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The American Jury and the Death Penalty

Harry Kalven Jr.

Hans Zeisel

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*Harry Kalven, Jr. and Hans Zeisel**

The reversal of civilized opinion on the death penalty during the past century and a half has been truly remarkable. It is an example of law in the process of radical change.[1]

As late as 1825 England had no less than 230 capital crimes on its law books. By the turn of the century legislative inroads had reduced the capital list to murder and treason, and, after an attempt to reduce it still further to certain types of murder, the English evolution has come to completion and the death penalty has now been abolished for all crimes.[2] Although in England the death penalty, wherever applicable by statute, was mandatory on the trial process, the English jury played a major role in its gradual attenuation. On many occasions the jury simply refused to convict a clearly guilty defendant in order to

 This article is a chapter from the authors' forthcoming book THE AMERICAN JURY, which is to be published by Little, Brown and Company in September, and which is an outgrowth of the work of the University of Chicago Law School Project on Law and the Behavioral Sciences. The authors anticipate the eventual publication of two additional books describing the results of their studies of jury behavior. The reader is advised of the deletion of cross-references to other sections of the work and of citations of specific research materials of the authors. A review of THE AMERICAN JURY is to be found in this issue at p. 884.

* With the collaboration of Philip Ennis and Thomas F. Callahan.

Harry Kalven, Jr., Professor of Law, the University of Chicago, is a member of the Illinois Bar. He received an A.B. degree in 1935 and a J.D. degree in 1938 from the University of Chicago.

Hans Zeisel, Professor of Law and Sociology, the University of Chicago, received a Dr. Jur. degree in 1927 and a Dr. rer. pol. degree in 1928 from the University of Vienna.

1 The topic has had a vogue in the last decade, yielding a burst of writing, especially in England. See, *e.g.*, GARDINER, CAPITAL PUNISHMENT AS A DETERRENT: AND THE ALTERNATIVE (1956); GOWERS, A LIFE FOR A LIFE? (1956); KOESTLER, REFLECTIONS ON HANGING (1956); O'DONNELL, SHOULD WOMEN HANG? (1956); ROLPH, COMMON SENSE ABOUT CRIME AND PUNISHMENT (1961). For a general overview and a complete bibliography see THE DEATH PENALTY IN AMERICA (Bedeau ed. 1964) and the forthcoming article on capital punishment by Allen, in THE NEW ENCYCLOPEDIA OF SOCIAL SCIENCE.

2 The Homicide Act of 1957 limited capital punishment to murder of a police officer or prison guard, in the furtherance of theft, by shooting or explosion, for the purpose of avoiding an arrest or effecting an escape, and to repeated murder. 5 & 6 Eliz. 2, c. 11, §§ 5, 6. In 1965 Parliament abolished even this limited use of capital punishment for a trial period of five years. Murder (Abolition of Death Penalty) Act, 1965, c. 71.

avoid the death penalty, and this nullification had its impact on the legislature.

In the United States the development has been different and more complicated, and the role of the jury even more important. While the number of capital crimes has at no point been as high as in England, a similar legislative process has been making inroads into the death sentence, so that today ten states have abolished it altogether and other states have limited it severely.[3]

In addition, the death penalty has ceased to be mandatory. The legislatures have left it to the discretion of the trial process, and it is now predominantly the jury which is called upon to exercise this discretion, even in states where the jury has no voice in other penalties.

The discretion which the jury in the United States is asked to exercise is, it should be emphasized, striking: there is neither rule nor standard to guide it.[4] For this reason comparison of judge and jury decision must here depart from the standard pattern of analysis which discussed disagreement in terms of why the jury differed from the judge. We have viewed the latter as a kind of baseline representing the law, and we have tried to trace the nuances of jury judgment as it deviated from the legal norm of the judge. For the death penalty, however, the judge is not "the law" but merely another decider. In no meaningful sense can it be said that the judge's decision is more representative of the law than is the jury's.

We have, in all, 111 cases in which either judge or jury found the defendant guilty of a capital crime and hence *could* have given the death penalty.[5] Table 117 sets forth the pattern of agreement and disagreement.

The upper lefthand cell represents the approximately two-thirds of all cases where both judge and jury withhold the death penalty. In

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3 Only within the last year two states, Iowa and Oregon, joined the abolition group. IOWA CODE ANN. § 690.2 (Supp. 1965); ORE. REV. STAT. § 163.010 (1965). New York has limited capital punishment to the murder of a police officer or prison guard. N.Y. PENAL CODE § 1045.

