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THE RIGHT OF THE STATE TO INFLICT CAPITAL PUNISHMENT

MOST REVEREND THOMAS J. RILEY*

ON DECEMBER 30, 1958, the Special Commission established in the Commonwealth of Massachusetts for the purpose of investigating and studying the abolition of the death penalty in capital cases presented to the Governor the final report of its deliberations. The majority report of the Commission recommended the abolition of the death penalty. A minority report, signed by two members of the Commission, one of whom was the present writer, held that abolition would be inopportune at this time. The present article embodies the reasoning which led to this conclusion.

The opinion to which I have subscribed assumes and is derived from the following fundamental postulates:

1) There is a supreme and all-perfect Being, God, Who has created man and upon Whom man depends for his continued existence.

2) By his possession of a spiritual soul, which is the source and explanation of his characteristically human activity, man is elevated above the material universe with which his body is related.

3) Man is capable of self-determined activity, through which he rises above the factors which may exercise a compulsive influence upon him. The normal man is thus capable of charting his own course over the period of his earthly existence.

4) In the relationship between man and God there arises the moral law, which is the expression of man's obligation to follow those courses of action which are in conformity with the essential requirements and tendencies of his nature, and to avoid those courses of action which lack this conformity.

5) As created by God, man is destined to live in society with his fellow men. Man's natural social condition implies the existence of a social entity, of which the organized expression is the state.

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6) The purpose of the state is to provide for the temporal welfare of its individual members. The very nature of the state implies, therefore, divine authorization to take whatever steps are necessary to assure its own existence and to guard against the dangers which threaten it, consistent with the more fundamental principles of the natural law.

7) Only God, Who created human life, has the right to take it away. Since, however, the authority of the state derives ultimately from God, and is exercised in God's name, it is not inconsistent to hold that the state may claim the right, in the name of God, to take away human life in circumstances in which this would appear clearly to be in accord with God's own will.

8) It is beyond the authority of the state to take directly the life of any human being. The right of each man to his life is anterior to the existence of the state. When, however, a man, through his own fault, has endangered the right of the state to carry on its divinely appointed functions, there may be reason to assume that he has forfeited his God-given right to live, and that the taking of his life may be justified as an indispensable means of protecting society from serious harm.

Human history bears witness to the persistent conviction that the state has a natural right to inflict the death penalty. It would be wrong to hold that capital punishment is an essential violation of the law of God, and that the taking of human life by the state represents essentially a tampering with rights which God reserves exclusively to Himself. Nor would it be right to assert that an individual member of human society has an absolute right to his life that is beyond all attack on the part of the state.

On the other hand, it is clear that the

taking of human life by the state can be justified only when no other means will be effective in safeguarding its essential interests from criminally immoral attack. Only a malefactor can be put to death by the state, and only when the taking of his life will be a necessary means for the strengthening of human society against attack upon its fundamental structure.

No one can deny that there have been grave abuses connected with the exercise by the state of its right to inflict the death penalty. History records the regrettable facts that men have been put to death by state governments for trivial reasons, in brutal and abhorrent ways, and in satisfaction of the basest of human passions.

We should not, however, allow the abuses connected with the exercise of the right of capital punishment to obscure our understanding of the considerations which justify this right in principle. We should not argue that, because the death penalty has often been imposed for minor crimes, there can never be a crime of major proportions for which it would be a necessary means for the protection of society. We should not identify the death penalty, itself, with the gruesome methods which have been employed in particular situations or by individual executioners. We should not infer from the fact that motives of hatred or vengeance are often associated with the inflicting of capital punishment that such motives constitute the only reasons for which the death penalty could be demanded or justified.

It is the opinion of the writer, therefore, that the supreme authority of the state has the right to inflict the death penalty when it can be shown to be a necessary means for protecting society against criminal attack which endangers its very foundations. It is

likewise the opinion of the writer that the death penalty for first degree murder, as it exists at present in the Commonwealth of Massachusetts, is justified in principle on these grounds.

