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Capital Punishment:
The Moral Issue

ORVILL C. SNYDER*

The death penalty is a perennial subject, said Justice Curtis Bok in his second lecture in the Fourth of the Roscoe Pound Lectureship Series,¹ and the recent confused controversy about the Chessman case underlines the statement. Justice Bok said too that it "sets the tone for the entire code."² That it does doubtless practically everybody agrees. But over what tone it sets there is much disagreement. Some are sure that the tone is one of barbarism; others that it is one of high principle. It is safe to say, however, that few if any dispute that essentially the issue posed by the penalty is a moral one, though certainly there is no general agreement as to just what this moral issue is.

I. ARGUMENTS OF LITTLE HELP

Meaningful examination of this question requires setting out at the beginning some things which can be taken for granted and also a preliminary survey of arguments which help little if at all either in defining or in resolving the issue.

A. Some Things Which Can Be Taken For Granted

That it is morally right for government, in performance of its functions, to bring force to bear on human beings is, it is apprehended,

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¹ BOK, PROBLEMS IN CRIMINAL LAW 30 (1955).
² Id. at 31.
not seriously disputed nor reasonably disputable. Doing this, however it is done, even in the enforcement of contracts or in compulsory hospitalization, is to some extent punitive; calling it by another name does not make this fact go away. Of course, there must be a factual basis to justify bringing the force to bear in that those upon whom it is brought to bear are in some way a source of harm; it is "harm that puts the law in motion." But no difficulty about this arises in the present context. The acts—treason, espionage, murder, kidnaping, rape, armed robbery—for which capital punishment is prescribed in this country are obviously harms and grave harms, as are also any others (dope peddling seems to be the only one seriously considered) for which it is reasonable to contemplate that this penalty may be prescribed. Also, it is plain that not all harm-doers, murderers included, are mentally irresponsible; that any honest and fair examination of the moral rightness or wrongness of capital punishment has reference to doers of the grave harms mentioned above who are mentally responsible; and that, in such an examination, it is assumed that the least painful method of inflicting the penalty is to be used. Moreover, there is no occasion to be distracted by pronouncements about criminals running wild; nobody advocates letting "loose the criminal, leaving the honest, peace-loving citizen to paddle his own canoe in a marasmic criminal world."

B. Arguments Helping Little or None

1. General

Arguments are made both for and against capital punishment on the basis of cost. On the one hand, attention is directed to the fact that it would save the taxpayers money to kill criminals rather than supporting them in prisons and hospitals; on the other, it is pointed out that trials in capital cases are more expensive and money would be saved by abolishing the death penalty. What these arguments have to do with whether capital punishment is morally right or morally wrong is not apparent. The argument is made also that

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3 RESTATEMENT, CONTRACTS § 342a (1932).
4 BOK, op. cit. supra note 1, at 18; HALL, BOOK REVIEW, 38 IOWA L. REV. 687, 691 & n. 16 (1953).
5 GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 447 (1952); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 322 (1947).
6 KOCOREK, JURAL RELATIONS 265 (1927).
capital punishment ought to be abolished because it has been and is being haphazardly enforced. The thrust of this argument is for more vigorous and consistent enforcement of the death penalty. Consequently, while the fact of haphazard enforcement does not help the supporters of capital punishment, it does not help the opponents either. Then too, there is dilatoriness in the courts—a source of quite meritorious complaint, but one not pertaining merely to capital punishment; in all cases, justice delayed is, in some measure anyway, justice denied. In addition, it is argued that capital punishment ought to be abolished because it makes convictions harder to obtain. This argument, though, is addressed not to the penalty as such but to mandatory capital punishment.

Some other arguments should be noted more particularly.

2. Sensationalism

It is argued against the death penalty that trials in capital cases occasion sensationalism on the part of the free press and its more prurient customers. Theatricalities in court rooms feed on the play thus given. Similar exhibitionism is manifested, as in the Chessman case, by opponents of capital punishment. Yet, deplorable as it is, what this has to do with the moral rightness or wrongness of capital punishment is not clear. For the people indulging in such displays have as much fun with juicy divorce cases, trials for procuring call girls, and bastardy proceedings; and their doing so shows that these laws are morally wrong no more than it shows they are morally right.

