as Amended" recommendation. As a footnote to the decision, Dellenback stated for the record that he voted in favor of sending the bill back to the floor because he had promised that SB 10 would come out of committee for a vote of the whole House.⁵³ This promise kept, the bill was ready for its final test in the House.

⁵¹Committee on Constitutional Revision, Minutes, May 20, 1963.

⁵²Committee on Constitutional Revision, Minutes, May 20, 1963.

⁵³Committee on Constitutional Revision, Minutes, May 20, 1963.

Meanwhile, SJR 3, adopted with little discussion on the floor, went back to the Senate for approval of the House amendments. But all was not easy going in the upper chamber because the Senate, on May 23, refused to concur in the additions proposed by the House. To resolve the difficulties a conference committee was established with Senators Willner and Boyd Overhulse, a member of the Senate Judiciary Committee, as the Senate conferees. The Speaker of the House, Clarence Barton, appointed Redden and Dellenback as the members from the House of Representatives.⁵⁴

Also on May 23, the House took up the latest version of SB 10. Redden opened the third reading debate by noting the compromise reached in committee on the ten year minimum term of imprisonment in place of the original fifteen or the amended seven year term. Representative Fred Meek of Portland, followed these brief remarks by declaring his opposition to SB 10. According to Meek, "The bill is no more palatable to me [now] than it was then [before referral]."⁵⁵ He warned that the new Constitution would run into difficulty if the bill were not altered; but he did not elaborate on how this would be so. It seems plausible that the abolition package with SB 10 would not greatly affect a decision on the new Constitution since the

⁵⁴Journals and Calendars, p. 581.

⁵⁵Selected Proceedings, (Tape No. 51), May 23, 1963. Brackets not in the original.

Constitutional Revision Committee provided for a popular decision on the fundamental question of abolition and purposely maintained the separate identity of SJR 3 and the new charter. Furthermore, the amendments by the House committee to SJR 3 on May 13 emphasized the separate identity of the two resolutions by allowing for an appropriately worded ballot title regardless of whether the new Constitution were approved or not. Yet Meek's argument may have carried more emotional weight than logical persuasion.

Cornelius Bateson spoke next, opposing the concept of the minimum sentence, though not the bill itself. He held that no good purpose was being served by a mandatory minimum sentence such as that required in the bill. He lauded the high calibre of the State Parole Board, and asserted that the House should show its faith in the board presumably by dispensing with the minimum term.⁵⁶ This position, though not a formal recommendation, fell on deaf ears. Throughout Senate and House testimony, as well as committee action, opponents and proponents of abolition recognized the necessity of a minimum term of some duration to "sell" abolition to the voters. Bateson's stance was much more open-ended than the realities of the situation, as judged by the Assembly, would permit. Yet the bill, according to Bateson, was far too important to let it fail.

⁵⁶Selected Proceedings, (Tape No. 51), May 23, 1963.

because of the minimum sentence provision; he would vote for it.⁵⁷

One who would not endorse it, however, was Victor Atiyeh, also of Portland. He made his position clear by asking Redden why the House was requested to approve SB 10 prior to a decision by the people on the fundamental issue. Redden reiterated the position of the abolitionists: passing SB 10, subject to approval of abolition by the electorate, was the only fair way to approach the people and "give them some idea of the intent of the legislature if they agree to eliminate capital punishment."⁵⁸ To Atiyeh, however, the rationale for such an arrangement was quite different. It was, he charged, a method of buying votes; and for this reason he was opposing the abolition measure. Pressing his opposition, Atiyeh joined with Berkeley Lent in putting to Redden a series of questions on the procedures followed in developing the bill, including which committees considered it and how many witnesses testified in favor of reducing the maximum sentence of twenty-five years from life for second degree murder. The object of this tactic was to discredit the measure as a sound piece of legislation; Redden was on the only two committees--State and Federal Affairs and Constitutional Revision--which

⁵⁷Selected Proceedings, (Tape No. 51), May 23, 1963.

⁵⁸Selected Proceedings, (Tape No. 51), May 23, 1963.

examined it and only one witness, Senator Willner, appeared before the State and Federal Affairs Committee to testify.⁵⁹ But the majority of the House members were not swayed by Atiyeh's attack. Following his questions, the House passed the bill for its third reading, thirty-six to twenty-four.⁶⁰

Four days later, on May 27, the conference committee established to rationalize the differences between the House and Senate positions on SJR 3, submitted its report to the Senate, asking that the body concur in the House amendments and readopt the resolution.⁶¹ Suspending the rules to place the matter on that day's calendar, the upper chamber approved the report and re-passed SJR 3, twenty-five to two.⁶² The House heard the recommendation of the conference committee the next day and followed suit in approving it but without a roll call vote.

