Mr. BAKER. Yes, I yield.

Mr. BYRD. Mr. President, I yield, for the present time, control of the time on this side to Mr. MITCHELL and later to Mr. DECONCINI, who is the manager of the bill on this side.

I thank the majority leader.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. HATFIELD. Mr. President, I have spoken on this subject before, and I am not going to delay the Senate by repeating the arguments that I have used in opposing the death penalty. I have indicated that it does, by the very record of executions, discriminate against minorities and that it resembles little more than a lottery system of justice.

I have indicated that I think there is evidence, too—ample evidence—to indicate that we have executed innocent people. That is a sentencing decision that cannot be retrieved once it is made.

I have indicated that it is my view that the death penalty is, most of all, immoral and that it perpetuates a circle of violence, of bloodletting, of killing.

I have compared it to my views about abortion and about war.

I also have indicated that it is my view that if we impose life imprisonment upon those who have committed heinous crimes and have meant it to be life imprisonment, we would probably have greater success in protecting society than using the so-called death penalty.

Mr. President, throughout the debate it appears the main argument made by those who are the proponents of the death penalty is that it represents the best way to protect the public against heinous crimes. It is argued that once we have the death penalty installed in all the States and under Federal crimes, for this bill would provide an expansion in the list of Federal crimes, that would then do precisely what the public is demanding, that is, provide better protection.

Well, now, Mr. President, if this is accurate and if this argument that is used by the proponents really is valid, then I have an amendment. I would have offered this amendment had the Senator from Michigan called up his amendment in the first degree because it would have been an amendment in the second degree. Senator LEVIN, for purposes of strategy, has not called up his amendment. Therefore, I am reticent to offer this amendment at this time but let me describe it.

If the argument is valid that capital punishment is the finest and the best possible deterrent to criminal action, then this amendment would have provided that the U.S. marshal be given the mandate to provide radio and television access to the executions, provided the State law does not forbid this kind of action. In other words, for those who argue that the death penalty is a deterrent, then we ought to maximize the deterrent value of executions. We cannot have it both ways—and we are getting a lot of doubletalk on this whole argument—we cannot have it both ways, supporting executions but requiring them to be conducted in virtual secrecy.

Having been a Governor and having had to face this problem, I know in my State how they conduct executions at midnight in secrecy. I had a special telephone put in my home directly contacting the execution chamber itself where I could telephone at the last second and give a reprieve in case the circumstances warranted. There is a very macabre kind of activity that surrounds the whole activity of execution. But if Senators really believe there is a deterrent inherent in executions, then my amendment would have provided the authorization to increase this deterrent effect.

I think by televising the executions we would then permit the citizens of this country to witness firsthand the horror of governmentally sanctioned murder which I believe will lead to swift repeal of this grizzly practice. If the public actually saw the ceremony in which we execute prisoners and the ghastly nature of these premeditated exterminations, I believe they would urge the United States to join the rest of the North American and Western Europe in abolishing the death penalty. I will not go through that description again of a recent execution where they had to shoot three bolts of electricity through a convict's body before they could pronounce him dead and by that time smoke was coming out of his ears and everything else that I prefer not to even recall.

Mr. President, this amendment is a repulsive amendment because the matter of legalized executions is repulsive. But I do really believe that the Senate cannot, like Pilate, wash its hands so easily from the passage of this barbaric legislation. We cannot continue to maintain our innocence of what we are saying or doing by passing S. 1765. If we want to execute people, then we should do it in the open. We should maximize the deterrent value if there is such deterrence.

Now, Mr. President, the death penalty is not a deterrent. It is a specious argument—the statistics, the record proves otherwise—that capital punishment really is a deterrent. Let me quote again the Congressional Research Service study which shows that the average murder rate per 100,000 people is almost twice as great in States with the death penalty as in States without the death penalty.