3. The Advocates of Capital Punishment Personally Recoil

Another argument made against the death penalty is that those in favor of it don’t want to have anything to do with it themselves. An event related by Dr. Karl Menninger is instructive here. His account is as follows:6

"The ten-year-old daughter in a middle-class family was threateningly molested by a disagreeable character who, it turned out, had been up to such mischief upon several previous occasions. When he was apprehended, the mother of the molested girl was urged to prefer charges for a criminal suit. This she hesitated to do until she had talked with various legal authorities. One state official assured her that the only appropriate treatment for such an offender was castration. The prosecuting attorney counselled her that a criminal charge, if sustained, probably would result in a five-year sentence to prison from which the man would be released after two years;
he urged her to solicit the assistance of psychiatrists in an effort to have the man declared dangerously insane in order that he might be permanently detained. Psychiatrists whom she approached declined to call him 'insane' and were alarmed at the implication that it might be their responsibility to deprive a man of his liberty for the rest of his life unless they could certify that they had cured him of a malignant tendency. It was decided to discuss the case, ostensibly as a moot trial, before a group of psychiatrists, lawyers, judges and state officials interested in the problem.

"And here was an astonishing thing: At this moot 'trial' the lawyers almost to a man took the position that the offender should be treated as abnormal, while the psychiatrists took the position that he should be tried as if he were normal. The lawyers didn't deny that a crime had been committed, but preferred to see this as evidence of a sickness, while the psychiatrists, without denying that he was abnormal, took the position that a crime had been committed for which the state had prescribed a penalty. Thus, while both agreed on the facts (namely, that he was an offender, that he was dangerous, and that he was aberrant) neither wanted to take the responsibility of dealing with him within the limits of the existing machinery. Both sides agreed that for his own sake and for the sake of society, the accused should be isolated, but whereas the psychiatrists felt that the lawyers were in the better position to effect this, the lawyers felt that the psychiatrists were in the better position to effect it.

There is nothing disreputable in these men's reluctance to take personal responsibility for disposing of the offender. Nor does their being so show that any of the ways of dealing with him mentioned, including castration, is either morally right or morally wrong.

"No one doubts that there is something horrible about killing a man,"9 "whether it be a victim of a crime or a man accused of crime."10 But, whether we say that capital punishment is justified or not, our not liking to be personally involved in its does not prove the penalty is either morally right or morally wrong; it may be no evidence either way. What it does show is that making the moral decision is, frequently anyway, tough on us and requires fortitude.

4. Capital Punishment Is Cruel

It is argued against the penalty that capital punishment is cruel both to the persons upon whom it is inflicted and to their families.

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10 Statement by Al Goossen, one of the detectives who nailed Chessman, Life, Feb. 22, 1960, p. 29, at 31.
And unquestionably, while "it cannot be said to violate the constitutional concept of cruelty," it is harsh. Its harshness, though, does not of itself make it morally wrong. We do and have to do harsh, even very harsh, things and still they are morally right. The question is the relative harshness of alternatives. For between alternatives, if both are or it is assumed they are equally effective, the morally right choice is that which is the less harsh. Hence, since confinement for life—or until it is safe to release the harm-doer, which, because many "will prove unredeemable," means surely for some and potentially for all confinement for life—is considered the alternative to the death penalty, the question here is: Which of these harsh alternatives is the less harsh?

It has been held that changing ex post facto the penalty from death to life imprisonment is unconstitutional, because the penalties are different and that is enough to violate this constitutional prohibition whether the change decreases, increases, or leaves the same the onerousness of the punishment; also that such a change is mitigation. Certainly, defendants rarely plead insanity except to capital charges and this argues that confinement for life is the lesser penalty. There is, however, some evidence the other way.

The deterioration of lifers is well known; though at the beginning they welcome life imprisonment as preferable to death (and we breathe a sigh of relief, perhaps for a hard moral decision shirked), the restriction of bodily liberty and deprivation of activities and associations which normally make life worth living become, after a while, a grinding experience for those who undergo it and those who have to see that they do. There is respectable opinion on the part of those who have had to observe or have taken the occasion to observe it and on the part of those who have suffered it that confinement for life is death by inches. Confinement in a hospital is no better, perhaps worse; for

"prison life holds fewer unknown terrors than life in an 'insane asylum.' Nor are these terrors all imaginary. At the hospital he may find himself strapped to a table and subjected to the painful and terrifying convulsions of electric shock and insulin

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12 ZILBOORG, op. cit. supra note 7, at 128.
shock therapy. If the hospital after commitment makes a really comprehensive ‘criminal investigation of his unconscious,’ laying naked his entire personality, stripping his act of any possible glamor and perhaps even of rationality, the experience will be uncomfortable.”