On Monday, June 3, both SJR 3 and its companion, SB 10, were signed by the Speaker of the House and the President of the Senate. Abolition had cleared the legislative hurdle and awaited the approval of the voters at the 1964 general election.

⁵⁹Selected Proceedings, (Tape No. 51), May 23, 1963.

⁶⁰Journals and Calendars, p. 453.

⁶¹Oregon, Legislative Assembly, House of Representatives, Conference Committee Report to Printed Engrossed Senate Joint Resolution 3, 52nd Sess., May 27, 1963.

⁶²Journals and Calendars, p. 581. Those who voted against the resolution were Ben Musa, President of the Senate, and Eddie Ahrens, Turner, Oregon.

CHAPTER VI

CONCLUSION

In review, the debates in Oregon and England to abolish the death penalty revealed that the same arguments were heard many times in each discussion and that these arguments were not fully developed by the legislators who examined the issue. Moreover, the participants in the debates failed to deal adequately with the fundamental moral questions which underlie capital punishment.

To illustrate these points, first consider the argument of deterrence. Legislators in both assemblies heard the abolitionists' negative petition that the death penalty was not a deterrent to murder and was, therefore, unnecessary. They heard others claim that capital punishment was indeed a deterrent. But the issue itself bore substantially more examination in Parliament than in the Oregon Legislative Assembly. From the opening address on the second reading in the Commons to the third reading in the Lords, the deterrent value of hanging was alternately confirmed and denied. For some, such as Sir Peter Rawlinson, this value was a matter of personal judgment unrelated to statistical evidence. For others, such as Sir Frank Soskice and Baroness Wootton, the statistics tended to

support the abolitionist view; but, in the final analysis, this data left the matter unsettled.

By contrast, the same issue received somewhat less attention in the Oregon debate, though it was a major concern. Senator Willner, among others, attacked the supposed deterrent effect of the death penalty in his testimony before the Senate Judiciary Committee, citing the Report of the Royal Commission (1953) for support. Representative Lang countered, firmly defending capital punishment as a guard against the crime of murder. Yet subsequent testimony merely reiterated such comments and committee discussion did not seek to uncover any flaws in the logic or supporting evidence. Representative Dellenback reaffirmed again and again the positive deterrent value of the gas chamber but without having to marshal information to substantiate his claim. Without proper development and use of data which clearly denies or confirms the death penalty's ability to deter, this argument remains a matter of conviction and faith.

Second, there is the concern for the public's reaction to abolition expressed by the solons in both assemblies. This is an argument which can be measured either at the polls or by opinion surveys. Without digressing into a discussion of the accuracy of such surveys, it is best to question the treatment of this argument. In Oregon, the popular attitude towards abolition was of little

real concern because the electorate would register its view in the 1964 general election. Therefore it received token acknowledgment only as it related to the bill's marketability at the polls. The English dealt with popular opinion at length but again it was not a productive line of inquiry. There was to be no referendum on capital punishment; the members were free to vote their consciences on the bipartisan issue. For either situation, Silverman's comment in opening the second reading debate provides the best answer to resolve this question. At that time, it will be recalled, he declared that "In a Parliamentary democracy it is for Parliament to decide what Parliament thinks right, knowing that in the background there is the public...."¹ The kernel of this belief is Edmund Burke's statement that Parliament should not subordinate its judgment nor destroy its conscience to do something it believed wrong for the sake of a vote or an election.² But this answer proved inadequate to opponents of the Murder Bill. In Oregon and England, the lawmakers returned to the argument again and again, forestalling further discussion of more pertinent topics.

Third, the proposed alternatives of each abolition bill also figured prominently in the debates. Both the

¹Great Britain. 5 Parliamentary Debates (Commons), DCCI (1964), 872.

²Debates (Commons), DCCI (1964), 873.

House of Commons and the House of Lords spent some time in committee wading through the several suggested options, each one designed to delay complete elimination of capital punishment. In Oregon, the debate on the alternative sentence and parole regulations erupted into a fight on the floor of the House of Representatives, resulting in a referral of the abolition package and a threatened tabling of the measure in committee. As used in each instance, the argument was over how best to design the alternative, and not that there was no suitable replacement for hanging or the gas chamber. The issue became a diversionary tactic rather than an argument on the principle of capital punishment.

