Is the Death Penalty Necessary?

by Giles Playfair

IN JUNE of 1955, a blonde London model, named Mrs. Ruth Ellis, was hanged for shooting and killing her faithless lover. The execution caused considerable criticism of British justice even in countries which still retained capital punishment for murder, one Paris newspaper remarking editorially that it symbolized "a pitiless legal system which, alone in the world, refuses to recognize the human sentiments of life."

As a matter of fact, the hanging of women murderers in Britain had become much more exceptional than usual. Although both English and Scottish law made the death sentence mandatory for any kind of murder — in other words, left the trial judge with no choice but to impose it — the Home Secretary had by virtue of the royal prerogative of mercy, a power of reprieve. Of late years this power had been exercised more and more liberally, with the result that a male murderer's chances of escaping the rope were now better than even and a female murderer's a good deal better than that.

Quite possibly Mrs. Ellis was ill-served by all the clamorous publicity that her case aroused, for this may have decided the then Home Secretary that if he spared her he would appear to be yielding to pressure and to be betraying the principle of capital punishment — a principle to which his government was staunchly committed. On the other hand, her execution provided so-called abolitionists with an opportunity to launch a new campaign to outlaw the death penalty for mur-

der, which except for treason was the only remaining capital offense in Britain.

The new campaign was intensively conducted and mustered very influential support in and out of Parliament. But all it won in the end was a promised reduction in the number of possible executions and in the already low number of likely ones. This was brought about by a half-baked piece of government-sponsored legislation called the Homicide Act, which became law last March and which, while it reaffirmed the necessity of retaining the power to hang, in the interests of law and order, enunciated the bizarre proposition that henceforth only some types of murder (for example, murder by shootings as opposed to murder by any other means) need be considered a sufficient threat to law and order to be called capital!

Such an outcome was for two reasons illogical. In the first place, every other European country, save France and Spain, had long since renounced the death penalty for murder without any consequent undermining of public safety. Secondly, the allowed penalty in Britain was clear indication of a declining faith on the part of successive governments in both the moral rightness of capital punishment and its practical usefulness.

One must conclude, therefore, that however close the British people may be led to abandoning the death penalty in practice, they are, as a whole, peculiarly resistant to abolishing it in principle.

But whatever may be true of Britain in this respect is true of nearly all English-speaking countries, and particularly of America, where devotion to the principle of capital punishment seems more firmly rooted today than it was a couple of generations ago. Back in 1917, abolitionists had excited a nation-wide interest in their cause and appeared on the verge of winning a nation-wide victory. Twelve states had already passed abolition acts, and in several other states legislation to outlaw the death penalty was pending and had been promised passage. But with America's entry into the First World War, and the concomitant atmosphere of insecurity, a sudden retreat from abolition began, which has yet to be halted.

In those states where legislation to outlaw capital punishment had been introduced, the bills, almost immediately, were either dropped or defeated. Since then six of the twelve formerly abolition states have restored the death penalty, while under federal law capital offenses which, numbered four in 1917, now number nine, three

of the additions — peacetime espionage, dope-peddling to minors, and causing death through sabotage of a commercial vehicle — having been made in the last three years. By contrast with the position in 1917, the abolitionist cause today, so far as the country as a whole is concerned, seems almost dead. Indeed, theoretically, America now makes a wider use of the death penalty than any other civilized nation in the world.

Throughout its jurisdiction, state and federal, some twenty different capital offenses remain on the statute books, including such archaic-sounding ones as train-wrecking. Though the majority of these cannot be fairly called more than capital in name, executions do in fact take place for other crimes besides homicide and treason. Thus in 1953 the Rosenbergs were executed for wartime espionage on behalf of an ally, another couple were executed for kidnaping, and in the South six Negroes and one white man were executed for rape. A year later, a Negro was executed in the South for armed robbery. There have been three comparatively recent executions in California for aggravated assault, and this year there has been an execution, again in the South, for burglary.

