

**EMERGING STANDARDS OF DECENCY & SOVEREIGNTY:  
The Death Penalty Is Justified, If At All,  
Only When the State Demonstrates Beyond  
A Reasonable Doubt That It Cannot Control  
Defendant's Conduct By Mere Incarceration.**

by

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**1. INTRODUCTION.**

The constitutional prohibition against cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice." *McCleskey v. Kemp* (1987) 107 S.Ct. 1756 *citing Weems v. United States* (1910) 217 U.S. 349, 378. "[T]he 'basic concept underlying the Eighth Amendment' in this area is that the penalty must accord with the 'dignity of man.'" *Id*, *citing Trop v. Dulles* (1958) 356 U.S. 86, 99, 100.

Decisions in this area have been informed by "contemporary values concerning the infliction of a challenged sanction." *McCleskey*, *citing Gregg v. Georgia* (1976) 428 U.S. 153, 173.

Based upon the foregoing, there are three objective manifestations of current evolving standards of decency which restrict when the death penalty may be inflicted: (i) a re-examination of the 8th Amendment in the context of the amount of force which a state may use to defend its citizens from harm; (ii) a historical retreat from infliction of the death penalty in all felonies to those limited circumstances when a victim is killed, and there is the requisite culpability; (iii) a historical retreat from public executions.

It is suggested here that the three emerging principles have now coalesced such that the imposition of the death penalty cannot be justified, if at all, unless a victim dies, **and** the defendant has the requisite culpability, **and** the State cannot, beyond a reasonable doubt, effective control defendant's behavior by mere incarceration.

**2. Constitutional Premise & Framework.**

Sovereignty resides in the People. U.S. Constitution,<sup>1</sup> Preamble ["We, the People"];<sup>2</sup> California Const., Preamble ["We, the People"]; Govt.C. § 100(a). The federal powers are expressly recognized as being delegated powers. U.S.Const., 10th Amendment; Rotunda, Treatise on Constitutional Law §§ 3.1, 3.2. By its terms, the 10th Amendment infers that powers are delegated by the People to the State, and the concept is written into the California Constitution's Preamble.<sup>3</sup>

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<sup>1</sup> In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *011":Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. No. 66 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *011":Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 85 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *011":Wright v. United States*, 302 U.S. 583, 588 (1938). Words and terms are to be taken in the sense in which they were used and understood at common law and at the time the constitution and the amendments were adopted. *011":Veazie Bank v. Fenno*, 8 Wall (75 U.S.) 533, 542 (1869); *011":Locke v. New Orleans*, 4 Wall (71 U.S.) 172, (1866); *011":Gibbons v. Ogden*, 9 Weat. (22 U.S.) 1, 188-189 (1824); *011":United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866); *011":United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); *023":Pardoning Power of the President*, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *011":United States v. Classic*, 314 U.S. 707.

<sup>2</sup> While the result in *011":Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 347, may be correct, its *ratio decidendi* does not square with the *012":F01":Preamble*; and *012":F01":Article I §§ 9 & 10*. Clearly, the President does not stand in the shoes of the King, because titles of nobility were abolished for an intended purpose. *023":4 Farrands 28-33*; *023":Federalist Papers, ## 32, 39*. The framers placed sovereignty in the People. *011":Scott v. Sanford*, 19 How. (60 U.S.) 393 (1857).

<sup>3</sup> Both the United States and California Constitutions were established in the light of the Hobbs/Locke Theory of Social Contracts wherein the Government is established to protect the welfare of its citizens at home. 1 Rotunda 3.12 n.2. This is an internationally recognized duty of Nations. *023":Verdross, Jus Dispositivum land Jus Cogens in International Law*, 60 AJIL 55 (1961); *023":Verdross, Forbidden Treaties in International Law*, 31 AJIL 571-577 (1937). And recognized in

It has always been recognized that a Person could only grant that estate which he possessed. Blackstone, Commentaries on the Laws of England, Vol. 2, page 290;<sup>4</sup> Cheshire, The Modern Law of Real Property, p. 660 (Citing common law principles).

