FEBRUARY 3, 1994

ATHENAEUM SOCIETY

EDWIN MORTON WHITE

DEATH IS DIFFERENT

In an editorial in the Courier-Journal, January 30, 1994, Frank Rich gave me my newest lead in this Athenaeum paper.

In his editorial "Simplistic Crime Crusaders" he states:

The good news is that it's no longer the economy, stupid. Crime now leads the pollsters hit parade of hot issues.

The bad news is that most politicians will now do for crime what they did for the economy: pander to the public by offering quick fixes to postpone the complex process of halting what the unglib Senator Daniel Patrick Moynihan calls "the manifest decline of the American civic order."

When murderer Joe Lewis Wise went to Virginia's electric chair Tuesday, September 17th, he became the 220th person executed in the nation since 1977, when Gary Gillmore faced a Utah firing squad ending a ten year hiatus for capital punishment.

The Courier-Journal on September 17, 1993, reported that executions in the United States that day reached the highest total since 1962. The news article related that states have already executed 32 prisoners this year, fourteen in Texas alone, and more than in any year since 1962. History tells us one thing that is definite about the debate regarding the death penalty and that is that the more executions there are the more lively the debate becomes regarding whether or not we should have a death penalty. Various writers on both sides of this issue are suggesting that the consensus of American citizenry at large clearly shows that we as a people are in favor of the death penalty. From a low of roughly forty-two percent in favor of the death penalty in the 1960's, the polls now tell us that anywhere from seventy to eighty-two percent of those polled are in favor of the death penalty.

DEATH IS DIFFERENT

It has always been. We have known or should have known that since November 7, 1932, the United States Supreme Court considered death to be different when it decided the Scottsboro rape case or Powell v. Alabama, 287 US 45 (1932). Powell held

that indigent defendants in a capital trail were entitled to court appointed attorneys. The Court thus held that death was different because it did not mandate appointment of attorneys in non-death cases.

In Kentucky as early as 1944, the highest court in this Commonwealth held in Edwards v. Commonwealth, 182 SW2d 948, that where a defendant's life is at stake, the technical rules of procedure must give way to the more lofty aim that justice may be done.

DEATH PENALTY - A PERSPECTIVE FROM AN HISTORICAL POINT OF VIEW

Man alone among all living creatures was endowed with the freedom to choose between following his instincts or departing from them. In the exercise of this choice, man learned that departure from the rule of instinct required a substitute rule and that he could not survive in chaos. So that the species could survive, man further learned that he must accept a degree of disciplined restraint - the law - in choosing to depart from instinct. John Ed Pierce in an editorial December 12, 1993, said that rules are the lubricant that permit people to live together with a minimum of friction.

We all know that the formulation, application and enforcement of duties and rights constitutes rule by law. Disciplined conformity with law is the essential substitute for

rule by instinct. Who made these rules and how were they enforced? How do we deal with the "friction"?

All early tribal societies used banishment as its severest punishment and the story from Genesis Chapter 4 of Cain and Able is just the historical retelling of this custom. The Abington Bible commentary interprets this part of Genesis and tells us that the story is representative not of two brothers but of two types of people, Cain being a nomad and Able being a farmer. The commentary further states that God did not impose an arbitrary penalty on Cain but that He merely stated the inevitable effect of the crime, that is that the land itself was angry for having Able's blood spilled into it and because of that its anger it would no longer allow Cain to remain on the land, that is to farm. Therefore, God's punishment was banishment or to make Cain a wanderer. This is not to say that death would not have been an appropriate punishment for Cain's crime. In fact, in Genesis Chapter 9, Verse 6, it is stated, "who so sheddeth man's blood by man shall his blood be shed." The brief reference in Genesis simply indicates that when a member of the tribe is killed the survivors may exact a life for a life without governmental intervention.

