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RECENT HISTORY AND PRESENT STATUS OF CAPITAL PUNISHMENT IN THE UNITED STATES

RAYMOND T. BYE^a

For the past century and more, in this country and abroad, the trend of evolution has been toward a more restricted use of the death penalty. This restriction took place through a number of changes in the penal laws.

One of the most significant of these changes was the gradual reduction in the number of crimes punishable by death.¹ In the early American colonies as many as twelve or more—and in the case of Pennsylvania, seventeen—offenses were subject to the death penalty. “Even as late as 1892, under the United States federal laws, there were 25 offenses subject to the death penalty under the military code, 22 under the naval code, and 17 under the civil code; while in the same year there were ten capital crimes in one state (Georgia), seven in three others (Alabama, Louisiana and Maryland), and four more in ten others (Arkansas, Delaware, Indiana, Missouri, Montana, New Jersey, North Carolina, South Carolina, Texas and Virginia).”² Sometime before this, however, a reaction away from this drastic policy had set in, and it has ever since continued. Ohio had limited the death penalty to the crime of murder as early as 1788;³ Pennsylvania had taken the same step by 1794;⁴ and others one by one fell into line, until today, as will presently be shown, a convict is seldom executed save for this offense.

A further evidence of the growing mitigation in the use of the death penalty is seen in the abandonment of public executions. Criminals were formerly put to death in full view of the populace, and public hangings were attended by thousands of persons amid scenes of great revelry and debauchery. It was believed that the terrible example of a criminal hung for his wickedness would deter the spectators from committing similar offenses; but so shocking a spectacle is out of harmony with the more delicate feelings of modern peoples, and

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¹For a detailed discussion of this evolution see R. T. Bye, “Capital Punishment in the United States” (1919), Chap. 1.

²*Ibid.*, p. 3.

³Maynard Shipley, “Does Capital Punishment Prevent Convictions?” in *American Law Review*, 43:327. May-June, 1909.

⁴Senate of New Jersey, Report of the Committee on Capital Punishment, 1908, pp. 17-18.

in consequence it is now the usual practice to execute malefactors quietly, in the presence of few witnesses; and frequently only meager details of the proceedings are allowed to be printed in the newspapers. New York abolished public executions in 1835, and other states followed; a number of them in the first decade of the present century.⁵ Public executions have been almost totally abolished in the United States today, but there are occasional instances of their existence. In Texas at least as late as 1906 men were hanged before the populace as of old, with the usual throngs and scenes of festivity,⁶ and, according to a newspaper dispatch, there was a double execution at Chestview, Florida, on September 24, 1921, which was witnessed by ten thousand spectators.⁷ Still more recently a Negro was hanged at Georgetown, Delaware, with a crowd of several thousand persons just outside the jail yard, and the latter were permitted to file past and view the body immediately after the execution.⁸ Such cases, however, are now rare; private executions prevail as a rule.

Further evidence of the growing humaneness of the criminal law is to be found in the elimination of the cruel methods of inflicting the death penalty which at one time prevailed. Torture, boiling and burning alive were not unknown in the American colonies, but the constitution of the United States put an end to them by its provision against cruel and unusual punishments. Criminals have usually been put to death in this country by hanging, but this, too, is steadily giving way to what is intended, at least, for a softer method. New York was the first to introduce electrocution, to be soon followed by Massachusetts, Ohio and New Jersey. Today the number of states in which this method is in use has been increased to nineteen: Arkansas, California, Florida, Georgia, Indiana, Kentucky, Massachusetts, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont and Virginia. Nevada, seeking a still more painless method, recently adopted asphyxiation by poisonous gas. The first execution under this statute, that of Gee Jon, a Chinese, was on February 8, 1924. It had been the intention of the framers of the law that the gas should be let into the prisoner's cell while he slept, so that he would not know of his execution; but this was not found to be feasible. It was necessary, therefore, to construct a special air-tight chamber in the prison yard, into which the con-

⁵S. J. Barrows, "Legislative Tendencies," in *Annals of the American Academy*, May, 1907, p. 180.

⁶See C. Kassel, "Recent Death Orgies: a Study of Capital Punishment," in *South Atlantic Quarterly*, 23:303-4, October, 1924.

