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THIS LIFE WE TAKE

THE CASE AGAINST
CAPITAL PUNISHMENT

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The Case Against the Death Penalty

This is a revised edition of the pamphlet published in 1955 under the same title. The facts are drawn from latest available sources. Some sections have been expanded and clarified. Many people across the country commented on the draft manuscript and contributed much to the final writing. I hope it will add weight to the resurgent movement to do away with the death penalty in the United States.

Trevor Thomas

San Francisco

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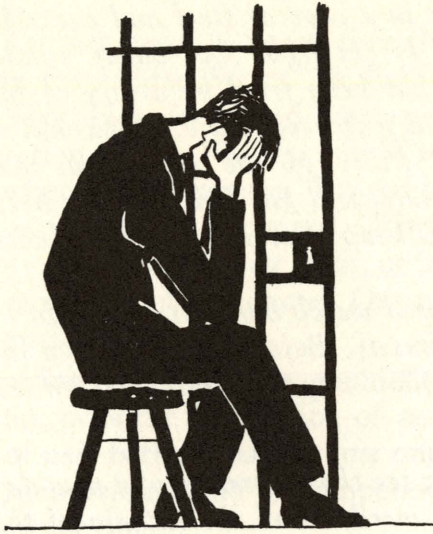
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"The defenders of capital punishment have produced no evidence of their own, nor contested the correctness of the documentary material assembled by Royal Commissions, Select Committees, etc.; nor even tried to put a different interpretation on it. They simply ignore it . . . when challenged they invariably and uniformly trot out the same answers; there is no alternative to capital punishment; statistics don't prove anything; other nations can afford to abolish hanging, but not [us]."

Arthur Koestler — *Reflections on Hanging.*



The man sits in a cage of steel and concrete under a single bright light that burns 'round the clock. He has been tried by a jury of his peers, judged and sentenced to die. He has killed and now society, through the anonymous machinery of the state, will kill him. He has been brought here to keep that appointment with death.

Two guards will watch him this last night so that he can do no violence to himself. Before settling down for the long night they offer tobacco and any variety of food for the last "hearty" meal.

After an eternity of night they see the beginning of a new day and a last breakfast. Now the warden and the captain of the guards move down the long corridor toward the cell. There will be no reprieve. The time of death, so impossible, so unimaginable, has come. A physician harnesses a stethoscope across his chest, its black tube dangling like an obscene umbilical cord.

Shoeless, he walks — or is carried or dragged — between two guards through the green door of the octagon chamber. Inside he is strapped to a metal chair; first around the chest, then the stomach and each arm and leg. A guard connects the black tube.

Outside the physician adjusts the stethoscope to his ears. Twelve witnesses of the people, as required by law, watch through thick glass windows.

Each step of the ritual, man and machinery, is checked and checked again. The last guard steps from the chamber and seals the door. The executioner makes his motions and inside liquid acid gurgles into a well beneath the chair. A bag of cyanide eggs is immersed in the acid. The combination produces deadly hydrocyanic acid gas, sweet-smelling like peach blossoms.

The man in the metal chair gasps and throws his weight against the straps in a final convulsive bid for life. Minutes pass. The head snaps back, then slumps forward. The physician hears the pounding, straining heart hesitate, become faint and then stop. He notes the official time on the appropriate charts. The man is pronounced dead.

IN THE PAST 28 YEARS there have been 3,568 legal executions in the United States. In California death is by gas. In New York, New Jersey and Tennessee the condemned dies by electrocution. Iowa, Kansas, and Washington are among those states where the prisoner is "hanged by the neck until dead." In Utah he may be shot or hanged. Why? For many the answer is obvious — to protect the rest of us, or to serve as a warning and prevent repetition of the crime. Others would answer in the name of justice, or revenge.

Society certainly has the right and need to protect its members, but does the destruction of an occasional criminal protect any of us? Is the penalty a just one? If it is evil for us to take life as individuals, do we compound that evil by killing in the name of the state?

These are questions which have social and moral implications for us all. They demand answers. They demand that we cast off old prejudices in our search for the truth; that we put to use the knowledge available to us by criminologists and psychiatrists; that we and our legislators take a careful look at present practices. This pamphlet is one attempt to throw light into some of the dark corners of that ancient institution, legal killing.

IN THE BEGINNING . . .

Capital punishment was first abolished in Austria as far back as 1791. That same year in England over 200 crimes were punishable by death. One might forfeit his life for stealing five shillings, fishing in other people's waters, or robbing a rabbit warren — to mention a few.

