THE DEATH PENALTY IN AMERICA

AN ANTHOLOGY

EDITED BY

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PREFACE

Despite the wealth of discussion that the death penalty has inspired in this country during the past several years, no volume has been published in which all the issues are presented against the background of the latest available research. Unfortunately, much of the information necessary for a thorough study of capital punishment in the United States has never been published or else it is inaccessible except to the scholar with a major research library at his disposal. In preparing this volume, I have been able to examine most of the published and unpublished legal, criminological, penological, and psychological literature touching the subject. The book has been designed to allow the partisans and the authorities on both sides of disputed questions to speak for themselves. The result, I hope, has been to bring under one cover a selection of the best recent writing on capital punishment and, through the footnotes, Index, and Bibliography, a guide to its farthest reaches.

Several principles of selection and organization have been in my mind while writing and editing the book. First of all, a deliberate effort has been made to avoid any extensive discussion of the controversial cases of Caryl Chessman, Julius and Ethel Rosenberg, and Sacco and Vanzetti. I have not, for example, even mentioned them in my essay in Chapter Eight on errors of justice, though one of the reasons these cases have become notorious throughout the world is that in each instance massive injustice was committed. The intrinsic importance of these cases has, understandably enough, permitted them to obtrude upon almost every discussion of capital punishment in America. The powerful emotions aroused and the far-reaching political and social consequences of each case have usually

Chapter One

GENERAL INTRODUCTION

American criminal law was not created out of nothing by the original colonists and the Founding Fathers. Rather, it took its shape directly from English criminal law of the sixteenth, seventeenth and eighteenth centuries. In order to appreciate the structure that this tradition imparted to the American law of capital punishment, it is necessary to review, if only briefly, the experience in England with the death penalty during our nation's formative years. Accordingly, in the following paragraphs, we shall examine the main features of the capital laws of England as a foundation for a study of the pattern of capital laws in colonial America. With this background of English and early American law in mind, we will then be in a position to appreciate the major American innovations in capital punishment developed during the past century and a half (privacy of executions, redefinition of the crime of murder, new methods of execution, and optional death penalties), innovations that give distinctive shape to this mode of punishment as it now exists in our country.

Capital Punishment in England and America: "The Bloody Code"

By the end of the fifteenth century, English law recognized eight major capital crimes: treason (including attempts and conspiracies), petty treason (killing of a husband by his wife), murder (killing a person with "malice"), larceny, robbery, burglary, rape and arson.[1] Under the Tudors and Stuarts, many more crimes entered this category. By 1688 there were nearly fifty. During the reign of George II, nearly three dozen more were added, and under George III the total was increased by sixty. The high-point was reached shortly after 1800. One estimate put the

[1] Theodore Plucknett, *A Concise History of the Common Law* (5th ed., 1956), pp. 424–454.

number of capital crimes at 223 as late as 1819. It is impossible to detail here the incredible variety of offenses involved. Crimes of every description against the state, against the person, against property, against the public peace were made punishable by death. Even with fairly lax enforcement after 1800, between 2,000 and 3,000 persons were sentenced to death each year from 1805 to 1810.[2]

Conviction of a capital offense, whether or not sentence was executed, resulted in attainder: forfeiture of all lands and property, and denial of all right of inheritance ("corruption of blood"). Although appeal of the death sentence itself to a higher tribunal was all but impossible, the descendants of an executed criminal occasionally succeeded in appealing the attainder.

The usual mode of execution was hanging, though there were several crimes for which this was deemed insufficient. The bodies of pirates were hung in chains from specially built gibbet irons along the wharves of London. Throughout England, the rotting corpses of executed criminals dotted the countryside, a grim warning to other malefactors. Executions were always conducted in public and often became the scene of drunken revels. Thackeray's vivid description is famous; he wrote in part:

> I must confess . . . that the sight has left on my mind an extraordinary feeling of terror and shame. It seems to me that I have been abetting an act of frightful wickedness and violence, performed by a set of men against one of their fellows; and I pray God that it may soon be out of the power of any man in England to witness such a hideous and degrading sight. Forty thousand persons (say the Sheriffs), of all ranks and degrees–mechanics, gentlemen, pickpockets, members of both Houses of Parliament, street-walkers, newspaper-writers, gather together before Newgate at a very early hour: the most part of them give up their

[2] Leon Radzinowicz, *A History of English Criminal Law* (1948), I, pp. 3–5, 153.

> natural quiet night's rest, in order to partake of this hideous debauchery, which is more exciting than sleep, or than wine, or the last new ballet, or any other amusement they can have . . .[3]

Traitors, whether guilty of petty or high treason, were subject to especially aggravated forms of execution. Burning to death was the fate of many a woman convicted of killing her husband. As late as 1786, a crowd of thousands watched as one Phoebe Harris was burned at the stake. But the worst punishment was reserved for criminals guilty of high treason. When Sir Walter Raleigh touched the headsman's sword, he is supposed to have quipped, "'Tis a sharp medicine." Beheading was the least of it. The standard practice, according to the great authority on English law, Sir William Blackstone, consisted of drawing, hanging, disemboweling, and then beheading, followed by quartering.[4] In 1812, this death sentence was pronounced in England on seven men convicted of high treason:

> That you and each of you, be taken to the place from whence you came, and from thence be drawn on a hurdle to the place of execution, where you shall be hanged by the neck, not till you are dead; that you be severally taken down, while yet alive, and your bowels be taken out and burnt before your faces–that your heads be then cut off, and your bodies cut into four quarters, to be at the King's disposal. And God have mercy on your souls.[5]

This "bloody code," as Arthur Koestler has called it, with its scores of capital offenses and almost daily public executions, was considerably mitigated by benefit of clergy and the Royal prerogative of mercy. Benefit of clergy arose from the struggle between church and state in England, and it originally provided that priests, monks and other

[3] William Thackeray, "Going to see a Man Hanged," *Fraser's Magazine* (August 1840), p. 156.

[4] William Blackstone, *Commentaries on the Law of England* (1769), IV, p. 92.

[5] Quoted in G. Ryley Scott, *The History of Capital Punishment* (1950), p. 179.

clerics were to be remanded from secular to ecclesiastical jurisdiction for trial on indictment of felony. In later centuries, this privilege was applied in ordinary criminal courts to more and more persons and for an ever larger number of felonies. Eventually, all persons accused of capital crimes were spared a death sentence if the crime was a first felony offense and if it was clergyable, provided only the criminal could recite the "Neck verse" (the opening lines of Psalm LI), this being construed by the court as proof of his literate (and thus clerical) status. Benefit of clergy became in effect the fictional device whereby first offenders were given a lesser punishment.[6]

A far different practice having a comparable effect was the trial court's frequent recommendation to the Crown that mercy be granted. Such recommendations were natural enough, since the judge had no alternative upon the conviction of an accused but to sentence him to death; all felonies carried a mandatory death penalty. Because the court's plea for mercy was usually granted (even during the years when Parliament was increasing the number of capital crimes!), hundreds of persons convicted and sentenced to death were not executed. Instead, they were transported to the colonies. During the last decade of the eighteenth century, in London and Middlesex alone, more than two-thirds of all death sentences were reversed through the Royal prerogative of mercy. Although death sentences issued annually throughout England sometimes ran in the thousands, by the 1800's executions apparently never exceeded seventy.[7]

Near the end of his *Commentaries,* Blackstone paused to reflect on the system of criminal justice whose workings he had so thoroughly described (and which has been only

[6] Thus, the phrase, "without benefit of clergy," which came to be attached to capital statutes during the nineteenth century in England and in America, meant not that a condemned man must go to his grave without the consolations of a spiritual advisor during his last moments, but that his conviction for a capital crime was not subject to a reduction in sentence on the ground that it was a first offense.

