

CAPITAL PUNISHMENT
IN THE UNITED STATES

THE DEATH PENALTY
ABOLITION CLASSICS

Complicit Press

CAPITAL PUNISHMENT IN THE UNITED STATES

The Argument in Brief
A Condensed Modern Edition

RAYMOND T. BYE

1919

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FOREWORD

I have watched thirteen people die.

I want to say that first, because Raymond Bye never did. He was a graduate student at the University of Pennsylvania. He worked from tables and census returns and letters from prison wardens. He built his case out of numbers gathered at a desk. He never sat in a witness room. He never watched a chest rise and then stop rising. He never walked out into a parking lot afterward and tried to remember where he left the car.

And still he got it right.

That is the thing about this little book that will not leave me alone. A man with no direct sight of the thing reasoned his way to the truth of it in 1919 ... and we have spent a hundred and seven years proving him correct at the cost of thousands of lives.

Read what he found. He went looking for deterrence and could not find it. He compared states that killed against states that did not and the murder rates would not separate. He counted executions against homicides and came out with one death for every eighty. He looked at Georgia, which executed more people than almost any state in the union, and discovered that Georgia also lynched more people than any state in the union. The gallows did not calm the mob. The gallows taught the mob.

He looked at the machinery of the courts and saw what I see now. Prosecutors running for reelection.

Newspapers convicting men before the jury is seated. Juries made of people who cannot bear to weigh a life and so weigh it badly. Appeals that turn on technicalities and never on innocence. Governors who will not be woken.

That last one stays with me. Tommy Bambrick was twenty years old. A room full of bankers in New York tried to save him the night before his execution. They telephoned Albany. The governor's secretary would not wake the governor, because the governor never permitted himself to be disturbed on the night before an execution. They tried to charter a train. Bambrick went to the chair.

I have made those calls. I have watched lawyers make them. I have sat with a man while the phone did not ring. The particulars change. The silence does not.

Bye's conclusion was that capital punishment was an outworn vestige and that its end was only a question of time. He wrote that in 1919. He was wrong about the time. He was not wrong about anything else.

So why print him now.

Because the arguments being made in courtrooms and legislatures this year are the same arguments he answered before my grandmother was born. Deterrence. Closure. The heinousness of the crime. The demand of the community. Bye took each of them apart with the tools available to him and none of them have been repaired since. They were not rebuilt. They were simply repeated, louder, by people who were counting on us not to check.

And because he tells the truth about what the death penalty actually is. He would not let his own side hide behind utility. He said plainly that the thing runs on revenge, and he proved it with a single observation so obvious it embarrasses us. If death deterred crime, we would use it on burglars. We do not. We reserve it for the crimes that make us angriest. That is not public safety. That is vengeance wearing a robe.

I want to say something about his honesty, because it is rare and it is instructive.

Bye takes apart the arguments of the abolitionists too. He tells them they have been sloppy. He shows that their claim about juries refusing to convict does not hold, and he says so in print, in a book arguing for abolition. He calls the innocence argument exaggerated. He publishes a survey of prison wardens that cuts against his own position. Then he explains why the death penalty is still indefensible, and the argument is stronger for everything he gave away.

We could learn from that. Our movement is not helped by claims that will not survive contact with a hostile reader. It is helped by the ones that will.

Now I have to tell you where he fails, because a foreword that hides it is not worth reading.

Bye was a white progressive in 1919 and he carried what that meant. He explains the southern murder rate by pointing at Black people. He treats emancipation as a cause of crime. He proposes sterilizing certain offenders and suggests it as a southern substitute for the death penalty in rape

cases. Those passages are in this book. We have marked them rather than removed them.

Understand what that means. In the same volume, the same man who documented that William Sanders was lynched over an overcoat, that two brothers were lynched for not giving enough room on a road, that Jeff Brown was lynched for brushing against a girl on a street ... that man could not see the whole of what he was looking at. He gathered the evidence of a racial terror campaign and filed some of it under the wrong heading.

I do not print this to condemn him. I print it because it is the pattern that has never broken. The American death penalty has always been a race problem that we insist on discussing as a crime problem. Bye came closer than most of his contemporaries. He got the lynching chapter almost entirely right. And he still could not follow his own evidence all the way home.

We are not finished with that failure. It is not an artifact. Look at who is on the rows in this country and tell me it is an artifact.

One more thing.

Bye wrote his conclusion during a war, and the war got into it. Two states nearly abolished the death penalty in 1917 and both were stopped when the country turned toward Germany. Legislators who had promised their votes changed their minds and gave the war as the reason. Bye watched a moral argument lose to a national mood and he wrote about it plainly.

That is our situation too. The argument has been won for a long time. It keeps losing anyway, to fear and to elections and to whatever the country is frightened of this season.

Bye ended by saying that nothing stands still. That an institution must progress or decay, and that to stand still in a changing world is itself decay. He believed the thing was already dying.

He was right that it is dying. He was wrong that dying is the same as dead.

It is still killing people. It killed people this year. It will kill people next year, and it will do it quietly, behind a curtain, in a room with a viewing window and a clock on the wall, while a chaplain holds an ankle and someone in a state office waits for a phone to ring.

I have been in that room thirteen times.

Read this book. Then help us finish what Raymond Bye started at a desk in Philadelphia in 1919.

The argument is over. Only the machinery remains.

Jeff Hood
North Little Rock, Arkansas
August 19, 2026

NOTE ON THIS EDITION

Raymond Taylor Bye submitted *Capital Punishment in the United States* to the Graduate School of the University of Pennsylvania in 1919, in partial fulfillment of the requirements for the doctorate. It was published that year by the Committee on Philanthropic Labor of Philadelphia Yearly Meeting of Friends.

Bye's complaint about the abolition literature he inherited was that it had been written almost entirely in the register of feeling. "Sentimentalism, theology and bias have been brought to bear upon it," he wrote, "but little painstaking study." His purpose was to submit the death penalty to the new science of criminology and to the verdict of the available evidence, and to see whether it survived either.

It did not.

This edition condenses Bye's six chapters to their argument. His original ran to 101 pages and carried nine statistical tables — homicide rates by state, prison commitments, legal executions, lynchings, conviction ratios. Those tables were the labor of the book and they nearly all point one direction: no measurable relationship between the death penalty and the killing of human beings. That finding is preserved here; the columns that established it are not. A handful of Bye's figures appear inline,

because in several places the number is not evidence for the argument but the argument itself.

A word on what has been left standing. Bye wrote as a white progressive in 1919, and the racial assumptions of that position are visible in his book, most heavily in his chapter on lynching and his account of rising homicide rates. Where those assumptions shape his reasoning, they are marked as his and identified as of their period rather than silently repaired. His documentation of lynching — the trivial pretexts, the overwhelming disproportion of Black victims — remains among the most damning material in the volume, and it is left intact.

I

THE EVOLUTION OF THE DEATH PENALTY

Bye opens with an accounting. In the twenty-eight years before he wrote, more than three thousand people had been put to death in the United States, and the country was executing at a rate of roughly one hundred a year. That is the toll he sets before the reader, and the question the book asks is whether any of it was necessary.

His first chapter establishes a direction of travel. The death penalty in America, he argues, has been contracting for two centuries — in the number of crimes it covers, in the cruelty of its methods, in the publicity of its performance, and in the number of jurisdictions willing to use it at all. Abolition, on this reading, is not a break with American practice but the completion of something long underway.

The starting point was severity almost beyond modern comprehension. The English penal code of 1780 contained 240 capital offenses; Blackstone counted 160 crimes punishable by death in his own day. As late as 1820, English law still made hanging offenses of remaining in the kingdom as a gypsy for a month, taking fish from a pond, damaging a bridge, cutting down a growing tree, and sending a threatening letter. Death was the universal remedy, applied to murderers and petty thieves without distinction.

The American colonies were milder but not mild. Most New England colonies made twelve offenses capital. Connecticut, adopting the Mosaic code, included blasphemy, and in 1650 added a child over sixteen who cursed or struck a parent. Pennsylvania had seventeen capital crimes at the Revolution. The colonies differed from England in a way Bye finds significant: they did not generally kill for property crimes. What drew the extreme penalty were offenses against person and morals — murder, adultery, offenses against chastity, witchcraft.