The evolution of the process for legally putting a person to death for murder is an interesting journey through legal history. The Supreme Court of the United States has held that the history of freedom is in no small measure the history of fair criminal procedures. Our criminal procedures of today have

not been developed overnight. Our society's method of dealing with persons convicted of murder also has not been developed overnight. It has been influenced by many different things.

If you had been arrested for a crime long ago, you would have found that the justice you received was very different from that of today. In 1584 the assassin of William of Orange was punished for his crime in a hideously cruel manner. The arm with which he had committed murder was immersed in boiling water. The following day it was cut off. During the next eighteen days, his flesh was torn with red hot irons, he was stretched on a wheel and he was beaten with a wooden club. Finally, the magistrate in charge, out of pity, ordered him strangled.

In primitive societies, custom governed the rules of conduct. Crime was equated with sin and offenders were punished as expiation in order to prevent the gods from wreaking vengeance on the entire tribe. For instance, if you had broken some significant taboo, such as committing incest, you might have been condemned to death along with your family so as to remove the source of danger to the rest of the tribe. If you had been guilty of a lesser offense, such as cowardice, you might have suffered public humiliation and then banishment. Actions which affect the society as a whole, such as the breaking of taboos, witchcraft and treason, were categorized as public crimes and were distinguished from private offenses.

Private crimes were those acts considered matters for personal revenge. These included murder, assault, theft, slander

and adultery; they were settled between individuals and families. Even before there were written laws, people recognized that it was necessary to protect personal and property rights. In more structured tribal societies, entire clans had the collective responsibility for avenging wrongs done to the individual members by members of another clan. If the offender could not be punished, then vengeance was visited upon the entire clan to which he or she belonged.

The carrying out of vengeance was regulated by the ancient code of lex taliones, the principle of an eye for an eye and a tooth for a tooth. The first biblical mention of this ancient code is in Exodus 21:24. The lex taliones also had application outside of the Bible. It was a universal principal with all the nations bordering on the Mediterranean Sea and represented a step toward the humanizing of acts of revenge limiting them to tit for tat and no more. It was no doubt originally intended to hold the balance in the relations of human society by means of a negative procedure of compensation.

After a crime was committed there has always been a desire for retaliation or even exact retaliation and this lead to blood feuds. It was recognized very early that blood feuds were not very satisfactory in one important respect: there was no means of ending them. Thus, the early Germanic and Anglo-Saxon peoples eventually developed a system of compensation that could end blood feuds and retaliations. The laws were very detailed and precise in assigning values to all kinds of injuries. For

example, an injury as long as the first joint of the forefinger was worth a shilling, and an injury to two joints long was worth two shillings, etc. The elders of the tribe acted as an impartial third party in settling disputes. Their decisions were not binding, and their function was more of peace keeper than judge. Still, this system of justice apparently represented an advance because it reduced the endless fighting and killing and made the offender at least try to redress any wrongs that had been committed.

Prior to the eighth century, the early penal customs surrounding feud and compensation applied only to free men and to those who were equal in social standing. Obviously, only propertied people were able to make monetary compensation. Corporal and capital punishments were reserved almost exclusively for slaves during this time. However, between the eighth and tenth centuries, punishments such as whipping, mutilation and death began to be used more frequently for free men, especially for crimes which were considered typical of slaves. These slave punishments were gradually incorporated into the criminal law as it evolved.

The administration of the earliest Anglo Saxon law dealt with two legal institutions, the blood feud and lynching. These, however, are not particular to the Anglo Saxons. As previously mentioned, many primitive societies used family fighting to address certain kinds of misbehavior and mob execution for others.

The feud and lynching are distinct from unorganized homicide which does not require the existence of society. The feud and lynching were responses to the breach of accepted rules of conduct and sought in their simple minded way to enforce such law as then existed.

The word "lynch" was not part of the language at this time although the act was. The word did not come into being until the act had existed for many centuries. The term comes to us from the sur name of an eighteenth century Virginian, a Justice of the Peace less interested in justice than in peace. It should also be noted that he was a Colonial and only lynched Tories.