[7] Radzinowicz, *op. cit.,* pp. 151, 153.

summarily outlined above). He said, speaking particularly of the methods of execution,

> Disgusting as this catalogue may seem, it will afford pleasure to an English reader and do honor to the English law, to compare it with that shocking apparatus of death and torment to be met with in the criminal codes of almost every other nation in Europe.[8]

It would never have occurred to Blackstone to measure England's criminal law by that prescribed in her colonies across the Atlantic. But were he to have made the comparison, he would have found it somewhat less than flattering to the mother country.

The American colonies had no uniform criminal law. The range of variation during the seventeenth and eighteenth centuries, so far as capital punishment is concerned, was considerable. It may be gauged from the differences in the penal codes of Massachusetts, Pennsylvania, and North Carolina. The earliest recorded set of capital statutes on these shores are those of the Massachusetts Bay Colony, dating from 1636. This early codification, titled "The Capitall Lawes of New-England," lists in order the following crimes: idolatry, witchcraft, blasphemy, murder ("manslaughter, committed upon premeditate malice, hatred, or cruelty, not in a man's necessary and just defense, nor by mere casualtie, against his will"), assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape (punishment of death optional), man-stealing, perjury in a capital trial, and rebellion (including attempts and conspiracies).[9] Each of these crimes was accompanied in the statute with an Old Testament text as its authority. How rigorously these laws were enforced is not known, nor is it known why the rest of the nearly three dozen capital laws in the Mosaic Code were not also adopted in the Bay Colony.

[8] Blackstone, *op. cit.,* p. 377.

[9] George Haskins, "'The Capitall Lawes of New-England'," *Harvard Law School Bulletin* (February 1956), pp. 10–11. A brief survey of the development of capital laws in Massachusetts after 1636 is available in Massachusetts, *Report on the Death Penalty* (1958), pp. 98–103.

In later decades, this theocratic criminal code gave way in all but a few respects to purely secular needs. Before 1700, arson and treason, as well as the third offense of theft of goods valued at over forty shillings, were made capital, despite the absence of any biblical justification. By 1785, the Commonwealth of Massachusetts recognized nine capital crimes, and they bore only slight resemblance to the thirteen "Capitall Lawes" of the Bay Colony: treason, piracy, murder, sodomy, buggery, rape, robbery, arson and burglary.[10]

Far milder than the Massachusetts laws were those adopted in South Jersey and Pennsylvania by the original Quaker colonists. The Royal charter for South Jersey in 1646 did not prescribe the death penalty for any crime, and there was no execution in this colony until 1691.[11] In Pennsylvania, William Penn's Great Act of 1682 specifically confined the death penalty to the crimes of treason and murder. These ambitious efforts to reduce the number of capital crimes were defeated early in the eighteenth century when the colonies were required to adopt, at the direction of the Crown, a far harsher penal code. By the time of the War of Independence, many of the colonies had roughly comparable capital statutes. Murder, treason, piracy, arson, rape, robbery, burglary, sodomy, and, from time to time, counterfeiting, horse-theft, and slave rebellion—all were usually punishable by death. Benefit of clergy was never widely permitted,[12] and hanging was the usual method of inflicting the death penalty.

Some states, however, preserved a severer code. As late as 1837, North Carolina required death for all the follow-

[10] "Capital Punishment in the United States," *Law Reporter* (March 1846), p. 487.

[11] This case is of unusual interest, for it involved the attempt to detect the murderer by means of "the right of bier," the superstition that if a murderer is brought near his victim's corpse, it will bleed ("blood will out") and thus identify him. See Joseph Sickler (ed.), *Rex et Regina v. Lutherland* (1948).

[12] For a full study of this subject, as well as for much else of value on the history of capital punishment in England and America, see George Dalzell, *Benefit of Clergy in America* (1955).

ing crimes: murder, rape, statutory rape, arson, castration, burglary, highway robbery, stealing bank notes, slave-stealing, "the crime against nature" (buggery, sodomy, bestiality), duelling if death ensues, burning a public building, assault with intent to kill, breaking out of jail if under a capital indictment, concealing a slave with intent to free him, taking a free Negro or mulatto out of the state with intent to sell him into slavery; the second offense of forgery, mayhem, inciting slaves to insurrection, or of circulating seditious literature among slaves; being an accessory to murder, robbery, burglary, arson, or mayhem. Highway robbery and bigamy, both capitally punishable, were also clergyable.[13] This harsh code persisted so long in North Carolina partly because the state had no penitentiary and thus had no suitable alternative to the death penalty.

The Movement for Reform

In England, the first of hundreds of capital statutes to be repealed early in the last century was a law enacted in 1565 which made picking pockets a capital offense; it was abolished in 1810 "without opposition or comment."[14] Penal reform in America dates from about the same period,[15] and was inspired by the same continental thinkers who stimulated reform in England. In May 1787, Dr. Benjamin Rush (1745–1813) gave a lecture in Benjamin Franklin's house in Philadelphia to a group of friends, recommending the construction of a "House of Reform," a penitentiary, so that criminals could be taken off the streets and detained until purged of their antisocial habits. A little

[13] *Revised Statutes of North Carolina* (1837), chapter 34. Virginia laws of a slightly earlier date punished Negro slaves with death for any of seventy crimes, though for whites only five crimes were capital. See Charles Spear, *Essays on the Punishment of Death* (1844), pp. 227–231.

[14] Radzinowicz, *op. cit.*, pp. 498–500.

[15] On the subject in general, see Louis Filler, "Movements to Abolish the Death Penalty in the United States," *The Annals* (November 1952), and David Davis, "The Movement to Abolish Capital Punishment in America, 1787–1861," *American Historical Review* (October 1957). The next few paragraphs are based almost entirely on these articles.

over a year later, Rush followed this lecture with an essay, entitled "Inquiry into the Justice and Policy of Punishing Murder by Death." He argued its impolicy and injustice. This essay, published a few years later, became the first of several memorable pamphlets originating in this country to urge the cause of abolition, and Dr. Rush is usually credited with being the father of the movement to abolish capital punishment in the United States.

