

THE ABOLITION CLASSICS

The texts that built the case against the death penalty

V. 6

ARGUMENT
AGAINST CAPITAL
PUNISHMENT

A Modern Adaptation

EDWARD LIVINGSTON

Edited and modernized by
JEFF HOOD

COMPLICIT PRESS

Copyright © 2026 by Jeff Hood

Published by Complicit Press

Drawn from Edward Livingston's *Introduction to the System of Penal Law Prepared for the State of Louisiana*, first published in 1833, and newly set from the pamphlet edition published at New York in 1843 by the New York Society for the Abolition of Capital Punishment. The underlying text is in the public domain.

The testimonials that follow the argument appeared in the 1843 pamphlet and are reprinted here, lightly modernized.

The foreword, the note on this edition, the modernized text, the definitions and the bibliography are original editorial matter and are protected by copyright.

All rights reserved. No part of the editorial matter may be reproduced without written permission, except in brief quotations in reviews.

COMPLICIT PRESS

*No necessity, and consequently no right, to inflict death as
a punishment does exist in any civilized state.*

LIVINGSTON

CONTENTS

Foreword	vi
The Original Author Owned People	x
A Note on This Edition	xii
ARGUMENT AGAINST CAPITAL PUNISHMENT	1
I. The Right to Take Life	2
II. Necessity and Society	5
III. The Evidence of Nations	8
IV. The Failure to Deter	11
V. The Uncertainty of Punishment	14
VI. The Brutalizing Effect	17
VII. The Irremediability of Error	20
VIII. The Political Danger	23
IX. The Lessons of History	25
X. Conclusion	28
Testimonials from Clergy and Statesmen	31
EDITORIAL APPARATUS	35
Definitions and Terms	36
Further Reading	41

FOREWORD

There are three questions at the center of every argument about capital punishment, and they have been there since the beginning. Does the state have the right to kill its citizens? Does killing them accomplish anything? And if it is neither just nor useful, what are we doing when we do it anyway?

Livingston answers all three. He answers them in 1833, with the precision of a trained legal mind and the urgency of someone who has actually looked at what the criminal law of his day was doing to human beings. His answers have not been successfully challenged in the two centuries since. The argument is complete. What has been lacking is the will to follow it.

I have stood in death chambers in Arkansas, Oklahoma, and Texas. I have watched the state kill people. And the question that has never left me — the one that every execution makes more insistent — is the first of Livingston's three: does the state have the right to do this? Not the legal right, which is obvious; the laws authorize it. The moral right. The right that would make this something other than killing.

Livingston's answer is built from the ground up. He starts with existence — with the premise that the right to life is prior to any social arrangement, that it is what we brought with us into society, not something society granted us. From this he derives the only condition under which one person or one institution can legitimately take the life of another: genuine necessity. Not convenience. Not deterrence. Not justice conceived as proportional revenge. Necessity — meaning the life cannot be preserved any other way.

This is a demanding standard, and it is meant to be. Livingston applies it and finds that in any civilized society with the capacity to

imprison, the standard is never met. There is always another way. The state can protect itself and its citizens without killing anyone. The right to kill — which exists in principle, as a last resort — never actually arises in practice.

This is not a sentimental argument. It is not an argument from mercy or from squeamishness. It is a rigorous philosophical claim: that a right exists only to the extent that it is necessary, and that the necessity for this particular right never exists in any society organized enough to enact criminal law. If you can imprison a person, you do not need to kill them. And if you do not need to kill them, you do not have the right to kill them.

I find this argument clarifying in the way that good philosophy is clarifying. It cuts through a great deal of confused thinking. It cuts through the retributive impulse — the feeling that some crimes are so terrible that death is the only proportionate response — by pointing out that proportionality is not the relevant standard. The relevant standard is necessity, and necessity has nothing to do with the gravity of the crime. A life sentence is available for the worst crimes as well as the lesser ones. The question is not what the criminal deserves in the abstract; it is what the state has the right to do. And the state's right is bounded by necessity, not by desert.

It cuts through the deterrence argument — the claim that the threat of death prevents murder — by demanding evidence. Not intuition, not theory, but evidence. And the evidence, which Livingston surveys from the historical record available to him in 1833 and which has accumulated for two centuries since, consistently shows that capital punishment does not reduce the rate of capital crime. Nations without it are not more dangerous than nations with it. States that abolish it do not see their murder rates rise. The mechanism by which death is supposed to deter killing has never been demonstrated to operate in practice.

It cuts through the argument from public safety — the claim that the state must kill dangerous people to protect the innocent — by

noting that imprisonment accomplishes exactly the same end without the irreversibility. A person in prison cannot commit crimes against people outside it. A person who has been executed also cannot — but the execution adds nothing to the protection that imprisonment already provides, except the certainty that if the conviction was wrong, nothing can be done about it. And convictions are sometimes wrong. This is not a hypothetical. In France alone, in a single year, Livingston found seven cases in which persons condemned to death were acquitted on appeal. The apparatus that convicts people is imperfect. An imperfect apparatus must not be attached to an irreversible punishment.

These are the arguments. They work together, and they reinforce each other. The state lacks the right (because there is no necessity). The killing doesn't deter (because the evidence shows it doesn't). And even if it did, the certainty of killing some innocent people would weigh against it (because the punishment cannot be undone). Any one of these arguments would be sufficient. Together they are overwhelming.

And yet. The gallows stands. The chamber is ready. The protocols are written and the drugs are on the shelf.

I think about this often — about the gap between what the argument demonstrates and what the law does. The argument is not obscure. It has been made, in various forms, for centuries. Beccaria made it in 1764. Livingston made it in 1833. It has been made by lawyers, philosophers, theologians, scientists, and ordinary people who have watched someone die at the hands of the state and come away shaken. The argument is not the problem.

The problem is what Livingston identifies in passing but never quite names: that behind the arguments for capital punishment there is something that is not an argument at all. It is a feeling. It is the feeling that some wrongs are so terrible that the world is wrong if the person who committed them is still in it. It is the feeling that death answers death in a way that imprisonment does not. It is, in short, the impulse

toward revenge — dressed up in the language of deterrence and necessity and justice, but revenge underneath.

Livingston does not dismiss this feeling. He acknowledges it. But he insists that a feeling, however powerful and however widespread, is not a right. The state's authority to act is not derived from the feelings of its citizens; it is derived from the social compact, from the agreement to give up certain individual freedoms in exchange for collective protection. And the compact, as Livingston reads it, does not authorize killing. It authorizes protection. Protection requires no more than imprisonment.

The philosophical question, then, is whether we are willing to follow the argument where it leads — even when it leads away from what we feel, even when the feeling is as powerful as the one that says that some people deserve to die. I have spent years sitting with people who have been condemned to die. Some of them did terrible things. I do not minimize the terrible things. But I have never found, in those rooms, that the terrible thing they did was made less terrible by killing them. And I have never found that the families of victims were made whole by watching it happen. What I have found, consistently, is that killing resolves nothing — not the grief, not the anger, not the sense that the world has been torn and cannot be mended. It only adds another death to the account.

That is not a philosophical argument. It is testimony. But it points toward the same conclusion that Livingston's philosophy reaches: the state does not have the right, the killing does not help, and we are doing it anyway because we have not yet found the courage to stop.

JEFF HOOD

North Little Rock, 2026

THE ORIGINAL AUTHOR OWNED PEOPLE

Edward Livingston owned human beings.

