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Articles, Reports, and Notes OF THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION

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THE DISTRICT ATTORNEY AND THE TRAFFIC PROBLEM

by the Honorable TOM C. CLARK

Associate Justice of the Supreme Court of the United States, Washington, D. C.

(An address before the National District Attorney's Association Mid-Winter Meeting at the Americana Hotel, Miami Beach, Florida, on March 19, 1960.)

It is a distinct pleasure, and Mrs. Clark and I deem it a rare privilege, to meet with you of the National District Attorneys' Association. Being an old "D. A." myself, it's like old home week—and particularly so when it is here in Florida in March. April in Paris only holds a candle to this! We have enjoyed every moment of it since sighting the beauties of Miami's shores, feeling her warm sunshine, and being met with the Southern hospitality of Dade County's own capable State Attorney, Dick Gerstein, and his lovely wife. So first let me thank you for the both of us. Next I bring you the cordial greetings and best wishes of my Brothers of the Supreme Court of the United States, each of whom recognizes and fully appreciates your deep responsibilities to our Nation. And finally let me congratulate you on the first decade of your existence as a national law enforcement association. It is most fitting in this connection that you are devoting your tenth session to the serious problem of "Murder by Motor," the tragic spectacle of the murderous motorist.

I plead guilty to still being one of the family of those who preach and practice strict law enforcement. When we mention "Mr. District Attorney," we naturally turn our thoughts to his valiant—but little appreciated—continued fight on organized crime; and so let us mention it for a moment. Certainly in this regard America never

needed a more cooperative law enforcement family than it does today. The organized law breaker is our most vital domestic challenge. As I look upon it, the problem is primarily a local one. It is in the local community that the racketeer—the hoodlum—can be most effectively detected and prosecuted. It is, therefore, to the local law enforcement profession that we must look primarily to root out and expose the deeply entrenched forces of the underworld. I do not overlook the responsibilities of the F. B. I. and other federal agencies in the enforcement field, but their's is a restricted jurisdiction defined by the Congress and based upon national necessities resulting from our present-day living. This is not to say that there should not be a "togetherness" between the F. B. I. and local agencies. Indeed this is the solution to the problem. Each can and should be strengthened by the other to the end that organized law enforcement may become a reality. In this connection I am happy to see the close liaison between the F. B. I. and local agencies. It is to be hoped that F. B. I. efficiency and techniques may be extended to each of the latter. But let us all remember that the state and local authorities, and the state and local laws, have long been and should continue to be the bulwark against crime. To my thinking it is not that we need new laws to cope with the organized criminal but rather that we make the

maximum use of those already on the statute books. Organized crime can be coped with only by organized law enforcement—not through a clamor for new laws every time a new criminal technique makes its appearance. The criminal must be stopped in his tracks, and along with him the cost of his activity, running into some twenty-two billion dollars a year. Just think of it—\$128 for each one of us, about \$500 for each family a year—enough for a wonderful vacation here in Florida. I for one believe that a people able to develop our country into such a paradise as we now enjoy must have the ability to destroy such a parasite as organized crime. Along with all thinking Americans, I have every confidence that through you, our local law enforcement profession, this end will be attained.

As I said earlier I am happy to see you devote your attention at this meeting to traffic problems. And so it is to this other type of criminal—the highway killer—that we now turn our attention. He is the most blood thirsty “highwayman” of them all. Last year the murderous motorist killed one of our fellow citizens every thirteen minutes, and along with it he seriously injured five in the same lapse of time. In fact while we sit here tonight in this luxurious atmosphere, enjoying the hospitalities of this great community, the murderous motorist will have snuffed out a dozen lives in the United States and brought serious bodily injury to some five hundred other persons. I know it’s hard to believe, but it’s based on the 1959 tally of almost thirty-nine thousand lives lost and nearly a million and a half seriously injured. This does not include the millions of minor injuries, and the costs that reached the staggering total of almost six billion dollars. And we “gripe” about the budget! What we should be doing is something more about this appalling situation of death’s stalking every one of our seventy million licensed motor vehicles. And along with it something more must be done about the eighty-two millions of us that are driving these vehicles. We, the drivers, are the ones who must shoulder the blame, and upon us, you the prosecutors must visit the penalty. This is straight talking, but it’s high time. Various associations—from the President’s Committee on Traffic Safety (headed by the distinguished Wm. Randolph Hearst) on down—have been waging a continuous campaign in this field. They have accomplished tremendous results with the tools they have had to work with. But they have not had the law enforcement ma-

