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Tom Soyars

CAPITAL PUNISHMENT

In Latin the word "caput" means head; hence a capital offense is one for which the punishment is the loss of the head or death.

Capital punishment is an ancient institution. Most primitive societies employ it. The code of Hammurabi showed that the ancient Babylonians used it for a variety of offenses. The Biblical Hebrews used the death penalty against idolatry, incest, rape, bestiality, blasphemy, cursing father or mother, Sabbath breaking, witchcraft and, of course, adultery. (Remember the adulteress that Jesus saved from being stoned to death with the remark "Let ^{he} who is without sin cast the first stone"- John 8:7) It will be observed that capital punishment initially was employed against crimes of sacrilege. The modern shift is toward crimes of violence. In the intermediate stage, crimes against property are most commonly punished capitally.

In Anglo-Saxon times capital offenses were surprisingly rare. Even murder was not punishable except by a fine, called a bot, two-thirds of which went to the relatives of the deceased and one-third to the king. ^{By the} Thirteenth Century death was prescribed for practically all felonies; ^{however,} but the doctrine of benefit of clergy, which spared anyone who could read, considerably mitigated its application. By the year 1700 there were only (and the use of

the word "only" will be explained in a second) 17 capital offenses, but during the 18th Century (dubbed by historians as the "Age of Enlightenment") several hundred crimes were made punishable by death. The Encyclopedia Britannica gives the figure as "more than 200". Professor Weihofen, ^{probably the leading authority on criminal insanity,} claims to have counted over 350 capital offenses during this era in Great Britain. Even in these grim days there was some mitigation because frequently the convicted party was given the option of being deported to one of the British Colonies. (If you're a proud descendant of a colonial settler you might speculate some time as to the exact motive which prompted your illustrious ancestor to come to the New World.) During the 19th Century under the influence of Jeremy Bentham and the British Utilitarians the entire concept of punishment was re-evaluated. Punishment was approved solely in those cases where it had a deterrent value. As a by-product of this agitation, bills were introduced in Parliament lowering the number of capital offenses from the 200 or more mentioned above to 15. In 1861 this number was further reduced to 4. In practice only murder and treason have been punished with the extreme penalty from that day to the present in Britain. In 1953, after five years study, a special royal commission recommended to Parliament that the death penalty be abolished and a bill to that effect actually passed the House of Commons, but the more traditionally minded House of Lords refused to go along and England rejected the

recommendation of the Royal Commission and remains one of two Western European countries that retain the death penalty, the other being France. All of the other western European nations have discarded it. Some did not even bother to do so specifically by legislation. The practice simply fell into disuse. The custom itself abolished the death penalty in Belgium and Luxemburg. In many of the countries that took the trouble to expressly prohibit capital punishment by statute, the Legislature was merely codifying into law the practice of decades and sometimes scores of years.

In the New World capital punishment is more prevalent. Slightly more than half of the Latin American countries have abolished it. Prohibition against capital punishment appear in several Constitutions, for example, in those of Brazil and the Dominican Republic.

In the United States capital punishment finds its greatest support. There has never been a strong movement against the institution in this country though the Quakers have been opposed to it from the beginning. The nearest thing to a genuine movement for abolishing capital punishment was the American League to Abolish Capital Punishment organized in 1927 as an aftermath of the famous (or infamous) Sacco-Banzetti case, a case in which two immigrant Anarchists were executed for the robbery-murder of a Boston fruit peddler, a crime of which they were subsequently shown to have been innocent. But the League accomplished very little.

Today there are ^{ten} nine states which have abolished capital punishment. The first was Michigan in 1847. Others are Rhode Island, Wisconsin, Minnesota, North Dakota, Maine, ~~Mississippi~~ ^{Delaware} Alaska and Hawaii. Of these ^{ten} nine states only three abolished it completely, Maine, Minnesota and Wisconsin. The others provide it in certain highly exceptional cases, usually homicide while serving a life sentence, or treason.

*Delaware now has
four or five
more states*

Nine other states experimented with the abolition of capital punishment only to restore it, usually after some extraordinarily heinous murder. These states were Iowa, Kansas, Colorado, Washington, Oregon, South Dakota, Tennessee, Arizona and Missouri. Maine, mentioned above as being a non-capital punishment state abolished it in 1876, restored it in 1883 and re-abolished it this time for good in 1887. (Murderers executed during that short four-year interval must feel themselves outraged victims of the Caprice of History.)