This conclusion would seem to issue from the following considerations. First of all, the state may take the life of a human being only in punishment of a crime of serious proportions. Capital punishment is essentially punishment. It is not basically and radically a measure for the protection of society, even though this is the reason and the only reason for which it can be invoked. The state can take human life only in punishment of serious crime. The right of capital punishment does not derive immediately from the obligation of the state to protect the common good. The death penalty cannot be inflicted merely to rid society of undesirable members. Nor can it be inflicted merely because an objectively criminal act has been committed, without reference to the subjective guilt of the criminal. Execution of a person by the state must represent essentially a punishment which fits a crime. It is thus primarily an exercise of vindicative justice, by which steps are taken to restore the order of society which has been wilfully and seriously violated.

Secondly, the infliction of capital punishment can be justified only if it serves as a deterrent in relation to future possible crimes of the same order, and only if less drastic measures toward the same end will not be sufficiently effective.

It is at this point that differences of opinion arise among those who admit in principle the right of the state to inflict the death penalty. Does the death penalty serve as a deterrent? Will life imprisonment, or any other penal measure, afford suffi-

cient protection against the crime of first degree murder for which the death penalty is now decreed? These are the important questions which I shall attempt to answer, and upon which the validity of the opinion which is presented in this article will depend.

Does the death penalty for first degree murder really serve as a deterrent to potential murderers? All human beings fear the loss of their lives, even those who may be suffering from major mental disturbances. The instinct of self-preservation is so fundamental that the threat of death, apprehended as such, must have a powerful determining influence on the voluntary direction of human activity. No one will knowingly drink poison or cast himself over a precipice unless he is so deranged that he cannot evaluate the consequences of what he is doing, or unless he studiously chooses the alternative of death to continued existence in what he judges to be an intolerable situation. The claim that the death penalty, in itself decreed for the committing of a major crime, will not exercise a deterring influence on the great majority of potential criminals, contradicts one of the fundamental facts of human psychology.

What of statistics which seem to show that the incidence of crime does not vary consistently with the presence or absence of the death penalty? These statistics have obvious reference to the particular circumstances in which the death penalty is inflicted. In point of fact, the death penalty, in states in which it exists, is incurred by only a small percentage of those who commit murder. It is impossible, of course, for the penalty to be implemented quickly and with unerring accuracy. Legal procedures, extending over long periods of time, are required to establish the moral responsi-

bility of one who has been charged with murder. The welfare of society as a whole demands that every possible precaution be taken against the execution of one whom the law would require to be spared.

This necessary delay in the carrying out of the death penalty will tend to reduce the effectiveness of the penalty as a deterrent measure. And because legal procedures are so complicated and so difficult of organization, the possibility is created that even those who are guilty before the law of the crimes with which they are charged may not be proven guilty by the courts. Some lawyers have remarked on the effect of the slowness with which trials for murders are conducted. The claim has been made, moreover, that those who have unlimited wealth at their disposal will almost certainly escape the death penalty, while those who are poor and unfortunate are more likely to be its victims.

All these factors are represented in the statistics which seem to indicate that the death penalty is not a deterrent to potential murderers. It seems quite possible, therefore, that the reason why the death penalty is not effective is the difficulty of applying it to concrete cases and the correspondingly increased possibility that the murderer may escape the penalty which the law decrees. This point should, it would seem, be kept in mind as I attempt to evaluate the statistics to which the advocates of abolition attach such great significance. It does not seem logical to say that the death penalty should be abolished because statistics prove that it is not a deterrent. It seems more consistent to urge that every effort be made to minimize the influence on the effectiveness of the death penalty of factors extrinsic to itself, and thus, to realize to the maximum its intrinsic value. The death

penalty strikes deeply at the possession of the bodily life which is for everyone the root and foundation of every other earthly possession and satisfaction. If we admit that the state has, in principle, the right to inflict it, we should admit likewise a corresponding obligation on the part of the state to make it effective; and we should not urge failure to do this as proof that the death penalty itself is not effective.