chinery of the country. That remains lodged where it should be: with you, The People’s Lawyers. You alone have the power to bring it into play more effectively. It is time we got out of the talking stage on the enforcement program and into the courthouse. That is what the experts in the field have been recommending; the American people are entitled to no less. It is your job to free Americans from the murdering hoodlum. The people in both instances have paid enough. And as to “Murder by Motor” they continue to pay not only in lives and money but in the irreparable injury to human values, the destruction of careers, of families and of homes; the shattering of hopes, of plans and of aspirations; the mental suffering and destruction of morale; the invaliding of loved ones with its consequent hardships; the orphaning of children with its attendant cost to the community and other immeasurable consequences inherent in such tragic situations. But, someone asks, what can be done about it? And the answer is that the Code of the Road must be geared more closely with the Code of the Law. I venture some suggestions:

The best place to begin is in the Traffic Court. Last year over four million people personally appeared there and pled their cases. The impression that they received of justice in action forms today the basis of their thinking as to the virtue of the rule of law. For this reason our traffic courts are the most important ones in our Judicial System. In this appraisal I include the Supreme Court itself. Each year thousands of people enter the Supreme Court building, but only a handful see the Court in action. There are only 299 seats in the courtroom itself. On the other hand, millions enter into the traffic courtroom either as visitors or violators. If the impression received there is one of integrity, fairness and efficiency, then the whole thinking of these millions is favorably impressed with the judicial processes. They truly feel that “Equal Justice Under Law” is a reality—not a phrase. You can do much in this regard. Only last July, Dade County overhauled its whole traffic court system by creating Metropolitan courts with county-wide jurisdiction. I am told that they are proving themselves most effective. In fact the death toll in the county thus far this year is half the total for the comparable period in 1959! Prosecutors are moving into high gear. Last year there were over 65,000 violations actually terminated in the courts. Almost 1,500 driving-while-intoxicated cases were prosecuted. While I do not know the

results as to sentencing, I do hope each found guilty of driving while drunk got the book thrown at him. Why anyone has so little respect for himself and regard for his fellow man as to drive while drinking is beyond imagination. Such persons should be brought to realize this must not be done. To assure it the prosecutor must be tough—the judge must show no leniency and the offender must be punished. This should include not only a jail sentence but forfeiture of the driver's license. Each of the more than 300,000 D. W. I. convictions last year deserved no less. Such an enforcement program would do much in reducing the high toll on the highways today. I hope that when you return to your jurisdiction you will enforce such a policy.

The whole tone of courtroom procedure can be set by the demeanor of the prosecutor. Here in Dade County—I am not a resident here, so no apology is due for my use of it as an example—Mr. Gerstein, I understand, has assigned top flight prosecutors to each of these Metropolitan courts. They know their business, as is shown by the statistical picture. They make themselves an integral part of the traffic court, always making certain that the violator is treated fairly but firmly. There is no rush in the call of cases, nor confusion of standing around the bench or the jury box. The Court is conducted with dignity, decorum and dispatch. Every one of the 65,000 violators had his day in court. The State Attorney does not use the court as a graduate course or training ground for the novice prosecutor. Lawyers tell me that he provides a trained staff, devoted to the administration of justice. Each of them knows that a job well done in traffic court is the surest way to recognition and promotion. The traffic court prosecutor conducts himself in such a way

as to inspire the confidence of both police and violator, as well as the court. He contributes to the over-all traffic court program by advising those attending as to their rights, and by education brings about observance of traffic regulations. He promotes respect for law as the *sine qua non* of our democratic system. In short, the traffic court prosecutor must be a dedicated public servant, determined at all times to promote the efficient administration of justice. I hope that while you are here you will look into Dade County's system and take from it those features that might improve the administration of traffic regulation in your community.