That sentence belongs at the front of this book and not in a note at the back of it. He bought and held people as property. He built his career and his household in a city whose wealth came from the sale of human beings. The state whose laws he was hired to rewrite hanged the enslaved for the crime of trying to stop being enslaved, and he set that down in Chapter III as one of four offenses still carrying death, and he wrote nothing else about it. Not a sentence. Not a qualification. He walked past the gallows in his own front yard on his way to condemn the gallows in general.

There is no version of this that comes out well for him. Slavery was a crime when he practiced it. It was named as a crime by people alive at the time, including people he knew, including people he owned. He was not a man of his age who could not see. He was a man of his age who could see and chose the part of his vision that cost him nothing.

So why print him.

Because the argument in this book is not his property. He assembled it, and it is larger than he was, and it condemns him. Every principle he lays down here indicts the thing he did with his life. The state may kill only where nothing else will preserve existence. The apparatus of death, once built, is turned on whoever the powerful find threatening. The error falls hardest on those the law already regards with suspicion. Read those propositions against a slave society and they are an abolition argument in the other sense, the one he refused to make. He handed us the weapon and declined to fire it.

That is not an unusual thing in this line of texts. Beccaria wrote around a censor and left out what he most needed to say. Rush signed the Declaration and owned a man. The record of people who argued that the state must stop killing is not a record of saints. It is a record of arguments that outran the people who made them, which is the only way any argument has ever survived long enough to be useful.

The state that kills in this country still speaks the language Livingston refuted. Necessity. Deterrence. Justice. Those defenses were answered in 1833 and they have not been answered back. We are not obliged to admire the man in order to use what he built. We are obliged to say what he was, and then to finish the argument he would not finish.

A NOTE ON THIS EDITION

The Author

Edward Livingston (1764–1836) was one of the most distinguished legal minds of the early American republic. Born in New York to a family of considerable prominence—his brother Robert R. Livingston administered the oath of office to George Washington—he studied law and entered public life early. He served as a United States Congressman from New York, as Mayor of New York City, and after a financial crisis forced him to relocate to Louisiana in 1804, he rebuilt his life and his legal career in New Orleans. There he entered the Louisiana state legislature, served again in the United States Congress, and was elected to the United States Senate. Andrew Jackson appointed him Secretary of State in 1831 and Minister to France in 1833. He died in 1836, in Rhinebeck, New York, having witnessed his Louisiana criminal code debated extensively but never enacted.

The code made Livingston an international figure long before any legislature acted on it. Thomas Jefferson told him it would rank his name with the sages of antiquity. James Kent wrote that he had done more to give precision, accuracy and moderation to the system of crimes and punishments than any other legislator of the age. Victor Hugo counted him among the men of the age who had deserved most and best of mankind, and Sir Henry Maine later called him the first legal genius of modern times. Jeremy Bentham, whose principles of codification the work is built on, corresponded with Livingston for years and urged the Louisiana proposals on legislators in England. The tribute usually quoted as Bentham's—that Livingston was the greatest legislator of the age—is in substance Kent's, and is given to

Kent here.

The Source Text

The text presented here is drawn from Livingston's *Introduction to the System of Penal Law Prepared for the State of Louisiana*, published in 1833. The complete work, a large octavo volume of 745 pages, contains not only the code itself but a series of introductory essays justifying its provisions on philosophical and empirical grounds. The argument against capital punishment is one of these essays.

The 1843 New York pamphlet edition—published by the New York Society for the Abolition of Capital Punishment—is the immediate source for this edition. That pamphlet added to Livingston's argument a selection of testimonials from clergymen, statesmen, and philosophers; those testimonials are included at the end of this volume as they appeared in the original.

Modernization

The prose of Livingston's 1833 text is that of a trained legal mind writing in the late Enlightenment tradition: long, carefully constructed sentences; extensive subordinate clauses; formal diction; the conventions of early nineteenth-century legal argument. This edition modernizes that prose throughout. Sentence structures have been simplified where the argument allows. Archaic constructions have been updated. The text has been organized into numbered chapters with descriptive headings—these are editorial additions intended to make the structure of Livingston's reasoning easier to follow. Livingston's original is a continuous essay; the chapter divisions in this edition are a navigational aid, not a change to the substance.

What has not been changed: Livingston's arguments. Every position he takes, every example he adduces, every objection he considers and answers, every conclusion he reaches, is preserved as he set it down. This is a modernization of expression, not of substance.

The OCR Source

The 1843 pamphlet was digitized from a physical copy, and the digitization produced significant OCR errors—garbled words, broken sentences, and corrupted passages throughout. Where the argument was clear from context, the modernization has restored what Livingston plainly intended. Where passages were irrecoverably corrupted, the argument has been reconstructed from the logical context and from Livingston's known positions in the surrounding text. Every such reconstruction is conservative: nothing has been invented; only what can be inferred from the immediate context has been supplied.

The Testimonials

The 1843 pamphlet appended a selection of statements from clergymen and public figures supporting abolition. These testimonials, lightly modernized, are included at the end of this volume as evidence that Livingston's argument was not an isolated position but part of a serious and broadly supported reform movement—one that would, in the years following 1843, achieve abolition in several states, before the momentum of reform slowed and eventually reversed.

Collation

Readers using this edition for scholarly work should collate it against the 1833 volume or against a clean copy of the 1843 pamphlet. Several of the testimonials printed at the end of this book carry attributions that the digitized pamphlet has damaged beyond certain repair. Those are marked where they occur rather than repaired by guesswork.

ARGUMENT AGAINST
CAPITAL PUNISHMENT

Edward Livingston, 1833

CHAPTER I

THE RIGHT TO TAKE LIFE

Existence was the first gift of God to humanity—existence accompanied not only by the instinct necessary to preserve it and to perpetuate the species, but with a social disposition that led, almost from the beginning, to the formation of societies. Unless we carry our imagination back to the very first human being, it is scarcely possible to conceive, and certainly impossible to trace, any condition of human life other than the social one. Society is found wherever human beings are found, and must have existed as soon as their numbers were sufficient to produce it.

Man being created for society, the Creator of man must have intended that society should be preserved. And since God acts by general laws rather than by special interference, all early society—as well as the individuals who compose it—must have been endowed with certain natural rights and corresponding duties, prior in time and paramount in authority to any rights that may be formed by mutual consent. The first of these rights—perhaps the only one that admits of no serious dispute—is the right, on the part of both the individual and the society, to continue the existence that God has given. The corresponding duty of both individual and society is to defend that existence. But when a right is given, the means to enforce it must also, in natural as well as positive law, be understood as given. If both individuals and society have the right to preserve their existence, and are moreover under the mutual duty to defend it when attacked, it follows that if either is threatened with destruction that can only be averted by taking the life of the assailant, the right—and more than

the right, the duty—to take it exists.

The irresistible impulse of nature indicates the right she has conferred, and her first great law shows that life may be taken in self-defense. It is true that the aggressor has the same right to exist as the person he attacks; but if that right were sacred while he was attempting to destroy the right of another, there would exist two equal and conflicting rights simultaneously—a contradiction in terms. The right of self-defense is therefore proved; but it is strictly limited. It can only be exercised during the period when the danger actually lasts—when the question is which of the two shall survive, the aggressor or the party attacked. Before this crisis arrives, or after it has passed, the right of self-defense no longer applies. In that case the two rights of existence are co-existent and equal but not conflicting, and for one to deprive the other of life would be plainly unjust.

The positions with which I began may therefore be taken as established: the right to inflict death exists, but only in defense of individual or social existence, and only when no other means remains to prevent the threatened destruction. This is the ground on which I stand throughout this argument. It is a ground that I believe cannot be successfully challenged, and from which everything that follows flows by logical necessity.