Independence changed little at first. Even in 1892, federal law carried twenty-five capital offenses under the military code, twenty-two under the naval code, and seventeen under the civil code. Georgia that year had ten capital crimes; three other states had seven; ten more had four or more.

Executions were public by design. The theory was deterrence through spectacle, and the practice was inherited from England, where bodies were left hanging along the highways as a standing warning. Bye's account of what these occasions actually became is one of the sharpest passages in the chapter. They were social events, drawing crowds estimated in the tens of thousands, rivaled as popular entertainment — he cannot resist the comparison — only by a great circus or a baseball game. He quotes a Pennsylvanian of the early nineteenth century describing executions in that state as scenes of riot and every species of wickedness, with twenty, thirty, or forty thousand in attendance and two or three days given over to

merrymaking in the manner of a country fair. At Orwigsburg, an execution postponed at the last moment because the condemned man was found insane nearly ended in the crowd lynching him out of sheer disappointment; officers rescued him with difficulty.

Cruelty went beyond hanging. Burning alive was inflicted for murder, insurrection, and arson. Where the offense was the rape of a white person by a Black man, courts held wide discretion over the manner of death, and burning was not infrequently the method chosen — a Black man burned by court decree in Somerset County, New Jersey, in 1744; thirteen burned in the colony of New York in 1741. The penalty was not confined to Black men; whites suffered it as well.

Then the humanitarian movement of the nineteenth century swept most of this away, and Bye traces the retreat along four fronts.

The list of capital crimes contracted. Ohio limited the death penalty to murder in 1788. Pennsylvania, through a sequence of acts between 1780 and 1794, reduced its seventeen capital crimes to one: murder in the first degree. Massachusetts cut twelve down to six by 1836. Rhode Island went from ten in 1647 to two by 1838. The federal government moved last, reducing seventeen civil-code capital offenses to three — treason, murder, and rape — only in 1892.

Executions went private. New York abolished public execution in 1835, and the practice spread; a number of states did not act until after 1903, Arizona

not until 1906. Bye notes the movement appears to have originated in America. He believes no state performed public executions as he wrote, but records an execution in a southern county seat three years earlier at which the public, knowing the hanging would occur at dawn in a jail yard behind a dilapidated fence, assembled before daylight, tore the fence down, and watched.

Methods softened. Torture and burning were barred at the founding by the constitutional prohibition on cruel and unusual punishments. Hanging gave way to electrocution in fifteen states by 1919, beginning with New York. Two states, Nevada and Utah, offered the condemned what Bye calls the doubtful privilege of choosing between rope and firing squad. He notes that some authorities — Thomas Edison among them — held electrocution no more humane than hanging, but takes its adoption as evidence of intent regardless.

Juries got discretion. First came the division of murder into degrees, only one of them capital. Then twenty-four states gave juries power to fix the penalty at death or life imprisonment. The practical result, Bye observes, is that death sentences became rare and reserved for the most heinous crimes, the most vicious defendants, or the cases where public indignation had been most violently aroused.

Finally, twelve states had abandoned the death penalty outright by 1919. Michigan was first, in 1847, though it had executed no one for fifteen years before that. Rhode Island followed in 1852, Wisconsin in 1853. Kansas passed a curious law in

1872 requiring the governor's personal order before any execution; no governor ever gave one, and the state formalized abolition in 1907. Maine abolished in 1876, restored in 1882 after an insane convict attacked a keeper, and abolished again in 1887 when the governor pointed out that murders had not decreased since executions resumed. Iowa and Colorado each tried abolition and reversed it. Then a second wave: Minnesota in 1911, Washington in 1913, Oregon in 1914, the Dakotas in 1915, Arizona in 1916, Missouri in 1917.

The question was live as Bye wrote. Two states nearly abolished in 1917 and were stopped by the war. Illinois passed an abolition bill through both houses; the governor vetoed it, citing partly its drafting and partly his judgment that wartime was no moment for the measure. In Pennsylvania, outrage at the death sentences given two boy murderers in 1916 produced a bill that seemed certain to pass — until the United States declared war on Germany, and legislators who had promised their votes changed their minds. In West Virginia the upper house voted for abolition 31 to 12 one day and defeated the same measure on reconsideration the next.

The trajectory, Bye concludes, is unmistakable. Fewer capital crimes, gentler methods, private executions, jury discretion, and outright abolition in a growing minority of states. Legal executions had fallen from an annual average of 145 in 1890-1895 to 96 in 1913-1917 — a decline of a third in a quarter century.

He then puts the question the rest of the book answers. Is this softening the mark of a weakening society and a corrupted sense of justice, or of a more enlightened civilization? If the first, the death penalty should be extended and the retreat reversed. If the second, the process should be carried to its conclusion and the hundred people sent yearly to the gallows and the chair should be spared.

II

CAPITAL PUNISHMENT IN MODERN
CRIMINOLOGICAL THEORY

The first chapter described what the law did. The second asks why, and here Bye makes his central theoretical case: the death penalty is a survival from a theory of crime that criminology has abandoned on every point.

He begins with origins, and he is blunt about them. All legal punishment begins in the instinct of revenge. Private vengeance becomes clan vengeance; the state then assumes supervision over the act of revenge, and finally reserves it entirely to itself. The earliest criminal codes are simply organized retaliation — *lex talionis*, an eye for an eye, with retributive justice as their ethical standard. The revenge motive recedes slowly, and Bye's claim is that it has not receded nearly as far as respectable opinion pretends.

The system that produced the modern death penalty rested on three principles he calls the classical theory:

Absolute individual responsibility. Every person is a free agent choosing between right and wrong. A criminal chose wickedness and could have chosen otherwise. Only the hopelessly insane were excused.

An objective test of punishment. Guilt is measured by the consequences of the act. Since all offenders are equally responsible, the same offense earns the same penalty, with no allowance for the individual.

Repression. The purpose of punishment is to terrorize potential offenders. This is the principle that produced public hanging, the gibbet, and the head on a spike — and, Bye notes, it is under this doctrine that capital punishment reached its fullest development.

Against each of these, modern criminology has substituted something else.

Against individual responsibility it sets social determinism. People are not free agents but products of heredity and environment. Bye credits Lombroso and the Italian school with establishing that congenital and biological factors matter, while noting that Lombroso's theory of a distinct criminal type has not found general acceptance. Environment matters as much or more: home life, standard of living, social surroundings, economic and political conditions. His formulation is characteristically direct — many a person who leads an honest life is no stronger in character or morals than someone behind prison bars; both are products of the forces that shaped them. Individual responsibility gives way to social responsibility.

Against the objective test it sets individualization. If crime has social causes, treating all offenders identically is absurd. Two men who commit the same act are not equally guilty and should not receive the

same treatment. This principle is visible in parole, probation, the indeterminate sentence, and special provision for juvenile and mentally ill offenders.

Against repression it sets reformation and prevention. Some offenders are beyond reform, but most are not. The old severity executed people who might have been restored and warehoused others in what amounted to schools of crime.

Capital punishment, Bye then argues, fails every one of these tests — and he begins with the one its defenders least like to admit.

It is grounded in revenge. Its advocates prefer utilitarian arguments, but retribution is what is actually operating. Bye's evidence here is unusually good, because he simply lets its defenders speak. He quotes a former state superior court judge who wrote to him protesting the softening of the criminal law: revenge, the judge argued, has the same evolutionary history as self-preservation and is equally necessary in a biological sense, to be tempered but not destroyed, and society therefore has no right to take that revenge away from the injured party under the plea that it means to reform the offender. He quotes Kenny's *Outlines of Criminal Law* holding that the gratification of the feelings of the injured is a proper object of punishment and that the right to punish must always rest in part on retributive justice. He quotes a champion of the death penalty stating flatly that a criminal is one who injures society, that society is thereby moved to anger, and that it proceeds to vent its wrath on him. And he quotes *The Outlook*, on the electrocution of

Police Lieutenant Becker, declaring that the value of capital punishment lies in its being the community's deliberate judgment that a man may commit a crime so monstrous that he is no longer worthy to live.

Bye's decisive argument on this point is structural rather than quotational. If deterrence were really the object, the death penalty would not be reserved almost exclusively for murder. If death deters killing, it would deter burglary and larceny equally well. That nobody proposes hanging burglars reveals what is actually at work: these lesser crimes are not thought to show a character black enough to deserve death. The selection of capital crimes is a moral ranking, not a deterrence strategy. Retribution is the operating principle, and everything else is decoration.