In 1801 a British child of thirteen was hanged for the larceny of a spoon. A boy of ten was sentenced to death for murder in 1748. The judges all ruled that it was proper to hang the child because, ". . . the example of this boy's punishment may be a means of deterring other children from the like offenses."¹ And just as certainly, the judges reasoned, no one would risk his neck for five shillings. They were wrong. In fact, picking pockets, itself punishable by death, thrived especially at public hangings "when everybody was looking up." Stealing increased to the point where bankers from 214 English towns petitioned Parliament for milder punishment that could be enforced. By 1819 there were more than twelve thousand similar petitions.

¹ Arthur Koestler, *Reflections on Hanging* (MacMillan Co., 1957), p. 14

But when Sir Samuel Romilly introduced a bill in 1810 to abolish the death penalty for stealing five shillings from a shop, not a single judge would support him. He was told such a law could lead to abolition for stealing from a dwelling house and then no man "could trust himself for an hour without the most alarming apprehensions that, on his return, every vestige of his property will be swept away by the hardened robber."

Eventually public opinion did away with the greatest number of capital crimes in England. The dire predictions did not come to pass, but the *same* arguments were (and are) used to defend the death penalty for murder and kidnapping.

THE TREND IN CAPITAL PUNISHMENT

The world trend is toward complete abolition. Fifty states have eliminated the death penalty by law or tradition*. France is the only democratic country in Western Europe that still exacts it for criminal offenses other than treason. The Soviet Union still demands death for political crimes.

The penalty was reinstituted on a terrible scale under the fascist regimes of Italy and Germany. With the collapse of the Nazi State, genocide disappeared. Article 102 of the Bonn Constitution (West Germany) abolishes the death penalty, and it has also been eliminated in Italy.

There has been a fluctuating tendency toward abolition in the United States though we lag far behind the rest of Western civilization. The English colonies in this country had from ten to eighteen capital offenses. Today there are a total of 31 separate capital offenses in 41 states. California lists six in addition to treason against the state: first-degree murder (if eighteen years or older), kidnapping, train wrecking, perjury in a capital trial resulting in the execution of an innocent person, sabotage, and assault by a life prisoner.

The death penalty may be imposed by forty-one states, the District of Columbia and the federal government. In 1957 twenty-one states and the District of Columbia had no executions.

At present, eight states — Delaware, Maine, Rhode Island, Michigan, Wisconsin, Minnesota, North Dakota, and Alaska — do not permit executions. In 1847 Michigan became the first state to abolish capital punishment; no one has been executed

* See list of abolition states on back cover

there since 1830. Delaware joined the abolition states in the spring of 1958, the first state to do so since 1917. The Territories of Hawaii and Alaska outlawed executions in 1957. Nine others — Kansas, South Dakota, Iowa, Colorado, Washington, Tennessee, Oregon, Arizona, and Missouri — have at one time or another abolished it and later conditionally re-established it with life imprisonment as an alternative. In most cases this action followed a particularly brutal crime. Five of the states which restored the death penalty did so under the impact of the crime wave at the end of World War I, which affected death penalty and abolition states alike. Lawmakers succumbed to the understandable but unfortunate atmosphere of righteous vengeance and reinstated the death penalty.

Discussing the trend away from the death penalty in an editorial of July 30, 1954, the New York Herald Tribune said:

"These states (with abolition) have not found that the lack of a supreme penalty has affected their crime rate; careful comparisons of states, region by region, shows that capital punishment does not have the deterrent effect which is alleged as its principal social excuse. The number of executions, even in states which retain the death penalty, is declining more rapidly than the homicide rate which indicated a public revulsion which has not yet found expression in statutes.

"Over the centuries, society has moved away from the crueller forms of inflicting legal death; it has limited the number of capital crimes; banned public executions; tended to be less ready to carry existing laws to extremes. Evidently, capital punishment itself is becoming outdated . . . as the public conscience becomes more and more aware of the possibilities for fatal error, of the capriciousness, of the relative ineffectuality of the death penalty, its end is inevitable and should be hastened."

OUT OF FEAR FOR OUR LIVES . . .

The primary argument for capital punishment is that the threat of death keeps people from committing murder and other capital crimes. The argument goes something like this:

- (a) People do not commit crimes largely because they fear punishment,
- (b) Therefore, since people fear death more than anything else, the death penalty will prevent crime better than anything else.