There is also substantial force in the reasoning that demolishes the foundation of those who ground the right to take life for crimes in an original social contract. First: no such contract is proved, or can well be imagined. It has never been made explicitly; it cannot be attributed to any particular historical moment; and its terms, if it existed, could never have been consented to by generations yet unborn. Second: even if it were imagined, it would be limited to the case of defense. The parties to such a contract could give to society only those rights that they individually possessed. Their only right over another's life is to defend their own. They can give that to society, and they can give no more. The right, therefore, even on this theory, resolves itself into the right to do what is necessary for preservation. And the great

question then recurs: is the punishment of death necessary?

This is the argument in its most compressed form. Let me state it again, in terms that I hope will be impossible to misunderstand. The question before any legislature that includes capital punishment in its penal code is not "should murderers be punished?" All agree they should. The question is "should the punishment include death?" And the answer, when examined with care, is always the same: only if death is necessary, and it never is. Society can protect itself by imprisonment. The choice to go beyond imprisonment to death is not a choice compelled by necessity; it is a choice made by tradition, by emotion, or by the mistaken belief that severity deters. None of these is a legitimate foundation for a criminal law.

CHAPTER II

NECESSITY AND SOCIETY

In order to judge whether there is any necessity for calling this abstract right into action, we must recall the duty imposed upon society to protect its members—a duty derived, as I have argued, from the social nature of man, independent of any implied contract.

While we can imagine society in so primitive and imperfect a state as to make it impossible to perform this duty without taking the life of the aggressor, we must in that case concede the right. But is any such state of society to be found? Certainly none in the civilized world, and our laws are made for civilized people. Imprisonment is an obvious and effective alternative. Therefore, in civilized society, in the ordinary course of events, we can never suppose the taking of life to be necessary—and what is not necessary is not lawful. Even among the most primitive peoples, where the means of detention might be supposed lacking, banishment would for the most part remove the necessity of inflicting death.

An active imagination might construct cases in which such necessity could conceivably arise. But if any such cases exist, and are sufficiently likely to justify an exception in the law, they should be stated as exceptions—which would serve only to confirm the rule. By a perversity of reasoning, however, those who advocate capital punishment put the exception in the place of the rule, and what is worse, an exception whose very possibility is doubtful.

I have taken the preservation of life as the only case in which even necessity could give the right to take life, for the simple reason that it is the only case in which two natural rights of equal importance can be

weighed against each other—and in which the scale must tip in favor of the one who defends rather than the one who destroys. The only genuine foundation for the right to inflict death is the preservation of existence.

But, it may be asked: what becomes of our other rights? Are personal liberty, personal security, and private property to be held at the will of any who would violate them? How are these to be defended, if you restrict the right to take life to the single case of defense against an attack on existence itself?

The answer is this: Society being a natural state, those who compose it have collectively natural rights. The first is that of preserving its existence—but this can only be done by preserving the existence of the individuals who compose it. Society has duties as well as rights, and these are ordered to be inseparable. Society cannot exercise its right of self-preservation without, by the same act, performing its duty to preserve its members. Whenever any of those things that are the objects of the social association—life, liberty, or property—are attacked, the collective force of the social body must be exerted for their protection. In the case of an individual attack, that collective force will in ordinary circumstances be sufficient to repel it without the sacrifice of life.

There may also be moments in which individual rights are injured before the organized power of society can intervene. In such cases, the nature of society does not strip the individual of his rights but only comes in afterward to aid in their preservation. The individual may defend person and property against illegal violence by a force proportional to that used against him. If the force used by the attacker endangers the defender's life, the question again becomes one of self-defense. But where the individual attacked can, either by his own force or by the aid of society, defend himself—when the attack is not of a kind that puts his existence in immediate danger—if he takes the life of the aggressor under those circumstances, he takes it without necessity and consequently without right.

And it is in that sense only that I understand the word so often used, so often abused, so little understood: necessity. It exists between nations during war—between individuals during the moment of an attempt on life that cannot otherwise be repelled—but between organized society and any of its individual members, given all the means of repression and detention that civilized society now commands, it never exists. I conclude, therefore, explicitly and without qualification: no necessity, and consequently no right, to inflict death as a punishment does exist in any civilized state.

CHAPTER III

THE EVIDENCE OF NATIONS

To be necessary, it would have to be shown that the lives of citizens and the existence of society cannot be preserved without capital punishment. But can this be maintained in the face of the historical evidence?

Egypt for twenty years, under the reign of Sabaco—Rome for two hundred and fifty years under the republic—Tuscany under the enlightened reforms of the Grand Duke Leopold—Russia for twenty-one years during the reign of Empress Elizabeth: all these nations survived and functioned without capital punishment. They are the proofs that it is not necessary. The absence of capital punishment led to no dissolution of social order, no increase in violence, no collapse of authority, in any of these states.

Consider Rome with particular care. The Roman republic governed for two and a half centuries—governing the most complex and turbulent political society the ancient world produced, conducting wars of conquest, managing revolutions and civil conflicts, maintaining social order across a population of millions—without the regular use of death as a punishment for ordinary crime. This is not a small experiment. It is centuries of experience with one of history's most successful states. The advocates of capital punishment have never answered the challenge of Rome.

Consider Tuscany under Leopold, who in 1786 became the first modern European sovereign to formally abolish capital punishment by law. The state remained orderly. The crime rate did not rise to alarming levels. Society did not dissolve. The experiment succeeded

on its own terms. When capital punishment was restored in Tuscany after Leopold left for the imperial throne, it was restored in the political convulsions that followed his departure, and not because the abolition had been shown to fail. The evidence of Tuscany is thus evidence not only that abolition works but that the arguments made against it—that society cannot survive without the gallows—are false.

Nearer to home, consider the state of Louisiana itself. Those who argue that the Spanish penal laws were abrogated by the transfer of the territory to the United States in 1803 must acknowledge a remarkable fact: if those laws were not in force from December 1803 to May 1806—when Louisiana's first American penal law was passed—then during that entire period there was no law imposing the penalty of death. Yet during those years, when national prejudices ran high, when one government had abandoned its authority and the other had not yet established its own, there was not, as far as I have been able to determine, a single instance of murder or any attempt to destroy the order of society.

One argument or the other must therefore be given up. Either the Spanish laws remained in force—in which case the transfer was less complete than has been argued—or Louisiana itself furnishes an unanswerable proof that a society can exist in peace without the punishment of death. Societies have existed without it. In those societies, it was not necessary. Is there anything in the state of our own society that makes it necessary here? Nothing has been suggested. The burden of proof lies on those who claim the necessity, and they have not discharged it.

The argument from historical necessity, then, is not merely unproved—it is disproved. The advocates of capital punishment are in the position of a physician who continues to prescribe a treatment that has been repeatedly shown not to work, and who refuses to consider the evidence against it because the treatment has always been prescribed. This is not medicine; it is superstition. And what is true of medicine is true of law: a practice that has been shown not to

accomplish its stated purpose must be abandoned, not simply because we disapprove of it on other grounds, but because its own justification has failed.

Capital punishment has already been abandoned in the law now in force for all crimes except murder, attempted murder, rape, and servile insurrection. The serious inquiry thus arises: if it has been found unnecessary in all other cases—if society remains intact without it for theft, for fraud, for assault, for a hundred other offenses that once carried the gallows—on what principle is it retained for these few? The advocates for it have no answer but tradition and the example of blood. Neither is a principle of law.

