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Recommended Citation

(2016) "Note: Capital Punishment in New York: A Re-Evaluation," *The Catholic Lawyer*: Vol. 9 : No. 2 , Article 9.
Available at: <https://scholarship.law.stjohns.edu/tcl/vol9/iss2/9>

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NOTES AND COMMENTS

NOTE: CAPITAL PUNISHMENT IN NEW YORK: A RE-EVALUATION

[I advocate] the total abolition of the Punishment of Death, as a general principle, for the advantage of society, for the prevention of crime, and without the least reference to, or tenderness for any individual malefactor whatever.¹

Charles Dickens (1846)

New York is the only state which has retained a *mandatory* death sentence for certain crimes.² In all other states the sentence has either been abolished entirely or been made discretionary. In view of the accusations of outmodedness which have been levelled at Section 1045 of the New York Penal Law,³ the New York Legislature has established the Temporary Commission on Revision of the Penal Law and Criminal Code to investigate anew the argumentation pro and con dealing with capital punishment. A dispassionate re-examination of this centuries-old controversy from the traditional utilitarian and moralistic standpoints is warranted before we can fruitfully examine the sweeping changes this Commission advo-

cates in a bill it hopes to sponsor at this session of the Legislature.

Utilitarian

Since the days when the remains of executed persons were left exposed to the public view in an effort to dissuade on-lookers from committing crimes,⁴ the war has been fought as to whether executions have a significant deterrent effect against future crime. It has been stated by historians that pickpockets harvested their largest crops from the pockets of spectators who gathered around the hanging corpse.⁵ In fact, the hangmen themselves tasted death on the gallows — a fate which they had so often meted out.⁶

A contention that execution is successful, or at least a significant factor, in the prevention of crime hinges on two assumptions. The first is that a potential criminal will reflectively consider the penalty which could be imposed,⁷ and the second is that the probability of its imposition be substantial.⁸ Both of these premises have been severely attacked by the abolitionists who argue that the psychological effect upon a potential murderer is minimal because the large ma-

¹ COLLINS, DICKENS AND CRIME 224 (1962).

² *Symposium On Capital Punishment*, 7 N.Y.L.F. 247, 251 (1961). The only other jurisdiction to retain a *mandatory* death penalty is the District of Columbia.

³ N.Y. PEN. LAW § 1045. Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided by section 1045-a. (§ 1045-a permits life imprisonment for felony-murder or depraved-mind murder).

⁴ Comment, 29 TENN. L. REV. 534, 535 (1962).

⁵ *Id.* at 540.

⁶ *Id.* at 541.

⁷ Reichert, *Capital Punishment Reconsidered*, 47 KY. L.J. 397, 404 (1959).

⁸ Sellin, *The Death Penalty*, MODEL PENAL CODE (Tent. Draft No. 9, 1959) 20.

majority of murderers are not normal and hence cannot properly reason to the logical consequences of their acts.⁹ Furthermore, the argument proceeds, most murders are crimes of passion¹⁰ and the murderer acts with a degree of spontaneity which reduces his ability to premeditate.¹¹ But even if the individual could reflect upon the effect of his acts, the second premise is faulty, say the abolitionists, because the chances of his incurring the death penalty have been reliably estimated as being from 50-1 to 100-1.¹² In view of the various studies which verify the statistical improbability of suffering capital punishment, it would seem that there is solid ground for the belief that even upon sufficient deliberation, the potential criminal would have little fear that his life will be taken.