Though not supported by evidence, this argument is advanced as fact whenever the issue comes before a legislative body. The real question is whether individuals who commit capital crimes consider the death penalty *before they act* — *whether the fear of death is sufficient to prevent murder*. Obviously, the threat of death failed to stop the 7,000 Americans who murdered last year. Nor did it have any effect on those who also took their *own* lives — 64 of the 461 Californians who killed in 1957 committed suicide afterward. Nor did it prevent passion murders — 27% of those Californians *executed* between 1938 and 1953 murdered their wives, mistresses or girl friends. The penalty is meaningless to the mentally deranged, but psychiatric evaluations made at California's San Quentin prison over a 15-year period show that a majority of those executed were emotionally unstable, psychoneurotic, or psychopathic.

One of the most striking bits of evidence before the Royal Commission of 1866 was from the Bristol prison chaplain who pointed out that of 167 persons awaiting execution in that prison, 164 had previously witnessed at least one execution! What would the Medical Association say of the value of polio vaccine if it were found that of 167 polio cases 164 had been treated with that vaccine?

Three of every five murders in California (1938-53) were the result of interrupting armed robbery. The thief is surprised and often, rather than risk capture, (probable penalty five years) he "chooses" to shoot it out if necessary to escape. He is caught, gun in hand. Can anyone claim he weighs the penalty for armed robbery against that for murder the instant before he pulls the trigger? No, for this act, like other crimes of violence, is committed in a blind rage or under great stress, or mental conditions which shut out any thoughts of penalty.

Here is absolute proof that thousands have *not* been deterred by the threat of the death penalty. It is impossible to prove that a single potential murderer *was ever deterred*. Ask yourself: is fear of the death penalty the primary reason that you do not kill a neighbor with whom you may be in violent disagreement? Social scientists and psychiatrists, ministers and criminologists know that this is not the case; that love, desire for approval and acceptance, favorable personal relationships, environment and other cultural factors all play greater roles than fear in controlling or giving direction to anti-social impulses. The "fear

of death" theory omits another large factor—the inability of most people to comprehend their own destruction. Even men on death row cannot believe "this will happen to me."

Any patrolman on his beat knows that whatever deterrent value there is in punishment lies in its certainty, not its severity. Yet capital punishment is the most uncertain punishment on the statute books! In 1957 there were 65 persons executed in the United States.² In that same year there were over 7,000 cases of murder and non-negligent manslaughter. Nor is this unusual. In 1941 there were about 6,990 such crimes and 119 executions. At this rate, the odds are better than 100 to 1 against a murderer paying the death penalty.

California, during the last 27 years, (1930-57) has averaged nine executions per year. But compare, for instance, the number of *reported* homicides in 1957 with the number of death sentences and executions:³

Non-negligent homicides reported by police	461
Convictions for murder	227
Sentenced to death	8
Executed	9

RECENT BRITISH EXPERIENCE

The Royal Commission on Capital Punishment sat for four years, heard innumerable witnesses, and sifted hundreds of documents. They visited Norway, Sweden, Belgium, Holland and the United States to hear further evidence in those countries. In 1953 the Commission reported that "whether the death penalty is used or not, both death penalty and abolition states show homicide rates which suggest that these rates are conditioned by *other* factors than the death penalty"⁴ — another way of saying there is no deterrent effect.

Further, "The general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate or that its re-introduction has led to a fall."⁵

Experience justifies these conclusions: the death penalty was suspended (through granting of reprieves) in 1956 and 1957

² National Prisoner Statistics, Federal Bureau of Prisons, Executions, 1957.

³ Crime in California. 1957 Report of the State Bureau of Criminal Statistics.

⁴ Report, Royal Commission on Capital Punishment, 1949-1953, page 23.

⁵ Ibid., page 23.

while Parliament was considering a bill to abolish capital punishment. In March of 1957, after the full abolition bill failed to get a necessary second hearing before Parliament, the penalty was reinstated but limited in application. Compare the following murder rates in England and Wales before, during, and after suspension:⁶

STATUS OF DEATH PENALTY	PERIOD	NO. OF MURDERS
In force	18 months <i>before</i> suspension (March 1954 - August 1955)	256
Suspended	18 months <i>during</i> suspension (Sept. 1955 - Feb. 1957)	246
Restored but limited .	17 months <i>after</i> restoration (March 1957 - July 1958)	310

NOTE that there was a decrease in murders when the death penalty was suspended, while there was a rise in murders after the death penalty was re-introduced.

COMPARISON OF OTHER STATES

If the death penalty is a deterrent to murder, then fewer murders should be committed in those states that retain the penalty than in those that have abolished it, other factors being equal. This last qualification is important, for we cannot honestly compare Rhode Island (very low homicide rate, no capital punishment) with say, Georgia (high homicide rate, inflicts capital punishment). Rather, we must select states for comparison that are as alike as possible in all social and economic respects, have about the same type of population distribution, one having the death penalty and the other without.

