

CHANGING METHODS AND PHILOSOPHIES: AN ANALYSIS OF
CAPITAL PUNISHMENT FROM THE SEVENTEENTH
TO THE TWENTIETH CENTURY

by

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A THESIS

IN

POLITICAL SCIENCE

Submitted to the Graduate Faculty
of Texas Tech University in
Partial Fulfillment of
the Requirements for
the Degree of

MASTER OF ARTS

Approved

Accepted

May, 1987

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ACKNOWLEDGMENTS

I acknowledge, gratefully, the guidance and support of my thesis committee: Dr. Sue Tolleson Rinehart, Dr. Jerry D. Perkins, and Dr. William E. Oden. The encouragement of Jeffery W. Hoag and his assistance with English mechanics proved invaluable to the timely completion of this thesis.

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CHAPTER I

INTRODUCTION

Since individuals first came together in association with others, societies have found reason to demand the lives of their members, through outlawry or death. Lives of individuals were demanded for offenses contrary to the rules of the established order, as a guarantee of internal peace, or as a defense against enemies. The death penalty is the most grave and parlous penalty inflicted on an individual. It is and has been used in some form for a great variety of offenses in virtually every country of the world.

A penalty for crimes against the established rules of early societies was outlawry or slow death as an outcast. Although outlawry, banishment, or transportation continued, methods for execution underwent numerous changes and modifications over the centuries. The question of what actions are thought serious enough to carry this extreme punishment has long been a topic of contention, as are limits of state intervention or societal interposition in exacting an individual's life.

Justification for capital punishment has remained a source of curiosity or allurement since individuals first

formed societies. John Stuart Mill's essay, On Liberty, illustrates this thought-provoking struggle for justification.

That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. (Mill, 1961, p. 263)

Is self-protection the only justification for taking an individual's life? Should a person's life be forfeit in exchange for the offense of ignoring another individual's right to life? Can society interfere with the life of any of its number if current values of those with power deem it necessary? What offenses constitute "harm to others?" The questions raised by this issue are endless. As humanity has evolved within society, so has its conception of the inherent humanity of each individual. Over the centuries the value of life has changed. The development of this concept has often coincided with modifications of execution practices and capital statutes.

"The principle of lex talionis that 'the punishment equal the crime,' or, more crudely, 'an eye for an eye,' is deeply embedded in Western ethical tradition" (Cochran,

1986, p. 152). This principle is based upon biblical scriptures found in Exodus 21: 23-25 and the Code of Hammurabi, which was written a thousand years prior to Mosaic Law (Cochran, 1986). It has passed on through the centuries as a continuing source of influence upon capital statutes. Illustrations of this Judeo-Christian heritage, extending from ancient civilizations, can be seen in Figure 1. Early techniques for carrying out capital punishment include stoning, crushing, impaling, boiling, flaying, or crucifying. Persian law decreed death for accidentally sitting on the king's throne, and Roman law demanded a woman's life "for stealing the keys to one's husband's wine cellar" (Encyclopedia Americana, 1986, p. 596).

From the middle ages to the seventeenth century few changes occurred except as pertained to procedures. Some techniques used during this period include burning at the stake, stretching on the rack, breaking on the wheel and drawing and quartering (Encyclopedia Americana, 1986). These executions were usually preceded by some form of torture. Forms of torture and execution were often viewed as entertainment, as were the gladiatorial games and state executions of the Roman Empire. As the centuries progressed, the practice of torture before death became less common. This gradual decline in the use of torture indicates an increase in conceptions of the value of life.

<u>Reference</u>	<u>Capital Offense</u>	<u>Punishment</u>
Exodus 12:15	"eats anything with yeast in it from the first through the seventh day"	banished/executed
19:12	"touches the mountain" (Sinai)	stoned/shot with arrows
21:12	"strikes a man and kills him"	put to death
21:14	"schemes and kills another man deliberately"	put to death
21:15	"attacks his father or mother"	put to death
21:16	"kidnaps another and either sells him or still has him when he is caught"	put to death
21:17	"curses his father"	put to death
22:18	"a sorceress"	put to death
22:19	"sexual relations with an animal"	put to death
22:20	"sacrifices to any god other than the Lord"	put to death
22:22	"takes advantage of a widow or an orphan"	death by sword
Leviticus 19:8	eats "impure" meat	banished/stoned
20:2	"sacrifices children"	stoned
20:10	"commits adultery"	put to death
20:11	"sleeps with his father's wife"	put to death
20:13	"lies with a man as one lies with a woman"	put to death
20:27	"a medium or spiritist"	stoned
21:9	"priest's daughter . . . becoming a prostitute"	burned by fire

(a)

Figure 1. Example of Judeo-Christian Heritage Concerning the Death Penalty.

Source: Barker, Kenneth, ed. 1985. The New International Version Study Bible. Michigan: Zondervan Bible Publishers.

24:16	"blasphemes the name of the Lord"	stoned
24:17	"takes the life of a human being"	put to death

(b)

Figure 1. (Continued) (b) Continued page.

The purpose of this paper is not to determine the suitability of, or justifications for, the death penalty. It is, instead, to explore expanding conceptions of human rights by examining the changes in orientations toward the death penalty and the crimes for which it has been deemed an appropriate punishment. What produced these changes? Was it public opinion? Was it the opinion of the sovereign, the judiciary, the politically active, the church, or prominent philosophers? Perhaps economics, political systems, or elite structures influenced decisions for change. Who and what produced these changes are the essential consideration of this thesis. As with all research, the question requires the imposition of some boundaries if coherent answers are to be found. I will examine the changing methods and philosophies of capital punishment in the United States of America and Great Britain from the seventeenth to the twentieth century. Prior to the seventeenth century, a virtually stable system of capital punishment existed. Changes in methods of execution were exhibited, but laws and traditional precedents remained constant. Agitation for change in both methods and laws rapidly increased from the seventeenth century to the present. A comparison between the United States and Great Britain creates more interesting analysis than a study of one or the other system of capital punishment. Similar legal and social backgrounds, as well as American colonial

status, facilitate this comparison. England transported traditions and customs along with goods and people, but differences between the systems also arose at an early point.

CHAPTER II

DATA AND METHODS

W. E. H. Lecky, the historian, has written that "selecting the facts that are most valuable and significant and explaining the relation between general causes and particular effects" is of utmost importance to research (Lecky, 1908, p. 2).

This research considers attitudes of groups and individuals in two nations. As prescribed by David and Chava Nachmias (1981), the purpose of research is to compare, assess, and describe the relationships between groups. The specific effect herein considered is the growth of conceptions of human rights and the value of life. Changing laws and methods of capital punishment illustrate these attitude fluctuations. The general causes to be examined include economic conditions, elite attitudes, system stability, and prevailing political philosophies. The concept "economic conditions" summarizes the following: general economic situations, average wages for common laborers, and life expectancy. These particular items are combined more adequately to measure overall economic conditions. These factors exert

influence on social and political change and, indirectly, on legal change.

Elite structures, as used in this thesis, are individuals or groups in each nation that exert some political influence or decisive power. These assemblages vary between the two nations and between centuries. They do not always share a common plan or purpose. They do not always use their influence for penal reform as examined here. Elites are those groups or individuals who retain some access to political authority.

Complex concepts like stability present problems in research. An attempt to link these concepts to operationalized concrete measures facilitates increased understanding by specifying and simplifying. System stability is herein defined as constancy within the overall political system or institutions. Only major alterations of political institutions will be assessed as system instability.

For each century, a few political philosophies are selected as being representative of overall systems of beliefs and principles. Each philosopher included here summarizes ideas and convictions prevalent in each age.

The interactive relationship of system stability and sources of authority influence the prevailing philosophies of each era. These philosophies contribute to change in elite attitudes, which in turn directly affect

change in laws and statutes. Economic conditions contribute to change in elite attitudes as well. Mass opinions appear only indirectly to influence elite dispositions. Actual changes in penal codes, capital statutes, and execution customs are outward manifestations of changes in conceptions of human rights and the value of life; thereby, they allow for more concrete operationalizing of such concepts.

Some starting point must be chosen for a discussion of possible influences upon change in orientations toward the death penalty. The status of the general public in Great Britain and the United States is one point. Estimating total national populations for any given period is difficult. "The difficulty is that the world population even today is only known within a 10% margin of error, [and] our information concerning earlier populations is still more incomplete" (Braudel, 1979, p. 31). Population totals, included in the following chapters, are estimates based on census data and on historical documents for years prior to official census records.

"Before the nineteenth century, wherever he lived, man could only count on a short expectation of life, with a few extra years in the case of the rich" (Braudel, 1979, p. 90). The battle against disease, scarce food and inadequate housing continuously dominated the masses of both nations. Frequent wars cut male populations, and frequent childbirth

reduced the life expectancy of female populations, as discussed by Antonia Fraser in The Weaker Vessel (1984). Life expectancy and living standards are used to determine the amount of time available to the masses for expression of political and social concerns and principles. Only brief summaries are included for each country's basic elite structure and political system.

The availability of demographic statistics prior to the late eighteenth century is problematic, but economic and political histories lend assistance in this area.

A writer who treats of some great revolution that has transformed human affairs should deal largely in retrospect, for the most important part of his task is to explain the long course of events that prepared and produced the catastrophe . . . (Lecky, 1908, p. 1)

CHAPTER III
SEVENTEENTH CENTURY

Changes in law, political or social custom and judicial behavior reflect numerous influences. Some are exerted by shifting public values and attitudes. Some originate from innovative and prolific philosophers. Others arise from fluctuating judicial and political tolerance or religious reformation. All are susceptible to economic conditions, elite structures and political systems.

First of all was the common law tradition itself, its roots extending deep into English legal history and jurisprudence. The theory behind English common law was that it was an expanding doctrine--that, as events developed, common law judges would 'discover' the law that already existed and apply it . . .
(Taylor, 1976, p. 47)

In England, the legal basis for determining punishment was built on an unstable system of discretion, and the laws "stemmed largely from judges limited only by a few great documents, such as the Magna Carta (1215), a few statutes enacted by Parliament . . . [and] pronouncements or actions of the king . . ." (Taylor, 1976, p. 47). In America, numerous "questions were left to the discretion of the judges, including the method of capital punishment and even its

assignment to crimes never before punished by death" (Mackey, 1982, p. 2). The abundance of judicial discretionary power coupled with a time of extreme and violent unrest caused the number of capital offenses to increase dramatically during the seventeenth century.

