

Bernard L. Cohen

IN DEFENCE OF CAPITAL PUNISHMENT

AN ALL-EMBRACING COMPASSION for human life is a basic tenet of Western civilization. Yet not so many centuries ago a public execution was no less frequent a means of departure from this world than were cancer or heart disease. During the centuries that witnessed the revival of learning, the flowering of the arts, and the rise of commerce and manufactures, sanguinary and hideous punishments continued to win the approval of even the most cultivated persons. A candid portrayal of the primordial barbarism still permeating the legal system of his country during the age of the Reformation is presented to us by the German historian Wolfgang Menzel:

The barbarous and dishonouring punishments inflicted by the degenerate Romans on their slaves were still enforced upon the free-born Germans. . . . Every township and provincial court had its torture chamber and place of execution. Wherever a hill commanding a lovely prospect rose in the vicinity of a town, its summit was crowned with a gallows and a wheel and covered with the bones of victims. The simple punishment of death no longer satisfied the pampered appetite of the criminal judge. Torture was formed into a system, and horrors practised by the ancient tyrants of Persia and Rome, by the American savage in his warlike fanaticism, were, in cold blood, legalized by the lawyers throughout Germany.¹

By way of example, the learned juriconsult, Benedict Carpzow, who occupied the bench at Leipzig between the years 1620 and 1660, was reputed to have decided no fewer than 20,000 capital sentences. Such judicially controlled destruction seems all the more nightmarish when it is recalled that during this period of internal warfare the population of the whole of Germany touched a low of five millions.

In England, at the beginning of the nineteenth century, there were on the statute books no fewer than 145 offences punishable by death. Contrary to the practice of other European countries, an accused person in England was not submitted to torture; yet he was altogether at a disadvantage. He could not be present in open court to hear the evidence presented against him by the prosecution, nor was he

allowed to summon witnesses in his own behalf. He could not even engage the services of a lawyer to conduct his defence.²

In our own time, the penal administration of the entire Western world has undergone a steady process of humanization and is indeed a revolutionary departure from the enormities of earlier centuries. Notwithstanding, in the eyes of many well-meaning persons, even the hanging of a murderer constitutes a barbarous survival from the past. Thanks to a prolonged and strenuous agitation led by numerous clergymen, sociologists, and lawyers, it has come about that in Canada the death penalty, though not as yet formally abrogated, is now almost invariably remitted in deference to "broader considerations". Since 1957, the odds against a convicted murderer actually going to the gallows have been more than ten to one. Since the election of the present government, there has not been a single execution. In the U.S.A., where the death penalty still exists *de jure* in 42 states, no more than 21 convicted murderers were executed in 1963, the lowest number of any year in American history. In England and Wales, the number of death sentences has been reduced from 39 in 1952 to only 4 in 1962. When one views the problem from the standpoint of existing realities, the proper question is not whether or not capital punishment should be abolished, but rather whether the prevailing trend towards abolition should be thrown into reverse.

On the pros and cons of capital punishment, two distinct questions present themselves for examination. First, is the infliction of the death penalty an effective measure for society's counter attack against its criminal element? Second, could the taking of a murderer's life by the state be justified on moral grounds?

In dealing with the first question, it would not be irrelevant to touch lightly upon the more general subject of crime and punishment. An intelligent observer will not fail to discover that the selfsame philosophy by which a killer has been liberated from dread of the gallows has been similarly instrumental in conferring a new deal upon the practitioners of all crimes, both great and small. Even as a punishment for murder, the substitution of life imprisonment for the death penalty has proved to be largely fictitious. An operation known in contemporary journalism as "cheating the rope" is not infrequently followed by "cheating the jailer". For lesser offences, all fines and prison sentences have been going through a process of deflation. Indeed, it has become almost a matter of protocol for the judge, in imposing sentence, to congratulate the accused on his "luck" in escaping a sentence that could have been more severe. Recently, in a case where it was proved that the

prisoner had held a knife against the throat of his victim while robbing him, the sentence meted out was two years, while at the same time the judge took the occasion to point out that it might have been life imprisonment plus the lash. Such drastic scaling down of statutory penalties by the courts is now all but a routine practice.³

Sentimentality in the matter of crime and criminals, in which little or no account is taken of any distinction between the new offender and the confirmed outlaw, is perhaps an indication of an overwhelming moral upheaval. Unfortunately, there is no evidence that this genial spirit of "live and let live" and of co-existence with known criminals has resulted in any greater measure of public safety. Quite the contrary. The insecurity of our cities increases year by year as the crime rate in virtually all categories surges relentlessly upward.