Now, that is the fact of the case. In 1982, the average murder rate in 37 States with the death penalty was 9.80. The average murder rate in 13 States without the death penalty was 5.04.

Hawaii recently did away with the death penalty and its homicide rate did not change. Michigan, which does not have the death penalty, has the same homicide rate as Ohio and Indiana which do have the death penalty.

A prison sentence or a death sentence is not the deterrent. A criminal fears being caught. Let us be mindful that today almost 30 percent of the murders reported each year do not even result in an arrest. This is the risk being assumed by the murderer who calculates his crime; 3 out of 10 that he will not be caught. And for those persons who are ruled by impulse and do not calculate the implications of what they do, neither the fear of arrest nor sentence will deter them.

This is an age-old argument, Mr. President. Let me just close my remarks by denying the deterrent value that is expressed so frequently in this debate by going back to Elizabethan England. In Elizabethan England they had public executions that I would have suggested in my amendment. They executed people for pickpocketing. The greatest field day that pickpockets had in Elizabethan England was at the public executions for pickpocketing. More people got their pockets picked at those public executions for pickpocketing than any other place in England at that time. So I think from that period on it has been proven, time and time again, that public executions or capital punishment or whatever it is called does not have the deterrent value that the proponents claim it to have.

Mr. President, I am a realist and I know the votes are not here to halt this kind of barbaric legislation, but I at least must speak out my conscience and my mind one last time before we take action on this grizzly matter.

Mr. MITCHELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Maine is recognized.

Mr. MITCHELL. Mr. President, I yield myself time from the three-fifths of the time that has been allocated to the control of the minority leader.

Mr. President, in 1972, in the case of Furman against Georgia the Supreme Court held that because the death penalty is a punishment different in kind, not just severity, its application must be strictly defined by constitutional standards so as to avoid arbitrariness and caprice in its use. In subsequent cases, the Court has refined the limits within which the penalty can be applied.

Mandatory sentencing schemes, such as the ones in the 1974 antihijacking law, have been found unconstitutional. The death penalty for crimes in which death does not result has been rendered constitutionally suspect. And

other recent rulings, including those which upheld some State statutes, have all carefully sought to define the procedural protections that must be followed for any death penalty to be constitutionally imposed.

Despite these rulings, the outcome of sentencing practices in the real world leads to the conclusion that it is only a matter of time before the Supreme Court, although perhaps not this one, will conclude that no statutory sentencing scheme can avoid the arbitrary and capricious nature of the old invalidated statutes.

In 1958, in the case of Trop against Dulles, the Court said:

> The basic concept underlying [the Cruel and Unusual Punishment Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards.

Standards by which punishment is imposed have evolved substantially since the late 18th century. We no longer consider physical mutilation to be an acceptable form of punishment. We no longer demand that prisoners serve their terms in chains. We no longer tolerate the death penalty for children.

These practices were accepted and known to the Founders of our Nation, along with public hangings. The mindset of the times can be best illustrated by the words used then. During the debate over the Bill of Rights in the First Congress, one Member said:

> * * * It is sometimes necessary to hang a man, villains often deserve whipping and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?

Is this the basis on which the constitutionality of punishments should still be contemplated? Public opinion, which has been used to justify the imposition of the death penalty in this debate, would truly be aroused at such a return to 18th century views of appropriate punishments.

So the constitutional underpinnings of the death penalty are no more sacred than the constitutional basis of limited suffrage.

The fact that death is an unusual punishment is statistically demonstrable. Of the 33,000-odd convicted murderers on our Nation's jails, barely more than 1,000 are currently considered worth executing. There is nothing usual about the imposition of the death penalty.

Whether or not it is cruel in a constitutional sense, in my judgment has not been determined with finality. In Woodson against North Carolina, a 1976 case following the Furman decision, the Court specifically found that death is "qualitatively different from a sentence of imprisonment, however long." And in its decision, the Court said:

> Because of that qualitiative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

The Court has said that even though a death penalty statute may not be invalid on the face of it, if it were so vague that jury sentencing decisions resulted in the same arbitrary and capricious sentencing which Furman found unconstitutional, then that outcome itself could render them subject to challenge.