And so, Mr. District Attorneys, we are counting on you to level down on this menace—the murderous motorist. I hope that you run him off of our highways. I have but one appeal. When you go back home, join in with the local traffic program. If there be none, let its creation be your first order of business. Consult with your traffic judges, your police chiefs, your councils. Take it up with your leading citizens. Help them to improve traffic techniques. See to it that the courtroom itself is a presentable place; that your staff assigned there is the best; that the processes of the court are modern; that the judge is fair and honorable. This you can do, for you stand in *the* one position of greatest influence. You can make certain that your traffic court is not a source of municipal revenue, but a real judicial forum where not only is equal justice dispensed, but those present are taught the necessity of obedience to the Code of the Road, respect for the Code of the Law and the inevitability of their strict enforcement against all violators alike. This lesson well learned will resound to the glory of democracy throughout the world.

A PROSECUTOR LOOKS AT CAPITAL PUNISHMENT

by RICHARD M. GERSTEIN

State Attorney of Dade County, Miami, Florida

(Editor's note: The subject "capital punishment" always raises a great deal of controversy. There are many people who are willing to state their views against capital punishment, but although the "public polls" indicate that the majority of people still favor its retention, very few are willing to give reasons for such retention. At the meeting of the Criminal Law Section of the American Bar Association in Miami Beach in August, 1959, a panel discussed the subject "Should Capital Punishment be Abolished." Governor DiSalle of Ohio took the affirmative. Richard M. Gerstein, who is a Vice President of the National District Attorneys' Association was asked to speak on the negative. The following paper is the text of that presentation.)

At the outset I would like to make my personal position clear. As a Prosecuting Attorney in this state in which the law provides for capital punishment I have always believed that I could best objectively do my job if I did not become known as an avid advocate of capital punishment. Conversely, I could not fulfill my duty under the law if I was opposed to capital punishment. Therefore, I have refrained from taking any personal position on this question. During the course of this presentation I will endeavor to convey a composite of the arguments in favor of the retention of capital punishment, since almost without exception, prosecutors both in the State of Florida and throughout the Nation, with whom I have discussed this issue, have been strongly in favor of the retention of capital punishment.

The most convincing and most widely used argument in favor of capital punishment is that it acts as a deterrent. Deterrence is usually defined as the preventive effect which actual or threatened punishment of offenders has upon potential offenders. This principle has influenced our penal codes since ancient times when tortuous deaths and mutilations were exacted with the thought of making an example of the malefactor. The deterrence concept governed the Romans in their use of crucifixion as a means of execution, and it led the English to employ the ingenious device of drawing and quartering to warn the potential criminal of the consequences of his proposed action. In Colonial America the use of the pillory and stocks served to remind those with criminal ideas that the course of lawlessness had its disadvantages. In short, it may be said that the deterrence concept has been evident through the ages in Western thought concerning crime and punishment.

As do many members of our profession, I take the position that deterrence is necessary for the maintenance of the legal system and the preservation of society. As clearly stated by Sir John Salmond:

"Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil doer an example and a warning to all who are like-minded with him." (1)

There can be no argument with the fact that capital punishment is totally effective as a deterrent in so far as convicted criminals are concerned. The murderer who has been permanently deterred by execution no longer poses a threat to society.