Small concern for human rights is reflected in the fact that executions increased among the poor as well as the elite. Although similar situations occurred in the colonies, they occurred to a lesser degree. Hanging and burning were the most widespread methods of punishing capital offenders in the colonies. Methods of execution in England were many. There were three common and widely used forms: beheading, hanging and burning. Beheading was reserved for high ranking members of the government, church, and aristocracy. The Earl of Essex (1601), Sir Walter Raleigh (1618), the Earl of Stratford (1641), and Charles I (1649) were beheaded, as was Archbishop Laud in 1644, whose punishment was upgraded from hanging to beheading. All of these executions were for political reasons. Poor and common men were hanged by the neck, and women were burned at the stake.

The American colonies inherited the English jurisprudential tradition of common law. While, in England, some degree of centrally controlled administration existed, the case was different in America. No uniform criminal code existed, and variance from one jurisdiction

to another was considerable. Administration of the codes in the colonies was wholly the work of laymen. "The lay judge cared little for consistency or precedent" (Adams, 1934, p. 15). Local values and attitudes, as well as the personal principles of these laymen, produced the codes used in the colonies. Richard Nicolls, the first English governor of New York, established twelve capital crimes closely following those in effect in the colony of Massachusetts. "The earliest recorded capital statutes are those of the Massachusetts Bay Colony dating from 1636" (Dike, 1982, p. 5). In 1636 in the northern colonies, capital offenses included blasphemy, idolatry and witchcraft. Colonies in the south more closely followed English codes. The fragmented political system of colonial government contributed to the great degree of variation between provinces and even cities. Isolation from strict political and legal authority caused some colonies to fall back on long held traditions of Mosaic Law. The first recorded execution in America occurred on September 30, 1630 (Carruth, 1972).

"The seventeenth century, overwhelmed with a sense of human depravity, had worried about how to control the corrupt will of the people so as to reduce their offensiveness to God" (Morgan, 1965, p. xxxv). Control was maintained by punishment; capital punishment was used as one means of control and as a deterrent to some crimes.

Before the seventeenth century, England had only eight major capital crimes. They included treason, murdering one's husband, murder, larceny, robbery, burglary, rape, and arson. By the end of the century, more than a hundred offenses were punishable by death. Victims of capital statutes were usually the poor and the common. False or "sham" sentences were frequent during this period. Only chance or crowd psychology saved an intended victim. Public executions were public displays; shops were closed, work ceased, and much revelry ensued during executions.

Economic influences, which often seem slightly connected to political and legal events, "are often those which have most largely contributed to the good or evil fortunes of a nation . . ." (Lecky, 1908, p. 11). To a great extent, abhorrent social and economic conditions fostered attitudes about life's comparative cheapness, attitudes already manifested in a period of unrest culminating in civil war. Laborers and artisans in England were to have no voice in political or economic affairs in their own communities much less in their nation for centuries to come. They were unable to offer comments on the wages they received. "A law passed during the reign of Edward VI declared that any workmen combining together for the purpose of improving their working conditions or wages, would be punished" (Finnemore, 1955, p. 49). Wages "ran from 4s. to 5s. per week for labourers, 4s. 6d. to 5s. 6d.

for artisans" (Finnemore, 1955, p. 48). Real earnings were approximately six times lower than average food prices by 1712 (Gimple, 1976). "The political ambitions of the various churches obscured and concealed the serious economic dislocation that attended the rise of modern trade and the destruction of the older economy" (Sabine, 1973, p. 404). Prices were up and the value of English money had decreased significantly since the sixteenth century. All wages of the laboring class went to maintain life. Subsistence survival was the rule for the majority of the population. The average day for a common laborer was fourteen hours, and only fifty percent of the population lived to the age of twenty. Real life was, as Thomas Hobbes envisioned the state of nature to be, "solitary, poor, nasty, brutish, and short" for the majority of individuals (Hobbes, 1958, p. 107).

English laws, social customs, and institutions adapted differently in the colonies. Obstacles to the development of democracy were less obtrusive. Social, political, and legal inequalities did not exist to the degree experienced in England. "Those who became colonists came largely from the classes which were least wedded to the aristocratic and monarchical institutions of the Old World" (Osgood, 1930, p. 14). Ties to English traditions remained evident. Writings of prominent individuals evidence the influence of these traditions. William Penn

wrote mainly of toleration and humane government in Pennsylvania; however, throughout his writings, notations exist "to the effect that government was of divine origin, that its chief objects were to terrify evil-doers and to cherish those who do well" (Osgood, 1930, p. 252). Despite legal, social, and political history similar to England's, equality of legal status, social position, and political access developed more quickly in the American colonies. The laboring and the professional classes accessed similar political power. Individual and family interests concerned the majority of colonists, however.

So fully occupied were the mass of the people who were thus situated with clearing the forest, building rude dwellings, laying out towns, fencing their farms, tilling the soil . . . or protecting themselves . . . that they had time and strength left for little besides. (Osgood, 1930, p. 435)

Self-sufficient and independent individualism, fostered by the remote situation of the colonies, led to increased democratization and extended political access in the next century. In England, the political voice of the general public was virtually nonexistent. Neither were voices of opposition tolerated from the educated or well-to-do. Algernon Sidney was executed in 1683 for voicing reforms and for his complicity in the Rye House Plot against the monarch.

In 1603, James I ascended the throne. It is often said of James that he was "easily led by favorites, who

gained ascendancy over him more by their personal graces than by their attainments" (Cross, 1939, p. 286). In spite of this trait, James I had his effect upon the enforcement of the death penalty. His obsession with witchcraft initiated a milieu leading to the execution of seventy thousand individuals--most of which were women--between 1603 and 1682 (Cross, 1939). During the Stuart reigns, the number of capital crimes increased dramatically.

From 1642 to 1652 England was embroiled in civil war. Charles I had discovered "that there was no shadow of yielding in that stern character when the Puritan believed his cause to be just" (Finnemore, 1955, p. 67). The church of England was under Royal control, and intolerance prevailed. The Anglicans and the Puritans began to divide the church, and in 1642 they split the country as well. When Charles I was beheaded in 1649, a critical blow was struck to execution reform. The old system of divine right was virtually abolished in one swift act. If the king could be executed, a never ending violation of rights appeared imminent. In 1653 Oliver Cromwell stepped to the head of government in England. There was a move away from royal absolutism to increased parliamentary authority. Although some English citizens gained new rights, tyranny continued--especially over the Irish populace. Cromwell became an autocratic dictator; even as constitutional

government became the new ideal. Prevailing philosophy reflects these realities.

Writers who were tolerated voiced royalist beliefs and principles. Sir Robert Filmer's Patriarcha or the Natural Power of Kings showed support for maintenance of royal prerogative. Filmer believed in a hierarchy in society, and he advocated government organization by command. His theory of patriarchalism allowed the king to decide the best interests of his subjects or "children." Locke, who wrote in direct opposition to Filmer's monarchical absolutism and patriarchalism, did not admit authorship, and indeed fled to Holland in 1683 according to editor Peter Laslett (1960). Thomas Hobbes, like Filmer, also supported absolute government, but not from Filmer's patriarchal perspective. Hobbes believed peace was only possible by understanding human nature and maintaining control over the forces which determine it (Harmon, 1964). Because Hobbes did not believe in government by consent or a citizen's right to participate in the "law-making process," his writing was seen, not as a threat to, but as support for an absolute monarch. Rights were abandoned to the sovereign whose duty it was to protect his subjects. Security was preferred to freedom. These philosophies pervaded social, legal, and political thought for most of the century.

A small number among the elites carried on these debates. The bottom of the elite structure was the bourgeoisie, who could provide some recourse for themselves under the laws. Common laborers were below the bottom, as they retained no rights. The elite structure commenced with informal debates at London coffee-houses. "Soon each party in politics, and almost every division of society, had its own favourite (sic) place of meeting" (Finnemore, 1955, p. 74). The coffee-house was one beginning of political influence in England by groups other than the aristocracy. Tradesmen and merchants met to discuss the happenings of the day. The sentiments of these individuals were noted by pamphleteers and, later in the century, by news runners. After the Puritan revolution, the voiceless common folk suddenly gained a modicum of notice in the political arena. The radical party, Levellers, arose from the revolution. Although short-lived, the Levellers urged the case of equality under the law for all men regardless of social standing and the rights of the propertyless. In regard to laws, the Levellers believed "it [was] the man, not property that should be represented" (Sabine, 1973, p. 450). A novel idea, this call for representation of the masses. The life of the individual was taking on increased importance in the eyes of the government and its legal system, and this concern laid groundwork for future reforms.

In 1660 the crowning of Charles II brought an end to Puritan rule, and restoration of the monarchy brought a measure of peace to England. Matters other than internal security could once again bear consideration, and minor adjustments in the accepted methods of exacting the death penalty appeared in law and custom.

In previous centuries, executions took place near the locations where the offenses occurred. "When caught, the highwaymen were hanged, and very often their dead bodies were swung in chains upon a gibbet near to the scene of their crimes" (Finnemore, 1955, p. 108). One adjustment in method of execution occurred with hangings. Hangings were moved to Tyburn and remained there for two centuries. The triangular gallows known as Tyburn were erected in Hyde Park, and moving public executions to a fixed location reduced some improper handling of the punishment (Laurence, 1960).

Another change in method was brought about by a group of humanitarians, who introduced the method of hanging by cart. This new procedure was thought to reduce suffering and add dignity to the execution process. It was later discovered that criminals suffered longer when hung from a cart than when jumping from a ladder as previously instituted. The jump often broke the offender's neck and reduced his suffering. This was the extent of capital statute reform despite elite or philosophical debate.

Debate centered on matters other than capital punishment, and elites were occupied by internal disputes and war with other European states. Because execution was useful in time of war, no sweeping changes occurred in England's laws on capital punishment. Execution was used as a means of control; especially political control. Reforms were instituted only for the alteration of extant methods of capital punishment. The domination of the monarchy and established beliefs remaining from feudal times limited reform to end torture prior to execution and the emergence of humanitarian efforts.

Blackstone, the great English jurist . . . said: 'For though the end of punishment is to deter men from offending, it never can follow from thence that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws'. (Scott, 1950, p. 8).

Blackstone's words were not followed by deeds, however.