And there are very serious grounds for finding that the post-Furman outcome is as violative of reliability as was the prior situation.

A Northeastern University study in 1980 reported:

> In the first five years after the Furman decision, racial differences in the administration of capital statues have been extreme in magnitude, similar across states and under different statutory forms, pervasive over successive stages of the judicial process and uncorrected by appellate review * * * differential treatment by race of offender and victim has been shown to persist post-Furman to a degree comparable in magnitude and pattern to the pre-Furman period.

When the killer of a white victim is 18 times as likely to receive the death penalty in Texas as the killer of a black victim; and when the murderers of whites in Georgia receive the death penalty 10 times as often as the murderers of blacks, there is legitimate cause for concern.

The 1980 decision of the Massachusetts State Supreme Court to overturn a State penalty statute rested on certain fundamental facts.

Those facts are clear, and every Member of the Senate ought to recognize them. Under statutes which may meet the most recent Supreme Court standards, the 1976 Gregg against Georgia standards, the outcomes are no more rationally balanced than before. From 1976 to 1980, in Florida, 286 blacks killed whites; 111 whites killed blacks; 48 blacks got the death sentence. No whites did.

In Texas, 344 blacks killed whites; 27 were sentenced to death; 143 whites killed blacks. None of them were sentenced to death.

In Ohio, 173 blacks killed whites and 37 of them were sentenced to death. Of the 47 whites who killed blacks, none received the death penalty.

Thus, in just these three States of Florida, Texas, and Ohio, 112 of the 803 blacks who killed whites received the death penalty, while not a single one of the 301 whites who killed blacks did.

Every Member of the Senate ought to consider these figures as they vote upon this bill.

It is immaterial whether this kind of outcome stems from unconscious bias or not. It is the outcome that counts.

The bill before us requires that the jury be instructed not to consider race, color, national origin, creed, or sex in its deliberations. That is a very minimal standard which all judges invoke when they caution that prejudice not affect jury deliberations.

Jurors in voir dire proceedings are routinely asked if they harbor racial prejudice when the defendant is nonwhite. Those who have observed the operation of the courts, as I have, know that jurors rarely admit such bias.

The bill before us will require jurors to certify that bias against classes or races did not affect their judgment. That is a precaution about whose value individuals may disagree. But there can be no disagreement with factual outcomes, and the factual outcomes today becoming apparent all indicate that the best intentioned sentencing scheme does not eliminate the bias which bias which results in discriminatory and arbitrary use of the death penalty.

I believe that it cannot.

One reason for that is obvious. Neither the judge nor the jury can review the discretionary decision of the prosecutor as to whether to prosecute a case as a capital offense or not.

The Supreme Court has already ruled that mandatory capital sentencing laws are not constitutional. Neither the Congress nor the State legislatures may mandate death as the only punishment for a given offense. So the ability of legislatures to construct acceptable limits or definitions for imposing the death penalty is curtailed. Indeed, the legislatures are virtually forced to develop procedures which cannot eliminate arbitrariness or bias in operation.

Given that fact, the discretion of prosecutors is the basis on which each case is pursued. A case which in one prosecutor's judgment calls for capital punishment may, in another's, not warrant more than a long jail sentence. By virtue of that fact, the random infliction of the death penalty is not a potential problem; it is practically guaranteed from the outset.

When disparate prosecution of like crimes affects noncapital cases, it results in a degree of disparity for which our system has some adjustments and whose aggregate effect our society can tolerate. But when that disparity affects life and death, the Supreme Court has ruled that this is the kind of punishment that cannot be arbitrarily inflicted.