At the time the constitution was drafted, an individual could use only reasonable force for self-defense, and deadly force only when met with deadly force and its use is reasonable. If the attacker retreats or abandons the fray, then the victim can no longer use deadly force. Foster, Crown Law 273-277 (1762); *Brown v. United States* (1921) 256 U.S. 335; Perkins, Criminal Law and Procedure (1972) 660-667; *011":Tennessee v. Garner*(1986) 471 U.S. 1.

Because an individual at common law could only use reasonable force, and deadly force if reasonable [*Foster*], that is all the power the individual collectively could delegate to the States, hence the State may only use reasonable force, and deadly force if reasonable. *Garner*.

### 3. CRUEL AND/OR UNUSUAL PUNISHMENT - UNREASONABLE FORCE

The rules of self defense apply in International Law.<sup>5</sup> 013\_United Nations Charter, Chapter VI [commencing with Article 33]. It is considered a rule of *jus cogens*, vis peremptory norm of international law, from which no state may derogate. 023\_Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55, 60, #3 (1961); Verdross, *Forbidden Treaties in International Law*, 31 AJIL 571-577 (1937).<sup>6</sup> The

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the 012":F01":Preamble; and 012":F01":Art. I, § 8; of the U.S. Constitution.

<sup>4</sup> 023":Blackstone; is a recognized source of the common law in aid of interpreting the U.S. Constitution. 023":1 Rotunda §§ 6.1 n.2, 15.11 n.4, & 23.8; n.1, para. 5 (p. 484, left column).

<sup>5</sup> Courts are bound by the law of Nations which is part of the law of the land. *The 011":Nereide*, The, 13 U.S. 388 (1815); *011":INS v. Cardozo-Fonesca*, \_\_\_ U.S. \_\_\_ (1987); *011":Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir., 1980).

<sup>6</sup> In *011":People v. Ghent* (1987) \_\_\_ C.3d \_\_\_, the court rejected an argument that the United Nations Charter and Declaration on Human Rights precludes the imposition of the death penalty, and in any event before those documents may be utilized, they must be either be implemented by Congress or self-executing. However, rules of *jus cogens* are recognized by multinational pact. The 013":United Nations Conference on the Law of Treaties [Vienna Convention], Art. 43; [Obligations imposed independently of treaty], Art. 53 [*jus cogens* and void treaties], U.N. Doc. A/Conf. 39/11. Moreover, Verdross points out that these laws, by their very nature, are self-executing. Finally, no

concept is preserved in the United States Constitution, Art. I, § 1 (No State Shall, ... engage in War, unless actually invaded ... imminent Danger ...). It has been tacitly recognized by *stare decisis*. *Tennessee v. Garner* (1986) 471 U.S. 1 [Striking down State's fleeing felon statute].

Once an individual is incarcerated, that is all the force required to protect society from further harm and the death penalty<sup>7</sup> therefore would be cruel and unusual punishment, unless the State shows, in a given case, beyond a reasonable doubt that society cannot protect itself by mere incarceration.

#### 4. EMERGING STANDARDS OF DECENCY - DANGER TO SOCIETY

*People v. Murteshaw* (1981) 29 C.3d 733, the court reversed the death penalty on the basis of erroneous admission of expert opinion evidence because (1) expert predictions that persons will commit future acts of violence are unreliable, and frequently erroneous; (2) forecasts of future violence have little relevance to any of the factor which the jury must consider in determining whether to impose the death penalty; (3) such forecasts, despite their unreliability and doubtful relevance, would confuse and mislead the jury. In *Barefoot v. Estelle* (1983) 463 U.S. 880 it was held that it was proper for the jury to consider whether or not defendant would commit criminal acts in the future and thus pose a threat to society. However, the court went on to say in *Solem v. Helm* (1983) 463 U.S. 277, that we will not assume that there is no rehabilitative opportunity. *Accord, Hitchcock v. Dugger* (1987) \_\_\_ U.S. \_\_\_ [reversing death penalty for refusal to consider mitigating circumstances].