THE American people do not have to look as far as Europe for evidence of the practical needlessness of the death penalty. That evidence exists, and perhaps even more impressively, within their own borders. A statistical comparison has been made over five yearly periods between contiguous abolition states and states that retain capital punishment. In these states, where social conditions are undeniably similar, the homicide rate is about equal and is subject to almost identical fluctuations. For instance, the homicide rate per 100,000 of the population between 1931 and 1935 was 5.0 in the abolition state of Michigan and 6.2 in the retention state of Indiana; between 1936 and 1940 it was 3.6 in Michigan and 4.3 in Indiana; and between 1941 and 1946 it was 3.4 in Michigan and 3.2 in Indiana.

Moreover, while throughout the country the power to impose the death penalty has been buttressed and widened during the past forty years, the actual exercise of that power has, just as in Britain, become steadily less likely. Between 1930 and 1950, the average number of annual executions under civil state and federal authority stood at 143. That number has dropped since to 79, and according to present indications will continue to drop. While the great majority

of executions that do take place are for first-degree murder — virtually all of them outside of the South — statistics show that at present the chances against a person convicted of intentional homicide ever entering the death chamber are a hundred to one. Several states which remain obstinately loyal to capital punishment in principle have in practice, apparently, ceased to use it at all. There have been no executions in Massachusetts, for example, since 1947. And South Dakota, which, though once an abolition state, went to the trouble of restoring the death penalty in 1939 for three offenses — murder, killing in a duel, and harming a kidnaped person — has conducted only one execution since then.

Nor, though the pardoning power exists in American jurisdictions, as it does in Britain, is this solely or even mainly responsible for the dwindling number of executions. By contrast with the position in Britain, the imposition of the death sentence in America is now largely left to the discretion either of a judge or a jury, and this discretion is being less and less used. Only in Vermont and the District of Columbia is the death penalty for first-degree murder mandatory. For rape, and which accounts for the second largest number of executions, it is mandatory only in Louisiana. Under federal law it is not mandatory for any offense — not even for treason, which is generally conceded to be the most heinous of all crimes and is still punishable by death in every European country save Western Germany.

This increasingly bashful use of the death penalty makes nonsense of the two main arguments for retaining it: namely, that it is a necessary form of retribution — the only adequate means of expressing society's condemnation of a particular crime—and a necessary deterrent against this same crime. Clearly, if first-degree murder is legally defined and some first-degree murders are punished by death and others are not, society is using the death penalty to express its condemnation of selected first-degree murderers rather than of first-degree murder as such. Hence the dividing line between retribution and vengeance, always a thin one, disappears; and an objective appraisal of such executions as do still take place, alike in Britain and America, strongly suggests that they are mostly vengeful in character. Thus it would be hard to deny, judging from the statistics, that the death penalty for rape in the southern American states exists essentially as a discriminatory weapon against Negroes. The most flagrant admission of this occurred in 1915

As for deterrence, any parent should know the absurdity of threatening a punishment and then not carrying it out. Indeed, by definition, the deterrent effectiveness of a penalty depends on the extent to which it is certain to be imposed, and the perpetrators of capital offenses must be well aware by this time that even if they are apprehended the death sentence is far from certain to follow.

But this is not the only reason why capital punishment, if it ever was a truly effective deterrent, is now plainly no longer so. By definition again, the more fearful, the penalty, the greater its deterrent value must be. But capital punishment is not such a fearful thing as theoretically it could still be, and as undoubtedly it once was. Gone are the days of preliminary torture, boiling in oil, burning at the stake, burying alive, and so forth. The whole tendency during the past fifty years and more has been to make the death penalty as "humane" as possible. Executions are now held in private rather than in public; in America, though this is not true of Britain, the bodies of executed people are returned to their relatives for burial in consecrated ground. The twenty-six American states that have substituted electrocution for hanging, and the eight that have substituted lethal gas, have done so in the belief that these are less, not more, fearful ways of dying. And the British have kept hanging as their method of execution only because they have yet to be persuaded that a practicable alternative method exists that would cause the victim less suffering or provide more certainty of instantaneous death.

