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## TWO MYTHS IN THE HISTORY OF CAPITAL PUNISHMENT

THORSTEN SELLIN

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Myths that are accepted as historical facts are innumerable. Once they are recorded in print they gain currency by being repeatedly quoted. They end by being accepted as facts, because with the passage of time they have been given the accolade by many trustworthy persons, who have themselves accepted them on trust, and they persist indefinitely, in the writings of authors who have not discovered their spuriousness, even long after they have been discredited.

Two such myths will be discussed briefly, because they may be of interest to those who study the history of punishment. Both of them concern the extent of the use of the death penalty in olden times. They are usually cited as examples of the brutality of the administration of justice during the 16th and 17th centuries. One of these myths is most likely to be mentioned in the works of English-language authors, while the other is best known in German language areas.

### THE 72,000 HANGINGS DURING THE REIGN OF HENRY VIII

In books about the history of punishment and especially in those dealing with the death penalty, one can almost count on finding a statement that there were 72,000 hangings during the reign of Henry the Eighth in England. It is such a common occurrence that it is hardly worth while to offer any proof. Occasionally, the figure is given as 70,000<sup>1</sup> and even 75,000.<sup>2</sup> Sometimes an author assumes that these figures apply to all offenses punished capitally, but some writers specify that they refer only to "theft and robbery," "major and minor thieves," "mostly for quite trivial offenses,"

<sup>1</sup> HARRY ELMER BARNES, *THE STORY OF PUNISHMENT* (vii, 292 pp. Boston: Stratford Co., 1930), p. 236.

<sup>2</sup> VISCOUNT TEMPLEWOOD, *THE SHADOW OF THE GALLOWS*. (159 pp. London: Victor Gollanz, Ltd., 1951), p. 17.

"thieves and vagabonds," "great and petty thieves," etc.

We have to go back to the 16th century to find the origin of these ideas. In 1577 there appeared in London two folio volumes entitled *The Chronicles of England, Scotland, and Ireland Conteyning the Description and Chronicles of England, from the first inhabiting unto the Conquest Until this present time 1577. . . . Faithfully gathered and set forth by Raphael Holinshed*. A second and augmented edition in three volumes appeared in 1587 and was reprinted in six volumes in 1807-1808. Holinshed employed a staff of writers to assist him, among them John Stow and William Harrison; the latter was the author of the first section, *An Historicall Description of the Iland of Britaine . . .*, and in its second book, chapter eleven, the subject "Of sundrie kinds of punishments appointed for malefactors" was discussed. Harrison described three classes of "annoiers of the common-wealth." The third class, he said, "are roges, which doo verie great mischeefe in all places where they become. For whereas the rich onlie suffer iniurie by the first two, these spare neither rich nor poore; but whether it be great gaine or small, all is fish that cometh to net with them, and yet I saie both they and the rest are trussed-up apace. For there is not one yeare commonlie, wherein three hundred or four hundred of them are not deuoured and eaten up by the galloves in one place and other. It appeareth by Cardane (who writeth it upon the report of the bishop of Lexovia) in the geniture of king Edward the sixt, how Henrie the eight, executing his laws verie seuerelie against such idle persons, I meane great theeues, pettie theeues and roges, did hang up threescore and twelue thousand of them in his time."<sup>3</sup>

<sup>3</sup> HOLINSHED'S *CHRONICLES OF ENGLAND, SCOTLAND AND IRELAND*. In six volumes. Vol. I. ENGLAND, (xi, 706, 40 pp. London, 1807), pp. 313-14.

Harrison, by his own admission, relied on Cardan for his statistics and Cardan got his information from the bishop of "Lexovia." In passage the statistics changed, however, but this can be observed only by an inspection of Edward the Sixth's "geniture." First, however, let us devote a brief moment to the internationally known Jerome Cardan (1501-1576) or Gerolamo Cardano, Italian mathematician, philosopher and physician, born in Pavia. He was called to Scotland in 1552 to treat John Hamilton, Archbishop of St. Andrews.<sup>4</sup> On his return through London in September of that year he had an audience with the young King Edward VI whose childhood tutor, Sir John Cheke, was one of Cardan's friends and later he drew up his horoscope. This document contained a variety of curious bits of data and among them this statement about Henry VIII, "He was affected also by a constellation with schismatic properties, and by certain eclipses, and hence and from other causes, arose a fact related to me by the Bishop of Lexovia, namely that two years before his death as many as seventy thousand persons were found to have perished by the hand of the executioner in that one island during his reign."<sup>5</sup>

