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NOTE

JUSTICE OR REVENGE?

"You die alone—but watched. It's a ritualistic death, ugly and meaningless. They walk you into the green, eight-sided chamber and strap you down in one of its two straight-backed metal chairs. Then they leave, sealing the door behind them. The lethal gas is generated and swirls upward, hungrily seeking your lungs. You inhale the colorless, deadly fumes. The universe disintegrates soundlessly. Only for an awful moment do you float free. For a blackness that is thick and final swiftly engulfs you."¹

Those words were written by a man who is waiting for just such an end; a man who, for the past eight years, has been condemned to die in California's San Quentin prison for a crime he maintains he never committed. But the purpose of this note is not to plead the case of Caryl Chessman; rather, it is to inquire into the problem of capital punishment in general.

Present Status

At present in our country, the supreme penalty of death is exacted by forty two states, while six states forbid it.² Of the forty two "capital punishment" states, twenty four electrocute, nine hang and eight use lethal gas. One state, Utah, is magnanimous about the whole thing and gives the condemned

¹ CHESSMAN, TRIAL BY ORDEAL 3 (1955), reviewed in 60 DICK. L. REV. 100 (1955).

² In the following jurisdictions electrocution is used: ALA. CODE ANN. tit. 15, § 343 (1940); CONN. GEN. STAT. §§ 8351, 8816 (1949); FLA. STAT. ANN. §§ 782.04, 922.10 (1941); GA. CODE ANN. §§ 26-1005, 27-2512 (1935); ILL. STAT. ANN. c. 38, §§ 360, 749 (1935); IND. ANN. STAT. §§ 9-2236, 10-3401 (1942); KY. REV. STAT. §§ 431.220, 435.010 (1943); LA. REV. STAT. §§ 14.30, 15.569 (1950); MASS. ANN. LAWS c. 265, § 1, c. 279, § 46 (1933); MISS. CODE ANN. §§ 2217, 2550 (1942); NEB. REV. STAT. §§ 28-401, 29-2504 (1943); N. J. STAT. ANN. §§ 2:138-4, 2:193-1 (1939); N. M. STAT. ANN. §§ 40-24-10, 41-14-11 (1953); N. Y. PEN. LAWS § 1045 (1951); OHIO CODE ANN. §§ 12400, 13456-2 (1939); OKLA. STAT. ANN. tit. 21, § 707, tit. 22, § 1014 (1951); PA. STAT. ANN. tit. 18, § 4701, tit. 19, § 1121 (Purdon 1950); S.C. CODE §§ 55-373, 16-52 (1952); S.D. CODE §§ 13.20212, 34.37a 11 (1952); TENN. CODE ANN. § 10771 (Williams 1934); TEX. PEN. CODE art. 1257 (1936), TEX. CODE CRIM. PROC. art. 798 (1950); VT. REV. STAT. §§ 2518, 8242 (1947); VA. CODE ANN. §§ 18-31, 19-275 (1950); W. VA. CODE ANN. §§ 5917, 6249 (1949).

In the following jurisdictions hanging is used: ARK. STAT. § 41-2227 (1947); DEL. CODE ANN. tit. 11, §§ 571, 3909 (1953); IDAHO CODE ANN. §§ 18-4004, 19-2717 (1948); IOWA CODE ANN. §§ 690.2, 792.9 (1950); KAN. GEN. STAT. ANN. §§ 21-403, 62-2401 (1949); MD. ANN. CODE art. 27, §§ 500, 502 (1951); MONT. REV. CODES ANN. §§ 94-2505, 94-8016 (1947); N. H. REV. LAWS c. 455, § 4, c. 429, § 6 (1942); WASH. REV. CODE §§ 9.48.030, 10.70.090 (1951).

In the following jurisdictions lethal gas is used: ARIZ. CODE ANN. §§ 43-2903, 44-2315 (1939); CAL. PEN. CODE c. 1, §§ 190, 3604 (Deering 1949); COLO. REV. STAT. ANN. c. 48, §§ 30, 536 (1935); MO. REV. STAT. §§ 546.720, 559.030 (1949); NEV. COMP. LAWS §§ 10073, 11079 (1930); N.C. GEN. STAT. §§ 14-17, 15-187 (1944); ORE. COMP. LAWS ANN. §§ 23-411, 26-1249 (1940); WYO. COMP. STAT. ANN. §§ 9-201, 10-1706 (1945).