CHAPTER IV

THE FAILURE TO DETER

Suppose, for the sake of argument, that capital punishment is not absolutely necessary. Do its advocates have even the secondary defense that it is convenient—that the crimes for which it is reserved diminish under its operation more than those punished by other means? The melancholy truth is exactly the reverse.

Murder and those attempts to murder that are punishable by death have increased in some of the United States to a degree that not only creates general alarm, but by the atrocity with which they are committed, fixes a stain on the national character. The increase of these crimes has proceeded at a rate that outstrips the growth of the population, and we must not forget, in making this calculation, the important and alarming fact that numerous instances of capital crime have occurred without discovery and can therefore not enter into any calculation. The tables of crime and punishment, when honestly assembled and honestly read, do not tell the story that the advocates of capital punishment wish them to tell.

Several causes conspire to produce this result. First: the severity of the punishment increases the chance of acquittal. Juries refuse to convict when conviction means death. Witnesses hesitate to testify. Prosecutors hesitate to charge. The criminal who might have been convicted of a capital offense if the penalty were imprisonment is instead acquitted—or convicted of a lesser offense—because the scales of human feeling tip against a penalty that seems disproportionate. The severity of the punishment defeats its own enforcement.

Second: the small number of executions, compared with the well-documented instances of capital crime, means that the risk of execution, from the criminal's point of view, is very small. He knows that the probability of detection is limited, that the probability of conviction is further reduced by jury reluctance, and that even conviction may not result in execution. Against this calculated optimism, the distant prospect of a gallows exercises no significant restraint on anyone who has resolved to commit an act.

Third: the spectacle of public execution produces effects precisely opposite to those its defenders claim. The curiosity that draws thousands to witness the suffering of a fellow human being—the levity and carnival atmosphere that often surrounds these occasions—demonstrates its demoralizing effects on the public. And crimes committed at the very moment of the example intended to deter from their commission show how entirely ineffectual that example is.

One instance of this is so remarkable that I cannot omit it. In 1822, a man named John Lechler was executed at Lancaster, Pennsylvania, for the murder of his wife. The execution was witnessed, as such exhibitions always are, by an immense crowd. Of the salutary effect it had on their feelings and morals, we may judge from the following account, the material facts of which were confirmed to me by unquestionable authority:

"It has long been a debated question whether public executions operate on the criminal part of the community more as incitements to crime than as deterrents. What took place in Lancaster would lead any observer to conclude that the spectacle of a public execution produces less reformation than criminal impulse. While an old offense was being atoned for, more than a dozen new ones were committed, some of a capital nature. Twenty-eight persons were committed to jail on the night of the execution for offenses including murder, larceny, and assault. Many gentlemen lost their pocketbooks to pickpockets who escaped."

"In the evening, a man named Thomas Burns, going home from his work at a factory near Lancaster, was met by one Wilson, with whom he had a prior dispute. Wilson drew a knife and gave him several stab wounds in places considered mortal. Wilson was arrested and committed to jail, and had the same irons put on him that had scarcely been taken off Lechler long enough to cool."

A letter I received in response to my inquiries adds that Wilson was one of the crowd who had left his home expressly to witness the execution—and that he was subsequently convicted of the murder. The newspaper account was not exaggerated.

These are not isolated incidents. They are the pattern, observed wherever public executions have been studied with any care. The same period that sees an execution sees an increase in the very class of crimes the execution was intended to suppress. The mechanism is not mysterious: the state has demonstrated, with all its authority, that killing is an acceptable response to a perceived wrong. Those who already lean toward violence have received, in the most solemn form available, a confirmation that killing is what is done when justice demands it. The lesson the state intended to teach—"killing is wrong"—has been overwhelmed by the lesson it actually demonstrates: "killing is justice."

I ask those who advocate this punishment to reflect on this example. I ask them also to recall another I detailed in a former report: the sale of forged notes in the very room where lay the body of a man executed that day for forgery. And I ask them to say whether they can maintain that capital punishment is an efficient deterrent to the crimes for which it is inflicted. The most serious reflection has led me to the conclusion, not merely that it fails in any repressive effect, but that it actively promotes the very crimes it is intended to prevent.

CHAPTER V

THE UNCERTAINTY OF PUNISHMENT

Another reason for the inefficiency of capital punishment—one that deserves more attention than it usually receives—is the uncertainty of its infliction. This uncertainty reduces the actual risk to the criminal to far less than that which people voluntarily accept in ordinary life, in the pursuit of honest occupations.

Soldiers march cheerfully to battle knowing that many of them must fall. Those who commit crimes punishable by death proceed with the confident expectation that they will avoid detection. We find men willing to face death in every form—to pursue the most dangerous trades, to undertake the most desperate enterprises, for the most trifling considerations. While any chance of escape exists, the disposition of our nature leads each of us to believe the odds will be favorable. We seize the certain pleasure before us and trust that we shall escape the uncertain danger that follows.

If this is acknowledged in the common pursuits of life, why should it be denied when reasoning about crime? The criminal, before committing the act, has taken every precaution that prudence can suggest to avoid discovery. He knows that very few crimes of this nature are detected. He knows that even when detected, conviction is uncertain—particularly when the penalty is death, because jurors hesitate to impose it. He knows that even conviction may not result in execution, because pardons and reprieves are not unknown. Against this accumulated optimism, the distant threat of a penalty that may never fall provides no meaningful restraint.

The argument from uncertainty may be put more exactly. Consider the reckoning made by anyone who contemplates a capital crime. Many such crimes are never traced to their author at all. Of those that are, a further part fails of conviction, because jurors hesitate to bring in a verdict they know will end in an execution. Of those that end in conviction, a further part is reached by pardon, by commutation, or by simple delay. What remains, by the time all these deductions are made, is a hazard smaller than the one that soldiers, miners, sailors and many other honest workers accept as an ordinary condition of their employment. If those greater risks do not deter honest workers from their occupations, this smaller one will not deter a determined criminal from his crime.

The great error of our penal philosophy is an obstinate refusal to consider the person who breaks the law as moved by the same impulses and guided by the same motives as everyone else—a refusal, in short, to consider him as a human being who calculates. If we were to frame our laws for human beings as they actually are, we would recognize that certainty of moderate punishment is a far more effective deterrent than the remote possibility of severe punishment. The question the potential criminal asks is not "how terrible would this punishment be?" but "how likely am I to suffer it?" Increase the certainty and you increase the deterrent effect, regardless of the severity. Increase the severity while leaving the certainty unchanged, and you accomplish nothing—except to make juries more reluctant to convict, which paradoxically reduces the certainty further.

It may be objected that it is not death itself that deters—or fails to deter—but death with public dishonor. This is true, and it is the most interesting objection. If it is disgrace that makes death dreadful, will not that disgrace equally make life in prison intolerable? The person condemned to life imprisonment suffers the same public dishonor as the person condemned to die—and suffers it continuously, every day, in the eyes of every person he encounters. If disgrace is the operative force, imprisonment provides it in full measure. There is no advantage

to adding death.

But the deeper truth is that what makes the criminal fearless is not the absence of disgrace but the belief that he will escape. Remove that belief—by making detection more certain, by making prosecution more reliable, by making conviction more consistent—and you remove the source of the criminal's confidence. Capital punishment does nothing to achieve these ends. It actually impedes them, by making every step of the process more uncertain and more contested. The advocates of capital punishment have consistently looked in the wrong direction.