The horoscope in question may have been prepared after Cardan's return to Milan, where he lived, because Bellini<sup>6</sup> related that it was on the journey from England that Cardan was "splendidly and cordially received at Besanzon by the Bishop of Lisieux"; this appears to have been his first contact with the worthy prelate of "Lexovia." How this bishop had acquired his information no one will probably know. He was Jacques d'Annebaut, son of the hereditary Constable of Normandy and a brother of Claude, a marshal and admiral of France. He had become bishop of Lisieux in 1539,

<sup>4</sup> JEROME CARDAN, *THE BOOK OF MY LIFE (DE VITA PROPRIA LIBER)*. Translated from the Latin by Jean Stoner (xviii, 331 pp. New York: E. P. Dutton, 1939), p. 97.

<sup>5</sup> Quoted by JAMES ANTHONY FROUDE, *HISTORY OF ENGLAND FROM THE FALL OF WOOLSEY TO THE DEATH OF ELIZABETH* (12 vol. Amer. ed., New York, 1867), vol. 3, p. 375. Froude says: "The words of some unknown foreign ecclesiastic discovered imbedded in the midst of this abominable nonsense and transmitted through a brain capable of conceiving and throwing it into form, have been considered authority sufficient to cast a stigma over one of the most remarkable periods of English history, while the contemporary English Records, the actual reports of the judges on assize, which would have disposed effectively of Cardan and his bishop, have been left undisturbed in their dust." (loc. cit.)

<sup>6</sup> A. BELLINI, *Gerolamo Cardano e il suo tempo (Sec. XVI)* (xi, 327 pp. Milano: Hoepli, 1947), p. 167.

a cardinal in 1544 and remained in his episcopate until his death in 1558.<sup>7</sup>

Cardan mentioned 70,000 executions, presumably for all classes of crimes, but this figure was claimed to cover only the first thirty-six of Henry's thirty-seven years and seven months as king, and would yield an average number of 1944 annually. Harrison's figure of 72,000 may have been due to an attempt to estimate and deduct the number of executions for other crimes than those against property, for otherwise the figure of 73,000 would have been nearer the mark.

David Hume used Harrison's statistics<sup>8</sup> and thereby added respectability to the claim. Later, Samuel Romilly repeated the statement in a debate on the death penalty in the House of Commons, February 9, 1810. These two authorities are even more commonly cited than is Harrison, while Cardan, who originated the story with the aid of a foreign bishop, is forgotten. Since Froude's time, careful English scholars have avoided the story. Luke Owen Pike, in 1876, refers to "a writer" who lived in the reign of Elizabeth and who claimed that nearly two thousand minor criminals were hanged annually during the reign of Henry VIII and that in his (the anonymous writer's) own time the number had fallen to about four hundred, but he adds, "As, however, he does not appear to have consulted those records from which the information might have been obtained, and which are now, unfortunately, not all in existence, his figures must be regarded as merely conjectural."<sup>9</sup> Arthur Griffiths considers the myth as having been "utterly demolished by Froude,"<sup>10</sup> and Leon Radzinowicz dismisses it with a reference to the opinions of Froude and Pike.<sup>11</sup> James Fitzjames Stephens makes no reference to the myth although he is concerned with the statistics of executions

<sup>7</sup> PIUS BONIFACIUS GAMS, *SERIES EPISCOPORUM ECCLESIAE CATHOLICAE...* (Ratisbonae, 1873), p. 567; Brief biography in H. FISQUET, *LA FRANCE PONTIFICALE (Gallia Christiana). HISTOIRE CHRONOLOGIQUE ET BIOGRAPHIQUE DES ARCHEVÊQUES ET ÈVÊQUES DE TOUS LES DIOCÈSES DE FRANCE...* (Paris, 1866), vol. 4, p. 299.

<sup>8</sup> *THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688* (New ed. 8 vol. London, 1882), vol. 4, p. 275.