Every day we incarcerate People who pose a threat to society. LPS Act, Welfare & Institutions Code § 5000, *et seq*; Probate Code, § 1400, *et seq*; Conservatorship and Wardship, Welfare & Institutions Code § 200, *et seq*; Generally, Probate Code Conservatorships A Legislative Grant of New Procedural Protections (1977) 8 Pacific L.J. 73.

Thus, the relevant inquiry is not whether the defendant poses a future threat to society, an entirely speculative and subjective opinion of

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argument is made here that the death penalty is barred; rather the argument centers on what process is due before it may be imposed.

<sup>7</sup> The 013":International Covenant on Civil and Political Rights, Part III, article 6(2), declares: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime ...." Ratified by the United States and 71 other countries, effective March 23, 1966. *Eg, 011":People v. Ghent*, \_\_ C.3d \_\_\_ (1987); (Dissenting Opinion by Broussard and Mosk, JJ).

what may happen, but whether or not society can effectively control the behavior by incarceration, with a possibility of rehabilitation. That is to say, the emerging standards of decency is such that the State may not exact the death penalty unless it demonstrates beyond a reasonable doubt that it cannot protect society by mere incarceration.

##### 5. EMERGING STANDARDS OF DECENCY - LIMITATION OF DEATH PENALTY TO THOSE CIRCUMSTANCES WHEREIN THE VICTIM DIES AND DEFENDANT HAS REQUISITE CULPABILITY

At common law, all felonies, regardless of whether death resulted, and in theft cases, regardless of the amount taken, warranted the death penalty, except mayhem for which mutilation was substituted. Perkins, *Criminal Law and Procedure* (Foundation press, 4th Ed., 1972), p. 4-5. Whipping was substituted for death as the penalty for petit larceny, but that was a change from the common law resulting from an early statute. *Id*; Statute of Westminster, 1, c. 15 (1275). In the words of Blackstone, "the true criterion of felony is forfeiture." 4 Bl.Comm. \*97. Modernly, few felonies are recognized as capital crimes. Perkins, at p. 5. *Generally*, 4 Encyclopædia Britannica 847 (1971). Moreover, and notwithstanding *Apodaca v. Oregon* (1972) 406 U.S.404, there is not a single jurisdiction left which allows the infliction of the death penalty with less than a unanimous jury verdict.<sup>8</sup>

The United States Supreme Court has recognized further restrictions upon the utilization of the death penalty. Thus in non-fatal felonies, the court held that the imposition of the death penalty was unconstitutional. *Coker v. Georgia* (1977) 433 U.S. 584; *Eberhardt v. Georgia* (1977) 433 U.S. 917.

Similarly, in *Enmund v. Florida* (1982) 458 U.S. 752, the court held that in felony-murder cases, the death Penalty was unconstitutional where the accomplice did not commit murder, nor intend that death result.

Then in *Tison v. Arizona* (1987) \_\_\_ U.S. \_\_\_, the Court distinguished *Enmund* on the basis "the degree of participation [] **was so tangential** that it could not be said to justify a sentence of death",<sup>9</sup> and held that the

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<sup>8</sup> When *Apodaca* was decided, only two jurisdictions allowed the death penalty on less than a unanimous decision. Oregon required a 10-2 decision. Oregon has since repealed its death penalty, and Louisiana now requires a unanimous decision. 023":ALI, MPC, p. 154.

<sup>9</sup> The court noted in *Tison* that in *Enmund* it conducted its own proportionality analysis. How about world wide proportionality analysis. Vis, England, Ireland, Canada, and France have all abolished death

reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.<sup>10</sup>

Congress has abolished the death penalty altogether. Pub.L. 98-473, Title II, §§ 212(a), 235(a)(1), Oct. 12, 1984, 98 Stat. 1987-2020, 2031, effective November 1, 1987, adopting Chapter 227 - Sentences, 18 U.S.C. §§ 3551, et seq. 10 States of the United States have abolished it. 4 Encyclopædia Britannica 847 (1971). Of 20 Latin American Countries, 10 have abolished it. *Id.* All but 4 Mexican States have abolished it. *Id.*<sup>11</sup>

The American Law Institutes Section on the Model Penal Code could not come to any consensus. The reporter urged a rejection of capital punishment. The Committee found that it had no influence in the matter, and thus refused to either endorse or reject capital punishment. While it set forth a model death penalty statute, its *caveat* was that it should not be construed as an endorsement of the death penalty. 023\_American Law Institute, Model Penal Code, Part II, volume 1, pp. 110-114.