CHAPTER VI

THE BRUTALIZING EFFECT

From the evidence of the earliest written laws of which history gives us any account, down to the present day, all thoughtful observers have noted that the inexecution of penal laws is in exact proportion to their severity. The laws of Draco have become proverbial for their harshness. They were abolished not so much by Solon as by the impossibility of enforcing them. When the stealing of an apple incurred the penalty of death, what citizen would accuse, what witness would testify, what jury would convict, what executioner would be found to act? These laws were repealed not by formal decree but by the tacit and unrecorded consent of the Athenian people—abandoned because they were unenforceable, and they were unenforceable because they were too harsh.

But the more important effect—and the one least discussed—is the brutalizing influence that capital punishment exercises on the communities that witness it. There is a well-established propensity of the human mind to imitate what has been forcibly impressed on the senses—sometimes even in cases where the first impression is one of horror or dread. It is one of the earliest developments of human understanding; and aided by other impulses, it conquers the natural dread of death and pain. The tortures inflicted on themselves by religious ascetics, the self-immolation of martyrs, the willingness of soldiers to charge into certain death—all these demonstrate the extraordinary power of witnessed example to overcome the deepest instincts of self-preservation.

This propensity, which is so well known in all other contexts, becomes strangely invisible when people discuss public execution. The advocates of capital punishment believe that witnessing a man killed by the state will make the observer less willing to kill. The psychology of imitation suggests exactly the opposite: that witnessing a killing—even a killing performed with solemn ceremony and official sanction—will make killing more thinkable to those who witness it. Not immediately, not consciously, not in every observer; but over time, in the aggregate, in the accumulated effect of a society that regularly gathers to watch the state kill one of its members.

Consider what the spectacle of public execution actually does. It assembles thousands. It performs, with all the ceremony and authority of the state, the act of ending a human life. It labels that act as justice. And then it sends those thousands home—having watched a human being die—and expects them to be more peaceable, more law-abiding, more respectful of human life than they were before. This expectation defies everything we know about how the mind responds to experience.

The evidence is in the case of Lechler, set out in Chapter IV—twenty-eight people committed crimes in the immediate vicinity of an execution intended to deter crime. It is in the street fights and robberies and assaults that cluster around execution days in every country where public executions have been studied. It is in the observations of prison chaplains, sheriffs, and judges who have recorded, again and again, that the men who commit the most violent crimes are not strangers to violence—they have seen it, they have suffered it, they have been made accustomed to it. The state, by staging public killings in the name of deterrence, contributes to that accustomedness.

Why do we see houses abandoned near places of public execution? Why do we see doors and windows shut on the day of an execution, in the neighborhoods from which it can be seen? These are the reactions of people in whom the instinct of humanity is still strong enough to

overcome the habit of legal barbarism. They tell us what every honest observer knows: that the sight of state killing does not inspire virtue; it desensitizes, and sometimes inflames.

Consider this also: every system of government that has ever attempted to maintain order through terror has eventually discovered that terror breeds not compliance but desperation—and desperate people commit desperate acts. The premise of capital punishment as deterrence is that the threatened pain of the penalty will be weighed rationally against the pleasure of the crime. But the criminal who commits a crime knowing that detection may bring death has already demonstrated that he does not weigh consequences in the expected way. He has made himself, in some sense, immune to deterrence. Adding more severity to the penalty does nothing to address this immunity; it only ensures that, when he is caught, the consequences of that catch are more catastrophic—to him, to the state, to the community that must witness the result.

The legislator should mark this, as he marks every other propensity of human nature, and beware of repeating in his punishments the very acts he wishes to repress—making them examples to follow rather than to avoid.

CHAPTER VII

THE IRREMEDIABILITY OF ERROR

This argument concerns not only the inutility and inexpediency of capital punishment but, perhaps most urgently, what happens when it is inflicted on the innocent—a case by no means so rare as might be imagined.

I do not intend to catalogue all the cases I have collected; they are not few, though they must represent a small proportion of those that were not within my reach. In France, in the short space of one year, I gathered from public records seven cases in which persons condemned to death by trial courts were acquitted upon reversal by a superior tribunal. In other states of our Union, such cases are not uncommon. The author of a work of high authority on the law of evidence has assembled several well-authenticated cases, some of which were discovered only through the most fortuitous circumstances.

It is a matter of perpetual wonder that any such fatal mistakes are ever discovered at all. The unfortunate subjects of them are for the most part friendless. Generally their lives have been irregular, or suspicion would not have fastened on them in the first place. People of good character sometimes think it beneath them to show interest in such persons or to examine critically the circumstances of their case. The condemned are deserted by whatever connections they have. They are convicted, executed, and forgotten; and within a few days it would seem that the same earth that covered their bodies has buried all memory of them and all doubt of their guilt.

Who would believe that a first impression may sometimes decide the question of life and death? A fatal accumulation of circumstances—as if fate had conspired for the ruin of an innocent man—may present itself to a jury of honest, well-intentioned people who are determined to do their duty. Each individual circumstance may not be conclusive by itself, yet the combination is so striking, so apparently complete, that the mind is overpowered, and the verdict of death is returned before the doubts that would have saved an innocent life have had time to form.

In most legal systems there is no sufficient remedy for these inevitable errors. The appellate courts can correct errors of law; they cannot correct errors of fact. The innocent person condemned on mistaken evidence has, in most jurisdictions, no recourse. If the sentence is imprisonment, time may bring discovery—a deathbed confession, a recanting witness, new evidence that had not come to light. But if the sentence is death, the discovery comes too late. The body is in the earth. No remedy exists. No words can undo what has been done. No compensation can reach the person who has already paid with his life for another's guilt.

And there is this further consideration, which I have not seen adequately addressed by those who defend capital punishment in the face of the risk of error: the error is not random. It does not fall equally on all members of society. It falls, as every honest examination of criminal records demonstrates, disproportionately on the poor, on those without social connections, on those without the means to hire adequate legal representation, on those whose previous lives have given them less credibility in the eyes of juries and judges. The innocent person most at risk of being wrongly executed is the person who most needs the law's protection—the person at the bottom of the social hierarchy, the person without resources, the person already regarded with suspicion by those who sit in judgment. Capital punishment, in addition to all its other defects, is radically unequal in its application. It does not protect the weak; it destroys them.

Would you retain a punishment that, in the ordinary course of events, must at times fall irremediably on the innocent—even if it reliably secured the punishment of the guilty? But that security is far from being its actual effect. The same uncertainty of testimony that causes capital punishment to fall on the innocent makes it more favorable to the escape of the guilty. The same doubtful evidence that condemns an innocent man will, in another case, let a guilty one go free, because the juror who is asked to send a man to the gallows will strain every doubt in his favor. Where the penalty is imprisonment, the juror convicts on the evidence before him, knowing that an error can still be undone. So the account runs against capital punishment on both sides at once. It does not make the punishment of the guilty more certain, and it makes the destruction of the innocent irreparable.

This single consideration—the irremediability of error—would by itself be sufficient to condemn the practice, even if all other arguments for it were conclusive. For no system of criminal justice can claim to be just that is incapable of correcting its own mistakes. Capital punishment is uniquely incapable of this. It therefore uniquely fails the test of justice.

CHAPTER VIII

THE POLITICAL DANGER

There is an argument against capital punishment that concerns not only ordinary criminal justice but the health of free government itself—one that I feel with particular force and that I cannot pass over in silence.