He is just as impatient with his own side. Opponents of the death penalty, he says, have wasted their energy on peripheral issues instead of making their appeal frankly on humanitarian grounds — that human life has come to be held sacred, and that the taking of it, even a murderer's, has become repugnant to a large part of the population. That appeal to the gentler emotions is, in his view, both the true basis and the strongest argument of the abolitionist case.

It assumes a responsibility that does not exist. Bye quotes Bulwer Lytton, by way of Governor Hunt of Arizona: society has erected the gallows at the end of the lane instead of guideposts at the beginning. Beneath every execution lies the assumption that the condemned alone caused his

crime and is merely getting his deserts, with no acknowledgment that social conditions beyond his control were probably the principal cause.

It is arbitrary where the science demands discrimination. Jury discretion and the pardoning power provide some individualization, but Bye has little confidence in either — pardons respond to political pressure, juries to vindictive malice or misguided sympathy. Neither is a reliable instrument. And twelve states provide no discretion at all. Meanwhile the category itself makes no sense: murderers vary enormously in guilt, while many burglars and thieves are more incorrigible and more dangerous than most killers. A man who attempts murder and fails is as guilty and as dangerous as one who succeeds, yet is punished far more lightly. He quotes Parmelee's observation that many murders are committed in fits of passion by otherwise non-criminal people, some by the insane and delusional, some by professional criminals whose object was theft — and that inflicting the same penalty on all these types is obviously stupid.

It forecloses reform. There can be no reform of a dead man. Bye's evidence that murderers are reformable is the best empirical material in the chapter, and it comes from the study of life prisoners. Warden Towne of the Wisconsin state prison reported 263 life prisoners received, 65 discharged by pardon, and exactly one known to have returned to crime — that offense being forgery. His experience was that life prisoners were a better class than those sent up for burglary or larceny,

their crime as a rule committed in a moment of passion. Dr. M. Liepmann of the University of Kiel, whose study Bye considers the most exhaustive published, gathered data on 2,071 life prisoners across six European countries and found wide diversity of type, little evidence that lifers were more troublesome than other prisoners, no tendency among those pardoned to return to crime, and substantial improvement in character during confinement. One Austrian warden called life prisoners the best element in the penal class; a German warden reported their conduct blameless with rare exceptions. In one Austrian prison, 82.5 percent of forty lifers were judged reformable. Bye is careful about the limits of this — it is European, it is not conclusive, and he calls explicitly for American studies to confirm or refute it.

It does nothing for prevention. Worse, Bye reports the argument that executions actively distract from prevention by lulling the public into a false sense that once a criminal is dead the matter is closed and nothing further is required until the next one appears.

He closes the chapter by taking up the strongest case that can be made for the death penalty — the positivist argument that execution serves as artificial selection, consciously eliminating dangerous degenerate types and extending the principle of natural selection. Bye concedes its force. On strictly utilitarian reasoning, untouched by humanitarian sentiment, he calls the argument unanswerable.

Then he shows what it would actually require. It would demand a completely different use of the death penalty from the present one, because murderers are not uniformly dangerous and many of the most hardened and dangerous offenders — recidivist thieves, alcoholics, panderers — never face capital charges at all. Consistently applied, the principle would require executions on a scale nobody contemplates. He gives the argument to Tarde: prove the necessity of guillotining ten or fifteen criminals a year in France or England, and it will not be difficult to prove the urgency of striking down a hundred or a thousand by electricity or chemistry. Either the instrument is swept away, Tarde wrote, or it is multiplied until the annual number of executions equals the number of anti-social beings condemned to elimination. There is no middle course.

And he gives the conclusion to Ferri, a positivist himself, who accepted the logic and followed it where it led: to draw from the death penalty its only positive utility, artificial selection, one must have the courage to apply it to all born criminals guilty of serious violence — which in Italy he estimated at a thousand executions annually. "And as I shall certainly not have the courage to ask for the restoration of these mediaeval modes of punishment," Ferri wrote, "I am still, for the practical considerations above mentioned, a convinced abolitionist."

The theoretical case, Bye concludes, is closed. Capital punishment is based on revenge, assumes a

responsibility that does not exist, judges by an objective test the science has discarded, permits almost no individualization, forecloses reformation, and contributes nothing to prevention. It is an anachronism, a survival of an outworn criminal philosophy.

But he refuses to stop there, and the refusal is what makes the book worth reading. Sound theory is not enough. The practical question remains: would abolition in fact produce an increase in murder, or an outbreak of lynching? Those are empirical questions, and the next two chapters go after them.

III

CAPITAL PUNISHMENT AS A
DETERRENT

This was the longest chapter in Bye's original and the one that carried the heaviest statistical apparatus. Its argument, stripped of the tables, is that the deterrence case for the death penalty fails three times over: it is ethically questionable, it is unsupported by the evidence, and it is undermined by the sheer rarity with which the penalty is actually inflicted.

He begins by stating the case he means to answer. Its supporters hold that nothing is so precious to a person as life, that the prospect of death is therefore the most powerful of all deterrents, and that abolition would loose a wave of violence. They point to rising homicide figures as proof that leniency has already begun to cost lives.

The alleged increase. Bye takes the claim seriously enough to examine its foundation, and finds it shakier than advertised. The figures everyone cited came from George P. Upton of the *Chicago Tribune*, compiled from the columns of nine leading newspapers in each state. They show homicides rising from 1,266 in 1881 to a peak of 10,652 in 1896, settling around 8,500 by 1904. Census mortality statistics, which Bye considers more reliable, show a much lower rate — 1,540

homicides in 1905 rising to 4,670 in 1915, or 4.5 to 6.9 per 100,000.

The gap between the two series is enormous, and Bye uses it to make a methodological point that most of the agitators on both sides had skipped. The *Tribune* counted everything — quarrels, jealousy, liquor, highwaymen, infanticide, resisting arrest, strikes, self-defense, riots, insanity — and probably double-counted by gathering the same case from different papers. The census figures are narrower and probably incomplete, since some violent deaths escape registration. Neither is an exact measure. And crucially, the apparent rise in both series may reflect improvements in the machinery of counting rather than in the killing: better news-gathering in one case, a more accurate registration system and more careful classification of causes of death in the other. Some real increase may have occurred. It is nothing like what the alarm suggested.

Is deterrence even a proper object? Before testing whether it works, Bye questions whether it should be attempted. To inflict a severe penalty on one person for the sake of making an example of him is ethically peculiar, and he illustrates it with the old English exchange: a man convicted of horse-stealing protested that it was hard to be hanged for stealing a horse, and the judge replied that he was not to be hanged for stealing a horse but in order that others might not steal them. Bye finds this difficult to reconcile with any refined sense of justice. The deterrent theory also sits badly with social determinism: instead of removing the social causes

of crime, it proposes to frighten the individual into resisting them.

His conclusion is that deterrence can only be defended if it can be shown to work — and if it does work, there is no principled reason to confine it to murder rather than deterring burglars and forgers by hanging those unskillful enough to be caught. The refusal to extend it exposes retribution as the real motive once again.

The psychology is wrong. The deterrent theory assumes a prospective murderer who rationally weighs the probable consequences of his act and then possesses sufficient strength of will to abandon it. Bye calls the assumption extravagant. General knowledge that wrongdoing brings punishment probably does build a durable disinclination toward crime in many minds — and that, he thinks, is how deterrence actually works when it works at all. But the people who have not developed that disinclination do not perform the calculation the theory imagines.

This is especially true of murderers. Some are mentally abnormal. Some kill incidentally to another crime. Some act under an emotion powerful enough to overwhelm any thought of future consequences. Bye is careful here to correct a favorite abolitionist argument: it will not do to say that murders are committed in sudden passion with no time to reflect, because killings of that kind fall legally under manslaughter or second-degree murder and are not capital anyway. His revised version is stronger — that jealousy or hatred can overrule or entirely

preclude consideration of the penalty in a killing that is technically deliberate and technically first-degree, no matter how drastic the punishment. And this holds most of all for the borderline individuals who supply so much of the criminal population, who lack the reason and balance of a fully normal person yet are not irresponsible enough to be called insane.

