WILL HE BE THE FIRST?: This month, capital punishment may become ...
By Peter Ross Range
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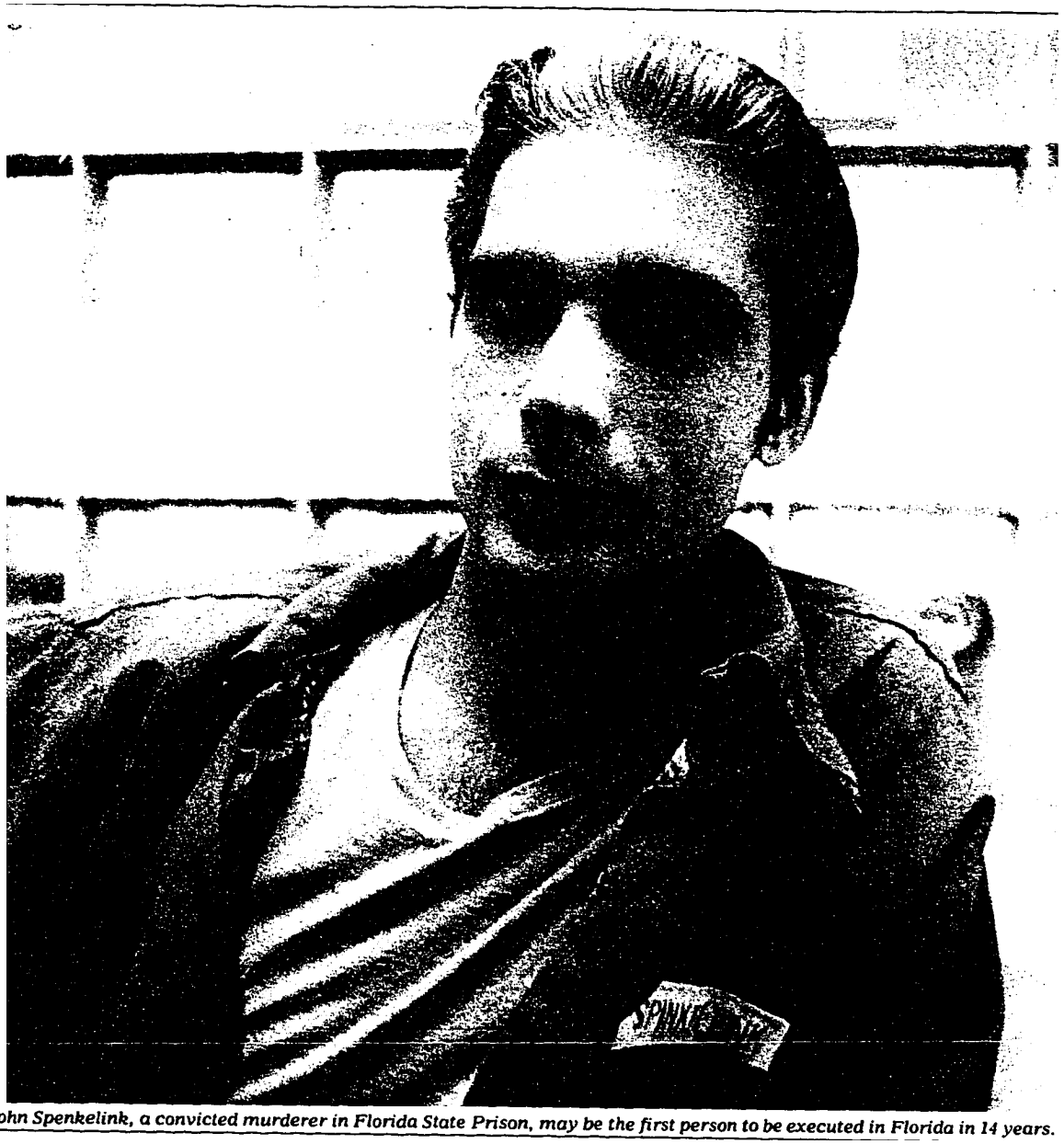

John Spenkelink, a convicted murderer in Florida State Prison, may be the first person to be executed in Florida in 14 years.

A guard tests Florida's electric chair.

WILL HE BE THE FIRST?

This month, capital punishment may become legal again — and 40 people on death row will be slated to die in 1979.