The following states most nearly meet these qualifications:

ANNUAL AVERAGE HOMICIDE PER 100,000 POPULATION⁷

STATE	1934-35	1936-40	1941-46
Rhode Island (<i>no</i> death penalty) .	1.8	1.5	1.0
Connecticut	2.4	2.0	1.9
Michigan (<i>no</i> death penalty) . . .	5.0	3.6	3.4
Indiana	6.2	4.3	3.2
Illinois	9.6	5.7	4.4
Wisconsin (<i>no</i> death penalty) . . .	2.4	1.7	1.5

⁶ Letter from Gerald Gardner, Q.C., Chairman: National Campaign for the Abolition of Capital Punishment, London.
⁷ Deterrent Influence of the Death Penalty, Karl F. Schuessler, *The Annals of the American Academy of Political and Social Science*, November, 1952.

NOTE that Rhode Island, an abolition state since 1852, has a homicide rate very similar to, though slightly lower than Connecticut, where the penalty has been retained. The homicide rate in Michigan, where the penalty was abolished in 1847 closely resembles that of Indiana and Illinois, while Wisconsin, an abolition state for practically a hundred years, has a rate significantly below Michigan, indicating that the homicide rate is not appreciably affected by the presence or absence of the death penalty.

Some of the highest homicide rates in the United States are to be found in the feud counties of Kentucky. The generally high homicide rates in our southern states reflect cultural conditions in those areas. A little noticed fact is that in the south not only is the homicide rate high among Negroes, but for whites it is far higher than among white people in other parts of the country—all this despite the fact that executions in our southern states have been far more frequent than in other regions.

Dr. Karl Schuessler summarizes: "Statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value. The belief in the death penalty as a deterrent is repudiated by statistical studies, since they consistently demonstrate the differences in homicide rates are in no way correlated with differences in the use of the death penalty. Case studies consistently reveal that the murderer seldom considers the possible consequences of his action, and, if he does, he evidently is not deterred by the death penalty. The fact that men continue to argue in favor of the death penalty on deterrence grounds may only demonstrate man's ability to confuse tradition with proof, and his related ability to justify his established way of behaving."⁸

THE DEATH PENALTY AND POLICE SAFETY

Law enforcement people number among the strongest supporters of the penalty. One readily sympathizes with their motivation, but, does the death penalty protect police officers? Careful and extensive studies say "no."

A 1950 study of over 266 cities of over 10,000 population in 17 states (six abolition, eleven death penalty) revealed that

⁸ Ibid.

"on the whole, abolition states . . . seem to have fewer police killings, but the differences are small."⁹

The British Royal Commission, referring to the fears of English police officers, reported: "We received no evidence that the abolition of capital punishment in other countries had in fact led to the consequences apprehended by our witnesses in this country."

"After several killings of policemen, Austrian police claimed that the presence of the death penalty in the law offered such a threat to certain types of offenders that they would go to the extreme in attempting to avoid capture, and that if the death penalty were removed there would be less danger for the police."¹⁰ The penalty was removed.

IN THE NAME OF JUSTICE

"In the twelve years of my wardenship I have escorted 150 men and one woman to the death chamber and the electric chair. In ages they ranged from seventeen to sixty-three. They came from all kinds of homes and environments. In one respect they were all alike. All were poor, and most of them friendless.

"The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favor the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favorable aspect, while the poor defendant often has a lawyer assigned by the court.

". . . Thus it is seldom that it happens that a person who is able to have eminent defense attorneys is convicted of murder in the first degree, and very rare indeed that such a person is executed. A large number of those who are executed were too poor to hire a lawyer, counsel being appointed by the State." So wrote Warden Lewis E. Lawes of the famed Sing Sing Prison.¹¹

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 in this country is predominantly and disproportionately imposed upon Negroes, the poor and the less educated, and upon men.

⁹ Dr. Thorsten Sellin, "The Death Penalty and Police Safety."

¹⁰ Testimony by Dr. Thorsten Sellin before the Royal Commission on Capital Punishment, 1951.

¹¹ Lewis E. Lawes, "Twenty Thousand Years in Sing Sing," p. 336.

In a summary of general findings on executions in California, 1938 through 1953, Robert M. Carter concluded:

1. Generally [those executed] were not skilled. The majority worked as laborers, seasonal farm hands or migrant pickers, at "odd jobs," etc. Few had steady employment for any length of time.