The following jurisdictions forbid capital punishment: ME. REV. STAT. ANN. c. 130, § 1 (1954); MICH. COMP. LAWS tit. 28, § 28.548 (1954); MINN. STAT. ANN. § 619.07 (1947); N.D. REV. CODE § 12-2708 (1943); R.I. GEN. LAWS c. 606, § 1 (1938); WIS. STAT. § 340.02 (1949).

Utah gives the election of hanging or shooting: UTAH CODE ANN. §§ 76-30.4, 77-36-16 (1953).

his choice of being hanged or shot. To date only one individual has elected the noose.

The offenses for which one can be executed vary greatly from state to state. A list of some, but by no means all of them, would include: murder, kidnapping, treason, rape, dueling, train wrecking, lynching, perjury in capital trials, dynamiting, armed robbery, arson, train robbery, burglary and castration.³

Capital Punishment as a Deterrent

Almost all writers on the subject agree that the reason advanced most often by the proponents of capital punishment is its deterrent effect.⁴ They argue that if society is aware that certain crimes are punishable by death, this knowledge will deter individuals from committing these crimes. In theory this sounds plausible. In reality, it just is not so. Murder, the crime usually associated with capital punishment, is generally committed by either the insane, the professional criminal, or persons in a state of great emotion such as hate, fear or jealousy.

An insane person has no fear of death. The professional criminal looks upon the death sentence as just another occupational hazard, something he must risk in practicing his profession. A person under great emotional strain is generally, at that time, indifferent to the consequences of his act.⁵

San Quentin's former warden, Clinton T. Duffy, is a man who has spent most of his life working in the field of penology. He has supervised the execution of nearly one hundred men. Of the deterrent effect of capital punishment, he says:⁶

"Capital punishment is a tragic failure and my heart fights it even as my hand gives the execution signal in the death house [In] one five year period, California Police arrested some two thousand men and women for murder but . . . only forty-six of them were finally put to death at San Quentin. I knew most of these condemned men, and I have officially executed many others since then, but *all of them said that the death penalty did not deter them, even momentarily from committing their crimes.*" (Emphasis added.)

If the death penalty had any deterrent effect on capital crimes, notably murder, it would follow that the number of murders per hundred thousand population in states which have the penalty would be lower than in those which do not. This, however, is not the case. In order to give a correct picture, any statistical comparison of homicide rates must be on the basis of regional groupings of contiguous states, where conditions of life and social-cultural attitudes are similar.⁷

³ McCafferty, BRIEF SURVEY OF CAPITAL PUNISHMENT IN THE UNITED STATES (unpublished thesis in Ohio State University Library 1952).

⁴ Sutherland, PRINCIPLES OF CRIMINOLOGY (1947).

⁵ See, THIS LIFE WE TAKE 3; for an excellent discussion of motivation of murderers by a man who, as physician at Sing Sing, came into close contact with those awaiting electrocution, see Squire, SING SING DOCTOR (1935).

⁶ Duffy, THE SAN QUENTIN STORY 80 (1950).

⁷ See, Vold, *Extent and Trend of Capital Crimes in the United States*, 284 ANNALS 1 (1952); and also 12 PRISON JOURNAL 7 (1932).

Table I

1954 Crime Rates⁸

Division and State	Homicide rate per 100,000 population	Division and State
1. New England	1.2	3. West North Central
Connecticut	1.4	Iowa
Maine*	2.4	Kansas
Massachusetts	1.1	Minnesota*
New Hampshire	.4	Missouri
Rhode Island*	.9	Nebraska
Vermont		North Dakota*
2. East North Central	4.1	South Dakota
Illinois	5.4	
Indiana	3.5	
Michigan*	4.3	* no capital punishment
Ohio	3.8	
Wisconsin*	1.1	