Will life imprisonment, or some other penal measure, afford sufficient protection to society against the crime of first-degree murder for which the death penalty is now decreed? Many advocates of abolition who have agreed with what has been already said will answer this last question affirmatively. We have reached, they will say, a point in the development of human society at which it is no longer necessary to resort to the drastic measure of capital punishment as a means of safeguarding society from the dangers created by potential criminals. The criminal, they say, should be punished in some less severe way which will leave open the possibility of his rehabilitation and his eventual restoration to full membership in society. In any event, he should be allowed to run the course of his natural life, atoning in enforced isolation for the wrong which he has done and no longer presenting a danger to society of further criminal activity.

In answer to this kind of argument I may point to the obvious fact that crime of all description is increasing both in numerical occurrence and in the efficiency of the methods by which it is perpetrated. Respect for the moral law is diminishing. Those who seek illegitimate gain hesitate less and less to sacrifice human life when it suits their purposes to do so.

The movement to abolish capital punish-

ment should, it would seem, be integrated with more comprehensive efforts to strike at the roots of the criminal tendencies which threaten the future of our democratic institutions. I look forward, as do many whose testimony I heard as a member of the Commission, to the time when it may be possible to dispense with the death penalty. It is my conviction, however, that as a society, we have not yet reached the stage of moral development at which it would be prudent to remove a safeguard judged to be necessary by so many who are charged with the heavy responsibility of protecting human life against criminal attack. Large numbers of law-enforcement officers have urgently demanded that the death penalty be retained. These men have not, to be sure, made the speculative study of the problem that would enable them to present their conclusions in compelling statistical form. Their point of view is not, however, for this reason to be taken lightly, especially since they insist that their own lives are endangered by their efforts to protect the lives and property of their fellow men, and would be even more seriously threatened if the death penalty were abolished.

Here again, I am faced with the objection of statistical evidence which seems to indicate that murders of law-enforcement officers do not vary consistently with the presence of the death penalty. I suggest that here too there may be hidden factors which may alter the significance of the data presented. A law-enforcement officer is a human being. His strongest natural tendency is to protect and preserve his own life. If he has become strongly convinced in his past experience that the death penalty is a necessary deterrent measure, his reaction to abolition might well be to relax

his efforts to enforce the law when the full discharge of his duty might place his own life in jeopardy.

I am not suggesting that any purely subjective impressions of law-enforcement officers should be accepted as sufficient reasons for retaining the death penalty. What I do say is that the convictions of law-enforcement officers on the necessity of the death penalty, earnestly expressed by so many of their representatives, should not be dismissed as groundless because of the lack of confirmatory statistical evidence.

Many of those who acted as spokesmen for their associates before the Commission used language which betrayed a high degree of emotional reaction. Possibly, many of them have found it difficult to dissociate in their thinking on the subject those motives which are morally sound from other motives which would be questionable on moral grounds as indicative of hatred or revenge.

Beyond all these questionable elements in the presentation of their arguments, however, there lies a groundwork of objective truth toward which their convictions are directed. I feel that society owes to them every possible measure of protection, and that it would be imprudent at the present time to disregard their warning that abolition of the death penalty would hamper them in their efforts to maintain public order.

This writer has likewise been deeply impressed by the honesty and sincerity of those who appeared before the Commission to urge abolition of the death penalty. Many are experts in their respective fields, and their conclusions have obviously followed upon careful and scientifically controlled study. It seems clear that in this

matter there can be honest differences of opinion, and that the point of view which is expressed in this article would be subject to revision at some future time under the influence of an improved condition of society.

At the same time, however, I would challenge the objection that advocacy of the death penalty as it stands is inconsistent with either the principles of the natural law or the findings of modern psychology. I have already stated the reasons why I feel that the state has, in principle, the right to inflict the death penalty. Another objection, less radical in its origin, but no less universal in its conclusion, is that capital punishment is wrong because the death penalty is irrevocable, and it is thus possible that a miscarriage of justice may send an innocent man to his death.

