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Capital Punishment Reconsidered

By William O. Reichert*

I

Among the many bills which failed to pass the last session of the General Assembly was one (House Bill No. 229) which called for the abolition of capital punishment in the State of Kentucky. Although the bill received relatively little attention in the press, and was not enacted into law by the legislature, an unusually large number of citizens expressed hostility to the proposal through letters to their newspapers. It is not at all surprising that the public—or at least that part of it which made itself heard—should react unfavorably to the idea that capital punishment be abolished. Opinion polls taken in other states and countries that have sought to implement this reform consistently indicate that the general public in most communities holds a persistent fear that discarding the death penalty will lead to a phenomenal increase of disorder and violence and is thus opposed to any movement toward abolition. The expressed fears of the public, however, are not always synonymous with the advanced social and political attitudes of a society. This is demonstrated by the fact that the long-range legislative trend everywhere has been in the direction of abandoning capital punishment. It is to be expected, therefore, that the Kentucky General Assembly will again have to debate the question of whether the death penalty shall be continued in force for the six crimes which at present are punishable by death in this state. This essay is devoted to a consideration of some of the problems such a discussion will entail.

Much of the confusion surrounding the question of capital punishment stems from the circumstance that the average citizen rarely has occasion to fully inform himself as to the actual facts

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1The bill was introduced by Representative Vernor O. Cottongim. Although it was successfully reported out of the Committee of Ways and Means, it did not come before the House for its final reading.
involved in the issue. The popular notion that the penalty of death is the most efficient, if not the only, means of deterring murder has become so deeply embedded in the folklore of American society that it is rarely evaluated as to its basic validity. Nor is this altogether peculiar to the United States, as witnessed by the fact that a heated controversy developed in Britain when it was recently proposed in Parliament that hanging should no longer be employed as a punishment for murder. One of the major reasons why this notion has for so long gone unchallenged is the widely held belief that those who favor the abolition of capital punishment have allowed their emotions to dominate their reason. Those who support the retention of capital punishment have thus been successful in defending their viewpoint as "realistic," as opposed to the "idealistic" but "impractical" label which has been attached to the abolitionists. A careful analysis of the facts surrounding the controversy reveals, however, that it is not true that those who would do away with the death penalty are less reasonable in their argument than their opponents. If we may rely on the testimony of Sir Ernest Gowers, chairman of the 1949 Royal Commission on Capital Punishment in Britain, it is actually not the abolitionists but the defenders of the death penalty who have allowed emotion to sway their reason.² This conclusion is substantiated by the viewpoint of those sociologists who maintain that "not a single assumption underlying the theory of capital punishment can be squared with the facts of human nature" as modern scientific thought conceives these facts to be.³

In an effort to clear away some of the confusion that surrounds the question of capital punishment, this essay will consider the death penalty in terms of its broad social and political effects. It is the writer's sincere conviction that no intelligent evaluation of capital punishment can be made so long as we continue to think of the death penalty as being unrelated to the system of values we as a society have created for ourselves. Law, on this view, is not something that is complete in itself; it is, rather, an integral part of our total social and political

experience. From time to time we must examine its various parts in order to determine whether they correlate with our newest insights into human values. When we find that any part of the law fails to reflect the spirit of our moral values, which is the most precious thing we as a society possess, we must do all that we can to correct the deficiency. It would be highly imprudent in this regard were we to substitute too hastily the untried theories of the social sciences for the tested wisdom which is embodied in the law. Yet we must also keep clearly in mind that there is nothing sacred about the law that should cause us to bow down before it in unquestioning obedience to its will.

Capital punishment, if it is to be defended successfully, must be proven to be adequate in two particulars. Not only must it be shown that the immediate and practical effect of the death penalty is to deter the murderer from committing an isolated act of violence but it must also be demonstrated that its long-range effect is to reduce the total quantity of violence within society. This essay will consider each of these propositions in turn.