From Table I it is evident that the absence or presence of the death penalty has no appreciable effect on the homicide rate. In both the New England and East North Central regions, one "non capital" state is above the regional average and one is below, while in the West North Central area, both are below. Lest Table I be dismissed as being indicative of nothing because it shows only one year, it might be noteworthy to point out that a recent study concludes, on the basis of statistics gathered during an eighteen year period (1933-1951), that capital punishment has no effect on the amount of murder in any given state.⁹

The Criminal Psychopath

In the eyes of the law, a person is either in the "white" area of sanity, or the "black" area of insanity. The law makes no provision whatsoever for the innumerable shades of grey lying between these two extremes. For over a century, our courts have clung, like the drowning man to the proverbial straw, to the M'Naughton test, i.e. whether or not the accused, at the time of the crime, knew the difference between right and wrong. Psychiatry on the other hand has long since discarded this outmoded test of criminal responsibility. A

⁸ 25 UNIFORM CRIME REPORTS 93 (1954).

⁹ 284 ANNALS, *op. cit. supra* note 8, at 4. See also Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS *op. cit. supra* note 8, who says, on page 61, ". . . the death penalty has little if anything to do with the relative occurrence of murder".

leading psychiatrist¹⁰ has pointed out that the closest approach to the legal term "insanity" is the medical term "psychosis". Yet, a person suffering from a psychosis may or may not be insane. A person with a psychopathic personality, although not legally insane, may be nevertheless unable to control his behavior. Thus while in the eyes of medical science a person is technically insane, in the eyes of the law, this same person can be legally sane. Until our courts discard their outmoded test of insanity and approach the problem through modern methods of psychiatry, we will continue to fill our prisons and death houses with men who have no control over their actions.

Irrevocability of the Death Penalty

Nothing is so final as death. Once an innocent man has been executed it is too late to undo the wrong. Knowing this, juries are often hesitant in bringing in "guilty" verdicts. Elimination of the death penalty would end forever the chance of killing an innocent man and on the other hand, would result in more convictions. For anyone naive enough to think that innocent men have never been convicted, it is interesting to observe that of the four hundred and fifteen persons condemned to die in Sing Sing's electric chair during the thirty year period 1889 to 1927, thirty were acquitted on appeal.¹¹ One cannot but wonder how many innocent men who did not have the money (or friends, or family with money) to engage in the costly litigation of appeals, have been executed. Indeed, Warden Lawes says that of the one hundred and fifty men and one woman that he escorted into Sing Sing's death chamber, all were alike in at least one respect. They were all poor.¹²

International Trend

The trend abroad is definitely toward eliminating the death penalty, either by statute or allowing it to fall into disuse.¹³

¹⁰ THOMPSON, *THE PSYCHOPATHIC DELINQUENT AND CRIMINAL* (1953). See also, What About the Legally "Sane" Psychopath? Boston Sunday Herald, September 30, 1951.

"By California Law (Penal Code Sec. 1367) it is possible to be legally sane and medically insane at one and the same time." *THIS LIFE WE TAKE* (1955). An interesting discussion of mental responsibility can be found by reference to Ehrmann, *The Death Penalty and the Administration of Justice*, 12 *ANNALS* 81, 82 (1952).

¹¹ Sutherland, *op. cit. supra* note 4, at 571. For a discussion of executing the innocent, see Pollak, *The Errors of Justice*, 284 *ANNALS* 115 (1952).

¹² LAWES, *TWENTY THOUSAND YEARS IN SING SING* (1932); "Warden Lawes' statement as to the discriminatory aspect of capital punishment is borne out by statistics. The trend can be briefly summarized: the death penalty is in this country predominantly and disproportionately imposed upon Negroes, the poor and the less educated . . .", *THIS LIFE WE TAKE* (1955).

¹³ 163 *BULLETIN OF COUNCIL FOR SOCIAL SERVICE, CHURCH OF ENGLAND IN CANADA* 7 (1955); CALVERT, *THE CASE AGAINST CAPITAL PUNISHMENT* 15 (1950); Lejins, *The Death Penalty Abroad*, 284 *ANNALS* 137 (1952); 12 *PRISON JOURNAL* 20 (1932).