⁷*Philadelphia Evening Bulletin*, September 24, 1921.

⁸See *Philadelphia newspapers* for February 27, 1926.

demned man was led at the appointed time, just as he would be to the scaffold or the electric chair. The gas used was so powerful that death was practically instantaneous.⁹ In all the other states where the death penalty is still retained it is inflicted by hanging; but in Utah the condemned man has the doubtful privilege of choosing whether he shall be hanged or shot. It is contended by some persons that electrocution is in fact no less brutal than hanging, and most commentators on Nevada's lethal gas experiment have expressed the view that it is even more barbaric. However this may be, these measures were introduced with the idea of making the execution more instantaneous, more merciful and less spectacular than hanging upon the gallows, and may therefore be taken as another evidence of the growing humaneness of the criminal law.

Even more significant than these measures, perhaps, because it marks a further step in curtailing the use of capital punishment, is the practice, which originated in this country, of giving to the jury the right to determine whether or not a convicted man shall be executed. The first move in this direction was the division of the crime of murder into two or more degrees, only one of which is punishable by death. This division is now in effect in nearly all of our states. Usually it rests with the jury to decide what is the degree of guilt in such cases, and with the natural reluctance of most men in modern times toward putting a man to death, it follows that convictions for murder in the second degree, or for manslaughter, carrying a lighter penalty, are far more frequent than convictions in the first degree. But many states (now thirty-two in number) have gone further than this, by giving to the court or jury, when a man is convicted of a crime for which death *may* be imposed, the power to substitute life imprisonment, or, in some cases, a shorter prison term. In these states, the usual procedure is for the jury, in bringing in a verdict of guilt in such cases, to specify the penalty in the verdict, and the judge must then follow this decision. If the defendant waives a jury trial or pleads guilty, however, the judge has the discretion as to the penalty. A more detailed account of the laws in the various states in regard to this practice is given in the table on page The net result of these modifications in the law has been to make the infliction of the death penalty much more seldom used than formerly, for juries are often moved to apply the more merciful punishment. It is only for crimes of a most heinous nature, or where the criminal is of a vicious or desperate character, or where

⁹See newspaper accounts on the date mentioned; e.g., Philadelphia Public Ledger, February 9, 1924.

public indignation has been violently aroused, that the sentence of death is likely to be imposed.

Some states have gone farther than any of these measures, however; they have abolished capital punishment completely. Michigan was the first of these. It did away with the punishment of death, except for treason, in 1847. Treason is still a capital crime there, but there have never been any executions for it; so that it is not improper to list it as a state which has abolished the death penalty. Rhode Island followed the example of Michigan in 1852, and Wisconsin in 1853. In 1882 an amendment to the Rhode Island law provided for the use of the death penalty in case a convict, serving a life sentence for murder, should again be convicted of a subsequent murder (and some other states have since copied this statute), but this law also has never been used. Kansas in 1872 passed a law providing that persons condemned to death were not to be executed until the expiration of a year, and then only upon the order of the governor. No governor ever issued such an order, so that abolition has virtually been effective since that time. Later, in 1907, Kansas passed a law definitely doing away with the death penalty. Iowa abolished capital punishment in 1872, but restored it in a revision of the penal code six years later. Maine abolished it in 1876, then restored it in 1882, and finally abolished it permanently in 1887. Colorado, like Iowa, tried abolition for a short time, only to return to the death penalty. The period of abolition lasted from 1897 to 1901. The restoration of the death penalty was attributed to an outbreak of lynchings in 1900, which were said to be due to popular dissatisfaction at the lenient punishment of serious offenders.¹⁰

Thus, by the beginning of the present century, the death penalty had been discarded in eight states of this country, and had later been reestablished in two of them. For a decade there was no further change in the situation, although doubtless there was some agitation. Then a revival of legislation against capital punishment set in, and seven more states abolished the death penalty. These were: Minnesota (in 1911), Washington (in 1913), Oregon (by constitutional amendment—in 1914), North Dakota and South Dakota (each in 1915), Arizona—except for treason (in 1916), and Missouri (in 1917). Tennessee also abolished it for murder (in 1915), but retained it for the crime of rape.