THE FACT is that capital punishment belongs historically to a penal system based on violence of an unspeakably brutal kind; and the morality which allowed this system to operate has for some two hundred years been in retreat before the advance of humanitarian and scientific influences. Hence there is no wonder that the death penalty should be falling into disuse. It was already an anachronism during the first half of the nineteenth century when, initially in America and later in Europe, the system of assaulting the bodies of criminals was replaced, broadly speaking, by the system of assaulting their minds, through solitary confinement in penitentiaries. Today, no civilized society would permit capital punishment to be practiced in accordance with the penal theory that fathered it. Admittedly, it can still be effectively employed, and is unfortunately from time to time in authoritarian coun-

tries, for preventive purposes — as a means of wholesale political suppression. But otherwise, regardless of whether or not it is morally justifiable, there no longer seems to be any logical point in its retention.

One may wonder, then, whether it remains an issue of any real importance. Couldn't it be safely left to disappear on its own?

Orthodox abolitionists would answer no to this question, because if and when the annual number of executions falls to one, that, from their point of view, will still be one too many. Further, they could fairly argue that so long as the power to impose the death penalty exists in principle, the chance and the danger persist that, under exceptional circumstances, it will be wielded in practice. This was shown at the end of the last war when the traditionally abolitionist Dutch, Norwegians, and Danes executed native traitors.

But there is another, and perhaps more compelling, reason why the issue cannot be disregarded. Though capital punishment was a contradiction to the chosen methods of nineteenth-century penology, which had revolted against violence, that penology still accepted the necessity of exacting retribution from criminals. Present-day penology, by contrast, puts its emphasis not on retribution, nor even on deterrence, but on rehabilitation. It combats crime by such reformative and essentially non-punitive means as probation and psychiatric help in and out of prisons. It seeks eventually to replace the old concept of "the punishment to fit the crime" with a quite new notion: "the treatment to fit the criminal." Clearly, the death penalty is wholly inimical to this aim, inasmuch as it serves the purely punitive ends of retribution and deterrence. Hence its retention is bound to produce a confusion of purpose in the whole penal picture, and to impede those reforms which are necessary before a policy fully in accord with modern penological theory can be put into operation.

Regrettably, organized abolitionists are apt to make little of this point. They are chiefly concerned with the moral objection to punishment by killing. They give the impression of being nineteenth-century penal reformers in the sense that to them abolition is an end in itself, and they are prepared to buy it with promissory notes of alternative punishments which, they claim, would prove no less retributive and no less deterrent.

Thus in Massachusetts recently, after an abnormal youth named Chapin had been sentenced to die for a horrifying but motiveless murder, aboli-

tionist spokesmen made no attack on the idea of punishing rather than treating this boy whose mind was clearly disordered. They urged clemency on the curiously illiberal grounds that life imprisonment would be just as terrible a punishnment for him as death, but would avoid the affront to social decency which his execution would entail.

And, indeed, from the point of view of the individual, natural life imprisonment as an alternative to capital punishment is apt to be little better than the substitution of a slow death for a quick one. In both cases the convicted man's only way of putting paid to his debt to society is through dying. But while natural life imprisonment is unknown in European abolition countries, where the outlawing of the death penalty clear the way for a curative approach to the problem of crime prevention, it is the alternative to execution that has been adopted in the American abolition states.