By Peter Ross Range

The electric chair at Florida State Prison is an unimposing machine. Standing empty, unconnected to the heavy black cables snaking behind it from an innocuous white power box, it appears almost antiseptically benign. Its broad, oaken flatness — it was built in 1924 from a single oak felled by inmates — reminds one of those ageless, flat-backed armchairs that used to grace Y.M.C.A. lobbies before they went to carpeting and high prices. The beveled, wooden headrest, where the condemned gets the jolt that kills him, looks somewhat like that on an antique barber's chair. In the clean, fresh-painted brightness of this linoleum-tiled, first-floor room, it is hard to imagine the chair as an instrument of extermination.

But kill it will. Within this year — perhaps this month — John A. Spenkelink, 30, a work camp escapee who killed his traveling companion, an ex-convict, in what he describes as a domestic quarrel over money, faces the probability that he will be shocked to death by 2,500 volts of direct current passed through his body eight different times at varying amperages over a two-minute period. If the death sentence is carried out, Spenkelink's dark hair with a swatch of premature gray in front will have been shaved, the better to establish electrical contact through the electrocution helmet. If the switch is thrown, his lightly tattooed body, lean and muscular from five years of doing push-ups and jumping jacks in a 6-by-9-foot cell, will strain and jerk against seven new thick leather straps holding him in the chair; his scalp may begin to emit smoke before the two minutes are up.

The 12 state-appointed witnesses, seated in dainty, scallop-backed wooden chairs, face to face with Spenkelink, will not notice the noxious smell of burning human skin; they will be separated by an odorproof double window of thick plate glass. Yet, as if to give reality to their witness, the sounds of this grisly business — attaching of straps, reading of sentence and last words of the condemned, activation of power, the flipping of three switches behind the executioner's partition and the struggles of John Spenkelink — will be piped into the viewing room by intercom. After two minutes, then, John Spenkelink will be dead at the end of a classically disheveled life; the State of Florida, in the name of the people, will have its revenge; and the floodgates of execution in the world's most developed country will be reopened.

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What has been in recent years a more or less theoretical debate over capital punishment will become a matter of corporeal urgency if Spenkelink's execution is scheduled. His avenues of appeal have been nearly exhausted. Nobody knows how the United States Supreme Court will decide Spenkelink's case, but if it turns down his current petition, it will short-circuit the process for many who have already seen their convictions and sentences upheld in the lower courts. Spenkelink's execution will sound the death knell for dozens of the nearly 500 men and five women now incarcerated under death sentences in 25 states. As many as 40 persons could be institutionally killed in 1979 — which may well be remembered as The Year of the Execution.

Death-penalty abolitionists already have plan- *(Continued on Page 72)*

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DEATH ROW

Continued from Page 29

ed overnight vigils and demonstrations on the greensward flanking the narrow highway outside Florida State Prison, located near the village of Starke in north central Florida, and officials there have agreed on the space to be used. Since the South, now as before, remains the chief bastion of capital punishment in America (84 percent of those on death row today are in 11 Southern prisons), Atlanta will this spring be the venue of a major national rally of those who oppose state executions.

It has been 12 years since a de facto moratorium was declared on the death penalty in America. A population of 600 persons accumulated on the death rows of the nation between 1967 and 1972, a period during which the states were reluctant to execute while capital-punishment laws were under fresh attack in the Federal courts. In 1972, the Supreme Court ruled the death penalty to be unconstitutional because it was arbitrarily applied, hence, "cruel and unusual." All condemned persons had their sentences automatically commuted to life imprisonment. Since then, 34 states have enacted new death-penalty statutes. Yet the only execution in America since 1967 was that of the suicidal, double-murderer Gary Gilmore, who qualified for the firing squad in Utah in 1977 by deliberately withdrawing his appeals.

With the present rate of sentencing to death at roughly two per week — especially in Southern states — there could be more than 100 executions per year in the 1980's. The annual figure could, in fact, equal that reached in the heyday of capital punishment in the postlynching era: 199 in 1935. "It promises to be a bloody decade," laments Henry Schwarzchild, director of the National Coalition Against the Death Penalty.

The death penalty, however, has ardent advocates. Ernest van den Haag, a conservative New York psychologist and sociologist, defends capital punishment, among other reasons, on the basis of retribution: "The motives for the death penalty may indeed include vengeance.... Legal vengeance solidifies social solidarity against lawbreakers and probably is the only alternative to the disruptive private revenge of those who feel harmed."