This trend of humanitarian legislation was destined to be checked by the advent of the great World War. When the United States en-

¹⁰Bye, *op. cit.*, Chapter 1.

tered the war, people became vaguely apprehensive that acts of violence would be committed by German spies and sympathizers. Moreover, the spirit of war is one of force, and it tends to build up an attitude of harshness in the social mind. Then, too, when the war was over, the reaction from the tension in our social and economic life, coupled with the difficult problems of readjustment occasioned by the return of vast numbers of soldiers trained in the use of firearms, accustomed to a rule of violence, and suddenly released from the restraints of military discipline, led to a wave of crime which invited repressive measures on the part of courts and lawmakers. Such an atmosphere was distinctly unfavorable to the further abandonment of capital punishment, but rather encouraged its increased use. The result was that several states which had abolished the death penalty now restored it. Tennessee restored the death penalty for murder in 1917, two years after it had been abolished; Arizona, Missouri and Washington, all of whom had been recent additions to the abolition list, likewise restored the punishment of death in 1919; and in 1920 a similar step was taken by Oregon. By these acts the number of states not using the death penalty was reduced from twelve to eight within two years time. In two other states, measures for the abolition of capital punishment, which had seemed certain to become law, were defeated for the same reason. In Illinois, the Canaday bill providing for the abolition of the death penalty passed both houses of the General Assembly, but was vetoed by the governor, partly because (as he explained in his veto message) he deemed it untimely to enact such a measure while the country was at war. In Pennsylvania also, in the same year, a bill to do away with capital punishment, which a poll of the legislators had indicated would be passed, was unexpectedly defeated by the declaration of war by the United States, which caused a number of members (as they later stated) to vote contrary to their previously announced intentions. Similar measures in other states in the same year likewise met with defeat.¹¹

Does this reaction in legislation, away from the humanitarian movement of the nineteenth and early twentieth centuries, indicate that the crest of the wave has been reached, and that we may now look for a return toward more repressive laws and more extended use of the death penalty? Or are we merely experiencing a temporary setback, which will soon be replaced by a renewal of the trend away from capital punishment? If the explanation of the reaction here advanced

¹¹See summary in *The Survey*, March 10, 1917, p. 671.

(viz., that it is a product of war conditions) is the true one, there is every reason to believe that it will be of short duration. Already there are signs that it may be passing. Since 1920 no more of the abolition states have gone back to capital punishment, and efforts in some places to increase the number of offenses punishable by death are not meeting with success. Meanwhile, the use of the death penalty is being further softened and mitigated. In 1918 the court or jury had power to substitute prison terms for death in capital cases in only twenty-five states; now it has this power in thirty-three. Since 1920 a number of states have substituted electrocution or other ostensibly more humane methods of execution for hanging. In 1921 California enacted a law prohibiting the execution of persons under eighteen years of age. And in the present year (1926) campaigns for the abolition of the death penalty are under way in at least three states (New York, North Carolina and California). Within the past year, there was organized in New York "The League for the Abolition of Capital Punishment," a national organization, which has for its avowed object the carrying on of a campaign for the complete abolition of the death penalty in every state where it is now retained. Whether or not these campaigns prove successful in the near future, they are evidence that the sentiment against the institution of capital punishment has not died out, and the indications are that, with the gradual passing of the problems created by the war, the evolution toward less and less use of the death penalty will continue to go on.

This brief history of capital punishment in the United States may be concluded with a resumé of its status at the present time. A digest of the laws pertaining to the subject, in effect on October 1, 1925, in the various states and in the federal jurisdiction, is given in the table on pages 241 to 242. It is based on information obtained by a questionnaire sent to the attorney-general of each state,¹² and may therefore be presumed to be accurate. According to this data, there are now five states in which the death penalty has been abolished outright, and three others where it is retained only for treason or other crimes so rare that these states may fairly be included among those which no longer retain the death penalty. These states, with the dates when capital punishment was abandoned, are as follows:

¹²Except in the case of Louisiana, data for which were kindly furnished me by Professor A. B. Cox, of the College of Law of Tulane University.

