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IN DEFENSE OF CAPITAL PUNISHMENT

INTRODUCTION

In many debates concerning capital punishment, the crimes for which it is given are entirely overlooked and the plight of the one convicted is generally stressed. This is unfortunate since a true evaluation of capital punishment cannot be made unless it is considered in the light of the crimes for which it has been given as the penalty. In the following three cases the defendant received the death penalty:

1. The defendant had raped and murdered his victim and afterwards attempted to have intercourse with her body.

2. The defendant unnaturally assaulted two young boys and then abandoned them in a bay.

3. The defendant raped the mother, killed her husband and one small child and left two other children for dead.¹

These are illustrative of the type of crimes for which the death penalty is given—crimes which shock the public and offend all sense of morality. Generally speaking, a capital crime must be of this nature for the death penalty to be given, as is evidenced by the fact that a defendant accused of a capital crime has merely one chance in a hundred of being given the death penalty.² This fact prompted a British writer to compare an execution in the United States to "an act of God."³

No one will question the proposition that laws should only be changed when society as a whole will benefit from such change. A necessary corollary to this proposition is that the status quo should, and rightfully so, assume the defensive. The burden of proving that a change is warranted should fall on the shoulders of those who would advocate the change. Nowhere in the law has the foregoing proposition been proven more conclusively than in the area of capital punishment. The proponents of the abolition of capital punishment have produced a vast amount of literature in support of their recommended change, while its defenders have remained relatively silent. For this reason it may seem to the casual reader in this field that the arguments in favor of the abolition of capital punishment are given more authoritative support than the opposing arguments, but it must

¹ Gerstein, *A Prosecutor Looks at Capital Punishment*, 51 J. Crim. L., C. & P.S. 252, 254 (1961).

² A.B.A. Proceedings, Section of Criminal Law 6 (1959).

³ Duff, *A New Handbook on Hanging* 50 (1954).

be remembered that far more material is available to support the side of the opponents.⁴

The abolitionists put forth many arguments in support of their position, but there are only thirteen which appear repeatedly and are therefore deemed by the author to be basic premises. Of these, five are basically sound and require a careful analysis; the remaining eight are considered by the author to be basically unsound and therefore very easily rebutted. As the title implies, the scope of this article will be limited to a rebuttal of each of the abolitionists' contentions.

ARGUMENTS, BASICALLY SOUND

Deterrence

Advocates of the abolition of capital punishment usually present as their first argument the proposition that, "the evidence clearly shows that execution does not act as a deterrent to capital crimes."⁵

First, they argue that the death penalty, in some isolated instances, actually encourages capital crimes. As a basis for this contention, it is said that psychologists suggest that the death wish is a factor in the human mind as equally dominant as the instinct for self-preservation.⁶ However, Dr. Melitta Schmideberg⁷ has recently made the following statement in rebuttal:

The assumption that offenders break the law because of an unconscious wish for punishment seems to me unsubstantiated and too general an explanation. It would, however, even if correct, be no argument to abolish punishment or even to avoid it in the individual offender. Punishment may or may not deter. If there is efficient law enforcement and a belief in justice, mostly it does.⁸

Also, it would seem to be impossible for those who advocate abolition to argue that the instinct for self-preservation is not a very real factor in the minds of many potential felons. Cases can be produced where a robber carried no weapon so that he would not be tempted to

⁴ Koestler, *Reflections on Hanging 165* (1957).

⁵ Bennett, *A Historic Move: Delaware Abolishes Capital Punishment*, 44 A.B.A.J. 1053 (1958).

⁶ Weihofen, *The Urge to Punish 154* (1956).

⁷ Dr. Schmideberg is Director of Clinical Services for the Association for the Psychiatric Treatment of Offenders (APTO), New York, and Medical Advisor for the Board of Corrections of New York City. Dr. Schmideberg is also co-editor of the *APTO Journal*, a member of the International Board of Editors of *Excerpta Criminologica*, and Associate Editor of *Archives of Criminal Psychodynamics*.

⁸ Schmideberg, *The Offenders Attitude Toward Punishment*, 51 J. Crim. L., C. & P.S. 328, 334 (1961).

use it in making his escape; where a criminal has submitted to arrest rather than resist with a weapon; or where a criminal has moved to an abolition state in order to carry out a capital crime.⁹ In all three cases the offenders admitted that it was fear of the death penalty which caused their actions. To say that there are at least as many cases of this nature as there are cases in which the offender's motive in killing was the "death wish" would almost certainly be an understatement.