A new twist to the deterrent argument, or rather the lack of deterrent effect, is the thesis that the death penalty actually stimulates crime rather than prevents it.¹³ A study taken in Alameda, Los Angeles, over a nine-year period indicated that more homicides were committed on the Thursdays and

Fridays when executions were performed than when there were no such executions scheduled.¹⁴ In the city of Philadelphia, a study prepared before and after five different executions revealed that during the sixty-day period preceding them, ninety-one homicides were committed whereas 113 were committed during the sixty-day period subsequent to the infliction of the death penalty.¹⁵ While it is evident that these two studies are far from conclusive, they are offered to indicate that further inquiry along these lines is warranted and indeed might revolutionize the deterrent concept. The deterrent argument is still in a state of flux. Professor Sellin has made a comprehensive state-by-state study on the deterrent effect of capital punishment and concluded that the frequency of murders is conditioned by factors other than the death penalty.¹⁶ His data reveal that:

- 1) The *level* of the homicide death rates varies in different groups of states. . . . 2) Within each group of states having similar social and economic conditions and populations, it is impossible to distinguish the abolition state from the others. 3) The *trends* of the homicide death rates of comparable states with or without the death penalty are similar.¹⁷

His conclusion was that "executions have no discernable effect on homicide death rates. . . ."¹⁸

⁹ MODEL PENAL CODE § 201.6, comment (Tent. Draft No. 9, 1959); Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U.L. REV. 433, 459 (1957); Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 63-64 (1952). "The relation between murderer and victim is usually primary, hence, one that is likely to be suffused with emotionality. This emotionality, probably heightened during a crisis, doubtless interferes with the objective assessment of future consequences." *Ibid.*

¹⁰ Reichert, *supra* note 7, at 402.

¹¹ *Id.* at 404 n.17.

¹² Comment, *supra* note 4, at 541; *Symposium on Capital Punishment*, *supra* note 2, at 253, 294; Kingsley, *Life or Death: Another View*, 35 J. OF STATE BAR OF CAL. 543, 550 (1960).

¹³ Blease, *Abolition of the Death Penalty in California*, 19 LAW. GUILD REV. 58, 59 (1959).

¹⁴ McCafferty, *Major Trends in the Use of Capital Punishment*, 25 Fed. Prob. 15, 20 (Sept. 1961).

¹⁵ *Ibid.* One author has thought it worthwhile to note that on the same day nineteen year-old Charles Starkweather was sentenced to die after a highly-publicized trial, 90 miles away a 17 year-old killed two people and himself. *Ibid.* This comment would have greater significance had the author established that the defendant had actual knowledge of the Starkweather execution.

¹⁶ Sellin, *supra* note 8, at 24-25.

¹⁷ *Id.* at 34.

¹⁸ *Ibid.*

A second utilitarian argument centers around the alleged economic benefit to society, the belief being that life imprisonment would be more costly. Such a view has been counted with the contention that when the penalty is death, a prolonged legal battle invariably occurs which is likewise costly to society. The expense involved in successive new trials and appeals is added to that of construction and maintenance of "death-rows" and the result is an expense approaching that of life imprisonment.¹⁹ One lawyer has estimated that it costs the state of California between \$50,000 and \$100,000 for each execution.²⁰ It is felt by some that under a well-organized system, "lifers" would not be a financial burden to society.²¹ The imprisoned could perform useful work for the state such as working on highway construction and consequently reduce the estimated \$1200-\$1800 jailing cost per year.²² It would seem then that the economic argument is not going to be determinative of an individual's ultimate stand on capital punishment because the difference in cost between life imprisonment and death ad-

ministered by the state is not substantial.

An argument offered in behalf of abolition consists of the fear that the *discretionary* use of capital punishment in the great majority of jurisdictions results in an inequality in its application, depending upon differences in judgment and other accidents of time and place.²³ Various contentions are offered in this rather broad area. It is said that women receive favor by the courts. Although women commit one out of every seven murders in this country, only one woman is executed each year as compared to forty-seven men.²⁴ In the state of California, only three women have ever been executed although they commit approximately fifteen per cent of the annual homicides.²⁵ Racial discrimination is another bitter battleground in the "equal justice under the law" argument. Proponents of abolition claim that the Negro is bearing the brunt of such punishment in the discretionary states and the available facts would seem to indicate that the contention has some validity.²⁶ From 1930 to 1957, there were 3,568 executions in the United States. More than one-half involved non-whites and considerably more than one-half occurred in the South.²⁷ The 1958 figures reveal that twenty-seven of the forty-eight persons executed in the United States were Negroes.²⁸ These