Therefore, the basic question to be resolved is whether or not the death penalty acts as a deterrent upon potential offenders. It is the contention of virtually all prosecutors that the death penalty does have this desired effect, although it must be admitted at the outset that most of the statistical evidence available does not support this position, for, according to statistics, in jurisdictions where the penalty has been abolished the number of murders has not increased and may even have decreased. For example, Maine, which abolished capital punishment in 1870, has the lowest murder rate of any State in the Union, and Wisconsin and Minnesota, which abandoned the death penalty in 1854 and 1911, respectively, have far lower homicide rates than most of the other states (2). However, it should be emphasized that criminologists and sociologists agree that statistics are an unsatisfactory indication of the deterrent effect of the death penalty because murder is a complex sociological problem, as well as a crime, and contributing factors, such as race, heredity, regional lines, standards of housing and education, are intangibles, the value

of which is difficult to assess. Furthermore, it is obvious that statistics cannot tell us how many potential criminals have refrained from taking another's life through fear of the death penalty. As Judge Hyman Barshay of New York stated:

"The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down." (3)

The contention that statistics are not necessarily the controlling factor in resolving the issue at hand was apparently shared by the Royal Commission on Capital Punishment which was set up on May 4, 1949. Under the chairmanship of Sir Ernest Gowers, their terms of reference were to consider and report, among other things, on "whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified. This inquiry extended over a long period and a most comprehensive report was submitted, with which I cannot deal in detail but which I commend to your perusal. Their terms of reference precluded the committee from considering whether the abolition of capital punishment would be desirable, but they did consider its deterrent effect, as the Report stated in part as follows:

"We recognize that it is impossible to arrive confidently at firm conclusions about the deterrent effect of the death penalty, or indeed of any form of punishment. The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment may be stated as follows: Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than other forms of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so." (4)

The evidence to which the Royal Commission refers is the testimony of law enforcement officials concerning their experiences in the apprehension and prosecution of criminals. This evidence clearly illustrates the inadequacy of the claim that capital punishment is not a deterrent, as is seen by the following:

(1) Criminals who have committed an offense punishable by life imprisonment, when faced with

capture, refrained from killing their captor though by killing, escape seemed probable. When asked why they refrained from the homicide, quick responses indicated a willingness to serve a life sentence, but not risk the death penalty.

(2) Criminals about to commit certain offenses refrained from carrying deadly weapons. Upon apprehension, answers to questions concerning absence of such weapons indicated a desire to avoid more serious punishment by carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty.

(3) Victims have been removed from a capital punishment State to a non-capital punishment State to allow the murderer opportunity for homicide without threat to his own life. This in itself demonstrates that the death penalty is considered by some would-be killers. Statistics cannot tell us how many lives have thus been saved.

Frank S. Hogan, District Attorney for the County of New York, wrote to me recently stating that he is "unalterably committed to the retention of the death penalty", and with the letter he enclosed a memorandum representing the thinking of eight or ten of his associates, all of whom have had considerable experience in the prosecution of murder cases. Their collective opinion as to the deterrent value of capital punishment is clearly set forth in the following excerpt from that memorandum:

"We are satisfied from our experience that the deterrent effect is both real and substantial . . . for example, from time to time accomplices in felony murders state with apparent truthfulness that in the planning of the felony they strongly urged the killer not to resort to violence. From the context of these utterances, it is apparent that they were led to these warnings to the killer by fear of the death penalty which they realized might follow the taking of life. Moreover, victims of hold-ups have occasionally reported that one of the robbers expressed a desire to kill them and was dissuaded from so doing by a confederate. Once again, we think it not unreasonable to suggest that fear of the death penalty played a role in some of these intercessions.

"On a number of occasions, defendants being questioned in connection with homicide, have shown a striking terror of the death penalty.

While these persons have in fact perpetrated homicides, we think that their terror of the death penalty must be symptomatic of the attitude of many others of their type, as a result of which many lives have been spared."

In further support of this argument, it is interesting to note that eight States which previously abolished the death penalty have found it necessary to re-adopt it for its deterrent value. In Washington, for example, the death penalty was repealed in 1913 and re-enacted in 1919. According to John R. Cranson, warden of the Washington State Penitentiary, "Records available . . . indicate that there was an increase in the number of capital crimes . . . during that period." (3) This increase, plus a scandalous trial in 1917, convinced Washingtonians that abolition of the death penalty was a mistake. The trial involved a man accused of a brutal murder. He boasted throughout his trial that the State could do nothing to him but board him up for the rest of his life.