Not everyone fears death, either. He points to the regularly reported cases of men who kill and then take their own lives, or who surrender willing to suffer the full penalty; to the coolness with which some approach execution, sleeping soundly and eating heartily beforehand. For a few, by some perversion of feeling, execution even holds an attraction. He reprints a 1911 newspaper item from Belleville, Illinois, in which a young Black man named Willis Clark, about to hang, joked with the sheriff, asked that a good job be made of it, and announced from the scaffold that if the papers did not give him a good write-up he would haunt them that night. In such cases execution does not deter; it lends the crime a glamor and gratifies a hunger for notoriety.

Finally, Bye cites Thomas Speed Mosby, who after studying 3,500 cases including many condemned murderers concluded that most crimes are committed by people who expect to escape detection entirely, or who in the moment are heedless of all punishment, or who are driven by factors that no severity can remove and that render the prospect of punishment wholly inoperative at the time of the act.

What experience shows. All of the above, Bye concedes, establishes only the obvious — that some people will kill despite the death penalty. The real question is whether others have been restrained by it, and that can only be answered by experience. If many have, then murders should rise after abolition, and abolition states should show higher murder rates than comparable retentionist states.

They do not.

He tests it first against history. The wholesale abandonment of the death penalty for burglary, larceny, forgery, and the rest produced no wave of those crimes; nobody today proposes hanging thieves, and society is manifestly no less safe from ordinary criminals than a century ago. If the state can protect its citizens against these offenses without executions, that establishes a presumption it can do the same for murder.

He tests it against the era of public execution, which was deterrence in its purest and most theatrical form — and which failed conspicuously. A prison chaplain at Bristol asked 167 convicts under sentence of death whether they had ever witnessed an execution; all but six had. A Massachusetts legislative report of 1846 found, after a rash of arsons following an execution for that crime, that every one of the culprits had watched the hanging. A man who had just watched the murderer Lechler hang at Lancaster, Pennsylvania, committed a murder the same day. In Ohio, on the day a man was executed for killing his wife with particular cruelty, another man near the place of execution killed his

wife in the same manner. And when pocket-picking was itself a capital crime in England, pickpockets worked the crowds at hangings — forty arrests for that offense at the execution of two pickpockets — the Chaplain of Newgate having been told that executions were the best harvest they had, because when the spectators' eyes are fixed above, their pockets are unprotected below.

Bye is appropriately cautious: some of these may be coincidence. But in the light of social psychology he thinks it entirely possible that the spotlight of a public hanging worked by suggestion, and that the spectacle brutalized its audience and cheapened the value of life rather than impressing the majesty of the law upon it.

Private execution, he argues, cannot be more effective than the public version that failed — and it introduces a dilemma with no good exit. Keep it genuinely secret, and the example is weakened to nothing; publicize the details in the press, and you risk brutalizing the public mind and suggesting the crime to exactly the impressionable and weak-minded people who supply the criminal classes. A vivid newspaper account may do nearly as much harm as a public hanging. And an execution carried out in strict secrecy becomes little more than a purposeless judicial killing, a blind wreaking of social vengeance.

He offers modern instances to match the historical ones. After ten men were hanged in Pennsylvania on a single day in 1877 for murderous conspiracy, the *New York Herald* predicted the

wholesome effect of so terrible a lesson, declaring that the pitiless severity of the law would deter the most wicked from imitation. Two of the witnesses at their trial were murdered the following night, and five of the prosecutors within two weeks. In 1916, Sing Sing held five men under sentence of death for murders closely resembling the Rosenthal killing for which Lieutenant Becker and four gunmen had recently been executed — and two of them had been hired to kill and had done it from an automobile, exactly as in the case whose punishment had been advertised across the country.

The statistical finding. Here the tables did their work, and here is what they found.

Bye compared homicide rates by state, using census mortality data for 1906–1915, grouped by geographic division so that comparable states were set against each other rather than lumped into a national average. He was explicit about why: southern states show far higher homicide rates, and comparing them against the abolition states — all of which were in the north and west — would have been an error. He was equally explicit about the limits of the data, noting that homicide statistics include every killing while only deliberate first-degree murder is capital, and that agitators on both sides had thrown such figures around as though they were conclusive when at best they approximate.

The comparisons showed nothing. Maine, without the death penalty, had a lower homicide rate than any New England state but New Hampshire. Rhode Island ran nearly level with neighboring Connecticut

and far below New York and Pennsylvania. Michigan and Wisconsin, long without executions, ran well below Ohio, Indiana, and Missouri. Kansas beat Missouri handily. Washington, which abolished in 1913, had the lowest rate in its group and showed no increase after the change — as was also true of Minnesota after 1911.

A second body of evidence, from an entirely independent source, gave the same answer. Census figures on prisoners committed for homicide in 1904 and 1910 — the latter distinguishing grave from lesser homicide, which Bye considered the closest available approximation to the actual prevalence of deliberate murder — showed no more murder in abolition states than in retentionist ones. Maine and Rhode Island recorded no commitments at all for grave homicide in 1910, against a regional average of 0.2 per 100,000. Michigan and Wisconsin fell below their regional average; Kansas sat level with its retentionist neighbors.

Two independent sets of figures, corroborating each other, and no connection whatever between capital punishment and the extent of homicide. Bye draws the possible conclusions with care. Either the death penalty deters no better than the life imprisonment that replaces it; or its effect is too small to detect; or deliberate murders are so small a fraction of total homicides that they cannot move the rate. And he notes that the third possibility helps abolition rather than hurting it: if deliberate murder is that rare, the occasion for the death penalty is rare enough that society can safely do without it.

What the figures do show is that murder tracks social conditions — high in the South and West, low in the North Atlantic and North Central states — with no relation to the presence or absence of the gallows. Bye's explanation of the southern rate rests on the region's Black population, and of the western rate on surviving frontier conditions; the first of these is a racial assumption of his period rather than a finding, and is reproduced here as his.

Certainty, not severity. The last movement of the chapter is the strongest, and it turns on a principle Bye takes as established: what deters is not the severity of a punishment but its certainty. A criminal who believes he will probably escape will risk even a terrible penalty; one who knows he will certainly be caught and punished will not lightly incur even a mild one.

By that standard the death penalty is close to worthless, because it is the least certain punishment in the code.

Juries will not impose it. Prosecutors report this almost unanimously, and jurors not infrequently ask to be excused from capital cases rather than take part in sending a man to his death. The pattern is old: when stealing forty shillings was capital in England, juries returned verdicts of stealing thirty-nine shillings regardless of the sum actually taken — 555 such verdicts in fifteen years, and when the threshold was raised to five pounds, the verdicts became four pounds nineteen shillings. In 1830 a thousand bankers in 214 towns petitioned Parliament to remove forgery from the capital list,

having found by experience that the possibility of death prevented prosecution, conviction, and punishment, and thereby endangered the very property the law meant to protect. A United States Attorney wrote to General Curtis in 1895 that he had 73 murder cases on his docket in which the severity of the penalty, in many cases where the parties were undoubtedly guilty, prevented juries from reaching a verdict at all or led them to acquit. Arthur Train, writing as an assistant district attorney in New York in 1908, reported that first-degree verdicts were extremely rare and that it took a crime of peculiar atrocity to induce a jury to send a defendant to the chair.

The difficulty is near absolute in the case of women, where Bye considers the death penalty a dead letter, since juries simply refuse to send women to their deaths — and he raises, without settling it, whether any punishment ought to be retained that cannot be enforced equally on both sexes.

Then Bye does something that distinguishes him from the abolitionist literature he is writing against: he examines the argument he has just made and finds it defective.

The trouble is that the same reluctance appears in abolition states. Rhode Island, without an execution in nearly three quarters of a century, produces the same complaint that juries will not convict of murder. Bye's own compilation from Minnesota's attorney general reports shows first-degree convictions running at 46.3 percent of

prosecutions before abolition and 44.2 percent after — no improvement at all. Data from Wisconsin and Arizona point the other way, showing higher proportions of first-degree commitments after abolition, but Bye flags the periods as short and the reporting as uncertain. Comparing Massachusetts, New York, and Ohio against Michigan and Wisconsin, he finds the abolition states show a higher ratio of first-degree to lesser-degree convictions but no higher share of first-degree convictions among homicide convictions overall — which is the more meaningful measure.

