

# Reflections on the Gas Chamber

CHARLES S. MILLIGAN

## THE TWO TYPES OF ARGUMENT

**A** RECENT Canadian publication lists 65 arguments in favor of capital punishment and 87 arguments against it.<sup>1</sup> In the extensive literature these overlapping arguments are repeated again and again. What is needed, I believe, is some clarification of the substance of a few of these arguments, and in particular to ferret out some of the assumptions hidden in them. Some special attention will be given to Colorado since it is currently an issue here.

It is helpful to keep in mind that all of these many arguments come down to two basic types. One type is empirical, which I will call arguments of **social utility**. That is, the death penalty is defended because it brings about certain results in the society in terms of human behavior. Or it is argued against because of such results. Or men argue about what the social results in fact are. Lord Halifax's epigram is an example of the utility argument: "Men are not hanged for stealing horses, but that horses may not be stolen." If this is the justification for hanging horse thieves, one then has the problem of examining the theft of horses. This type of argument presumably could lead to a measure of agreement among reasonable men. What is important to note is that the settlement of the argument would come about by examination of what happens in the actual behavior of men, and not by mere repetition of claims about principle or theory.

The second type of argument is non-

empirical, which I will call arguments of **satisfaction**. That is, the death penalty is defended because it satisfies some demand or principle. The claim which it satisfies or with which it corresponds may be emotional or ideal, ethical or religious, or some combination of these. One such argument regards the executioner as embodying "the wrath of God." The Word of God, he says, requires that "all murderers **must** be put to death."<sup>2</sup> Entirely apart from any social consequences, then, executions are not only justified but required. A more common version is that an execution satisfies an emotional demand. Writing about Colorado, Prof. J. E. Cutler of the University of Michigan, asserted many years ago:

Whenever unusually brutal and atrocious crimes are committed, particularly if they cross racial lines, nothing less than the death penalty will satisfy the general sense of justice in the average American community.<sup>3</sup>

Whether he had correctly assessed average community sentiment is an empirical question, but the justification clearly rested on feelings.

There are several reasons why it is important to distinguish between these two types of argument, especially since they are usually intertwined. First, it is possible that empirical evidence regarding social utility supports the abolitionist case, whereas emotional considerations support the retentionist. Or vice versa. Or, more likely, that some empirical matters more clearly provide support, one way or the other, than others. Second, social utility evidence cuts no ice with a counter argument of

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<sup>1</sup> *Capital Punishment: Material Relating to Its Purpose and Value*. Ottawa: Queen's Printer, 1965, pp. 23-35.

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<sup>2</sup> Richard A. Bodey, "The Bible and Capital Punishment," *Presbyterian Journal* (pub. by the Southern Presbyterian Journal, Inc.), June 8, 1960.

<sup>3</sup> "Capital Punishment and Lynching," *The Annals*, XXIX (May, 1907), p. 815.

satisfaction. For example, if a man wants capital punishment retained because he enjoys seeing certain men put to death, the fact that this may result in more murders, if that could be demonstrated, would not affect his enjoyment. It might provide more frequent occasions for the enjoyment. Third, this distinction clarifies some of the questions about which it is profitable to debate and some which are undebatable.

### FACT AND SYMBOL

The debate is further complicated because capital punishment is to such a large extent a symbol—a symbol of many different things to different people and from one period of history to another. This is most obvious when the discussion wanders far from the most obvious facts or indulges in the most patent contradictions. For example, I remember hearing the argument that opposition to capital punishment was “Communitic,” at the very time that some of us were vigorously protesting Castro’s orgy of summary executions. Rev. I. E. Howard wrote in the May 30, 1961 issue of *Christian Economics* that “Socialists have always opposed capital punishment,” and made much of this argument. It was ironic timing, because it was on May 5 of that year that the U.S.S.R., which had retained the death penalty for “crimes against the state,” extended it to cover “economic crimes,” and during the succeeding twelve months executed 25 people under this category. This, too, was protested by abolitionists, although *Christian Economics* took no note of their misrepresentations and made no corrections. Those who favor abolition, however, find little satisfaction in its use anywhere.