4 In the words of Justice Tobriner of the Supreme Court of California: "[T]he Legislature fixed no standards for the guidance of the jury in determining whether a defendant should suffer the penalty of life imprisonment or death, and to that extent left the function of the jury in a somewhat nebulous state." People v. Terry, 61 Cal. 2d 137, 141, 390 P.2d 381, 384, 37 Cal. Rptr. 605, 608 (1964). California allows for a separate trial on the issue of the death penalty. See note 27 *infra*.

5 These 111 cases are those in which the defendant was convicted of a crime that permitted a finding for the death penalty and in which the judge agreed with the guilty verdict of the jury. They happen to be all murder cases. While in some states there are other capital crimes on the books, *e.g.*, forcible rape and kidnaping, there was no such guilty verdict in the sample, partly because these situations are relatively rare and partly because our southern sample is relatively small.

TABLE 117

FREQUENCY OF DEATH SENTENCE FOR DEFENDANTS FOUND GUILTY OF A CRIME

		Jury Gave— Prison	Jury Gave— Death Penalty
Judge Gave—	Prison	68% *76*	6% *7*
	Death Penalty	13% *14*	13% *14*
		Number of cases	*111*

only 13% of all cases (lower righthand cell) do both jury and judge agree on the death penalty. When they disagree, the jury is somewhat more lenient, but the imbalance is modest.[6] Neither jury nor judge imposes the death penalty with any great frequency. The jury does so in only (13 + 6 =) 19% of the cases, the judge somewhat more often, in (13 + 13 =) 26% of the cases.

This then is an overall view. We shall look first at the individual cases to learn what we can about the motivations of the jury and the judge in their respective judgments. Finally, recent studies of executive clemency make it possible to round out the discussion by bringing in a third decider, the chief executive, who is as a rule called upon to make the final decision on this awesome issue. We can thus attempt a rough comparative study across these three institutions.

The cases in which jury and judge agree that the defendant should pay for his crime with his life are marked for the most part by peculiar heinousness. In many, a clear pattern emerges: there is an aspect of almost gratuitous violence. Five involve multiple victims. In one the defendant kills his wife and her brother. In another the defendant exterminates his entire family, although the trial is limited to the murder of his nine-year-old son. In a third domestic murder case the defendant comes upon his separated wife at her mother's home, kills her, and severely stabs the mother as well.

[6] It is of interest to see the full extent of the disagreement in the 21 cases where only one decider opts for death:

Extent of Disagreement on the Death Penalty

	Judge gives death penalty	Jury gives death penalty
	Jury	*Judge*
Agrees on capital charge but not on death penalty	10	7
Convicts on lesser (non-capital) charge	4	0

The theme of multiple murder is at times aggravated by the patent defenselessness of the victim. Thus there is a burglary case in which an old man and his wife are beaten to death with a tire iron:

> Victim wounded a dozen times with a metal tool. Asleep in his home when aroused.

Another case adds still other alienating factors to the multiple victim theme: special ugliness in the tools of a murder with sexual overtones:

> Defendant, a sex deviate, murdered two girls—one aged 8 years, the other 18 years. Both killings were with a screw driver.

Two other cases pick up the sex element; both are murders committed in the course of rape. In one, a strangulation, the judge adds that this was the defendant's seventh criminal offense of a violent nature, a fact also known to the jury. He says:

> This was a violent and brutal killing, a heinous crime by a sadistic defendant.

In a burglary case, after the burglary is complete and almost as an afterthought, the defendant rapes and then stabs to death "with a paring knife" a woman who a few moments before had been secure and asleep.

Then there is perhaps the ugliest of these cases, which the judge describes as follows:

> Defendant was charged with the rape and sodomy of a four and a half-year old child who was also his step-child. The penetration of the anal canal resulted in massive hemorrhage which caused shock and ultimately death ensued.

The mark of the beast is perhaps a little less evident in the remaining cases in which judge and jury agree on the death penalty. In one the victim is an elderly truck driver making his last trip prior to retirement. During a stop, his helper in the truck steals his receipts and shoots him while he is asleep, leaving the body in the van on the desert. In a second case the defendant, refused credit by a village merchant, returns with his rifle and shoots the seventy-two-year-old grocer in the back through the window of his office. And in a domestic murder case, where husband and wife have been separated, the judges notes with pungent brevity:

> Husband killed wife. Six pistol shots, 2:30 a.m., at wife's home.