Rush's argument was based on the analysis originating with the Italian jurist, Cesare Beccaria, whose book, *On Crimes and Punishments,* had been published a generation earlier and had stirred all European intellectuals. The main points of Rush's argument were simple enough: scriptural support for the death penalty was spurious; the threat of hanging does not deter but increases crime; when a government puts one of its citizens to death, it exceeds the powers entrusted to it. In the years immediately following the publication of Rush's essay, several other prominent citizens in Philadelphia, notably Franklin and the Attorney General, William Bradford, gave their support to reform of the capital laws. In 1794, they achieved the repeal of the death penalty for all crimes in Pennsylvania except for the crime of "first degree" murder.

These reforms in Pennsylvania had few immediate influences in other states. Whereas in England, Samuel Romilly began to make a Parliamentary career for himself in the service of penal reform, in the United States no major public figures emerged as leaders in this movement until several decades later. The most distinguished American lawyer in this group was Edward Livingston (1764–1836). Under commission from the Louisiana legislature, and inspired by the radical approach to crime and punishment being preached with such persuasiveness in France and England, Livingston prepared a revolutionary penal code for Louisiana. At the center of his proposals, he insisted, was "the total abolition of capital punishment."[16] The legislature was not convinced, and it rejected most of his recommendations, including this one. Livingston did not

[16] *The Complete Works of Edward Livingston* (1873), II, p. 224.

live long enough to learn that during the next half-century, the leading piece of anti-capital punishment propaganda in the United States was a thirty-page excerpt from his model Louisiana code.[17]

Not until the 1830's did the literary efforts of Rush and Livingston begin to bear fruit. By this time, the legislatures in several states (notably Maine, Massachusetts, Ohio, New Jersey, New York and Pennsylvania) were besieged each year with petitions on behalf of abolition from their constituents. Special legislative committees were formed to receive these messages, hold hearings, and submit recommendations. Anti-gallows societies came into being in every state along the eastern seaboard, and in 1845 an American Society for the Abolition of Capital Punishment was organized.[18] With the forces arrayed against slavery and saloons, the anti-gallows societies were among the most prominent groups struggling for social reform in America.

The highwater mark was reached in the later 1840's, when Horace Greeley, the editor and founder of the *New York Tribune,* became one of the nation's leading critics of the death penalty. In New York, Massachusetts and Pennsylvania, abolition bills were constantly before the legislature. Then, in 1846, the Territory of Michigan voted to abolish hanging and to replace it with life imprisonment for all crimes save treason. This law took effect on March 1, 1847, and Michigan became the first English-speaking jurisdiction in the world to abolish the death penalty, for all practical purposes.[19] In 1852, Rhode Island abolished the gallows for all crimes, including treason; the next year Wisconsin did likewise. In several other states, capital punishment for many lesser crimes was replaced by life im-

[17] *Ibid.,* pp. 192–224. It was taken from Livingston's "Introductory Report to the System of Penal Law Prepared for the State of Louisiana," completed in 1824 but not published until 1833.

[18] Albert Post, "Early Efforts to Abolish Capital Punishment in Pennsylvania," *Pennsylvania Magazine of History and Biography* (January 1944), p. 49.

[19] See Louis Burbey, "History of Execution in What is Now the State of Michigan," *Michigan History Magazine* (Autumn 1938).

prisonment, and other reforms affecting the administration of the death penalty were adopted. By the middle of the last century in most of the northern and eastern states, only treason and murder universally remained as capitally punishable crimes. Few states outside the South had more than one or two additional capital offenses. The anti-gallows movement rapidly lost its momentum, however, as the moral and political energies of the nation became increasingly absorbed in the struggle over slavery.

After the Civil War and the Reconstruction Era, both Iowa and Maine abolished the death penalty, only to restore it promptly. In 1887, Maine again abolished it, thereby becoming the first American jurisdiction which has twice voted to end the death penalty. During this period, the federal government, after extensive debate in Congress, did reduce its dozens of capital crimes to three: murder, treason and rape (and for none was death mandatory). Colorado abolished the death penalty for a few years, but reinstated it in the face of what at the time seemed the threat of mob rule. In that state, public dissatisfaction with mere imprisonment twice resulted in lynchings during the abolition years.

Between the peak of the Progressive Era and the years when women got the vote and whiskey got the gate, no less than eight states—Kansas, Minnesota, Washington, Oregon, North and South Dakota, Tennessee, and Arizona—abolished the death penalty for murder and for most other crimes. In only a few states did the reform last, however. By 1921, Tennessee, Arizona, Washington, Oregon and Missouri had reinstated it. During the Prohibition Era, when law enforcement often verged on total collapse, the abolitionists were nearly routed in several states. Had it not been for the persuasive voices of Clarence Darrow, the great "attorney for the damned," and of Lewis E. Lawes, the renowned warden of Sing Sing Prison, and the organization in 1927 of the American League to Abolish Capital Punishment, the lawless era of the twenties might have seen the death penalty reintroduced in every state in the Union.

Throughout this period in England, the abolition movement remained somewhat more popular. Primarily through the dedicated efforts of Roy Calvert, a Select Committee of the House of Commons studied the issue and published a scholarly report in 1931. Although they recommended an experimental period of five years without the death penalty,[20] no action was taken by the government. Immediately after the end of World War II, while the Labor Party controlled the government, several Labor M.P.s struggled to have their Party vote out the death penalty, as abolition was one of the social reforms that labor and socialist parties in many countries had promised for decades. Even so, the government was not receptive. In 1949 it created a Royal Commission on Capital Punishment and suspended all executions. But the Commission was expressly forbidden to consider whether the death penalty should be abolished. Nevertheless, it was these investigations, stretching over four years, which set off the current wave of agitation against the death penalty in the Commonwealth countries and in the United States.

It was quite clear that the Royal Commissioners favored complete abolition as the best solution to the complex legal and penal problems they were forced to face, even though their explicit recommendations (eventually embodied in an unrecognizable form in the Homicide Act of 1957) were required to fall short of this radical position. No sooner was their report published than the Canadian Parliament established its own inquiry into capital punishment, and several United States experts gave testimony at these hearings. Concurrently, debates at the United Nations often touched on the compatibility of the state's right to kill and the individual's right to live.[21] Many of the delegates, especially the Scandinavian, Benelux, and Latin American representatives, were from nations that had long abandoned recourse to the executioner in peace time. Thus it

[20] Great Britain, *Select Committee Report on Capital Punishment* (1931), p. c, §475. In general, see Elizabeth Tuttle, *The Crusade Against Capital Punishment in Great Britain* (1961).

[21] See James Avery Joyce, "Capital Punishment at UN," *Contemporary Review* (March 1962), and "The United Nations and the Issue of Capital Punishment," *U. N. Monthly Chronicle* (1966).