Colonial America experienced different progress from England despite a similar legal background. Between 1610 and 1690, the European population in the colonies experienced tremendous growth; numbering from 210 to approximately 213,400 (Carruth, 1972). Far from England, colonial social stratification proceeded along different lines. Colonists struggled mainly for existence rather than social status. Laborers could, however, rise to middle gentry in virtually one step. Individual

industriousness was rewarded. Planter "aristocracies" arose and gained some social status quite early; though no "English" aristocracy proceeded from this move. Many individuals started life in the colonies as transported criminals or dissidents, who left in order to avoid hanging. In the general orientation to life, elite influence and the influence of philosophers was less important in the colonies. With a society in the making, energies were focused on successfully establishing trade. The small elite structure consisted of colonial governors, church leaders, councils, and charter company officials. Charter company officials, like those of the Dutch East India Company, were concerned with trade, but other elites were involved in legal codification affecting capital statutes. The list of colonial capital crimes bears marks of religious influence and puritanic intolerance. Idolatry, witchcraft, "blaspheme, murther," false witnessing, insurrection, adultery, bestiality, treason, and homosexuality were capital offenses in the Massachusetts Bay Colony. Religious and Puritan influence is obvious. Beside each crime from A Coppie of the Liberties of the Massachusets Colonie in New England is listed the scripture reference for justification of each punishable offense (Morgan, 1965). Colonial isolation furthered religious influence. Massachusetts' codes follow Exodus and Leviticus almost word for word rather than

simply stating justifications. Isolation from strict legal precedence and application encouraged these colonists to rely on religious traditions like those expressed in Figure 1 on page 4. "Though arriving in Massachusetts ten years after the Pilgrims, the Puritans quickly became the dominant political and theological force in New England" (Taylor, 1976, p. 76).

Because the population was small and the room for growth and expansion was unlimited, executions were not as frequent in the colonies. Those who failed to agree with local ordinances or religious prescriptions could easily move elsewhere. The need for able bodies and the struggle for survival increased the estimated value of human life.

Participation in local government and legal affairs was usually conducted through the churches, especially in the northern colonies. Access to the system was available to more individuals. Although a somewhat expanded notion of human rights existed in colonial America, no real reform of capital codes or execution methods occurred. The inherent humanity of individuals was not a common topic to the philosophies or practices of the time. Although John Locke wrote about states created by unanimous consent of individuals and sovereignty of the people, the concept of human rights remained virtually nonexistent. Seeds were sown for reform which occurred in the next century, however. The Grand Remonstrance or Parliament's appeal for

public support over the king and the Reformation or "priesthood of all believers" doctrines contributed to the growth of later reform efforts (Harmon, 1964). Ideas for change remained confined to procedural rather than substantive rights. In England, the philosophies of Filmer and Hobbes remained prevalent forces, and despite some differences, neither Filmer nor Hobbes seriously respected what they "regarded as the claptrap concerning a system of natural rights" (Harmon, 1964, p. 237). Although the beginning of Hobbes' Leviathan is a careful attempt to establish a system of natural rights from logical, "scientific" principles, his system is different from other natural rights conceptions (Hobbes, 1958). The philosophies of Harrington and Locke for republicanism, on the other hand, were more appealing to colonists, and a major division in political and legal thought carried through to the next century. Divisions in thought occurred as elites in each country sought the best justification for those goals which they wished to attain and those traditions they sought to maintain.

CHAPTER IV
EIGHTEENTH CENTURY

England in the eighteenth century was a land of hamlets and coastal towns. Population estimates vary considerably because evidence is unreliable, and most population changes during this period were geographical rather than numerical. Factories became more numerous, and many women and children were forced to work in them for extremely low wages. These workers were "ignorant, were careless of comfort, of health, of decency, and their standard of living steadily sank" (Finnemore, 1955, p. 88). It was a brutal age (Finnemore, 1955). As in the seventeenth century, the average work day was fourteen hours or longer in duration. The increases in prices of essential goods and services virtually nullified any increase in disposable income. No leisure was yet in sight for the majority of the populace. Most were so preoccupied with rising prices, taxation, and land use that other issues were ignored. Living standards and life expectancy remained low. London was overcrowded and unsanitary, and only about one in four city dwelling children survived to adulthood. As in the previous century, the laborer found

little time for law or politics; survival was too time-consuming.

The American continent offered a somewhat more optimistic picture. "The development of a greater confidence in the virtue and capacities of the people was facilitated among Americans by the manifest success of ordinary men in wringing the comforts of life from a wilderness" (Morgan, 1965, p. xxxv-xxxvi). A population of 275,000 in 1700 exploded to 3,929,625 by the time of the first census in 1790 (U.S. Department of Commerce, 1975). Other than some advancement afforded to colonists, no middle class existed in English society. The only group between the poor and wealthy was the craftsmen. In England, the decay of the guild system left the artisans without political power. The reestablishment of the monarchy kept legal, social and philosophical change to a minimum early in the century.

Regarding religious influence, the Church of England experienced a protracted period of "spiritual deadness" during this period and needed reform (Finnemore, 1955). Because the Church was not meeting the needs of the poor, John Wesley began winning many to Methodism. Like the Levellers of the previous century, this group appealed to the common laborer. Methodists were successful at "grassroots" mobilization in both England and the American colonies; however, they did not make use of their power at

this time to further any legal or political reform efforts. A potentially good opportunity for political reform was lost. Through most of the eighteenth century this group, which remained linked to the Church of England until 1784, was busy with promotion of conservative doctrines. John Wesley was politically conservative. He once stated, "The greater the share the people have in government, the less liberty, civil or religious, does a nation enjoy" (Plumb, 1951, p. 94). The local institutions of Methodism were fairly rigid and allowed little room for a social consciousness among their membership. Although changes were evident later in the century and into the next, it was clear that political and legal reforms would glean no support from popular religious groups and churches on any significant scale. Intolerance of change continued to a greater extent in England because its rigid system and limited access to political power allowed for a slower adaptation of new ideas.

The poor remained voiceless and the elite structure retained similarities to the seventeenth century. Merchants and artisans were low in the elite structure. Those few with free time spent some at coffee-houses, which were still popular places for political debate and news gathering. Daily newspapers began production, and collection of news from coffee-houses was on the agenda of most new sheets of the day.

The main elite structure, or group with political power and influence, consisted of a few merchant princes and high civil officials who controlled the Bank of England and the great chartered companies such as the Dutch East India Company. Their ties with government followed Robert Walpole's leadership of the conservative Whig party; so status quo politics rather than reform was on the agenda. From 1715 to 1722, Robert Walpole and the Whigs dominated English politics (Cross, 1939). Acts were passed to maintain the position of the church and squirearchies. As a result, domestic reforms were slow to emerge. Among elites, industrial capitalists exerted indirect influence on public policy. During the eighteenth century, however, this group was concerned with trade and commerce and not with requests for penal reform. Other merchants and artisans did not gain increased opportunities for upward mobility until after 1760. Social mobility in England was quite limited. Male suffrage was not universal. Only property holders were allowed any political access, and the aristocracy continued to dominate the government.

Nor were the monarchs of the century concerned with reform. Anne succeeded William in 1702. Like previous rulers, Anne allowed herself to be molded by the strong influences around her. She did, however, take an active interest in public affairs. Anne was primarily concerned with uniting Scotland and England in 1707 as "Great

Britain." The Hanoverian dynasty commenced in 1714 with George I, who was indifferent to "English domestic concerns" and let his Whig Ministers run the country thereby contributing "greatly to foster the growth of Cabinet and party government" (Cross, 1939, p. 464). The Hanoverians were Germans. They spent the majority of their reigns in residence in Germany rather than England. Thus, they were apathetic toward other than foreign policy concerns.

Under George II, the constitutional government was allowed virtually free reign in domestic affairs, but numerous wars and foreign controversies preoccupied the best political minds. However, "Court was the heart of political and social life, for all decisions taken, all places promised, from a turnkey to a bishopric, had to be discussed and argued with the King" (Plumb, 1951, p. 50). The succeeding reign of George III ultimately made more serious inroads into the liberties of English subjects. George III eventually lost Britain its colonies in America. Revolutionary war with the colonies occupied the energies of the nation during the later portion of the century. The energy that could be spared from this preoccupation was devoted to European foreign policy and the protracted conflicts with France culminating in the Napoleonic Wars. Attention of British elites turned toward these different directions rather than to internal concerns.

As a result of governmental, monarchical, and parliamentary indifference, judges were left to form the current penal system. As this system evolved it aimed to prevent repetition of the crime, provide a suitable punishment based on the theory of lex talionis and make retribution to the victim or his family. "These various objectives were, it was contended, achievable in one way and one way only, by the judgment of death" (Scott, 1950, p. 8). Although penal codes existed, law-makers still considered murder and other crimes involving personal injury to be regulated by revenge due the injured party or the relatives. Sufficient progress had been made, however, so that "blood-revenge" was not carried out by the closest family member. The injured party or family could make a claim to the state which would then specify the form of revenge and the type of restitution. "Once the State's right to exact vengeance on behalf of its citizens was accepted and approved, the way for the exercise of such tyranny and persecution was clear" (Scott, 1950, p. 5). Later, deterrence gained ground as the most sought objective of capital punishment.

One reason for maintaining public executions was deterrence. Hanging was still the most commonly used method. Once sentence had been pronounced, execution took place the next morning unless that day was a Sunday. Later in the century, Monday was considered 'hanging morning.'

Mobs often gathered at Newgate to witness public executions (Scott, 1950). As in the seventeenth century, public executions were public entertainment. Seats were sold in 1758 so spectators would have a clearer view of the proceedings. Parties also hired windows overlooking the grounds for such occasions. John Timbo wrote in his Curiosities of London (1855), "'In 1758, when Dr. Henesey was to have been executed for treason, the prices of seats rose to two-shillings and two-shillings-and-sixpence . . .'" (Scott, 1950, p. 50). The eighteenth century was a cruel age for punishments. There was no discrimination by sex or age. "The Government had not learned that prevention is better than cure. They made no attempt to prevent wrongdoing by the establishment of an efficient police force, but tried to terrify evildoers from their ways by the ferocity of the punishment inflicted upon those who were caught" (Finnemore, 1955, p. 121). Many capital offenses of the time would only be punishable with fines by twentieth century standards.

The indifference of the monarchy and clergy to reform is evident. They were not without influence upon the system, however. Under the three Hanoverian kings, capital crimes increased to approximately 350 by 1780 (Finnemore, 1955). Existing at the dawn of the Enlightenment, this situation illustrates the delay of change in any practical or immediate terms. Influence of

the clergy was also apparent. It was a principle of common law that clergy were under ecclesiastical laws. They were granted "benefit of clergy" because they could read and write. This benefit was extended to other persons who could read and write, again discriminating against the poor. The clergy closely guarded the spread of literacy in order to protect this privilege. High treason, murder, and theft were not covered by "benefit of clergy."