Finally, in a robbery-mugging case, the defendant brutally beats an elderly, crippled man, then drags him to a lonely spot in the woods where he strangles him.

These cases in which judge and jury have agreed on the death penalty give, at first impression, a strong sense of unity. Among cases of premeditated killing they seem to stand out as especially vicious. The trouble is that some aspects of this viciousness verge so much on the clearly pathological that the criterion loses some of its usefulness. Moreover, as we shall see, many of the murder cases in which the judge and jury disagree on the death penalty appear no less heinous than those in which they agree.

We now turn to the cases where jury and judge disagree on the death penalty. The cases of disagreement, as may be recalled from Table 117, exceed the agreements 21 to 14.

The first group of cases involves a measure of mental and emotional instability on the part of the defendant, which falls short, however, of insanity. In the first case, where the violence is atrocious, it is the jury which is lenient.[7] A twenty-two-year-old inmate of an institution for defective delinquents kills an aged guard in an unprovoked and ferocious attack. The judge tells us:

> Defendant had been in one school or institution after another from the age of ten. His father and mother separated when defendant was approximately two years of age. The defendant had been an inmate of this institution for six years prior to the commission of this crime. I believe the jury reached the conclusion that, even though the defendant knew the difference between right and wrong, and even though he was not insane, nevertheless he did not possess a normal mentality and for this reason I believe the jury concluded not to impose the supreme penalty of capital punishment . . . . This conclusion, coupled with the story of the defendant's hardships during his early life, probably led the jury to conclude that despite the enormity of the crime, the defendant should not be required to suffer penalty of death.

A second case presents the same pattern: a crime of violence, an

[7] The organization, as noted, here departs from that used throughout the book because often the explanation given by the judge is put in terms of the leniency-disposing factors. Moreover, historically, the problem has developed as one of making exceptions to the death penalty. And, finally, as indicated, we wish to compare the decisions of judge and jury with those of executive clemency, which, of course, are always in terms of reasons for leniency.

unsuccessful plea of insanity as the leniency-disposing factor, and the jury as the lenient decider. This is the judge's description:

> The defendant in this case beat and broke the neck of a young woman then cut her throat and threw her in a lake. He went to the police, told them what he had done, and asked them to have him executed as soon as possible. His attorneys pleaded insanity. He was examined by the state authorities, and found to be sane. He pleaded insanity through his attorneys on the trial. The insanity plea was submitted to the jury. He did not take the stand, and the jury agreed as to his guilt, but disagreed as to death penalty. I automatically sentenced him to life in the state penitentiary.

The judge notes that he thinks "the defendant feigned insanity" and adds:

> This was a very cruel murder. Defendant said he killed her because he loved her.

In these two cases the suggestion is that the jury is responding to a level of insanity or instability not sufficient to preclude a verdict of first degree murder but sufficient to avoid the death penalty. Two other cases, however, show how much judgment may waver when the death penalty is the issue.

In a multiple victim case, we are told:

> The defendant stopped at a filling station and because of his conduct was requested to leave. Station owner approached the car owner a second time whereupon the defendant shot him and when his wife ran out defendant shot and killed her.

This time it is the judge who is lenient. He explains:

> I believe the defendant shot the [station owner] because he said "You damn niggers get the hell out of here," and killed the wife because his anger toward the [station owner] was not satisfied when he shot him down.

The judge, who, unlike the jury, did not respond to the touch of insanity in the first two cases, does accept this sudden anger as a sufficient reason for withholding the death penalty. And the jury, sensitive to the marginal responsibility in the previous cases, is deaf to the wild anger in this one.

The final case in this cluster deals with a killing committed in the course of an armed robbery. There are two accomplices, but the defendant is the actual killer; once again there is an unsuccessful plea

of insanity, and again it is the judge who is lenient. The circumstance which divides judge and jury is set forth by the judge as follows:

> The conduct of defendant and his counsel was such as to antagonize the jury and in the opinion of the court caused the imposition of death penalty rather than life imprisonment. The defendant indulged in repeated outbursts of vile language and finally was handcuffed to seat and his mouth taped. At one point, defendant jumped up and threw a book at jury. Defense lawyer was entirely incompetent although of defendant's own choice—in fact defendant refused any other counsel. Conduct of defendant and his counsel was such to antagonize jury and in the opinion of the court caused the imposition of death penalty rather than life imprisonment.