The rate of execution peaked at the height of the Depression and many students of capital punishment think economic woes and the public desire for harsh penalties go hand in hand. "Inflation wears on middle-class minds with economic interests to protect," remarks Carol Palmer, a capital-punishment researcher at the NAACP Legal Defense and Educational Fund. "When times are tight, people think more about crime and they start looking for panaceas. The motivation to enact the death penalty always rises with inflation."

Our own inflationary period, some would say, is just such a time of vengeance. "This state is in a bloodthirsty mood," says one Georgia attorney who is fighting such a tenuous battle for the commutation of his client's sentence from death to life that he refuses to let his name be used. Indeed, the Chief Justice of the Georgia Supreme Court, H. E. Nichols, has been barnstorming the state, speaking out in favor of speedy executions of present death-row inmates in the interest of judicial efficiency. "I think it is a deterrent, especially to the more serious crimes," says Justice Nichols. "If they know they're going to get punished, brother, they're going to think twice about it."

Georgia, with 417 executions since it began keeping records in the 1920's, has put more people to death than any other state. Today, with 74 men and one woman on death row, Georgia ranks third in the nation behind Florida (119) and Texas (105). Georgia's death chamber and its massive, 43-year-old electric chair in the fifth-floor cupola atop the main building of the state prison in Reidsville have received a fresh coat of white paint. The three oversized black switches behind the simple, plywood executioner's partition have been checked — and they worked. The warden, Charles Balkcom — his father was warden before him — is a soft-spoken man who says he is ready. "I favor the death penalty. We'll carry out the law. But I don't intend to watch it. I have enough other problems as it is."

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The remarkable thing about America's impending return to capital punishment on a significant scale is how few people realize it is about to hap-

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pen. Most Americans seem to think the moratorium of the past 12 years, unofficial or not, is here to stay. While the new death-penalty statutes had to be approved by the state legislatures in full public view (in Oregon and California last November, they were approved by popular ballot), many Americans seem unprepared for the reality of executions themselves. "There is a paradox, a schizophrenia about the matter," says Prof. Hugo Adam Bedau of Tufts University, editor of the definitive book "The Death Penalty in America." Death-penalty abolitionists expect a certain degree of public revulsion once the institutional killing resumes, but no one knows whether this will have significant political impact.

There is a sense of *déjà vu* about this curious current state of affairs. In 1972, a Supreme Court that was still dominated, 5-to-4, by pre-Nixon appointees declared existing capital-punishment laws to be unconstitutional because they violated the Eighth Amendment. They were so arbitrarily applied, mostly to the poor and the black, explained Justice Potter Stewart, that they were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." This was a historic decision that was heralded in The New York Times with a rare banner headline. Four years later, however, the Court upheld newly written death statutes in Georgia, Florida and Texas — an equally historic decision which made banner headlines nowhere. Yet today, as a result of that decision, the death-row population of the country is quietly but quickly reaching the size it had attained when all sentences were commuted to life imprisonment in 1972.

The clock would seem to have been turned back. Since the responsibility for criminal executions was taken from the county courthouses (the hanging of a black man in Owensboro, Ky. in 1936 is thought to have been the last public execution under county jurisdiction in the United States), the national trend has been away from execution. It was around the turn of the century that most of the states made official killing a state-supervised affair, behind closed prison gates with only a small, carefully chosen audience. This coincided with the widespread adoption of the electric chair or gas chamber, as opposed to hanging, as the method of execution. Subsequently, the rate moved fitfully but steadily downward: from 124 executions in 1940 to two in 1967. The last man executed before the current moratorium began was Luis José Monge, gassed in Colorado on June 2, 1967, for the murder of his wife and three children. Public opinion was in agreement with the demise of the death penalty: A 1965 Harris poll showed that while 38 percent of the American population favored capital punishment, 47 percent opposed it.

When the Supreme Court struck down capital punishment in its momentous decision in Furman v. Georgia in 1972, death-penalty opponents assumed they had finally won a battle that reformers had lost for two centuries; the United States, it seemed, had joined the three dozen other major countries, including all Western nations except France and Franco's Spain, that had abolished capital punishment. But that judgment was premature.