Lynch now denotes an organized killing outside the law. Execute without due process of law says one dictionary, but in Anglo Saxon England what we now call "lynching" was not only legal it was obligatory. If a criminal act was seen to occur, the community was duty bound to chase the culprit and when it caught him, kill him. Anyone who witnessed the crime was expected to call on those available to join in a pursuit and if the quarry beat the pack to the communal boundary, the next settlement was expected to take over. It was sort of a relay race with the human baton slightly out of reach until the end. At the end was execution.

Cy Rembar in his book, The Law of the Land, relates that it was more than sport; it was an instrument of government but it was also sport and there has probably never been a more

popular one. Here was homicide without risk, either from its victim, he being so outnumbered, or from the law which did not scold but instead approved and indeed demanded so that conscience could not spoil the fun.

It came to be known as the Hue and Cry. Hue means a hunting cry or call - cry is defined as to call out an announcement. The one who saw the crime let out the yell, at least he did if help was handy. Anyone who heard the yell, that is now the Hue and Cry, was supposed to join the chase.

A victim and runaway and the evidence of one person's cry. That was all the trial there had to be. In most instances probably there was guilt, but there must have been a few mistakes and likely now and then a frame up. It would take no great imagination for the miscreant to start a Hue and Cry against an innocent bystander. There seems to be no recorded case in which the quarry, at length run down, denied the crime because he was innocent but killed anyway. Nobody was bothering to keep records and it obviously must have happened.

When it did, those dominant in the group made their on-the-spot decision. It may be properly assumed that often there was execution of the innocent. It was a quick procedure, though. Those who complain about the law's delays might ruminate not only about this practice in Anglo-Saxon England but in Mayfield as late at 1908. The Louisville Times ran a story August 1, 1908, entitled "Justice, Swift and Terrible - Short Work of Negro Fiend, Mathis, at Mayfield." The story goes on to

relate that at 6:55 p.m. the prisoner who was under guard of the National Guard (Company D. Latham Light) arrived for trial. At 7:00 the trial began. At 7:24 a death verdict was returned. At 7:55 first drop from scaffold. At 8:05 second drop from scaffold and at 8:15 display of body in front of courthouse.

It is worth mentioning for today that we are inclined to be more disturbed by frustration than by injustice. The common criticism of the law is not that it works badly but that it works slowly. One of Shakespeare's best known phrases about the law is "the law's delay". Slowly can, of course, be badly but there are other things that should concern us more. Cy Rembar also wrote that our Constitution decrees a solicitous regard for Defendant's rights and that takes time. A great deal of what seems ponderous in the law comes from the need to ponder. Speedy justice is not the ultimate aim, just justice is. Think about the Hue and Cry.

During the tenth, eleventh and twelfth centuries in England, when the kings became more powerful and were able to extend their authority, the regulation of criminal punishment gradually ceased to be a private matter. During this time in England there was a tremendous struggle between the monarchy and the church for control of what we would call the courthouse. The struggle reached a climax in 1154 when Thomas Becket, the Archbishop of Canterbury, was killed by soldiers of King Henry, II. During his life, Becket had clearly wanted to take the clergy beyond the reach of royal prerogative and royal law and

the royal court. Henry resisted. Becket's followers, after his death, made huge profit from his murder. The martyr Becket accomplished much that the Archbishop Becket could not. The outcome of this tragedy was a compromise on all issues and much more favorable to the church because of the manner of Becket's death. The privileges and obligations of land holding in the feudal system which then made up the bulk of what we would call civil law would continue to be the business of the royal courts. But crimes committed by the clergy would in the main be handled by church courts. The significance of this is that apparently one-sixth of the population in England at that time as well as vast holdings of property belonged to the church. The secular courts would decide whether an accused was a church man and if they found that he was, they could do nothing to him. This privilege came to be know as benefit of clergy and regardless of the crime if a person was found to be in that status the secular courts could do nothing with him. Apparently this privilege also existed at that time for peers of the realm and continued to exist for them until late in the nineteenth century.