II

No responsible person in this country any longer urges the retention of the death penalty solely on the argument that the murderer should be made to suffer as retribution for his criminal act. The idea of inflicting physical pain upon an individual as just punishment for committing a crime against society has become morally repulsive to us. Capital punishment, therefore, must be justified on some grounds other than vindication. The major argument thus advanced by those who favor the retention of capital punishment is usually stated in utilitarian terms. Were the death penalty to be abandoned as a deterrent to murder and other heinous crimes, it is argued, the incidence of murder and other forms of violence would in all probability become so great that the state would be unable to provide the basic order that is essential for a well-functioning society. This argument cannot lightly be set aside. The quest for order is a primary function of every society, for no society can hope to achieve continuity

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5 Margaret Wilson, The Crime of Punishment 15-16 (1934).
unless it perfects effective techniques for controlling the destructive forces it finds within itself. But it does not necessarily follow, as many defenders of capital punishment seem to believe, that the abolition of the death penalty must inevitably cause society to revert to the chaos and brutality of the Hobbesian state of nature.

Were the death penalty an effective means of deterring murder, an analysis of the criminal statistics of the United States could be expected to conclusively demonstrate the validity of this proposition. A recent study of the subject makes clear, however, that there is no necessary correlation between the presence or absence of the death penalty and the murder rate in any particular state. Maine, which abolished capital punishment in 1870, has the lowest murder rate of any state in the union. Wisconsin and Minnesota, which abandoned the death penalty in 1854 and 1911, respectively, have far lower homicide rates than most of the other states. Michigan, Rhode Island, and North Dakota, which have also abolished capital punishment, have somewhat higher murder rates than Wisconsin and Minnesota. A comparison of the criminal statistics of these states and those of the states which lie adjacent to them reveals, however, that murder is not more frequently committed in the states that have given up capital punishment than in those that have retained it. It is highly significant, on the other hand, that Georgia, the state that executes more persons annually than any other, also has the highest murder rate.

Due to social and cultural differences which exist between the American experience and that of other nations in Europe and Asia, it is impossible to make any exact comparison between one country and another. It is interesting to note, nevertheless, that the British Select Committee on Capital Punishment heard evidence in 1930 which indicated that in no country that has abolished capital punishment has there been an increase in the murder rate. Many countries, as well as states, have reintroduced the death penalty some years after it was abolished. But it appears that this action has been taken more for hysterical

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than for scientific reasons. Having allowed the death penalty to fall into disuse in 1936, as an example, New Zealand reintroduced it in 1950 after two bloody murders had outraged public opinion. Yet the murder rate in New Zealand was lower in the fifteen year period during which capital punishment had been suspended than in the fifteen year period which immediately preceded its suspension. Although these fragmentary statistics do not prove that capital punishment is entirely without power to deter murder, they do indicate that the abolition of the death penalty does not inevitably lead to social chaos.

If society is to continue to defend capital punishment on the grounds that it is a successful means of deterring violence within the social order, we must clearly demonstrate that the threat of death does in fact deter would-be murderers from carrying out their violent impulses. But the utilitarian argument in support of capital punishment, when viewed in terms of its psychological effect upon the potential murderer, is seen to be almost entirely without validity. Were human beings mechanical creatures whose actions are rigidly determined according to felt sensations of pain and pleasure, it would follow that no man would commit murder when the certain penalty for his act would be death. But the mechanical theory of human nature that serves as the foundation of the utilitarian theory is no longer acceptable to the social scientist. No doubt men do attempt to regulate their actions as best they can according to what they think will bring them happiness and avoid pain. But human existence is much too complex in nature to permit men any exact knowledge of where happiness actually lies, or what kind of action will ultimately lead to the greatest amount of unhappiness. The vast majority of murders, moreover, are not committed by normal persons but by socially maladjusted individuals who are incapable of grasping the logic of cause and effect which is embodied in the theory of capital punishment. It might well be argued, in fact, that all murderers are affiliated with insanity in one form or another, for "a normal person in a normal state of mind just doesn’t commit murder." The difficulty here is

10 See E. Roy Calvert, Capital Punishment in the Twentieth Century (1927).
12 Arthur Koestler, Reflections on Hanging 149 (1957). See also John Biggs
that psychiatry has not yet developed an adequate definition of insanity, or at least one that is uniformly acceptable in the courts.\footnote{See Roy Moreland, “Mental Responsibility and the Criminal Law—A Defense,” 45 Ky. L. J. 215 (1956-57).}

Those who argue for the retention of the death penalty on the grounds that it is a practical means of maintaining order within society tend to overlook the fact that most murders are crimes of passion. As the name implies, the crime of passion is one which involves strong human emotions which have gotten out of control. Man, of course, is largely a creature of emotions, and it is just these forces that under normal circumstances furnish motivation for his actions. But man is also a reasonable creature, in the sense that his upbringing and education provide him with a set of values which give meaning and direction to his emotions. The individual whom we describe as normal, while potentially capable of murder, never seriously contemplates such an act because it is wholly alien to his moral character. The murderer who kills while under the influence of an abnormal sexual urge or in a moment of passionate hate, on the other hand, has obviously allowed his emotions to momentarily dominate his reason. If the moral teachings of his family, church, and community, to which he has been exposed since infancy, were so poorly learned that he was unable to keep himself from committing the most repulsive of all anti-social behavior, what hope is there that a remote threat of punishment, stated in abstract terms, will help him to maintain control of himself at the moment that highly irrational forces in his subconscious surge forward to overpower his reason?