¹⁹ Caldwell, *Why is the Death Penalty Retained?*, 284 *Annals* 45, 48 (1952). "When the penalty may be death, the legal battle is often fierce and prolonged as each side struggles for an advantage. Much time and money may be spent in the selection of jurors acceptable to both sides, in the employment of experts and witnesses, and in the successive new trials and appeals that may ensue. Add to this the cost of constructing, maintaining, and staffing a suitable place of detention for those awaiting execution and it can be seen that the cost of inflicting capital punishment may be very great — greater, . . . than life imprisonment." *Ibid.*

²⁰ Blease, *supra* note 13, at 61. The Chessman trial cost the state of California approximately one million dollars. *Ibid.*

²¹ Sellin, *The Death Penalty*, MODEL PENAL CODE (Tent. Draft No. 9, 1959) 18; Sellin, *Capital Punishment*, 25 *Fed. Prob.* 3 (Sept. 1961).

²² Comment, 29 *TENN. L. REV.* 534, 549 (1962).

²³ MODEL PENAL CODE § 201.6, comment 64 (Tent. Draft No. 9, 1959).

²⁴ Comment, *supra* note 22, at 542.

²⁵ Blease, *Abolition of the Death Penalty in California*, 19 *LAW. GUILD REV.* 58, 59 (1959).

²⁶ *Symposium on Capital Punishment*, 7 *N.Y.L.F.* 247, 259 (1961).

²⁷ Sellin, *supra* note 21, at 5.

²⁸ See Sellin, *The Death Penalty*, MODEL PENAL CODE (Tent. Draft No. 9, 1959) 82. In the case of *Hampton v. Commonwealth*, 190 Va. 531, 58 S.E.2d 288, *cert. denied*, 340 U.S. 914 (1950), the NAACP appealed on the ground that the Commonwealth of Virginia had a policy of applying the death penalty for rape only to Negroes and

figures are far from conclusive because of the missing factor of the incidence of crimes punishable by death committed by white men, but the following specifics shed some light on the overall facts. In Virginia from 1909 to 1950, forty-two Negroes were executed for rape while not a single white man was so punished even though 809 whites had been convicted of rape which was punishable by death at the discretion of the jury.²⁹ Another cogent fact indicating inequality is that under Louisiana's penal code, a distinction between "aggravated rape" which is punishable by death and "simple rape" which can be punishable by only imprisonment for one year is made in order to allow the prosecutor to indict the man under either statute, depending on the color of his skin.³⁰ A recent study in Pennsylvania establishes that between 1914 and 1958, 439 persons were sentenced to death in Pennsylvania. In six per cent of the cases, Negro felony-murderers received commutations whereas white felony-murderers were so favored in over seventeen per cent of the cases.³¹

While these are facts which bolster the inequality of administration argument, one wonders if they would be significant in the event it were established that those actually executed deserved this penalty. If it were so established, the proponents of this viewpoint would merely be stating that there are those who escape the punishment they deserve. The argument begs the question in that it criticizes the manner in which the law

is administered and not the penalty itself.

Perhaps the most outspoken groups favoring retention of the death penalty are the law enforcement agencies,³² which believe that abolition would make the policeman's lot a more hazardous one because the threat of the death penalty dissuades criminals from either carrying lethal weapons or from using them against the police when in danger of being arrested. J. Edgar Hoover, employing such reasoning, has spoken out against abolition many times.³³ A recent study substantiates the conclusion that there is no factual basis for the belief that more police are killed in abolition states. The rate per 100,000 population of fatal attacks on police in eighty-two cities in the abolition states was 1.2% and in 182 cities in the death penalty states, 1.3%, a minute difference.³⁴ In view of these results, it would appear that the thinking of law enforcement officers does not conform to the facts. The most vigorously propounded utilitarian arguments are evidently laden with emotion, for time and time again, the facts seem to belie popular conceptions. The deeper roots for such beliefs, it would appear, lie imbedded in the moral fibre of our society.