This type of incarceration may, since “It is certainly an open professional secret that . . . psychiatrists do not know how to treat such patients in a curative way,” go on for life too. Judge Caverley, in sentencing Loeb and Leopold, said that life imprisonment would make them suffer more than hanging. Leopold agreed then and after more than thirty years still thought that prompt death would have caused him and his family less suffering. Of course, he may have changed his mind after he got out. Chessman said that, if the only alternative were life imprisonment, he would take the gas chamber; also that, when he got right up to where his next step would be into that place, he might change his mind. Whether he did we shall never know.

All this is, to be sure, inconclusive. Certainly it does not prove that the death penalty is more merciful than life imprisonment. Neither does it prove that life imprisonment is more merciful than the death penalty. The opinions of those who have had the closest view cannot be lightly brushed aside. Nor does the fact that opponents of capital punishment don’t like to think about the miseries of the alternative for those who do the suffering alter the balance. This debate sheds little light on either defining or resolving the moral issue of capital punishment.

5. Capital Punishment Lowers the Moral Standard of the Community

This has been said to be the main argument against the penalty. It is that capital punishment dulls sensibility to suffering, encourages the thirst for vengeance, makes killing respectable, and elevates hate to the status of a healthy natural sentiment. On the other hand, there is equally respectable and knowledgeable opinion that the most dramatic form of condemnation is necessary, at least for the most impudent offenders, to uphold the moral standard of the community.

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17 Saturday Evening Post, April 23, 1955, p. 28, at 138.
18 Life, Feb. 22, 1960, p. 29, at 32.
Of one thing we can be sure: "Hatred is not health."

But it is fair to ask: Which lowered the moral standard more, Lepke's going to the chair or Anastasia's escaping it? Opponents of capital punishment complain, it is true, that those who disagree with them "are always quick to cite atrocious cases" and they intimate that doing this is unfair argument. However, they linger over the gruesome scene in the death chamber, the sickening atmosphere, the ropy saliva dripping from the dead man's mouth, and shroud in forgetfulness the plight of the victim of the convict's act, the suffering of his family, and fear in the community. With both sides do taken into account, it seems fair to ask: Whose instincts and sentiments are the less healthy?

No doubt, all the gruesome features should be squarely faced or all should be left out of consideration. Doing it either way though helps little or none on the moral issue.

5. Executing the Innocent

Judge Learned Hand once said: "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." But the opponents of capital punishment always call the ghost forth. It is astonishing how they can inflate doubt about guilt in order to do so. The point is, they say, that with capital punishment the victim of a mistake is dead and the injustice irreparable. "Such a miscarriage could as well occur," though, "to a man wrongly sentenced to life imprisonment and discovered only in his advanced years and close to death." Likewise, before the mistake is discovered, he could die in prison or hospital in advanced years or before advanced years and either way whether the commitment is for life or less; and he could get out and die before his innocence comes to light. The only sure way to exorcise the ghost is to abolish convictions.

"There is a margin of possible error in the administration of all justice." And that margin includes the escape of the guilty. That is injustice too; for, the venerable aphorism notwithstanding,

19 WEBER, op cit. supra note 7, at 140.
21 WEBER, op. cit. supra note 7, at 154.
22 Quoted in MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT 37 (1959).
24 Ibid.
the ideal of the law is "that neither ninety-nine nor nine guilty persons shall escape, nor that a single innocent person shall be convicted." However, while hanging one innocent man is too many, the inescapable risk does not appear to be great. The cases, some sixty in one and fewer than forty in the other, in the two leading books on convicting the innocent, presumably gathered by diligent search, are not all capital cases; and, for comparison, there are no assembled data on the total number of cases nor on the number of cases in which the guilty escaped during the time covered in the jurisdictions where the collected cases occurred. All considered, the balanced conclusion is: "The possibilities that the wrong man may be executed . . . is not of overriding importance." We can now turn to arguments which do bring us to the moral issue.

II. ARGUMENTS REACHING THE MORAL ISSUE

These are the arguments based on the theories of vengeance, retribution, self-defense and rehabilitation.