STATES WHERE THE DEATH PENALTY IS ABOLISHED (1925)

Name of State	Date of Abolition
Kansas ¹³	1907 ¹⁴
Maine	1876 ¹⁵
Michigan ¹³	1847
Minnesota	1911
North Dakota ¹⁶	1915
Rhode Island ¹⁶	1852
South Dakota	1915
Wisconsin	1853 ¹⁷

There are six states in which the death penalty, having once been abolished, was later restored. These states, with the dates of abolition and restoration, are given below. It is noteworthy that in each case the period of abolition was short.

STATES WHERE THE DEATH PENALTY WAS ABOLISHED AND LATER RESTORED¹⁸

Name of State	Date of Abolition	Date of Restoration
Arizona	1917	1919
Colorado	1897	1901
Iowa	1872	1878
Missouri	1917	1919
Oregon	1914	1920
Washington	1913	1919

In forty states, and in the Federal penal code, the penalty of death is still retained. The list of these states follows:

STATES WHERE THE DEATH PENALTY IS RETAINED (1925)

Alabama	Illinois	Nebraska	Pennsylvania
Arizona	Indiana	Nevada	South Carolina
Arkansas	Iowa	New Hampshire	Tennessee.
California	Kentucky	New Jersey	Texas
Colorado	Louisiana	New Mexico	Utah
Connecticut	Maryland	New York	Vermont
Delaware	Massachusetts	North Carolina	Virginia
Florida	Mississippi	Ohio	Washington
Georgia	Missouri	Oklahoma	West Virginia
Idaho	Montana	Oregon	Wyoming

¹³Treason is punishable by death. It is believed that there have never been any executions for this offense in these states, however.

¹⁴The penalty of death in Kansas was abolished in fact in 1872; but the law making executions illegal was not passed until 1907. See *supra*, page 237.

¹⁵In 1882 the death penalty was re-established in Maine, but abolished again in 1887.

¹⁶If a person is convicted of a murder committed while he is serving a life sentence, he is punishable by death. There has been no execution under this law.

¹⁷Prior to 1849 the most extreme punishment for any crime in Wisconsin was life imprisonment. In 1849 a law was passed prescribing death for first degree murder. This was repealed in 1853. There were only three executions under the statute.

¹⁸Tennessee is not included, because although it once abolished the death penalty for murder, it has never been abolished for rape. Maine is likewise excluded, for although this state once abolished the death penalty and later restored it, it was again abolished at a later date, and is not in use today.

STATUS OF THE DEATH PENALTY IN THE UNITED STATES
October 1, 1925

States	Crimes punishable by death	Discretion as to penalty given to jury or judge	Method of execution
Alabama	Murder in first degree; rape; carnal knowledge of a girl under 12; or of a girl or woman over 14 by administering drug, etc.; carnal knowledge of married woman by impersonating the husband; treason; robbery; arson in first degree; train wrecking.	To jury; except where a life prisoner is convicted of murder, in which case the death penalty must be imposed.	Hanging.
Arizona	Murder in first degree; assault with deadly weapon by a convict serving a life sentence; train wrecking; treason.	To jury.	Hanging.
Arkansas	Murder in first degree; rape; treason.	To jury.	Electrocution.
California	Murder in first degree; treason; securing conviction and execution of innocent person by perjury or suborning perjury.	To jury.	Electrocution.
Colorado	Murder in first degree.	None.	Hanging.
Connecticut	Murder in first degree.	None.	Hanging.
Delaware	Murder in first degree; breaking and entering at night with intent to commit murder, rape or arson in first degree; kidnapping child under 15 with intent to conceal it from its parents.	To judge, in case the jury recommends mercy.	Hanging.
Florida	Murder in first degree; rape; treason.	To jury.	Electrocution.
Georgia	Murder in first degree; rape; treason; arson if death results; train wrecking if death results.	To jury; or if evidence is circumstantial, to judge.	Electrocution.
Idaho	Murder in first degree.	To jury.	Hanging.
Illinois	Murder; treason; kidnapping for ransom.	To jury, except for treason.	Hanging.
Indiana	Murder in first degree; treason.	To jury.	Electrocution.
Iowa	Murder in first degree.	To jury.	Hanging.
Kansas	Treason.	To jury.	Electrocution.
Kentucky	Murder in first degree; rape.	To jury.	Hanging.
Louisiana	Murder; murderous assault; administering poison; dueling to the death; rape; treason; kidnapping a child; breaking and entering a dwelling at night while armed, or being an accessory thereto; arson of any inhabited structure or vessel.	To jury, in case of murder, electrocution; for rape, hanging.	Hanging.
Maine	None.	To jury.	Hanging.
Maryland	Murder in first degree; rape; treason.	To either.	Hanging.
Massachusetts	Murder in first degree; petit treason.	None.	Electrocution.
Michigan	Treason.	None.	Hanging.
Minnesota	None.	To jury, in cases of murder and certain cases of rape; none as to other offenses.	Hanging.
Mississippi	Murder; rape; treason; arson of inhabited dwelling at night.	To jury, in cases of murder and certain cases of rape; none as to other offenses.	Hanging.