2. Almost 75 per cent came from homes broken by divorce, death, or separation.

3. In general, the psychiatric evaluations made at San Quentin indicated that the majority were emotionally unstable, psychoneurotic, or psychopathic.

4. Twenty-eight per cent had no record of prior commitment for criminal offense; twenty-one per cent previously committed in jails or juvenile institutions; fifty-one per cent had prison records.

5. Sixty per cent committed capital crimes in the course of a felony, mostly armed robbery.¹²

It is inevitable that such a system should exist under capital punishment laws. The stakes are high in the contest between the state and the offender and one cannot blame the man of means for throwing his every resource into the battle. The less fortunate must trust his fate to any attorney the court may chance to name.

States retaining the penalty are harassed by lengthy and costly trials and repeated appeals by those of means while the less fortunate but certainly no more guilty are often executed with comparative haste. Where there is no death penalty, but life imprisonment for capital crimes, there are fewer prolonged cases, and a greater degree of justice.

The late August Vollmer, former Chief of Police of Berkeley and nationally known criminologist, put it this way: "Until capital punishment is abolished, there is little hope of even-handed justice in murder trials."¹³

A classic case illustrating Vollmer's point is that of Alger Simmons (*People vs. Simmons*, August 1946). In the course of a holdup of a service station operator by Simmons and his partner, Webb, a repairman was shot and killed in a struggle for Webb's gun.

Webb entered a plea of guilty and was given a life sentence.

¹² Robert M. Carter, "Capital Punishment in California" 1938-53, Thesis, University of California School of Criminology.

¹³ August Vollmer, "The Case Against Capital Punishment in California."

At Simmon's trial, Webb "testified that he was the one who had the gun . . . and that he himself had fired the fatal shot." The station operator testified that Simmons was with him in the back room during the entire time, including the time the shot was fired. The Supreme Court concluded that there was "a strong showing made . . . that it was Webb and not the defendant (Simmons), who was in the front office at the time of the shooting."

The jury found Simmons guilty of first degree murder. He was sentenced to death and executed in the San Quentin gas chamber.

Legislators who have conducted impartial investigations have been aware of the discriminatory aspects of the penalty for many years. As far back as the sixty-ninth Congress, a House Committee on the District of Columbia reported favorably to out-law the death penalty in Washington, D.C., but the bill did not become law. The committee said:

"As it is now applied the death penalty is nothing but an arbitrary discrimination against an occasional victim. It cannot even be said that it is reserved as a weapon of retributive justice for the most atrocious criminals. For it is not necessarily the most guilty who suffer it. Almost any criminal with wealth or influence can escape it, but the poor and friendless convict, without means or power to fight his case from court to court or to exert pressure upon the pardoning executive, is the one singled out as a sacrifice to what is little more than a tradition."

DOLLAR VALUES VS. HUMAN VALUES

Some would justify capital punishment as an economical and legal means to rid society of criminals. A man can be killed neatly for less than two hundred dollars, the argument runs, whereas his maintenance in prison costs the taxpayers several hundred dollars more a year.

At the close of 1957 a total of 151 prisoners were awaiting execution by civil authorities. Thirty-five, or about one fourth, had been awaiting execution more than two years and one California prisoner had been under sentence of death for eight years. More than half of the 151 were in eight states: California 20, Louisiana 14, Ohio 12, Florida 11, Alabama 9, New Jersey 8,

and New York and Texas 7 each. Not all those on death row are executed; some will be committed to life imprisonment.

To effect any sizeable saving would necessitate executing not only death row inmates, but other unwanted members of society such as the hopelessly insane and mentally retarded. Yet no one dares to suggest that such large-scale executions would be a saving — public opinion would shrink in revulsion.

The economy argument raises other fundamental questions. First of all, is it cheaper to execute the prisoner than to maintain him? Figures released by the California Department of Corrections (1957) indicate otherwise; removing the death penalty would *save* the state \$150,244 over a six-year period in administrative costs alone. Abandonment of the condemned row at San Quentin prison would release six permanent employees. Offsetting this saving would be the additional costs of items consumed by each prisoner — amounting to \$271 per man per year. The small number of death row inmates now executed (less than 9 per year), in a prison population of over 18,000 would incur no additional personnel or operating costs.

Although a prisoner may not be self-supporting, he usually contributes something to his upkeep. A positive approach suggests that we can extend this to the point where he would contribute, not only toward his own support, but toward that of the dependents of the victim of his crime.