In 1972, the country was on the cusp of what has now been recognized as the conservative turn of the 1970's. Fears of crime in the streets were rising and, indeed, were being fanned by the Nixon Administration. The still unsettled war in Vietnam, the bitter national trauma of the previous year's conviction of Lieut. William L. Calley of My Lai infamy and the fresh memories of the killings at Kent State and Jackson State — all this contributed to a sharp political polarization that was further exacerbated by the Watergate break-in, which occurred just 12 days before the Supreme Court decision. It should have been no surprise that the largely conservative state legislatures

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rushed to rewrite their capital-punishment statutes.

The South led the way. Attempting to meet the Supreme Court's objections, Florida called its legislature into special session before the calendar year was out, passing a new, more carefully written death-penalty statute on Dec. 8, 1972. Georgia, Mississippi, Tennessee, Virginia and Arkansas — as well as Idaho, Indiana and Oklahoma — re-enacted capital punishment by April of the following year. Being in favor of the death penalty became valuable political currency in legislative election campaigns and, by last year, became a crucial issue in gubernatorial races in several states. By now, 34 states have readopted the death penalty, and similar legislation is pending in three others. (Some states, such as Michigan, Minnesota, Wisconsin, Alaska, Iowa, South Dakota, North Dakota and Hawaii pride themselves on a consistent history of abolitionism.)

A CBS/New York Times poll taken in August 1977 showed that 73 percent of the population now favored capital punishment. A Harris poll taken a few months before showed 67 percent in favor, and the racial breakdown of the respondents was especially interesting: 72 percent of the whites favored capital punishment (22 percent opposed), while only 40 percent of the blacks were in favor (48 percent opposed). White America was now clearly unprepared to relegate capital punishment to the past. The only other industrialized Western nation still commonly using capital punishment is South Africa; France retains the guillotine but uses it only about once a year, and only for the most heinous crimes. In its new Constitution, adopted last December, Spain, released from the Franco era, abolished capital punishment except for treason.

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The legal basis for America's return to state executions lay in the wording of the 1972 Furman decision. The five-man majority on the Supreme Court did not, as Chief Justice Warren Burger pointedly remarked in his dissenting opinion, rule "that capital punishment is per se violative of the Eighth Amendment; nor has it ruled that the punishment is barred for a particular class or classes of crimes." Instead, the decision simply struck down existing statutes for violations, *as then applied* — that is, primarily against blacks and the poor. Burger further pointed the way for rewritten statutes by stating in his dissent that "significant statutory changes will have to be made. ... Real change could clearly be brought about if legislatures provide mandatory death sentences...."

This clearly opened the door for the comeback of capital punishment, and this time its supporters meant to avoid the pre-Furman pitfalls of "arbitrariness" that had been struck down in 1972. A number of states wrote laws designed to apply equally to everyone by making the death penalty mandatory for certain crimes, such as killing a peace officer or murder by a life-term prisoner. This posed a problem for juries in capital cases in that they had no choice regarding punishment: Conviction meant death and the only lesser penalty was outright acquittal. Hence, some states, such as Ohio and North Carolina, found themselves sentencing criminals to death in unprecedented numbers. Recognizing the dangerous rigidity of these laws, the Supreme Court, in Lockett v. Ohio and Woodson v. North Carolina, struck down mandatory death-penalty statutes in a number of states in 1976.

However, in the same 1976 rulings, the Court upheld a different kind of statute written in other states, notably Florida, Texas and Georgia (Gregg v. Georgia). Their laws contained no mandatory death penalties, but rather outlined what is called "guided discretion." This meant that while the law contained a specific list of capital murders, it also gave the juries discretion to

decide on life imprisonment or death, according to a suggested list of "aggravating and mitigating circumstances." This decision was to be reached in a second trial immediately following a guilty verdict in the main trial itself. Known as a bifurcated trial, this system, primarily as written in the Florida law, has become the model for other states.

Opponents of capital punishment regard the bifurcated trial as just a more sophiticated masking of the same old system of arbitrariness and caprice in the matter of who gets death and who gets life. In fact, even at the present rate of sentencing, only a tiny percentage of murderers is sentenced to death. And there seems to be no consistent pattern dividing the one group from the other. One woman in Georgia is on death row for a murder that her husband committed; she was convicted of being a co-conspirator, which she vehemently denies. In another Georgia conspiracy case, however, two men recently received life imprisonment for a clearly proved "contract" killing. There are child-killers serving life, while, in Florida, for instance, one teenaged boy received a death sentence for the sale of heroin that led to the purchaser's accidental death by overdose.