Thus, the emerging standards of decency has been a gradual withdrawal of the death penalty from all felonies, to those felonies in which the victim dies as a proximate result of culpable personal conduct on the part of the defendant.

#### **6. Emerging Standards of Decency -- Withdrawal of Death Penalty As a Public Spectacle.**

At the restoration, Cromwell's body was exhumed, and his head displayed on a spike at the gates as a warning to all. 6 Encyclopædia Britannica 802. At common law, and the early days of this Country, executions were a public affair designed as a deterrent. 3 Encyclopædia Britannica 404 (1971) [except heads of state]; 4 *Id.* 847; 6 *Id.* 825; 11 *Id.* 64; 18 *Id.* 556.

The last public execution occurred in Kentucky in 1936. 11 Encyclopædia Britannica 64. Under modern statutes, the public is

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penalties. How many other countries? How many still have it? See Brennan's dissent.

<sup>10</sup> It should be noted that *Enmund* was outside in the getaway car, hence he was not even in a position to stop the homicides by co-defendants even if he had wanted to stop the homicides. In *Tison*, on the other hand, the defendants were at the scene of the homicides, and made no effort to curb their father.

<sup>11</sup> See footnote 6.

excluded, witnesses limited to those found by law necessary to be present to assure the State that the law had been obeyed. Infliction of the death penalty has steadily been withdrawn from public view.<sup>12</sup> Former 18 U.S.C. § 3566 [Chap. 227]; California Penal Code § 3605. Thus, much of the deterrent effect is now gone, if there ever was any deterrent effect.<sup>13</sup>

The justification for the change has traditionally been that allowing the public to witness such events only appeals to the barbaric instincts, it is degrading, and brings society down to the level of the condemned individual. Because the infliction of the death penalty is no longer a public event, it has lost any deterrent value it may have been, and in any event is a recognition that the death penalty serves no justifiable governmental interest other than an appeal to the prurient interests of society to witness a degrading and uncivilized event. The current administration of the death penalty is therefore a tacit recognition that it is cruel and unusual.

## 7. CHILDHOOD DEPRIVATION

Based upon a multidisciplinary approach of experts from Psychology and Cultural Anthropology, mores and behavior are learned from the environment.

Anthropology can demonstrate that in some societies, cannibalism<sup>14</sup> was an accepted mores, at least as to enemies. Both they, and sociologists can probably trace the history of cannibalism to rather recent modern times, and show that entire cultures were civilized and trained to reject it.

Experimental psychologists can demonstrate in laboratory experiments that primates which undergo species deprivation during the critical

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<sup>12</sup> We can literally say "We have swept the death penalty under the carpet and out of view."

<sup>13</sup> The ALI Committee set out some rather stale statistical studies which failed to conclusively prove that capital punishment was or was not a deterrent. ALI, MPC, part II, vol. I, pp 112-114. In the table hereinafter, using more current statistics, based upon the number of murders per hundred thousand, the rate remains fairly constant over the years with or without capital punishment suggesting an inelasticity for capital punishment. A statistician would be better qualified to render an expert opinion.

