

THE ABOLITION CLASSICS

The texts that built the case against the death penalty

V. 8

THE OPINIONS OF
DIFFERENT AUTHORS
UPON THE
PUNISHMENT OF
DEATH

A Modern Adaptation

COMPILED BY BASIL MONTAGU

Edited and modernized by
JEFF HOOD

COMPLICIT PRESS

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Newly set and modernized from *The Opinions of Different Authors Upon the Punishment of Death*, selected by Basil Montagu and published at London by Longman, Hurst, Rees, Orme, and Brown in three volumes in 1809, 1812 and 1813.

The underlying texts are in the public domain.

Montagu's anthology gathers sixty-two authors. This edition presents twelve of them.

The selection, the chapter divisions and the chapter titles are editorial.

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*What theory of justice places the deliberate taking of
human life in the same category as destroying a fish pond?*

COLQUHOUN

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FOREWORD

There is a particular kind of courage in the act of compilation. It is different from the courage of the original argument — it does not require the genius of a Beccaria or the systematic rigor of a Mittermaier. It requires something else: the patience to read widely, the judgment to select well, and the willingness to let the accumulated weight of many voices make the argument that no single voice could make alone. Basil Montagu had this kind of courage in abundance, and the book he produced, beginning in 1809 — this book, in your hands now — is one of the most quietly devastating arguments against capital punishment ever assembled.

Montagu was a lawyer and a friend of poets. He knew Wordsworth, Hazlitt, Coleridge. He had read widely in the literature of penal reform, in the philosophical arguments of Beccaria and Bentham, in the statistical reports of Howard, in the moral essays of Johnson and Goldsmith. And he understood — with the instinct of someone who had also worked in actual courtrooms, who had seen the machinery of criminal justice from the inside — that the argument against capital punishment was not one argument but many, and that its power came from their convergence.

The voices in this book do not all agree. That is part of Montagu's point. Dr. Paley, the most eminent defender of the existing system of his era, appears here alongside Beccaria, his most formidable opponent. Blackstone, who provided the classical legal framework within which capital punishment was defended, appears alongside Clarkson, who described what actually happened when imprisonment was tried as an alternative. The book is not a polemic in the ordinary sense. It is something more like a trial — one conducted not before a

jury but before the reader's own conscience, with all the principal witnesses called and examined.

I have spent time in the places this book is ultimately about. I have sat with people whose execution dates were set, whose lawyers were filing last-minute motions, whose children did not fully understand what was happening. I know what it is to wait with someone who is waiting to die — the specific quality of that air, the way time moves differently in those rooms, the look on a person's face when they have accepted something they cannot change. Montagu never sat in those rooms, as far as I know. But the authors he compiled had their own forms of proximity to the question. Johnson had studied the actual behavior of criminals and magistrates. Colquhoun had catalogued the insane breadth of England's capital laws. Howard had traveled through the prisons of Europe and counted the bodies.

What strikes me most about this book, reading it more than two centuries after its compilation, is how contemporary the arguments remain. When Johnson writes that multiplying capital crimes teaches criminals to take greater risks rather than fewer — since the penalty for minor offenses is already severe, why stop there? — he is describing a dynamic that criminologists have documented in every era. When Clarkson describes the Philadelphia penitentiary, where prisoners work in trades and earn wages and emerge reformed rather than hardened, he is anticipating every serious prison reform movement of the next two centuries. When Goldsmith writes that the penal laws of England are "in the hands of the rich" and "laid upon the poor," he is describing what every serious study of capital punishment in America has confirmed: the penalty falls not on the most culpable but on the most vulnerable.

Montagu understood that the best argument against capital punishment is the weight of many good arguments, none of them conclusive on its own but all of them pointing in the same direction. Johnson from human nature, Beccaria from philosophy, Paley (inadvertently) from practical concern, Montesquieu from

FOREWORD

comparative law, Clarkson from evidence, Colquhoun from the simple spectacle of absurdity, Goldsmith from moral indignation, Eden from legal history, Bentham from rational analysis, Howard from statistics, Turner from theology. All of them arrive at the same place by different routes: the state does not know what it is doing when it kills in the name of justice, and the evidence of this ignorance is everywhere available to anyone willing to look.

The book you hold is a modernized edition of Montagu's compilation, updated for a reader in 2026 who may not have encountered these authors before and who lives in a world that has accumulated two additional centuries of evidence on the question Montagu was examining. The evidence has not changed the argument's direction. It has deepened and confirmed it. More than 100 nations have abolished capital punishment since this book was first published. The nations that retain it are, with a handful of exceptions, not nations whose criminal justice systems anyone would describe as models. The voices Montagu assembled in 1817 were on the right side of history.

They were also on the right side of mercy. That matters to me as much as the evidence. The arguments in this book are rational and well-grounded, and I commend them to you on those grounds. But behind every statistical table and every philosophical proposition is a human being in a cell, counting the hours. Montagu knew this. That is why he compiled the book. That is why it is still being read.

JEFF HOOD
North Little Rock, 2026

A NOTE ON THIS EDITION

THE COMPILER

Basil Montagu (1770–1851) was a barrister, legal reformer, and man of letters whose personal life was as extraordinary as his public career. He was the illegitimate son of the fourth Earl of Sandwich, grew up in modest circumstances, and made his way through Cambridge and the bar by ability alone. He became a close friend of William Wordsworth — it was Montagu who introduced Wordsworth to Samuel Taylor Coleridge, and who later precipitated the famous quarrel between them by carrying, with disastrous accuracy, a confidence Coleridge had shared about Wordsworth's character. He knew Hazlitt, Lamb, and most of the literary circle of early nineteenth-century London.

His professional life was devoted to law and to its reform. He was a Chancery barrister of considerable reputation, and he spent decades working to simplify the procedures of the court of Chancery — procedures so cumbersome that Dickens would later immortalize them in *Bleak House* as *Jarndyce v. Jarndyce*. He wrote extensively on bankruptcy law, on legal reform, and on the condition of the poor. And beginning in the 1800s, he became one of the leading advocates in England for the abolition of capital punishment, producing a series of books, pamphlets, and compilations that put the case for reform before the widest possible audience.

The Opinions of Different Authors Upon the Punishment of Death appeared in three volumes, in 1809, 1812 and 1813, with a second edition of the first volume in 1816. It was a deliberate act of

advocacy: Montagu believed that the best way to make the case for abolition was to let the accumulated authority of many respected writers speak for itself, surrounding the reader with the weight of evidence and argument from sources no reasonable person could dismiss. The work was widely read in the reform circles that eventually produced the wave of legislative change that reduced England's capital offenses from more than 200 to a handful.

THE BOOK

The original compilation draws on authors spanning two and a half centuries, from Francis Bacon in the early seventeenth century to writers of Montagu's own time. The organizing principle is not chronological but cumulative: each voice adds its weight to the case that capital punishment is both unjust and counterproductive, that it fails on its own terms and violates principles that its defenders profess to hold.

The writers represented include:

Dr. Samuel Johnson, whose essays in *The Rambler* (1751) argued that excessive punishment teaches criminals to take greater risks and makes witnesses and juries reluctant to cooperate with prosecutions — a practical objection to severity made by the most morally serious English writer of his age.

Sir William Blackstone, the great systematizer of English common law, whose *Commentaries* provided the theoretical framework within which both defenders and critics of capital punishment argued — including a crucial account of how the right to punish derives from the natural right of self-defense and how this derivation limits what the state may do.

Marquis Beccaria, the Italian philosopher whose *On Crimes and Punishments* (1764) remains the foundational text of penal reform, arguing that capital punishment exceeds the state's legitimate authority and that perpetual imprisonment is a more effective deterrent.

Dr. William Paley, the utilitarian theologian who provided the most serious philosophical defense of the English system, arguing that the certainty rather than the severity of punishment was what mattered — an argument that, taken seriously, pointed toward reform rather than retention of capital punishment.

Baron Montesquieu, whose *Spirit of Laws* had demonstrated that excessive severity was characteristic of despotism rather than freedom, that it corrupted public morals rather than restraining crime, and that proportionality between crime and punishment was a mark of civilization.

Thomas Clarkson, the anti-slavery activist, who provided an account of the Philadelphia penitentiary system as evidence that imprisonment designed for reform could transform even serious offenders into productive citizens.

Patrick Colquhoun, the police reformer, whose catalogue of the more than 200 capital crimes in England demonstrated by sheer accumulation the absurdity of the existing system.

Oliver Goldsmith, whose essays and fiction had established that the penal laws of England bore most heavily on the poor, that the rich who made the laws did not themselves suffer under them, and that severity generated rather than deterred crime.