The Supreme Court, meanwhile, has denied all attempts to attack the death penalty on the basis of continuing arbitrariness. "The Court just doesn't want to hear about capital punishment," complains Atlanta lawyer Millard Farmer, director of the Team Defense Project, which successfully defended the Dawson Five in south Georgia last year. "They just threw the whole issue back to the states and said, 'Do what you will.' "

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In their attempts to force Americans to deal with what they consider the horror of institutional killing, liberals have adopted the unlikely position of opposing any trends toward making executions "more humane." While reform-minded groups originally supported the move from the disfiguring and brutalizing method of hanging to the modern and allegedly more humane techniques of electrocution and gas chambers, the new abolitionists see such changes today as inimical to their cause. Thus, their opposition to newly enacted statutes in Texas, Oklahoma and Idaho that call for execution by injection into the condemned person's arm of a lethal dose of sodium thiopental. Aside from the overtones of Nazi-style euthanasia or "putting a dog to sleep," abolitionists see this new technique as yet another way of masking the central issue of whether a modern society should take a life for a life (rape and kidnapping no longer being capital crimes, as a result of the decision in Coker v. Georgia, 1977).

"There is no such thing as a humane way of killing," observes Clinton P. Duffy, the retired longtime warden of California's San Quentin prison, who had to carry out 90 executions. "I'm against the death penalty because it is wrong to kill. It was wrong to have the first murder and it's wrong for the state to premeditate another murder. Besides, it's a privilege of the poor. I don't know of a wealthy person ever executed in the United States."

The racial implications of capital punishment have taken a subtle and ironic turn. A decisive majority of the 600 persons on death row when the 1972 decision was issued were indeed black (at a time when rape was still a capital crime, and when whites almost never received a death sentence for rape). Today, 54 percent of those on death row are white, 41 percent black. But Northeastern University sociologists William Bowers and Glenn Pierce have unearthed startling data which indicate that while whites and blacks may receive the death penalty in more or less equal numbers today, more than the race of the murderer, it is the race of the *victim* which determines whether or not the guilty party will receive the death penalty. Abolitionist Alabama lawyer Morris Dees once pointed out to Bowers and Pierce that he always knew whether to prepare for a capital trial in homicide cases by finding out if the victim was white — regardless of the race of the killer. If the victim was black, no matter what the race of the offender, the prosecutor would probably not request the death penalty.

Bowers and Pierce undertook a detailed study of homicides in Florida over the five-year period of 1973-77. He then correlated the race of the victim with the race of the offender and came up with the table below.

This research shows that the 72 white men on Florida's death row (by the beginning of 1978) had *all* killed other whites. Not one of the 111 whites who killed blacks received a death sentence. It also shows that 92 percent of the men on death row — white or black — had killed whites, although, in fact, an almost identical number of murders of blacks had occurred (2,432 offenders arrested for killing whites versus 2,431 offenders arrested for killing blacks). The taking of a black life, even by another black, was one-tenth as likely to be punished by death as the taking of a white one. And yet, a black who took a white life was five times as likely to receive the death penalty as a white doing the same thing. John Spenkelink's lawyers used this line of reasoning in their

FLORIDA, 1973-77

Victim/Offender Race	Estimated Number of Offenders	Persons Sentenced to Death	Probability of Death Penalty
B kills W	286	48	.168
W kills W	2,146	72	.034
B kills B	2,320	11	.005
W kills B	111	0	.000

petition to have his sentence overturned, only to have it rejected by the Fifth Circuit Court of Appeals; it now rests with the Supreme Court. The man Spenkelink killed was, like himself, white.

Death-penalty opponents claim that the obvious bias demonstrated by the race-of-the-victim argument is but one example of the continued arbitrary application of the death penalty — the very practice that the Furman decision was supposed to strike down. There are more invidious problems, such as the obvious tendency for people of means who commit homicides to retain skilled counsel to plea-bargain for a lesser charge or manage to obtain a life sentence even when their clients are convicted of first-degree murder. Another example of arbitrariness sanctioned by law is "prosecutorial discretion," the decision of one man, the local district attorney, as to what charge to bring for any given homicide.