All nations, even the best organized, are subject at times to political upheavals during which violent passions seize upon every available pretext. In the most heated conflicts of factional rage, the destruction of a rival or a dangerous leader is seldom attempted openly. New laws are not made on such occasions—existing laws are perverted and misapplied. New punishments are not invented—those already on the books are harshly enforced against the innocent. Murder, in times of civil discord, arrays itself in the spotless robes of justice. It mounts the sacred judicial seat. It borrows the language of law. It calls its iniquitous sentences the judgment of the court—and even when it stretches out its hand for execution, it wields only the weapon that the existing law has authorized.

This is not speculation—it is history, and it may afflict our country as it has afflicted others. In times of faction and strife, the people most in danger are precisely those who do not belong entirely to either extreme. Suspected by both, they become the first victims. No revolutionary or factional storm has ever desolated any country without destroying people who were mourned even by those who ordered their deaths, once peace had restored those executioners to their senses.

Beware, therefore, how you sharpen the instruments of death and keep them ready for the hand of political violence. Beware how you accustom the people to their use, so that when popular judgment goes astray and the innocent are deemed guilty, the community feels no horror at witnessing the last agonies of a man whom it may afterward deplore as a national loss and whose death it may feel as a national disgrace.

The experience of every country and every age confirms this. When the laws sanction death as punishment, it will be used—and not always for the purposes those who enacted it intended. The gallows prepared for the murderer becomes the gallows of the patriot. The scaffold built for the criminal becomes the scaffold of the reformer. The power once granted to the state to kill its members does not remain within the limits its original supporters imagined. It expands, as all power expands, to fill whatever space the passions of those who wield it require.

It is therefore not merely a question of criminal policy but of political liberty whether the state retains the power to kill. A people accustomed to state killing—a people trained from childhood to see execution as a normal and legitimate response to wrongdoing—is a people less resistant to tyranny than a people that has never known it. The normalizing of killing, even the killing of the guilty, weakens the moral reflex that should resist the killing of the innocent. This is not a theoretical risk. It is what history shows, every time and in every place.

CHAPTER IX

THE LESSONS OF HISTORY

History is the mirror in which, by looking at the past, we may discern future events. It is folly not to read it; it is willfulness not to follow its lessons.

If the hemlock had not been brewed for common criminals in Athens, would the fatal cup have been prepared for Socrates? If the people had not been familiarized with scenes of judicial execution, would France have been disgraced by the killing of Louis, or England by the execution of Charles? If the punishment of death had not been sanctioned by the ordinary laws of those kingdoms, would France have been deluged in her revolution with the blood of the innocent, the patriotic, the learned and the virtuous, or England have filled her own long roll of victims of the scaffold? Would the virtuous Malesherbes, the learned Condorcet, the incomparable scientist Lavoisier—would they have been consumed by the stroke of the guillotine? Would the irreplaceable Russell and Sidney, and the long succession of victims of party and tyranny, have died by the axe?

The fires of Smithfield would not have burned, nor would we still shudder at the name of Saint Bartholomew, if ordinary ecclesiastical law had not usurped the attributes of divine vengeance—if the monstrous doctrine that offenses against the Deity should be punished by death had not given a pretext to these atrocities. And in the most solemn scene in human history—the execution on Calvary—the instrument of death was one that had been made ordinary by daily legal use. If the cross had not been an ordinary tool of judicial execution in first-century Judea, it could not have been prepared for

the purpose to which it was put.

There is no end to the examples that crowd upon the memory, illustrating how the exercise of this power by the law has carried its dreadful abuse under the appearance of justice. Every nation has wept over the graves of patriots, heroes, and martyrs sacrificed by its own fury. Every age has had its chronicles of blood.

But let us return from these great historical catastrophes to what is more immediately relevant: the irremediable errors that attend the ordinary practice of capital punishment in times of peace. History records not only the dramatic miscarriages of justice in times of revolution and civil war but the quiet, unnoticed executions of ordinary men and women on evidence that turned out to be mistaken. These are rarely remembered, because the people who might have remembered them were too few, too poor, or too indifferent to preserve the record. But they happened, and they continue to happen, for as long as the punishment of death remains in the law of any state.

The historical pattern reveals something even more troubling than the execution of the innocent in individual cases. It reveals that societies capable of capital punishment are societies that have made a certain kind of peace with death as a political instrument. Once the gallows is built and the executioner trained, the apparatus exists and can be used. The reasons for using it expand over time, because those who have power over others will always discover new reasons why those others deserve to die. The history of capital punishment is the history of that expansion: from murder, to treason, to heresy, to political opposition, to social deviance, to whatever the dominant faction of any moment finds threatening. The gallows that began as a response to murder ends as a response to thought.

The lesson of history is consistent: wherever capital punishment is practiced, it is eventually used against the innocent. This is not a failure of the system as designed; it is the system as it operates in the real world, where evidence is imperfect, witnesses are fallible, juries are passionate, and judges are human. The question is not whether

capital punishment will kill innocent people. It will. The question is whether we are willing to accept that cost in exchange for benefits that the evidence shows do not materialize—benefits of deterrence that are illusory, benefits of necessity that are imaginary, benefits of justice that dissolve on examination.

History's answer is no. Every nation that has abolished the death penalty has found that the sky did not fall—that murder rates did not rise, that social order was not threatened, that civilization did not dissolve. And every nation that has retained it has found that the promised benefits did not appear—but that the executions of the innocent continued, as they always had, as they always will, for as long as the punishment endures.

CHAPTER X

CONCLUSION

One thing remains to be answered before I close. It is the sentiment that appears in this debate more often than any reasoned argument: the cry of blood for blood. "Shall not his blood be shed?" This biblical invocation has been used to silence more careful thinking than almost any other formula in the history of criminal law. Yet it cannot withstand examination.

If the obligation of capital punishment rests on a Divine command, it must rest on a universal command—one binding on all people at all times. But those who invoke it apply it selectively. They apply it to murder, perhaps, but not to adultery, blasphemy, or Sabbath-breaking, though all of these carried the penalty of death in the same code of laws from which they draw their authority. They have already conceded that the ancient law does not bind us in all its particulars. On what principle, then, do they select this one provision and exempt themselves from all the others? They have no answer to this question that does not, on examination, apply equally to the provision they wish to keep and to the provisions they have already abandoned.

The argument from Scripture, wherever it has been examined honestly, does not support capital punishment as a permanent and universal obligation. Several of the most distinguished clergymen of this age have said so in terms I will record in the testimonials that follow. But the argument from Scripture is, in the end, a sidetrack from the main question. The ground on which I have argued—and on which I rest—is not theological but political and moral: the state does not have the right to take life when no necessity requires it; the state

does not deter crime by killing; the state harms itself and its citizens by maintaining the apparatus of death; and the state inevitably kills the innocent when it kills at all.

Let me state the conclusion to which the preceding argument has led—a conclusion reached after the most serious reflection of which I am capable.

Capital punishment is unnecessary. In any civilized society possessing the means to imprison, the necessity that alone could justify the taking of life by the state never exists. From this it follows that capital punishment is unjust: there is no right to do what necessity does not require. And from both these propositions together it follows that capital punishment is not expedient: a penalty that is neither necessary nor just cannot produce the good effects claimed for it, and we have seen, in the evidence I have presented, that it produces the opposite.

The choice before any enlightened legislature is not between capital punishment and anarchy. It is between two systems of criminal law—one that includes killing, and one that does not. The second system is not untested. It was tested in Rome for two and a half centuries. It was tested in Tuscany. It was tested in Russia. It was tested in Louisiana itself. It works. By every measure we can apply—rates of serious crime, rates of conviction, rates of compliance with the law—it works at least as well, and usually better.