Secondly, they argue that when the crime committed is a capital offense other than killing, such as rape or kidnapping, the threat of death may actually encourage murder.¹⁰ The theory is that after a man has committed a crime of this nature he is more likely to cover his trail by murdering his victim, since, if caught, he is already subject to the death penalty.

Although this theory undoubtedly has some merit, it is more than merely offset by the converse proposition. If capital punishment were abolished, a criminal caught in the act of committing any crime punishable by a life sentence would not hesitate to kill in order to escape since he has already subjected himself to life imprisonment, which would also be the penalty for murder.

Thirdly, it is argued that statistics which compare capital punishment.¹¹ The statistics show that the states which retain the penalty have no lower incidence of capital crimes and, in fact, the incidence is sometimes higher.

However, it should be emphasized that criminologists and sociologists agree that statistics are an unsatisfactory indication of the deterrent effect of the death penalty because murder is a complex sociological problem, as well as a crime, and contributing factors such as race, heredity, regional lines, standards of housing and education, are intangibles, the value of which is difficult to assess.¹²

Moreover, an exhaustive study of the problem was made in England by the Royal Commission on Capital Punishment and it concluded that *although capital punishment has some deterrent effect* and that no punishment at all would not be feasible, the relation between the homicide rate and the death penalty cannot be discerned.¹³ This admission by one of the strong proponents for the abolition of capital punishment that it has some deterrent effect would indicate the weakness of the statistical argument. It should

⁹ Gerstein, *supra* note 1, at 252.

¹⁰ Wechsler, *Big Debate on Capital Punishment*, Life, May 19, 1960, p. 42.

¹¹ Reichert, *Capital Punishment Reconsidered*, 47 Ky. L.J. 397, 400 (1958).

¹² Gerstein, *supra* note 1, at 252.

¹³ Royal Commission on Capital Punishment Report 24 (1953).

also be noted that the statistics "for the most part have been assembled by those who would abolish the death penalty; their object has been to disprove the deterrent value claimed for that punishment."¹⁴

Furthermore, the statistics cannot tell us how many potential criminals the death penalty has deterred from the commission of a capital offense. Judge Hyman Barshay of New York gave an excellent illustration of this when he stated:

The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about the shipwrecks but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down.¹⁵

It might be said that, as far as the statistics go, there is a "lack of evidence that it [capital punishment] is more of a deterrent than any other forms of punishment,"¹⁶ but there is a greater lack of evidence that it is not.

Conviction of the Innocent

The second argument is the proposition that "convictions of the innocent do occur and death makes a miscarriage of justice irrevocable. Human judgment cannot be infallible."¹⁷ This contention is based upon a fear that three unrelated factors may have a profound and disastrous effect on the outcome of any given trial. First, abolitionists stress the fallibility of a single jury and overlook the fact that it is made up of twelve reasonable men who understand fully the magnitude of their responsibilities. Secondly, they assert the possibility of an inflamed atmosphere in which the trial might take place, but fail to mention the fact that venue provisions allow for a removal of a trial to a new jurisdiction if an "inflamed atmosphere" would render a fair trial impossible at the place where the action was originally brought. Thirdly, they indicate that the disposition of a single judge may have a great effect on the outcome of the case, but forget that a judge, although unquestionably plagued by human emotions, will make a real and determined effort on the bench to be completely objective and unswayed by social, economic or political pressures. Furthermore, assuming that an innocent man is convicted at the trial level, an appeal may be taken and in the calm, impartial

¹⁴ *Id.* at 22.

¹⁵ Barshay, *Capital Punishment: Pro and Con*, 71 Senior Scholastic 6 (Sept. 20, 1957).

¹⁶ Weihofen, *supra* note 6.