Table II

Country	Year Abolished or Abrogated by Disuse	Country	
A. Europe		C. South America	
Austria	1950	1922	Argentina
Belgium	1863	1891	Brazil
Denmark	1930	1910	Colombia
Finland	1949	1880	Costa Rica
West Germany	1949	1924	Dominica
Holland	1870	1897	Ecuador
Iceland	1944	1894	Honduras
Italy	1948	1928	Mexico
Luxembourg	1822	1903	Panama
Norway	1905	1907	Uruguay
Portugal	1867	1863	Venezuela
Sweden	1921		D. Australia
Switzerland	1942	1922	Queensland
B. Africa		E. Asia	
Israel	1954	1931	Nepal
		1944	Travancore

Not shown in Table II are "iron curtain" countries, notably Rumania and Soviet Russia, whose professions of abolishing capital punishment lack a certain amount of sincerity.

The most recent development on the international scene, occurred in England. By a vote of two hundred ninety three to two hundred sixty two, the House of Commons voted to abolish the death penalty for murder.¹⁴ It should be noted that the House of Commons did this once before in 1948 only to have the House of Lords nullify it. Whether or not history will repeat itself is a matter of conjecture. However, this recent action is indicative of the growing trend toward the abolition of capital punishment.

As is usually the case, whenever a country reexamines its position on the death penalty, the present furor in England was caused by a belief that an innocent man was hanged. In 1950, Timothy Evans was executed for the murder of his infant daughter. His wife had also been murdered. The chief witness against him was his neighbor, John Christie.

On July 15, 1950, John Christie was hanged, after confessing to the murder of at least seven women, among them, Mrs. Evans. Newly discovered evidence strongly indicates that Christie also murdered Evan's daughter. Evans went to the gallows protesting his innocence.¹⁵

¹⁴ Time, Feb. 27, 1956 p. 29.

¹⁵ Time, *op. cit. supra*; 163 BULLETIN *op. cit. supra* note 13, at 12; BULLETIN, AMERICAN LEAGUE TO ABOLISH CAPITAL PUNISHMENT (Oct. 1953).

Conclusion

Capital Punishment is a failure. It deters no one. It is brutalizing and degrading not only on the victim but on his executioners¹⁶ and on society as a whole.¹⁷ We have advanced beyond the eye-for-an-eye, limb-for-a-limb concepts of Mosaic law, yet we persist in taking a life for a life.

Is there an alternative? A life sentence is the most commonly used alternative to capital punishment.¹⁸ There are those who argue that this would cost the taxpayers more money. For approximately two hundred dollars we can execute a man. To maintain him in prison for even one year costs over five times that amount.¹⁹

To compare a human life with a dollar value is abhorrent to the fundamental concepts of our society. The recognition that each human life has importance is one of the major differences between a democratic society and a totalitarian state. Are we executing people not so much for the crime which they have committed, but rather because it is the cheapest solution to the problem?

Would we be endangering other prisoners by exposing them to an increased number of "lifers"? On the contrary, it is often said that "lifers" are among the best behaved inmates of the whole prison system.²⁰

Perhaps we would do well to heed the words spoken in a case which was reported many years ago. A woman was apprehended in the commission of a crime for which the law demanded the supreme penalty of death by stoning. It was said to her accusers, "He that is without sin among you, let him first cast a stone at her".²¹

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¹⁶ A recent hanging in England was so horrible that ". . . the Chaplain had a nervous breakdown, one wardress went mad, the hangman committed suicide and all present left the prison service soon afterward." 163 BULLETIN *op. cit. supra* note 13 at 13. For an account on its effect on other prisoners, see 12 PRISON JOURNAL 22 (1932).

¹⁷ A discussion of the effect of capital punishment upon society can be found in 163 BULLETIN *op. cit. supra* note 13 at 14.

¹⁸ Wood, *The Alternatives to the Death Penalty*, 284 ANNALS 71 (1952).

¹⁹ THIS LIFE WE TAKE 6 (1955).

²⁰ Wood, *op. cit. supra* note 18, at 69; ABOLISH THE DEATH PENALTY 23 quotes Warden Lawes of Sing Sing as expressing the view that they are ". . . the most reliable and dependable men in the institution."

²¹ JOHN 8:7.