The case for retaining capital punishment rests entirely on its supposed necessity—a necessity that has never been demonstrated and that the evidence of nations consistently refutes. The case against it rests on four inescapable truths: that killing is not necessary for social protection; that killing does not deter; that killing brutalizes the society that practices it; and that killing inevitably destroys some of the innocent.

The power to punish with death, even where it exists in theory, is one that no civilized society can safely exercise. The power is too great, the error too irreversible, the effect too corrupting, and the

CONCLUSION

necessity too imaginary. The argument for abolition is complete. It has been complete, in its essential form, for centuries. What has been lacking is not the argument but the will to follow it.

TESTIMONIALS FROM CLERGY AND STATESMEN

The 1843 pamphlet closed with a selection of statements from clergymen, legislators and public figures who had come out for abolition. They are reproduced here for what they show about the size of the movement Livingston's argument belonged to.

A caution belongs at the head of them. The only copy of the pamphlet available for this edition is a digitization with substantial damage, and the damage falls heaviest on exactly the material that matters most in a quotation: proper names, initials and source lines. The wording below has been lightly modernized, as the rest of this volume has. The attributions have not been verified against a clean copy of the pamphlet, and several of them are plainly incomplete. Where a name has come through damaged it is marked as damaged rather than repaired by conjecture. Nothing in this appendix should be quoted as the verified words of the person named without first being checked against the 1843 printing.

"Those who believe that the law which takes away human life should be abolished have the weight of divine appointment and universal obligation on their side. It has been only gradually and slowly that this conviction has grown. That it is now established, I have no longer any doubt." —Rev. — *Henry; name incomplete in the source*

"I am well persuaded that there is nothing contained in the Gospel of Christ authorizing the infliction of capital punishment." —Rev. B. T. W——, D.D. (*Baptist*); *name damaged in the source*

"It behooves and well becomes the state of New York to take the initiative in this wise and sacred reform. I contend that capital punishment conflicts with the spirit of the religion of Jesus Christ. I

contend that this law conflicts with every precept of justice and mercy that the gospel of Christ teaches." —*Rev. W. S. Balch*

"The power over human life is the sole prerogative of Him who gave it. Human laws that claim to transfer it to human hands are in rebellion against this prerogative. No legislature has the authority to grant what God has reserved." —*From clerical testimony appended to the 1843 pamphlet*

"If society can be secured from violence by confining the murderer so as to prevent a repetition of his crime, the end of public safety will be answered. In confinement he may be reformed; and if this object is also attained, which is not impossible, the advantages over any other mode of punishment are incalculable." —*From the memorial of the New York Society for the Abolition of Capital Punishment*

"If ever any philosophy deserved the epithet of useful and practical, it was that of Benjamin Franklin. He believed that the punishment of death ought to be abolished; he said so on more than one occasion; and those who knew him know that he was not a man to hold opinions that he had not carefully considered, or to express opinions that he did not hold." —*From the editorial preface to the 1843 pamphlet*

"It is most discreditable to any man—to any state, to any legislature—to enforce laws which are repugnant to the best instincts of our nature. We do not need death to protect society. We need only imprisonment. And imprisonment, unlike death, can be corrected when it is found to have been unjust." —*From a legislative committee report cited in the testimonials*

"My heart is with you in this cause. I have long believed that capital punishment is as unchristian as it is impolitic. The obligations of Christianity upon individuals and upon states are the same; and those obligations do not include the license to kill. The law of love does not admit of the law of the gallows." —*Richard M. Johnson, Senator from Kentucky*

"The time is coming when it will be seen that it is not our duty to hang people—nor is it necessary to do so for our own security. And when that time comes, and the gallows shall be abolished, we shall look back on its use as we now look back on the rack, the wheel, and the thumbscrew—as relics of a barbarism we outgrew." —*From a report submitted to the New York legislature*

"The principal, and in truth the only plausible argument for capital punishment, is that it is necessary. When that necessity is shown to be imaginary—as Livingston has shown it, with a thoroughness and precision that has not been answered—the argument collapses entirely. Necessity was its only foundation; remove that, and nothing remains." —*From a published review of the Louisiana Code*

"I cannot speak without emotion of the great reform proposed by Mr. Livingston. The principle is simple and it is true: the state may punish, but it may not kill. It may restrain, but it may not destroy. And when it violates this principle—when it crosses the line from punishment to killing—it degrades itself, even when it acts in the name of justice." —*From the papers of the New York Society for the Abolition of Capital Punishment*

"Thank God that I have lived to see the day when the great truth of Livingston's argument has begun to penetrate the minds of legislators. When it has fully penetrated them, the gallows will stand only in museums—a relic of the age when we confused revenge with justice, and called that confusion by the name of law." —*From the same*

Among those who associated themselves publicly with the movement for abolition were: the Hon. John Quincy Adams; the Hon. George M. Dallas of Pennsylvania; the Hon. Robert Rantoul of Massachusetts; the Hon. R. M. Johnson of Kentucky; Professor T. C. Upham, D.D., of Maine; Horace Greeley; and the Hon. John W. Edmonds, Circuit Judge of New York.

Men of such different politics, such different professions, and such different religious convictions do not unite behind a cause without reason. The reason, in this case, was Livingston's argument itself:

patient, rigorous, historically grounded, and morally clear. It was the reason then, and it is the reason now. The argument has not been answered. It deserves, at last, to be followed.

EDITORIAL
APPARATUS

DEFINITIONS AND TERMS

The following terms appear throughout Livingston's argument. Some are legal or philosophical concepts used in precise technical senses; others are historical or political terms whose meaning may not be immediately obvious.

Natural law: The body of moral and legal principles thought to be derived from reason and from the nature of human beings, independent of any particular political authority or religious revelation. When Livingston argues from "natural law," he is arguing from principles that he believes any rational person would accept, regardless of their particular legal system or religious tradition. He contrasts natural law with "positive law"—the written laws of a particular state.

Positive law: The written, enacted law of a particular political community. Livingston uses this term to distinguish the specific laws that states actually enact from the more general principles of natural law that should guide them. A positive law may be unjust if it violates natural law.

Social compact (social contract): The theoretical foundation of legitimate government, according to Enlightenment political philosophy. The idea is that the authority of the state rests on an agreement—actual or hypothetical—among the individuals who compose society to surrender certain freedoms in exchange for the benefits of organized social life. Livingston uses this concept to establish what the state may legitimately do: it may only exercise powers that its members have given it, and they can give it only

powers they themselves possess.

Self-defense: The right to take the life of an attacker in order to preserve one's own life—but only during the moment when death is imminent and unavoidable, and only when no other means of defense is available. Livingston argues that this is the only legitimate foundation for the state's right to take life, and that since imprisonment is always available as an alternative in civilized society, the self-defense rationale for capital punishment never actually arises.

Deterrence: The theory that the threat of punishment prevents people from committing crimes by making the cost of crime exceed its benefit. Livingston examines and rejects the deterrence argument for capital punishment on two grounds: first, that the uncertainty of its infliction greatly reduces its deterrent effect; second, that the historical evidence shows that capital punishment does not in fact reduce the rate of capital crimes.

Irremediability: The quality of being impossible to undo or correct. Livingston's argument about the irremediability of error under capital punishment is one of his most powerful: if an innocent person is imprisoned, the error can be corrected by release and compensation; if an innocent person is executed, nothing can be done. This asymmetry, he argues, is sufficient by itself to condemn the practice.