It would be impossible to deny the premises from which this conclusion is derived. The conclusion itself, however, does not seem valid. In the first place, the danger of convicting a person for a crime which he did not commit, while not absolutely negligible, is, in existing circumstances, extremely remote. There is far greater danger, as I have previously suggested, that a person who is really guilty of murder may escape the punishment which the law decrees for him, so carefully and painstakingly do the courts sift the evidence which would lead to his conviction. While suggesting, as I already have, that the procedures of the courts might be expedited to the extent consistent with conservative legal and judicial requirements, I would not want any change introduced which would increase the danger of error in a matter in which error is irreparable.

I do not feel, however, that the mere possibility of error, which can never be com-

pletely ruled out, can be urged as a reason why the right of the state to inflict the death penalty can be questioned in principle. It is not possible for human authorities to make judgments which are infallible in matters which require lengthy deliberation and logical analysis. All that can be expected of them is that they take every reasonable precaution against the danger of error. When this is done by those who are charged with the application of the law, the likelihood that errors will be made descends to an irreducible minimum. If errors are then made, this is the necessary price that must be paid within a society which is made up of human beings and in which authority is exercised not by angels but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty aims to provide an effective remedy.

I have likewise met the objection of many authorities in psychology and psychiatry that all murderers are psychopathic personalities, and that few, if any, murders are committed by persons who could be held legally responsible. I recognize the value of the psychological studies which have revealed the influence of sub-conscious motivation on all forms of human activity. I have noted disagreement among psychiatrists themselves, however, as to the extent to which this motivation is effective. I would certainly agree that some murderers are victims of strong impulses which reduce, if they do not remove completely, the power of self-determination which is fundamental to any degree of moral or legal responsibility.

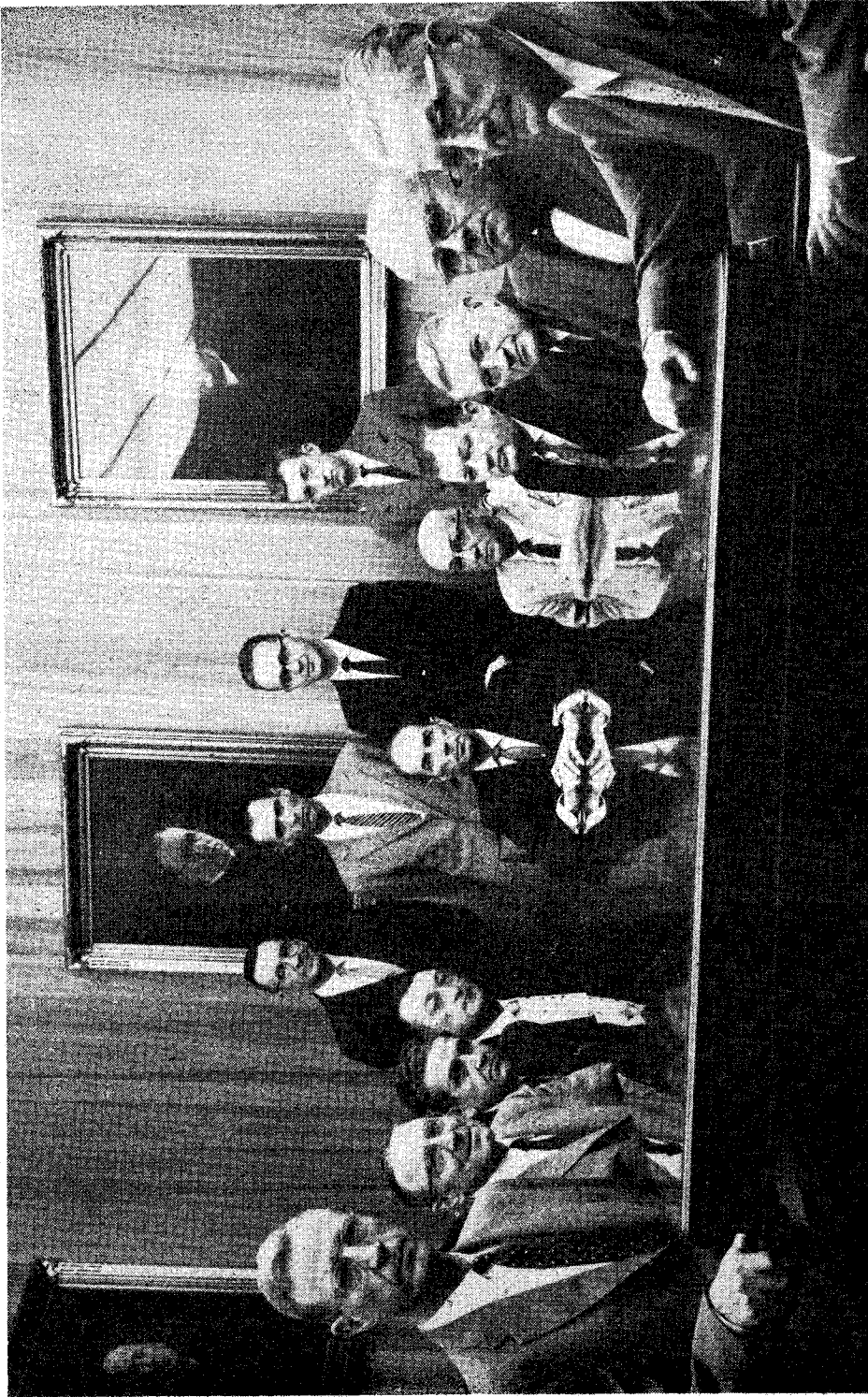
I maintain, nevertheless, that premeditated murder, for which full responsibility should be imputed, is not just a speculative