It is commonly realized that throughout the free world, major felonies have been rocketing at a tempo well above that of the population "explosion". In England and Wales, the number of persons found guilty of all offences combined rose from 753,012 in 1952 to 1,266,596 in 1962, or by almost 70% in the course of a decade. For the single year from 1960 to 1961, the increase was no less than 11½%. For offences listed under the heading "Violence to the Person"—comprising murder, manslaughter, and wounding—the number of convictions escalated from 4,127 to 11,986 during this same ten-year period.⁴ In both Canada and the U.S.A. the upsurge in all forms of criminality has been no less impressive and alarming. In the state of New York, the prison population has grown by 70% in the past decade. So awesome have all forms of lawlessness become that it is scarcely possible to dissent from the opinion voiced on several occasions by Mr. J. Edgar Hoover, and endorsed by other law enforcement officials, that acts of indulgence on the part of the courts tend only to precipitate more violence and more larceny.

To turn now specifically to statistics relating to murder: in England and Wales, where, according to the tables mentioned above, acts of violence to the person have risen by 200% in the course of a single decade, the combined figures for murder and manslaughter indicate a growth of no more than 25%, or from 108 in 1952 to 130 in 1962; in the U.S.A., where a killing takes place at the rate of one for each hour of the year, the increase from 1962 to 1963 was a mere 1%, and we are told that since 1958 the murder rate has held "steady".⁵

Admittedly, the figures on the frequency of homicides are less startling than are those covering the broader category of violence in general. Nevertheless, the lower figures for murder *per se* fail to present a proper evaluation of the true gravity of the problem.

To begin with, the distinction formerly drawn between murder and less grave acts of homicide has become indeterminate, varying from one jurisdiction to another, and even from one court to another. In fact, so flexible has the concept of murder become that all statistics concerning it must necessarily be treated with caution. Interesting in this connection is a footnote to be found in the *Criminal Statistical Yearbook for England and Wales*, 1961, p. 35: "The figures for these years [for murder] are not directly comparable because as a result of the Homicide Act they exclude some cases which would previously have been classified as murder, but are not now so classified".

Again, hardly a week passes in which we do not read in our newspapers about some vicious slayer being declared "unfit to stand trial". Obviously, the acts of such men are not listed as murders, since no trials have been held and there have been no condemnations. But this is not all. The number of acquittals on grounds of insanity grows from year to year. Nowadays, virtually every hearing for murder resolves itself into a contest of professional skill between opposing alienists. The definition of legal insanity as a defence against a charge of murder has undergone some manifold diversification and many extensions. Pleas of "emotional insanity", "brainstorm", "irresistible impulse", "emotional undevelopment", "psychopathic personality", "mental instability", and even drunkenness, have time and again been accepted by juries as grounds for acquittal.

But even this is not all. Perhaps most of the many shootings and stabbings reported day by day would, in a less easy-going age, be classified as attempted murders rather than as "criminal negligence" or "aggravated assaults". Finally, there are countless armed holdups in which the threat to kill would be carried out readily enough but for the victims' surrender to the threats made upon them.

In order to evaluate fully the changed situation consequent upon the scaling-down of the death penalty, it is not sufficient merely to add up the number of murders in a given period of time, and to compare such a figure with that of some earlier decade. Nor do we get the complete picture even by including the number of attempted murders. At the very least, one other significant statistic is to be taken into account: not unconnected with the suppression of the death penalty has been the proliferation of thieves armed with guns, knives, and other lethal weapons; a thug so armed has in effect been guaranteed immunity from a possible death sentence and enjoys a more extended latitude in maiming or terrorizing his victim.