TABLE 1
ABOLITION OF DEATH PENALTIES IN THE UNITED STATES

Jurisdiction	*Date of Abolition*	*Date of Restoration*	*Date of Reabolition*
Michigan	1846[a]	—	—
Rhode Island	1852[b]	—	—
Wisconsin	1853	—	—
Iowa	1872	1878	1965
Maine	1876[c]	1883	1887
Colorado	1897	1901	—
Kansas	1907[d]	1935	—
Minnesota	1911	—	—
Washington	1913	1919	—
Oregon	1914	1920	1964
North Dakota	1915[e]	—	—
South Dakota	1915	1917	—
Tennessee	1915[f]	1917	—
Arizona	1916	1918	—
Missouri	1917	1919	—
Puerto Rico	1917	1919	1929
Alaska	1957	—	—
Hawaii	1957	—	—
Virgin Islands	1957	—	—
Delaware	1958	1961	—
West Virginia	1965	—	—
Vermont	1965[g]	—	—
New York	1965[h]	—	—

[a] Death penalty retained for treason until 1963.
[b] Death penalty restored in 1882 for any life term convict who commits murder.
[c] In 1837 a law was passed to provide that no condemned person could be executed until one year after his sentencing and then only upon a warrant from the Governor.
[d] In 1872 a law was passed similar to the 1837 Maine statute (see note c above).
[e] Death penalty retained for murder by a prisoner serving a life term for murder.
[f] Death penalty retained for rape.
[g] Death penalty retained for murder of a police officer on duty or guard or by a prisoner guilty of a prior murder, kidnapping for ransom, and killing or destruction of vital property by a group during wartime.
[h] Death penalty retained for murder of a police officer on duty, or of anyone by a prisoner under life sentence.

was that several American organizations, notably the Society of Friends and the American League to Abolish Capital Punishment, were encouraged to restimulate public interest against the death penalty in the United States as well.

By the later 1950's, abolition groups were once again active and moderately well organized in nearly two dozen death penalty states in this country. Public hearings on abolition bills were again echoing in legislative chambers, reminiscent of the 1840's and 1910's. Except for Delaware, where the death penalty was abolished in 1958, abolitionists were able to obtain no more than a few legislative committee reports in their favor. Suddenly, in November 1964, all capital penalties in Oregon were voted out by a large majority, and the log jam was broken. Within six months, New York and three other states followed suit.

The checkered pattern of experiment with abolition in the United States from 1846 to date is summarized in Table 1.

Major Trends in Capital Punishment

The focus of the abolition movement in America has always been on reform of the punishment for murder, as most death sentences and executions have been for this crime. Not many observers have noticed that in recent years capital punishment for certain other crimes has been quietly removed from the statute books, even though the death penalty for murder has remained unaltered. For instance, in 1961, Nevada dropped trainwrecking from its list of capital crimes, and Illinois repealed the death penalty for dynamiting. On the whole, however, many more capital statutes have been added during this century than have been removed, and considerable publicity has surrounded these additions. The best known example is the crime of kidnapping, which, in one form or another (usually kidnapping for ransom, or kidnapping where the victim is not released unharmed), was elevated to capital status in over two dozen states during the 1930's, after the death of the kidnapped Lindbergh baby in 1932. Revenge and deterrence seem to be about equally powerful motives in the

minds of most of those who favored making this crime a capital offense.

There have been other occasions when particularly shocking crimes have provoked this response. After President William McKinley was assassinated in 1901, Connecticut and New Jersey made murder or attempted murder of a high public official a capital crime. Airplane bombings in 1958–59, air piracy in 1960–61, and the assassination of President Kennedy in November 1963, led Congress to make such offenses punishable by death under Federal law. Most capital statutes added during the past generation cannot be traced to any such spectacular causes; e.g., providing narcotics to a minor (1946, Federal law), espionage violations of the Atomic Energy Act (1946, Federal law), assault by a life term prisoner (1939, Pennsylvania; 1941, California), armed robbery (1955, Tennessee; 1957, Georgia), third offense of a capital crime after having received mercy at the prior convictions (1955, South Carolina). Very few death sentences have issued from these novel laws, and even fewer executions. Yet their number and variety is undeniable evidence that the death penalty is still believed in many quarters to be an effective deterrent and an appropriate punishment for several different kinds of crime.

The ostensible failure of the abolition movement in this country, after a century and a half of effort, may be in part attributable to the weakness of the arguments and the fickleness of the sentiments on which they are based. It may also be because only a few Americans in each generation bother to inform themselves on the facts surrounding the actual use of the death penalty and on the merits of the abolitionist's position. Furthermore, support for the death penalty may rest on attitudes that are nearly universal, unconscious and impervious to rational persuasion. But it is far more likely that the very reforms in the administration of capital punishment, the hard-won results of the struggle for abolition during the last century, have paradoxically become the major obstacles to further statutory repeal. They have mitigated the rigidity and brutality of this form of punishment to a point where the average citizen no longer regards it as an affront to his moral sensibilities. As a consequence, he has no strong motive to press for further reduction, much less complete abolition, of the death penalty. The reforms referred to here are several, but four of them are particularly important: the disappearance of violent and repulsive modes of carrying out the sentence; the protection of the general public from exposure to executions; the limitation of the death penalty to the highest degree of murder; and the extension of authority to the trial jury in capital cases to grant imprisonment rather than death as the punishment.[22] As all these reforms originated in the United States, and as each is an integral part of our present system of capital punishment in every jurisdiction, they deserve the closest attention.

Methods of Execution. The variety of ways in which men have put one another to death under the law is appalling. History records such exotic practices (fortunately, largely unknown in the Anglo-American tradition) as flaying and impaling, boiling in oil, crucifixion, pulling asunder, breaking on the wheel, burying alive, and sawing in half. But not so many generations ago, in both England and America, criminals were occasionally pressed to death, drawn and quartered, and burned at the stake. Had any of these punishments survived the eighteenth century, there is little doubt that public reaction would have forced an end to capital punishment long ago.

Originally, the purpose of *peine forte et dure* (pressing to death) was to force an accused person to plead to an indictment. Such tactics became necessary because anyone

[22] Reform has also moved with a comparable effect in three other directions (not discussed below): toward a statutory minimum age of sixteen, below which a capital indictment may not issue (this is usually accomplished by restricting jurisdiction over juveniles to special courts); toward a statutory requirement of an automatic writ of error to issue upon a death sentence, with an accompanying stay of execution, ordering a review of the case by a higher court; and toward a two-stage trial, in which the jury first determines the question of guilt and then, if it decides on a conviction and after hearing further testimony relevant to the sentence, whether the punishment shall be death or a term of imprisonment. Some states, e.g., California, have all three provisions.

who refused to plead to a felony indictment (that is, refused to plead either guilty or innocent) could avoid forfeiture even if he was later found guilty. The effect of pressing on an uncooperative accused was, and was intended to be, fatal. As early as 1426, pressing was used in England, though it never seems to have enjoyed wide popularity with the courts. Its sole recorded use in this country seems to have been during the notorious Salem witchcraft trials, in 1692, when one Giles Cory was pressed to death for refusal to plead to the charge of witchcraft.[23]

Burning at the stake is intimately connected with the punishment of witchcraft and heresy, having been endorsed for these crimes by several medieval Christian theologians. In civilized countries, such as England, if we may believe Blackstone, it was the practice to strangle the condemned person before the flames reached him. There are records showing that in New York and New Jersey, and probably elsewhere in the American colonies, rebellious Negro slaves were burned at the stake during the early and middle eighteenth century. Except for these occasional excesses, however, burning at the stake seems to have played no part among standard methods of execution actually practiced on these shores.