Second, sending a man to his death is expensive. The legal battle can be prolonged. Much time and money may be spent in the selection of jurors, and in successive new appeals and trials as the state seeks to exact the supreme penalty, and the prisoner does his utmost to thwart the state — if he has the money. One current case has cost the state of California over half a million dollars and is now in its ninth year of litigation!

Abolition could lead to substantial savings on the county level of government and in Superior and Supreme Court costs, by reducing the length of trials. In Michigan, a comparable abolition state, murder trials seldom last more than two or three days. Some California trials last two or three weeks. In addition, California law requires an automatic appeal to the State Supreme Court in every death penalty case. This is time-consuming and expensive, though necessary to the minimum requirements of justice.

Third, the economy-of-resources, cheapness-of-life approach reeks of the barracks, the chain and the whip. It is the denial of the worth of the individual, central to our religious concepts and to democracy itself. Carried to its logical conclusion, it is the police state wherein absolute power to destroy rests with a few — the transition from the gas chamber at San Quentin to that of Buchenwald.

THE CHANCES FOR ERROR

"That is the man who killed my husband."

There was no doubt as the widow of Charles Drake identified James Foster as the slayer of her husband in June, 1956. Mrs. Drake was an eye witness. Neither was there doubt in the minds of the jury who sentenced Foster to death by electric chair in the Jefferson, Georgia jailhouse.

Appeals delayed the execution and Foster sat on death row for 29 months. In July, 1958, a former policeman confessed in detail the planned robbery which resulted in the death of Charles Drake. Foster, "positively identified as the murderer," was released.

John Rexinger of San Francisco "practically has the pellets (in the gas chamber) dropping." So said a police officer working on this 1957 case. Everything pointed to Rexinger as a torture-rapist; he was an ex-convict; he could not account for his whereabouts at the time of the crime. Finally, he was *twice* identified by the victim. Several days later the actual criminal confessed. He was a full eight inches shorter than Rexinger.

Except for these confessions, an innocent man would have died. But how many times has the actual murderer not come forward?

Investigators in Los Angeles' office of Public Defender are estimated to have saved the lives of 84 defendants charged with murder. The police and the District Attorney were sure of their guilt. Some of them had even confessed. Many had been positively identified by witnesses. But eyewitness reports are notoriously fallible. A Los Angeles Police Department survey of identifications of suspects in a line-up once indicated that 28 per cent — more than one out of four — are later proved false!¹⁴

¹⁴ Reported by Keith Monroe in "California's Dedicated Detective," Harper's, June 1957.

How many others are false but never proved so? But if the innocent person is *alive* the injustice can be in part righted.

The late Judge Jerome Frank of the Second Circuit Court of Appeals stated: "No one knows how many innocent men, erroneously convicted of murder, have been put to death by American governments. For . . . once a convicted man is dead, all interest in vindicating him usually evaporates." *Not Guilty*, Judge Frank's book, documents thirty-six cases in which a man was convicted of a crime he did not commit.

California has an automatic appeal to the State Supreme Court in all death penalty cases. Of 180 sentences of death (1942-57) there were 25 reversals on appeal. On retrial of these cases, six were dismissed or acquitted, and only three resentenced to death. This is strong evidence of the high rate of error in trial courts. Another eleven persons had their death sentences commuted to life imprisonment. Each of these eleven persons would have been executed after full judicial consideration except for executive clemency. What of the others, perhaps no more guilty, who were not so fortunate?

Those opposed to abolition have said that the innocent are *almost* never executed. One might reasonably say that we almost never execute *anyone*, if we consider the number executed in relation to the total capital crimes committed. But the supporter of the penalty never claims its infrequent use to be one of its merits. To do so would be to advance one of the strongest arguments against it.

The question is not numerical nor utilitarian, but an ethical one. Whether it be one man or one hundred is irrelevant. And until the death penalty is erased the possibility of error is constant. To argue otherwise is to support the notion that errors do not occur in sentencing for non-capital crimes, or in life terms for capital offenders, which of course is not the case.

Over sixty years ago the state of Maine hanged an innocent man. As Governor Edmund Muskie writes, "This unfortunate accident was the main reason for doing away with capital punishment in this state . . ." ¹⁵

In the year 1852 the state of Rhode Island abolished the death penalty when it was discovered that an innocent man was put to death for a murder he did not commit. Today, the F.B.I.

¹⁵ Letter, dated March 20, 1958, from Edmund S. Muskie, Governor of Maine.

Uniform Crime Report reveals that Rhode Island, with a .3 rating per 100,000 population has the third lowest murder rate in the nation.