For what purpose was capital punishment restored in these states, who urged it and why, if not to serve notice on people who might be tempted to murder that on conviction their lives would be forfeited?

It is argued that the professional criminal does not take the death penalty seriously due to the lack of consistency with which it is applied. For example, out of an estimated 23,370 cases of murder, non-negligent manslaughter, and rape in the year 1949, there were only 119 executions carried out in the entire United States. In 1953 there were 62 persons executed in this country. In that same year there were over 7,000 cases of murder and non-negligent manslaughter. At that rate the criminal's chances of escaping execution are better than 100 to 1 (5).

While this factor must of necessity affect the deterrent value of capital punishment, it is the contention of prosecutors that the potential killer will refrain from taking a life if there is the slightest possibility that the death penalty may be invoked against him.

It is clear that for normal human beings no other punishment deters so effectively from committing murder as the punishment of death. The threat of death is the one to which resort has always been made, when there is an absolute determination to produce some result.

The Commissioner of Police of London, England, in his evidence before the Royal Commission on Capital Punishment, told of a gang of armed

robbers who continued operations after one of their members was sentenced to death and his sentence commuted to penal servitude for life, but the same gang disbanded and disappeared when, on a later occasion, two others were convicted of murder and hanged (4).

Surely it is a common sense argument, based on what is known of human nature, that the death penalty has a deterrent effect particularly for certain kinds of murderers. Furthermore, as the Royal Commission opined the death penalty helps to educate the conscience of the whole community, and it arouses among many people a quasi-religious sense of awe. In the mind of the public there remains a strong association between murder and the penalty of death. Certainly one of the factors which restrains some people from murder is fear of punishment and surely, since people fear death more than anything else, the death penalty is the most effective deterrent.

Another factor in support of the retention of capital punishment is that the public is in favor of it. A poll on this issue by the American Institute of Public Opinion in 1955 showed these results: In favor of the death penalty, 68%; opposed, 25%; no opinion, 7% (3). The reason for this may be seen in the following excerpt from the report of the Royal Commission on Capital Punishment:

"Moreover, we think it must be recognized that there is a strong and widespread demand for retribution in the sense of reprobation—not always unmixed in the proper mind with that of atonement and expiation. As Lord Justice Denning put it: 'The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else. . . The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime; and from this point of view there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.' " (4)

That this opinion is shared by those of us who are called upon to prosecute for heinous crimes may be seen in the experience of J. Frank Adams, State Attorney for the Fourteenth Judicial Circuit of Florida. In his recent letter to me, he described the following three cases which he prosecuted:

1. The defendant had raped and murdered his

victim and afterwards attempted to have intercourse with her body;

2. The defendant unnaturally assaulted two young boys and then abandoned them in St. Andrews Bay;
3. The defendant raped the mother, killed her husband and one small child and left two other children for dead. In each of these cases, the defendant received the death penalty, and in speaking in justification of these sentences, State Attorney Adams said: "I feel that in all three of these cases imprisonment would not have been much punishment to these defendants nor would it have satisfied the public." In concluding his letter, he made the following statement in support of capital punishment:

"In my career as a prosecuting attorney, I have had occasions to talk to many defendants, some of them hardened criminals, and they all fear the chair and to many of them being in the penitentiary merely furnished security. Therefore, I believe it would be a terrible mistake to abolish capital punishment or to weaken it in any way in the State of Florida."

Much of the opposition to the retention of capital punishment is based on the ideas of the fallibility of a single jury in a murder trial, of the possibly inflamed atmosphere in which a trial might take place, and of the personal disposition of a single Judge in directing the jury in such a trial. However, under appeals acts, a person convicted of murder may appeal his conviction, and in the serene and impartial atmosphere surrounding an appellate court he may have the conviction set aside and a judgment and verdict of acquittal entered, or may be granted a new trial; or he may have the capital charge reduced to a lesser crime, if the jury, on the evidence, could have found him guilty of such an offense. We must not forget the importance of the American citizen and the role he plays as a jurist. It's not a duty he takes lightly, nor do the attorneys and judges. No man on trial for murder is given a superficial trial. I therefore feel that there is little chance for an innocent man to be sentenced to death.