It is easy to see what alienated the jury here, but we can only surmise what moved the judge to leniency. Possibly, he distrusted the ability of the trial process to render fair judgment on the issue of death where the circumstances have been made so prejudicial to the defendant, albeit by his own conduct and that of incompetent counsel.

Another group of disagreement cases involves, in differing ways, situations of domestic tension. Here the context tends to belie somewhat any deliberate intent to kill. A husband and wife are charged with the murder of their four-year-old daughter, who died "after the administering of a brutal beating." The jury, which is lenient, finds only second degree murder—thus precluding the death penalty, which the judge would have given. Little background is supplied about the case, but there may be a clue in the fact that the husband pleads insanity as a defense. Presumably there was no literal intent to kill the child. The judge finds first degree murder pursuant to the legal rule which holds the actor liable, as if he intended it, for a death that occurs in the course of a felony.[8] In this context the jury will not accept the legal fiction of intent. Further, with respect to the wife, the jury may have been following its special form of chivalry in not imposing the death penalty on a woman;[9] and the husband may accordingly have been the beneficiary of a desire, at least where the death penalty is at issue, to treat partners in crime with an even hand.

In another domestic case the defendant kills his estranged wife, whose reputation was "poor so far as marital relations were concerned."

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8 The felony murder doctrine provides in general that if a death occurs in the course of the commission of a felony, or certain felonies, the crime is murder in the first degree, even if the intent was not to kill. See PERKINS, CRIMINAL LAW, 33-36 (1957). The felony murder rule is the harshest instance of strict liability in our criminal law.

9 See generally O'DONNELL, SHOULD WOMEN HANG? (1956); note 25 *infra*.

There is a record of prior abuse by the defendant of the victim, "a good looking woman." The jury is lenient, and the judge is explicit as to why:

> Eternal triangle if this is extenuating. Perhaps the so-called unwritten law.

In another version, a man jealous of his paramour because she tried, as the judge puts it, to "quit being familiar with him," stabbed her to death—"in the daytime on a public street while she was running from him." The jury is lenient. The judge adds the following comment to the explanation suggested by the jealousy theme:

> A Negro killing a Negro, that is, the jury did not attach enough importance to the value of a human life due to race.

Perhaps one other case is conveniently placed here. The body of the victim, a woman of poor reputation, is found in the desert. Her boy friend confesses to the killing. On the witness stand he boasts of his criminal reputation. This time it is the judge who is lenient because of the status of the victim. He explains:

> I felt that because the victim was herself an underworld character and was guilty at least of keeping company with a person of defendant's reputation—society because of her wrongful death did not require the supreme penalty of the defendant.

Other disagreement cases pick up a theme touched on in the case of the parents who beat their child to death. In each case there are partners in the crime and the defendant is not the actual killer. The felony murder rule precipitates the disagreement.[10] The jury rebels at imposing the death penalty for the vicarious criminal responsibility of the defendant. One illustration will suffice. Four defendants conspire to rob a seventy-six year old woman in a hotel room. In the course of the robbery the victim is gagged and she accidentally strangles. The defendant has been a mere go-between in recruiting accomplices to the crime. Three of the accomplices, the judge reveals, have "been tried, found guilty of first degree murder and given life by the jury." There

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10 We had anticipated that, because of the rigidity of the felony murder rule, the jury's sense of equity would produce a broad area of disagreement. It turned out, however, that disagreement over the rule emerges only at the level of the death penalty. The American Law Institute MODEL PENAL CODE proposes to limit the felony murder rule to a rebuttable presumption. MODEL PENAL CODE § 201.2 (1)(b) (Tent. Draft No. 9, 1959). It is worth noting that the first step in the evolution away from the death penalty in New York was to repeal the law that made the death penalty mandatory in cases of felony murder.

are two leniency-disposing factors: the defendant did not commit the act of violence and the death penalty had already been withheld for the partners in the crime.

A final source of disagreement is somewhat curious. In two instances the judge, when asked for his hypothetical decision "had he tried the case without a jury," refers to what he would have done had the defendant in fact waived a jury trial:

> The killing was wanton but on a plea of guilty or a bench trial, I would have spared his life.
>
> The jury verdict of first degree murder without recommendation of mercy was, in my opinion, justified by the nature of the attempt to escape although I would have imposed a life sentence rather than invoke the death penalty if I had tried the case myself without a jury.