<sup>14</sup> See, *Cannibalism and The Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise*, A.W. Brian Simpson (U. of Chicago Press, 1984). While concerned primarily with survival cannibalism, it does get into the history of cannibalism in other respects.

period undergo behavioral problems at maturity to the extent of not being able to mate absent rehabilitation.<sup>15</sup> Medical literature seems to indicate a decline in infant mortality for premature babies kept in incubators where an adult messages the infant after birth periodically, suggesting that the species deprivation phenomenon may be applicable to humans. There is other literature which suggests that adult children of alcoholics also suffer maladaptive behavior problems, which can be corrected if recognized.<sup>16</sup>

Where society breaches its duty by failing to remove a person as a child from an unfit home, vis W&I § 300 petition, then society ought not to be allowed later to take that person's life as an adult for a wrong under circumstances where Society stood by and allowed that person to be programmed for wrongful acts, but should be required to rehabilitate that Person. Otherwise, the punishment would amount to cruel and unusual punishment. *E.g.*, *Thompson v. Oklahoma*, 108 U.S. 2687 (1988); *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985); *Ollie v. Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Ollie v. Robinson v. California* (1962) 370 U.S. 483; *Brown v. Board of Education (Brown II)* (1955) 349 U.S. 294, 299, fn. 11. [Psychological damage to children forced to undergo racial segregation.

## 8. CONCLUSION.

Capital punishment is no longer a universally recognized means of controlling human behavior. It has been withdrawn as a public spectacle, and its use restricted to a narrow class of cases in which a victim dies as a proximate result of the defendant's own culpable conduct. Most jurisdictions that do allow capital punishment require a unanimous verdict. Just as *Tison* teaches that some homicides are justifiable, anthropologists have shown us in the recent modern time cultures which recognize as socially acceptable cannibalism. Those youths who are left unguided, or misguided by parents, or abused by those society failed, or could not, control may well have grown up with mal-adaptive behavior through no fault of their own.

The sum total of the foregoing, implicit in *Garner*, is that the State may not use its sovereignty with any more force than is reasonably under the circumstances, and the death penalty only if it has demonstrated beyond a reasonable doubt that it cannot protect society by mere incarceration.

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<sup>15</sup> Harry Harlow, Ph.D., Wisconsin.

<sup>16</sup> Although this author does not have the name of the author(s), he understands there is a paper, or collection of papers, in the field of psychology referred to as "Adult Children of Alcoholic Parents."

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RELEVANT HOMICIDE STATISTICS<sup>17</sup>

YEAR <sup>18</sup>	HOMICIDES EXECUTIONS		
	TOTAL #	# PER 100,000	TOTAL # <sup>19</sup>
1957		4.6	71.7
1958		4.6	71.7
1959		4.8	71.7
1960		5.0	36.2
1961		4.7	36.2
1962	8,000	4.5	36.2
1963	9,000	5.0	36.2
1964	9,000	5.0	36.2
1965	10,000	5.0	7.0
1966	11,000	6.0	1.0
1967	12,000	6.0	2.0
1968	14,000	7.0	0.0
1969	15,000	7.3	0.0
1970	16,000	7.9	0.0
1971	17,800	8.6	0.0
1972	18,700	9.0	0.0
1973	19,600	9.4	0.0
1974	20,700	9.8	0.0
1975	20,500	9.6	0.0
1976	18,800	8.8	0.0
1977	19,100	8.8	1.0
1978	19,600	9.0	0.0
1979	21,500	9.7	2.0
1980	23,000	10.2	0.0
1981	22,500	9.8	1.0
1982	21,000	9.1	2.0
1983	19,300	8.3	5.0
1984	18,700	7.9	21.0