A. Vengeance

The theory that capital punishment is grounded in vengeance is invoked both for and against the penalty. On the one hand, it is contended that capital punishment is justified because it is vengeance; on the other, that capital punishment is unjustified because it is vengeance. What is certain is that human beings do have instincts impelling them to seek vengeance and "we must of course take them into account." Holmes tells us:

"The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion for revenge outside the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution." And Bacon tells us: "Revenge is a kind of wild justice." But he tells us too: "which the more man's nature runs to, the more ought

B. Retribution

A theory that has been advanced in support of the death penalty is the theory of retribution. That is, if a man has committed a wrong and is caught, he should be punished. If one is caught for a crime which he did not commit, he should not be punished. The theory of retribution as a justification of capital punishment is not the same as the theory of vengeance. It is based on a different concept of justice. The retributively-minded person believes that the criminal should be punished because it is just that he should suffer for his actions. The vengeance-minded person believes that the criminal should be punished because it is just that he should suffer for the wrongs he has committed.

C. Self-Defense

The theory of self-defense is also invoked in support of capital punishment. The argument is that if a man is in danger of losing his life, he has the right to defend himself. If he kills someone in the process, it is justified because it is necessary to save his own life. The theory of self-defense is a justifiable defense for the use of capital punishment.

D. Rehabilitation

The theory of rehabilitation is also invoked in support of capital punishment. The argument is that if a man is dangerous to society, he should be punished. If he is caught for a crime which he did not commit, he should not be punished. The theory of rehabilitation is based on the belief that the criminal is a threat to society and must be punished to prevent him from committing future offenses. The rehabilitation-minded person believes that the criminal should be punished because it is necessary to prevent him from committing future offenses. The vengeance-minded person believes that the criminal should be punished because it is necessary to prevent him from committing future offenses.

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26 BORCHARD, CONVICTING THE INNOCENT (1932); FRANK, NOT GUILTY (1957).
27 DAVITT, op. cit. supra note 23.
28 WEIHOFEN, op. cit. supra note 7, at 143.
30 THE ESAYS OF FRANCIS BACON 19 (Modern Student's Library Ed. 1908).
law to weed it out”—which we are unable to deny. Though the urge exists and must as a practical matter be taken into account, vengeance is no moral justification of capital punishment, nor of any other punishment. The reasons appear below under retribution.

B. Retribution

While "retribution is no longer the dominant objective," the idea still lingers in our law, especially as justification of capital punishment. It is invoked against capital punishment too; for, as will be recalled, the argument was advanced that Chessman ought not to be killed because he had not killed. The first step in examining the subject is to take note that, when this theory is brought in, the arguments move clearly onto moral grounds. The next step is to take a look at punishment.

All punishment is suffering; but all suffering is not punishment; punishment is suffering which is the consequence of doing harm. In this sense, retribution is punishment. In fact, there is a view that only suffering which is retribution is truly punishment. This view is not taken here. The view taken here is that all suffering inflicted for causing harm—and all measures whereby government brings force to bear on human beings entail some suffering—is punishment, whether it is called punishment and whether it is retribution or not. What then is retribution?

The basic conception is that retribution is punishment which, independently of the human will, is suffered as the consequence of doing harm; as regards its having a purpose, the purpose is to make the person upon whom it is inflicted suffer to counterbalance the suffering he has caused. Retribution differs from vengeance in that, while both involve suffering, in vengeance the suffering gratifies the desires of the person inflicting it, whereas in retribution the suffering is inflicted dispassionately, without liking to inflict it, even sorrowfully, because the person upon whom it is inflicted deserves to suffer. Both may be and have been called vengeance

31 Ibid.
34 Davitt, op. cit. supra note 23, at 138, 214; Guttmacher & Weihofen, op cit. supra note 5, at 412, 444; Hall, op. cit. supra note 5, at 321; Criminal Justice 21.
but, if that is done, they must be differentiated and then vengeance is human vengeance and retribution is God's vengeance.

Neither the theory of retribution nor of vengeance justifies punishment inflicted on human beings by human beings. And both government and the people are only human beings. Of course, punishment inflicted on the theory of retribution or of vengeance may be justified on other grounds. But punishment merely to make the offender suffer is in our concept beyond government's just powers. For, in our concept, government's just powers are grounded in the moral law; it has no just powers except those derived from delegation to by the people of their individual moral-law rights of self-protection; and human beings have no right to take revenge nor to inflict God's vengeance but only the moral-law right to protect themselves. Consequently, capital punishment, for that matter any other punishment inflicted by government, can be morally justified only as "a necessary means of self-defense."