Another example is found in Jacques Barzun’s essay. Of abolitionists, he says, “they speak of the sanctity of life, but have no concern with its quality.”<sup>4</sup> He

charges them with disinterest in prison reform, which is curious since many distinguished wardens have so long been identified with both movements.

One further example is that of a man who favors retention because he believes the death penalty fitting for treason. But it happens that treason is not included in the capital offenses in Colorado law.<sup>5</sup> Where individual states have such a law it is plainly symbolic, because it would be a federal case. In any event the argument has no bearing on the Colorado question.

Or we can get at the symbolic nature of the subject by simply considering the amount of writing and emotion generated. You would think that it had to do with a proportionately large social problem. The fact is that there were seven executions in the entire U.S. in 1965. The number of executions in the nation in recent years runs:

1960—	56
1961—	42
1962—	47
1963—	21
1964—	15
1965—	7

The average per year runs as follows in each decade:<sup>6</sup>

1930s—	166.6 per year
1940s—	128.4 per year

<sup>5</sup> The ones which are: first degree murder, dueling, abortion leading to the death of a woman, kidnapping where the victim suffers bodily harm or threat of it, armed assault by a life term prisoner. Execution is not mandatory. For two additional crimes, which most Coloradans do not even know about, it is mandatory: murder committed during criminal anarchy and perjury in a capital case leading to the death of an innocent person. In certain cases an accessory is equally guilty with the perpetrator.

<sup>6</sup> The F.B.I. Uniform Crime Reports go back only to 1930, which is why figures are at best rough estimates before that. There is little doubt that many more executions, as well as lynchings, occurred in previous decades. The estimate is that in 1900, with half our present population, executions occurred three times as often as in the 1950s and 1960s. (Bedau, *op. cit.*, p. 23.)

<sup>4</sup> In *The Death Penalty in America*, edited by Hugi A. Bedau. Garden City: Doubleday, 1964, p. 161.

1950s— 71.7 per year  
 1960s— 31.3 per year

Colorado reflects this trend, except that the 1930s saw a disproportionate increase, beginning with the execution of nine men in a nine month period, May 1930 to January 1931. Total executions in Colorado:<sup>7</sup>

1890-96—	12
1905-09—	7
1910-19—	4
1920-29—	7
1930-39—	26
1940-49—	12
1950-59—	3
1960-65—	5
—	—
Total	76

Before 1890 executions were carried out in the county where the crime was committed, often under rather informal procedures. When legislation was passed to confine executions to the state penitentiary, to get away from the quasi-lynching atmosphere, Warden J. A. Lamping objected, because he did not relish this new "sport." It is important to remember this when we come to consider the local historic background. For the moment it is important to observe that the smaller the number of people being considered, and the shorter the time span, the less reliable general population statistics are. Colorado, like other states, exhibits fluctuations, as between the 1920s and 1930s, but over a longer period of time the general trend away from murder, dueling, lynching and executions is clear and in accord with national experience.

It is also significant that murders have diminished, both absolutely and relatively, despite increases in other forms of crime. In 1930, with a national population of 123 million, there were 10,617 homicides. This rose to 12,124 in 1933. It has never been as high since. In

recent years, with a population of upwards of 180 million, it averages around 9,000, of which about 15% are capital crimes. It appears that we are less inclined as a people, as time goes by, to solve our problems by murder or to respond to murder with execution. Compare this with 105,000 deaths last year by accident, including 49,000 on the highway, and with 400,000 total casualties in Viet Nam, and it is obvious that known murders<sup>8</sup> and executions are a relatively small phenomenon, socially considered. To the victim and his family, it is not a small matter, obviously, and it is not my wish to convey the impression that any murder is of small importance. What is to the point is that we get worked up to an extraordinary extent over the alleged degree of danger, when the facts simply do not bear us out. Many people have the notion that if you abolish capital punishment, vastly increased numbers of murderers would be roaming the streets. This is preposterous in view of the number of executions per year. The discrepancy between general impressions and the facts underscores the symbolic function of the subject of capital punishment.

Another indication of the symbolic function is found in the fact that nationally there are 33 crimes punishable by death, but since 1930 only seven of these have been used as grounds for an execution. Under the law in 16 states, children as young as seven can be executed; in fact, children are not. In Colorado, as we have seen, there are seven capital crimes, but all executions by the state have been for murder. No woman has been executed by the state. Whatever it is that capital punishment is symbolic of, it is evidently not applicable to women.

