# Department of Justice

STATEMENT

by

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before the

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
of the
SENATE JUDICIARY COMMITTEE

on

S. 1760. To Abolish the Death Penalty

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We live in days of turbulence. Violence is commonplace: murder an hourly occurrence.

In the midst of anxiety and fear, complexity and doubt, perhaps our greatest need is reverence for life--mere life: our lives, the lives of others, all life. Life is an end in itself. A humane and generous concern for every individual, for his safety, his health and his fulfillment, will do more to soothe the savage heart than the fear of state-inflicted death which chiefly serves to remind us how close we remain to the jungle.

"Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind." Shaw advises. When the state itself kills, the mandate "thou shalt not kill" loses the force of the absolute.

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Surely the abolition of the death penalty is a major milestone in the long road up from barbarism. There was a time when self preservation necessitated its imposition. Later inordinate sacrifices by the innocent would have been required to isolate dangerous persons from the public. Our civilization has no such excuse.

Today more than seventy nations and thirteen of our states have generally abolished the death penalty. While most states and the federal system reserve the ultimate sanction, it has been rarely used in recent years. There were 199 executions in the United States in 1935. There was only one in 1966; two in 1967. Only one person has been executed under any of the 29 federal statutes authorizing death in the past decade. He can be the last.

Our history shows the death penalty has been unjustly imposed, innocents have been killed by the state, effective rehabilitation has been impaired, judicial administration has suffered, crime has not been deterred. Society pays a heavy price for the penalty of death it imposes.

Our emotions may cry vengeance in the wake of a horrible crime. But reason and experience tell us that killing the criminal will not undo the crime, prevent other crimes, or bring justice to the victim, the criminal, or society. Executions cheapen life. We must cherish life.

Extensive studies show that the death penalty does not deter crime. A comprehensive study by Professor Thorsten Sellin concludes, "it has failed as a deterrent." A United Nations report finds from all available information that abolition of the death penalty has no effect on murder rates. With, or without, they are much the same. Why should we expect a deterrent value? Most capital crimes are committed on impulse in a moment of passion without thought of gain or loss. No punishment deters unpremeditated crime. Premeditated crime is committed by people who believe they will not be caught no matter what the penalty. The best deterrent is swift apprehension, prosecution and conviction. The need is to build better law enforcement--to professionalize police, to bring science and technology to criminal justice. The death penalty is considered by some to be incentive for mentally unstable persons to commit capital crimes.

The death penalty's impact on the administration of justice has been malign. Mr. Justice Frankfurter strongly opposed it for this reason. "When life is at hazard in a trial," he said, "it sensationalizes the whole thing almost unwittingly." He regarded as "very bad" the effect on juries, the bar, the public and the judiciary. President Johnson's Crime Commission found that the sensationalism "destroys the fact finding process."

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In a capital case, realization of the consequences of error permeates the entire proceedings. A jury might acquit because of its fear of the death penalty rather than the weight of evidence. Mr. Justice Jackson observed that appellate courts in capital cases "are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."

Fear of mistake produces excruciating delays in executions. Of the 435 men now on death row, who range in age from 16 to 68, half have been waiting death more than 29 months since being sentenced. Such delays add immeasurably to the inhumanity of capital punishment. Combined with the infrequency of actual imposition, delay eliminates a deterrent effect the penalty might otherwise be thought to have. Moreover, as the American Bar Foundation found in a 1961 study, it weakens public confidence in the law. The President's Crime Commission noted: "The spectacle of men living on death row for years while their lawyers pursue appellate and collateral remedies tarnishes our image of humane and expeditious justice."

The death penalty is irrevocable. For this reason, Lafayette vowed to opposecapital punishment until "the infallibility of human judgment" was demonstrated to him. Innocent

persons have been executed. Mental defectives and incompetents have been executed. A judicial determination that a person is legally responsible for his act is not yet precise.

A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of men on death row.

Death has been visited in a discriminatory fashion. Clarence Darrow observed that, "from the beginning, a procession of the poor, the weak, the unfit, have gone through our jails and prisons to their deaths. They have been the victims." It is the poor, the weak, the ignorant, the hated who are executed. Racial discrimination occurs in the administration of capital punishment. Since we began keeping records in 1930, there have been 2,066 Negroes and 1,751 white persons put to death, although Negroes made up only one-eighth of our population. Of the 455 men executed for rape, 405 were Negroes.

As a people, we are committed to the rule of law. We obey the law, not because we are forced to or fear not to, but because we want to. The law therefore must be just. It must

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offer hope to all our people. When it suggests vengeance or inhumanity, it loses the respect that is necessary if a free people are to fix it in their hearts.

Modern penology offers effective methods of protecting society. We are at last beginning to realize what can be accomplished through rehabilitation, achieved in confinement and in limited custody or supervision in open society. Community treatment centers, halfway houses and work release programs are evidence of the thrust toward community programs. Their potential is great. They are the future of corrections. It is a sad commentary on how much we care that this wealthy nation spent 95% of all funds for corrections on custody, the remaining 5% on education, therapy and other rehabilitation techniques--while still killing those who offend us the most.

If an offender cannot adapt to community programs, he need not be a burden to society. Through employment in industries within the prison he can be productive. If he is unable or unwilling to work, he can be treated humanely, allowed to live, and society can be fully protected. We do not need to kill from fear.

Murderers, the most likely candidates for execution, generally make well behaved prisoners. There is nothing to indicate that the death penalty is needed to protect prison personnel from murderous assaults by life-termers. One study covered 121 assaults with intent to kill in the prisons of 27 states during the 1940's. Only 10 were committed by prisoners serving life for murder.

The death penalty is inconsistent with the purposes of modern penology. It is a costly substitute for the effort and money needed to develop correctional knowledge and skills.

Our difficult days call for rare courage: the willingness to disenthral ourselves, to think anew and act anew. There is no justification for the death penalty. It cheapens life. Its injustices and inhumanity raise basic questions about our institutions and purpose as a people. Why must we kill? What do we fear? What do we accomplish besides our own embitterment? Why cannot we revere life and in so doing create in the hearts of our people a love for mankind that will finally still violence?

The death penalty should be abolished.