THE MYTH OF THE LEGALLY SANE

In 1938 San Quentin began to keep detailed case records of its inmates. Robert Carter has compiled a study of fifty executed for capital crimes from 1938 through 1953. Let us select one at random:

Leandress Riley, Negro, executed February 20, 1953. Defended by a Public Defender; robbery and first degree murder. Family background: confused and unstable, St. Louis slum . . . left school at fourteen. Legally sane when executed but reports by San Quentin psychiatrists point to medical insanity. June 26, 1950 report: ". . . at present he is so depressed and so agitated, despite electric shock treatment, that we are all agreed he is too insane to be executed. We recommend early transfer to Mendocino State Hospital." But Leandress Riley was executed two and one half years later.

For hundreds of years our criminal law has divided offenders into "sane" and "insane." Insane defendants are judged "not guilty" and today are committed to mental institutions. Legally "sane" defendants, on conviction, are sentenced regardless of their respective mental conditions. For over a century, our criminal law has clung to the test of sanity laid down in the now-famed M'Naughten's case of 1847, viz: — did the accused, at the time of the crime, know that his act was wrong and contrary to law?

Psychiatry, on the other hand, has long since discarded such concepts of responsibility. Many murderers know the difference between right and wrong. Hence, from the medical standpoint, numerous insane persons are executed, though the law may hold them sane through the haphazard application of the "M'Naughten test."

By California law (Penal Code Sec. 1367), it is possible to be legally sane and medically insane at the same time. In his study Robert Carter points out that some prisoners cross this bridge between medical and legal sanity several times. One man spent almost 2200 days in condemned row at San Quentin because of the sanity question.

San Quentin records reveal many variations on this same

theme: execution of a legally "sane" but medically insane person.¹⁶ Time and again these comments indicate the mental state of the condemned:

"... We are of the opinion that he has fundamentally a psychoneurotic personality, on top of which has had considerable cerebral deterioration . . . chronic alcoholic, and definitely a suicide risk."

"... We are all in agreement that although he is medically insane, he knows fairly well the crime he committed . . . he is considered to be legally sane at this time."

Thomas Honeycott White is an illustration of our present inability to deal with the psychopathic personality. He culminated his career of crime with a particularly brutal murder. In 1938 he was sentenced to the state prison in Carson City, Nevada, for larceny. Six months later he was transferred to Nevada Hospital for mental diseases, where his record states: "he was suffering from an illness of one month's duration, manifested in delusions of persecution, and was disoriented to time, place and person . . ." San Quentin diagnosis confirmed his psychopathic personality. Later, in Western State Hospital in Washington he was described as a "psychotic of years standing and is entitled to every consideration which the law will allow chronic psychotics who are mentally irresponsible."

Carter writes, "White's case illustrates again the strange dissimilarity between the concepts of sanity from the points of view of the law and of medicine. By every medical standard he was insane, but legally . . . he knows the nature and quality of his acts, that he is able to cooperate with his attorney, and he knows the nature and character of the impending execution." White was executed February 7, 1947.

WILL THE PUBLIC SUPPORT ABOLITION?

Some legislators say that capital punishment is law in most states "because the people want it." While the death sentence still has a good deal of support, the weight of American public opinion is *against* execution as a punishment for even the most serious crimes. Here is the way a recent nationwide cross-section split on this question:¹⁷

"Certain states have abolished the death sentence.

¹⁶ Robert M. Carter, "Capital Punishment in California" 1938-53, Thesis, University of California School of Criminology.

¹⁷ *The Public Pulse*, February 9, 1958, Elmo Roper and Associates.

Do you think people who have been convicted of the worst crimes, like murder, should be executed, or do you think the heaviest penalty given anyone should be life imprisonment?"

For death sentence 42%

Against death sentence 50%

Express no opinion 8%

Opposition to the death penalty is strongest among the lower economic groups. Fifty-three per cent at the lowest economic levels oppose it, while its opponents among the higher economic levels are only 42 per cent, thus rather accurately reflecting the fact that the poor most often pay this penalty. This sense of unequal justice may also influence the thinking of Negroes, 78 per cent of whom are opposed to capital punishment. These percentages seem to indicate that though the people may not know all the facts supporting abolition, a majority has an intuitive reverence for life.

MURDERERS CAN BE PAROLED

What happens to first-degree murder defendants who are convicted and imprisoned but not executed? From 1945 through 1954, 342 *such defendants were paroled from California prisons*. They served an average of 12 years and five months. During this same period there were 454 new commitments for first-degree murder.