It is somewhat curious that any of these barbarous and inhumane methods of execution survived as long as they did, for the English Bill of Rights of 1689 proscribed "cruel and unusual punishments." This phrase worked its way through several of the early American state constitutions into the federal Bill of Rights (in the Eighth Amendment) of 1789. Supreme Court opinions interpreting this clause have been few, but they agree in declaring that the intent of the Framers of the Constitution was to rule out, once and for all, the aggravations attendant on execution, e.g., drawing and quartering, pressing, or burning.[24] These

[23] Some details of the case (which figures in Arthur Miller's play, *The Crucible*) are available in Dalzell, *op. cit.*, pp. 182–185.

[24] See Wilkerson v. Utah, 99 U. S. 130 (1878) at p. 135, and subsequent decisions. In this opinion, the Court held that there was nothing "cruel and unusual" in Utah's practice of allowing a condemned man to choose either the firing squad or the hangman for his executioner.

practices had all but totally disappeared by 1789 and they had never taken firm root here, anyway; but their express exclusion by Jefferson, Madison and the other authors of the Bill of Rights was a service to the interests of a free and humane people. Except when executing spies, traitors and deserters, who could be shot under martial law, the sole acceptable mode of execution in the United States for a century after the adoption of the Eighth Amendment was hanging.

In the 1880's, as one story has it, in order to fight the growing success of the Westinghouse Company, which was pressing for nationwide electrification with alternating current, the advocates of direct current staged public demonstrations to show how dangerous their competitor's product really was: if it could kill animals—and awed spectators saw that, indeed, it could—it could kill human beings as well. Within a few years, this somber warning was turned completely around, and in 1888, the New York legislature approved the dismantling of its gallows and the construction of an "electric chair," on the theory that in all respects, scientific and humane, executing a condemned man by electrocution was superior to executing him by hanging.[25] On August 6, 1890, after his lawyer had unsuccessfully argued the unconstitutionality of this "unusual" method of execution, one William Kemmler became the first criminal to be put to death by electricity. Although the execution was little short of torture for Kemmler (the apparatus was makeshift and the executioner clumsy), the fad had started. Authorities on electricity, such as Thomas Edison and Niccola Tesla, continued to debate whether electrocution was so horrible that it never should have been invented. The late Robert G. Elliot, electrocutioner of 387 men and women, assured the public in his memoirs that the condemned man loses consciousness immediately with the first jolt of current.[26] The matter remains controver-

[25] See the *Report* of the New York Legislative Commission on Capital Punishment (1888), pp. 52–92.

[26] Robert Elliot, *Agent of Death* (1940).

sial to this day. Despite the record of bungled executions,[27] the unavoidable absence of first-hand testimony, and the invariable odor of burning flesh that accompanies every electrocution, most official observers favor the electric chair. However ironical it may be, it is a fact that electrocution was originally adopted and is still employed in two dozen states on the grounds of its superiority to hanging as a civilized method of killing criminals.

Not satisfied with shooting, hanging or electrocution, the Nevada legislature passed a bill in 1921 to provide that a condemned person should be executed in his cell, while asleep and without any warning, with a dose of lethal gas. Governor Emmet Boyle, an avowed opponent of capital punishment, signed the bill, confident that it would be declared unconstitutional on the grounds of "cruel and unusual punishment." Nothing much was done one way or the other until one Gee Jon was found guilty of murder and sentenced to death. When the Nevada Supreme Court upheld the constitutionality of lethal gas, a chamber was hurriedly constructed after practical obstacles were discovered in the original plan for holding the execution in the prisoner's cell. On February 8, 1924, Jon became the first person to be legally executed with a lethal dose of cyanide gas. A Nevada newspaper editorial hailed the event: "It brings us one step further from the savage state where we seek vengeance and retaliatory pain infliction."[28]

It is doubtful whether any serious scientific inquiry has ever substantiated the claims advanced on behalf of either electrocution or gassing. According to a 1953 Gallup Poll, the American public strongly favored electrocution over lethal gas, while hanging and shooting had very few supporters (twelve per cent registered no opinion, or recommended "drugs" or "any of them, but let the prisoner choose"). Also during 1953, though few Americans knew

[27] Several were cited by the defense in the remarkable case of Louisiana *ex rel.* Francis v. Resweber, 329 U. S. 459 (1947); some are mentioned in Barrett Prettyman, Jr., *Death and the Supreme Court* (1961), pp. 105 ff.

[28] A.P. dispatch from Carson City, Nevada; see e.g. *Newark News* of April 8, 1960.

it, the British Royal Commission on Capital Punishment stated:

> . . . we cannot recommend that either electrocution or the gas chamber should replace hanging as the method of judicial execution in this country. In the attributes we have called "humanity" [rapidity with which unconsciousness is induced] and "certainty" [simplicity of the apparatus] the advantage lies, on balance, with hanging; and though in one aspect of what we have called "decency" [decorum with which executions can be conducted, and absence of mutilation to the body of the condemned man] the other methods are preferable, we cannot regard this as enough to turn the scale.[29]

When representatives of the British Medical Association were cautiously sounded out on the question whether they would be willing to endorse and administer death sentences by lethal injections, they made it quite clear to the Royal Commissioners that they wanted nothing to do with it, no matter how humane, certain and decent it might be.

In this country, voices are occasionally still heard, protesting the risks, indignities and mutilations incident on hangings, shootings, electrocutions and gassings. "Contemporary methods of execution," it has been said, "are unnecessarily cruel"; they are "archaic, inefficient, degrading for everyone involved."[30] Novelties, such as allowing the condemned man to choose the method of his execution, or even to administer it to himself, or to become the subject of medical experiments until he dies of a fatal one, have lately been suggested.[31] But these objections and suggestions seem to go almost entirely unheeded. Retentionists

[29] Great Britain, Royal Commission on Capital Punishment, *Report* (1953), p. 256.

[30] Respectively, Clarence Farrer, in *American Journal of Psychiatry* (1958), p. 567, and Rufus King, "Some Reflections on Do-It-Yourself Capital Punishment," *American Bar Association Journal* (July 1961), p. 669.

[31] King, *op. cit.*, and Jack Kevorkian, "Capital Punishment or Capital Gain?" *Journal of Criminal Law, Criminology and Police Science* (May–June 1959).