C. Self-Defense

Government, of course, has the right to defend itself but only as an incident of its protecting the governed. The basic moral-law right is that of the governed. It has two aspects: one as the individual's right, the other as the community's right.

1. The Individual's Right

While it seems to be universally conceded that every individual has a moral-law right to defend himself, his family, and other persons in his presence or company, some dispute the right to use force. But there is an old story about the Quaker who turned the other cheek and, when his assailant smote him again, announced that he had fulfilled the commandment and the assailant was going to get a good licking. This doubtless satisfies most people on this point. Notwithstanding, some deny the right to take life in self-defense on the ground that doing so is against "the law of God, Whose function alone it is to kill, not man's." Lingering around this argument is

37 This concept is developed in Snyder, Justice by Means of State Law: Natural Rights, 26 BROOKLYN L. REV. 184, 193-97 (1960).
38 Davitt, op. cit. supra note 23, at 220.
39 Bok, op. cit. supra note 1, at 31.
a suggestion, or the shadow of a suggestion, that the proposition that situations arise in which a man can protect himself or his family only by taking the life of an assailant is a false pretense. However, when the point is pressed, it is acknowledged that such situations do in fact occur. It may then be conceded, for the sake of argument, that a man must allow himself to be killed rather than kill his assailant. But the question remains whether he must also sacrifice his family. Though a distinction may be drawn between actively killing and not preventing another's killing somebody other than one's self, the answer inevitably is that a man may, indeed must, kill the assailant if that is necessary to protect his family. This situation shows not only that sometimes the moral law permits and even requires the taking of human life by human beings but also that it does happen that a man has no choice not to kill. He can choose to kill the assailant or choose to stand by while the assailant kills another; and morally his standing by, when he can prevent the act, is consenting to it and killing as much as killing the assailant. The truth is that “no one has consistently carried out the view” that the taking of human life by human beings “is absolutely prohibited by the moral code of all mankind.”

2. The Community's Right

There are differences between the individual's and the community's right. The individual's right pertains to imminent danger; its exercise prevents harm. Governmental action in exercising by delegation the community's right is taken after harm is done. Therefore, it is asserted, it does not prevent harm, and is not defensive. For using force on a man, whether by an individual or by government for the community, is defensive in preventing his doing more harm. The argument is made, to be sure, that men who have done harm can be prevented from doing more harm without killing them. They can be incarcerated. That prevents their doing more harm while they

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41 Davitt, op. cit. supra note 23, at 217.
42 Zeiberg, op. cit. supra note 7, at 77.
43 Davitt, op. cit. supra note 23, at 219.
are confined. They can be immured for life. That prevents them permanently from doing more harm. But that is not all there is to the matter. Protection is needed not merely against future harm by those who have done harm; it is needed also against future harm by others; and the deterrent effect of punishing actual harm-doers affords this needed protection. The question here, consequently, is whether potential harm-doers (the context is those grave harms mentioned above) "are less likely to be deterred by imprisonment or other measures and more likely to be deterred by the threat of death,"\(^\text{44}\) whether capital punishment is "a necessary deterrent. If it is, it can be justified."\(^\text{45}\) Before considering deterrence, however, it will be helpful to take a look at rehabilitation.

**D. Rehabilitation**

That "every effort to rehabilitate the offender"\(^\text{46}\) should be made is now established doctrine.\(^\text{47}\) From this, it is argued that capital punishment ought to be abolished because it abandons this method of dealing with offenders.

Procedures to effect rehabilitation are not merely those of treatment and re-education. Punishment is involved; offenders are forcibly taken in hand. Moreover, not only is it an inescapable incident; punishment itself may be reformative and valuable and necessary in treatment and re-education.\(^\text{48}\) There is too the question of what justifies compelling people to submit to reformative procedures. The justification given is that rehabilitation is "society's own best protection."\(^\text{49}\) In the light of our concept of government's just powers, that is the only justification which can be given. For, though it is said that they are taken forcibly in hand for their own good and the good of society, restricting these people of their liberty is not an exercise of government's just powers if done merely for their own good; it is an exercise of these powers only if the need to protect society warrants it.\(^\text{50}\) Thus the theory of rehabilitation

\(^{44}\) WEHOFEN, *op. cit. supra* note 7, at 158.


\(^{47}\) DAVITT, *op. cit. supra* note 23, at 214; Snyder, *op. cit. supra* note 33, at 17.