The reality of prosecutorial discretion is fundamental to the arbitrary outcomes we see in capital cases. And no legislative enactment, either Federal or State, can eradicate that factor.

That is one of the reasons why I believe that the final judgment on the death penalty in this country will inevitably be the one that virtually all the industrialized nations have ren-

dered: That it is a barbaric, inappropriate and ineffective penalty for the State to impose.

It is ironic that our Nation shares with the Soviet Union, South Africa, and Japan the distinction of being among the few modern industrial states which still claims the moral authority to execute some of its citizens.

The inclusion in this bill of the death penalty for nonhomicidal crimes has been addressed by others. I would like only to highlight the sheer illogic of the so-called deterrent effect in that connection.

In the Coker case, the Court ruled that the death penalty was unconstitutional when it:

> Makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.

One of those goals is deterrence. And one of the crimes for which this bill authorizes death is an attempt to assassinate the President and other officials.

Can anyone imagine that a John Hinckley, with his bizarre affection for a movie actress, or Arthur Bremer, with his stalking of the President before he shot Governor Wallace, could have been deterred by any conceivable statute? In fact, Hinckley himself explicitly stated that he expected to die in his attempt. No one can credibly claim any deterrent effect in adding the death penalty for these attempted assassinations.

Attempted assassination is a serious offense and should be seriously dealt with. We have already amended the insanity defense to prevent its abuse by assassins and others. Federal law already carries a life sentence for an attempt on the life of a President or his staff. The death penalty will add no deterrence.

In fact, the theory of deterrence which has been advanced for the reimposition of a Federal death penalty is untenable for virtually all the kinds of murders to which it is specifically addressed.

The bill provides, for example that an individual convicted of an arson, a burglary, a robbery, a kidnapping, a rape, an airplane hijacking, a train wrecking, or the mailing of dangerous articles can be sentenced to death if anyone dies, whether that was an intentional outcome or not.

Obviously, all these are serious crimes which demand the swiftest and surest imposition of punishment. But the Supreme Court has said that a penalty is unconstitutional if it makes no measurable contribution to acceptable goals of punishment. Obviously, you cannot deter someone from doing something he did not intend to do in the first place.

The principle of intentional action is the principle that underlie negligent manslaughter statutes. Through them, society recognizes that the intent to kill is a vital component of the crime of murder. Conduct which results in unintentional death—even criminal conduct—has not been equated with deliberate, intentional murder by our system. Yet this bill does just that.

The bill before us also contains serious procedural shortcomings which render it constitutionally suspect.

It eliminates a unanimous jury agreement in the sentencing phase of the trial by allowing all jurors to find different aggravating circumstances without necessarily agreeing on even one.

In Bullington against Missouri (1981) the court said that "in all relevant respects" a capital sentencing hearing is "like the immediately preceding trial on the issue of guilt or innocence." Yet the sentencing procedures in this bill do not provide for jury unanimity on what constitutes the particular aggravating circumstance. The bill specifically invites jurors to consider aggravating circumstances, which are not listed in the statute and which need not be identified. And it does not require evidence of aggravating circumstances to be subject to the same evidentiary rules that govern the trial itself.

The Court held, in Godfrey against Georgia (1980), that the standards guiding sentencers must be such as to "make rationally reviewable the process for imposing the sentence of death."

But where you have aggravating factors that are not identifiable in the statute but which the jury may take into account, and where neither the nature nor the weight given those factors need even be identified, there can surely be no rational basis for appellate review and certainly not any rational basis.

Additionally, a factor in Gregg which the Court specifically identified as making that statute valid was the automatic review by the State supreme court which requires that the court compare similar crimes and the penalties imposed on them to assure that the death penalty is being proportionately applied. Such a requirement is entirely absent from the bill before us.

I want to make clear that I do not believe that the correction of any of these procedural defects would make the bill acceptable.

I continue to believe that death is an unconstitutional penalty.