The very savagery of the penalties inflicted for trivial offences (sic) had one good effect: it was largely instrumental in bringing about a reform in the law. True, the process was prodigiously slow, for those who created and enforced the laws of England were resistant to the arguments of the humanitarians, with the result that, while the battle was being waged, thousands of unfortunates were to be sacrificed; but nonetheless, in the end, the government was compelled, by sheer weight of public opinion to change its tune. (Scott, 1950, p. 76)

Four philosophers of the eighteenth century--two French and two British--influenced the effort for humanitarian reform. The work of Charles Louis de Secondat, Baron de La Brede et de Montesquieu was transported to England and also to America. Alexander Hamilton and John Adams in the colonies were particularly influenced by his ideas. A republic should be based upon the people, a "natural aristocracy" of leadership, and equality under the law for all persons, according to Montesquieu. Montesquieu believed that

. . . criminal laws of a country have a direct bearing on personal liberty. If they are not

good, liberty vanishes. An acceptable code of criminal law will provide that no death penalty shall be assessed on the evidence of a single witness. (Harmon, 1964, p. 284)

Montesquieu believed punishment should not be arbitrary; it should be carefully and narrowly defined. Thomas Jefferson and the founding fathers, in writing the American Constitution, relied upon many of Montesquieu's ideas on law and separation of powers.

Alexander Hamilton in The Federalist No. 84 (1949) shows the influence of English jurists as well. The legal philosophy of the seventeenth century English jurist, Blackstone, is quoted. He calls for careful consideration of an individual's rights in maintaining thorough trial and sentencing procedures--especially in capital cases.

Jean-Jacques Rousseau influenced thought in both Britain and America. His ambivalence appealed to both "individualist" and "collectivist" thought (Plattner, 1979). Editor Roger D. Masters (1964) says Rousseau is called both the "apostle of popular democracy" and a near totalitarian. Rousseau was widely read during the eighteenth century. His attack on Enlightenment values of reason and education continue to spark debate. Passion, he maintained, must be subsumed by a single will as stated in his Second Discourse.

The people having, on the subject of social relations, united all their wills into a single one, all the articles on which this will is explicit become so many fundamental laws obligating all members of the state without exception, and one of these laws

regulates the choice and power of magistrates charged with watching over the execution of others. (Rousseau, 1964, p. 169)

The philosophies of Montesquieu and Rousseau were more influential in American political thought than was true in England. The English elite was more conservative and less inclined to theories with revolutionary ideas.

David Hume's utilitarian thought was more acceptable in England. Man, he believed, was ruled by passions and self-interest. Principles like natural sympathy would help reason guide passion in each individual. Civil society is based on agreement, he claimed. However, this agreement has been "obliterated" by habitual deferment to the monarchy (Hume, 1974). Hume's writings gained acceptance as the middle class began to supplant the aristocracy and royal prerogative was being supplanted by parliamentary authority.

The English statesman, Edmund Burke, was also prominent and widely read. Burke's popularity is attributed to his appeal to the constitutional traditions of Britain. He appealed to elites when he said it was absurd "to regard the consent of an ignorant worker as of equal weight with that of an informed and propertied gentleman" (Harmon, 1964, p. 331). Burke supported long established English institutions. He made the American revolution appear the work of good English citizens defending traditional rights of subjects against the

wrongfully administered monarchical reign of George III. Both Burke and Hume believed strongly in a cautious approach to reform and conservation of established laws and customs. These influences did nothing to increase the progress of penal reform in England. "Time is required to produce that union of minds which alone can produce all the good we aim at" (Burke, 1980, p. 273).

Again, most reform efforts concentrated on procedure rather than substance of law. On March 18, 1789, Christian Murphy became the last woman in England to be burned at the stake (Carruth, 1972). After 1790, women were executed on the gallows. This was observed as a humanitarian reform. Burning had always been viewed as a lower form of punishment. The status of women increased somewhat with this change. Toward the close of the century, a repeal of torture prior to execution was implemented; as was the repeal of capital punishment for a few petty crimes. Juries began circumventing penal codes by working around the death penalty for small thefts. They often purposely lowered the estimated worth of stolen goods.

The actual legal reforms, although based on dominant political philosophies, were largely the work of a few individuals. John Howard was a leading prison reformer and helped further many humanitarian efforts. Cesare Beccaria in Essay on Crimes and Punishments (1775) wrote "But the punishment of death is not authorized by any

right; for no such right exists" (Scott, 1950, p. 78). Enlightenment theorists influenced attitudes of reformers. Howard and Beccaria affected rising public sentiment and attitudes among some members of Parliament. Sir William Meredith, a member of the House of Commons, was gravely concerned with reform after the mishandled hanging of one Mary Jones. Sir Samuel Romilly helped abolish the death penalty for the crime of pick-pocketing, but his effort to abolish the death penalty for theft was undermined by the opposition of Lord Ellenborough in the Upper Chamber.

Enlightenment thinkers also influenced American statesmen. The concepts of the sovereignty of individuals and rights vested in an individual by virtue of his humanity found fertile ground in America. Again, the rigid system in England allowed for slower adaptation of revolutionary ideas.

The philosophy which guided the reformers of the young nation was that of the European enlightenment. Belief in progress and concern with rationalism, humanitarianism, and environmentalism had permeated much of American intellectual life before the Revolution. (Mackey, 1982, p. 36)

Before the Revolution, however, colonial criminal statutes followed English patterns fairly closely. As the number of capital crimes increased in England so did they in the colonies. The one exception to this appears to be Rhode Island, which omitted three crimes from their books during the same period. All of the colonies with the exception of

Rhode Island had more than ten offenses under punishment of death prior to the Revolution. Like eighteenth century England, methods used were hanging to death or burning at the stake; with an increasing number of observers at every execution. The first official state execution in the colonies occurred in March of 1720. William Smith and Hannah Travis were convicted of theft and executed in Pennsylvania (Carruth, 1972). More leniency is evident in the colonies than in their mother country. Governors' pardons, "benefit of clergy," and corporal punishment were used to a greater extent. "This undercurrent of leniency, this seeming reluctance to kill, probably resulted from America's low crime rate and chronic labor shortage" (Mackey, 1976, p. xiii). The influence of philosophers like Locke, Rousseau, and Montesquieu contributed as well. Reforms may also have been more rapid in America because dissidents in England either sought or were forced to find refuge there. The expulsion of dissidents and revolutionary reformers from England, whether voluntary or not, may account for the slow spread of reform in that country.

In America, the pace of change increased even more following the revolution. Pennsylvania, virtually alone beginning reform efforts, was later followed by other states. Trade, economic problems, and a new political system occupied many minds. The increased value of

individual rights expressed in the Declaration of Independence, the Federalist Papers, and the American Constitution contributed to these reforms. Pennsylvania reform was advanced by Dr. Benjamin Rush. This Quaker statesman advocated complete abolition of the death penalty based on an expanded conception of the value of human life and the sin of taking same away by either state or individual effort. Rush's ideas were too advanced for the times, but his feelings were noted and influenced abolition for several capital offenses. Pennsylvania attorney general William Bradford wrote An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania in 1793. Bradford advocated abolition for all crimes except murder. On April 22, 1774, Pennsylvania abolished the death penalty for all crimes except murder. These massive reforms helped further the work of a Quaker in New York. New York was receptive to reform, as seen by a 1777 statute allowing the right of counsel in capital cases. In Article 34 of the New York Constitution of 1777, Revised Statutes, I, 37; Chapter 19 of the Laws of 1778, Laws I 43-44, they had determined this lack of defense was manifestly "repugnant to that spirit of humanity, which should ever distinguish a free, a civilized, and a Christian people" (Mackey, 1976, p. 44). Thomas Eddy with the help of Senator Ambrose Spencer, Senator Philip Schuyler, Governor John Jay, and ex-Governor George Clinton helped construct a new law for

New York. On March 26, 1796, the thirteen capital crimes on New York's books were reduced to treason and murder. Similar reforms occurred in Kentucky in 1798 under the direction of Assemblyman John Breckinridge. In 1797, Vermont also reduced its number of capital offenses. Major reductions were brought about by influence of the expanded notion of individual rights, due process and laws against "cruel and unusual" punishment as established by the founding fathers. The capacity for acceptance of new revolutionary ideas coupled with the ability to design a new political system increased the capacity for reform of criminal codes in America. The maintenance of established laws and social traditions in Britain led to slower acceptance of reform.

CHAPTER V

NINETEENTH CENTURY

"A see-saw movement is observable through the ages, at one period life being the most treasured possession and at another, property" (Scott, 1950, p. 37). Not until the advent of the nineteenth century did life finally attain the highest value and remain so. At the beginning of the century, however, capital punishment devolved, according to George Ryley Scott in The History of Capital Punishment (1950), on an act of retribution applied on behalf of a victim's relatives by the state or governing body. Revenge and protection against possible injury were motives for capital punishment in Britain.

A barbarous, inhuman and ineffective criminal code, which punished with death every offence (sic) that could be swept within its net, and meted out the same penalty to the sheep-stealer or the shop-lifter as to the murderer, a procedure that in the common law courts made justice the expensive luxury of the rich and . . . placed Great Britain half a century behind the countries of the Napoleonic codes. (Robertson, 1920, p. 484)

Reform efforts were close, however. Sir Samuel Romilly began to push in 1810 for change in the laws, methods, and administration of capital punishment. In 1814, disemboweling was officially abolished. Hanging was the

accepted method even though the king could still request a beheading. Abuses continued. Young children could be and were punished by death under the current statutes, as were expectant mothers. Edmund Burke wrote in 1816 of the alarming increase in the number of capital offenses. Burke believed the House of Commons would probably pass any bill imposing the sentence. Before this tide receded, the number of capital crimes had reached two-hundred and twenty-two; even the crime of shoplifting any item valued over five shillings was on this list (Finnemore, 1956).

Nineteenth century American codes were well in advance of those in Britain according to reformers. Reform efforts of the previous century virtually abolished capital punishment for all but the most serious crimes. Expansion occupied many minds; it left little room for change in political or legal processes. Dissidents were encouraged to move west where laws were not as strict and justice was often by individual effort. Reform efforts continued with vigor throughout most of the century. New ideas about individual rights were more palatable to Americans for many reasons. Constitutional standards of equality were greatly influential. Literacy rates were higher in the United States, and the emphasis on free public education fostered greater freedom of thought. Provisions for popular free speech and legislative debate furthered efforts to change federal and state regulations. The disruption caused by

the Civil War, although halting specific reforms of the penal codes, helped elevate the mass conception of the value of life and individual rights. Capital punishment did not increase dramatically during the American Civil War as it had during England's. Leaders of the Confederacy were not beheaded and political prisoners were not executed on any official basis as they had been in England.

Although Confederate officials were not allowed to hold office for a time, their lives were not forfeit for their differences of opinion. The passage of the Civil War Amendments expanded equality under the law to slaves, and their inherent humanity was officially recognized.