\(^{50}\) Snyder, *op. cit supra* note 37, at 196 & n. 87.
is grounded on the community’s right of self-defense. In addition, it must be borne in mind that it is but one of the ways of protecting the community.\textsuperscript{51} Other ways are the incapacitation of actual offenders by imprisonment or execution and deterrence thereby of potential offenders.\textsuperscript{52} “Safeguarding society should,” to be sure, “not assume so all-important a role that we ride roughshod over the legitimate interests of the individual, his right to fair and decent treatment and to have his life and liberty held inviolate against unjustified infringement by the state.”\textsuperscript{53} Obviously, if and when efforts to rehabilitate and to protect the community go hand in hand, where “management of the one will take care of the other,”\textsuperscript{54} there is no difficulty. But “the public safety must take precedence.”\textsuperscript{55} Hence, incapacitation of actual offenders and deterrence of potential offenders, if necessary to protect the community take precedence over rehabilitation. And this is as true with regard to procedures “to identify potential criminals and guide them away from an anti-social career before they carry that career to a tragic climax”\textsuperscript{56} as it is with regard to rehabilitation after the climax is reached; for the only constitutional and moral justification for bringing force to bear on human beings in either and both of these ways is the same as and no more than it is in bringing force to bear to incapacitate and deter, namely, the protection of the community. Consequently, since actual offenders can be otherwise incapacitated, capital punishment, if it is a necessary deterrent of potential offenders, takes precedence over rehabilitation.

\textbf{E. Deterrence}

In considering this subject, we need pay no attention to the notion that “no penalties deter anyone from anything.”\textsuperscript{57} All reasonable men know that penalties do deter. They deter mentally normal persons. Moreover, there is respectable opinion that they deter some mentally abnormal persons and that action against non-detractables deters deterss\textsuperscript{58} What we are concerned with here is,

\begin{itemize}
  \item \textsuperscript{51} Trop v. Dulles, 356 U.S. 86, 111 (1958).
  \item \textsuperscript{52} Ibid; REPORT, N.Y. LAW REV. COMM’N 531 (1937) quoted in Snyder, \textit{op. cit. supra} note 33, 21 BROOKLYN L. REV. at 17.
  \item \textsuperscript{53} GUTTMACHER & WEIHOFEN, \textit{op. cit. supra} note 5.
  \item \textsuperscript{54} THOMPSON, \textit{THE PSYCHOPATHIC DELINQUENT AND CRIMINAL} 126 (1953).
  \item \textsuperscript{55} EAST, \textit{op. cit. supra} note 48; Robbins v. State, 8 Ohio St. 131, 171 (1857).
  \item \textsuperscript{56} WEIHOFEN, \textit{op. cit. supra} note 7, at 170.
  \item \textsuperscript{57} Menninger, \textit{op. cit. supra} note 8, at 703.
  \item \textsuperscript{58} United States v. Young, 25 Fed. 710, 712 (E.D. N.C. 1885); GUTTMACHER & WEIHOFEN, \textit{op. cit. supra} note 5, at 412-13; Waite, \textit{Irresistible Impulse and Criminal Liability}, 23 MICH. L. REV. 443, 450 (1925).
\end{itemize}
of course, the deterrent effect of capital punishment. The question plainly is not whether the penalty deters. It does. The question is whether capital punishment, because of its deterrent effect, protects the community better than its alternatives. Its answer depends on what the evidence is.

The evidence as to the deterrent effect of the penalty is on murder. Some of it is statistical, some not. Let us look at the statistical evidence first.

The statistics have been gathered from states, both here and abroad, which have and which do not have capital punishment. These statistics show that states which retain the penalty have no lower incidence of murders, in fact some of them have a higher incidence, than states which have abolished it. From this, it is claimed that "it is valid and correct to conclude that the death penalty is not more of a deterrent than other forms of punishment that might be substituted for it." The conclusion is drawn also that "the figures afford no reliable evidence one way or the other." And this conclusion is not surprising. "Murder is a complex sociological phenomenon;" a "number of factors—ethnic, general cultural and perhaps economic—enter as determinants into the production of the phenomenon which is designated by the simple word 'murder' or 'homicide.' It is not easy to isolate any one of the determinants and assess its role in the causation or inhibition of homicidal trends in a given society;" and "it is almost impossible to draw valid comparisons between different countries." Moreover, it is generally conceded that the deterrent effect of a penalty depends on the certainty of its infliction; in "most countries where capital punishment has been abolished, statutory abolition has come after a long period when the death penalty was in abeyance;" and where retained it has been indifferently enforced. Another aspect is that the statistics have "for the most part been assembled by those who would abolish the death penalty; their object has been to disprove the deterrent value claimed for that punishment." Consequently, the conclusion that the figures afford no reliable evidence either way seems eminently fair, if not generous, to the opponents of capital