—those who favor keeping, adopting or extending the death penalty—usually have no curiosity about the regrettable details of actual executions, and abolitionists, being totally out of sympathy with the whole business, have no interest in finding a more humane way to do what they disapprove of on principle.

Private Executions. The strongest argument in favor of public executions and of cruel methods of inflicting the death penalty was that such procedures greatly increased the deterrent effect. Hence, the desirability of having children and the criminal fringe of society witness these spectacles. Also, the notion of executions hidden from public view suggested to many the unsavory aspects of secret Star Chamber proceedings. Thackeray's reaction (quoted in part above), however, seems to have been the judgment of most sensitive witnesses: "I feel myself ashamed and degraded at the brutal curiosity which took me to that brutal sight." It was probable, too, that the deterrent effect of attending an execution was considerably overrated. A classic tale has it that when pick-pocketing was a capital crime in England, pick-pockets plied their trade at the foot of the gallows while the other spectators watched a pick-pocket being hanged! The story is probably apocryphal[32] (as is another oft-told tale, that in England during Henry VIII's reign, over 72,000 persons were hanged[33]), but it illustrates the point. Somewhat more reliable may be the observation of the chaplain at Bristol Prison, England, who reported that all but three of the 167 men sentenced to death whom he had interviewed had, at one time or another, witnessed a hanging.[34] Nor could terror and hatred of the criminal increase if he took his punishment like a man. As the

[32] See Radzinowicz, *op. cit.*, p. 498. The story may have started from a chance remark in the testimony given before the first Royal Commission on Capital Punishment; see its *Report* (1886), p. 302 (#2294).

[33] Thorsten Sellin, "Two Myths in the History of Capital Punishment," *Journal of Criminal Law, Criminology and Police Science* (July–August 1959); and Radzinowicz, *op. cit.*, p. 139.

[34] Spear, *op. cit.*, p. 53.

New York Legislative Commission on Capital Punishment observed,

> . . . the very boldness with which he [the condemned man] marched from the cell to the scaffold is extolled as an act of heroism and as evidence of courage and valor. "He was game to the last" has been many a ruffian's eulogy.[35]

But public executions continued well into the last century. Dr. Benjamin Rush, in his address of 1787 delivered in Franklin's house, attacked "The Effects of Public Punishments Upon Criminals and Upon Society." In response to his arguments and the support they aroused, the Walnut Street Jail was built in Philadelphia three years later. From this primitive beginning sprang the whole penitentiary system, and a realistic alternative to hangings at last was available. But nothing was done about public executions until New York, in 1830, imposed some control on the county sheriffs, requiring them (but only at their discretion!) to hold executions away from public view. Not until 1835 did New York increase the stringency of this law so as to prohibit public executions. Within the next few years, several other states followed suit, and this reform—at most, merely a sop to abolitionists—was underway.

The reform was by no means universal or thoroughgoing, however. Pennsylvania and New Jersey, for instance, stipulated only that executions should take place within the walls or buildings of the county jail. Since in most cases the gallows was erected out of doors in the jail yard, it was a simple enough matter for any interested spectator to watch the entire proceeding from a vantage point well outside the walls. Not until nearly the end of the last century were such abuses prohibited. Even so, flagrantly public executions continued in some states until quite recently. The last such event in the United States is said to have been the hanging of a Negro in Owensboro, Kentucky in August 1936. A news service photograph taken moments after the "drop" shows some 20,000 people packed around the gallows, with the dead man dangling at the end of his

[35] New York, *op. cit.*, p. 93.

rope. Several spectators are atop a nearby utility pole, and others are leaning out of windows a block away. The platform is jammed with official witnesses.[36] Two years later, Kentucky passed a statute prohibiting all but official witnesses from attending future executions.

Even today, however, most states allow considerable discretion to the warden in charge of an execution as to how many persons shall qualify as official guests and witnesses. Wardens and executioners have often told how the announcement of an execution (required by law) brings a flood of requests for permission to attend. Such requests, they say, are never granted. But if the condemned man is enough of a celebrity, the mass news media will send their representatives, and these, plus the officials directly and indirectly involved, often swell the total to several dozen, as in the execution of Julius and Ethel Rosenberg at Sing Sing in 1953 and of Caryl Chessman at San Quentin in 1960.

The relative privacy of executions nowadays (even photographs of the condemned man dying are almost invariably strictly prohibited) means that the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes a criminal. Lately, it has been suggested, though with what seriousness it is hard to gauge, that executions should be televised for public viewing.[37] More than one abolitionist has wistfully recalled the days when all executions were holiday occasions, confident that if this were to happen today, the whole practice of killing criminals would be rapidly outlawed. The adage, "out of sight, out of mind," goes some distance toward explaining why even the opponents of the death penalty today are not as evangelical as were the reformers in the last century.

[36] The photo is reproduced in Negley Teeters, "Public Executions in Pennsylvania, 1682 to 1834," *Journal of the Lancaster County Historical Society* (Spring 1960), p. 117.

[37] Vigorous opposition to this idea was expressed by convicts in *The San Quentin News* (March 5, 1959), p. 2. Their former warden, however, seems to support it, though only in order to educate and shock the public and thereby to secure greater support for abolition; see Clinton Duffy, *88 Men and 2 Women* (1962), p. 21.

Actually, the relative loss of ardor and persistency among today's abolitionists probably has its main explanation elsewhere. Capital punishment today is not thought to be the dreadful evil it once was, partly because the number of persons executed has been drastically reduced. Whereas there is now about one execution a week in the nation, with a population of 180 million people, in 1900, with a population half that size, executions were held on an average three times as often. Reliable statistics on the annual number of executions prior to 1930 are unavailable, but there is no doubt that the number has steadily decreased during the last generation. Although executions seem to be fewer and fewer, the number of death sentences shows a slower decline. Hence, an increasing number of men each year are awaiting execution under sentence of death. This circumstance tends to veil the fact that for a century and a half, the ratio of death sentences to convictions for capital crimes has itself been steadily decreasing. When we add to this the widespread belief that only the worst murderers and other felons are even sentenced to death, thanks to the American innovations of degrees of murder and jury discretion in sentencing, it is not difficult to understand why the abolition movement has achieved so few successes during the past decade.

Degrees of Murder. Since time immemorial, death has been regarded as the supremely suitable manner of punishing murderers. The Bible, somewhat cryptically, tells us, "Whoso sheddeth man's blood, by man shall his blood be shed" (Genesis IX:6). But what is the crime of murder, as distinct from the fact of homicide? Blackstone, speaking for the English tradition, declared:

> . . . all homicide is malicious, and . . . amounts to murder unless where *justified* by the command or permission of the law; *excused* on account of accident or self-preservation; or *alleviated* into manslaughter, by being either the involuntary consequence of some act

not statutorily lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation.[38]

The effect of this definition, which became a standard interpretation of the law of murder in this country, was to make into "murder," and thus punishable by death, all homicide not involuntary, provoked, justified or excused.