Many individuals began a call for complete abolition of capital punishment in the United States at this time. Edward Livingston was one opponent of execution. The Yorktown Gazette (1822) reported his efforts against public executions (Mackey, 1976). Livingston believed executions appealed to the "vicious" part of a community; it was not a deterrent. Following the tradition of Cesare Beccaria, Livingston wrote extensively on reasons against the death sentence. He abhorred the irrevocability of the penalty and the inevitability of mistakes throughout the legal process. Livingston felt it the greatest tragedy "to see a mortal distribute the most awful dispensations of the Diety, usurp his attributes, and fix, by his own decree, an inevitable limit to that

existence which Almighty power alone can give . . ."

(Mackey, 1976, p. 18). Livingston illustrates an expanded notion of human and civil rights. The controversy surrounding slavery and its westward expansion helped to prepare the way for a wider acceptance of abolitionist literature.

Massachusetts born Robert Rantoul, Jr. opposed capital punishment in his 1836 Has Society the Right to Take Away Life? Like Thomas Jefferson, Rantoul argued that man did not give away his right to life when entering the "social compact." He wrote many powerful arguments in this work.

Liberty may be taken away for a time, and subsequently restored. The wound which is inflicted may be healed, and the wrong we have suffered may be atoned for; but there is no Promethean heat that can rekindle the lamp of life if once extinguished. (Mackey, 1976, p. 38)

Rantoul stated the taking of a life by the State was out of its sphere of authority. During this same period, the Supreme Court considered such cases as the Slaughterhouse Cases (1873) and later Plessy v. Ferguson (1896). Vested civil rights were argued intensely. The seeds of "inalienable rights" and equality of all men found fruition in post-civil war debates. Rantoul sought specification about punishment in general and complete abolition of capital punishment. He argued that

. . . hanging adds no new terrors to that death which all must sooner or later meet, is evident from its having become so common a mode of suicide, for which purpose it is

was almost unknown among the ancients.
(Mackey, 1976, p. 52)

In Britain, such conceptions of human rights and the value of life were slower to manifest. During the first part of the century, life was a struggle for the populace. The death rate rose until, in the mid 1800's, more than fifty percent of children born did not live to age five. The standard of living rose faster than the expectancy of a long, healthy life. "The weekly wage of a farm labourer [did] not exceed the price of a four-bushel sack of wheat" (Finnemore, 1956, p. 17). In actuality, ten shillings a week for farm labor and nine shillings a week for factory workers was the average. Children worked sixteen hours a day for one penny. Resistance was focused on the Corn Laws and tax on bread. Representation in the House of Commons was reserved for the landowners; commoners had almost no voice. Although news sheets were still a source of information, only two-thirds of the adult male population could read, and a duty on newspapers had been applied. "This duty was imposed with two aims: one, to supply the Government with money, the other, to keep newspapers away from the masses, lest they should be inflamed with revolutionary ideas" (Finnemore, 1956, p. 65). Despite measures to keep commoners under control and maintain the status of the previous century, humanitarian ideas emerged. William Cobbet removed the news from his

Weekly Register in order to avoid the duty, and he gained a wide reputation for his ideas on reform. In 1832 when the Reform Bill was on the public agenda, The Times was a regular daily paper with a circulation of approximately 10,000 copies. By 1855 the newspaper stamp tax was abolished, education spread, literacy rates increased among both sexes, and reform efforts gained substantial ground. England from 1800 to 1875 experienced dynamic change (Cross, 1939). The industrialization of the country and the rise of an industrial middle class were pushing the transition. This group wanted political access commensurate with its role in British society and economic structures. As previously noted, change was slow because a minority of landowners controlled the government and suffrage was restricted to those persons. Efforts toward reform in government and law were widely expressed in the literature of the period, including such "sociopolitical" works as those of George Eliot. The industrial class aggressively sought reforms. Utilitarian principles, further expounded by Jeremy Bentham, were the foundation of their arguments. Government should be maintained to supply the greatest happiness for the greatest number of people. Bentham was interested in practical reforms and devising methods to achieve them. His Fragment on Government (1776) and Introduction to the Principles of Morals and Legislation (1789) criticized English law. His standard was utility.

"His deep and abiding interest in prison reform and in the reform of criminal law are also indicative of Bentham's benignancy" (Harmon, 1964, p. 375). Punishment should provide men with direction. His ideas influenced a great many reformers. Bentham encouraged proposals for universal suffrage and expansion of education. A corresponding rise in literacy, plus the availability and increased circulation of newspapers, coincides directly with a rise in reform efforts. Without a change in public opinion, reform efforts of the later half of the century and the corresponding "Epoch of Reform" would have been impossible. A large share of wealth was transferred to the merchants and industrialists from the aristocracy. Another influence, and "perhaps the most significant cause of all, was the influence of the advanced thinkers and the zeal of the practical statesmen who labored to prepare the way during the long and discouraging years of reaction" (Cross, 1939, p. 645).

Philosophers of the day sought practicality. Instead of lofty utopian ideals, they wrote of useful, practical suggestions to improve current systems. This approach increased the circulation of their writings and drew the attention of statesmen. A real concern for rights had developed slowly from the Enlightenment. John Stuart Mill embraced principles of equality for women and "protection also against the tyranny of the prevailing

opinion . . ." (Harmon, 1964, p. 383). The value of the individual was of utmost importance to him. Like Bentham, Mill believed the principle aim of government was to seek the greatest good for the people it governed; although Mill anguished much more than Bentham over articulating just what "the greatest good" actually was. These aims were furthered by reforms of the system of parliamentary representation.

George IV abolished "benefit of clergy" in 1827. This act somewhat reduced the bias of capital punishment against the poor and uneducated (Scott, 1950). Reforms continued to expand under Victoria. They were uneven, however, due to clashing ideologies. Karl Marx led a move for expanding ideals of equality and human rights. Social Darwinists did not speak of vested rights, but of survival of the fittest. Despite ideological clashes, reform progressed. The vote was extended to male citizens, and popular opinion was more nearly expressed than ever before (Cross, 1939).

According to Gordon Rose (1961), Parliament began making its report available to the public, acknowledging the right of the voters for access to legislative information in 1835. Their efforts, along with a few evangelical church officials seeking prison reform and an end to slavery, renewed interest around 1819. A Select Committee recommended the repeal of twenty-seven capital statutes. Flogging of women was dropped in 1820, and by

1836 prisoners could have their representing counsel speak to the jury on their behalf. Parliamentary Acts of 1837 and 1838 again limited the number of capital offenses (Rose, 1961). This occurred largely through the efforts of the statesman William Ewart. Anti-capital punishment societies were formed. Between 1833 and 1861 repeals in Britain focused on abolition for lesser crimes. The Criminal Law Consolidation Act was passed in 1861. This reduced the number of capital crimes in Britain to four and brought English codes into similar approximation with American statutes. The 1861 Act reduced capital crimes to murder, treason, piracy with violence, and arson of dockyards or arsenals (Rose, 1961). The slower move to public education and limited political access held reform efforts back in Britain. Clashing ideologies and strict adherence to precedence slowed reform of Britain's penal system. Sessional Papers 366 in 1856 show evidence of the first official recommendations to abolish public executions. All movements of reform began reflecting a broader conception of human rights. John Stuart Mill helped introduce a suffrage bill expanding voting rights to more individuals. Abolition of slavery also did much to expand notions of equality and human rights. Recommendations for abolition of public executions became more vigorous, as a Select Committee in the House of Lords began an examination of the issue (Rose, 1961).

Eight years later, the first advocates of complete abolition began pressing their suit. William Tallack, Secretary of the Society for the Abolition of Capital Punishment, along with the Howard Association and Quaker reformers, presented bills for abolition in 1869, 1873, 1878 and 1881 all with little result other than the spread of their views, according to Gordon Rose in The Struggle For Penal Reform (1961). As those societies were being formed, the first Royal Commission on Capital Punishment was already at work on recommendations in other areas. The Commission favored abolition of public executions and the grading of murders. William Ewart, Charles Gilpin, M.P., Frederic Hill and Thomas Beggs, who were all members of abolitionist societies, gave evidence before the Royal Commission in 1865. "In 1868 their influence came to fruition and public executions were abolished in Britain" (Joyce, 1961, p. 115). Passage through the House of Lords was furthered by Viscount Stansgate, who favored abolition of public executions because they incite rather than deter people from crime. The House of Commons noted these suggestions. In 1868 the Hansard Report stated public executions were no longer effective as deterrents. They were called "degrading" and "dehumanizing." The last public hanging in Great Britain was at Newgate on May 26, 1868. Hangings continued, but they were confined inside prison walls. The first execution under the new act was in

1869 in Manchester (The Times, 1869). Most executions took place on Monday morning at eight o'clock. "When the drop fell a large black flag was immediately hoisted above the prison, as a signal to the public that the sentence had been fulfilled" (The Times, 1869, p. 10).

Commitment to education and diversity of opinion kept American reform efforts ahead of Britain. A focus on public executions began prior to the Civil War. In 1833, Rhode Island abolished public hangings. By 1849 fifteen states followed their lead. Abolitionists, aided by this change, exploited the weakness of the death penalty advocates who claimed the punishment was a deterrent.

John L. O'Sullivan, a New York editor of the United States Magazine and Democratic Review and former lawyer, carried the torch of abolition after Rantoul. O'Sullivan tried his influence in the New York legislature but was largely unsuccessful. His arguments were mostly borrowed, but he did force further consideration of the insanity plea and the problem of reluctant jurors (Mackey, 1976).

John Greenleaf Whittier was a Quaker poet and newspaperman who posed political and social questions in much of his poetry. In his poem The Human Sacrifice published in 1843, Whittier speaks strongly for the condemned prisoner (Scudder, 1894).

Charles Spear was one of the most prolific writers among nineteenth century reformers. This minister used his

sermons and Christian background to write several books on the death penalty. He cites advocates' examples from Mosaic Law, but concludes in Thou Shalt Not Kill (1844) that no man has the right to take another's life regardless of the offense. He offered many strong Christian oriented arguments.

Go! and then take your fellow-man, one for whom Christ died; one, weak, helpless, tempted, frail, like yourself; one made in the image of God; go, and erect your scaffold; and amid his shrieks and groans, innocent though he may be, hurl him into the presence of his God! (Mackey, 1976, p. 90)

Thoughts on the Death Penalty by Charles C.

Burleigh (1845), shows a strong argument strongly against the death penalty. Burleigh believed a Christian nation should follow Christ's example and forgive. He believed our society drove men to crime by its unequal distribution of wealth and almost complete neglect of the poor. He also worried about the conviction of innocents and the many potential sources of error within the system (Burleigh, 1845).