The offenses punishable by death are most commonly murder, kidnapping, treason, rape and armed robbery. In five states arson is a capital offense; ¹ in four states burglary, train wrecking, perjury during a trial for a capital offense, and using bombs or machine guns in the commission of a crime. In Florida selling narcotics to minors is a capital offense as is administering drugs with the

intent to rape in Arkansas. Georgia law recognizes two unique capital offenses: castration and--believe it or not--grave desecration. Kentucky allows capital punishment for the following offenses: murder, including various statutory types of same, kidnapping, armed robbery, rape and having carnal knowledge of a child under 12 years of age.

The death penalty can obviously be carried out in a number of ways. In cataloging the techniques of the olden days, one can list them almost to the point of exhaustion, but he will probably stop short of that point because many of them are so horribly gruesome as to offend one's sense of humanity and decency. Hanging, burning at the stake, boiling in oil, drowning, drawing and quartering, poisoning (remember Socrates and the "cup of hemlock") breaking on the rack or wheel and flogging were the more common methods. ¹³⁰⁷ Edward II of England was executed (perhaps assassinated would be a more precise word) in such a gruesome and dreadful manner that I hesitate to relate it but those who are interested in the subject of capital punishment should hear it and many of those who believe in the institution of capital punishment will want to hear it so I will describe the event. It was necessary that no visible mark be left on the king's body. Also it was necessary that he "pay for his crime". So his executioners burned out his bowels by passing red hot irons into his body through

his anus.

Modern advocates of capital punishment say that the more common modern methods, the electric chair, and the gas chamber are humane. But few who have ever read a detailed description of an electrocution and fewer still who have ever witnessed one would agree. The horrible convulsions of the condemned, the sickening smell of burning human flesh, the ghastly appearance of the face of the corpse--thoughtfully concealed from the viewers by the leather hood worn over the head of the victim--do not appear humane. Perhaps the gas chamber is more "humane" but the writer revolts from the idea of applying this adjective to any killing of another human being.

We have mentioned electrocution and lethal gas. The electric chair is used in 23 states and the District of Columbia. The gas chamber in 11 states. Hanging is still employed in 6 states, 7 if you want to count Utah which gives the convicted person a macabre "choice"--hanging or the firing squad. England and France cling to the older tradition. The former still uses hanging and the latter the guillotine.

Up to this point we have been principally concerned with examining capital punishment as an institution, with learning its history, ^{with} and comparing the various ^{capital} crimes ~~and punishments~~ and describing the various methods of execution/ ^{used.} Now let us turn to the more crucial

portion of this paper. Let us attempt to answer the question:

Is capital punishment a wise policy?

Most persons who have made a detailed investigation of the subject are convinced that it is not. Many states have set up commissions to examine the problem with a view of reporting to the Legislature some recommendation as to whether capital punishment should be abolished. Almost invariably the commissions have favored abolition. For example, the Royal Commission appointed by Parliament referred to above. Most scholars who have examined the subject are opposed to capital punishment.

The main reason that capital punishment is attacked is of course the conscientious or ethical one. In fact, many advocates of capital punishment agree that capital punishment is ethically and morally wrong but one of the necessary evils of society. The statement that generally speaking it is wrong to take a human life is almost universally believed ~~by most people~~, at least when ^{people} they are thinking and speaking logically and reasonably. "Thou shalt not kill" is deeply rooted in all of our hearts and consciences. In fact, prosecuting attorneys trying for the death penalty ^{in a murder case} invariably quote this portion of the Ten Commandments. Apparently they read into this the sixth Commandment, an implied exception "Thou shalt not kill except killers". Judge Curtis Bok, a prominent Philadelphia jurist and a well known foe of capital punishment, has attacked this distortion of the Sixth Commandment as follows: With equal logic

one could read a similar exception into the Seventh Commandment thereby rendering it absolutely ineffective. It would then read: "Thou shalt not commit adultery except with adulterers". Perhaps we might drop for the time being our discussion of the moral arguments against capital punishment, since in the first place most of us probably agree that capital punishment is essentially immoral and since in the second place a discussion of moral or ethical values is generally fruitless.

The argument most frequently advanced by those who believe in capital punishment is that it is a protection to society, and an effective deterrent to crime, ^{especially murders.} This argument is vigorously denied by those who are opposed to capital punishment.

In the first place, very few murders are deliberately out premeditated in the sense that they are carefully thought ~~about~~ and planned. Most murders involve sudden fights, drunken brawls, lovers' quarrels, domestic or family difficulties. Many technical murders are no more than killings which occurred while someone was engaged in a felony such as robbery or burglary. Unless a murder is carefully planned and considered there is, of course, no opportunity to weigh the consequences. The consequences ^{are} can therefore be absolutely no deterrent. In many of the cases where a murder is carefully planned and thought out the potential murderer is so ^{determined} crazed or unbalanced that no deterrent whatsoever could be effective.