In 1919, for example, a psychopathic young hooligan, named Joseph Redenbaugh, who had spent most of his brief life in and out of reformatories, was convicted of first-degree murder in the abolition state of Minnesota and was sentenced to life imprisonment. Prompted by an illusory hope of regaining his liberty, and through exploiting an innate intellectual curiousity, Redenbaugh accomplished a remarkable job of self-reform or cure. He grew from an unmoral, undisciplined, semiliterate "tramp kid" into a peaceable, law-abiding, highly educated man. It is years now since both the prison and parole authorities in Minnesota were persuaded that Redenbaugh, who has become learned in an immensely varied number of subjects and the master of several trades, had conquered his criminal aggressiveness; years since they were persuaded that he would no longer prove a danger to society. Yet Redenbaugh remains in prison. Short of special legislative action, there appears to be little or no chance that he can ever be released.

It is not surprising that this man, when he looks back on some thirty-eight years of what now seems wasted effort to equip himself for freedom, believes that from the individual's point of view it is better that the death penalty should be retained than replaced by natural life imprisonment. At this point, certainly, his punishment would appear to be as vengeful in character as any execution, and to make as much of a mockery of the new penology, which places rehabilitation before retribution or deterrence. In short, the abolitionists are content.

THIS may go far to explain the olligocal reluctance to suggest life imprisonment as a suitable alternative to the death penalty, they are in effect offering society an alternative form of vengeance, without giving society and solid reasons for believing that it will be better off if it accepts it.

So long as vengeance is socially permissible in certain circumstances, the average citizen, who does not happen to share the abolitionist's emotional objection to punishment by ropekilling, prefers to stick to the rope or the electric chair or whatever it may be as the most satisfying method of exacting vengeance which the law, in theory at least, allows.

An unhappy illustration of this was provided a few years ago by the acts of William Edward Cook. On December 29, 1950, Cook began a hitchhike from El Paso, Texas, that turned into a homicidal rampage. At the end of the following week he had been in and out of Oklahoma, Arkansas, New Mexico, and California, and had fled to Mexico City. He had shot and killed eight people, including a whole family.

Murder on such a horrific scale inevitably excites a demand for vengeance. Cook was in an unusually weak position to escape, or be protected from, the satisfaction of this demand. He was young man of twenty-two from a broken and underprivileged home; he had no money, friends, or influence; and he was grossly unbalanced mentally.

He was tried, first of all, under federal law at Oklahoma City. Presumably on the advice of his attorney, he pleaded guilty; and one may doubt whether he could have supported an insanity plea (his only possible defense) before a jury. The prosecution had mustered three psychiatrists to say that he wasn't insane. Their view may have been correct according to the strict legal test, which defines sanity as the ability to make an intellectual distinction between what is right and wrong (punishable by law). Though this test was originally propounded by the law lords of England more than a hundred years ago, and is entirely outmoded by medical knowledge, it remains in force in most American jurisdictions.

Nevertheless, the federal judge used his discretionary power to circumvent the death penalty. He had appointed four independent psychiatrists to advise him and, on the basis of their findings, he decided that though in law Cook might be responsible for his actions, in fact this derelict young man was "hopelessly insane." According-

ly, he refused to sentence him to death, as the prosecution urged, and instead sent him to prison for three hundred years. The decision prompted Cook's own attorney to an almost lyrical flight of appreciation. "The result proves conclusively," he said, "that even the vicious, the homeless and the friendless can be dealt with compassionately and justly."

He spoke too soon. The state of California demanded Cook's extradition, so that he could stand trial for the murder of one of his victims, whom he had killed within the jurisdiction of the California town of El Centro. This demand was backed by a bloodthirsty local newspaper and radio campaign to which the El Centro district attorney and sheriff were prominent contributors. The United States attorney general opposed no objection. Cook was removed from Alcatraz, where he had been sent to serve his federal sentence, and was handed over to the California authorities.

By then he had been publicly called "Badman" and "Butcher." Moreover, California's purpose in extraditing him was openly and avowedly to do the job that the federal judge had shrunk from doing. The result of his trial, therefore, could hardly have been other than a foregone conclusion. Under California law there was an automatic appeal and, one is tempted to suggest, an equally automatic rejection of it. On December 12, 1952, William Edward Cook was gassed to death at San Quintin.