Walt Whitman, editor and poet, believed the death penalty unnecessary. In an article for United States Magazine and Democratic Review, he wished society to consider other methods of punishment and restitution. He believed in imprisonment with the offender working to support himself so he might be removed from society but not be completely unproductive or without the possibility of effecting his own reformation (Mackey, 1976).

The most influential of these reformers was Horace Greely of New Yorker and New York Tribune fame. The only right of society to take a life, he claimed, should rest with the individual for self-defense and preservation if threatened. He believed executions weakened the "natural horror of bloodshed" and made killing appear more, rather than less, acceptable (Mackey, 1976).

A prominent women's movement leader, Elizabeth Cady Stanton, felt capital punishment was "a relic of barbarism" in the United States and should be eliminated. The direct influence of women over establishment of legal codes, she felt, would help the abolitionist cause (Mackey, 1976).

When Wisconsin abolished capital punishment in 1853, legislator Marvin H. Bovee was behind the bill. While the Civil War occupied the energies of the nation, Bovee continued his efforts. He was concerned that the war had demoralized the public. He believed abolition of the death penalty would restore an increased reverence for human life (Bovee, 1896).

Reform efforts were not without opposition. George Cheever and the religious establishment were great proponents of the penalty. They interpreted the Bible literally.

Reforms of mandatory death penalty laws were considered, and juries were allowed alternative sentences.

By 1895 eighteen states had discretionary rather than mandatory statutes.

One other movement affected capital codes during this era. Many states, beginning with New York in 1888, replaced hanging with electrocution as the preferred method. The first electrocution was in 1890 at Auburn Prison in Auburn, New York, when William Kemmler was executed for murder. This new invention spurred many new arguments. Was the electric chair more humane?

The Constitutional provision against "cruel and unusual punishment" led to extraordinary reforms in the United States. A search for more humane methods of execution illustrates this increased commitment to human rights.

The close of the nineteenth century saw an increased commitment to universal enfranchisement, public education, expanded political access, intensified interest in economic equality and extended dissemination of information. By 1868 both Great Britain and the United States maintained similar capital statutes and practices.

CHAPTER VI
TWENTIETH CENTURY

Two world wars and wide scale economic depression devastated Britain and America in the first half of the century. National and international conflict dominated the energies of both countries, and technology presented numerous changes with increasing alacrity. United States legislative bodies, occupied with pressing economic matters, made minimal reform efforts during the early 1900's. The British monarchy, by this time, was extremely limited and constitutionally prohibited from intervening in politics. The Beveridge Report in England solidified a welfare state, as did New Deal policies in America. The welfare state intensified growth of ideas concerning what is due to citizens. Under welfare state ideals, capital punishment could not be relished as before. Human rights were meant to be the central focus of welfare policies.

In Britain a national campaign for abolition was organized. Its head and leading advocate, Arthur Koestler, was extremely outspoken. His book Reflections on Hanging was a "widely read and discussed book [which] helped to change the course of social history in Britain" (Joyce,

1961, p. 113). Koestler did not believe abolition would increase capital crimes, or murder in particular. Fallibility of juries and courts and the irrevocability of the penalty headed the list of concerns. Religious reformers believed the sanctity of life would be increased by abolition; all persons were considered redeemable.

A new bill for abolition was introduced to Parliament in 1928 without success; however, it led to the Sentence of Death Act in 1931, which forbade the death penalty for expectant mothers. Between 1929 and 1933 several measures were considered for "test" abolition periods (Rose, 1961). Retentionist efforts, led by Alexander Paterson, pushed unsuccessfully for these periods. In 1933 the Children and Young Persons Act raised the minimum age limit for a death sentence to eighteen at time of conviction. Numerous measures were put before the House of Commons only to be defeated in the House of Lords. Smaller measures continued to be passed, however. In 1948 the Criminal Justice Act again increased the age limit for the death penalty to eighteen at the time an offense is committed (Rose, 1961).

After the execution of a twenty-eight year old model for a crime passionel, it became apparent that public sympathy was with the abolitionists. Victor Gollancz, Gerald Gardiner, Cannon Collins of St. Paul's, Christopher

Hollis, Arthur Koestler, Frank Owen and Reginald Paget mounted a massive campaign in 1955 to lobby members of Parliament. A petition was drawn up, but their efforts failed once again. The Homicide Act of 1957 specified the death penalty for murder, theft by shooting or explosion, murder while resisting arrest, murder of police or prison officials, and repeat murderers (Rose, 1961). All other capital offenses were given life sentences.

Advances in technology brought increased leisure to more individuals. This increase in leisure time aided the progress of reform, and influential persons furthered the progress through numerous publications. Finely Peter Dunne in America was one such individual.

Through the fictitious character of Mr. Dooley, Dunne "attacked many individuals, institutions, and acts he deemed harmful to society" (Mackey, 1976, p. 156). His writings, from an observational approach, were more subtly influential.

The famous criminal lawyer, Clarence Seward Darrow, was an opponent of the death penalty throughout his career. His gift for argument lent power to his many debates on the issue. "We teach people to kill, and the State is the one that teaches them. If the State wishes that its citizens respect human life, then the State should stop killing," said Darrow in 1924 (Mackey, 1976, p. 169-170.) Darrow was concerned about the inordinate number of poor

persons in prison. He believed "a procession of the weak and the poor and the helpless has been going to our jails and our prisons and to their deaths" (Mackey, 1976, p. 178). Concern over prison populations and possible bias illustrates further expansion of attitudes toward increasing the rights of individuals.

Kathleen Norris affiliated herself with the American League to Abolish Capital Punishment and addressed the public on many occasions to further the cause of abolitionists. One of her most stirring arguments included the following:

It is hard to follow their line of reasoning. They would not punish theft by stealing from the thief, or set fire to the incendiary's house. They would not . . . force infidelity upon the outraged wife. This revenge in kind is worthy only of the Mikado himself, with his decree that the 'punishment fit the crime.' Why preserve this cruel old law, when we have modified all the others? (Mackey, 1976, p. 185)

Norris, like Darrow, was concerned with the number of poor in prisons and the effect of the death penalty on children. She advocated life imprisonment over the death penalty because she believed "death row" martyred criminals.

The warden of Sing Sing prison, Lewis E. Lawes, oversaw so many executions that he questioned the rightness and purpose of the penalty and spent a number of years trying to prove its failure as an effective punishment. Punishments were designed as a form of retribution,

deterrence or way to reform. These widely accepted views of punishment show the changes in conceptions of what justifies punishment. State imposed revenge and lex talionis have virtually disappeared by the twentieth century from retentionist arguments, except for a small minority including a few religious literalists. Lawes believed capital punishment failed in all these areas, and he advocated imprisonment for reasons similar to Kathleen Norris.

The executed man passes quickly from the mind, while the criminal in life imprisonment remains as a living symbol of the awful consequences of an awful act. (Lawes, 1928, p. 139).

Executioner Robert G. Elliot and lawyer Herbert Ehrmann also supported abolition. Ehrmann saw the issue in a more practical light. He voiced opposition to the cost of trials for capital cases as well as the sensationalism caused by such trials.

Caryl Chessman, a death row inmate, wrote several books from prison claiming that the American prison system taught crime. Capital punishment, he believed, served no purpose but vengeance.

The psychological stress of receiving a death sentence was explored by psychiatrist Louis J. West. West believed the death penalty encouraged murder. He thought it became "a promise, a contract, a covenant between society and certain (by no means rare) warped mentalities

who are moved to kill as a part of a self-destructive urge" (Mackey, 1976, p. 293). West advocated the complete boycott of physicians at executions to prevent proper certification of death.

Throughout the twentieth century, individuals from all professions poured their energies into abolitionist efforts. Writers, lawyers, prison wardens, educators, executioners, inmates and physicians joined the fight. Books, lectures, and articles were not the only means of effecting change; litigation also proved to be effective. The NAACP Legal Defense and Education Fund, Inc., began supporting human rights efforts in 1939. The 1972 decision of Furman v. Georgia, which NAACP lawyers helped bring about, has been called the most successful abolition campaign of the century. "There was no doubt, however, that Furman saved the lives of over six hundred men and women awaiting execution in June 1972. No other reform argument had accomplished so much" (Mackey, 1976, p. 265). Furman is an example of the Court acting as a distiller of political thought. As the twentieth century progressed, the court gained prominence as the leading participant in the controversies over civil and human rights issues. The tight community of intellectuals who carried on the debates over capital punishment in the seventeenth and eighteenth centuries dissolved into increased pluralism of thought and technological advances. Prominent individuals,

organizations, jurors and the general public lean indirect support to the movement for abolition of the death penalty. The real public connection is through interest groups. The elite-mass connection has not changed. Mass involvement remains minimal except on specific occasions. Although public opinion is still aroused over serial or unusual killings and over executions, the judicial system has played a more significant role in the controversy.

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. (Rawls, 1971, p. 3)

Justice reflects changes in values. As human rights agitation increased and controversies came before the Court, changes were made. The Furman case represents some of these legal reforms. This case established that capital cases deserved to be treated as "a class apart." The United States' legal system, as mentioned by Charles Black (1981), has accepted death cases as special cases, and it is appropriate to require more careful procedures than those leading to lesser punishment. The Furman decision stated current statutes governing capital punishment violated the Eighth Amendment provision against "cruel and unusual punishment" and the "due process" clause. Justices Brennan and Marshall advocated capital

punishment be replaced with life imprisonment, but the majority opinion claimed only unfair application of statutes.

The Furman case effectively prevented executions between 1972 and 1976 because its meaning was so ambiguous. It was read to cast doubt on the constitutional validity of the death penalty as such. (Böckle, 1979, p. 30)

Justice Brennan believed "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values" (Böckle, 1979, p. 31).

The Court upheld the death penalty, employing the following rationale: the men who drafted the Bill of Rights accepted death as a common sanction for crime. (Dye, 1987, p. 104).