Because of the lack of conclusive statistical data as to the deterrent effectiveness of capital punishment, the proponents and opponents of its abolition carry on their dialogue primarily on the basis of moral considerations and, in many instances, from purely emotional points of view. It is to be realized that often the moral attitude asserted stems directly from emotions, and

that such discrimination was unconstitutional. *Ibid.*

²⁹ Reichert, *Capital Punishment Reconsidered*, 47 Ky. L.J. 397, 411 n.35 (1959).

³⁰ Comment, *supra* note 22, at 545.

³¹ *Id.* at 543; Sellin, *Capital Punishment*, 25 Fed. Prob. 3, 10 (1961).

³² Sellin, *supra* note 31, at 3; Murdy, *A Moderate View of Capital Punishment*, 25 Fed. Prob. 11, 13 (1961).

³³ Murdy, *supra* note 32, at 14.

³⁴ Sellin, *The Death Penalty*, MODEL PENAL CODE (Tent. Draft No. 9, 1959) 52-62.

that the separation of the two is made for the convenience of analysis.

Moralistic and Psychiatric

It is precisely in this area that one can appreciate the interplay and seeming conflict between morality and psychiatry. Often, one's view of murder and the murderer predetermines his attitude toward capital punishment. The impact of psychiatry on the concept of free will and on one's control over his environment has had a concomitant effect on the issue of capital punishment. Thus, those who view the murderer as having a diseased mind prescribe clinical treatment rather than punishment.³⁵ Underlying this approach is a deterministic concept³⁶ which disregards the various motivational factors which enter into killing.³⁷

The moral issue becomes clearer, once it is accepted that there are what can be labelled "normal murderers" for whom Professor Guttmacher has given us a description:

Certainly one must admit that such individuals are maladjusted to society. But, in all

probability, the genesis of such defective personality structure has resulted from the defective ethical standards which flourish in the social milieu in which they are spawned, rather than from hidden neurotic complexes.³⁸

It is at this juncture that the polar moral attitudes take shape. On the one hand, some profess that the moral law forbids any kind of killing irrespective of who commits it — a murderer or the state punishing the murderer³⁹— and on the other, there are those who contend that the moral law demands the exaction of capital punishment where it is warranted on the principle of retribution, *i.e.*, to exact suffering commensurate with the suffering caused society in order to re-establish the moral equilibrium.⁴⁰ Both positions disregard the utilitarian concept of deterrence.

The underlying reason for denying the state the right to exact the death penalty as punishment is based on man's inherent right to life, which right cannot be taken away under any conditions. Application of this principle seems untenable when viewed by the experience the world has had with war and murder throughout its history.⁴¹ The

³⁵ "It is absurd to think of punishing a person who is suffering from cancer or any other malignant disease. It is likewise absurd to punish those who are socially ill to the degree that they commit socially disapproved acts." BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 359 (1951).

³⁶ Professor Cohen answered this deterministic attitude in the following manner: "When we are considering whether we should or should not punish certain individuals, it is irrelevant to argue that no one can help doing what he does. For against such an argument it is fair to reply as the irate father did to the wayward son who used it: 'If no one can help doing what he does, then I can't help punishing you.'" Cohen, *Moral Aspects of The Criminal Law*, 49 *YALE L.J.* 987, 999 (1940).

³⁷ A good discussion of these various factors together with numerous case studies can be found in GUTTMACHER, *THE MIND OF THE MURDERER* (1960).

³⁸ *Id.* at 20.

³⁹ "For some people the death penalty is ruled out entirely as something absolutely evil which, like torture, should never be used however many lives it might save." Hart, *Murder and the Principles of Punishment: England and the United States*, 52 *Nw. U.L. REV.* 433, 447 (1957).