We must realize in this connection that the popular notion that man is an absolutely free moral agent is largely without factual basis. It is true, of course, that in most ordinary social situations the average individual is generally able to determine for himself how he will behave, and to this extent it is correct to say that he possesses free will. Yet it is equally true that in many situations the course of action a given individual will follow may greatly be determined by factors that are altogether
beyond his control. Being a creature of habit and routine, the average man is apt to give the appearance of being a very simple organism. Yet as the psychologist, the biographer, and the novelist have shown, the main part of human nature lies beneath the surface of appearance. All too often we lose sight of the fact that every individual has a personality that has been conditioned by inherited biological characteristics as well as a myriad of daily events and tensions experienced since infancy. We can no more explain the conduct of the individual without reference to his past than we can understand a nation or civilization that has been detached from its history. Although the individual appears to be absolutely free to choose what he will do in any given situation, his choice is always restricted by the entire past his personality has been conditioned by. It is a gross over-simplification of the problem to argue that the man who commits murder in the heat of passion has deliberately chosen to do the bad rather than the good. In point of fact, it might virtually have been impossible for him not to commit murder in the particular situation he found himself in. It requires very little effort upon the part of the normal individual to live his life in an orderly and peaceful manner. The same thing cannot be said for the unfortunate individual whose heredity and early environment are so seriously defective that he develops a wholly abnormal personality. Such a person may be tormented by so powerful a psychological tendency toward violence that the amount of will power required to refrain from murder in his particular case may well be beyond the level of human capability.¹⁴

It is frightening to admit that there are some individuals in society who are incapable of controlling themselves at certain times and are virtually compelled to commit murder. The retention of capital punishment, however, is not an intelligent answer to this problem. Murder is a social phenomenon which can never be brought under control until we approach it in a scientific manner. But until the death penalty is abolished we can not get to the important task of finding adequate techniques for the social control of the abnormal individual who might be inclined toward violence. As matters now stand, we spend

¹⁴ Calvert, Capital Punishment in the Twentieth Century 153 (1927).
an enormous amount of money and energy in maintaining a penal system that is in large measure devoted to the punishment of the convicted murderer. There is much truth in the statement that the legal profession has devoted more time and energy to the task of finding ways to punish the human race than it has to developing techniques for its improvement. Yet criminologists generally agree that the number of murderers, other than the insane, who ever commit a second murder is negligible. Actually our fear of the potential murderer is greatly out of proportion to the seriousness of the problem. This is not to minimize the fact that there is on the average over 7,000 cases of murder and non-negligent manslaughter committed each year in the United States. Yet the popular notion that we must retain the death penalty as a defense against the insane murderer who suddenly strikes down the innocent bystander is wholly unreasonable. In point of fact very few people suddenly go beserk and do bodily harm to the perfect stranger. Most murders are committed on the spur of the moment and are not in the least premeditated. There is in almost every case of murder, however, a long history of grievance or antagonism between the murderer and his victim who is most often a friend, relative, or close acquaintance. A man may well strike down his wife or girl friend in a fit of uncontrolable rage. But a strange woman would have nothing to fear from this same man, for there would be no motive or cause for violence in the latter case. It can not be too strongly emphasized that the death penalty is wholly useless as a deterrent to violence in either of these two situations.