William Eden (later Lord Auckland), whose *Principles of Penal Law* (1771) had argued that the English capital code was riddled with disproportionate offenses that no serious assessment of proportionality could defend.

Jeremy Bentham, whose analysis of the proper proportion between crimes and punishments, included here from his writings on penal theory, supplied the utilitarian framework for measuring whether any given penalty was justified.

John Howard, the prison reformer, whose systematic surveys of prisons and prison conditions across Europe — with accompanying statistical tables — provided the empirical foundation for reform arguments.

William Turner, who demolished the theological defense of capital punishment — the claim that Scripture commands execution for murder — by close reading of the texts and the tradition.

THE MODERNIZATION

This edition presents each author's contribution in modernized language, preserving the substance and force of the original arguments while removing the obstacles of archaic vocabulary and syntax that might prevent a contemporary reader from engaging with them. The statistical examples and some legal specifics have been updated where they have direct contemporary equivalents. The multi-author structure of the original — its defining feature as a compilation — is fully preserved.

Montagu's own preface, in which he explains the project and quotes Lord Bacon and Lord Coke on the importance of accumulated learning, appears here as part of the editor's apparatus. His voice as compiler — selecting, arranging, allowing each author's argument to build on the last — is the silent voice that makes the book more than the sum of its parts.

COLLATION

The publication history above has been checked against the surviving catalogue records of the 1809, 1812 and 1813 volumes. Readers using this edition for scholarly work should collate the individual selections against Montagu's originals, since the compilation itself is a work of selection and the boundaries of each extract are editorial.

THE OPINIONS OF
DIFFERENT AUTHORS

Selected by Basil Montagu, 1809–1813

CHAPTER I

DR. SAMUEL JOHNSON: THE FAILURE OF SEVERITY

Samuel Johnson, writing in The Rambler, 1751

Power and superiority are so flattering and delightful that few who have been once intoxicated by their influence have managed to resist the temptation to extend and enlarge them. Even those who most genuinely revere the laws of right are sometimes pleased to show that their restraint is a matter of choice rather than necessity — that they comply with the law because they prefer it, not because they fear it. We love to overlook the boundaries we have set ourselves; and as the Roman satirist remarks, the man who has no intention of taking another's life is yet glad to have the power to do so in his hands.

From the same principle — a tendency toward degeneracy that is encouraged rather than checked by the possession of power — springs the desire to invest legitimate authority with terror and to govern by force rather than persuasion. Pride is flattered by the enlargement of its means; the legislator who can terrify is more impressive than the one who merely governs. And from this desire for impressive terror come the multiplied capital penalties, the extended lists of offenses carrying death, the confident assumption that the way to reduce crime is to make punishment more severe.

This method has long been tried, and tried with so little success, that rapine and violence continue their daily increase despite it. Yet few seem willing to despair of its efficacy. The defenders of severity propose still more terrible punishments, longer lists of capital crimes, faster executions, fewer pardons, more consistent enforcement of laws

already extreme. And all of them seem to believe that we can be rescued from the talons of crime only by inflexible and sanguinary justice.

But since the right to set an uncertain and arbitrary value on human life has been disputed, and since experience gives us little reason to hope that any permanent reformation will be accomplished by the periodic destruction of our fellow human beings, perhaps it will not be useless to ask what consequences actually arise from this policy. The answer will not comfort those who believe in the simple equation: more punishment, less crime.

The lawgiver is allowed to estimate the gravity of an offense not merely by the direct harm it produces but by the general alarm and insecurity it creates in the community. He therefore claims the right to enforce laws with severity that are most in danger of violation, as a garrison commander doubles the guard on the side most likely to be attacked. This reasoning justifies severity in the abstract. But it assumes that severity actually produces the security it promises. The assumption is false.

When laws are established that threaten death for offenses of varying enormity, and when these laws are enforced without discrimination, the inevitable effect is to make criminals more dangerous rather than less. The offender who has committed a crime for which he faces death has no additional reason to stop there. He cannot be punished more severely for adding murder to his original offense, and he has every reason in his own terms to silence witnesses, to resist arrest, to commit whatever further crimes his safety seems to require. The law, by providing no gradation between the minor offense and death, removes the incentive to keep minor offenses minor.

This observation is not theoretical. It is the observed behavior of people who inhabit the world that extreme laws create. When the penalty for shoplifting is death, the shoplifter who has been observed will consider murdering the witness. He has nothing to lose. The law

that claimed to protect property by its severity has actually endangered life, because it eliminated the gradation between property offenses and mortal ones.

The same severity that makes criminals more desperate also corrupts the administration of justice. The lawgiver who can only imagine more extreme penalties, and who therefore cannot conceive of a law that is too severe, is the lawgiver who will eventually hang a man for picking a pocket. And when that happens — when the specific punishment is so obviously disproportionate to the offense — the whole apparatus of justice is seen to be absurd. Jurors will refuse to convict. Witnesses will fail to appear. Victims will decline to prosecute. The law, in its excess, defeats itself.

It was a remark of great wisdom, made long ago, that in the multitude of laws there is the greatest license. When no offense is too small to carry the ultimate penalty, every offense becomes in practice smaller than it appears, because the system cannot sustain the application of death to the full breadth of crimes it threatens. Pardons multiply. Juries nullify. Prosecutors undercharge. The result is not justice, sanguinary or otherwise, but a lottery in which the victims of law enforcement are selected more by chance than by any principled assessment of desert.

The practical wisdom of this observation has been confirmed in every era and every jurisdiction where severity has been tried. In England, where more than 200 offenses carried the death penalty at the beginning of the nineteenth century, the number of convictions for those offenses was far lower than the number of offenses committed — not because crime was rare but because the penalty was so extreme that all the participants in the legal process conspired to avoid imposing it. The law claimed severity. The practice was impunity. Neither served justice.

What follows from this? Not that criminals should escape punishment. Johnson was no sentimentalist about crime. He understood that persons who harm others must be restrained, that their

victims have legitimate claims on society's protection, and that the state cannot be indifferent to the conduct of those who violate the peace. What follows is that punishment must be proportionate — not merely in theory but in practice — and that a punishment too severe to be consistently applied will not, in fact, be applied consistently, and will therefore fail to accomplish even the limited deterrent purpose that its defenders claim for it.

Restraint and punishment are not the same thing as death. The person who is imprisoned is restrained, and can in many cases be reformed. The person who is hanged is neither.

CHAPTER II

SIR WILLIAM BLACKSTONE: ON THE STATE'S RIGHT TO PUNISH

From the Commentaries on the Laws of England

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. But as man also depends on his fellow men for protection, safety, and the enjoyment of the many advantages of social life, it is reasonable that he in return submits to the restraints that the good of the community requires. Without this mutual exchange, no society could subsist, and without society no man could preserve the benefits of his rational nature.

From this submission of individual will to communal welfare arises the power of the state to punish. The principle is this: by entering into society, each person surrenders a portion of the natural rights he held in a state of nature. Among those natural rights was the right of self-defense — the right to repel force with force, to protect oneself and others from aggression by whatever means necessary, including lethal force if no other means would suffice. In civil society, this right is surrendered to the sovereign power: individuals agree to abstain from personal vengeance and to rely on the magistrate for their protection. In exchange for this surrender, the magistrate undertakes to provide the protection that justified the surrender.

The right to punish therefore derives, in its foundation, from the right of self-defense as it existed in the state of nature. Whatever the individual could legitimately have done to protect himself and others from unprovoked aggression, the sovereign can do in the individual's

name. The magistrate bears the sword of justice by the consent of the whole community.

This derivation has important consequences. It means that the state's authority to punish is not unlimited. It is bounded by what the right of self-defense could justify — and the right of self-defense justifies only what is necessary for protection. It does not justify revenge. It does not justify cruelty beyond what protection requires. It does not justify punishment that exceeds what is necessary to restrain the offender and deter others from similar offenses.

The crucial question, which the theory of punishment forces upon every thoughtful legislator, is this: how much is necessary? The answer will vary by time, place, and offense. But it cannot, in principle, be unlimited. A punishment that is more severe than necessity requires is not justice but excess. And excess, however clothed in the language of law, is not justifiable.

Consider how this principle applies to the capital laws of England. More than 200 offenses have at various times been made capital by statute. Some of these — murder, treason — are undeniably grave. Others — picking a pocket above the value of twelve pence, cutting down trees in a garden, damaging a fish pond — are offenses against property that, whatever their civil character, could not by any stretch of reasoning be said to justify the taking of life by way of necessary protection of the social order. The question is not whether these offenses are wrong. They are. The question is whether death is a proportionate response — whether the execution of a man for picking pockets is within the authority that the social contract confers.