States	Crimes punishable by death	Discretion as to penalty given to jury or judge	Method of execution
Missouri	.....Murder in first degree; rape; treason; train robbery; murder resulting from attempted arson, assault or burglary; train wrecking.	To either.	Hanging.
Montana	.....Murder in first degree; treason; procuring conviction and execution of innocent person by perjury or suborning perjury.	To either, in case of murder; none as to the other offenses.	Hanging.
Nebraska	.....Murder in first degree.	To jury.	Electrocution.
Nevada	.....Murder in first degree; rape; train robbery; train wrecking resulting in death; treason.	To jury.	Asphyxiation.
New Hampshire	.....Murder in first degree.	To jury.	Hanging.
New Jersey	.....Murder in first degree; treason.	To jury.	Electrocution.
New Mexico	.....Murder in first degree; arson or train wrecking resulting in death; train robbery.	None as to murder; to judge for other offenses.	Hanging.
New York	.....Murder in first degree; treason.	None.	Electrocution.
North Carolina	.....Murder in first degree; rape; arson in first degree; burglary in first degree.	None.	Electrocution.
North Dakota	.....Murder in first degree by a person serving a sentence of life imprisonment.	None.	Hanging.
Ohio	.....Murder in first degree.	To jury.	Electrocution.
Oklahoma	.....Murder in first degree; rape in first degree; robbery with firearms.	To jury.	Electrocution.
Oregon	.....Murder in first degree; treason.	To jury.	Hanging.
Pennsylvania	.....Murder in first degree.	To jury.	Electrocution.
Rhode Island	.....Murder by a person serving a sentence of life imprisonment.	None.	Hanging.
South Carolina	.....Murder in first degree; rape; assault with intent to ravish; arson of a dwelling house.	To jury.	Electrocution.
South Dakota	.....None.	To jury.	Electrocution.
Tennessee	.....Murder in first degree; rape; treason; train wrecking.	To jury.	Electrocution.
Texas	.....Murder; rape; treason; highway robbery with use of firearms.	To judge, if jury recommends.	Condemned, has choice of hanging or shooting.
Utah	.....Murder in first degree.	None.	Electrocution.
Vermont	.....Murder in first degree; treason.	To jury.	Electrocution.
Virginia	.....Murder in first degree; rape; attempted rape; treason; highway robbery with violence and use of firearms; kidnapping for ransom.	To jury.	Electrocution.
Washington	.....Murder in first degree; treason.	To jury, in case of murder; none as to treason.	Hanging.
West Virginia	.....Murder in first degree; rape; treason.	To jury.	Hanging.
Wisconsin	.....None.	To jury.	Hanging.
Wyoming	.....Murder in first degree; arson resulting in death; train wrecking.	To jury.	Hanging.
Federal Penal Code	.....Murder in first degree; rape; treason.	To jury, for murder and rape; to judge for treason.	Hanging.