Turning to the professional criminal, it is apparent that the death penalty is equally impotent in persuading him to refrain from murder. The theory of capital punishment is based on the supposition that the criminal will pause to reflect on the painful consequences he will suffer if he commits murder. But rational reflection plays little part in the life of the criminal, and this is particularly true at the moment he is actually engaged in carrying out a crime. The business of the professional criminal

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15 Biggs, op cit. supra note 12, at XI.
17 A recent study of 2,700 cases of murder and non-negligent manslaughter revealed that in only 37 of them was there clear intent or material motive for the crime. Hall & Glueck, Cases On Criminal Law and Its Enforcement 86 (1958).
is a hazardous occupation. It is foolish to suppose that a remote fear of future death at the hands of the state will be more meaningful to him than the immediate fear which dominates his attention as he actually faces his victim or enemy.\footnote{Karl F. Schnessler, "The Deterrent Influence of the Death Penalty," 284 Annals 61 (1952).} Most men, however educated and enlightened they may be, are prone to live in the present and take little heed of the future. If this is so for the average individual, it is particularly true of the criminal whose moral sensibilities have been warped and twisted by a defective inheritance and environment.\footnote{Robert G. Caldwell, "Why is the Death Penalty Retained?" 284 Annals 51 (1952).} The very act of choosing a life of crime rather than a socially acceptable means of making a livelihood testifies to the fact that the professional criminal is incapable of seeing what is actually to his greatest self-interest.

Much of the responsibility for the fact that the professional criminal does not take the death penalty seriously ultimately rests upon society itself. It is well-known that it is not the severity of the penalty that deters crime but the consistency with which the penalty is applied. Just as the small child does not fear threats of punishment if he is seldom punished, so the professional criminal has learned that is is unlikely that he will suffer the pain of death if he commits murder. Out of an estimated 23,370 cases of murder, non-negligent manslaughter, and rape in the year 1949, there were only 119 executions carried out in the entire United States.\footnote{Id. at 50.} Wide differences in the methods employed for reporting criminal statistics make it extremely difficult to compare Kentucky's rate of execution with that of other states. But one conclusion may safely be drawn; the potential murderer in Kentucky has little more to fear than potential murderers do in other parts of the country. In the fiscal years 1955 to 1957 there were a total of 369 cases of murder, voluntary manslaughter, and rape received by state penal institutions in Kentucky, whereas there were only six executions carried out during this same period.\footnote{These figures were supplied by the Division of Corrections of the Kentucky Department of Welfare.} Obviously the statistical probability of suffering the death penalty is so low under these
circumstances that only the most timid murderer has any reason
to fear for his life. To retain capital punishment in the face
of this fact is an absurdity of the highest magnitude.

The utilitarian idea that capital punishment is an effective
and practical deterrent to crime fails to achieve credulity be-
cause of the outmoded and inadequate theory of human nature
upon which it is based. Those who argue for the retention of the
death penalty assume that man's basic nature is such that he
may readily be compelled to be peaceful and law-abiding through
punishment and threats of punishment. Yet almost 200 years
ago the Italian reformer Beccaria pointed out that punishment
can never be an effective deterrent to crime of any type because
human beings naturally develop a mental immunity to the threats
which must accompany it. England in the nineteenth century
adopted its famous "Bloody Code" according to the terms of
which over two-hundred crimes, including picking pockets, shop-
lifting, poaching, stealing turnips, and associating with gypsies,
became punishable by death. These executions, which were
carried out in public at periodic intervals, soon became festive
occasions. Enormous crowds attended them, causing the author-
ities much concern as a result of their boisterous conduct. Iron-
ically, public executions had to be discontinued after a time
because pick pockets were drawn to them in such large num-
bers that the purses of those in the crowd were not safe. Eng-
land today has a very enviable record so far as public order is
concerned. The police in its largest city, who do not ordinarily
carry guns, have not become targets as many people at first
feared they would. In 1950 there were only 122 murders reported
throughout the whole of England, most of which were com-
mitted by persons who were proven to be mentally deranged.
If there is any lesson to be learned from this it is that human
beings cannot be intimidated into being "good."

III

Probably the most meaningful criticism to be made of capital
punishment is that its actual effect upon society is likely to be
exactly the reverse of what its proponents claim for it. Many
responsible and serious persons who defend the death penalty
do so on the assumption that without its continued use, society
is apt to see the forces of law and order break down, with the result that the very existence of civilization would be placed in jeopardy. It has already been shown, however, that the claims made for capital punishment as a practical deterrent to murder are much exaggerated, if not altogether without reasonable basis. We may go further than this and argue that capital punishment, rather than reducing the total level of violence within society, may actually lead to its increase.