The answer, in the framework of natural law from which the right to punish derives, must be no. The right of the magistrate to punish does not extend beyond what necessity requires for protection. And the protection of society from pocket-picking does not require death — as the existence of transportation, imprisonment, and other lesser penalties demonstrates. If lesser penalties are available that accomplish the protective purpose, the greater penalty cannot be

justified by appeal to necessity. It can only be justified by appeal to revenge, which is not a legitimate purpose of law.

This does not settle every question about capital punishment. It leaves open the possibility that for some offenses — murder, perhaps — death is genuinely necessary in some circumstances, if no other available means would adequately protect the community. But it does establish that most of the capital laws that have actually operated in England at any period cannot be justified by the principles on which the right to punish is founded. They are not expressions of the social contract but violations of it — exercises of power beyond what the members of society can be understood to have consented to when they surrendered their natural rights to the magistrate's protection.

The law that kills for petty theft is not the execution of the social contract. It is its repudiation.

CHAPTER III

MARQUIS BECCARIA: THE CASE AGAINST CAPITAL PUNISHMENT

From On Crimes and Punishments, 1764

The question of whether death is truly useful and necessary for the safety and good order of society requires careful examination. By what right can governments put citizens to death? This right cannot be founded on the social contract by which individuals agreed to live under common rules. In ceding a portion of their liberty for the common benefit, how can anyone be thought to have given up the greatest good of all — life itself? If such cession were possible, how could it be reconciled with the principle that the state exists to protect its members? The power to take a citizen's life would be a contradiction in terms for any government that claims to derive its authority from the consent of the governed.

The punishment of death, therefore, is not a right. It is a war of a whole nation against a single citizen — a war that the nation declares unnecessary and harmful when its own laws can adequately defend society without recourse to it. It is a strange way of governing men by example, to teach them by the death of a citizen that murder is wrong. The spectacle is brief, confined to those who happen to observe the execution. The influence of perpetual imprisonment — visible, lasting, always before the eyes of the community — is more sustained and therefore more effective.

The death of a citizen cannot be necessary except in one case: when, though deprived of liberty, that citizen still retains connections and power that endanger the security of the nation. But even this

exceptional case can only arise when a nation is on the verge of losing its liberty entirely — in times approaching anarchy, when individual disorders take the place of laws. No calm reign, no society well-fortified against internal and external dangers, can have need of taking a citizen's life. Twenty years of peaceful government in any nation have never provided a single instance where the death of a prisoner who was in confinement was truly necessary for public safety.

A punishment, to be just, should be calibrated to deter. By this standard, the punishment of perpetual slavery — hard, continuous labor in conditions that others can observe and that will be remembered long after an execution would be forgotten — should produce a stronger deterrent effect than death. When those prone to crime consider their options, the prospect of a lifetime of labor is more continuously present to their minds than the prospect of a moment of death that their vanity, their fanaticism, or their despair may render less fearful than it appears to others.

Let us look at human nature. The death penalty, whatever its theoretical justifications, is not a spectacle that achieves what its promoters claim. In all nations where death is used as punishment, every example of it requires the supposition of a murder committed. In perpetual slavery, every criminal affords a continuing and lasting example. The death penalty is used once. The imprisoned criminal serves as an example every day of every year.

I shall be told that perpetual slavery is as painful as death, and therefore equally cruel. I answer that, taking all the miserable moments of slavery together, they may be more painful in aggregate — but that the pain of death is concentrated in a single moment, while the pain of slavery is spread across a lifetime in which habit exercises its softening influence, in which hope whispers its consolations, in which the human capacity for accommodation reduces what seemed unbearable to bearable. The criminal who faces death must face all of it at once. The criminal who faces imprisonment can face each day as

it comes.

There is another objection to death as a penalty that has nothing to do with its comparative severity. It is irreversible. Every other penalty admits of degrees; every other penalty can be modified if evidence emerges that the condemned person was innocent; every other penalty leaves open the possibility of correction. Death does not. The execution of an innocent person is a harm that cannot be undone by any subsequent action of the state. A legal system that condemns people to death is therefore a legal system that must be perfect in its operations, or it will kill innocent people with the sanction of law. No legal system is perfect. Therefore every legal system that includes the death penalty will, over time, kill innocent people.

If passion or necessity has sometimes taught men to shed the blood of their fellow creatures, laws ought not to add another example to what is already too common a practice. The law, which is supposed to moderate the ferocity of mankind, should not increase it by the example of barbarity the more horrible because it is performed with deliberation and ceremony. And what are we to say of those governments that contrast their humanity in their ordinary practice with the occasional fury of their penal laws? The spectacle of an execution, surrounded by formal pageantry, is not the expression of justice. It is the expression of power — power that does not know what else to do with those it cannot reach.

The punishment of death has never been effective in preventing determined men from injuring society. Not the death of Socrates prevented the spread of his philosophy; not the burning of martyrs prevented the spread of their faith. The execution of criminals will not prevent determined criminals from committing crimes. What prevents crime is not the severity of punishment but its certainty. A moderate punishment, consistently applied, produces more prevention than an extreme punishment that is applied rarely and arbitrarily.

The history of punishment is the history of excess and reaction. Nations begin by punishing too little, then overreact by punishing too

much, then recognize that excess has defeated its own purpose, and slowly retreat toward proportionality. The punishment of death is one of the excesses from which every civilization that seriously examines its practices eventually retreats. The question is only when.

CHAPTER IV

DR. WILLIAM PALEY: IN DEFENSE OF THE PRESENT SYSTEM

From Principles of Moral and Political Philosophy, 1785

The proper end of human punishment is not the satisfaction of justice but the prevention of crimes. This is the principle on which the defense of the existing system of capital punishment rests, and it requires careful examination because it leads, when followed honestly, to conclusions that may surprise those who invoke it.

If the sole object of punishment is the prevention of crime, then the proper question about any given punishment is not whether it is deserved but whether it is effective. The severity of punishment should be proportioned not to the gravity of the offense but to the difficulty of detection. Offenses easily detected need not carry severe penalties, since the certainty of punishment provides sufficient deterrence; offenses rarely detected must carry severe penalties if any deterrent effect is to be achieved. By this logic, a penalty of death is justified for a minor offense if it is rarely detected, while a penalty of death is not justified for a serious offense if it is almost always detected.

This framework — whatever its abstract merits — provides a defense of the existing English system on the following grounds: many of the crimes that are made capital in England are crimes that are difficult to detect, and the extreme penalty is therefore justified as the only means of deterring those who would otherwise calculate that the probability of punishment is low enough that even a severe penalty provides insufficient deterrence.

I state this argument as strongly as it can be stated because I believe the reader deserves to encounter it in its best form. But I also believe that when followed to its conclusions, it does not lead where its proponents wish.

If prevention is the sole object of punishment, and if the means of prevention should be calibrated to the difficulty of detection, then the system should also ensure that detected offenders are actually punished — that the certainty of punishment is maintained alongside its threatened severity. But this is precisely what the existing system fails to achieve. The very breadth and severity of English capital law — the inclusion in the capital list of offenses that reasonable people find disproportionate — makes jurors reluctant to convict, witnesses reluctant to testify, prosecutors reluctant to charge, and victims reluctant to prosecute. The result is that many offenses which should, in terms of deterrence, be certainly punished are in fact unpunished, because the legal machinery cannot function when its penalties are so extreme that its own participants resist them.

A system that threatens death for more than 200 offenses but actually executes people for very few of them is not a system of certain, deterring punishment. It is a system of arbitrary and uncertain punishment that provides the worst of both worlds: the moral costs of death without the practical benefits of deterrence. Those who invoke prevention as the justification for severity should be the first to recognize that the existing system fails on prevention's own terms.

What would an honest system of preventive punishment look like? It would threaten penalties calibrated to the difficulty of detection. It would ensure that threatened penalties were actually imposed, without the corruption of juries who must choose between a guilty verdict they believe just and a penalty they find barbarous. It would maintain the proportionality between crimes of different gravity that gives the entire system its moral credibility. And it would reserve its severest penalties for its most serious offenses — not spread them across an undifferentiated list of property crimes, thefts, and social

disturbances.

Such a system would look very different from the one we actually have. It would carry severe penalties for a small number of grave offenses, applied with certainty. It would carry moderate penalties for a wider range of offenses, applied consistently. And it would abandon the current practice of threatening death for offenses whose perpetrators face, in practice, little chance of actually being executed — a practice that achieves neither the deterrence it promises nor the justice it claims.

I am aware that this argument leads toward reform rather than toward the retention of the existing system. I state it here because honesty requires it. Those who defend severity on the grounds of prevention cannot consistently defend the existing pattern of English capital punishment. They must either defend severity and demand consistency in its application — which would require either abolishing half the capital statutes or actually enforcing all of them, neither of which the system currently does — or they must acknowledge that the case for severity must be substantially more limited than its proponents usually claim.