What the evidence actually shows, he concludes, is that juries shy from any arbitrary and severe penalty, death or life imprisonment alike. And he identifies the flaw in his own side's reasoning precisely: abolitionists have assumed jurors face a choice between sending a man to his death and letting him go free. They never do. They can always return a lesser degree, and in most states can now substitute life imprisonment on a first-degree conviction — which is the very punishment most abolitionists propose as the replacement. There is thus no reason why the death penalty should cause murderers to be acquitted, "a fact which seems to have been altogether overlooked."

But — and this is the pivot — demolishing that argument does not save the death penalty, because the uncertainty is real even if its cause has been misdiagnosed. Both punishments are uncertain. Both are seldom imposed. Few are convicted, and few of those convicted are actually executed;

sentences are commuted and pardons granted. In New York between 1890 and 1907, 344 condemned murderers were pardoned and 904 had sentences commuted, against 112 executions in the same period — 1,208 escapes against 112 deaths. Of 378 homicide cases in federal courts from 1890 to 1892, 73 were convicted and 13 executed. Of 2,444 people committed to American prisons for homicide in 1904, only 106 — 4.2 percent — were sentenced to death, and a considerable number of those escaped through commutation or retrial.

Then comes the number that carries the chapter. In 1917, eighty-five people were legally executed in the United States. Against an estimated 7,000 homicides in a population of 100,000,000, that is one execution for every eighty killings. Taking the five-year average of a hundred executions annually, roughly one in seventy. Even granting that not every homicide is deliberate murder, and halving the figure to be generous, one murderer in thirty-five or forty faces the full penalty. Every criminal knows this, Bye observes, and reasonably expects to be among the thirty-four who are spared. In most states the odds are longer still — only one, two, or three people executed in a year.

The death penalty, on this showing, is a vestigial organ that has ceased to function for lack of exercise. It is used too rarely to deter, and its occasional use makes it a purposeless outrage. And Bye's final charge is the one that has aged least: as applied, it is not reserved for the worst offenders but falls arbitrarily on an occasional victim. Almost any

criminal with money or influence escapes it. The poor and friendless convict, without the means to fight from court to court or the connections to pressure a governor, is the one selected for sacrifice to what has become little more than a tradition.

What actually explains the rise. If deterrence is not the answer, what accounts for such increase in homicide as has genuinely occurred? Bye rejects the leniency explanation and offers others. Urban congestion and the growth of large cities. Immigration, and here he repeats the period's claim that crimes of violence run higher among Italian immigrants. The emancipation of enslaved people, which he argues gave Black Americans greater liberty and therefore greater opportunity for crime, and which he attributes further to an impulsive nature quick to violent anger — a claim that belongs entirely to the racial assumptions of 1919 and is preserved here only because it is his.

His own preferred explanation, insofar as the law bears on it at all, is not leniency but incompetence: the notorious inefficiency of American criminal justice compared with English courts. Slow trials, restricted examination of witnesses, absurd rules of evidence, and the disgraceful abuse of appeal on trivial technicalities have made American criminal jurisprudence, in his words, a travesty on justice. He adds one more cause — the total non-enforcement of laws against carrying concealed weapons, attention to which alone would go far toward eliminating the unpremeditated killings that arise from sudden passion.

What the country needs, he concludes, is not greater harshness but greater efficiency. Given that, there is little reason to fear an outbreak of crime from abolishing the barbarities in the criminal codes, the death penalty among them.

IV

LYNCHING

The fourth chapter takes up the argument Bye considered the most serious practical objection to abolition, and the one most specifically American.

The claim runs as follows. In the twenty-eight years Bye surveyed, more than three thousand people had been lynched in the United States — almost exactly the same number as had been executed legally. That figure is taken to reveal a public sentiment so fierce toward certain offenders that it demands their deaths, and if the courts will not supply them the mob will. On this theory lynching is an extra-legal correction to an over-tender penal code, and abolishing the death penalty where such sentiment prevails is an invitation to more of it.

Bye quotes the theory's ablest exponents. One writer holds that criminal law is a pure expression of the public's vindictive sentiments, and that where judicial punishment is insufficient to satisfy popular feeling, vengeance takes the form of lynching. J. E. Cutler, whose *Lynch Law* Bye regards as the most exhaustive study available, argues that the history of lynching furnishes fairly conclusive evidence that for certain crimes no punishment short of ignominious death can satisfy the popular sense of justice, that the foundation of the law of retaliation is laid deep in

human nature, and that to abolish capital punishment in this country is likely to provoke lynchings — especially where atrocious crimes cross racial lines.

Bye notes carefully that this is not itself a defense of revenge as a principle. It is the narrower claim that the revenge motive exists in the population, and that the law had better express it or the population will. At least one state had acted on the theory: Colorado's restoration of the death penalty in 1901, after less than four years without it, is generally attributed to three lynchings in 1900 having been read as proof that executions were needed to satisfy public indignation.

He then tests the theory.

The abolition states. Over twenty-eight years, five states were without the death penalty throughout. Their lynching records: Rhode Island none, Maine none, Wisconsin two, Michigan four, Kansas twenty. Of the states that abolished during the period, Minnesota went from an average of 0.36 lynchings a year to none, Washington from 0.5 to none, North Dakota from 0.28 to none, Oregon from 0.33 to 0.25. Arizona rose from 0.34 to 0.50, but the period after abolition covers only two years and one lynching.

Colorado, the case cited as proof, dissolves under examination. Its lynchings averaged 0.75 a year during abolition — but all three occurred in a single year, 1900, with none in the other three years. Fourteen lynchings had occurred in the six years before 1896 and four in the year immediately

preceding abolition. The practice had effectively ceased in 1896, four years *before* the outbreak that supposedly proved the necessity of hanging. Bye calls it extravagant to attribute the 1900 lynchings to abolition, or the subsequent quiet to restoration.

Kansas, the one abolition state with a substantial record, is no worse than its retentionist neighbors — twenty lynchings against Colorado's twenty-three, Nebraska's fourteen, Oklahoma's sixty-two, and Missouri's sixty-five, most of those states smaller in population. And Kansas had recorded no lynching at all since 1902.

But the theory survives this. Bye is scrupulous here in a way that strengthens his eventual conclusion. The argument he is testing never claimed that abolition produces lynching everywhere — only where retributive sentiment is deeply entrenched. The abolition states are in New England and the central west, where civilization is stable and no disturbing causes exist. The real test would be the South, and there has been no experiment with abolition below the Mason-Dixon line.

So he approaches the southern question by a different route: through the causes of lynching itself.

What lynching actually is. Bye follows Cutler in identifying two kinds of community where lynch law appears. The first is the frontier, where legal institutions are not yet established enough to keep order — which explains its earlier prevalence in the West and its rapid decline there as frontier conditions passed. The second is settled

communities with stable institutions, where lynching breaks out in times of popular excitement or social disruption, or where the population contains a sharp division, or against people of disreputable character against whom no evidence can be produced, or for offenses whose atrocity especially shocks the community.

In the United States, race is the dominant cause, and Bye's figures are unambiguous. Of 2,359 people lynched over twenty years, 1,858 — 78.8 percent — were Black. Seven were Indian, nineteen Mexican, three Chinese; 472 were white.

The pretexts tell the rest. Bye obtained detailed records from Monroe M. Work at the Department of Records and Research at Tuskegee Institute covering 1913 through 1917: of 264 lynchings, 240 of the victims were Black. Only 105 were for homicide and 48 for rape or attempted rape — leaving 111, well over a third, for miscellaneous offenses. Cutler's longer series from 1882 to 1903 gives a similar distribution: 49.2 percent for murder or attempted murder, 8.5 percent for rape, 20.6 percent for theft — nearly ninety percent of those for stealing livestock — and the balance for assault, desperadism, minor offenses, and unknown causes.

Bye then prints five cases from the Tuskegee record, and they are the most damning paragraph in his book:

March 12, 1917 — William Sanders, lynched at Mayesville, Kentucky, for the alleged theft of an overcoat.

July 24, 1917 — William and Samuel Powell, brothers, lynched for insolence and for not giving enough road to a passer-by while driving.

November 17, 1917 — two Johnson brothers, lynched at Sale City, Georgia, for disputing a white man's word.

