

## Capital Punishment

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## POSTSCRIPTS

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### Capital Punishment

In 1959, Albert Camus expressed his aversion to capital punishment in these words:

Justice of this kind is obviously no less shocking than the crime itself, and the new "official" murder, far from offering redress for the offense committed against society, adds instead a defilement to the first. . . . The death penalty is to the body politic what cancer is to the individual body, with perhaps the single difference that no one has ever spoken of the necessity of cancer.<sup>1</sup>

This author is only one of many spokesmen for the viewpoint that execution as a means of punishing criminals should be abolished. Increased interest in this issue has resulted in a reconsideration of the value of capital punishment in various jurisdictions.

In recent months, several states have abolished the death penalty;<sup>2</sup> but, in other states, either legislative committees have refused to recommend abolition,<sup>3</sup> or proposed legislation has been defeated.<sup>4</sup> In Indiana, where the legislature voted to prevent further capital punishment, the governor vetoed the bill.<sup>5</sup> A proposed law, recently submitted to the United States Congress, provides "a penalty of death or

life imprisonment" for murdering or kidnaping the President.<sup>6</sup> In light of these facts, although the abolition movement is discernibly influential, it cannot be defined as a dominant "trend" in our society today.

In the past, New York has been harsh in the treatment of capital crimes, having been the last state to retain the mandatory death penalty for premeditated murder.<sup>7</sup> As a result of legislation enacted in 1963, a New York jury must now unanimously agree on the death penalty before it will be assessed for first degree murder or kidnaping.<sup>8</sup>

The commission which had recommended these changes later reported that it had not expressed a view on the abolition of capital punishment because "several factors militate against any early decision of the matter."<sup>9</sup> Several state legislators, however, have introduced bills which would alter the existing statutory criminal

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<sup>1</sup> CAMUS, REFLECTIONS ON THE GUILLOTINE 5-6 (1959).

<sup>2</sup> *E.g.*, Iowa, Oregon and West Virginia.

<sup>3</sup> *E.g.*, Florida and New Jersey.

<sup>4</sup> Missouri.

<sup>5</sup> N.Y. Times, March 14, 1965, § 1, p. 74, col. 3.

<sup>6</sup> N.Y. Times, March 9, 1965, p. 21, col. 2.

<sup>7</sup> Memorandum of Commission on Revision of the Penal Law and Criminal Code, N.Y. Sess. Laws 1963, 2018, 2019.

<sup>8</sup> N.Y. PEN. LAW §§ 1045, 1045-a, 1250 (Supp. 1963). For an extensive discussion and evaluation of the 1963 revisions see Note, 9 CATHOLIC LAW. 138 (1963). See N.Y. PEN. LAW § 2382. Since the provision for punishment of treason was not amended, the statute requires execution for that crime.

<sup>9</sup> Third Interim Report of the Temporary State Commission on Revision of the Penal Law and Criminal Code, N.Y. Sess. Laws 1964, 2010, 2021.

penalties. These proposals are of two types:

- (1) Those providing indeterminate sentences, with a maximum of life imprisonment, for first degree murder, kidnaping and treason—with parole allowed for those so sentenced if an advisory board of psychiatrists approves;<sup>10</sup>
- (2) Those providing sentences of life imprisonment for first degree murder, kidnaping and treason, unless a shorter term is recommended by the jury in cases of kidnaping or treason—with no alteration of the present parole procedure.<sup>11</sup>

In March of this year, the Temporary State Commission on Revision of the Penal Law and Criminal Code recommended the abolition of capital punishment in New York.<sup>12</sup> The reasons expressed in the majority report included: (1) the lack of justification for such “act of supreme violence under circumstances of the greatest cruelty”;<sup>13</sup> (2) undue sensationalism and sentiment attaching to trials of capital crimes; (3) the possibility of error in enforcing capital punishment statutes; (4) inequality in the exercise of discretionary assessment of the death penalty; (5) the

lack of “major quantitative significance” as a deterrent. The minority called for further consideration of the issues and of public opinion before final decision. This opinion was based on the belief that (1) society should assert its aversion to certain heinous crimes by assessing the particularly severe penalty of execution, and that (2) abolition may be interpreted “by the lawless masses as a signal for even further outbreaks of lawlessness. . . .”<sup>14</sup> The majority recommendation “is expected to be a decisive force in favor of eliminating capital punishment.”<sup>15</sup>