CHAPTER V

BARON MONTESQUIEU: ON PROPORTIONALITY AND THE SPIRIT OF LAW

From The Spirit of Laws, 1748

When several passages of Scripture seem to command the punishment of death for various offenses, and when governments invoke these passages as authority for their penal codes, a fundamental confusion has taken place between the prerogative of God and the authority of man.

Experience shows that a country in which there is only one capital punishment has generally fewer crimes than a country in which there are many. In proportion as punishments become more cruel, the minds of men, as a fluid rises to the level of the body that surrounds it, grow hardened and insensible; and after many years of great severity, men are punished with death for offenses that were previously punished with the rod alone, while the rod is used for offenses that had previously gone entirely unpunished.

A wise legislator would not have attempted to reclaim people through the terror of punishment and reward alone; he would have applied moral and philosophical education, adapted to human nature, aiming at the prevention of crime through improved conditions rather than attempting the impossible task of deterring it through fear after it has occurred. Where the deterrent theory of punishment has been most faithfully applied — where punishments have been most systematically and severely graduated to offenses — the result has not been the reduction of crime but its proliferation. Japan's system, which attempted to cure social disorder through maximum severity,

succeeded only in establishing that there is no limit to the cruelty that can be authorized in the name of law, and no corresponding limit to the crime that will follow.

The Roman Senate understood something important. When the question arose whether to establish more severe punishments for a particular class of crime, the senate — composed of experienced rulers who had seen the actual effects of penal policy — judged that immoderate punishments would indeed strike terror into people's minds, but would also produce the secondary effect that there would be nobody afterward willing to accuse or condemn. The principle they articulated has been confirmed in every subsequent era: severity that exceeds the moral consensus of the society that applies it is self-defeating, because the human agents of the system — judges, jurors, witnesses, prosecutors — will find means to avoid carrying it out.

Of the proper proportion between punishment and crime, this is the essential principle: there should be a certain proportion between crimes and punishments, because it is essential to a good system that a man should, if possible, have a stronger motive for avoiding a great crime than a smaller one. In particular, offenses against persons should be punished more severely than offenses against property alone, since the injury to the person is more grave and the motive to commit it must be overcome by a correspondingly greater fear. When property offenses carry the same penalty as personal injury — when stealing twelve pence and murdering carry the same penalty — the law has destroyed the very gradation of severity that gives it whatever deterrent force it possesses.

The accumulation of sanguinary laws is the worst distemper a government can be afflicted with. Laws that threaten death for a hundred offenses, but execute only a handful of those condemned under them, create a system of pure arbitrariness — not justice but the performance of justice, conducted without principle and producing without fail both the most severe injustices and the most complete

impunity. The fortunate escape; the unfortunate are made examples; and no one can tell, in advance, which they will be.

A character of moderation should be the governing quality of penal legislation. Positive laws — laws that do not flow from the general obligations of morality but have their justification in the temporary and particular circumstances of a given community — should have a limited duration. When the grievance that produced them has passed, the law should pass with it. But what we observe instead is the accumulation of penal statutes passed in response to particular crises, and never repealed when those crises end, so that the statute book becomes a museum of panics, each represented by a clause threatening death for something that is no longer a serious social problem, if it ever was.

A state in which the law makes no distinction between picking a pocket and killing a man has not achieved the maximum severity of justice. It has achieved the maximum incoherence of law.

CHAPTER VI

THOMAS CLARKSON: THE PHILADELPHIA EXPERIMENT

From A Portraiture of Quakerism, 1806

In the state of Pennsylvania, beginning in 1786, an experiment was conducted that deserves the attention of every person who has the improvement of criminal law at heart. The inhabitants of that state, believing that the existing system of criminal punishment was both unjust and ineffective, resolved to try an alternative. They built a penitentiary — a house of reform rather than a house of punishment — and they confined within it persons who had previously been sentenced to death or to public labor as examples to the community.

The principle of the penitentiary was simple: that the purpose of criminal confinement should be reformation rather than mere punishment, and that reformation was achievable if the conditions of confinement were designed with that end in mind. Prisoners were not to be exhibited as examples of suffering. They were to be employed in useful work. They were to be paid modest wages that would accumulate during their confinement, providing them with some resource at their release. They were to be treated with decency and without cruelty. They were to have access to religious instruction. And the conditions of their confinement were to be calculated to prepare them for re-entry into society as useful and law-abiding citizens.

The results of this experiment were observed carefully by those responsible for the penitentiary and by visitors from other states and countries who came to see what was happening. What they saw was

this.

The prison was nothing like what most people imagined when they thought of criminal confinement. There was no idleness. No profanity. No alcohol. The prisoners were engaged in trades — as nail-makers, sawyers, carpenters, joiners, weavers, and others — performing useful labor throughout their days. The products of their labor were sold, the proceeds credited against the costs of their confinement and partially retained for their own benefit upon release. When observers visited the workshop, they reported seeing something that looked more like a manufactory than a prison: men absorbed in work, organized into regular patterns of labor, producing goods of real value.

The effect on the prisoners themselves was observable. Men who had come in as habitual criminals — men whose whole previous life had been organized around theft, fraud, or violence — were found, after months in this environment, to have changed in measurable ways. They did not look forward to release as an occasion to resume previous habits; they looked forward to it as an opportunity to practice the trades they had learned. The chaplain reported cases of genuine religious conversion — not the performance of repentance designed to obtain early release, but the quieter transformation of a person who had spent months in an environment that valued work, order, and honest self-support.

This is not a romantic account. Not every prisoner was reformed. Some were refractory and had to be dealt with by solitary confinement and deprivation of the earning opportunities that other prisoners enjoyed. But the proportion who emerged genuinely improved was, by every report, substantially higher than any comparable system of public punishment had ever achieved. The gibbet and the public lash had never reformed anyone that anyone could document. The penitentiary had reformed many, and the evidence was available to anyone willing to examine it.

The implications are clear. If the purpose of criminal punishment is the prevention of future crime — either through deterrence or through

the reform of offenders — then a system that actually reforms offenders is more effective than one that merely kills them. The executed offender commits no further crimes, but neither does the imprisoned offender who, after years of structured labor, emerges with a trade, with modest savings, and with the habits of a working person rather than those of a criminal. And the imprisoned offender provides the additional benefit of demonstrating, to everyone who observes the penitentiary, that crime leads to a long and unpleasant confinement — a more sustained and realistic threat than the distant and uncertain prospect of execution.

The question that every defender of capital punishment must answer is this: given that imprisonment can reform serious offenders, and given that the evidence of reformation is documented and observable, what purpose is served by executing them instead? If the answer is deterrence, the evidence does not support it — the certainty of imprisonment deters as effectively as the uncertain threat of death, and probably more so. If the answer is retribution — that the offender deserves to die, regardless of consequences — then the defender of capital punishment must admit that the argument has nothing to do with prevention and everything to do with a theory of justice whose foundations must then be examined on their own terms.

The Philadelphia experiment was not a perfect demonstration. But it was a demonstration — the first large-scale, carefully observed test of whether imprisonment designed for reform could work. The answer it returned was yes. That answer has been confirmed by every subsequent generation of evidence. A state that ignores it and continues to execute its criminals is not acting on evidence. It is acting on preference dressed in the language of necessity.

CHAPTER VII

PATRICK COLQUHOUN: A CATALOGUE OF CAPITAL CRIMES

From A Treatise on the Police of the Metropolis, 1796

To understand the true character of English criminal law, it is necessary to look at it not in its finest principles but in its actual substance — to examine what, specifically, the law threatens with death. The exercise is instructive, and the instruction it provides is not flattering to those who administer the system.

The following offenses are, as the law currently stands, capital felonies in England — that is to say, they carry the punishment of death:

- Arson of any dwelling house, though no person be therein.
- Bankrupts not surrendering themselves, or concealing their effects.
- Being accessories to felonies declared capital.
- Breaking down the head of a fish pond, whereby fish may be lost.
- Burglary, or house-breaking in the night time.
- Challenging jurors above twenty, in capital felonies, or standing mute.
- Concealing the death of a bastard child.
- Cutting down trees in an avenue, garden, orchard, or plantation.
- Cutting down or destroying river banks or sea banks.
- Destroying ships or setting them on fire.
- Destroying silk or velvet in the loom, or the tools for manufacturing them, or entering a house for that purpose.
- Deer-stealing, second offense, or even first offense under the Black Act.
- Destroying turnpikes or bridges, gates, weighing engines, locks, sluices, or engines for draining marshes.