It is not suggested that capital punishment be restored for offences other than murder. But even so limited, it should be of some deterrent value against all crimes against the person and perhaps, indirectly, it would reduce crimes against property

as well. Concomitantly, it is insisted that for a restored death penalty to play any significant role in the war against crime, two conditions are indispensable. First, it must be enforced with reasonable promptitude in all cases of fully proved murder—not at rare intervals, but as a general practice, and with only occasional exceptions. Secondly, the more general application of the extreme penalty must be accompanied by an enhanced sternness in dealing with all manner of lawlessness. It is difficult to see, for example, how a jail sentence could be too severe in the case of a concealed weapon, or a fine in the case of reckless driving of a motor vehicle.

One hears it argued, not infrequently, that what matters more than the severity of the punishment is the certainty that some kind of penalty will be inflicted. A profound misconception lurks in this manner of thinking. To expect all crime to be followed by certain retribution is to expect the impossible. At present, the number of crimes, large, small, and petty, vastly exceeds the number of apprehensions. It has been estimated that in the city of Montreal there are, each year, no fewer than 20,000 instances of shoplifting. The number of offenders laid by the heels is infinitesimally small. For the crime of arson, the ratio of prosecutions throughout Canada to the number of suspected occurrences is perhaps one in eighty. In the absence of a police force grown to gargantuan dimensions and acting with unheard-of efficiency, merely reducing the penalty for murder or any other crime would do nothing to make punishment more "certain" than it is at present.

It is, of course, incontrovertible that larger police departments would be of great value in the war against crime, always assuming that the additional money and manpower are available. But it is sheer dogmatism to insist that no other remedy is of value. To insist that a criminal worries about being caught, but that he becomes utterly stoical as to his precise fate once he has been caught, is to affront one's knowledge of human nature. A would-be offender, being in effect a gambler, may be reasonably expected to feel some apprehension first, as to his chances of losing out, and secondly, as to what will happen to him in the event that he does lose out.

In their attempts to demonstrate its utter uselessness, opponents of capital punishment are fond of reminding us that during the centuries when death was the regular penalty for almost all manner of wrongdoing, crimes of every conceivable description flourished notwithstanding. Pickpockets were known to ply their trade unconcernedly, literally under the shadow of the gibbet, among the throngs assembled to witness the gruesome exercises. (It has never been contended, however, that the risk of forfeiting one's life will—any more than the danger of going to jail or being heavily fined—be an absolute deterrent to unlawful activity). Human beings, in every country and in every age, have been known to place themselves in peril

of their lives for the sake of booty, and this, be it added, has been done in pursuit of lawful as well as unlawful occupations. If fear of the executioner were sufficient to govern the conduct and activities of every individual, an end to all killing by one human being of another could well be anticipated. But, by the same token, this selfsame dread of an untimely end would also inhibit all stunt fliers, all mountain climbers, all automobile racers, all trapeze artists, all policemen, all firemen, and all soldiers. Obviously, human nature being so variegated, the fear of death, whether at the hands of justice or in some other fashion, refuses to operate on a uniform pattern. None the less, the asseverations of numerous and respected reformers that the death penalty is of no deterrent value whatsoever does not merit acceptance. These men, who profess to be so certain that the spectre of the gallows necessarily plays no part in any deliberation involving the commission of a heinous act, are in effect proclaiming that they have been vouchsafed an insight into the thought processes of every killer and would-be killer.

The argument that perpetual imprisonment is a more effective panacea for anti-social intentions than the sentence of death is known to have been made long ago by Julius Caesar before the Roman Senate while it was sitting in judgment of a trouble-maker named Catilina. Undoubtedly, the fear of a lengthy imprisonment can be said to carry weight. Prisoners, before trial, have been heard to talk theatrically about preferring death to a permanent confinement. None the less, few "lifers" have ever been known to commit suicide. Hardly a day passes in which we do not read in our newspapers about lawyers for the defence resorting to every conceivable manoeuvre both before and after the trial in an effort to save their clients from the gallows. Nor does the condemned man fail to be greatly relieved when told that his sentence has been changed to one of lifetime detention. It is impossible to avoid the conclusion that the forfeit most of all dreaded by careerists in crime is the one that offers the greatest possible discouragement to those who might be inclined to follow in their footsteps. But altogether aside from its admonitory function, the supreme penalty has yet another merit to recommend it. The mere incarceration of a murderer offers no more than a partial security to the society from which he is ostensibly removed. Even if he should fail to escape or otherwise regain his freedom, he can remain a threat to the other inmates of the prison, to say nothing of its officials and employees. It is unnecessary to demonstrate, on the other hand, that a dangerous killer will forever remain innocuous once he has been executed.