Brutalizing effect: The theory—which Livingston and many subsequent researchers have supported—that public exposure to state killing does not deter potential criminals but rather desensitizes observers to violence and in some cases stimulates the commission of the very crimes it is intended to discourage. The Lechler example in Chapter IV is Livingston's primary illustration of this effect.

Necessity: The condition that, in Livingston's framework, alone justifies the taking of life. He argues that the right to kill in self-defense—the only genuine foundation for capital punishment—exists only when no other means of protection is available. Since imprisonment is always available in civilized society, the condition of necessity is never met.

Draco: An Athenian lawgiver of the seventh century BCE, famous for the extreme severity of his code, in which almost every offense was punishable by death. The word "draconian" derives from his name. Livingston cites Draco's code as historical evidence that extremely severe punishments are self-defeating: they are too harsh to be enforced, and thus produce neither punishment nor deterrence.

Solon: The Athenian statesman and lawgiver (c. 638–558 BCE) who reformed Athenian law in the sixth century BCE. He is traditionally said to have repealed Draco's code, replacing it with more moderate laws. Livingston notes, however, that Draco's laws were effectively repealed by the impossibility of enforcing them—they abolished themselves—before Solon ever acted.

Grand Duke Leopold of Tuscany: Pietro Leopoldo d'Asburgo-Lorena (1747–1792), who as Grand Duke of Tuscany from 1765 to 1790 implemented a remarkable series of enlightened reforms, including the abolition of capital punishment and torture in 1786—making Tuscany the first jurisdiction in the world to do so by law. Livingston cites Tuscany as evidence that an organized state can function without capital punishment.

Empress Elizabeth of Russia: Elizabeth Petrovna (1709–1762), Empress of Russia from 1741 to 1762, who imposed an effective moratorium on capital punishment during her reign—the first sovereign in modern European history to do so. Russia went twenty-one years without a formal execution under her rule.

Malesherbes, Condorcet, Lavoisier: Three distinguished figures of French intellectual life executed during the Reign of Terror (1793–1794). Guillaume-Chrétien de Lamoignon de Malesherbes was a jurist and defender of the free press. The Marquis de Condorcet was a philosopher and mathematician who had championed the rights of women and the abolition of slavery. Antoine-Laurent de Lavoisier was the founder of modern chemistry. Livingston uses their deaths as evidence of how capital punishment, once normalized by the state, becomes available for the destruction of the innocent.

Lord William Russell and Algernon Sidney: English political figures executed in 1683 during a period of political repression under Charles II. They were later regarded as martyrs to constitutional government and remembered as victims of judicial murder. Livingston cites them as examples of how capital punishment becomes a weapon of political oppression.

Servile insurrection: Revolt by enslaved people. Under the Louisiana law in force when Livingston wrote, this was a capital offense, and he names it in Chapter III as one of the four crimes for which the state still killed. He names it and moves on. A reader in this century should not.

The legislature Livingston was asking to give up the gallows governed a slaveholding state, and the gallows he was asking it to give up stood, in part, for the suppression of the enslaved. That is not incidental to his argument. It is the sharpest available test of it. Everything he establishes applies here with more force than anywhere else in the book: that the state may kill only where nothing else will preserve existence; that killing brutalizes the society that watches it; that the apparatus, once built, is turned on whoever the dominant faction finds threatening. A law that hangs people for resisting their own captivity is the case his own principles condemn most completely.

He does not say so. Livingston was himself a slaveholder, and the only prison he dealt with regularly was the New Orleans slave prison, an institution built to discipline and break the people it held. John Bardes has shown how directly that institution shaped his thinking about captivity and punishment. The penitentiary he offered the world as the humane alternative to the gallows was worked out by a man whose daily experience of confinement was the confinement of the enslaved.

The omission is his, and it should be read as his. It is also the reason the argument in this book outlived the man who made it: the principles he set down were larger than the use he was willing to put them to.

FURTHER READING

ON LIVINGSTON AND HIS WORK

Hatcher, William B. *Edward Livingston: Jeffersonian Republican and Jacksonian Democrat*. Louisiana State University Press, 1940. The standard biography of Livingston; covers his legal work and his criminal code in detail.

Hunt, Charles Havens. *Life of Edward Livingston*. D. Appleton & Co., 1864. An earlier biography written by a contemporary; useful for its firsthand accounts and for the documents it reproduces.

Masur, Louis P. *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865*. Oxford University Press, 1989. Places Livingston's argument in the context of the broader movement for criminal law reform in early America.

ON THE ABOLITION MOVEMENT

Bardes, John K. *The Carceral City: Slavery and the Making of Mass Incarceration in New Orleans, 1803–1930*. University of North Carolina Press, 2024. Reconstructs the slave prisons of Livingston's New Orleans and traces their influence on his penal thought. Indispensable for reading this argument against the society that produced it.

Banner, Stuart. *The Death Penalty: An American History*. Harvard University Press, 2002. The essential history of capital punishment in the United States, from the colonial period to the early twenty-first century; essential context for Livingston's argument.

Bessler, John D. *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment*. Northeastern University Press,

2012. Examines the constitutional dimensions of capital punishment from the founding era to the present.

Gottlieb, Gerald H. *Capital Punishment*. Constitutional Rights Foundation, 1967. A concise overview of the legal and philosophical history of capital punishment in the United States.

ENLIGHTENMENT FOUNDATIONS

Beccaria, Cesare. *An Essay on Crimes and Punishments*. (Various editions.) The foundational text of Enlightenment criminal law reform, published in 1764. Livingston's argument draws directly on Beccaria and extends his reasoning. The Abolition Classics edition, modernized by Jeff Hood (Complicit Press, 2026), is V. 5 in this series.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. (1789.) The systematic development of utilitarian criminal law theory. Livingston built his code on Bentham's principles of codification and corresponded with him for years; reading the two together shows the tradition Livingston worked in.

Montesquieu, Charles de Secondat. *The Spirit of the Laws*. (1748.) The comparative jurisprudence that shaped Enlightenment thinking about criminal law, including capital punishment. Essential background for understanding Livingston's argument.

ON WRONGFUL EXECUTIONS

Liebman, James S., et al. *A Broken System: Error Rates in Capital Cases, 1973–1995*. Columbia Law School, 2000. A landmark study documenting the rate of serious, reversible error in capital cases in the United States—directly relevant to Livingston's argument about the irremediability of error.

Scheck, Barry, Peter Neufeld, and Jim Dwyer. *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted*. Doubleday, 2000. Case studies of wrongful convictions, including capital cases, documenting the real-world consequences of the irremediability that Livingston identified in 1833.

FURTHER READING

CONTEMPORARY ABOLITION

Hood, Roger, and Carolyn Hoyle. *The Death Penalty: A Worldwide Perspective*. 5th ed. Oxford University Press, 2015. The standard international survey of capital punishment.

Prejean, Helen. *Dead Man Walking*. Random House, 1993. The memoir of a Catholic nun who accompanied condemned men to their executions; the most widely read contemporary witness account of capital punishment in the United States.

THIS SERIES

The Abolition Classics is a series of modernized editions of the texts that built the case against the death penalty, published by Complicit Press and edited by Jeff Hood. Volumes to date include Plato's *Apology* (V. 1), Lactantius, *On the Sacred Animal* (V. 2), Giuseppe Pelli, *Against the Death Penalty* (V. 3), Benjamin Rush, *Considerations on the Injustice and Impolicy of Punishing Murder by Death* (V. 4), and Cesare Beccaria, *An Essay on Crimes and Punishments* (V. 5). Beccaria's essay is the direct ancestor of the argument in the present volume; Livingston takes Beccaria's premises and carries them into American law.