- Escape from prison in certain cases.
- Forgery of deeds, bonds, bills, notes, public securities, or any legal instrument. Clerks of the Bank embezzling dividend warrants, paper makers using unauthorized molds for notes.
- Government stores embezzled, burned, or destroyed in dock-yards, in certain cases.
- Highway robbery.
- House-breaking in the daytime.
- Impersonating an out-pensioner of Chelsea Hospital.
- Killing or maiming cattle.
- Larceny above the value of twelve pence privately in a shop.
- Larceny above the value of forty shillings in a dwelling house.
- Larceny above the value of forty shillings on a navigable river.
- Maliciously cutting or maiming any person with intent to disfigure.
- Maliciously shooting at any person.
- Manslaughter.
- Murder.
- Personating the owner of bank stock or public securities.
- Rape.
- Returning from transportation.
- Riots by twelve or more persons, not dispersing within one hour after proclamation.
- Robbery of the mail.
- Sacrilege.
- Sending threatening letters.
- Setting fire to any mine, pit, or delph of coal.
- Shooting at or attempting to wound any revenue officer.
- Smuggling in arms or in company with more than five persons.
- Sodomy.
- Stealing a shroud from a grave.
- Stealing any goods from bleaching grounds.
- Stealing goods from a vessel in distress.
- Stealing letters from the post office.
- Stealing linen or other goods from a bleaching ground.
- Stealing records from courts of justice.

- Trading with the servants of the East India Company without license.
- Treason, and all its accessories.
- Unlawfully and maliciously demolishing or pulling down any church, chapel, meeting house, or other building for religious worship.

I have not exhausted the list. The offenses enumerated above represent what a person familiar with the statute books would recognize as only a portion of the offenses that technically carry capital punishment in England at the present time. The total number exceeds two hundred.

Let the reader consider this list carefully. Let them consider what it includes and what it excludes. The man who murders his neighbor is here. The man who cuts down a tree in a garden is also here. The woman who kills her infant after concealing an illegitimate pregnancy is here — and so is the man who shoots at a revenue officer, the weaver who destroys silk in a loom, the bankrupt who fails to surrender to his creditors, the person found returning after transportation.

What organizing principle connects these offenses? What theory of justice places the deliberate taking of human life in the same category as destroying a fish pond? The answer is that there is no organizing principle. The capital statutes of England are not the expression of a coherent theory of punishment. They are the accumulation of panics — each statute passed in response to a particular crisis or the lobbying of a particular interest, never reviewed for proportionality, never repealed when the crisis passed, and never organized into anything resembling a rational system.

The consequences of this incoherence are what one would expect from any system built on incoherence. Juries refuse to convict when the penalty is obviously disproportionate to the offense. In cases of shoplifting, it is common for juries to find that the goods stolen were worth less than the threshold amount for capital conviction — to find that the item was worth elevenpence when the evidence shows it was worth a shilling — because the alternative is sending a first offender

to the gallows for stealing handkerchiefs. The jury's mercy, exercised in this way, is in itself an indictment of the law. The law has become so extreme that the only way to administer it with any humanity is to lie about the facts.

The same pattern operates at every level of the criminal process. Prosecutors decline to charge capital offenses when they expect that a jury will not convict. Witnesses reconsider what they saw. Victims choose not to report offenses they know will result in an execution they cannot in conscience endorse. The law, in its excess, has created a vast system of unofficial mitigation — a shadow system of mercy exercised at every stage by every participant, none of whom will say publicly what they are doing, because to say it would be to admit that the law is unworkable.

And the result? The offenses that should be certainly punished — property crimes that cause real harm, frauds that undermine commercial confidence, violence that endangers persons — are in fact prosecuted with great uncertainty, because the penalty attached to them is too high for the legal system to sustain. The certainty of punishment, which every serious student of deterrence agrees is more important than its severity, is destroyed by the very severity that was supposed to make the deterrent effect irresistible.

The reform of this system requires, at minimum, that the capital list be reduced to those offenses whose gravity is beyond serious dispute and for which the penalty of death can be applied consistently without producing the moral revulsion that currently corrupts the administration of justice. To argue for this reduction is not to argue for lenience toward the crimes that remain capital. It is to argue for the kind of certainty that deterrence theory itself requires.

CHAPTER VIII

THE ADMINISTRATION OF JUSTICE: TWO
VOICES

From Executive Justice (1809), and from Patrick Colquhoun

ON THE BEHAVIOR OF JURIES

The oath administered to jurors at the beginning of every trial contains language that many who have observed the English criminal courts find, on reflection, deeply ironic. The juror is adjured, in the most solemn terms, to consider only the evidence before them and to give a true verdict according to that evidence. The solemnity of the charge, its invocation of divine witness, its explicit restriction of the juror's attention to the evidence — all of this appears very plain and very intelligible.

What actually happens is something different. Jurors frequently take upon themselves to give verdicts diametrically opposite to the evidence that has been delivered. A prisoner is set to the bar and put upon his trial. The witnesses testify uniformly, and without doubt, to the facts against him. But the prisoner happens to be young; it appears to be his first offense; he was drawn in by others; he was drunk at the time; or some other circumstance of that kind strikes the minds of the jurors. They forget their oath — or, more precisely, they find that they cannot both keep their oath and produce an outcome they can live with. And so they perjure themselves in mercy, returning a verdict of not guilty against all the evidence, or finding the value of stolen goods to be less than the threshold amount when the evidence shows the contrary.

This is not a peripheral phenomenon. It is widespread and well-known to everyone who has any experience of the English courts. The judge who, on such occasions, takes little further notice of the matter than to congratulate the prisoner on his narrow escape and to tell him he has had a very merciful jury — this judge is not ignorant of what has happened. He is simply acknowledging the reality that the law, as written, cannot be enforced by human beings with normal moral sensibilities. The jury has performed the only role available to it: it has been the last institution standing between an excessive law and a disproportionate outcome.

I have often observed this, with much uneasiness. That man who can hear twelve people simultaneously perjure themselves, without being affected by it, must be void of all proper feeling. And yet the systematic production of this perjury is what the current criminal law requires. A law that can only be administered by those who are willing to ignore the evidence, or to mischaracterize it, is not a workable law. It is a ceremony — a performance of justice that everyone present understands to be something less than justice.

The consequences for the deterrent purpose of the law are what one would expect. If the penalty for an offense is routinely avoided through jury nullification, the offense is not in fact punished with the certainty that deterrence requires. The offender who calculates that juries will not convict — and the experienced criminal knows this very well — is not deterred by a nominal penalty that is never actually imposed. The law, by being too severe to enforce consistently, has achieved nothing beyond the corruption of those who participate in its administration.

ON THE STATE OF THE CRIMINAL LAW

Imperfect must be, either the plan or the execution, or both, of our criminal code, if crimes are found to increase. If the moral principle ceases to be a check upon a vast proportion of the lower ranks of the people, and if petty thefts are known to prevail among almost all ranks

of the community — since opportunities for pilfering arise in every situation of employment — it becomes an important inquiry, from what source these numerous inconveniences spring, and where a remedy is to be found.

We boast of the security that our laws afford us, but if we cannot lie down to rest in our habitations without the dread of a burglary being committed, our property invaded, and our lives exposed to imminent danger before the approach of morning — if travel on the highway after dark carries the risk of assault and robbery — then the security our laws are supposed to provide is more theoretical than real.

The fault lies partly in the plan and partly in the execution. A system that makes everything capital makes nothing effectively capital. The same statute that threatens death for murder threatens it for cutting down ornamental trees, for damaging a fish pond, for returning from transportation. The message this sends to the potential criminal is not that the law values human life above all other considerations. The message it sends is that the law does not distinguish, that any offense is as likely as any other to result in execution, and therefore that the potential criminal's calculation about risk is not altered by the particular nature of what he intends to do.

What is needed is not more severity but more proportionality — a code in which the penalty attached to each offense reflects the gravity of that offense, and in which the expectation of enforcement is high enough that the penalty actually operates as a deterrent. A moderate penalty certainly and consistently enforced does more to prevent crime than an extreme penalty that is applied arbitrarily and escaped through the connivance of those who cannot in conscience apply it.

The reform of the criminal law is not a concession to criminals. It is a requirement of rational governance. The code as it stands has failed, by its own standards, to prevent crime. The question is not whether to maintain it but what to replace it with.

CHAPTER IX

DR. OLIVER GOLDSMITH: HOW SEVERITY BREEDS CRIME

From The Traveller (1764), The Vicar of Wakefield (1766), and The Citizen of the World (1762)

Laws grind the poor, and rich men rule the law. This observation, offered in the voice of a fictional character but felt through the flesh of observation, is not a polemical exaggeration. It is a description of how penal legislation actually operates when it is made by one class and applied predominantly to another.