From the detailed summary presented in the table on pages 241 to 242, it appears that of these forty states, there are seven in which the death sentence *must* be imposed by the court upon persons convicted of murder or certain other crimes. In the other thirty-three states, and in the federal jurisdiction, discretion is allowed to the jury or the court as to whether the penalty shall be death or a term of imprisonment.¹⁹

Of the forty states where capital punishment is retained, there are nine in which only one crime (murder in the first degree) is punishable by death, eight states where two crimes may be so dealt with, and twenty-four (including the Federal code) in which the supreme penalty may be applied to three offenses or more. A survey of the statutes indicates that there are, in general, three types of offenses which are regarded as so heinous as to justify punishment by death. These are crimes, deliberately committed, which involve the taking of human life, crimes against chastity, and the crime of treason. Thus in all of the forty states, premeditated murder (usually described as murder in the first degree) is punishable by death, and in a number of them such crimes as the arson of an inhabited dwelling, assault or the committing of robbery with the use of a deadly weapon, and the wrecking of a passenger train, are likewise subject to the extreme penalty, presumably because in the committing of them the taking of life is very likely to result. In eighteen states (and in the federal jurisdiction), rape is punishable by death, and in some of them certain other sexual offenses. The fact that all but one of these states (Nevada) is located in the southeastern part of the United States would indicate that capital punishment is still used for this offense because it is occasionally committed by Negroes upon white women, a crime which arouses most violent indignation on the part of the whites, and which they accordingly treat with severity. Although there are twenty-seven states in which treason is listed on the statutes as a capital offense, this provision is practically inoperative, since it is a crime that seldom occurs, and executions for it in the history of this country have been extremely rare. The offenses listed as punishable by death in the several states are in some cases misleading, and make the law seem much more severe relative to that of other states than it really is. This is due to the fact that in one state a number of acts may be listed as separate crimes which in another would be listed under one general head. For example, in Georgia both arson resulting in death and train-wrecking

¹⁹In the case of murder the law usually prescribes that the penalty must be life imprisonment if the death penalty is not imposed.

resulting in death are listed as capital crimes, in addition to murder in the first degree. In many other states, however, first degree murder would be so defined as to include both the offenses named. Likewise, it is probable that some of the sexual offenses listed separately as capital crimes by Alabama would technically be construed as rape in other jurisdictions, and might be in fact punishable by death the same as in Alabama. Moreover, regardless of the crimes which *may* be punished by death in the various jurisdictions, the fact is that the use of capital punishment in the United States at the present time is confined almost exclusively to premeditated murder, and executions for other offenses are relatively rare. This fact is clearly shown by the statistics of persons committed to prisons under sentence of death in this country during the year 1904, as compiled by the Census Bureau. The figures are as follows:²⁰

Committed under sentence of death for:	
Homicide	99
Assaults	4
Rape	2
Other offenses	1
	106
All crimes combined.....	106

Homicide here undoubtedly refers to premeditated murders or those which technically constitute murder in the first degree, as distinguished from lesser degrees of murder or manslaughter; for the latter crimes are not punishable by death. In other words, 99 out of a total of 106 death sentences (or 93%) were for the crime of murder. It may accurately be said, therefore, that in recent years the use of the death penalty in the United States has been reduced to the most grave offenses, usually those involving jeopardy of life or chastity, and particularly murder. Not only this, but it can be shown that the limitations placed upon it in those states where it is still retained have so restricted its use, that save in a mere handful of states it is seldom resorted to at all.

The history and present status of the death penalty in the United States, which has just been outlined, points definitely to the conclusion that the trend of evolution, except for a temporary period of reaction during and following the World War, is toward the gradual abandonment of capital punishment. Step by step, the putting to death of criminals has been surrounded with modifications and limitations until but a vestige of it remains. The number of capital crimes has been gradually reduced and the methods of execution have been made

²⁰U. S. Bureau of the Census, "Prisoners and Juvenile Delinquents in the United States," 1904. Figures for later years have not been published.

less cruel. Executions formerly performed in public as a horrible example to would-be malefactors are now carried out quietly and in private. Juries or judges have been given the power to substitute lesser penalties for death in most of the states. Finally, eight of the commonwealths have seen fit to abolish altogether the last remnants and substitute for it the more humane punishment of life imprisonment. As a result of all these measures, the number of persons whose lives are annually sacrificed in the name of legal justice is being steadily reduced. It is hardly to be doubted that this evolution will go on. Reactions such as that through which we have recently passed will recur from time to time; but the trend of opinion among criminologists accords with the growth of humanitarianism among the public at large, and these combined influences are slowly having their way over all opposition. There is reason to believe that in the course of the present century the use of the death penalty will finally pass away.