<sup>7</sup> Bureau of Identification and Classification, Statistical Division, based on "The Executions Book and Warden's Report."

<sup>8</sup> I say "known murders," because there is no way of even guessing how many of the deaths by accident are actually murders or suicides. But compared with frontier history of a century ago, the decline seems clear enough.

When I say that capital punishment is "symbolic," I do not mean to suggest that it is unimportant. Symbols can be exceedingly important. But there is need to distinguish between the direct facts of the matter and the indirect symbolic functions. A final indication of the symbolic aspects can be seen in the case of Massachusetts, where there has been a long and vigorous campaign for abolition. The law has been kept on the books. However Massachusetts has not executed anyone since 1947. There is no great pressure from any quarter to renew executions, but there is on both sides of the issue of abolition of the death penalty. Even more remarkable, especially in view of the history of naval law, is that the U.S. Navy has not carried out an execution since 1849.

#### DETERRENCE AND SOCIAL UTILITY

One of the main arguments for retaining capital punishment is that it serves as a warning to potential murderers and thus deters them from this particular crime. Common sense would seem to support this at first thought. After all, what is more important to a man than his life? On second thought, however, it is obvious that those who did commit murder were not deterred. One recalls some particularly horrible multiple murders in recent years that occurred not in states without the death penalty, but in Colorado, Nebraska, and Kansas with the death penalty. One reflects on the four per cent of persons charged with criminal homicide who commit suicide, remembering that many more are prevented from this by close surveillance. For many years now, more such persons have killed themselves than were executed by the state. It is obvious that many of these people do not have a strong and sustained drive to live and that the thought of their own death would not be a very ef-

fective deterrent.<sup>9</sup> Every now and again one reads such items as these:

OROVILLE, Calif. A man who the prosecutor said failed at suicide, then committed murder to gain execution by the state was given a life sentence Tuesday . . . John Arthur Dublin, 22, of Oakland, Calif., bought a pistol intending to commit suicide but lost his nerve. He decided instead to shoot someone, then have the state take his life. (AP Dispatch, Feb. 19, 1964)

OKLAHOMA CITY. A state prison convict asked Dist. Judge Boston Smith Thursday to send him to the electric chair . . . Lowery's request for a death sentence came after a district court jury found him sane. (AP, April 24, 1964)

BROADUS, Mont. A former undersheriff and town marshal shot and killed his wife, and then himself Wednesday in the basement of their home. (AP, April 20, 1966)

It seems unlikely that prudential considerations would have had much reliable effect on such people. In point of fact, they did not. These and hundreds of other examples could be cited from death penalty states. In one case in California the psychiatric record revealed:

This man stated that there was absolutely no motive to the offense other than his desire to do away with himself. He felt that if he could go to the gas chamber he would achieve his own self-destruction which he could not do on his own initiative because of his Catholic belief.<sup>10</sup>

It should give us pause to reflect that particularly horrible and multiple murders of the "senseless" type would be encouraged by the motive of self-destruction. This helps us understand why what looks like a logical and reasonable argument does not work out in experience.

<sup>9</sup> Special Commission . . . *Report and Recommendations*, House Doc. 275. Boston: Commonwealth of Massachusetts, 1958, pp. 22, 41.

<sup>10</sup> *Ibid.*, p. 28. The state obliged him. Denmark back in 1767 excluded the death penalty for those who murder "for the exclusive purpose of losing their lives." (*Ibid.*)

Now it may very well be that some persons are deterred from murder by thoughts of the death penalty. But if the murder rate is not significantly affected by the death penalty, then it must be the case that there are as many persons invited to commit murder by it as are deterred by it. The retentionist is quite correct when he says, even if we can prevent one murder, that is good and important; but he is tragically mistaken if where one is prevented two more occur that would not have otherwise. It is a strange vaccine that makes no observable difference in the disease it is supposed to prevent, and to the extent that it may in fact prevent the disease, in an equal or larger number of other instances it causes the disease.