¹⁷ Bennett, *supra* note 5.

atmosphere surrounding an appellate court he may have the conviction set aside and a judgment of acquittal entered. Also, the appellate court may grant a new trial, or reduce the capital charge to a lesser offense if the jury could have so found on the evidence. The jurors, the attorneys and the judges do not take their roles lightly in a trial involving a capital offense, and therefore no man whose life is at stake is given a superficial trial. Bearing this in mind, there is little chance of an innocent man being sentenced to death. As Judge Learned Hand once said, "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream."¹⁸

Two leading writers on conviction of the innocent¹⁹ cite forty and sixty cases, respectively, but not all were capital cases. Considering all the cases which have been decided, these represent a minute percentage. All things considered, "the possibilities that the wrong man may be executed . . . is not of overriding importance."²⁰

Another factor to consider is that if a convicted murderer should not be convicted because of the fallibility of human nature, then that same fallibility will be ever present and may afford an opportunity for his escape leaving more victims in his wake.

Convictions of the Mentally Disturbed and Impulsive Criminals

The third major argument involves the proposition that "serious offenses are committed, except in rare instances by those suffering from mental disturbances; are impulsive in nature, and are not acts of the criminal class."²¹ This premise consists of three distinct allegations which will be considered in the order in which they are set forth in the argument.

First, the argument that "serious offenses are committed, except in rare instances, by those suffering from mental disturbances" will be considered. The only reference found illustrative of what is meant by "mental disturbances" as used by the proponents of this theory, was found in an argument in support thereof, as follows: "The committee stated that about one murder out of seven is committed by a person *who is so deteriorated mentally as to have no conception of the consequences.*" [Emphasis added.]²² A person who is so deteriorated mentally as to have no conception of the conse-

¹⁸ Mayers, *Shall We Amend the Fifth Amendment?* 37 (1959).

¹⁹ Borchard, *Convicting the Innocent* (1932); Frank, *Not Guilty* (1957).

²⁰ Davitt, *The Elements of Law* 221 (1959).

²¹ Bennett, *supra* note 5.

²² Goetz, *Should Ohio Abolish Capital Punishment*, 10 *Clev.-Mar. L. Rev.* 365 (1961).

quences would clearly be legally insane under either of the best known and most widely accepted definitions of criminal insanity.²³ A person who had no conception of the consequences of his act would not know right from wrong,²⁴ or the jury could easily find that the "actions were the product of a mental disease or defect."²⁵

Therefore, this argument is an attack upon the efficiency of our judicial system in rendering justice, not a valid argument against capital punishment. This is true because every state in the union and virtually all civilized nations of the world provide that insanity is a complete defense to an offense punishable by death. If an accused is so mentally defective as to be determined legally insane he will be incarcerated in a mental institution or the penitentiary and will not be given the death penalty. The required mental defectiveness, of course, is a question of degree to be determined by the court and a jury of his peers.

Secondly, we will consider the proposition that many serious offenses are impulsive in nature. That is true, but that the law has, in certain circumstances, recognized this, is illustrated by the fact that killings done in "heat of passion" and in "sudden affray" will not be considered as first degree.²⁶ These are mitigating circumstances, and rightly so, but are all impulsive killings something less than murder? Killings in street brawls and over poker tables may very well be impulsive, but they are nonetheless murder. In a civilized society, men so dangerous that they kill when they lose their tempers should be executed for the safety of other people. It should be noted at this point that when reference is made in this article to "other people" (as above) or to "society" the terms include prison personnel and inmates who would be in daily contact with the "impulsive" or "mentally disturbed" inmate who is given a life sentence. Will this person, convicted of a capital crime, be any less impulsive or mentally disturbed behind the prison walls? Will his associates therein be able to avoid any conflict with him? The answer is negative.²⁷ A prison guard or inmate is not any less a part of society or any less entitled to the protection it affords because of his position than the public in general.

²³ M'Naghten Case, 10 C. and F. 200, 8 Eng. Rep., 718 (1843); *Durham v. United States*, 94 App. D.C. 228, 214 F.2d 862 (D.C. Cir. 1954).

²⁴ M'Naghten Rule: If the defendant did not know the nature of his act or that it was wrong, he will be declared insane.

²⁵ Durham Rule: One accused is not criminally responsible if his unlawful act was the product of a mental disease or defect.

²⁶ *Cottrell v. Commonwealth*, 271 Ky. 52, 111 S.W.2d 445 (1937); *Beach v. Commonwealth*, 240 Ky. 763, 43 S.W.2d 6 (1931).

²⁷ *Sellin, Capital Punishment*, 25 Fed. Prob. 7 (1961).