January 18, 1916 — William Warren, lynched at Buckville, Arkansas, for slapping a boy.

March 20, 1916 — Jeff Brown, lynched at Cedar Bluff, Mississippi, for accidentally brushing against a girl on the street.

All five victims were Black. Bye's comment is that whatever pretexts were offered, the racial motive is plainly present.

The southern test. With this in hand he returns to the question. Has the death penalty in the South prevented lynching there?

The answer is visible in a single comparison. The fifteen states with the most legal executions over twenty-eight years include all but one of the ten states with the worst lynching records, and all but three are southern. Georgia leads the nation in executions with 264 — roughly ten a year — and *also* leads in lynchings with 365. The states that hang the most also lynch the most.

Bye draws the conclusion the numbers force. Either capital punishment bears no relation to lynching at all, or — if executions really do satiate the public appetite for stern justice — they must be multiplied far beyond present levels to do it. If

Georgia's ten executions a year still left its citizens to hang and burn another 365 people extra-legally, then satisfying public opinion would require the state to execute not ten but twenty or twenty-five annually.

And the causes make even that insufficient. Since a large share of lynchings are for offenses that are not capital crimes anywhere — and many of them, as the Tuskegee cases show, absurdly trivial — the list of capital offenses would have to be substantially enlarged as well. The trend runs unmistakably the other way, and few would have the nerve to propose it. Even then Bye doubts it would work: if fairly rigorous hanging for murder has not stopped the lynching of accused murderers in the South, extending it to theft seems unlikely to do better.

He goes further, entertaining an argument he acknowledges is extreme: that lynching is the *sequel* to legal execution rather than its substitute — the state, by setting the example of killing criminals, teaching mobs to do the same when roused. He treats this as probably too strong, but it parallels his earlier finding that public hangings appeared to stimulate crime by brutalizing the crowd and cheapening the value of life.

His moderate conclusion is that lynching rests in the racial and social constitution of the community and bears no relation to the death penalty at all. Insofar as it connects to the administration of justice, he suspects the connection runs through the delays, technicalities, and abuses he catalogued in the previous chapter. Lynch law may express a

public desire for more *certainty* rather than more cruelty — in which case speedier and surer trials would answer it better than more hangings.

The problem is receding. Bye closes on the trend. Lynchings had fallen in every five-year period he tabulated, from 1,107 in 1890-1895 to 328 in 1911-1915, and 1917 saw fewer than any year in thirty-five. The decline was not confined to the vanishing western frontier; it was visible in the South as well. Even Georgia, with the blackest record in the country, fell from 96 lynchings in 1890-1895 to three in 1917.

The lynching argument, he concludes, need not stand in the way of abolition. Where the death penalty has been abolished, lynching has not increased. Where the death penalty is used most heavily, lynching flourishes anyway. The extension of executions that the theory logically demands runs against the whole direction of the century's development and will not happen. And the practice is disappearing on its own.

V

ERRORS OF JUSTICE

The fifth chapter takes up what abolitionists had long treated as their decisive argument: that the death penalty is irrevocable, that courts are fallible, and that an innocent person executed is a wrong beyond any repair. Bye's handling of it is the most surprising passage in the book, because he substantially agrees with the premises and then declines to accept the conclusion.

He opens by giving the criminal law its due, and the catalogue is generous. The accused is presumed innocent. He cannot be tried without a grand jury indictment; cannot be convicted except by the unanimous verdict of twelve jurors instructed that they must be convinced beyond reasonable doubt; may challenge jurors freely; must be tried in open court with witnesses testifying in his sight and hearing; is protected by strict rules of evidence; may testify in his own defense and compel his witnesses to appear; will be given an attorney if poor; may appeal with great freedom; and may finally seek commutation or pardon. These safeguards are so elaborate, Bye notes, that they are more often attacked for excessive leniency than for inadequacy.

And yet the law is not infallible, and Bye observes that European legal systems admit as much where American ones do not. Switzerland, Portugal,

Sweden, Norway, France, Austria, and Germany all provided by statute for indemnities to persons convicted and later found innocent. American courts are no less liable to error than European ones. Where a person is falsely imprisoned the state can at least make some reparation. Where the sentence has been carried out, it cannot.

He then works through the ways justice goes wrong.

Public feeling and the press. When an atrocious crime inflames a community, a suspect is condemned in the public mind before trial, the newspapers demand his punishment, and a district attorney whose office depends on popular vote is put on his mettle to secure a conviction. A fair trial would require removal to another jurisdiction or delay until the storm subsided, and the very intensity of the clamor makes both impossible.

His cases here are contemporary and well chosen. **Leo Frank**, tried in Georgia in 1915 for the murder of a white woman, convicted amid a public demand for his blood, with equally cogent reasons pointing to another man whose testimony was hopelessly confused. Impartial investigators outside Georgia became convinced Frank was innocent and being made the victim of religious persecution and a prosecutor's need to protect his reputation. Every effort at a new trial failed. The governor finally risked his political future to commute the sentence — and the mob broke into the jail and lynched Frank before it could take effect. Bye's point is precise: this is not a case of an innocent man legally executed, but

it demonstrates how thoroughly press and public opinion can combine to convict a man whose guilt was never established beyond the reasonable doubt he was entitled to. Had Georgia's governor been a little less conscientious, Frank would have been sacrificed legally rather than illegally.

Thomas Mooney, under sentence of death as Bye wrote, convicted of murder after a bomb killed ten people at a San Francisco preparedness parade. Here the inflaming emotions were patriotism and anger at recent labor troubles, compounded by prejudice against Mooney's radicalism and a district attorney determined to convict. The conviction appears to have rested largely on perjured testimony; it was not even certain the explosion was not an accident. The President's Mediation Commission concluded Mooney should have a new trial, and President Wilson personally appealed to the governor of California. (A note appended as the book went to press records that Mooney's death sentence was commuted to life imprisonment.)

Lieutenant Becker and the four gunmen, electrocuted in New York for the Rosenthal murder after an investigation that exposed deep police corruption and aroused the public. Warden Clancy of Sing Sing, positioned to know the details, was quoted at the time saying two of the men were innocent. Thomas Mott Osborne, the former warden, wrote to Bye that he had known intimates of two of the gunmen, all of whom agreed that one — "Dago" Frank — had nothing to do with the murder and was not even present. Of Becker himself, Osborne wrote

that he had gone to Sing Sing fully believing in his guilt, unwilling to consider that two juries might be mistaken, but that toward the end he heard much to shake that conviction and finally became convinced that while Becker had been guilty of many crimes, he was not guilty of Rosenthal's murder.

Bye adds a letter from Governor Hodges of Kansas, who wrote in 1913 that in his short time in office he had seen enough evidence to satisfy him that men are convicted of first-degree murder under the stress of enraged public sentiment, and that in such cases execution would sometimes be a grievous mistake. He had just paroled an old man who had served twenty-one years after a trial that appeared in retrospect to be a travesty of justice, and who seemed quite probably innocent — a man who would undoubtedly have hanged had Kansas then had a governor who took pleasure in hanging.

Judges, lawyers, and juries. The outcome of a trial often depends as much on personalities as on evidence. A judge shapes it through his rulings on evidence and his charge to the jury. A skillful prosecutor, particularly against a defendant too poor to hire comparable counsel, can go far toward determining the result. Jurors are laymen, unpracticed in weighing evidence and easily moved by emotion and prejudice. Bye's summary is unsentimental: to regard courts as machines for arriving at truth automatically and impersonally is absurd; like all human institutions they are a medium in which personalities and interests

contend, and there is always a considerable margin of error.

Witnesses. Eyewitness testimony seems reliable and is not. Nothing is trickier than human memory, and guilt often turns on the recollection of some detail of feature, time, or circumstance. Bye cites the classroom experiment psychologists had been running for years — staging a mock crime before students, sometimes without warning, then collecting their accounts — which produced divergences and misrepresentations wide enough to settle the question. Witnesses may also fall victim to optical illusion or to suggestion built up by the atmosphere of the courtroom. He points readers to Münsterberg's *On the Witness Stand* for the full treatment.

His illustration is an English case from 1797. Martin Church and James Mackley were tried, convicted, and hanged for the murder of Sydney Fryer, largely on the testimony of Anne Fryer, an eyewitness who swore positively that they were her cousin's assailants. Years later two other men, each awaiting execution for other crimes, separately confessed to the killing.