Of these 342 parolees, only 37 violated their parole in any way, and only nine (2.6%) were recommitted to prison — one for second-degree murder, another for assault. Of 18 murders by parolees during 1955-57, just one involved a previous homicide offender (manslaughter), while seventeen were by: robbers 6, burglars 4, narcotics offenders 4, car thieves 1, and escapees 1. Judged by the standard of public safety, a stronger argument could be made for executing robbers and burglars rather than murderers. Compare the following parole failure rates (for those released 1954-1956) prepared by the California Bureau of Criminal Statistics. Failure is measured by a return to jail for three months or more for any violation of parole.

OFFENSE GROUP	PER CENT FAILING
Homicide (murder)	11.9
Sex	15.8
Assault	16.6
Robbery	29.3

Narcotics	30.1
Burglary	39.5
Forgery	40.5
Auto Theft	46.8

Of 117 murderers paroled in New Jersey during the last decade, all under life sentence and some originally condemned to death, none had subsequently been charged with another murder. Only ten have violated parole in any way. They had served an average of 19 years in prison before being paroled.

Only the best risks among imprisoned first-degree murderers are selected for parole. For such men and women we now have a clear alternative to the death penalty; life imprisonment *with* possibility for parole. Murderers are clearly the best parole risks of any class of offenders.

WHAT WE MUST DO

In 1748 solemn English judges ruled it proper to hang a boy of ten as an example to other children. We restrict such punishment to adults, but the arguments in support of the death penalty have not changed one whit in 200 years.

What plaintiff would want to be compensated for the loss of an eye by being permitted to pluck out one of the defendant's eyes? We no longer take "an eye for an eye, or a tooth for a tooth." Yet we continue this barbarous form of justice by taking a life for a life.

But what is the alternative? How is society to be protected against the murderer? The answer is epitomized in two words, *rehabilitation* and *prevention*.

A NEW WAY OPENS

Any alternative to capital punishment must aim to protect society. Therefore, the first step is the segregation of the offender. But segregation for punitive purposes in the traditional prison is not enough. The old idea of *retributive justice* must yield to the more enlightened aim of *redemptive justice*.

This requires, first of all, that the view of the murderer as a vicious person fit only for death must be revised. If he suffers from incurable mental illness that makes him a peril to society, he should be permanently segregated. Otherwise, he should be segregated long enough to rehabilitate him and prepare him for a useful life in society.

WORLD TREND TOWARD ABOLISHMENT OR DISUSE OF CAPITAL PUNISHMENT

	Year Abolished	Last Execution		Year Abolished	Last Execution
EUROPE			Nicaragua	.....	.....
Austria	.....1950	.....	Panama	.....1903 ³	.....
Belgium	.....	1863	Peru*	.....1900	.....
Denmark	.....1930	1892	Puerto Rico	.....1929	.....
Finland	.....1949	1826	Uruguay	.....1907	.....
Holland	.....1870	1860	Venezuela	.....1863	.....
Italy ¹	.....1889	.....	Virgin Islands	.....	.....
Lithuania*	.....	1911			
Luxembourg	.....	1822	AUSTRALIA		
Norway	.....1905	1875	New South Wales	.....	.....
Portugal	.....1867	.....	Queensland	...1922	.....
Rumania*	.....1865	1833			
Spain ²	.....1932	.....	ASIA (INDIA)		
Sweden	.....1921	1910	Nepal	.....1931	.....
Switzerland	.....1879	1924	Travencore	.....	.....
Turkey	.....1950	.....		
U.S.S.R.*	.....1947	.....	UNITED STATES		
Western Germany	1949	.....	Maine	.....1887	.....
			Michigan	.....1847	.....
CENTRAL-SOUTH AMERICA			Minnesota	.....1911	.....
Argentina	.....1922	.....	North Dakota	...1895	.....
Brazil	.....1891	.....	Rhode Island	...1852	.....
Columbia	.....1910	.....	Wisconsin	.....1853	.....
Costa Rica	.....1888	.....	Alaska	.....1957	.....
Dominican			Delaware	.....1958	.....
Republic	.....1924	.....		
Dutch Guiana			ELSEWHERE		
(Surinam)	.....	.....	Greenland	.....1930	.....
Ecuador	.....1897	.....	Hawaii	.....1957	.....
Guatemala ³	.....1955	.....	Iceland	.....1944	.....
Honduras	.....1894	.....	Israel	.....1948	.....
Mexico ⁴	.....1928	.....	New Zealand ⁵	...1941	1935

* Retained for political crimes.

¹ Restored by Mussolini; re-abolished in 1948.

² Under Martial Law.

³ Abolished for women and children.

⁴ Abolished in Federal Law in all but ten states.

⁵ Restored in 1950.