Here was a flagrant example of the kind of legalized vengeance that the existence of the death penalty encourages — and one all the more remarkable because it happened in California, which, with its wide use of such rehabilitative techniques as prisons without bars, has the reputation of being among the most penologically advanced jurisdictions in the world.

Yet the federal disposition of the case was also an attempt to satisfy the public's thirst for vengeance, and, looked at objectively, showed little of the justice and compassion that Cook's attorney saw in it. True, the court's hands may have been tied. But that does not alter the fact that to punish a "hopelessly insane" man by imprisonment in Alcatraz, toughest of the federal maximum-security institutions, is only in degree less barbarous than to execute him.

The interests of society must, of course, be placed before the rights of the individual! and no judge would be doing his duty if he permitted men of Cook's kind to remain at large. But society's interests would have

been adequately protected in this case if Cook had been committed to a custodial non-punitive institution until he died or was cured. Society's interests would have been far better protected if he had been committed before and not after he killed eight people.

This last suggestion is something that could and would have happened under a genuinely curative penal system. Though murderers of Cook's type are not legal madmen, they are often popularly referred to as "mad dogs" — a fact which makes their treatment under the criminal law as fully responsible people all the more ironic. Murder is seldom the first crime they commit, and a competent diagnostician, given the chance, can usually detect their homicidal tendencies before these erupt. Certainly Cook's murderous rampage was predictable in general terms. He had a history of antisocial, psychopathic behavior dating back to his ninth year. At the Missouri intermediate reformatory, which he entered when he was still in his early teens, he was classified as incorrigible. Consequently, he was transferred for closer custody to the state prison, where he was held until, on the expiration of his sentence, he had to be released. In other words, though his condition was diagnosed in a rough-and-ready sort of way, no attempt was made to treat it, and no power existed to prevent this obviously sick and dangerous boy from reentering the free world once he had paid his so-called debt to society.

But nothing much better can be expected so long as an archaic legal test of sanity allows psychopaths and other grossly abnormal people to be held fully responsible to the law. The practice of punishing rather than treating these people, who are incapable of helping themselves, does worse than violate the right of the individual: it threatens public safety. For, as Cook's case illustrates, while punishment has no beneficial effect on them, its infliction means that society cannot be permanenlty safeguarded from them unless and until they commit a crime of such gravity that the legal sentence is life imprisonment or death. The law of criminal responsibility must be reformed if the problem that the abnormal offender represents is ever to be solved by curative means; and this is a reform, vital to modern penological principles, that the death penlaty and other purely punitive symbols are holding back.

Yet there are examples to demonstrate how much society would have to gain from it and how little to lose — except the right to vengeance. Some two years before Cook was executed

in California, a number of psychiatrists and other public-spirited people had successfully launched an attack on the "right and wrong" test of sanity. Like Cook, Brettinger antisocial history dating back to his childhood! like Cook, he had not responded to punishment; and like Cook he was a severe psychopath. Unlike Cook, he pleaded insanity.

He was incapable, they said, of controlling his impulses; he had virtually no moral sense. One of these expert witnesses, the late and distinguished Robert Lindner, boldly predicted from the stand that if Brettinger were not treated and confined, if he were merely sent to prison for a determinate term, he would eventually do murder. It was this prediction which in all probability decided the jury, after much debate, to accept Brettinger's innsanity plea. So instead of being punished again, he was committed to a hospital for treatment over an indefinite period. Today, seven years later, he has been released on parole. He is holding down a good job, and shows every indication of being a useful member of society.

The moral of this story has, unfortunately, not been widely heeded, but it provides, surely one of the most persuasive messages for abolitionists to proclaim. Granted a reform in the law of criminal responsibility, murder can be prevented through cure — not every murder, obviously enough, but a great many of the murders which, in practice, the death penalty is retained to punish.

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Cooking Adage

Which reminds us of the newest cook book from deepest Africa.

"How to Serve Your Fellow Man."