Crime was now considered a public matter, an offense against the king and a breach of public tranquility. No longer did the victims receive compensation, instead, the king exacted tribute and punishment. The penal system was administered by officers and judges in the name of the crown, and the heavy fines that were levied were a good source of income. The principle of compensation for injury reverted to the principle of vengeance.

The individual no longer had the power and it was the central authority that took revenge. The penalties for crime became very harsh, partly in order to maintain the authority of the king and partly because of the idea that punishment did have a deterrent effect. These developments ushered in an era of great severity and cruelty that persisted for several hundred years. Many offenses that we would consider relatively minor today were punishable by death. In England as late as the eighteenth century, there were still more than 200 crimes that carried the death penalty.

Horrible forms of torture were used, not only in determining guilt, but also as punishment for serious crimes. Capital punishment ranged from more or less instantaneous death to the slow, agonizing means of execution reserved for criminals such as the killer of William of Orange described earlier. The court decided whether the criminal was to die slowly and by what means. It should be noted that this occurred not only in the secular courts but in the church courts, too. The issue that is important to us from this historical perspective is why?

As we all know, Jesus Christ was executed for a violation of Roman law at the insistence of the Jewish population in Palestine. The Jewish method of execution was stoning to death. The Roman form was crucifixion. How ironic is it that the symbol of Christianity is the cross, the method of execution used to kill our Lord. Crucifixion remained the official Roman method of execution until the fall of the Empire.

From 400 to 1500 the world of most of our ancestors was plunged into darkness. The level of everyday violence - deaths in alehouse brawls, during bouts with staves or even in playing football or wrestling - was shocking. As late as the year 1240 in a tournament near Dusseldorf sixty knights were hacked to death. Despite their bloodthirstiness, all were Christians. Medieval Christians knowing to turn the other cheek would cause it to be bloodied, did not turn it. The threat of capital punishment was even used in religious conversions and medieval threats were never idle. Charlemague was a just and enlightened ruler for the times and was also a devout Christian. After conquering a group of Saxon rebels he gave them a choice between baptism or immediate execution. They declined and he had all 4,500 of them beheaded that morning.

William Manchester wrote a wonderful book entitled A World Lit Only By Fire and he tells us that folklore of the time was rich in violent tales stating that death was a constant companion. Life expectancy was brief; half of the people in Europe died before age 30. If a man passed 30, his chances of reaching 40 or even 50 were probably good, though he looked much older. At 45 his hair was white, his back as bent and face as knurled as an octogenarian's today. The same was true for women. In longevity she was less fortunate than her husband. A young girl's life expectancy was 24.

Prior to the 1500's when there was but one church it had been the most dominate factor in the life of king, noble or

serf. The medieval church was strong on law and order. Excessive punishments were common. In fact, to eat meat during Lent was a capital offense. The "evening news" came from the pulpit as did most moral teaching. There were very few books and those were written in Latin. In fact, the church wanted to suppress learning. As late as 1525 William Tyndale translated the New Testament into English which rather than bringing him glory, only brought him to the stake. The church felt that to make the Bible accessible to the common people would threaten the authority of the church.

During this period of time in Europe and in all of Christiandom there was no such thing as a watch, a clock and apart from a copy of the Easter tables at the nearest church, anything resembling a calendar. For 1,000 years generations succeeded one another in a meaningless, timeless blur. Any innovation was inconceivable; to even suggest the possibility of one would have invited suspicion and because the accused were guilty until they had proved themselves innocent by surviving generally impossible ordeals of fire, water or combat - to be suspect was to be doomed.

Modern jurisprudence really began with the renaissance not with the Magna Charta. Monarchs challenged the Pope - they wanted many things but chief among that was the right to control their own lives and destiny. Henry VIII and Martin Luther each challenged the Church and changed the landscape but each for very different reasons.