And that is about what we have. The best way to determine the social utility of the deterrence theory is to compare homicide rates in abolition states with neighboring death penalty states. This must be done over a long period of time and with sizeable population units to have any validity. If we compare abolition states with death penalty states in general or with states which have had the largest number of executions, let it be clear that the argument would go overwhelmingly on the side of abolition. But that would not be a reasonable basis of comparison, and it is to the credit of abolitionists that they have not used it. Not so the retentionists. One such article compares two cities, entirely different in size, economy and constituency over a two year period.<sup>11</sup> Can you imagine an insurance company drawing up actuarial tables on that kind of basis? Another retentionist article compares one state with two others for a single year.<sup>12</sup> It

is only in this sense that retentionists "use statistics." At least I have been unable to find any retentionist study that gives serious and extensive attention to the statistical aspects of the matter.

The statistical studies are readily available in Bedau's *The Death Penalty in America*, together with a bibliography giving additional studies. There are many difficulties involved, as for example, that the so-called murder rate means murder and non-negligent homicide. The *Uniform Crime Reports* are not as uniform as might be desired. What does clearly emerge from them is this:

1. The regional differences are more remarkable than any other factors, regardless of death penalty or not.
2. Every state shows occasional fluctuation, so that conclusions must be based on a span of several years.
3. Within any region the absence of the death penalty does not reflect a higher homicide rate. The slight edge, with a surprising degree of consistency, goes to the abolition states.
4. Police safety reflects this same pattern, a slight edge favoring the abolition states.

The conclusion to be drawn is not that abolition would cut down the murder rate. It is that the death penalty is not an **effective** deterrent to murder. If it were, there would be unmistakable evidence of this in the statistics, rather than a slight advantage in the other direction.

Crime is too serious a problem and murder too heinous a crime for society to rely on methods of prevention that over the years demonstrate ineffectiveness. Experience with automobile safety provides some guidance here. For years our main dependence was on slogans, but with little evident effect. More recently it has been demonstrated **statistically** that safety belts, driver training courses, and clearer highway signs make a more genuine difference. Connecticut is a state that has given serious

<sup>11</sup> See *Christianity Today*, Feb. 1, 1960, p. 22. The cities are Detroit and Windsor, Ont.

<sup>12</sup> Edward J. Allen in Bedau, *op. cit.*, p. 114. He compares Michigan with New York and Pennsylvania. It is interesting that neither this article nor the one above mentions the authors' home states, which would throw their arguments completely off.

attention to highway safety, and ranks second lowest in death rate (3.2) per million miles of motor vehicle travel. Colorado was 18th (4.9).<sup>13</sup> You can find individual instances in which fatal accidents occur because of some fluke, or in which a youngster without driver training is a safer driver than another with it, but if a state wishes to tackle this problem seriously, it takes serious account of the total picture. And insurance companies give serious attention to statistical tables, knowing full well that there will be individual variation. This canard, that "you can prove anything with statistics," applied to homicide rates to determine the effectiveness of capital punishment, is not worthy an age which has found statistical methods so useful in determining medical, insurance, safety, and advertising effectiveness. To my mind one of the chief arguments against capital punishment as social policy is that so many people imagine it affords a protection which it does not afford. Since it is such an emotional symbol, it stands in the way of giving really serious attention to methods of crime prevention and criminal rehabilitation. It is not to be supposed that abolition of capital punishment will be any substitute for that. My guess is that the reason abolition states have an over-all record better than contiguous death penalty states—and a substantially better record than states from death penalty sections of the country—is not due to the capital punishment factor at all, but that they are in degree more civilized and have a history and traditions of less murderous tendencies. If the problem is more serious here, and it is, then all the more reason to stop depending on an ineffective symbol and look for socially effective methods.

<sup>13</sup> National Safety Council, AP, April 10, 1966.