The third portion of this argument alleges that "capital crimes, except in rare instances . . . are not acts of the criminal class." The abolitionists include in the category of persons outside of the "criminal class" those who are pathological personalities, those who act in a fit of passion and those whose act is premeditated but caused by "the culmination of embitterment and frustration in the generation of which the victim played a part."²⁸ They argue that these are *good* citizens who have unfortunately done one bad thing and that they should not be considered in the same light as hardened criminals, especially racketeers, who are the real threats to society. Is the victim of one who kills in a fit of passion any less dead than the victim of a "hardened criminal"? It is the author's contention that a second similar crime will be easier for each type. The abolitionists are emphatic in their denunciation of the death penalty for those outside the criminal class, but they imply that capital punishment for the professionals (hardened criminals) would be or at least might be a good thing.²⁹ It may be concluded from this that their attack is not upon the penalty as such, but upon its general application to both impulsive and professional criminals.

Unequal Application of the Law

The fourth argument put forth is that "unequal application of the law takes place because those executed are the poor, the ignorant, and the unfortunate without resources."³⁰ This is another argument that is concerned with the integrity of our judicial system and not the punishment it renders. This is clarified by the fact that nowhere in the vast amount of material produced which expounds upon this argument is there any allegation that the "poor," "ignorant," and "unfortunate" were not guilty as charged, but only that others (wealthy and influential) who were charged with similar crimes were given a sentence less than death. Their argument seems to be that if our judicial system is incapable of rendering uniform punishment then the death sentence should be abolished. It seems to the writer that although this is a weak argument against capital punishment (those executed were unquestionably guilty), it is a strong indictment against not only our judiciary, but the public as a whole for acquiescing in its continued existence. However, in recent years steps have been taken to remedy this condition. The "poor" and the

²⁸ Snyder, *Capital Punishment: The Moral Issue*, 63 W. Va. L. Rev. 99, 115 (1961).

²⁹ *Ibid.*

³⁰ Bennett, *supra* note 5.

"unfortunate" without resources are appointed counsel by the court,³¹ which counsel invariably do very commendable jobs in their defenses. Although the appointed counsel is not at present adequately reimbursed for his efforts, his belief in justice and knowledge that reputations are enhanced by participating in this type of case, prompt him to more than merely adequately represent the accused for which he is appointed. The "ignorant" are now notified before questioning of their right to counsel and of the fact that they are not required to answer until counsel is present.³² This right to appointed counsel at all stages of the case would seem to absolve both the judiciary and the public of the charge that only the "poor," "ignorant" and "unfortunate" are executed. These people are now entitled to and get the same protection before, during and after the trial that is available to the more fortunate accused. When adequately represented, the poor and the wealthy stand on equal footing in the eyes of the jury.

Life Sentence Alternative

The proponents of abolition contend that "society is amply protected by a sentence of life imprisonment."³³ In order for the abolitionists to sustain this proposition, they must show that prison guards and inmates are not a part of the society which they allege is amply protected. As was stated earlier in this article, it is the author's firm belief that prison personnel and inmates cannot be excluded from the term "society" simply because they are confined within prison walls. Surely the proponents do not contemplate solitary confinement in their definition of life imprisonment since this would almost universally be considered a fate worse than death. It will be assumed that the proponents of abolition concede that prison personnel and inmates are a definite part of society, since a contrary assertion by them would appear to be untenable. Since the prison personnel and inmates will be in daily contact with the person convicted of a serious crime and given the maximum penalty, a life sentence, how can the abolitionists contend that this portion of society is amply protected? As long as there exists the possibility of a cold blooded killing within the walls and the possibility of escape (due to the fallibility of human nature), there would seem to exist a very real danger to society. It is impossible to argue the fact that, given the opportunity, a convict serving a life sentence will attempt to escape,

³¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³² *Escobedo v. Illinois*, 378 U.S. 478 (1964).

³³ Bennett, *supra* note 5.

and, if capital punishment be abolished, he will unhesitatingly kill anyone, whether guard or innocent bystander, whom he believes may stand in his path. Who would contend that this is not true? Should the convict make good his escape then society as a whole is again confronted with this menace, and, having been exposed to the true nature of his sentence, it is at least doubtful that he would allow himself to be taken again without bloodshed.