Arbitrary and inconsistent procedures in the sentencing, trial and appeals processes then came under attack. In the specific case of plea bargaining, Jan Gorecki stated:

. . . lightening the sentence within discretionary boundaries does not necessarily result from insignificance of guilt or any other uniform principle but often depends on how all the participants have played the negotiation game. (Gorecki, 1983, p. 20)

Plea bargaining itself has come under much criticism. Reformers claim arbitrariness exists and becomes intolerable in many instances when through the current process one man is confined and another is put to death for a similar offense. As indicated by William Bowers (1974), capital punishment should be debated not simply for its

legal and social purposes, but to evaluate its actual operations. Abolitionists charge susceptibility to mistake is intolerable. Charles Black states:

Those who are to die have been chosen by a process which, at every critical stage, proceeds on no clearly articulated or understandable criteria. This starts with the stage of charging and pleading; the decision of the prosecutor as to what to charge and as to whether to offer a plea-bargain is not only unfettered and unreviewable but also without any clear and authoritative standards for the exercise of discretion. (Black, 1981, p. 158)

Guided discretion was put into law in 1976 with Profitt v. Florida, Gregg v. Georgia, and Jurek v. Texas. Justice Stewart, in speaking for the plurality of the Court, claimed death cases must provide for a "bifurcated proceeding at which the sentencing authority is appraised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information" (Gregg v. Georgia, 1976). As stated in Gardner v. Florida (1977), capital defendants "have significantly broader rights than other defendants to examine evidence used in making the sentence determination" (White, 1984, p. 97). An extraordinary leap in the value of an individual's life regardless of social standing is evident by the 1970's. Not only are procedural standards questioned, examined, and changed, but substantive meanings and moral justifications are challenged. Mandatory sentences of death are also struck down as being "unduly harsh and

unworkably rigid" (Dye, 1987, p. 105). Discretion and mandatory sentencing are two of many areas of reform during the later portion of the century, but efforts for complete abolition remain unsuccessful. Retentionist arguments are supported by a large number of citizens. Issac Ehrlich (1975) claims each execution can be credited with saving eight potential victims. Multiple murderers and rapist murderers continue to arouse public support for the death penalty. The status of probation and parole administration has been examined and found lacking and a "strong sense of justice among many Americans . . . [demands] retribution for heinous crimes - a life for a life" (Dye, 1987, p. 104). Arguments and attitudes, similar to those in previous centuries, remain a strong force in the examination of the penal system.

In contrast to prior centuries, amazing strides have been made in recognizing the value of human life. Psychological stress of death row inmates, attention to due process, extensive appeals and the search for increasingly sterile and non-participatory methods of execution evidence an almost pure view of the value of human life. The focus on capital punishment has moved almost exclusively away from its intent as punishment to its meaning in a system where life is valued as the ultimate inalienable right, not to be transferred to the state or any other individual.

CHAPTER VII

CONCLUSIONS

Figures 2 through 6 illustrate the flow of influence both direct and indirect upon laws and methods governing capital punishment. Changes in statutes and methods of capital punishment are directly affected by judges, statutes enacted by Parliament, the monarch, and government officials in both countries. As the separate figures indicate, church leaders had a more direct effect on criminal codes in the English colonies in America than at any other place or period. The decisions of judges and lawmakers were changed by contributions from Parliament, legislative bodies, documents such as the Magna Carta (1215), and the United States Constitution, English colonial governors, and other elites. Philosophies indirectly affected judges' decisions for change. Political stability, mass attitudes (in the late eighteenth, nineteenth, and twentieth centuries), and prominent philosophers contributed to changing attitudes of government officials and other elites. Philosophers were directly affected by system stability and indirectly influenced by some elite and mass attitudes. Economic conditions determined the political access of the masses.

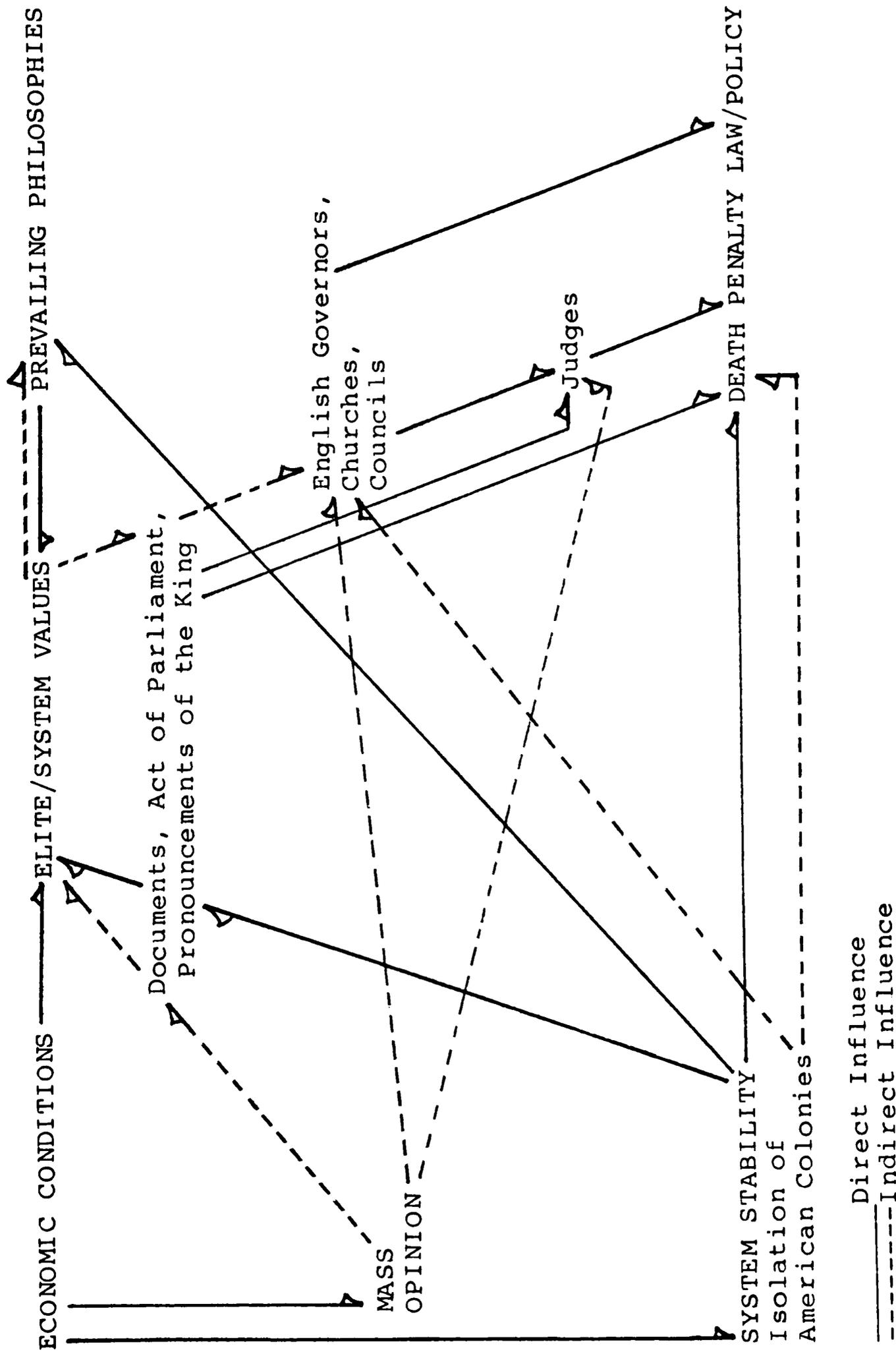


Figure 2. Chart of Influence for Seventeenth Century.

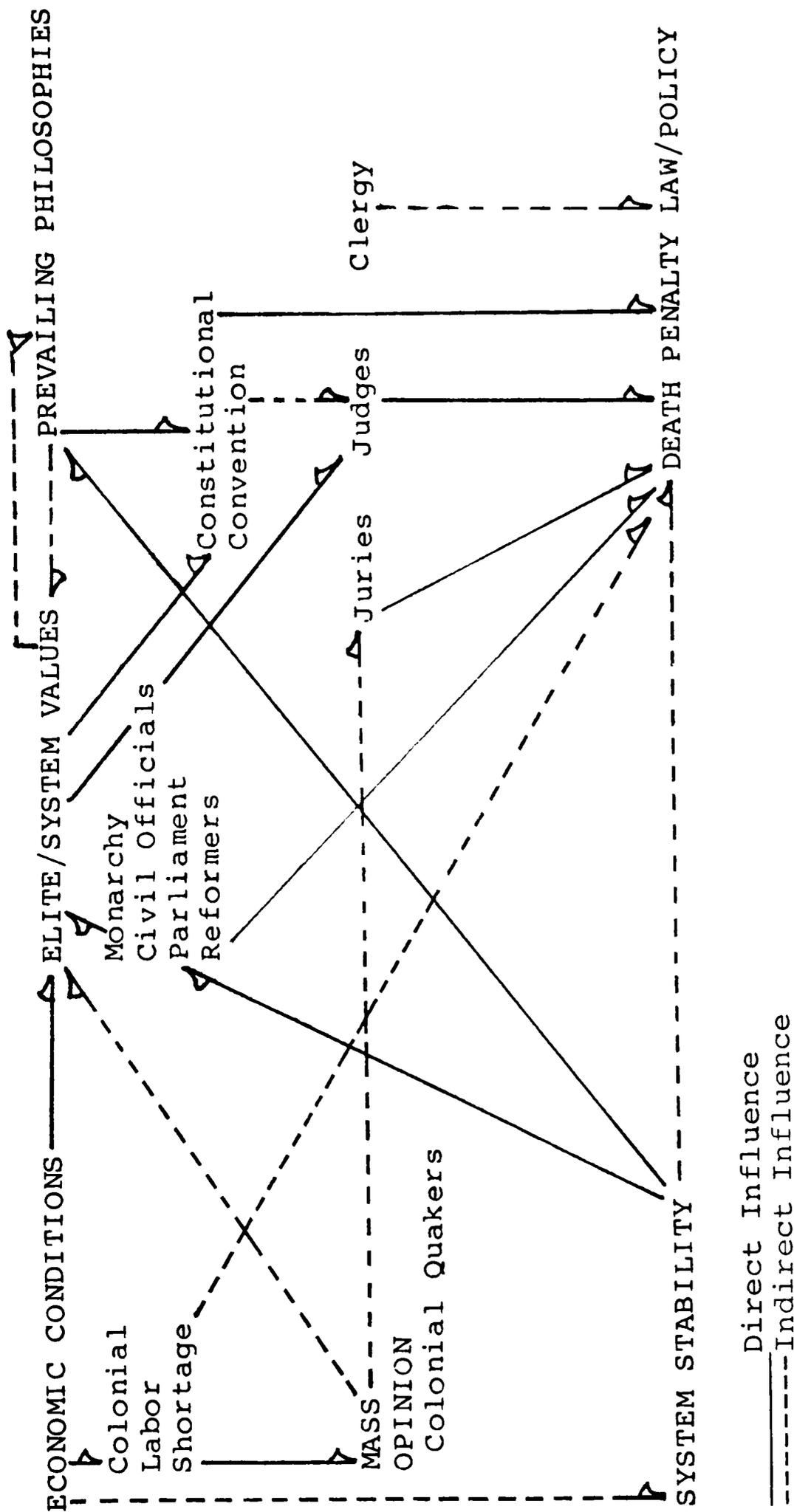


Figure 3. Chart of Influence for Eighteenth Century.