### COLORADO AND CONTIGUOUS STATES <sup>14</sup>

#### Murder and Non-negligent Manslaughter per 100,000 Population

	1958	1959	1960	1961	1962	1963
Colo.	4.1	5.4	4.2	4.7	5.0	4.8
Ariz.	6.6	5.2	6.0	6.0	5.7	6.0
Kan.	2.6	2.4	2.9	1.9	2.8	2.6
Nebr.	3.2	2.8	2.3	2.4	1.5	2.0
N.M.	4.3	6.0	7.2	6.6	6.1	5.4
Okla.	6.6	6.7	7.5	5.0	5.1	5.2
Utah	1.2	1.0	1.0	1.7	2.3	2.4
Wyo.	2.8	4.3	4.8	3.3	3.3	3.6

#### HISTORICALLY NON-DEATH PENALTY STATES

Me.	2.5	1.5	1.7	1.6	1.4	1.9
Mich.	3.1	4.2	4.3	3.9	3.3	3.3
Minn.	.9	1.0	1.2	1.0	.9	1.2
N. D.	.6	.5	.5	.9	1.2	2.1
R. I.	.7	.9	1.0	1.0	.8	1.4
Wis.	1.0	1.1	1.3	1.6	.9	1.7
U.S. Aver.	4.7	4.8	5.0	4.7	4.5	4.5

The two tables cannot justly be compared. Regional factors, as is obvious from the states listed, are far more determinative, as examination of the complete table will readily disclose. But anyone who thinks that you "can prove anything" by responsible use of these statistics is deceiving himself, and anyone who can find in them any basis for believing that the death penalty is an **effective** deterrent would not be persuaded by any kind of evidence. For all we know, the death penalty does deter some, but if so, it encourages as many others to murder. In most cases it simply does not figure in, as in this example:

The case of Detective Sgt. William J. Mulrine III, of Wilmington, Del., is a classic example of why there is no deterrent value in the death penalty. Delaware abolished the death penalty in 1958 but restored it in 1961, after two murders and over the veto

<sup>14</sup> Taken from *Capital Punishment* (Canadian Ministry of Justice, see note 1), Appendix K, pp. 112 ff.

of the Governor and opposition of the state bar. In the year prior to abolition there had been seven murders. In the following year, without the death penalty, only one.

Detective Mulrine was a vociferous advocate of restoration on the ground that it was "for the safety of the police to have capital punishment as a deterrent." But 10 days after the death penalty was reinstated, he shot and killed his wife. Thus, he became the first candidate for the noose, a classic repudiation of the main argument of defenders of the death penalty.

He was white, 49, and not a youthful or indigent offender. He hired good lawyers and on the third day of his trial (the trial judge acidly commented on the failure of the police to extract the usual confession) he pleaded guilty to manslaughter. He received five years, later reduced, making him eligible for parole within two years.

Capital punishment as a deterrence to crime is for the other fellow, not to say the birds.<sup>15</sup>

### THE "SATISFACTION" ARGUMENT

There is one argument which seems to me unanswerable. That is, that when an outrageous murder occurs, the normal human reaction is outrage. It is to the everlasting credit of police, that coming upon such a killer, they restrain themselves. But that is why we have a system of law, for emotion—however strong and however justified—is not the basis on which to determine the difficult questions of guilt. Retentionists seem to have the impression that abolitionists are devoid of feelings of sorrow for the victim, outrage at the murderer, and sympathy for the bereaved. And I fear some abolitionist statements lend some support of that impression. But I would dissociate myself from such callousness, if it exists, and insist that it is not characteristic of those who favor abolition.

The most perceptive remark I have ever heard on this subject was made

by a man who was a personal friend of the Clutter family, murdered by Hickok and Smith, and made famous in Truman Capote's *In Cold Blood*. He said, "I could have pulled the rope on those two fellows myself—that's why I don't believe in capital punishment." The feelings are understandable and appropriate. It does not follow that they provide an intelligent guide to social policy. Perhaps the arsonist gives us the best clue for understanding this distinction. If someone sets my house on fire, there is a kind of obvious retributive justice in my setting his house on fire. He has it coming. My desire to strike back, and in kind, is understandable enough. But the state is not about to let me indulge in this method of appropriate retaliation, especially since my certainties about who did it might just be mistaken. Nor is the state going to do this for me, when they find the guilty party, for the very good reason that the arsonist does not get the needed lesson and the community does not need to have any more houses set afire, however understandable the reasons may be. It is very strange that those who justify state policy on satisfaction of their own emotion, which may be very justified, do not understand this distinction.