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59 Weihoferen, op. cit. supra note 7, at 155.
60 Report of the Royal Comm'n, supra note 45, at 24.
61 Weihoferen, op. cit. supra note 7, at 150.
62 Zilboorg, op. cit. supra note 7, at 29.
63 Report of the Royal Comm'n, supra note 45, at 22.
64 Id. at 23.
65 Weihoferen, op. cit. supra note 7, at 165.
66 Report of the Royal Comm'n, supra note 45, at 22.
punishment. It might be said that, as far as the statistics go, there is a "lack of evidence that it [capital punishment] is any more of a deterrent than any other forms of punishment" but there is a greater lack of evidence that it is not.

Of the other evidence, there are many impressive opinions to the effect that capital punishment does not deter more than alternative measures and also simply that it does not deter. On the other hand, the Royal Commission, impressed by "the evidence of the representatives of the police and prison service . . . [as to the] deterrent value of capital punishment in its effect on professional criminals," thought "we cannot treat lightly the considered and unanimous views of these experienced witnesses, who have had many years of contact with criminals." And while the importance of this evidence has been discounted, opponents of capital punishment have adumbrated that the point about "the professionals, who are most likely to weigh the odds before they act," may be valid.

From the evidence we have, "it is impossible to arrive confidently at firm conclusions about the deterrent effect of the death penalty." We cannot assume that "these arguments and considerations close once for all the discussion as to the deterrent value of the death penalty." Further research, it has been suggested, may produce evidence disproving the deterrent value of capital punishment; but it may produce evidence proving its deterrent value; and again it may do neither. We know: "Capital punishment has obviously failed when a murder is committed. We can number its failures. But we cannot number its successes." And it has been stated: "It is certain that, with the means of scientific investigation available, we cannot determine how many possible homicides are deterred by the death penalty." This poses the issue.

III. The Moral Issue

Just what this issue is must be discerned before an answer can be considered.

A. Just What the Moral Issue Is

If the evidence supported a firm conclusion that, because of its deterrent effect, capital punishment protects the community

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67 WEIHOFEN, op. cit. supra note 7, at 160.
68 REPORT OF THE ROYAL COMM’N, supra note 45, at 21.
69 WEIHOFEN, op. cit. supra note 7, at 159.
70 Ibid.
71 REPORT OF THE ROYAL COMM’N, supra note 45, at 24.
72 ZILBOORG, op. cit. supra note 7, at 33.
73 REPORT OF THE ROYAL COMM’N, supra note 45, at 20.
74 America, Jan. 16, 1960, p. 464.
better than its alternatives, we could say confidently that the penalty is morally justified. Also, if the evidence supported a firm conclusion that, notwithstanding the deterrent effect it does have, capital punishment does not protect the community as well as its alternatives, we could say confidently that the penalty is morally unjustified. But the evidence supports neither of these conclusions. Obviously, it would be unrealistic to decide on the basis of "exaggerated estimates of the uniquely deterrent force of the death penalty."

What conclusion then does the evidence support? Three things about it tip, anyway seem to tip, the balance in favor of capital punishment. These are: It has been gathered for the most part by opponents of the penalty to sustain a preconceived thesis. We can number the penalty's failures but cannot number its successes. There is quite respectable evidence of its deterrent effect on professional criminals, the significance of which opponents of capital punishment appear, grudgingly it seems, to acknowledge. But perhaps all this is not enough. It is necessary to be cautious. A fair conclusion, certainly one not unfair to the opponents of capital punishment and it may be a little generous to them, is that the evidence on deterrence is in equipoise. What then?

Shall we hold decision in abeyance until we have evidence, if we ever do, supporting a firm conclusion one way or the other? But what shall we do in the meantime which may be quite a while? The grave harms mentioned above are going to be committed and we are going to have to deal somehow with those who commit them.

Thus, as it confronts us now and will confront us as far into the future as we now can see, the question is: In an equipoise of the evidence on deterrence is capital punishment justified or unjustified? This is the issue. It is a moral issue; its decision a moral decision.