A careful weighing of consequences is a physical impossibility for the mad man, the maniac and for many who are on the boundaries of these two categories.

Furthermore, statistics conclusively show that the homicide rate in states which have abolished the death penalty is significantly lower than in states which have not. These figures are irrefutable but the proponents of capital punishment argue that it is a coincidence. They argue that those states with no death penalty are states which have a rural, racially ^{homogeneous} population which would consequently be states with a low homicide rate in any event. ^{all} But Michigan, Delaware and Maryland/are highly urbanized areas with a large percentage of the population in the non-white or foreign born category and their homicide rate is ~~far~~ lower than in neighboring states. It might surprise some of you to know that the ^{ratio} percentage of ~~colored people~~ ^{negroes} to whites in Michigan is practically the same as in Kentucky; That of Maryland and Delaware double that of Kentucky. ~~And~~ all of these states are of course more urban than Kentucky.

Another ~~factor that indicates~~ that the death sentence is a poor sanction is ^{the fact} ~~that the almost universal experience everywhere~~ ~~has been~~ that as the number of executions goes down and as the number of capital crimes diminishes the homicide rate declines. The annual number of persons executed in the United States has

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dropped in the last ten years ~~to~~ about 150 to 70. The homicide rate has declined. The experience of England has been similar. The converse of this proposition has been observed to be true. In 18th Century England several hundred people a year were executed with apparently no deterrent effect whatsoever. For example, at one time hanging was the punishment for picking pockets, and it was decided that it would be a good idea to make examples of the thieves by hanging them in public. The public executions were dropped however because the authorities learned that the vast crowds attracted to the hangings were always victimized by veritable armies of pickpockets operating among them!

Those favoring capital punishment like to use as an argument the fact that some ^{nine}~~eight~~ states mentioned above experimented with abolition for a while and then went back to capital punishment. But this repeal was occasioned almost in every instance by one particularly heinous crime, not by a general increase in the homicide rate. Furthermore most of these crimes are thought by criminologists who have studied them to be of the non-deterrable nature that we mentioned above. It is simply a case of the people and the Legislature falling victim to the old "post hoc" fallacy, that simply because there was no capital punishment, there were these terrible crimes.

Opponents of capital punishment believe that the abolition

of the death penalty actually helps to lower the homicide rate. In killing, the State sets a bad example for its people. It is impossible to tell people that killing is right and expect to have that precept completely compartmentalized by the people to the extent that they will believe that only certain killings are right. When an important execution is about to take place the newspapers are full of statements that "justice has triumphed", "right has been vindicated" and utterances of like import. During wartime everyone is convinced that killing is good, that it was morally right to kill 100,000 Japanese (mostly civilians) at Hiroshima and Nagasaki. We train our young men to kill. Is it surprising that murders increase during and after wars? In fact, statistics show that murders increase whenever a much publicized execution is held. The explanation here is that some people are mentally so close to the borderline of murder that the example of the state committing murder is enough to push them across.

Another argument against capital punishment is that occasionally innocent people are convicted and after their execution proved to be innocent. Even advocates of capital punishment say that it should be reserved for only those cases where there is no doubt. But when is there "no doubt"? I mentioned the Sacco-Vanzetti case above. All of the appellate courts of Massachusetts examined the case. The governor of Massachusetts appointed a special commission, one of the members of which was the President of Harvard University,

and ordered this commission to review the case to determine whether the sentence should be commuted to life. All said it was a "clear case". After the execution it was learned for the first time that some of the testimony of the prosecution was perjured ^{attorneys} and that the Commonwealth's ~~witnesses~~ had known of witnesses who ^{possibly} could have cleared Sacco and Vanzetti but had concealed this fact from the defendants! Other examples of "clear cases" which after execution were shown to be erroneous can be found in Borchard's book "Convicting The Innocent".

Furthermore, capital punishment operates unfairly. It falls on the poor, the unpopular, the members of despised minority groups. Sacco and Vanzetti were all three. They were poor, they were Italians and they were believers in anarchy. Of the 152 persons executed in 1947, 110 were Negroes and only 42 white. This ratio is even more significant when we realize that the American population in 1947 was less than 1/10 Negro. In Virginia up to 1951 no white man had ever been executed for rape. Fifty-two Negroes had been. Here at home we have no cause to be proud. Of the 8 persons executed from Christian County since 1900 not one was white. Of the 12 executed before the Civil War only one was white (~~the~~ ^{first} (Lonz Pennington with whose history some of you are familiar). I don't believe there is a lawyer ^{at} this bar who can remember a death sentence handed out to a white man in Christian County. The pattern is the same everywhere. Those executed are almost always

the poor, the hated and the weak.