Since these proposals will be considered this year, the legislators can be expected to debate the traditional arguments, pro and con, with reference to the validity of capital punishment. It will be argued that the present statutory position should be altered, particularly after a re-evaluation of the relative merits of the fundamental purposes of all punishment, *i.e.*, retribution, deterrence and rehabilitation.<sup>16</sup> Generally, it is agreed that retribution does not justify the imposition of the death penalty; the arguments that capital punishment actually does or does not deter potential criminals are inconclusive; those advocating rehabilitative penalties, of course, support abolition. Since the legislative debates will consist largely of statistical and theoretical argumentation, it is difficult to predict the conclusions which will be reached by the legislature. Nevertheless, there are two elements present which may well influence the outcome: certain proposed changes in the New York

<sup>10</sup> N.Y.S. Int. No. 1416, Print No. 1430 (Feb. 17, 1965); N.Y.S. Int. No. 549, Print No. 549 (Jan. 6, 1965); N.Y.A. Int. No. 1862, Print No. 1862 (Feb. 10, 1965).

<sup>11</sup> N.Y.S. Int. No. 274, Print No. 274 (Jan. 6, 1965); N.Y.S. Int. No. 639, Print No. 639 (Jan. 6, 1965); N.Y.A. Int. No. 2925, Print No. 2940 (Feb. 23, 1965); N.Y.A. Int. No. 2524, Print No. 2530 (Feb. 17, 1965); N.Y.A. Int. No. 1316, Print No. 1316 (Jan. 6, 1965).

<sup>12</sup> Excerpts from the official recommendation were reprinted in N.Y. Times, March 20, 1965, p. 23, cols. 5-7.

<sup>13</sup> *Id.* at col. 5.

<sup>14</sup> *Id.* at col. 7.

<sup>15</sup> N.Y. Times, March 20, 1965, p. 23, col. 4.

<sup>16</sup> See Cutler, *Criminal Punishment—Legal and Moral Considerations*, 6 CATHOLIC LAW, 110, 115-17 (1960).

Penal Law and the "innocent man" argument.

The proposed revision of the Penal Law would eliminate the distinction between first and second degree murder and would treat all intentional killings alike, regardless of the concepts of premeditation and deliberation.<sup>17</sup> If this recommendation were enacted into law, it would seem to follow that a decision on the issue of capital punishment would be necessary. Either all murderers would face the possibility of execution (in which case unpremeditated murder would be punished more harshly than it is now), or no murderers would be sentenced to death.

The argument to abolish the death penalty on the ground that an innocent man may be executed was expressed in an earlier edition of *The Catholic Lawyer*:

The value of one human life is so great that the state should not be allowed to make the unredeemable error of injustice, executing the wrong individual.<sup>18</sup>

Conversely, it has been suggested that "some risks of tragedy are unavoidable in organized society . . . [and] that this is one of them. . . ."<sup>19</sup> Regardless of which opin-

ion is accepted, the "innocent man" argument is certain to be influential in this year's decision in Albany.

Proponents of the abolition of capital punishment include Mayor Robert Wagner, many of the state legislators and the Civil Liberties Union. Among the adversaries of abolition are Wilfred Denno, warden of Sing Sing prison, Arthur Cornelius, Jr., Superintendent of the New York State Police, Judge Samuel S. Leibowitz, Mr. Justice Samuel H. Hofstadter, and J. Edgar Hoover.

As individuals interested in the progress of the law, as citizens whom the legislators represent, and as members of society, we should be particularly interested in this issue. We should recall the words of Pope Pius XII, who defined rehabilitation as the primary end of punishment:

The criminal action has revealed in the guilty person an element that clashed with the common good and with well ordered life with others. Such an element must be removed from the culprit.<sup>20</sup>

We must determine, individually, whether any man can be judged so incorrigible as to render rehabilitation impossible—and whether this situation justifies capital punishment.

<sup>17</sup> Third Interim Report of the Temporary State Commission on Revision of the Penal Law and Criminal Code, N.Y. Sess. Laws 1964, 2010, 2020.

<sup>18</sup> Cutler, *supra* note 16, at 113.

<sup>19</sup> *Symposium on Capital Punishment*, 7 N.Y.L.F. 247, 259-60 (1961).

<sup>20</sup> From the text of the Papal address to the Italian Association of Catholic Jurists, as reprinted in 6 CATHOLIC LAW, 92, 97 (1960).