Circumstantial evidence. Bye thinks it more trustworthy than commonly supposed — possibly more so than eyewitnesses — but especially treacherous in murder cases, since the real facts often die with the victim. Cause, time, and manner of death, and motive, must all be reconstructed from objective facts of doubtful authenticity. Crimes are often discovered long after the fact. It is not always

certain a murder occurred at all. And a clever criminal will hide his traces and may deliberately leave signs pointing to someone else. Colorado, when it restored the death penalty in 1901, provided that it could never be inflicted on a defendant convicted by purely circumstantial evidence.

The American cases Bye assembles here are older. Margaret Houghtaling, hanged in Columbia County, New York, for the murder of a child; fifteen years later a dying woman confessed to a clergyman that she had committed the murder and deliberately arranged the suspicion that killed Houghtaling. Dr. Hamilton of Kentucky, hanged around 1825 for the murder of a Dr. Saunderson after his pistols were found near the body; three months later two robbers confessed on the gallows that they had stolen the pistols and used them. A young man named Boynton, hanged in Louisiana for the murder of a fellow boarder — he broke from his executioners on the scaffold and jumped into the crowd shrieking his innocence — after which the tavern keeper confessed on his deathbed to the killing and to contriving Boynton's guilt.

False confessions. Bye devotes real attention to what many of his contemporaries would have dismissed, and his account is recognizably modern. A person may confess to a crime he did not commit — in hope of escaping the extreme penalty; because third-degree methods have broken his spirit; or, if his mind is weak or highly suggestible, because suggestion has actually led him to believe he did it. He cites Münsterberg's chapter on untrue

confessions. And a confession may be made to shield the truly guilty.

His examples: an Ohio man hanged for murder who declared from the gallows that his hands were innocent of human blood, that he knew the guilty party and could not reveal it, and that his innocence would someday come to light — whose own mother eventually admitted she had done it. Rose Dolbey, tried in Maine in 1896 after confessing to killing her infant son, saved when the evidence showed the confession was made to shield her mother, the real culprit. The Boorn brothers of Vermont, who, facing evidence they believed made acquittal impossible, confessed to murdering a brother-in-law who had disappeared — and who turned up alive and well in time to save the condemned elder brother.

To these Bye adds Tommy Bambrick, a twenty-year-old convicted of murder in New York who knew the real killer and refused to inform on him. Warden Osborne got a lead from another prisoner, tracked the actual murderer down, and could not get the judge even to hear Bambrick, who waited two days in the next room. The new trial was denied. The night before the execution Osborne described the case to a large meeting of bankers in New York, who were moved enough to form a committee to try to save him; they attempted to reach Governor Whitman by telephone in Albany, but the governor's secretary would not wake him — he never permitted himself to be disturbed on the night before an execution — and an attempt to charter a special train failed. Bambrick went to the chair. Osborne's

verdict: a poor, ignorant little tough, but more loyal to his code than most of us to our professed religion.

The appellate courts are not a remedy. Appeals turn on technical error concerning the defendant's legal rights, rarely on his actual guilt or innocence. If a trial observed the rules of the game, there is little opportunity for redress. And fighting a case from court to court takes money, which means only the wealthy convict can do it. The pardoning power is no better: power, influence, pressure, prejudice, and sympathy — all uncertain criteria of justice — govern its exercise. On the whole By judges that appeal and pardon have more often been the escape route of a guilty man than the protection of an innocent one.

He offers *Donnelly v. United States* as the clearest case of the machinery failing. Donnelly, convicted of murdering an Indian named Chickasaw, tried to introduce evidence that another Indian, since dead, had confessed to the crime. The court excluded the confession as hearsay; the Supreme Court affirmed, over dissents from Holmes, Lurton, and Hughes. So a probably innocent man was imprisoned for life by a technical rule originally created for his protection — the hearsay rule existing to shield defendants from unsubstantiated accusation — with the confession unavailable in writing or in person because it was never written and the man who made it was dead.

Against this he sets Governor Dunne's account of the Chicago case of Synon, convicted of murder and condemned in 1901. The Supreme Court reversed

because of objectionable remarks by the trial judge, and at the second trial — over which Dunne himself presided — Synon was acquitted after reputable witnesses testified he had been four miles from the scene. He was saved, as Dunne put it, by a few harsh and prejudicial words of the judge who first tried him; only those words, themselves an error, stood between him and the tragedy his state would have committed. Bye's comment: no better example could be desired of how capricious the protection of the appellate courts really is.

The mentally ill and intellectually disabled.

Here Bye's case is at its strongest, and he says so. The law's test of criminal responsibility, he argues, is half a century behind medicine. Most American courts still applied the rule from M'Naghten's Case of 1843 — that a person is responsible unless, at the time, a defect of reason left him unable to know the nature and quality of his act and that it was wrong. Yet a person may kill under a paranoid delusion, or an impulse genuinely irresistible, while fully aware that the act is wrong in the eyes of the law.

The consequences reached the scaffold. Bye quotes Chief Justice Harry Olsen of the Municipal Court of Chicago, whose psychopathic laboratory had examined thousands of defendants: the number put to death whose crimes were the result of their mental condition, Olsen wrote, is much greater than any of us ever suspected. Olsen described three successive executions in Cook County — Harry Lindrum, diagnosed in the court's own laboratory; a man named Wheed, known to be severely impaired;

and Roswell Smith — all of whom he considered mentally defective. He added that in traveling around the country he had repeatedly picked up local newspapers whose photographs of murder defendants showed plainly to his trained eye that the man was mentally disabled, with nothing in the article suggesting the writer understood it.

Bye also recounts Richard Ivens, the Chicago boy executed for the murder of Bessie Hollister, whom Olsen — who had prosecuted the case and tried unsuccessfully to persuade the jury toward life imprisonment — considered a clear case of combined intellectual disability and dementia praecox, the assault itself being a symptom of the disease. No intelligence testing was available; neither side's expert considered the psychology of the case. Münsterberg studied the youth's confession and concluded he was irresponsible, going so far as to say the confession was wholly untrue.

Bye's conclusion is flat: when three people are executed in succession in a single city who a competent authority believes were mentally disabled, something is wrong. The law clearly intends not to execute the mentally ill. As applied, it does so anyway.

And then he refuses the conclusion. Having assembled all of this, Bye declines to treat irreparability as the decisive argument, and says plainly that those who urge it as the final and conclusive fault greatly exaggerate the point.

His reasoning is exact. The cases show that executing an innocent person is *possible*; they do not show that it happens often. And he notices something about his own evidence: in most of the cases he collected, the victim escaped the gallows by some fortunate circumstance — a technicality that permitted a new trial, a last-minute reprieve, a commutation. That the near-misses so heavily outnumber the completed injustices is itself proof that the law's safeguards largely work. Most of the actual erroneous executions he could find dated to the previous century, rested on hearsay, or were not clearly substantiated.

He submits the strongest evidence against his own side. In 1911 a committee of the American Prison Congress wrote personally to the warden of every state prison in the United States and Canada, asking whether they had personal knowledge of anyone executed for murder whom they believed, on subsequent developments, to have been innocent. Every warden answered no except two. Colonel McClaughry of Leavenworth said he knew of one or two who might in his opinion have been wrongly executed; Bye wrote for details and received no reply. Warden Fogarty of Indiana said he had no personal knowledge of such a case but no doubt whatever that some innocent men had been executed. Bye calls this remarkable testimony to the substantial safety from wrongful conviction afforded by American law — adding only that if more wardens were of Osborne's type, taking a personal and

intelligent interest in their prisoners, the result might have differed.

He does not abandon the argument entirely. Some innocent people are executed, few though they are, and if all the facts were known his list would probably grow. He offers a shrewd observation about why such cases stay hidden: an innocent man alive in prison will work with his friends indefatigably until his innocence is established, while a dead man is forgotten and the evidence dies with him.

Then he states the condition on which the whole question turns, and it is the hinge of his book. The occasional sacrifice of an innocent person *could* be justified on grounds of social expediency — if the death penalty were necessary to protect society. We do not hesitate, he notes, to send hundreds of thousands of soldiers to their deaths for society's protection. Irreparability would not be a fatal objection to a punishment that was actually necessary.