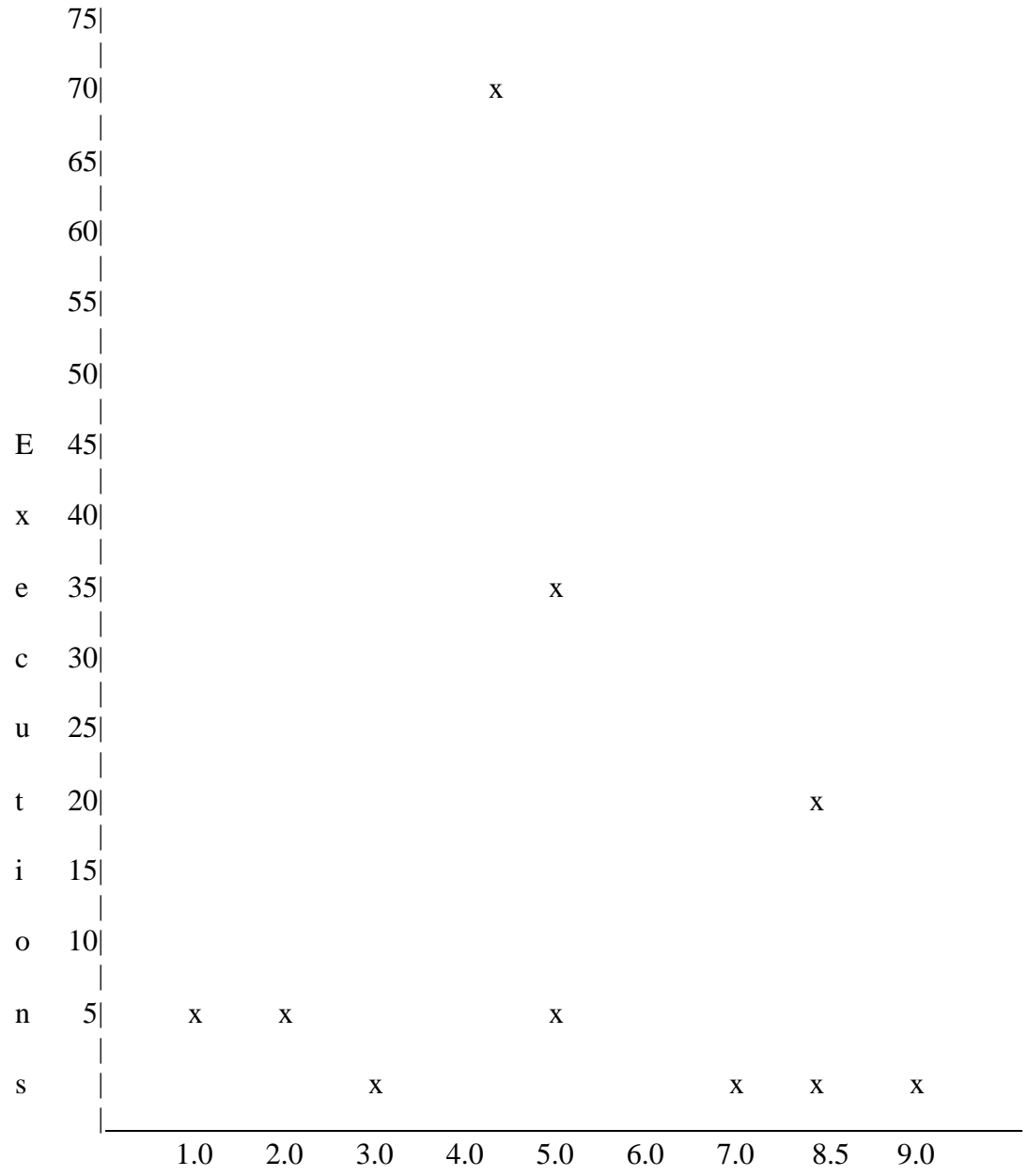
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<sup>17</sup> Source: Statistical Abstract of the United States, 1963 (Table 197), 1969 (Table 199), 1976 (Tables 252 & 299), 1986 (Tables 279 & 329). Exhibits 1 to 5. Total Murders represent number of murders committed in United States. Number per 100,000 represents the number of murders per 100,000 persons in the United States.

<sup>18</sup> The first year in which Uniform Crime Reports for the United States became available was 1966, hence for years prior to 1966, figures are incomplete or not available.