By the end of the fifteenth century, English law recognized eight major capital crimes: treason, petty treason (killing of a husband by his wife), murder, larceny, robbery, burglary, rape and arson. Under the Tudors and Stuarts, many more crimes entered this category. By 1688, there were nearly fifty. During the reign of George II nearly three dozen more were added and under George III the total was increased by sixty. The high point was reached shortly after 1800. One estimate put the number of capital crimes at 223 as late as 1819. It is impossible to detail here the incredible variety of offenses involved. Crimes of every description against the state, against the person, against property, against the public peace were made punishable by death. Even with fairly lax enforcement after 1800, between 2,000 and 3,000 persons were sentenced to death each year from 1805 to 1810 in England.

The usual mode of execution at this time was hanging, though there were several crimes for which this was deemed insufficient. The bodies of pirates were hanged in chains from specially built gibbets along the along the wharves of London. Throughout England, the rotting of corpses of executed criminals dotted the countryside, a grim warning to others.

Traitors, whether guilty of petty or high treason, were subjected to especially aggravated forms of execution. Burning to death was the fate of many a woman convicted of killing her husband. The worst punishment was reserved for criminals guilty of high treason. Prior to the execution of Sir Walter Raleigh,

convicted of high treason, he is supposed to have quipped after touching the headsman's, "'Tis a sharp medicine." Beheading was the least of it. The standard practice, according to the great authority on English law, Sir William Blackstone, consisted of drawing, hanging, disemboweling and then beheading, followed by quartering. In 1812, this death sentence was pronounced in England on seven men convicted of high treason:

> "That you and each of you, be taken to the place from whence you came, and from thence be drawn on a hurdle to the place of execution, where you shall be hanged by the neck, not till you are dead; that you be severally taken down, while yet alive, and your bowels be taken out and burnt before your faces - that your heads be then cut off and your bodies cut into four quarters, to be at the King's disposal. And God have mercy on your souls."

This "bloody code", as Blackstone called it, with scores of capital offenses and almost daily public executions, was considerably mitigated by royal prerogative of mercy. Apparently, also a death sentence could be mitigated under the doctrine of benefit of clergy. As mentioned earlier, benefit of clergy was available to churchmen but eventually all persons accused of capital crimes were spared a death sentence if the crime was a first felony offense and if it was clergyable, which meant that the defendant could recite the neck verse which was the first line of the 11th Psalm. By the middle of the sixteenth century, every nobleman could claim the clergy privilege, including those who could only count on their fingers and could

not read at all. Thus, the phrase without benefit of clergy which came be attached to capital status during the nineteenth century in England and America meant not that a condemned man must go to his grave without the consolations of a spiritual advisor during his last moments but that his conviction for a capital crime was not subject to reduction in sentence on the ground that it was a first offense. After Henry VIII broke with Rome the privilege receded but was not done away with until 1837.

Also the trial court frequently recommended to the Crown that mercy be granted. Such recommendations were natural enough, since the judge had no alternative upon the conviction of an accused but to sentence him to death because all felonies carried a mandatory death penalty.

Executions were generally carried out in public places to set an example, to deter others and to remind the people of the power of the monarchy. In England, the practice of public executions did not end until 1868. The principal method of execution in England was hanging.

Because of the benefit of clergy privilege or royal mercy and because there were no prisons or penitentiaries something had to be done with people convicted of crimes. During the Middle Ages and Elizabethan times, many captured outlaws and criminals were sent to work on galleys. By the end of the sixteenth century sailing ships had replaced galleys and crime was on the increase. What to do with criminals became a problem. England found two ways to solve this problem. Some convicts were

sent to work on prison ships which were generally kept anchored in harbors.

Many criminals or undesirables were sent to the colonies. By 1775, England was transporting 2,000 criminals a year to America. Australia was also colonized by England as a penal colony.