<sup>9</sup> *A HISTORY OF CRIME IN ENGLAND* (2 vols. London: Smith, Elder & Co., 1876), vol. 2, p. 110.

<sup>10</sup> *THE CHRONICLES OF NEWGATE* (2 vols. London, 1884), vol. I, p. 61.

<sup>11</sup> *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750. THE MOVEMENT FOR REFORM 1750-1833* (xxiv, 853 pp. London and New York: Macmillan, 1948), p. 139.

during the Tudors.<sup>12</sup> He noted, in that connection, that it was difficult to discover how Tudor justice worked in practice, for "no statistics as to either convictions or executions were kept then, or till long afterwards." What he found were "a few vague generalities, with here and there a piece of positive evidence." We must conclude, then, that no one knows how many executions there were during the reign of Henry the Eighth. Whether the number was large, as it probably was, or small, one thing seems to be clear, namely, that the figures of 70,000, 72,000 or 75,000 are imaginary. This, of course, will not prevent their being cited again and again in the unlimited future.

#### CARPZOV'S 20,000 DEATH SENTENCES

Benedict Carpzov (1595-1666) was one of Germany's most famous legal scholars, who in his *Practica nova Imperialis Saxonica rerum criminalium*, published in 1635, systematized the substantive and procedural criminal law and thus became for a century the leading German authority in such matters. He was at the time the senior or president judge of the Leipzig court of juriconsults (*Schöppenstuhl*), the most important of the four "dicasteries" of Electoral Saxony.<sup>13</sup> He had become associated with that body in 1620, a regular member in 1623 and senior judge in 1633. Except for eight years, when he was called to occupy some high government posts in Dresden he served as head of the court until his death.

Until quite recently, Carpzov has enjoyed the dubious reputation of being one of the perhaps most bloodthirsty judges in the history of the world, one who would most merit the epithet of "hanging judge." In the *Encyclopædia of the Social*

<sup>12</sup> A HISTORY OF THE CRIMINAL LAW OF ENGLAND (3 vols. London: Macmillan, 1883), vol. I, pp. 467-8.

<sup>13</sup> The criminal courts of the period were staffed with laymen, as a rule. The introduction in 1530 of the criminal Code of Charles V, usually referred to as the Carolina, increasingly revealed their lack of legal learning. The four "dicasteries" of Electoral Saxony (the courts of juriconsults in Leipzig and in Wittenberg, and the judicial counsel committees of the law faculties of Leipzig and Wittenberg) functioned, in fact, as expert consultants to the local courts, of which there were some 2000 in the Electorate. If the local judge found that a case was beyond his comprehension of the law, "he sent the minutes of the proceedings and pertinent documents to such a body of legal experts with a request for instructions. It even became customary to place before these experts all important questions, namely, whether or not torture should be used or what sentence should be imposed." EBERHARD SCHMIDT, *EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE* (462 pp. 2d rev. ed. Göttingen: Vandenhoeck & Ruprecht, 1951), p. 128.

*Sciences*, Eberhard von Künssberg writes that "because of the 20,000 death sentences which he is said to have pronounced, Carpzov is regarded as the exponent of a cruel criminal law. Such a reputation is unjust. It must be remembered that Carpzov lived in the stormy period of the Thirty Years' War, and that although he believed that punishment should inspire fear and looked upon the Mosaic law as *jus divinum* he nevertheless set himself against arbitrariness, impunity, and injustice."<sup>14</sup> This apology for Carpzov's activity does not question the accuracy of the statistics cited; the record of 20,000 death sentences seems to be affirmed. We find that record referred to also in the biographies of Carpzov in many encyclopedias. *Meyers Lexicon* (7th ed., Leipzig, 1925) notes that Carpzov is supposed to have "participated in 20,000 death sentences" and that they came "mostly in witch trials." The *Schweizer Lexicon* (Zürich, 1946) claims that as judge in innumerable cases, he imposed 20,000-30,000 death sentences. We find the smaller of these figures also referred to in *La Grande Encyclopédie* (Paris, n.d.) and the *Grande Enciclopedia Popolare Sonzogno* (Milan, n.d.), as well as in some of the similar works issued in other countries, but we find no mention of either in the *Encyclopedia Britannica* or the *Encyclopædia Americana*.