⁴⁰ *Ibid.* "The basic conception is that retribution is punishment which, independently of human will, is suffered as the consequence of doing harm; as regards its having a purpose, it is to make the person upon whom it is inflicted suffer to counterbalance the suffering he has caused." Snyder, *Capital Punishment: The Moral Issue*, 63 *W. VA. L. REV.* 99, 107 (1961).

⁴¹ It would seem that this view would preclude the right to self-defense by one whose life is threatened. Such a view seems highly idealistic.

contrary position would allow the sovereign to participate in the Creator's right over life and death in certain instances where one by his own action has forfeited his right to life.⁴² This latter position, on analogy to the principle of self-defense, requires that the state utilize capital punishment despite its seeming ineffectiveness as a deterrent.⁴³ The self-defense argument has also been asserted by those who favor capital punishment as being a dictate of nature:

It is my belief that the death penalty is prescribed by Nature in every part of the universe and in all phases of universal life. It does not seem to be in absolute contradiction with personal rights, because when the death of another is absolutely necessary, it is perfectly just, as a case of self-defense, whether individual or social.⁴⁴

Although it is not the purpose of this discussion to adopt either of these moral positions, it is significant to point out that there is a long tradition which supports the view in favor of retention, thus placing the burden on the abolitionists to demonstrate the reasonableness of their cause. The death penalty is as old as man himself⁴⁵ and deeply rooted

⁴² This theory relies on certain basic assumptions. See Riley, *The Right of the State To Inflict Capital Punishment*, 6 CATHOLIC LAWYER 279-80 (1960).

While Bishop Riley speaks in terms of forfeiture of the right itself, the better view seems to have been stated by Jacques Maritain: "If a criminal can be justly condemned to die, it is because by his crime he has deprived himself, let us not say of the right to live, but of the possibility of justly asserting this right: he has morally cut himself off from the human community, precisely as regards the use of this fundamental and 'inalienable' right which the punishment inflicted upon him prevents him from exercising." MARITAIN, *MAN AND THE STATE* 101-02 (1951).

⁴³ RILEY, *supra* note 42, at 281-82.

⁴⁴ FERRI, *CRIMINAL SOCIOLOGY* 528 (1917).

⁴⁵ See LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* (1960).

in his psychic makeup.⁴⁶

If one is going to assert that capital punishment is *only* a moral issue, one must consider its morality independently of any utilitarian considerations of deterrence, economy or inequality of administration. Yet, even when one restricts the controversy to moral considerations, there is no unanimity among churchmen. The Rt. Rev. Msgr. J. P. Moreton, ex-prison chaplain at Utah State Penitentiary, stated that "man should not be permitted to destroy the one thing which cannot be restored—life, a gift of Almighty God Himself."⁴⁷ Another leading moral thinker, Bishop Thomas J. Riley, a member of the Massachusetts Legislative Committee to study capital punishment, expressed a contrary view:

When 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

⁴⁶ There is a great deal of testimony to the basic instinct of revenge in society. "For the delight seemeth to be not so much in doing the hurt as in making the party repent." BACON, *Essay of Revenge*. See Odenwald, *Punishment From The Viewpoint of Psychiatry*, 6 CATHOLIC LAWYER 126, 128 (1960). Colorado reinstated the death penalty because of the increase in lynchings during its abolition which was attributed to the "lynch-instinct" of the people. See Note, 5 BUFFALO L. REV. 304, 306 n.11 (1956).

It seems that it was fashionable at one time to send invitations to hangings:

You are cordially invited to attend the hanging of one George Smiley, murderer. His soul will swing into eternity on Dec. 8, 1896, at 2 P.M. sharp. Latest improved methods in the art of scientific strangulation will be employed, and everything possible will be done to make surroundings cheerful and the execution a success. (Signed) F. J. Watron, Sheriff of Navajo County (Ariz.), DONELLY, GOLDSTEIN & SCHWARTZ, *CRIMINAL LAW* (1962).