Under the influence of reforms in the late eighteenth century, physical punishment, torture and public executions finally began to disappear. The 1800's saw a gradual transition from corporal punishment to imprisonment although the early reformers did not envision imprisonment as a punishment in and of itself because it was too closely associated with the arbitrary use of the power by the kings. It was also criticized by some reformers for not being a specific enough punishment; it had no effect on the public, it was useless and expensive and it maintained idleness and encouraged vice.

Many reformers of this period advocated imprisonment instead of the death penalty because death was less of a deterrent. They felt that long and painful punishment such as penal servitude would make a greater impression. France and Austria, in revising their penal codes at the end of the eighteenth century, substituted imprisonment for the death penalty; but France used the infamous Devil's Island for its prisoners sentenced to life. It was called the "dry guillotine" because prisoners sentenced to life died on the island. There was virtually no escape.

American criminal law was not created out of nothing by the original colonies and the founding fathers, rather it took its shape directly from the English criminal law of the sixteenth, seventeenth and eighteenth centuries. The earliest recorded set of capital statutes in America are those of the Massachusetts Bay Colony dating from 1636. This early codification entitled "The Capital Laws of New England" listed in order the following capital crimes: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, man-stealing, perjury in a capital trial and rebellion. Each of these crimes was listed and accompanied in the statute with an Old Testament text as to its authority. Historians do not know how rigorously these laws were enforced nor do they know why the rest of the nearly three dozen capital laws listed in the Mosaic Code were not also adopted by the Bay Colony.

Before 1700, arson and treason as well as the third offense of theft of goods valued at over forty shillings, were made capital, despite the absence of any biblical justification. By 1785 the Commonwealth of Massachusetts recognized nine capital crimes, and they bore only slight resemblance to the thirteen capital laws of the Bay Colony and they were treason, piracy, murder, sodomy, buggery, rape, robbery, arson and burglary. However, burglars for first offenses were branded "only" on the forehead with the letter "B"; for a second offense, whipped and for a third offense, put to death as incorrigible. If the crime

was committed on Sunday, the miscreant also lost an ear as an additional punishment.

In Pennsylvania, as a contrast and presumably because originally settled by Quaker colonists, there was no execution under a death penalty until 1691 and William Penn's Great Act of 1682 specifically confined the death penalty to crimes of treason and murder. By the time of the War of Independence, many of the colonies had roughly comparable capital statutes. Murder, treason, piracy, arson, rape, robbery, burglary, sodomy and from time to time, counterfeiting, horse theft and slave rebellion. Benefit of clergy was never widely permitted and hanging was the usual method of inflicting the death penalty.

By the 1840's, the reform movement made its way to the United States. With this general reform, there came a reduction in the number of crimes for which the death penalty was applicable. Besides the need to reform and the need to make some of these crimes non-capital, many states had established penitentiaries and used penitentiary sentences as punishment for those convicted of felonies. In 1846 the Territory of Michigan voted to abolish hanging and became the first state to enter the union without a death penalty. In fact, it became the first English speaking jurisdiction in the world to abolish the death penalty. In 1852, Rhode Island abolished the gallows for all crimes, including treason and the next year Wisconsin did likewise. By the 1850's, only treason and murder universally remained as capitally punishable crimes. A few states outside

the south had more than one or two additional capital offenses. After the Civil War and the Reconstruction Era, more states abolished the death penalty. The United States in 1887 reduced its dozens of capital crimes to three: murder, treason and rape, but for none of those was death mandatory.

The focus of the abolition movement in America has always been on reform of the punishment for murder as most death sentences and executions have been for this crime. Although it was not until 1974 that Kentucky dropped the death penalty for the offense of train wrecking and Illinois repealed the death penalty for dynamiting.

B. METHODS OF EXECUTION

There is a bill prefiled with the Kentucky Legislature for the upcoming 1994 session which would amend the law in the Commonwealth of Kentucky to the extent that lethal injection would now become the authorized method for executing a person condemned to death.