The complete absence of any demonstrable deterrent effect has been decisively demonstrated by statistics in this and other nations. The death penalty neither causes more crime nor does it reduce crime. And because of the kinds of crimes to which it is addressed, it must logically fail in any deterrent effect. More of the kinds of individuals who commit most of the kinds of crimes punishable by death do so for the kinds of reasons that no rational deterrent could ever hope to reach.

The testimony of experienced law officers is clear: The worst killers—the kinds of crimes we are presumably trying to deter—are not lucid thinkers. They do not make a cost-benefit calculation and conclude that murder is too risky. The kind of murders to which this bill does not go—the true crimes of passion—are virtually undeterrable by definition. An individual so enraged as to kill is not deterred by the existence of a death penalty whose provisions, under this bill and by Supreme Court rulings, will not apply to him in any event.

The testimony of convicted murderers who faced the death penalty, as well as those who did not, simply reinforces what logic can demonstrate: We cannot stop deranged killers with rational deterrents. We cannot induce murderously angry individuals to fear a penalty that does not apply to them. We cannot hope to affect the thinking of any drunken or drugged individual.

The Supreme Court, in Gregg, said of deterrence theories that:

> There is no convincing empirical evidence either supporting or refuting this view. * * * The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures * * *.

No member of this legislative body has offered a single piece of evidence, other than personal opinion, that a Federal death penalty would reduce the number of murders, either at the Federal level, where roughly 75 occur each year, or at the State level, from which most of the descriptions of repulsive crimes have been drawn.

The Court has identified retribution as a valid goal of punishments. Since the legislative judgment we are exercising does not go to public policy in crime control, we are clearly engaged in making social policy, not public policy.

Are we proposing to put certain criminals to death because that will make other members of society recognize that crime is wrong? If that is the purpose, the death penalty is excessive for that purpose.

Or are we considering the death penalty purely to respond to popular discontent with the failures of our criminal justice system? If so, then this would be a form of human sacrifice, where, because we are unwilling to provide the resources needed to control crimes of various kinds, we will offer up to the collective public anger the heads of several individuals each year.

But the appropriate outlet for the expression of public discontent and anger in our Nation is the political process, not the system of criminal

justice. We do not further justice or public order or any other social goal by executing a few particularly violent murderers to make up for the failure to apprehend and punish other violent criminals.

The only other basis for this legislation is vengeance.

These has been a startling claim made over and over again throughout this debate that some individuals have forfeited their right to live. Leaving aside the moral arrogance of any human being to make that judgment of another, the basis of both our public and our private morality in this Nation has always been grounded in the idea of individual regeneration and renewal. Our religious faiths all hold out the possibility of redemption through personal will. And our public institutions are based on controlling the mistakes, not extolling the perfection, of human beings.

Moreover, the fact remains that we cannot give to government a moral right which we do not have ourselves. We, as individuals, may not morally kill, except in self-defense. And when we individuals form ourselves into a community, we cannot grant that community a moral authority we cannot claim for ourselves. We can and do ask members of our community to kill and risk life in our joint defense. But just as we have no individual right to exact vengeance, so also can we not give such a grant of authority to the state we have constructed in our own behalf.

I would like to comment on a more mundane side to this debate over crime and its control from Washington.

It must be very clear to every member of the Senate that Federal laws affect the most minimal number of violent criminals. Yet all this anticrime legislation has been characterized by the President, just this past Saturday, as a rejection of the idea of "coddling criminals."

The political purpose of such exaggerated rhetoric is too obvious to need comment. The purpose of this exercise has been to permit a certain amount of righteousness over who is the more anticrime.

I feel no need to make an impassioned public claim that I personally do not approve of coddling criminals. No responsible person approves of coddling criminals.

I do not feel called upon to ardently assure our people that "nothing in our Constitution gives dangerous criminals a right to prey on innocent law-abiding people." As if anyone ever suggested that it did.