⁴⁷ *Symposium on Capital Punishment*, 7 N.Y.L.F. 247, 290 (1961).

serious harm.⁴⁸

The utilitarian arguments, as has been shown, are far from clear-cut, and likewise, there seem to be no binding or ultimately convincing moralistic arguments which must sway the objective listener. Is it not possible that the most important single factor is emotionalism and that it is the very nature of death itself which demands an emotional reaction⁴⁹ which carries over into any controversy involving death? If this be true, then perhaps all arguments and statistics are but so much extraneous matter in the formation of one's own personal judgement and the determinative ingredient is simply one's emotional reaction to the concept of the state's extinguishing life. This analysis has been succinctly expressed by Clarence Darrow, a well-known crusader for abolition:

There is just one thing in all this question. It is a question of how you feel, that is all. It is all inside of you. If you love the thought of somebody being killed, why you are for it. If you hate the thought . . . you are against it.⁵⁰

Whatever may be the pulse of New York residents concerning the abolition of capital punishment, one thing is certain: the time has come to seriously question New York's solitary retention of the mandatory death penalty. The Temporary Commission on Revision of the Penal Law and Criminal Code has unequivocally stated that such compulsory death should be terminated by the 1963 session of the Legislature.

⁴⁸ *Ibid.*

⁴⁹ "When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the judiciary, I regard as very bad." OF LAW AND MEN, PAPERS AND ADDRESSES OF FELIX FRANKFURTER (1939-56) 77 (Elman ed. 1956).

⁵⁰ Debate on capital punishment between Clarence Darrow and Judge Talley, in ATTORNEY FOR THE DAMNED 89, 95-96 (Weinberg ed. 1951).

The Proposed Bill

The Commission intends to sponsor a bill which will advocate far-reaching changes. Under present New York law, there are only two instances where the death penalty might be avoided: 1) if the crime were a felony-murder and the jury recommends life imprisonment,⁵¹ 2) in the case of a wanton or depraved type of killing and the jury recommends life imprisonment.⁵² Furthermore, the court is not bound by the jury's recommendation. The first proposed change which the Commission itself terms "drastic"⁵³ is that the jury's power of recommending life imprisonment be extended to *all* cases of first-degree murder. Further, unlike present law, should the jury determine that the sentence be life imprisonment, this conclusion would *bind* the court.

The second major revision to be proposed is that the murder trial be in two stages.⁵⁴ At the end of the trial proper, a verdict would be rendered as to guilt or innocence. A second proceeding would be held if the defendant is over eighteen years of age (under eighteen, the life imprisonment verdict would be automatic) at which a special penalty verdict would be rendered. The appealing feature of this proceeding to determine the proper penalty is that the exclusionary rules of evidence would not apply and a wide variety of information dealing with the convicted person's economic and religious background would be admitted. In short, information which might provide a fairer basis for such a penalty determination would not be ex-

⁵¹ N.Y. PEN. LAW § 1045-a.

⁵² See N.Y. PEN. LAW § 1045-a.

⁵³ TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT OF THE STATE OF NEW YORK 6 (February 1, 1963).

⁵⁴ *Ibid.*

cluded. The Commission strongly urges that guilt and punishment be treated separately⁵⁵ because they feel that oftentimes a jury will agree that the defendant is guilty of first-degree murder, but individual members of the jury will disagree as to whether the defendant is deserving of death. This, they suggest, results in an influencing of the eventual verdict and hence the consequent verdict is not expressive of what the jurors truly believe the facts establish. It seems reasonable to assume that individual treatment of guilt and punishment will reduce considerably any obstruction of true fact-finding which the present system of dual considera-

tion may produce.

Conclusion

Since it is clear that the most recent data are far from conclusive as to the beneficial consequences of abolition, and since there exists considerable dispute regarding a binding moral standard which must be adhered to, it appears that the most reasonable and cautious approach is not complete abolition but the wise application of a discretionary death penalty. The Commission's proposed bill is, in some respects, almost revolutionary and yet, upon a sober deliberation of all the statistics and contentions, it seems the most practicable solution to an age-old problem.

⁵⁵ *Id.* at 7.