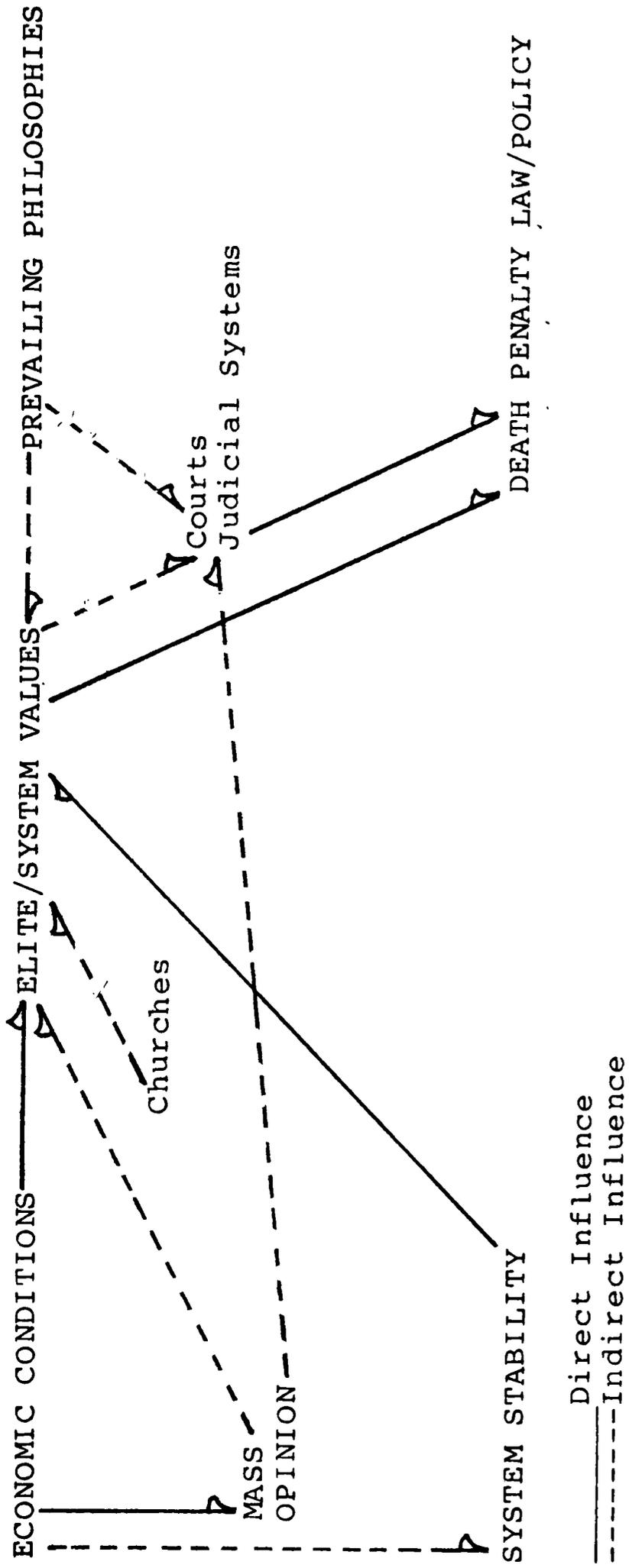


Figure 5. Chart of Influence for Twentieth Century.

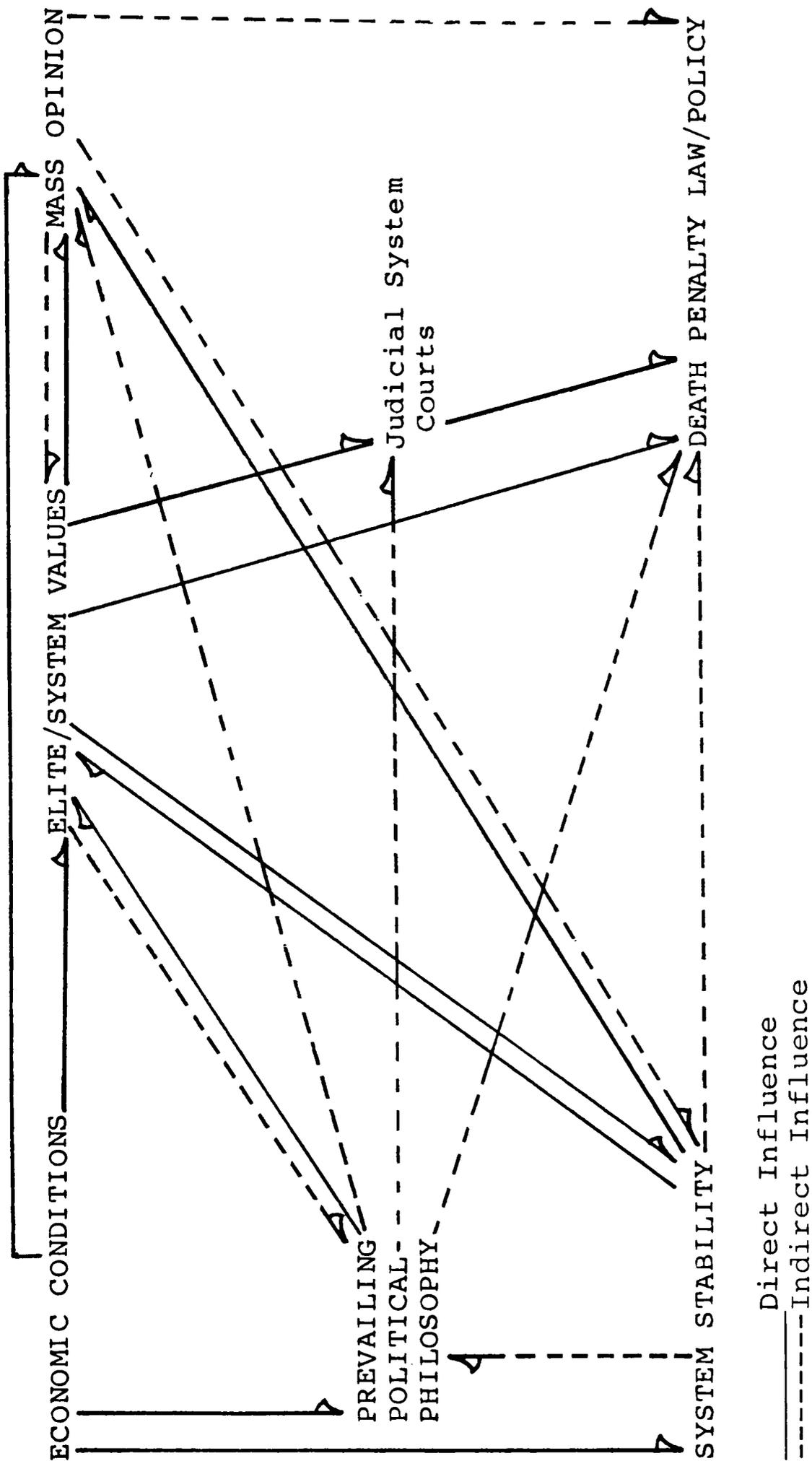


Figure 6. Summary Chart of Influence.

Public attitudes were affected by system stability indirectly, but dominant elite attitudes and philosophies contributed as well. Economic conditions directly affected not only the masses, but elites, system stability and prevailing philosophies.

The arguments continue among abolitionists and retentionists in Britain and the United States. In 1956 in England, the House of Commons voted to abolish, completely, capital punishment in their nation. The Lords remained staunch in their defense of the old system, however. Humanitarians in Britain now believe abolitionists "must first succeed in abolishing the medievalism of England's Second Chamber before they can hope to succeed in abolishing the hangman's rope" (Duff, 1974, p. 49).

In 1950, four states in the United States had no capital punishment statutes. Neither these states nor other countries who removed or suspended the death penalty showed a corresponding rise in murder rates. The theory of deterrence thus lost some of its appeal as a justification. The theory of deterrence, according to Kilman Shin, "supports the brutalization hypothesis that the death penalty brutalizes human nature and drives a potential criminal to commit a brutal crime" (Shin, 1978, p. 35).

The obsession with empirical research and the increased sophistication of statistical manipulation and interpretation have helped make the issue of capital

punishment an almost exclusively moral judgment. If deterrence is ruled an impossible objective, or if capital punishment no longer serves a useful purpose in deterring the commission of the offense it punishes, does not the debate become one of moral judgments? A pluralistic society in America fosters pluralistic thought as it has for hundreds of years. According to Benjamin Taylor and Thurman White (1976), this multiplicity of orientations furthers a great variety of attitudes toward the penal system. This is one reason why capital punishment remains a source of controversy. Change is indicative of shifts in morals more than intellect.

Prior to the seventeenth century, Jewish Law and Greek concepts of divine justice made change in capital punishment difficult. In some instances, as with some American colonies, the absence of real political control fostered the extension of the church and religious attitudes dependent on ancient laws and traditions. Capital punishment was easier to enforce when divinely sanctioned.

As belief in the divine origin of political power lost its recognition, the reform of capital statutes began to come through elite channels. Judicial officials, civil officials and legislative bodies took on responsibility for revision of criminal codes in England and America.

Change accelerated as the state became more abstract. As biblical illustrations confirm, it is easier to be vengeful within a tribal situation. If one member of a tribe killed another, the procedure was clear--death. As authority became increasingly removed, individuals began to question, first, the morality of certain procedures, and second, the morality of execution itself when carried out by the state.

The mutual dependence of men is so great in all societies that scarce any human action is entirely complete in itself, or is performed without some reference to the actions of others, which are requisite to make it answer fully the intention of the agent. (Hume, 1974, p. 371)

The debate continues because it is now an issue of human rights reflecting moral attitudes. Disassociation from other human rights concerns such as war, abortion, or euthanasia is difficult; therefore, the issue remains controversial. Prior to and extending through the seventeenth century, an individual committing an inhumane act was deemed inhumane. It was, therefore, easier to execute this individual. While a criminal's act may still be determined inhumane, according to current laws, the criminal nonetheless retains his inherent humanity.

David Hume wrote in 1748, in An Enquiry Concerning Human Understanding, of the "mutual dependence" of individuals and their actions in an increasingly complex society. Society grew and changed, and although slow at

first, reform of methods and philosophies concerning capital punishment became increasingly dynamic. The recognition of our interdependence and the removed nature of authority produced changes in conceptions of human rights and increased the value of life.

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