After all, if emotion were sufficient justification, few murders could be condemned. Let it be perfectly clear that there is a difference between the emotion of the murderer, who finds that his victim stands in the way of what he **wants**, and the enraged citizen, who is responding to a dastardly deed, but if **wanting** a death is sufficient reason in itself, the murder as well as the upholder of capital punishment has that. This point is important, because I am convinced that a great deal of what passes for arguments from "justice" and "Biblical teaching" is in fact an emotional satisfaction in seeing someone die. In some cases the emotion is appropriate and understandable. In some cases it is sick and sickening. But

<sup>15</sup> J. L. Bernstein, Editor of the *New Jersey State Bar Journal*, writing in the *New York Herald Tribune*, March 3, 1965.

in neither case is it any basis for legislation and social policy. Marcus Aurelius wrote: "The best way of avenging thyself is not to become like the wrong doer." Capital punishment is a temptation to descend to the level of the killer. The most redemptive answer, for ourselves as well as for him, is to answer that we do not have to and do not choose to.

At this juncture the opposition is apt to say, "but what choice do we have?" But of course there are many choices. The analogy of self-defense is entirely invalid. It is quite clear to me that under circumstances where I had **no other alternative** but to kill a madman, who was in the process of murder, or let him continue, I would be morally justified in killing him. But this is not the state's predicament. It has the killer in custody. It has other alternatives. It therefore has the responsibility of weighing the consequences of these alternatives, and it does not possess the privilege of vengeance for the pleasure of it. The argument from sheer emotion is one which I understand. It is no basis for law, which exists partly to protect us from impulsive action based upon raw emotion.

Arguments from principle or theological doctrine are more complex. I have dealt at length with Biblical treatment of this subject, so will not do so at any length here.<sup>12</sup> What is important to note is that those who use the Bible to justify capital punishment use it very selectively. They ignore particularly the New Testament passages which bear most directly on the subject. To Christians Christ was supposed to have eliminated the need for blood sacrifice.<sup>13</sup> They ignore the text that those who take vengeance on Cain are to receive

vengeance seven-fold. They "interpret" the passages they quote, but will not permit others to "interpret." For example, they rightly cite passages enjoining death, but do not apparently approve the list of "crimes" for which death is to be meted out, such as adultery, cursing or striking a parent, erecting an altar to a God other than Jahweh, and so on. Nor do they favor following these ancient codes regarding the method of execution. So far as I know, nobody is advocating a strict, literal application of all the capital laws of the Old Testament. One of the few attempts to do so—with regard to witchcraft in Salem in 1692—was tragic for all concerned, judges as well as judged.

An ingenious attempt to get around this is to assert that the New Covenant of Christianity may cancel the detailed laws of Moses, but not that given to Noah, namely: "Whoso sheddeth man's blood, by man shall his blood be shed." (Gen. 9:6) This is the blood vengeance principle. Oliver Wendell Holmes, Jr., in *The Common Law*, regarded it as the foundation of subsequent law, that is, subsequent law was a method of finding substitutions for blood payment. Much of the development of civilization has been the attempt to find more effective and less costly ways of handling disputes than "blood for blood."

What is to be noted especially is that the blood for blood injunction was not given as a legal principle to states, but to families, clans and individuals. We know something of the history of clan feuds, even in recent times, and it is astonishing that anybody would wish to go back to that. Even in Old Testament times, as government developed, this costly and endless vicious circle was taken out of the hands of families and tribes and placed under procedures of governments and courts. Judaism developed such strict requirements in murder trials that executions very sel-

<sup>12</sup> "Capital Punishment: A Christian Approach," *Social Action*, April, 1961 (reprinted in Bedau, *op. cit.*, pp. 175-182), and Capital Punishment and the Bible," *Christianity Today*, Feb. 1, 1960.

<sup>13</sup> Especially Ephesians 2:11-22 and Romans 12:19.



dom resulted.<sup>14</sup> It is astonishing to find some Christians now attempting to give an eternal validity to the blood for blood principle. Furthermore, the blood part of it was meant quite literally. It was believed that innocent blood contaminated the land. An elaborate ritual was required to decontaminate things. (Deut. 21:1-9) Those who wish to go back to the blood vengeance method might well ponder the bloodlessness of the gas chamber.