The waiver is apparently regarded as a gesture of cooperation warranting withholding the death penalty.

TABLE 118

FACTORS EVOKING LENIENCY IN CASES WHERE ONE DECIDER GIVES DEATH SENTENCE

LAW	*Number of Cases*
Diminished responsibility	
Abnormal mentality, though not legally "insane"	2
Provocation, anger, jealousy	
Lovers, triangle	4
Neighborhood fight	1
Child-beating	2
Negro is called "nigger"	1
"Worthless victim"	
Underworld characters	1
Negro kills Negro	1
Felony murder	
Others involved did not get death penalty	7
Defendant not the actual killer	4
Procedural	
Trial process distrusted, because defendant's behavior prejudiced trial against him	1
Guilty plea or jury waiver would have mitigated	2
DEFENDANT	
Defendant a female	2
Father cried on stand	1
COUNSEL	
Incompetent counsel	1
EVIDENCE	
Prosecution witness—contradiction between first and second trial	1
UNEXPLAINED	2
Total cases	21*

*Factors add to more than 21 because of multiple reasons.

It will be helpful to summarize at this point the reasons which moved jury or judge to withhold the death penalty in cases where one of the two decided for it.[11]

Table 118 imposes, if for a brief moment, a sense of regularity on the discretionary allocation of the death penalty. The leniency categories have a plausible ring. But the brute fact is that each time one of the factors listed was persuasive to one of the deciders, it was unpersuasive to the other. Either the judge or the jury was willing, despite the presence of the leniency-disposing factor, to have the defendant executed.

Having explored in detail the pattern of decision for our two deciders, the judge and the jury, we look now at the record of the third decider, the executive. Although commutations are seldom accompanied by published reasons, we know something about these reasons. In 1949 in the United Kingdom, the Home Office itself submitted an illuminating memorandum to the Royal Commission on Capital Punishment[12] and there is a fine recent study on the variety of commutation procedures in the United States.[13]

It will be convenient to follow the structure of the American study, noting the analogous English materials. The study lists thirteen factors or standards which have influenced clemency.[14]

The Nature of the Crime. "[A]cts which, because of the status of the victim and the viciousness of the crime, most offend the community. The more heinous the crime, the less chance for clemency."[15]

Doubt as to Guilt. This is a less frequent basis than one might expect, because the executive is often hesitant to displace the jury as fact-finder.[16]

Fairness of Trial. "[The question] usually arises in a situation where there has been considerable publicity surrounding the trial."[17]

Relative Guilt and Disparity of Sentences. "The principle [in felony murder trials] that the acts of one shall be the acts of all, insofar as it

11 Table 118 attempts to group the reasons by using previously established categories. Admittedly, in several cases the fit is not very good. Some cases, which have not been specifically adverted to in the text to avoid repetition, are included in the table.

12 ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 1-38 (1949).

13 Comment, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136 (1964).

14 The format follows that which appeared in the American article. The following list gives the British counterpart, by citing the corresponding passages from the Report of the Home Office as given in the report of the Royal Commission, *supra* note 12, at 3-4: *Doubt:* § 21; *Trial:* § 27; *Guilt:* § 26; *Mitigation:* §§ 23, 25; *Physical Condition:* § 22; *Recommendation:* § 16; *Politics:* § 27.

15 Comment, *supra* note 13, 39 N.Y.U.L. Rev. at 159.

16 *Id.* at 160.

17 *Id.* at 162.

fails to recognize relative degrees of culpability, leaves to the clemency authority the opportunity to inquire into the defendant's personal responsibility and the directness of his participation . . . ."[18]

Geographical Equalization of Sentences. "The acceptance of this standard is rooted in the belief that the locale of the crime should not dictate the severity of the sentence."[19]

Mitigating Circumstances. "The existence or lack of mitigating circumstances accompanying the commission of the crime, such as duress, provocation, intoxication and self-defense, is of some importance . . . ."[20]

Rehabilitation. "Rehabilitation appears to be a standard for commutation only in cases where the defendant has managed through court action to remain alive for a number of years after the original date of execution."[21]

Mental and Physical Condition of the Defendant. "Dissatisfaction with the *M'Naghten* rule and the artificial line between 'legal' and 'medical' insanity has led more than a few clemency authorities to commute a sentence on the basis of medical insanity where the defendant had previously been judged legally sane."[22]