The penal laws of England are in the hands of the rich and laid upon the poor. Government, while it grows older, seems to acquire the moroseness of age: and, as if our property were become dearer in proportion as it increased, as if the more enormous our wealth, the more extensive our fears — all our possessions are paled up with new edicts every day, and hung round with gibbets to scare every intruder.

I cannot tell whether it is from the number of our penal laws, or the licentiousness of our people, that this country should show more convicts in a year than half the dominions of Europe united. Perhaps it is owing to both. For they mutually produce each other. When, by indiscriminate penal laws, a nation holds the same punishment affixed to dissimilar degrees of guilt — when the people are led to perceive no distinction in the penalty, they begin to lose all sense of distinction in the crime. The multitude of laws produces new vices, and new vices call for fresh restraints.

A citizen who has committed a petty theft, and who has been tried under a system that treats petty theft as potentially capital, has learned

something from this experience. He has learned that society regards him as a serious criminal regardless of what he actually did. He has also learned that the legal process is arbitrary — that whether he is executed or transported or imprisoned or acquitted depends not on what he did but on the mood of the jury, the aggressiveness of the prosecutor, the skill of his defender, and a dozen other variables that have nothing to do with justice. Having learned these things, he is not particularly likely to emerge from the experience more law-abiding than he entered it. He is more likely to emerge more thoroughly criminal — more connected to other criminals, more habituated to the criminal world, and more convinced that the distinction between lawful and unlawful conduct is a matter of power rather than principle.

It were greatly to be wished that our penal laws could be more proportioned to the offense. Whatever the politicians of England may think, I know there is not a people on earth more hospitable, humane, and generous than the common people of England — but a spirit of savage barbarity deforms all our institutions. The laboring man, whose only crime was want, and whose punishment is death — this man is the product of the system as much as he is its victim.

Our Saxon ancestors, fierce as they were in war, had but few executions in times of peace; and in all commencing governments that have the print of nature still strong upon them, scarce any crime is held capital. It is among the citizens of a refined community that penal laws, which are in the hands of the rich, are laid upon the poor. Government, while it grows older, seems to acquire the moroseness of age. And as if our property were become dearer in proportion as it increased, all our possessions are paled up with new edicts every day, and hung round with gibbets to scare every intruder.

It were to be wished, then, that power, instead of contriving new laws to punish vice, instead of drawing hard the cords of society till a convulsion is produced to burst them, instead of cutting away wretches as useless before we have tried their utility — it were to be

wished that power would be merciful; that it would try what may be done by reclaiming those who are past hope of other recovery, and would correct and reform rather than destroy.

The problem with a system of multiplied capital punishments is that it cannot distinguish between the person who deserves mercy and the person who deserves death, and so it applies the same treatment to both. A law that cannot make this distinction is not a law of justice but a law of power — the power of the comfortable to dispose of the inconvenient. The fact that the disposing is done with legal ceremony and official sanction does not make it justice. It makes it ceremonial injustice, which is worse.

If society is serious about reducing crime — about actually preventing the harms that criminal law claims to prevent — it will look at the conditions that produce criminals as carefully as it looks at the criminals themselves. A man who has been raised in desperate poverty, given no education, offered no legitimate means of economic advancement, and presented with a community in which crime is the only available avenue to even minimal prosperity is not a man who will be deterred by the threat of execution. He will be deterred, if anything deters him, by the existence of a realistic alternative — work that pays, a community that offers something worth belonging to, a system of law that treats him as a citizen rather than an enemy.

The gallows has never yet produced this alternative. It has only confirmed the lesson that those who make the law and those who suffer under it inhabit different worlds, governed by different rules.

CHAPTER X

WILLIAM EDEN AND JEREMY BENTHAM:
DISPROPORTIONATE LAWS

From William Eden, Principles of Penal Law, 1771; and Jeremy Bentham, on the Proportion Between Crimes and Punishments

WILLIAM EDEN — ON THE ENGLISH CAPITAL
CODE

The principle from which any rational system of penal law must begin is this: positive laws are those which do not flow from the general obligations of morality and the general condition of human nature, but have their reason and utility in reference to the temporary advantage of that particular community for which they are enacted. Every law therefore which comes under this description ought to have a limited duration, and should not be suffered to remain a burden upon the people when the grievance for which it was framed has ceased and been forgotten.

This principle, applied to the English capital code, produces a result that should disturb anyone who examines it carefully. A very large proportion of the statutes that currently make offenses capital were passed in response to particular crises — periods of social disorder, the lobbying of particular industries, the panics of particular governments — and have never been repealed. They remain on the books not because they continue to serve any rational purpose but because no one has taken the trouble to remove them. The statute book is, in this respect, not a rational system but an archaeological deposit — a layering of fears accumulated over centuries, each one

preserved in amber while the circumstances that produced it dissolved.

The accumulation of sanguinary laws is the worst distemper a government can be afflicted with. The worst distemper — not merely an inconvenience, not merely a failure of elegance, but a genuine corruption of the legal system's capacity to function. When every statute threatens the same ultimate penalty, the penalty loses its meaning. When the person who cuts down a tree in a garden faces the same nominal punishment as the person who murders a neighbor, the law has announced that it cannot distinguish between these acts — that it regards them as equivalently serious. But no one believes this. Judges do not believe it. Juries do not believe it. Witnesses do not believe it. The only people who might be thought to believe it are the legislators who passed the statutes, and one may reasonably doubt whether even they believed it.

The consequence is that the capital laws of England are honoured not in the observance but in the breach. Convictions for capital offenses represent a small fraction of the offenses committed. The machinery of mercy — royal pardons, transportation as an alternative to execution, benefit of clergy for first offenders — has grown elaborate precisely because the law as written is too extreme to be applied as written. The mercy is a concealed admission that the law is wrong.

A rational penal code would begin by asking, for each offense: what is the minimum penalty sufficient to deter this offense, given realistic assumptions about the probability of detection and punishment? It would threaten that minimum penalty and enforce it consistently. It would reserve its most severe penalties for its most serious offenses, creating the gradation of severity that gives the entire system its moral and practical credibility. And it would review its statutes periodically, repealing those that have outlived their purpose and reforming those that have proved ineffective.

Such a code would look nothing like the current law of England. But it would actually serve the purposes that law claims to serve.

JEREMY BENTHAM — ON THE PROPORTION BETWEEN CRIMES AND PUNISHMENTS

The chief rules that govern the proper proportion between crimes and punishments may be briefly stated.

First rule: Let the evil of the punishment exceed the advantage of the offense. To prevent the offense, it is necessary that the repulsive motive — the fear of punishment — should be stronger than the attractive motive — the desire to commit the offense. More fear ought to be excited by the punishment than desire by the crime.

Second rule: The severity must be increased as the certainty is diminished. No person engages in crime from hope of impunity alone; if the punishment consisted merely in depriving the offender of what he has gained, and this deprivation were invariably inflicted, such crimes would no longer exist. In proportion as the certainty of punishment can be increased, the severity may be diminished without loss of deterrent effect.

Third rule: When two offenses are in competition, the punishment for the greater ought to be sufficient to induce a preference for the lesser. The danger of the current system — in which many offenses of very different gravity carry the same penalty — is that it eliminates precisely this preference. A criminal who has committed an offense for which he faces death has no reason to refrain from additional offenses. He can make his situation no worse by adding to his crimes, and may improve it by silencing witnesses or evading capture. The law, by failing to distinguish, has removed the incentive to restraint.

Fourth rule: The punishment should be adjusted to each particular offense. Not only should the overall level of punishment be proportioned to the gravity of the offense, but within each category of offense there should be gradations that reflect the wide variety of circumstances — aggravation, mitigation, premeditation, passion, first

offense, habitual criminality — that affect the actual degree of culpability. A system that prescribes a single mandatory penalty for an entire category of offense cannot achieve this, because the range of cases within any category is too wide.

Fifth rule: The punishment should never be more than what is necessary to bring it into conformity with these rules. Every unit of punishment that exceeds what is necessary to achieve the deterrent effect is a unit of useless suffering — it costs something to the person who endures it without producing any corresponding benefit to the community that authorizes it. Excessive punishment is not merely unjust in theory; it is irrational in practice, because it consumes resources and produces harms without producing the benefits that alone could justify those harms.

These rules, applied to the capital laws of England, lead to the same conclusion that every other analysis leads to: the laws are in urgent need of reform. They fail by every criterion that their own defenders claim to value. They are disproportionate in their penalties, arbitrary in their application, and demonstrably ineffective in achieving the deterrent purpose that is their primary justification.