The variety of ways in which men have put one another to death under the law is amazing and perhaps only limited by imagination. History records such exotic practices, fortunately largely unknown in our Anglo-American tradition, as flaying and impaling, boiling in oil, crucifixion, pulling asunder, breaking on the wheel, burying alive and sawing in half. As strange as it may sound, not so many generations ago in both England and America, citizens and criminals were occasionally pressed to

death, drawn and quartered and burned at the stake. Many argued that if these punishments had survived the eighteenth century, there would have been a much better chance that public reaction to the death penalty would have forced an end to it. Of course we know from our history that in Europe and in the United States when witches were condemned to death the method of execution was generally fire. Historians note that as terrible as that punishment must have been, many of the condemned were strangled before the fire was started, presumably to be merciful.

In the United States, except when executing spies, traitors and deserters who could be shot under martial law, the sole acceptable method of execution in the United States for the century after the adoption of the Eighth Amendment was hanging.

In the 1880's, as one story has it, in order to fight the growing success of the Westinghouse Company which was pressing for nationwide electrification with alternating current, the advocates of direct current staged public demonstrations to show how dangerous their competitor's product really was. If it could kill animals, and awed spectators stated that indeed it could, it could kill human beings as well. Within a few years, this somber warning was turned completely around and in 1888 the New York legislature approved the dismantling of its gallows and constructed an "electric chair" on the theory that in all respects, scientific and humane, executing a condemned man by electrocution was superior to executing him by hanging. On August 6, 1890, after his lawyer had unsuccessfully argued the

unconstitutionality of this unusual method of execution, William Kemmler became the first criminal to be put to death by electricity.

Of course, all of us know that the Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. However, the amendment makes no effort to define what cruel and unusual means. In fact, in 1879 the United States Supreme Court in Wilkerson v. Utah, held that shooting was not cruel and unusual, but suggested that the ban on cruel and unusual punishments would include both drawing and quartering and burning alive. Even as late as 1947, the United States Supreme Court in Louisiana, ex rel, Frances v. Resweber, 329 US 459 (1947), not only held capital punishment to be valid, but rejected the contention that the state's failure to electrocute the defendant on the first try made subsequent tries cruel and unusual. The majority opinion and the dissent both use language which we may interrupt as showing each side's opinion of the death penalty. The court, through Mr. Justice Reed for the majority, wrote that even though the petitioner had already been subjected to a current of electricity did not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the

sentence cannot, it seems to us, add an element of cruelty to a subsequent execution.

Mr. Justice Burton dissented. The affidavit of the official witness, Harold Resweber, states "I saw the electrocutioner turn on the switch and saw Willie Frances' lips puff out and swell. His body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie was not dying and the one on the outside yelled back he was giving him all he had. Then Willie cried out take it off, let me breath." Then they took the hood from his eyes and unstrapped him.

Despite the record of bungled executions (and it is larger than one would think), most states favor the electric chair. However ironical it may be, it is a fact that electrocution was originally adopted and is still employed in two dozen states on the grounds of its superiority to hanging as a civilized method of killing criminals.

In Kentucky KRS 431.220 authorizes electrocution as the mode of execution. It states "causing to pass through the body of the condemned a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall be continued until the condemned is dead."

In Glass v. Louisiana, 471 US 1080 (1985), Justice Brennan published a dissent to a writ for stay of execution and he wrote that originally the Supreme Court upheld electrocution on the grounds that it produced instantaneous and, therefore,

painless death. However, electrocution has shown itself to be a technological horror show. He further stated that electrocution is extremely violent and inflicts pain and indignities far beyond the mere extinguishment of life. Further, that the 98 year history of electrocution has been characterized by repeated failure and the need to send to recurrent charges into the condemned. Indeed after witnessing the first electrocution in the nineteenth century, George Westinghouse, founder of the Westinghouse Electric Company, reported that the job could have been done better with an ax, and again in Glass Justice Brennan stated that electrocution is nothing less than the contemporary technological equivalent of burning people at the stake.