With the intention of giving the trial jury an opportunity to exclude from the punishment of death all murderers whose crime was not of the gravest nature, William Bradford, the Attorney General in Pennsylvania and a friend of Dr. Rush's, proposed the following now classic division of murder into "degrees":

> . . . all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kinds of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree . . .[39]

To this was added the stipulation, "That no crime whatsoever hereafter committed (except murder of the first degree) shall be punished with death in the State of Pennsylvania." The legislature adopted this statute in 1794. With certain minor modifications, the distinction of degrees of murder, with the death penalty limited to first degree murder, was quickly adopted in Virginia (1796), somewhat later in Ohio (1815), and during the next generation in most other states, until today all but a few states use it.

[38] Blackstone, *op. cit.*, p. 201.

[39] Quoted in Edwin Keedy, "History of the Pennsylvania Statute Creating Degrees of Murder," *University of Pennsylvania Law Review* (May 1949), pp. 772–773.

The distinction of murder into degrees has often been disputed as an improvement over the common law notion of murder. It is arguable whether the common law concept of "malice" is really clarified by the equally shadowy notions of wilfulness, deliberateness and premeditation.[40] But it was an effective compromise of the policy that murderers shall be punished with death, since it left for the jury to decide in each case whether the accused, though he may be guilty, had committed his crime with sufficient conscious calculation to deserve the maximum punishment. One of the main objections to the doctrine of degrees of murder is that it can often have just the opposite of the intended effect. For example, a mean, impulsive and violently brutal person who kills suddenly and without a weapon nor in the course of another felony (and thus kills in absence of wilfulness, deliberation or premeditation) may be as great (or even greater) a menace to society than is another person who carefully plans the death of some one victim, e.g., a doctor who decides to put a hopelessly incurable patient out of his misery. Indeed, in the latter case, a jury might wish to mete out light, or even no, punishment. But it could do so only by flouting the letter of the law, since the doctor's crime is clearly first degree murder.

After weighing the merits of the doctrine of degrees of murder for more than a century, the English have concluded that it is a clumsy tool for demarking the class of murderers meriting execution. The Report of the Royal Commission trenchantly observes:

> There are strong reasons for believing that it must inevitably be found impracticable to define a class of murders in which alone the infliction of the death penalty is appropriate. The crux of the matter is that any legal definition must be expressed in terms of objective characteristics of the offense, whereas the choice of the appropriate penalty must be based on a much wider range of considerations, which cannot

[40] The classic criticism of the doctrine is by Benjamin Cardozo, in his essay, "What Medicine Can Do for Law" (1928), reprinted in his *Selected Writings* (1947), pp. 382–384.

be defined but are essentially a matter for the exercise of discretion.[41]

Besides the difficulties surrounding the distinction of degrees of murder, another equally disastrous tendency originated in the same 1794 Pennsylvania statute and has spread throughout American criminal law. Under the common law of England, all homicides not excusable or justifiable were murder and punishable by death. In the sixteenth century, manslaughter was made non-capital on the ground that such homicide lacked the required *mens rea,* or criminal intent, to deserve such severe punishment. But according to the Pennsylvania statute, first degree murder includes not only wilful, deliberate and premeditated homicide; it includes also all "homicides in or in the attempt to perpetrate arson, rape, robbery or burglary." This notion that killings in the course of a felony (other than the felony of murder itself) are on a par with wilful, deliberate and premeditated killing seems a complete throwback to the primitive theory that a person is to be punished not for what he intends to do (e.g., rob a store) but for what results from his action (e.g., the death, however unintended, of the store keeper). The most remarkable feature of the concept of felony murder is the way it has grown in several states so as to encompass homicides done in the course of *any* felony (where "felony" is defined as any crime punishable by death or by more than a year in prison), and to allow a felon to be punished as a first degree murderer for a homicide committed by a co-felon or even by a *police officer!*[42] Considerable experience with this doctrine has shown not only that it has thoroughly defeated any hope its originators may have had to mitigate the severity and inequity of capital punishment—rather, its effect has been exactly the opposite—but also that it makes for bad law, so much so that the American Law Institute has recently advocated abandoning the entire doctrine.[43]

[41] Royal Commission, *op. cit.,* p. 173. How little effect the Commission's advice had may be seen from the fact that the Homicide Act passed by Parliament in 1957 attempted to draw this distinction in the very way the Commission declared to be impossible. See, on this and other points, Sidney Prevezer, "The English Homicide Act," *Columbia Law Review* (May 1957).

[42] See especially Norval Morris, "The Felon's Responsibility for the Lethal Acts of Others," *University of Pennsylvania Law Review* (November 1956), and Note, "Felony Murder As a First Degree Offense," *Yale Law Review* (January 1957).

Jury Discretion. The early reformers may have dimly sensed what was to come, and while they deserve the credit for inventing the distinction of degrees of murder, they also deserve the blame for expanding the concept of felony murder. They and their successors must have seen the need for a better solution to the problem of making the punishment fit the crime and of limiting the severity of punishment, whenever possible, to something less than death.

The solution seems obvious enough now, though only quite recently has it been universally adopted: make the punishment fit both the crime and the criminal by abolishing all mandatory death penalties, and instead authorize the jury in capital trials to sentence a guilty person either to death or to life imprisonment. The democracy of the idea was one source of its appeal. To give discretion to the jury meant that the Governor's arbitrary power to extend clemency would be considerably curbed, if not by law at least by force of public opinion, and thus this vestige of the old Royal privilege would be curtailed in favor of popular expression of the community's will.[44]

But by far the most pronounced argument in favor of ending mandatory death penalties, echoed on every side, was the extreme difficulty of obtaining convictions in cases where a conviction is tantamount to a death sentence. Because this difficulty was one of the strongest complaints against capital punishment, retentionists may have recognized that they could cut the ground from under the abolitionists by adopting the simple expedient of discretionary death sentences. Abolitionists may well have looked with some dismay on this development, as they could hardly

[43] See American Law Institute, *Model Penal Code Tentative Draft No. 9* (1959), pp. 33–39, 115–120, especially pp. 65–70; and the *Proceedings* of the Institute's Thirty-sixth Annual Meeting (1959), pp. 123–133.

[44] On this subject, see Christen Jensen, *The Pardoning Power in the American States* (1922).

fail to appreciate how much more difficult this reform would make achievement of their ultimate aim, while at the same time they could not deny that it was a step in the right direction.