Though treated differently in each assembly, the inequities of application of the death penalty also appear to have been a useful argument, at least for the abolitionists. The House of Lords, led by Baroness Wootton and the Lord Chief Justice, devoted a portion of its allotted time on the second reading of the Murder Bill to the anomalies produced by the present law, noting the difficulties of administering a law which failed to account for a multitude of situations involving murder. In Oregon, however, the legislators worried more over the inequitable applications of the death penalty to the lower socio-economic groups. The evidence to support this concern was available by comparing socio-economic class in capital cases with the

eventual disposition of the accused or convicted murderer. Though perhaps the same argument could have been made in England, the effects of the Homicide Act dominated the issue of inequity. Even so, the evidence could be gathered to document the errors in convictions and to note the hair-line cases.³ Both the Oregon and English versions of this argument have a legitimate role in the debate over capital punishment, even though their role may be of secondary importance. Unfortunately, they were not cultivated to fulfill even their secondary character.

Fifth, there is the argument of cost which is also a legitimate consideration in the capital punishment debate. In testimony before the Senate Judiciary Committee, Hugo Bedau suggested that the increased court costs for appeals in capital cases surpassed the cost of imprisonment for life. No such thesis was examined in Parliament, and even in the Oregon debate, it was not pursued at length. However, it would have been an appealing argument to tax payers and lawmakers if properly supported with appropriate data. Easily expressed in quantitative terms, the issue can be demonstrated, even though it runs counter to the popular view that it is less expensive to execute a person

³See, for example, Leslie Hale, Hanged in Error, (Baltimore: Penguin Books, 1962).

than to incarcerate him for life.⁴ Yet no legislator followed up on this during committee or during the testimony. For that matter, it was given only cursory mention by Bedau himself.

Finally, the moral implications of the death sentence, in contrast to the other spoken arguments, are central to a discussion of capital punishment. Examination of such propositions as society's relationship to the individual and the worth of each person is a more fruitful line of inquiry. But there were only brief discussions of the moral issues in the House of Lords and the Oregon Senate. In the Lords, for example, the Bishop of Chichester called upon the state to repudiate the taking of life by refusing to claim a life for a life. Also, Senate testimony was spotted with protests from the clergy and explanations for the "eye for an eye" tenet. But in neither place did the participants amplify this line of reasoning even though it directly addressed the principle of abolition. The need to develop the moral questions involved in capital punishment is underscored by the considerable attention devoted to the secondary arguments and the concomitant lack of scrutiny and data in their use.

⁴Thomas Gaddis, the Portland author who testified at the same hearing, developed this argument later when, in 1964, he campaigned for abolition. See the Capital Journal, February 4, 1964, sec. 1, p. 7.

The issue of deterrence, the question of the proper alternative, the role of popular opinion and the other spoken arguments all are relevant to the debate on capital punishment, but they are also of secondary importance. They deal, not with the principle of abolition, but with the possible results once abolition is resolved. Not only did the lawmakers in the study not fully consider the fundamental questions, but they did not muster all the requisite evidence for the arguments they did use. Given the long history of capital punishment and the movement to abolish it, the moral questions involved in the dispute will continue unexamined by those who debate if they persist in dwelling on subordinate issues. Only when the basic moral implications of the death penalty are examined and resolved can the debate itself progress towards resolution.

BIBLIOGRAPHY

- Beatty, John L., and Johnson, Oliver A. Heritage of Western Civilization: Selected Readings. 3rd ed. Englewood Cliffs, New Jersey: Prentice Hall, 1966.
- Beccaria - Bonesana, Cesare. An Essay on Crimes and Punishments. Stanford, California: Academic Reprints, 1953.
- Bedau, Hugo A. "Capital Punishment in Oregon, 1903-1964," Oregon Law Review, XLV, (December, 1965), 1-39.
- _____. The Death Penalty in America. Garden City, New York: Doubleday and Co., Inc., 1964.
- Blom-Cooper, Louis J. The Hanging Question. London: Gerald Duckworth and Co., 1969.
- Bressler, Fenton S. Reprieve. London: George Harrap and Co., Ltd., 1965.
- Bromhead, P. A. The House of Lords and Contemporary Politics. London: Routledge and Kegan Paul, 1958.
- _____. Private Members' Bills in the British Parliament. London: Routledge and Kegan Paul, 1956.
- Calvert, E. Roy. Capital Punishment in the Twentieth Century. London: G. P. Putnam's Sons, 1927.
- Capital Journal. 1963-1964.
- Christoph, James B. Capital Punishment and British Politics; The Movement to Abolish the Death Penalty, 1945-1957. London: Allen and Unwin, Ltd., 1962.
- Dann, Robert H. "Capital Punishment in Oregon," The Annals, CCLXXXIV, (November, 1952), 110-114.
- Facts on File Yearbook. New York: Facts on File, Inc., 1960.
- Frank, Jerome, and Frank, Barbara. Not Guilty. Garden City, New York: Doubleday and Co., Inc., 1957.
- Gollancz, Victor. Capital Punishment: The Heart of the