The author admits that killings within prison walls and escapes therefrom are infrequent, but they do occur. Therefore, the life sentence alternative is not perfect security against the commission of other crimes.³⁴ If one innocent life is lost society is not amply protected.

ARGUMENTS BASICALLY UNSOUND

State Sets a Bad Example

The proponents of abolition argue that "the state sets a bad example when it takes a life. Imitative crimes and murder are stimulated by execution."³⁵ In defense of the first contention, "Governor Disalle, in his special message, said that one of the obligations of society is to establish a civilization that takes into consideration the example that people must set."³⁶ This is true, but an even more important and fundamental obligation of society is to protect its members and to punish and restrain offenders. Capital punishment is not murder, as the opponents of capital punishment would have us believe, but society's method of self-protection. The fear of execution is society's major psychological weapon in its attempt to minimize capital crime. "Enlightened and civilized countries ever since the Greeks have tried to develop a social or religious ideology that supplants the fear of law, but it would be unrealistic to assume that ideals could ever supplant it."³⁷ The argument illustrated by Governor Disalle's statement is based on ideology and is undoubtedly true but there are two reasons why it is untenable. First, our society has not reached that stage of civilization which can maintain justice and order without the fear of punishment. Secondly, if capital punishment is considered in its true light, that is as a means of self-protection of society, the state does not set a bad example when it is forced to carry out its duty. The self-protection concept will be considered

³⁴ Gerstein, *supra* note 1, at 255.

³⁵ Bennett, *supra* note 5.

³⁶ Goetz, *supra* note 22, at 373.

³⁷ Schmideberg, *supra* note 8, at 329.

in greater detail later in this article under the heading of "legal murder."

Abolitionists also urge that imitative crimes and murder are stimulated by execution, but the author has found nothing to substantiate this contention. Assuming, but by no means conceding, that this has been one of the motivating factors in the minds of a few criminals, it would be improbable that the abolitionists would contend that this thought was the sole or driving force which motivated them. On the other hand, what effect would the abolition of capital punishment have upon the philosophy of our potential criminals? Richard M. Gerstein stated his answer to this question as follows:

Many of them might very well look upon the criminal code, including that part of it forbidding murder, as a mere convention of society which advanced thinking and progressive social theories permit them to set aside as a matter of no consequence. This theory leads to the belief that each is a law unto himself; that each may choose the laws which he will obey, and that he may violate the rest. This type of thinking would eventually lead us into virtual anarchy.³⁸

This argument seems to the writer to be basically more sound than the contention put forth by the advocates of abolition.

Execution is Useless and Demoralizing

Next, the abolitionists argue that "legally taking a life is useless and demoralizing to the general public."³⁹ The proponents of this argument inevitably base it upon a vivid description of the gruesome scene in the death chamber, the nauseating atmosphere and the expression on the dying man's face; they tend to forget the victim of his act, the suffering of his family and widespread fear created in the community. Was his execution more demoralizing to the general public than was his crime?

The following excerpt from the report of the Royal Commission on Capital Punishment indicates a very different viewpoint of the general public:

Moreover, we think it must be recognized that there is a strong and widespread demand for retribution in the sense of reprobation—not always unmixed in the proper mind with that of atonement and expiation. As Lord Denning put it: the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else . . . the ultimate justification of any punishment is not that it is a

³⁸ Gerstein, *supra* note 1, at 253.

³⁹ Bennett, *supra* note 5.

deterrent but that it is the emphatic denunciation by the community of a crime; and from this point of view there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.⁴⁰

It is the author's contention that any one individual's conception of the feeling of the general public pertaining to any social phenomenon is based primarily upon his own feelings on the subject. Therefore, the author accords very little weight to this proposition put forth by the abolitionists.

Sensationalism

The abolitionists staunchly maintain that "a trial where a life may be at stake is highly sensationalized, adversely affects the administration of justice, and is bad for the community."⁴¹ Deplorable though this may be, it is undoubtedly true. But, are not hotly contested divorce cases, trials involving morals charges and bastardly proceedings also highly sensationalized and therefore just as deplorable? All of these cases occasion sensationalism on the part of the free press and its more prurient customers; and theatrics in the courtroom are not limited to cases involving capital crimes. Therefore it could be logically said that it is the offense for which the accused is being tried which causes the publicity and sensationalism, not the punishment which he may face if convicted. Bearing this in mind, it seems that this argument, although admittedly true, is due very little consideration in an evaluation of the abolitionists' platform.