What moral issues are involved in the judicial taking of human life, as dis-

tinguished from the practical and expedient? Sooner or later, the opponents of capital punishment fall back upon the thesis that the state is altogether without moral right to assume a prerogative that is God's alone. Admittedly, the deliberate and ceremonial taking of the life of a human being is offensive to humane persons, and this is the reason why executions, when they do take place, are no longer performed in public. Nor, should it be added, is the the populace encouraged to oversee the daily holocausts inside our abattoirs and slaughterhouses. However, that which is aesthetically repugnant to our senses might on occasion have to be endured. A society already well inured to tales of violence and bloodshed, both real and fictitious, could be reasonably expected to accept with some composure an occasional and well-deserved execution.

It is generally agreed that it would be wrong for the state to inflict torture, or any hideous punishment, no matter how callous the offence. No less reprehensible is the infliction of death for such offences as theft, embezzlement, smuggling, bribery, counterfeiting, or seditious utterances, as happens all too often behind the Iron Curtain and elsewhere. Yet in protest against such inhumanity, we should not unthinkingly jump to the opposite extreme and propound it as a categorical negative that no crime, however dastardly, is deserving of the death penalty.

At the present time, the doctrine of absolute non-resistance forms no significant part of the thinking of the Western world. Hence, the right of an individual to take the life of another in defence of his person, or even of his property, is hardly contested, even by the most advanced ideologists. Let us imagine a situation, hypothetical and yet not improbable, in which you find yourself threatened by a gunman. You happen to carry a loaded weapon, and drawing in self-defence, kill the marauder. Obviously, no charge will be laid against you, once the facts have been ascertained. You will also meet with the congratulations of many of your high-minded acquaintances, even though you have just taken the life of a human being.

Now, altering the illustration somewhat, let us imagine a less fortunate outcome of the encounter. Your assailant is quicker with his gun and you are the victim. The courts, in all likelihood, would call it murder; but according to the ethic of those who are opposed to capital punishment such is the sanctity of human life that the killer's right to go on living in this world is not to be denied him. Unfortunately for them, these doctrinaires must contend with a contradiction or two. To begin with, why is it proper on occasion for a private citizen to take the life of another, while the state may do so under no circumstances whatsoever? Again, if it is allowable to deprive a would-be murderer of his life, in order to forestall a

crime, why does it become morally reprehensible to do so after the crime has been committed?

It will be argued, no doubt, that an act of murder, once having been committed, is irreversible. And since nothing could be done to restore the victim to life, hanging the murderer becomes no more than a wanton act of vengeance. In passing, it could be remarked that the renunciation of vengeance is a virtue far more easily exercised by the dispassionate onlooker of a crime than by the sorrowing relatives who are directly afflicted. But further, could not the alleged incompatibility between vengeance, which is stigmatized as altogether bad, and justice, which is always reputed as good, lead us into some rather subtle hair-splitting? The only recognizable moral test of any act of retribution—call it vengeance, revenge, retaliation, justice, or what you will—is whether it is commensurate with the wrong suffered or whether it is excessive under the circumstances. If a man has insulted your wife, you might either shoot him or merely knock him down. Your action in either case constitutes an act of vengeance; but morally there is obviously a vast difference.

The supposed contradiction between punitive measures and rehabilitation is similarly open to question. Allowing for the consideration that the protection of society and the safety of innocent persons are, or at least should be, the predominant incentives, it can be asserted that nearly always the imposition of a penalty by a court does carry with it some hope that reform or correction of behaviour will ultimately result. As often as not, adequate punishment can be the only road leading to an abandonment of the criminal mode of life. It is a fallacy to assume that a mild sentence is necessarily more "educational" than one that is severe. A stiff sentence could be highly salutary and result in new respect for authority, while in the minds of the culprit and his friends ill-advised clemency all too frequently arouses not contrition but contempt.