CHAPTER XI

JOHN HOWARD: THE EVIDENCE FROM ABROAD

From The State of the Prisons in England and Wales, 1777, and An Account of the Principal Lazarettos in Europe, 1789

In the course of my surveys of prisons and penal institutions across Europe, I was able to observe the operation of criminal justice in many countries and to compare, on the basis of direct observation, the results produced by different approaches to punishment. The following account draws on those observations.

BRUNSWICK

The tower, or prison for capital offenses, is over one of the gates. It consists of three rooms, but none of them had been occupied for a considerable time. There had been no execution in Brunswick for fourteen years. The authorities I consulted reported no increase in serious crime as a result of this effective suspension of capital punishment. The population had not drawn the conclusion that murder was unpunished; it had drawn the conclusion that the state had found better means of dealing with serious offenders. Property was as secure. Persons were as safe. The machinery of execution had been rendered unnecessary without any adverse consequence.

DENMARK

At the entrance of many towns in Denmark, a whipping post stands conspicuously — on the top of which the figure of a man is placed, with a sword by his side, and a whip in his right hand. Gibbets and wheels are also placed on eminences, on which the bodies of

malefactors are sometimes left after execution, to deter others from their crimes.

I observed this practice and I observed its effects. The place of execution is out of the city, and decollation — beheading — is reckoned more honorable than hanging by the sword than by the axe. This distinction, which seems absurd to an English observer, is entirely serious to those who live within the system: the mode of execution is understood to carry moral meaning, and a condemned person's family may have strong views about which form is inflicted. The classification and gradation of punishments that seem arbitrary from outside are deeply meaningful to those subjected to them.

What I observed in Denmark, as in many other countries, was that the administration of capital punishment was attended by elaborate ritual and ceremony — not because the ceremony served any obvious purpose, but because the accumulated custom of generations had wrapped the act in forms that gave it the appearance of moral significance. The ceremony was the law's claim to be doing justice rather than merely killing. But the ceremony did not reduce the arbitrariness of the outcome, and it did not demonstrably reduce the crime that the execution was supposed to prevent.

AMSTERDAM AND THE NETHERLANDS

In Amsterdam and the neighboring towns, the public walk was adorned not with trees or fountains but with representations of punishments painted on boards and hung up in different places — men being whipped, branded, broken on the wheel, hanged. The intention was clearly deterrent: to make the consequences of crime constantly visible to the population. The result was that people who lived among these representations were accustomed to them, and the accustomization reduced rather than enhanced their deterrent effect.

Those responsible for public order in Amsterdam acknowledged, when I discussed the matter with them, that the representations had become invisible through familiarity — that a person who had walked

past the image of a hanging man every day for twenty years did not find it more frightening than the furniture of the street. The deterrent effect, if it ever existed, had been entirely consumed by familiarity.

This observation applies with equal force to actual executions. A society that conducts frequent public executions does not become a society that increasingly fears execution as a deterrent. It becomes a society that is accustomed to executions — that treats them as spectacle rather than warning, that crowds around the scaffold not in horror but in curiosity, and that sends children to watch what the state does to those it has condemned. The execution that was supposed to teach reverence for human life teaches instead that the taking of life by authorized persons in public is an ordinary feature of the social world.

THE TABLES

In the surveys from which these observations are drawn I recorded, prison by prison, the numbers of felons delivered out of the principal gaols of England for transportation in the years 1773 to 1775, together with the conditions in which they were held. The tables themselves are printed in the original survey and are too long to reproduce here. What they establish is simple enough to state without them: several hundred serious offenders were disposed of in those three years by means other than the gallows, and the country suffered no calamity in consequence.

The evidence from Pennsylvania, from the Netherlands, from Brunswick, and from Denmark points in the same direction: capital punishment is not necessary for public safety. Alternative means of dealing with serious offenders exist and have been tried. Where they have been tried with any seriousness — with appropriate resources, with genuine commitment to the reformatory purpose, with the institutional design that makes reform possible — they have achieved their purpose. The execution of convicted criminals is not a necessity but a choice, and it is a choice that the evidence does not support.

CHAPTER XII

WILLIAM TURNER: AGAINST THE BIBLICAL DEFENSE

From a Memoir read before the Literary and Philosophical Society of Manchester

It is a common form of argument, among those who defend capital punishment against the force of the objections that reason and experience bring against it, to appeal to the authority of Scripture. The argument runs as follows: God commanded, through the text of the Old Testament, that murder should be punished by death. The state, in executing murderers, acts on this divine command. To abolish capital punishment is therefore not merely to change a policy but to defy God.

This argument has the advantage of appearing to settle the question by appeal to an authority beyond debate. It has the disadvantage of not being true in the form in which it is stated.

Those who quote the passage from Genesis — "Whoso sheddeth man's blood, by man shall his blood be shed" — as establishing a divine command for capital punishment are quoting the text as if it were a law, a command addressed to magistrates, requiring them to execute murderers. But the text itself does not take this form. It is a prediction, or a description of a general truth about human nature, rather than a command to any particular person or institution. The form of the expression is simply that such will be the depravity and folly of man, that murder, in every age, shall beget murder.

Laws therefore, which inflict death for murder, are, in my opinion, as unchristian as those which justify or tolerate revenge — for the

obligations of Christianity upon individuals, to promote repentance, to forgive injuries, and to discharge the duties of universal benevolence, are equally binding upon states. The argument from Genesis does not establish a divine command for state execution; it describes the natural human tendency to respond to violence with violence, a tendency that the Gospel is explicitly directed toward overcoming rather than institutionalizing.

The power over human life is the sole prerogative of Him who gave it. Human laws, therefore, rise in rebellion against this prerogative when they transfer it to human hands. This is the theological argument against capital punishment: not that murder should go unpunished, but that the punishment of death is reserved to God and cannot be delegated to the magistrate without usurping a prerogative that belongs to the divine alone.

There is a practical argument alongside the theological one. If society can be secured from violence by confining the murderer, so as to prevent a repetition of his crime, the end of extirpation will be answered. In confinement, he may be reformed — and if this should prove impracticable, he may be restrained for a term of years that will, in all probability, be coeval with his natural life. The divine prerogative over life is not compromised by imprisonment. The human prerogative to protect society is fully served. And the irreversibility that makes execution so morally problematic — the fact that no subsequent discovery of error can undo it — is avoided.

Furthermore, the appeal to Scripture as commanding capital punishment requires a willingness to apply the same texts consistently. The text of Genesis that commands blood for blood is part of a legal framework that also commands, with equal explicitness, the death penalty for working on the Sabbath, for cursing a parent, for a range of offenses that no modern defender of capital punishment would propose to make capital. If the authority of the Mosaic law is invoked for the capital punishment of murder, it must be invoked equally for these. If it is not invoked for these — if the

defender of capital punishment applies the Mosaic law selectively, retaining the provisions that support the existing practice and ignoring those that would require radical change — then the argument from Scripture is not an argument from authority but a confirmation of a preference that was reached on other grounds.

The honest position is that the question of capital punishment must be settled by reason, by evidence, and by the moral principles that careful reflection yields, and not by the selective invocation of ancient texts. When reason and evidence have been examined, they point consistently toward the conclusion that execution is neither necessary nor proportionate in the vast majority of cases for which it is now prescribed. The theological arguments, properly understood, point the same way.

EDITORIAL
APPARATUS

DEFINITIONS AND TERMS

Basil Montagu (1770–1851): The compiler of this anthology — barrister, legal reformer, and man of letters. The illegitimate son of the fourth Earl of Sandwich, Montagu made his career entirely on merit, becoming a distinguished Chancery barrister and one of the leading advocates for capital punishment reform in early nineteenth-century England. His personal circle included Wordsworth, Coleridge, Lamb, and Hazlitt. He produced a series of volumes on capital punishment reform throughout the 1810s and 1820s, of which this compilation is the most widely read. He also worked extensively on bankruptcy law reform and the reform of the Court of Chancery.

Capital felony: In English law, an offense carrying the punishment of death. At the time of this compilation, more than 200 offenses were technically capital felonies in England, including murder, treason, burglary, forgery, robbery, rape, sodomy, arson, stealing from a dwelling house above the value of forty shillings, shoplifting above twelve pence, cutting down trees in a garden, destroying a fish pond, and many others. The breadth of this list was itself one of the principal arguments for reform: its disproportionality was so evident that juries routinely refused to convict, and the law was systematically unenforced.

Jury nullification: The practice by which a jury returns a verdict of not guilty despite evidence sufficient to support a conviction, when the jurors believe the penalty would be unjust. In the English courts of Montagu's era, this was common in capital cases involving

offenses that jurors considered too minor to warrant death. Juries frequently found that stolen goods were worth less than the threshold for capital conviction when the evidence showed otherwise, or simply acquitted defendants whose guilt was clear. Several authors in this compilation treat jury nullification as evidence that capital punishment's breadth had exceeded what the moral sensibility of ordinary people could accept.