One of the major functions of law—perhaps its highest function—is the difficult task of keeping the forces of hate and vindictiveness which are bound to arise among any large group of people under control. This is not to suggest that the state has any responsibility for teaching morality to its citizens. Distinguishing the concept of state from that of society, we recognize that each of these entities has distinct functions and purposes. Society is the larger entity within which the individual finds freedom for the development of his own private moral and social satisfactions. The state, on the other hand, is theoretically subordinate to society and has the limited function of maintaining a legal order which is meant to serve the interests of all the individual persons and groups who collectively comprise society.

It is no longer possible to hold, however, as Herbert Spencer and other early liberals did, that the state has no other function than the negative one of maintaining a bare legal order that has no relevance whatever to morality. It is true, of course, that the state has no right to directly teach morality. This is the province of the church, the family, and other spontaneous associations within society that are qualified to carry out this highly important function. But we now acknowledge the fact that the law, while it is theoretically neutral in regard to ethical matters, does have the practical effect of setting a moral example for those who are regulated by it.

This is the reasoning behind the assertion that capital punishment may actually increase the level of violence within society rather than diminish it. The state, when it carries out the execution of one of its members, unconsciously develops attitudes in the minds of the remainder of its citizens which may have dire

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22 Weihofen, 140.
social consequences. Just as the citizen-soldier loses his horror of killing in time of war because he is rewarded for doing it, so the average citizen is apt to be made brutal by the example set for him by the state when it takes life. As Weihofen puts it: "Official killing by the state makes killing respectable. It not merely dulls the sensibilities of people to cruelty and inhumanity but actually stimulates cruelty." Capital punishment, on this view, is itself an act of violence. Never having personally witnessed an execution, most of us are not fully aware of how brutal and out of keeping with our moral ideals an execution is. Those who have studied the subject, however, report that the typical condemned prisoner suffers a thousand deaths before his life is finally snuffed out. We may argue in return, of course, that a murderer deserves to suffer, just as the victim he killed was made to suffer. To argue in this way, however, is to confuse the idea of justice with the spirit of revenge; it is tacit admission that we actually enjoy the thought of another human being made to suffer.

Most of us, of course, are quick to deny that we derive any sadistic enjoyment from the execution of a criminal. Unfortunately, however, we are not always aware of the unconscious motives which help to determine our actions. Were we completely rational in regard to the criminal, we would experience no emotional involvement whatever when we consider his fate. But who in good conscience can claim that he has always been calm and detached upon hearing of some particularly gruesome crime? Most of us realize full well, when we are honest enough to admit it, that there is something in ourselves which is akin to that which is in the criminal. The average person, in the very act of attempting to live up to the letter of the civil law, not to mention his own personal moral code, is compelled to repress a host of natural instincts within himself which make him into a human being. Modern psychiatry suggests that most individuals at one point or another in their lives develop guilt feelings as a result of this repression. The criminal who goes to his death in the execution chamber, on this view, serves as the means by which the rest of us are able to vicariously purge

24 Weihofen, 168.
our own personalities of burdensome feelings of guilt. This is particularly true in the case of the criminal who has been convicted of rape. All of us know how powerful a force the sexual urge is within ourselves. The normal individual takes personal pride in the fact that he is able to keep his sexual desires under control. This seems to make us all the more vindictive toward the individual who lacks the inner strength to emulate our good example. The zealous way in which we punish the sex offender is stark testimony to the fact that we are ourselves fearful that we might sometime engage in the same kind of anti-social behavior.

Being a relatively new branch of science, psychiatry is not yet sufficiently accepted by the general public to permit any thoroughgoing revision of the law in conformity with its findings. The above argument against capital punishment is thus apt to be rejected offhand by the majority of persons as being out of touch with reality. But as Plato argued in his Republic, the ideas the majority of us accept as valid may only be shadows of the truth. It is painful to admit that we as a society actually enjoy inflicting pain upon criminals for the personal satisfaction it affords our egos. Yet if this is not so, why do we continue to subject the condemned prisoner to a torture which is as mentally painful as being broken on the wheel was physically painful? Were we as charitable as Socrate’s executioners, we might permit the condemned prisoner to end his own life by taking poison in the seclusion of his cell. Not only is this method less physically painful than other forms of execution we presently employ but it would permit him to retain a semblance of his human dignity to the last possible moment. Instead of choosing this more humane method of execution, we force the individual condemned to death to submit to a number of indecencies before we permit death to ease his suffering. Just as the mythical Tantalos was condemned to stand in a pool of water that ever receded from his thirsty lips, so we condemn the prisoner to what may prove