Cruelty

The abolitionists argue that capital punishment by any method is "cruel both to the persons upon whom it is inflicted and to their families."⁴² Although "it cannot be said to violate the constitutional concept of cruelty,"⁴³ it is definitely a harsh punishment. Since all punishment is harsh, the real question is whether capital punishment is any more harsh than its alternative, life imprisonment. This question has been the subject of considerable debate and conjecture, with no clearly defined conclusion found on either side by the author.

It would seem that the most authoritative statements as to the relative cruelty of the two punishments would have to come from those who have had to suffer under the impending reality of each.

⁴⁰ Quoted in Gerstein, *supra* note 1, at 254.

⁴¹ Bennett, *supra* note 5.

⁴² Snyder, *supra* note 28, at 102.

⁴³ Trop v. Dulles, 356 U.S. 86, 99 (1958).

Leopold stated after thirty years of imprisonment that he still believed that prompt death would have caused him and his family less suffering.⁴⁴ Chessman said that, if the only alternative were life imprisonment, he would take the gas chamber.⁴⁵ Both of these men had reason to consider both punishments and their thoughts were substantially similar. It is not difficult to understand how, or why, a man would prefer instant death to life imprisonment, which has been defined as death by inches. This, admittedly, is not a sufficient basis to conclude that the death penalty is less cruel than life imprisonment, but it would indicate that the difference in degree of cruelty, if any, must be measured in light of the particular individual who is facing the punishment. This is an area worthy of debate but any conclusion drawn by one who has made it while seated securely behind his desk, far removed from the nearest prison cell or electric chair, would be deemed by the author to be due very little weight in an argument either for or against capital punishment.

Religion

A few abolitionists contend that "capital punishment has no place in our society simply because it is purely a matter of vengeance not to be satisfied within our Judeo-Christian morality."⁴⁶ It is the author's contention that any arguments based upon religion could, and usually do, continue ad infinitum with neither side gaining any noticeable headway. For this reason this argument will not be granted much space in this article. Of necessity, an argument in this vein will include numerous quotes from scripture. Therefore, the author feels justified in using two of his own; First, "he that striketh a man with a will to kill him, shall be put to death,"⁴⁷ and secondly, "the ancients shall deliver him into the hand of the kinsman of him whose blood was shed and he shall die. Thou shall not pity him."⁴⁸

These abolitionists also argue that the state is "playing God" in taking a life. Richard H. Rovere answered this argument as follows:

Man must play God, for he has certain God like powers, among them a considerable degree of mastery over life and death, and he cannot avoid their exercise. Science has put into our hands—and politics has required us to grasp firmly—instruments which force a human judgment on whether or not the entire race is to be executed; even in benign employment, these instruments can affect the very image of man

⁴⁴ Saturday Evening Post, April 23, 1955, p. 138.

⁴⁵ Life, Feb. 22, 1960, p. 32.

⁴⁶ Hagarty, *Capital Punishment Should Be Retained*, 3 Can. B.J. 42, 47 (1960).

⁴⁷ Exodus 21:12 (King James).

⁴⁸ Deuteronomy 19:12-13 (King James).

many millenia hence, and for that matter, the duration of all life. In a less awesome—but an awesome enough—way, modern science has been usurping prerogatives once held to be God's alone. It has learned to cheat death not merely by the prolongation of life but by calling men back to life after several hours on the other shore. The judge who orders an execution is no more guilty of playing God than the doctor who, having decided that a human being has been summoned to eternity too soon, restores him to the world of time and suffering and sin.⁴⁹

Any argument by the abolitionists based upon religion cannot be given great weight because of the nebulous nature of the foundation on which it rests.

Expediency

The next basic premise of the abolitionists is the proposition that "when the death sentence is removed as a possible punishment, more convictions are possible with fewer delays."⁵⁰ This argument seems to be based primarily upon expediency. While the means of achieving justice should be as simple, direct and unencumbered as possible, should the end be sacrificed to expedite the means? This would seem to be their basic contention, and, if so, it falls of its own weight. Before they can make a sound argument in this vein, they must first prove that the end (capital punishment) as such, is not such a legally justifiable end as would offset the fact that convictions are very difficult to obtain (and are almost always appealed) and are often subject to many delays. This they have not shown.