The Bloody Code: An informal name for the English penal statutes of the eighteenth and early nineteenth centuries, referring to the more than 200 capital offenses created by Parliament over several centuries. The name was applied critically, by reformers who regarded the code as barbarous in its breadth and incoherent in its principles. The reform movement that Montagu supported — associated with Samuel Romilly, James Mackintosh, and eventually Robert Peel — succeeded in dramatically reducing the number of capital offenses between 1820 and 1850.

The Black Act (9 George I, c. 22, 1723): An act passed after armed poaching raids in Windsor and Hampshire, which at a stroke created some fifty new capital offenses, among them going armed in disguise, poaching deer, and damaging trees or fish ponds. It is the single clearest case of what Colquhoun describes in Chapter VII: a panic answered with the gallows, never revisited once the panic passed. Much of the catalogue in that chapter descends from this one statute, and it remained in force until the 1820s.

Beccaria (Cesare Bonesano de Beccaria, 1738–1794): Italian philosopher and jurist whose *On Crimes and Punishments* (1764) is the founding text of modern penal reform. Beccaria argued that the right to punish derives from the social contract, that individuals cannot have surrendered their right to life in that contract, and that capital punishment therefore exceeds the state's legitimate authority. He also argued that perpetual imprisonment was a more effective deterrent than death, and that the certainty rather than the

severity of punishment was the relevant variable for deterrence. His book went through thirty Italian editions and was translated into most European languages within a decade of publication.

Paley (William Paley, 1743–1805): Anglican clergyman and utilitarian philosopher whose *Principles of Moral and Political Philosophy* (1785) provided the most serious contemporary philosophical defense of the English penal system. Paley argued that prevention rather than justice was the proper aim of punishment, and that the specific penalties appropriate for any offense depended on the difficulty of detecting it. His framework, which appears in this compilation as the most rigorous version of the case for severity, is also one that leads — as the section on Paley here illustrates — toward reform rather than retention of capital punishment when followed honestly.

Montesquieu (Charles-Louis de Secondat, Baron de Montesquieu, 1689–1755): French political philosopher whose *Spirit of Laws* (1748) applied comparative analysis to legal institutions, arguing that the character of a society's laws reflected and reinforced its political character. He associated severity of punishment with despotism and argued that free societies required a moderation in penalties that despotic ones lacked. His observation — that the Roman Senate had recognized that immoderate punishments produce juries who will not convict and accusers who will not accuse — was one of the most quoted passages in the eighteenth-century reform literature.

Clarkson (Thomas Clarkson, 1760–1846): Anti-slavery activist who played a central role in the British campaign to abolish the slave trade, eventually successful in 1807. His inclusion in this compilation reflects the connections that reformers of the era made between the abolition of slavery and the reform of criminal punishment: both involved the state treating human beings as disposable, and both were challenged by the same arguments from

natural rights, human dignity, and the capacity for moral development. His account of the Philadelphia penitentiary drew on his travels in America and his contacts with Quaker reformers.

Colquhoun (Patrick Colquhoun, 1745–1820): Scottish merchant and magistrate who became one of the most influential figures in early modern policing and criminal justice reform in England. His *Treatise on the Police of the Metropolis* (1796) combined a devastating catalogue of the absurdities of the existing capital code with practical proposals for more rational law enforcement. He is credited with contributing to the establishment of the Thames River Police, one of the first professional police forces in England.

Howard (John Howard, 1726–1790): Prison reformer whose surveys of prisons in England and across Europe — published as *The State of the Prisons in England and Wales* in 1777 and supplemented by subsequent accounts — created the empirical foundation for the prison reform movement. Howard died in Ukraine while studying conditions in Russian military hospitals, a death sometimes described as the ultimate example of dedication to the cause. His name is preserved in the Howard League for Penal Reform, which continues to advocate for penal reform in the United Kingdom.

Bentham (Jeremy Bentham, 1748–1832): English philosopher, legal reformer, and founder of utilitarianism. His analysis of the proper proportion between crimes and punishments — included here from his extensive writings on penal theory — applied the utilitarian calculus to criminal justice with a rigor that exposed the irrationality of much existing practice. Bentham's broader reform agenda encompassed parliamentary reform, prison design (he proposed the "Panopticon" as a rational model of prison architecture), and the codification of English law. His preserved body, dressed in his own clothes, is still on display at University College London.

Benefit of clergy: A historical exemption from secular criminal punishment, originally available only to members of the clergy but gradually extended by legal fiction to any person who could demonstrate literacy by reading a verse of Scripture. This exemption protected the beneficiary from the death penalty for a first offense in certain cases. The absurdity of the system — which linked the punishment of serious crime to the ability to read a specific Biblical verse — was one of the features of English criminal law most frequently cited by reformers as evidence that the system needed radical rationalization.

FURTHER READING

MONTAGU'S OWN WORK

Montagu, Basil. *Thoughts on the Punishment of Death*. London, 1818.

Montagu's own essay on capital punishment, written alongside the compilations. More personal in voice than the anthology format, it provides his clearest statement of his own views.

Montagu, Basil. *Some Enquiries Respecting the Punishment of Death for Crimes without Violence*. London, 1818. A focused argument for removing the death penalty from non-violent offenses — the first and most obviously defensible step in the reform he advocated.

THE AUTHORS OF THE COMPILATION

Beccaria, Cesare. *An Essay on Crimes and Punishments*. 1764. Edited and modernized by Jeff Hood. Complicit Press, 2026. V. 5 in *The Abolition Classics*. The foundational text from which the whole reform tradition descends, and the argument Montagu places at the center of this compilation.

Bentham, Jeremy. *Rationale of Punishment*. London, 1830. Bentham's most sustained treatment of punishment theory, including his analysis of capital punishment. Available in academic libraries and through Project Gutenberg.

Howard, John. *The State of the Prisons in England and Wales*. London, 1777. Howard's original survey, remarkable for its methodological rigor and its devastating documentation of conditions that most of his contemporaries preferred not to examine. Available through Project Gutenberg and academic libraries.

FURTHER READING

Montesquieu, Charles-Louis de Secondat. *The Spirit of Laws*. 1748.
Available in multiple modern editions. Books VI and XII are most
directly relevant to the arguments excerpted in this compilation.

ON THE REFORM OF ENGLISH CRIMINAL LAW

Emsley, Clive. *Crime and Society in England, 1750–1900*. 4th edition.
London: Pearson, 2010. The standard historical account of the
transformation of English criminal law in the period covered by this
compilation, providing essential context for understanding what
Montagu and his contemporaries were arguing against.

Gatrell, V. A. C. *The Hanging Tree: Execution and the English People, 1770–1868*. Oxford: Oxford University Press, 1994. A detailed and
often disturbing account of what execution actually was in England —
who witnessed it, what they saw, what they made of it — that confirms
from historical evidence many of the observations made in this
compilation.

Radzinowicz, Leon. *A History of English Criminal Law and Its
Administration from 1750*. 5 volumes. London: Stevens & Sons,
1948–1986. The definitive scholarly account of the transformation of
English criminal law, including the reform movement that this
compilation contributed to.

THE PHILADELPHIA EXPERIMENT AND PRISON REFORM

Meranze, Michael. *Laboratories of Virtue: Punishment, Revolution, and
Authority in Philadelphia, 1760–1835*. Chapel Hill: University of
North Carolina Press, 1996. The scholarly account of the Pennsylvania
penitentiary experiment that Clarkson describes in this compilation —
what it actually accomplished, where it fell short, and what it meant
for the subsequent history of imprisonment.

THE BROADER SERIES

Rush, Benjamin. *Considerations on the Injustice and Impolicy of
Punishing Murder by Death*. 1792. Edited and modernized by Jeff

Hood. Complicit Press, 2026. V. 4. The American argument written while Montagu was still a student, and the one Turner's theological case most resembles.

Livingston, Edward. *Argument Against Capital Punishment*. 1833. Edited and modernized by Jeff Hood. Complicit Press, 2026. V. 6. The American lawyer's argument that capital punishment fails on its own terms, written for a legislature that refused it.

Romilly, Samuel. *Observations on the Criminal Law of England*. 1810. Edited and modernized by Jeff Hood. Complicit Press, 2026. V. 7. The parliamentary reformer who, more than anyone else, carried the arguments in this compilation into actual legislation. Published while Montagu was assembling his second volume.

Spear, Charles. *Essays on the Punishment of Death*. 1844. Edited and modernized by Jeff Hood. Complicit Press. The American abolitionist argument of the next generation, drawing on the additional evidence that had accumulated since Montagu.