Spenkelink's crime is a case in point. He had been traveling for some months with a man with a much longer and more serious criminal record than his own. His companion, testified Spenkelink, carried a pistol and occasionally threatened him with it. He once forced Spenkelink to have homosexual relations with him. During a brief motel stop in Tallahassee, Fla., Spenkelink discovered that all of his money was missing from his suitcase. He argued and fought with his companion. Later, he testified, he returned to the motel to pick up his clothes, tried to recover his money and leave. He brought the pistol in from the car. His companion attacked him, both men went for the gun and Spenkelink shot the other man. Since the body was found in the bed with two gunshot wounds from behind, the prosecution argued that Spenkelink had premeditated the killing.

First-degree murder? Second-degree? Manslaughter? Justifiable homicide in self-defense? That question must be answered by the prosecutor in making his decision as to what charge to bring before the grand jury. It is argued that even in another part of Florida, Spenkelink, like several hundred other men serving life or long terms at the state prison, would have been charged with something less than first-degree murder. Indeed, the Bowers-Pierce study showed a distinct geographic break between conservative north Florida and more lib-

eral south Florida. For example, the killer of a white in the Florida Panhandle is 24 times more likely to receive the death penalty than the killer of a black in Miami. Tallahassee is in the Panhandle.

This very circumstance prompted Florida Supreme Court Justice Richard W. Ervin to dissent from his court's affirmation on appeal of Spenkelink's death sentence: "Truly characterized, the sentencing to death here is an example of the exercise of local arbitrary discretion. The two actors in the homicide were underprivileged drifters. Their surnames, Spenkelink and Szymankiewicz, were foreign and strange to the Tallahassee area. They have no family roots or business connections here. All of the ingredients were present for the exercise of invidious parochial discrimination. . . ."

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The argument that the return to the death penalty merely reflects a vengeful turn in public sentiment is supported by the age-old deterrent debate. First, there are virtually no reputable data to prove that capital punishment is a deterrent to murder. But second, just as people once opposed the death penalty but now favor it, the 1977 CBS/New York Times poll showed that 61 percent believed in its deterrent value. Third and most interesting, when the 1977 Harris poll asked the people being polled whether they would support capital punishment *even if* they were shown that it had no deterrent effect, whites still favored it by 49 percent (39 percent against). This leads directly to the conclusion that it is the retributive aspect of capital punishment that has come on strongest in the past 10 years. Deterrent value or no, people want a death penalty.

Despite the intensity of these battles between the abolitionists and the lawmakers (and prosecutors) who favor the death penalty, most of the country seems to have been blissfully oblivious to the controversy. The capital-punishment debate has never been raised to the level of a national issue which can be fully investigated with national resources. A Senate committee last year held hearings which probably helped kill a movement to re-enact a Federal death penalty, but no sweeping report was issued. Instead, each state operates with limited data, local political pressures and expediency on an issue that promises once again to become a serious moral dilemma.

Last year Alabama attorney Morris Dees capitalized on his standing with Jimmy Carter — Dees was the President's chief fund-raiser during the 1976 primaries — to urge him to depoliticize the death-penalty debate. President Carter, who signed the Georgia death-penalty statute and personally favors capital punishment for such crimes as killing a peace officer, listened over a private lunch in the Rose Garden at the White House while Dees made his proposal. Following the model of the British Royal Commission on Capital Punishment, whose 1952 report led to the eventual abolition of capital punishment in Great Britain in 1965, Dees suggested that Carter establish a National Commission on Capital Punishment to prepare a thorough report on the subject. "This would take the political pressure off the governors, the legislatures and the President himself," insists Dees, who obviously hopes such a commission would recommend abolition.

So far nothing has been heard from President Carter. In the meantime, the death penalty moves daily closer to being not just a statute but a reality. John Spenkelink spends his time in R wing reading Edgar Cayce and the Bible, helping illiterate death-row mates write and read letters, and smoking his one pack of Benson & Hedges per day. His girlfriend from Jacksonville comes to visit every weekend and her children call him "Dad." Says Spenkelink: "I can see a bright future someday. I've got things to do when I get out of here. I shouldn't die, but the state wants to make sure I burn." ■