A history of the principle of jury discretion in capital trials has yet to be written,[45] and the suggestions in the above paragraphs are largely speculations. We do not in fact know whether the idea of jury discretion was invented by abolitionists, retentionists, or some third party seeking a middle way. Nor do we know where or when the idea originated (it should be noticed that it apparently was a feature of the Massachusetts "Capitall Lawes" of 1636 for the crime of rape), nor when it was first applied to the punishment for murder. We do know that in Maryland, where the jury had the power to fix degrees of murder, the death penalty became optional in 1809 for treason, rape and arson, but not for homicide;[46] that Louisiana in 1846 may have been the first state to make all its capital crimes optionally punishable by life imprisonment;[47] and that jury discretion was introduced specifically for the punishment of murder in California in 1873, in Illinois the next year, and in Georgia the following year. According to one report, some thirty-two states had given either the judge or the jury discretion as to the punishment in capital cases by the year 1926.[48] Between 1949 and 1958, five more states (Massachusetts, Connecticut, North Carolina, New Mexico and Vermont) introduced this procedure.[49]

At present, twenty-two jurisdictions–just half the total–

[45] The leading article is by Robert Knowlton, "Problems of Jury Discretion in Capital Cases," *University of Pennsylvania Law Review* (June 1953). For current American Law in this area, see American Law Institute, *op. cit.*, pp. 121–126.

[46] *Dorsey's Maryland Laws* (1809), pp. 573 ff.; cf. "Capital Punishment in the United States," *Law Reporter* (March 1846), p. 484.

[47] Act of June 1, 1846, cited in *State v. Lewis* (1848), 3 *Louisiana Annotated Reports* 398.

[48] Raymond Bye, "Recent History and Present Status of Capital Punishment in the United States," *Journal of Criminal Law, Criminology and Police Science* (August 1926), p. 239.

[49] Sara Ehrmann, "Capital Punishment Today–Why?" in Herbert Bloch (ed.), *Crime in America* (1961), pp. 81, 91.

have made all their capital crimes optionally punishable by death or by imprisonment. It is interesting to note that many of those states which were the first to accept the doctrine of degrees of murder were among the last to add the doctrine of jury discretion for this crime. Ohio did not accept it until 1898, New Jersey until 1916, Pennsylvania until 1925. When the District of Columbia abolished the mandatory death sentence for murder in March 1962,[50] New York remained the last stronghold of this practice in the United States. After considerable pressure, including pleas from the District Attorney of New York County, the Legislature abolished this restriction in April 1963, and Governor Nelson Rockefeller signed it into law, to take effect the following July.

It often used to be maintained by abolitionists that if the death penalty were abolished, convictions would increase.[51] There seems to be little or no evidence that this is so.[52] Had the practice of jury discretion, however, not been introduced in most death penalty states over fifty years ago, there might have been considerable evidence to support this claim. There is some slight evidence in this direction, in favor of the view that the change from a mandatory to an optional death sentence for murder has resulted in significantly more convictions of first degree murder. In Philadelphia, for instance, in the last year of mandatory death penalties (1924), there were 118 indictments for first degree murder, but only six convictions were sustained by the courts after appeals. Some twenty years later (1947), out of 102 such indictments, twenty-six con-

[50] For an instructive public debate over the mandatory death penalty, see the *Congressional Record,* March 14, 1962, pp. 3771–3801.

[51] See, e.g., Maynard Shipley, "Does Capital Punishment Prevent Convictions?" *American Law Review* (May–June 1909), and the remark of the Governor of Minnesota, that in the three years after abolition (1911–1913), convictions for murder increased "approximately fifty per cent," cited in Lamar Beman (ed.), *Selected Articles on Capital Punishment* (1925), p. 355.

[52] Raymond Bye, *Capital Punishment in the United States* (1919), pp. 50–55.

victions were obtained and in twelve of these the jury had granted mercy, i.e., life imprisonment.[53] On the other hand, far more cases went to trial in 1947 than in 1924. Under the mandatory law, twenty-one first degree murder indictments were not opposed by the accused, giving full sentencing discretion to the judge; whereas in 1947, under the law that gave sentencing discretion to the jury, only seven defendants were willing to leave their fate in the hands of the judge. Presumably, they thought they would have a better chance of mercy from the jury. But no nationwide statistics are available against which we can place these data; they may or they may not be representative.

Whereas Americans seem to have their doubts about complete abolition of the death penalty for the crime of murder (since only twenty-one states have ever abolished it, and half of these later reintroduced it), the optional death penalty has been thoroughly accepted. There seems to be but one case of backsliding. Vermont adopted jury discretion in 1911, and a veritable crime wave of twenty murders occurred the next year. Although it subsided noticeably after one Elroy Kent was sentenced to death (with the jury exercising its discretion in favor of the death penalty), the legislature voted overwhelmingly to return to the mandatory death penalty for murder in 1913.[54] More than forty years were to pass before Vermont reabolished this mandatory law. Today there is no jurisdiction in the United States in which the jury is denied sentencing discretion for the crime of murder.

Conclusion

It would be premature at this juncture to attempt to estimate either the merits or the probability of complete abolition of the death penalty in this country. Supporters of abolition in the past have been noticeably sanguine in their predictions. Thirty-five years ago, Raymond Bye, one of the sociologists to pioneer in the study of this subject, remarked, "There is reason to believe that in the course of

[53] Thomas White, "Punishment for Murder in the First Degree," *The Shingle* (March 1948), p. 62.

[54] Reported in Beman (ed.), *op. cit.*, p. 8.

the present century the use of the death penalty will finally pass away."[55] A decade ago, another observer said that "the over-all, international trend is toward the progressive abolition of capital punishment."[56] It is difficult to believe these predictions, if that is what they are. As these lines are being written, the Soviet Union has announced executions under *ex post facto* laws for currency speculation,[57] the French government is in an uproar over the failure of a special tribunal to issue a death sentence to renegade Army generals, the Union of South Africa has decided to impose the death penalty on its colored population for a host of crimes, South Korea has executed six soldiers for embezzlement of military funds, and Israel has announced that the notorious Adolf Eichmann has been hanged. The political executions in Cuba, Algeria, and the Congo are too infamous to need comment.

Yet it is true that in the United States, as the next chapter will show, nearly half the states now use the death penalty so sparingly that it plays almost no part in their program of law enforcement and criminal treatment. Of all the persons today in state and federal prisons, only about one in a thousand is under sentence of death.[58] The obvious inference is that the death penalty in our country is an anachronism, a vestigial survivor of an earlier era when the possibilities of an incarcerative and rehabilitative penology were hardly imagined. Although killing persons in the name of the law for racial, political, and military crimes remains one of the familiar social phenomena elsewhere in the modern world, yet the infrequency with which ordinary peacetime criminal offenses against persons and property are punished with death outside the United States[59] focuses

[55] Bye, *op. cit.* note 48 *supra*, p. 245.

[56] Frank Hartung, "Trends in the Use of Capital Punishment," *The Annals* (November 1952), p. 19.

[57] See particularly "The Death Penalty and the USSR," *Bulletin of the International Commission of Jurists* (November 1961), pp. 55–62.

[58] James McCafferty, "Major Trends in the Use of Capital Punishment," *Federal Probation* (September 1961), p. 21.

[59] Until recently no reliable survey of the status of capital punishment in foreign countries existed; cf. Sara Ehrmann, *op.*