B. An Answer

The principle to be applied in this equipoise of evidence is derived from our concept of the moral-law basis of government's just powers and of the nature and measure of these powers. It is that the public safety takes precedence. The application of this principle resolves the doubts in favor of protecting the community. In safeguarding the community, it would, of course, be morally wrong to

75 REPORT OF THE ROYAL COMM'N, supra note 45, at 24.
ride roughshod over the legitimate interests of harm-doers. However, notwithstanding the rule that the fact of the accused's having done the harm with which he is charged must be proved beyond a reasonable doubt, resolving the doubts about which of alternative ways of dealing with him better protects the community in favor of the community instead of in favor of the harm-doer, in cases of the grave harms listed above, infringes unjustifiably no interest of the criminal which is legitimate either constitutionally or morally. Consequently, the adoption or retention of capital punishment is morally justified. This answer is supported by other considerations.

C. Supporting Considerations

The chief of these is that the arguments of the opponents of capital punishment support the answer that the penalty is morally justified. They point out that it usually is the murderers without money and the Negro not the white rapists who get hanged. This argument supports the conclusion that hanging one and not the other is morally wrong. It also supports the conclusion that what is morally wrong about this is not the hanging of the murderers without money and the Negro rapists but not hanging the murderers with money and the white rapists and that hanging both would be morally right, as much as or more than it supports the conclusion that hanging both would be morally wrong. The opponents of capital punishment stress too that many times in murder both the actor and his act are such that the deterrent effect of any penalty is nil or at a minimum. Many murderers, they present figures to show, are not hardened criminals but pathological personalities; in many instances, this crime is committed in a fit of passion arising out of an unpremeditated quarrel and, even when the act itself is premeditated, it is often the culmination of embitterment and frustration in the generation of which the victim played a part. Moreover, they iterate that there are crimes worse than murder, worse than such murders as those just mentioned anyway; that the professional criminals, especially racketeers, are the real threat to society; and, while emphatically denouncing the death penalty for murderers such as those mentioned above, imply that capital punishment, not for murder alone, for the professional gentry, who act from deliberate motives and whose crimes, including murder, are therefore of the kind most likely to be deterred, would or at least might be a good thing. Thus

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their assault is not upon the penalty as such but upon its discriminatory enforcement and upon mandatory capital punishment.

Al Goossen, one of Chessman's nemeses, summed it up for himself as follows: "I think it all depends on the specific individual, the specific crime, the nature of the crime, the details of the crime, and the individual himself." That is a pretty good summary of what, when it is boiled down, the opponents of capital punishment are saying too. It is interesting to note that the recent Royal Commission did not recommend abolition and Parliament amended the laws along the lines of this thought. Twenty years ago, the late Professor Morris Raphael Cohen, in examining the moral aspect of capital punishment, concluded: "It may be that in some cases the death penalty should be eliminated but perhaps in other cases extended."

The two things the opponents of capital punishment, anyway the level-headed ones, are really fighting for are (1) the elimination of the mandatory death penalty and (2) the determination of governmental action against harm-doers by the criterion not of the retributive deserts of the offenders but of social dangerousness. On both points, they are unquestionably right. For punishment of human beings by human beings cannot be morally justified on the ground of retribution; it can be morally justified only on the ground of the community's moral-law right of self-defense. Obviously, crimes differ in social dangerousness; the concrete acts which are the same crime differ in social dangerousness; and the persons who do the concrete acts differ in social dangerousness. For example, though both acts are done with a premeditated and deliberate design to effect death, everybody discerns a difference between a killing, even of another racketeer let alone of a law-abiding citizen, by a hired gun and a killing by an harassed shopkeeper of a racketeer. The opponents of capital punishment want the penalty adjusted accordingly; and it is constitutional to adjust the penalty to both the crime and the criminal, morally justifiable too.

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79 Guttmacher & Weihofen, op. cit. supra note 5, at 444; Weihofen, op. cit. supra note 7, at 146.
81 The degree of immorality of a concrete act is inseparable from its social dangerousness and the motivation of the actor. Davitt, op. cit. supra note 23, at 180-81.
This finishes this examination of the moral issue posed by capital punishment. Incidentally, it may be remarked that making the adjustment of penalty to crime and criminal "calls for sharp separation of the two major questions involved in a criminal trial—ascertaining whether the accused did in fact commit the act, and, if he did, deciding what should be done with him."\textsuperscript{82}

\textsuperscript{82} Guttmacher & Weihofen, \textit{op. cit. supra} note 5, at 445.