Like other Members of the Senate, I agree with some of the provisions of these anticrime bills, and I disagree with others. But I deeply resent the clear and intentional implication that any disagreement on these bills is based upon a desire to coddle criminals.

According to both the New York Times and the Washington Post, last Saturday President Reagan described the issue of crime as "a prolonged partisan struggle." Of all the false and outrageous statements made by this President or any of his predecessors, this is one of the worst. Crime is not now a partisan struggle. It has never been a partisan struggle.

Fourteen years ago another President tried to label one political party as being soft on crime. This is not a new political tactic. And it has not become a better tactic with time. It continues to be one of the most intentionally divisive ways of preying on legitimate public concerns. And it is cynically recognized as such by most of the Members of this Senate.

I have devoted a good portion of my life to the criminal justice system in this country, and I can tell you without hesitation that both Republicans and Democrats throughout the system of justice, in our political life, and in our Nation share an abhorrence of crime and a dedication to reducing it in our Nation.

There is not a Republican kind of criminal justice and a Democratic kind of criminal justice. Nor should there be. What the American people want is an American kind of criminal justice and one that works.

It does no service to the debate over the constitutional ways our community can control crime to inject a baseless and mischievous inference that political affiliation plays some sort of role in determining how many murders will be committed in America next year.

It is a disservice to the goal of reducing violent crime—which is a mutual goal, shared by people of all political persuasions—to suggest that one or another political party can somehow be blamed for the problems faced by our overworked police forces and our understaffed court systems.

Crime indicators have been moving down, and responsible expert opinion says that is the result of demographic factors, not political ones.

Republican Presidents in the 1920's did not create the wave of lawlessness in Roaring Twenties. And Democratic Presidents in the 1930's did not stop it. Nothing has changed. It is a serious abuse of the truth for anyone to suggest that crime is a partisan issue.

The death penalty does not work as a deterrent. It does not promote more equal justice. And it has no moral foundation. This bill should be defeated.

Mr. President, I suggest the absence of a quorum and ask unanimous consent that the time in this quorum call be equally divided between the two sides.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. THURMOND. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. ABDNOR). Without objection, it is so ordered.

Mr. THURMOND. Mr. President, I can understand the feeling of Christian people to hesitate to put another person to death. On the other hand, some cases cry out as a matter of justice for the most severe penalty possible. I have a few cases which I want to call to the attention of the Senate. When I mention these matters, it is not with any intention of inflaming Senators but with the intention of informing them of some of the brutal crimes which I think justify capital punishment.

For instance, on a night in July 1966, Richard Speck broke into a townhouse which served as a dormitory for student nurses. He crept upstairs to the bedroom of Corazon Amurao, a 22-year-old Philippine exchange student and awakened her. He was carrying a small black pistol in one hand and a butcher knife in the other. According to Miss Amurao's account, Speck made her go down the hall to the next bedroom, where he awakened the three girls there. The four were then herded into the back bedroom where two more girls were sleeping. Speck told the girls that he would not hurt them and only wanted money.

While Speck was tying up the girls, the three remaining nurses returned home. They, too, were forced to join the others and were bound and gagged. Then, one-by-one, Speck began leading the girls out of the bedroom and returning alone. None of the girls uttered more than a little scream. While he was gone on one trip, Miss Amurao managed to roll under one of the beds and hide. It was in this way that she escaped death. After spending hours under the bed terrified, Miss Amurao finally managed to free herself and summon help. The picture the police found was one of horror:

Gloria Davy lay nude and face down on a divan, strangled and mutilated;

Sue Farris was stabbed nine times and strangled;

Mary Ann Jordan was stabbed five times, including one thrust in the left eye and one in the heart;

Pat Matusek was strangled;

Pam Wilkening was stabbed in the heart;

Nina Schmale was stabbed four times in the neck and strangled;

Merlita Gargullo was dead of a 6-inch-deep thrust in the side of her neck;