Dissents and Inferences Drawn from the Courts. Certain pardon officials have given special consideration to a case where in the appellate court "one or more judges dissented . . . . Somewhat similar . . . is a written opinion . . . which, while affirming the death penalty, intimates that the case might be appropriate for the exercise of executive clemency."[23]

The Clemency Authorities' Views on Capital Punishment. "[T]he views of a clemency official on the issue of capital punishment will have some influence . . . ."[24]

The Role of Precedent. "There is generally a discernible continuity of policy in the actions of a governor within his administration and in those of a board within its term of office."[25]

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18 *Id.* at 163. The English formulation refers to cases where two or more persons were involved and "it may be right that the principal should be executed and the secondary partners reprieved [or where] the principal has escaped trial, conviction, or execution, [and] it may be expedient to reprieve the accomplices." ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 4, § 26 (1949).

19 Comment, *supra* note 13, 39 N.Y.U.L. REV. at 165.

20 *Ibid.*

21 *Id.* at 168.

22 *Ibid.*

23 *Id.* at 170-71.

24 *Id.* at 175. "Political motives would have doomed a murderer when Sir Herbert Samuels was Secretary but might have operated to save him during the incumbency of Lord Brentford."

25 *Id.* at 177. The American study offers us two other bases: recommendations of the prosecution and the trial judge, *id.* at 171, and political pressure and publicity, *id.* at 172.

The comparison of executive discretion with that of the judge and jury is suggestive. There are, of course, several points—rehabilitation, judicial dissent, political pressure, prosecutor recommendation, geographical equalization—which in the nature of things have no parallel in the judge-jury situation. But for other factors the parallelism is worth noting. Thus heinousness offends both. And provocation, marginal insanity, the rigors of the felony murder rule, and procedural fairness are visible leniency factors in both forums. Somewhat surprisingly, doubt as to guilt is not a salient factor in Table 118.[26]

The empirical data about jury, judge, and the executive, however, do little to upset an a priori conviction that the administration of the death penalty today is singularly agonizing. The jurisdictions that retain it follow the same policies. There is agreement that not all of those convicted of first degree murder should be executed, and also it is a dominant policy that the legislature does not specify by a general rule any category of defendants for whom the death penalty and its execution should be mandatory. As a result, the law can only leave to discretion the decision as to who is to die. The materials just reviewed show how difficult the exercise of this discretion is, whether by the jury, the judge, or the executive.

Procedural changes are being attempted to improve the administration of the discretionary death penalty. Thus, California and New York now require a separate trial on the issue of death, so as to permit the jury access to the broadest possible evidence about the defendant.[27] The new penal code for Illinois requires explicit agreement of jury and judge for the death penalty.[28] The cases we have reviewed lend considerable support to such a move.[29]

But even these techniques for locating a hard core of capital cases do not put to rest the concern about evenhanded justice. In the end the task is one of deciding who, among those convicted of capital

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The Home Office mentions in addition other possible areas of extenuation: suicide pact survivals, § 19; physical deterioration to such a degree that the execution would not be humane, § 22; certain instances of felony murder, § 24; special consideration to females, § 28; and, finally, youth, § 29. ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 3-4 (1949).

26 What the Home Office calls a scintilla of doubt, *id.* at 4, § 21, may appear substantial in the shadow of the death penalty.

27 See Comment, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L. REV. 50 (1964). Some judges have suggested that the system may be resulting in an increase in capital cases.

28 The death penalty may be imposed only if the jury explicitly recommends it; the recommendation is not mandatory on the court. ILL. REV. STAT. ch. 38, § 1-7(c) (1965).

29 Table 117 shows that of the 35 cases in which one of the two deciders would demand the death penalty, there is a failure to agree 60% of the time.

crimes, is to die. Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes.[30] The discretionary use of the death penalty requires a decision which no human should be called upon to make.

30 The point was made years ago with distinctive force by Professor Wechsler: "[Capital punishment] is not and cannot be administered with even rough equality. . . . A rigid legislative definition of the cases where the sentence should be death has proved to be unworkable in practice, given the infinite variety of circumstances that attend even the heinous crimes. Therefore, it is inevitable that the jury or the court be given power to decide whether the punishment should be imposed. . . . Discretion means, however, that variations are inevitable, depending on the individuals involved, the jury empanelled, the attitude of the press and public and other accidents of time and place. . . . Yet most dramatically when life is at stake, equality is . . . a most important element of justice." *Symposium on Capital Punishment*, 7 N.Y.L.F. 250, 259 (1961).