Historians of German criminal law and procedure also seem to have accepted the statistics mentioned. L. von Bar noted that "people say that he participated in imposing 20,000 death sentences,<sup>15</sup> and, in an article on the death penalty, E. Kohlrausch wrote that "as evidence of his [Carpzov's] far-reaching activity, it is reported that in 1620-1660 he imposed not fewer than 20,000 death sentences."<sup>16</sup> Many other citations could be made to authors who have repeated the allegation.

The origin of the myth is found in a statement in a work of Philipp Andreas Oldenburger. Originally from northern Germany, he settled in Geneva, where he became a professor of law and author, who, under different names including his own, published a wide variety of works, one of which was a spicy and scurrilous opus on the life and morals of the ruling princes of Germany; it made him an involuntary exile. One gathens from one of his

<sup>14</sup> Vol. III, p. 232 (1930).

<sup>15</sup> *GESCHICHTE DES DEUTSCHEN STRAFRECHTS UND DER STRAFRECHTSTHEORIEN* (xvi, 361 pp. Berlin, 1882), p. 145, note 587.

<sup>16</sup> A. ELSTER AND H. LINGEMANN, eds., *HANDWÖRTERBUCH DER KRIMINOLOGIE*, vol. 2, p. 297, Berlin, 1935.

biographers that he was not only an early and inventive exponent of yellow journalism but also an unscrupulous plagiarist.<sup>17</sup> Eberhard Schmidt refers to him as an "evil legal charlatan."<sup>18</sup>

In a work entitled *Thesauri rerum publicarum* . . .,<sup>19</sup> published in Geneva in 1675, Oldenburger stated that Carpzov had "given rise" to upwards of 20,000 capital sentences. Muther,<sup>20</sup> who mentions this statement and its source casts serious doubt on its accuracy. He assumes that what Oldenburger actually meant was that, as a result of the severity of the penalties which Carpzov prescribed in his *Practica*, he became indirectly responsible for at least 20,000 death sentences imposed by courts. In the light of recent research, Muther's scepticism was justified, but it went unheeded, judging from the evidence presented earlier in this paper.

The Carpzovian myth was not laid to rest until the second World War. About that time Ernst Boehm discovered in the library of the University

<sup>17</sup> GOLDSCHLAG's biography of Oldenburger in ALLGEMEINE DEUTSCHE BIOGRAPHIE, vol. 24, pp. 261-3.

<sup>18</sup> *Op. cit.*, p. 148.

<sup>19</sup> 4 vols. Geneva, 1675, vol. IV, p. 816.

<sup>20</sup> *Biography of Carpzov* in ALLGEMEINE DEUTSCHE BIOGRAPHIE, vol. 4, pp. 11-20, Leipzig, 1876.

of Leipzig a collection of the decisions of the Leipzig court of jurisconsults covering the years 1487-1835. In a scholarly report of his study of these decisions,<sup>21</sup> he established the fact that Carpzov probably did not impose more than 300 death sentences, and that of 21 witchcraft cases dealt with by the Schöppenstuhl while he was a member of it, probably not more than two resulted in death sentences. Elsewhere, Hellmuth von Weber states that "no death sentence imposed by Carpzov himself on a witch is known and it is improbable that he ever imposed one."<sup>22</sup>

The demise of the myth has been recognized in recent German encyclopedic works. In *Der Grosse Herder*<sup>23</sup> it is clearly stated, as well as in Erich Döring's biography in the more recently published *Neue Deutsche Biographie*.<sup>24</sup>

<sup>21</sup> *Der Schöppenstuhl zu Leipzig und der sächsische Inquisitions-prozess im Barockzeitalter*. ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 59: 371-410, 620-39, 1940; 60: 155-249, 1941; 61: 300-403, 1942.

<sup>22</sup> *Benedict Carpzov. Ein Bild der deutschen Rechtspflege im Barockzeitalter*. SONDERABDRUCK AUS DER ROSENFELD-FESTSCHRIFT, (1950, pp. 29-50), p. 41, note 36.

<sup>23</sup> 5th rev. ed. Freiburg: Herder, 1956; vol. 2, col. 688.

<sup>24</sup> Vol. 3, Berlin, 1957.