It is frequently argued that a man who has been hanged for murder might on later verification be proved guiltless. It is an historical fact that in every country and in every age countless persons have been harried to their doom through the machinations of private enemies as well as by hatreds begotten of religion and politics. In 1916, Tom Mooney was tried in San Francisco on the charge of having hurled a bomb that killed ten persons taking part in a Preparedness Day parade. He was condemned to death on the strength of fabricated testimony introduced with the connivance of the district attorney; but he was saved from the gallows as a result of an investigation carried out by the editor of a San Francisco newspaper. Occasional repetitions of such scandals cannot be entirely ruled out for the future;

but they are likely to be counteracted by an aroused public opinion and a vigilant press. Moreover, the revised criminal procedure now almost everywhere in force does provide almost ironclad guarantees to an accused person. He is safeguarded by stringent laws of evidence, and he is seldom lacking in experienced counsel. Invariably, a verdict of murder is subject to minute scrutiny through a series of appeals and reviews.

It is true that a vast number of prosecutions do leave behind them a strong element of doubt. Indeed, a trial is meant by its very nature to distinguish between that which is certain and that which remains unconvincing. In by far the greater number of acquittals, the accused is discharged, not after being certified innocent and harmless, but only because the charge against him has not been proved beyond all reasonable doubt. Be it remembered that in cases where any doubt remains it is always the accused who is entitled to benefit. But it must also be acknowledged that not all court proceedings necessarily leave in their wake a residue of doubt. Often the charge against the accused is easily substantiated, the testimony of the prosecution's witnesses fully corroborated, and all contradictory evidence conspicuous by its total absence. To convert into a universal principle the legitimate lack of assurance that is the necessary consequence of many a court proceeding would soon reduce to chaos the entire administration of justice.

It should be pointed out also that there is not a single human enterprise or field of activity which is not marred by some regrettable episodes. Yet we do not prohibit the erection of tall buildings or bridges, or the digging of subways, merely because invariably some two or three persons lose their lives in the course of each operation. Acts of justice, designed as effectively as possible to protect the innocent will unquestionably be accompanied, now and again, by tragic blunders. But unless such miscarriages become blatant and of alarming extent, there is nothing to be done except to minimize them as far as is humanly possible. In any event, such errors, tragic though they must be, could at their worst be insignificant as compared with opposite blunders in which further loss of innocent lives could be the direct consequence of thoughtless clemency extended to dangerous and unrepentant assassins.

Be it noted, in conclusion, that this doctrine of the sanctity of human life was enunciated a very long time ago, though not to the point of absurdity, when it was written "Whoso sheddeth man's blood by man shall his blood be shed, for in the image of God made he man" (Genesis 9:6). If we are to discourse in terms of what is morally right or wrong, could it not be asserted that it is the paramount duty of a state, undeterred by obfuscations about "rights", "vengeance", "eye-for-an-eye",

and similar clichés, to offer its citizens the maximum protection, in the light of all known experience, from killers, both sane and insane, both actual and potential?

NOTES

1. *History of Germany*, Vol. III, trans. Mrs. George Horrocks (New York: P. F. Collier & Son, 1900), p. 1091.
2. See Sir James Fitzjames Stephen, *History of the Criminal Law of England* (London: Macmillan, 1883).
3. See *Montreal Gazette*, August 14, 1964, p. 3.
4. See *Annual Abstract of Statistics*, 1963, p. 65.
5. *Montreal Daily Star*, July 20, 1964, p. 19.

YOUNG SONG

Nancy-Lou Patterson

What have we to do with these old towns?—
we young, who stumble on their concave stairs,
scratching our cheeks against their stony faces,
preferring electrical dawns and neon days
to the slow shape of morning among the cedars,
the smell of autumn gardens and winter sheds.

Let things be older—the quarries, where we fall
like lucifers against our own reflections,
seeking chilly answers to unasked questions—,
or newer—the loops of glistening road
where we can learn the need for old equations:
did we not invent our back-seat games?

Let these stern houses keep their window secrets;
the dead in our frequent churchyards never loved.