possibility, but an imminent danger actually to be feared. There is such a thing today as organized crime; it is a big business in this country. Those who are engaged in it are highly intelligent and completely unscrupulous. They do not hesitate to plan and commit murder in cold blood when the need arises. Those whose assistance they seek in the actual perpetration of crime are fully aware of the implications and requirements of the cooperation which they are asked to afford.

It is wrong, I hold, to evaluate the moral or legal responsibility of criminals in terms simply of their psychological condition at the moment when they actually commit a crime. When any wrong deed is committed, its agent has built up within himself, while he is still free to conform to the requirements of the law, an attitude of intellectual contempt for what the law demands, and of voluntary determination to break it. It is during this period of calm and deliberate reflection that moral responsibility is incurred. A criminal should not be allowed to plead insanity as a ground for release from the charges made against him simply because at the moment at which he actually perpetrated the crime he was under the influence of an impulse which he could not resist. This point of view prescind entirely from the crucial question: why was the criminal under the influence of an irresistible influence? If his personality is habitu-

ally psychopathic, he may well have been lacking in the moral responsibility for which he could be legally punished. If, however, his inability to resist was due to his having voluntarily prepared for the situation in which he executed his criminal intention, he is not less but more guilty for this very reason.

This point of view is presented in the hope that it may contribute to a better understanding of the problems which are fundamental to the controversy which has arisen regarding the death penalty. I have tried to distinguish carefully between what must be held as emerging immediately from changeless principles and what is subject to change as involving judgment regarding contingent facts. That the state has the right to inflict the death penalty would seem to be a matter of principle beyond any question. Whether or not the state should, in existing circumstances, inflict the death penalty is a matter concerning which there may be difference of opinion. My own answer to this second question represents only one point of view. I can only say that in formulating it I have tried to be objective and to rise above the emotional prejudice which so easily injects itself into any discussion of controversial matters. If the death penalty is necessary, we must resort to it. Once we can say, however, that it can be dispensed with, our arguments in favor of it lose all force.



Full-time faculty of De Paul University College of Law. Seated (left to right): Arthur Anderson, Max P. Rapacz, Lawrence F. Murphy, John S. Mortimer, Ass't Dean Philip Romiti, Lawrence F. Daly, Francis J. Seiter, Jeremiah J. Buckley, Eugene C. Jachimowski, Albert A. Vail. Standing (left to right): Robert G. Weclaw, James Starrs, Robert Q. Kelly, and Brian J. Buckley.