Rehabilitation

The proponents of abolition argue that the theory of rehabilitation is inconsistent with the death penalty.⁵¹ However, it should be remembered that rehabilitation is only an enjoyable by-product, and is by no means the sole goal of punishment.⁵² The fact that a life sentence is the generally recognized alternative to the death penalty is prima facie proof that protection and not rehabilitation is the desired aim of punishment.

Admittedly, the theory of rehabilitation is and should be one of society's major weapons in asserting its self-defense, but it would be a "vain and dangerous boast to say that modern science can cure anybody with understanding," including the most cold-blooded killer.⁵³ Safeguarding society should unquestionably "not assume so all-important a role that we ride roughshod over the legitimate interests

⁴⁹ Rovere, *Review of Reflections on Hanging*, The New Yorker, Sept. 14, 1957, p. 164.

⁵⁰ Bennett, *supra* note 5.

⁵¹ Snyder, *supra* note 28, at 110.

⁵² Gerstein, *supra* note 1, at 255.

⁵³ Hagarty, *supra* note 46, at 45.

of the individual, his right to fair and decent treatment and to have his life and liberty held inviolate against unjustified infringements by the state."⁵⁴ But, "the public safety must take precedence."⁵⁵ Therefore, in the few extreme cases where a death penalty is given, and a conflict thereby arises with the theory of rehabilitation, sound reasoning dictates that in the interest of public safety the death penalty must take precedence.

Legal Murder

Many abolitionists use the term "legal murder" as synonymous with capital punishment in presenting their case. The author contends that the use of this term because of its obvious implications, presents an argument in itself. "Legal murder" paints a picture of capital punishment in the mind of the laymen as being a brutal, cold-blooded killing by the state of a helpless victim of the state's wrath. This term is based solely on the emotional image it creates in the listener, is completely unfounded in fact or in theory, and is unworthy of employment by the conscientious proponent of abolition.

The fact that individuals have given up their right to private vengeance and turned it over to the state, with the state having taken over the right and duty to protect its members and to punish and restrain offenders, has always been regarded as a fundamental step in the formation of a society.⁵⁶ A state's right and duty of protecting its members is generally recognized as being one of its most important functions. This function of the state has been likened to an individual's right to self-defense.⁵⁷ Just as an individual has the right to protect himself from an aggressor, the state has the right, and also the duty, to protect its members from the danger presented by a corrupt member of the social body. "The slaying of an evil-doer is lawful," says St. Thomas Aquinas, "inasmuch as it is directed to the welfare of the whole community."⁵⁸

The state's right and duty to execute a member of its society has been said to be similar to that of a doctor who has the right and duty to amputate the gangrenous foot of a diabetic for the sake of the health of the entire body.⁵⁹ "Execution is a social remedy for a social disease."⁶⁰

⁵⁴ Guttmacher & Weihofen, *Psychiatry and the Law* 447 (1952).

⁵⁵ East, *Society and the Criminal* 268 (1951).

⁵⁶ Guttmacher, *The Psychiatric Approach to Crime and Correction*, 23 *Law & Contemp. Prob.* 632, 639-40 (1958).

⁵⁷ Snyder, *supra* note 28, at 108.

⁵⁸ Gerstein, *supra* note 1, at 255.

⁵⁹ Hagarty, *supra* note 46, at 44.

⁶⁰ *Ibid.*

It is clear that capital punishment is not "legal murder" and the use of the term is unfortunate because of the cloud it casts upon otherwise laudable arguments set forth by the proponents of abolition.

CONCLUSION

The proponents of the abolition of capital punishment have the burden of proving that such a change in judicial theory is warranted, and also that the recommended change will inure to the benefit of society as a whole. The foregoing thirteen arguments represent the basis of the abolitionists' case. Have the proponents of the abolition of capital punishment sustained their burden of proof? In presenting a concise rebuttal of each of the traditional arguments espoused by abolitionists and showing that this burden of proof has not been met, it is clear that the author's position is that capital punishment should be retained. However, the writer's primary intention in writing this article was to present the abolitionists' case in such a way as to inspire the reader to carefully evaluate the merits of the contentions set forth by the proponents of abolition, and make his own conclusion as to whether the burden of proof has been sustained.

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