### SELECTIVE EXTERMINATION

Yet in a deeper sense those who defend the death penalty by appeal to blood for blood are correct. This is precisely what it is, a vestige of retaliatory vengeance, the feud, lynching. It was undoubtedly far better to turn this over to the state and to mitigate the brutality of methods. But the very secrecy and tidiness of the execution enable us to avoid realizing what we are doing. If executions are so ennobling, why not hold them publicly and have children especially attend?

The time fixed by said warden for said executions shall be by him kept secret and in no manner divulged, except privately to the persons by him invited to be present . . . No account of the details of any such execution, beyond the fact that such convict was on the day in question duly executed according to law at the state penitentiary, shall in any manner be published in this state.<sup>15</sup>

The fact is that people have had extensive experience with all varieties of this phenomenon, including public and publicized execution, and the experience has not been encouraging. Lynching became popular in the U.S. around 1830 and was originally meted out mostly to

white men.<sup>16</sup> From 1889 to 1940 there were some 3,833 lynchings, four-fifths of the victims being Negroes. The annual average in the 1890s was about 200, in the 1930s about 10. This bears on Colorado history, because this is the only state that restored capital punishment to avert lynchings. In 1897 it had been abolished. In 1901 the legislature restored it because of three lynchings the previous year, two of the victims being Negroes.

One of these men, John Porter, was being held in jail in Denver. On November 15, 1900, citizens of Lincoln County met and declared "their desire to hang Porter and they do not care to disgrace the state by resorting to torture." (*Daily News*, Denver, Nov. 16 and ff., 1900) The Sheriff, acting on instructions from the District Attorney, came to Denver and took custody. He wrote of this:

I declined to attempt to convey him to Hugo until a delegation of prominent and law abiding citizens of Lincoln County gave me their personal assurance that he would not be taken from me at Limon, and that I would be permitted to lodge him in the county jail at Hugo. With this assurance from men I had long known and whom I respect, I felt I could safely do my duty and convey the prisoner without molestation to the county jail. The assurance so given me was carried out in the letter of it, but was violated in the spirit of it, for between Limon and Lake Station, three miles beyond, I was overpowered by citizens of the county and the prisoner taken from me.

Porter was tied to a stake and burned alive, November 16. On the 19th mass meetings were held in Denver and Colorado Springs condemning the lynching and the deceptions used to effect it. The supposition that the government is helpless to prevent such things is preposterous. Perhaps one of the great statements of irresponsible hand washing was that of the Governor:

<sup>14</sup> See Isrel J. Kazis, in Bedau, *op. cit.*, pp. 172 ff.

<sup>15</sup> *Colorado Revised Statutes*, Vol. III, 39, 11, 4. The last public execution in the U.S. was 1936. Camus, "Reflections on the Guillotine," *Resistance, Rebellion, Death* (New York: Modern Library, 1963), makes much of this and other inconsistencies.

<sup>16</sup> I am here following Gunnar Myrdal, *An American Dilemma* (New York: Harper, 1944), pp. 560 ff.

Gov. Charles S. Thomas refused to discuss the Limon affair. "I do not care to express an opinion on this matter one way or the other," he said. (*Daily News*, Nov. 17, 1900)

Equally preposterous is the view expressed by a letter I received about this case, and typical of many others: "But I suppose you think that was all right for that man to rape and torture the little girl, and that he should have gone free to do that all over again." No, I do not think that. The crime was a horrible one. There should have been a careful trial to determine guilt. The lynching was horrible. There should have been arrests and trials for it. The alternative to lynching was not freeing Porter, if evidence was as positive as they claimed, but locking him up for a long time and with it denying the lynchers the "satisfaction" of burning to death.

It is not pleasant to recall our violent heritage, and I shall not dwell on it at length, but it is necessary. Emerson wrote: "Crime and punishment grow out of one stem." The sort of people who call for blood vengeance reveal under stress what things are at work in them. In November of 1864 the Sand Creek Massacre took place. The U.S. House of Representatives conducted an investigation the following year, and concluded:

From the suckling babe to the old warrior, all who were overtaken were deliberately murdered. Not content with killing women and children, who were incapable of offering any resistance, the soldiers indulged in acts of barbarity of the most revolting character; such, it is hoped, as never before disgraced the acts of men claiming to be civilized.<sup>17</sup>

Among these acts were the mutilation of the Indian woman, White Antelope, target practice, finally successful, on a three year old child, and rampant scalping. The Indians retaliated on

Julesburg in January. Blood for blood rose to such a fever that two men made public a letter addressed to Major General John Pope.