But it is not necessary. The preceding chapters established that. And once the penalty is shown to perform no useful social function, its irrevocability tells decisively against it — because there is no longer anything on the other side of the scale. If the danger of sacrificing an innocent life can be eliminated at no cost to public safety, it should be.

The danger of judicial error, then, is not by itself a decisive fault. It is an added link in the chain of considerations that condemn the practice.

VI

CONCLUSION

Having concluded that capital punishment has no place in a modern penal system, Bye turns to the question that abolitionists are always asked next: what should be done with capital offenders instead?

The standard answer is life imprisonment, and every state that had abolished the death penalty adopted it. Bye does not think it a satisfactory solution, and his objections are worth attention because they come from the abolitionist side.

Life sentences are rarely served. Very few prisoners actually die in the penitentiary. After ten, fifteen, or twenty years — sometimes less — when the crime has been forgotten and the prisoner has grown old, a pardon releases him. Life imprisonment is therefore nearly as uncertain as death, and the pardoning power has been abused badly enough that defenders of the death penalty cite it as a reason against abolition. Bye grants the point: many guilty people, by fighting through the courts and then waiting out the public feeling their crime aroused, have used wealth and influence to obtain release.

Life imprisonment is just as arbitrary. This is his more fundamental objection, and it is the same one he brought against the gallows. Applying life imprisonment uniformly to everyone convicted of first-degree murder is as unscientific as executing

them all. It shocks humanitarian feeling less. It is no less irrational.

Individualization must extend to murderers as to anyone else, and dividing homicide into degrees does not accomplish it. Degrees are set by judge or jury, and neither is positioned to do the work; it can only be done in the correctional institution itself, where the prisoner can be studied over time and subjected to reformative influence. A scientific treatment of the murderer, Bye argues, will not differ materially from the treatment of any other class of offender.

His proposals follow from that. The mentally ill must be separated from the sound and placed in hospitals for medical rather than punitive treatment, and released if cured with no likelihood of relapse. The murderer of normal mentality is a case for the indeterminate sentence — confinement in a reformatory rather than punitive institution until it seems safe to return him to free society, with a minimum term long enough that no one imagines murder can be committed with impunity, but short of life.

Life imprisonment will still be necessary for some. The incorrigible, the desperate, the recidivist, the hopelessly insane cannot safely be at large, and should be confined for life in suitable institutions where they can work and not burden the state. But — and this is the same argument he made against the positivists — such people are by no means confined to murderers and rapists. Some of the most hopeless recidivists are petty offenders. Life

imprisonment must therefore be applied not by an objective test attaching it to the gravest crimes, but by individual study of those who are genuinely hopeless, whatever their offense.

He notes that life imprisonment is far more feasible now than a century earlier. There was once some justification for executing incorrigible offenders because no other effective means existed to stop them; modern penitentiaries and asylums have removed that excuse entirely.

(Bye also proposes surgical sterilization for some classes of offender, particularly as a southern substitute for the death penalty in rape cases — a recommendation that belongs to the eugenic thinking of his period and that no modern reader will follow him in. It is noted here for completeness rather than reproduced as argument.)

He is realistic about how change will come. Legislators will not soon abandon the traditional idea that a murderer is the worst of criminals and must receive a commensurate penalty. The likely first step is therefore what the abolition states already did: substitute life imprisonment for death, with no individualization beyond the degree of guilt the jury finds. That is a great improvement over execution and probably a necessary stage toward something better.

Whatever replaces the gallows, he insists, must be *certain*. The abuses and delays of the law have to go, which requires reform of judicial procedure and a more enlightened legal profession. Life sentences must actually be carried out except in unusual cases,

which means the pardoning power should be taken out of the hands of governors and given to a properly constituted board better able to resist pressure and sympathetic appeal and to decide each case on its merits. When the criminal law is administered more speedily and surely, one of the strongest objections to abolition disappears — the claim that its only proposed substitute cannot be enforced.

The summary of the case. Bye then draws his six chapters together.

Evolution. The severity of the criminal law has been contracting for two centuries. Capital crimes have been reduced from many to, in practice, one. Public hangings gave way to private executions, cruel methods to comparatively humane ones. Nearly all states let juries set the degree of guilt, and twenty-four let jury or court choose between death and life imprisonment. Twelve states have abolished the penalty outright, and agitation is active in others. Complete abandonment is the logical climax of a development already two centuries old.

Theory. Criminology has discarded revenge, absolute individual responsibility, the objective test, and repression, replacing them with more humane sentiment, the doctrine of social causation, and treatment through individualization, reformation, and prevention. The death penalty conforms to none of these. It rests on retributive justice; it applies an objective test that ignores society's responsibility for crime; its object is repression rather than reform or prevention. It could be defended as artificial

selection, but only at a scale of killing no one will countenance.

Deterrence. It is not clear that deterrence is a proper motive at all. Some criminals do not fear death and will not be restrained by it. Public executions did not prevent crimes committed at the foot of the scaffold. The steady reduction in hanging produced no rise in crime. Statistics show no larger proportion of homicides, or of prison commitments for homicide, in abolition states than in retentionist ones. And the penalty is far too uncertain to deter: whether because juries will not convict, or because the pardoning power is abused, or because the law is administered so laxly, executions very rarely occur. They have become, in Bye's phrase, little more than a blind discrimination against an occasional and usually poor victim of society's wrath. Such increase in homicide as has occurred he attributes to immigration, to the changed condition of Black Americans after emancipation, and to the notoriously lax and inefficient administration of the law — the first two of these reflecting the racial assumptions of his period rather than any finding of his research. A less severe penalty, more certainly enforced, promises at least as much deterrent effect.

Lynching. Abolition has produced no increase in lynching in the North and West. In the South, where executions are most frequent, lynching has flourished regardless. Many lynchings are for offenses so trivial that only a vastly expanded death penalty could satisfy the appetite they express — an expansion that will not happen. Lynching is a

product of frontier conditions and of communities where the race problem is present, and it is declining.

Error. The irreparability argument has been exaggerated but is not weightless. The safeguards of American law are extensive and largely effective; genuine wrongful executions appear to be rare. But they occur. And since the penalty serves no necessary function, there is no reason to permit even these few blunders. Abolition would make them impossible.

Then his verdict: evolution, theory, practice, and humanity all lead to the same conclusion. The death penalty is an outworn vestige, a cruel remnant of barbarism with no place in a modern enlightened community. It should be replaced for the present with life imprisonment, until individualization can be more fully applied. The three thousand people legally put to death in the preceding twenty-eight years were an unjust and unnecessary sacrifice to a tradition — a grievous error the nation should not repeat.

A wartime coda. Bye wrote with the country at war, and he closes by taking up treason, a crime he says had been almost forgotten and was suddenly looming in the courts. Should an offense against the existence of the state itself be punished by speedy and ignominious death?

He answers that this is not a question of social expediency but of social emotion. To execute a traitor is simply for the state to strike in blind hatred at its enemy — which is what it does in war. War

lessens the sacredness of life and licenses much that peace would not sanction. But one point he takes as clear: executing traitors is not necessary to public safety. Death will no more deter treason than it deters a spy from crossing enemy lines or a soldier from charging a cannon. If it is justified at all, it is justified on grounds of retribution and on the principle that a different code governs wartime conduct.

He is willing to concede the military code. So long as armies rest on stern discipline, courts martial and severe punishment will be part of them — a necessary part of the great evil of war itself, which can only vanish when war does. "But this is not a justification," he writes; "it is resignation to the inevitable."

The civil code he will not concede. The state is not organized on army discipline, and if the death penalty can be dispensed with for murder and rape, it can be dispensed with for treason. To retain it there alone, after abolishing it everywhere else, would be an admission that in time of war society is blind with rage and unbridled passion.

The last word. Bye ends on the proposition that nothing stands still. Any individual, society, or institution must progress or decay; to remain stationary in a changing environment is itself decay. Capital punishment is in exactly that position. No one seriously proposes extending it, yet the remnant is clung to with obstinate persistency out of sheer force of tradition. The situation cannot last. The trend of evolution is unmistakable and runs toward

abolition. It is only a question of time, he wrote in 1919, before this disgraceful barbarity is swept away in the better order gradually creeping over the world.