The prosecutors final argument for the retention of capital punishment is the State's right of self-defense. Just as the individual has the right to defend his life against the attacks of an unjust aggressor, so the State has the right to defend itself against external enemies (by waging war)

and internal enemies (by capital punishment), who by their crimes undermine the very foundations of the social order. "The slaying of an evildoer is lawful," says St. Thomas Aquinas, "inasmuch as it is directed to the welfare of the whole community."

A man who has committed murder deliberately has proved himself unfit for society, and regardless of all the duties which belong to it. The safety of society is most effectually guarded by cutting him off from the power of doing further mischief. If his life be not taken away, the only other means left are confinement for life or exile for life. Neither of these is a perfect security against the commission of other crimes. It is true that the latter punishments leave open the chance of reform to the offender, but we must not forget that reformation is an enjoyable by-product, not the sole goal of punishment. Suppose a criminal has proved unable to be reformed in spite of many honest attempts. Logic demands refraining from further punishment, as its alleged end cannot be attained. But the law demands his punishment and an especially severe one, life imprisonment, and this fact proves that not reformation but protection is the desired aim of punishment (6).

Society must also consider what effect the abolition of capital punishment could have upon the philosophy of the youth of our country. Many of them might very well look upon the criminal code, including that part of it forbidding murder, as a mere convention of society which advanced thinking and progressive social theories permit them to set aside as a matter of no consequence. This theory leads to the belief that each is a law unto himself; that each may choose the laws which he will obey, and that he may violate the rest. This type of thinking would eventually lead us into virtual anarchy.

The moralist argues that the State has no right to take away a human life, for in doing so, the State is "playing God". This argument was eloquently answered by Richard H. Rovere in his review of Arthur Koestler's book *Reflections on Hanging*, as he wrote:

"Man must play God, for he has acquired certain Godlike powers, among them a considerable degree of mastery over life and death, and he cannot avoid their exercise. Science has put into our hands—and politics has required us to grasp firmly—instruments that force a human judgment on whether or not the entire race is to be executed; even in benign employment, these

instruments can affect the very image of man many millenia hence, and for that matter, the duration of all life. In a less awesome—but an awesome enough—way, modern medicine has been usurping prerogatives once held to be God's alone. It has learned to cheat death not merely by the prolongation of life but by calling men back to life after several hours on the other shore. The judge who orders an execution is no more guilty of playing God than the doctor who, having decided that a human being has been summoned to eternity too soon, restores him to the world of time and suffering and sin." (7)

CONCLUSION

Any case for the retention of the death penalty does not rest upon sentiment or hysteria. It is based quite simply on the fact that, human nature being what it is, potential criminals are most effectively deterred from crime by what they fear most. The penalty of death is obviously the most dreaded punishment; obviously it is more dreaded than life imprisonment, else why does every murderer sentenced to death thankfully accept a life sentence if and when he is reprieved? And even the strongest opponents of capital punishment admit that it is necessary to provide the death penalty for murders committed by men under life sentences. This in itself is a complete admission that life imprisonment does not produce sufficient horror in the mind of the killer to deter him.

There is no question that there are some murders committed upon sudden passion, so strong that the existence of no penalty would be sufficient to stay the hand of the murderer. But this is

not an argument against capital punishment, as the abolitionists would have us believe. Indeed, it may be that men so dangerous that they kill when they lose their tempers should be executed for the safety of other people. Moreover, we must remember that all murders are not committed under sudden impulse; and, because of those cases in which men do turn over in their minds the dreadful thought of murder. It is necessary that the most powerful and effective deterrent should be retained. As Daniel Webster said:

"... When the guilty, therefore, are not punished, the law has so far failed of its purpose; the safety of the innocent is so far endangered". (8)

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