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27 Welhoen, 28.
28 For a very forceful presentation of this viewpoint, see Wilson, op. cit. supra note 5.
29 According to one study, electrocution, which is the prescribed method of execution in the state of Kentucky, is not, as is generally thought, entirely free of physical pain. See Barnes and Teethers, op. cit. supra note 8, at 350.
to be several years of anxious waiting in death row, only to learn in the end that he must die after all. If he is to be electrocuted, he must submit to having his ankles, wrists, and head shaved. Then, having finished his last meal on earth, he must walk under his own power to the execution chamber where he will at last come face to face with his maker. All too often the condemned prisoner is unable to walk to the place of execution, with the awkward result that he must be carried there by the prison officials while a chaplain walks nearby in hope that he may be of some consolation at some point in the proceedings.

If we were certain that only the guilty are condemned to death, the brutal drama which accompanies an execution might conceivably be justifiable. But as Professor Edwin M. Borchard has shown in his collection of case studies in mistaken identity, the courts, however careful they may be, very often convict innocent men. Not only is it difficult to obtain reliable testimony in a murder trial but the very nature of the event causes far-reaching psychological repercussions throughout society. From the moment a crime is first announced in the newspapers the civil authorities are deluged with false information from mentally unstable individuals. As the trial reaches its climax various persons emerge from the anonymity of the public to claim a part in the drama. “In our own time, we have been treated often to the fantastic spectacle of the innocent voluntarily confessing to murder, putting their own lives in jeopardy for a moment in the spotlight.” Worse than this, there is reason to believe that the wide publicity a murder trial receives leads to imitative crime. This may well explain why murders follow one another in rapid succession at certain times, whereas at other times there is very little violence within society.

It is shocking to realize that the “only” persons who are actually made to suffer the death penalty in this country are “unfortunates without friends or money.” In theory the American system of criminal law does not distinguish between persons or show favoritism toward any group or class. In actual practice, however, the law is brought to bear most heavily, and often

30 Borchard, Convicting the Innocent (1932).
31 Cook, op. cit. supra note 7, at 196.
32 Calvert, op. cit. supra note 14, at 112.
with vengeance, on a very small percentage of the population. In every society known to history there have always been one or more minority groups that have been held suspect by the majority. In America it is the foreign born, and particularly the Negroes, who are considered strange and different and are thus largely treated as outsiders. Recognizing very little kinship or common ideals with these minority groups, we seem to derive sadistic pleasure from punishing individual persons from them who come into conflict with the law.\[34\]

An analysis of national criminal statistics reveals that 50 per cent more Negroes are actually executed in this country than are Whites.\[35\] While this might seem to imply that Negroes are basically more violent in temperament or nature than are Whites, the facts do not bear out this conclusion. In the state of Virginia, as an example, no white man has been convicted of rape in the past 50 years. Yet in this same period 59 Negroes have been executed on conviction of this crime.\[36\] Obviously the law has been brought to bear more heavily on Negroes than Whites.

In the light of such social injustice, the retention of capital punishment as an official policy of the state has become a matter of great concern to many thinking Americans. Among those who are disturbed by the idea of continuing to employ the death penalty as a social expedient is the sensitive Christian who feels that "society is itself indelibly corrupted when it assumes the prerogative of God and attempts to impose or even threatens to impose on anybody, whether guilty or innocent, the final and irreversible judgement of death."\[37\] In the mind of this type of religious person capital punishment not only rules out the possibility that the individual criminal might be reformed by society but asserts in absolute terms that he is also completely beyond the redemptive power of God. This, of course, is an assumption which no thoughtful Christian consciously cares to make.

On the secular plane, many persons are opposed to the retention of capital punishment on the grounds that it makes even greater the wide discrepancy which exists between democratic

\[34\] Austin L. Poterfield, "The 'We-They' Fallacy in Thinking About Delinquents and Criminals," 21 Fed. Prob. 46 (1957).


\[36\] Id. at 16.

\[37\] "The Death Penalty Must Go," 74 Christian Cent. 413 (1957).
theory and practice in the United States. One of the most widely accepted principles of liberal-democracy is a sincere respect for the rights of the individual. While the right to life cannot be defended as absolute, democracy insists that the individual should never be deprived of his life without good cause determined through due process of law. The deep reverence for human life which is fundamental to the theory of democracy is reflected in the fact that the movement toward the abolition of capital punishment has made its greatest advances in those countries which have adopted democratic forms of government. Of the western democracies, only Britain, France, and the United States will condone the death penalty, and Britain is making rapid strides in the direction of abolition.