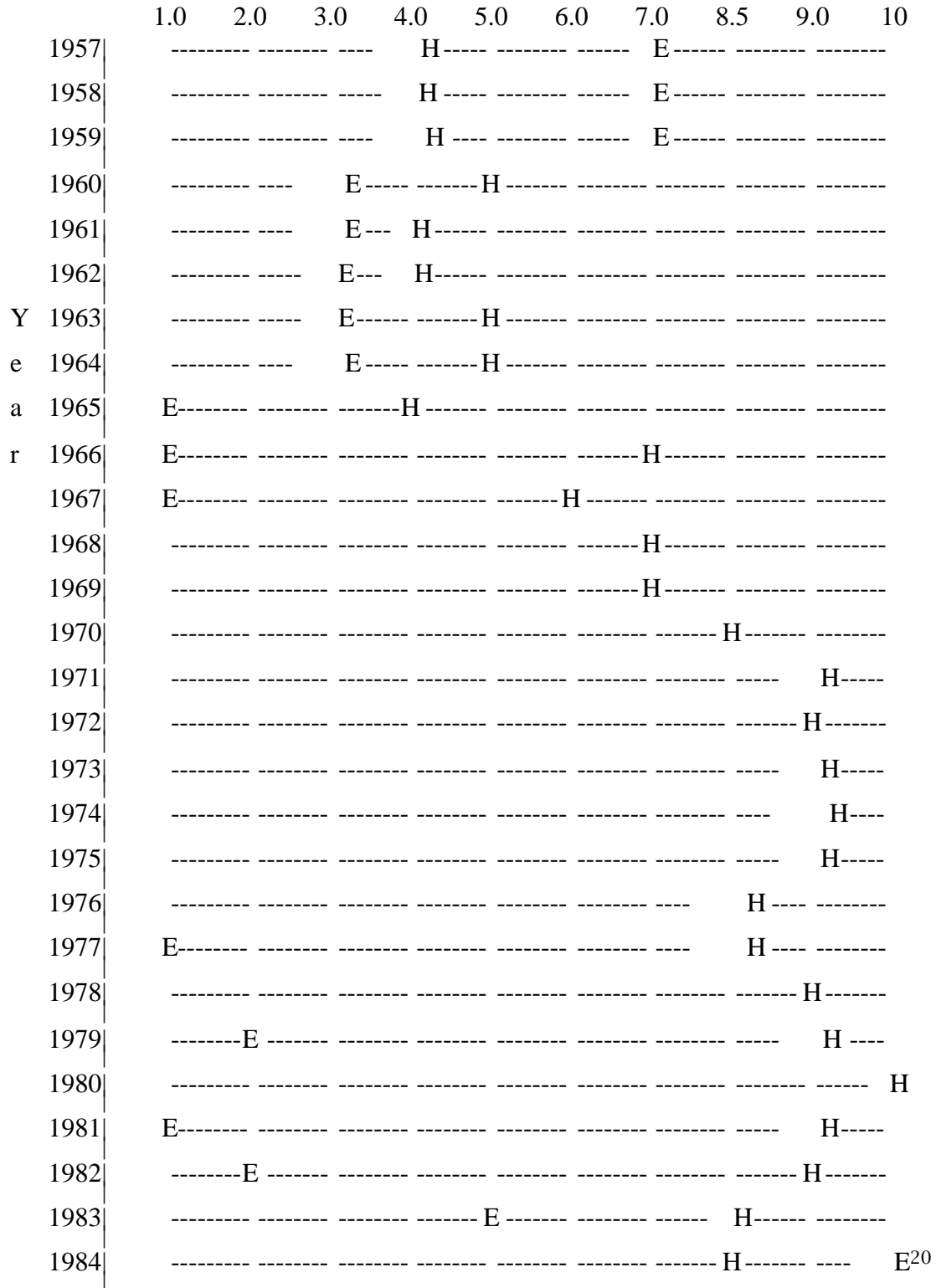
<sup>19</sup> For the purposes of this preliminary survey, executions per year prior to 1965 were not available. The figures were per 10 year interval, except 1960-65. Therefore, the totals were divided by the number of years to get a yearly average prior to 1966.

CORRELATION BETWEEN HOMICIDES AND EXECUTIONS, IF ANY



Homicides per thousand population - 1957 to 1986

GRAPH OF HOMICIDES AND EXECUTIONS BY YEAR 1957 TO 1984



<sup>20</sup> 21 Executions in 1984.

1.0 2.0 3.0 4.0 5.0 6.0 7.0 8.5 9.0 10  
H = Homicides - Per thousand population  
E = Executions - Number