Not satisfied with shooting, hanging or electrocution the Nevada legislature passed a bill in 1921 to provide that a condemned person should be executed in his cell, while asleep and without warning with a dose of lethal gas and on February 8, 1924, one Gee Jon became the first person to be legally executed with a lethal dose of cyanide gas. The practice was stopped however because the cell took a awhile to clean out. In 1953, a Gallup Poll was taken which showed that the American public strongly favored electrocution over lethal gas while hanging and shooting had very few supporters. Twelve percent of the Gallup Poll recommended that the prisoner should choose and apparently in Utah the condemned man can still choose the firing squad or the hang man.

Until very recently in our history, all executions were public events. As mentioned earlier, the last public execution in England was in 1868. The last such event in the United States was a hanging in Owensboro, Kentucky, in August of 1936. Some 20,000 people witnessed the execution. Much was written about the almost carnival atmosphere of this event and it received nationwide attention. Two years later, we passed a statute prohibiting all but official witnesses from attending any future executions. It is also interesting to note that this execution took place in Owensboro, Daviess County, and the condemned was hanged. At that time the electric chair was at Eddyville, but anyone convicted of rape was hanged in the county where he was convicted. This practice ended soon after the Owensboro hanging, too. Maybe we ought to rethink this practice.

Recent newspaper articles from the editorial pages to the front pages have told us that we live in a violent society. We are told that homicide is on the increase especially with our youth. From 1986 to 1991 the homicide rate among 14 to 22 year olds rose 62 percent. It jumped 124 percent among those 14 to 17. A survey by the National School Board Association found that school violence is "more acute". Increased alcohol and drug abuse, television, children's easy access to guns and changing family situations were all cited as contributing to the increase of school violence. The study also reported that 100,000 students bring guns to school daily.

Our own Kentucky New Era opined on December 31, 1993, that Americans are in turmoil about the plague of violence gripping our nation. They were also correct in their assessment of the problem and the best way to solve this problem. They state that the real crisis gripping our nation is a spiritual one and that many people have lost the belief that life is valid and vital, whether it's their lives or someone else's life.

It was the aftermath of Bobby Kennedy's assassination that the federal government gave us the Omnibus Crime Control Bill - a massive restructuring of federal law including adding the death penalty for murder of the President. However, in 1968 less than 50 percent of the people in this country believed in the death penalty. The polls taken very recently show that over 80 percent of Americans want a death penalty. Politicians seek votes by asking for more state executions so that they can prove that they are tough on crime.

How can this be? Do increased executions lower the murder rate? No. Absolutely not.

Many people who clamor the loudest for more executions argue that they will end the violence simply do not or cannot understand the magnitude of the problem.

In 1976, the last year that executions were barred, the murder rate in Texas was 12.2 per 100,000. In 1991, the murder rate was 15.4 per 100,000. That is a 25 percent jump during 15 years of capital punishment. During this same era, violent crimes more than doubled in Texas. Why is this significant? It

tells us that the imposition of death sentences have nothing at all to do with the rate of violence.

Sometime last fall Cecil Herndon wrote a wonderful column about the debates on capital punishment arguing that we should decide the issue only on moral grounds. The debate is becoming polarized because of the huge increase in its implementation. It is also getting much attention in the media and from politicians who want "to kill" to be tough on crime.

I am in favor of the death penalty but I will also tell you that we should not have a death penalty. Brooks, this is not another spineless Athenaeum paper and of course I understand how stupid it sounds to be morally in favor of the death penalty but to be opposed on practical grounds. We simply cannot afford it. But if we do have it, let's get on with it. But that debate is for another day.

Next Sunday we should all watch NBC's "Witness To The Execution". It is a movie about the death penalty and it will simulate a death sentence being carried out. Because of its subject matter, some argue that perhaps this show will kill the trend of showing violence on television or if it is as good as NBC says it is perhaps it could be the show that will put an end to capital punishment. Wouldn't it be nice if it did both.