It is not by accident that democratic nations have generally veered away from the use of capital punishment, whereas totalitarian governments have found it compatible with their goals and have thus encouraged its use. In counter-distinction to totalitarianism, there is general agreement among the theorists of democracy that the state is not an end in itself but is merely the means by which the good of the individual is to be furthered. This means, of course, that a democracy must be extremely cautious in what it decides when its government engages in the formulation of policy in regard to the taking of human life. Democratic governments in practice have often sanctioned the taking of life when it was thought essential to the maintenance of the general welfare, as in time of war and in the preservation of domestic tranquillity. But ultimately they must defend their actions in terms of what is just and fair rather than what is most expeditious. As Machiavelli so clearly saw, the most difficult problems of statecraft are easily solved when those who exercise political power are guided by no consideration other than that of expediency. In any democracy worthy of the name, however, the easy solutions Machiavelli urged upon his prince are not easily adopted. This goes a long way toward explaining why the death penalty in the United States is so seldom carried out. Even if it might conceivably be proven a highly efficacious deterrent to murder, we are still compelled to justify its use in terms of our fundamental ideals and values. And here we find that the theory of capital punishment is hopelessly out of keep-
ing with the basic principles we as a nation profess to believe in, for in taking the life of the criminal we are actually treating him as a means to the good of others rather than as an end in himself. 38

Totalitarianism, on the other hand, which has generally been judged guilty of retarding the advance of human standards of decency, has not been troubled with any such moral scruples. Extending the use of capital punishment to political crimes, totalitarian governments justify their actions on the argument that anything is right if it furthers the good of the whole society. This is evident in the statement by Mussolini that “the state is an absolute before which individuals and groups are relative.” 39 Convinced that the end of the state is more important in value than the rights of the individual, the elimination of recalcitrant and politically unstable individuals has become an accepted means to the greater glory of every totalitarian regime we have witnessed thus far. In retaining capital punishment for its supposed qualities as a social expedient, American democracy comes dangerously close to accepting the totalitarian precept that the life of the individual has little real significance compared with the superior interest of the whole society.

IV

Any real progress we are apt to make in reducing the incidence of crime within American society must come about through efforts to revise our basic outlook toward crime and the criminal. We must come to realize in this regard that the idea that crime, including murder, is something the individual freely and willingly chooses to engage in is a theological doctrine and is not a logically defensible proposition. 40 This attitude is based on the highly dubious supposition that some individuals are born with defective moral characters and are therefore destined to do the evil rather than the good. While we may have no quarrel with this idea when it is presented as a theological statement, we must totally reject it when it is introduced as a possible guide for our actions in social and political matters. Not only is the

39 See The Doctrine of Fascism (1932).
40 See Kosetler, op. cit. supra note 12, at 93-94.
self-righteous indignation which characterizes this attitude toward the criminal morally offensive when it is advanced as a practical solution to the problem of crime but it so completely distorts our social vision that we are unable to formulate any intelligent policy in the all-important area of human relations.

There is considerable evidence to suggest that a life of crime is never actually chosen by any individual but is a fate that has been arbitrarily assigned to him by his society. So far as good and evil are concerned, the average individual at birth is entirely neutral. Some few people, of course, are born with defective mentalities and are therefore practically destined to come into conflict with the law at one point or another in their lives if the circumstances of their environment also tend to lead in this direction. But this type of person belongs in a mental institution where he might be kept out of serious trouble if not rehabilitated for a normal life within society. The average individual, if provided with a fairly adequate environment, invariably attempts to attain the goals and personal satisfactions his society has taught him to value. It clearly follows from this that any large scale deviation from the socially accepted norm of behavior, such as the "crime wave" this country is experiencing at the present time, is symptomatic of serious deficiencies in the institutional and value arrangement of society.41 Plato in his Republic makes mention of two different social types that have since the earliest times been a problem to government. The "ordinary drone," according to him, is the socially deprived person who has become lazy and indifferent as a result of his life of poverty but is otherwise harmless. The "drone that stings," on the other hand, is that deprived individual who has been made bitter by the thought of the social injustices he feels he has suffered and consequently becomes a threat to the stability of the social order. It is to Plato's credit that he clearly distinguishes between these two types. The first of these two classes of persons is comparable to the modern lower income group, while the second is what we generally refer to as our "criminal element." There are two alternatives we may choose from in attacking the problem these classes present to government. The state, to continue the metaphor begun by Plato, might instigate a program