The execution of criminals is in complete opposition ^{to} with the basic principle of our criminal law. That, of course, is the principle that convicts should be rehabilitated. The death penalty is the last remaining vestige of our old penal philosophy based on vengeance and vindictiveness. "Let the punishment fit the crime" has given way to "Let the punishment fit the criminal". Society can be protected by sentences of life imprisonment. If a man is genuinely rehabilitated he should be paroled. If he is not, he should be kept in prison, not as punishment but purely for the protection of society. We preach rehabilitation to all of our prisoners. We tell them to learn a trade, that they "paid their debt to society" etc. and then we execute a man right there in their own prison. This shows our true colors! The effect on the other prisoners can be easily imagined. The dimming of the lights as the warden pulls the switch occurs ~~only~~ today ^{and} in the movies but the prisoners know of the execution and are affected accordingly.

Furthermore, most penologists would tell you that murderers are among the very best candidates for parole, the prisoners most likely to make good citizens upon release. The rate of recidivism (repetition of prior criminal conduct after release from prison) is practically zero among murderers. In contrast, thieves, forgers, and their ilk are far more likely to fall again into the pattern

of crime.

There are a few arguments in favor of capital punishment. Most of them, however, fail to withstand analysis. We have examined the ~~XXXXXX~~ "deterrent" theory earlier. Some say that without the death sentence people would resort to lynching. However, figures show that lynching has all but died out. From 1900 through 1950, 1986 persons were lynched. all but 195 of them Negroes. However, from 1951 to date there have been only four lynchings. Thus the average number of lynchings has dropped from about forty a year for the first half of the 20th Century to less than 1 a year for the following period. In the light of these statistics there is little likelihood that lynching will be resumed. Furthermore, virtually all of the lynching was done in states which at the time of the lynching had capital punishment.

Some have suggested that the cost and the dangers involved in keeping convicted murderers would be very great. However, the cost of keeping these men prisoners would be infinitesimal compared ^{with} ~~to the~~ other government expenditures. ^{essentially} There are, ~~of course,~~ dangers in ^{with the same amount of men} incarcerating prisoners, ~~but even today we do not execute but in fact imprison for life~~ ^{dangerous} our most desperate killers, the psychopaths and homicidal maniacs who are not legally sane and hence not technically guilty of murder.

Let us return for one moment to the beginning of this discussion. The principal issue remains a moral one. Clarence

Darrow (and no paper on capital punishment would be complete ^{one} without a mention of Darrow) said that the issue of how ~~we~~ stood on the question of capital punishment was simply resolved. "If you're for killing, you're for it; if you're against killing, you're against it." Blunt words, perhaps, but in Darrow's mouth they were powerfully convincing.

Arthur Koestler--the author of ^{the} classic book describing Communist brain-washing, "Darkness at Noon"--is another leading advocate of abolition. In fact, his bitter ^{book entitled} "Reflections on Hanging" is credited by some with providing the impetus that caused the House of Commons to pass the anti-capital punishment bill in 1956. It is Koestler's theory that capital punishment exists today largely because many judges and prosecutors persist in telling the people that it is necessary, persist in spite of the great weight of evidence against such a belief. As an illustration of this he cites Lord Ellenborough's statement made in 1810. "If this offense were not capital, depr~~idation~~ of an unlimited extent would be committed." The offense referred to --stealing an ^{over} article worth/5 shillings, approximately \$1.25 in American money.

Koestler further ~~xxxxxxxxxxxx~~ demonstrates his views on capital punishment in the following passage:

"The gallows is not only a machine of death, but a symbol-- a symbol of terror, cruelty, and irreverence for life; the common denominator of primitive savagery, mediaeval fanat~~acism~~s and

modern totalitarianism."

The trend is away from capital punishment. There is more and more agitation for its repeal. Even television (remember Joseph Welch on Omnibus) and the movies ("I Want to Live", the story of the convicted murderess, Barbara Graham) have joined the battle. At the present time the fight is won in practically every civilized democratic country except England, France and the United States, ironically the very countries which have always been the leaders in the fight for liberty, freedom and human decency. The writer predicts that within the lifetime of some of us here tonight we will see capital punishment relegated to the ~~dark~~^{black} and bloody oblivion now occupied by the cat o' nine tails, the stake, the rack, the thumbscrew, and the other sadistic symbols of man's inhumanity to man.

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