For a number of years the policy of our Government has been to remove our Indians Westward . . . The cruel or the thoughtless, might leave to this steady advance of a superior race, the ultimate destruction of the various Indian tribes. That it would occur from this cause alone is certain, but humanity shudders at the picture presented by the destruction of hundreds of our fellow creatures, until every effort shall have been tried for their redemption and found useless. By dispossessing them of their country, we have assumed their stewardship, and the manner in which this duty is performed will add a glorious record to all American history, or a damning blot and reproach for all future time.<sup>18</sup>

These men, who appealed thus to humane sentiments, were Col. Kit Carson and Col. William W. Bent, both of whom had been involved in the Indian wars and tragedies. The Rev. William Crawford, who made his headquarters at Central City, commented sadly on the barbaric attitudes of that period in a letter written September 25, 1864, a month before the Sand Creek Massacre:

There is but one sentiment in regard to the final disposition which shall be made of the Indians: "Let them be exterminated, men, women, and children together." They are regarded as a race accursed, like the ancient Canaanites, and like them, devoted of the Almighty to utter destruction. Of course, I do not myself share in such views.<sup>19</sup>

This is but one side of our history. It is the side with which capital punishment is a part and parcel. Note Crawford's term, "extermination." It keeps appearing.

<sup>18</sup> *Ibid.*, p. 142.

<sup>19</sup> Colin B. Goodykoontz, "Colorado as Seen by a Home Missionary, 1863-8," *Colorado Magazine*, Vol. XII (March, 1935), pp. 60-69.

<sup>17</sup> *A Colorado Reader*, edited by Carl Ubbelohde. Boulder: Pruett Press, 1962, p. 139.

None of us likes to put anyone to death, but unpleasant as it sometimes is, as in any war on "rats" . . . we have to **exterminate** all sorts of varmints for the protection of society. Let's face up to the chore.<sup>20</sup>

That is what capital punishment is, selected extermination. The gas chamber is a perfect symbol for it: extermination by poison. It brings satisfaction to some, ranging all the way from outright sadism to the feeling that justice has been done. To others it brings revulsion. Neither is a very good guide to what social policy should be. After all, we are not without the experience of other states, who have managed without it. Michigan abolished it in 1846. The others: Rhode Island (1852), Wisconsin (1853), Maine (1876), Minnesota (1911), North Dakota (1915), The recent ones: Alaska and Hawaii (1957), Oregon (1964), Iowa, West Virginia, Vermont, and New York (1965).

It should give retentionists pause to consider that if we are told that Germany followed a different policy, which it did, under Hitler, from the period before and after, we would all guess without difficulty that Hitler restored capital punishment. Ditto Mussolini. Or if we were asked which of the following nations have abolished capital punishment: Sweden or Spain, Netherlands or South Africa, Switzerland or Cuba, we would have no difficulty guessing the first named. Although there are some states which surprise one in the total list, the over all picture is not

surprising. Capital punishment is a hallmark of blood for blood. It's abolition is a symbol of civilization, one small step, but a step which we can take. The listing of other states and nations is not an argument, but the late Joseph N. Welch said, speaking on this subject, "Look about you and see who is on your side."<sup>21</sup> It should give retentionists pause.

### THE COST

I have never been able to understand the argument that extermination should be carried out to save the state money, but since it comes up, let it be understood that it costs the state more money to maintain death row than it would to keep alive for their natural lives those executed. For this is a very expensive luxury, when you consider the lengthened capital trials, the insanity test procedures, the difficulties impanelling a death jury, the appeals, the special administrative and guard requirements. It is not unusual for an execution to cost a state hundreds of thousands of dollars, when it is all added up. But the real cost is in fouling up judicial procedures, the intensified wear and tear on public officials, the damage to morale in the prison among men who are learning new and better ways of life, and the sensational publicity surrounding capital cases. Is the "satisfaction" of exterminating a human being, whatever he has done, worth all that?

<sup>20</sup> *Denver Post*, May 8, 1966, p. 36.

<sup>21</sup> *Memphis Press-Scimitar*, Oct. 28, 1958.

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