- Matter. London: Victor Gollancz, 1955.
- Gowers, Ernest. A Life for a Life? London: Chatto and Windus, 1956.
- Great Britain. Parliamentary Debates (5th series). (Commons.)
- Great Britain. Parliamentary Debates (5th series). (Lords.)
- Great Britain. Report of the Royal Commission on Capital Punishment, 1949-1953. Cmd. 8932. London: H. M. Stationery Office, 1953.
- Great Britain. Report of the Select Committee on Capital Punishment, 1929-1930. London: Her Majesty's Stationery Office, 1931.
- Hale, Leslie. Hanged in Error. Baltimore, Maryland: Penguin Books, 1962.
- Hazen, David. Scrapbook 76. Oregon Historical Society.
- Helm, P. J. Alfred the Great. New York: Thomas Crowell Co., 1963.
- Hollis, Christopher. The Homicide Act. London: Victor Gollancz, Ltd., 1964.
- Johnsen, Julia E. Capital Punishment. New York: The H. W. Wilson Company, 1939.
- Joyce, James Avery. Capital Punishment: A World View. New York: Thomas Nelson and Sons, 1961.
- Koestler, Arthur. Hanged by the Neck. Baltimore, Maryland: Penguin Books, 1961.
- _____. Reflections on Hanging. New York: Macmillan Co., 1957.
- Laurence, John. A History of Capital Punishment. New York: The Citadel Press, 1960.
- McClellan, Grant S. Capital Punishment. New York: The H. W. Wilson Company, 1961.
- Nicolson, Nigel. People and Parliament. London: Weidenfeld and Nicolson, 1956.

Oregon. Constitution. (1857).

Oregon. Revised Statutes. (1963).

Oregon. Legislative Assembly. House Bill 1677. 52nd Sess., 1963.

_____. Journals and Calendars of the Senate and House. 52nd Sess., 1963.

_____. Senate Bill 10. 52nd Sess., 1963.

_____. Senate Bill 21. 52nd Sess., 1963.

_____. Senate Joint Resolution 3. 52nd Sess., 1963.

Oregon. Legislative Assembly. House of Representatives. Conference Committee Report to Printed Engrossed Senate Joint Resolution 3. 52nd Sess., 1963.

Oregon. Legislative Assembly. House of Representatives. Committee on Constitutional Revision. Minutes. 52nd Sess., 1963.

Oregon. Legislative Assembly. House of Representatives. Committee on State and Federal Affairs. Minutes. 52nd Sess., 1963.

Oregon. Legislative Assembly. House of Representatives. Selected Proceedings of the House. Tapes No. 47 and No. 51. 52nd Sess., 1963.

Oregon. Legislative Assembly. Senate. Committee on Judiciary. Minutes. 52nd Sess., 1963.

Oregon. Secretary of State. Official Voter's Pamphlet: General Election, November 4, 1958.

Oregon Council to Abolish the Death Penalty. "The Case Against Capital Punishment in Oregon." Portland, 1964. (Mimeographed.)

Oregonian. 1914-1964.

Phillipson, Coleman. Three Criminal Law Reformers: Beccaria, Bentham and Romilly. Montclair, New Jersey: Patterson Smith, 1970.

Radzinowicz, Leon. A History of English Criminal Law and Its Administration from 1750. London: Stevens and Sons, 1948.

- Rigg, James McCullen. "Sir Samuel Romilly," Dictionary of National Biography, vol. XVII (1953).
- Rose, Gordon. The Struggle for Penal Reform: The Howard League and Its Predecessors. London: Stevens and Sons, 1948.
- Sampson, Anthony. Anatomy of Britain Today. New York: Harper and Row, 1965.
- Sellin, John Thorsten (ed.). Capital Punishment. New York: Harper, 1967.
- Smith, John M. P. The Origin and History of Hebrew Law. Chicago: University of Chicago Press, 1961.
- Stevas, Norman A. F. St. John. Life, Death and the Law. London: Eyre and Spottiswoode, 1961.
- Taylor, Eric. The House of Commons at Work. London: Penguin Books, 1971.
- Templewood, Viscount. The Shadow of the Gallows. London: Victor Gollanez, Ltd., 1951.
- Tidmarsh, Mannes, Holloran, J. D., and Connolly, K. J. Capital Punishment: A Case for Abolition. London: Steed and Ward, 1963.
- The Times (London), 1962-1965.
- Tuttle, Elizabeth O. The Crusade Against Capital Punishment in Great Britain. London: Stevens and Sons, 1961.
- United Nations. Department of Economic and Social Affairs. Capital Punishment. United Nations Document No. 62.IV.2. 1962.
- Wilding, Norman and Laundry, Philip. An Encyclopedia of Parliament. New York: Frederick A. Praeger, 1968.