41 For a very illuminating discussion of this problem, see Herbert Read, Anarchy and Order: Essays in Politics (1954).
of pest control designed to rid society of its drones that sting. But this has the unfortunate result of indirectly goading the ordinary drones to pick up the weapons of their fallen comrades in misfortune and to join the ranks of the harmful pests. The other method, although the more difficult one, is for the state to directly attack the problems of poverty and social injustice, thereby eliminating the basic cause of criminal activity. All efforts to reduce the level of crime within society are bound to fail until we realize that the reform of the criminal is inseparably connected with the general reform of our social and economic institutions.42

Fundamental social and economic reforms, of course, are not accomplished overnight, nor are they ever complete. Yet we must not allow this fact to lead us to adopt an attitude of hopeless pessimism regarding crime and the criminal. If we can bring ourselves to clearly understand that the criminal is the product of inadequate social and economic arrangements within society, we will be capable of creating ideals against which existing arrangements can be judged. A society that can create ideals for itself is a dynamic society capable of accomplishing almost anything it sets out to do. This is the only intelligent approach to the problem of crime. It is a terribly difficult goal to set for ourselves. Yet we must recognize the fact that if we fail to solve our basic social problems, we must fall back on the “easy way out,” which consists of the futile method of attempting to repress crime through the vicious expedient of capital punishment.43

The first step we must take in an attempt to revise our perspective toward murder is to bring ourselves to clearly realize that murder is not a wholly natural act of man but one which is greatly conditioned by the mores of society. One of the most pronounced attitudes that characterizes American society at the present time is the general assumption that “wherever there is a conflict between human relations and necessity, the outcome is not only inevitable but even progressive when necessity wins....”44 This idea is clearly reflected in our attitude toward

43 Rusche & Kirchheimer, Punishment and Social Structure 207 (1939).
the convicted murderer. It is necessary for our peace of mind and public safety that we remove such individuals from our midst. This we do by locking them up in penitentiaries or, more rarely, by carrying out the threatened death penalty. But in either case we have clearly announced that public necessity is more important than the intrinsic value of the human beings concerned. This fact has not gone unnoticed by those who are responsible for catering to the public's entertainment desires. As a consequence, the American youth of today is raised on an enriched pap of horror and suspense. His heroes are fast-shooting cowboys, cagey detectives, and toughened combat veterans. While it may be true that he instinctively knows the difference between the "good guys" and the "bad guys," a steady entertainment diet of violence and bloodshed is bound to impress upon his mind the thought that life is cheap. How could he believe otherwise when he knows full well that the society of which he is a part "almost reaches out to encourage murder."45

It would be strange indeed, in the light of the present cultural situation in America, if today's youth took seriously the religious injunction that life is sacred.

We cannot look forward to a reduction in the rate of homicide in this country until we undertake the extremely difficult task of revising our basic attitudes and values concerning the worth and significance of human life.46 While the problem of changing fundamental attitudes of this kind is not one that is given to easy solutions, neither is it insoluble. Much study must be applied to this question before we can find a way out of our predicament. There are, however, two practical and immediate steps we might take that are almost certain to result in a sharp decline in the rate of homicide within the United States. First, laws pertaining to the sale and possession of guns must be tightened and more closely supervised, for "it is a well-known fact that stringent regulations . . . governing the possession of firearms will reduce the number of murders."47 It is not enough, however, that this program be carried out by the civil authorities alone. No progress in this direction can be made so long as Americans continue to think of the privilege of owning firearms

46 H. C. Brearley, Homicide in the United States 142 (1932).
47 Calvert, op. cit. supra note 14, at 164.
as a natural right that cannot be interfered with for any purpose. Public opinion must be educated to adopt the attitude that firearms are not playthings but extremely dangerous implements of violence. Secondly, Kentucky, along with the other states that still retain capital punishment, must immediately abolish it. This will have the effect of raising the respect felt for the sanctity of human life in the minds of all Americans. It is not in the least unrealistic to predict that if capital punishment were abolished, the rate of homicide in this state would immediately drop. Let us hope that Kentucky is not the last state to give up the death penalty as it was the last to abandon the practice of public executions.
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